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# Legal and Political Obstacles to Smoke-Free Regulation in Minnesota Regions

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**Abstract:** As communities move toward statewide smoke-free regulation, progress is often stymied by legal and political challenges that arise when multiple cities and counties share regulatory power within what is, for economic purposes, a single population center. Political challenges are exacerbated by legal inconsistencies and uncertainties, such as confusing and conflicting lawmaking power in boards of health, cities or counties, and diverse procedures and timelines for adopting and amending ordinances. Surprisingly little research is available about the legal and political obstacles communities face in regulating tobacco on a regional basis.

Researchers used case study methodology to analyze legal and political challenges that seven multi-jurisdictional Minnesota regions faced in smoke-free ordinance campaigns between 2000 and 2006, to examine the approaches regulatory authorities took in each of these communities, and to identify strategies to help public health advocates, health organizations, policymakers, and legal professionals anticipate, avoid, and address these obstacles. Legal impediments included confusing rules for passing smoke-free laws via ballot measures (initiatives and referenda); distracting lawsuits; and conflicts over legal jurisdiction. Political challenges included the recurrent argument for regional consistency, protracted timelines, pending legislation and elections, and mayoral vetoes. Legal and political challenges similar to those in this study appear in smoke-free campaigns across the U.S. By recognizing the risks posed by these obstacles, advocates will be better prepared to advance smoke-free policies effectively.

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## Introduction

As communities move toward statewide smoke-free regulation, progress is often stymied by legal and political challenges that arise when multiple cities and counties share regulatory power within what is, for economic purposes, a single population center. Political challenges are exacerbated by legal inconsistencies and uncertainties, such as confusing and conflicting lawmaking power in boards of health, cities or counties, and diverse procedures and timelines for adopting and amending ordinances.

While a wealth of material exists on the issue of preemption and local smoke-free regulation, surprisingly little research is available about the legal and political obstacles communities face in passing smoke-free laws—particularly when the impediments do not rise to the level of litigation but still affect the progress of regional regulation. Studies have examined the obstacles to the implementation and enforcement of state and local clean indoor air laws,<sup>1</sup> the need for local

regulation in limiting secondhand smoke<sup>2</sup> and on harmonizing local and national smoke-free initiatives,<sup>3</sup> the extent to which strong clean indoor air laws have been enacted and have been successful,<sup>4</sup> tobacco industry lawsuits challenging local smoke-free ordinances,<sup>5</sup> and strategies the tobacco industry has used to thwart clean indoor air regulations.<sup>6</sup> One valuable but dated study examined legal and political challenges encountered in several California nonsmoking campaigns<sup>7</sup> but did not explore the range of legal and political obstacles faced more recently by metropolitan regions. Also, some states, including California, Massachusetts, Minnesota, New Hampshire, and New York, have developed narratives of their experiences in enacting smoke-free laws, but these publications have neither the scope nor the focus of this multi-region study.<sup>8–15,a</sup>

The goal of this research was to explore legal and political challenges that seven multi-jurisdictional Minnesota regions faced in successful smoke-free ordi-

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<sup>a</sup>The Tsoukalis case study focused on one Minnesota city, rather than several regions within the state, and examined events from February 2000 to June 2002. In contrast, this study explored the legal and political hurdles Duluth public health professionals faced from 2000 to 2006 in the city's efforts to expand its smoking restrictions, and compared its experiences with those of other metropolitan regions in the state during this time.<sup>12</sup>

nance campaigns between 2000 and 2006 and to develop recommendations to help public health advocates, health organizations, policymakers, and legal professionals in the tobacco-control community anticipate, avoid, and address these obstacles. This study examined the approaches regulatory authorities took in each of these campaigns and analyzed the significance of legal and political obstacles in obstructing or supporting progress toward smoke-free regulation.

## Methods

Two researchers selected seven geographically diverse Minnesota regions containing 14 communities (ten cities and four counties) where smoke-free ordinances faced legal and political challenges between 2000 and 2006 (Figure 1):

- **Fargo ND/Moorhead MN, including the cities of West Fargo ND and Dilworth MN.** In this cross-border region, simultaneous smoke-free ordinance campaigns in adjacent cities in different states in 2004 resulted in an often-confusing multi-jurisdictional minuet. The desire to ensure regional consistency caused the Moorhead City Council to weaken its city's newly adopted smoke-free ordinance in June 2004 to conform to Fargo's less comprehensive smoke-free ordinance, passed in November 2004. The Fargo ordinance passed in an election in which voters were asked to choose among three conflicting municipal smoke-free ballot initiatives—an electoral process so legally unprecedented that the North Dakota Attorney General's opinion was solicited to interpret electoral results.<sup>16</sup>
- **Olmsted County, including the city of Rochester.** In this region, the Rochester City Council and the Olmsted County Board of Commissioners had different perceptions of their legal authority and obligation to regulate public health. Eventually, the County Board of Commissioners assumed the powers and duties of the Board of Health and, led by a determined board chair, county health director, and organized and committed public health advocates, waged a long, bitter and intense campaign in 2001 to pass the first smoke-free ordinance in a Minnesota county.
- **Hennepin County, including the cities of Minneapolis, Bloomington, and Golden Valley.** Hennepin County, the largest metropolitan region in Minnesota, and three cities within it, succeeded in passing smoke-free ordinances in one tumultuous year (2004), only to have smoke-free regulation figure as a campaign issue in both the 2005 Minneapolis and St. Paul mayoral elections and the county ordinance rolled back temporarily in 2006.<sup>b</sup> Discussions

<sup>b</sup>On October 10, 2004, the Hennepin County Board of Commissioners passed a countywide smoke-free ordinance that prohibited smoking in indoor areas of restaurants, private clubs, and neighborhood bars that served food, exempting outdoor areas of restaurants, motel and hotel rooms, and nongovernmental workplaces. The ordinance took effect March 31, 2005. Seven months later, a slim majority of Hennepin County Commissioners concluded that a temporary amendment would help ease the transition to smoke-free workplaces, and on December 13, 2005, voted 4 to 3 to roll back the ordinance to exempt traditional bars and private clubs. The amended Hennepin County ordinance lasted

about the need for regional regulation within the seven-county metro area went nowhere as Bloomington, Minneapolis, Golden Valley, and Hennepin County each ended up passing their own local ordinances. The multi-jurisdictional nature of the campaigns, however, was evident not only in Hennepin but in adjacent Ramsey County and St. Paul, and advocates found themselves waging multi-front campaigns throughout this period. The regulatory authority of the county and city to enact smoke-free ordinances was challenged in two lawsuits and although neither challenge prevailed, surrounding communities had an understandably heightened interest in the outcome of the litigation.<sup>17,c</sup>

- **Ramsey County, including St. Paul.** Although the state capital of St. Paul was instrumental in jumpstarting city and county smoke-free campaigns throughout the Twin Cities metro area, passage of the city's ordinance floundered in 2004 after two mayoral vetoes, and the ordinance was enacted only when a new mayor was elected. Meanwhile, St. Paul faced a lawsuit claiming that the city was unauthorized to enact a smoke-free ordinance that was more restrictive than the ordinance enacted by Ramsey County.<sup>19</sup>
- **The city of Duluth.** In the Twin Ports region, one of the largest metro areas in the state, Duluth tackled the thorny issue of smoke-free regulation in 2000, at a time when only one other community in Minnesota had passed such a law.<sup>d</sup> Duluth's exhaustive struggle to pass a smoke-free ordinance, amid a dizzying number of false starts, amendments, ballot measures, and compromises, illustrates the variety of legal and political challenges faced by public health pioneers.
- **Beltrami County.** In this first rural region in Minnesota to adopt a smoke-free ordinance, a protracted ordinance approval process resulted in a year-and-a-half hiatus in the midst of ordinance readings between 2002 and 2004. Unlike other regions in the study, no effort was made to pass an ordinance at the city level—largely because of lack of political support. As in Olmsted County, the Beltrami County Board of Commissioners served as the County Board of Health, with a mandate to protect public health. A legal challenge to the constitutionality of Beltrami County's smoke-free ordinance proceeded all the way to the U.S. Supreme Court, which denied *certiorari* on November 13, 2007.<sup>20</sup>

from January 3, 2006, to July 31, 2007, after which time the original ordinance took effect again.

<sup>c</sup>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 indoor 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.<sup>17,18</sup>

<sup>d</sup>The small town of Moose Lake, which prohibited smoking in restaurants in August 2001, had only nine restaurants. In comparison, Duluth in 2000 had approximately 190 restaurants. Moreover, in 2000, Duluth's hospitality industry alone employed nearly 9000 people (more than eight times the entire population of Moose Lake) with an annual payroll of close to \$73 million.<sup>12</sup>

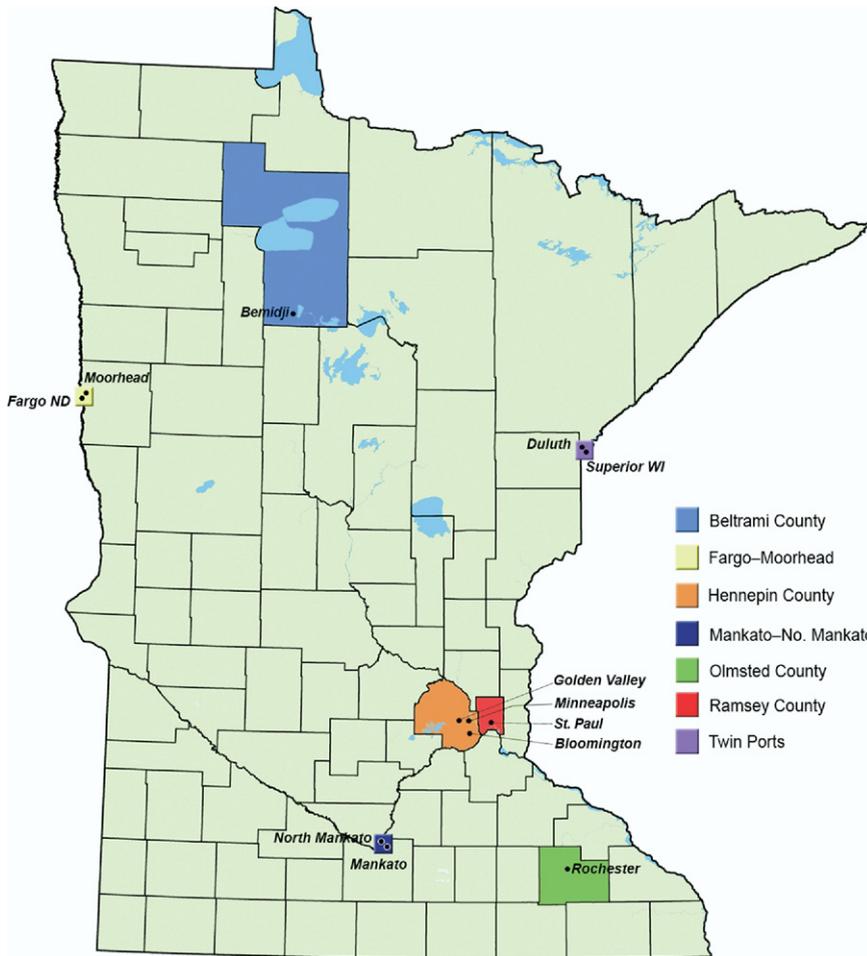


Figure 1. Map of seven Minnesota regions

- Mankato/North Mankato region.** The timing of the smoke-free campaign in Mankato from 2004 to 2006 was often driven by the prospect of activity in its sister city North Mankato, an independent community across the Minnesota River that remained largely uninvolved in smoke-free activities. In 2006, the Mankato City Council approved a ballot referendum at least in part to arrive at a final decision about the ordinance and to stop the procrastination that was a hallmark of the Mankato smoke-free campaign.

### Compilation of Data

Using legal databases, online and print legal resources, public documents, and an extensive network of legal and public health contacts, researchers compiled relevant news and journal articles, editorials, law review commentary, city council and county board minutes, and other background information on the smoke-free ordinance campaigns in each of the seven Minnesota regions ranging from 2000 to 2006.<sup>c</sup> Researchers compiled all legal documents related to legal challenges to smoke-free ordinances in Minneapolis, Bloom-

<sup>c</sup>The Minnesota Department of Health and the American Lung Association's Duluth office also lent the researchers their collections of news clippings and editorials on Minnesota smoke-free campaigns and hearings, covering 2001 through 2005.

ington, St. Paul, Fargo, and Beltrami and Hennepin Counties, including legal motions, pleadings, decisions, briefs, and assorted material. Between September 2005 and August 2007, two research assistants kept abreast of local events through daily WestLaw and Lexis Nexis news services, tobacco-control listservs, websites, and other online information resources.<sup>f</sup>

### Key Informant Interviews

To identify key informants for each region, researchers used a purposeful snowball sampling plan, soliciting input from seasoned advocates and requesting referrals from informants themselves.<sup>g</sup> This sampling strategy was selected to permit the research team to identify the people most knowledgeable about the ordinance campaign and enactment process.<sup>21</sup> Informants were drawn from three areas: law, including city and county attorneys and legal professionals from public health associations and private practice ( $n=5$ ); government, including city council members, county commissioners and staff ( $n=6$ ); and public health, including public health professionals and tobacco-control advocates ( $n=39$ ).<sup>h,i</sup> Each set of informants for a region included one informant with first-hand experience with the legal issues and obstacles faced by the region and at least four politically-attuned advocates who were either involved in the campaign or who had the ability to provide an overview of the entire campaign and enactment process.

<sup>f</sup>As the designated provider of legal technical assistance to the tobacco control community in Minnesota, Tobacco Law Center attorneys attended public hearings on smoke-free ordinances in Hennepin, Ramsey, and Olmsted Counties and participated in state-wide advocacy meetings covering all seven regions.

<sup>g</sup>Researchers initially identified eight legal and political informants, who met the study criteria by having firsthand detailed knowledge of at least one campaign. These informants identified others in an iterative process until a list was compiled of 79 candidates who met the criteria for inclusion in the study. Researchers ultimately refined the list to 50, based on informant type, level, and breadth of experience. Because of the limited number of attorneys that played a role in these campaigns, fewer legal informants were represented in the study than public health informants. Only one individual contacted declined to participate, recommending instead a colleague more familiar with the campaign in question. Interviews were anonymous. All interview participants provided informed consent.

<sup>h</sup>Public health advocates were typically supported by a variety of health organizations, such as the American Cancer Society, American Lung Association, American Heart Association, ClearWay Minnesota, and Blue Cross/Blue Shield Foundation, or they were part of voluntary coalitions of community leaders, hospital and medical groups, and concerned citizens.

<sup>i</sup>One informant with a public health background, who worked as a journalist and editor but wrote exclusively on public health issues in the local Duluth newspaper and covered Minnesota smoke-free campaigns for years, was classified under Public Health.

**Table 1.** Profiles of communities and smoke-free ordinance campaigns in seven Minnesota regions

Community	Population (2006 est.)	2000 presidential election	2004 presidential election	Type	Number of council/board members	Vote on initial ordinance	Adoption date	Months to adoption	Effective date	Scope	Amended?
Fargo	90,056	Rep	Rep	HR	5	Ballot	11/2/04	5.75	11/19/04	C2	
West Fargo	21,508	Rep	Rep	HR	5	Ballot	11/2/04	5.50	12/15/04	C2	W
Moorhead	34,749	Rep	Rep	HR	8	5-3	6/21/04	3.75	12/15/04	C2	W
Olmsted County	137,521	Rep	Rep	Stat	7	5-2	11/13/01	1.75	1/1/02	D	S
Rochester <sup>†</sup>	96,975	Rep	Rep	HR	7	N/A	N/A	N/A	N/A	N/A*	
Beltrami County	43,169	Rep	DFL	Stat	5	3-2	8/17/04	25.00	1/1/05	C2	S
Hennepin County	1,122,093	DFL	DFL	Stat	7	5-2	10/12/04	1.00	3/31/05	C1	W
Bloomington	80,869	DFL	DFL	HR	7	6-1	7/19/04	2.00	9/1/04	A	W
Minneapolis	372,833	DFL	DFL	HR	13	12-1	7/23/04	2.25	3/31/05	C1	
Golden Valley	19,921	DFL	DFL	Stat	5	5-0	10/19/04	0.50	3/31/05	A	
Ramsey County	493,215	DFL	DFL	HR	7	7-0	9/14/04	1.50	3/31/05	D	
St. Paul	273,535	DFL	DFL	HR	7	4-3	1/11/06	20.00	3/31/06	C1	
Mankato	34,970	DFL	DFL	HR	7	6-1	3/28/05	7.50	7/1/06	B	
Duluth	84,167	DFL	DFL	HR	9	6-3	6/12/00	2.00	1/1/01	D	S/W
MINNESOTA	5,167,101	DFL	DFL				5/16/07		10/1/07		

Scope: A=workplaces, bars, restaurants, outdoors; B=workplaces, bars, restaurants; C1=bars, restaurants; C2=workplaces, restaurants; D=restaurants, some bar exemptions

Hennepin County's bar exemption included sunset provision, so counted as C1, rather than D

Bar exemptions for Hennepin County, Olmsted County and Ramsey County based on liquor sales (>50%)

Under "Amendments," "S" or "W" mean "strengthened" or "weakened"

\*This table does not include the city of North Mankato, where no smoke-free campaign arose.

†No ordinance passed

DFL, Democratic-Farmer-Labor Party; Rep, Republican Party; HR, Home rule/charter community; Stat, Statutory community

Interviews were semi-structured, ranging from 30 to 45 minutes. Interviewers used a protocol of ten open-ended questions soliciting background information about each smoke-free campaign, major legal and political obstacles experienced during the campaign, whether the obstacles had been anticipated, the approach taken toward smoke-free regulation, the impact the issue of regional regulation had on the campaign, and lessons learned. Between January and December 2006, two researchers conducted fifty interviews in the study regions, averaging seven interviews per region. Thirty-eight interviews were by telephone; twelve, in person.

### Analysis of Data

Researchers sifted and charted data from each community, categorizing communities by local government type (city versus county; statutory versus home-rule charter)<sup>j</sup>; structure of governing body; ordinance enactment process and procedures; initiative and referendum process and procedures; and political demographics. (Table 1) The intent was to discern patterns and to flag similarities and differences among the various legal and political challenges that occurred in the smoke-free campaigns.

Researchers also examined the role, if any, that a community's political demographics played in the smoke-free ordinance process from 2000 through 2006,<sup>k</sup> as well as the impact

of outside events, such as the 2006 U.S. Surgeon General's report on the hazards of secondhand smoke<sup>l</sup> and the 2007 passage of Minnesota's statewide smoke-free law.<sup>m</sup>

Two researchers analyzed the fifty interview transcripts using a contextual framework approach,<sup>23</sup> identifying recurrent themes, conducting legal and regulatory issue-spotting, developing timelines (Figure 2), and comparing 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 com-

electorate were of far less significance than the cultural demographics—in other words, the portrayal by smoke-free opponents of the smoke-free advocates as do-gooder, paternalistic doctors and public health professionals versus hard-working blue-collar small business (bar, restaurant, bowling alley) owners. Pending or actual elections played a role in several smoke-free campaigns, particularly in communities like St. Paul, Minneapolis, and Hennepin County, where the positions of candidates on smoke-free laws became part of the election debate. Also, pending or actual elections of policymakers often had an impact on the progress of a smoke-free campaign. Nevertheless, no pattern was discerned that indicated that the political demographics of the electorate (as reflected in the presidential elections of 2000 and 2004) played a significant role in any smoke-free campaign.

<sup>l</sup>In 2006, the USDHHS released *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*, which reviewed the massive and conclusive scientific evidence of the adverse health effects of secondhand smoke and its properties as a known human carcinogen, or cancer-causing agent. By 2006, many communities in the study had already passed smoke-free ordinances. The release of this comprehensive discussion of the scientific research on secondhand smoke exposure served mainly to buttress the case of those who supported a statewide smoke-free law.<sup>22</sup>

<sup>m</sup>On May 16, 2007, Minnesota Governor Tim Pawlenty signed Minnesota's smoke-free legislation (Freedom to Breathe Act of 2007), prohibiting smoking in all public places in Minnesota. The law went into effect on October 1, 2007. In a few communities in the study, such as Beltrami County and the cities in the Fargo/Moorhead region, policymakers were galvanized by the passage of Minnesota's statewide law to amend their local ordinances, adopt the state law as a minimum, and add stricter provisions as necessary.

<sup>j</sup>Minnesota has two types of cities: statutory cities and home-rule charter cities. Most of Minnesota's 850 cities are statutory cities, which are governed by Minnesota Statutes, Chapter 412, and other statutes that regulate local government. Minnesota's 180 home-rule charter cities are governed loosely by Minnesota Statutes, Chapter 410, but their main source of authority is found in their city charters, which function as local constitutions and include what a city can and cannot do, and specific procedures to follow. Nine of the ten cities in the study are home-rule charter cities.

<sup>k</sup>Researchers examined whether a community's political demographics played a significant role in obstructing the smoke-free ordinance process. Findings indicated that the political demographics of the

**Table 2.** Key issues affecting progress of smoke-free ordinance campaigns in seven Minnesota regions

Community	Issues of regional regulation		Issues of regulatory authority	Structure of local regulatory bodies <sup>‡</sup>	Ordinance process <sup>‡</sup>	Initiative and referendum process <sup>‡</sup>		Legal challenges
	General	Lack of local precedence	Mayoral veto allowed?	Task force convened?	Ballot measures allowed?	Governing body election issues		
Fargo	X					X-Used		X
West Fargo	X					X-Used		
Moorhead	X			X-Threat		X		
Olmsted County		X					X	
Rochester <sup>†</sup>			X	X				
Beltrami County					X		X	X
Hennepin County	X		X				X	X
Bloomington	X		X		X	X		X
Minneapolis	X		X	X	X		X	X
Golden Valley	X							
Ramsey County	X		X			X		
St. Paul	X		X	X-Used		X-Threat	X	X
Mankato	X					X-Used		
Duluth	X	X		X-Used		X-Used		

\*This table does not include the city of North Mankato, where no smoke-free campaign arose.

†No ordinance passed

‡This topic includes several issues that affected the ordinance campaigns in different ways. Table 2 identifies the issue within this category that had the most significant impact on the progress of the ordinance.

munities in the state. The researchers read and discussed the data, defined terms for consistency in analysis (Table 3) and came to a consensus on themes and obstacles. (Table 2.) Analyses were completed in 2007.

## Results

The studied communities took seven approaches in enacting smoke-free ordinances from 2000 to 2006:

1. city considers, then passes (Minneapolis, Golden Valley);
2. county considers, then passes (Ramsey County);
3. city considers, passes, then amends (Moorhead, Duluth, Bloomington);
4. county considers, passes, then scales back temporarily (Hennepin County);
5. city considers, passes, mayor vetoes, city considers, passes, mayor vetoes, new mayor signs (St. Paul);
6. city considers and rejects, then county considers and passes (Rochester and Olmsted County; Bemidji and Beltrami County); and
7. city uses initiative/referendum process to pass or uphold ordinance (Duluth, Fargo, West Fargo, Mankato).

**Table 3.** Definition of terms used in study

**Obstacle:** Since the focus was on communities in which smoke-free laws were enacted, the identified obstacles did not prove fatal to the eventual passage of most ordinances. Moreover, the significance of obstacles varied: some proved to be mere distractions to policymakers and public health advocates, while others were considerable stumbling blocks. Some obstacles that may not have been noteworthy from a public health perspective were a larger concern to the legal research team, because of problems they highlighted in a jurisdiction's legal process or procedures.

Given these variables, researchers viewed obstacles as those events or challenges that disrupted or prolonged the ordinance enactment process or that resulted in a smoke-free ordinance that was significantly less comprehensive or effective than originally proposed. It is important to add here that the comprehensiveness and effectiveness of smoke-free ordinances were assessed in light of the time of their enactment. Smoke-free laws today are far more restrictive than they were earlier this decade, when many of the smoke-free campaigns in this study occurred.

**Ordinance process:** Research often covered periods when a smoke-free ordinance proposal was discussed or groundwork for a campaign was laid, but no local regulatory authority had officially become involved. For analytical purposes, ordinance process is defined as the series of events starting when a local regulatory authority first considers a smoke-free proposal to the date the ordinance is enacted or additional measures affecting the ordinance have been passed or proposed. Included here, for example, are amendments, partial repeals and roll-backs.

**Multi-jurisdictional region** is defined as areas with more than one regulatory authority, such as Hennepin, Ramsey, Olmsted, and Beltrami counties, as well as core cities, such as Moorhead, Duluth, and Mankato, and their surrounding or neighboring suburbs and communities.

**Local regulatory body** is used synonymously with local governing authority to refer to the city council, county board of commissioners, board of health, or other policymaking entity with the designated authority to pass a smoke-free ordinance.

Researchers examined each ordinance campaign in detail to identify any important differences in the process that were due, at least in part, to the type of regulatory authority enacting the ordinance (city versus county). The nine home-rule cities in the study had charters that could have had ordinance enactment procedures that significantly affected the ordinance process. An analysis of these charters, however, and the way the process played out in each community revealed relatively little difference between the overall ordinance processes in cities and counties. According to informants, the decision to approach a particular regulatory authority to enact a smoke-free ordinance depended on the political makeup of the governing bodies (that is, number of supporters/champions among individual members) and community politics.

Although the conventional approach in the tobacco-control community is to begin smoke-free policies at the grassroots (local and city) level and then proceed to larger communities, in some cases a County Board of Commissioners' role as Board of Health made it easier to pass an ordinance at the county level. Moreover, counties are not subject to the initiative and referendum process,<sup>n</sup> or to a mayoral veto—events that can delay or disable an ordinance campaign. On the other hand, informants identified many reasons for approaching cities first. For example, they cited the reluctance of counties to adopt ordinances as often as cities, and the difficulty in altering proposed county-wide ordinances once the process is initiated, as well as perceptions—such as the sense that city council members are closer to their constituents than county board members, that cities tend to be more manageable for advocates than counties, and that county boards tend to look for greater consensus than city councils, with cities more tolerant of split votes.<sup>o</sup>

## Discussion

Researchers identified the following legal and political obstacles to smoke-free regulation in the communities studied.<sup>p</sup> This section uses questions derived from the study results to discuss these obstacles. Table 4 summarizes key findings in the seven selected regions based on informant interviews and data analysis.

<sup>n</sup>Ramsey County, the only home-rule charter county in Minnesota, is the exception.

<sup>o</sup>Researchers also examined the vote outcomes in the communities that passed smoke-free ordinances in an effort to identify any patterns between the final votes of city councils versus county boards. These vote outcomes did not appear to reflect any trend toward consensus in one governmental body over another. Moreover, the significance of these data is limited, since members often shift votes in the final count.

<sup>p</sup>Some of these obstacles were only indirectly related to the multi-jurisdictional nature of the campaigns.

## Obstacle 1. Regional Regulation Issue

**Question:** How significant an impediment to local smoke-free ordinances was the threat or prospect of regional or statewide smoke-free regulation?

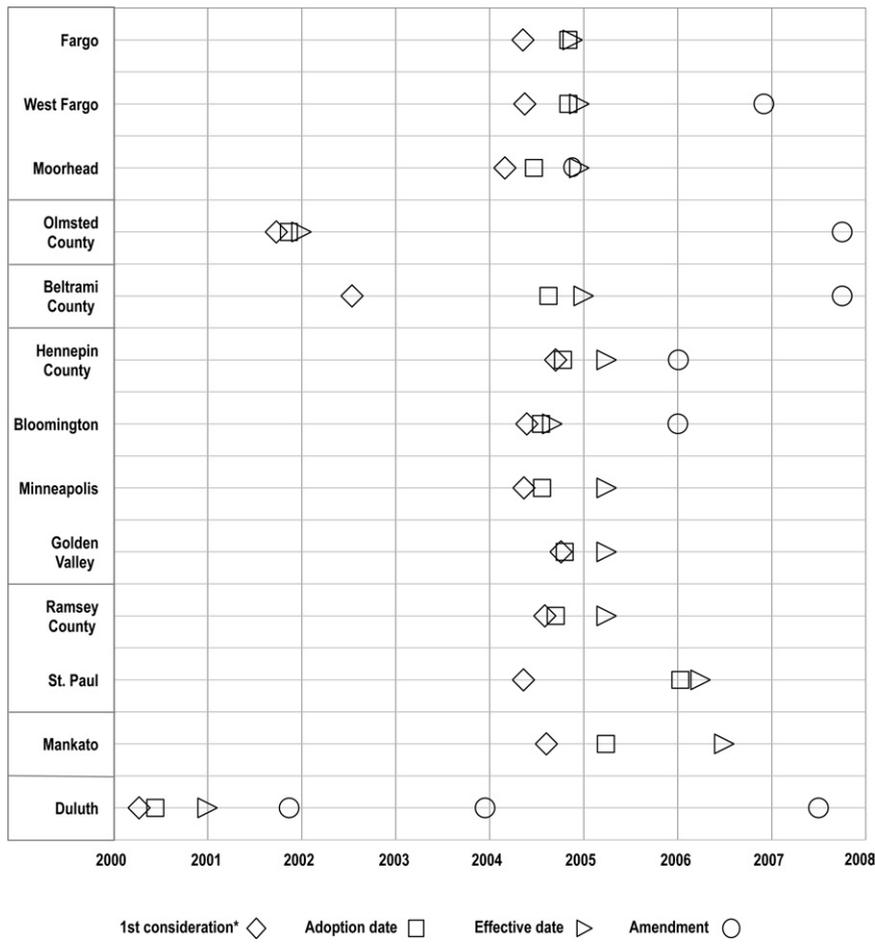
**Discussion:** In every community studied, policymakers, or others, raised the issue of consistent smoke-free regulation in adjacent communities, within the region, or throughout the state. In 11 of 14 communities, this issue served as a rationale for disrupting or prolonging the ordinance process, or compromising or weakening an ordinance. (Common refrains of the Moorhead key informants were: *We're always looking over the river*, and *It's all about Fargo*.) In the other three campaigns, the regional regulation issue was discussed, but never reached the point where it affected the ordinance process or ordinance itself.

## Obstacle 2: Conflicting Interpretations of Local Regulatory Authority

**Question:** Did conflicts or confusion about a local government's authority to pass smoke-free ordinances result in obstacles to the enactment of an ordinance?

**Discussion:** Conflicts occasionally surfaced because of confusion about the power of various governing bodies to enact health-related legislation in their individual jurisdictions, including state preemption over local authorities. In Ramsey County, for example, the County Board of Commissioners acts as Board of Health for the county, while the St. Paul City Council acts as Board of Health for the city. Under a Joint Powers Agreement, however, Ramsey and St. Paul have a combined health department, through which they provide joint services. Because of the merger of city and county health departments, confusion arose (and a lawsuit was filed in 2006) over whether the city had the authority to enact a smoke-free ordinance. In another example of confusion over regulatory authority, the Hennepin County District Court dismissed a 2005 challenge to Hennepin County's ordinance by a group of Bloomington and Minneapolis bar owners and nonprofit clubs, because the county lacked regulatory authority to enact a smoke-free ordinance located in cities that had their own boards of health.

In other parts of the state, county seats such as Rochester (Olmsted County) and Bemidji (Beltrami County) viewed the county as the governing body responsible for protecting public health, rather than the city. State law grants a county board the authority to adopt ordinances *to regulate actual or potential threats to the public health* and to enforce laws, regulations and ordinances relating to public health for the territory within its jurisdiction.<sup>24</sup> Cities, however (both statutory and charter), generally have administrative jurisdiction over public health in their municipalities as well. Re-



**Figure 2.** Timelines of 13 smoke-free ordinance campaigns in seven Minnesota regions. *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. \*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.

searchers found that advocates who approached the county about a smoke-free law often did so with trepidation, having first determined that insufficient support existed at the city level. One informant cited the example of an Olmsted County Commissioner and former Rochester City Council member, who claimed 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.

### Obstacle 3: Problems Stemming from the Structure of Local Regulatory Authority

**Question:** Did the way in which a city council or county board was set up pose obstacles to the enactment of a smoke-free ordinance?

**Discussion:** Obstacles occasionally arose as a result of the way in which a city council or county board was structured, as well as the role of the policymakers, the impact of other decision-makers, and the overall system

of power-sharing and accountability. Researchers compared and analyzed such regulatory data in each jurisdiction as the number of council or board members, whether members were elected by district or at large, whether the mayor served on (or had veto power over) the council, and the number of votes required to pass an ordinance and overcome a veto. In St. Paul, for example, the former mayor's repeated vetoes of St. Paul's smoke-free ordinance, which prolonged the ordinance process until he was voted out of office, were a direct result of the structure of the city council. Other obstacles occurred in communities where an un-supportive city administrator, city manager, or city attorney impeded a council's discussion of a smoke-free ordinance or where (in the words of two Ramsey County informants) city councils and county boards rarely interacted and operated in theoretical silos.

### Obstacle 4. Conflicts and Compromises in the Ordinance Process

**Question:** Did problems resulting from the ordinance enactment process and procedures constitute obstacles in the enactment of smoke-free ordinances?

**Discussion:** Each local governing body followed its own ordinance enactment process and procedures, based on the city or county code or charter rules. These documents generally specified procedural requirements for passage of an ordinance, such as number of readings/considerations, number of public hearings, number of votes for passage, timing issues, opportunity for ballot measures, and related matters. Occasionally, this information is not spelled out in codes or charters, which left advocates confused and feeling out of control.

One strategy that some governing bodies used, for various purposes, was to delegate critical drafting or research tasks to a subordinate body, such as an advisory group or a task force. In Bloomington, the advisory health board did a stellar job in researching the overall smoke-free issue and laying the groundwork for a proposed citywide ordinance. In Minneapolis and Beltrami, the creation of task forces invited speculation and concern among some advocates, who saw them as diversionary. Still, the task force in Minneapolis accom-

**Table 4.** Key findings based on informant interviews and data analyses for seven selected regions

<b>Obstacles</b>	<b>Exemplifying communities</b>
<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

*(continued on next page)*

**Table 4.** Key findings based on informant interviews and data analyses for seven selected regions (*continued*)

<b>Obstacles</b>	<b>Exemplifying communities</b>
<ul style="list-style-type: none"><li>• 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.</li><li>• 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.</li></ul>	Fargo, Moorhead, Duluth, Mankato  Mankato
<b>Impact of elections</b> <ul style="list-style-type: none"><li>• The pending election or retirement of a key policymaker can drive the timing of a smoke-free ordinance campaign and ultimately determine its outcome.</li></ul>	Hennepin County, Minneapolis, St. Paul, Olmsted County, Beltrami County
<b>Legal challenges</b> <ul style="list-style-type: none"><li>• 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.</li></ul>	Beltrami County, Hennepin County, Bloomington, Minneapolis, St. Paul, Fargo

plished its purpose of drafting an ordinance that satisfied the mayor, whose support was critical in this campaign; and the Beltrami task force served its purpose of allowing policymakers to draft a compromise ordinance that the Beltrami County Board eventually adopted.

### **Obstacle 5. Complexity and Confusion in the Initiative and Referendum Process**

**Question:** How did the initiative and referendum process affect the enactment of smoke-free ordinances?

**Discussion:** Some of the most dramatic obstacles in the smoke-free campaigns occurred because of ballot measures, which often served to delay or weaken ordinances. Of the 14 communities studied, seven cities and one county have the legal authority to use initiatives and referenda. Typically, a group of citizens petitions to place an issue on the ballot, such as a smoke-free ordinance. Occasionally, however, policymakers raise the prospect of taking the issue to the voters as a possible option/threat. In some cases, an ordinance can be put on hold pending a public vote. In four cities (Fargo, West Fargo, Mankato, and Duluth), the public was asked to vote on initiatives or referenda, with mixed results.<sup>4</sup> In Fargo and West Fargo, for example, the placement on the ballot of three conflicting municipal initiatives posed a legal dilemma, since North Dakota had no constitutional or statutory provision or case law dealing with conflicting initiatives and the interpretation of electoral results when more than one initiative received a majority vote.

<sup>4</sup>Also, in St. Paul, opponents to the city ordinance circulated a petition for a ballot initiative in 2006, which the Ramsey County Election Bureau ruled invalid.

### **Obstacle 6. Impact of Elections**

**Question:** How did the pending or actual election or retirement of policymakers affect the enactment of smoke-free ordinances?

**Discussion:** In the 2005 mayoral elections in Minneapolis and St. Paul, smoke-free regulation became a campaign issue. The candidates supporting smoke-free ordinances won in both cities. In Olmsted and Beltrami Counties, the passage of a smoke-free ordinance was expedited due to the upcoming retirement of a supportive board member and concern by other supporters about staying on top of a majority.

### **Obstacle 7. Legal Challenges**

**Question:** Did any lawsuit challenging the enactment of a smoke-free ordinance present an impediment to its eventual implementation?

**Discussion:** None of the four legal challenges to the smoke-free ordinances in this study succeeded in defeating an ordinance, although they served as distractions and drained resources from communities defending against them.<sup>7</sup> In, for example, the challenge to Beltrami's ordinance, the plaintiffs raised several constitutional claims, including takings and privacy arguments, which were dismissed by the U.S. District Court and the 8th Circuit Court of Appeals. The plaintiffs even took the case to the U.S. Supreme Court, which denied *certiorari*. The challenges to Bloomington, Hen-

<sup>7</sup>Across the U.S., the majority of challenges to smoke-free ordinances do not prevail. For a good overview of rulings on common issues raised in challenges to smoke-free ordinances, see *Coalition for Equal Rights v. Bill Owens*, *Dennis Steffes v. City of Lawrence*, and *NYC C.L.A.S.H. v. City of New York*.<sup>25-27</sup> 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.<sup>28</sup>

nepin and Minneapolis (*Earl C. Hill v. City of Bloomington*) and to Minneapolis (*U Otter Stop Inn v. City of Minneapolis*) were largely preemption claims.<sup>17,18</sup> In both cases, the courts applied what is known as the *Dahlberg* factors,<sup>5</sup> and ruled that the plaintiff/appellant failed to establish a likelihood of success on the merits regarding the legal issues.<sup>17,18</sup>

## Conclusion

This detailed examination of 14 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.

One study limitation was that by focusing primarily on regions that passed smoke-free ordinances, researchers may have missed findings that could have been uncovered in an examination of unsuccessful campaigns. Given, however, the rocky journey to enactment that many ordinances took, researchers identified many impediments that could just as easily have proved fatal to initiatives at a different time or place, or in different political environments.<sup>1</sup> Other limitations include the use of snowball sampling (potentially resulting in a more homogenous sample), the small sample

size, and each community's unique nature (potentially affecting the generalizability of the study findings).

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.

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<sup>5</sup>For plaintiffs in Minnesota to get a preliminary injunction, the Court considers five factors: (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.<sup>29</sup>

<sup>1</sup>Also, nine of the ten cities studied were home rule charter cities, rather than statutory cities. At the time of the study, home rule cities were more engaged in ordinance campaigns than statutory cities. One could surmise that home rule charter cities are more likely to pass independent legislation, while statutory cities are more accustomed to following the state or county. Note, however, that Golden Valley, the one statutory city examined, quickly passed the most comprehensive smoke-free ordinance in the study. In sum, the researchers did not find the statutory/home rule difference to be of import in the campaigns studied.

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