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Going Smoke-free in the Land of Lakes: Law and Politics in Minnesota Smoke-free Campaigns

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# Going Smoke-free in the Land of Lakes: Law and Politics in Minnesota Smoke-free Campaigns

Case Studies of Seven Regions



*Improving health through the power of law*

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# Introduction

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In 2005, ClearWay Minnesota<sup>SM</sup> awarded the Public Health Law Center (former Tobacco Law Center) a two-year research grant to study the legal and political obstacles that seven multi-jurisdictional Minnesota regions faced in smoke-free campaigns between 2000 and 2006. At the time, many Minnesota communities were engaged in protracted campaigns to pass ordinances that regulated smoking. Challenges were compounded in communities where multiple cities and counties shared regulatory power within what was, for economic purposes, a single population center.

The purpose of our study was to examine the approaches regulatory authorities took in these campaigns; to analyze the significance of legal and political obstacles in obstructing or supporting progress toward smoke-free regulation; and to develop recommendations to help public health advocates, health organizations, policymakers, and legal professionals anticipate, avoid, and address these obstacles.

## Background

We identified seven geographically diverse Minnesota regions, containing fourteen communities (ten cities and four counties), where smoke-free campaigns had figured prominently in the years between 2000 and 2006:

1. Fargo, North Dakota / Moorhead, Minnesota, including the cities of West Fargo, North Dakota and Dilworth, Minnesota
2. Olmsted County, including the city of Rochester
3. Hennepin County, including the cities of Minneapolis, Bloomington and Golden Valley
4. Ramsey County, including St. Paul
5. The city of Duluth
6. Beltrami County
7. The Mankato/North Mankato region

With the use of legal research and analysis, as well as case study methodology based on key informant

interviews, we researched the smoke-free campaigns in each community. We compiled information from legal databases, online and print legal resources, public documents and an extensive network of legal and public health contacts. We reviewed relevant news and journal articles, editorials, law review commentary, city council and county board minutes, and other background information on each of the ordinance campaigns in the seven Minnesota regions ranging from 2000 to 2006.

Using a snowball sampling plan, we identified key informants who were most familiar with the ordinance campaign and enactment process in each region. Informants were drawn from law, including city and county attorneys and legal professionals; government, including city council members, county commissioners and staff; and public health, including public health professionals and tobacco control advocates. Each set of informants for a region included one informant with first-hand experience of the legal issues and obstacles faced by the region and at least four politically-attuned informants who were either involved in the campaign or were able to provide an overview of the entire campaign and enactment process. In total, we conducted fifty key informant interviews, averaging seven interviews per region. The interviews were semi-structured, ranging from 30 to 45 minutes each, and were based on a series of ten open-ended questions soliciting background information about each smoke-free campaign.

To analyze our data from each community, along with the fifty interview transcripts, we identified recurrent themes, conducted legal and regulatory issue-spotting, developed timelines, and compared the impact legal and political obstacles had on each community's overall ordinance process and outcome, as well as the way in which one community's regulatory experiences affected other communities in the state.

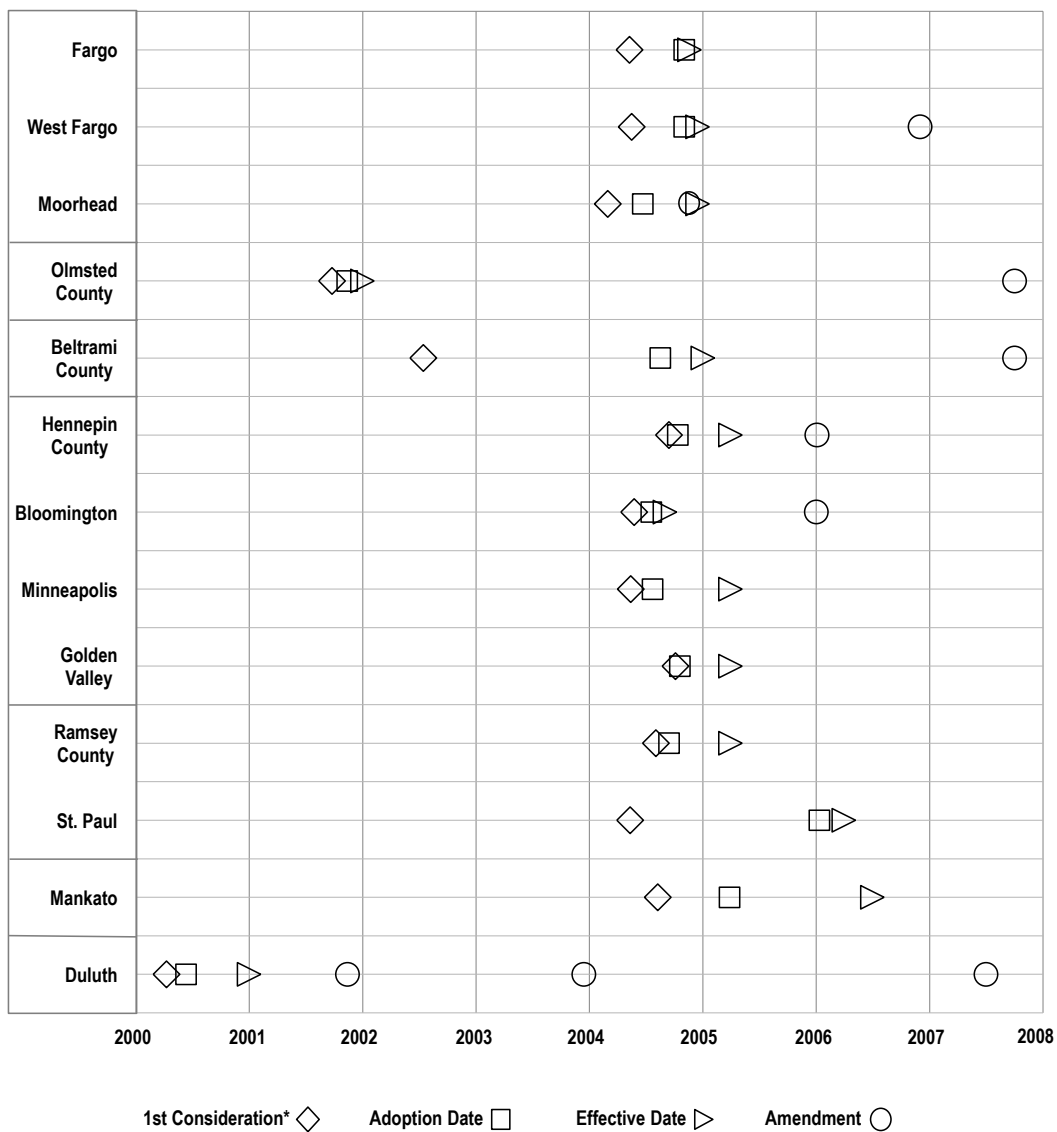
As a result of our research, we developed the following seven detailed case studies that chronicle the intriguing stories behind six pivotal years in Minnesota's journey toward a statewide smoke-free

law in 2007, and the legal and political false starts, missed opportunities, compromises, and complexities along the way. The case studies are available as seven discrete downloadable files, and as sections in this overall compilation. Since our findings were based on our analysis of all communities, we have inserted them in the Conclusion of this compilation. For those

who would prefer to review case studies individually, we have included our findings at the end of each stand-alone file.

The timelines below illustrate the overlapping sequence of events in the Minnesota smoke-free campaigns between 2000 and 2007:

### Timelines of Thirteen Smoke-free Ordinance Campaigns in Seven Minnesota Regions



\* Date that a local regulatory authority, such as a city council, county board of commissioners or board of health, first considers a smoke-free proposal.

Note: This figure does not include the city of North Mankato, where no smoke-free campaign arose, or the city of Rochester, where the city council refused to act on a proposed ordinance.

Our hope is that these stories will be of use to communities around the U.S. seeking to introduce or amend tobacco control or other public health laws, and will serve as cautionary tales for communities considering multi-jurisdictional approaches in passing smoke-free laws.

## A Final Note

After Minnesota legislators passed the statewide smoke-free Freedom to Breathe Act of 2007, prohibiting smoking in most workplaces and public places, smoke-free activity throughout the state slowed down, but did not stop. Minnesota tobacco control policy efforts then turned to outdoor recreational settings, such as parks and playgrounds; school campuses, particularly post-secondary areas; and multi-unit housing, such as apartments, condominiums and public housing. During the 2008 session, the legislature passed the State Health Improvement Program (SHIP), which focuses on interventions for community health boards and tribal governments designed to address the leading preventable causes of illness and death in the U.S., including the reduction of Minnesotans who use or are exposed to tobacco.

The success of these tobacco control initiatives in Minnesota will depend on the support and perseverance of public health and legal professionals, advocates, and policymakers throughout the state. The following stories of the Minnesota smoke-free ordinance campaigns are a testament to the impact that active and engaged individuals and communities can have in preserving, protecting and promoting public health. We have a ways to go, but it is exhilarating to see how far we have come.

## Acknowledgements

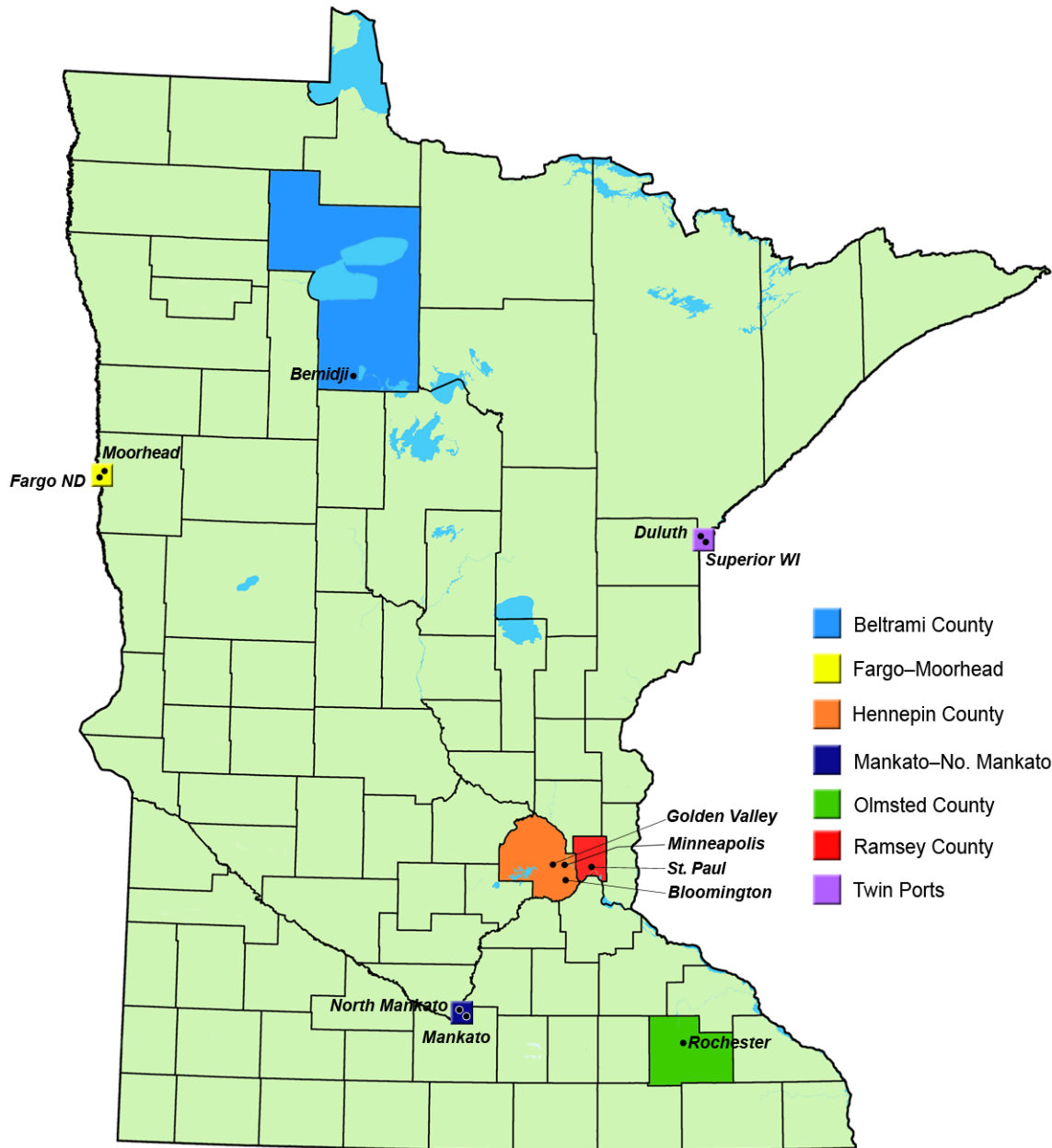
These case studies were developed by Principal Investigator Kerry Cork, J.D. at the Public Health Law Center, based on research made possible by ClearWay Minnesota<sup>SM</sup> Grants Number RC-2005-0032 and

RC-2009-0045. Many individuals contributed to the completion of this project. Dr. Barbara Schillo of ClearWay Minnesota<sup>SM</sup>, and Dr. Michael Fiore and Paula Keller of the Center for Tobacco Research and Intervention at the University of Wisconsin School of Medicine and Public Health served on our advisory panel and provided invaluable ongoing guidance throughout the research and publication stages of our project. Professor Jean Forster from the University of Minnesota's School of Public Health gave us indispensable advice during the initial and final phases of the research process. Pat McKone from the American Lung Association, Christina Thill from the Minnesota Department of Health and Mary Wellik from Olmsted County Public Health Services all graciously lent us boxes of news clippings and related resources on smoke-free campaigns in many Minnesota communities from 2000 to 2006.

Our colleagues at the Public Health Law Center also helped enormously throughout the grant process. In particular, we appreciate the keen legal acumen and insights of Doug Blanke, the unflagging administrative support of Joan Flynn, the software wizardry of Jean Mornard, and the impeccable eye and graphic design expertise of Robin Wagner. We wish to thank Mike Freiberg for his careful review of the final version of these case studies and Carolyn Forman for playing an instrumental role in every stage of this project, from the compilation of data and analysis to assistance with interviews to the time-consuming review of multiple manuscripts.

Finally, we owe a huge debt of gratitude to over fifty anonymous legal and political key informants who played pivotal roles in these Minnesota smoke-free campaigns, and who graciously volunteered their time and expertise in extensive interview sessions to help us tell the complex stories behind the smoke-free campaigns in Minnesota described in our study. Without their willing support and participation in this study, this research would have been far more daunting and the stories (in our view, at least) far less interesting.

# Map of seven Minnesota regions





# The Fargo/Moorhead Story

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*This case study covers events that transpired in the smoke-free campaigns in Fargo, North Dakota and Moorhead and Dilworth, Minnesota between 2000 and 2006. It was written as one of seven case studies under a ClearWay Minnesota<sup>SM</sup> research grant to study legal and political obstacles to smoke-free regulation in seven geographically diverse Minnesota regions.*

*Since this study was completed, Fargo and West Fargo residents voted to pass ordinances that prohibited smoking in all enclosed workplaces, including bars. These smoke-free ordinances took effect July 1, 2008. As of February 2010, despite ongoing work by smoke-free advocates, policymakers and the public health community, North Dakota has yet to pass a statewide smoke-free law.*

## Introduction

This is a tale of two cities in neighboring states, divided by a great river, and located in some of the flattest and most fertile land in the world – the Red River Valley. It is also a tale of sister communities whose simultaneous smoke-free ordinance campaigns bear witness to the important role that local laws and geopolitics play in tobacco control and to the contortions that can result when multiple jurisdictions attempt to adopt similar smoke-free policies at the same time.

## Overview of Communities

The city of Moorhead, Minnesota lies directly east of Fargo, North Dakota, with the Red River of the North serving as a natural border between the states. The two communities make up the Fargo/Moorhead region, the largest metropolitan area between Minneapolis-St. Paul, Minnesota and Spokane, Washington, with a combined population of around 190,000.

Moorhead, the seat of Clay County, is the smaller of the two cities, with a population of 36,012<sup>1</sup>, compared to Fargo's population of 93,531.<sup>2</sup> The population in

both cities is predominately Caucasian (Moorhead – 92%; Fargo – 92.4%), with the two top ancestry groups German and Norwegian (and Irish, Swedish, English and French the next dominant groups).<sup>3</sup> Moorhead is a shipping and processing center for a livestock, dairy and farm area, where sugar beets and potatoes are grown and sugar, molasses, barley malt and soft drinks are manufactured.<sup>4</sup> Between 2004 and 2006, approximately 29 bars and restaurants operated in Moorhead, while 130 operated in Fargo, 15 in West Fargo, and 3 in Dilworth.

Fargo, founded in 1871, is the largest city in North Dakota and the county seat of Cass County. Known as the “Gateway to the West,” Fargo is the crossroads and economic center of a large portion of eastern North Dakota and northwestern Minnesota. The Fargo economy is dependent on educational services, healthcare, social assistance, and retail trade.<sup>5</sup>

The Fargo/Moorhead metropolitan region also includes two smaller cities: West Fargo, North Dakota and Dilworth, Minnesota. West Fargo, located in Cass County, is approximately 6 miles west of Fargo and 8 miles west of Moorhead. Known as North Dakota's fastest growing major city, West Fargo has a population of 20,300.<sup>6</sup>

Finally, there's Dilworth. Only 2 square miles in size, Dilworth is located on the eastern border of Moorhead, in Clay County, approximately six miles from Fargo.<sup>7</sup> Dilworth has a population of 3,677.<sup>8</sup> Dilworth counts retail trade, finance and insurance and food services as its key industries.

Although Fargo officials, and North Dakotans in general, are heirs to a century-old tradition of Progressivism dating from 1905, when it comes to public policy, the tendency in North Dakota is to look east, toward Minnesota. Ironically, however, in this metropolitan region of four cities, the smaller cities govern in the shadow of the much larger Fargo, and often take their lead from the course set by Fargo's Board of Commissioners.

## Telling the Stories

Although each of these four cities has its own local government, political environment, regulatory authorities, and constituencies, the smoke-free ordinance campaigns in this region during the years of 2003 to 2006 were tightly interrelated. City council and commission decisions and political events in one jurisdiction often had a direct effect on decisions and events in adjacent jurisdictions.

### The Moorhead Story

The story begins back in the winter of 2003, when a group of students at Moorhead High School organized a committee to survey fellow students about how they and their families viewed smoke-free restaurants.<sup>9</sup> The students then circulated a petition at Moorhead High supporting a smoke-free restaurant ordinance, which was signed by one-third (574) of the students.

On February 9, 2004, the students presented the Moorhead City Council with the petition supporting smoke-free restaurants, along with several sample smoke-free ordinances, and urged the city council “to be a ‘Public Health Champion’ and lead the way in the metro area by approving a smoke-free ordinance.”<sup>10</sup> Galvanized by this initiative, city council members agreed to ask the city attorney to draft a smoke-free restaurant ordinance. The council also asked that the research be shared with Fargo’s Secondhand Smoke Task Force, a group of citizens that the mayor had commissioned to study secondhand smoke policy planning for the city.

The city attorney drafted an ordinance that prohibited smoking in all Moorhead restaurants, exempting bars. As if to underscore how tightly interwoven the various municipal campaigns had become, the attorney serving as Moorhead City Attorney played a dual role, serving simultaneously as City Attorney of West Fargo, and drafting the ordinance language for both cities.

In March 2004, the Moorhead City Council met to review the ordinance and rejected the initiative on a 4-3 vote, where 5 votes were needed for approval. Only 7 of the 8 council members were present. According to key informants, the absent member would likely have voted for the ordinance. Also, two members who had previously expressed support voted against

the ordinance. One became concerned that the city council was inappropriately regulating business.

**First Reading of Ordinance.** A few months later, on May 3, 2004, the City Council voted 6-2 for an amended ordinance that prohibited smoking in all public indoor workplaces, including all bars and restaurants, with no exemptions, and an effective date of June 1, 2005. One council member who switched his vote to oppose the ordinance in March, now voted to support it. This council member also moved that the ordinance become effective only if Fargo, West Fargo and Dilworth pass similar ordinances. Although this motion was tabled, that it was even raised highlights the context in which many of these council meetings were taking place. Moorhead was keenly aware that Fargo was also considering a smoke-free ordinance at this time.

**Second Reading of Ordinance.** On May 17, the Moorhead City Council held a second reading of the ordinance. At this meeting, the ordinance was revised to define public indoor workplace as “any enclosed indoor facility, business or establishment used by the general public or used as a place of work.” A council member then announced that he would not vote for the ordinance on the third reading unless Fargo, West Fargo and Dilworth also approved similar ordinances.

**Third Reading of Ordinance.** On June 21, the Moorhead City Council held a third reading of the ordinance. By this time, Fargo was also considering a smoke-free ordinance, and the pending passage of a Fargo ordinance dominated the Moorhead discussion. A motion to require any smoke-free ordinance passed in Moorhead to match those in the other metro cities was considered and rejected. During a lively debate, the mayor urged the council to table the ordinance until Fargo passed its smoke-free ordinance, stating that “we have pushed this issue very hard onto the tables of the commissions across the river” and expressing concern about the impact on Moorhead if the two communities passed different smoke-free ordinances.<sup>11</sup> When the council failed to table the ordinance, the mayor threatened to veto it.<sup>12</sup> In an attempt to address the mayor’s concern, a council member vowed to move at the next meeting that the council reconsider the Moorhead ordinance if Fargo or West Fargo passed a law that exempted bars. The council member’s promise apparently met with the mayor’s approval, and the council approved

the smoke-free ordinance (5-3). The ordinance, prohibiting smoking in *all* indoor public places (no exemptions), was set to take effect September 1, 2004. At this point, many Moorhead public health advocates and professionals assumed that Moorhead was about to become the first jurisdiction in Minnesota to prohibit smoking in bars. Their joy was short-lived.

**Vote to Reconsider Ordinance.** On July 19, 2004, the Fargo City Commission agreed to place a voter-initiated smoke-free ordinance on the ballot in the November general election. Two weeks later, on August 2, Moorhead's City Council voted to reconsider its new ordinance, which was scheduled to take effect the following month. One council member opposed this motion, expressing concern that reconsideration would open the ordinance to exemptions. By a 6 to 1 vote, however, the Council voted to postpone the effective date until December 15, 2004, which would allow Moorhead to reconsider its policy after Fargo residents had voted on the Fargo initiatives in the November election. The Council then reapproved the amended ordinance (5-3).

**Fargo/West Fargo Elections.** In the general election on November 2, 2004, initiated smoke-free ordinances passed in Fargo and West Fargo. Both ordinances were less restrictive than Moorhead's ordinance and allowed smoking to continue in some bars. Still, bar owners in Fargo and West Fargo believed the passage of these ordinances evened out the competition since, due to differences in the laws of the two states, Moorhead bars were able to remain open an hour later than those in North Dakota, where bars must close at 1 a.m.

**First Reading of Amended Ordinance.** On November 8, 2004, the Moorhead City Council held a special meeting to discuss the Moorhead ordinance in light of the new ordinances passed at the ballot in Fargo and West Fargo. A week later, the Council met again and heard public testimony about "smoking issues" related to the recent elections.<sup>13</sup> The city manager presented a comparison of the smoking ordinances in the Fargo/Moorhead area, and the implications of including exemptions. He proposed the idea of "leveling the playing field" by adopting Fargo's ordinance (without an exemption for truck stops that had been included in Fargo to accommodate a specific business there). After some discussion, the Council voted for the first time (5-2) to amend the

ordinance so that the ordinance, in effect, mirrored Fargo's ordinance. It exempted businesses with liquor licenses that restrict minors, as well as bar areas of restaurants that are enclosed by walls and closed to minors. The amended ordinance also included a provision requiring the City Council to revisit the ordinance in February 2008. A second vote was needed before the ordinance became law.

**Second Reading of Amended Ordinance.** On December 6, 2004, the Moorhead City Council met to hear public testimony on the amended ordinance, and then voted to pass it. On December 15, 2004, the Moorhead ordinance (as amended) went into effect.

**Since 2004.** On December 18, 2006, the Moorhead City Council voted 6-2 in favor of exploring the possibility of enacting a "metro-wide smoke-free ordinance" in Moorhead, Dilworth, Fargo and West Fargo. This proposal arose as talk of statewide smoke-free laws grew among Minnesota and North Dakota lawmakers.

On May 16, 2007, Minnesota lawmakers passed the Freedom to Breathe Act of 2007. The provisions in this legislation expanded the Minnesota Clean Indoor Air Act,<sup>14</sup> to prohibit smoking in virtually all indoor public places and places of employment, including bars and restaurants. The new provisions took effect October 1, 2007.

## The Fargo Story

On the other side of the river, the larger City of Fargo was moving ahead with a smoke-free ordinance of its own. Unlike Moorhead, which has a "city council/city manager" form of government, Fargo is governed by a Board of Commissioners. The board consists of the mayor and four commissioners, who are elected at large. A majority of all commissioners must concur in the passage of any ordinance; unlike the Moorhead City Council, the mayor does not hold veto power in the ordinance process.<sup>15</sup>

Back in 2003, Fargo city commissioners established a mayoral Secondhand Smoke Task Force, consisting largely of business owners, who met regularly over a period of several months to develop a series of recommendations entitled a "Conceptual Framework for a Secondhand Smoke Policy." The task force presented its recommendations to Fargo's five-

member City Commission in April 2003, and on April 26, the commissioners held a public hearing on the issue.<sup>16</sup> After two hours of debate and three failed motions to pass different types of smoking ordinances, the commissioners voted to take no action.

Among matters debated at this hearing was whether the city or the state had authority to implement smoke-free regulations in an employee workplace. This issue received a great deal of attention in the smoke-free community as a result of a legal opinion that North Dakota Attorney General Wayne Stenehjem issued on April 14, 2004, concluding that the state, through the Labor Commissioner, has statutory authority to implement non-smoking regulations in an employee workplace.<sup>17</sup> Although this opinion proved only a minor and temporary distraction in the Fargo campaign, the attention it drew highlighted the need for clarity on the regulatory authority to implement smoke-free laws.

On May 10, 2004, Fargo's City Commission approved an ordinance (3-2) prohibiting smoking in indoor public workplaces, including bars. To become law, however, the ordinance needed to be approved at one more hearing. Although the mayor voted for the ordinance, he made it clear at the reading that he voted solely in the interest of moving the issue forward to a second reading, that he would not support actual enactment of a comprehensive ordinance, and that he favored an ordinance that prohibited smoking in restaurants only.

On June 8, 2004, elections were held for city commissioners in Fargo and West Fargo. Candidates that favored smoke-free ordinances won by a large margin, while those who were strongly opposed (including incumbents) lost. Two new city commissioners were elected in Fargo, both of whom supported a smoke-free ordinance. They replaced a supporter and an opponent of the ordinance. The new makeup of the board gave advocates hope in the imminent passage of a comprehensive smoke-free ordinance.

Things were not to be that easy, though.

That summer, a group of bar owners circulated a petition and collected more than 4,500 signatures of Fargo citizens favoring a weaker ordinance that would exempt all local bars and approximately a

dozen restaurants (defined in the proposal as those establishments with "Class A" and "Class AB" liquor licenses), as well as truck stops. The group submitted the petition for an initiated ordinance to the City Commission. On July 19, the City Commission accepted the petition and unanimously voted to place an "initiated ordinance" on the November general election ballot. According to Fargo City Attorney Garrylle Stewart, this was the first initiated ordinance to come before the city since Fargo's city charter was approved thirty-two years earlier.<sup>18</sup> Because initiatives were a rarity, the city had no experience in interpreting the relevant charter provisions.

Placing the initiated ordinance on the ballot was not the only option for the City Commission at this time. The Commission could have enacted the bar owners' petition and proposed ordinance without making any changes to it. It could have done nothing and after 21 days, the issue would have been automatically sent to a public vote.<sup>19</sup> Instead, by affirmatively voting to send the initiated ordinance to a public vote, the Commission essentially tabled discussion of the pending ordinance proposed by the Commission. If the initiated ordinance failed to pass by a simple majority vote, the Commission would be able to hold a second hearing on its own proposed ordinance.

Public attention in Fargo was now focused on the initiated ordinance process. Within a short time, a second group of bar owners submitted a second petition for an alternative initiated ordinance that exempted truck stops and any enclosed bar area that restricted customers under the age of 21 from entering a bar or grill. Finally, the Smoke-free Air For Everyone (SAFE) Coalition gathered enough signatures to place a third more comprehensive ordinance option on the ballot, covering all indoor public work places, with the exception of one "tobacco bar."

Anticipating a potential problem with the three competing smoke-free initiated measures on the ballot, the Fargo City Attorney requested a letter opinion from the North Dakota Attorney General, on which ordinance would prevail if two or more of the ordinances received a majority of "yes" votes. On October 4, 2004, Attorney General Wayne Stenehjem responded that if voters approved conflicting municipal initiated measures, the measure receiving the highest number of "yes" votes would prevail.<sup>20</sup>

On October 29, 2004, nine city leaders from Fargo, West Fargo and Moorhead signed a letter supporting the most comprehensive and restrictive initiated ordinance proposals in Fargo, as well as West Fargo, where two additional initiated measures were on the ballot (see below). On November 2, general elections were held, with three smoke-free initiatives on the ballot in Fargo:

- Measure #1, proposed by bar owners, prohibited smoking in most public indoor workplaces, but exempted bars and some restaurants (establishments with the two least restrictive liquor licenses), as well as truck stops.
- Measure #2, proposed by a second group of bar owners, exempted truck stops and bars and separate bar areas in restaurants that deny access to those under 21 years old.
- Measure #3 (Fargo Smoke Free Air Act), proposed by the SAFE Coalition, prohibited smoking in all public indoor workplaces, including bars, with the exception of one cigar bar.<sup>21</sup>

The ballot language read simply “Shall this ordinance be approved?,” and then listed the three options, but did not explain that voters were to vote YES for the option they most wanted *and* to vote NO for the options they did not want. As a result, many voters were apparently confused by the number of initiative choices and voted “Yes” for more than one initiative.<sup>22</sup> Both measures #2 and #3 received more than 50 percent of the vote – enough votes to pass.

The initiative that received the most votes (both in Fargo and in West Fargo, where a similar ballot process played out) was the weakest initiative, the measure that exempted some bars. In Fargo, the winning initiative was Measure #2. This was a blow to the local tobacco control community, since Measure #3, supported by the SAFE coalition, had also received a majority of the votes. In the wake of some confusion following the election results, Fargo City Attorney Garylle Stewart confirmed that the Fargo ballot had been worded and configured in compliance with the requirements of the Fargo Home Rule Charter. He pointed out that the ballot language and the way the initiatives were presented could not have been changed, even if the city had wanted to change them.<sup>23</sup>

On November 17, 2004, two days before the new Fargo ordinance was to go into effect, the Fargo Buffalo Wild Wings restaurant chain and three employees sued in U.S. District Court seeking a temporary restraining order and temporary injunction. The suit was based on three grounds: 1) The ordinance violated the state statute prohibiting employment of people in conditions hazardous to their health; 2) the ordinance violated equal protection, since there was no rational basis for its age distinction or truck stop exemption; and 3) the ballot with multiple initiatives was confusing (people didn’t understand the rules and were unaware that their choices were mutually exclusive).<sup>24</sup>

On November 19, 2004, the Fargo ordinance took effect.

On the same day, Federal District Court Judge Ralph Ericson denied the temporary restraining order and scheduled a hearing for November 23 to allow both sides to argue the merits of an injunction. On November 20, however, the Buffalo Wild Wing plaintiffs withdrew their petition for a temporary injunction. The plaintiffs, apparently intent on proceeding with their lawsuit, approached SAFE about joining the suit, but the coalition refused. On January 6, 2005, the plaintiffs dropped their lawsuit and shifted their efforts to revising the Fargo ordinance to eliminate the exemption allowing smoking in enclosed areas.<sup>25</sup>

**Since 2004.** On August 1, 2005, North Dakota’s statewide Clean Indoor Act went into effect.<sup>26</sup> Weaker than Minnesota’s statewide law, which was to be enacted twenty-one months later, the North Dakota law prohibits smoking in enclosed areas of most public places, including restaurants and places of employment, but exempts bars and enclosed bar areas within restaurants, bowling alleys and hotels.

In the fall of 2006, the SAFE coalition circulated a proposal for a comprehensive smoke-free ordinance in all four cities of the metropolitan region – Fargo, Moorhead, West Fargo, and Dilworth. Leaders from all four cities met that year to discuss this regional approach. In January 2007, Fargo Commissioners unanimously agreed to support a stricter ordinance if neighboring cities adopted similar ordinances.

A few months later, Minnesota legislators made Moorhead, Dilworth, and the rest of the state, smoke-

free by way of the Freedom to Breathe Act, which was passed on May 16, 2007. In July 2007, largely in reaction to the Minnesota development, both Fargo and West Fargo discussed putting the smoke-free ordinance issue on the November ballot, with the idea that it would settle the matter once and for all. In North Dakota, citywide laws can be enacted either by City Commissioners or by public vote. If the public voted in favor of the ordinance, the opposition could not “refer” the ordinance – that is, send it to a referendum. If, however, the City Commission passed an ordinance and the opposition gathered enough signatures for a referendum, enactment of the ordinance would be delayed until after the referendum in June 2008 (the next scheduled election).

On July 30, 2007, the Fargo City Commission heard public testimony on adopting a stricter citywide smoke-free ordinance, similar to one being proposed by West Fargo, which was based on Minnesota’s recently passed statewide law.<sup>27</sup> The Fargo Commission voted 5-0 to direct City Attorney Erik Johnson to draft an ordinance by August 13 to mirror West Fargo’s ordinance, and at the same time to draft ballot language.<sup>28</sup> City Attorney Johnson stated that he would “work with the West Fargo City Attorney to make sure the two ordinances have the same effective date and are contingent upon voters in both cities approving the stricter ban.”<sup>29</sup> Much of the debate during this meeting focused on the possible strategy of going smoke-free by having the Commissioners vote to place the issue on the ballot. The plan was to have a first reading of the stricter ordinance, then delay the second reading until a special election in November was confirmed. If there were a special election, the Commissioners would be able to add the smoke-free ordinance to the ballot. As described above, the benefit of this approach was that if the Commissioners passed an ordinance, bar owners were likely to petition to force the ordinance onto a subsequent ballot, throwing the issue into even more confusion. By placing it there themselves, and doing so quickly, the Commissioners hoped to regain greater control over the process. Accordingly, at this meeting, the City Commission directed the City Attorney to draft an ordinance that would give the Commission the authority to refer ordinances to a citywide vote. (At the time, the Commission could only refer sales tax issues. All other ballot measures needed to be initiated by the public.)

On August 13, the City Commission held the first reading of the ordinance that gave Commissioners the power to put the smoke-free ordinance directly to the voters. The change to the initiative process was approved unanimously, although there was some uncertainty about its legality. The City Attorney was directed to do additional research prior to the second reading. At this meeting the Commission also held the first reading of the stricter smoke-free ordinance, which would prohibit smoking in all bars, truck stops and places rented for private functions, with no exemption for cigar bars. The proposed ordinance was not tied to West Fargo adopting a similar ordinance.

The ongoing discussions in the Fargo/Moorhead region about ballot initiatives and referenda reflect the extent to which the communities continue to interact and play off each other, as well as the confusion that continues to exist about the most politically expedient legal method to enact smoke-free ordinances in adjacent communities.

## The West Fargo Story

West Fargo, like Fargo, is governed by a Board of Commissioners, all of whom are elected to four-year terms from the city at large. The West Fargo City Commission consists of four commissioners and the mayor, who acts as the commission president, votes as a member of the board, and does not have veto power.<sup>30</sup> The City Commission needs to hold two readings on an ordinance, and to approve the proposal by two majority votes, before it can be adopted.<sup>31</sup>

On May 17, 2004, the West Fargo City Commission voted to ask the City Attorney – who happened to serve as the city attorney in Moorhead as well – to draft an ordinance prohibiting smoking in public workplaces to correspond to those in Fargo and Moorhead. The West Fargo City Attorney agreed, under the assumption that Fargo and Moorhead would not subsequently change their ordinances. At the meeting, three of the five West Fargo commission members, including the mayor, stated they would not support an ordinance that covered bars.

In the meantime, a group of West Fargo business owners collected signatures and petitioned to have an initiated smoke-free ordinance placed on the ballot. This initiative, Measure #1, exempted West Fargo bars

that, as of August 1, 2004, denied access to those who were under 21. Bars without that restriction as of that date were not exempt. A second initiative, Measure #2, proposed by the SAFE Coalition, called for no smoking in West Fargo indoor public workplaces, except for tobacco bars. Also that August, Moorhead passed a smoke-free ordinance, but then amended it to postpone the date the ordinance went into effect until after the election.

On November 2, 2004, the general election was held, and the electoral results in West Fargo were similar to those in Fargo: the least restrictive initiative on the local ballot (Measure #1) passed. Still, the measure adopted in West Fargo was more restrictive than that approved in Fargo. While the Fargo initiative exempted all bars and some restaurants, the West Fargo measure exempted only certain bars. As in Fargo, post-election concerns were raised about the likelihood of voter confusion, given the two competing initiatives.

On December 15, 2004, the West Fargo ordinance went into effect, the same day as the Moorhead ordinance and a month after the Fargo ordinance.

**Since 2004.** In August 2006, the West Fargo mayor proposed amending the smoke-free ordinance to weaken it to correspond to Fargo's ordinance and North Dakota law. On October 16, Commissioners had the first reading of a proposal to revise the ordinance so it exempted bars, tobacco shops, designated hotel rooms and party rooms – and, in effect, matched state law. As mentioned earlier, this was around the time that city leaders from West Fargo, Fargo, Moorhead and Dilworth had begun discussions on the possibility of adopting identical smoke-free ordinances.

On November 20, 2006, the City Commission voted 4-1 to relax West Fargo's ordinance, to make it less restrictive, and match it to state law, which permits smoking in stand-alone bars and in bars within restaurants if the two sections are separated. The amended ordinance went into effect on December 1, 2006.

On January 15, 2007, the West Fargo City Commission voted 4-1 to support a comprehensive smoke-free law, but only if its "neighboring cities" passed similar laws. The Commission now defined West Fargo's "neighboring cities" to include not only

Fargo, Moorhead and Dilworth, but also the cities of Mapleton, Harwood, and Horace, North Dakota, which had not previously figured prominently in the debate.

On May 16, 2007, Minnesota's Governor Tim Pawlenty signed Minnesota's statewide smoke-free legislation, the Freedom to Breathe Act of 2007. On May 21, 2007, the West Fargo City Commission directed the city attorney to work with Fargo and Moorhead in drafting a smoke-free ordinance that mirrored Minnesota's recently passed statewide law, with the idea that this draft ordinance might be adopted by all three cities. The new Minnesota law prohibited smoking in virtually all public places, including bars. The intent was to pass a tri-city ordinance that would be stricter than North Dakota law. A first reading of the proposed comprehensive smoke-free ordinance in West Fargo was scheduled for July 16, and then postponed to July 30.

Throughout the month of July 2007, four local radio stations ran bar owner-funded advertisements in West Fargo, describing how the proposed West Fargo smoke-free ordinance would hurt bar operations, including jobs and charitable gambling. Of course, these advertisements were broadcast and heard throughout all the affected communities. Also during this time, West Fargo and Fargo discussed putting the smoke-free ordinance issue back on the ballot in November.

On July 30, in a lengthy first reading of the proposed comprehensive ordinance, where three and one half hours of emotional and heated public testimony was given, the West Fargo City Commission rejected the ordinance 2-3. The Commission moved to send the ordinance to a public vote, either as part of a special election in November 2007, or as part of the City election in June 2008. As with so many of the smoke-free ordinance-related activities that occurred in this region throughout these years, much depended on what happened in the neighboring jurisdictions.

## The Story of Dilworth

The small community of Dilworth, Minnesota had only a bit part in the drama played out among the three larger communities of Moorhead, Fargo and West Fargo. It never ended up voting on a smoke-free ordinance. In many respects, it followed the lead of

Moorhead. Often, it appeared to serve as a strawman that other communities used as a pretext for inaction. Yet policymakers on both sides of the river never failed to consider this small independent community when they were arguing for or against a regional smoke-free law, or the adoption of a local ordinance.

## Reviewing the Moorhead/Fargo Story

### Analysis and Findings

Of the seven Minnesota metropolitan regions examined, Fargo/Moorhead best illustrates the challenges that can arise in passing smoke-free ordinances in cross-border communities. While tobacco control advocates are experienced in addressing the “level playing field” concerns of communities when a neighboring community is considering a smoke-free ordinance, the Fargo/Moorhead campaigns between 2003 and 2006 stretched resources to the limit. Campaigns in this region were often waged on several fronts simultaneously. All seven Fargo/Moorhead key informants cited difficulties in working with three governmental bodies, two states, and three communities as a primary obstacle to enacting ordinances in this region. These difficulties had both legal and political components, many of which stemmed from conflicts among policymakers about the need to have a consistent smoke-free law across the region. Other apparent political difficulties arose from confusing or problematic legal processes or regulatory procedures in the various jurisdictions.

The key legal and political obstacles in the Fargo/Moorhead smoke-free campaigns from 2003 to mid-2007 can be broken down into three types:

1. Conflicts and Compromises in the Regulatory Process
2. Confusion about the Initiative and Referendum Process
3. Legal and Geopolitical Challenges

### Conflicts and Compromises in the Regulatory Process

*The Moorhead City Council: Waiting for Fargo*

Under their home rule charters, Fargo and West Fargo both have commission forms of government. The mayor and four members, elected at large, make up the Board of Commissioners, and a majority of three

commissioners is needed to approve an ordinance. Moorhead’s home rule charter, however, establishes a city manager/council form of government. The city council consists of eight members, elected by district, and the mayor (who is not a member) presides at council meetings. A majority of five council members is needed to approve an ordinance. Although not a council member, the Moorhead mayor can play a decisive role in council decisions. The mayor can vote to break a tie, and also has veto power; 6 of 8 votes are required to override a veto.<sup>32</sup>

On a controversial issue, when votes are close, the threat of a mayoral veto on the Moorhead City Council can pose a significant challenge to the passage of a proposed ordinance. On June 21, 2004, during the third and final reading of the city’s smoke-free ordinance, the Moorhead mayor resorted to just such a tactic in what proved to be a successful effort to delay the passage of a strong ordinance until after the general election so Moorhead could then amend it to mirror Fargo’s newly passed less comprehensive ordinance.<sup>33</sup>

The Moorhead City Council’s decision to reconsider the city’s ordinance after Fargo had passed its own ordinance, demonstrated the way the Moorhead process was, in the words of one informant, a “Fargo-led initiative.” Several informants expressed frustration at the Council’s decision to vote to reconsider its ordinance and to amend it to conform to Fargo’s new ordinance – in a sense, forfeiting Moorhead’s City Council process for Fargo’s ballot initiative process. Informants described the end-result as a “rollback” or “repeal” of Moorhead’s original ordinance, a product of the “level playing field” concern that many council members had voiced during this process. Common refrains of the Moorhead key informants were: “We’re always looking over the river” and “It’s all about Fargo.”<sup>34</sup>

None of the informants questioned the process by which a governmental body elected to lead in one jurisdiction allowed a neighboring jurisdiction to lead in its stead. Nor did they question whether the council was placing its desire to ensure regional consistency over the rights of its constituents to local representation. Given the sequence of events, however, both of these questions seem reasonable to ask, particularly since they may be raised in other multi-jurisdictional regions.



*The Fargo Commissioners: Let the People Decide*

Over the river, in the summer of 2004, the Fargo Board of Commissioners was close to passing a comprehensive smoke-free ordinance. Following months of discussion, several meetings among the mayors and other elected officials in the Fargo/Moorhead region, media events, and a great deal of planning and public anticipation, the Board was about to hold the second and final reading of the Fargo ordinance. Word then got out that a group of bar owners was circulating a petition and collecting signatures in support of an ordinance less restrictive than the Board's proposed ordinance.<sup>35</sup>

At this point, the Board of Commissioners decided to table public discussion of its ordinance, and place the initiated ordinance on the November 2004 general election ballot. Three of the seven informants expressed concern that, in placing the less restrictive initiated ordinance on the ballot, the Board was tacitly derailing its more restrictive ordinance. Two informants professed uncertainty about whether the Board could legally vote on the proposed ordinance once the initiated ordinance was approved. The Board apparently did not believe it had any choice but to allow the ballot initiative process to take precedence over the commission process. At any rate, the timing here was tight, because within a few weeks, two bar-owner-supported initiatives were presented to the Board, along with the SAFE coalition's own measure. The Board placed all three initiated measures on the ballot – in effect, letting the voters select the ordinance they wanted.

### Findings

- A policymaker with tie-breaking or veto power can often disable, postpone or defeat an initiative by simply threatening to exercise that power.
- Passing smoke-free laws requires an understanding of each regulatory entity's rules and procedures in passing an ordinance, including the number of required public hearings, amendment

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procedure, voting mechanics and majorities, timing between hearings, and the implications of having a strong decision maker on the council or board with veto power. When cross-border communities or multiple jurisdictions are engaged in the process of enacting smoke-free laws simultaneously, the procedural issues and political interactions can be complex.

- Allowing the ballot measure process to take precedence over responsible lawmaking, and even shape policy in another jurisdiction, can arguably represent a significant impediment to the accountability of elected officials and the functioning of representative democracy. (Moorhead)
- In multi-jurisdictional communities, when the call of "level playing field" is raised, policymakers may be distracted into paying more attention to obtaining a consistent smoke-free policy across borders than to representing the interests of their local constituents or serving the public interest in their community.

*The City Attorney: Drafter and Advisor*

In all three smoke-free campaigns, the city attorney represented each city in drafting sample smoke-free ordinances and providing legal advice and representation. All informants acknowledged the importance of having access to sound and objective legal counsel. Although the same individual served as part-time city attorney in Moorhead and West Fargo, this dual role was not seen as tainting or skewing the advice the attorney gave the two municipalities. While it does not appear that any laws or ethical principles were broken by the same attorney representing cities in two different states with their smoke-free legislation, the perception of a conflict of interest did exist. In the Fargo/Moorhead campaigns, as is usually the case, the city attorney played a role in drafting ordinances and fielding legal questions from city council and board members. Some informants

viewed the Fargo city attorney as less responsive in clarifying legal issues than they would have liked. Several informants contacted attorneys at the Tobacco Law Center with questions during the Fargo/Moorhead campaigns from 2003 and continuing into 2007.

### Finding

A knowledgeable responsive attorney familiar with the laws of given jurisdictions or with tobacco law in general can be an invaluable resource in smoke-free ordinance campaigns in multi-jurisdictional regions.

## Confusing Initiative and Referendum Process

### *Overview of Ballot Initiatives and Referenda*

Ballot initiatives and referenda are two of the limited methods by which citizens can directly influence the passage or repeal of a law. An initiative is the process by which voters in a community can petition to place a question on the ballot seeking adoption of a particular ordinance. If the election succeeds, the ordinance must be adopted regardless of the desire of the governing body.

A referendum, on the other hand, is an election that seeks to undo action taken by the governing body. If a referendum is passed, the ordinance previously adopted by the governing body is repealed. Otherwise, the ordinance is upheld. Generally, a legislative body puts an issue on the ballot to let voters decide an issue, or citizens gather signatures and petition to have the issue put on the ballot in an effort to amend or repeal an existing law or policy. Referenda can be binding or non-binding.

Contrary to popular belief, the use of initiatives and referenda is quite limited. In fact, there are no Minnesota statutes authorizing the general use of either initiatives or referenda at the State, County, or Township levels of government. There is limited statutory authority for County and Township residents to petition for a referendum on certain financial matters, such as tax increases or the incurring of debt, but there is no authority for these units of government to use initiatives or referenda for ordinances related to secondhand smoke.

Likewise, there is no general statutory authority for the use of initiatives or referenda at the city level. Home rule charter cities such as Moorhead, Fargo, and West Fargo, however, all have charters that include the authority to use initiatives and referenda. Until recently, this authority was rarely exercised. In fact, Fargo's smoke-free ordinance was the first initiated ordinance since Fargo's charter was approved in 1971.

The effect of ballot initiatives on the ordinance process in Moorhead and Fargo in 2004, and to a lesser extent West Fargo, was dramatic. In both of the larger cities, pending votes on more restrictive ordinances were, in effect, preempted to allow the electorate to participate in the process (or, in the case of Moorhead, the Fargo electorate).

### *The Competing Initiatives Dilemma*

Ballot measures are not always the best way to make strong smoke-free laws. Opponents often take advantage of this process to introduce measures in an attempt to delay, disable, or defeat ordinances. Fargo's ballot initiative experience in 2004 is a classic example of how the presence of conflicting ordinances on the ballot can confuse the electorate, and weaken an ordinance.

Few informants believed that either Fargo or West Fargo was prepared for ballot initiatives during the election, and none of the informants anticipated three competing initiatives on the ballot. One informant admitted that the coalition wasn't as "nimble in reacting to the Fargo ballot initiatives as [it] should have been," and expressed frustration at the "ever-changing environment" and the lack of an overall master plan for educating citizens in three different communities. Advocates had little time to inform voters of the differences between the three measures, and the necessity of voting NO NO YES on the Fargo ballot and NO YES on the West Fargo ballot – rather than simply YES for the measure the voter approved. Informants claimed that lack of organizational resources left them ill prepared to conduct a massive voter education prior to the election.

In addition to limited time, resources, and the lack of a master plan, advocates faced yet another challenge when it came to educating the public about the ballot initiatives – the difficulty in targeting the appropriate voters in Fargo and West Fargo. The Fargo/Moorhead region shares one daily newspaper, *The Forum of*

*Fargo-Moorhead.* *The Forum* is also the primary daily paper for southeast North Dakota and much of northwest Minnesota, with an average daily circulation of 62,097. Although some informants claimed it was convenient to deal with the same media throughout the region, they also acknowledged the challenge in targeting messages in one newspaper to different communities about different initiatives. Despite the efforts of other public health organizations to inform the electorate and promote the most comprehensive initiative, by the time the election rolled around, some voters facing the initiative choices were clearly baffled.

What caused this confusion? The ballot language was in compliance with Initiative and Referendum requirements spelled out in Article 4 of Fargo's Home Rule Charter.<sup>36</sup> What the Charter does not include, however, are voter instructions for a ballot with multiple conflicting initiated measures. Thus, the Fargo ballot did not inform voters that the three initiated ordinances were inconsistent and mutually exclusive or that the City of Fargo planned to adopt only one initiated ordinance. Nor did the ballot explain what would happen if more than one initiated ordinance received a majority of "yes" votes.

When the 2004 election results were announced, all but one of the five smoke-free ballot initiatives in Fargo and West Fargo achieved more than 50 percent of the vote. Since multiple measures could, and did, receive a majority, the public was understandably confused about how to interpret the vote. Attorney General Stenehjem's Opinion from the previous month guided the interpretation of the vote, even though North Dakota had no constitutional or statutory provision or case law dealing with conflicting initiated municipal ordinances.<sup>37</sup>

#### *Revisiting the Referendum Process*

In 2008, in the ongoing interest of "creating a level playing field" and strengthening their ordinances to be consistent with the new Minnesota law, Fargo and West Fargo Commissioners placed their smoke-free ordinances on the ballot. On June 10, 2008, Fargo voters passed a comprehensive smoke-free ordinance, which prohibited smoking in all public places, including bars, restaurants, truck stops, and indoor workplaces. The same day, West Fargo voters voted to approve a similar ordinance, with the proviso

that if passed, the law would go into effect July 1, 2008, or on the same day a similar ordinance in Fargo became effective. On July 1, the Fargo and West Fargo smoke-free ordinances took effect.<sup>38</sup> Looking back over the history of these campaigns, what seems remarkable is the extent to which the Fargo and West Fargo Commissioners were willing to collaborate to ensure a consistent policy across the region. Minnesota's new statewide law clearly had an impact on this collaboration.

#### **Findings**

- Smoke-free advocates can best prepare for ballot initiatives or referenda by familiarizing themselves with each jurisdiction's rules for ballot measures. Ballot measure rules, typically found in a home rule charter or city code, contain procedural requirements (the number of voters required to sign the petition; the format of the petition; the petition language; deadlines; the requirements for winning) and the substantive requirements (the issues that can be decided via initiatives and referendums).
- Advocates need to anticipate conflicting or confusing ballot initiatives and commit time and resources to distinguishing and clarifying measures for voters before an election.

#### **Legal and Geopolitical Challenges**

The Buffalo Wild Wings legal challenge was viewed more as a distraction than as significant obstacle in the Fargo smoke-free campaign.<sup>39</sup> The plaintiffs sought a temporary injunction on several equal protection grounds, a due process claim (alleging voter confusion), and a novel preemption claim that the Fargo ordinance was superseded by state law. They approached the SAFE coalition, the local public health department, and other advocates about joining the lawsuit, asserting that their motive was to delay implementation of the ordinance until the outcome of the lawsuit and potential appeals. Their professed intent in filing this suit was to seek a comprehensive smoke-free ordinance. Advocates were leery of partnering with the restaurant industry, and the local health department refused to join forces with an entity that the department regulated. On January 6, 2005, the plaintiffs dropped the lawsuit.

Unlike other Minnesota regions where legal challenges have had more of an impact on the passage of ordinances, the Buffalo Wild Wings lawsuit appears to have been relatively inconsequential. Its main contribution to the Fargo ordinance saga may be its litany of due process charges stemming from voter confusion about the ballot initiatives. Regardless of the merit of the Buffalo Wild Wings lawsuit, voter confusion in the Fargo election was a significant

obstacle to passage of a comprehensive smoke-free ordinance.

Finally, it is worth noting that these local campaigns occurred at the same time that North Dakota and Minnesota legislators were holding sessions to discuss the passage of statewide smoke-free laws. As they did with regional regulation, many policymakers used the prospect of statewide legislation to delay or weaken local smoke-free ordinances.

## Endnotes

- 1 U.S. Census Bureau, *Population Estimate for Moorhead, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Moorhead, Minnesota, then follow hyperlink).
- 2 U.S. Census Bureau, *Population Estimate for Fargo, North Dakota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Fargo, North Dakota, then follow hyperlink).
- 3 U.S. Census Bureau, *Moorhead city, Minnesota – Fact Sheet* (2006-2008); U.S. Census Bureau, *Fargo city, North Dakota – Fact Sheet* (2006-2008).
- 4 Moorhead data: Email from Kaye Buchholz, Moorhead City Clerk, to Abigail Mayer, Research Assistant, William Mitchell College of Law (Aug. 27, 2007); Fargo data: Email from Sharon Plecity, Auditor’s Office, City of Fargo, to Abigail Mayer, Research Assistant, William Mitchell College of Law (Aug. 21, 2007). West Fargo data: E-mail from Karen Belisle, Licensing, West Fargo city government, to Abigail Mayer, Research Assistant, William Mitchell College of Law (Aug. 21, 2007).
- 5 U.S. Census Bureau, *Economic Fact Sheet for Fargo, North Dakota* (2006-2008), available at <http://www.census.gov/>.
- 6 U.S. Census Bureau, *Population Estimate for West Fargo, North Dakota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type West Fargo, North Dakota, then follow hyperlink).
- 7 See City-Data.com, Dilworth-Minnesota, <http://www.city-data.com/city/dilworth-minnesota.html>.
- 8 U.S. Census Bureau, *Population Estimate for Dilworth, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Dilworth, Minnesota, then follow hyperlink).
- 9 Moorhead City Council Minutes, Feb. 9, 2004.
- 10 The Moorhead City Council consists of eight council members, all of whom are elected to four-year terms. Two council members are elected from each of four wards. Although the mayor is not a member of the council, he or she presides at council meetings and can vote to break a tie. The mayor has veto power; 6 of 8 votes are required to override a veto. MOORHEAD, MINN., CODE Ord. 95-1, Sect. 2.03.  
  
At this time, the Moorhead City Council had to consider an ordinance in three meetings called “considerations,” before it could be adopted. The council does not technically hold “public hearings.” The city charter was changed in September 2004, between the adoption of the initial ordinance and the amendment, to require only two readings to pass an ordinance. MOORHEAD, MINN., CODE Ord. 95-1, Sect. 3.05.
- 11 On May 10, 2004, the Fargo Board of Commissioners had approved an ordinance prohibiting smoking in public places. Under Fargo’s city charter, to become law, an ordinance must be approved in two hearings. FARGO, N.D., CHARTER ch. 3, § 3.05 (2004).
- 12 This could have proved fatal to the ordinance process, since six council member votes are required to override a mayoral veto. MOORHEAD, MINN., CHARTER ch. 3, § 3.07.
- 13 Moorhead City Council, Nov. 15, 2004 minutes, available at <http://www.cityofmoorhead.com/Uploads/councilAgendas/1113%20minutes.pdf>.
- 14 MINN. STAT. §§ 144.411-417 (Supp. 1999), amended by MINN. STAT. §§ 144.411-417 (2007).
- 15 FARGO, N.D., CODE § 1-0203 (1974).
- 16 To pass a Fargo ordinance, two “readings” are required, with the second reading held at least one week after the first. The ordinance can be amended between the first and second reading. If an ordinance is amended, final passage cannot occur until one week after the second reading. FARGO, N.D., CODE § 1-0203 (1974).
- 17 The opinion, which also stated that employees may have a cause of action to sue employers who allow smoking in the workplace, was based on an interpretation of a 1919 state law about unsafe work conditions. § 34-06-05, N.D.CENT.CODE states that “It is unlawful to employ in any occupation within this state: 1) Employees for unreasonably long hours. 2) Employees under surroundings or conditions, sanitary or otherwise, which may be detrimental to their health or morals.”
- 18 Dawn Peake, *Bar Smoking Ban to Go to Vote; 4,500 Sign Petition*, THE FORUM, July 7, 2004.
- 19 FARGO, N.D. HOME RULE CHARTER, Art. 4.
- 20 Op. N.D. Att’y Gen. No. L-60 (2004). He pointed out there is no North Dakota constitutional or statutory provision or case law dealing with conflicting initiated municipal ordinances. Based on the analysis of other state courts that have faced this issue, and the rules of statutory construction, he concluded that the measure receiving the highest number of affirmative votes should prevail.
- 21 In a get-out-the-vote flyer distributed by the American Heart Association prior to the election, the three smoke-free initiatives were compared in a grid. Two columns in the grid highlighted the “level playing field” benefit of Measure #3, and another column pointed out that Measure #3 matched the Moorhead City Council/Fargo City Commission’s recommended policy.
- 22 Voters could have marked “Yes” or “No” on all or none of the proposed smoking ordinances. Nearly 1,400 more votes were cast in total on Initiative No. 3 than on Initiative No. 2, which won by fewer than 500 votes. Ordinance #2 received 24,986 votes; Ordinance #3 received 24,489 votes. Mary Jo Almquist, *District 21 Difference Maker for All-Out Fargo Smoking Ban*, THE FORUM, Nov. 7, 2004.
- 23 Mary Jo Almquist, *Fargo Smoke Ban Challenged*, THE FORUM, Nov. 18, 2004.

- 24 *Buffalo Wild Wings Grill & Bar v. City of Fargo*, No.: 3-04-CV-136; (D.N.D. filed Nov. 11, 2004).
- 25 Buffalo Wild Wings headquarters did not allow its restaurants to renovate to create enclosed bar areas. Thus, plaintiffs' support for a comprehensive ordinance may have been motivated by concerns about unfair competition.
- 26 N.D. CENT. CODE §§ 23-12-9 to -11 (2005).
- 27 Mike Nowatzki, *Cities' Smoking Ban Haze Clears Up*, THE FORUM, Aug. 1, 2007.
- 28 *See id.*
- 29 *See id.*
- 30 Two commission seats are elected biennially, and each commissioner is responsible for specific portfolios of city departments. The Board of City Commissioners also serves as the Board of Health.
- 31 WEST FARGO, N.D. CODE § 1-0203 (1998).
- 32 MOORHEAD, MINN., CHARTER, ch. 3 § 3.07; ch. 2, § 2.07.
- 33 Several informants described the Moorhead mayor as being committed to a regional approach – a “level playing field,” which includes all four cities in the area.
- 34 Four informants pointed out that North Dakota tends to look to Minnesota in many areas, but in the Fargo/Moorhead region, Minnesota (and West Fargo) often look to Fargo, which is the major metropolitan area in the region.
- 35 Following the June 8, 2004 elections, the new Board of Commissioners was made up of more supporters than opponents of the ordinance, and the likelihood of passage was great.
- 36 FARGO, N.D. HOME RULE CHARTER, Art. 4.
- 37 Op. N.D. Att’y Gen. No. L-60 (2004).
- 38 While the 2004 ballot initiative delayed Fargo’s ordinance process by only a few months, consideration of this ballot measure delayed the process by nearly one year. This substantial delay was created by procedural rules relating to timing of ballot initiatives and the use of special and general elections.
- 39 *See Fargo section, supra.*

# The Olmsted County Story

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*This case study covers events that transpired in the smoke-free campaigns in Olmsted County and the City of Rochester, Minnesota between 2000 and 2006. It was written as one of seven case studies under a ClearWay Minnesota<sup>SM</sup> research grant to study legal and political obstacles to smoke-free regulation in seven geographically diverse Minnesota regions.*

## Overview of Olmsted County

Olmsted County is a region of rolling farmlands, deep valleys, and streams in the southeastern corner of Minnesota. It is beautiful country, originally inhabited by the Dakota Sioux, Ojibway, and Winnebago, with white settlers first arriving in 1855.<sup>1</sup> Olmsted's county seat, Rochester, was a nineteenth-century crossroads campsite for wagon trains that passed through the territory and banked along the southern fork of the Zumbro River. Established as county seat in 1857, Rochester later served as a stagecoach stop between St. Paul, Minnesota, and Dubuque, Iowa.

Today Rochester, with an estimated population of 100,413, is best known as the home of the world-renowned Mayo Clinic.<sup>2</sup> More than 3,700 physicians and scientists, 3,200 residents, fellows and students, and 50,100 allied health staff work at the Mayo Clinic, treating over half a million people each year.<sup>3</sup> Not only a medical community, Rochester is also the site of one of IBM's largest complexes. The city's diverse economy draws on a workforce of many highly trained professionals.

Given the city's high standard of living, strong job market, low crime rate, and range of cultural opportunities, national publications often rank Rochester as one of the country's "Best Places to Live."<sup>4</sup> Approximately two-thirds of the county's population resides in Rochester – the economic hub of the county. The city's primary industries are medical services, software design and programming, light manufacturing (primarily computers and electronics) and a large hotel and restaurant trade, which serves visitors from around the world.

Outside Rochester, the main industry in Olmsted County is agriculture. Approximately 60 percent of

the half-million acres in Olmsted County is farmland –nearly 1,400 working farms.<sup>5</sup> The county has an estimated population of 141,360, with an ethnic makeup that is largely German, Norwegian and Irish.<sup>6</sup> Both Olmsted County and Rochester voters have traditionally tended to be conservative, but this trend may be changing.<sup>7</sup>

## Telling the Stories

### The City Council Punts

This is a story of a city and a county where the local health community led a smoke-free ordinance campaign and lost, but then returned and won an historic victory. The campaign was long, bitter and intense, and many who were involved in it speak with awe of the strong passions it evoked. Yet the outcome was a triumph of local advocacy and organization, dogged perseverance, and a county board that took its public health mission to heart. The outcome, in fact, was the first smoke-free ordinance in a Minnesota county.

The story begins in early 2000, when a community partnership called CardioVision 2020 conducted a survey entitled "Attitudes of Olmsted County, Minnesota Residents About Tobacco Smoke in Restaurants and Bars."<sup>8</sup> The partnership's goal was to reduce cardiovascular disease in Olmsted County, and one of the key ways to achieve this goal was to eliminate tobacco smoke in the county's public places. In this random survey of 2,014 residents, conducted between February 28 and May 5, 2000, 72 percent of informants said they would select a smoke-free restaurant over one where smoking was permitted, and 70 percent said they would select a smoke-free bar over one where smoking was permitted. The survey's net result: Olmsted County residents preferred smoke-free over smoking establishments.

On June 19, 2000, before the survey was officially published, the Zumbro Valley Medical Society, a nonprofit physicians' organization unaffiliated with the Mayo Clinic, (but including many Mayo physicians as members) decided to promote a smoke-

free restaurant ordinance in Olmsted County.<sup>9</sup> The Society's executive director approached the County Board of Commissioners about this idea, but the Board was too busy to take on the issue that year. In the beginning of 2001, the Society's director retired and another physician assumed leadership of the organization.

In the meantime, a second local group was on the move, called Citizens for a Smoke-Free Rochester. This group included public health care professionals, business leaders, parents, health organizations and concerned citizens. The group distributed information on the public health impact of tobacco smoke and the benefits of smoke-free air to approximately 60 community groups and organizations. The campaign's public education efforts were beginning in earnest. As a helpful kickoff, in February 2001, CardioVision 2020 published its survey on the attitudes of Olmsted County residents about tobacco smoke in restaurants and bars. The Olmsted County Community Health Services Advisory Board and the Independent School District 535 School Board held meetings in February and March 2001 to review the survey information and to discuss a proposed smoke-free ordinance for Olmsted County.

An even more significant survey was to follow. In April 2001, the SNG Research Corporation conducted a community survey for Citizens for a Smoke-Free Rochester and the Zumbro Valley Medical Association, to determine the level of support for a smoke-free ordinance in Rochester. The survey results, published in May 2001, found that nearly 75 percent of the people surveyed would approve a smoke-free ordinance covering Rochester restaurants and 50 percent of those surveyed would support a smoke-free ordinance covering Rochester bars and nightclubs.<sup>10</sup> On May 8, 2001, with these survey results in hand, the Olmsted County Board met as a Committee of the Whole to discuss a smoke-free ordinance for Olmsted County.<sup>11</sup> Nothing substantive came of this meeting.

All eyes now turned to Rochester. This city, after all, was the site of the world's first and largest integrated, nonprofit group medical practice, known world-wide for the quality of its medical care. The Rochester ordinance was championed by the local medical society with the committed support of some of the world's leading medical experts. Surely the Rochester

City Council would have no problem recognizing the serious health hazards of tobacco smoke and would feel an obligation, in the interest of public health, to prohibit smoking in the city's eating establishments.

The Citizens for a Smoke-Free Rochester went to work, drafting a proposed smoke-free restaurant ordinance for Rochester. The ordinance prohibited smoking in restaurants, but exempted bars, private clubs (except when open to the public) and restaurants when being used for private functions to which the public was not admitted. The drafters inserted clear rules about violations and enforcement procedures to avoid problems that had arisen when Duluth's smoke-free ordinance was implemented.<sup>12</sup> In June 2001, the citizens' group presented their draft proposal to the City Council.

The Rochester City Council consists of seven elected officials. The Council President is elected at large and the six Council members are elected by the residents of each ward that they represent. The mayor is not on the City Council. Rochester has a "strong council, weak mayor" form of government that endows a great deal of power and authority to the City Administrator. This unelected official plays a key role in coordinating the operations of City government and its departments, carrying out policies adopted by the Council and Mayor, and, among other tasks, setting all City Council agendas.<sup>13</sup>

On June 20, 2001, two county health advisory committees appointed by the Olmsted County Board of Commissioners adopted a resolution to recommend a smoke-free ordinance in Rochester.<sup>14</sup> This was encouraging news for the advocates. Yet the proposed ordinance was before the City of Rochester now, not Olmsted County.

Five days later, the City Council, convening as a Committee of the Whole, met to discuss the proposed smoke-free restaurant ordinance. The City Attorney had reviewed the ordinance and found it "reasonably clear, legal and enforceable." City Council members, however, were split about the ordinance, with some contending that two-thirds of the city's restaurants were already smoke-free, and that patrons seeking smoke-free establishments already had enough choices. Although many members of the Zumbro Valley Medical Society were affiliated with the Mayo Clinic, the Mayo Clinic itself did not take a leadership role in supporting this initiative.



On July 19, Olmsted County Public Health Services arranged a public forum where dozens of supporters, including many medical and public health professionals, testified for the smoke-free ordinance before members of the Olmsted County Board, Rochester City Council, the Olmsted County Environmental Health Commission and the Olmsted County Community Health Services Advisory Board.

On July 29, the City Council met to hear the views of Rochester restaurant owners who opposed the ordinance. The following day, the Council convened again as a Committee of the Whole to decide whether or not to proceed with the ordinance. Not only was there no champion on the Council to support the ordinance, there was little support from city officials in general.<sup>15</sup> The business community/Chamber of Commerce (primarily the hospitality industry), the city attorney, police department, and the powerful city administrator all opposed it. As a result, the City Council declined to move ahead on the ordinance and by refusing to give it a formal hearing, effectively tabled the ordinance without a vote.

Two weeks later, on August 14, 2001, the Olmsted County Board and Community Health Board recommended establishing a joint task force with Rochester to review and improve the proposed ordinance for Rochester. To the relief of the advocates, who were concerned about encountering further delays, this joint task force never materialized. The city had had its chance. It was now time to move to the county.

### **The County Board Takes the Ball**

What happened next was the direct result of leadership by the county health director, the county board chair and public health community, organized community outreach and education by the advocates, and hard work by all. Olmsted County's 7-member Board of Commissioners, acting as authorized under Minnesota statute and led by a determined chair, assumed the powers and duties of the County Board of Health. State law grants a county board the authority to adopt ordinances "to regulate actual or potential threats to the public health."<sup>16</sup> The County Board, as the County Board of Health, is authorized to enforce laws, regulations and ordinances relating to public health for the territory within its jurisdiction.<sup>17</sup> The county board chair pointed out repeatedly to her fellow commissioners that they had the responsibility

and authority to make public health policy decisions for the community. The County Board was engaged.

On September 25, 2001, the Olmsted County Board met as a Committee of the Whole to consider the latest draft of the restaurant ordinance. With the support of the board chair, public health professionals drafted the language, and the Public Health Law Center (the former Tobacco Law Center) director and city attorney reviewed the ordinance to ensure that the legal process and provisions were sound. The original proposal was to cover bars; however, no community coalition in Minnesota at this time was prepared to fight for smoke-free bars and no local government had shown interest in this. The attorneys also ensured that the ordinance language was tightened, terms defined (e.g., "bar," "restaurant," "50 percent"), and issues clarified.<sup>18</sup>

From that point on, the Olmsted public health professionals launched a blitzkrieg of more than 25 countywide informational meetings, public information releases and related communication activities. On October 16, 2001, representatives from several small cities in Olmsted County met with the County Board in Chatfield to discuss the ordinance and the experiences of businesses that had gone smoke-free. On October 17, the County's Environmental Commission recommended that the County Board hold public hearings and adopt the ordinance. The County Board set a November 13 public hearing date for the proposed ordinance. A few days later, copies of the ordinance were mailed to Olmsted municipalities (seven townships and seven cities), followed up with phone calls to the municipalities to confirm the upcoming public information meetings. On October 30, officers from Rochester's Lodging and Hospitality Association met with the County Board to discuss the ordinance.

On November 1, 2001, the County Board held two public informational meetings on the ordinance. Approximately 40 people attended these events.

During the first week of November, the Board published a Notice of Public Hearing on the ordinance, posted the ordinance on the Olmsted County public health website and at the County Government Center, and sent out a news release inviting people to the website and encouraging them to contact the Public Health Department for additional information. Copies of the ordinance were mailed out

again to the seven townships and seven cities in the county.

On November 13, 2001, the County Board held a public hearing on the smoke-free ordinance. The proposed ordinance prohibited smoking in all indoor areas of restaurants and indoor entrance areas, but exempted bars where liquor sales were more than 50 percent of total sales, and which were separated from restaurants by solid barriers, had separate ventilation and were off-limits to minors. The ordinance also exempted private clubs open to serve members only, and restaurants when closed for private functions.

The public hearing was structured to allow alternate testimony from supporters and opponents of the ordinance. As an indication of the high community interest in the proposal, more than 200 people attended the hearing, which lasted for several hours. The testimony was intense and emotional. Speakers included representatives from Rochester's Lodging and Hospitality Association, as well as officials from the Olmsted County Health Department. One speaker for the opposition left behind a draft of her speech that had clearly been scripted for her, probably by the tobacco industry, complete with generic testimony and blank lines for her to insert her name and personal information. The speech was shown to the Commissioners, who were annoyed by the involvement of outside forces. One Commissioner who had been on the fence stated later that she voted in favor of the ordinance because of this discovery. At the end of the hearing, the Board voted to adopt the ordinance (5-2). Olmsted County thus became the first county in the state to pass a smoke-free ordinance.

On January 1, 2002, Olmsted County's Smoke-free Restaurant Ordinance took effect. Restaurants were given 30 days to comply with the ordinance and allowed to apply for a 90-day extension after that date, effectively postponing compliance to May 1, 2002.

### **Since 2002**

On February 8, 2005, the Olmsted County Board passed a resolution (4-3) to endorse statewide smoke-free workplace legislation, and on February 28, restated its support (5-2). In early 2006, Olmsted County's Community Health Services Advisory Board recommended that the Olmsted County Board expand its smoke-free ordinance to include all workplaces,

including bars. Behind this recommendation was the concern that Olmsted County's smoke-free ordinance, now four years old, would continue to be viewed as a model for the state. Advocates worried that legislators considering a statewide law might look to Olmsted County's restaurant-only ordinance and (according to one informant) say, "If it's good enough for Mayo, it must be good enough for the state."

In August 2006, the SNG Research Corporation conducted a community survey of Olmsted County voters on their opinions of the smoke-free law. The survey showed strong support for the county's smoke-free ordinance: 82 percent "strongly favored" the current law and 77 percent favored extending its reach.<sup>19</sup> Economic data showed that in the four years since the smoke-free ordinance passed, 57 smoke-free restaurants had opened in Olmsted County and not a single bar allowing smoking had opened.<sup>20</sup>

On October 11, 2006, the Community Health Services Advisory Board presented the survey results to the County Board, along with a draft ordinance prohibiting smoking in all workplaces. In November 2006, the Community Health Services Advisory Board and the Environmental Commission held public information meetings on the draft ordinance.

On January 2, 2007, after additional public forums and surveys showing strong support for strengthening the ordinance, the County Board voted to publish its intent to act on the ordinance (6-1). On January 17, 2007, the ROCHESTER-POST BULLETIN editorial page argued against the proposed ordinance, and in support of action at the state level.<sup>21</sup> Later that month, opposition to the comprehensive ordinance arrived in the form of a community survey conducted for the Olmsted County Tavern Owners Association that showed strong support for "individual choice," and in the form of resolutions from every city council in the county supporting the current ordinance. The County Board was not swayed.

On January 23, 2007, the Olmsted County Board voted to approve the Olmsted County Smoke-Free Workplace Ordinance (5-2). The new ordinance expanded the existing smoke-free ordinance to prohibit smoking in all workplaces and public places, including bars and public transportation, and prohibited smoking on the outdoor patios of any dining or bar area if served by wait staff and within 15 feet of entrances, windows and ventilation intakes of

workplaces and public places. The ordinance was to take effect June 1, 2007.

With the passage of the Smoke-Free Workplace Ordinance, Olmsted was the second county in the state, after Beltrami, to pass a comprehensive smoke-free ordinance, without exemptions. Cities with equivalent ordinances included Bloomington, Golden Valley, and Hutchinson.

On May 16, 2007, Minnesota lawmakers passed the Freedom to Breathe Act of 2007. The provisions in this legislation expanded the current Minnesota Clean Indoor Air Act to prohibit smoking in virtually all indoor public places and places of employment.<sup>22</sup> The new provisions took effect October 1, 2007.

On May 22, 2007, the Olmsted County Board voted unanimously to delay implementation of its Smoke-free Workplace Ordinance until October 1 to coincide with the effective date of the Freedom to Breathe Act. The County Board that made history in 2001 with its smoke-free ordinance had been waiting for the state to catch up for six years. It could wait a few months more.

## Reviewing the Olmsted County Story

### Analysis and Findings

Olmsted County was a pioneer in Minnesota tobacco control when it passed the state's first county-wide smoke-free ordinance in 2001. Local communities in Minnesota were just beginning to consider smoke-free policies in public places, and although some jurisdictions adopted tobacco control measures, no other county had succeeded in passing a smoke-free ordinance.<sup>23</sup>

Neither Rochester nor Olmsted County faced legal challenges, such as litigation or ballot initiatives, during the smoke-free ordinance campaigns of 2000 and 2001. Still, at least some of the obstacles Rochester advocates encountered stemmed from the city's perception of its legal authority and obligation to regulate threats to public health. Another minor, but significant, obstacle was the questionable role the Rochester City Attorney assumed during public hearings by displaying active opposition to the ordinance, and acting more as an unauthorized council member than a city attorney. Other minor legal issues emerged occasionally, but none impeded the process in any significant way.

Lack of political support was a key obstacle in the Rochester campaign. Other political obstacles occurred as a result of the time that these campaigns were undertaken – a time when few smoke-free ordinances had passed in Minnesota, the local smoke-free movement was just beginning to get underway in the U.S., and economic data was starting to be compiled following the enactment of smoke-free ordinances.

The key legal and political obstacles in the Rochester/Olmsted County smoke-free campaigns from 2000 and 2001 fall into three categories. The fourth category covers related challenges that surfaced during the campaigns but failed to disable or delay the campaigns.

1. Conflicting Interpretations of Legal Regulatory Authority
2. Lack of Political Support (Rochester)
3. Timing and Inexperience
4. Other Legal Issues

### Conflicting Interpretations of Legal Regulatory Authority

*Rochester City Council: It's Not Our Role*

All seven informants expressed disappointment in the Rochester City Council's refusal to act on the smoke-free restaurant ordinance proposal in 2000. The initial reaction of many advocates had been that, if any community could pass a tobacco control measure like this, it would be Rochester, "a community that revolves around health issues." After all, Minnesota cities have the power under the Minnesota Clean Indoor Air Act to prohibit smoking in restaurants and other public places.<sup>24</sup> Moreover, in the summer of 2001, while the Rochester City Council was considering this proposal, the cities of Cloquet, Mankato, and Hutchinson were also discussing smoke-free ordinances, and the Duluth City Council was voting to strengthen that city's smoke-free ordinance.

Still, at least some Rochester City Council members believed that it was not the Council's responsibility to legislate in this area. One informant cited the example of a County Commissioner who voted for the county ordinance and who had previously served as a Rochester City Council member. The Commissioner said she would NOT have voted for the city ordinance,

but voted for the county ordinance because it was the County Board's responsibility to protect public health.

That the County Board, also acting as County Board of Health, had authority to regulate smoking in the county was never an issue. What apparently was an issue in the minds of at least some city council members was whether that regulatory authority was mutually exclusive. The City Charter grants the city "all powers which may now or hereafter be possible for a municipal corporation in this state to have and exercise in harmony with the constitutions of this state and of the United States. . . . Unless granted to some other officer or body, all powers are vested in the common council."<sup>25</sup> Yet the charter does not supersede state law, which grants cities as well as counties the power to regulate smoking. While some city council members may have been legitimately confused over the Council's regulatory authority in this area, it is also true that the County Board's dual role as Board of Health provided council members with a convenient way to avoid addressing this politically controversial issue.

### Finding

Questioning a governmental body's regulatory authority to enact smoke-free legislation can provide municipalities with a pretext to avoid acting in this area.

#### *Olmsted County Board: It's Our Duty*

On the other hand, the Olmsted County Board of Commissioners was led by a chair who was not confused about the Board's responsibilities, either as a county board or as a board of health. Under Minnesota Statutes §§ 145A.04 and 145A.05, both county boards and boards of health "shall" adopt ordinances to regulate actual or potential threats to public health. A countywide smoke-free ordinance clearly served the interest of public health, and adopting such an ordinance was within the board's jurisdiction. That the County Board had a duty to pass this law was, in the words of the Board Chair, a "no-brainer." The influence of a supportive Board Chair (a popular five-term Commissioner), who took it upon herself to champion this ordinance cannot be overestimated. Individuals can, and do, make a difference every day in policymaking.

### Lack of Political Support

Several informants expressed the belief that stiff opposition from Rochester's business community – in particular, the city's strong hospitality industry – was the main reason the City Council refused to act on the ordinance. Two informants speculated that the administrative structure of the city, which allocated considerable power to the city administrator, was at least partially to blame. The city administrator strongly opposed the ordinance. Moreover, neither the mayor nor the city attorney was supportive.

Still, the level of political opposition to the city ordinance was more than matched by political opposition to the county ordinance, much of which was directly linked to the tobacco industry.<sup>26</sup> Informants who played a role in the campaigns at this time spoke with emotion of receiving hate mail and death threats, and of losing life-long friendships as a result of their positions. Three of the informants, seasoned public servants with dozens of years of experience behind them, stated that working on these smoke-free ordinance campaigns was the most difficult thing they had done in their professional careers.

Although several Mayo physicians were members of the Zumbro Valley Medical Society and leaders in the smoke-free effort, the Mayo Clinic itself was nowhere near as active in the campaign or as strong a supporter of the Rochester ordinance as some advocates might have liked. Mayo, the city's "800-pound gorilla" in the words of one informant, was largely invisible in the city campaign and played only a nominal role in the county campaign, submitting a one-paragraph letter on September 28, 2001 to the County Administrator supporting the county ordinance.<sup>27</sup>

One of the key differences between the Rochester and the Olmsted County ordinance campaigns in 2000 and 2001 was strategic leadership in the county campaign, and the impressive level of support for the county ordinance from the health community, the community at large, and the County Board itself.<sup>28</sup> Not only was the County Board Chair able to set and control the County Board agenda, but thanks to an active public health department and a committed citizens' group with strong ties to the department, the public was kept up-to-date on events and engaged throughout the county ordinance campaign. The

community education process was transparent and inclusive, involving the opposition (the business community) in several informational meetings and informal get-togethers. The advocates worked hard at building coalitions among diverse populations in the community – ethnic groups, veterans, the young and the elderly, business owners with smoke-free establishments, students, and medical professionals – and at obtaining testimony at public hearings from disparate members of the community. The impact of two local community surveys supporting smoke-free establishments was also important.<sup>29</sup>

### Finding

Non-elected government officials, such as city administrators and city managers, can have a disproportionate effect on the success or defeat of a smoke-free ordinance.<sup>30</sup>

### Timing and Inexperience

The period of time during which the Rochester and the Olmsted County ordinance campaigns occurred created challenges for the advocates. Although some Minnesota communities were considering smoke-free initiatives in 2000, few ordinances had been enacted by then, so little local economic data from smoke-free communities was available to rebut opposition claims that businesses would be irreparably harmed when the ordinance was enacted. Even nationally, few economic studies were available in 2001 to debunk this economic hardship argument. Since the Olmsted initiative was the first countywide smoke-free ordinance in the state, the Board of Commissioners waged a lonely battle at the county level, learning lessons along the way that proved valuable to successive communities. Thus, the timing of both campaigns definitely posed a challenge.

Also, because this was early in Minnesota's smoke-free movement, many local advocates in the Rochester and Olmsted County campaigns were inexperienced in tobacco control. This too proved a challenge at first. Advocates, for example, initially used an objective, scientific approach, focused on medical facts, in public meetings and hearings. The opposition, however, used a more emotional, personal testimony

approach, focused on stories of real people (the bartender up the street, the single mother working as a waitress down the road), whose livelihoods would be destroyed by a smoke-free ordinance. The personal approach was far more effective than the scientific approach in garnering public and policymaker support for an ordinance. In the Olmsted campaign, in particular, as advocates became more seasoned, they drew on more individuals to share their stories (for example, war-decorated veterans, parents, children, police officers, former smokers, and patients), and this testimony helped sway public opinion toward the ordinance.

Finally, opponents used the issue of poor timing in both the Rochester and Olmsted County campaigns as a delay tactic. They proposed waiting until Minnesota strengthened the Clean Indoor Air Act so the same smoking restrictions would apply throughout the state.

Ironically, however, timing also appeared to be an impetus behind the passage of the Olmsted County ordinance. Advocates presented the smoke-free restaurant ordinance proposal to the County Board in September 2001. The County Board Chair's term was about to expire at the end of December 2001. The pending retirement of this strong champion of the ordinance encouraged advocates to fight even more vigorously for this legislation. The short timeline also prevented county advocates from proposing a more comprehensive ordinance than the one proposed in Rochester (all workplaces versus restaurant-only), since they didn't believe they had time to coordinate support for a different ordinance. Advocates believed it was critical to get the smoke-free restaurant ordinance passed during the Board Chair's term, since it was unlikely the subsequent chair would champion the ordinance the way the current chair did.

### Finding

- The pending retirement or election of a key policymaker can drive the timing of a smoke-free ordinance campaign and ultimately determine its outcome.<sup>31</sup>
- Opponents often cite the prospect of statewide laws to delay or disable local smoke-free initiatives.

## Other Legal Issues

As mentioned earlier, no formal legal challenges arose during the 2000 to 2001 Rochester and Olmsted County smoke-free campaigns and only a few informal legal issues emerged at this time. One legal question raised during the county campaign echoed a concern that arose in the city campaign: to what extent could the County Board of Commissioners enforce smoke-free laws under Minnesota's Clean Indoor Air Act? In other words, would the Clean Indoor Air Act preempt the county from regulating in this area? Both the Public Health Law Center (former Tobacco Law Center) and the county attorney, who acted as legal advisor to the Public Health Department, allayed concerns along this line, pointing out that state law did not preempt local communities from enforcing smoke-free laws that were more restrictive than state law.

The second legal issue had to do with the possibility of involving the Olmsted community

in a countywide referendum on the ordinance. This issue was never formally presented to the Board, but was occasionally raised as a possibility at meetings. The county attorney dismissed the referendum issue as well. His position was that since no explicit statutory authority existed for a countywide referendum on public policy issues, a referendum would be an illegal expenditure of public funds.

Finally, the director of the Public Health Law Center was involved in drafting and refining Olmsted County's smoke-free ordinance to ensure that the document was legally sound and that terms were defined, procedures were clear, and the process fair and enforceable. The involvement of supportive legal counsel at the drafting stage helped ensure that the ordinance could withstand legal scrutiny if it were challenged in court – just one of many practices that have become common over the years as recognition has grown of the importance of technical legal assistance in local smoke-free initiatives.

## Endnotes

- 1 See Official Olmsted County website, available at [http://www.co.olmsted.mn.us/general/history\\_of\\_olmsted\\_county.asp](http://www.co.olmsted.mn.us/general/history_of_olmsted_county.asp).
- 2 U.S. Census Bureau, *Population Estimate for Rochester, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Rochester, Minnesota; then follow hyperlink).
- 3 See *Current Facts About Mayo Clinic*, available at <http://www.mayoclinic.org/about/facts.html> (last visited Feb. 10, 2010). The Mayo Clinic was founded, and is headquartered, in Rochester, and now operates facilities in two other locations – Jacksonville, Florida and Scottsdale/Phoenix, Arizona. *Id.*
- 4 *Best Places to Live 2006*, MONEY, available at <http://money.cnn.com/magazines/moneymag/bplive/2006/top100/index3.html>.
- 5 Rochester Area Economic Development, Inc., *Rochester Area’s Economy*, available at [www//raedi.org/economic\\_overview.html#economy](http://www.raedi.org/economic_overview.html#economy) (last visited Feb. 10, 2010).
- 6 U.S. Census Bureau, *Population Estimate for Olmsted County, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Olmsted County, Minnesota; then follow hyperlink).
- 7 See City-Data.com, Olmsted County, Minnesota Detailed Profile, available at [http://www.city-data.com/county/Olmsted\\_County-MN.html](http://www.city-data.com/county/Olmsted_County-MN.html).
- 8 Thomas Kottke, *Attitudes of Olmsted County, Minnesota Residents About Tobacco Smoke in Restaurants and Bars*, 76 MAYO CLIN. PROC. 134-37 (2001).
- 9 Am. Med. Ass’n, *Smoke-free Workplaces*, available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/medical-student-section/advocacy-policy/smoke-free-workplaces/update-smokefree-workplaces.shtml>. The Zumbro Valley Medical Society was the first physicians’ organization in the U.S. to lead a smoke-free restaurant ordinance campaign.
- 10 SNG Research Corp., *Zumbro Valley Medical Society Second Hand Smoke Consumer Study* (2001).
- 11 In a Committee of the Whole meeting, all members sit as a committee to hear details of a proposal, and engage in discussion and debate, without making motions or taking action on the proposal.
- 12 See Kerry Cork, Public Health Law Center, *Going Smoke-free in the Land of Lakes: Law and Politics in Minnesota Smoke-free Campaigns – The Duluth Story* (2010).
- 13 See official website of City of Rochester, Minnesota, Administration Services, <http://www.rochestermn.gov/departments/administration/>.
- 14 The Olmsted Board of Commissioners appoints two health advisory committees to provide guidance on matters of health policy – the Community Health Services Advisory Board and the Environmental Health Commission. Both of these groups were actively engaged in the smoke-free ordinance campaigns during this time.
- 15 This was particularly striking in light of survey results two months earlier showing that 75 percent of Rochester residents surveyed said they would support a smoke-free restaurant ordinance in Rochester.
- 16 MINN. STAT. § 145.05 (2006).
- 17 MINN. STAT. § 145.04 (2006).
- 18 For example, language was added to explain the process for verifying revenue, dealing with economic hardship, and enforcing the ordinance.
- 19 SNG Research Corp., *supra* note 10.
- 20 Jeffrey Pieters, *Will Smoking Ban Expand?*, ROCHESTER POST-BULLETIN, Oct. 11, 2006.
- 21 ROCHESTER POST BULLETIN, Editorial Page, Jan. 17, 2007.
- 22 Minnesota Clean Indoor Act, MINN. STAT. §§ 144.411 to 144.417 (Supp. 1999), amended by Freedom to Breathe Act of 2007.
- 23 In 1998, St. Louis County adopted an ordinance regulating the sale, possession and use of tobacco and tobacco-related devices; mandating yearly compliance checks of all licenses; and establishing penalties and procedures for violation, all in accordance with Minnesota statutes Chapter 461 (1997) to prevent easy youth access. That same year, St. Louis County installed signs asking people not to smoke within 25 feet of all entrances to county buildings. In 1999, Moose Lake passed a restaurant-only smoke-free law. In 2000 and 2001, Duluth passed a compromise smoke-free ordinance regulating smoking in public places, and in 2001, Cloquet passed a smoke-free law that required bar areas of restaurants to be separately ventilated if smoking were allowed.
- 24 MINN. STAT. §§ 144.411-144.417 (Supp. 1999). Minnesota state law preserves the right of local governments to impose smoking restrictions that are stricter than those imposed at the state level.
- 25 ROCHESTER, MINN., CHARTER § 1, subd.3 (2000). (Municipal powers not limited).
- 26 This intense political opposition to the Rochester and Olmsted County ordinance proposals was interesting in light of the 2000 and 2001 surveys showing a large majority of city and county residents supported the ordinances.
- 27 In recent years, the Mayo Clinic has taken a far more supportive stance, submitting a letter to the County Board on November 13, 2006, in favor of a comprehensive smoke-free ordinance.

- 28 In June 2001, the Citizens for a Smoke-free Rochester assembled an impressive amount of background material, fact sheets, survey reports and statements from local and national health organizations and concerned professionals supporting the proposed smoke-free restaurant ordinance, but this material did not dissuade the City Council from tabling discussion of the ordinance.
- 29 *See, e.g.*, Kottke, *supra* note 8; SNG Research Corp., *supra* note 10.
- 30 City codes and home rule charters often, but not always, detail the roles, duties and powers of influential unelected officials.
- 31 *See* Kerry Cork, Public Health Law Center, *Going Smoke-free in the Land of Lakes: Law and Politics in Minnesota Smoke-free Campaigns – The Hennepin County Story* (2010).



# The Hennepin County Story

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*This case study covers events that transpired in the smoke-free campaigns in Hennepin County, Minnesota, including the cities of Minneapolis, Bloomington and Golden Valley, between 2000 and 2006. It was written as one of seven case studies under a ClearWay Minnesota<sup>SM</sup> research grant to study legal and political obstacles to smoke-free regulation in seven geographically diverse Minnesota regions.*

## Introduction

This is a story of how Hennepin County, the largest metropolitan area in Minnesota, and three cities within it – Bloomington, Minneapolis, and Golden Valley – all succeeded in passing smoke-free ordinances in one tumultuous year. The county and cities began to talk about smoke-free ordinances in the summer of 2004 and by the fall of that year, they had all adopted legislation. The Bloomington ordinance took effect in September 2004, while the other three ordinances took effect in March 2005.

Although St. Paul, the other twin in the Twin Cities, is not in Hennepin County, the regional politics here spanned the Mississippi east into Ramsey County, and surrounding counties, and affected the statewide discussion over smoke-free regulation. The smoke-free regulation debate acquired enough prominence in the public eye to figure as a campaign issue in both the 2005 Minneapolis and St. Paul mayoral elections.

## Overview of Communities

### Hennepin County

Located in southeastern Minnesota, Hennepin County is one of the nation's major metropolitan areas and easily the largest of the state's 87 counties in budget, estimated market value, and population.<sup>1</sup> Its 606 square miles contain 45 municipalities and one township, including the county seat of Minneapolis, and approximately 1.1 million residents, one quarter of the state's population. Since the nineties, the county has seen an influx of immigrants to the area.

Over 40 percent of Minnesota's non-white population and 46 percent of its foreign-born population live in Hennepin County.<sup>2</sup> Hennepin County voters tend to be more liberal than conservative; this trend is apparent in all four of the Hennepin communities in our study.<sup>3</sup>

Hennepin County has a diverse economy with major manufacturing, financial, governmental, health care, trade, and entertainment sectors. Many national corporations are headquartered in the county, and income levels tend to exceed the national average.<sup>4</sup> The county is governed by an elected board of seven commissioners, each representing a district of equal population.

### Minneapolis

Minneapolis, the seat of Hennepin County, is the largest city in Minnesota and one of the largest cities in the Upper Midwest. The city straddles the Mississippi River, and is located directly west of its sister metropolis, St. Paul, the state's capital. Together the two cities constitute the Twin Cities, the fifteenth largest metropolitan area in the U.S.<sup>5</sup> The Twin Cities dominate the economic and cultural life of the region. Nicknamed "City of Lakes," Minneapolis has twenty-two natural lakes and an abundance of wetlands, creeks, waterfalls, and riverfronts. The city owed its early growth as the center of flour-milling and lumber industry to the water power of the only naturally occurring waterfall on the Mississippi River, St. Anthony Falls. Today, the city exists as a regional hub of commerce, finance and transportation, with major industries including medical research, printing and publishing, food and dairy product processing, medical instrument and other manufacturing.

Minneapolis is a home rule charter city. The Minneapolis City Council also serves as the city's board of health, with the authority to pass ordinances relating to public health. The council consists of thirteen members, all elected by district. The mayor has veto power over the city council. Nine votes are needed to override a mayoral veto.<sup>6</sup>

## **Bloomington**

Just south of Minneapolis lies the community of Bloomington, the largest Twin Cities suburb and one of the largest cities in the state, with a population of approximately 81,280.<sup>7</sup> Bloomington, a major hospitality center with roughly 7,000 hotel rooms,<sup>8</sup> employs over 20,000 people in its 33 hotels and motels, and is the home of the popular Mall of America, the nation's largest, and most visited, indoor shopping center and entertainment complex. At the time of the ordinance campaigns, the city also had approximately 250 restaurants, 65 of which served hard liquor and beer that is over 3.2 percent alcohol.<sup>9</sup> Benefiting from its location near major transportation routes and the Minneapolis-St. Paul International Airport, Bloomington employs thousands in retail and entertainment, health maintenance and computer manufacturing. At the same time, one-third of Bloomington (or 8,000 acres) is designated parkland and recreation space, including the Minnesota Valley National Wildlife Refuge, one of four urban wildlife refuges in the country.

The City of Bloomington is governed by a seven-member City Council. Members include the mayor and six Council members, four of whom are elected from districts and two of whom are elected at-large. Members are elected to four-year terms, except during redistricting when all district council members have a two-year term. The Council hires a professional City Manager, who administers all City business for the Council. The Council also appoints citizens to various advisory boards and commissions.

Bloomington has an Advisory Board of Health, which consists of up to seven city residents appointed by the City Council for two-year terms "to research, study and evaluate issues concerning the health and environment of the City." Four Advisory Board members are providers of health services and three members are consumers of health services. The Advisory Board of Health also works with the Bloomington Public Health Division on public health-related issues. The Public Health Division is a separate entity in the City that promotes healthy practices and behaviors for all ages.

## **Golden Valley**

On the northwest border of Minneapolis lies the wooded suburban community of Golden Valley, a city

approximately 10.5 square miles in size. Although the city's population is roughly 20,344<sup>10</sup>, more than 30,000 people work in Golden Valley.<sup>11</sup> A number of major corporations are located in the city, including General Mills headquarters, and Tennant, Honeywell, Dahlberg Industries, United Healthcare, and CyberOptics. Key industries include finance, health care, insurance, and manufacturing.

Golden Valley is a statutory city, one of only two statutory cities in our study.<sup>12</sup> It has a city council/city manager form of government. The City Council consists of five members, elected at large, including the mayor, who presides at all meetings.

Golden Valley distinguished itself in 2004 by adopting the most comprehensive smoke-free ordinance, not only in Hennepin County, but in the state of Minnesota.

## **Telling the Stories**

### **The Bloomington Story**

Of the fourteen communities in our study, the Bloomington story stands out as a prime example of a local smoke-free campaign where careful planning resulted in an engaged, informed community, a streamlined process, and a comprehensive ordinance. Bloomington proved the exception to the conventional wisdom that multi-jurisdictional issues in a county engaged in multi-front efforts to enact ordinances in different cities can jeopardize the effort on any one front. Of the fourteen communities in our study, Bloomington and Golden Valley were alone able to circumvent obstacles to smoke-free regulation with little or no effect on the enactment process. The story of how Bloomington accomplished this feat is a tribute to a process grounded in community education and communication.

#### *A Model Approach*

The story begins in February 2004 when the Bloomington City Council asked Bloomington's Advisory Board of Health to study "the current trends, activities and research concerning smoke-free workplace policies in restaurants and bars; and to develop recommendations for the City Council's consideration."<sup>13</sup> The Advisory Board set about gathering data and information from a variety of sources, meeting in monthly study sessions from

March to June. As documented in its final report, the Advisory Board used several methods to compile data during this time:

- Review of the Public Health Division’s activities related to smoke-free workplaces, restaurants and bars
- Updating the list of Bloomington’s smoke-free restaurants and bars
- Review of local health data about tobacco, health risks and chronic disease
- Literature review of scientific studies about the health impact of secondhand smoke, economic impact of smoke-free laws on restaurants and bars, and trends regarding smoke-free regulation and public attitudes
- Interviews with representatives from voluntary and health care organizations, businesses, and the hospitality industry about their perspectives and experiences regarding smoke-free regulation
- Meeting with representatives from other Minnesota communities that had passed or considered smoke-free ordinances (including Duluth, Eden Prairie, and Olmsted County)
- Review of the Minnesota Clean Indoor Air Act rules and regulations

During the four months that Bloomington’s Advisory Board studied this issue, the cities of Minneapolis and St. Paul began public deliberations on smoke-free laws. At the same time, a bill was introduced in the Minnesota House and Senate that would have modified the Minnesota Clean Indoor Air Act, requiring all workplaces, including bars and restaurants, to be smoke-free. Although the Senate heard the bill, it was not brought forward in the House.

On May 25, 2004, the Advisory Board of Health met to discuss its findings and recommendations. Based on its research into health and economic data, along with its literature review, key informant interviews, and the results of panel discussions and public surveys, the Board recommended that the City of Bloomington: (1) prohibit smoking citywide in workplaces, including restaurants and bars (outdoors and indoors); public places, including outdoor bars and eating areas; and entrances (within 25 feet) to workplaces and public places; and (2) continue to allow hotels and motels to designate guest rooms

as smoking and nonsmoking as provided under the Minnesota Clean Indoor Air Act.

The Board then asked the City Attorney to draft a few versions of a smoke-free ordinance for the City Council’s consideration. The City Attorney reviewed sample ordinances from several communities, including Duluth, Olmsted County, and New York City, and also consulted with the Public Health (former Tobacco) Law Center, before drafting sample ordinances for Bloomington. On June 28, 2004, the Advisory Board presented its findings and recommendations to the Bloomington City Council Work Session. The final proposed ordinance, which prohibited smoking in indoor public places and workplaces, was similar to a smoke-free ordinance that Eden Prairie city officials rejected in 2002 after a heated debate during which several major city employers threatened to relocate if the law was passed. A majority of the Bloomington City Council members indicated their support of a smoke-free ordinance prior to the public hearing. Although some Council members expressed concern about Bloomington taking the first step in a seven-county metro area, most members voiced support for the Advisory Board’s findings and the view that Bloomington should not wait for the larger communities to move, but should boldly take the initiative, and be a leader in the metro area.

On July 12, 2004, the Bloomington City Council held a public administrative hearing to discuss the smoke-free ordinance. More than thirty critics and supporters testified, including veterans, bar and restaurant owners, medical professionals, current and former smokers, hospitality workers, and public health advocates. The Council did not vote on the ordinance at this hearing.

Seven days later, on July 19, the City Council held another hearing on the smoke-free ordinance, which lasted until the early morning hours of July 20. A standing-room only crowd of more than 100 people packed the council chambers, while an overflow group of at least 60 listened to the hearing in an adjacent auditorium and dozens of others watched the proceedings on monitors in the outside lobby. The lengthy hearing allowed public comment for more than four hours. Seventy-five people signed up to speak, including the former mayor of Bloomington, who was a strong supporter of the ordinance, bar

and restaurant owners and employees, bowling alley operators, and members of nonprofit organizations, such as the Veterans for Foreign Wars, American Legion and Knights of Columbus, who said the ordinance would hurt their charitable gambling operations. After two additional hours of discussion, the City Council finally voted to approve the Twin Cities area's first citywide smoke-free ordinance (6-1). The Council also approved a resolution requesting that Hennepin County adopt a countywide smoke-free law. At the same time, the Council agreed to revisit the ordinance if other metro-area cities passed less-restrictive smoke-free laws that could potentially lure customers to other communities, and to review the ordinance's impact after it went into effect to determine if there was any disparate economic impact on Bloomington businesses.

The Bloomington ordinance took effect in two phases to give businesses additional time for implementation:

- Phase 1: On September 1, 2004, all workplaces and public places, except those with on-sale liquor, wine or 3.2 beer licenses, lawful gambling permits, and bingo licenses, went smoke-free.
- Phase 2: On March 31, 2005, the ordinance went into effect in all establishments with an on-sale liquor, wine or 3.2 beer license and public places that had a permit for lawful gambling or a bingo hall license. This included all restaurants, bars, bingo halls, bowling alleys and private clubs.

In an effort to assuage the concerns of restaurant owners, City Council members agreed to allow establishments to designate up to half of their outdoor patios for smoking. The ordinance also prohibited smoking within 25 feet of entrances, exits, open windows and ventilation intakes.

On June 6, 2005, as promised at the time the ordinance was adopted, the City Council heard public comments from the owners, members and staff of some of the establishments affected by the ordinance. As a result, the Council asked for a 3-month status report on the effects of the ordinance on licensed establishments. Bloomington city staff reviewed and analyzed the data for licensed establishments available for April, May and June 2005. In "A Preliminary Report" presented to the City Council on August 15, 2005, the city staff presented an overview of data related to food sales,

liquor sales and charitable gambling. Although data showed that some businesses experienced decreased sales, the report concluded that it was "difficult to discern the extent to which the smoking ordinance contribute[d]" to changes in revenue from 2004 to 2005, and recommended that the City Council review data spanning a longer period of time. The report also cited the results of two surveys that measured public opinion of Bloomington's smoke-free ordinance in July 2004 before the ordinance was passed, and in June 2005, after it was implemented. The surveys, conducted by the Mellman Group of Washington, D.C., showed that a majority of Bloomington residents supported the ordinance, 68 percent in 2004 and 76 percent in 2005.<sup>14</sup>

At the end of the City Council meeting on August 15, 2005, the council voted to send a resolution to the State of Minnesota supporting a statewide smoke-free law covering all workplaces, consistent with Bloomington's ordinance, so as "to provide a level playing field for businesses across the State." The Council also voted to send a similar resolution to Hennepin County, urging the county to retain its countywide smoke-free law to "preserve the protections in place for the health of those who live and work in Hennepin County and to provide a level playing field for businesses across Hennepin County."<sup>15</sup>

On December 19, 2005, the City Council, recognizing that the City Code did not address smoking shelters, adopted an ordinance establishing Standards for the Construction and Use of Smoking Shelters. The ordinance allowed smoking shelters to be located in the rear or side yards of public places or workplaces, no closer than 25 feet from entrances, exits, open windows or ventilation intakes. The shelters could be no larger than 200 square feet and 16 feet high.

#### *The Lawsuit*

In the meantime, on March 9, 2005, several weeks before the Hennepin County and Minneapolis ordinances would take effect, a group of bar owners and nonprofit clubs, including Veterans for Foreign Wars, sued in Hennepin County District Court seeking a temporary injunction to keep Hennepin County, Minneapolis and Bloomington from enforcing their smoke-free ordinances.<sup>16</sup> The plaintiffs claimed that the county and cities had no legal authority to ban smoking because state law already set parameters on

where people can smoke.<sup>17</sup> The Minnesota Clean Air Act of 1975 created exemptions for bars and restaurants that allowed patrons to smoke in specially designated areas. The plaintiffs argued that state law preempted local laws, as state laws did not expressly provide that local governments may enact more stringent measures.

On March 22, 2005, the district court held a hearing on the temporary injunction against all three defendants. Three days later, Hennepin County District Court Judge John McShane denied the motion on the ground that the plaintiffs failed to meet the requirements for a temporary injunction.<sup>18</sup> In addition, the judge dismissed the case against Hennepin County, ruling that the plaintiffs lacked standing because the county had no regulatory authority over the establishments, which were located in Minneapolis and Bloomington and under the jurisdiction of the city boards of health.

On July 19, 2005, the plaintiffs filed a brief in the Minnesota Court of Appeals, appealing the District Court's decision. After several months, the plaintiffs returned to court on October 11, and moved for a temporary injunction pending appeal. On February 21, 2006, the Court of Appeals denied the temporary injunction and affirmed the lower court's decision.

On May 16, 2007, Minnesota legislators passed statewide smoke-free legislation, the Freedom to Breathe Act of 2007. This historic Act was still less comprehensive than the Bloomington and Golden Valley smoke-free ordinances, both of which covered outdoor bar and restaurant eating areas.

## The Minneapolis Story

### *The Mill City Makes the Move*

The Twin Cities enjoy the benefits of a close relationship, while remaining distinctly independent communities often competing for attention from the outside world. Minneapolis, with its large bustling economy and cosmopolitan skyline, has been described as the “first city of the West,” while St. Paul, the Capital City, with its Victorian mansions, winding streets, and working class character has been described as the “last city of the East.”<sup>19</sup> The gentle rivalry between the two municipalities immediately became apparent in May 2004, when St. Paul City Council Member Dave Thune announced that he

would propose a smoke-free ordinance covering bars and restaurants in the City of St. Paul. Predictably, the news from St. Paul resonated with city leaders across the Mississippi.

Only a few days after news that St. Paul would consider an ordinance, the Minneapolis City Council took straw polls on adopting a smoke-free ordinance in the City of Minneapolis. On May 9, 2004, a Minneapolis council member announced that six of the thirteen council members were willing to sponsor an ordinance to prohibit smoking in all bars and restaurants in Minneapolis.<sup>20</sup> Only one more council vote was needed for the ordinance to have majority support. Minneapolis Mayor R.T. Rybak, however, was noncommittal. The mayor's support was important because if the council passed an ordinance, he could veto it – and it would take nine votes to override the veto. A former smoker and self-proclaimed “rabid anti-smoker,” the mayor expressed ambivalence about a citywide law. “If we're going to consider something of this scope, it shouldn't be done by just a few people at City Hall, but should be a communitywide conversation,” he said.<sup>21</sup> Rybak's concern with a city ordinance was that it might put local businesses at a competitive disadvantage. He expressed a preference for a statewide smoke-free law.

In May 2004, a Minneapolis City Council member who had not previously supported a smoke-free law announced at an American Cancer Society meeting that he would likely support an effort to pass an ordinance. His statement buoyed smoke-free advocates since his support would provide the City Council with the seven votes needed to pass the ordinance.

On May 11, 2004, the six Minneapolis City Council members who had voted earlier to support a smoke-free ordinance held a news conference to announce that, based on medical evidence of the ill effects of secondhand smoke and their concern for the health of bar and restaurant workers, they were supporting a proposed ordinance that would prohibit smoking in Minneapolis public places and places of work, including all bars and restaurants. Their intent was for the ordinance to take effect on September 1, the same effective date of the proposed St. Paul ordinance.<sup>22</sup> Two of the seven remaining City Council members stated that they would like more testimony about the economic effects of a smoke-free ordinance on business establishments in the city.

On May 14, 2004, the City Council held its first reading of the Minneapolis smoke-free ordinance, and promptly referred it to committee. Departments in the Minneapolis city government report to the City Council through assigned committees. Committee recommendations are forwarded to the full Council for consideration and Council actions are then sent to the Mayor for approval or veto.<sup>23</sup> The smoke-free ordinance was referred to the Health and Human Services and Public Safety and Regulatory Committees, two of the seven standing committees that work with the Minneapolis City Council.

On June 7, 2004, the City Council's Health and Human Services Committee held a public hearing on a proposed ordinance to prohibit smoking in city public places and workplaces. Seventy supporters and opponents testified at this meeting, including St. Paul City Council member Dave Thune and Bloomington City Council member Steve Peterson (a strong proponent of the Bloomington ordinance), both of whom supported the ordinance. Four committee members voted to support the ordinance and two abstained.

Two days later, the City Council's Public Safety and Regulatory Services Committee met to discuss the ordinance. On June 11, 2004, Mayor Rybak announced that he was concerned about vague language in the ordinance, its impact on small businesses, and the prospect of a "cumbersome patchwork" of city ordinances across the region. He expressed dislike for what he saw as a lack of coordination between neighboring cities.<sup>24</sup>

On June 18, the Minneapolis City Council held a meeting where the smoke-free ordinance figured prominently. Both committees recommended that the ordinance be sent forward. The council, however, voted unanimously to postpone a second reading of the ordinance until July 23, 2004. In the meantime, reflecting the mayor's concern about a "patchwork" of ordinances, the council passed a resolution to create a task force charged with developing a smoke-free ordinance for Minneapolis "restaurants, nightclubs and coffee shops" – one that could "serve as a model to be adopted by other cities or counties in the region."<sup>25</sup> The task force consisted of staff of the Regulatory Services committee and approximately sixteen other members, including bar owners, members of health-based organizations, residents that

lived near bars, hospitality industry representatives, elected officials, the mayor/designee, and other stakeholders. The task force was to meet three times, with a deadline of July 23.

Over the next few weeks, a Minneapolis survey was released that showed overwhelming public support for smoke-free initiatives. Seventy-two percent of Minneapolis residents surveyed were in favor of prohibiting smoking in all workplaces.<sup>26</sup>

Smoke-free efforts were proceeding in many metro communities at this time. On July 19, 2004, Bloomington adopted a comprehensive smoke-free ordinance, to take effect September 1, 2004, with a phase-in for bars to take effect March 31, 2005. A month earlier, Moorhead had passed a smoke-free ordinance to take effect December 15, 2004, and the St. Paul City Council had adopted the first of two ordinances to be vetoed by the city's mayor. And in less than two months, both Beltrami County and Ramsey County would pass their countywide ordinances. On July 19, the Minneapolis task force held its third and final meeting. A majority of members recommended that the city pass a smoke-free ordinance covering bars and restaurants, to take effect March 31, 2005.

On July 20, 2004, to the joy of the local public health community, Mayor Rybak announced his support for the smoke-free proposal that was headed to the City Council. The following day, however, the Minnesota Licensed Beverage Association proposed a regional smoke-free law that was less restrictive than the ordinance proposed by the metro area officials – one that paralleled Olmsted County's ordinance and exempted establishments that earned more than 50 percent of their revenue from alcohol; private clubs; and separately ventilated smoking areas. Although members of the Beverage Association discussed their plan with city and county officials, the plan did not move forward.

On July 23, 2004, three days after the Mayor's statement of support for the Minneapolis smoke-free proposal, the City Council held its second and final reading of the proposed ordinance. Two hours of intense debate followed with failed attempts by members to amend the ordinance to lessen its potential impact on owners of small neighborhood bars, by prohibiting smoking in restaurants only, or by carving out permanent or temporary exemptions

for establishments that sell primarily liquor. Finally, the City Council voted on the bar and restaurant ordinance proposed by the task force, a less restrictive ordinance than the broad workplace and public place ban proposed at the first ordinance reading. The new proposed ordinance prohibited smoking in indoor food and liquor establishments, bowling alleys and pool halls licensed by the city. By a 12 to 1 vote, the council approved the smoke-free ordinance. Its effective date was March 31, 2005 – the same date that Bloomington’s ordinance phasing in bars was to take effect.

At one point during the meeting, Mayor Rybak (who sat with the council, but did not speak during the debate) announced that he would sign the smoke-free ordinance. The City Council then passed a resolution urging Hennepin County to enact a countywide ordinance that would be even broader than the Minneapolis ordinance and that would prohibit smoking in places of employment, including restaurants. Hours after the Minneapolis City Council vote, St. Paul Mayor Randy Kelly, who vetoed a smoke-free ordinance the previous month because he preferred a “regional approach,” announced that he was ready to support a similar smoke-free ordinance in St. Paul.

On September 7, 2004, Ramsey County held a public hearing on a restaurant-only ordinance. Some public health professionals were concerned that Ramsey County’s action would cause the Minneapolis City Council to reconsider their stricter ordinance, particularly after one council member proposed that Minneapolis might want to “tweak” its ordinance before it went into effect. This tweaking, however, did not occur.

On March 31, 2005, the Minneapolis ordinance took effect.

*Here Come the Lawsuits!*

The City of Minneapolis enjoyed the distinction of being sued twice over its smoke-free ordinance. These lawsuits were filed both before and after the ordinance took effect.

*Earl Hill Bloomington Post 550 v. Bloomington, Minneapolis and Hennepin County.* As mentioned earlier, in March 2005, before the Minneapolis ordinance took effect, a group of bar owners and

nonprofit clubs sought to enjoin Hennepin County, Minneapolis and Bloomington from enforcing their smoke-free ordinances.<sup>27</sup> On March 25, the Hennepin County District Court denied the plaintiffs’ motion for a temporary injunction and on February 21, 2006, the Court of Appeals affirmed the lower court’s decision.

*U Otter Stop Inn v. City of Minneapolis.* The battle was not yet over, though. On May 13, 2005, six weeks after the Minneapolis ordinance took effect, a group of six bar and restaurant owners and a Lions Club chapter (a nonprofit organization that raises funds through charitable gambling) sued Minneapolis, seeking a temporary restraining order and temporary injunction to stall enforcement of the Minneapolis smoke-free ordinance. The plaintiffs argued that the ordinance was having a “devastating and potentially ruinous” impact on their businesses.<sup>28</sup> Unlike plaintiffs in the *Earl Hill* case, the plaintiffs in *U Otter Stop Inn* provided details regarding their claims of irreparable harm and economic injury if the city’s smoke-free ordinance remained in effect. The plaintiffs also charged that the smoke-free ordinance jeopardized the safety of their customers when they stepped outside the bar to smoke, because of narrow sidewalks and heavy street traffic adjacent to the bar. Finally, as in the *Earl Hill* case, the plaintiffs argued that the Minnesota Clean Indoor Air Act preempted the city’s prohibitions against smoking, since the state law specifically authorized smoking in designated areas.

On May 25, 2005, Hennepin County District Judge Charles Porter, Jr. denied the plaintiffs’ motion for a temporary restraining order (TRO) on the grounds that the plaintiffs were unlikely to succeed on the merits of their claim. Judge Porter dismissed the public safety claims as speculative, and dismissed the preemption argument because the Minnesota Clean Indoor Air Act specifically allows cities and counties to enact more stringent provisions than those codified in state law. The judge did, however, state that the plaintiffs made “a strong showing that they stand to suffer serious economic injury if the ordinance remain[ed] in effect” – even to the point of needing to go out of business. He concluded, though, that they were not entitled to a court’s intervention simply because they suffered, and were suffering, harm; they needed to prove the ordinance was invalid as applied to them.<sup>29</sup> On June 27, Judge Porter denied the plaintiffs’ motion for a temporary injunction. On July 5, 2005, the

plaintiffs appealed the court's denial of a temporary injunction and at the same time sought an order from the appellate court enjoining the ordinance pending appeal. On July 26, 2005, the Court of Appeals denied the plaintiffs' motion for injunctive relief pending appeal.

Finally, seven months later, on March 27, 2006, the Minnesota Court of Appeals affirmed the lower court's decision denying the plaintiff's request for a temporary injunction of the smoke-free ordinance. The appellate court found that the lower court did not abuse its discretion in determining that "despite appellants' showing of serious economic injury," the appellant/plaintiffs were unlikely to succeed on the merits.<sup>30</sup> The litigation over the Minneapolis smoke-free ordinance was finally over.

*Since 2004*

In the fall of 2005, as Hennepin County was considering an amendment to roll back its ordinance, smoke-free regulation became a major issue in the mayoral race between incumbent Minneapolis Mayor R.T. Rybak and Hennepin County Commissioner Peter McLaughlin. In November 2005, Mayor Rybak, who supported Hennepin County's original smoke-free ordinance, won a second term.

On December 13, 2005, the Hennepin County Board of Commissioners voted to roll back the county's smoke-free ordinance to exempt traditional bars and private clubs, on a temporary basis.<sup>31</sup> Interestingly, County Commissioner Peter McLaughlin, who represented Minneapolis, cast the deciding vote on the Hennepin County rollback. At the same time, the Minnesota Hospitality Association began efforts to weaken the Minneapolis ordinance along the lines of Hennepin County. The Hospitality Association announced that it would join forces with tobacco control advocates to push for a partial statewide ban, similar to Hennepin County's, *if* Minneapolis were to align its ordinance with Hennepin County. Minneapolis stood firm.

### **The Golden Valley Story**

The Golden Valley smoke-free ordinance story begins back on March 16, 2004, when the city council passed a resolution supporting legislation for a statewide ban on smoking in public places (4-1). Later that spring, the cities of St. Paul, Bloomington, and Minneapolis

began considering ordinances as well. At a city council meeting on June 8, 2004, the Golden Valley Mayor stated that other metropolitan cities had approached her about taking a unified approach to smoking restrictions, assuming Minneapolis and St. Paul led the way with smoke-free ordinances. The council then asked the staff to prepare for further discussion on this issue by —

- Obtaining pro/con research on smoking restrictions
- Seeking comments from the Twin West Chamber of Commerce regarding its business position
- Seeking information from the Northwest Hennepin Human Services Council on their programs to educate the public on smoking
- Seeking information from League of Minnesota Cities on model ordinances that could lead to a unified approach

The staff was also asked to survey other Hennepin County cities regarding interest in smoke-free ordinances.

On July 20, 2004, the Golden Valley City Council announced its intention to discuss a possible smoke-free ordinance for the city at a September meeting with the City Manager. In the meantime, the Council asked to review the recently passed Bloomington ordinance and directed a planning intern to draft a proposed ordinance for consideration, which would prohibit smoking in public places and workplaces.

On September 13, the Golden Valley City Council met with the City Manager to review the draft smoke-free ordinance. The ordinance was even more restrictive than Bloomington's, prohibiting smoking in all indoor and outdoor dining areas of liquor and food establishments; in all places of work; within 25 feet of entrances, exits, open window and ventilation intakes of public places and places of work; within 25 feet of any outdoor dining area at any liquor or food establishment; and in all public parks and recreation facilities. Several ordinances in the metro area were being considered at this time: a week earlier, Ramsey County had held a public hearing on a proposed smoke-free restaurant ordinance and the following day (September 14), Hennepin County was scheduled to hold a public hearing on its smoke-free ordinance proposal. Also, earlier that month, the St. Paul City



Council had passed its second smoke-free ordinance, which was vetoed by Mayor Kelly on September 13.

The Golden Valley Council voted to amend the draft ordinance for formal City Council consideration, adding provisions tying the ordinance to the revocation of business licenses for noncompliant establishments, adding a penalty for noncompliant smokers, prohibiting smoking within 25 feet of primary entrances, and restricting smoking in all indoor workplaces. The City Manager agreed to provide a draft of the revised ordinance to the Twin West Chamber of Commerce.

The first public hearing and consideration of Golden Valley's smoke-free ordinance was held on October 5, 2004. After testimony by sixteen people, the Council voted unanimously to adopt the ordinance, as amended regarding police enforcement and business license revocation. The city attorney pointed out that since these two amendments to the proposed ordinance were substantial, the amended ordinance would need two considerations before it could be adopted.

On October 19, 2004, the Golden Valley City Council held a public hearing for the amended smoke-free ordinance. Technically, this was to be the first of two considerations for the amended ordinance, but because only two people testified (both in support of the proposal), the city council voted 4-1 to hold the first and second considerations at the same meeting.<sup>32</sup> No one to date had voiced opposition to the amendments. The City Council's willingness to merge both considerations in one meeting expedited the process and enabled the City Council to pass Golden Valley's smoke-free ordinance unanimously and expeditiously without the kind of foot-dragging experienced by other communities.

It did not take long for problems to arise, however. In early December 2004, after receiving a letter from the Brookview Men's Golf Association expressing concern about the smoke-free ordinance, the Golden Valley City Council decided to review the ordinance at the end of the 2005 golf season. On January 25 and February 28, 2005, Golden Valley's Open Space and Recreation Commission met to discuss how the smoke-free ordinance applied to the city's golf courses. A city golf course manager argued at the second meeting that the ordinance should not apply at outside courses where people are not in

close proximity to each other, that the ordinance would place Golden Valley courses at an economic competitive disadvantage with other golf courses in the area, and that the ordinance would be difficult to enforce on the course. The Commission voted unanimously to ask the City Council to amend the ordinance by exempting golf courses. In November 2005, the City Council rejected a proposed amendment to exempt golf courses from the smoke-free ordinance.

Meanwhile, on March 31, 2005, the Golden Valley smoke-free ordinance took effect, heralded as the strongest smoke-free law in the metro community. At the end of the year, while Hennepin County was considering the possibility of scaling back its smoke-free ordinance, the Golden Valley City Council authorized the mayor to send a letter to the Hennepin County Board in support of retaining the original Hennepin County smoke-free ordinance. A week later, however, on December 13, 2005, Hennepin County's Board of Commissioners voted to roll back the county's ordinance, temporarily exempting traditional bars earning more than 50 percent of revenue from liquor sales, as well as private clubs. This decision had a ripple effect on several cities within the county, as well as adjacent communities. Early in 2006, Golden Valley council members discussed the possibility of exempting outdoor patios, but this proposal failed for lack of support. Also in 2006, as a possible reaction to the Hennepin County rollback, representatives from Golden Valley bars, an American Legion and a VFW post asked the City Council to weaken some of the ordinance provisions. The Council refused to budge.

## **The Hennepin County Story**

### *Moving It Forward*

Following in the footsteps of Minneapolis and Bloomington, the Hennepin County Board of Commissioners met in late summer of 2004 to discuss a countywide smoke-free ordinance. At this time, St. Paul was debating competing smoke-free proposals, and elsewhere in the state Duluth, Moorhead, Cloquet, Moose Lake, and the counties of Olmsted and Beltrami had already passed smoke-free ordinances. During the County Board meeting, the commissioners asked for information on exemptions, enforcement strategies, authority and air-purifying technologies.

On September 14, 2004, the Hennepin County Board held a public hearing on a proposed ordinance that prohibited smoking in the indoor areas of all Hennepin County food establishments. Following the hearing, the Board's Community Health/Metropolitan Health Plan Committee met on September 21 to discuss the proposal.<sup>33</sup>

On October 5, 2004, the County Board met again to discuss the proposed smoke-free ordinance. In an attempt to align Hennepin County's proposed ordinance with a similar proposal under consideration by Ramsey County, Board members debated whether to exempt bars that offered limited food service. A vote for this exemption failed 3-4. Commissioners also voted to eliminate an exemption for private clubs.

The Hennepin County Board of Commissioners met a week later and, to the delight of the tobacco control community, passed a countywide smoke-free ordinance by a 5 to 2 vote. Hennepin County's Ordinance 24 prohibited smoking in indoor areas of restaurants, private clubs and neighborhood bars that served food. It exempted outdoor areas of restaurants, motel and hotel rooms and non-governmental workplaces. The county ordinance, which took effect March 31, 2005, was modeled closely after the Minneapolis ordinance. It was not as restrictive as Bloomington's ordinance, which prohibited smoking within 25 feet of entrances, exits, open windows and ventilation intakes and banned smoking in half of a restaurant's outdoor patio, but it was more comprehensive than Ramsey County's recent ordinance that exempted neighborhood bars.

The Hennepin County ordinance seemed a natural step for the county to take, given the smoke-free initiatives of Minneapolis, Bloomington, and Golden Valley. At least one Hennepin County community, however, was less inclined to rejoice over the county's action. In early 2005, the City Council of Mound – a city of 9,000 people, located on Lake Minnetonka's west end – lodged a symbolic protest over the Hennepin County smoke-free law. Council members voted unanimously to defy the county's ordinance and to refuse to cooperate with the county in enforcing the law. The Mound City Council believed that the county usurped the city's authority to regulate smoking. Hennepin County's reaction to Mound's protest was a decided shrug. According to county officials, Hennepin County already conducted health inspections of bars,

restaurants and other businesses, and it would simply enforce the smoke-free law through these inspections.

As mentioned above, on March 9, 2005, the *Earl C. Hill Bloomington Post 550* plaintiffs sued in district court to enjoin the smoke-free ordinances in Hennepin County, Minneapolis and Bloomington.<sup>34</sup> On March 22, 2005, Hennepin County District Court Judge John McShane denied the motion for a temporary injunction against all three defendants, on the ground that the plaintiffs failed to meet the requirements for a temporary injunction.<sup>35</sup> The judge also dismissed the case against Hennepin County because the plaintiffs lacked standing since the county had no regulatory authority over the plaintiffs' establishments, all of which were located in Minneapolis and Bloomington, cities under the jurisdiction of boards of health. Hennepin County's Health Board has the powers and duties of a board of health for all territory within its jurisdiction that is not already under the jurisdiction of a city board of health.<sup>36</sup> Thus, Hennepin County's ordinance was not applicable in Minneapolis and Bloomington or to the plaintiffs in this case.

In the meantime, on March 31, 2005, local smoke-free ordinances went into effect in five communities: Bloomington, covering public places and workplaces, including bars and restaurants; Minneapolis, covering food and liquor establishments, bowling alleys and pool halls; Golden Valley, covering indoor and outdoor dining areas of liquor and food establishments, workplaces, and public parks and recreation facilities; Ramsey County, covering establishments that made more than 50 percent of their sales from food; and Hennepin County, covering indoor areas of restaurants, private clubs and neighborhood bars that served beer.

But the Hennepin County story was not yet over.

#### *Rolling It Back*

Two months later, on June 7, 2005, the Hennepin County Board of Commissioners held a General Government Committee meeting, where approximately thirty people spoke in an open forum about the Hennepin County smoke-free ordinance. Several expressed concern about the ordinance's impact on local businesses and the prospect of customers abandoning Hennepin County bars and restaurants and instead patronizing establishments in either adjacent Anoka County, which had no smoke-

free ordinance, or adjacent Ramsey County, which exempted bars.

The following month, at a County Board meeting on July 26, commissioners voted to undertake a study of the economic impact of the ordinance. The study was proposed by a commissioner who wanted to roll back the Hennepin County smoke-free ordinance to match Ramsey County's ordinance, which exempted bars that received at least 50 percent of their revenue from liquor. The Board adopted a resolution to direct the county's Budget Office to collect aggregate sales tax data for the second quarters of 2004 and 2005 for bars and restaurants in Hennepin, Ramsey and Anoka Counties.

The study concept appeared to signal a backlash against the ordinance, with the prospect of an amendment exempting bars. Local newspapers began to run articles covering the ordinance's effect on the local economy.<sup>37</sup> And, significantly, Hennepin County Commissioner Peter McLaughlin, who was running for mayor of Minneapolis, emerged as a swing vote on the issue of softening the county's smoke-free ordinance. McLaughlin had originally voted for the ordinance, but was seen as sympathetic to the plight of local bar owners, who were lining up to push for an exemption. Incumbent Minneapolis Mayor Rybak strongly supported the ordinance.

After the County Board meeting on July 26, bar owners held a fundraiser for McLaughlin's mayoral campaign. Although the fundraiser had been planned long before the bar exemption issue was under consideration, the timing was unfortunate. Mayor Rybak's campaign accused McLaughlin of "selling his vote for campaign dollars,"<sup>38</sup> and in no time at all the Hennepin County smoke-free ordinance became a big issue in the race for Minneapolis mayor.

On September 21, 2005, an economic impact study was released showing that Hennepin County's smoke-free ordinance had had a mixed impact on the sales of food and liquor in county bars and restaurants. Overall sales increased, but at a slower rate than in the past, and some establishments in border communities had declining sales. The day after the study was released, an anti-ordinance rally was held at Hennepin County's Board meeting. The following month, the Taxpayers League of Minnesota announced a major campaign in opposition to the smoke-free ordinance.

On November 1, the County Board set a November 15 date for a public hearing to consider amending the 7-month old Hennepin County ordinance to exempt so-called traditional bars. A week later, Commissioner McLaughlin lost the mayoral election.

The public hearing on November 15, 2005 lasted six hours, and consisted of heated and at times emotional testimony from 111 people. St. Paul Council Member David Thune, who first announced St. Paul's proposed ordinance earlier in the year and was to a large extent responsible for kicking off the ordinance process in the metro area, urged Hennepin County leaders not to amend the law. He promised that St. Paul would soon adopt a measure that was similar to the Hennepin County ordinance – another reminder that the "level playing field" argument could be used to support (as well as defeat) initiatives. Opponents to the ordinance claimed that the County's bars and private clubs (mainly service clubs, such as American Legion Posts) had suffered substantial economic losses under the ordinance.

On November 29, 2005, the County Board's Community Health and Metropolitan Health Plan Committee approved an amendment to the ordinance that would exempt traditional bars that earned 50 percent or more of their total gross sales from liquor, and private clubs, when they were not open to serve food or beverages to the public. The County Board then met to discuss the proposed amendment, along with a sunset provision, which provided that all exemptions would expire on July 31, 2007, after which time the ordinance language would revert to its original text.

Although Hennepin County Commissioners acknowledged the public health benefits of the smoke-free ordinance, as well as evidence that the ordinance had not hurt Hennepin County's businesses overall, and that the general public favored the law, a slim majority of Commissioners concluded that a temporary amendment would help ease the transition to smoke-free workplaces. Thus, on December 13, 2005, the Board voted 4 to 3 to roll back the ordinance to exempt traditional bars and private clubs. Commissioner McLaughlin was one of the four Commissioners who voted in favor of the amendment. The amendment lasted only from January 3, 2006 to July 31, 2007, and the language was tightly worded, due in part to the drafting assistance of Public Health (former Tobacco) Law Center attorneys.

The amended Hennepin County ordinance took effect January 3, 2006. Bars and private clubs had until January 30, 2006 to apply for exemptions. Applicants for exemptions needed to provide a copy of their businesses' food and liquor sales records as submitted to the Minnesota Department of Revenue and the local municipality from the preceding calendar year. On February 1, 2006, fifty bars and private clubs had applied for, and were granted, exemptions.

The temporary easing of Hennepin County's ordinance was viewed as a setback by the public health community, both on a practical and a symbolic level. Since Minneapolis and several other cities in Hennepin County already prohibited smoking in bars, the rollback only affected about 75 bars, mainly in western Hennepin County. Opponents of smoke-free regulation in adjacent communities touted this temporary rollback as a victory for "the little guy," while supporters saw the relaxed smoke-free law as a short-term political concession to bar owners, and expressed concern that the weakened ordinance in the state's largest county would send the wrong signal to legislators who were considering a statewide smoke-free law.

They need not have been concerned.

On May 16, 2007, Minnesota legislators passed the statewide smoke-free Freedom to Breathe Act of 2007, prohibiting smoking in all indoor public places and places of work, including bars and restaurants. And a few months later, on July 31, 2007, the rollback amendment to Hennepin County's smoke-free ordinance expired.

## Reviewing the Hennepin County Stories

### Analysis and Findings

The four Hennepin County smoke-free ordinance campaigns in our study occurred in mid-2004 at a time when Ramsey County and St. Paul were also considering ordinances, a time when public health professionals and tobacco control advocates, as well as opponents, were working feverishly around the clock to keep up with an endless series of board and council meetings, strategy sessions, public hearings, press releases and news conferences for multiple campaigns. What's more, much of the Hennepin County roll back activity took place during an election year, when policy positions on an issue such as smoke-free regulation were ripe for the taking.

Ironically, although Bloomington had begun researching a smoke-free ordinance before May 2004, and other communities had also considered the issue, what galvanized these metro communities to act at this particular time was almost certainly the announcement that St. Paul was about to consider a smoke-free ordinance on its own. To a certain extent, then, the Hennepin County story is also a Ramsey County/St. Paul story since throughout this period – as in Fargo/Moorhead – people were constantly "looking across the river" to track the progress of ordinance proposals in their neighboring communities.

Although the Hennepin and Ramsey County campaigns influenced each other, they each experienced a series of unique challenges during the ordinance process, ranging from legal and political challenges to regulatory authority issues. Many of these obstacles stemmed from the intensely multi-jurisdictional nature of these campaigns. Others arose as a result of the time frame during which several campaigns were underway.

When all is said and done, the key legal and political obstacles in the Hennepin County smoke-free campaigns from 2004 to 2006 can be broken down into three types:

- Legal and Regulatory Challenges
- Political Issues
- Lack of Time and Resources

### Legal and Regulatory Challenges

Although neither of the two legal challenges to smoke-free ordinances in Hennepin County prevailed, many surrounding communities had a heightened interest in the outcome of the litigation.

#### *Regulatory Authority*

In the *Earl C. Hill* case, the plaintiffs sought a temporary injunction to smoke-free ordinances passed by Hennepin County, as well as its cities of Minneapolis and Bloomington. Under state law, a county board of health "has the powers and duties of a board of health for all territory within its jurisdiction *not under the jurisdiction of a city board of health.*"<sup>39</sup> (Emphasis added.) Since both Minneapolis and Bloomington have their own city boards of health and since they had enacted smoke-free ordinances of their own, they were not subject to Hennepin County's smoke-free ordinance. The plaintiff

establishments were all located in either Minneapolis or Bloomington. Thus, both the district and appellate courts found that Hennepin County’s ordinance did not apply to the plaintiff/appellants, and dismissed the case against the county for lack of standing. Other Hennepin County cities with boards of health, such as Edina and Richfield, were interested in the court’s clarification of the county’s regulatory authority, as were all communities in this region.

### *Preemption*

The plaintiffs in both the *Earl C. Hill* and *U Otter Stop Inn* cases claimed that the Minnesota Clean Indoor Air Act preempted local smoke-free ordinances, because the state law specifically allows smoking in designated areas. Again, this preemption issue was of keen interest throughout Minnesota because it applied to every local smoke-free ordinance that prohibited smoking in public places. In both cases, the courts determined that this preemption argument was flawed, in that the Minnesota Clean Indoor Air Act specifically allows local government units, such as cities and counties, to enact more stringent provisions than those codified in state law. Although preemption and regulatory authority arguments did not prevail in these cases, occasionally courts do find merit in these claims when smoke-free laws are challenged.<sup>40</sup>

### *Economic Harm*

Finally, although the plaintiffs in *U Otter Stop Inn* were unsuccessful in their efforts to defeat the Minneapolis smoke-free ordinance, the district court did find that they had shown “serious economic injury.” Despite this showing, the court determined that the plaintiffs would be unlikely to succeed on the merits of the case and, after applying the other *Dahlberg* factors discussed in note 18, denied their motion for a temporary injunction.<sup>41</sup> Still, it is instructive that the economic argument apparently resonated with the court, even though the court ultimately decided against the plaintiffs.

#### **Finding**

Although “economic harm” arguments are often raised in public hearings, the likelihood of plaintiffs succeeding on that ground alone has become increasingly unlikely in recent years.

## **Political Issues**

### *The Hennepin County Rollback*

The Hennepin County ordinance campaign was by all accounts more political than the Minneapolis, Bloomington and Golden Valley campaigns. Although the County Board passed the original ordinance in a relatively short amount of time (5-2), the debate continued in the county. As weeks went by, a groundswell of opposition surfaced both in lawsuits and in organized support for a proposed ordinance amendment that would exempt traditional bars and private clubs by temporarily scaling back the ordinance. Commissioner Peter McLaughlin, who ran for Minneapolis mayor in 2005, was widely perceived to be the swing vote on the rollback amendment to the Hennepin County ordinance.

Although McLaughlin opposed such exemptions when the ordinance was originally adopted, he decided to support them in 2005. His stated rationale for revising his position was that he believed it was unlikely that Minnesota would pass a comprehensive statewide smoke-free law, and he was convinced Hennepin County’s smoke-free law was unfairly harming local bar owners. Several tobacco control advocates, however, felt McLaughlin’s decision was political, believing that he switched his position on the ordinance exemption issue when most of the tobacco control community supported incumbent Mayor Rybak over him in the mayoral election.

Fortunately, the rollback of Hennepin County’s smoke-free ordinance was only a temporary setback. Still, it could have had more of an impact on local ordinance activity had the legislature not enacted a statewide smoke-free law in May 2007.

#### **Finding**

Policymakers and politicians are typically inclined to prefer compromise over “all or nothing” approaches. Nevertheless, once a controversial topic such as smoke-free regulation becomes a political campaign issue, they tend to become entrenched in their positions.

### *Regional Issue*

From 2004 through 2007, many policymakers in Hennepin County expressed interest in regional

or statewide smoke-free regulation, rather than local regulation. According to several informants, policymakers would often pay “lip service” to the regional approach, and underestimate how complicated it can be to pass smoke-free ordinances in different communities at the same time – particularly when many cities view themselves as “islands” within a county. Moreover, discussions were ongoing at the legislature about a proposed statewide smoke-free law. “So many conversations were going on at the same time – local, county, state” – that some advocates found it challenging for ordinances to “get traction.”

### Finding

In multi-jurisdictional communities, when the call of “level playing field” is raised, policymakers may be distracted into paying more attention to obtaining a consistent smoke-free policy across borders than to representing the interests of their local constituents or serving the public interest in their community.

### Lack of Time and Resources

“You never know when your window of opportunity is going to come. Ours came and we weren’t prepared to take full advantage of it.” Informant comments like these were common in interviews about the Hennepin County and Minneapolis campaigns. Although before this year, some public health organizations had made grants available for smoke-free organizing efforts in Minnesota, the timing of smoke-free ordinance campaigns was out of the control of advocates. No one, for example, could have predicted St. Paul Council Member Dave Thune’s announcement about a proposed St. Paul ordinance in May 2004, and the colossal impact this news had on the metro community. Still, as ordinance campaigns kicked into full gear in both Hennepin and Ramsey Counties, advocate personnel and resources were stretched thin. It became clear that by not maintaining over the years a certain level of funding and an infrastructure able to adapt to a sudden increased level of activity, many advocate groups had left themselves vulnerable. One informant pointed out that, given the frenzied tempo of the campaigns, advocates were unable to reach out and engage segments of the community, such as

unions and independent bar owners, as soon as they would have liked. “It’s hard to recruit when you’re in the middle of a dog fight.” According to several informants, timing issues resulted, at least in part, from a lack of coordination and master strategy for the different campaigns.

Informants also pointed out that because different organizations were funded to work in different areas, no one person or organization ended up leading the campaigns. Again, because of the timing, limited opportunities were available for advocate planning and collaboration at a high enough level to make a difference in the overall campaigns.

### Finding

Trade-offs occur when smoke-free advocates have neither the resources nor the infrastructure in place to wage multiple campaigns at the same time.

### A Prototype Process

“Bloomington was the lynchpin in the whole area. They were the ones who really stuck their necks out first each step of the way.” This response was echoed by many informants. According to them, Bloomington’s comprehensive ordinance and inclusive approach to smoke-free regulation is a model that other communities, not only in Minnesota but elsewhere in the U.S., examine and often seek to emulate. What confluence of timing, planning, and events contributed to Bloomington’s success in passing such a strong ordinance only three months from the date the City Council first considered a proposed ordinance?<sup>42</sup> Above all, why was Bloomington able to move ahead in the summer of 2004 and adopt the first ordinance in the seven-county metro area, when more prominent communities sat in the wings?

Informants suggested several reasons for Bloomington’s success in enacting its smoke-free ordinance:

- The city council collaborated with a supportive city board of health and division of health, a responsive city attorney and city manager, and a

committed citizen’s advisory board of health. As one advocate put it, “The relationship between the city council and the city health department was one of trust and respect.”

- Bloomington advocates actively engaged the community, educated and informed the public during every step of the process, and constantly solicited feedback. As a result, people felt they were allowed to be heard.
- The advisory board of health took the time to research and analyze the issue thoroughly and to get input from local and out-of-state communities about their experiences with smoke-free regulation. The board took “precise, controllable steps” throughout the process and focused on what was “logical and feasible” to do.
- The process may also have been “driven by the pending retirement of a supportive city council member.”
- Based on its extensive research, the advisory board of health drafted the strongest ordinance possible.

- In the view of at least three informants, the Bloomington City Council’s process transcended politics. The perception among informants familiar with the Bloomington approach was that City Council members were patient and willing to get into the details on issues, which was not often the case with elected officials.
- Supportive testimony at public hearings was often eloquent and compelling, not only from the public health and medical community, but employees, citizens and popular figures such as former Minnesota Viking and Bloomington mayor – bar/restaurant owner Joe Senser.

Bloomington’s pioneering success in passing a smoke-free ordinance kicked off the scramble among other metro communities to pass similar ordinances – including the much larger cities of Minneapolis and St. Paul, and both Hennepin and Ramsey Counties. In a sense, then, the efforts of this City Council, City Health Department, and Advisory Board of Health may have been indirectly responsible for state legislators finally taking notice of the momentum behind the smoke-free movement in Minnesota and, three years later, passing the Freedom to Breathe Act of 2007.

## Endnotes

- 1 Based on statistics provided by the Hennepin County Departments of Planning and Development and Budget, Hennepin County Fast Facts, <http://www.Hennepin.us/>; U.S. Census Bureau, *Population Estimate for Hennepin County, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Hennepin County, Minnesota, then follow hyperlink).
- 2 U.S. Census Bureau, *Population Estimate for Minneapolis, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Minneapolis, Minnesota, then follow hyperlink).
- 3 A majority of Hennepin County residents voted for the Democratic over the Republican candidate in the 2000, 2004, and 2008 presidential elections. See Dave Leip’s Atlas of U.S. Presidential Election Results, available at <http://www.uselectionatlas.org/>.
- 4 U.S. Census Bureau, *State and County Quick Facts*, available at <http://quickfacts.census.gov/gfd/states/27/27053.html>.
- 5 With a population of approximately 382,605, Minneapolis has 8 percent of the total state population. U.S. Census Bureau, *Population Estimate for Minneapolis, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Minneapolis, Minnesota, then follow hyperlink).
- 6 MINNEAPOLIS, MN, CITY CHARTER, Chap. 3, §1.
- 7 U.S. Census Bureau, *Population Estimate for Bloomington, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Bloomington, Minnesota, then follow hyperlink).
- 8 In 2005, Bloomington’s 700 hotel rooms were more than Minneapolis and St. Paul’s hotel rooms combined. *A Preliminary Report: Bloomington’s Ordinance on Regulating Smoking*, Presented to the City Council (August 15, 2005).
- 9 *Id.*
- 10 U.S. Census Bureau, *Population Estimate for Golden Valley, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Golden Valley, Minnesota, then follow hyperlink).
- 11 Based on statistics from the City of Golden Valley website, available at [www.ci.golden-valley.mn.us/community/about.htm](http://www.ci.golden-valley.mn.us/community/about.htm).
- 12 The other statutory city in our study is Golden Valley. Other cities are all home rule charter municipalities.
- 13 *Smoke-Free Workplaces/Restaurants & Bars Study*, Bloomington Advisory Board of Health. One council member, in particular, was intrigued by New York City’s Smoke-Free Air Act, which took effect March 30, 2003, and asked the City Attorney to obtain a copy of that ordinance to review.
- 14 The Mellman Group, Inc., Survey of Registered Voters in Bloomington, Minnesota (July 2004); The Mellman Group, Inc., Survey of Registered Voters in Bloomington, Minnesota (June 2005).
- 15 See *infra* Hennepin County section.
- 16 *Earl C. Hill Bloomington Post 550 v. City of Bloomington, City of Minneapolis and County of Hennepin*, Hennepin County District Court File No. 05-3733 (March 25, 2005). The ordinances in question were Bloomington’s Ordinance 2004-34, which prohibited smoking in public places and places of work, including outdoor and bar areas of restaurants; Minneapolis’s Ordinance 2004-OR-085, which prohibited smoking in the in door areas of bowling alleys and pool and billiard halls and liquor and food establishments; and Hennepin County’s Ordinance No. 24, which prohibited smoking in the “indoor areas of food establishments.”
- 17 “While the parties have from time to time referred to it as a motion for a temporary restraining order, it is clear that Plaintiffs are seeking a temporary injunction pursuant to Minnesota Rule of Civil Procedure 65.02, Temporary Injunction.” *Id.* at 2.
- 18 To determine whether to grant temporary relief, the District Court’s analysis required consideration of five factors, known as the *Dahlberg* factors after *Dahlberg Bros. Inc. v. Ford Motor Co.*: 1) the nature and relationship of the parties; 2) the balance of relative harm between the parties; 3) the likelihood that one party or the other will prevail on the merits; 4) public policy consideration; and 5) any administrative burdens involving judicial supervision and enforcement. 137 N.W.2d 314, 321-22 (Minn. 1965).
- 19 Patrick Condon, *Minneapolis/St. Paul Put Differences Aside for Marketing*, Kare 11 TV, March 26, 2007. Historically, even the cultural backgrounds of the cities are different, with Minneapolis drawing largely from its Scandinavian Lutheran roots and St. Paul drawing largely from its Irish and German Catholic origins.
- 20 Rochelle Olson, *Smoking Ban in Minneapolis?*, STARTRIBUNE, May 10, 2004, at A1.
- 21 Gita Sitarmiah, *Minneapolis Joins Debate on Smoking*, ST. PAUL PIONEER PRESS, May 11, 2004, at 1A.
- 22 See Kerry Cork, Public Health Law Center, *Going Smoke-free in the Land of Lakes: Law and Politics in Minnesota Smoke-free Campaigns – The Ramsey County Story* (2010).
- 23 Minneapolis City Council Roles and Responsibilities, available at [www.ci.minneapolis.mn.us/council/roles.asp](http://www.ci.minneapolis.mn.us/council/roles.asp).
- 24 Gita Sitarmiah, *Rybak Opposes Proposed Smoking Ban*, PIONEER PRESS, June 12, 2004.
- 25 Minneapolis City Council, Resolution 2004R-271.
- 26 The Mellman Group, Inc., Survey of Registered Voters in Minneapolis, Minnesota (May 2004).
- 27 See *supra* Bloomington section and *infra* Hennepin County section.
- 28 *U Otter Stop Inn v. City of Minneapolis*, Hennepin Cty. District Court, File No. 05-7572 (May 25, 2005).
- 29 *Id.*



- 30 *U Otter Stop Inn v. City of Minneapolis*, 2006 WL 771936 (Minn. Ct. App. 2006) (*unpublished opinion*, filed Mar. 28, 2006).
- 31 *See infra* Hennepin County section.
- 32 One of the two people testifying on behalf of the Golden Valley smoke-free ordinance was the Chair of the Bloomington Advisory Board of Health, who had been a driving force behind Bloomington's recently adopted smoke-free ordinance.
- 33 Before the Board takes formal action, items are usually discussed in committee.
- 34 *Earl C. Hill Bloomington Post 550 v. City of Bloomington, City of Minneapolis and County of Hennepin*, Hennepin County District Court File No.: 05-3733 (March 25, 2005).
- 35 *See supra* Bloomington section.
- 36 MINN. STAT. § 145A.10 (2004).
- 37 Brandt Williams, *Impact of Smoking Bans Under Scrutiny*, Minnesota Public Radio, July 25, 2005; Mike Kaszuba, *Hennepin Rethinks Smoking Ban*, STAR TRIBUNE, July 27, 2005.
- 38 Jeremy Stratton, *A Smaller Smoke-free Island*, SKYWAY NEWS, Aug. 9, 2005.
- 39 MINN. STAT. § 145A.03 (2004).
- 40 *See* Cheryl Sbarra, Tobacco Control Legal Consortium, *Legal Authority to Regulate Smoking and Common Threats and Challenges: 2009* (2009).
- 41 *See supra* Minneapolis section.
- 42 The process took six months from the initial Advisory Board of Health directive to examine the issue to the City Council's final adoption. Golden Valley took a little less than three weeks to pass a comprehensive smoke-free ordinance in October 2004, but Bloomington blazed the path in the metro community.

# The Ramsey County Story

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*This case study covers events that transpired in the smoke-free campaigns in Ramsey County and the City of St. Paul, Minnesota between 2000 and 2006. It was written as one of seven case studies under a ClearWay Minnesota<sup>SM</sup> research grant to study legal and political obstacles to smoke-free regulation in seven geographically diverse Minnesota regions.*

## Introduction

This is the story of how, in the words of one informant, “a pebble started an avalanche,” and a remarkable example of how crucial timing can be in effecting health policy change. The story also illustrates how politicized the smoke-free regulation issue can become, especially during a mayoral campaign. Although the City of St. Paul was not the first metro community in Minnesota to adopt a smoke-free ordinance, it was instrumental in jumpstarting city and county smoke-free campaigns throughout the Twin Cities metro area.

## Overview of Ramsey County

Ramsey County, the smallest county in Minnesota, is also the most densely populated.<sup>1</sup> Located in east central Minnesota, Ramsey County was one of the original nine counties in the Minnesota Territory founded in March 1849, and was named after Alexander Ramsey, the first governor of the Minnesota Territory.

The seat of Ramsey County is the state capital of St. Paul, situated at the confluence of the Mississippi and Minnesota Rivers to the east of Minneapolis. Back in the 1820s, St. Paul’s proximity to waterways made it known as a trading center and a frontier gateway for settlers traveling west toward the Minnesota frontier or Dakota Territory. Originally dubbed “Pig’s Eye” after a prominent French Canadian who built a settlement near Fort Snelling in the 1840s, St. Paul lost its colorful name as it grew in size and prestige, eventually becoming the most populous city in Minnesota next to Minneapolis.<sup>2</sup>

Today St. Paul is a commercial hub and the site of many major corporate headquarters, including 3M,

Travelers Insurance, Ecolab, Lawson Software and other insurance, software, medical and chemical device manufacturing companies. St. Paul boasts numerous museums, theatres, and cultural attractions, including the country’s longest stretch of Victorian residential mansions. While many St. Paulites are of German, Irish and Scandinavian heritage, a growing number of Asian, African and Hispanic immigrants add to the city’s diverse culture.<sup>3</sup> Based on the last three presidential elections, voters in St. Paul and Ramsey County tend to be more liberal than conservative.<sup>4</sup>

Both Ramsey County and St. Paul are charter/home rule communities.<sup>5</sup> The seven-member County Board of Commissioners acts as Board of Health for Ramsey County, and the seven-member St. Paul City Council acts as Board of Health for St. Paul. Under a Joint Powers Agreement, Ramsey and St. Paul created a joint health department. The city and county each retain their status as boards of health, with the power to enact health-related legislation in their individual jurisdictions, while Ramsey County’s Health Department provides health services to St. Paul.

## Telling the Stories

### The St. Paul Ordinance

The spring of 2004 was a somber time for the tobacco control community in the Twin Cities metropolitan area. Although outlying communities such as Duluth, Moose Lake, Cloquet, and Olmsted County had passed smoke-free ordinances, the largest cities in the state, including the capital city of St. Paul, and Minneapolis, had not yet taken the first steps toward smoke-free regulation. A proposed statewide law, prohibiting smoking in public places, including bars and restaurants, had just died in the legislature. From the south metro, rumors began to circulate that the City of Bloomington had commissioned a study from the city’s advisory board of health on the possibility of enacting a citywide smoke-free ordinance.

Then May 5 arrived, along with an event that would jumpstart tobacco control efforts throughout the

7-county metropolitan area. St. Paul City Council Member Dave Thune held a news conference to announce that he was about to propose an ordinance prohibiting smoking in all city bars, restaurants and bowling centers, with the exception of outdoor seating areas and patios. Thune, a long-time smoker, was an unlikely smoke-free proponent, but he knew firsthand the personal cost smoking can exact – his mother-in-law had died of lung cancer caused by smoking and his father, also a smoker, suffered from emphysema. A Harley-riding rock n’ roll musician, who had struggled for years to kick the habit, Thune proved a determined and committed champion.

The public health community welcomed Thune’s announcement, although privately many tobacco control advocates expressed surprise at the news, coming “out of left field.”<sup>6</sup> Still, there was little time to rejoice or even reflect on the implications of Thune’s statement. A proposed St. Paul smoke-free ordinance was a gift to the tobacco control community and advocates quickly began to mobilize. A St. Paul ordinance would need four City Council votes to pass, and only three city council members were supportive. Moreover, Mayor Randy Kelly was undecided, which worried many advocates since five votes were needed to override a mayoral veto. All concerned knew they were in for an intense battle, although few could have predicted how intense.

After working with the St. Paul City Attorney to draft a smoke-free ordinance, Council Member Thune introduced a comprehensive proposal to the City Council on May 12, 2004. The day after this first reading of the ordinance, the St. Paul Area Chamber of Commerce, consisting of 2,200 members, announced its opposition to the proposal, while the Summit Hill Association (representing residents in one of the seventeen district councils in St. Paul) voted in favor of it.

On May 19, 2004, the St. Paul City Council held a second reading of the ordinance. In the meantime, hundreds of e-mail messages and phone calls were arriving in the City Council’s and Mayor’s offices each day from supporters and opponents of the proposed ordinance. Groups such as the St. Paul Hospitality Association and the St. Paul Convention and Visitors Bureau announced their opposition to the proposal, while advocates and representatives from the national heart, lung, and cancer associations

pledged their support and strategized about communicating a clear and consistent health message to the public.

A week later, the City Council held a public hearing and third reading of the ordinance. The hearing, limited to one hour, allowed each side thirty minutes. More than 350 people attended the hearing, with twenty-four people testifying.

On June 2, 2004, upon a motion by Council Member Thune, the St. Paul City Council amended the ordinance to change the effective date to September 1, 2004 – the same date that the original proposed Minneapolis ordinance was to go into effect. Thune stated that he had been talking with Minneapolis city staff, who expressed interest in the Twin Cities ordinances taking effect on the same date. The City Council asked its research staff to obtain a copy of the smoke-free study prepared by the Bloomington Advisory Board of Health.

On June 9, the City Council held yet another reading of the ordinance and approved an amendment to exempt sealed “smoking rooms.”<sup>7</sup> The same day, across the Mississippi, the Minneapolis City Council President proposed a regional smoke-free law that would include Minneapolis, St. Paul, and Bloomington. Mayor Kelly, in particular, was interested in the idea of a regional approach, and urged the St. Paul City Council to slow down and delay a vote on its ordinance pending the development of a regional approach. Nothing, however, was to come of this proposal.

In the meantime, St. Paul continued to hold “final” readings of the city’s proposed ordinance, which kept being held because the ordinance kept being amended. On June 16, for example, the City Council met and amended the effective date of the St. Paul ordinance from September 1, 2004 to January 2, 2005, to give bar owners time to decide on a plan for smoking rooms.

Finally, on June 23, 2004, the St. Paul City Council held the last reading of the city’s proposed smoke-free ordinance. After seven readings, the ordinance was put to a vote and passed by a slim margin of 4-3. The ordinance, which prohibited smoking in all St. Paul bars and restaurants, but exempted smoking rooms, was to take effect on January 2, 2005. Local newspapers estimated that the ordinance would affect anywhere from 800 to 900 establishments.<sup>8</sup>

## The Mayoral Vetoes

What happened next did not come as a surprise to those who were following the smoke-free campaign closely. On July 6, 2004, St. Paul Mayor Kelly, stating that the ordinance was flawed, that the smoking rooms idea was “ill-conceived and dangerous,” and that he continued to support a regional smoke-free approach, vetoed the ordinance.<sup>9</sup> The City Council had 30 days to override the veto, and supporters begin to look for a fifth vote on the Council to override the mayoral veto.

While the St. Paul Mayor continued to promote the idea of a “regional approach,” the region was moving ahead without St. Paul. In late July 2004, both Bloomington and Minneapolis passed smoke-free ordinances.<sup>10</sup> St. Paul Mayor Kelly, aware of the local momentum toward smoke-free regulation, acknowledged that “it makes sense for St. Paul to move forward . . . with some form of a smoking ban,”<sup>11</sup> and an encouraged Council Member Thune stated that he was willing to try a new approach and would not attempt to override the veto, since it would send a divisive message to the mayor.

The mayor’s interest in regional collaboration was not the only impediment surfacing at this time. Local bars and restaurants were voicing loud concerns about the economic impact of an ordinance. Moreover, on July 18, the *BUSINESS FORUM* published a letter from Minneapolis attorney Marshall Tanick, arguing that St. Paul’s smoke-free law could be legally challenged on several potential grounds including violation of labor laws, violation of laws against disability discrimination and the unconstitutional taking of private property. In a letter published July 25, 2004 in the *BUSINESS FORUM*, the St. Paul City Attorney promptly responded to, and dismissed, Tanick’s claims, pointing out that “St. Paul has devoted a substantial amount of attention to the legality of the smoking ban” and that if it were duly adopted, it would be legally valid.<sup>12</sup>

After Mayor Kelly vetoed the smoke-free ordinance proposal, a determined St. Paul City Council met to consider two different smoke-free ordinance proposals. Thune reintroduced the original ordinance he had proposed in May, which prohibited smoking in all bars and restaurants, with no exemptions. Supporters hoped this proposal would meet with

the mayor’s approval, since it no longer contained smoking rooms, and since other cities were now enacting ordinances. The second ordinance proposal was similar to the Olmsted County model, which exempted bars, defined as establishments that earned more than 50 percent of their revenue from alcohol. In the St. Paul proposal, council members increased the percentage to 70 percent.<sup>13</sup>

The first reading of both ordinance proposals was July 28, 2004, and the second reading was August 4. At the third reading/public hearing on August 25, the Olmsted-like proposal was dropped. This, ironically, was the model that Mayor Kelly was leaning toward, although he continued to talk about the need for a regional approach.

That summer, other communities outside St. Paul, including Ramsey and Hennepin Counties, began discussions about countywide smoke-free ordinances. After considering regulation for several weeks, the Dakota County Board of Commissioners dropped the issue, passing a resolution to support a statewide smoke-free law. In the meantime, both Minneapolis and Bloomington, whose ordinances would not go into effect for months, were watching St. Paul closely. Some worried that if St. Paul was unable to pass a comprehensive smoke-free law, these cities would take the opportunity to modify their ordinances.

Another issue that arose at this time was the matter of Ramsey County’s regulatory jurisdiction over St. Paul, both charter communities. At the time, Ramsey County Commissioners were considering a countywide smoke-free ordinance that prohibited smoking in alcohol-free restaurants, but exempted those that earned more than 50 percent of their revenue from liquor (again, the Olmsted model).<sup>14</sup> Although some officials initially speculated that the city and county might need to forge a joint-powers agreement for the county ordinance to apply in the city, upon consideration policymakers believed that a Ramsey County ordinance would be enforceable in St. Paul.

On September 1, 2004, the St. Paul City Council passed the ordinance prohibiting smoking in all bars and restaurants with no exemptions (4-3). Six days later, the Ramsey County Board of Commissioners held a public hearing on the proposed Olmsted model smoke-free ordinance. The city and county were moving ahead, step by step.

Then, on September 13, Mayor Kelly vetoed the St. Paul smoke-free proposal a second time. His rationale was that he wanted the city's ordinance to be consistent with the county's ordinance, and that he was committed to balancing public health concerns with business interests and jobs.

The following day, Ramsey County passed its smoke-free ordinance. As a result, St. Paul would fall under the county's smoke-free restrictions, without city leaders needing to take action. On October 12, Hennepin County followed Ramsey County's lead, passing a more restrictive countywide ordinance that prohibited smoking in bars and restaurants.

On November 24, 2004, the St. Paul City Council voted (6-0) in favor of a resolution supporting the state's Freedom to Breathe Act, which was under consideration at the state legislature. Over the next three months, state legislators debated the statewide smoke-free law. On March 31, 2005, the smoke-free ordinances of Minneapolis, Golden Valley and Ramsey County went into effect.

During the 2005 St. Paul mayoral campaign, incumbent Mayor Kelly was widely portrayed as opposing a smoke-free ordinance in St. Paul while his opponent, Chris Coleman, campaigned in favor of a comprehensive smoke-free citywide ordinance. On November 10, 2005, Mayor Kelly lost the race to Chris Coleman. No sooner had the balloons descended than the St. Paul City Council was back at work, considering a total smoke-free law. The plan was to have the new ordinance proposal ready for the new mayor when he took office in January 2006. On November 16 and 23, December 7 and 14, and January 11, the Council held a second, third and fourth reading of the ordinance, with public hearings at the last two readings.<sup>15</sup> In the meantime, Hennepin County temporarily rolled back its ordinance on December 13, 2005 to exempt bars that earned more than 50 percent of their revenue from alcohol sales.<sup>16</sup> And the ST. PAUL PIONEER PRESS published results from a study that found that, although some individual bars and restaurants were affected by the smoke-free ordinances in the metro area, overall the ordinances had not hurt the hospitality industry. According to taxable sales reported to the Minnesota Department of Finance, sales tax receipts from these establishments actually increased during the second quarter of 2005 over the previous year.<sup>17</sup>

Finally, on January 11, 2006, after the St. Paul City Council's fourth reading of the City's oft-revised smoke-free proposal, the Council passed the ordinance (4-3). The ordinance prohibited smoking in bars, restaurants, bowling alleys and bingo parlors, but allowed smoking on outdoor patios. It was to take effect March 31, 2006. The same day the ordinance was passed, Mayor Coleman signed it. It had been a long, exhausting journey.

But St. Paul's drawn-out smoke-free ordinance process was not yet over.

### Legal Challenges

The new year of 2006 began with opponents to St. Paul's smoke-free ordinance circulating petitions for an initiative that would repeal the more restrictive ordinance and replace it with a less restrictive ordinance that exempted bars, similar to Ramsey County's ordinance. To qualify for the ballot, either an initiative or a referendum proposal required 4,732 signatures of registered voters (8 percent of the number of those who voted in November's St. Paul mayoral election). Petitions for an initiative needed to be submitted by July 10, 2006. Once the signatures were certified, the matter could then be decided in a citywide general election in November.

Many St. Paul bar owners, led by the Minnesota Licensed Beverage Association, also began talking at this time about a legal defense fund and the possibility of seeking an injunction to stop the ordinance from being implemented. In February 2006, St. Paul Mayor Chris Coleman and Minneapolis Mayor R.T. Rybak pledged to campaign together to fight any attempt to repeal St. Paul's tougher smoke-free law, scheduled to take effect at the end of March.

On February 28, 2006, a group of sixteen bar owners filed suit in District Court against the City of St. Paul, seeking a temporary restraining order against the smoke-free ordinance on the ground that the city did not have the authority to regulate smoking in bars and restaurants.<sup>18</sup> The plaintiffs claimed that when St. Paul and Ramsey County merged their health departments in 1996, St. Paul gave up its right to regulate public health issues such as smoking, and that the city's regulatory authority over public health issues extended only to those enumerated in the joint powers agreement, such as property code enforcement, animal control, food licensing and solid

waste. An attorney for the bar owners claimed “It’s not about smoking. It’s about who gets to regulate it.”<sup>19</sup> All of the plaintiffs had been granted exemptions under the Ramsey County ordinance. By March 1, more than a hundred St. Paul bars had filed for exemptions from the Ramsey County ordinance.

On March 23, 2006, Ramsey County District Court Judge David Higgs held a hearing on the *DeGidio* temporary restraining order. In addition to claiming that the city lacked the authority to regulate smoking, the plaintiffs argued that Ramsey County exemptions should be valid through June 30, bar owners’ constitutional rights were violated because exemptions were revoked without a proper hearing, and it was illegal for the city to pass a law without setting aside money in the city budget to enforce it. The Court rejected all claims, denying the request for a temporary restraining order and ruling that the city was within its legal rights to impose a smoke-free law. The Court found that the City did not give up its right to legislate with the merger of the city and county health departments.<sup>20</sup> The St. Paul ruling came two days after a Minnesota appeals court denied an appeal by a Minneapolis bar to suspend the Minneapolis smoke-free ordinance.<sup>21</sup>

On March 31, 2006, the St. Paul smoke-free ordinance finally took effect. The St. Paul ordinance prohibited smoking in all St. Paul restaurants, bars, pool halls, bingo parlors and bowling centers, but allowed smoking on outdoor patios. As a result, one hundred and seventeen formerly exempt St. Paul bars were now smoke-free. Many St. Paul restaurant and bar owners, resigned to the inevitable, began to consider constructing “smoking patios” for their smoking patrons.

Meanwhile, the petition drive to repeal St. Paul’s smoke-free ordinance hit a snag. On May 15, 2006, the Ramsey County Election Bureau ruled that the petitions for the proposed ballot initiative failed to meet procedural requirements. State law requires that initiative and referendum petitions conform to a size requirement of 8 ½ by 14 inches. The form circulated by the St. Paul bar owners was printed on 11-by-17 inch paper – 42 percent larger than permitted by statute. The elections manager suggested that the petitioners start over. Disappointed, the Minnesota Licensed Beverage Association (the group leading the petition drive) remained undecided about whether to

continue with the effort, since recent polls suggested that a vote for a ballot initiative was unlikely to prevail. On July 8, the association abandoned the petition drive, reluctant to invest a great deal of money in a campaign against a smoke-free ordinance when polls were showing that residents were evenly split on the issue.<sup>22</sup>

Also around this time, the *DeGidio* plaintiffs had returned to court to seek a permanent injunction, continuing to argue that the city lacked authority to regulate smoking. By now, five of the sixteen original plaintiffs had dropped out of the suit for financial reasons. On July 7, 2006, Judge Higgs upheld St. Paul’s smoke-free ordinance, ruling again that the city was within its authority to regulate indoor smoking.<sup>23</sup> The legal challenges over St. Paul’s smoke-free ordinance were over.

### **The Ramsey County Ordinance**

The Ramsey County smoke-free ordinance process proved less eventful than the St. Paul process and, once underway, proceeded fairly quickly. Back in March 2004, the Ramsey County Board of Commissioners began discussing smoke-free regulation and considered supporting state legislation for smoke-free workplaces and public places. The Board then voted to defer discussion of the issue until it had more information.

Later in the summer of 2004, after Mayor Kelly vetoed St. Paul’s first citywide ordinance, Ramsey Commissioner Rafael Ortega announced a plan to introduce a countywide smoke-free ordinance. At this time, Ramsey was the first metro-area county to take up the smoke-free issue. Commissioner Ortega said he intended to propose an ordinance similar to the Minneapolis model, which prohibited smoking in bars and restaurants. Other commissioners expressed varying levels of concern about a comprehensive ordinance, with one commissioner expressing willingness to consider such a proposal if the neighboring counties of Anoka, Washington and Dakota did the same. Yet another commissioner expressed interest in waiting to see what St. Paul ending up doing.

On August 3, 2004, Ramsey County Commissioners considered two smoke-free ordinances, one comprehensive and one partial, which was similar to the Olmsted County model and prohibited smoking

in restaurants that derived at least 40 percent of their revenue in food sales. Although the Commissioners expressed interest in proceeding quickly with some ordinance, there was no consensus about which proposal to adopt. After some discussion about enforcement issues, the Board asked the Public Health Director to conduct additional research and to identify, if possible, the county restaurants that would be affected by a partial ordinance. The Public Health Director replied that since sales tax data is not public information, it was unlikely that a list of restaurants that were above and below the 50 percent threshold for food sales could be obtained.

Later in the summer, the Ramsey County Board decided to hold a first reading of the Olmsted-model smoke-free ordinance, and then on September 7, 2004, held a public hearing on the ordinance. On September 14, 2004, the Board unanimously adopted the Olmsted-model ordinance. This partial smoke-free ordinance prohibited smoking in businesses earning more than 50 percent of their revenue from food sales, and did not cover private clubs or establishments that earned more than 50 percent of their revenue from liquor. It allowed establishments to apply annually for exemptions, and to create physically separate bar areas, in which smoking was permitted. Establishments with separate bar areas would need two sets of food and beverage licenses. The ordinance, which would affect approximately 1,369 establishments, including 850 in St. Paul, was to take effect March 31, 2005.<sup>24</sup> Commissioners agreed to review the ordinance in two years and decide whether to expand it to include bars. A few weeks later, the Board met to discuss the exemption application process.

By the time the ordinance was implemented six months later, approximately 100 establishments in Ramsey County had applied for exemptions, in anticipation of the countywide smoke-free ordinance. On March 31, 2005, the Ramsey County smoke-free ordinance took effect, along with ordinances in Minneapolis, Bloomington, Golden Valley and Hennepin County. Ramsey County was the only community in this group that allowed smoking in bars.

In fall 2006, in response to public support of a more restrictive ordinance, Ramsey County Commissioners began to consider strengthening the county ordinance. This proved unnecessary on May 16, 2007, when

the legislature passed the state's smoke-free law, the Freedom to Breathe Act of 2007, which covered all workplaces, including bars and restaurants.

## Reviewing the Ramsey County Stories

### Analysis and Findings

Although the announcement of St. Paul's smoke-free ordinance proposal may well have spurred similar campaigns in adjacent cities and counties, St. Paul did not succeed in passing its ordinance until more than a year after Bloomington, Minneapolis, Golden Valley, Hennepin County and Ramsey County had all passed their ordinances. Both St. Paul and Ramsey County encountered several legal and political challenges throughout their ordinance campaigns, but the main reason for St. Paul's delay in passing a smoke-free ordinance was its mayor's repeated vetoes of the legislation. In a sense, then, the St. Paul experience dramatizes the political impact one person can have in starting a smoke-free movement and another person can have in halting it – at least temporarily.

The key legal and political obstacles in the Ramsey County smoke-free campaigns from 2004 to 2006 can be divided into three types:

1. Legal and Regulatory Challenges
2. Political Issues
3. Mayoral Vetoes

### Legal and Regulatory Challenges

#### *The Lawsuit*

Few informants regarded the *DeGidio* lawsuit as a serious obstacle to the St. Paul ordinance process. The main claim of the sixteen plaintiff bar owners was that the City of St. Paul acted outside the scope of its authority (“*ultra vires*”) by enacting a smoke-free ordinance that included more stringent terms than those already enacted by Ramsey County. They argued that the City of St. Paul's 1996 Joint Powers Agreement with Ramsey County for public health services also delegated the City's authority to enact public health legislation to the Ramsey County Board of Commissioners, and that the City thus exercised non-existent legislative authority by enacting the ordinance. The District Court rejected this interpretation of the Joint Powers Agreement, pointing out that the purpose of the Agreement was

merely to combine the public health services of two public health departments, and that nowhere in the Agreement was there language “expressly or impliedly stating that the City is turning over its authority to legislate.”<sup>25</sup>

In addition to their flawed regulatory authority claim, the *DeGidio* plaintiffs alleged that because the City engaged in wrongful conduct, the plaintiffs were entitled to equitable estoppel (license exemption). Since the Court found no wrongful conduct on the part of the City, it rejected this claim as well.

As in the legal challenge to the Minneapolis smoke-free ordinance, the District Court in *DeGidio* acknowledged that the plaintiffs had shown they would suffer economic injury if the ordinance took effect, but that the presence of harm alone was insufficient for the court to grant injunctive relief. Since the plaintiffs did not show the requisite likelihood of succeeding on the merits of the case, they failed to satisfy the necessary factors for granting a temporary restraining order, and the court ultimately dismissed the case.

### Finding

Although “economic harm” arguments are often raised in public hearings, the likelihood of plaintiffs succeeding on that ground alone has become increasingly unlikely in recent years.

### *The Ballot Initiative*

The other failed legal challenge to the St. Paul ordinance was the effort by the Minnesota Licensed Beverage Association and others to put a new smoke-free ordinance proposal on the ballot. This ballot initiative attempt, which began in January of 2006, was abandoned six months later after an election official found the petitions invalid because they were on the wrong size paper, and polls showed significant public support for the St. Paul ordinance. Although the initiative effort failed in St. Paul, ballot initiatives and referenda have been considerable obstacles to smoke-free regulation in other regions of our study, such as Duluth and Fargo, and have affected policies in adjacent communities, such as Moorhead.

### Finding

The introduction of a ballot initiative or referendum can significantly delay the ordinance process, and can result in a weaker law.

### Political Issues

The legal challenge waged by sixteen bar owners against St. Paul’s smoke-free ordinance and the petition drive to repeal the ordinance were unsuccessful but predictable efforts by local businesses that were well integrated in the city’s politics. As one informant put it, St. Paul is a “stay in your own zip code, stay in your own neighborhood kind of place,” where council members are close to their constituents and have relationships with local bar owners and businesses that go back years. Although the lawsuit and ballot initiative effort failed, political opposition to St. Paul’s ordinance remained strong during this time – as evidenced by the mayor’s decision to strike down two ordinances in a row.

### Mayoral Vetoes

Mayor Kelly’s vetoes of his city’s smoke-free ordinances were not inconsistent with his position on the issue, since for months he had expressed concern about a citywide proposal and stated his preference for a “regional approach.” The problem was that the term “regional approach” apparently meant different things to different people at different times. With no clear understanding of how wide to cast the net, or of whether the term meant other cities or surrounding counties or even the same policies – it was hard for municipalities to collaborate and develop such an approach. Moreover, by the second time the mayor had vetoed the St. Paul ordinance, Bloomington and Minneapolis had passed their ordinances and Ramsey and Hennepin County were about to pass theirs. In this context, as one informant put it, “there were too many odds and ends going on in each community” for any uniform “regional approach” to succeed.

While several informants expressed dismay at Mayor Kelly’s vetoes and his refusal to succumb to public pressure and pass the St. Paul ordinance, others acknowledged the importance that the mayor and his allies placed upon individual relationships with



constituents in the business community. In the end, the biggest obstacle to St. Paul’s smoke-free ordinance was the political expression of a legal process. The city’s home rule charter granted the mayor veto power over ordinances passed by the city council, and the mayor continued to exercise this power until he was voted out of office.

### **Finding**

A policymaker with veto power can often disable, postpone or defeat an initiative by exercising that power.

### *Communication Challenges*

Although the Ramsey County ordinance passed relatively quickly once the process was underway, informants pointed out a few issues that occurred at the beginning of the process that could have proved fatal to the ordinance, but that instead resulted in a less restrictive countywide ordinance. Each of these issues related in one way or another to fault lines in the communications between policymakers and advocates.

Several informants expressed disappointment in the Ramsey County Board of Commissioners for failing to adopt a comprehensive Ramsey County ordinance, and in the county commissioner who had first championed a comprehensive countywide ordinance for failing to secure the votes needed for the broader policy. In retrospect, advocates seemed to agree on the importance of “making sure the ground

is solid before you move forward” and understanding the importance of supporting elected officials before, during and after the ordinance process. (This applied both in St. Paul and Ramsey County.)

Another political obstacle flagged by informants was the misunderstanding by some advocates that once a county ordinance is introduced, it can be substantively amended at any stage. In Ramsey County, the ordinance process was prolonged because an ordinance could not be amended at the reading at which it was to be adopted. Many advocates lobbied in vain to move the Board to adopt a comprehensive ordinance AFTER the partial ordinance, covering restaurants only, was adopted. In retrospect, advocates should have focused their efforts BEFORE the county’s ordinance proposal was introduced.

### **Finding**

Ordinance enactment procedures and timelines often differ in home rule charter communities and statutory communities.

Finally, two informants mentioned that St. Paul officials and Ramsey County officials appeared to operate independently, in their own “silos,” and very rarely interact with each other. The apparent lack of communication between these local government authorities struck some informants as ironic, given the emphasis that opponents to the St. Paul ordinance, including the mayor himself, placed on regional collaboration.

## Endnotes

- 1 Ramsey County, an area of 156 square miles, has an estimated population of 501,428. U.S. Census Bureau, *Population Estimate for Ramsey County, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Ramsey County, Minnesota, then follow hyperlink). See also Minnesota Population Estimates: Number and Characteristics of the Current Population, available at <http://www.demography.state.mn.us/estimates.html>.
- 2 St. Paul has an estimated population of 279,590. U.S. Census Bureau, *Population Estimate for St. Paul, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type St. Paul, Minnesota, then follow hyperlink).
- 3 See official St. Paul city website, available at <http://www.stpaul.gov/>.
- 4 See Dave Leip’s Atlas of U.S. Presidential Election Results – Ramsey County, Minnesota, available at <http://uselectionatlas.org/RESULTS/index.html>.
- 5 Ramsey County is the first and only Minnesota county to be governed by home rule; all other counties are governed by state statutes.
- 6 A local paper described the announcement as “an impromptu decision [that] arced over the plans of clean-air advocacy groups, who were still in the mode of laying the educational groundwork.” Jackie Crosby and Tony Kennedy, *Leading the Rally Against Smoking*, STAR TRIBUNE, May 16, 2005, at B1.
- 7 This exemption allowed bars and restaurants to permit smoking in separate rooms that were sealed by a solid wall and doors with a gasket, restricted in size, had vents to the outside, that offered no food or beverage service, and were subject to other regulations.
- 8 Jackie Crosby, *Kelly to Veto Smoking Ban*, STAR TRIBUNE, June 24, 2004, at A1; Robert Ingrassia, *Advocates of Smoking Restrictions Mobilize*, ST. PAUL PIONEER PRESS, June 25, 2004, at 3B; Robert Ingrassia, *Smoking Fight Heads for Next Round*, ST. PAUL PIONEER PRESS, July 27, 2004, at 1A; and Robert Ingrassia, *Total, Restaurant-Only Bans Offered in Council*, ST. PAUL PIONEER PRESS, July 29, 2004, at 3B.
- 9 Jackie Crosby, *Kelly Vetoes City Smoking Ban*, STAR TRIBUNE, July 7, 2004, at B1.
- 10 See Kerry Cork, Public Health Law Center, *Going Smoke-free in the Land of Lakes: Law and Politics in Minnesota Smoke-free Campaigns – The Hennepin County Story* (2010).
- 11 Robert Ingrassia, *Ban Put Back on Table*, ST. PAUL PIONEER PRESS, July 28, 2004, at 1B.
- 12 Manual Cervantes, Letter from St. Paul City Attorney, BUSINESS FORUM, July 25, 2004.
- 13 Ramsey County was also planning to introduce a similar measure at this time.
- 14 See *infra* Ramsey County ordinance section.
- 15 The readings continued because the ordinance was revised on December 7, 2005.
- 16 See Cork, *Hennepin County Story*, *supra* note 10.
- 17 Jason Hoppin and Maryjo Sylvester, *Smoking Ban Fears Prove Unfounded*, ST. PAUL PIONEER PRESS, Dec. 6, 2005, at 10A.
- 18 DeGidio, Inc. v. City of St. Paul, Minn. No. 62-C7-06-001899 (2<sup>nd</sup> Dist. 2006).
- 19 Patrick O’Neill, cited by Jason Hoppin, *St. Paul Bar Owners Sue to Block City’s Smoking Ban*, ST. PAUL PIONEER PRESS, Mar. 1, 2006.
- 20 DeGidio, Inc. v. City of St. Paul, Order Denying Temporary Restraining Order, No. 62-C7-06-001899 (2<sup>nd</sup> Dist. Mar. 29, 2006).
- 21 See Cork, *Hennepin County Story*, *supra* note 10.
- 22 Tim Nelson, *Drive to Kill Smoking Ban Dropped*, ST. PAUL PIONEER PRESS, July 9, 2006.
- 23 In dismissing the case, Judge Higgs called the claim that the 1996 merger of the city and county health departments stripped the city of the authority to regulate smoking a claim “rife with error.” DeGidio, Inc. v. City of St. Paul, No. 62-C7-06-001899 (2<sup>nd</sup> Dist. July 7, 2006).
- 24 *About Ramsey County’s Smoking Ban*, STAR TRIBUNE, Sept. 14, 2004.
- 25 See DeGidio, Inc. v. City of St. Paul, No. 62-C7-06-001899 (2<sup>nd</sup> Dist. March 29, 2006).

# The Duluth Story

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*This case study covers events that transpired in the smoke-free campaigns in the City of Duluth, Minnesota between 2000 and 2006. It was written as one of seven case studies under a ClearWay Minnesota<sup>SM</sup> research grant to study legal and political obstacles to smoke-free regulation in seven geographically diverse Minnesota regions.*

## Introduction

This is a story of how Duluth, Minnesota, one of the largest metro areas in the state, tackled the thorny issue of smoke-free regulation at a time when only one other community in Minnesota had passed such a law – the small town of Moose Lake. In February of 2000, Moose Lake passed a law prohibiting smoking in restaurants. Moose Lake at the time had only nine restaurants. In comparison, Duluth in 2000 had approximately 190 restaurants. Moreover, in 2000, Duluth’s hospitality industry alone employed nearly 9,000 people (more than eight times the entire population of Moose Lake!) with an annual payroll of close to \$73 million.<sup>1</sup> The tale of Duluth’s exhaustive struggle to pass a smoke-free ordinance, amid a dizzying number of false starts, amendments, ballot measures, and compromises, illustrates the diverse legal and political challenges faced by public health pioneers.

## Overview of Duluth

The Twin Ports of Duluth, Minnesota and Superior, Wisconsin share a harbor on Lake Superior, a lake so large it could cover all of North America in water three feet deep.<sup>2</sup> Duluth, the county seat of St. Louis County, is the world’s largest and farthest inland seaport, located at the westernmost tip of Lake Superior’s north shore. More than 1,000 vessels each year drop anchor in Duluth, and carry iron ore, grain and coal across the Great Lakes to the Atlantic Ocean.<sup>3</sup> Built beside steep cliffs, the city is known both for its many municipal parks, gardens, streams, waterfalls, and woods, and as the gateway to the North Shore Scenic Drive, heading toward the Canadian border.

Approximately 68 square miles in land area, Duluth

is one of Minnesota’s largest cities. Its industries include tourism, health care, mining, finance/banking, wood and paper products, education, and shipping.<sup>4</sup> The city has a population of approximately 84,284; however, if outlying suburbs within a 30-mile radius of the city are included, the total population is roughly 184,000.<sup>5</sup> Duluth voters tend to be relatively liberal and less conservative, in general, than voters in the outlying rural St. Louis County.<sup>6</sup>

Duluth is a home rule/charter city with a mayor/city council form of government. The city administration makes policy proposals to a city council of nine members (known as “councilors”), five of whom are elected by district and four at-large. The mayor can attend council meetings and express opinions, but is not on the council. Two public readings are required to pass an ordinance, and the mayor must approve or object to any ordinance within ten days of receipt. The council can override a mayoral veto by a vote of six council members.<sup>7</sup> The city has an initiative and referendum process, allowing voters and councilors to submit ordinances to a public vote for either adoption or repeal.<sup>8</sup>

## Telling the Story

### The Compromise Ordinance

Back in the spring of 2000, the Duluth City Council began discussing a citywide smoke-free ordinance. Just that February, Moose Lake had become the first city in Minnesota to adopt a smoke-free ordinance, and a month before that, all fourteen restaurants in the town of Crookston had voluntarily become smoke-free. A group known as the Twin Ports Youth and Tobacco Coalition had been working with local restaurants to craft a Duluth ordinance since November 1999.<sup>9</sup> The time seemed ripe for the city to consider a smoke-free ordinance.

On April 10, 2000, three Duluth city councilors introduced an ordinance “to eliminate smoking in restaurants, pool halls, bowling alleys, common hotel areas, and any other public place that allowed people under 18.” Bars were not included. It was a strong

smoke-free ordinance for its time. In a televised town meeting two weeks later, a hundred people debated the proposal as part of a panel discussion organized by a local TV station and the Duluth Area Chamber of Commerce.

Ordinance opponents, including the Minnesota Licensed Beverage Association and the Duluth Hospitality Association, warned of economic harm to local businesses and encouraged the City to appoint a task force to study the issue, rather than vote on the ordinance. After the mayor also asked the Council to delay the vote, the Council deferred discussion until June 12, 2000. At that time, the Council abandoned the idea of a task force and instead, in an effort to address opponent concerns, amended and adopted (6-3) an ordinance that was considerably “watered down” from the original proposal. This “compromise ordinance” prohibited smoking in restaurants, but exempted bowling alleys, pool halls and private offices, as well as bars and separately enclosed and ventilated smoking rooms in restaurants if minors were not allowed. It allowed smoking in restaurants with bars between 8 p.m. and 1 a.m. It also allowed restaurants to obtain hardship exemptions if they could prove a 15 percent decline in sales over the same month the previous year, or a 10 percent decline over two months, due to the smoke-free ordinance.

The Duluth “compromise ordinance,” riddled with waivers and exemptions, was convoluted and confusing. On December 18, 2000, the Council met, in what would become a common routine, to amend it. The proposed amendment clarified (1) that the provision for smoking in separately ventilated rooms applied to both bars and restaurants<sup>10</sup> and (2) that the exemption for restaurants with liquor licenses between 8 p.m. and 1 a.m. only applied if minors were excluded from the premises. On December 21, after a second reading, the amendment passed.

The Duluth smoke-free ordinance went into effect January 1, 2001. Within weeks, the first restaurant applied for a hardship exemption and, in reviewing the restaurant’s application, the Council quickly realized the exemption process was flawed. After a failed attempt to amend the process on February 20, the Council succeeded the following week in passing a provision that prohibited minors from exempted restaurants where smoking was allowed. Proponents of the ordinance were focusing at this point on

protecting children from exposure to secondhand smoke.

On March 19, 2001, however, the City Council changed its mind and voted to delete the provision it had just approved, on the ground that it was unfair to businesses. Keeping minors from restaurants that allowed smoking was thought to give an edge to bowling alleys and pool halls, which were exempt from the smoke-free ordinance. “I think some people could look at this and say that we didn’t think this through,” remarked one councilor the day after the meeting.<sup>11</sup>

The truth of this statement was evident throughout the spring as five of Duluth’s 190 restaurants filed for economic hardship exemptions, claiming that most of their patrons were smokers, and presenting sales receipt data claiming a 15 percent loss in revenue in January 2001 over January 2000.<sup>12</sup> The City Council approved all of these exemption requests, without any independent assessment of the revenue loss claims. Meanwhile, several Duluth restaurants openly defied the smoke-free law, claiming it was unfair and unconstitutional.<sup>13</sup> The police chief went on record criticizing the ordinance because it failed to give police the authority to cite restaurant owners who allowed customers to smoke.<sup>14</sup> On April 9, three councilors introduced an ordinance to repeal the smoke-free ordinance, since there was general consensus that “the city’s embattled smoking ban” (as it was called in the press) was arbitrary, unenforceable, and simply not working.<sup>15</sup>

On April 13, 2001, a group of Duluth bar and restaurant owners proposed that the city suspend the smoke-free ordinance and set up a task force to study the best ways to address its problems. The business owners, in turn, offered to examine ways to reduce secondhand smoke exposure in their establishments. Rather than set up a task force, the Duluth City Council resumed tinkering with the ordinance. On May 29, 2001, after discussing several options, councilors adopted (6-3) a proposal that would repeal various ordinance exemptions, provide enforcement mechanisms, and allow smoking in bar areas of restaurants only if the areas were separately enclosed. Bowling alleys and pool halls would go smoke-free on April 1, 2003, the date that hardship exemptions would also expire. This was basically the stronger ordinance originally introduced in April 2000, before

it had been weakened.

On June 6, 2001, Duluth Mayor Gary Doty signed the strengthened smoke-free ordinance, while claiming that he would have supported an even more comprehensive ordinance that prohibited smoking in bars.<sup>16</sup> The ordinance was to take effect July 15, 2001.

### **The Repeal Referendum**

On the same day the Mayor signed the amended smoke-free ordinance, members of the Duluth Hospitality Association held a news conference to launch a petition drive for a referendum to repeal the new law. Signatures needed to be submitted to the city by July 13, 2001.

Five weeks later, on July 12, the Duluth Hospitality Association submitted a referendum petition with over 6,000 signatures. As a result, the new amended ordinance, which was to go into effect in three days, was suspended pending certification of the results and a public vote. The original ordinance remained in effect. A few weeks later, the Duluth City Clerk determined that 2,581 of the 6,000 signatures collected were valid – only nine more than the 2,572 required. With the referendum petition thus certified, the City Council voted to place measures on the ballot that gave the public the opportunity to keep or repeal the original “compromise” smoke-free ordinance and to keep or repeal the amendments (which strengthened the ordinance).

As the election neared, both supporters and opponents of the amended ordinance engaged in significant efforts to sway voters. Issues regarding the funding behind advocacy efforts arose. Supporters of the ordinance raised concerns about perceived tobacco industry involvement in the referendum campaign, while opponents raised questions about state tobacco settlement money being used to fund the smoke-free campaign. A week before the election, Philip Morris conducted a direct mail campaign encouraging voters “not to further restrict smokers’ and business owners’ rights” and to reject the ordinance amendments. Philip Morris claimed it did not take a position on Duluth’s original smoke-free ordinance “because the company believes the existing ban allows some reasonable leeway for businesses with hardships or with the desire to wall off and vent separate smoking rooms.”<sup>17</sup> Smoke-free advocates were not surprised that Philip Morris did not challenge the original

ordinance, since it lacked enforcement provisions, which meant there were no consequences for business owners who failed to comply.

Ordinance supporters also engaged in ad campaigns at this time, framing secondhand smoke as a health issue, and challenging the claims of opponents that the health effects of secondhand smoke were overstated. Realizing how easy it would be for voters to be confused by the two questions on the ballot,<sup>18</sup> advocates encouraged a “Yes-Yes” vote, which would keep the current ordinance, plus amendments. Voters could, however, vote “No-Yes,” thinking they were rejecting the current ordinance in favor of the stricter law. That vote, however, would mean no law at all, because there could be no amendments without an ordinance.

By now, the local media had taken sides in the smoke-free debate. The DULUTH NEWS TRIBUNE encouraged a “Yes-Yes” vote, while the BUDGETEER encouraged a “Yes-No” vote for the current ordinance without the amendments. The smoke-free ordinance had also become a campaign issue for city council candidates. Four of the nine council seats were turning over and only one councilor was seeking reelection. All candidates, however, pledged to abide by the results of the smoke-free ballot measures.

On November 6, 2001, the day of the election, 61 percent of all registered voters in Duluth went to the polls. Heightened publicity surrounding the smoke-free debate prior to the election was credited for the high turnout. The electoral result was a victory for smoke-free advocates: Voters upheld Duluth’s current smoke-free ordinance (61% to 39% or 18,347 to 11,582) and upheld the amendments tightening and strengthening the ordinance (53% to 47% or 15,688 to 14,052).

Eight days later, on November 14, 2001, Duluth’s new and improved smoke-free ordinance took effect, covering restaurants and restaurants with bars.

### **The Rollback**

By November 2001, three Minnesota cities had enacted smoke-free ordinances (Moose Lake, Cloquet and Duluth), one county had passed an ordinance (Olmsted) and thirteen cities had rejected such ordinances (Rochester, Mankato, Hutchinson, Hermantown, Proctor, New Prague, Faribault, St. Cloud, Shakopee, Grand Rapids,

Maple Grove, Wanamingo and Little Falls (repealed by referendum)). Across the bay from Duluth, the neighboring community of Superior, Wisconsin was also beginning to consider a smoke-free ordinance, and petitions were being circulated to gauge community interest. Interest in smoke-free regulation was growing throughout the state and adjacent communities.

The saga of the Duluth smoke-free ordinance was not yet over.

On January 24, 2002, a newly elected Duluth city councilor expressed interest in amending the smoke-free ordinance to allow restaurants to apply for hardship exemptions until April 1, 2003, so they would have more time either to comply with the smoke-free ordinance or to close.<sup>19</sup> The following month, city councilors met with restaurant and bar owners to discuss the economic hardship issue. The Duluth Hospitality Association presented the results of a survey of 22 city businesses that were purportedly affected by the smoke-free ordinance.<sup>20</sup> City councilors expressed interest in exploring ways to help businesses that had been hurt.

In March 2002, a city councilor crafted a plan to give businesses grants and loans to help them comply with Duluth's smoke-free ordinance. Although some councilors were intrigued by the proposal, they were uncertain of the logistics, and nothing came of this proposal to revise the ordinance. Still, many councilors remained sympathetic to the economic harm claims of local businesses.

As the year drew to a close, smoke-free advocates became concerned that the city council might attempt to soften the ordinance before April 1, 2003, when hardship exemptions were to expire. At the beginning of 2003, the American Lung Association conducted a survey of Duluth voters on the city's smoke-free ordinance, which showed that 63 percent of those surveyed supported the Duluth ordinance, 30 percent opposed it, and 6 percent were undecided.<sup>21</sup>

Smoke-free advocates were right to be nervous about a possible rollback of the Duluth ordinance. On February 24, 2003, the Duluth City Council considered a proposed ordinance amendment that would limit smoking in restaurant bar areas to 30 percent of the total smoking area, but would also allow a full food menu to be served in that area. A

second reading of the proposed "rollback" amendment was tabled on March 24, after the Mayor sent a letter to the City Council, stating that if the Council passed the amendment by a narrow margin, he would veto it. The issue did not go away, however, and was to reappear at the end of the year, after a new mayor had been voted into office.

On April 1, 2003, the smoke-free ordinance, as amended on May 29, 2001, went into effect, prohibiting smoking in restaurants and restaurants with bars. All hardship exemptions expired. Organized opposition to the ordinance, however, did not go away.

Then, on December 1, 2003, the Duluth City Council revisited the "rollback" proposal and voted to amend the smoke-free ordinance to allow any restaurant with a liquor license to permit smoking and full food service in sealed-off bar areas.<sup>22</sup> Making good on his promise back in March, Mayor Doty vetoed the amendment. (This was one of the last official acts of the Mayor, who was leaving office the following month. Former Councilor Herb Bergson had been elected Mayor in November.)

On December 15, the Duluth City Council reconsidered the ordinance amendment, which effectively watered down the smoke-free ordinance. The Council then repassed the amendment, overriding the Mayor's veto (6-3). As a result, restaurants with bars that had been smoke-free for the last nine months could allow smoking again in sealed off areas. The decision to relax the ordinance was a setback for smoke-free advocates, but in Duluth's long rollercoaster smoke-free regulation process, nothing seemed surprising any more.

### **The Ballot Initiative Effort**

In early 2004, smoke-free advocates began organizing a ballot initiative for a stronger Duluth ordinance. They contacted Public Health (formerly Tobacco) Law Center attorneys for help in understanding the initiative process and advice in drafting a more restrictive smoke-free ordinance. In May 2004, advocates began collecting signatures to put a stronger ordinance on the ballot. For the initiative petition to be certified, they needed 5,888 signatures of registered voters (that is, 20 percent of the number of people who voted in the last general election).

On September 13, 2004, smoke-free advocates

submitted the required number of petition signatures and the City Council passed a resolution to put a stronger, citizen-initiated ordinance proposal on the ballot that would ask whether all Duluth indoor workplaces with two or more workers should be smoke-free.

The new Duluth mayor, however, had a problem with the language of the ballot question. He was concerned that voters might not understand that they were voting for a comprehensive ordinance that covered all bars, restaurants and indoor workplaces. As a result, he vetoed the ordinance resolution.

Mayor Bergson's veto sent the Duluth City Council into an Emergency Session, where councilors revised the ballot question to clarify that the ordinance being voted on specifically included bars and restaurants. With the mayor's announcement that he would not veto this amended resolution, campaigning on the ballot initiative began in earnest.

In October 2004, the Duluth Hospitality League kicked off a television and radio advertising campaign to "educate" voters about the smoke-free ordinance and the potential economic harm it would do to local businesses. Ordinance supporters responded with business data from other smoke-free communities around the U.S. that indicated that these economic "doom and gloom" scenarios were untrue. They also continued to focus on the strong medical evidence of the toxicity of secondhand smoke. During this intense period of debate, both supporters and opponents challenged each other's funding sources and tactics.

Finally, on November 2, voters went to the polls. The question on the ballot was "Should Duluth's existing smoking ordinance be changed to prohibit smoking in indoor public places and most places of work where two or more people work, including restaurants with bars, bars, and private clubs? (Article VII, Chapter 28, Duluth City Code)."

To the dismay of the public health community, 54 percent of the Duluth voters rejected the stricter smoke-free ordinance. The referendum's defeat meant Duluth's weaker, less restrictive smoke-free law continued in effect. Disappointed advocates announced they would shift their focus to enforcement efforts and smoke-free environments in other Minnesota communities. While Duluth's long ordinance process had played out over nearly

five years, the debate about smoke-free regulation had continued in cities and counties around the state. In 2004, Mankato, Moorhead, Bloomington, Minneapolis, Golden Valley, and Beltrami, Hennepin and Ramsey Counties had all adopted smoke-free ordinances. The smoke-free movement was on a roll in Minnesota.

### **Since 2004**

On September 11, 2006, the Duluth City Council had the first reading of a proposal to amend the city's smoke-free ordinance once again to prohibit smoking near medical facilities. The amendment was approved on September 25, and went into effect on July 1, 2007.

On December 12, 2006, St. Louis County and the neighboring counties of Carlton and Lake all considered countywide smoke-free ordinances, and the following February, Carlton County successfully passed a smoke-free ordinance.

Then, on May 16, 2007, the Minnesota Legislature passed the Freedom to Breathe Act of 2007, which prohibited smoking in virtually all indoor public places and places of employment, including bars, restaurants and private clubs.

The long twisted tale of the Duluth smoke-free ordinance was finally over.

## **Reviewing the Duluth Story**

### **Analysis and Findings**

It is never easy being a pioneer. Duluth, the second city in Minnesota to adopt a smoke-free ordinance, was a large enough metropolis for the tobacco industry in 2000 to take notice and to support efforts to weaken, undermine and compromise its law. Although the Duluth ordinance was never challenged in court, it was revised and amended so many times and in so many ways that by the end of the process in 2004, supporters and opponents alike were suffering from "ordinance fatigue."

Some of the problems that occurred during the ordinance process were undoubtedly due to the inexperience of the state's public health advocates in advancing smoke-free regulation, as well as the lack of models in Minnesota and elsewhere in the country. Yet other obstacles arose as a result of organized resistance to the smoke-free ordinance by

the city's large and influential hospitality industry, the willingness of city policymakers to accommodate business interests and concerns in light of the ordinance's unknown economic effect on local establishments, and the reliance on ballot measures to settle controversial issues.

The key legal and political obstacles in the Duluth smoke-free ordinance campaign from 2000 to 2004 fall into several categories:

- Poorly Drafted Legislation
- Ballot Measures
- Mayoral Vetoes and Veto Threats
- Timing Issues and Inexperience
- Regional and Socio-Political Issues

### Poorly Drafted Legislation

Duluth's "compromise" smoke-free ordinance, passed in June 2000, was a weak, limited, convoluted law, full of exemptions and loopholes – "hung together by chewing gum and baling wire," in the words of one informant. "We were all over the place on what we should do," said another informant. The ordinance reflected the City Council's efforts to draft a veto-proof ordinance, one that would satisfy those who opposed it. Not surprisingly, the ordinance ended up satisfying no one.

By starting with such a poorly drafted initial ordinance, the City Council found itself repeatedly going back to the drawing board and amending the law. The lack of enforcement provisions, complicated hardship exemption language that required no independent verification of sales data, vague terminology (especially related to bars and food service), and other inconsistencies not only led city councilors to revisit the ordinance often, but ultimately resulted in ballot measures that prolonged the ordinance process for years.

One informant pointed out that, in a strange way, the ordinance was SO poorly drafted, with no consequences for business owners, that the process, in her words, "boomeranged."

*"In the first convoluted ordinance, part of the political compromise was they didn't want businesses to be hurt, so they put no penalties in it. So lack of political will, weakness, resulted in no consequences. . . . Business owners*

*said, 'We're not going to comply. There are no consequences.' . . . The decision makers were not happy that their decision was being discarded because there were no penalties. . . . So the council said, 'Okay, you want consequences, we'll strengthen this thing.' And it got strengthened five months later. So that lack of political will came to this political compromise of no penalties which came to this disobedience which came to this strange outcome. We would never have dreamed of approaching the council in five months. And there we were, getting more than we ever figured we would."*

Still, this was a unique situation, and all informants agreed that Duluth's initial smoke-free ordinance had serious problems that proved fatal to effective implementation.

### Finding

A poorly drafted smoke-free ordinance can be a magnet for legal and political challenges, and set back regulatory efforts for months, if not years.

### Ballot Measures

Under the Duluth City Charter, both citizens and the City Council can submit ordinances to a public vote.<sup>23</sup> The availability of Duluth's initiative and referendum process and the willingness of ordinance supporters and opponents to use ballot measures to strengthen or weaken the law kept the ordinance process alive for more than four years.

In 2001, ordinance opponents tried to repeal the smoke-free ordinance through a referendum. The two questions on the ballot, which asked voters to support or repeal both the original ordinance and amendments to the ordinance, could easily have confused voters, unsure of what various combinations of votes might mean. In Fargo, North Dakota, for example, when three conflicting municipal initiatives were put on the ballot, the Attorney General needed to be consulted to help interpret electoral results.<sup>24</sup> Although in Duluth, the ordinance opponents lost, and voters approved the stronger amended ordinance, the ballot initiative process took a considerable amount of unanticipated time, money and resources.



In 2004, the second time Duluth's smoke-free ordinance went to the ballot, advocate efforts to pass a stronger ordinance proved unsuccessful. Informants offered various reasons for the defeat of the 2004 ballot initiative. One informant pointed out that, as the ordinance process dragged on, the opposition gained in effectiveness. "They had five points and they hammered them either together or one at a time, depending upon the medium. They were against property taxes going up, they were against businesses closing, and so on. We gave people one reason to vote for it (health) and they gave people five reasons to vote against it."

Others disagreed, pointing out that as time went by, the advocates became more adept at addressing economic issues and focusing on secondhand smoke as a health issue for all workers, not just children. Another informant speculated that the smoke-free issue simply got lost in the 2004 general election and that the initiative might have passed in the spring of 2005, when only those who cared about the smoking issue would have voted. Yet another informant mused that advocates might have overreached by including private clubs in the 2004 referendum, when the Iraq war was in the headlines. "You had the exuberance and the patriotism and the Iraq war and support our troops and then the idea was launched that: How can you tell these people who have died for their country that they can't light up a cigar in their servicemen's club?"

What seems clear is that the Duluth ballot measures were responsible for prolonging the smoke-free ordinance process for years, and to a certain extent, intensifying the debate. During ballot campaigns, both sides leveled attacks, questioning the tactics and funding of each other – charges that set off political firestorms of their own and only distracted from the main objective, the passage of a fair and effective smoke-free ordinance.

### **Mayoral Vetoes and Veto Threats**

At times the mayor played a significant role in Duluth's smoke-free ordinance process. In March 2003, Mayor Doty threatened to veto a proposed "roll-back" amendment that would allow any restaurant with a liquor license to permit smoking and full food service in sealed-off bar areas. The City Council backed off that amendment until after November, when a new mayor was elected. In December 2003,

before the new mayor took office, the City Council passed the amendment, Mayor Doty vetoed it, and the Council overrode the mayor's veto and repassed the amendment (6-3). Thus, despite the mayor's efforts, the City Council rolled back the ordinance.

In September 2004, Mayor Bergson also intervened in the smoke-free ordinance process when he vetoed the City Council's resolution to put the ordinance on the November ballot, on the ground that voters needed to be clear that they were voting for an expanded ordinance, covering all bars, restaurants and workplaces. As a result, the City Council revised the ballot question.

In none of these instances did a mayoral veto or veto threat prove an insurmountable obstacle to the passage of an ordinance. Still, by exercising the power to reject a City Council-approved ordinance, the Duluth mayor figured as a major player in the process, and a potential legal impediment.

### **Timing Issues and Inexperience**

Since Duluth was the first large Minnesota city to enact a smoke-free ordinance, its ordinance process was watched with interest and concern by officials in other cities and counties throughout the state that were considering smoke-free regulation. The Duluth experience served as a cautionary tale for those public health professionals and policymakers who were inclined to underestimate the amount of time and work it would take to enact a smoke-free ordinance, the intensity and resourcefulness of the opposition, and the ease with which the law could be implemented.

The long drawn out smoke-free ordinance process created issue fatigue on both sides. Some informants believed that the issue took up so much of the city councilors' time that they began to resent it. "What, are we STILL talking about this? . . . There are absolutely other important issues.' It'd be like 2 hours, now 4 hours on that smoking thing. It just didn't go away. It wasn't like you'd sign a bill and that was it. Or fixed the sewer and the neighbors go back. It just took so much time. I don't think it ended up being productive. It took its toll on everyone – supporters and opponents. You could see that glaze in their eyes. Fatigue."

The smoke-free advocates often found themselves learning the art of political compromise as they

went along. Since smoke-free regulation was a relatively new issue at the time and policymakers tend to fear the unknown, Duluth's first "compromise ordinance" was a masterpiece of equivocation. In one informant's view, more seasoned advocates would have approached the City Council with a game plan rather than leaving so much in the hands of the city councilors. Still, as others pointed out, the entire smoke-free ordinance campaign process was new to almost all of the parties involved, and both sides learned from each other as time went on. Also, as more communities throughout the state and nation joined the smoke-free movement, Duluth policymakers began to view the public health advocates as a political force, respect their position, and see smoke-free regulation as a viable campaign issue.

### **Regional and Socio-Political Issues**

Several informants mentioned that one of the key political issues raised by opponents during the ordinance campaigns was the prospect of Duluth losing business to adjacent communities that were not smoke-free. Opponents would talk about the unlevel playing field created by the ordinance and how it would result in restaurant patrons flocking to Superior, southeast of Duluth, and bowlers flocking to Hermantown, north of Duluth. Yet once Duluth passed its ordinance, this regional issue slowly faded away. There was simply no evidence to suggest that any flight of customers was taking place.

A few informants did raise socio-political issues as possible obstacles in the ordinance process. One cited "Minnesotan niceness" – the tendency to be polite

and not want to impose one's personal preferences on someone who wants to sit in a bar and smoke – as a reason for many Duluth citizens resisting the smoke-free ordinance at least at first. According to this informant, many Duluth residents might not like secondhand smoke, but saw it more as a nuisance and inconvenience than a serious health risk. (The U.S. Surgeon General's report on the hazards of secondhand smoke was released in 2006, several years after the Duluth campaigns took place.) The same informant suggested that the smoke-free debate in Duluth became a social class issue because the "town is extraordinarily divided along class lines" with the "East the wealthier part of town and the West the more working class part of town." In his perspective, "the issue was seen as being principally pushed by white middle class folks," and many folks who may have supported smoke-free bars, voted against them in sympathy and solidarity with the "working class bar crowd." The City Council was also very sensitive to the concerns of their working class and labor constituents – a group (according to this informant) that the smoke-free advocates failed to cultivate in Duluth.

In many ways, Duluth's long journey to smoke-free regulation was a product of the times. Since 2000, when Duluth first took up this issue, hundreds of communities across the United States have successfully passed smoke-free ordinances. Yet even though Minnesota passed a statewide smoke-free law in 2007, cities and counties throughout the state, and elsewhere in the U.S., can continue to benefit from the experiences of Duluth's public health pioneers and their epic struggle to pass the most effective and comprehensive smoke-free law in their community.

## Endnotes

- 1 Theodore Tsoukalas & Stanton Glantz, *The Duluth Clean Indoor Air Ordinance: Problems and Success in Fighting the Tobacco Industry at the Local Level in the 21<sup>st</sup> Century*, 93 AM. J. PUBLIC HEALTH 1214-21 (2003).
- 2 Minnesota Sea Grant, *Superior Pursuit: Facts About the Greatest Great Lake*, University of Minnesota (2005), available at [www.seagrant.umn.edu/superior/facts](http://www.seagrant.umn.edu/superior/facts).
- 3 See official Duluth website, available at [www.ci.duluth.mn.us/city/mainpage](http://www.ci.duluth.mn.us/city/mainpage).
- 4 See *Duluth Facts*, available at [http://www.visitduluth.com/general/duluth\\_facts.php](http://www.visitduluth.com/general/duluth_facts.php).
- 5 U.S. Census Bureau, *Population Estimate for Duluth, Minnesota* (2008), available at <http://www.census.gov> (in “Population Finder,” type Duluth, Minnesota, then follow hyperlink). See also *Duluth Facts*, available at [http://www.visitduluth.com/general/duluth\\_facts.php](http://www.visitduluth.com/general/duluth_facts.php).
- 6 St. Louis County supported Bush over Gore in 2000, but switched in the 2004 election to support Kerry over Bush. *Dave Leip’s Atlas of U.S. Presidential Elections*, available at <http://uselectionatlas.org>.
- 7 DULUTH, MINN. CITY CHARTER, Ch. II; Ch. III.
- 8 DULUTH, MINN. CITY CHARTER, Ch. VII, § 51 - 52.
- 9 Coalition members included the American Lung Association, the American Cancer Society, the American Heart Association, hospital and medical groups, and Duluth public schools.
- 10 City councilors belatedly realized they had accidentally omitted restaurants with liquor licenses.
- 11 Councilor Ken Hogg, quoted by Baird Helgeson, *Council Revamps Smoking Ban*, DULUTH NEWS TRIBUNE, March 20, 2001.
- 12 Baird Helgeson, *Duluth Delays Smoking Ban Vote*, DULUTH NEWS TRIBUNE, April 32, 2001.
- 13 Opponents to the Duluth ordinance expressed a range of views, calling the ordinance “ominous and unfair – an infringement on personal liberties, a reincarnation of Prohibition, an affront to smokers distressed by their addiction to nicotine, an assault on free enterprise, and a cause of competitive disadvantage since all food service businesses are not regulated equally.” Dr. Terrence Clark, *Surgeon General’s Report Bolsters Smoke-Free Ordinance*, DULUTH NEWS TRIBUNE, April 6, 2001.
- 14 Baird Helgeson, *Smoking Ban’s Fate Falls to City Council*, DULUTH NEWS TRIBUNE, May 28, 2001.
- 15 Baird Helgeson, *Smoking Ban Lights Up Again*, DULUTH NEWS TRIBUNE, April 10, 2001. As an example of the craziness of the situation, the City Council denied an exemption request in May by the owner of a restaurant (the Duluth Grill) that was not yet open, based on economic harm to a predecessor restaurant that had closed. The owner, the Duluth Mayor’s former campaign manager, had closed a restaurant that could have applied for an exemption, and then sought an exemption for the unopened restaurant. After the City Council denied the exemption on the ground that exemptions were not intended to be transferable, the Mayor vetoed the Council’s decision. A frustrated City Council protested that the Mayor could not veto a “No” vote and turn it into a “Yes” vote, and overrode the mayoral veto – rejecting the Duluth Grill’s exemption request.
- 16 Baird Helgeson & Chuck Frederick, *Duluth Smoke Ban Adds Muscle*, DULUTH NEWS TRIBUNE, June 7, 2001.
- 17 Larry Oakes, *Duluth Smoking Ban on Ballot Again*, STAR TRIBUNE, Nov. 3, 2001.
- 18 The ballot questions were: (1) Should Duluth’s present smoking ordinance (No. 9448) continue to remain in effect? (Article VII, Chapter 28, Duluth City Code) (2) Should the amendments made to Duluth’s smoking ordinance which place enforcement responsibilities on restaurant owners and eliminate exemptions from the smoking ordinance in 2003 be allowed to take effect? (Amendments were passed on May 29, 2001 as Ordinance No. 9490).
- 19 Under the current ordinance, hardship exemptions expired on April 1, 2003.
- 20 Pat Faherty, *City May Help Businesses Hurt by Smoking Ban*, Duluth.com newspaper, Feb. 27, 2002.
- 21 Baird Helgeson, *Smoking Ban Has Strong Support*, DULUTH NEWS TRIBUNE, Feb. 17, 2003.
- 22 The first reading of the amendment was November 24, 2003; the second reading and approval was December 1, 2003.
- 23 DULUTH MINN. CITY CHARTER, Ch. VII, § 51.
- 24 See Kerry Cork, Public Health Law Center, *Going Smoke-free in the Land of Lakes: Law and Politics in Minnesota Smoke-free Campaigns – The Fargo/Moorhead Story* (2010).

# The Beltrami County Story

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*This case study covers events that transpired in the smoke-free campaigns in Beltrami County, Minnesota between 2000 and 2006. It was written as one of seven case studies under a ClearWay Minnesota<sup>SM</sup> research grant to study legal and political obstacles to smoke-free regulation in seven geographically diverse Minnesota regions.*

## Overview of Beltrami County

Beltrami County is a region in the North Woods of Minnesota that covers 2,500 square miles of lush state forests of pine and birch, as well as the largest lakes in the “Land of 10,000 Lakes.” The area includes portions of two Indian reservations, Red Lake and Leech Lake. Sparsely populated, the county has roughly 43,835 residents in 86 townships – roughly 16 people per square mile (compared to 62 people per square mile in the state at large).<sup>1</sup> Approximately 18 percent of Beltrami County residents are Native American. The county’s recent political demographics tend to be split fairly evenly between liberal and conservative.<sup>2</sup> In the 2000 presidential elections, a sizable minority of county residents voted for the Green (Independent) party, suggestive of the strong libertarian streak in the populace.

Beltrami’s county seat is Bemidji (“First City on the Mississippi”), birthplace of the legendary lumberjack Paul Bunyan and Babe the Blue Ox, whose exploits are commemorated with large statues on the shore of Lake Bemidji. The city is within a 35-mile radius of 400 fishing lakes, with lovely names such as Lake Winnibigoshish, Blackduck Lake, Kitchie Lake, Big Wolf Lake, and Lake Plantaganet. The city of Bemidji itself is an Ojibwa name meaning “lake with cross water.” The city, and surrounding county, is steeped in Native American culture, legends and folklore. It is a beautiful region of untouched woods and independent-minded, hardworking residents – the only predominantly rural region in the seven Minnesota regions studied.<sup>3</sup> Beltrami County’s main industries include manufacturing, primarily timber and wood products, the retail trade, and tourism.

## Telling the Story

### The County Board: Round One

This story is about the first smoke-free ordinance in a rural Minnesota county. The saga begins back in October 1999, when Blue Cross Blue Shield of Minnesota set up a pilot program, called the Minnesota ACTS project, to reduce youth tobacco use in the state. The project targeted Bemidji because of its higher than average smoking rates.<sup>4</sup> In January 2000, the Beltrami Tobacco Education Awareness Movement, or “B-Team,” was established to continue the pilot to reduce youth tobacco use on a countywide basis, and to create smoke-free environments in Beltrami County.<sup>5</sup>

From 2000 through 2002, the B-Team gave dozens of presentations throughout Beltrami County on the dangers of secondhand smoke, and sponsored several school-based activities. Many Bemidji State University health students were heavily involved in these events.

On May 7, 2002, the Beltrami County Board of Commissioners met in Bemidji to begin initial discussions about the possibility of a countywide smoke-free ordinance.<sup>6</sup> The Board asked the county attorney to draft a smoke-free ordinance for Beltrami County that would follow the Olmsted County model, which Olmsted had just passed in November 2001. Olmsted’s new law prevented smoking in restaurants and bar areas of restaurants, unless they were separately ventilated. As in Olmsted, the issue of a possible referendum was raised, and the county attorney pointed out that Beltrami could not hold a referendum on the smoke-free issue because state law has no provision for a countywide ballot question on a public policy issue at taxpayer expense.<sup>7</sup>

Nine weeks later, on July 16, the County Board met in rural Grygla to review the draft ordinance. The proposed ordinance prohibited smoking in restaurants, but included an exemption for bars where food sales were less than 50 percent of an establishment’s gross

revenue, as well as an exemption for bars connected to restaurants if they were separated by a wall and had a negative flow ventilation system. Also at this meeting, Commissioners asked that the draft ordinance include an exemption for restaurants with separate, ventilated smoking areas. Finally, they expressed concern about a B-Team sponsored telemarketing campaign in support of the ordinance, which overwhelmed their offices with phone calls and backfired politically by fueling commissioner resentment.

For an ordinance to pass in Beltrami County, the Board of Commissioners needed to hold three readings, along with one public hearing, which usually is at the second reading. Between September and October 2002, the Beltrami County Board held three public readings of the proposed smoke-free restaurant ordinance. At the first reading, on September 3, 2002, the Board voted to drop the exemption for separate smoking rooms. A commissioner asked the County Attorney about the responsibilities of the County Board of Health, and the County Attorney pointed out that the County Board, acting as an arm of the Board of Health, has the authority and responsibility to impose regulations to protect public health. The motion to accept the first reading was unanimously carried.

On October 1, 2002, the second reading of the ordinance was a public hearing as well. Again, the county attorney was asked why the smoke-free ordinance issue could not be placed on a ballot, and again he explained that, unlike many Minnesota cities (such as Duluth), counties do not have the authority to put this issue to a vote. The commissioners then asked the county attorney to provide them with more economic data on seasonal and rural areas and on which bars in the area account for 50 percent of their revenue in food sales. They wanted to know how many establishments would be affected by the ordinance. They then unanimously voted to accept the second reading.

On October 15, 2002, at the third and final reading of the proposed ordinance, the public was allowed to testify (even though this was not an official “public hearing”). One individual warned of a constitutional challenge if the ordinance passed. (This same individual later sued the county on this and other grounds.) A discussion ensued about the minimum percentage of food sales needed for exemption, as

well as the impact on small rural restaurants and bars. The Board could not reach consensus on these issues, and finally, to the great disappointment of the advocates, the commissioners voted 4-1 to table the ordinance. “We need those people whose businesses are going to be affected to be at the table,” said one commissioner. “We need to have time to go through this with other folks and develop an implementation strategy.” The commissioners then spoke of putting together a committee that would meet with restaurant and bar owners to structure clarifying language for the ordinance. Unfortunately, it would be a long time before the Board agreed to take up this ordinance again. During this hiatus, no committee or task force was established and, perhaps just as significantly, the B-team lost its state funding and went largely dormant.

### **The County Board: Round Two**

More than a year and a half passed before the County Board put the smoke-free ordinance back on the table again. In January 2004, the B-Team received new funding from the Minnesota Department of Health, hired an executive director, and resumed its Smoke-free Environments Committee meetings.<sup>8</sup> On March 16, 2004, at a working group meeting, the Board again proposed the formation of a task force, this time to study the need for a smoke-free ordinance.

In the spring of 2004, the County Board developed a new general policy for drafting ordinances. The impetus for this new policy was at least partially due to the length of time the Beltrami County smoke-free ordinance had been on the table with no action taken.<sup>9</sup> Because of the lack of a quorum at the June 1 meeting, discussion of the ordinance and the new ordinance creation policy was put on hold until June 15.

On June 15, 2004, the County Board held a public hearing on the need for a county smoke-free ordinance. The B-Team presented health information and a professor of public health at Bemidji State University presented the results of a community health class survey of restaurant and bar owners and employees. The majority polled favored eliminating smoking in the hospitality industry. Also at this meeting, the commissioners asked the county attorney if the County Board had the authority to enact a smoke-free ordinance and he assured them that commissioners, serving as the County Board

of Health, had the power to address employee and public health. Following this discussion, the County Board voted 3-2 to pursue a comprehensive smoke-free law in all public places and places of work in Beltrami. This would be the most restrictive smoke-free law in the entire state. The Board asked the county attorney to draft another ordinance – but this time, a far more comprehensive ordinance than the one initially proposed, which was limited to bars and restaurants. At the same time, the Board adopted the “new ordinance” drafting policy, which required three readings and a public hearing before any ordinance was passed.

On July 6, 2004, the County Board met to review the draft ordinance before deciding how to proceed. The commissioners disagreed on whether their June 15 vote was to move ahead with an ordinance or to explore the possibility of an ordinance. Eventually, the commissioners agreed to form a task force to study the draft ordinance. They selected members of the task force, which consisted of representatives from the hospitality industry, the B-Team, and Bemidji physicians, with an unbiased facilitator. The Board commissioned the task force to review the ordinance and recommend a compromise ordinance by August 3. (The ordinance was apparently put on a fast track because on September 3, one of the commissioners who supported the smoke-free law was resigning her post and the smoke-free proponents on the Board would lose their majority. Also, statewide interest in smoke-free regulation was high, since several communities in the seven-county Twin Cities metro area were adopting smoke-free ordinances at this time.)

A few weeks later, the Beltrami smoke-free task force voted in favor of a compromise smoke-free ordinance (with two task force members abstaining). The “compromise” prohibited smoking in all indoor public places and workplaces, with a temporary exemption allowing smoking in bars and restaurants between 8 p.m. and 3 a.m. The exemption would be dropped as of January 2007. The idea behind the compromise was to give bar and restaurant owners time to adjust to the smoke-free law. Also, the compromise included a provision that the Board review the ordinance within 60 days of the state’s passage of smoke-free legislation.

On August 3, 2004, the task force presented its compromise ordinance to the Board of

Commissioners. Ironically, neither side was happy with the “compromise” of delayed implementation. Opponents pointed out that the ordinance was very similar to the one that the Board had initially proposed and tabled. Supporters pointed out that the delay in implementation was too long. The Board accepted the compromise ordinance anyway.

The Board then voted 3-2 to resurrect the previous ordinance (tabled in October 2002), and to consider the compromise ordinance an upgrade of this earlier ordinance. Since two readings and one public hearing had already been held on the earlier ordinance, only one more reading was required before the ordinance could be approved. Even so, the Board decided to hold another public hearing, prior to the third and final reading, and encouraged the public to attend.

On August 10, 2004, the Board held a three-and-a-half hour long public hearing on the compromise ordinance. An overflow crowd of more than 150 people poured into the Beltrami County Lakeside Service Center to listen to fellow citizens attempt to persuade the Board to approve the smoke-free ordinance or quash it. Twenty-two speakers testified in favor of the ordinance and twenty-six testified against it.

One week later, on August 17, Beltrami County’s two-year effort to pass a countywide smoke-free ordinance finally paid off. After the third reading of the compromise ordinance, the Board of Commissioners successfully passed the Beltrami County Smoke-free Ordinance for Indoor Public Places and Places of Work. A last-minute amendment to the ordinance included a provision to allow bars and restaurants to construct separate “smoking rooms” – enclosed rooms separate from the non-smoking area and with ventilation systems maintaining a negative air pressure. The law was to go into effect on January 1, 2005, with other exemptions to expire on January 1, 2007 (for example, restaurants and bars between the hours of 8 p.m. and 3 a.m., hotel/motel rooms, resorts and dormitories).

### **The *Pro Se* Lawsuit**

Although the ordinance was adopted on August 17, 2004, a group of bar owners waited until December 29, just two days before the ordinance was to be enacted, to file a complaint *pro se* (“by oneself”) in U.S. District Court, seeking a temporary restraining

order against the Beltrami County smoke-free ordinance.<sup>10</sup> The lead plaintiff, Adam Steele, described himself in the Complaint as “a smoking taxpaying resident of Beltrami County.”<sup>11</sup> He and his fellow plaintiffs argued that the ordinance violated the rights of smokers and business owners under the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution and alleged nine causes of action.<sup>12</sup> The lawsuit asked for \$8 billion in damages for deprivation of constitutional rights and \$2 billion in punitive damages from Beltrami County. On December 30, 2004, U.S. District Judge Joan Erickson denied the temporary restraining order, concluding that the plaintiffs failed to demonstrate how they would be irreparably harmed if a temporary restraining order were not issued. The next month, the plaintiffs moved for a preliminary injunction, which the court denied on March 7, 2005.

At this point, the defendant Beltrami County moved for summary judgment. On June 27, 2005, the U.S. District Court granted summary judgment on claims 1, 2, 3, 4, and 7 and dismissed the remaining state claims (5, 6, 8 and 9) without prejudice. On July 29, 2005, the plaintiffs retained counsel and appealed the summary judgment of claims 1, 4 and 7 to the U.S. Court of Appeals, 8<sup>th</sup> Circuit. Their appeal was based largely on the allegation that the ordinance violated their constitutional right to smoke, and specifically, their rights under the Fourth, Fifth, Ninth and Fourteenth Amendments.

On June 7, 2007, the Eighth Circuit U.S. Court of Appeals affirmed the District Court’s ruling of summary judgment in favor of Beltrami County. The Court upheld the constitutionality of Beltrami County’s smoke-free ordinance, ruling that there is no constitutional right to smoke and that business owners have no constitutional right to control smoking policies on premises they have opened to the public. The Court said its legal research had found there is “no relevant authority supporting these rights under any theory.”<sup>13</sup>

On September 18, 2007, the dogged Adam Steele and his fellow plaintiffs filed a petition for writ of *certiorari* in the U.S. Supreme Court, asking the Court to rule on the constitutionality of the Beltrami County ordinance. On November 13, 2007, the Court denied *certiorari*.

## Since 2006

Beltrami County’s smoke-free ordinance went into effect on January 1, 2005. Two years later, the ordinance exemptions expired that allowed smoking in Beltrami County restaurants and bars from 8 p.m. to 3 a.m., and in the guest rooms of hotels and motels, in rented or leased cabins at resorts and college dormitory rooms.

On May 16, 2007, Governor Tim Pawlenty signed Minnesota’s statewide smoke-free legislation (Freedom to Breathe Act of 2007), which prohibited smoking in all public places in Minnesota. The law went into effect on October 1, 2007. The main differences between the Beltrami County ordinance and state law were that (1) Beltrami County allowed smoking rooms; the state did not. When the state law went into effect, smoking rooms were no longer allowed; and (2) Beltrami County prohibited smoking in hotel/motel rooms; the state did not. The County could choose to keep this restriction.

On July 17, 2007, as stipulated in its ordinance, the Beltrami County Board met to review the smoke-free ordinance in light of the state legislation, which was adopted into law 60 days earlier. The Board’s options were to do nothing; to repeal the ordinance (effectively adopting state law); or to amend the ordinance to adopt state law as the minimum and to add stricter provisions where necessary. The commissioners decided to amend the ordinance to make it more restrictive than state law, by including stricter penalties for violations of the ordinance than the state. They also continued to prohibit smoking in hotel/motel/dorm rooms and resort cabins. Also under consideration was a proposal to link the county liquor licensing law with the smoke-free ordinance. The idea here was to provide a means to penalize bar owners who allow patrons to smoke in their establishments by suspending or revoking their liquor licenses.

It had been a long five-year battle, but Beltrami County was once again ahead of the pack, with smoke-free proposals even more restrictive than state law. The independent rural county up in Minnesota’s North Woods country was continuing to make headlines.

## Reviewing the Beltrami County Story

### Analysis and Findings

Beltrami County was the second Minnesota county to pass a smoke-free ordinance, but it was the first rural region in the state to tackle this issue successfully. Its accomplishment is also notable given the unusual nature of the ordinance approval process, with a year and a half hiatus in the midst of ordinance readings. Throughout this long campaign, the commitment of the Beltrami public health community, including the B-Team and other smoke-free advocates, never flagged.

Unlike other regions in our study, advocates made no concerted effort to pass an ordinance at the city level. A majority of Bemidji City Council members opposed a smoke-free ordinance. Moreover, as in Olmsted County, the Beltrami County Board of Commissioners served as the County Board of Health, with a mandate to protect public health.

The County Board's inability to reach a consensus drove its decision to table the ordinance in 2002, after two readings and a hearing. Political considerations also drove the Board's decision to revive the ordinance process in 2004, set up a task force, and rush to approve a compromise ordinance. In the meantime, the legal challenge to the constitutionality of the smoke-free ordinance proceeded through the courts – a perpetual reminder of the lengths to which some Beltrami residents were willing to go in opposing this law.

The key legal and political obstacles in the Beltrami County smoke-free campaign from 2000 to 2004 fall into three categories:

1. Protracted Timeline
2. Task Force Process
3. Legal Challenge

#### Protracted Timeline

The protracted approval process for Beltrami County's smoke-free ordinance was largely the result of an evenly split Board of Commissioners – two supporters, two opponents, and an uncommitted Board Chair, with a fairly libertarian bent, who held the swing vote. Although the County Board, as Board of Health, took its responsibility to

protect health seriously, and although the tobacco control organizations, including the American Lung Association, the American Cancer Society, the public health community, the local school system, and the B-Team, collaborated effectively within the county and were supportive of ordinance efforts, the political reality was that the Beltrami County Commissioners were at a standoff in 2002.

On October 15, 2002, in the midst of the third reading of the proposed ordinance, a discussion arose over how to define “bars” and “restaurants.” No one could agree on what the minimum percentage of food sales should be to enable an establishment to qualify for an exemption from the smoke-free ordinance. The Board Chair then tabled the ordinance to allow the Board time to form a committee (or Task Force) to define the language. Still, since a year and a half passed before the formation of a Task Force, the Board's tabling of the ordinance may have been less about crafting definitions and more about seizing an opportunity to delay the vote until a consensus of policymakers could be reached. One informant, expressing what he suspected was the hope of many commissioners at this time, said he was banking on the state legislature coming to its senses in the meantime and passing a statewide law. That would have relieved local policymakers from taking on this task.

Some informants decried what they considered the County Board's tactical move in 2002 to avoid making a difficult political decision. They pointed out that it was a challenge for the B-team and other advocates to regain momentum in the campaign after an eighteen-month hiatus, and to reengage community supporters.

#### Task Force Process

Once the County Board decided to revive the smoke-free ordinance in July 2004, it set up a task force with representatives from both sides of the smoke-free issue to draft a “compromise” ordinance. This process could easily have backfired and ended up in a standoff between smoke-free advocates and the business communities. Nevertheless, throughout the state the tide was turning. It had been almost three years since the Olmsted County Board of Commissioners had passed Minnesota's first county-wide ordinance. Other municipalities around the state were considering similar smoke-free laws.



The Board-appointed task force took its commission seriously and put the ordinance on the fast track. As a result, the approval process accelerated. Readings and hearings that took four months in 2002 took approximately 5 weeks in 2004. What enabled the Board to rush the approval process along was its decision to view the substantially revised “compromise ordinance” as an upgrade to the original ordinance, rather than as a new ordinance. The Beltrami County charter required three readings and one public hearing to pass an ordinance. Technically, the compromise ordinance could have passed with only one additional reading. Instead, the Board decided to hold an additional public hearing for the ordinance.

Some opponents viewed a supportive commissioner’s pending retirement as driving the expedited ordinance review process. Regardless of the motive behind the faster approval process, it is worth noting that the end process resulted in two fewer readings of what was arguably a different ordinance. Had the ordinance been considerably less restrictive, labeled an “upgrade to the existing ordinance” and then approved in one reading, this task force process could have proved a significant obstacle.

### Finding

Although the use of an “advisory study group” or “task force” can prolong the ordinance process, it can also help ensure the eventual adoption of a proposal.

### Legal Challenge

The *Steele v. Beltrami County* lawsuit, first filed in U.S. District Court at the end of December 2004, was typical of many legal challenges to local smoke-free ordinances at this time. The plaintiffs, representing themselves in the initial litigation, included in their Complaint any cause of action they could apparently think of, regardless of merit, in an effort to delay, disable, and defeat the ordinance. Although few Minnesota ordinances had been legally challenged back in 2004, such lawsuits were becoming increasingly common around the U.S. Many of these cases were based on the same constitutional claims raised in *Steele*, such as takings and privacy arguments.<sup>14</sup>

The Takings Clause of the Fifth Amendment provides that no private property may be taken for public use without just compensation. Steele’s initial complaint alleged that Beltrami bars and restaurants would be unreasonably restricted as a result of the smoking prohibition – victims of a partial regulatory taking. Such a taking may occur if the ordinance prevents property owners from some economic use of their property, depending on the state interest at stake and the level of governmental intrusion.<sup>15</sup>

Neither the U.S. District Court nor the U.S. Court of Appeals for the Eighth Circuit found merit in the *Steele* takings claim. Their rulings were consistent with those of courts in other jurisdictions where takings arguments have been raised in challenges to smoke-free laws.<sup>16</sup> In 2004, for example, the State Supreme Court of Kentucky upheld a takings challenge to a comprehensive smoke-free ordinance in Lexington, stating categorically that “Where public interest is involved, it is to be preferred over property interests even to the extent of destruction if necessary.”<sup>17</sup>

The *Steele* plaintiffs also alleged that the Beltrami County ordinance violated their constitutional right to privacy, as guaranteed by the Fourth, Fifth, and Ninth Amendments. Above all, they alleged that they had a constitutionally protected right to smoke, and to permit smoking, in any place at any time. The 8<sup>th</sup> Circuit Court of Appeals dismissed these claims, pointing out that the plaintiffs cited no law supporting their assertions, and declining their apparent invitation to create such rights.

Legal challenges to smoke-free laws often claim that the laws infringe upon a specially protected constitutional liberty or privacy right. People who make such claims usually rely on two arguments (1) that smoking is a personal liberty protected by the Due Process Clause; or (2) that the Equal Protection Clause extends special protection to smokers as a group. Smoking, however, is not a specially protected liberty right under the Due Process Clause and smokers are not a specially protected category of people under the Equal Protection Clause of the Constitution. In dismissing the *Steele* claims of constitutional protection, the Appeals Court cited the District Court in another tobacco-smoking controversy – a thirty-year-old Louisiana case where supporters of smoke-free legislation urged the creation of a constitutional right to be free from tobacco smoke in state buildings:

[T]he United States Constitution does not provide judicial remedies for every social and economic ill. For the Constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of and to engage in that type of adjustment of individual liberties better left to the people acting through legislative processes.<sup>18</sup>

Although Beltrami County public health officials and lawyers did not consider the *Steele* lawsuit a serious threat to the County's ordinance, the ongoing litigation (which only ended with the U.S. Supreme Court's denial of *certiorari*) served as an asterisk beside the county's law. Legal challenges to smoke-free laws,

such as the *Buffalo Wild Wings* challenge in Fargo, often disappear quietly, or as the *Steele* challenge in Beltrami, die the death of a thousand cuts. At times these lawsuits weaken, compromise, or delay a smoke-free ordinance, and can often distract the parties from more important issues. What these lawsuits rarely do is prevail.

### **Finding**

Even frivolous legal challenges to a smoke-free ordinance can be expensive and time-consuming to address and can divert public attention from the merits of the legislation.

## Endnotes

- 1 U.S. Census Bureau, *Population Estimate for Beltrami County, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Beltrami County, Minnesota, then follow hyperlink).
- 2 In the 2000 presidential election, Beltrami County residents supported the Republican candidate, and in the 2004 presidential election, they supported the Democratic candidate. Epodunk.com, Beltrami County, MN: Political info, available at <http://www.epodunk.com/cgi-bin/politicalInfo.php?locIndex=20848>.
- 3 In 2005, the Beltrami County population was 31 percent urban and 69 percent rural. Beltrami County – Minnesota, [http://www.city-data.com/county/Beltrami\\_County-MN.html](http://www.city-data.com/county/Beltrami_County-MN.html).
- 4 In a survey of 600 households in the Bemidji area, 92 percent believed teen tobacco use was a moderate or serious problem. Robby Robinson, *B-TEAM Seeks to Cut Smoking*, THE PIONEER, May 9, 2001.
- 5 Organizations represented on the B-Team included the American Cancer Society, American Lung Association, Bemidji City Attorney’s Office, Beltrami County courts, Bemidji High School, Bemidji Police Department, Beltrami County Area Service Cooperative, Beltrami County Attorney’s Office, Beltrami County Public Health, Bemidji Middle School, Bemidji State University, Evergreen House, Girl Scouts of America, Indian Health Service, KAWE-TV, Minnesota Department of Corrections, North Country Regional Hospital, Merit Care Clinic, and the Minnesota National Guard.
- 6 The Beltrami County Board of Commissioners consists of 5 members, elected by district, each serving 4-year terms.
- 7 See MINN. STAT. §375.20 (1986).
- 8 In addition to Minnesota Department of Health grants, the B-Team received funding from Blue Cross/Blue Shield Foundation, North Country Health Services Foundation, Northwest Minnesota Foundation, First National Bank Foundation, Nielson Foundation, Beltrami Area Service Collaborative and Bemidji area service organizations.
- 9 The draft policy outlined a “core policy that a county ordinance would be the last resort in any sort of regulatory action.” The Policy allowed the Board to “formally create an ad hoc committee to prepare recommendations if it determines the need for an ordinance. It may include a member of the County Board, county staff, or persons, organizations, business and other who may be directly impacted by the issue or the potential ordinance.” The committee’s goal was “to seek to understand interests and concerns expressed by committee members and to seek compromise and consensus related to the development of ordinance language.” The policy also provided for public hearings to determine if an ordinance were needed.
- 10 *Steele v. Beltrami County*, No. 04-5109, slip op. (D. Minn. Mar. 7, 2005).
- 11 Adam Steele is the Bemidji tabloid publisher of *The Northern Herald*, and has been an unsuccessful candidate for a House of Representatives seat eight times, running every two years since the 1990s, as a Republican, a Democrat, a Reform Party candidate and an Independence Party candidate.
- 12 The plaintiffs claimed (1) violation of the right to be secure in person and effects under the Fourth Amendment, when one is a guest upon private property of another; (2 and 3) the unreasonable restriction of use of private property invoking the “takings” clause of the Fifth Amendment; (4) violation of the right to be secure in person and effects under the Fourth Amendment, related to business property; (5) the County Commission vote was unlawful, because one of the Commissioners had moved; (6) the ordinance was arbitrary and unreasonable; (7) the County Board acted beyond the scope of its authority in restricting lawful private activity upon publicly-owned premises, in conflict with the Ninth Amendment; (8) preemption by the State; and (9) subterfuge, in that the ordinance’s intent was actually to reduce smoking.
- 13 *Steele v. Beltrami County*, No. 05-3154, 2007 U.S. App. LEXIS 13513 (8<sup>th</sup> Cir. June 7, 2007).
- 14 See Samantha K. Graff, *There Is No Constitutional Right to Smoke*, Tobacco Control Legal Consortium: 2008 (2008); Cheryl Sbarra, *Legal Authority to Regulate Smoking and Common Legal Threats and Challenges*, Tobacco Control Legal Consortium: 2009 (2009).
- 15 *D.A.B.E., Inc. v. City of Toledo*, 292 F.Supp.2d 968, 971 (N.D. Ohio 2003).
- 16 See *id.*
- 17 *Lexington Fayette County Food and Beverage Ass’n v. Lexington-Fayette Urban County Gov’t*, 131 S.W.3d 745, 752 (Ky. 2004).
- 18 *Gaspar v. Louisiana Stadium and Exposition Dist.*, 418 F.Supp. 716, 718-22 (E.D. La. 1976), *aff’d*, 577 F.2d 897, 899 (5<sup>th</sup> Cir. 1978).

# The Mankato/North Mankato Story

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*This case study covers events that transpired in the smoke-free campaigns in Mankato and North Mankato, Minnesota between 2000 and 2006. It was written as one of seven case studies under a ClearWay Minnesota<sup>SM</sup> research grant to study legal and political obstacles to smoke-free regulation in seven geographically diverse Minnesota regions.*

## Overview of Mankato and North Mankato

The City of Mankato is nestled at a bend of the Minnesota River where it meets the Blue Earth River in south central Minnesota. Popular legend has it that the city was originally named “Mahkato” or “greenish blue earth” — the name given to this site by its original settlers, the Dakota Indians. European settlers adapted this name in designating the surrounding area Blue Earth County. The name is apt: the area’s rich loam, silt and clay make it one of the most fertile farming regions in the United States.

The Minnesota River divides Mankato, county seat of Blue Earth County, from its sister city, North Mankato, located in neighboring Nicollet County. Mankato is the larger of the two cities, with a population of 36,248.<sup>1</sup> It is known for its lovely parks, wooded trails, rivers, ravines, bluffs, and natural prairies, as well as its highly ranked educational system, cultural activities, corporate facilities, and recreational areas, and is often cited for its quality of life.<sup>2</sup> Mankato’s primary industries are manufacturing, health care, education, services and retail. Across the Minnesota River to the northwest lies the smaller community of North Mankato, with a population of approximately 12,530.<sup>3</sup> North Mankato is one of only two statutory cities in our study; the other cities are all home rule charter municipalities.<sup>4</sup> North Mankato’s primary industries are manufacturing and services.

Based on presidential electoral results, Mankato voters tend to be slightly more liberal than conservative, while North Mankato voters tend to be split evenly between the two major parties.<sup>5</sup> Located about 75 miles southwest of Minneapolis and St. Paul, the Mankato/North Mankato region has been described as “A little Twin Cities. A lot Minnesota.”

## Telling the Story

### The Mankato Campaign – Stage 1

This story is about a smoke-free campaign in one city, where timing was often driven by the prospect of activity in a second city. The neighboring cities of Mankato and North Mankato, while viewed by many in the outside world as “Greater Mankato,” are two decidedly independent, even competitive communities. Given their municipal and city council dynamics, passing a regional smoke-free ordinance in tandem was not a realistic option for the two cities. Throughout most of the Mankato campaign, North Mankato remained largely uninvolved – a holdout whose intransigence at times affected the progress of events across the Minnesota River.

The story begins back in 1999, when a few tobacco control advocates working on a volunteer basis asked the Mankato City Council to consider passing a smoke-free workplace ordinance.<sup>6</sup> Few Minnesota communities had passed smoke-free policies at the time, and little data was available to rebut concerns about the economic effect such policies might have on businesses. In sum, the City Council was not supportive. The advocates then decided to focus their energies on educating Mankato residents and business owners about the dangers of secondhand smoke in an effort to encourage businesses to establish smoke-free workplaces on a voluntary basis.

A few years later, after Minnesota communities such as Moose Lake and Duluth had passed smoke-free ordinances and several other communities were seriously considering them, a group of physicians in the Mankato area decided to approach the City Council again. They persuaded the Blue Earth Medical Society to write a letter to the Mankato City Council, formally asking the Council to consider enacting a smoke-free ordinance. Again, the Council declined to act. Council members remained concerned about the negative economic impact of a smoke-free ordinance on downtown Mankato bars and restaurants.

In 2003, the physicians who supported a smoke-free ordinance in Mankato teamed up with a small group of volunteer advocates called the Mankato Area Smoke-free Coalition. By this time, Olmsted County had adopted the state's first countywide smoke-free ordinance. The Mankato advocates and physicians decided to ask the Blue Earth County Board of Commissioners to adopt a similar ordinance in Blue Earth County. Like the Mankato City Council, however, the Blue Earth County Board expressed little support for the initiative. Unlike the Olmsted Board of Commissioners, which also served as the Olmsted County Board of Health, the Blue Earth County Board did not feel compelled to take on this issue.

The smoke-free campaign in Mankato slowed down considerably until early 2004. On February 9, the Mankato City Council finally broached the idea of a smoke-free ordinance. The mayor noted that he had received several letters asking the city to enact a smoke-free law for bars and restaurants. He pointed out, however, that he believed the issue should be addressed at the county, state or federal level. Four months later, the mayor changed his mind. On July 26, 2004, the mayor announced that he would like to bring forward a smoke-free ordinance at a City Council work session the following month.

On August 9, 2004, the City Council reviewed and discussed a draft smoke-free ordinance for bars and restaurants. Although several amendments were proposed, the only amendment to pass was a provision that the Mankato ordinance become null and void if the Minnesota legislature passed a statewide smoke-free law.

The following month, the Mankato public had its first opportunity to comment on the proposed smoke-free ordinance. At a public hearing on September 13, 2004, the City Council listened to an hour and a half of testimony on the ordinance. The public testimony was familiar: medical professionals spoke of the dangers of secondhand smoke and bar and restaurant owners spoke of the negative impact the ordinance would have on their businesses. Afterwards, the Council spent a half hour discussing the ordinance. Some council members believed North Mankato and the county should be on board, or that the smoke-free law should be a state, rather than local, issue. One council member in particular, a local bar owner, strongly opposed the ordinance.

During the meeting, a motion to adopt the ordinance subject to a referendum failed; a motion to include a hardship exemption failed; a motion to change the date of compliance failed; and a motion to place the ordinance on the November 2, 2004 ballot failed. Unfortunately, a motion to approve the ordinance also failed (4-3).

While a definite setback, this turn of events did not defeat the ordinance. Under Mankato's City Charter, the City Council can adopt an ordinance after only one public hearing, following notice and publication of the public hearing at least seven days in advance.<sup>7</sup> Thus, the advocates were undeterred.

At the same time, the opponents remained active. That fall, a citizen began circulating a petition and collecting signatures for a ballot referendum opposing a smoke-free ordinance.

In February 2005, a council member who opposed the smoke-free ordinance, believing it to be a state issue, was replaced by a supportive council member. More public and political support for the ordinance was beginning to develop.

On March 28, 2005, the City Council held a second public hearing and vote on a citywide smoke-free workplace ordinance that prohibited smoking in bars, restaurants, and all other enclosed public places. Again a lively discussion ensued. Among those testifying was the citizen behind the petition drive, who reminded the City Council of the 2,300 signatures he had collected over the last several months of Mankato residents who opposed the ordinance. "I believe personal issues should be left to individuals," he said. "By voting [for the ordinance], you are intruding on an owner's private property." A motion to recuse the council member who owned a bar from voting on the issue because of his personal financial stake in the matter, failed for lack of a second. An amendment to ban sales of all tobacco in Mankato also failed.

What the City Council *did* pass (6-1) at the end of day on March 28, 2005, was a smoke-free workplace ordinance that prohibited smoking in bars, restaurants and other enclosed places. The ordinance included a temporary hardship exemption, expiring July 1, 2007, that required an applicant establishment to demonstrate a 15 percent drop in revenues related to the implementation of the ordinance. The ordinance was to go into effect July 1, 2006.

In June 2005, the petition drive for a ballot referendum to reject the ordinance was abandoned after many of the 4,400 names and addresses on the petition compiled over the last two years turned out to be invalid.

## **The Mankato Campaign – Stage 2**

In January 2006, Mankato's mayor resigned. A special election for his successor was held on January 31, with several mayoral candidates opposed to the ordinance competing, including the citizen who led the petition drive. A city council member who supported the ordinance won the election. That spring, in a campaign for the city council seat vacated by the new mayor, Mankato's smoking ordinance became an electoral issue for the first time.

In April 2006, a local group in North Mankato began plans to seek grant money to educate residents about the effect of secondhand smoke, and to bring the issue before that city's council. To date, the North Mankato City Council had not discussed the enactment of a smoke-free ordinance. That same month, during a "Public Open Forum" portion of the Mankato City Council meetings, several opponents testified against the ordinance, including the council member / bar owner.

The following month, in May 2006, the council member / bar owner proposed that the enactment of the smoke-free law be delayed one year to July 1, 2007, since the Mankato Area Smoke-free Coalition had made few efforts to date to get North Mankato and the state to pass smoke-free ordinances, as promised. The Coalition claimed it met with the North Mankato City Council as a group, and individually, but to no avail. The North Mankato City Council, a traditionally independent body, was uninterested in a smoke-free law, even though a public opinion poll conducted in July 2006 showed that 74 percent of North Mankato residents supported a smoke-free ordinance.<sup>8</sup> Although Mankato and North Mankato shared many public services, the city councils of the sister cities did not often collaborate on ventures or coordinate policies.

On May 8, 2006, the Mankato City Council held a public hearing, attended by approximately 140 people, on delaying the smoke-free ordinance's effective date until July 1, 2007. A large number of bar workers, concerned about losing their jobs, supported the

delay, and testified at the hearing. Many of these workers had signed the original petition for a ballot referendum against the ordinance. Several business owners expressed concern that a Mankato ordinance would place their establishments at a competitive disadvantage with North Mankato. They also voiced apprehension about the ordinance's effect on pending public events that would draw large numbers of outside visitors to the area.<sup>9</sup> After three hours of testimony, the City Council voted to reject a proposed amendment to delay the start of the law (4-3). At the same time, however, the Council agreed to hold a referendum on the ordinance during the November 6, 2006 general election. The referendum was to decide whether the ordinance, which was to go into effect on July 1, 2006, would stay in effect, or end on November 8, 2006, the day after the general election.

In June 2006, Mankato's medical professionals raised money to market the city as a smoke-free destination, in an effort to defuse criticism that the medical community was unconcerned about any possible economic impact the ordinance might have on local businesses. In the meantime, anticipating the ordinance's implementation, local restaurants began to construct patios for patrons who smoked.

On June 27, 2006, the U.S. Surgeon General issued an unprecedented 670-page report on the dangers of secondhand smoke concluding "The debate is over. The science is clear: Secondhand smoke is not a mere annoyance, but a serious health hazard."<sup>10</sup> This official scientific confirmation of the hazards of secondhand smoke galvanized tobacco control advocates in communities around the world. The Surgeon General's report effectively removed from the table any questions opponents might raise about the public health value of smoke-free ordinances.

Four days later, on July 1, 2006, Mankato's smoke-free ordinance went into effect. On August 1 and 2, ClearWay Minnesota (the former Minnesota Partnership for Action Against Tobacco) conducted a public opinion survey (a phone interview of 5,500 Mankato residents), which found that 58.4 percent of respondents wanted to keep the ordinance and 19.3 percent wanted to repeal the ordinance. The remaining 22 percent didn't answer or were undecided.

On August 15, 2006, to the surprise of many, the council member/bar owner who most adamantly

opposed Mankato's smoke-free ordinance resigned from the City Council, citing a desire to devote more time to his restaurants. Earlier in the year, the city attorney had ruled that the council member's ownership of two restaurants did not constitute a conflict of interest that would prevent him from voting on a smoke-free ordinance that would affect his businesses. The council member continued to oppose the ordinance, and a week before resigning, wrote the council a letter detailing the economic losses his restaurants were suffering as a result of the new law and urging the council to be more aware of the financial impact of its decisions. He had filed for re-election without a challenger and withdrew too late to remove his name from the ballot. Four write-in candidates emerged to run for his seat.

Two days later, the Mankato Area Smoke-Free Coalition released the results of a ClearWay Minnesota-funded air quality study before and after the ordinance took effect, showing an 86 percent decrease in the amount of dangerous indoor air pollutants found in bars and restaurants after the ordinance took effect. Also that August, the American Lung Association released the results of a local public opinion poll of Mankato residents conducted between July 5 and 11, 2006, which showed that 74 percent of respondents supported an ordinance.<sup>11</sup>

On October 2, 2006, the Bandana Brewery became the first Mankato restaurant to qualify for a temporary exemption from the smoke-free ordinance because of a drop in revenue related to its implementation. By October 26, fifteen Mankato bars and restaurants had received temporary exemptions.

On October 9, at a public forum, three of the four candidates vying for the retired council member's seat stated that they would vote to uphold the smoke-free ordinance in the November referendum. The fourth member also supported the ordinance. Public opinion had clearly shifted to support for the law.

On Election Day, November 7, 2006, Mankato voters were presented with the following ballot question:

“Should smoking be prohibited in public places and places of work within the City of Mankato pursuant to Ordinance No. 05-0328-5?”

The result was a resounding “Yes.” Voters approved the Mankato smoke-free ordinance 69.1 percent

to 30.8 percent ((9,780 to 4,356). The ordinance remained in effect.<sup>12</sup>

Meanwhile, over in North Mankato, residents expressed their growing interest in smoke-free environments by selecting City Council candidates who supported regulation. Of the five North Mankato candidates running for two Council seats, four supported a smoke-free ordinance. The seats were won by a supporter and an opponent of the ordinance.<sup>13</sup> Thus, even though Mankato passed a smoke-free ordinance, and saw it through a prolonged referendum process, the neighboring city of North Mankato retained its status as a holdout on local smoke-free regulation.

### Since 2006

North Mankato's reluctance to enact a smoke-free policy proved moot on May 16, 2007, when Governor Tim Pawlenty signed Minnesota's statewide smoke-free legislation (Freedom to Breathe Act of 2007), prohibiting smoking in all public places in Minnesota. The law took effect on October 1, 2007. By then, all temporary hardship exemptions granted under Mankato's ordinance had expired (as of July 1, 2007). The two sister communities in separate counties that had parted ways years ago on the smoke-free issue were now united under one statewide smoke-free law.

## Reviewing the Mankato Story

### Analysis and Findings

The Mankato story is similar to those of many communities throughout the United States where local policymakers, considering the passage of smoke-free laws, find themselves engaged in a standoff with policymakers in neighboring governments. Despite the support of many in the medical community, as well as a majority of City Council members, progress toward the Mankato smoke-free law was complicated by the desire of Mankato policymakers to see North Mankato adopt a similar smoke-free ordinance. As with other communities in our study, the prolonged timeline in Mankato, ostensibly to allow either North Mankato's City Council or the state legislature the opportunity to pass comparable laws, created difficulties. Also, as in communities such as Fargo/Moorhead, advocates with limited funds and resources found themselves working in one city and county to

promote a public health policy that opponents claimed would economically benefit a neighboring city and county. Although Mankato finally enacted its smoke-free ordinance in 2006, the protracted journey to implementation was characterized by a lot of “running in place,” waiting futilely for North Mankato to catch up with Mankato.

The key legal and political obstacles in the Mankato/North Mankato smoke-free campaigns from 2004 to 2006 can be divided into three types:

- Multi-jurisdictional Issues
- Ballot Referendum Issues
- Other Political Challenges

### **Multi-jurisdictional Issues**

Back in 2003 and 2004, when advocates first began discussing the passage of a smoke-free ordinance in Mankato, the question of North Mankato was always the elephant in the room. That the two cities were located in two different counties would have been more significant had either the Blue Earth or Nicollet County Boards expressed interest in adopting a countywide law. According to several respondents, commissioners in both counties declined to address this issue, believing it did not fall within their jurisdictions. Instead, the hope of many Mankato City Council members was that the two sister cities would pass ordinances together, or at roughly the same time. At least in theory, a regional implementation would help address the economic hardship and competitive disadvantage issues often raised by bars and restaurants in communities adopting smoke-free ordinances for the first time in a region.

In reality, however, the two cities, though geographically close, did not have a history of collaborating on public policy. They were each independent communities that took pride in maintaining separate identities. On the Mankato City Council, support for an ordinance was present but not strong in 2005; and on the North Mankato City Council, support for an ordinance was tepid at best. North Mankato was simply in no rush to implement an ordinance of its own. Although the Mankato City Council passed the city’s ordinance in 2005 and set the implementation date 15 months later to give North Mankato time to pass an ordinance, North Mankato refused to take on the issue.

In their ongoing effort to give North Mankato even more time to adopt an ordinance, several Mankato council members tried in May 2006 to postpone the ordinance’s effective date for another year (until July 2007), but this motion was narrowly defeated. Instead, the Council approved a ballot referendum on the ordinance during the November 2006 general election. Regardless of the motives of those who supported the referendum, it seems clear that the ballot measure was approved at least in part to arrive at a final decision about the ordinance and to stop the procrastination that was a hallmark of this smoke-free campaign. Much of this procrastination was directly due to concerns about the multijurisdictional issue and the desire to wait until other jurisdictions (local, county or state) adopted similar smoke-free ordinances.<sup>14</sup>

### **Finding**

Local policymakers may delay the implementation of smoke-free ordinances in an attempt to obtain regional consensus for their decision.

### **Ballot Referendum Issues**

Opponents of smoke-free ordinances often use the threat of ballot measures to pressure policymakers into compromising, weakening or delaying action on a smoke-free law. In the Mankato situation, the ballot referendum, while prolonging discussion initially, actually served the dual purpose of concluding the negotiated delay and deferred enactment of the ordinance.

In an interesting illustration of the confusion that can surround ballot measures, shortly before the election the question arose as to whether the City Council would have to comply with the results of a referendum that it placed on the ballot. The council member who introduced the resolution on May 22, 2006, asking for a public vote on the city’s smoke-free ordinance, claimed that his intent was that the referendum would be legally binding. The city manager asked the city attorney for clarification on the referendum’s status, since at least one council member was referring to the upcoming referendum as an “advisory” rather than a “binding” vote. As a result,



some citizens were unsure of the significance of their vote in the upcoming election. The city attorney acknowledged that the City Charter gave little guidance in this area. She pointed out that according to Mankato's City Charter, if a referendum is brought by the people, it is binding on the city council. If, however, it is initiated by the city council (as it was in this case), it is a nonbinding advisory referendum.<sup>15</sup>

This issue received publicity on the eve of the election after the council president posted online the city attorney's opinion regarding the effect of the pending smoke-free ordinance ballot vote. In the ensuing discussion, the city manager claimed that, regardless of whether the referendum was legally binding, it was "morally binding."<sup>16</sup> Other council members acknowledged that it would be "political suicide" for a council member to vote against the referendum's results.<sup>17</sup> Nevertheless, had voters defeated the referendum at the polls, the council would have had to go through the process of repealing the existing ordinance at a post-election meeting. Since voters approved the referendum, Mankato's smoke-free ordinance remained on the books.

### Finding

The process by which an initiative or referendum is placed on the ballot can determine whether the electoral results on the measure are legally binding or merely advisory.

### Other Political Challenges

Several respondents identified the economic hardship argument leveled by bar and restaurant owners throughout the region as a key obstacle in

the Mankato smoke-free campaign. Much of this organized opposition was led by a City Council member/bar owner, who some members felt had too much of a "personal financial stake" in the discussions. The city attorney ruled the council member's status as a bar owner created no conflict of interest with respect to his position on the Board. Still, that this question was even referred to the city attorney reflects the level of discourse and distrust at this time. The council member finally resigned from the Council in August 2006, after the initial adoption of the ordinance but before the referendum.

Another challenge faced by tobacco control advocates was limited resources. From 2004 through 2006, the same core group of advocates worked with Mankato and North Mankato. As is often the case in smoke-free campaigns, advocates were often stretched beyond their capacities, lacking funding and other support at critical times. Since most smoke-free activity took place in Mankato, including the general referendum, advocates found themselves unable to devote sufficient time or resources in North Mankato to promote candidates who supported smoke-free ordinances.

Yet another obstacle identified by one respondent was the inability of Blue Earth and Nicollet County public health professionals to support local smoke-free ordinances publicly. County employees could work independently to support these policies but, according to the respondent, the counties discouraged employees from acting in any way that could be seen as representing county commissioners or public health services. Particularly at the beginning of Mankato's smoke-free campaign, several medical professionals in the region were frustrated with the disparate views county and city policymakers had regarding their responsibility to protect public health.

## Endnotes

- 1 U.S. Census Bureau, *Population Estimate for Mankato, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type Mankato, Minnesota; then follow hyperlink).
- 2 See *The New Rating Guide to Life in America’s Small Cities*, January 1998. The City of Mankato was named the 14<sup>th</sup> most livable “micropolitan” area in the United States. Bizjournals.com 2006 ranked the Mankato/North Mankato region the 16<sup>th</sup> in the U.S. in a survey of 577 cities nationwide, based on quality of life criteria. *America’s Dreamtowns: Quality of Life Ranking*, BIZJOURNALS.COM, available at <http://www.bizjournals.com/specials/pages/27.html> (Aug. 7, 2006).
- 3 U.S. Census Bureau, *Population Estimate for North Mankato, Minnesota* (2008), available at <http://www.census.gov/> (in “Population Finder,” type North Mankato, Minnesota; then follow hyperlink).
- 4 The City of Golden Valley is also a statutory city. North Mankato’s status as a statutory city played no discernable role in the region’s smoke-free campaigns of 2004 – 2006.
- 5 In both the 2000 and 2004 presidential elections, Mankato residents supported the Democratic candidate. In the 2000 presidential election, North Mankato residents supported the Republican candidate, but in the 2004 presidential election, they supported the Democratic candidate. See Dave Leip’s Atlas of U.S. Presidential Election Results, available at <http://www.uselectionatlas.org>.
- 6 The City Council consists of a Mayor and one Council member, elected at large, and five other Council members, each elected from one of the city’s five wards. The Council Member At Large serves as president of the Council. MANKATO, MINN., CHARTER § 2.02(1.000).
- 7 MANKATO, MINN., CHARTER § 2.14 (2000).
- 8 The Mellman Group, Clean Indoor Air Ordinance in North Mankato, Minnesota (Survey of 350 registered voters in North Mankato), July 17, 2006.
- 9 These events included a large pool and dart tournament, which met two weekends a year in Mankato, and was unlikely to be held in the city if the law went into effect. On the other hand, the 154<sup>th</sup> annual Minnesota Medical Association Convention, slated to bring hundreds of medical professionals to Mankato in September 2007, was unlikely to be held in Mankato if the city’s smoke-free law were delayed.
- 10 See U.S. Dep’t of Health and Human Servs., Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006).
- 11 See Mellman Group, *supra* note 8.
- 12 In an odd twist, the November 7, 2006 general election resulted in an improbable victory for the Mankato City Council member who resigned in August, whose name remained on the ballot, and who remained strongly opposed to the smoke-free ordinance. He received nearly 50percent of the votes, almost twice as many as his closest challenger. On November 9, he decided not to serve his term, and a special election for his seat was held on December 19, 2006.
- 13 Interestingly, North Mankato’s practice of electing council members at-large (versus by district) may have resulted in a smoke-free opponent winning a seat in the 2006 election. Voters who favored a smoke-free ordinance could choose among four candidates who supported smoke-free regulation, and likely split their vote among the four.
- 14 One informant related a comment made in a May 2006 City Council meeting, describing state lawmakers and local governments as “staring at each other over a chasm,” in a standoff over which would be the first to move on a smoke-free ban.
- 15 MANKATO, MINN., CHARTER § 5.05-.06, subd.2. Memorandum from Eileen Wells, City Attorney, to Pat Hentges, City Manager (Oct. 30, 2006), available at Posting of Mike Laven to <http://community.cnhi.com/eve/forums/a/tpc/f/71010411/m/396105265> (Oct. 30, 2006, 22.53 CST).
- 16 Jeff Hansel, *Tide Turns Toward Statewide Restrictions on Workplace Smoking*, ROCHESTER POST-BULLETIN, Nov. 18, 2006.
- 17 Dan Linehan, *Smoking Ban Referendum Results Will Be Decisive*, MANKATO FREE PRESS, Nov. 6, 2006.

# Conclusion

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Our detailed examination of fourteen campaigns to enact smoke-free ordinances in seven Minnesota regions from 2000 to 2006 identified several legal and political obstacles that either delayed adoption of an ordinance, or resulted in a weaker, less restrictive law. The most significant political obstacle in the campaigns was the issue of regional consistency, which often prolonged consideration of a local ordinance. The most significant legal obstacle in the campaigns occurred when communities used the initiative and referendum process to place smoke-free ordinances on the ballot. Ballot measures caused Fargo, West Fargo, Duluth and, by proxy, Moorhead, to adopt weaker ordinances than originally proposed, and could have defeated them. Study findings identified several other significant obstacles: conflicting interpretations of the authority of local regulatory bodies, problems arising from the structure of these bodies, conflicts and compromises in the ordinance process, electoral issues, and court challenges—none of which, however, proved fatal to the eventual enactment of an ordinance.

The value of this intensive study of one state's experiences in enacting smoke-free laws in seven regions lies in its focus on legal and regulatory issues that other studies have not explored to date. Many of the findings can apply to the ordinance enactment process in communities throughout the U.S. The regional regulation issue, for example, is frequently brought up in municipalities considering smoke-free regulation. Also, legal challenges to smoke-free ordinances are often based on similar causes of action

(such as preemption, equal protection, takings, and occasionally due process or privacy claims). Finally, the enactment process, the structure of regulatory authorities, and many of the legal and political obstacles raised in the study, are similar to those in other U.S. communities.

These findings indicate that tobacco-control advocates in the U.S. may be able to anticipate, avoid or address obstacles to smoke-free regulation in several ways: (1) work to ensure that the debate remains focused on individual local ordinances, rather than on the pending passage of adjacent, regional or statewide laws; (2) familiarize themselves with each jurisdiction's rules for ballot measures (including procedural and substantive requirements), typically found in a city's home-rule charter or city code, and the impact ballot measures can have on the ordinance process; (3) understand the ordinance enactment rules and procedures, as well as the political dynamics in each community, and develop realistic strategies for avoiding roadblocks and derailments; (4) develop and maintain relationships within each local government authority so they are aware of pending departures and shifting positions and are able to gauge support and opposition among members; and (5) consult with an attorney throughout the ordinance drafting process to ensure that legal loopholes are closed and the language is as tightly crafted as possible, and throughout the ordinance enactment process, to help analyze and interpret legislative language and legal procedures, and provide assistance if an ordinance is legally challenged.

# Key findings based on informant interviews and data analyses for seven selected Minnesota regions

OBSTACLES	MINNESOTA COMMUNITIES
<b>Use of “regional regulation” issue</b>	
Local policymakers may delay the implementation of smoke-free ordinances in an attempt to obtain regional consensus for their decisions.	Mankato, St. Paul
In multi-jurisdictional communities, when the call of “level playing field” is raised, policymakers may be distracted into paying more attention to obtaining a consistent smoke-free policy across borders than to representing the interests of their local constituents or serving the public interest in their community.	Fargo/Moorhead; Hennepin County, Mankato
Policymakers often cite the prospect of regional or statewide smoke-free laws to delay or disable local smoke-free initiatives.	Olmsted County, Fargo/Moorhead, Hennepin County, Ramsey County/St. Paul, Mankato/North Mankato, Beltrami County, Duluth, Minneapolis, Golden Valley
<b>Conflicting interpretations of authority of local regulatory bodies</b>	
Cities (and counties) with their own boards of health may be vulnerable to legal challenges, or subject to confusion, regarding their jurisdictional authority to enact smoke-free laws.	Ramsey County, St. Paul, Hennepin County, Minneapolis
Questioning a governmental body’s regulatory authority to enact smoke-free legislation can provide municipalities with opportunities to delay or avoid acting in this area.	Fargo/Moorhead, Rochester/Olmsted County, Bemidji/Beltrami County
<b>Problems stemming from structure of regulatory bodies</b>	
A policymaker with tie-breaking or veto power can often disable, postpone or defeat an initiative by using or simply threatening to use that power.	Mankato/North Mankato, Moorhead, Twin Ports – Duluth, St. Paul
Non-elected government officials, such as city administrators, city managers, and city attorneys, can have a disproportionate effect on the success or defeat of a smoke-free ordinance.	Olmsted County
<b>Conflicts and compromises in the ordinance process</b>	
Policymakers often see issues as variations of gray, rather than black and white, and tend to be receptive to compromised policies, which are difficult for some tobacco control advocates and public health professionals to support.	Olmsted County, Fargo/Moorhead, Hennepin County, Ramsey County/St. Paul, Mankato/North Mankato, Beltrami County, Duluth, Minneapolis
Passing smoke-free laws requires an understanding of each regulatory entity’s rules and procedures in passing an ordinance, including the number of required public hearings, amendment procedures, voting mechanics, timing between hearings, and the implications of having a strong decision maker on the council or board with veto power. When cross-border communities or multiple jurisdictions are engaged in the process of enacting smoke-free laws simultaneously, the procedural issues and political interactions can be even more complex. Resources are often stretched when advocates work on more than one community at a time; thus, it is especially important that the initial information-gathering is as comprehensive and accurate as possible the first time around.	All communities
City councils and county boards are not restricted by law from putting smoke-free ordinances on a fast track. In many cases, municipal charters, codes, or statutes say nothing about the amount of time that must pass between scheduled readings or hearings.	All communities
Although the use of an “advisory study group” or “task force” can prolong the ordinance process, it can also help ensure the eventual adoption of a proposal.	Bloomington, Minneapolis, Beltrami County

<b>Complexity and confusion in the initiative and referendum process</b>	
The introduction of a ballot initiative or referendum can significantly delay the ordinance process, and can result in a weaker law.	Duluth, Fargo/Moorhead
Advocates need to anticipate conflicting, confusing, or purposefully misleading ballot initiatives and commit time and resources to distinguishing and clarifying measures for voters before an election.	Fargo, West Fargo, Mankato, Duluth
Allowing the ballot measure process to take precedence over responsible lawmaking can arguably represent a significant impediment to the accountability of elected officials and the functioning of representative democracy.	Fargo, Moorhead, Duluth, Mankato
In some jurisdictions, the process by which an initiative or referendum is placed on the ballot can determine whether the electoral results on the measure are legally binding or merely advisory.	Mankato
<b>Impact of elections</b>	
The pending election or retirement of a key policymaker can drive the timing of a smoke-free ordinance campaign and ultimately determine its outcome.	Hennepin County, Minneapolis, St. Paul, Olmsted County, Beltrami County
<b>Legal challenges</b>	
Legal challenges to a smoke-free ordinance can be expensive and time-consuming to address and can divert public attention from the merits of the legislation.	Beltrami County, Hennepin County, Bloomington, Minneapolis, St. Paul, Fargo

## **About the Public Health Law Center**

The Public Health Law Center (former Tobacco Law Center) at William Mitchell College of Law is one of America's preeminent centers of expertise in public health law and policy. A respected think tank grounded in research and scholarship but focused on real-world results, the Center's attorneys help local, state, national and international health organizations use the power of law to advance public health. Our staff includes a skilled team of legal and policy specialists experienced in developing legislation to preserve, protect and promote public health. We help defend effective policies against legal attacks and we provide legal guidance on public health legal issues ranging from tobacco control and obesity prevention to worker health, product regulation and land use planning.

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