

THE USE OF ZONING TO RESTRICT FAST FOOD OUTLETS: A POTENTIAL STRATEGY TO COMBAT OBESITY

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The Use of Zoning to Restrict Fast Food Outlets: A Potential Strategy to Combat Obesity

Ashe et al., in a September 2003 article in the *American Journal of Public Health*, discuss how local communities can use zoning laws to create a retail market that offers healthier foods.¹ In considering how zoning laws have been used to reduce the adverse health effect of alcohol, the researchers mention studies that provide substantial evidence of a positive correlation between alcohol availability and alcohol-related health problems, such as liver cirrhosis, motor vehicle crashes, and violence. They also comment that, since the mid-1980s, many California cities have passed zoning laws that reduce alcohol availability by restricting the density and location of alcohol retailers. California courts have upheld these laws. According to the researchers, these findings suggest that zoning laws have provided a useful tool for reducing alcohol-related health problems.

The Ashe et al. article also considers how the alcohol zoning model could be extended to other retailers, including “fast food” outlets.² “The prevalence of ‘fast food’

¹ Ashe M, Jernigan D, Kline R, Galaz R. Land use planning and the control of alcohol, tobacco, firearms, and fast food restaurants. *American Journal of Public Health* 2003; 93(9):1404-1408.

² In this monograph, we use the terms “fast food outlet,” “fast food establishment,” “fast food restaurant,” and “fast food business” interchangeably. In zoning codes, various terms are used to describe different food retailers, including: “formula fast food establishment,” “fast food restaurant,” “large-scale fast food establishment,” “small-scale fast food establishment,” “full-service restaurant,” “standard restaurant,” “carry out food store,” “quick service restaurant,” “drive-in restaurant,” “drive-through restaurant,” “convenience food store,” “cafeteria,” “café,” and “class I, class II and class III” (see Part II of this monograph). The same term is often defined differently in different zoning codes. What to call and how to distinguish among the various types of businesses that sell food can be difficult. Definitions must be clear in zoning laws to include only those establishments the municipality would like to regulate and exclude those it does not. See McAllister A. *Zoning for Fast-Food and Drive-In Restaurants*. Planning Advisory Service, Report No. 320. Chicago, Illinois: American Society of Planning Officials,

outlets offering menus filled with nutritionally deficient food and promoting ‘super-sized’ portions, in combination with a scarcity of healthy alternatives, is an important public health issue.”³ They suggest that communities can combat the public health threat posed by fast food by issuing zoning laws that restrict where and how fast food outlets can operate.

In this monograph, we build on Ashe et al.’s suggestions for using zoning laws to restrict the operations of fast food outlets to combat obesity. Fast food is defined generally here 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. We recognize that diet is only half of the equation as obesity results from the consumption of too many calories and the expenditure of too few. 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, they are not the focus of this monograph. Information on that topic can be found elsewhere.⁴

September 1976. When zoning laws are not drafted clearly, litigation can arise. See, e.g., *Vitolo v. Chave*, 314 N.Y.S.2d 51 (N.Y. Sup. Ct. 1970) (determining whether proposed use is “restaurant” or “drive-in restaurant”); *Board of Supervisors of Upper Merion Township v. McDonald’s Corp.*, 497 A.2d 264 (Pa. Cmmw. Ct. 1985) (discussing difference between terms “drive-in” and “drive-thru”); *Appeal of Haff*, 448 A.2d 120 (Pa. Cmmw. Ct. 1982) (determining which use definition McDonald’s restaurant falls under).

³ Ashe et al. Land use planning and the control of alcohol, tobacco, firearms, and fast food restaurants at 1407.

⁴ Trust for America’s Health. *Fast 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;

This monograph accompanies our abbreviated guide, *The City Planner's Guide to the Obesity Epidemic: Zoning and Fast Food*.⁵ In that guide, we ask and attempt to answer three 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?**

These issues are addressed in more detail here, and we encourage planners and others to use the content of this monograph to supplement the Guide. This monograph also discusses zoning and its traditional focus on protecting the public's health. We suggest that zoning law has the potential to be an effective tool for addressing obesity as a public health problem.

The monograph is divided into three parts. In Part I, *Connecting the Dots: Obesity to Fast Food to Zoning*, we answer the first question above. Specifically, we discuss the problem of obesity in the United States, paying particular attention to the role of fast food in the obesity epidemic. Part I also explores how zoning can be an effective tool for reducing obesity and explains the legal bases of zoning fast food

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>; Institute of Medicine of the National Academies. *Preventing Childhood Obesity: Health in the Balance, Executive Summary*. The National Academies Press: Washington, D.C. (2005). Available at: http://www.nap.edu/execsumm_pdf/11015.pdf.

⁵ *The City Planner's Guide to the Obesity Epidemic: Zoning and Fast Food* is available electronically at The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities' website (<http://www.publichealthlaw.net>).

outlets. The final section of Part I briefly describes potential federal constitutional challenges to zoning laws aimed at fast food.

Part II, *Zoning Laws Regulating Fast Food Outlets*, answers the second question by providing numerous examples of existing zoning laws that regulate fast food. This section should be a useful resource for planners and others interested in specific language restricting fast food outlets.

Part III, *Case Law Supporting Zoning of Fast Food Outlets*, answers the third question by discussing selected court cases that involve zoning of fast food outlets. While we have found no examples by which municipalities 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. These cases shed light on zoning's potential with respect to obesity and lead to a few practical suggestions for drafting zoning laws that address obesity.

Part I: Connecting the Dots: Obesity to Fast Food to Zoning

I. Obesity as a Current Public Health Crisis

Obesity⁶ is a significant public health problem in the United States and has been described as an epidemic. One study calculated that in 2000 at least 365,000 deaths in the United States or about 15.2 percent of the total number of deaths were attributable to poor diet and physical inactivity, second only to tobacco use (n=435,000), and the number is increasing.⁷ Using all levels of overweight (including obesity) as an estimate of poor diet and physical activity (see note 6 for definitions of weight categories), the authors found that overweight alone accounted for nearly all of the deaths (n=350,000), while nutritional deficiencies and obesity-independent effects of physical inactivity accounted for the rest (n=15,000).⁸ 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.⁹ While there are differences in the scientific findings over the estimated number of deaths attributable to obesity and

⁶ For adults over 20 years old, *overweight* is defined as a body mass index (BMI) between 25.0 and 29.9; *obesity* as 30.0 or higher; and *extreme obesity* as 40.0 or higher. BMI is a tool used for determining weight status and measures weight adjusted for height. For determining weight status in children and teens, BMI is plotted on the 2000 Centers for Disease Control and Prevention (CDC) Growth Charts which are age and gender specific. *Overweight* is defined as at or above the 95th percentile of BMI-for-age. *At risk of overweight* is defined as at or above the 85th percentile but less than the 95th percentile of BMI-for-age. Centers for Disease Prevention and Control. *BMI - Body Mass Index: Home*. Available at: <http://www.cdc.gov/nccdphp/dnpa/bmi/index.htm>; Flegal KM, Carroll MD, Ogden CL, Johnson CL. *Prevalence and trends in obesity among US adults, 1999-2000*. *JAMA* 2002;288(14):1723-1727.

⁷ 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.

⁸ Mokdad et al. Correction: actual causes of death in the United States, 2000.

⁹ Flegal KM, Graubard BI, Williamson DF, Gail MH. Excess deaths associated with underweight, overweight, and obesity. *JAMA* 2005;293(15):1861-1867.

overweight, even the lowest estimates suggest that at least tens of thousands of people in the United States die from obesity each year.¹⁰ Individuals even moderately overweight are 2 times more likely to die prematurely than those of normal weight.¹¹ Life-expectancy at birth and at older ages in the United States might level off or even decline within the first half of this century because of obesity and its related complications.¹² It is estimated that about 9 million U.S. children over age 6 are overweight.¹³ For adults alone, overweight and obesity costs between \$98 billion to \$129 billion each year in national health care expenditures.¹⁴

¹⁰ See Mark DH. Deaths attributable to obesity. *JAMA* 2005;293(15):1918-1919 (commenting on differences in the two studies).

¹¹ DeMaria AN. Of fast food and franchises. *Journal of the American College of Cardiology* 2003;41(7):1227-1228.

¹² Olshansky SJ, Passaro JK, Hershow RC, Layden J, Carnes BA, Brody J, Hayflick L, Butler RN, Allison DB, Ludwig DS. A potential decline in life expectancy in the United States in the 21st Century. *New England Journal of Medicine* 2005;352:1138-1145.

¹³ 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>. The Institute of Medicine of the National Academies Report defines "obesity" as children and youth between ages 2 and 18 with a body mass index (BMI) equal to or greater than the 95th percentile of the Centers for Disease Control and Prevention (CDC) Growth Charts. This is essentially the "overweight" category as defined by CDC as CDC does not refer to children as obese (see note 6).

¹⁴ 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>.

According to national surveys,¹⁵ the prevalence of obesity in adults, defined as a body mass index (BMI) of 30 or higher, was relatively stable from 1960 to 1980 and then increased in 1988-1994 and in 1999-2002.¹⁶ Specifically, in 1960-1962, 13.4 percent of U.S. adults aged 20-74 were obese, 14.5 percent in 1971-1974, and 15.0 percent in 1976-1980. In 1988-1994, the prevalence of obesity increased to 23.3 percent in that group.¹⁷ In 1999-2002, among adults aged 20 or older, 30.4 percent were obese and 34.7 percent were overweight; thus, recent data indicates that nearly two-thirds of U.S. adults (65.1%) are either overweight or obese. The 1999-2002 data also show that in nearly every age and racial/ethnic group (non-Hispanic white, non-Hispanic black, Mexican-American) of adults, the prevalence of overweight or obesity was greater than 50 percent. By racial/ethnic group, gender, and age, the prevalence of obesity ranged from a low of 22.9 percent of non-Hispanic white men aged 20-39 to a high of 50.6 percent of non-Hispanic black women aged 40-59. While there was no significant difference in the prevalence of obesity among men across racial/ethnic

¹⁵ The National Health and Nutrition Examination Survey (NHANES) is a series of nationally representative cross-sectional surveys conducted by the National Center for Health Statistics of the Centers for Disease Control and Prevention. The surveys began in 1960 and each provides a national estimate of the weight status of the U.S. population at the time of the survey. In 1999, NHANES became a continuous survey. Previous surveys include the National Health Examination Survey (NHES I, 1960-1962) and three NHANES surveys (NHANES I, 1971-1974; NHANES II, 1976-1980; and NHANES III, 1988-1994). The results from NHANES are considered more accurate than other surveys such as the Behavioral Risk Factor Surveillance System (BRFSS) and the Harris Poll because those surveys are based on self-reports and self-reported weight tends to be lower. By contrast, NHANES is based on measured weight and height data. Centers for Disease Control and Prevention, *NHANES homepage*. Available at: <http://www.cdc.gov/nchs/nhanes.htm>.

¹⁶ Flegal et al. Prevalence and trends in obesity among US adults, 1999-2000; 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.

¹⁷ Flegal et al. Prevalence and trends in obesity among US adults, 1999-2000.

categories for all age groups, for women aged 20 or older the difference was significant. Non-Hispanic black women had the highest prevalence of obesity at 49.0 percent, followed by Mexican-American women at 38.4 percent, and non-Hispanic white women at 30.7 percent.¹⁸

The 1999-2002 data also show that among children aged 6-19, 16 percent were overweight and 15 percent were at risk for becoming overweight (see note 6 for definitions of weight categories in children). For boys aged 6-19, Mexican-American boys had a significantly higher prevalence of overweight (25.5%) than both non-Hispanic white boys (14.3%) and non-Hispanic black boys (17.9%). For girls aged 6-19, non-Hispanic white girls had a significantly lower prevalence of overweight (12.9%) than both non-Hispanic black girls (23.2%) and Mexican-American girls (18.5%).

Obesity is a risk factor for many chronic conditions such as diabetes, stroke, heart disease, high blood pressure, and certain cancers.¹⁹ Children who are obese are more likely to be obese adults and obesity in children may predispose them to adult diseases.²⁰ Over the past two decades, the public health sector has devoted increasing attention to determining the causes of obesity and has been developing strategies to prevent it. Healthy People 2010, which is a set of health objectives for the nation to achieve by year 2010, identifies overweight and obesity as one of ten Leading Health

¹⁸ Hedley et al. Prevalence of overweight and obesity among US children, adolescents and adults, 1999-2002.

¹⁹ Visscher TL, Seidell JC. The public health impact of obesity. *Annual Review of Public Health* 2001;22:355-75; Flegal et al. Prevalence and trends in obesity among US adults, 1999-2000.

²⁰ 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*.

Indicators that will be used to measure the health of the nation over the first decade of the 21st century.²¹ The 1999-2002 data indicate that we are far off from the stated goals. For example, the prevalence of obesity in adults (30.4%) is double the Healthy People 2010 objective of 15 percent; and the prevalence of overweight in children is 16 percent—more than 3 times the 5 percent stated goal. Moreover, the prevalence of adults at a healthy weight is only 33 percent—about half of the Healthy People 2010 objective of 60 percent.²²

II. Why Zoning Fast Food Outlets Can Help Address Obesity

A. Food Retail Market and Diet

Obesity is believed to have many causes, including polygenic, metabolic, psychosocial, and environmental ones. For example, certain genes may make an individual more susceptible to obesity by affecting energy intake and requirements, energy utilization, taste preferences, and metabolism.²³ Most experts agree, though, that biology cannot explain the rapid weight gain in the past few decades. While there are insufficient data to state definitively the cause of the recent obesity epidemic, the growing consensus among experts is that environmental factors are responsible—specifically, high caloric intake and low levels of physical activity.²⁴ With respect to

²¹ Healthy People 2010. Available at: www.healthypeople.gov.

²² 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.

²³ Poston II, WS, Foreyt JP. Obesity is an environmental issue. *Atherosclerosis* 1999;146:201-209.

²⁴ Hill JO, Wyatt HR, Reed GW, Peters JC. Obesity and the environment: where do we go from here? *Science* 2003;299:853-855; French SA, Story M, Jeffery RW. Environmental influences on eating and physical behavior. *Annual Review of Public Health* 2001;22:309-335; Poston II et al. Obesity is an environmental issue.

intake, fast food has been under increasing scrutiny for its role in the obesity epidemic. In this section, we consider some of the reasons why fast food may contribute to obesity in the United States, and we review several studies that indicate that access to fast food is positively associated with higher caloric intake, higher BMI, weight gain, and low nutrition. These and other studies suggest that zoning laws that limit individuals' access to fast food and provide access to healthy food alternatives could help reduce the prevalence of obesity in the United States.

1. *Fast Food*

The scientific literature suggests three main reasons why fast food likely contributes to obesity: large, inexpensive portion sizes; high energy density; and the frequency with which Americans, including children, consume it.²⁵

Food portion sizes have increased significantly in the United States over the past several decades. One study found that between 1977 and 1996, with the exception of pizza, food portion sizes increased for Americans aged 2 and older for all foods studied in all locations examined (eaten or prepared at home, fast food establishments, restaurants, and any other source).²⁶ Specifically, during the 19-year study period, a single serving of a soft drink increased by 6.8 ounces, Mexican dishes by 1.7 ounces, hamburgers by 1.3 ounces, salty snacks by 0.6 ounces, and french fries by 0.5 ounces. The same study found that in 1994-1998, for most of the foods studied, the largest portion sizes were found at fast food establishments and the smallest portions at other restaurants.

²⁵ See Brownell KD. Fast food and obesity in children. *Pediatrics* 2004;113(1 Pt 1):132.

²⁶ Nielsen SJ, Popkin BM. Patterns and trends in food portion sizes, 1977-1998. *JAMA* 2003;289(4):450-453.

Another study looked at ready-to-eat prepared foods (marketplace portions) and found that the portion sizes of all of the food studied, with the exception of sliced white bread, exceeded federal standards (U.S. Department of Agriculture standard serving sizes for dietary guidance and U.S. Food and Drug Administration standard servings for food labels) by a minimum factor of 2 and sometimes by as much as 8.²⁷ According to the study, hamburgers, sodas, and french fries served at fast food chains are often 2 to 5 times larger than their original portion size. Specific examples are illustrative. In 2001, McDonald's "small" french fries were the same size as the only size offered in the mid-1950s and one-third the weight of the largest size available in 2001. In 2001, "large" was equivalent in weight to 1998's "Supersize," and the 2001 "Supersize" was nearly one ounce more.²⁸ Portion size matters because studies repeatedly demonstrate that, except for young children, people tend to eat more when served more.²⁹ Food retailers also recognize that consumers like values, and offering larger portions for relatively less money has become a successful marketing strategy for fast food businesses.³⁰

Large portion size by itself is not the problem, but rather the consumption of large servings of high energy dense food (*energy density* refers to the amount of energy or calories per weight of a particular food). Foods higher in fat tend to be more energy

²⁷ Young LR, Nestle M. Expanding portion sizes in the US marketplace: implications for nutrition counseling. *Journal of the American Dietetic Association* 2003;103:231-234.

²⁸ 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.

²⁹ Rolls BJ. The supersizing of America: portion size and the obesity epidemic. *Nutrition Today* 2003;38(20):42-53.

³⁰ Young et al. The contribution of expanding portion sizes to the US Obesity Epidemic; Nestle M, Jacobson MF. Halting the obesity epidemic: a public health policy approach. *Public Health Reports* 2000;115:12-24.

dense.³¹ Fast foods tend to be high in fat, energy dense, and low in nutrition.³² For example, the combined total of McDonald's Supersize french fries (7.1 oz with 610 kcal) and Supersize Coca-Cola (42 oz with 410 kcal) makes up about half of the daily energy requirements for large segments of the U.S. population.³³ The combination of a Big Mac (570 kcal and 32g of fat) and medium french fries (450 kcal and 22g of fat) also has about half of the daily energy requirements as well as 83 percent of recommended daily fat based on a 2000 kcal/day diet.³⁴ And Burger King's Double Whopper alone, with nearly 1,000 kcal, provides nearly half of total daily energy requirements for many Americans.³⁵ Between 1977 and 1996, soft drinks increased by 49 kcal (6.8 oz), french fries by 68 kcal (0.5 oz), and hamburgers by 97 kcal (1.3 oz).³⁶ One study found that children and adolescents aged 4-19 who ate fast food consumed on average 187 kilocalories per day more than those who did not, which could theoretically account for an additional 6 pounds of weight gain per child per year.³⁷ As only 10 extra kilocalories

³¹ Rolls BJ. The supersizing of America: portion size and the obesity epidemic. Rolls notes that large portions of low energy dense food such as fruits and vegetables should be encouraged.

³² 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; 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.

³³ Young et al. Expanding portion sizes in the US marketplace: implications for nutrition counseling.

³⁴ French et al. Environmental influences on eating and physical behavior.

³⁵ Young et al. Expanding portion sizes in the US marketplace: implications for nutrition counseling.

³⁶ Nielsen et al. Patterns and trends in food portion sizes, 1977-1998.

³⁷ Bowman et al. Effects of fast-food consumption on energy intake and diet quality among children in a National household survey.

per day of unexpended energy amounts to an extra pound of weight per year, the high fat and caloric content of many fast foods raises legitimate concerns.³⁸

Fast food consumption may also contribute to a less nutritional diet in both children and adults. In a study of U.S. children and adolescents aged 4-19, those who ate fast food compared to those who did not consumed 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.³⁹ A second study found that adolescents who frequently ate fast food consumed more total energy, a higher percent of energy from fat, more daily servings of cheeseburgers, french fries, pizza, and soft drinks, and less daily servings of fruit, vegetables, and milk.⁴⁰ A third study involving both adults and children found similar results: fast food consumers had a higher intake of energy, fat, saturated fat, sodium, and soft drinks, and a lower intake of fruits and vegetables, milk, and vitamins A and C compared to those who did not eat fast food.⁴¹ A fourth study of adults alone found that eating fast food increased the day's energy intakes, increased energy density of the overall day's diet, and decreased micronutrient density. The same study found that adults who ate fast food on one of the two survey days also consumed 206 calories more on the day they ate fast food than on the non-fast food day, and that eating fast

³⁸ Nielsen et al. Patterns and trends in food portion sizes, 1977-1998.

³⁹ Bowman et al. Effects of fast-food consumption on energy intake and diet quality among children in a National household survey.

⁴⁰ French SA, Story M, Neumark-Sztainer D, Fulkerson JA, Hannan P. Fast food restaurant use among adolescents: associations with nutrient intake, food choices and behavioral and psychosocial variables. *International Journal of Obesity* 2000;25:1823-1833.

⁴¹ Paeratakul S, Ferdinand DP, Champagne CM, Ryan DH, Bray GA. Fast-food consumption among US adults and children: dietary and nutrient intake profile. *Journal of the American Dietetic Association* 2003;103(10):1332-1338.

food was associated with failing to meet at least one of the recommendations for total fat, saturated fat, and added sugars.⁴² In a prospective study, researchers found that fast food consumption was associated with increased total energy and percentage of energy from fat, and more frequent consumption of hamburgers, french fries and soft drinks and less frequent consumption of fruit and fiber.⁴³

The third factor implicating fast food in the recent obesity epidemic is the frequency with which it is eaten. In general, more people are eating away from home. In 1977-1978, Americans (aged 2 and older) consumed about 77 percent of total kilocalories at home; by 1994-1996, the percentage had decreased to 65 percent.⁴⁴ In 1970, Americans spent 25 percent of their total food spending away from home, and by 1999 they spent nearly half (47.5%). By 2010, it is projected that the majority (53%) of the food dollar will be spent on away-from-home foods.⁴⁵ When people do eat out, many are choosing fast food restaurants. In 1953, fast food consumption comprised only 4 percent of the total away-from-home food sales compared to 34 percent in 1997.⁴⁶ Between 1977 and 1995, the percentage of meals/snacks eaten at fast food restaurants increased 200 percent compared to a 150 percent increase at other restaurants.⁴⁷ In

⁴² Bowman SA, Vinyard BT. Fast food consumption of U.S. adults: impact on energy and nutrient intakes and overweight status. *Journal of the American College of Nutrition* 2004;23(2):163-168.

⁴³ French SA, Harnack L, Jeffery RW. Fast food restaurant use among women in the Pound of Prevention study: dietary, behavioral and demographic correlates. *International Journal of Obesity* 2000;24:1353-1359.

⁴⁴ Nielsen et al. Patterns and trends in food portion sizes, 1977-1998.

⁴⁵ French et al. Fast food restaurant use among adolescents: associations with nutrient intake, food choices and behavioral and psychosocial variables.

⁴⁶ French et al. Fast food restaurant use among women in the Pound of Prevention study: dietary, behavioral and demographic correlates.

⁴⁷ French et al. Environmental influences on eating and physical behavior.

2001, about \$110 billion was spent on fast food alone in the United States.⁴⁸ The number of fast food restaurants in the United States has increased dramatically over the past few decades from 72,850 in 1972 to 180,205 in 1995⁴⁹ to over 280,000 in recent years.⁵⁰ In the late 1970s, fast food accounted for 2 percent of the total energy consumed by children; by the mid-1990s, it accounted for 10 percent or a 500 percent increase.⁵¹ The average adolescent eats at a fast food restaurant two times per week,⁵² and on a typical day, 30.3 percent of U.S. children and adolescents eat fast food.⁵³ It is not surprising that children eat so much fast food as a recent study found that fast food restaurants in Chicago are clustered within a short walking distance from schools; 3 to 4 times as many fast food restaurants were located within 1.5 kilometers of schools than would have been expected if the restaurants had been distributed throughout the city unrelated to school locations.⁵⁴ In half of Chicago's schools, students need only walk about 5 minutes to reach a fast food restaurant. Adults are big consumers of fast food as well. In a nationally representative 24-hour dietary recall survey, one in four adults (26.5%) reported eating fast food.⁵⁵ In another 24-hour dietary recall survey, 37 percent

⁴⁸ DeMaria AN. Of fast food and franchises.

⁴⁹ French et al. Environmental influences on eating and physical behavior.

⁵⁰ Austin SB, Melly SJ, Sanchez BN, Patel A, Buka S, and Gortmaker SL. Clustering of fast-food restaurants around schools: a novel application of special statistics to the study of food environments. *American Journal of Public Health* 2005;95(9):1575-1581.

⁵¹ Bowman et al. Effects of fast-food consumption on energy intake and diet quality among children in a National household survey.

⁵² French et al. Fast food restaurant use among adolescents: associations with nutrient intake, food choices and behavioral and psychosocial variables.

⁵³ Bowman et al. Effects of fast-food consumption on energy intake and diet quality among children in a National household survey.

⁵⁴ Austin et al. Clustering of fast-food restaurants around schools: a novel application of special statistics to the study of food environments.

⁵⁵ Bowman et al. Fast food consumption of U.S. adults: impact on energy and nutrient intakes and overweight status.

of the adults and 42 percent of the children reported eating fast food.⁵⁶ And in a third study of women aged 20-45, 21 percent reported eating at a fast food restaurant 3 or more times a week, 15.7 percent reported two visits per week, and 39.2 percent reported one visit per week.⁵⁷

2. Suggestive Links to Obesity

Some research suggests that fast food may be linked to obesity. For example, studies have found an association between eating fast food and increased energy intake, higher fat intake,⁵⁸ higher BMI,⁵⁹ and overweight status.⁶⁰ A 15-year prospective study in young adults found strong positive associations between fast-food consumption and weight gain and insulin resistance.⁶¹ People eating fast food more than twice a week at both baseline and follow-up gained an extra 10 pounds (4.5 kilograms) over 15

⁵⁶ Paeratakul et al. Fast-food consumption among US adults and children: dietary and nutrient intake profile.

⁵⁷ French et al. Fast food restaurant use among women in the Pound of Prevention study: dietary, behavioral and demographic correlates.

⁵⁸ Bowman et al. Fast food consumption of U.S. adults: impact on energy and nutrient intakes and overweight status; Bowman et al. Effects of fast-food consumption on energy intake and diet quality among children in a National household survey; French et al. Fast food restaurant use among women in the Pound of Prevention study: dietary, behavioral and demographic correlates; French et al. Fast food restaurant use among adolescents: associations with nutrient intake, food choices and behavioral and psychosocial variables; Jeffrey RW, French SA. Epidemic obesity in the United States: are fast foods and television viewing contributing? *American Journal of Public Health* 1998;88(2):277-280; Paeratakul et al. Fast-food consumption among US adults and children: dietary and nutrient intake profile.

⁵⁹ Bowman et al. Fast food consumption of U.S. adults: impact on energy and nutrient intakes and overweight status; French et al. Fast food restaurant use among women in the Pound of Prevention study: dietary, behavioral and demographic correlates; Jeffrey et al. Epidemic obesity in the United States: are fast foods and television viewing contributing?.

⁶⁰ Bowman et al. Fast food consumption of U.S. adults: impact on energy and nutrient intakes and overweight status.

⁶¹ Pereira MA, Kartashov AI, Ebbeling CB, Van Horn L, Slattery, ML, Jacobs Jr, DR, Ludwig DS. Fast-food habits, weight gain, and insulin resistance (the CARDIA study): 15-year prospective analysis. *Lancet* 2005;365:36-42.

years, compared to those eating fast food less than once a week. The associations, moreover, were largely independent of potentially confounding factors such as physical activity and television viewing. Another study found that predominantly black neighborhoods had 2.4 fast food restaurants per square mile compared to only 1.5 fast food restaurants in predominantly white neighborhoods.⁶² For an average-sized neighborhood shopping area, this finding meant that predominantly black neighborhoods had 6 more fast food restaurants than predominantly white neighborhoods. The authors suggest that in black and low-income neighborhoods, more convenient access to fast food combined with decreased access to healthy food may increase consumption of unhealthy foods and play a role in the obesity epidemic in these populations.⁶³

3. *Alternatives to Fast Food*

While fast food restaurants have generally been associated with poorer eating habits, supermarkets and grocery stores have been associated with healthier eating habits. A 1991 study found a positive and significant association at both the community and zip code level between the availability of healthful products (low fat and high fiber) in supermarkets and grocery stores and reported consumption of healthful products by

⁶² Block JP, Scribner RA, DeSalvo KB. Fast food, race/ethnicity, and income: a geographic analysis. *American Journal of Preventive Medicine* 2004;27(3):211-217.

⁶³ One study found no association between overweight in urban low-income preschool children and three environmental factors—the proximity of the children’s residences to fast food restaurants, the proximity to playgrounds, and the level of neighborhood crime. Burdette HL, Whitaker RC. Neighborhood playgrounds, fast food restaurants, and crime: relationships to overweight in low-income preschool children. *Preventive Medicine* 2004;38:57-63.

individuals living near the stores.⁶⁴ In general, supermarkets tend to offer healthier foods at lower prices⁶⁵ and, therefore, may help to encourage individuals to eat healthier foods.

A U.S. study found that for each additional supermarket in the census tract, black residents' consumption of fruits and vegetables increased by 32 percent. Moreover, while fast food restaurants were evenly dispersed across neighborhoods, there were 5 times as many supermarkets in census tracts where white Americans lived. In fact, only 8 percent of black Americans lived in a census tract with one or more supermarkets compared to 31 percent of white Americans.⁶⁶ Another multi-jurisdictional study found that wealthier neighborhoods had over 3 times as many supermarkets as the lowest-wealth neighborhoods, and that there were 4 times as many supermarkets in predominantly white neighborhoods than in predominantly black neighborhoods.⁶⁷ The same study found 5 supermarkets serving nearly 118,000 people in 35 predominantly black neighborhoods (ratio 1:23,582) compared to 68 supermarkets serving 259,500 people (ratio 1:3816) in predominately white neighborhoods. The additional factor that

⁶⁴ Cheadle A, Psaty BM, Curry S, Wagner E, Diehr P, Koepsell T, Kristal A. Community-level comparisons between the grocery store environment and individual dietary practices. *Preventive Medicine* 1991;20:250-261.

⁶⁵ Morland K, Wing S, Diez Roux A, Poole C. Neighborhood characteristics associated with the location of food stores and food service places. *American Journal of Preventive Medicine* 2002;22(1):23-29; Cotterill RW, Franklin AW. *The Urban Grocery Store Gap*. Food Marketing Policy Issue paper, No. 8, Food Marketing Policy Center, Department of Agricultural and Resource Economics, University of Connecticut: Storrs, Connecticut, April 1995; Weinberg Z. No place to shop: food access lacking in the inner city. *Race, Poverty & the Environment* 2000;Winter:22-24.

⁶⁶ 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.

⁶⁷ Morland et al. Neighborhood characteristics associated with the location of food stores and food service places.

fewer households in poor and black neighborhoods had access to private transportation led the researchers to “suggest that residents of these neighborhoods have greater difficulty obtaining healthy food” and “may be at a disadvantage when attempting to achieve a healthy diet.”⁶⁸

Access to healthier foods alone, though, will not stop the obesity epidemic in the United States because many other factors influence what people eat including taste, cost, familiarity, nutritional value, and advertising.⁶⁹ But without access to healthy foods, the choice of what to eat is limited, and the research suggests lack of access is likely a significant barrier to healthy eating in some populations.⁷⁰ The Institute of Medicine of the National Academies’ report, *Preventing Childhood Obesity: Health in the Balance*, lists as one of the immediate steps for local and state governments to “[w]ork with communities to support partnerships and networks that expand the availability of and access to healthful foods.”⁷¹ One way to expand access to healthful foods is through zoning. By limiting the prevalence of fast food outlets and encouraging the development of healthier alternatives, such as supermarkets, zoning laws could help increase

⁶⁸ Morland et al. Neighborhood characteristics associated with the location of food stores and food service places.

⁶⁹ Poston II et al. Obesity is an environmental issue; Morland et al. The contextual effect of the local food environment on residents’ diets: the atherosclerosis risk in communities study; Henderson VR, Kelly B. Food advertising in the age of obesity: content analysis of food advertising on general market and African American television. *Journal of Nutrition Education & Behavior* 2005;37(4):191-196; Trust for America’s Health. *F as in Fact: How Obesity Policies are Failing in America*.

⁷⁰ Trust for America’s Health. *F as in Fact: How Obesity Policies are Failing in America*; Morland et al. Neighborhood characteristics associated with the location of food stores and food service places; Wendy C. Perdue, Larry O. Gostin & Lesley A. Stone, National challenges in population health: public health and the built environment: historical, empirical, and theoretical foundations for an expanded role, 31 *Journal of Law, Medicine & Ethics* 557 (2003).

⁷¹ Institute of Medicine of the National Academies. *Preventing Childhood Obesity: Health in the Balance, Executive Summary*, Table ES-1 at 21.

people's access to healthy foods and, in turn, help reduce the prevalence of obesity in this nation. In the next section, we review how zoning works and describe several zoning techniques that could be used to limit fast food outlets in communities and encourage the development of healthier, alternative food retailers.

B. Zoning to Create a Healthier Food Retail Market

The positive association between fast food, unhealthy diets, and obesity suggests that by reducing access to fast food restaurants and displacing them with healthier alternatives, local governments could encourage healthier eating patterns in their communities. Zoning provides a useful tool for reducing access to fast food restaurants and for encouraging healthier alternatives.

Zoning has been defined as “action by the state, or by a city under authority of the state, to control...a) the heights to which buildings may be erected; b) the area of lots that must be left unbuilt upon; and c) the uses to which buildings and lots may be put.”⁷² Of these three purposes, use restrictions are the most relevant to creating a healthier food retailer market. By regulating how land and buildings are used, governments can influence where and how fast food restaurants can operate and can encourage the development of alternative, healthier food retailers.

Use zoning has become increasingly flexible to adapt to changing community needs and development pressures.⁷³ The earliest zoning ordinances were very simple and divided communities into just a few use zones, such as residential, commercial, and

⁷² Martha A. Lees, Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916-1926, 56 *University of Pittsburgh Law Review* 357, 370-371 (1994).

⁷³ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* (West Group 1998) at 103.

industrial.⁷⁴ Usually these zoning schemes were “cumulative”: that is, as zones became less restrictive, they not only permitted additional, more intensive uses, but also incorporated all the less intensive uses that were allowed in the more restrictive zones. Thus, residential development could occur in residential, commercial, or industrial zones, whereas industrial use could only occur in industrial zones. Today, many communities retain elements of cumulative zoning, but most have departed somewhat from the cumulative model. For example, most communities do not allow residential development in industrial zones, and many communities prohibit residential development in commercial zones as well.⁷⁵

One of the main difficulties with use zoning in its simplest form is its rigidity: residential communities may have a need for some commercial development, and municipalities may sometimes need to define more precisely the exact types of establishments they want or do not want in a particular location.⁷⁶ One solution has been to create a wider variety of zones. Whereas early zoning ordinances often distinguished between just three or four types of uses, modern zoning ordinances often define their zones more narrowly, distinguishing, for example, between lighter, medium, and heavy commercial uses.⁷⁷ Thus, if a community wanted to allow the development of a supermarket in a particular neighborhood but prohibit the development of a fast food restaurant, it could create a zone whose definition included supermarkets but excluded fast food restaurants. In addition to expanding the spectrum of use zones, municipalities

⁷⁴ See Patrick J. Rohan, *Zoning and Land Use Controls*, §1.03[2] (Patrick J. Rohan & Damien Kelly eds., 2004).

⁷⁵ Patrick J. Rohan, *Zoning and Land Use Controls*, §1.03[2].

⁷⁶ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 106.

⁷⁷ Patrick J. Rohan, *Zoning and Land Use Controls*, §1.03[2] at 1-36.

have adopted a number of techniques that allow them to zone with more flexibility and that could be useful in encouraging healthier food retailers and discouraging unhealthier food retailers. Like all zoning ordinances, these techniques must conform to both state and federal requirements. Below, we briefly describe the techniques that will most likely be helpful in discouraging fast food restaurants and encouraging healthier alternatives.

1. *Conditional Zoning*

Conditional zoning allows municipalities to designate permissible uses on a site-specific basis.⁷⁸ Under this approach, a municipality rezones a piece of land for more intensive use, but on the condition that only specified new uses be allowed or that certain uses (that would otherwise be allowed) be prohibited.⁷⁹ For example, a municipality could rezone a residential site to allow the development of all types of restaurants except fast food establishments or to allow only supermarkets. Conditional zoning comes in many varieties, but its basic purpose is to give municipalities greater control over how particular parcels of land are used.

Conditional zoning has gained increasing acceptance among courts over the past few decades, though it is still vulnerable to attack.⁸⁰ At first, courts struck down conditional zoning ordinances because site-specific legislation seemed antithetical to the spirit of general-use districts, which treated all parcels within a use district equally.⁸¹ Today, some courts still apply a stricter standard to site-specific zoning decisions. In

⁷⁸ See Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 106.

⁷⁹ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 107.

⁸⁰ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 196-98.

⁸¹ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 196.

some cases, courts will hold that a parcel of land that is zoned for more intensive use than the surrounding area is an illegal “spot zone,” or if the parcel is zoned to allow only less intensive uses, an illegal “reverse spot zone.”⁸² Courts may apply stricter review in such cases and require that the decision to distinguish the particular parcel from the surrounding land be consistent with a broader plan for the community.⁸³ Furthermore, some courts treat site-specific rezonings as quasi-judicial because their focus on a particular parcel of land more closely resembles a judicial decision than a legislative one.⁸⁴ If a court treats a rezoning decision as quasi-judicial, the burden is on the government to prove that the rezoning is proper.⁸⁵ Finally, if the condition appears to be part of a bargaining process, in which the government agrees to rezone a piece of property in exchange for a specific promise or performance from the developer, a court may invalidate it as illegal “contract zoning.”⁸⁶

Most courts, however, uphold conditional zoning as long as it is in the public interest.⁸⁷ Courts will generally not conclude that rezoning is illegal contract zoning unless “there is an express bilateral agreement that bargains away the municipality's

⁸² Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 192-93.

⁸³ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 193.

⁸⁴ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 190-91.

⁸⁵ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 189.

⁸⁶ Edward H. Ziegler, Jr., Arden H. Rathkopf, and Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning*, §44:11 (4th ed. & cum. supp. 2004).

⁸⁷ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 196-197.

future use of the police power.”⁸⁸ (See Part I, Section III below for discussion of police power.) If no such agreement exists, most courts apply a “public interest test,” upholding conditional zoning as long the zoning primarily promotes the public interest, rather than individual interests.⁸⁹ Because public health is included within the public interest, any condition that promotes public health should be upheld under the public interest test.

2. *Incentive Zoning*

Incentive zoning allows municipalities to encourage the construction of certain amenities that benefit the public, while avoiding charges of contract zoning. One law review article described incentive zoning as follows: “[t]he local government presents the developer...with instructions to choose an item from column A (which the zoning code does not permit) and to give the local government in return an item from column B (which the zoning code does not require).”⁹⁰ Because the trade-offs are predetermined, no individual bargaining takes place and the government cannot be accused of contract zoning.⁹¹ Theoretically, municipalities could use incentive zoning to create a healthier food retail market by, for example, providing incentives for developers to build healthier retail food stores, such as supermarkets or health-food restaurants.

⁸⁸ Edward H. Ziegler, Jr., Arden H. Rathkopf, and Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning*, § 44:11.

⁸⁹ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 193, 198; see also Edward H. Ziegler, Jr., Arden H. Rathkopf, and Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning*, § 44:4.

⁹⁰ Roy P. Cookston & Burt Bruton. Zoning Law, 35 *University of Miami Law Review* 581, 592-593 (1981).

⁹¹ Roy P. Cookston & Burt Bruton, Zoning Law at 592.

3. *Performance Zoning*

Performance zoning focuses not on how the land is used but on the effects of the land use.⁹² A performance zoning ordinance sets specific standards that anyone who uses the land must meet. For example, the ordinance might prohibit land users from exceeding certain noise, vibration, or pollution levels.⁹³ Performance zoning can serve as a supplement or an alternative to use zoning; if the ordinance includes no use restrictions, then any use will be permitted as long as it does not transgress the ordinance's performance standards. By contrast, the zoning ordinance may also include use restrictions, in which case the landowner must meet both the use restrictions and the performance standards.⁹⁴

Performance zoning could be used to promote a healthier selection of food choices for consumers. Although performance zoning has primarily been used in industrial use zones, it has also been used to regulate non-industrial development and could be applied to restaurants as well. A municipality could, for example, require fast food and other restaurants to offer a minimum number of healthy alternatives on their menu. Courts review performance zones under the rational basis standard—the legislation must have a rational relationship to a legitimate governmental purpose of promoting the public health, safety, morals, or general welfare.⁹⁵ Therefore, a requirement that restaurants provide a healthy mix of foods should pass constitutional

⁹² Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 111.

⁹³ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 111.

⁹⁴ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 111.

⁹⁵ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 111.

muster because there is evidence that healthier food choices would help decrease obesity.

These are not the only innovations to traditional use zoning that allow communities more flexibility in regulating how land and buildings can be used,⁹⁶ but they are the ones most likely to be useful for communities that wish to issue zoning ordinances that restrict the operation and location of fast food establishments and encourage the development of healthier alternatives. In the next section, we consider the legal basis of such zoning ordinances.

III. Legal Basis of Zoning Fast Food Outlets

As we have seen, studies suggest that obesity rates within a community are influenced, in part, by the selection of foods that are available in that community's retail market. By restricting where and how fast food restaurants operate and encouraging the development of healthier alternatives, such as supermarkets, zoning ordinances may help reduce the prevalence of obesity. But like all laws, zoning ordinances are subject to legal challenges. In this section, we consider the legal basis for zoning laws aimed at creating a healthier food retail market and the possible legal challenges that such laws will face.

The section is divided into three parts. Part A provides an overview of the "police power," which is the basis of authority for all zoning laws, and reviews the two landmark Supreme Court opinions that establish that zoning to promote public health is a legitimate exercise of the police power. Part B expands upon this conclusion by

⁹⁶See, e.g., *Supermarket Access in Cambridge: A Report to Cambridge City Council Community Development Department, December 19, 1994*. Available at: <http://www.cambridgema.gov/~CDD/cp/zng/super/super.html>.

considering language from other zoning opinions and prominent zoning commentators that suggests that public health goals have historically provided—and perhaps still provide—not only a *legitimate* legal basis for zoning ordinances, but the *strongest* legal basis. Finally, Part C briefly describes federal constitutional challenges that zoning ordinances aimed at creating a healthier food retail market may face.

A. Public Health Zoning as a Legitimate Exercise of the Police Power

1. *Origins and Scope of the Police Power*

All zoning laws and many public health laws are exercises of the “police power.”⁹⁷ Before we review the two Supreme Court cases that established that states may use their police power to zone for the public’s health, however, it may be helpful to explain the origins and general scope of the police power and how it fits into this country’s federalist framework.

Under the police power, states have authority to regulate private individuals in the interest of the public’s health, safety, morals, and welfare.⁹⁸ The police power is not the only source of state regulatory authority. The *parens patriae* powers, for example, encompass the states’ inherent authority to care for those who cannot care for themselves.⁹⁹ States may also derive authority over certain issues from federal legislation: federal environmental statutes, for example, often grant states the authority to regulate “in lieu” of federal programs.¹⁰⁰ These other sources of authority can

⁹⁷ See Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 111 (West Group 1998); Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press 2000) at 50-51.

⁹⁸ Lawrence O. Gostin. *Public Health Law: Power, Duty, Restraint* at 48.

⁹⁹ Lawrence O. Gostin. *Public Health Law: Power, Duty, Restraint* at 52.

¹⁰⁰ Judith V. Royster & Rory SnowArrow Fausett, Control of the Reservation Environment, 64 *Washington Law Review* 581, 613 -614 (1989).

influence zoning decisions.¹⁰¹ The police power is, however, the ultimate source of authority for all zoning laws.

The police power predates the Constitution and inheres in the states as a remnant of their sovereignty.¹⁰² Prior to the formation of the United States, the individual states or colonies were sovereigns and, as such, had inherent authority over certain matters. When the states agreed to unite under the Constitution, they gave up some of their inherent authority to the federal government. They did not, however, give up all of their sovereignty.¹⁰³ Instead, they created a federal government whose authority is limited to those powers specifically enumerated in the Constitution.¹⁰⁴ The enumerated list is quite extensive and includes some far-reaching powers, such as the power to tax and spend, and the power to regulate interstate commerce.¹⁰⁵ It does not, however, include a federal police power. In other words, the federal government cannot enact laws *solely* in the interest of the public's health, safety, morals, and general welfare. That power, like other non-enumerated powers, is reserved to the states under the Tenth Amendment of the U.S. Constitution.¹⁰⁶ Although the police power, and therefore the power to zone, ultimately resides in the states, all fifty states have delegated at least

¹⁰¹ See, e.g., *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, New York*, 799 F. Supp. 272 (N.D.N.Y. 1992) (holding that the state of New York had standing under its *parens patriae* power to challenge the Village of Waterford's denial of a zoning approval for a residence for homeless persons living with HIV/AIDS).

¹⁰² Edward H. Ziegler, Jr., Arden H. Rathkopf, and Daren A. Rathkopf. *The Law of Zoning and Planning*, § 1:2.

¹⁰³ Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* at 52.

¹⁰⁴ D. Benjamin Barros, The Police Power and the Takings Clause, 58 *University of Miami Law Review* 471, 475 (2004) ("In giving the federal government limited and enumerated powers, the Constitution left the remaining sovereign authority of the United States with the individual states.").

¹⁰⁵ U.S. Const. Art. 1, § 8.

¹⁰⁶ See U.S. Const. amend. X; see also Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* at 52; Patrick J. Rohan, *Zoning and Land Use Controls*, § 35.03[1].

some of their zoning authority to local governments (see Appendix A: State Delegation of Zoning Authority). Most zoning decisions, therefore, are made by local governments.

The Supreme Court has described the police power as “one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.”¹⁰⁷ This assessment of the broad reach of the police power is at no time more apt than when states are regulating in the interest of the public’s health and safety. As one court put it:

When the city council considers some occupation or thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation. Municipalities are allowed a greater degree of liberty of legislation in this direction than in any other...The most important of the police powers is that of caring for the safety and health of the community...¹⁰⁸

Thus, state regulatory authority is arguably at its greatest when regulating to protect and promote the public’s health and safety. It is not surprising, therefore, that a state’s power to zone, which is based on the police power, is greatest when the state enacts zoning ordinances in the interest of public health and safety. This, as we shall see later, has been true historically and appears to remain true today. First, however, we consider two Supreme Court cases that together help define the reach and limits of the states’ power to zone for the public’s health.

2. Zoning for Public Health as a Legitimate Exercise of the Police Power

Two landmark U.S. Supreme Court cases confirm the general validity of using the police power to promote public health and to enact zoning ordinances in the interest

¹⁰⁷ *District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909).

¹⁰⁸ *Cleaners Guild of Chicago v. City of Chicago*, 37 N.E.2d 857, 865 (Ill. App. Ct. 1941) (citing *Biffer v. City of Chicago*, 116 N.E. 182, 569 (Ill. 1917)).

of public health. *Jacobson v. Massachusetts*, a non-zoning case,¹⁰⁹ made clear that courts should be deferential when considering public health legislation. In that case, the Supreme Court upheld a Massachusetts law that allowed local boards of health to require individuals to be vaccinated if the boards determined vaccination was necessary “for the public health or safety.”¹¹⁰ Anyone over twenty-one who refused was subject to a five dollar fine. Jacobson refused, was charged five dollars, and appealed the case to the Supreme Court, arguing, unsuccessfully, that the law violated his due process rights because it was “unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best.”¹¹¹ In rejecting Jacobson’s challenge, the Supreme Court affirmed the broad power of states to regulate individuals in the interest of public health and articulated a deferential standard of review for public health legislation: it stated that a court can only overturn a public health statute if that statute “has no real or substantial relation to [public health], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”¹¹²

Twenty years later, the Supreme Court invoked *Jacobson’s* deferential standard in the seminal zoning decision *Village of Euclid v. Ambler Realty*,¹¹³ which affirmed that comprehensive zoning laws were a permissible use of the police power and that public health was a permissible goal of zoning laws. *Euclid* involved a method of zoning now called “Euclidean” (or cumulative) zoning, in which, as described above, a municipality

¹⁰⁹ *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905).

¹¹⁰ *Jacobson v. Massachusetts*, 197 U.S. at 12.

¹¹¹ *Jacobson v. Massachusetts*, 197 U.S. at 26.

¹¹² *Jacobson v. Massachusetts*, 197 U.S. at 31.

¹¹³ *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

is divided into a number of zones, ranging from most restrictive—where only one or two uses are allowed—to least restrictive, where all uses are allowed. Ambler Realty sought to enjoin the zoning scheme, arguing that it violated the company’s constitutional right to property because the value of its land had been diminished by 75 percent¹¹⁴ in a manner that was allegedly “unreasonable and confiscatory.”¹¹⁵ In rejecting this argument, the Supreme Court cited *Jacobson* as it articulated a similarly deferential standard: “the [Village’s] reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹¹⁶

Euclid conclusively established that zoning for the public health is a proper exercise of the police power. The Supreme Court did not say that public health was the only permissible purpose for zoning laws, but it relied heavily on health-related goals in upholding the zoning law. It stated that the separation of residential, commercial, and industrial areas from each other “bears a *rational relation* to the health and safety of the community,”¹¹⁷ and it favorably cited expert reports and lower-court decisions that had found that such separation could reduce a city’s risk of fires, traffic accidents, and nervous disorders.¹¹⁸

Neither *Jacobson* nor *Euclid* suggested that the government’s power to zone or enact other laws in the interest of public health was unlimited. At the end of *Jacobson*,

¹¹⁴ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 456.

¹¹⁵ *Village of Euclid v. Ambler Realty*, 272 U.S. at 384, 386.

¹¹⁶ *Village of Euclid v. Ambler Realty*, 272 U.S. at 395.

¹¹⁷ *Village of Euclid v. Ambler Realty*, 272 U.S. at 391 (emphasis supplied).

¹¹⁸ *Village of Euclid v. Ambler Realty*, 272 U.S. at 391, 394.

the Supreme Court stated that “the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression.”¹¹⁹ *Euclid* echoed this sentiment, stating that zoning ordinances may be unconstitutional as applied if they are arbitrary and unreasonable.¹²⁰

Despite these limitations, one scholar has noted that “[t]he legacy of *Jacobson* surely is its defense of social welfare philosophy and unstinting support of police power regulation.”¹²¹ As we will discuss in the next section, this legacy was upheld in many subsequent zoning decisions in which courts generally deferred to legislatures when the purpose of zoning laws was to promote the public health.

B. Public Health as the Strongest Basis for Zoning Laws

Euclid conclusively established that public health provides a *legitimate* basis for zoning, but a deeper look at the history of zoning laws and zoning law cases suggests that, as a historical matter, public health has provided the *strongest* legal basis for zoning. Here, we discuss how many early zoning laws and their predecessors were motivated by public health concerns and how this traditional use of zoning-type restrictions to promote public health appears to have made public health the primary focus of early zoning decisions.

Modern zoning laws first appeared in the United States in the early twentieth century, but their precursors date back to the colonial era. Public health was a primary

¹¹⁹ *Jacobson v. Massachusetts*, 197 U.S. at 38.

¹²⁰ *Village of Euclid v. Ambler Realty*, 272 U.S. at 395.

¹²¹ Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* at 67.

motive for many of the early regulations. Fire was a particular concern as towns developed and grew in the early United States. A 1692 Massachusetts ordinance, for example, sought to prevent fires by requiring all buildings of a certain size to be made of brick or stone and to have slate roofs.¹²² Municipalities also exercised control over where explosives could be stored in thickly settled areas.¹²³ In the nineteenth and early twentieth centuries, as cities grew even more rapidly, states and cities began to use zoning-type laws to prevent the spread of diseases as well. Cities in several states passed laws prohibiting the expansion of urban cemeteries,¹²⁴ and some imposed height controls on buildings, in part to ensure that city residents received sufficient light and air, which were considered essential to good health.¹²⁵ These precursors to modern zoning laws demonstrate that the link between public health and zoning-type restrictions is longstanding in this country.

The arrival and rapid spread of comprehensive zoning laws in the first quarter of the twentieth century was also due, in part, to public health concerns. In 1916, New York City passed the first comprehensive zoning ordinance in the United States. It divided the city into a residential district, a business district, and an industrial district and

¹²² James Metzenbaum, *The Law of Zoning*, vol. 1, 4-5 (Baker, Voorhis, & Co. Inc. 2 ed. 1958).

¹²³ Norman Williams Jr. & John M. Taylor, *American Land Planning Law: Land Use and the Police Power*, § 8.01 (Callaghan & Company 1988).

¹²⁴ *Laurel Hill Cemetery v. City and County of San Francisco*, 216 U.S. 358, 366 (1910) (citing several early cases that upheld ordinances restricting the expansion of urban cemeteries).

¹²⁵ See, e.g., *Welch v. Swasey*, 79 N.E. 745,746 (Mass. 1907) (“The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light and air, and thus to affect the public health.”).

imposed upon each district a series of height, bulk, and use restrictions.¹²⁶ Public health was an important impetus for the ordinance. For example, a 1913 report that laid the foundation for the 1916 ordinance and that has been described as “mark[ing] the beginning of the zoning movement in America” was initiated by public health concerns.¹²⁷ The report recommended height, bulk, and use restrictions in order to protect public health and safety.¹²⁸ Other cities quickly followed New York’s lead, and their enthusiasm for zoning was motivated to an important extent by public health concerns.¹²⁹

A prominent early advocate of zoning suggested that zoning’s primary purpose was to protect community health.¹³⁰ In a 1924 paper entitled “Zoning and Health,” Professor George C. Whipple described zoning’s numerous potential health benefits. By ensuring that individuals received adequate light and air, zoning could improve mental

¹²⁶ Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916-1926* at 372.

¹²⁷ Seymour I. Toll, *Zoned American* (Grossman Publishers 1969) at 147.

¹²⁸ Georgette C. Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 *Boston University Law Review* 445, 460 -461 (1998) (“The Commission found that this resulted in darkened streets and buildings, and recommended that in the interest of public safety, height along with area and use should be regulated.”); see also Seymour I. Toll, *Zoned American* at 153-54 (stating that planners worried that skyscrapers raised the risk of tuberculosis by blocking light and air).

¹²⁹ Kenneth H. Young, *Anderson’s American Law of Zoning* § 7.04 (4th ed. 1996) (“The initial zoning ordinance of New York City was enacted at a time when public officials had become aware of the health hazards of congested tenement districts, and the very real threat that things were likely to get worse with increases in population, continued migration to the cities, and consequent intensive use of land. The rapid adoption of zoning during the 1920’s undoubtedly was encouraged by the belief that zoning regulations would at least minimize the health hazards of unrestricted urban growth.”).

¹³⁰ George C. Whipple, “Zoning and Health,” 6, 10, in *Zoning Pamphlets* vol. 1 (Department of Commerce 1930).

health and reduce the incidence of tuberculosis, rickets, and skin and eye problems.¹³¹ By decreasing traffic congestion, zoning could reduce the harms from pollution.¹³² And by segregating residential and industrial districts, zoning could prevent injuries caused by noise and vibration.¹³³ Towards the end of his paper, Professor Whipple emphasized that these health effects were significant at the community level, even if not at the individual level: “It is often difficult to show that zoning prevents injury to the health of certain particular individuals...The relation between zoning and health is a mass relation. It is the health of the community, the collective health of many people, that is at stake.”¹³⁴

Public health was not, however, the only issue driving zoning’s early success. A number of commentators have argued that the real impetus behind zoning was and continues to be preservation of property values.¹³⁵ Property owners were the most powerful group pushing for zoning reforms in New York City, and it may have been no more than coincidence that their goals meshed with those of public health and other land reformers.¹³⁶ In fact, many of the zoning supporters openly acknowledged that their primary concern was property value. For example, although the 1913 report’s official

¹³¹ George C. Whipple, “Zoning and Health” at 6.

¹³² George C. Whipple, “Zoning and Health.”

¹³³ George C. Whipple, “Zoning and Health.”

¹³⁴ George C. Whipple, “Zoning and Health.”

¹³⁵ Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916-1926* at 370-71; Juliana Maantay, *Zoning, Equity, and Public Health*, *American Journal of Public Health* 2000;91(7):1033-1041; Seymour I. Toll, *Zoned American* at 187.

¹³⁶ Seymour I. Toll, *Zoned American* at 148 (stating that, during zoning's rapid growth in the 1920s, it lost its early reforming tendencies and "became the desired institution of men whose principal interest was the condition of the real estate market. ").

purpose was to address public health concerns, public health took second seat to preserving property values.¹³⁷

Notwithstanding doubts about the true motivations underlying the early zoning laws and the court decisions that upheld them, it is clear that, as a legal matter, public health and safety provided the strongest basis for zoning laws. In “Zoning and Health,” Professor Whipple acknowledged that zoning could promote goals other than public health, but he cautioned that zoning laws would not be upheld unless squarely based upon the four permissible purposes of police power: protection of the public health, safety, morals, or general welfare.¹³⁸ For practical purposes, this meant that zoning laws had to be justified on public health and safety grounds since “general welfare” was considered synonymous with public health and safety, and courts appeared unwilling to rely exclusively on morals to uphold zoning measures.¹³⁹

¹³⁷ Seymour I. Toll, *Zoned American* at 165 (“Height and court restrictions should be framed with a view to securing to each district as much light, air, relief from congestion and safety from fire as is consistent with a proper regard for the most beneficial use of the land and as is practicable under existing conditions as to improvements and land values.”).

¹³⁸ George C. Whipple, “Zoning and Health” at 3 (“Zoning is advantageous to a city in many ways. It tends to stabilize real estate values, to promote orderly building, to enhance beauty, and to develop local self-consciousness and civic responsibility on the part of the people. Yet in the face of these benefits, zoning is likely to be declared unconstitutional if it cannot be justified under the police power.”)

¹³⁹ Harvard Law Review Association, *The Legitimate Objectives of Zoning*, 91 *Harvard Law Review* 1443, 1445 -1446 (1978) (“Apparently no court, for example, has ever relied on ‘morals’ to sustain a zoning measure; those that mention morals could have relied on other aims instead. Earlier in this century, the general welfare was often treated not as an independent objective but as equivalent to health and safety. At that time, zoning typically was used for more limited purposes than it is today. Height, setback, and lot size requirements were aimed at ensuring that adequate light and air would enter urban dwellings. Minimum floor space standards were designed to prevent the unhealthy overcrowding of dwellings. Uses were separated in order to alleviate noise, odors, and similar effects in residential areas, and to reduce traffic congestion and provide recreational spaces so that the safety and well-being of children would not

This assessment is borne out by early opinions for and against zoning, which focused almost exclusively on public health and safety. For example, in a decision upholding the separation of business and residential districts, the Supreme Court of Massachusetts placed particular emphasis on public health and safety:

The segregation of manufacturing, commercial and mercantile business of various kinds to particular localities, when exercised with reason, may be thought to bear a rational relation to the health and safety of the community. We do not think it can be said that circumstances do not exist in connection with the ordinary operation of such kinds of business which increase the risk of fire, and which renders life less secure to those living in homes in close proximity. Health and security from injury of children and the old and feeble and otherwise less robust portion of the public well may be thought to be promoted by requiring that dwelling houses be separated from the territory devoted to trade and industry.¹⁴⁰

Similarly, decisions invalidating zoning ordinances emphasized the absence of any relationship between the ordinance and public health:

The proper operation of a grocery store cannot possibly be injurious to the public health. One of the ordinary uses of property is for personal gain, and in the lawful use of this property the individual is protected by the Constitution. He must so use it as not to injure others. By using this property for the purpose of conducting a retail grocery store in a lawful manner he does not injure, in the legal sense, the property of his neighbor.¹⁴¹

be threatened. Thus 'health' and 'safety' construed according to their natural meanings were sufficient to sustain these measures.”).

¹⁴⁰ *In re Opinion of the Justices*, 127 N.E. 525, 531 (Mass. 1920); see also *Miller v. Board of Public Works of City of Los Angeles*, 234 P. 381, 385 (Cal. 1925) (“As the congestion of our cities increases, likewise do the problems of traffic control and police, fire, and health protection. Comprehensive and systematic zoning aids in the successful solution of these problems and obviously tends thereby to affirmatively promote the public welfare.”).

¹⁴¹ *Fitzhugh v. City of Jackson*, 97 So. 190, 193 (Miss. 1923); see also *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912) (“It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.”).

Thus, as a historical matter, public health provided motivation and, to an even greater extent, justification for early zoning laws. This history suggests that a government's authority to zone has traditionally been greatest when it is zoning in the interest of public health.

This tradition holds true today: courts continue to be deferential in their review of zoning laws enacted to promote public health. As one commentator put it:

[I]t is no longer true that there are serious difficulties in providing fire protections for very tall buildings, nor is much emphasis now placed on the advantages (for purposes of fire fighting) of having buildings spaced farther apart. On the other hand, there are numerous instances where [zoning] controls are in fact based directly on considerations of either public safety or public health. When such a relationship clearly appears, this is of course the strongest possible basis for any land use controls.¹⁴²

C. Federal Constitutional Limitations on the Police Power

As we have seen, through the police power states have broad zoning authority, especially when zoning to protect and promote the public's health and safety. Nevertheless, zoning restrictions, by their nature, interfere with private property owners' interests and are, therefore, prime targets for legal challenges on the federal, state, and local levels. For example, a developer could argue that the planning board, in denying a conditional use permit, did not apply the zoning ordinance properly or that the zoning authority exceeded its power under state law in enacting the ordinance. With respect to federal legal challenges, this broad authority primarily is limited to the extent that a regulation violates the federal constitution or is not reasonably or rationally related to protecting the public's health, safety, morals, or welfare. Because no zoning laws have

¹⁴² Norman Williams Jr. & John M. Taylor, *American Land Planning Law: Land Use and the Police Power*, § 8.0 (Callaghan & Company 1988); see also Kenneth H. Young, *Anderson's American Law of Zoning*, § 7.08.

been enacted specifically to address the epidemic of obesity, it is impossible to state with certainty what types of federal constitutional challenges may be brought against these laws and how courts will respond to them. However, the possibility of a constitutional challenge is very real and poses a threat to these laws. Accordingly, lawmakers, when drafting zoning legislation to address obesity, need to consider the potential constitutional challenges that might be raised. Courts have considered federal constitutional challenges to zoning restrictions placed on fast food outlets enacted for purposes other than addressing obesity and to zoning restrictions placed on other types of retailers, such as firearm, alcohol, and tobacco outlets. Constitutional challenges that have been raised and mostly failed include violations to equal protection, due process, the takings clause, the commerce clause, and the First Amendment. Appendix B provides a brief description of potential constitutional challenges. While it is beyond the scope of this monograph to analyze the various court decisions on this topic, we believe that carefully drafted restrictions placed on fast food outlets, such as those identified in this monograph, would likely survive similar constitutional challenges.

Part II: Zoning Laws Regulating Fast Food Outlets

Many communities have passed zoning restrictions on fast food outlets (see note 2 on defining fast food outlets). These laws were enacted on bases other than the protection of the public's health from obesity, although some were enacted for other public health purposes. In this section, we provide a sample of the types of restrictions some communities have adopted.

I. Banning Fast Food Outlets and/or Drive-Through Service

The most obvious way to curtail the development of fast food outlets is to ban them entirely. A wholesale ban could be accomplished in various ways. For example, a specific provision in the zoning code could prohibit the development of fast food outlets anywhere in the locality. A ban could also be indirect if there is no specific provision prohibiting fast food outlets but, in an exclusive list of permitted uses in the zoning districts, fast food outlets are not listed. In a third approach, fast food outlets could be banned, but permitted with a special or conditional use permit. What approach a locality ultimately chooses depends upon many variables including what the locality hopes to accomplish, what is politically feasible, and how easy or difficult a special use permit is to obtain. Banning only drive-through service can potentially have the same effect as an outright ban because 60 percent or more of fast food business is from drive-through service, and therefore, it may be unprofitable to conduct business without it.

An example of an outright ban appears in the Zoning Bylaw of The City of Concord, Massachusetts, which is located less than 20 miles northwest of Boston, with a population of about 15,600 and total area of 25.9 square miles. Concord bans both "fast food restaurants" and "drive-in" service:

Drive-in or fast food restaurants are expressly prohibited. A drive-in or fast-food restaurant is defined as any establishment 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 customer in a motor vehicle.¹⁴³

While the purpose section of the ordinance does not specifically mention fast food outlets as some zoning codes do, it does include the following objectives: “to lessen congestion in the streets” and “to preserve and enhance the development of the natural, scenic and aesthetic qualities of the community.”¹⁴⁴ These two general purposes have historically been used to justify restrictions on fast food outlets.

The City of Carlsbad, California (population over 78,000 and a total area of 40.8 square miles), located in San Diego County, bans all new drive-through restaurants in its thirty-five classes of zones. Interestingly, for other businesses, drive-through service is permitted in most zones with a conditional use permit:

Drive-thru business or drive-thru facilities to existing businesses except drive-thru restaurants which are prohibited from all zones in the city including coastal zone properties. The drive-thru restaurant prohibition applies citywide to all existing and proposed specific plans, master plans, and related amendments. Drive-thru restaurants that are either existing or have received final approvals on the effective date of the ordinance codified in this section are allowed to continue in existence subject to the terms and conditions of this code and the conditional use permit or other discretionary permit permitting them and may apply for and may be granted CUP extensions under this code.¹⁴⁵

¹⁴³ Section 4.7.1, Town of Concord Zoning Bylaw, Town of Concord, Massachusetts. Available at: <http://www.bostonrealestate.com/downloads/Concordzoning.pdf>.

¹⁴⁴ Section 1.2, Town of Concord Zoning Bylaw, Town of Concord, Massachusetts.

¹⁴⁵ Section 21.42.010(5)(N), Carlsbad Municipal Code, Title 21 Zoning, The Zoning Ordinance, Carlsbad, California (emphasis supplied). Available at: <http://municipalcodes.lexisnexis.com/codes/carlsbad/>.

“Drive-thru restaurant” is defined very simply as “a restaurant that has a drive-thru lane to serve customers in motor vehicles.”¹⁴⁶ No other restaurants are defined in the definition sections of the code.

The City of Newport, Rhode Island (population about 26,500 and total area of 11.5 square miles) has a more complicated scheme in this regard. Restaurants are divided into four groups: carry-out, drive-in, fast-food, and standard.¹⁴⁷ While standard restaurants are permitted “by right” in all five commercial districts and fast-food restaurants are permitted with a special use permit in four of the five commercial districts, both drive-in and carry-out restaurants are specifically prohibited in any district in the city.¹⁴⁸ The definition of “drive-in” is also far more detailed than the definition of “drive-thru” found in the Carlsbad ordinance:

“Drive-in restaurant” means any establishment whose principal business is the sale of foods, frozen desserts or beverages to the customer in a ready-to-consume state and whose design, method of operation or any portion of whose business is such that foods, frozen desserts or beverages are served directly to the customer in a motor vehicle, either by a car-hop or by other means which eliminate the need for the customer to exit the motor vehicle, or where the consumption of food, frozen desserts or beverages within a motor vehicle parked on the premises is allowed, encouraged or permitted.¹⁴⁹

¹⁴⁶ Section 21.04.109, The Zoning Ordinance, Carlsbad, California.

¹⁴⁷ Section 17.08.010, 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/>.

¹⁴⁸ Section 17.04.050(B), Codified Ordinances of the City of Newport, Rhode Island, Title 17 The Zoning Code Newport, Rhode Island (“Prohibited Uses. It is intended that any use not included in this zoning code as a permitted use is prohibited. To assist in the interpretation of such permitted uses, the following uses, the list of which is not intended to be complete, are specifically prohibited... drive-in restaurants; carry-out restaurants...”).

¹⁴⁹ Section 17.08.010, Codified Ordinances of the City of Newport, Rhode Island, Title 17 The Zoning Code, Newport, Rhode Island.

In addition, a special provision in the Newport’s zoning code addresses restaurants specifically and reiterates in one subsection that carry-out restaurants are prohibited in the city.¹⁵⁰ Another subsection in the same provision makes it incumbent upon the owners of standard and fast-food restaurants to post that “the consumption of food, frozen desserts or beverages within a motor vehicle parked upon the premises” is prohibited and requires owners to “strictly enforce” the prohibition. Thus, while fast food restaurants are permitted in Newport,¹⁵¹ customers are expressly prohibited from both buying food from their vehicle or eating it in their vehicle on the restaurant premises.

II. Banning “Formula” Restaurants

Instead of enacting an outright ban on all types of fast food restaurants, several cities ban what have become known as “formula” restaurants.¹⁵² The definition can be drafted and interpreted broadly to include a local restaurant that has only one other similar restaurant in the area or interpreted narrowly to include only large national chain restaurants. For example, in 1996, the City of Calistoga, California (population of about 5,200 and total area of 2.6 square miles), located in Napa County, banned “formula restaurants”¹⁵³ and regulated other “formula businesses” in order “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

¹⁵⁰ Section 17.100.090(D), Codified Ordinances of the City of Newport, Rhode Island, Title 17 The Zoning Code, Newport, Rhode Island.

¹⁵¹ Section 17.100.090(B), Codified Ordinances of the City of Newport, Rhode Island, Title 17 The Zoning Code, Newport, Rhode Island.

¹⁵² For both citywide and partial bans on formula restaurants see The New Rules Project, The Hometown Advantage, *Formula Business Restrictions*. Available at: <http://www.newrules.org/retail/formula.html>.

¹⁵³ Section 17.22.020(D)(2), Calistoga Municipal Code, Title 17 Zoning, Calistoga, California. Available at: http://www.thefiengroup.com/municipal_codes.html.

economy...”¹⁵⁴ With respect to formula restaurants, in particular, the City Council found that:

formula food businesses do not reflect the unique character of the community and the desired aesthetic ambience of the commercial areas of the city in that they offer rushed, ready made meals from formula menus identical to similarly decorated units located in other communities and thus cannot contribute to the established uniqueness which the Council finds necessary to maintain a viable visitor industry.¹⁵⁵

“Formula restaurant” is defined broadly in Calistoga’s code:

“Formula restaurant” shall mean an eating establishment devoted to the preparation and offering of food and beverages for sale to the public for consumption either on or off the premises which, by contractual or other arrangement, established or recognized business practice, or membership affiliation, maintains any of the following:

- A. Business name common to a similar business located elsewhere;
- B. Standardized menus, ingredients, food preparation, uniforms, or other standardized features common to a restaurant located elsewhere;
- C. Interior decor common to a similar business located elsewhere;
- D. Architecture or exterior signs common to a similar business located elsewhere;
- E. Use of a trademark or logo common to a similar business located elsewhere (but not including logos or trademarks used by chambers of commerce, better business bureaus, or indicating a rating organization including, but not limited to, AAA, Mobil or Michelin); or
- F. A name, appearance, or food presentation format which causes it to be substantially identical to another restaurant within or outside Calistoga.¹⁵⁶

¹⁵⁴ The New Rules Project, The Hometown Advantage, *Formula Restaurant Ban-Calistoga, CA*. Available at:<http://www.newrules.org/retail/calistoga.html>.

¹⁵⁵ The New Rules Project, The Hometown Advantage, *Formula Restaurant Ban-Calistoga, CA*.

¹⁵⁶ Section 17.04.616, Calistoga Municipal Code, Title 17 Zoning, Calistoga, California.

III. Banning Fast Food in Certain Areas

A ban on fast food outlets might only affect certain areas in a locality. For example, the City of Solvang, California (population 5,332 and total area of 2.5 square miles), which is known for its Danish Northern European character, bans new or expanded formula restaurants in its Tourist Commercial District,¹⁵⁷ finding that the proliferation of formula restaurants would adversely affect its unique character:

The Village Area is unique not only because of its Danish architecture, but because of its small individualized shops and restaurants. Solvang's Village Area is recognized worldwide. It attracts hundreds of thousands of visitors each year, a large part of whom come to enjoy and experience the unique character of the Village. This unique character would be adversely affected by a proliferation of "formula restaurants" which are required by contractual or other arrangements to be virtually identical to restaurants in other communities as a result of standardized menus, ingredients, food preparation, decor, uniforms and the like. The development of such restaurants would conflict with the distinct atmosphere and unique character for which Solvang's Village is famous. Therefore, the City Council finds that in order to preserve the character of the Village, it is reasonable and necessary to adopt this ordinance which would preclude the development of new formula restaurants in the Village.¹⁵⁸

The City and County of San Francisco (population about 777,000 and total area of 231.9 square miles of which 185.2 is water) prohibits all "formula retail uses" (including fast food outlets) in its four-block Hayes-Gough Neighborhood Commercial District¹⁵⁹ and makes formula business conditional uses in some other districts¹⁶⁰ in order to, among other things, "protect its vibrant small business sector and create a

¹⁵⁷ Sections 11.-7A-2(E) & 11-12-7(E), Solvang Zoning Ordinance, Solvang, California. Available at: <http://www.sterlingcodifiers.com/CA/Solvang>.

¹⁵⁸ The New Rules Project, The Hometown Advantage, *Formula Restaurant Ban-Solvang, CA*. Available at: <http://www.newrules.org/retail/solvang.html>.

¹⁵⁹ Section 703.3(e), San Francisco Planning Code, San Francisco, California. Available at: <http://www.amlegal.com/library/ca/sanfrancisco.shtml>.

¹⁶⁰ Section 703.3(f), San Francisco Planning Code, San Francisco, California.

supportive environment for new small business innovations” and preserve “the distinctive character of certain neighborhood commercial districts.”¹⁶¹ The findings in the City’s planning code explicitly state what the unregulated growth of formula retail businesses could do:

The increase of formula retail businesses in the City's neighborhood commercial areas, if not monitored and regulated, will hamper the City's goal of a diverse retail base with distinct neighborhood retailing personalities comprised of a mix of businesses. Specifically, the unregulated and unmonitored establishment of additional formula retail uses may unduly limit or eliminate business establishment opportunities for smaller or medium-sized businesses, many of which tend to be non-traditional or unique, and unduly skew the mix of businesses towards national retailers in lieu of local or regional retailers, thereby decreasing the diversity of merchandise available to residents and visitors and the diversity of purveyors of merchandise.¹⁶²

“Formula retail use” is defined, in part, numerically:

as a type of retail sales activity or retail sales establishment which, along with eleven or more other retail establishments located in the United States, maintains two or more of the following features: a standardized array of merchandise, a standardized façade, a standardized décor and color scheme, a uniform apparel, standardized signage, a trademark or a servicemark ...”¹⁶³

The City of Davis, California (population about 60,000 and total area of 10.5 square miles) has a somewhat complicated zoning scheme in this regard. For example, “formula fast food restaurants” or “drive-through facilities” are not permitted by right in its central commercial district¹⁶⁴ although they could be developed with a conditional use

¹⁶¹ Sections 703.3(a)(2) & (a)(8), San Francisco Planning Code, San Francisco, California.

¹⁶² Section 703.3(a)(9), San Francisco Planning Code, San Francisco, California.

¹⁶³ Section 703.3(b), San Francisco Planning Code, San Francisco, California.

¹⁶⁴ Section 40.14.030(b), Davis Municipal Code, Chapter 40 Zoning, Davis, California. Available at: <http://www.city.davis.ca.us/cmo/citycode/chapter.cfm?chapter=40>.

permit.¹⁶⁵ In its residential conversion zone, all restaurants are allowed, including formula fast food, but drive-through service is expressly not permitted even with a conditional use permit.¹⁶⁶ In the mixed use district, “restaurant” is defined exclusively for that district and “fast-food and full-service dining establishments” are listed as an example of the type of restaurant included in the definition.¹⁶⁷ Drive-through service is a conditional use.¹⁶⁸ There is also a lengthy list of regulations on drive-through facilities that apply across districts.¹⁶⁹ Interestingly, in addition to the general considerations for granting a conditional use permit, with respect to formula fast food restaurants in the central commercial district, zoning authorities may also consider the “concentration of like uses” in addition to other specified factors (“litter, odors, exterior design, signage, concentration of like uses, and the extent to which the use enhances the unique characteristics of the core area”).¹⁷⁰

Depending upon how many zones in the locality the ban affects, a more limited ban could begin to approach an outright ban throughout the entire locality. The Municipal Code of Bainbridge Island, Washington (population about 20,000 and total area of 65.5 square miles of which 57.87% is water) permits “formula take-out food restaurants” (defined as “a restaurant or establishment that (1) is contractually required to offer standardized menus, ingredients and interior or exterior design; and (2) serves

¹⁶⁵ Sections 40.14.050(g) & (h), Davis Municipal Code, Chapter 40 Zoning Davis, California.

¹⁶⁶ Sections 40.11.020(c) & 40.11.04, Davis Municipal Code, Chapter 40 Zoning Davis, California.

¹⁶⁷ Section 40.15.030(d), Davis Municipal Code, Chapter 40 Zoning Davis, California.

¹⁶⁸ Section 40.15.050(i), Davis Municipal Code, Chapter 40 Zoning Davis, California.

¹⁶⁹ Section 40.26.420, Davis Municipal Code, Chapter 40 Zoning Davis, California.

¹⁷⁰ Section 40.14.050(h), Davis Municipal Code, Chapter 40 Zoning Davis, California.

or delivers its food or beverages in disposable containers”)¹⁷¹ in only one part of one district (High School Road District I east of State Route 305).¹⁷² In addition, formula take-out restaurants must meet specific design guidelines,¹⁷³ which include the prohibition of drive-through facilities and provide specific density requirements (see section V below). The locality justified the ban as follows:

WHEREAS, as a result, the City Council of the City of Winslow, Washington, [now Bainbridge Island] now finds that formula take-out food restaurants represent a type of business that is automobile-oriented or of a particular nature that *the existence of one such restaurant in the High School Road zone is a sufficient maximum number of that use for the village character of Winslow to be preserved. That other or additional restaurants of that type in all zones should not be permitted hereafter*; that expansion in number of such establishments should be disallowed entirely in order to establish at this time, an optimal mix of pedestrian-oriented and other kinds commercial [sic] and retail establishments; that to preclude further development of such restaurants in a town of this size prevents commercial over concentration of automobile-oriented businesses and of that type of retail service establishment and will provide for smaller neighborhood-style pedestrian and other kinds of retail outlets to best serve the varied needs of Winslow residents and consumers.¹⁷⁴

IV. Regulating the Number of Fast Food Outlets: Quotas

The City of Berkeley, California (population over 100,000 and total area of 17.7 square miles of which nearly 41% is water) is located in northern California in the San Francisco Bay area. Elmwood Commercial District, located south of the University of

¹⁷¹ Section 18.06.370, Bainbridge Island Municipal Code, Title 18 Zoning, Bainbridge Island, Washington. Available at: [http://search.mrsc.org/nxt/gateway.dll/bnbgmc?f=templates&fn=bnbgpage.htm\\$vid=mun icode:BainbridgeIsland](http://search.mrsc.org/nxt/gateway.dll/bnbgmc?f=templates&fn=bnbgpage.htm$vid=mun icode:BainbridgeIsland).

¹⁷² Section 18.40.020, Bainbridge Island Municipal Code, Title 18 Zoning, Bainbridge Island, Washington.

¹⁷³ Section 18.41.050, Bainbridge Island Municipal Code, Title 18 Zoning, Bainbridge Island, Washington.

¹⁷⁴ The New Rules Project, The Hometown Advantage, *Formula Restaurant Ban-Bainbridge Island, WA* (emphasis supplied). Available at: <http://www.newrules.org/retail/bainbridge.html>.

California, Berkeley, is known for its historic mansions, shopping, restaurants, cafes, and old neighborhood atmosphere. The Elmwood Commercial District was created in 1981, among other things, to preserve the shopping area that serves the surrounding community and the character of the neighborhood.¹⁷⁵ To help accomplish these goals, the City of Berkeley has implemented a quota system in the Elmwood Commercial District which includes numerical limitations on the number of “Food Service Establishments.”¹⁷⁶ There are three types of “Food Service Establishments”: “carry out food store” (no seating on premises), “quick service restaurant,” and “full service restaurant.” What is commonly known as “fast food” would fall under the definition of “quick service restaurant.”¹⁷⁷ Elmwood is permitted three carry out food stores up to 1,000 square feet, seven quick service restaurants up to 1,000 square feet, and seven full service restaurants.¹⁷⁸

The City of Arcata, California (population over 16,600 and total area of 11.0 square miles) limits the number of formula restaurants to nine at any one time:

The number of Formula Restaurants in Arcata shall be limited to nine (9) establishments from the date of the adoption of this ordinance. A new Formula Restaurant shall only be allowed if it replaces an existing Formula Restaurant in one of the following business districts: Janes Road [1], Northtown [1], Uniontown [2], and Valley West/Giuntoli Lane [5]. The allowed number of Formula Restaurants per business district has been indicated in the brackets, and replacement Formula Restaurants are allowed within the business district boundaries as identified in Attachment 1. All other business districts, as labeled in Attachment 1, shall not allow Formula Restaurants.¹⁷⁹

¹⁷⁵ Section 23E.44.020, Berkeley Zoning Code, Berkeley, California. Available at: http://www.ci.berkeley.ca.us/bmc/Berkeley_Zoning_Code/index.html.

¹⁷⁶ Section 23E.44.030, Berkeley Zoning Code, Berkeley, California.

¹⁷⁷ Section 23F.04.010, Berkeley Zoning Code, Berkeley, California.

¹⁷⁸ Section 23E.44.040, Berkeley Zoning Code, Berkeley, California.

¹⁷⁹ The New Rules Project, The Hometown Advantage, *Formula Restaurant Ban-Arcata, CA*. Available at: <http://www.newrules.org/retail/arcata.html>.

V. Regulating Density of Fast Food Outlets

Controlling the development of fast food outlets can also be accomplished by limiting the number of such outlets per unit space or through spacing requirements. The Westwood Village area of Los Angeles provides an example of this approach.

Westwood Village surrounds the University of California at Los Angeles (UCLA) and has a wide variety of retail shops, boutiques, and restaurants. “Fast food establishments” are permitted:

provided the total number of fast food establishments along any public street does not exceed one for every 400 feet of lot frontage along that street, except that on Broxton Avenue one fast food establishment shall be permitted for every 200 feet of lot frontage. Fast food establishments need not be spaced at said intervals, provided that the total number along any public street does not exceed the above ratios.¹⁸⁰

In addition to these density requirements, the Westwood Village Specific Plan also provides a chart listing exactly how many fast food establishments (and other restaurants and uses) are allowed on each street. For example, as of December 2002, Broxton Avenue was permitted up to nine such establishments and already had seven.¹⁸¹ The purposes listed behind the Specific Plan seek, among other things, to preserve the unique character of the area and to ensure that the area continues primarily to serve the retail needs of the surrounding community.¹⁸²

¹⁸⁰ Section 5(B), Westwood Village Specific Plan, Westwood Village, Los Angeles, California. Available at:

<http://cityplanning.lacity.org/complan/specplan/sparea/wwdvillagepage.htm>.

¹⁸¹ Exhibit A, Westwood Village Specific Plan, Westwood Village, Los Angeles, California.

¹⁸² Section 2, Westwood Village Specific Plan, Westwood Village, Los Angeles, California.

The City of Bainbridge Island, Washington, in addition to severely restricting the location of fast food outlets discussed above, sets forth specific design guidelines for formula take-out restaurants, which include a density limitation:

Any formula take-out food restaurant may not exceed 4,000 square feet and must be in a building that is shared with at least one other business that is not a formula take-out food restaurant. Only one formula take-out food restaurant is permitted per parcel, lot or track on which all or a portion of a building is located. No drive-through facilities are allowed.¹⁸³

The Town of Warner, New Hampshire (population 2,760 and total area 55.9 square miles) takes a somewhat different approach by requiring a specified distance between fast food outlets in its Commercial District:

No fast-food or drive-in restaurant shall be located on a site, lot or parcel within two thousand (2,000) feet of any other site, lot or parcel occupied by another fast-food or drive-in restaurant, with such distance measured along and/or across one (1) or more public highway rights-of-way.¹⁸⁴

The description of the Commercial District states that its purpose “is to encourage growth of [business and commercial establishments as well as certain dwelling and light industrial uses] in the proximity of the interstate highway interchanges” as well as “to promote a scale and quality of development compatible with the rural character of the community.”¹⁸⁵

VI. Regulating Distance 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

¹⁸³ Section 18.41.050, Bainbridge Island Municipal Code, Bainbridge Island, Washington.

¹⁸⁴ Article XI(H), Town of Warner, NH Zoning Ordinance, Warner, New Hampshire. Available at: <http://www.warner.nh.us/regulations.htm>.

¹⁸⁵ Article XI, Town of Warner, NH Zoning Ordinance, Warner, New Hampshire.

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.¹⁸⁶

The City of Detroit, Michigan (population 911,000 and total area 142.9 square miles) provides an example of this approach. Its zoning ordinance states, with respect to certain standard, carry-out, fast-food, and drive-in restaurants, that “[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.”¹⁸⁷

The City of Arden Hills, Minnesota (population 9,692 and total area 9.4 square miles) has a similar provision in its zoning ordinance:

Because drive-in businesses, fast food restaurants and automobile service stations present certain unusual problems, they are hereby required to meet the following requirements in addition to the general requirements applicable to them in the zoning district in which they are to be located ...

Proximity to Schools, Churches, Public Recreational Areas and Residential Lots. No drive-in business or fast food restaurant shall be located on a site that is within four hundred (400) feet of a public, private or parochial school, a church, a public recreation area, or any residentially zoned property.¹⁸⁸

These examples demonstrate that municipalities across the country have developed different types of zoning approaches, with various justifications for the laws, to regulate the presence of fast food outlets. Although none of the municipalities mentioned in this section chose to justify their zoning regulations on the issue of

¹⁸⁶ McAllister A. *Zoning for Fast-Food and Drive-In Restaurants*.

¹⁸⁷ Sections 92.0379A(j), B(j) & C(j) and 94.0379D(i), City of Detroit, Official Zoning Ordinance. Available at: http://www.municode.com/resources/code_list.asp?stateID=22.

¹⁸⁸ Section 6(D)(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.

obesity, such a justification seems warranted based on both scientific findings and legal precedent governing the relationships between zoning and public health.

Part III: Case Law Supporting Zoning of Fast Food Outlets

Several courts have upheld zoning laws that restrict fast food outlets or upheld decisions made by zoning officials applying such laws. Although none of the court decisions that we found discusses zoning restrictions on fast food outlets enacted specifically to reduce obesity, some of the decisions involve zoning ordinances aimed at achieving other public health goals such as protecting pedestrian safety. Courts responded favorably to these laws as long as there was evidence that the laws would, in fact, promote the public's health and safety. Because there is no dispute that obesity is a significant public health problem in the United States, courts should recognize addressing obesity as a legitimate objective of zoning. Courts have also upheld zoning restrictions on fast food outlets enacted for goals unrelated to public health, such as compatibility with the surrounding community. These cases suggest that if courts are willing to uphold zoning restrictions on fast food outlets for other reasons, given that public health arguably provides the strongest basis for zoning laws, courts should be more inclined to uphold zoning laws aimed at obesity. Finally, zoning cases not involving fast food outlets can sometimes suggest arguments that could be used to justify regulations on fast food outlets. In this section, we discuss judicial decisions involving all of these issues.

I. Public Health Objectives

A. Traffic Concerns

The most common public health concern raised with respect to fast food outlets is that the traffic generated from drive-through service will adversely affect such things as pedestrian safety, congestion, and air and environmental quality. In general, courts

find that preventing traffic hazards is a legitimate objective of zoning.¹⁸⁹ With respect to fast food outlets, in particular, courts have upheld laws regulating drive-through service based on these concerns when the zoning authority offered evidence that drive-through service would generate more traffic than permitted uses.

For example, in *Bellas v. Planning Board of Weymouth* (Massachusetts, 2002) (unpublished opinion)¹⁹⁰ a developer appealed from a lower court opinion that affirmed the decision of the planning board to deny a special permit for a drive-through window at a Dunkin' Donuts shop.¹⁹¹ Relying on "trip generation figures" (i.e., the number of vehicle trips the proposed business would likely generate during peak morning traffic time), the appellate court found that:

While most school children walking to the elementary school nearby do not pass by the site, some do. That fact, combined with evidence that a drive-through window in a fast food establishment such as this will generate more traffic than a similar facility without a drive-through window, especially during peak morning hours when much of the foot traffic by school children occurs, was sufficient to support the judge's conclusion that the board's concerns with traffic and pedestrian safety had a reasonable basis in fact.¹⁹²

In *Matter of Hobbs v. Albanese* (New York, 1979),¹⁹³ the Board of Trustees of the Village of Manlius denied landowners a special use permit to develop a McDonald's Drive-In Restaurant, in part because the proposed use would adversely impact traffic

¹⁸⁹ See, e.g., *Columbia Oldsmobile v. City of Montgomery*, 564 N.E.2d 455, 461 (Ohio 1990) ("This court has held several times that a '...city may lawfully regulate [safety hazards] pursuant to its police powers: protection of pedestrians and drivers, elimination of traffic congestion and reduction of air and noise pollution.'"), *rehearing denied* (Jan. 16, 1991), *cert. denied* (June 24, 1991).

¹⁹⁰ Unpublished opinions have limited precedential value in court cases, but do provide insight into how courts may view zoning restrictions placed on fast food outlets.

¹⁹¹ *Bellas v. Planning Bd. of Weymouth*, No. 00-P-1837, 2002 WL 31455225 (Mass. App. Ct. Nov. 4, 2002) (unpublished opinion).

¹⁹² *Bellas v. Planning Bd. of Weymouth*, 2002 WL 31455225 at 2.

¹⁹³ *Matter of Hobbs v. Albanese*, 417 N.Y.S.2d 556 (N.Y.A.D. 4th Dept. 1979).

congestion. Landowners petitioned the court to compel the village board to issue the permit, which the lower court denied. On appeal, the appellate court found that the village board could rely on the so-called “public health clause” of the special use ordinance (requiring applicants to show that “[t]he proposed use will not create a hazard to public health, safety, morals, or the general welfare”) to deny the permit if it found there would be an “increased traffic problem special to the proposed use.”¹⁹⁴ Because the evidence in the record was insufficient to establish that the proposed use “would have a greater impact on the traffic in the area than would other permitted uses not subject to special permits,” the court sent the case back to the board to provide further proof of the alleged traffic hazard or to issue a permit.¹⁹⁵

Similarly, in *Old Country Burgers Company, Inc. v. Town Board of Town of Oyster Bay* (New York, 1990),¹⁹⁶ the petitioner operated a Burger King restaurant and applied for a special permit to operate a drive-through window. The zoning board granted the application subject to several conditions including the so-called “meal-time restriction,” which prohibited drive-through service during meal-time hours. The zoning board justified this restriction by alleging that drive-through service would significantly increase the existing traffic flow. The court disagreed, finding that “there was no showing that the proposed use would have a greater impact on traffic than other uses which are unconditionally permitted in the area,” and found the restriction improper.¹⁹⁷

¹⁹⁴ *Matter of Hobbs v. Albanese*, 417 N.Y.S.2d at 557.

¹⁹⁵ *Matter of Hobbs v. Albanese*, 417 N.Y.S.2d at 557.

¹⁹⁶ *Matter of Old Country Burgers Co., Inc. v. Town Bd. of Town of Oyster Bay* 553 N.Y.S.2d 843 (N.Y.A.D. 2d Dept. 1990).

¹⁹⁷ *Matter of Old Country Burgers Co., Inc. v. Town Bd. of Town of Oyster Bay*, 553 N.Y.S. at 844.

Other court decisions, though, have upheld zoning authority decisions to deny special use permits for drive-through service without explicitly requiring proof that the proposed use would generate more traffic than permitted uses. For example, in *Bess Eaton Donut Flour Company, Inc. v. Zoning Board of Review of Town of Westerly* (Rhode Island, 2000) (unpublished opinion)¹⁹⁸ Bess Eaton Donut applied for a special use permit for a drive-through window at a bake shop. Despite favorable expert testimony, including a report by an independent traffic engineer that the proposed drive-through would not have an adverse impact on traffic or the neighborhood, the zoning board denied the special permit, in part because it found that the drive-through window would increase congestion and create a hazard in violation of the zoning code. The court gave great weight to facts within the personal knowledge of members of the zoning board. In discussing the proposed use, one of the board members stated “that he travels to the area when bringing his son to a school bus stop and observed other children also being dropped off at school bus stops or at the nearby school, that he has gone to the site to study the traffic, and that in the morning there is also a lot of foot traffic to the nearby school” to conclude that a drive-through at the particular site would be a nuisance and create a traffic hazard.¹⁹⁹ The chairman of the board also noted that, although the traffic would not increase with the proposed use, a nuisance would result from stopping and pulling into the lot and going in and out of the site and that any other drive-through that would create similar traffic would be a nuisance. Based on these

¹⁹⁸ *Bess Eaton Donut Flour Co., Inc. v. Zoning Bd. of Review of Town of Westerly*, No. 99-0209, 2000 WL 276818 (R.I. Super. Ct. Feb. 15, 2000) (unpublished opinion).

¹⁹⁹ *Bess Easton Donut Flour Co., Inc. v. Zoning Bd. of Review of Town of Westerly*, 2000 WL 276818 at 5.

statements, the court held that the board's denial was supported by substantial evidence in the record and not arbitrary and capricious.²⁰⁰

Public health concerns over traffic generated by fast food outlets are not exclusively related to drive-through service. In *McDonald's Corporation v. Board of Selectmen of Randolph* (Massachusetts, 1980),²⁰¹ McDonald's Corporation challenged a zoning board's denial of a license for a restaurant in a shopping center. The board claimed, among other things, that the proposed use would increase traffic which, in turn, would endanger students from a nearby high school who would be attracted to the restaurant. The lower court disagreed, finding that the restaurant would not increase traffic or materially hamper or interrupt traffic flow in the area, and thus, would not pose a threat to student safety. The appellate court agreed that the denial of the license on this basis was improper and found that the lower court's finding on this point was amply supported by the evidence:

There was also evidence that peak hours at the plaintiff's restaurant would not coincide with the arrival or departure of the buses at the high school and that police were assigned to traffic duty at those times. Further, it was significant on the safety claim that traffic signals had been approved for a site near the school some six years prior to McDonald's application but had never been installed. There was evidence that the accident rate in the vicinity was average to low and that most accidents were minor property damage cases occurring within the confines of the shopping center. Finally,

²⁰⁰ *But see Bess Easton Donut Flour Co., Inc. v. Zoning Bd. of Review of Town of Richmond*, No. C.A. 99-0132, 1999 WL 1062185 (R.I. Super. Ct. Nov. 10, 1999) (unpublished opinion). ("During deliberations, two Board members did state that they were familiar with the area and that they believed the drive-thru would cause an increase in traffic. However, these are exactly the kind of conclusory statements that our Supreme Court has rejected as not being substantial evidence sufficient to deny a request for a special use permit.").

²⁰¹ *McDonald's Corp. v. Board of Selectmen of Randolph*, 399 N.E.2d 38, 40 (Mass. App. Ct. 1980).

there was evidence that because the shopping center was not near a major highway the proposed restaurant would not draw additional traffic, but rather would serve those already in the immediate area on other business. In view of this evidence we conclude that the judge did not err in rejecting the board's second reason for denial of the license.²⁰²

B. Public Health Necessity

At least one case (not involving a fast food business) upheld the validity of a requirement in a conditional use permit provision that required the applicant to demonstrate that the proposed use was reasonably necessary for the public health or general welfare. In *SBA, Inc. v. City of Asheville City Council* (North Carolina, 2000)²⁰³ petitioners sought a conditional use permit to construct a telecommunications tower, which the city council denied and the lower court upheld. In order to approve the permit, seven general requirements had to be met, including: "That the proposed use is *reasonably necessary for the public health or general welfare*, such as by enhancing the successful operation of the surrounding area in its basic community functions or by providing an essential service to the community or region."²⁰⁴ The city denied the conditional use permit because petitioners did not meet three of the seven requirements, including that they failed to show that the proposed tower was reasonably necessary for the general welfare. Although the public health clause in the same requirement of the conditional use provision was not addressed by the court, the fact that the petitioners were required to show reasonable necessity with respect to the general welfare clause suggests that, on its face, a requirement to affirmatively show

²⁰² *McDonald's Corp. v. Board of Selectmen of Randolph*, 399 N.E.2d at 40-41.

²⁰³ *SBA, Inc. v. City of Asheville City Council*, 539 S.E.2d 18, 21 (N.C. App. Ct. 2000).

²⁰⁴ *SBA, Inc. v. City of Asheville City Council*, 539 S.E.2d at 21(emphasis supplied).

public health necessity may also be a legitimate exercise of zoning power in North Carolina and perhaps other states as well.

A provision requiring a showing of public health or general welfare necessity is not valid in all jurisdictions. For example, New York courts have explicitly invalidated an almost identical provision setting forth the requirements for special use permits. In *Cove Pizza, Inc. v. Hirshon* (New York, 1978), to obtain a special use permit the applicant was required to show, among other things, that the use “is reasonably necessary for the public health or general interest and welfare.”²⁰⁵ *Cove Pizza, Inc.* was denied a special use permit, in part because it failed to show “any necessity for the use for which the application was made, nor that such prospective use was in any way related to the public health or general interest and welfare.”²⁰⁶ The court found that the planning board’s “interpretation of the ordinance placed an unwarranted burden on the applicant to show that the restaurant would advance the public health or general welfare.”²⁰⁷ Instead, the issue was whether the operation of the restaurant would be harmful to the public health or general welfare and, according to the court, there was “a complete lack of substantial evidence” that supported this finding.²⁰⁸ Other New York cases have reached similar conclusions. For example, citing *Cove Pizza*, the court in *Christie v. Hirshon* (New York, 1982) stated:

Although the ordinance calls for the board to find that the exception is reasonably necessary for the public health or general interest and welfare, to require an applicant to prove that a proposed relocation would advance the public health or general welfare is to impose an undue burden where

²⁰⁵ *Matter of Cove Pizza, Inc. v. Hirshon*, 401 N.Y.S.2d 838, 839 (N.Y.A.D. 2d Dept. 1978).

²⁰⁶ *Matter of Cove Pizza, Inc. v. Hirshon*, 401 N.Y.S.2d at 839.

²⁰⁷ *Matter of Cove Pizza, Inc. v. Hirshon*, 401 N.Y.S.2d at 840.

²⁰⁸ *Matter of Cove Pizza, Inc. v. Hirshon*, 401 N.Y.S.2d at 840.

there is evidence that the use would not be injurious to the public health or welfare.²⁰⁹

C. Community Need

Community need (or equivalent language) can support zoning restrictions in some jurisdictions and under some circumstances. For example, the Illinois Supreme Court lists 8 factors, none controlling, for Illinois courts to consider when determining whether a zoning ordinance is valid; one of those factors is the community's need for the proposed use.²¹⁰ However, in Illinois (and likely other states as well), depending on the context and language of a particular zoning ordinance, a community needs assessment may be more complicated than readily apparent.

In *Cosmopolitan National Bank v. Village of Niles* (Illinois, 1983)²¹¹ McDonald's Corporation, along with other plaintiffs, sued the Village of Niles, Illinois for denying a special use permit for the development of a McDonald's fast-food restaurant. Under the particular zoning ordinance, the Village Board could not grant a special use permit unless three standards were met, including that the proposed use "[i]s deemed necessary for the public convenience at that location."²¹² The trial court found that, because there were four other restaurants located within a two-block area of the proposed site, the restaurant was not necessary for the public convenience. The appellate court disagreed, finding that the term "necessary" as used in the ordinance did not mean "absolutely necessary" but "expedient" or "reasonably convenient" to the

²⁰⁹ *Christie v. Hirshon*, 449 N.Y.S.2d 771, 773 (N.Y.A.D. 2d Dept. 1982).

²¹⁰ *State Bank of Countryside v. City of Chicago*, 679 N.E.2d 435, 440-41 (Ill. App. Ct. 1997) (citing *Sinclair Pipe Line Co. v. Village of Richton Park*, 167 N.E.2d 406, 411 (Ill. 1960)).

²¹¹ *Cosmopolitan Nat'l Bank v. Village of Niles*, 454 N.E.2d 703 (Ill. App. Ct. 1983).

²¹² *Cosmopolitan Nat'l Bank v. Village of Niles* 454 N.E.2d at 705.

public welfare. Further, the issue is not “an absence of public necessity,” but rather that “[p]ublic necessity is relevant to determining the relative gain or detriment to the public caused by the development.” Because there was a “clear, commercial pattern” along the street where the proposed restaurant would be located, the appellate court found that the use was compatible with the surrounding area and was therefore not a detriment. The court held that the denial of the permit was unreasonable.

A later appellate case, *Scadron v. Zoning Board of Appeals of the City of Chicago* (Illinois, 1994), reviewing nearly identical language (“necessary for public convenience”) in a Chicago ordinance, elaborated on this language: “A use does not necessarily meet this standard, however, merely because it is a legitimate use or one which is commercially expedient to the applicant...Instead, the applicant must demonstrate that the community will derive at least some benefit from the proposed use.”²¹³

Other state courts have explicitly prohibited a community needs assessment in the context of a special use exception. In *Bess Easton Donut Flour Company, Inc. v. Zoning Board of Review of Town of Richmond* (Virginia, 1999) (unpublished opinion),²¹⁴ the court found that the zoning board’s decision to deny a special unit permit for a drive-through window in a bake shop was arbitrary and capricious, and ordered the zoning board to issue the permit, in part because two board members considered whether there was a community need for a drive-through at the site. According to the court, “[a]

²¹³ *Scadron v. Zoning Bd. of Appeals of City of Chicago*, 637 N.E.2d 710, 713 (Ill. App. Ct. 1994).

²¹⁴ *Bess Easton Donut Flour Co., Inc. v. Zoning Bd. of Review of Town of Richmond*, 1999 WL 1062185.

zoning board may not deny granting a special exception to a permitted use on the ground that the applicant has failed to prove that there is a community need.”²¹⁵

II. Non-Public Health Objectives

A. Preserving Neighborhood Character and Aesthetics

Courts have long recognized that preserving neighborhood character and concern about aesthetics are proper objectives of zoning. For example, in *Franchise Developers, Inc. v. City of Cincinnati* (Ohio, 1987),²¹⁶ the Cincinnati City Council denied Franchise Developer, Inc.’s application to remodel a theatre for use as a Wendy’s restaurant. The proposed site was in an overlay district with a provision stating that: “New businesses should contribute to the desired mix of commercial activities; franchise type establishments are acceptable provided that they are primarily pedestrian and not automobile oriented.”²¹⁷ Although the case was technically moot because the City had purchased the property at issue, the Supreme Court of Ohio addressed it nevertheless because the case involved “matters of great public interest” and a debatable constitutional question remained. In its opinion, the court initially noted that there is a strong presumption that the overlay ordinance is valid. The court also found that the particular provision in question could not be viewed in isolation as it was inextricably interwoven with other relevant provisions of the ordinance, as well as the City’s Urban Design Plan and its Coordinated City Plan, which specifically provided that drive-in restaurants and fast food restaurants were not appropriate at the site at issue. In finding the ordinance valid, the court found, among other things, that the City’s “attempt to

²¹⁵ *Bess Easton Donut Flour Co., Inc. v. Zoning Bd. of Review of Town of Richmond*, 1999 WL 1062185 at 5.

²¹⁶ *Franchise Developers, Inc. v. City of Cincinnati*, 505 N.E.2d 966 (Ohio 1987).

²¹⁷ *Franchise Developers, Inc. v. City of Cincinnati*, 505 N.E.2d at 968.

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.”²¹⁸ While aesthetics is a valid objective of zoning, courts differ over whether aesthetics alone can be the sole justification in support of a zoning regulation.²¹⁹

In *Bess Eaton Donut Flour Company, Inc. v. Zoning Board of Review of Town of Westerly* (Rhode Island, 2000) (unpublished opinion),²²⁰ the zoning board denied Bess Eaton Donut Flour Company’s request for a special use permit to develop a bake shop with drive-through service, in part because it failed to show that it was “compatible with neighboring uses” as required by the zoning ordinance.²²¹ On this issue, a member of the zoning board noted that allowing certain cars ingress and egress to the property would adversely change the neighborhood and another member stated that the area had no other drive-in businesses. The Superior Court of Rhode Island upheld the zoning board’s decision, finding that the zoning board had provided “reliable, substantial, and probative evidence” to support its decision and therefore did not exceed its authority.

²¹⁸ *Franchise Developers, Inc. v. City of Cincinnati*, 505 N.E.2d at 971 (citing *Hudson v. Albrecht, Inc.*, 458 N.E.2d 852 (Ohio 1984)).

²¹⁹ *Compare Transylvania County v. Moody*, 565 S.E.2d 720, 726 n.3 (N.C. App. Ct. 2002) (“Since aesthetics is listed as only one of the purposes for the [sign] ordinance, we need not consider whether the ordinance is constitutional as an aesthetics-only regulation.”) with *Parking Ass’n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200, 202 (GA. 1994) (“An ordinance is not unreasonable even if designed only to improve aesthetics. Legislation based on aesthetics is within the public welfare aspect of the police power.”), *reconsideration denied* (Dec. 20, 1994), *cert. denied* 515 U.S. 1116 (May 30, 1995), *rehearing denied* 515 U.S. 1178 (Aug. 11, 1995).

²²⁰ *Bess Eaton Donut Flour Co., Inc. v. Zoning Bd. of Review of Town of Westerly, C.A. No. 98-0648*, 2000 WL 976659 (R.I. Super. Ct. June 30, 2000) (unpublished opinion).

²²¹ *Bess Eaton Donut Flour Co., Inc. v. Zoning Bd. of Review of Town of Westerly*, 2000 WL 976659 at 3.

Other courts may require more substantial proof of the proposed use's incompatibility. For example, in *Westbury Trombo, Inc. v. Board of Trustees of Village of Westbury* (New York, 2003),²²² a New York appellate court found that zoning laws requiring fast food businesses to obtain a special use permit or variance to operate between 11:00 PM and 6:00 AM on property within 100 feet of land zoned for residential or apartment use were invalid absent evidence that a 24-hour retail business near the vicinity of a residential area had any detrimental impact on health, safety, welfare, or morals of the community. According to the court, "generalized concerns of the neighboring community uncorroborated by any empirical data" are not enough.²²³

B. Economic Considerations

One argument that has been made against the development of fast food restaurants is that large national chain restaurants squeeze out local food establishments because the smaller businesses do not have the economic resources to compete with the chains. Ultimately, the argument continues, the loss of neighborhood businesses will change the character of the community and potentially ruin the community's economic base. This reasoning has been the impetus behind many restrictions on so called formula fast-food restaurants. Using an economic argument to justify a zoning ordinance must be done cautiously, though, because it is well established across jurisdictions that zoning cannot be used to restrict competition.²²⁴

²²² *Westbury Trombo, Inc. v. Board of Trustees of Village of Westbury*, 763 N.Y.S.2d 674 (N.Y.A.D. 2d Dept. 2003).

²²³ *Westbury Trombo, Inc. v. Board of Trustees of Village of Westbury*, 763 N.Y.S.2d at 676 (citing *Matter of Framike Realty Corp. v. Hinck*, 632 N.Y.S.2d 177 (N.Y.A.D. 2d Dept. 1995)).

²²⁴ See, e.g., *Ensign Bickford Realty Corp. v. City Council of City of Livermore*, 137 Cal. Rptr. 304, 309 (Cal. Ct. App. 1977) ("Where the sole purpose of a zoning ordinance or

Although zoning may not be used to restrict competition, courts recognize that land use decisions will nearly always have an indirect impact on economic competition. If the goal is not to restrict competition and an otherwise legitimate purpose exists, the zoning provision should be deemed valid. For example, in *Coronadans Organized for Retail Enhancement v. City of Coronado* (California, 2003) (unpublished opinion)²²⁵ (case does not involve a fast food business), property owners and an unincorporated association challenged the constitutionality of a zoning ordinance that required a special use permit to open or expand a “formula retail” business in the city and limited the street level frontage size of these businesses. “Formula retail” was defined in the ordinance as:

a type of retail sales activity or retail sales establishment (other than a ‘formula fast food restaurant’) which is required by contractual or other arrangement to maintain any of the following: standardized (‘formula’) array of services and/or merchandise, trademark, logo, service mark, symbol, décor, architecture, layout, uniform, or similar standardized feature.²²⁶

decision is to regulate or restrict business competition, the regulation is subject to challenge. It is not the proper function of a zoning ordinance to restrict competition or to protect an enterprise which may have been encouraged by a prior zoning classification”); *Wyatt v. City of Pensacola*, 196 So.2d 777, 779 (Fla. Dist. Ct. App. 1967) (“According to this record, the sole basis for the sentence delaying the effective date [of the ordinance] was economical--that is, to restrict competition in this industry through the use of the police power. Municipalities may not use their zoning powers for this purpose.”); *Cosmopolitan Nat’l Bank v. Village of Niles*, 454 N.E. 2d at 705 (“...the control or restriction of competition is not a proper or lawful zoning objective.”); *In re Northeast Corner of E. Center St. and Chicago Ave., Marion, Ohio*, 186 N.E.2d 515, 521 (Ohio Com. Pl. 1962) (“A zoning ordinance cannot be used to control competition.”); *In re Lieb’s Appeal*, 116 A.2d 860, 865 (Pa. Super. Ct. 1955) (“zoning is not for the purpose of limiting or prohibiting competition, and when that is the only purpose of a zoning ordinance it must be declared invalid.”).

²²⁵ *Coronadans Organized for Retail Enhancement v. City of Coronado*, No. D040293, Super. Ct. No. 766111, 2003 WL 21363665 (CA. App. Ct. June 13, 2003) (unpublished opinion).

²²⁶ *Coronadans Organized for Retail Enhancement v. City of Coronado*, 2003 WL 21363665 at 1 (citing Coronado Mun. Code § 86.04.682).

The stated purpose of the ordinance was “to regulate the location and operation of formula retail establishments in order to maintain the City’s unique village character, the diversity and vitality of the community’s commercial districts, and the quality of life of Coronado...”²²⁷ Despite a challenge claiming, among other things, that the “true” purpose of the ordinance was to provide economic protection to local businesses, the court disagreed and rejected, among other things, challenges based on the commerce and equal protection clauses of the U.S. Constitution. With respect to the equal protection challenge, the property owners claimed that the ordinance regulated only one class of retail stores. Applying the rational basis standard, the court found that:

The Ordinance’s classifications (requiring only Formula Retail businesses to obtain special use permits and adhere to size limitations) are rationally related to a legitimate state interest. As discussed, Coronado has a legitimate interest in seeking to maintain the village ambiance of its commercial district and to ensure the long-term economic viability of the community. It was not irrational for the city council to decide that this objective could best be met by imposing a public permit process and frontage size limitation on “Formula Retail” businesses. The city council could reasonably conclude that this type of store requires special scrutiny because it is more likely to be inconsistent with Coronado’s land use goals than would be a unique one-of-a-kind business and that such “formula” businesses—by their nature—have a greater potential to conflict with the village atmosphere of the community.²²⁸

This case suggests that zoning laws that restrict fast food outlets may survive an anti-competition challenge provided that they have other legitimate objectives such as preserving neighborhood character and/or the economic vitality of a locality, or even preventing obesity.

²²⁷ *Coronadans Organized for Retail Enhancement v. City of Coronado*, 2003 WL 21363665 at 1.

²²⁸ *Coronadans Organized for Retail Enhancement v. City of Coronado*, 2003 WL 21363665 at 8.

III. Preventing Obesity

In general, the cases discussed in this section demonstrate that municipalities can constitutionally regulate fast food outlets based on both public health and non-public health reasons. The same reasoning applied in these cases could also support zoning restrictions on fast food outlets to prevent obesity. For example, suppose one of the requirements in a special use permit is that the applicant must prove that the proposed use is reasonably necessary for the public health or general welfare. Certainly, with what is now known about diet and obesity, it would be difficult for a fast food developer to suggest that a fast food outlet is reasonably necessary for the public health. The same developer would likely find it difficult to show reasonable necessity for the general welfare—especially in localities that already have one or more fast food outlets or in localities that regulate fast food businesses for reasons other than for public health objectives. By contrast, in many communities that lack access to healthy foods, healthier food retailers will likely be able to show that their proposed use is reasonably necessary for the public health or general welfare because it helps to create a healthier food retail environment. Thus, a provision requiring proof of public health necessity would pose challenges to developers of fast food and, at the same time, present an opportunity to healthier food retailers. In jurisdictions that do not allow a requirement that the applicant affirmatively show a public health or general welfare necessity, municipalities could argue that the proposed fast food outlet would be injurious to the public health to the extent that it undermines, prevents, or displaces the establishment of a healthy local food environment.

Spacing requirements and quotas of fast food outlets also could be justified with obesity prevention as the goal. At least two courts have reviewed and upheld a zoning ordinance that provides a spacing requirement for fast food outlets. In *McDonald's Corporation v. Board of Trustees, Village of Elmsford* (New York, 1994),²²⁹ McDonald's was denied a special permit to develop a drive-in restaurant within the village, in part because the restaurant was to be located 1,320 feet from an existing Wendy's drive-in restaurant and the zoning ordinance required 2,000 feet between such establishments.²³⁰ Similarly, in *Fain v. New Milford Zoning Commission* (Connecticut, 2005) (unpublished decision), the Superior Court of Connecticut rejected an argument that the zoning commission's denial of an application to amend a zoning regulation, which required that fast food restaurants, gasoline service stations, convenience stores, and auto dealerships be separated by at least one mile, was arbitrary and violated a statutory uniformity requirement that "[a]ll such regulations shall be uniform for each class or kind of buildings, structures or uses of land throughout each district..."²³¹ In part, the court found that "[t]he plaintiffs have not cited any cases which would prohibit a zoning commission from creating a town-wide regulation which treats certain uses

²²⁹ *McDonald's Corp. v. Board of Trustees, Village of Elmsford*, 610 N.Y.S.2d 387 (N.Y.A.D. 3d Dept. 1994).

²³⁰ Another case, *Ji v. City of Los Angeles*, No. B161391, Super. Ct. No. BC257676, 2003 WL 22017849 (Cal. Ct. App. August 27, 2003) (unpublished decision), involves property owners' request for a preliminary injunction to prevent the enforcement of a Los Angeles ordinance regulating the number of restaurants permissible along a particular section of a street. The ordinance stated: "[t]he total number of restaurants...may not exceed one for every 270 feet of public street lot frontage. Such businesses need not be spaced at said intervals, provided that the total number does not exceed the above ratio...Drive-through fast-food establishments are prohibited." Although the appellate court upheld the trial court's denial of the preliminary injunction, it did not specifically address the legitimacy of the density provision.

²³¹ *Fain v. New Milford Zoning Comm'n*, No. CV044000252S, 2005 WL 1154713 (Conn. Super. Ct. April 22, 2005) (unpublished decision).

differently based upon a rational basis related to a legitimate goal of zoning: reducing traffic congestion in this case.”²³² Finding the denial of the application was not “illegal, arbitrary or an abuse of discretion,” the court dismissed the case.

With respect to quotas, New York (and likely other jurisdictions) appears to allow zoning authorities to limit the number of restaurants in a particular area. In *Christie v. Hirshon* (New York, 1982), the planning board granted a special use permit for the relocation of a restaurant/bar. With respect to community opposition that the relocation would oversaturate the area with alcohol outlets, the court responded:

to deny a special use permit based on an overabundance of this type of permitted establishment in the neighborhood, as the petitioners argue should be done, would be contrary to the legislative finding implicit in the ordinance, i.e., that a restaurant/bar in the B-1 Central Commercial District would not adversely affect the neighborhood. The ordinance authorized the [planning] board to fix quotas for permitted uses within the district. Should there exist a saturation of permitted uses within a district, it is for the board to seek to amend the applicable ordinance rather than to apply it in a discriminatory fashion.²³³

A municipality could argue that the quota or spacing requirement will prevent an oversaturation of fast food outlets and thereby help to promote a healthier local food environment.

IV. Practical Suggestions

Clearly obesity is a significant public health problem in the United States and addressing a significant public health problem is a legitimate objective of zoning. The following question remains: is there sufficient scientific evidence to link obesity to fast food and a sufficient legal basis to use zoning to regulate fast food outlets? In Part I of

²³² *Fain v. New Milford Zoning Comm’n*, 2005 WL 1154713 at 2.

²³³ *Christie v. Hirshon*, 449 N.Y.S.2d at 773 (citing *Matter of Cove Pizza, Inc. v. Hirshon*).

this monograph, we argue that there is ample scientific evidence and legal basis to support zoning fast food outlets. In Part II, we provide many examples of zoning restrictions placed on fast food outlets for other purposes that could be used as models for zoning laws aimed at obesity. And in Part III, we show that some courts have upheld zoning laws that regulate fast food outlets for both public health and non-public health reasons. Given the significance of the obesity epidemic in the United States and the scientific evidence and legal basis supporting the zoning of fast food outlets, municipalities have an effective, yet untried, tool to address obesity in their communities. We conclude Part III with a few general legislative drafting suggestions. Of course, municipalities will have to use their discretion regarding these suggestions depending upon their particular circumstances and applicable law.

Zoning restrictions on fast food outlets have been upheld for various reasons, and perhaps historically and most successfully, based on traffic concerns and the preservation of neighborhood character. If a zoning ordinance restricting fast food outlets can be justified by what has been successful in the past, one might argue that it is unnecessary to proffer an untried justification such as addressing the problem of obesity. In other words, even if the primary goal of the ordinance is to address obesity, if it can be achieved through a secondary consideration such as controlling traffic, why not use the established justification? As a general rule, there is little reason not to offer multiple justifications for a particular zoning decision, because a zoning law will be upheld if it rationally relates to only one legitimate purpose.²³⁴ In *TPW, Inc. v. City of*

²³⁴ See *Bell v. Planning & Zoning Comm'n of City of Bridgeport*, No. CV 95322396, 1997 WL 133447, at 3 (Conn. Super. Ct. March 7, 1997) (unpublished decision) (“The Commission’s decision must be sustained if any one of the reasons given for the

New Hope (Minnesota, 1986), New Hope’s city council denied, among other things, a conditional use permit for the construction of a Taco John’s fast food restaurant.²³⁵ The developer filed a writ of mandamus asking the court to order the city to issue a conditional use permit, which the trial court granted. The appellate court reversed the trial court and dismissed the writ of mandamus, finding that the city council had provided “legally sufficient and factually supported reasons” for its denial: “Although the record does not support the city council’s concerns regarding noise and traffic, its findings of inadequate parking and inadequate stacking lane are factually supported and legally sufficient under the code.”²³⁶ Thus, the invalidity of one zoning objective does not mean the zoning law will fail if another objective is deemed valid. The greatest legal risk appears to be that the untried justification will be rejected by the courts and unfavorable law will be established on that point.

In addition, not specifically stating that the zoning law was adopted to address obesity limits zoning’s potential contribution to addressing the obesity epidemic. Zoning laws generally need only pass the rational basis test (see Part I, Section III and Appendix B) and therefore, the law is conducive to innovative approaches. For example, suppose a locality would like to limit fast food restaurants and encourage healthier food alternatives. The purpose section of the zoning ordinance could not only include the preservation of the unique character and economic vitality of the community, but also a statement of purpose related to obesity: “to protect the public health and address

decision are [sic] substantially supported in the record.”) (citing *Huck v. Inland Wetlands and Watercourses Agency*, 525 A.2d 940 (Conn. 1987)).

²³⁵ *TPW, Inc. v. City of New Hope*, 388 N.W.2d 390 (Minn. App. Ct. 1986), review denied (Aug 13, 1986).

²³⁶ *TPW, Inc. v. City of New Hope*, 388 N.W.2d at 394.

obesity by creating a local food retail environment that provides our communities access to healthy foods and encourages healthier eating.” The goal is to make the objective of addressing obesity as common and accepted in zoning ordinances as the objectives of addressing traffic issues and neighborhood character. Over time, a body of judicial law may develop that specifically recognizes that addressing obesity is a valid objective of zoning.

In addition, and to the extent possible, the objective of addressing obesity should be included in all levels of land use regulation including enabling legislation, comprehensive plans, municipal codes, and zoning ordinances. For example, often state or local law requires that a zoning ordinance conform to the “comprehensive plan.” King County, Washington’s 2004 Comprehensive Plan specifically addresses the relationship between obesity and physical activity:

Focusing development in urban areas can have a positive effect on public health. The percentage of King County residents who are overweight or obese has risen rapidly since the late 1980s. With obesity comes increased risk for diabetes, hypertension and heart disease. Evidence suggests one major reason for rising obesity is the lack of physical activity. Growth patterns in suburban areas, which discourage walking and promote a reliance on private auto use, have contributed to this public health problem. Communities that feature many land uses, higher housing density, sidewalks and street connections and nearby services encourage physical activity such as walking or bicycling.²³⁷

Several other sections of King County’s Comprehensive Plan also mention the importance of physical activity to health (e.g., “Neighborhood plans may include... Specific land uses and zoning that encourage healthy, livable communities by

²³⁷ 2004 King County Comprehensive Plan, Chapter 2, Section I(A)(2). Available at: http://www.metrokc.gov/ddes/compplan/2004/PDFs/mkcc_ord_15028_attachment_A.pdf.

promoting physical activity of walking and bicycling”).²³⁸ While food diversity is not directly discussed in King County’s Comprehensive Plan, the importance of healthy food is an acknowledged goal:

Every resident of King County has an equal right to a healthy and safe environment. This requires that our air, water, earth and food be of a sufficiently high standard that individuals and communities can live healthy, fulfilling and dignified lives...²³⁹

Agricultural lands and farming provide many benefits to the citizens of King County including scenic open space, a connection to our cultural heritage, fresh local foods and a diverse economy.²⁴⁰

Along these same lines, a comprehensive plan could acknowledge the importance of healthy eating and explicitly state the goal of creating a retail market that offers healthy food. If a comprehensive plan specifically states something to the effect that one of its objectives is “to promote the public health of the community and reduce the prevalence of obesity by creating an environment that promotes healthier lifestyles, including access to healthy foods,” a zoning ordinance with a similarly stated purpose will more likely be upheld if challenged. Similarly, just as special use permits often require that the applicant show that the proposed use will not cause a traffic hazard, another requirement might be that food retailers demonstrate that the proposed use helps to create a local environment that promotes healthier lifestyles, including access to healthy foods. If this language tracks similar language in a comprehensive plan, again a court would be more likely to uphold it. Finally, as seen in New York, if a planning board has explicit power to set quotas, a zoning ordinance setting up a quota system for fast food outlets has a greater chance of withstanding judicial scrutiny. The guiding principle here

²³⁸ 2004 King County Comprehensive Plan, Chapter 2, Section II(E).

²³⁹ 2004 King County Comprehensive Plan, Chapter 4, Section I(A).

²⁴⁰ 2004 King County Comprehensive Plan, Chapter 3, Section V(C).

is to ensure that the zoning authorities are given the necessary authority to achieve their stated goals and that the goals are repeatedly stated in the various levels of land use regulations.

Conclusion

Scientists tell us that obesity is a life-threatening epidemic in the United States and it involves two facts of modern life--we consume too many calories, and we burn off too few.

This monograph focuses on the consumption side of the equation and, in particular, the use of zoning to regulate fast food outlets. By the proposed regulation of these establishments, we examine how zoning laws can help to limit the proliferation of food that can be harmful and to encourage the availability of nutritious food. We focus on fast food because of its unique role in the obesity epidemic.

Space does not permit a discussion about everything related to the potential use of zoning as a tool to address obesity. For example, a discussion about how zoning has been used with respect to the sale of other products such as alcohol and firearms, and how courts have ruled on those laws, would be beneficial to understanding zoning's potential with respect to fast food sales. Additionally, advertising, marketing, and promotion heavily influence product sales, especially to children. The extent to which zoning can be used to control advertising of fast food in light of *Lorillard v. Reilly*,²⁴¹ the 2001 U.S. Supreme Court case striking down regulations promulgated by the Attorney

²⁴¹ *Lorillard v. Reilly*, 533 U.S. 525 (2001); see also Hackbarth DP, Schnopp-Wyatt D, Katz D, Williams J, Silvestri B, Pflieger M. Collaborative research and action to control the geographic placement of outdoor advertising of alcohol and tobacco products in Chicago. *Public Health Reports* 2001;116:558-567; Ashe et al. Land use planning and the control of alcohol, tobacco, firearms, and fast food restaurants.

General of Massachusetts restricting tobacco sales and advertising, should be further explored. There has also been no discussion about site development standards (e.g., parking, ingress and egress, signs, landscaping) often found in zoning codes and how they could be used to address obesity. Moreover, some zoning laws might actually impede the opportunities for healthier food retail outlets. Current zoning laws should be examined in this regard and those obstacles removed.²⁴² Finally, this monograph raises many issues and discusses them in general terms. Municipalities interested in adopting zoning laws that regulate fast food outlets and promote healthier alternatives will need to evaluate their own local and state laws, and more fully explore the federal issues, to determine the best regulation for their communities.

More fundamentally, though, while zoning can help establish a local environment that provides access to healthy food, access alone will not solve the obesity problem in the United States. Zoning cannot guarantee that people will choose a healthy diet and that businesses offering healthy foods will be successful. Thus, simplistic zoning solutions such as mandating grocery stores in every neighborhood will not solve the problem.²⁴³ Significant progress toward the Nation's Healthy People 2010 objectives will require a collaborative effort involving numerous partners, including zoning and planning authorities, city and state governments, corporate and local food producers and retailers, public health agencies, neighborhood associations and more.²⁴⁴ For example, local and state governments must find ways to attract supermarkets and other healthier

²⁴² Perdue et al. National challenges in population health: public health and the built environment: historical, empirical, and theoretical foundations for an expanded role.

²⁴³ Perdue et al. National challenges in population health: public health and the built environment: historical, empirical, and theoretical foundations for an expanded role.

²⁴⁴ Institute of Medicine of the National Academies. *Preventing Childhood Obesity: Health in the Balance*.

food retailers to communities that lack them (e.g., tax incentives).²⁴⁵ Members of the public health community, including state and local authorities and research institutions, must develop and implement community-level interventions that encourage healthier eating habits and create a market demand for healthy foods. The fast food industry has a vital role to play as well, which includes offering healthier food that consumers want to eat, providing nutritional and caloric information at the point of sale, and engaging in responsible advertising, marketing, and promotional practices. Ultimately, Americans need to embrace a healthier lifestyle, including changes to both diet and levels of physical activity, in order to reach the nation's goals. While zoning's contribution to this effort is limited, it is not insignificant.

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.

²⁴⁵ Trust for America's Health. *F as in Fact: How Obesity Policies are Failing in America*.

APPENDIX A: State Delegation of Zoning Authority

There is tremendous variation in how states distribute their zoning authority, and the methods of distribution can be complex. States may grant local governments the authority to zone to the full extent of the police power or may grant more limited authority.¹ Moreover, a single state may vary how much authority it delegates according to whether the local government is a city, town, village, or county. Given these differences across and within states, we cannot describe how zoning authority is distributed in each particular state. Instead, our goal is to give a general overview of the three factors that determine the scope of local zoning authority: 1) the terms of the state's "zoning enabling legislation"; 2) the scope of "home rule" powers within the state; and 3) the existence of conflicting state and local legislation.

Zoning enabling statutes are the most common means of delegation. They became popular after 1924, when an advisory committee to the Department of Commerce released the Standard State Zoning Enabling Act (SZEA). The SZEA provided a template for states that wanted to delegate their zoning authority, and eventually all fifty states adopted legislation based on the SZEA. Over the years, states have modified their enabling statutes in a variety of ways, but the SZEA remains the basic model in most states.²

The impact of zoning enabling legislation on local zoning authority varies by state. In some states, courts have held that zoning enabling legislation is just one source of local zoning authority and that local governments may also issue zoning

¹ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law*, 51 (West Group 1998).

² Kenneth H. Young, *Anderson's American Law of Zoning* § 7.2 (4th ed. 1996).

ordinances based on “home rule powers.” By contrast, in states where courts follow the so-called “Dillon’s Rule” (municipalities have only that power granted to them by the state), enabling statutes are the only source of local zoning authority, and local governments cannot exceed the boundaries of those statutes.³

Local zoning authority in states that follow Dillon’s Rule tends to be more restricted because zoning enabling statutes frequently place limitations on local zoning powers and impose detailed procedures for enacting and administering zoning ordinances.⁴ Many zoning enabling acts, for example, impose rigid notice and hearing requirements and detailed restrictions on the make-up and voting procedures of local zoning commissions.⁵ These restrictions have been criticized, but they are still pervasive.

Home rule provisions, found in a state’s constitution, can provide an additional source for local zoning authority. Home rule provisions grant municipalities the general authority to manage their local affairs. Whereas zoning enabling statutes are specific to zoning, home rule provisions are broad grants of power that provide municipalities the general authority to manage their local affairs without having to rely on specific enabling statutes. Courts are split as to whether home rule provisions provide a basis for zoning power, but where they are found to, municipalities may have greater flexibility to zone because they are not restricted by the requirements of the state's enabling statutes.

Two conditions must be present for a municipality to issue zoning laws based on home rule authority. First, the municipality must be in a state that recognizes home rule

³Patrick J. Rohan, *Zoning and Land Use Controls*, § 35.03[2] (Patrick J. Rohan & Damien Kelly eds., 2004).

⁴ Patrick J. Rohan, *Zoning and Land Use Controls*, § 35.03[2].

⁵ Patrick J. Rohan, *Zoning and Land Use Controls*, § 35.03[3].

as a basis for local zoning authority, i.e. not a Dillon Rule state. Second, the municipality must adopt a charter that includes a specific zoning provision. If a municipality satisfies both of these requirements, then the scope of its zoning authority is determined by its particular charter, not the state's zoning enabling statute.⁶ If, however, a municipality has not adopted a charter or has adopted a charter with no zoning provision, then it must abide by the requirements of the state's zoning enabling statute, even if courts in that state recognize home rule power as a valid source of zoning authority.⁷

Municipalities with zoning authority based on home rule have greater autonomy over zoning matters, but their authority is not unlimited. In a regime where home rule is a source of zoning authority, the municipality adopts its own charter and, therefore, gets to set the scope of its zoning powers. The charter then becomes the “organic law of the municipality” on matters of local concern.⁸ Because zoning is generally considered a matter of local concern, the charter’s zoning provisions will not be preempted by state zoning enabling statutes. The charter must, however, be consistent with the state’s constitution and general laws. In addition, a local zoning ordinance enacted under home rule powers may be preempted if it conflicts with a state law that is not specific to zoning. For example, a California statute giving firearm dealers a range of options for storing their firearms was held to preempt a zoning ordinance that required firearm

⁶ Patrick J. Rohan, *Zoning and Land Use Controls*, §35.03[3].

⁷ 2A Eugene McQuillan, *The Law of Municipal Corporations* § 9.03 at 165 (3d ed. 1996) (noting that a home rule charter authorized by a state constitution becomes “the organic law of the people promulgating it in all matters pertaining to the local civil government of the municipality,” while legislative charters are merely grants of power to the locality) as cited in Charles B. Ferguson, Hamlets: Expanding the Fair Share Doctrine under Strict Home Rule Constitutions, 49 *Emory Law Journal* 255, 258 n.15 (2000).

⁸ Patrick J. Rohan, *Zoning and Land Use Controls*, § 35.03[3].

dealers to store their firearms in a particular way.⁹ Thus, even when a zoning ordinance is based on home rule powers, it is important to make sure that the ordinance does not conflict with the general laws of the state.

⁹ *Suter v. City of Lafayette*, 67 Cal. Rptr.2d 420 (Cal. Ct. App. 1997), *review denied* (Dec. 10, 1997).

APPENDIX B: Possible Constitutional Challenges to Zoning Fast Food Outlets

Equal Protection

Equal protection requires zoning laws to be *rationaly related* to a legitimate government purpose and to treat all similarly situated individuals alike.¹ Courts may apply a stricter standard if a zoning law were to facially or purposefully discriminate on the basis of a particular characteristic, such as race, gender, or nationality,² or to discriminate in a way that interferes with a fundamental right.³ It is difficult, however, to conceive when such discrimination would be necessary in the case of zoning restrictions on food retailers. Therefore, courts will most likely apply the deferential “rational basis” standard when reviewing the types of zoning laws with which we are concerned.

Due Process

The due process clause provides both substantive and procedural protections. *Procedural due process* requires zoning authorities to give affected parties adequate notice and an opportunity to be heard. *Substantive due process* generally requires that zoning ordinances be rationally related to a legitimate government interest and not be arbitrary or capricious.⁴ In the case of most public health zoning laws, this “rational basis” standard is relatively easy to meet. Public health has long been considered a

¹ Patrick J. Rohan, *Zoning and Land Use Controls*, § 35.04[1][c] (Patrick J. Rohan & Damien Kelly eds., 2004).

² Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press 2000) at 76.

³ See *Sullivan v. Reilly*, No. CIV.A.00446-H, 2000 WL 776414, at 4 (Mass. Super. Ct. 2000) (unpublished decision) (refusing to apply strict scrutiny in an equal protection challenge to a law restricting firearms sales because “the right to pursue one's business is not a fundamental right necessitating strict scrutiny.”).

⁴ Patrick J. Rohan, *Zoning and Land Use Controls*, § 35.04[1][b].

legitimate basis for zoning laws and, in fact, arguably provides legislatures with broader discretion to zone than would other goals.⁵ Moreover, under the rational basis standard, courts are reluctant to question the wisdom or logic of legislative choices, and public health zoning ordinances will generally be upheld as long as there is “any reasonably conceivable state of facts that could provide a rational basis for the classification.”⁶

Substantive due process does, however, place some restrictions on state and local zoning authority. Courts may strike down a zoning ordinance justified on public health grounds if there is really no evidence that the ordinance will promote or protect public health. For example, one court invalidated a moratorium on cell phone antennas that was purportedly based on public health concerns because “there [was] not a scintilla of evidence in the record indicating that the installation of cellular antennas in accordance with the plaintiff’s proposed plan will be inimical to the well-being of the Village citizenry.”⁷ Furthermore, courts will scrutinize a zoning ordinance more closely if it infringes upon a fundamental right, such as freedom of speech.⁸ Courts apply “strict scrutiny” when a fundamental right is at stake, which means that the burden is on the government to show that the zoning ordinance is necessary to achieve a compelling government interest.⁹ Zoning ordinances that simply prohibit individuals from operating

⁵ Norman Williams Jr. & John M. Taylor, *American Land Planning Law: Land Use and the Police Power*, § 8.0 (Callaghan & Company 1988); Kenneth H. Young, *Anderson’s American Law of Zoning* § 7.08 (4th ed. 1996).

⁶ Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* at 78.

⁷ *Cellular Telephone Co. v. Village of Tarrytown*, 624 N.Y.S.2d 170, 176 (N.Y.A.D. 2d Dept., 1995).

⁸ See *Suter v. City of Lafayette*, 67 Cal. Rptr.2d 420, 431 (Cal. Ct. App. 1997), review denied (Dec. 10, 1997). (“It is true that ordinances impinging on First Amendment activities are subjected to strict scrutiny.”).

⁸ Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* at 80-81.

⁹ Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* at 80-81.

fast food restaurants are unlikely to implicate a fundamental right and are likely to be reviewed under the lenient “rational basis” test.

Takings Clause

The takings clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, requires governments to provide just compensation whenever a zoning ordinance imposes an unfair burden on a landowner, known as a “regulatory taking.”¹⁰ Although takings challenges are common in zoning disputes, they are unlikely to be successful against zoning laws that impose restrictions on where food retailers can operate. To constitute a taking, a zoning ordinance must “deny an owner economically viable use of his land.”¹¹ Prohibiting a few specific types of retail operations does not deprive a landowner of all economically viable uses and, therefore, does not constitute a taking.¹²

Commerce Clause

The Commerce Clause not only empowers Congress to regulate interstate commerce, but also prohibits states from regulating in a manner that places an undue burden on interstate commerce.¹³ Lawyers refer to this limiting element of the Commerce Clause as the Dormant Commerce Clause. As a general rule, as long as the

¹⁰ Julian Conrad Juegensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law*, 682 (West Group 1998).

¹¹ *Downie v. Liverpool Township Trustees*, No. 1662, 1988 WL 49413, 3 (Ohio Ct. App. 1988) (unpublished decision).

¹² See *Downie v. Liverpool Township Trustees*, 1988 WL 49413 (finding no regulatory taking where a zoning ordinance allowed only certain industrial activities and prohibited plaintiffs from using their land for various retail and service operations).

¹² Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* at 41.

¹³ Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* at 41.

law is not aimed at restricting competition, local zoning measures aimed at promoting safety and health are unlikely to violate the Commerce Clause.

First Amendment

The First Amendment protects speech and religion. Zoning laws aimed at obesity are unlikely to implicate religion. They may, however, restrict free speech. Historically, two types of zoning laws have been challenged on free speech grounds: 1) sign and billboard controls; and 2) restrictions on business that engage in non-obscene sexually oriented speech, such as adult bookstores and movie theaters.¹⁴ Sign and billboard controls provide a fairly obvious method for fighting obesity: a municipality may, for example, want to restrict advertisements of unhealthier foods. A 2001 U.S. Supreme Court case, *Lorillard v. Reilly*, which held invalid several zoning restrictions on tobacco advertising, might limit what can be accomplished in this regard with respect to fast food.¹⁵

¹⁴ Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* at 475.

¹⁵ *Lorillard v. Reilly*, 533 U.S. 525 (2001).

APPENDIX C: Zoning Code Websites

a. *Zoning Codes**

Arden Hills, Minnesota, Arden Hills Zoning Ordinance, Arden Hills, Minnesota.
Available at: http://www.ci.arden-hills.mn.us/Departments/Community_Development/Zoning_Ordinance/zoning_ordinance.htm.

Bainbridge Island, Washington, Bainbridge Island City Code.
Available at:
[http://search.mrsc.org/nxt/gateway.dll/bnbgmc?f=templates&fn=bnbgpage.htm\\$vid=municoes:Bainbridgeland](http://search.mrsc.org/nxt/gateway.dll/bnbgmc?f=templates&fn=bnbgpage.htm$vid=municoes:Bainbridgeland).

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

Calistoga, California, Calistoga Municipal Code, Title 17 Zoning.
Available at: http://www.thefiengroup.com/municipal_codes.html.

Carlsbad, California, Carlsbad Municipal Code, Title 21 Zoning, The Zoning Ordinance.
Available at: <http://municipalcodes.lexisnexis.com/codes/carlsbad>.

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

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

Detroit, Michigan, City of Detroit, Official Zoning Ordinance.
Available at: http://www.municode.com/resources/code_list.asp?stateID=22.

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

San Francisco, California, San Francisco Planning Code.
Available at: <http://www.amlegal.com/library/ca/sanfrancisco.shtml>.

Solvang, California, Solvang Zoning Ordinance.
Available at: <http://www.sterlingcodifiers.com/CA/Solvang>.

Town of Warner, New Hampshire, Town of Warner, NH Zoning Ordinance.
Available at: <http://www.warner.nh.us/regulations.htm>.

Westwood Village, Los Angeles, California: Westwood Village Specific Plan.
Available at:
<http://cityplanning.lacity.org/complan/specplan/sparea/wwdvillagepage.htm>.

*b. General Zoning Code Databases and Land Use Resources**

California Land Use Planning Information Network (LUPIN), County Zoning Ordinances. Available at: <http://ceres.ca.gov/planning/zoning/county.html>.

LexisNexis™ Municipal Codes. Available at: <http://www.bpcnet.com/codes.htm>.

Municipal Research and Services Center of Washington, Comprehensive Planning/Growth Management.

Available at: <http://www.mrsc.org/subjects/planning/compplan.aspx?r=1>

Municode.com Online Library.

Available at: http://www.municode.com/resources/online_codes.asp.

The Fien Group, infobase library, municipal codes.

Available at: http://www.thefiengroup.com/municipal_codes.html.

The New Rules Project, The Hometown Advantage, *Formula Business Restrictions*. Available at: <http://www.newrules.org/retail/formula.html>.

* All websites accessed August 24, 2005.