

THE CITY PLANNER'S GUIDE TO THE OBESITY EPIDEMIC: ZONING AND FAST FOOD

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THE CITY PLANNER'S GUIDE TO THE OBESITY EPIDEMIC:

ZONING AND FAST FOOD

Obesity, scientists tell us, is a life-threatening epidemic in the United States. It involves two facts of modern life – we consume too many calories, and we burn off too few.

In reality, then, this guide could more accurately be called “Half the City Planner’s Guide to the Obesity Epidemic: Zoning and Fast Food.” The half we deal with is the consumption of calories. The expenditure of calories, which is vitally important to battling obesity, is also quite amenable to influence by zoning laws. Laws that encourage exercise by creating hiking trails or bicycle paths, or by restricting automobile use or parking in certain areas, can alter the balance between the consumption and expenditure of calories, thereby altering the prevalence of obesity. Important as those laws are, we do not deal with them in this guide. Information on that topic can be found elsewhere.¹

Instead, in this abbreviated guide for planners that accompanies our larger monograph entitled, *The Use of Zoning to Restrict Fast Food Outlets: A Potential Strategy to Combat Obesity*, we focus on the intake side of the equation, and particularly on fast food establishments (fast food is defined generally as inexpensive food that is prepared and served quickly often by drive-through service, and tends to be high in fat and low in nutritional value). By the proposed regulation of those establishments, we examine how zoning laws can encourage the availability of nutritious food and limit the proliferation of food that can be harmful. We ask and attempt to answer the following key questions:

- **What is the supporting scientific evidence for zoning laws that address fast food outlets?**
- **Have such zoning laws been enacted by municipalities and what are the bases of such laws?**
- **Have the courts upheld zoning laws that address fast food outlets?**

¹ Trust for America’s Health. *F as in Fact: How Obesity Policies are Failing in America*. Issue Report (2005). Available at: <http://healthyamericans.org>; Fenton M. Engineering physical activity back into Americans’ lives. *Progressive Planning* 2003;157:12-17; Hirschhorn JS. Zoning should promote public health. *American Journal of Health Promotion*. 2004;18(3):258-260; Sallis JF, Kraft K, Linton LS. How the environment shapes physical activity: a transdisciplinary research agenda. *American Journal of Public Health* 2002;22(3):208; American Planning Association. *Planning and Designing the Physically Active Community: Resource List*. Available at: <http://www.planning.org/physicallyactive/pdf/ReferenceList.pdf>.

Question 1: What is the supporting scientific evidence for zoning laws that address fast food outlets?

CONNECTING THE DOTS FROM OBESITY TO FAST FOOD TO ZONING:

THE “WHEREAS” CLAUSES

Legislation can be justified, in part, by the content of its preamble, which explains the need for such legislation and the intent of the legislators. The “Whereas” clauses can provide the scientific or social basis for a law that will allow a reviewing court to determine that the legislation is not arbitrary or capricious, that it addresses a legitimate problem, and that the court should therefore be deferential to the legislature.

In the area of obesity and fast food, consider the following possible Whereas clauses as justification for a zoning approach to combat obesity:

WHEREAS, overweight and obesity in the United States has been described as a public health epidemic estimated to kill more than 350,000 people per year;² and

WHEREAS, overweight and obesity in adults cost this nation between \$98 billion to \$129 billion each year in national health care expenditures;³ and

WHEREAS, nearly two-thirds of American adults aged 20 or older are either overweight or obese,⁴ with obesity being a risk factor for diseases such as diabetes, stroke, heart disease, high blood pressure, and certain cancers;⁵ and

² Mokdad AH, Marks JS, Stroup DF, Gerberding JL. Actual causes of death in the United States, 2000. *JAMA* 2004;291(10):1238-1245; Mokdad AH, Marks JS, Stroup DF, Gerberding JL. Correction: actual causes of death in the United States, 2000. *JAMA* 2005;293(3):293. Another study found that compared to the normal weight category, obesity was associated with nearly 112,000 excess deaths in 2000 and overweight was not associated with any excess mortality. Flegal KM, Graubard BI, Williamson DF, Gail MH. Excess deaths associated with underweight, overweight, and obesity. *JAMA* 2005;293(15):1861-1867. See Mark DH. Deaths attributable to obesity. *JAMA* 2005;293(15):1918-1919 (commenting on differences in the two studies).

³ Institute of Medicine of the National Academies. *Overview of the IOM’s Childhood Obesity Prevention Study*. Fact Sheet, September 2004. Available at: <http://www.iom.edu/Object.File/Master/22/604/0.pdf>.

⁴ Hedley AA, Ogden CL, Johnson CL, Carroll MD, Curtin LR, Flegal KM. Prevalence of overweight and obesity among US children, adolescents and adults, 1999-2002. *JAMA* 2004;291(23):2847-2850.

⁵ Visscher TL, Seidell JC. The public health impact of obesity. *Annual Review of Public Health* 2001;22:355-75; Flegal KM, Carroll MD, Ogden CL, Johnson DL.

WHEREAS, children who become obese are more likely to be obese adults, and obesity in children may predispose those children to adult diseases;⁶ and

WHEREAS, the nation is failing to reach its stated health objectives for the reduction of obesity prevalence;⁷ and

WHEREAS, fast food establishments have significantly increased the size of their food portions over the past several decades to the extent that today's french fries, hamburgers, and sodas are 2 to 5 times larger than original sizes and that marketplace portions are considerably larger than federal standard serving sizes;⁸ and

WHEREAS, fast foods tend to be high in fat content and energy dense (meaning many calories per weight of the food);⁹ and

WHEREAS, children who eat fast food compared to those who do not eat it consume more total energy, more total fat, more saturated fat, more total carbohydrates, more added sugars, more sugar-sweetened drinks, less fluid milk, less fiber, less fruits, and less nonstarchy vegetables;¹⁰ and

Prevalence and trends in obesity among US adults, 1999-2000. *JAMA* 2002;288(14):1723-1727.

⁶ Hill JO, Trowbridge FL. Childhood obesity: future directions and research priorities. *Pediatrics* 1998;101:S570-S574; St-Onge MP, Keller KL, Heymsfield B. Changes in childhood food consumption patterns: a cause for concern in light of increasing body weights. *American Journal of Clinical Nutrition* 2003;78(6):1068-73; Institute of Medicine of the National Academies. *Childhood Obesity in the United States: Facts and Figures*. Fact Sheet, September 2004. Available at: <http://www.iom.edu/Object.File/Master/22/606/0.pdf>.

⁷ Healthy People 2010, *Nutrition and Overweight*. Available at: http://www.healthypeople.gov/document/HTML/Volume2/19Nutrition.htm#_Toc490383123; Hedley et al. Prevalence of overweight and obesity among US children, adolescents and adults, 1999-2002.

⁸ Young LR, Nestle M. The contribution of expanding portion sizes to the US Obesity Epidemic. *American Journal of Public Health* 2002;92(2):246-249.

⁹ Prentice AM, Jebb SA. Fast foods, energy density and obesity: a possible mechanistic link. *Obesity Reviews* 2003;4(4):187-194; French SA, Story M, Jeffery RW. Environmental influences on eating and physical behavior. *Annual Review of Public Health* 2001;22:309-335; Bowman SA, Gortmaker SL, Ebbeling CB, Pereira MA, Ludwig DS. Effects of fast-food consumption on energy intake and diet quality among children in a national household survey. *Pediatrics* 2004;113(1):112-118.

¹⁰ Bowman et al. Effects of fast-food consumption on energy intake and diet quality among children in a national household survey.

WHEREAS, more and more Americans are eating fast food, to the extent that on a typical day, 30 percent of U.S. children eat fast food;¹¹ and

WHEREAS, supermarkets tend to offer healthier food at lower prices than other food outlets, and people living in neighborhoods with supermarkets have been found to consume more fruits and vegetables;¹² and

WHEREAS, zoning laws historically state as one of their chief purposes the protection of the public's health;¹³ and

WHEREAS, both zoning laws and public health laws are authorized by the states' police powers to protect the health and safety of the public,¹⁴ with the police powers having been reserved to the states by the United States Constitution.¹⁵

¹¹ Bowman et al. Effects of fast-food consumption on energy intake and diet quality among children in a national household survey.

¹² Morland K, Wing S, Diez Roux A. The contextual effect of the local food environment on residents' diets: the atherosclerosis risk in communities study. *American Journal of Public Health* 2002;92(11):1761-1767.

¹³ See, e.g., *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 391, 394 (1926); *In re Opinion of the Justices*, 234 Mass. 597, 611 (Mass.1920); *Miller v. Board of Public Works of City of Los Angeles*, 195 Cal. 477, 488-489 (Cal. 1925) (all emphasizing health and safety concerns in upholding early zoning ordinances); see also Harvard Law Review Association, *The Legitimate Objectives of Zoning*, 91 *Harvard Law Review* 1443, 1445-1446 (1978) (stating that almost all early zoning ordinances were upheld at least partially on public health and safety grounds).

¹⁴ Julian Conrad Juegensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* (West Group 1998) at 45 ("Public land use controls, including zoning..., are exercises of the police power. Though broad, this power to enact laws to promote the health, safety, morals, and general welfare is limited by the federal and state constitutions."); Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press 2000) at 48 ("States exercise police powers to ensure that communities live in safety and security, in conditions conducive to good health, with moral standards, and, generally speaking, without unreasonable interference in human well-being.").

¹⁵ U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* (stating that the states did not surrender their police power under the Constitution).

These suggested Whereas clauses present a logical and compelling justification for the regulation of fast food outlets by zoning laws to protect the public's health from the devastating obesity epidemic.

Question 2: Have zoning laws that address fast food outlets been enacted by municipalities, and what are the bases of such laws?

IT CAN BE DONE; IT HAS BEEN DONE.

Many communities have already passed zoning restrictions on fast food outlets. Historically, however, these laws were enacted on bases other than the protection of the public's health from obesity. The nature of the zoning restrictions and their stated purposes include the following:

- **Banning Fast Food Outlets and/or Drive-Through Service**

Concord, Massachusetts bans both fast food restaurants and "drive-in" service, defining such establishments as those "...whose principal business is the sale of foods or beverages in a ready-to-consume state, for consumption within the building or off-premises, and whose principal method of operation includes: (1) sale of foods and beverages in paper, plastic or other disposable containers; or (2) service of food and beverages directly to a consumer in a motor vehicle."¹⁶ The stated purposes of the Concord Zoning Bylaw include lessening congestion in the streets, and preserving and enhancing the aesthetic qualities of the community.¹⁷ Carlsbad, California¹⁸ and Newport, Rhode Island¹⁹ have also enacted zoning laws banning drive-through service.

- **Banning "Formula" Restaurants**

Instead of enacting an outright ban on all fast food outlets, several cities ban what have become known as "formula" restaurants which, depending on the definition used in the statute, may be narrowly construed to cover only large, national chain fast

¹⁶ Section 4.7.1, Town of Concord Zoning Bylaw, Town of Concord, Massachusetts. Available at: <http://www.bostonrealestate.com/downloads/Concordzoning.pdf>.

¹⁷ Section 1.2, Town of Concord Zoning Bylaw, Town of Concord, Massachusetts.

¹⁸ Section 21.42.010(5)(N), Carlsbad Municipal Code, Title 21 Zoning, The Zoning Ordinance, Carlsbad, California. Available at: <http://municipalcodes.lexisnexis.com/codes/carlsbad>.

¹⁹ Section 17.100.050(B), Codified Ordinances of the City of Newport, Rhode Island, Title 17 The Zoning Code, Newport Rhode Island. Available at: <http://municipalcodes.lexisnexis.com/codes/newport>.

food outlets or more broadly construed to cover other food retailers. For example, Calistoga, California bans formula restaurants “to preserve the unique and historic character of Calistoga’s downtown commercial district...which has become a cornerstone of the visitor industry which is a key component in the City’s economy.”²⁰ The Calistoga code contains a carefully phrased definition of a formula restaurant.²¹

- **Bans that Apply to Certain Areas**

Instead of banning fast food or formula restaurants throughout the entire municipality, a ban might apply only to a designated area. For example, Solvang, California, which is known for its Danish character, bans new or expanded formula restaurants in its Tourist Commercial District, finding that the proliferation of formula restaurants would adversely affect its unique character.²² Similarly, San Francisco, California prohibits “formula retail uses” in at least one of its commercial districts.²³ The purposes of this restriction are, among other things, to “protect its vibrant small business sector and create a supportive environment for new small business innovations,” as well as to preserve “the distinctive character of certain neighborhood commercial districts.”²⁴

Davis, California²⁵ and Bainbridge Island, Washington²⁶ are additional examples of municipalities that have regulated the placement of fast food outlets.

²⁰ The New Rules Project, The Hometown Advantage, *Formula Restaurant Ban-Calistoga, CA*. Available at: <http://www.newrules.org/retail/calistoga.html>; Section 17.22.020(D)(2), Calistoga Municipal Code, Title 17 Zoning, Calistoga, California. Available at: http://www.thefiengroup.com/municipal_codes.html.

²¹ Section 17.04.616, Calistoga Municipal Code, Title 17 Zoning, Calistoga, California (see note 20).

²² The New Rules Project, The Hometown Advantage, *Formula Restaurant Ban-Solvang, CA*. Available at: <http://www.newrules.org/retail/solvang.html>; Sections 11-12-7(E) & 11.-7A-2(E), Solvang Zoning Ordinance, Solvang, California. Available at: <http://www.sterlingcodifiers.com/CA/Solvang>.

²³ Section 703.3(e), San Francisco Planning Code, San Francisco, California, Available at: <http://www.amlegal.com/library/ca/sanfrancisco.shtml>.

²⁴ Sections 703.3(a)(2) & (a)(8), San Francisco Planning Code, San Francisco, California.

²⁵ Davis Municipal Code, Chapter 40 Zoning, Davis, California. Available at: <http://www.city.davis.ca.us/cmo/citycode/chapter.cfm?chapter=40>.

²⁶ Section 18.40.020, Bainbridge Island Municipal Code, Bainbridge Island, Washington. Available at: [http://search.mrsc.org/nxt/gateway.dll/bnbgmc?f=templates&fn=bnbgpage.htm\\$vid=municipal_codes:BainbridgeIsland](http://search.mrsc.org/nxt/gateway.dll/bnbgmc?f=templates&fn=bnbgpage.htm$vid=municipal_codes:BainbridgeIsland); The New Rules Project, The Hometown Advantage, *Formula*

- **Regulating the Number of Fast Food Outlets: Quotas**

Berkeley, California has implemented a quota system in its Elmwood Commercial Districts that limits the number of “Food Service Establishments,” which includes “quick service restaurants.”²⁷ The purposes of the Elmwood Commercial Districts are, among other things, to preserve the shopping area that serves the surrounding community and the character of the neighborhood.²⁸

- **Regulating the Density of Fast Food Outlets**

The Westwood Village area of Los Angeles, California permits fast food outlets in general, but controls the number of such outlets by regulating their spacing on public streets.²⁹ Bainbridge Island, Washington limits the density of formula take-out food restaurants in design guidelines.³⁰ The Town of Warner, New Hampshire requires a specified distance between fast food outlets in its commercial district.³¹

- **Regulating Distances From Other Uses**

Fast food outlets are historically perceived as having the potential to create a nuisance with the litter, noise, traffic, loitering, air pollution, and odors they can generate. Accordingly, some zoning laws require a specified distance between a fast food outlet and other uses such as schools, churches, hospitals, and nursing homes. Detroit, Michigan, for example, requires that for fast food restaurants (and other restaurants as well) “a minimum distance of five hundred (500) feet shall exist between the subject site and the nearest point of an elementary, junior high, or senior high school site.”³² Arden Hills, Minnesota has a similar provision in its zoning ordinance.³³

Restaurant Ban- Bainbridge Island, WA. Available at:
<http://www.newrules.org/retail/bainbridge.html>.

²⁷ Section 23E.44.040, Berkeley Zoning Code, Berkeley, California. Available at:
http://www.ci.berkeley.ca.us/bmc/Berkeley_Zoning_Code/index.html.

²⁸ Section 23E.44.020, Berkeley Zoning Code, Berkeley, California.

²⁹ Section 5(B)(4), Westwood Village Specific Plan, Westwood Village, Los Angeles, California. Available at:
<http://cityplanning.lacity.org/complan/specplan/sparea/wwdvillagepage.htm>.

³⁰ Section 18.41.050(B)(1), Bainbridge Island Municipal Code, Bainbridge Island, Washington.

³¹ Article XI(H), Town of Warner, NH Zoning Ordinance, Warner, New Hampshire. Available at:
<http://www.warner.nh.us/regulations.htm>.

³² Sections 92.0379C(j), City of Detroit, Official Zoning Ordinance. Available at:

Thus, there are many examples of municipalities across the country that have developed different types of zoning approaches, with various justifications, to regulate the presence of fast food outlets. None of the municipalities mentioned in this section chose to justify its zoning regulations on the issue of obesity, but as stated earlier in this guide, such a justification seems warranted by both scientific findings and legal precedent governing the relationship between zoning and public health.

Question 3: Have the courts upheld zoning laws that address fast food outlets?

***ZONING THAT REGULATES FAST FOOD ESTABLISHMENTS
IS CONSTITUTIONAL***

Several courts have upheld zoning laws that address fast food outlets or decisions made by zoning officials applying laws affecting fast food outlets. In most cases, a zoning ordinance or decision will be reviewed under the very deferential rational basis standard. Under this standard, the regulation will be upheld if it has a rational relationship to a legitimate governmental purpose of promoting the public health, safety, morals, or general welfare. To be unconstitutional, the ordinance or decision must be arbitrary, capricious, or not rationally related to a legitimate government purpose. A few examples of court decisions upholding zoning restrictions on fast food outlets are below.

Franchise Developers, Inc. v. City of Cincinnati, 505 N.E.2d 966, 971 (Ohio 1987) (denial of permit to develop a Wendy's restaurant based on ordinance requiring franchise establishments in overlay district to be "primarily pedestrian and not automobile oriented" upheld where the Supreme Court of Ohio found, among other things, that the City's "attempt to preserve and protect the character of certain neighborhoods" was a proper exercise of its zoning authority and that "[t]here is a legitimate governmental interest in maintaining the aesthetics of the community and, as such, aesthetic considerations may be taken into account by the legislative body in enacting zoning legislation.")

McDonald's Corporation v. Board of Trustees, Village of Elmsford, 610 N.Y.S.2d 387 (N.Y.A.D. 3d Dept. 1994) (board's decision to deny McDonald's a special permit to develop a drive-in restaurant within the Village of Elmsford in Westchester County upheld where restaurant was to be located 1,320 feet from an existing Wendy's drive-in

http://www.municode.com/resources/code_list.asp?stateID=22.

³³ Section 6(D)(1)(a), Arden Hills Zoning Ordinance, Arden Hills, Minnesota. Available at: http://www.ci.arden-hills.mn.us/Departments/Community_Development/Zoning_Ordinance/zoning_ordinance.htm.

restaurant and the zoning ordinance required 2,000 feet between such establishments, and because the petitioner did not satisfactorily address issues related to traffic.)

Bellas v. Planning Board of Weymouth, No. 00-P-1837, 2002 WL 31455225 (Mass. App. Ct. Nov. 4, 2002) (unpublished opinion) (decision of planning board to deny a special permit for a drive-through window at a Dunkin Donuts facility upheld because “board’s concerns with traffic and pedestrian safety had a reasonable basis in fact.”)

Bess Eaton Donut Flour Company, Inc. v. Zoning Board of Review of Town of Westerly, C.A. No. 98-0648, 2000 WL 976659 (R.I. Super. Ct. Feb.15, 2000) (unpublished opinion) (denial of a special use permit for a drive-through window at Bess Eaton Donut’s bake shop upheld because “there was sufficient, competent evidence in the record to support the dissenting members’ denial of the special use permit based on incompatibility with the surrounding neighborhood and the threat of increased traffic congestion and hazard.”)

Conclusion

This guide describes in brief fashion the complex issue of zoning fast food establishments for the purpose of addressing the public health crisis of obesity in America. A much more complete monograph on the subject has been compiled by the Center for Law and the Public’s Health of the Georgetown and Johns Hopkins Universities. That monograph, *The Use of Zoning to Restrict Fast Food Outlets: A Potential Strategy to Combat Obesity*, is available electronically at the Center’s website (<http://www.publichealthlaw.net>). Planners and others are encouraged to supplement their understanding of these issues by reading that monograph.

In general, the main points of this guide indicate that zoning law might well be an effective tool for addressing obesity as a public health problem. While we are aware of no municipalities that have directly confronted their populations’ problems with obesity through zoning legislation, zoning fast food establishments for other reasons has been tried and approved by the courts.

The law, in all its forms, has an enormous impact on the preservation, protection, and enhancement of the public’s health. Mandatory childhood immunization laws, vehicle and traffic safety laws, building codes, product liability litigation, food and drug regulations, air and water quality laws and regulations, and many other forms of law have saved and will continue to save countless lives. It is well within public health tradition and legal precedent to explore the ways new forms of law, such as zoning law, might successfully address new threats to the public’s health, such as the epidemic of obesity.