

Memorandum

To: Honorable Mayor Shetter and members of the Burleson City Council

From: Lisa Duello, Director of Neighborhood Services

Date: March 2, 2009

Subject: Ordinance B-785-09, repealing Chapter 70, Article III, "Smoking in Public Places" of the Code of Ordinances of the City of Burleson and replacing it in its entirety and establishing revised regulations for smoking in public places. (First Reading)

Council Action Requested:

Approve Ordinance B-785-09, repealing Chapter 70, Article III, "Smoking in Public Places" of the Code of Ordinances of the City Burleson and replacing it in its entirety and establishing revised regulations for smoking in public places.

Background Information:

On February 16, 2009, the first reading of Ordinance B-785-09, relevant to smoking in public places, was presented to the Burleson City Council for consideration. A motion was made to approve Ordinance B-785-09, with an outcome of a 3-3 vote. The tie vote has prompted a second consideration of regulations for smoking in public places. Based on the feedback from the February 16, 2009, the new proposed ordinance has deleted the following provision:

"Sec. 70- 93. Exceptions.

(a) Notwithstanding any other provision of this Article to the contrary, the following areas shall not be subject to the smoking prohibitions in Section 70-92:

~~(3) Outdoor dining area and/or patio of a business that derives less than 30% of its revenue from the sale of food and beverages."~~

The following provision was added:

“Sec. 70-92. Smoking Prohibited.

(e) A person commits an offense if the person smokes in an outdoor dining area and/or patio of a restaurant.”

On January 20, 2009 Burleson City Council considered options for implementing a smoke-free ordinance in the City of Burleson. The options presented included: keeping the city ordinance as is; passing a 100% smoke-free ordinance; considering a more restrictive ordinance than the current; or waiting for the outcome of House Bill 5 relevant to a statewide smoking ban. At this meeting the City Council directed staff to move forward with more stringent regulations similar to the City of Fort Worth.

The current City of Burleson regulations relevant to smoking in public places is 15 years old and does not reflect the current scientific data significant to the health consequences of smoking and secondhand smoke. Many surrounding cities and cities nationwide have updated their regulations to reflect the 2006 Surgeon General report. This scientific evidence in this report indicates that there is no risk-free level of exposure to secondhand smoke and eliminating smoking in indoor spaces fully protects nonsmokers from exposure to secondhand smoke. It is only prudent that the City of Burleson consider the implementation of smoke-free regulations to protect the public from serious health problems, including lung cancer, heart disease and chronic lung ailments such as bronchitis and asthma.

Smoking Ordinance Comparison Summary

Staff has researched smoking ordinances in the metroplex area, statewide and nationwide. In general, city ordinances have evolved from creating smoking and non-smoking areas, to adding proper ventilation, to banning smoking in some places. In response to the scientific data presented in the 2006 Surgeon Generals Report, many cities and states in the past few years have started banning smoking in all public places.

Staff’s research found that within the metroplex area, depending on the age of the ordinances, the majority of the cities smoking regulations were similar to Burleson’s.

However, more recent smoking ordinances passed reflects the scientific data in the Surgeons General Report and prohibits smoking to protect the public. As such, the majority of the top 10 cities in Texas and top 10 cities nationwide have passed smoke-free provisions. There are 22 cities in Texas that have a comprehensive smoke-free ordinance. Although the 22 cities are only 1.8 % of the cities in Texas, these cities represent over 30% of the population in Texas. Furthermore, there are 20 states that have statewide smoking bans and another six (6) states that have partial smoking bans. Additionally, House Bill 5 (Attachment #2) relating to a statewide smoking ban is currently showing a strong support, including the Texas Restaurant Association.

Current Ordinance Summary

The current City of Burleson regulations for smoking in public places essentially allow an owner/operator of an establishment to make the decision to prohibit or allow smoking in their facility, provided there is a designated area and proper signage. Approximately 70% of Burleson's establishments already prohibit smoking.

Proposed Ordinance Summary

The following is a brief summary of the proposed ordinance provisions:

- Several new definitions were added to correspond with the new text.
- Prohibit smoking in the following:
 - Restaurants, including the bar area and outdoor dining and/or patios
 - Bowling alleys
 - Business offices/buildings
 - Within 20 feet of any primary entrance or exit of a regulated facility.
- Provide exceptions to the smoking prohibitions. Smoking is proposed to be allowed in the following establishments:
 - **Bars** – defined as establishments that are licensed by the State and that move more than 70% of their annual gross sales in alcoholic beverages for consumption by guests on the premises.

- **Hotel/Motel Rooms** - provided that no more than 25% of the total number of rooms rented to guests may be designated as smoking rooms.
 - **Private Clubs** - as defined in this Article, as long as the facility is used or operated by the members and is not open to the general public.
 - **Bingo Parlor** - operated under the Bingo Enabling Act, Chapter 2001 of the Occupations Code provided no one under the age of 18 years is allowed in the smoking area and the facility provides an enclosed designated non-smoking area.
 - **Private Meeting Rooms** – as long as the entire room remains private and is not open to the general public such as hotel/motel conference or meeting rooms and public facilities while being used for a private function (with the exception of restaurants).
 - **Private or Semi-Private Room in a Nursing Home or Long Term Care Facility** - that is occupied by persons who smoke and have requested in writing to be placed in a room where smoking is permitted.
 - **Retail Tobacco Stores** – if the store is a stand-alone facility and its primary business is the sale of tobacco products and accessories.
- The owner/operator of an establishment will be in violation of these provisions if he or she knowingly allows a person to smoke. The violations will be punishable, upon conviction, by a fine of an amount not to exceed two thousand dollars (\$2,000.00) for each offense.
 - A person who violates the provisions commits a class c misdemeanor, punishable by a fine not to exceed five hundred dollars (\$500.00).

Board/Citizen Input:

A letter (Attachment #3) was sent to approximately 180 permitted food establishments regarding the proposed ordinance to allow them the opportunity to attend the meeting to speak on the matter.

Furthermore, the same establishments were contacted for the preceding meetings of February 16, 2009, and January 20, 2009.

The following citizens and/or business owners/operators spoke at the February 16, 2009 council meeting regarding the proposed Ordinance B-785-09:

- Doug Drake - Against
- Gloria McCann, Gina's Pizza -Against
- Bill Albany, Miranda's Mexican Restaurant - Against
- Henry Eder - Against
- Rodney Smith - Against
- Carlos Rios, Miranda's Mexican Restaurant - Against
- Roman Cruz, Antonio's Mexican Restaurant - Against
- Maggie Kramer – For
- Jim Bailey – Is there a problem with the current ordinance?

At the January 20, 2009 council meeting, Citizen Henry Eder spoke against implementing new smoke-free regulations and requested City Council to leave the ordinance as is and wait for the outcome of House Bill 5 relevant to a statewide smoking ban.

Financial Considerations:

N/A

March 2, 2009
4A -6

Attachments:

1. Ordinance B-785-09
2. House Bill 5
3. Letter to establishments
4. Comparison Table

Staff Contact:

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ATTACHMENT 1

ORDINANCE B-785-09

AN ORDINANCE OF THE CITY OF BURLESON, TEXAS, REPEALING CHAPTER 70, ARTICLE III, "SMOKING IN PUBLIC PLACES" OF THE BURLESON CITY CODE AND REPLACING IT IN ITS ENTIRETY; ESTABLISHING REVISED REGULATIONS FOR SMOKING IN PUBLIC PLACES TO PROTECT THE PUBLIC HEALTH, SAFETY AND WELFARE OF THE CITIZENS OF BURLESON; PROVIDING THAT THIS ORDINANCE BE CUMULATIVE OF ALL OTHER ORDINANCES; PROVIDING A SEVERABILITY CLAUSE; PROVIDING FOR A PENALTY FOR VIOLATION OF THIS ORDINANCE; PROVIDING A SAVINGS CLAUSE; PROVIDING FOR PUBLICATION IN THE OFFICIAL NEWSPAPER; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City of Burleson, Texas is a home rule city acting under its charter adopted by the electorate pursuant to Article XI, Section 5 of the Texas Constitution and Chapter 9 of the Local Government Code; and

WHEREAS, the City Council ("City Council") of the City of Burleson, Texas ("Burleson") finds that it will be advantageous, beneficial and in the best interest of the citizens of Burleson to amend Chapter 70, Article III, "Smoking in Public Places" of the Burleson City Code; and

WHEREAS, the City Council of Burleson is concerned about the impact of smoking in public places on the public health, safety and welfare; and

WHEREAS, it is a generally accepted principle that the use of cigarettes second-hand smoke and other tobacco products constitute a hazard to a person's health; and

WHEREAS, the exposure to secondhand smoke has been determined to have numerous health effects on non-smokers; and

WHEREAS, the City Council desires to prohibit smoking in certain public places and places of employment to protect the public, as provided below.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BURLESON, TEXAS:

SECTION 1.

Chapter 70, Article III of the Burleson City Code is amended to read as follows:

Article III. Smoking in Public Places

Sec. 70-91. Definitions.

The following words and phrases, whenever used in this Article, shall be construed as defined in this Section.

Bar means an establishment licensed by the state which has more than seventy percent (70%) of its annual gross sales from alcoholic beverages for consumption by guests on the premises. Calculation of gross sales shall mean be made from the combined sales of food and beverages. Restaurants that contain a bar are not considered a "bar" for purposes of this Article.

Billiard hall means a place of amusement whose chief purpose is providing the use of billiard/pool tables to the public for a fee.

Bingo parlor means a facility regulated under the Bingo Enabling Act, Chapter 2001 of the Occupations Code.

Business means any sole proprietorship, partnership, joint venture, corporation or other business entity formed for profit-making or non-profit purposes, including but not limited to, banks, laundromats, hotels, motels, retail establishments, professional corporations and other entities where legal, medical, dental, engineering, architectural or other professional services are delivered.

Employee means any person who is employed for the consideration of direct or indirect monetary wages or profit, and any person who volunteers his or her services for a profit or non-profit entity.

Employer means any person, partnership, corporation, municipal corporation, non-profit entity, or other entity who employs the services of one (1) or more individual persons.

Enclosed area means an area closed in by a roof and walls with appropriate openings for ingress and egress.

Health care facility means any institution that provides medical, surgical, and overnight facilities for patients, including but not limited to, hospitals, clinics, physical therapy facilities, doctor's offices, dentist's offices, nursing homes, adult care facilities, convalescent homes, and residential treatment centers/homes.

Outdoor dining area and/or patio means any non-enclosed contiguous portion of a restaurant that contains seating for members of the public to consume food or drink.

Person means any individual, partnership, cooperative, association, corporation or venture.

Place of employment means any area under the control of an employer including but not limited to work areas, employee lounges, rest rooms, conference

rooms, classrooms, employee cafeterias and hallways. A private residence shall not be considered a place of employment.

Private club means an association of persons as members, whether incorporated or unincorporated under the laws of the state, for the promotion of some common object, and organized by a board of representatives, including but not limited to a fraternal organization, private social or dinner club. When used to describe a facility in this Article, "private club" shall mean any enclosed area to which the public is not invited or in which the public is not permitted which is owned, leased or rented by the private club for its members and their guests. A privately-owned business, open to the public, is not a private club.

Private function means the rental of a ballroom, private club, or other facility for the sole purpose of entertaining, private parties, events or other social functions that the general public is not able to attend.

Public place means any enclosed area in which the public is invited or permitted, including, but not limited to, banks, educational facilities, health facilities, laundromats, public transportation facilities, reception areas, restaurants, marketing establishments, retail service establishments, retail stores, theaters, waiting rooms, bowling alleys and billiard halls.

Retail tobacco store means a retail store whose primary business is the sale of tobacco products and accessories and in which the sale of other products is merely incidental.

Restaurant means any place where food is manufactured, packaged, produced, processed, transported, stored, sold, commercially prepared, vended, or otherwise handled. The term includes any such place regardless of the duration of the permit or whether there is a charge for the food. The term includes, but is not limited to, a coffee shop, cafeteria, sandwich shop, private or public school cafeteria, and any other eating establishment that gives or offers food to the public, guests or employees, including

catering facilities. The term shall not include a cocktail lounge or tavern if said cocktail lounge or tavern is a "bar" as defined in this Article. The term does not include private homes where food is prepared or served for guests and individual family consumption.

Service line means any line or area where persons wait for goods or services of any kind, regardless of whether or not an exchange of money will occur. Such service includes, but is not limited to: sales, giving of information, directions, advice, and the transfer of money or goods.

Smoking means inhaling, exhaling, burning or carrying any lighted cigar, cigarette, tobacco product, weed, plant, or other combustible substance whose smoke is intended to be inhaled.

Sec. 70-92. Smoking prohibited.

(a) A person commits an offense if the person smokes in a public place.

(b) A person commits an offense if the person smokes in an enclosed area in a building or facility owned, leased, or operated by the City.

(c) A person commits an offense if the person smokes in an enclosed area of a place of employment.

(d) A person commits an offense if the person smokes within twenty (20) feet from a primary entrance or openable window of an enclosed area in which smoking is prohibited.

(e) A person commits an offense if the person smokes in an outdoor dining area and/or patio of a restaurant.

(f) Notwithstanding any other provision of this section, any owner, operator, manager, or any other person who controls any establishment or facility may declare the entire establishment or facility as a nonsmoking establishment.

Sec. 70- 93. Exceptions.

(a) Notwithstanding any other provision of this Article to the contrary, the following areas shall not be subject to the smoking prohibitions in Section 70-92:

- (1) Bars, as defined in this Article;
- (2) Private residences, except when used as a child care, adult day care or health care facility;
- (3) A private or semi private room in a nursing home or long term health care facility that is occupied by persons who smoke and have requested in writing to be placed in a room where smoking is permitted;
- (4) Hotel and motel rooms; provided that no more than twenty-five percent (25%) of its rooms are rented for temporary overnight occupancy by the public as smoking rooms;
- (5) Retail tobacco stores in stand alone physical facilities;
- (6) Hotel and motel conference or meeting rooms and public facilities while being used for a private function. This exception shall not include restaurants, as defined in this Article;
- (7) Private clubs, as defined in this Article, as long as the facility is used or operated by the members and is not open to the general public;

(8) A bingo parlor operated under the Bingo Enabling Act, Chapter 2001 of the Occupations Code if:

a. An enclosed non-smoking area is provided; and

b. No one under the age of eighteen (18) years is admitted to the smoking areas.

(b) Notwithstanding any other provision of this Section, any owner, operator, manager, or other person who controls any establishment described in this section may designate the entire establishment as a nonsmoking establishment.

Sec.70-94. Owner/operator responsibilities.

(a) The owner and/or operator of a public place shall conspicuously post a "No Smoking" sign, the international "No Smoking" symbol (depiction of a burning cigarette enclosed in a red circle with a red bar across it), or other sign containing words or pictures that prohibit smoking:

(1) In each public place and workplace where smoking is prohibited by this Article; and

(2) At each entrance to a public place or workplace.

(b) The owner/operator of a public place shall conspicuously post signs in areas where smoking is permitted under Section 70-93.

(c) The owner/operator of a public place and an employer shall remove any and all ashtrays or other smoking accessories from a place where smoking is prohibited.

(d) An owner/operator commits an offense if he or she violates any provision of this section.

(e) An owner/operator commits an offense if he or she knowingly allows a person to remain in a place under the owner/operator's control while such person is smoking in violation of this Article. This offense is punishable, upon conviction, by a fine of an amount not to exceed two thousand dollars (\$2,000.00) for each offense. Each day that a violation is permitted to exist shall constitute a separate offense.

(f) It is not a defense to prosecution of any offense under this Article that an owner/operator failed to post a sign required under this section.

Sec. 70-95. Employer responsibilities.

(a) Except as provided in section 70-93, an employer shall provide a smoke-free place of employment.

(b) Employers shall designate all areas of the place of employment including but not limited to, conference rooms, break rooms, rest rooms, and dining areas as nonsmoking.

(c) If an employer requires employees to work in an area described in Section 70-93, the employer shall make reasonable accommodations for an employee who requests an assignment to a smoke free area.

(d) An employer shall notify each employee and applicant for employment in writing that:

(1) Smoking in the place of employment is prohibited; or

(2) Smoking is permitted in the place of employment because it is exempted from the prohibition of smoking under Section 70-93.

(e) A person, employer, building manager, building owner or lessee commits an offense if he or she violates any provision of this section.

Sec. 70-96. Voluntary designation of a non-smoking facility.

Nothing in this Article shall prevent the owner/operator of an enclosed area or public place from designating the entire facility and/or area as non-smoking.

Sec. 70-97. Retaliation prohibited.

A person commits an offense if the person discharges, refuses to hire, or retaliates against a customer, employee, or applicant for employment because the customer, employee or applicant for employment reports a violation of this Article.

Sec. 70-98. Structural modification.

Nothing in this Article shall require the owner, operator, manager or other persons in control of any building, facility, room, establishment to make any structural modifications to comply with the terms of this Article.

Sec. 70-99. Enforcement.

(a) The City Manager or his/her designee shall be primarily responsible for the implementation and enforcement of this Article.

(b) Any owner, manager, operator, or employer of any establishment regulated by this Article must inform persons violating this Article of the appropriate provisions thereof.

(c) The City Manager or designee shall investigate complaints and may issue warnings and citations to persons violating this Article.

Sec. 70-100. Culpability.

Except as otherwise provided in this Article, there shall be no requirement of a culpable mental state for a violation of this Article.

Sec. 70-101. Other applicable laws.

This Article shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable law.

Sec. 70-102. Violation and penalty.

(a) Unless otherwise stated in this Article, a person who violates the provisions of this Article commits a class c misdemeanor, punishable by a fine not to exceed five hundred dollars (\$500.00).

(b) Each day an offense occurs is a separate violation.

Sec. 70-103. Permit suspension or revocation; hearing.

(a) Upon notice and a hearing, the City Manager or his/her designee may suspend or revoke a permit or license issued by the city to the operator of a public place or place of employment where a violation of this Article occurs.

(b) Prior to the revocation or suspension of a permit or license, the City Manager or his/her designee shall set a hearing to determine if grounds exist to revoke or suspend a permit or license due to a violation of this Article.

(c) The City Manager or his or her designee shall act as the hearings officer.

(d) Written notice of the hearing shall be served on the petitioner/violator at least fifteen (15) business days prior to the hearing. Notice shall be served in person or by certified mail, return receipt requested.

(e) Notice shall specify the date, time and place of the hearing. The petitioner/violator must request the hearing be rescheduled within five (5) business days of receiving the written notice if the petitioner/violator cannot attend the hearing at the originally scheduled time.

(f) For purposes of this Section, the hearing officer shall be empowered to administer oaths and to promulgate procedural rules for the conduct of the hearing.

(g) The hearing officer shall base the decision to revoke or suspend the permit or license on a preponderance of the evidence. The petitioner shall bear the burden of proof to show that the permit or license should not be revoked or suspended.

(h) After the conclusion of the hearing, the hearing officer shall make written findings of fact and conclusions of law and shall issue a written decision without undue delay.

(i) A hearing shall exhaust all administrative remedies of the petitioner/violator.

SECTION 3.

This ordinance shall be cumulative of all provisions of ordinances and the Code of the City of Burleson, Texas, except where the provisions of this ordinance are in direct conflict with the provisions of such ordinances and Code, in which event the conflicting provisions of such ordinances and Code are hereby repealed.

SECTION 4.

It is hereby declared to be the intention of the City Council that the phrases, clauses, sentences, paragraphs, and sections of this ordinance are severable, and if

any phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this ordinance, since the same would have been enacted by the City Council without the incorporation in this ordinance of any such unconstitutional phrase, clause, sentence, paragraph or section.

SECTION 5.

All rights and remedies of the City of Burleson are expressly saved as to any and all violations of the provisions of the Burleson City Code or any other ordinances regulating smoking that have accrued at the time of the effective date of this ordinance; and, as to such accrued violations and all pending litigation, both civil and criminal, whether pending in court or not, under such ordinances, same shall not be affected by this ordinance but may be prosecuted until final disposition by the courts.

SECTION 6.

The City Secretary of the City of Burleson is hereby authorized to publish this ordinance in book or pamphlet form for general distribution among the public, and the operative provisions of this ordinance as so published shall be admissible in evidence in all courts without further proof than the production thereof.

SECTION 7.

The City Secretary of the City of Burleson is hereby directed to publish in the official newspaper of the City of Burleson, the caption, penalty clause, publication clause and effective date clause of this ordinance at least two (2) times within fourteen (14) days after the passage of this ordinance as required by Section 36 of the Charter of the City of Burleson.

SECTION 8.

This ordinance shall be in full force and effect from and after its passage and publication as required by law, and it is so ordained.

PASSED AND APPROVED ON FIRST READING THIS ____ DAY OF _____, 2009.

MAYOR

ATTEST:

CITY SECRETARY

PASSED AND APPROVED ON SECOND READING THIS _____ DAY OF _____, 2009.

MAYOR

ATTEST:

CITY SECRETARY

EFFECTIVE:

APPROVED AS TO FORM AND LEGALITY:

CITY ATTORNEY

ATTACHMENT #2

By: Crownover

H.B. No. 5

A BILL TO BE ENTITLED

AN ACT

relating to the elimination of smoking in all workplaces and public places; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle H, Title 2, Health and Safety Code, is amended by adding Chapter 169 to read as follows:

CHAPTER 169. SMOKING PROHIBITED IN PUBLIC PLACES

AND PLACES OF EMPLOYMENT

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 169.001. DEFINITIONS. In this chapter:

(1) "Bar" means an enclosed indoor establishment that is open to the public and is devoted primarily to the sale and service of alcoholic beverages for on-premises consumption.

(2) "Business" means:

(A) a sole proprietorship, partnership, joint venture, corporation, or other business entity, either for-profit or not-for-profit, including a retail establishment, where goods or services are sold;

(B) a professional corporation or other entity where legal, medical, dental, engineering, architectural, or other professional services are delivered; or

(C) a private club.

(3) "Department" means the Department of State Health Services.

(4) "Employee" means an individual who:

(A) is employed by an employer for direct or indirect monetary wages or profit; or

(B) volunteers the individual's services for an employer.

(5) "Employer" means a person who employs one or more individuals or uses the volunteer services of one or more individuals. The term includes:

(A) a nonprofit entity;

(B) the legislative, executive, and judicial branches of state government; and

(C) any political subdivision of this state.

(6) "Enclosed area" means all space between a floor and ceiling that is enclosed on all sides by solid walls or windows, exclusive of doorways, which extend from the floor to the ceiling.

(7) "Health care facility" means an office or institution in which care or treatment is provided for physical, mental, or emotional diseases or other medical, physiological, or psychological conditions.

(8) "Place of employment" means an area under the control of an employer that is used by employees of the employer but is not generally open to the public.

(9) "Private club" means an organization that:

(A) owns, leases, or occupies a building used exclusively for club purposes at all times;

(B) is operated solely for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose, but not for pecuniary gain;

(C) sells alcoholic beverages only incidentally to its operation;

(D) is managed by a board of directors or similar body chosen by the members at an annual meeting;

(E) has established bylaws or a constitution to govern the club's activities; and

(F) is exempt from federal income taxation under Section 501(a), Internal Revenue Code of 1986, as a club described by Section 501(c)(7) of that code.

(10) "Public place" means:

(A) an enclosed indoor area the public is invited or permitted to enter, including all or part of the following:

(i) a restaurant;

(ii) a bar;

(iii) a retail or service establishment;

(iv) a facility of a business or nonprofit entity;

(v) a shopping mall;

(vi) a convention facility;

(vii) a theater or other facility primarily used for exhibiting a performance;

(viii) a sports arena;

(ix) a health care facility;

(x) a licensed child-care or adult day-care facility;

(xi) a polling place;

(xii) a room in which a public meeting under the control of

this state, an agency or branch of government of this state, or a political subdivision of this state is in progress;

(xiii) a common area in a multiple-unit residential facility;

(xiv) a public transportation facility, including a bus or taxicab, and a ticket, boarding, or waiting area of a public transportation depot;

(xv) a waiting room, hallway, room, or ward in a health care facility; or

(xvi) a restroom, lobby, reception area, service line, hallway, elevator, or other common-use area the public is invited or permitted to enter; or

(B) a facility of the state or of a local government, including a building or vehicle owned, leased, or operated by the state or local government, regardless of whether the public is invited or permitted to enter.

(11) "Restaurant" means an enclosed indoor establishment that is open to the public and is devoted primarily to the sale and service of food for immediate consumption. The term includes a bar located at the establishment.

(12) "Retail or service establishment" means an establishment that sells goods or services to the public.

(13) "Service line" means an indoor line in which one or more persons wait for or receive service, whether or not the service involves the exchange of money.

(14) "Shopping mall" means an enclosed public walkway or hall area that connects retail, service, or professional establishments.

(15) "Smoke" means to inhale, exhale, burn, or carry a lighted cigar, cigarette, pipe, or other smoking equipment in any manner.

(16) "Sports arena" means a place in which a person engages in physical exercise, participates in athletic competition, or witnesses sports or other events.

Sec. 169.002. APPLICABILITY. (a) Except as provided by Subsection (b), this chapter preempts and supersedes a local ordinance, rule, or regulation adopted by any political subdivision of this state relating to smoking.

(b) To the extent that a local ordinance, rule, or regulation adopted by a political subdivision of this state prohibits or restricts smoking to a greater degree than this chapter, the ordinance, rule, or regulation is not preempted or superseded by this chapter.

(c) This chapter does not preempt or supersede Section 38.006, Education Code.

Sec. 169.003. PUBLIC EDUCATION. The department shall engage in a continuing program to explain and clarify the purpose and requirements of this chapter and to guide employers, owners, operators, and managers in complying with this chapter. The program may include publication of a brochure for businesses and individuals that explains the provisions of this chapter.

Sec. 169.004. GOVERNMENT AGENCY COOPERATION. The department shall annually request other government agencies to establish local operating procedures to comply with this chapter. This request may include urging all federal, state, county, municipal, and independent school districts to update existing smoking control regulations to be consistent with the current health findings regarding secondhand smoke.

Sec. 169.005. OTHER APPLICABLE LAWS. This chapter may not be construed to permit smoking where it is restricted by other applicable law.

Sec. 169.006. LIBERAL CONSTRUCTION. This chapter shall be liberally construed to further its purpose.

[Sections 169.007-169.050 reserved for expansion]

SUBCHAPTER B. PROHIBITED ACTS

Sec. 169.051. SMOKING PROHIBITED IN PUBLIC PLACES. A person may not smoke in a public place in this state.

Sec. 169.052. SMOKING PROHIBITED IN PLACE OF EMPLOYMENT. A person may not smoke in a place of employment.

Sec. 169.053. PROHIBITION OF SMOKING IN SEATING AREA AT AN OUTDOOR EVENT. A person may not smoke in:

- (1) the seating area of an outdoor arena, stadium, or amphitheater; or
- (2) bleachers or grandstands for use by spectators at a sporting or other public event.

Sec. 169.054. REASONABLE DISTANCE. A person may not smoke within a distance of 15 feet outside an entrance, operable window, or ventilation system of an enclosed area in which smoking is prohibited.

Sec. 169.055. EXCEPTIONS. This subchapter does not apply to:

- (1) a private residence, except when used as a child-care, adult day-care, or health care facility;
- (2) a hotel or motel room rented to a guest and designated as a smoking room, if:
 - (A) not more than 20 percent of rooms rented to guests in a hotel or motel are designated as smoking rooms;

(B) all smoking rooms in the hotel or motel on the same floor are contiguous;

(C) smoke from smoking rooms does not enter an area in which smoking is prohibited; and

(D) nonsmoking rooms are not converted to smoking rooms;

(3) a private or semiprivate room in a nursing home or long-term care facility occupied by one or more persons, all of whom are smokers and have requested in writing to be placed in a room where smoking is permitted, provided that smoke from the room does not enter an area where smoking is prohibited;

(4) a private club that does not employ any employees:

(A) unless the club is being used for a function to which the general public is invited; and

(B) provided the private club is not established for the sole purpose of avoiding compliance with this chapter; or

(5) the outdoor area of a place of employment other than the areas described by Sections 169.053 and 169.054.

Sec. 169.056. DECLARATION OF ESTABLISHMENT AS NONSMOKING. (a) An owner, operator, manager, or other person in control of an establishment, facility, or outdoor area may declare that entire establishment, facility, or outdoor area as a nonsmoking place.

(b) A person may not smoke in a place in which a sign conforming to the requirements of Section 169.057(a) is posted.

Sec. 169.057. DUTIES OF OWNER, MANAGER, OR OPERATOR OF PUBLIC

PLACE OR EMPLOYER IN PLACE OF EMPLOYMENT. (a) An owner, manager, or operator of a public place or an employer in a place of employment shall:

(1) post clearly and conspicuously in the public place or place of employment, as applicable:

(A) a sign with the words "No Smoking"; or

(B) a sign with the international "No Smoking" symbol, consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across the cigarette;

(2) post at each entrance to the public place or place of employment, as applicable, a conspicuous sign clearly stating that smoking is prohibited; and

(3) remove all ashtrays from any area in which smoking is prohibited.

(b) An employer shall provide written notice that smoking is prohibited in the place of employment to each:

(1) prospective employee in any application the employer supplies; and

(2) employee on the first day of employment.

(b-1) An employer shall provide written notice not later than December 1, 2009, that smoking is prohibited to each employee who is employed by that employer on September 1, 2009, and who continues to be employed by the employer on the date of the notice. This subsection expires January 1, 2011.

Sec. 169.058. NONRETALIATION; NONWAIVER OF RIGHTS. (a) A person or employer may not discharge, refuse to hire, or in any manner retaliate against an employee, applicant for employment, or customer because that employee, applicant, or

customer exercises any right afforded by this chapter or reports or attempts to prosecute a violation of this chapter.

(b) An employee working in a setting in which an employer allows smoking does not waive or surrender any legal right the employee may have against the employer or any other party.

[Sections 169.059-169.100 reserved for expansion]

SUBCHAPTER C. ENFORCEMENT AND PENALTIES

Sec. 169.101. ENFORCEMENT. (a) The department shall enforce this chapter.

(b) An agency of this state or a political subdivision of this state that issues a license, certificate, registration, or other authority or permit to a business or to an owner, operator, or other person in control of a business shall provide notice to each applicant for the permit or authority of the provisions of this chapter.

(c) A person may file a complaint concerning a violation of this chapter with the department.

(d) The department or another agency of this state or a political subdivision of this state designated by the department may inspect an establishment for compliance with this chapter.

(e) An employer or an owner, manager, operator, or employee of an establishment regulated under this chapter shall inform a person violating this chapter of the appropriate provisions pertaining to the violation.

Sec. 169.102. INJUNCTIVE RELIEF. In addition to the other remedies provided by this chapter, the attorney general at the request of the department, or a person aggrieved by a violation of this chapter, may bring an action for injunctive relief to enforce this chapter.

Sec. 169.103. OFFENSES; PENALTIES. (a) A person who violates Section 169.051, 169.052, 169.053, 169.054, or 169.056(b) commits an offense. An offense under this subsection is a Class C misdemeanor punishable by a fine not to exceed \$50.

(b) An owner, manager, or operator of a public place or an employer in a place of employment, as applicable, who violates Section 169.057 or 169.058(a) commits an offense. An offense under this subsection is a Class C misdemeanor punishable by a fine not to exceed \$100.

(c) If it is shown on the trial of an offense under Subsection (b) that the defendant has previously been finally convicted of an offense under that subsection that occurred within one year before the date of the offense that is the subject of the trial, on conviction the defendant shall be punished by a fine not to exceed \$200.

(d) If it is shown on the trial of an offense under Subsection (b) that the defendant has previously been finally convicted of two offenses under that subsection that occurred within one year before the date of the offense that is the subject of the trial, on conviction the defendant shall be punished by a fine not to exceed \$500.

Sec. 169.104. SUSPENSION OR REVOCATION OF LICENSE OR PERMIT. An agency of this state or a political subdivision of this state may, in accordance with the applicable procedures of the agency, suspend or revoke a license, permit, or other authority for the premises on which a violation of this chapter occurs.

Sec. 169.105. PUBLIC NUISANCE. A violation of this chapter is a public nuisance and may be abated by the department by restraining order, preliminary or permanent injunction, or other means provided by law. The state may take action to recover the costs of the nuisance abatement.

Sec. 169.106. SEPARATE VIOLATIONS. Each day on which a violation of this chapter occurs is considered a separate and distinct violation.

SECTION 2. The following are repealed:

(1) Section 48.01, Penal Code; and

(2) Section 2, Chapter 290, Acts of the 64th Legislature, Regular Session, 1975.

SECTION 3. The repeal by this Act of Section 48.01, Penal Code, does not apply to an offense committed under that section before the effective date of this Act. An offense committed before that date is covered by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose.

SECTION 4. This Act takes effect September 1, 2009.

ATTACHMENT # 3

February 23, 2009

RE: Proposed City of Burleson Smoking Ordinance

Dear Owner/Operator:

On February 16, 2009, the first reading of Ordinance B-785-09, relevant to smoking in public places was presented to the Burleson City Council for adoption consideration. A motion was made to approve Ordinance B-785-09, with an outcome of a 3 -3 tie vote. The tie vote has prompted a second consideration of regulations for smoking in public places.

Therefore, this letter is to inform you that the City of Burleson City Council will again consider the first reading of a new smoke-free Ordinance at the **March 2, 2009, City Council meeting starting at 7:00 PM**. This letter is to inform you of the proposed changes and allow you the opportunity to attend the meeting to express your position on the matter.

The following is a brief summary of the proposed ordinance provisions:

- The proposed regulations will prohibit smoking in all restaurants, including the outdoor dining area and/or patio and bar area; bowling alleys; business office/buildings and within 20 feet of any primary entrance or exit of a regulated facility.
- The proposed regulations also provides for exemptions to the requirements. Smoking is proposed to be allowed in the following establishments:
 - **Bars** – defined as establishments that are licensed by the State and that move more than 70% of their annual gross sales in alcoholic beverages for consumption by guests on the premises.
 - **Hotel/Motel Rooms** - provided that no more than 25% of the total number of rooms rented to guests may be designated as smoking rooms.
 - **Private Clubs** - as defined in this Article, as long as the facility is used or operated by the members and is not open to the general public.
 - **Bingo Parlor** - operated under the Bingo Enabling Act, Chapter 2001 of the Occupations Code provided no one under the age of 18 years is allowed in the smoking area and the facility provides an enclosed designated non-smoking area.
 - **Private Meeting Rooms** – as long as the entire room remains private and is not open to the general public such as hotel/motel conference or meeting rooms and public facilities while being used for a private function (with the exception of restaurants).
 - **Private or Semi-Private Room in a Nursing Home or Long Term Care Facility** - that is occupied by persons who smoke and have requested in writing to be placed in a room where smoking is permitted.
 - **Retail Tobacco Stores** – if the store is a stand-alone facility and its primary business is the sale of tobacco products and accessories.

The foregoing information is a brief summary of the proposed ordinance. If you have specific questions or would like a copy of the proposed ordinance, please call me at 817-447-5410, ext. 226. You may also obtain a copy of the proposed ordinance by visiting my office located at 1675 SE John Jones, Burleson, Texas 76028.

Regards,

Lisa Duello
Director of Neighborhood Services
lduello@burlesontx.com

ATTACHMENT # 4

Comparison of Smoking Regulations						
Type of Place	Proposed City of Burleson		City of Fort Worth		House Bill 5	
	Prohibit	Exception	Prohibit	Exception	Prohibit	Exception
Restaurant	X*		X*		X	
Bar - In a restaurant	X*		X*		X*	
Bar		X		X	X	
Outdoor Dining	X			X		X*
Area of restriction - Proximity to public entrance	20'		20'		15'	
Bowling alley	X*		X*		X*	
Bingo parlor		X		X	X*	
Hotel / Motels		X		X		X
Private club		X		X		X
Private meeting room		X		X	X*	
Private or semiprivate room in a nursing home		X		X		X
Retail tobacco store		X		X	X*	

*Not specifically stated