IDENTIFYING AND REVISING LANGUAGE IN TEXAS MUNICIPAL SHS ORDINANCES THAT DETRACT FROM THEIR STRENGTH

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**Introduction**

The Texas Tobacco Prevention and Control Research and Evaluation Project at the University of Houston (“the project”), part of the Texas Tobacco Prevention Initiative sponsored by Texas Department of Health, collected, analyzed and assigned ratings for strength of restrictiveness to current and former Texas municipal SHS ordinances in order to identify the scope and nature of protection against secondhand smoke at the municipal level.

**Methods**

**Data Collection**

In summer 2002, telephone contacts were made with 536 municipalities meeting specified criteria, requesting a paper or electronic copy of the “most recent ordinance restricting exposure to SHS.” A total of 241 ordinances were collected. All known ordinances through January 2003 for municipalities with over 5,000 residents were analyzed (n=189) for the preliminary report.

**The Rating System**

The ordinance coding system was a modified version of the CDC’s system for rating state laws to limit exposure to SHS. The first level of coding was a review of the restrictiveness of the ordinance with respect to five types of public places: (1) municipal worksites; (2) private sector worksites; (3) restaurants; (4) child daycare - commercial; and (5) child daycare - home-based.

**The Ordinance Scoring System**

- **1** = The municipality has an SHS ordinance, but there are no restrictions on smoking in a particular setting.
- **2** = The ordinance requires or allows designated smoking areas in a particular setting.
- **3** = The ordinance either does not permit smoking or requires designated smoking areas with separate ventilation in a particular setting (i.e. the owner or manager may choose for the establishment to be smoke-free or may designate separately-ventilated smoking areas), but coverage is partial due to exceptions, restrictions, or other legal issues.
- **4** = The ordinance does not permit smoking or requires designated smoking areas with separate ventilation in a particular setting (i.e. the owner or manager may choose for the establishment to be smoke-free or may designate separately-ventilated smoking areas).
- **5** = The ordinance does not permit any smoking in a particular setting (100% smoke free).
## Results

Table 1. Number and percent of municipalities with a SHS ordinance that received ratings in each setting (n=241 ordinances)

<table>
<thead>
<tr>
<th>Setting</th>
<th>‘1’ = No coverage n</th>
<th>‘2’ = Limited n</th>
<th>‘3’ = Mixed n</th>
<th>‘4’ = Stronger n</th>
<th>‘5’ = Strongest 100% Smokefree n</th>
</tr>
</thead>
<tbody>
<tr>
<td>Municipal worksites</td>
<td>25 10%</td>
<td>103 43%</td>
<td>3 1%</td>
<td>10 4%</td>
<td>100 42%</td>
</tr>
<tr>
<td>Private worksites</td>
<td>151 62%</td>
<td>67 28%</td>
<td>4 2%</td>
<td>11 5%</td>
<td>8 3%</td>
</tr>
<tr>
<td>Restaurants</td>
<td>122 51%</td>
<td>87 36%</td>
<td>8 3%</td>
<td>16 7%</td>
<td>7 3%</td>
</tr>
<tr>
<td>Childcare-Commercial</td>
<td>212 87%</td>
<td>12 5%</td>
<td>2 1%</td>
<td>1 1%</td>
<td>14 6%</td>
</tr>
<tr>
<td>Childcare-Home</td>
<td>209 87%</td>
<td>13 5%</td>
<td>2 1%</td>
<td>3 1%</td>
<td>14 6%</td>
</tr>
</tbody>
</table>

Table 1 summarizes how often the 241 Texas municipalities that were identified as having a SHS ordinance through January, 2003, received scores ranging from 1-5 in each of the five settings studied.

**Ordinances Containing Notably Ambiguous or Weak Language (Ratings of 3 or 2)**

Provisions of ordinances meriting a rating of ‘5’ or ‘4’ are usually relatively simple and straightforward. They either mandate that an area be smoke-free, or, if they generally permit any smoking areas, impose strict ventilation requirements.

Provisions of ordinances meriting a rating of ‘3’ or ‘2,’ on the other hand, can be far more difficult to assess. Ordinances rated ‘3’ would have been rated ‘4’ or ‘5’, but for an exception or provision it give that has the potential to mitigate the ordinance’s otherwise strong protections against SHS. For example, an ordinance may prohibit all smoking in the workplace except in separately-enclosed and -ventilated areas, but then provide that an employer who wishes to offer one or more designated smoking areas, yet who cannot meet the stringent ventilation requirements without incurring expense for physical modifications to his or her workplace, is automatically eligible for an exemption to the ordinance’s requirements.

Fewer than five percent of all ordinances in each category received a rating of ‘3.’

Ratings of ‘2’, on the other hand, were overall the most common in all settings assessed.
Ordinances rated ‘2’ must, by our ordinance rating criteria, provide for smoking areas or allow their creation. Such ordinances often contain numerous specific exceptions for particular types of businesses, ventilations requirements, and other matters. Occasionally, such ordinances appear to have been intended to be stronger, but, because of drafting issues, are in actuality rather weak.

A category received a ‘2’ if the ordinance permits or requires nonsmoking areas, other than in designated smoking sections with minimal or nonexistent ventilation requirements. There were two major categories of provisions rating a ‘2’: (1) those which mandated nonsmoking areas, but permitted those in control of regulated facilities to designate smoking areas with lax ventilation requirements, if any, and (2) those which permitted people in control of regulated facilities to designate smoking or nonsmoking areas at their discretion, and which imposed requirements should a nonsmoking section be created.

No Protections: (Ratings of 1)

Settings receiving a ‘1’ had no SHS protections. If a setting received a ‘1,’ then the municipality had an SHS ordinance, but did not regulate SHS with respect to one or more of the specific settings reviewed.

Occasionally, drafting issues resulted in a category receiving a ‘1’, rather than a stronger rating. This occurred, for instance, when a municipality included a category in the definitions section of the ordinance, but then failed to impose any SHS restrictions concerning it. As one example, the city of Kingsville at first appears to prohibit smoking in workplaces by including places of employment in its definition of “public place.” See City of Kingsville, Municipal Ordinances, § 9-9-1 (last amended 2/8/1993). Rather than limiting or prohibiting smoking in all public places, however, the ordinance only prohibits smoking in particular locations, such as public schools, elevators, libraries, museums and hospitals. See City of Kingsville, Municipal Ordinances, § 9-9-4. Because these locations are public places, and because the ordinance also includes places of employment in its definition of public places, this means that the ordinance prohibits smoking in the workplaces of those locations, even if they are not accessible to the general public. However, the ordinance does not apply to any workplace that is not included in the list of public places in which smoking is prohibited. Because it fails to protect workers in many, if not most, places of employment in the city, it therefore received a ‘1’ with respect to its coverage of private workplaces.

Suggestions for Strengthening Ordinances

Most municipalities do not ban smoking outright in all public places. Given the numerous studies showing the harm caused by SHS, however, some municipalities may wish to strengthen their ordinances. Others may wish to amend their ordinances to correct any unintentional omissions of coverage. The following are three suggestions for drafting stronger SHS ordinances.
1. The body of the ordinance should be as clear, simple and comprehensive as possible or desired. Including numerous minor exceptions and caveats muddies an ordinance and could unintentionally weaken it. It also makes it more difficult to understand, and therefore also difficult to obey. Residents, employees and business owners want a clear rule that they can easily implement and follow.

2. When drafting the ordinance, do not give with one hand and take away with the other. If a municipality takes the time to draft and enact an SHS ordinance, it ought not to include such significant exceptions to it that the effect of the ordinance is mitigated or even nullified.

3. Ensure congruence between the definitions section and the remainder of the ordinance. Municipalities should first review the definitions section of their ordinance to ensure it is as simple yet comprehensive as possible. Key terms used in the body of the ordinance itself should be defined. Terms not otherwise appearing in the ordinance should not be defined. This may seem elementary, but many municipalities did just this, potentially leading to confusion. Definitions should be clear and as simple as possible. For example, “public place” could be defined as “any enclosed area to which the public is invited or in which the public is permitted, including but not limited to: banks, educational facilities, health facilities. . . .” See, e.g., City of El Paso, Municipal Ordinances, § 9.50.020(H).