ORDINANCE NO. MC-1465

ORDINANCE OF THE MAYOR AND CITY COUNCIL OF THE CITY OF SAN BERNARDINO, CALIFORNIA, ADDING CHAPTER 8.97 TO THE SAN BERNARDINO MUNICIPAL CODE ESTABLISHING REGULATIONS FOR THE SMOKING OF CANNABIS IN PUBLIC PLACES (DEVELOPMENT CODE AMENDMENT 18-02B)

WHEREAS, the City of San Bernardino, California ("City") is a municipal corporation, duly organized under the Charter of the City of San Bernardino and the Constitution and laws of the State of California; and,

WHEREAS, at the General Election held on November 8, 2016, California voters approved Proposition 64, commonly known as the "Control, Regulate and Tax Adult Use of Marijuana Act" ("AUMA"), making it unlawful to "...smoke or ingest cannabis or cannabis products in a public place..." (Health & Saf. Code, § 11362.3(a)(1)); and,

WHEREAS, on October 18, 2017, by Resolution No. 2017-211 the Mayor and City Council directed the Citizen's Advisory Committee on Marijuana ("CAC") to discuss the issue of public consumption of cannabis and, working with City staff and the City's consultant HdL, report back to the Mayor and City Council on December 20, 2017; and,

WHEREAS, the Mayor and City Council received the report from the CAC at its regular meeting on December 20, 2017, and determined there was a need for further time to adequately consider regulations on public consumption of cannabis; and,

WHEREAS, on January 22, 2018, the Mayor and City Council held a public workshop to discuss, among other topics, public consumption of cannabis; and,

WHEREAS, on February 1, 2018, the Mayor and City Council directed City staff to expeditiously prepare regulations for public consumption of cannabis within the City of San Bernardino; and
WHEREAS, the Mayor and City Council specifically finds that:

1. Secondhand cannabis smoke has been repeatedly identified as a health hazard;

2. There is no constitutional right to smoke cannabis in public;

3. The U.S. Surgeon General found there is no risk-free level of exposure to secondhand cannabis smoke. Separating cannabis smokers from non-cannabis smokers, cleaning the air, and ventilating buildings cannot eliminate exposure of non-cannabis smokers to secondhand cannabis smoke;

4. The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;

5. The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the State of California to cause cancer, birth defects, and other reproductive harm;

6. Exposure to secondhand cannabis smoke anywhere has negative health impacts, and exposure to secondhand cannabis smoke occurs at significant levels outdoors, as evidenced by the following:

   a. Levels of secondhand cannabis smoke exposure outdoors can reach levels attained indoors depending on the direction and amount of wind and number and proximity of cannabis smokers;

   b. Cannabis smoking near building entryways can increase air pollution levels by more than two times as compared with background levels, with maximum
levels reaching the "hazardous" range on the U.S. Environmental Protection Agency Air Quality Index; and

c. A person may have to move nearly 23 feet away from the source of the cannabis smoke to be completely free from exposure to secondhand cannabis smoke in outdoor places.

7. Cannabis has been found to be toxic. In addition, cannabis exposure during fetal development, a critical window for brain development, has lasting adverse consequences. Cannabis adversely affects maternal and fetal health during pregnancy, contributing to multiple adverse outcomes such as preterm delivery and stillbirth. In addition, cannabis exposure during adolescence, also a critical window for brain development, may have lasting adverse consequences;

8. Cannabis packaging is a major and persistent source of litter, and in most cases, does not biodegrade, and are often cast onto sidewalks and streets, frequently ending up in storm drains that flow into creeks, rivers, and ultimately the ocean;

9. Studies on electronic cigarettes' vapor emissions and cartridge contents have found a number of dangerous substances including chemicals known to the State of California to cause cancer, such as formaldehyde, acetaldehyde, lead, nickel, and chromium;

10. Several studies have concluded that vapor from electronic cigarettes may cause passive or secondhand inhalation of vapor by nearby people;

11. There are no studies proving that inhalation of vapor from electronic cigarettes is not harmful to health, and the long-term health risks of the use of electronic cigarettes on device users and nearby people remain unknown;
12. Secondhand cannabis smoke contains many of the same chemicals and carcinogens as secondhand tobacco smoke. Results from laboratory testing under standard conditions found that secondhand cannabis smoke contained more than twice as much tar and ammonia as tobacco smoke and more than eight times as much hydrogen cyanide; and,

WHEREAS, there is a need to adopt health, safety and welfare regulations to avoid adverse impacts on the City's residents that may arise from public consumption of cannabis; and,

WHEREAS, the Mayor and City Council have considered the report of the CAC, City staff recommendations, the report of the City's consultant, HdL, on cannabis issues, the viewpoints of stakeholders and extensive public comment to craft this Ordinance, which provides an effective regulatory system for public consumption of cannabis in the City, and will address potential adverse impacts to the public health, welfare, and safety, while allowing residents to consume cannabis in a manner consistent with State law; and

WHEREAS, federal law, codified at 21 U.S.C. Sections 801 et seq., entitled the "Controlled Substances Act" ("CSA") makes it unlawful to possess any controlled substances, including cannabis, which has, as a Schedule I drug under the CSA, been determined by the federal government to have a high potential for abuse and no accepted medical value in treatment; and

WHEREAS, nothing in this Ordinance is intended to authorize the possession, use, or provision of cannabis for purposes that violate federal law.

NOW, THEREFORE, THE MAYOR AND CITY COUNCIL OF THE CITY OF SAN BERNARDINO DO ORDAIN AS FOLLOWS:

SECTION 1. INCORPORATION OF RECITALS
The foregoing recitals set forth above are true and correct and are a substantive part of this Ordinance.

SECTION 2. AUTHORITY

Pursuant to Sections 5 and 7 of Article XI of the California Constitution, the Charter of the City of San Bernardino, and State law, including Health and Safety Code Section 11362.3(a)(1) and Business and Professions Code Section 26200, the City of San Bernardino is authorized to adopt ordinances that protect the health, safety and welfare of its residents and businesses. The adoption of reasonable regulations on public consumption of cannabis is a permissible exercise of this authority.

SECTION 3. ADOPTION OF ORDINANCE

Chapter 8.97 entitled “Smoking Cannabis in Public Places”, of Title 8 “Health and Safety” of the San Bernardino Municipal Code is approved and shall be added to the San Bernardino Municipal Code as follows:

Chapter 8.97
SMOKING CANNABIS IN PUBLIC PLACES

8.97.010 Purpose and Intent
8.97.020 Applicability
8.97.030 Definitions
8.97.040 Prohibition of Smoking and Inhaling in Enclosed Places
8.97.050 Prohibition of Smoking and Inhaling in Unenclosed Areas
8.97.060 Prohibition of Smoking and Inhaling in City Vehicles and on City Campuses
8.97.070 Smoking Distance Required
8.97.080 Additional Smoking—Related Restrictions
8.97.090 Other Requirements and Prohibitions
8.97.100 Posting of Signs
8.97.110 Interpretation
8.97.120 Other Laws
8.97.130 Violations Declared a Public Nuisance
8.97.140 Each Violation a Separate Offense
8.97.150 Criminal Penalties
8.97.160 Remedies Cumulative and Not Exclusive

8.97.010 Purpose and Intent

The purpose of this Chapter is to protect the good health and well-being of the residents of the City of San Bernardino from the documented negative effects of secondhand
cannabis smoke. Smoke-free air is an important component of a healthy community. The Mayor and City Council intend to protect the public health, safety, and welfare by providing a secondhand cannabis smoke-free environment in public and private places where non-cannabis smokers may be exposed to secondhand cannabis smoke. The Mayor and City Council further intend to promote secondhand cannabis smoke-free air, recognizing the need to breathe smoke-free air has a priority over the desire to smoke cannabis. This Chapter is not intended to interfere with a patient’s right to use medicinal cannabis pursuant to State law, as may be amended, nor does it criminalize cannabis possession or use otherwise authorized by State law.

8.97.020 Applicability

Nothing in this Chapter shall be construed to allow any conduct or activity relating to the cultivation, distribution, dispensing, sale, or consumption of cannabis that is otherwise illegal under local or State law. No provision of this title shall be deemed a defense or immunity to any action brought against any person by the San Bernardino County District Attorney’s office, the Attorney General of the State of California or the United States of America. This Chapter shall be applicable in the incorporated areas of the City of San Bernardino and in all City buildings, whether owned, leased, or controlled by the City, and on all City campuses.

8.97.030 Definitions

A. "Business" means any sole proprietorship, partnership, limited liability company, joint venture, corporation, association, or other entity formed for profit-making purposes or for nonprofit charitable, religious, philanthropic, educational, political, social, or similar purposes. A government agency is not a business within the meaning of this chapter.

B. “Cannabis” means all parts of the plant Cannabis sativa Linnaeus, Cannabis indica, or Cannabis ruderalis, or any other strain or varietal of the genus Cannabis that may exist or be discovered, or developed, that has psychoactive or medical properties, whether growing or not, including but not limited to the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. “Cannabis” also means the separated resin, whether crude or purified, obtained from cannabis. “Cannabis” also means marijuana as defined by California Health and Safety Code section 11018 and Business and Professions Code section 26001(f), as both may be amended from time to time. Any reference to cannabis or cannabis products shall include medical and nonmedical cannabis and medical and nonmedical cannabis products, unless otherwise specified. Cannabis or cannabis product does not mean industrial hemp as defined by Health and Safety Code section 11018.5, or the weight of any other ingredient combined with cannabis to prepare topical or oral administrations, food, drink, or other product. Cannabis does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation
of the mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination.

C. "City" means the City of San Bernardino, a Charter City in the State of California.

D. "City campus" means enclosed areas and unenclosed areas under the legal control of the City, including property that is owned, leased, or maintained by the City or governed by the Mayor and City Council.

E. "Prohibited smoking area" means a designated portion of an unenclosed area where cannabis smoking is prohibited.

1. Cannabis smoking shall be prohibited within one thousand (1,000) feet of any of the following:

   i. Any school (k-12) regardless if it is a public, private or charter school;

   ii. Day care center as defined in Section 1596.76 of the Health and Safety Code;

   iii. Youth center as defined in Section 11353.1 of the Health and Safety Code;

   iv. Any library, park, bicycle paths or area in which the primary purpose is used for minors; and

   v. Any alcohol rehabilitation center or substance abuse facility.

F. "Dining area" means any area which is available to or customarily used by the general public or an employee and which is designed, established, or regularly used for consuming food or drink.

G. "Electronic smoking device" means an electronic device that can be used to deliver an inhaled dose of cannabis, cannabis oils or other substances, including any component, part, or accessory of such a device, whether or not sold separately. "Electronic smoking device" includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, vaping pens or any other product name or descriptor.

H. "Employee" means any natural person who is employed or retained as an independent contractor by any employer in consideration for direct or indirect monetary wages or profit, or any natural person who volunteers his or her services for an employer.

I. "Employer" means any business with one or more employees.
J. "Enclosed area" means an area in which outside air cannot circulate freely to all parts of the area, and includes an area that has:

1. Any type of overhead cover and at least three walls or other vertical constraint to airflow; or

2. Four walls or other vertical constraints to airflow.

K. "Person" means any natural person, business, personal representative, receiver, trustee, assignee, or any other legal entity.

L. "Place of employment" means any area under the legal or de facto control of an employer that an employee or the general public may have cause to enter in the normal course of operations, regardless of the hours of operation.

M. "Public place" means any place, publicly or privately owned, when being used for a public event, including but not limited to a farmers' market, parade, craft fair, festival, or any other event open to the general public.

N. "Recreational area" means any area that is owned, controlled, or used by the City and open to the general public for recreational purposes, regardless of any fee or age requirement. "Recreational area" includes, but is not limited to, parks, picnic areas, playgrounds, sports fields, walking paths, gardens, hiking trails, bike paths, riding trails, swimming pools, skateboard parks, and amusement parks. "Recreational area" does not include golf courses.

O. "Service area" means any publicly or privately-owned area designed to be used or is regularly used by one or more persons to receive a service, wait to receive a service, or to make a transaction, whether or not such service or transaction includes the exchange of money. "Service area" includes, but is not limited to, areas including or adjacent to information kiosks, automatic teller machines, ticket lines, bus stops or shelters, mobile vendor lines, or cab stands.

P. "Smoke" means the gases, oils, particles, or vapors released into the air as a result of combustion, electrical ignition, or vaporization, when the apparent or usual purpose of the combustion, electrical ignition, or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco, cannabis, cannabis oils, or nicotine and the purpose of inhalation is solely olfactory, such as smoke from incense. "Smoke" includes, but is not limited to, tobacco smoke, electronic smoking device vapors, and cannabis smoke.

Q. "Smoking" means inhaling, exhaling, burning, or carrying any ignited, heated, or activated cigar, cigarette, cigarillo, pipe, hookah, electronic smoking device, or any plant product intended for human inhalation including, but not limited to, cannabis or cannabis products.
R. “Cannabis concentrate” means cannabis that has undergone a process to concentrate one or more active cannabinoids, thereby increasing the product’s potency. Resin from granular trichomes from a cannabis plant is a concentrate for purposes of this Chapter. A cannabis concentrate is not considered food, as defined by Section 109935 of the Health and Safety Code, or drug, as defined by Section 109925 of the Health and Safety Code.

S. "Cannabis paraphernalia" means any item designed for the consumption, use, or preparation of cannabis or cannabis product.

T. “Cannabis product” means:

1. Any product containing, made, or derived from cannabis or cannabis products that is intended for human consumption, whether smoked, heated, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, bongs, blunts, pipes; and

2. Any electronic smoking device. Notwithstanding any provision of subparagraphs (1) and (2) to the contrary, "cannabis products" includes any component, part, or accessory of a cannabis product, whether or not sold separately.

U. "Unenclosed area" means any area that is not an enclosed area.

8.97.040 Prohibition of Smoking and Inhaling in Enclosed Places

The City shall enforce the California smoke-free workplace law (Labor Code Section 6404.5), which prohibits smoking in enclosed places of employment, in all areas subject to this Chapter. In addition, all cannabis smoking and the inhaling of cannabis products are prohibited in the enclosed areas of the following places:

A. All businesses that are not places of employment and which have a common or shared air space with an enclosed area, such as, without limitation, openings, cracks, air ventilation systems, doorways, hallways, and stairways, in which smoking is prohibited by law. Notwithstanding any other provision of this chapter, the fact that cannabis smoke enters one enclosed area from another enclosed area is conclusive proof that the areas share a common or shared air space;

B. Public places as defined in section 8.97.030(M); and

C. Any area within 50 feet of any door, window, opening, or vent, into a public place, dining area, service area, or recreational area except for such areas on private residential property.

8.97.050 Prohibition of Smoking and Inhaling in Unenclosed Areas
Smoking and inhaling of cannabis products are prohibited in the unenclosed areas of the following places as defined in Section 8.97.030 above:

A. Dining areas;
B. Public places;
C. Recreational areas;
D. Service areas; and
E. Places of employment.

8.97.060 Prohibition of Smoking and Inhaling in City Vehicles and on City Campuses

A. Smoking and inhaling of cannabis products are prohibited in all vehicles leased, owned, or operated by the City or any district governed by the City.
B. Smoking and the use of cannabis or cannabis products are prohibited in all enclosed areas and unenclosed areas of a City campus.

8.97.070 Smoking Distance Required

A. Smoking and inhaling of cannabis in all unenclosed areas is prohibited within 50 feet from any enclosed or unenclosed areas in which smoking is prohibited.
B. A private property or business owner may authorize a Designated Smoking Area in an unenclosed area of his or her private property.

8.97.080 Additional Smoking-Related Restrictions

A. A person who owns, manages, operates, or otherwise controls the use of any place where cannabis smoking is prohibited by this Chapter may not knowingly or intentionally permit cannabis smoking in those places. For purposes of this section, a person has acted knowingly or intentionally if the person has not taken the following actions to prevent cannabis smoking by another person:

1. Requested that a person who is smoking refrain from cannabis smoking in the prohibited place; and

2. Requested that a person who is smoking cannabis leave the prohibited place if the person refuses to stop smoking in the prohibited place after being asked to stop. This Section does not require physically ejecting a person from a place or taking steps to prevent smoking under circumstances that would involve risk of physical harm.
B. No person shall intimidate, harass, or otherwise retaliate against any person who seeks compliance with this Section. Moreover, no person shall intentionally or recklessly expose another person to cannabis smoke in response to that person's effort to achieve compliance with this Section.

8.97.090 Other Requirements and Prohibitions

A. No employer or business doing business with the City and within the City of San Bernardino shall knowingly or intentionally permit cannabis smoking or inhaling in an area which is under the employer's or business's control and in which cannabis smoking is prohibited.

B. No person shall litter or dispose of cannabis packaging or cannabis products waste within the boundaries of an area in which cannabis smoking or cannabis products is prohibited except into a waste receptacle or ash can.

C. No person, employer, or business shall intimidate or threaten or effect any reprisal against another person for the purpose of retaliating against that person for seeking to obtain compliance with this chapter.

8.97.100 Posting of Signs

A person, employer, or business that has legal or de facto control of an area in which cannabis smoking, or the use of cannabis products is prohibited by this chapter shall post a clear, conspicuous and unambiguous "No Smoking and No Vaping" or "Smoke-Free" sign at each point of ingress to the area, and in at least one other conspicuous point within the area. The signs will have letters of no less than one inch in height and shall include the international "No Smoking and No Vaping" symbol (consisting of a pictorial representation of a burning cigarette, cannabis leaf and e-cigarette enclosed in a red circle with a red bar across it). Signs posted on the exterior of buildings to comply with this section shall include the reasonable distance requirement set forth in section 8.97.070. At least one sign with a City phone number (to be determined by the director of Community Development and made available on the department's website which complaints can be directed must be placed conspicuously in each place in which cannabis smoking is prohibited. The Community Development Department shall be responsible for providing appropriate signs in public facilities controlled by the City. Notwithstanding this section, the presence or absence of signs shall not be a defense to a charge of cannabis smoking or the use of cannabis products in violation of any other provision of this chapter.

8.97.110 Interpretation

This chapter shall not be interpreted or construed to permit cannabis smoking where it is otherwise restricted by other applicable laws.

8.97.120 Other Laws
It is not the intention of this chapter to regulate any conduct where the regulation of such conduct has been preempted by the State of California.

8.97.130 Violations Declared a Public Nuisance

Each and every violation of the provisions of this Chapter is hereby deemed unlawful and a public nuisance.

8.97.140 Each Violation a Separate Offense

Each and every violation of this Chapter shall constitute a separate violation and shall be subject to all remedies and enforcement measures authorized by the City of San Bernardino.

8.97.150 Criminal Penalties

Any person causing, permitting, aiding, abetting, suffering or concealing a violation of this Chapter shall be guilty of a misdemeanor, and may, in the discretion of the City Attorney, be prosecuted as a misdemeanor and upon conviction be subject to a fine not to exceed one thousand dollars ($1,000) or imprisonment in the city or county jail for a period of not more than six (6) months, or by both such fine and imprisonment. The City Attorney, in his or her sound discretion, may prosecute a violation of this Chapter as an infraction, rather than a misdemeanor, or reduce or agree to the reduction of a previously filed misdemeanor to an infraction. Any person convicted of an infraction under this provisions of this Chapter shall be punished by a fine not exceeding one hundred dollars ($100) for the first violation, a fine not exceeding two hundred dollars ($200) for a second violation within one year, and a fine not exceeding five hundred dollars ($500) for a third and subsequent violations within one year. A fourth violation of this Chapter within one year shall be charged as a misdemeanor and may not be reduced to an infraction.

8.97.160 Remedies Cumulative and Not Exclusive

The remedies provided herein are not to be construed as exclusive remedies. The City is authorized to pursue any proceedings or remedies provided by law or equity.

SECTION 4. REPEAL OF ORDINANCES

All ordinances related to personal cultivation within the City of San Bernardino are hereby repealed and shall be of no further effect from the effective date of this Ordinance.

SECTION 5. SPECIFIC FINDINGS

The Mayor and City Council, after considering the extensive meetings of the CAC, the Planning Commission, City staff reports, reports from the City’s cannabis consultant HdL, testimony from stakeholders, and public comment, make the following specific findings:
(A) The Ordinance is consistent with the General Plan;
(B) The Ordinance is not detrimental to the public interest, health, safety, convenience, or welfare;
(C) The Ordinance would maintain the appropriate balance of land uses within the City; and
(D) The subject parcel(s) are physically suitable (including, but not limited to, access, provision of utilities, compatibility with adjoining land uses, and absence of physical constraints) for the requested land use designation(s) and the anticipated land use development(s).

SECTION 6. ENVIRONMENTAL DETERMINATION

The Mayor and City Council of the City of San Bernardino, California, hereby find and determine that this Ordinance is not subject to environmental review under the California Environmental Quality Act pursuant to Title 14 of the California Code of Regulations Section 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and Section 15060(c)(3) (the activity is not a project as defined in Section 15378) because it has no potential for resulting in a physical change of the environment, directly or indirectly.

SECTION 7. EFFECTIVE DATE

This Ordinance shall be effective upon the thirty-first (31st) day following its final passage by a majority vote of the Mayor and City Council.

SECTION 8. SEVERABILITY

While it is the intent of the Mayor and City Council to adopt a comprehensive regulatory system regarding public consumption of cannabis within the City of San Bernardino, if any provision of this Ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end, the provisions of this Ordinance are severable. The Mayor and City Council declare that they would have adopted this Ordinance irrespective of the invalidity of any particular portion thereof.

SECTION 9. PUBLICATION

The City Clerk shall certify to the adoption of this Ordinance and shall cause this Ordinance to published as provided by State law.

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ORDINANCE OF THE MAYOR AND CITY COUNCIL OF THE CITY OF SAN BERNARDINO, CALIFORNIA, ADDING CHAPTER 8.97 TO THE SAN BERNARDINO MUNICIPAL CODE ESTABLISHING REGULATIONS FOR THE SMOKING OF CANNABIS IN PUBLIC PLACES (DEVELOPMENT CODE AMENDMENT NO. 18-02B)

I HEREBY CERTIFY that the foregoing Ordinance was duly adopted by the Mayor and City Council of the City of San Bernardino at a joint regular meeting thereof, held on the 7th day of March 2018, by the following vote, to wit:

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The foregoing Ordinance is hereby approved this 7th day of March 2018.

R. Carey Davis, Mayor
City of San Bernardino

Approved as to form:
Gary D. Saenz, City Attorney

Georgeann Hanna, CMC, City Clerk