

**LAW JOURNAL**  
**FOR SOCIAL JUSTICE**  
SANDRA DAY O’CONNOR COLLEGE OF LAW  
ARIZONA STATE UNIVERSITY

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**Volume 6** **Spring** **2016**

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## EDITOR INTRODUCTION

The 2016 Law Journal for Social Justice Symposium, “Promising Practices in Criminal Justice” focused on current programs regarding re-entry and rehabilitation. Discussions ranged from specialty court programs like the Veteran’s Court and Homeless Court, victim-oriented rehabilitation for trafficking victims, and re-entry programs. Panelists included judges, practicing attorneys, and community organizers.

Social justice is an evolving, broadening concept, finding new meaning throughout the academic community. This journal, and the articles found herein, is designed to present these emerging concepts in a manner that allows both the jurist and the layperson to engage them. The issue begins with *Zoning and Regulating for Obesity Prevention and Healthier Diets: What Does the South Los Angeles Fast Food Ban Mean for Future Regulation?*, written by Kim Weidenaar, an article commenting on local zoning ordinances as tools for preventing obesity in disproportionately affected populations. However, with the second article, *Eating Mascots for Breakfast: How Keeping Native Faces off Labels Can Grow Tribal Economies*, Leah K. Jurss concentrates on food sovereignty in tribal communities and labeling of Native food products. Alex D. Ivan then shifts the focus by studying how electronic monitoring may be used to empower victims while reducing burdens of imprisonment spending in *Utilizing Electronic Monitoring to Enhance Domestic Violence Victim Safety*. Next, in *Constitutional Protection of Domestic Violence Victims Reinforced by International Law* Marina Kovacevic argues ratification of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in the United States. Sara Movahed, in *Devastating Effects of the International Failure to Recognize Refugees of Gender Based Persecution*, then examines legal shortcomings resulting when asylum based solely on a history of gender-based persecution is not considered. Through *Kennedy’s Law: The Hidden Constitutionally-Protected Classification*, Nicole Fries explores the necessity of Supreme Court action to provide lower courts the ability “to apply a suspect class framework to non-marriage sexual orientation laws.” Next, Erin Iungerich, in *My Nurse is a Pornstar: Should Discrimination Law Protect Moonlighting in the Adult Industry?*, considers protections for at-will employees participating in adult industry activities after-hours. Finally, *Secrecy, Espionage, and Reasonable Efforts Under the Uniform Trade Secrets Act – An Unbalanced Mass* by Peter L. Krehbiel concludes the issue by analyzes concerns that shifting costs related to trade secrets may undermine public policy and society at large. Collectively, the unique perspectives of these articles present important domestic and international issues that must be examined in today’s changing landscape.

Special thanks to the Law Journal for Social Justice Editorial Board for their hard work and dedication.

Asha McManimon  
2015-2016 Editor-in-Chief  
Law Journal for Social Justice



# ZONING AND REGULATING FOR OBESITY PREVENTION AND HEALTHIER DIETS: WHAT DOES THE SOUTH LOS ANGELES FAST FOOD BAN MEAN FOR FUTURE REGULATION?

Kim Weidenaar, JD \*

## INTRODUCTION

One of the greatest public health challenges facing the United States (U.S.) today is the astounding overweight and obesity rates. In 2012, 69% of adults were overweight or obese, while over 20% of adolescents aged 12-19 were obese.<sup>1</sup> Obesity can lead to many devastating and preventable chronic and acute diseases and conditions, including heart disease, stroke, and type 2 diabetes.<sup>2</sup> Further, certain racial and ethnic groups are disproportionately affected by this problem. Black and Latino populations have significantly higher obesity and overweight rates compared to White adults and children.<sup>3</sup>

This challenge is well publicized and acknowledged, but like most pervasive problems, the causes—and more importantly, solutions—remain relatively unknown. In an attempt to create healthier communities, local governments across the nation have proposed and implemented a number of innovative legal interventions aimed at reducing obesity, improving diets, and increasing overall health. Many of these measures adapt interventions long used to curb tobacco and alcohol use, and apply them to Sugar Sweetened Beverages (SSBs) and fast food outlets. Regulations that traditionally restricted alcohol and tobacco retailers now focus in on fast food restaurants and convenience stores. Laws that previously restricted the advertisement of alcohol and tobacco or required warning labels are now being used in an attempt to reduce SSB consumption. For instance, in 2015, San Francisco's Board of Supervisors passed a trio of measures aimed at reducing SSB consumption, including: (1) prohibiting SSB

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<sup>1</sup> *FastStats: Obesity and Overweight*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/obesity-overweight.htm> (last updated Sept. 30, 2015).

<sup>2</sup> *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/obesity/data/adult.html> (last updated Sept. 21, 2015).

<sup>3</sup> *The Numbers: Adult Obesity Rates*, THE STATE OF OBESITY: BETTER POLICIES FOR A HEALTHIER AMERICA, <http://stateofobesity.org/disparities> (last visited Jan. 6, 2016).

advertisements on County property; (2) banning the City from purchasing or distributing SSBs; and (3) requiring SSB advertisements to include a warning about the health effects of drinking such beverages.<sup>4</sup>

Jurisdictions are also turning to traditional local authorities, such as zoning and licensing, in an attempt to reduce obesity rates and increase health. For decades, local jurisdictions have banned or restricted fast food restaurants, drive-thrus, formula restaurants (often defined as franchises or chains), and convenience stores in the name of protecting town character and charm, reducing traffic, or improving safety. More recently, some cities, like Minneapolis, Minnesota, have utilized their business licensing scheme to require certain retailers to stock healthier staple foods such as fruits and vegetables in a professed effort to reduce crime and blight.<sup>5</sup> Local authorities have long used their zoning and licensing authority to regulate food retail in a very general sense to protect the health, welfare, and safety of the community. However, jurisdictions are just beginning to regulate specifically on the basis of reducing obesity and improving access to healthy foods.

Most notably, in 2007, Los Angeles' (L.A.) City Council implemented a fast food ban affecting a large region of South L.A. for the purposes of improving the community's health, making it the first jurisdiction to do so with this specific and identified goal.<sup>6</sup> At the same time, the city council created an incentive package to attract grocery stores and sit-down restaurants to the area.<sup>7</sup> In 2015, a study of the South L.A. regulations found that since they were implemented, the number of fast food restaurants increased, along with obesity and fast food consumption.<sup>8</sup> Such disappointing results raised the question of whether these regulations are reasonable. Moreover, are these regulations legally valid when the rationality of the relationship between the goals and the regulation is considered? As public health continues to move towards evidence-based

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<sup>4</sup> San Francisco, Cal., Ordinance 98-15 (June 1, 2015); San Francisco, Cal., Ordinance 100-15 (June 1, 2015).

<sup>5</sup> *Licensing for Lettuce: A Guide to the Model Licensing Ordinance for Healthy Food Retailers*, CHANGLAB SOL. 6 (Feb. 2013), [http://www.changelabsolutions.org/sites/default/files/Licensing\\_for\\_Lettuce\\_FINAL\\_20130212\\_0.pdf](http://www.changelabsolutions.org/sites/default/files/Licensing_for_Lettuce_FINAL_20130212_0.pdf).

<sup>6</sup> Los Angeles, Cal. Ordinance 180103, (May 25, 2007); Roland Sturm & Deborah Cohen, *Zoning for Health? The Year-Old Ban On New Fast-Food Restaurants in South LA*, 28 HEALTH AFFAIRS no. 6, at w1088-89 (2009).

<sup>7</sup> *Market Opportunities: Incentives for Food Retailers*, COMMUNITY REDEVELOPMENT AGENCY - CITY OF LOS ANGELES, 2 (2008), [http://www.crala.org/internetsite/Development/upload/Market\\_Opportunities\\_08.pdf](http://www.crala.org/internetsite/Development/upload/Market_Opportunities_08.pdf).

<sup>8</sup> Roland Sturm et al., *Diet and Obesity in Los Angeles County 2007-2012: Is there a measurable effect of the 2008 "Fast-Food Ban"?*, 133 SOC. SCI. & MED. 205 (2015).

practices<sup>9</sup> and public health advocacy groups encourage the use of zoning and licensing authority to reduce obesity,<sup>10</sup> the need to study these measures and regulate accordingly in order to be legally supported is paramount.

Part I of this article discusses the general legal basis for local regulation of land and businesses. Part I also explores the existing regulatory environment surrounding food retail, particularly zoning ordinances that limit fast food and formula restaurants, as well as regulatory schemes which promote and encourage the establishment of grocery stores and produce markets. Part II focuses on constitutional challenges of zoning regulations and the standards used by courts to determine if local regulations are reasonable. Part III examines the current state of studies, which have examined relationships between fast food locations, obesity, and diet, among other things. Part IV investigates a particular fast food ban in South L.A. that was premised on improving health and the corresponding studies that examined its effects on the community and food environment. Finally, Part V argues that given the regulatory shift toward public health bases, ordinances must be supported (or at least not contradicted) by studies as they are completed, not only to ensure the regulation is legally supported and valid, but to demonstrate legitimacy and to protect the public's health.

## I. EXISTING ZONING ORDINANCES & REGULATORY CONTROLS

The authority to regulate land use, through zoning and other means, relies upon the state's police power. "Police power" is the inherent authority of a state to regulate to protect the health, safety, morals, and public welfare.<sup>11</sup> A municipality's power to regulate depends on the authority delegated to it by the state, the state's zoning enabling act, and whether the policy or focus of the policy may be subject to preemption.<sup>12</sup> Local governments only have the power given by a state constitution or legislature to the political subdivisions of the state. That authority generally comes in two forms: (1) narrow authority, commonly known as

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<sup>9</sup> See e.g., Scott Burris et al., *Making the Case for Laws That Improve Health: A Framework for Public Health Law Research*, 88 MILBANK Q. 169, (2010); *Evidence-Based Public Health*, ASTHO, <http://www.astho.org/programs/evidence-based-public-health/> (last visited Jan. 25, 2016).

<sup>10</sup> See e.g., *Model Healthy Food Ordinance*, CHANGELAB SOL. 6 (Aug. 2013), <http://www.changelabsolutions.org/publications/model-ord-healthy-food-zone>.

<sup>11</sup> *Lochner v. New York*, 198 U.S. 45, 53 (1905).

<sup>12</sup> State law may expressly or impliedly preempt local laws. Paul A. Diller & Samantha Graff, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?* 39 J. LAW MED. ETHICS SUPP. 89, 90 (2011).

Dillon's Rule, or (2) broad authority, known as Home Rule.<sup>13</sup> Cities and counties in Dillon's Rule states can only exercise powers expressly delegated to it or those that are necessarily implied or otherwise essential.<sup>14</sup> By contrast, Home Rule refers to a state granting "local governments all the powers which the legislature is capable of delegating, which the legislature may then cut back by statute."<sup>15</sup>

In addition to general local authority granted by the state, all states have implemented Zoning Enabling Acts. These acts delegate the authority to zone to local governments and are largely based on a Standard Zoning Act created by the U.S. Department of Commerce in 1926.<sup>16</sup> The enabling acts delineate local governments' ability to zone. Accordingly, the validity of a zoning ordinance hinges upon the jurisdiction's delegated authority and the parameters of the applicable zoning enabling act. Whether a given jurisdiction has the authority to enact a particular zoning ordinance is a critical legal inquiry. However, this article assumes that jurisdictions discussed have the authority to regulate the targeted businesses generally and in the manner chosen.

Zoning and licensing are the most commonly used exercises of the police power to regulate land and business activity. Zoning ordinances determine what can be built where, in what manner, how the building or land can be used, and for what purpose. Zoning essentially is the division of land, generally a jurisdiction, into defined districts or areas.<sup>17</sup> Each district then has set regulations, which determine what type of uses (e.g., commercial, residential, farm) are permitted and prohibited for the land, and may also provide density limits, building size requirements, and so on.<sup>18</sup>

Licensing on the other hand, affords a privilege to a licensee, permitting them to do something that they would not otherwise be entitled to do.<sup>19</sup> Inherent in a state's police power is the authority to regulate by

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<sup>13</sup> *Local Government Authority*, NAT'L LEAGUE OF CITIES, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority> (last visited Jan. 24, 2016).

<sup>14</sup> Diller, *supra* note 12.

<sup>15</sup> 1 JOHN MARTINEZ, *THE PLACE OF LOCAL GOVERNMENT IN THE SCHEME OF AMERICAN LAW*, LOCAL GOVERNMENT LAW § 4:8 (2nd ed. 2015).

<sup>16</sup> Advisory Committee on Zoning, *Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations*, U.S. DEP'T OF COMMERCE (1926), <https://www.planning.org/growingsmart/pdf/SZENablingAct1926.pdf>; 1 ARDEN H. RATHKOPF, DAREN A. RATHKOPF & EDWARD H. ZIEGLER, JR., *NATURE OF POLICE POWER IN RELATION TO ZONING*, 1 RATHKOPF'S *THE LAW OF ZONING AND PLANNING* § 1:9 (4th ed. 2015).

<sup>17</sup> 8 MCQUILLIN MUN. CORP. § 25:1 (3d ed.).

<sup>18</sup> *Id.*

<sup>19</sup> 51 AM. JUR. 2d Licenses and Permits § 1.

licensing certain businesses, activities, and professions.<sup>20</sup> Generally, licensing agencies can set any conditions, standards, or requirements that are reasonably necessary to protect the public's health, safety, or welfare.<sup>21</sup> Courts will typically uphold licensing schemes, so long as the requirements and qualifications for obtaining a license are clearly and adequately stated. Jurisdictions can impose reasonable fees on licensees, but the fees must be proportional to the cost of regulating (e.g. enforcement, inspection).<sup>22</sup> Finally, a license does not permit the licensee to violate a zoning ordinance, and in the same vein a zoning ordinance that permits a use in a certain area, does not obviate the need to obtain a license.<sup>23</sup>

For decades, communities have regulated fast food establishments through zoning, limiting their size, location, density, and proximity to certain places, like schools. However, until L.A. implemented its Interim Control Ordinance banning stand-alone fast food outlets in 2008, a specific public health goal (e.g. obesity prevention) had never explicitly been stated as a justification for such a regulation.<sup>24</sup> Current ordinances regulating fast food and "formula restaurants" often include broad definitions of these terms including chain restaurants or franchises that have standardized menus, uniforms, décor, and architecture.<sup>25</sup> These ordinances run the gamut and include all-out bans, limits on their locations, quotas on the total number, density restrictions, and bans on drive-thrus.<sup>26</sup> Furthermore, municipalities are using (and advocacy groups are encouraging) their business licensing authority to require food retailers to provide certain foods<sup>27</sup> or to encourage the development of grocery and produce stores in designated food deserts.<sup>28</sup> How an ordinance is drafted, its stated goals, and its application are all critical for not only the ordinance's effectiveness, but its legality. As jurisdictions follow suit,

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<sup>20</sup> 51 AM. JUR. 2d Licenses and Permits § 9.

<sup>21</sup> LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 466 (University of California Press 2008).

<sup>22</sup> *Id.*

<sup>23</sup> 8 MCQUILLIN MUN. CORP. § 25:14 (3d ed.).

<sup>24</sup> Julie Samia Mair, Matthew W. Pierce, Stephen P. Teret, *The Use of Zoning to Restrict Fast Food Outlets: A Potential Strategy to Combat Obesity*, THE CENTERS FOR LAW AND THE PUBLIC'S HEALTH, 39 (October 2005), <http://www.publichealthlaw.net/Zoning%20Fast%20Food%20Outlets.pdf>.

<sup>25</sup> See e.g., CALISTOGA CAL., CALISTOGA MUN. CODE § 17.04.616 (2000).

<sup>26</sup> *Zoning Against Unhealthy Food Sources in New York City*, THE NEW YORK ACAD. OF MED. FOR THE NYC STRATEGIC ALL. FOR HEALTH, 6-8 (September 2010), *available at* [http://www.obesitypolicies.org/sites/default/files/ZoningSAFH\\_Sept2010.pdf](http://www.obesitypolicies.org/sites/default/files/ZoningSAFH_Sept2010.pdf).

<sup>27</sup> CHANGE LAB SOL., *supra* note 10.

<sup>28</sup> *Food Retail Expansion to Support Health*, THE CITY OF NEW YORK, <http://www.nyc.gov/html/misc/html/2009/fresh.shtml> (last visited Jan. 6, 2016).

regulating in the name of specific public health goals,<sup>29</sup> and advocacy groups encourage policy-makers to use zoning and licensing authority to promote healthy diets, understanding these ordinances and their purposes, goals, and impacts are critical both to effectuate public health gains and to be legally permissible in the future.

### A. Ordinances Prohibiting and Limiting Fast Food and Formula Restaurants

Municipalities have taken markedly different approaches in limiting fast food and formula restaurants, often depending upon the ordinance's justification and purpose. Several jurisdictions have gone so far as to completely ban fast food establishments. Concord, Massachusetts banned all fast food restaurants within its city limits in 1981, likely making it the first jurisdiction to do so.<sup>30</sup> Concord expressly prohibits fast food restaurants and drive-thrus in its zoning plan by identifying them as a prohibited use.<sup>31</sup> The ordinance defines fast food restaurants broadly to include establishments whose principle business is the sale of foods or beverages that are either (1) in disposable containers, or (2) served directly to customers in motor vehicles.<sup>32</sup> The stated purpose of the town's zoning bylaws lists a number of objectives including: lessening congestion, conserving health, securing safety, and to preserve the "scenic and aesthetic qualities of the community."<sup>33</sup>

Similarly, in the mid-1980s, the town of Carmel-by-the-Sea, California became the first to ban all "formula restaurants" within its bounds.<sup>34</sup> By prohibiting formula restaurants,<sup>35</sup> Carmel's ordinance reaches far beyond Concord's. Carmel still bans all fast food restaurants,

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<sup>29</sup> See e.g., Howard County, Md., CB 17-2015 (2015) (ordinance citing that SSB consumption was correlated with high obesity rates and its associated diseases).

<sup>30</sup> Concord, Mass., ZONING BYLAW APP. B-8 (1981), [http://www.concordnet.org/Pages/ConcordMA\\_BOA/zone/2014ZBL\\_APPENDIX\\_B.pdf](http://www.concordnet.org/Pages/ConcordMA_BOA/zone/2014ZBL_APPENDIX_B.pdf)

<sup>31</sup> Concord, Mass., ZONING BYLAW § 4.7.1 (1981), [http://www.concordnet.org/pages/concordma\\_boa/zone/ZBL2014SECTION4\\_C.pdf](http://www.concordnet.org/pages/concordma_boa/zone/ZBL2014SECTION4_C.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> Concord, Mass., ZONING BYLAW § 1.2 (1981), [http://www.concordnet.org/Pages/ConcordMA\\_BOA/zone/ZBL2014SECTION1.pdf](http://www.concordnet.org/Pages/ConcordMA_BOA/zone/ZBL2014SECTION1.pdf).

<sup>34</sup> Carmel-by-the-Sea, Cal., Formula Business Restriction 17.06.036, *available at* <https://ilsr.org/rule/formula-business-restrictions/2310-2>.

<sup>35</sup> Carmel defines "formula restaurant" as, one "that (1) is required by contractual or other arrangements to offer standardized menus, ingredients, food preparation, employee uniforms, interior décor, signage or exterior design; or (2) adopts a name, appearance or food presentation format that causes it to be substantially identical to another restaurant regardless of ownership or locations." CARMEL-BY-THE-SEA, CAL., MUN. CODE § 17.70.020 (2004).

drive-thrus, and formula restaurants from within its city limits,<sup>36</sup> but in 2004 also restricted the total number of restaurants permitted in the city to 15.<sup>37</sup> The new regulations' stated purposes include limiting traffic and litter, and promoting unique, quality commercial uses that service the needs of the community.<sup>38</sup>

Since many of the zoning ordinances related to fast food and formula restaurants are based on traffic and aesthetic concerns, many jurisdictions prohibit these establishments from historic or downtown areas in an effort to preserve them. For example, in 2005, Port Townsend, Washington's city council enacted an ordinance barring formula restaurants and retail establishments from its downtown area.<sup>39</sup> The ordinance was enacted to preserve the "special environment" and vital "small town atmosphere."<sup>40</sup> In addition, rather than passing an outright ban on formula or fast food restaurants, a number of jurisdictions simply ban drive-thrus in an effort to lessen traffic and reduce accidents.<sup>41</sup> Carlsbad, California prohibits drive-through restaurants within all zones of the city, but exempts all existing ones and those that received approval prior to the ordinances adoption.<sup>42</sup>

Practically speaking, most municipalities already have a number of fast food and formula restaurants. Accordingly, cities may seek to limit the total number by implementing quotas and density limits, rather than all-out bans. In 2002, Arcata, California, limited the number of formula restaurants within the city limits to nine.<sup>43</sup> In order for a new formula restaurant to open, it must replace an existing one. In addition to the nine-establishment cap, the total number of restaurants per district is also capped.<sup>44</sup> The Arcata Ordinance states that the "public health, safety, and general welfare require the adoption" of this ordinance and that the quota "caps growth within that specialized market area."<sup>45</sup> Warner, New Hampshire, does not cap the total number of fast food outlets, but has

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<sup>36</sup> Carmel-by-the-Sea, Cal., Ordinance 2004-02 § 1, 2004-01 § 1 (2004).

<sup>37</sup> CARMEL-BY-THE-SEA, CAL., MUN. CODE § 17.56.020, TBL. 17.56-A (2004).

<sup>38</sup> CARMEL-BY-THE-SEA, CAL., MUN. CODE § 17.56.010 (2004).

<sup>39</sup> Port Townsend, Wash., Ordinance No. 2896, available at <http://www.ilsr.org/rule/formula-business-restrictions/2319-2/>.

<sup>40</sup> *Id.*

<sup>41</sup> CARLSBAD, CAL., MUN. CODE § 21.42.140 (55)(a).

<sup>42</sup> *Id.*

<sup>43</sup> ARCATA, CAL., LAND USE CODE § 9.42.164. The city defines "formula restaurant" rather broadly to include establishments that sell food and beverages which are contractually required to have standardized menus, ingredients, décor, uniforms, signs, or other features making it "substantially identical" to at least 11 other restaurants. ARCATA, CAL., ORDINANCE 1333, § 1, App. A (2002).

<sup>44</sup> LAND USE CODE § 9.42.164.

<sup>45</sup> ARCATA, CAL., ORDINANCE 1333, §§ 1, 4 (2002).

issued density limits. Warner does not allow a new fast food restaurant or drive-thru to open if it is within 2,000 feet of an existing one.<sup>46</sup>

Finally, some jurisdictions choose to restrict fast food from areas where children and adolescents generally congregate, such as schools, parks, and community centers. Arden Hills, Minnesota, restricts fast food restaurants, convenience stores, and drive-thrus from within 400 feet of any school, church, park, or residentially zoned area.<sup>47</sup> The Arden Hills zoning code also limits the proximity of such establishments, requiring a distance of at least 1,320 feet from between them.<sup>48</sup>

### **B. Other Regulations to Provide and Improve Access to Healthy Foods**

In addition to using zoning to limit fast food establishments, municipalities are utilizing licensing authority to increase access to healthy foods by encouraging grocery store development and food retailers to carry staple foods. Unlike most zoning regulations discussed here, which focus on small, well-off communities, many of these regulations and policies attempt to create equitable access to affordable and healthy foods, which is lacking in many communities.

In 2008, Minneapolis, Minnesota added requirements to its licensing scheme, making it the first city to require food stores to stock staple foods as a condition of obtaining a business license.<sup>49</sup> The ordinance requires grocery stores, convenience stores, dollar stores, and pharmacies to stock staple foods, including whole grains, meats, dairy, and fruits and vegetables.<sup>50</sup> The ordinance was reportedly enacted to ensure public safety on the assumption that the sale of primarily junk food, tobacco, and alcohol can contribute to crime and blight.<sup>51</sup>

In 2014, the Minneapolis City Council amended the Staple Foods Ordinance to include additional specifications regarding the types and quantities of the foods the ordinance required.<sup>52</sup> The City Council also

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<sup>46</sup> TOWN OF WARNER, N.H., ZONING ORDINANCE art. III (Mar. 10, 2015), [http://www.warner.nh.us/downloads/zoning/2015\\_Zoning\\_Ordinance.pdf](http://www.warner.nh.us/downloads/zoning/2015_Zoning_Ordinance.pdf). The ordinance exempts small delis and bakeries with a limited number of seats. *Id.*

<sup>47</sup> Arden Hills, Minn., Municipal Code § 1325.04(1)(A) (2006).

<sup>48</sup> Arden Hills, Minn., Municipal Code § 1325.04(1)(B) (2006).

<sup>49</sup> CHANGELAB SOL., *supra* note 5.

<sup>50</sup> MINNEAPOLIS, MINN., CODE OF ORDINANCES § 203.10 (2008); *Staple Foods Ordinance*, MINNEAPOLIS HEALTH DEP'T, <http://www.minneapolismn.gov/health/living/eating/staple-foods> (last updated Aug. 20, 2015).

<sup>51</sup> CHANGELAB SOL., *supra* note 5.

<sup>52</sup> MINNEAPOLIS, MINN., CODE OF ORDINANCES § 203.10 (2014).

added findings, which state, “it is in the interest of the public health, safety, and welfare to ensure that grocery stores [...] provide a certain minimum level of healthy food.”<sup>53</sup> The Department of Health describes the purpose of the ordinance as helping to “ensure that everyone has access to healthy foods no matter where they shop,” to support a healthy lifestyle.<sup>54</sup>

Besides bans and requirements, some jurisdictions are using their authority in other ways to encourage retailers to make healthy changes, focusing on areas with limited access to healthy foods.<sup>55</sup> Jurisdictions from New York City to rural West Virginia have implemented programs.<sup>56</sup> In Mid-Ohio Valley, West Virginia, corner and convenience stores can receive up to a 20% reduction in the costs for their Retail Food Permits for each type of fresh fruit or vegetable it offers for purchase.<sup>57</sup> New York City’s Food Retail Expansion to Support Health (FRESH) Program, created in response to a study indicating many neighborhoods were underserved by grocery stores, provides zoning and financial incentives to encourage grocery store development in designated areas.<sup>58</sup> The City Planning Department provides a number of incentives, including allowing mixed-use buildings to have additional residential floor space for every square foot of grocery store, and exempting grocery retailers from certain parking requirements.<sup>59</sup> The Industrial Development Agency provides at its discretion real estate tax reductions for 25 years, sales tax exemptions on building materials, and a mortgage recording tax deferral.<sup>60</sup> FRESH incentives are only available to grocery stores in designated FRESH-eligible areas that meet a number of requirements including the proportion of space designated for produce and perishable foods.<sup>61</sup>

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<sup>53</sup> MINNEAPOLIS, MINN., CODE OF ORDINANCES § 203.05 (2014).

<sup>54</sup> MINNEAPOLIS HEALTH DEP’T, *supra* note 50.

<sup>55</sup> *Incentives for Change: Rewarding Healthy Improvements to Small Food Stores*, NAT’L POL’Y & LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY 6 (2014), [http://www.changelabsolutions.org/sites/default/files/Incentives-for-Change-Small-Food-Stores\\_FINAL\\_20140131\\_2.pdf](http://www.changelabsolutions.org/sites/default/files/Incentives-for-Change-Small-Food-Stores_FINAL_20140131_2.pdf).

<sup>56</sup> *Communities Putting Prevention at Work: Nutrition*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nccdphp/dch/programs/CommunitiesPuttingPreventiontoWork/action/nutrition.htm> (last updated Oct. 23, 2013).

<sup>57</sup> *Id.*

<sup>58</sup> THE CITY OF NEW YORK, *supra* note 26.

<sup>59</sup> *FRESH Food Stores*, DEPT. OF CITY PLANNING: CITY OF NEW YORK, <http://www.nyc.gov/html/dcp/html/fresh/index.shtml> (last visited Jan. 6, 2016).

<sup>60</sup> *Food Retail Expansion to Support Health (FRESH)*, N.Y.C. ECON. DEV. CORP., <http://www.nycedc.com/program/food-retail-expansion-support-health-fresh> (last visited Jan. 6, 2016).

<sup>61</sup> *Id.* (to be eligible, stores must have a minimum of: (1) 6,000 square feet of retail

Beyond changes at the local level, some state legislatures are taking action to ensure municipalities have the authority to provide similar regulatory incentives. In April 2015, the Maryland State Legislature passed Senate Bill 541, at the request of the Baltimore City Administration, which authorizes the City Council to grant property tax credits to supermarkets located in identified food deserts.<sup>62</sup> The legislation requires the Mayor and City Council to designate the retail incentive area,<sup>63</sup> and limits to tax credit to the property tax imposed.<sup>64</sup> On a policy level, the Baltimore City Health Department created Baltimarket, a set of “community-based food access and food justice programs,” with the goal of creating “equitable access to healthy, affordable, and culturally-specific foods every day.”<sup>65</sup>

As noted through the examples above, local governments across the U.S. are using a number of different authorities to restrict fast food outlets and conversely increase access to healthy foods. Although many of these ordinances are based on traffic control, aesthetic concerns, and even to reduce crime, jurisdictions are increasingly motivated by specific public health concerns. As local governments begin to premise new laws on particular public health goals, the effectiveness in achieving these goals is paramount to their legitimacy

## II. CONSTITUTIONAL CHALLENGES OF ZONING ORDINANCES

### A. **Zoning**

Zoning restricts what can be done with land and what it can be used for, often greatly affecting its value. Accordingly, property owners often challenge ordinances based on violations of the Constitution. This article focuses on the constitutionality of these enacted regulations under substantive due process challenges, particularly as evidence regarding the efficacy of these measures is uncovered and more jurisdictions predicate their regulations on identified health promotion purposes.

Since the U.S. Supreme Court case, *Village of Euclid v. Ambler Realty*, decided in 1926, zoning has been considered a proper exercise of

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space for products intended for home preparation, (2) 50% of the retail space set for food products intended for home preparation and consumption, (3) 30% of the retail space for perishable foods, and (4) 500 square feet set for fresh produce).

<sup>62</sup> S.R. 541, Reg. Sess. (Md. 2015).

<sup>63</sup> Where new grocery stores are eligible for the credits.

<sup>64</sup> S.R. 541, Reg. Sess. § 1(H)(3)-(4) (Md. 2015).

<sup>65</sup> *About*, BALTIMARKET, <http://www.baltimarket.org/about/> (last visited Jan. 6, 2016).

the police power.<sup>66</sup> In *Euclid*, the Court cited the historic public health case, *Jacobson v. Massachusetts*,<sup>67</sup> which upheld mandatory vaccination under the police power. The Court in *Euclid* stated that before an ordinance can be deemed unconstitutional, the law must be “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>68</sup> Additionally, it asserted, that if a court determines that a law “purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects...” it must be found unconstitutional.<sup>69</sup>

In *Euclid*, the city’s zoning plan, specifically the division of land into classes of use and area, was challenged. The Court considered a number of reports that investigated the plan, and found that the regulations would increase safety, reduce traffic, prevent accidents, and decrease noise.<sup>70</sup> The Court concluded that, at the very least, these reasons were sufficient for it to determine that the ordinance was not arbitrary, unreasonable, and having no relation to the public health, safety, and general welfare.<sup>71</sup> Though the Court easily determined this, there are, however, real limits to the police power. The Court in *Jacobson* emphasized that the “police power of a state [...] 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.”<sup>72</sup>

Since *Euclid*, courts have routinely examined the relationship between zoning ordinances and the promotion of public health, safety, and general welfare. Constitutional challenges of zoning regulations generally hinge on claims of: (1) substantive due process, (2) equal protection, (3) takings, (4) procedural due process, (5) the first amendment, and (6) the commerce clause.<sup>73</sup>

When fundamental rights and suspect classes are not involved, claims of substantive due process and equal protection are reviewed under a rational basis test.<sup>74</sup> Under this test, courts will uphold a regulation in question so long as it promotes the public health, safety, or general welfare, and is reasonably related to the purported purpose.<sup>75</sup> Accordingly,

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<sup>66</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>67</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>68</sup> *Village of Euclid*, 272 U.S. at 395.

<sup>69</sup> *Jacobson*, 197 U.S. at 31.

<sup>70</sup> *Village of Euclid*, 272 U.S. at 394.

<sup>71</sup> *Id.* at 395 (citing *Jacobson*, 197 U.S. at 30-31).

<sup>72</sup> *Jacobson*, 197 U.S. at 38.

<sup>73</sup> Samia Mair, *supra* note 24; 2 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 15:1 (5th ed. 2015).

<sup>74</sup> SALKIN, *supra* note 73.

<sup>75</sup> *Boundary Drive Assocs. v. Shrewsbury Tp. Bd. Of Sup’rs*, 507 Pa. 481, 489 (1985)

plaintiffs challenging zoning regulations rarely succeed given the remarkably low threshold municipalities must meet under rational basis review.

Historically, courts were deferential to zoning regulatory bodies. In the last several decades, courts have given municipalities even more leeway to regulate, recognizing additional permissible bases for zoning. Until the 1980s, courts across the country invalidated zoning regulations premised entirely on aesthetic purposes.<sup>76</sup> Since then, courts in many states have upheld zoning ordinances premised solely on aesthetics as an acceptable basis for restricting land use.<sup>77</sup> This change represents a larger shift, in which courts are highly deferential to zoning authorities and are unlikely to invalidate land use regulations under rational basis review.<sup>78</sup>

However, when the connection between a zoning regulation and its justification or goal is arbitrary or unreasonable, courts will invalidate it. For example, the Commonwealth Court of Pennsylvania, in *In re Bartkowski Investment Group Incorporated*, found a citywide ban on billboards to be unconstitutional because the city did not establish a substantial relationship between the broad prohibition and the public's health, safety, and welfare.<sup>79</sup> According to Pennsylvania law, to challenge the validity of a citywide ban by zoning ordinance, the challenger must overcome a substantial burden of proving the ordinance excludes a legitimate use.<sup>80</sup> If the presumption is met, the burden shifts to the jurisdiction to demonstrate "that the total exclusion [of a use] 'bears a substantial relationship to the public health, safety, morality, or welfare.'"<sup>81</sup> Previously, the court had held that the constitutionality of a zoning ordinance, which completely prohibits a legitimate use, "must be highly scrutinized and, thus, such ordinance must bear a more substantial relationship to a state public purpose than a regulation which merely

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(citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365; *Miller & Son Paving, Inc. v. Wrightstown Township*, 499 Pa. 80, 88 (1982)).

<sup>76</sup> See e.g., *People v. Dickenson*, 343 P.2d 809 (Cal. App. Dep't Super. Ct. 1959); *Thomas v. City of Marietta*, 245 Ga. 485 (1980); *Redevelopment Auth. of Oil City v. Woodring*, 430 A.2d 1243 (Pa. 1981), order *aff'd*, 498 Pa. 180, 445 A.2d 724 (1982).

<sup>77</sup> See e.g., *State v. Jones*, 290 S.E.2d 675 (1982); *Landmark Land Co. v. City and Cty. of Denver*, 728 P.2d 1281 (Colo. 1986); *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. 1995).

<sup>78</sup> 2 PATRICIA E. SALKIN, SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION, AMERICAN LAW OF ZONING, AM. LAW ZONING § 15:11 (5th ed.) (last updated May 2015).

<sup>79</sup> *In re Bartkowski Inv. Group Inc.*, 106 A.3d 230, 250 (Pa. Commw. Ct. 2014).

<sup>80</sup> *Id.* at 238-39 (citing *Twp. of Exeter v. Zoning Hearing Bd. of Exeter Twp.*, 962 A.2d 653, 661 (2009)).

<sup>81</sup> *Id.*

contains a use to a certain zoning district.”<sup>82</sup> Accordingly, when a jurisdiction completely bans a business or activity, the burden is heightened. In this case, the city cited numerous reasons suggesting that the ban on billboards was related to the public health and welfare, including that billboards distracted drivers, violated “principles of the comprehensive plan,” and was adverse to the scenic and aesthetic environment of the area.<sup>83</sup> However, because these justifications focused solely on locations of proposed billboards, and not on the entire city, the court determined that it could not sufficiently support a citywide exclusion.<sup>84</sup> Accordingly, the justification for and evidence in support of the regulation is highly relevant to its legality.

The majority of challenges are premised on substantive due process and equal protection claims, which are generally considered under a rational basis review. However, claims under the dormant commerce clause, which prohibits regulations aimed to “benefit in-state economic interest by burdening out-of-state competitors”<sup>85</sup> may be subject to a heightened review. Dormant commerce clause claims may be reviewed under one of two tests, depending on if the regulation directly or indirectly discriminates against interstate commerce.<sup>86</sup> If a regulation directly discriminates against interstate commerce, it must be shown to advance a legitimate local purpose that cannot be adequately achieved by other means. Conversely, if a regulation applies to local and interstate business equally, but indirectly effects interstate commerce, the courts look to see if the interest is legitimate and if the burden on interstate commerce exceeds the local benefits.<sup>87</sup>

In *Cachia v. Islamorada*, the 11<sup>th</sup> Circuit determined that the ban on formula restaurants indirectly burdened interstate commerce, and imposed an elevated scrutiny test.<sup>88</sup> In 2002, Islamorada, Florida enacted an ordinance prohibiting formula restaurants and restricting the size of formula retail establishments.<sup>89</sup> The stated purpose for the ordinance was to preserve the unique “small town” community characteristics and avoid

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<sup>82</sup> *Id.* at 240 (citing *Adams Outdoor Adver., Ltd. v. Hanover Twp. Zoning Hearing Bd.*, 633 A.2d 240, 245 (1993)).

<sup>83</sup> *Id.* at 241-44.

<sup>84</sup> *Id.* at 243.

<sup>85</sup> *Cachia v. Islamorada*, 542 F.3d 839, 842 (11th Cir. 2008) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)).

<sup>86</sup> *Id.* at 842 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986)).

<sup>87</sup> *Id.* at 842-43.

<sup>88</sup> *Id.* at 843.

<sup>89</sup> Islamorada, Fla. Ordinance 02-02 §§ 6.4.3-4(a-b) (Jan. 10, 2002).

traffic congestion.<sup>90</sup> A local property owner attempted to sell property to Starbucks; until Starbucks was informed that the franchise coffee shop it planned to open was a prohibited use under the ordinance.<sup>91</sup> The property owner challenged the regulations, alleging violations of due process and the dormant commerce clause. The 11<sup>th</sup> Circuit determined that the ban did more than indirectly burden interstate commerce, requiring an elevated scrutiny test.<sup>92</sup> Under this heightened test, the municipality must demonstrate that there is a legitimate local purpose and that there are “no reasonable nondiscriminatory alternatives adequate to serve that purpose”<sup>93</sup> a much higher standard than rational basis.

In a companion case, *Island Silver & Spice, Inc. v. Islamorada*, the 11<sup>th</sup> Circuit supported the district court’s findings that although preserving a small town is a legitimate purpose, this city “had not demonstrated that it has any small town character to preserve”<sup>94</sup> on the basis that the city had a number of formula retail establishments, had no historic district or buildings, and still allowed small formula retail shops under the ordinance.<sup>95</sup> Accordingly, courts have found where the stated purpose purports to protect values or characteristics that are lacking, it is not a legitimate purpose, at least where a heightened standard under the dormant commerce clause applies.

While *Euclid* certainly recognized that public health was a legitimate basis for zoning, land use laws typically rely on other purposes such as aesthetics, character, traffic control, and safety. Zoning ordinances based upon these purposes have been challenged numerous times, but the challenges tend to fail as it is easy to show that most regulations are reasonably related to public health, safety, and welfare. Many jurisdictions are just beginning to implement measures with well-defined, specific public health purposes and goals, but a zoning ordinance premised on an identified public health goal (e.g. obesity prevention, increased access to health foods) has yet to make its way through the courts. However, as seen in *Cachia*, protecting small town character is not a legitimate purpose to enact restrictions where there is little character to protect, under the heightened review of the Dormant Commerce Clause. This determination

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<sup>90</sup> Islamorada, Fla. Ordinance 02-02 Preamble (Jan. 10, 2002); *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 847 (11th Cir. 2008).

<sup>91</sup> *Cachia*, 542 F.3d at 841.

<sup>92</sup> *Id.* at 843.

<sup>93</sup> *Id.* (citing *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 353 (1977)).

<sup>94</sup> *Island Silver & Spice, Inc.*, 542 F.3d at 847 (quoting *Island Silver & Spice, Inc. v. Islamorada, Village of Islands*, 475 F.Supp. 2d 1281 (S.D. Fla, 2007)).

<sup>95</sup> *Id.*

may have critical implications for certain public health measures aimed at reducing obesity, as discussed below.

### III. THE EVIDENTIARY SUPPORT

Over the last decade, researchers have investigated the relationships between individuals, the surrounding food environment, activity level, obesity, and other health factors. Many articles, reports, and advocacy groups suggest that there is evidence that living close to fast food restaurants is associated with higher obesity rates.<sup>96</sup> Based on this evidence, these groups hope to persuade jurisdictions to implement ordinances restricting or banning fast food outlets. While the relationships between fast food outlets, access to healthy foods, and Body Mass Index (BMI) have frequently been examined, few, if any studies, have honed in on the effect of specific ordinances or programs designed to reduce obesity.

In a 2014 study, researchers at the University of Texas MD Anderson Cancer Center surveyed African-American adults in Houston, Texas, and examined associations between BMI and the density of fast food restaurants around the participants' homes.<sup>97</sup> The study found that fast food density (calculated at buffer sizes of 0.5, 1, 2, and 5 miles) around the participants' homes was not significantly associated with BMI. While overall the density mattered little, simply living nearer to the closest fast food restaurant was associated with a higher BMI.<sup>98</sup> Additionally, once adjusted for income, the results indicated that for households earning less than \$40,000 a year, there was a positive and significant correlation between fast food restaurant density within 0.5, 1, and 2 miles from the home and BMI,<sup>99</sup> which was not the case for those with higher incomes. Finally, the study determined that for every additional mile from the nearest fast food establishment, the participants' BMI was 2.4% lower, suggesting that even one fast food restaurant close to the home may impact obesity levels.<sup>100</sup>

A 2014 study from the University of Michigan School of Public Health examined the relationship between fast food outlet locations and

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<sup>96</sup> See e.g., THE NEW YORK ACAD. OF MED. FOR THE NYC STRATEGIC ALL. FOR HEALTH, *supra* note 26; Samia Mair, *supra* note 24.

<sup>97</sup> Lorraine R. Reitzel et al., *Density and Proximity of Fast Food Restaurants and Body Mass Index Among African Americans*, 104 AM. J. PUB HEALTH 110, 111-12 (2014).

<sup>98</sup> *Id.* at 113.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 114.

residents' diets and weights.<sup>101</sup> The researchers determined that a local concentration of fast food outlets is related to higher BMI and inversely related to consumptions of fruits and vegetables.<sup>102</sup> A 2015 study out of Penn State University, which examined the general food environment and obesity rates among adults, also found that in urban areas, grocery store density was negatively associated with obesity rates, while convenience stores were positively associated.<sup>103</sup> Similarly, a study conducted by researchers at Tulane University School of Public Health and Tropical Medicine assessing the associations between food retail outlets and obesity in New Orleans, Louisiana found that grocery stores were significantly associated with odds of lower obesity rates, while access to convenience stores and fast food outlets were positive predictors of obesity.<sup>104</sup>

Many studies (as well as regulations) focus specifically on the relationship between fast food restaurant density around schools and students' BMIs. In a study published in 2009, researchers at Azusa Pacific University and University of California, Irvine investigated the relationship between fast food outlets near schools and the BMIs of junior and high school students.<sup>105</sup> Researchers found that students attending schools with fast food outlets located within half a mile were heavier, more likely to be overweight, and consumed fewer fruits and vegetables.<sup>106</sup> Additionally, the association between BMI and fast food proximity was greater for black students.<sup>107</sup> More recently, a study conducted by the University of Arkansas in 2014 examined the effect of the number of fast-food outlets on school-level obesity rates.<sup>108</sup> The results of the study suggested that the number of fast food restaurants within a mile of the school could significantly impact and increase obesity rates.<sup>109</sup> Specifically, these researchers reported that a fast-food outlet

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<sup>101</sup> Daniel J. Kruger et al., *Local Concentration of Fast-Food Outlets is Associated with Poor Nutrition and Obesity*, 28 AM. J. HEALTH PROMOTION. 340, 340 (2014).

<sup>102</sup> *Id.* at 342.

<sup>103</sup> Renfei Yan et al., *Association of Food Environment and Food Retailers With Obesity in US Adults*, 33 HEALTH & PLACE 19, 21 (2015).

<sup>104</sup> J. Nicholas Bodor et al., *The Association between Obesity and Urban Food Environments*, 87 J. URBAN HEALTH 771, 776-77 (2010).

<sup>105</sup> Brenna David & Christopher Carpenter, *Proximity of Fast-Food Restaurants to Schools and Adolescent Obesity*, 99 AM. J. PUB. HEALTH 505, 505 (2009).

<sup>106</sup> *Id.* at 508-09.

<sup>107</sup> *Id.* at 508.

<sup>108</sup> Pedro A. Alviola et al., *The Effect of Fast-Food Restaurants on Childhood Obesity: A School Level Analysis*, 12 ECON. & HUMAN BIOLOGY 110, 110 (2014).

<sup>109</sup> *Id.* at 117.

within 1 mile of a school increases the student obesity rates at a school-level by 1.23% points.<sup>110</sup>

Similarly, researchers have looked at the effects of healthy food availability in corner stores and customers' shopping behavior. In a study of nineteen corner stores in Hartford, Connecticut that examined customers' food shopping behavior and healthy food availability, researchers approached customers at designated corner stores and interviewed those who were willing, focusing on where and how often the individual shopped, if they received Supplemental Nutrition Assistance Program (SNAP) or Women, Infants, and Children (WIC) benefits, and what foods they bought at the designated store within the last three months.<sup>111</sup> The study found that for each additional variety of fruit or vegetable offered by the corner store, the likelihood that customers purchased fruit increased by 12% and vegetables by 15%.<sup>112</sup>

In sum, these studies found links between the density of fast food restaurants and obesity for households earning less than \$40,000 a year. In one study, researchers also saw that an individual's BMI increased the closer they lived to any fast food establishments. Additionally, in urban areas, a higher number of grocery stores was associated with lower obesity rates. Finally, research supports that the number of fast food establishments within a mile of a high school can significantly impact and increase the students' obesity rates. The relationship between BMI and the proximity of fast food to the school was even greater for Black students. Accordingly, there is ample research to suggest that living or going to school near fast food restaurants positively affects the BMI of the community and that this more of a problem for those with lower incomes and for some minority populations.<sup>113</sup>

#### **IV. ILLUSTRATION - THE SOUTH LOS ANGELES BAN AND STUDY RESULTS**

In 2008, the Los Angeles City Council, through an interim control ordinance, banned the establishment of new stand-alone fast food restaurants in south L.A.<sup>114</sup> The ordinance prohibited the issuance of a

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<sup>110</sup> *Id.*

<sup>111</sup> Katie S. Martin et al., *If You Stock It, Will They Buy It? Health Food Availability and Customer Purchasing Behavior Within Corner Stores in Hartford, CT, USA*, 15 PUB. HEALTH NUTRITION 1973-4 (2012).

<sup>112</sup> *Id.* at 1976.

<sup>113</sup> Reitzel, *supra* note 97, at 113; David & Carpenter, *supra* note 105 at 508-09.

<sup>114</sup> L.A., Cal., Ordinance 180103 (Jul. 3, 2008); Nicky Bassford et al., *Fast Food Restaurant Report: Promoting Healthy Dining in South Los Angeles*, COMMUNITY HEALTH COUNCILS, INC. 5 (2011), <http://www.chc->

building permit for any project that would result in a new stand-alone fast food restaurant, or the expansion, or addition of a drive-thru window in any existing fast food establishment.<sup>115</sup> Like many similar ordinances, it did not apply to existing restaurants or in situations where developers had already applied for a permit.<sup>116</sup> The interim ordinance was extended twice, until 2010, when the General Zoning Plan was amended, through a footnote, to continue the ban on building, expanding, or renovating stand-alone fast food outlets permanently, notwithstanding several exceptions.<sup>117</sup>

The findings supporting the 2010 amendment focused solely on the oversaturation of fast food restaurants and the limited availability of land.<sup>118</sup> Comparatively, the original purpose of the interim control ordinance focused clearly on health, although aesthetic, traffic, and other concerns were mentioned. The findings of the city's 2008 ordinance stated that one of the goals was to "address the over-concentration of [fast food restaurants] which are detrimental to the health and welfare of the people of the community."<sup>119</sup> Despite the relatively vague language, the 2008 ordinance was well publicized and understood to be the first fast food ban implemented primarily to address obesity and diet concerns.<sup>120</sup>

In addition, the City of L.A. Community Redevelopment Agency proclaimed its top priority for the South L.A. region was to increase healthy eating options.<sup>121</sup> To do so, it created an incentive package in 2006 to encourage grocery stores, produce markets, and sit-down restaurants to move into the area in hopes of reducing the high obesity rates.<sup>122</sup> The incentives were offered to (1) grocery stores over 12,000 square feet, (2) sit-down restaurants with capacity for at least 30 customers, or (3) produce markets with 80% of their floor space dedicated to fruits and vegetables, that were within the designated South LA zones.<sup>123</sup> Qualified retailers were eligible for financing assistance through a number of loans, investment projects, grants, tax credits, electricity discounts, and an expedited review by the City Planning Department.<sup>124</sup>

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inc.org/downloads/PB\_Fast\_Food\_Report\_2012.pdf.

<sup>115</sup> L.A.s, Cal., Ordinance 180103 §§ 1-2 (Jul. 3, 2008).

<sup>116</sup> L.A., Cal., Ordinance 180103 § 4(B) (Jul. 3, 2008).

<sup>117</sup> L.A., Cal., Council File 10-1843 (Dec. 8, 2010), available at [http://clkrep.lacity.org/onlinedocs/2010/10-1843\\_ca\\_12-08-10.pdf](http://clkrep.lacity.org/onlinedocs/2010/10-1843_ca_12-08-10.pdf); Nicky Bassford et al., *supra* note 99, at 5.

<sup>118</sup> L.A., Cal., Council File 10-1843.

<sup>119</sup> L.A., Cal., Ordinance 180103 (Jul. 3, 2008).

<sup>120</sup> See e.g., Strum, *supra* note 8.

<sup>121</sup> COMMUNITY REDEVELOPMENT AGENCY, *supra* note 7.

<sup>122</sup> *Id.* at 5.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

The ordinance covered an area of South L.A. which contains three communities: West Adams-Baldwin Hill-Leinert, South L.A., and Southeast L.A., and a population of over 700,000, making this segment of L.A. one of the twenty largest cities in the nation.<sup>125</sup> Prior to the ordinance and incentives, a number of community assessments found many disparities between South L.A. and West L.A., including fewer healthy food options, markets, and physical activity facilities in South L.A.<sup>126</sup> Additionally, the obesity and overweight rates in South L.A. were considerably higher compared to the rest of L.A. County. In 2007, the obesity rate in South LA was 63%, compared to 57% in all of LA County,<sup>127</sup> indicating significant health disparities for residents of South L.A.

In 2015, the Rand Corporation published a study of the effects of the South Los Angeles Fast Food Ban from 2007-2012.<sup>128</sup> The results were highly disappointing. The study analyzed new food outlets in South L.A.,<sup>129</sup> compared to the entire City and County, as well as diet and obesity behaviors in the respective areas.<sup>130</sup> It found that during the period examined, 17 permits for new fast-food chain restaurants were issued in South L.A. (none were stand-alone, so they were allowable under the ban).<sup>131</sup> This rate was no different than other parts of L.A. unaffected by the ordinance.<sup>132</sup> During the first two years in which the interim control ordinance were in effect, 12 outlets were opened as part of larger developments (e.g. strip malls).<sup>133</sup> In addition, the study found that the obesity and overweight rates continued to increase in all areas studied,<sup>134</sup> but did so at a significantly increased rate in the area covered by the ban.

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<sup>125</sup> L.A., Cal., Ordinance 180103 (Jul. 3, 2008); Adam Chandler, *Why the Fast-Food Ban Failed in South L.A.*, THE ATLANTIC (Mar. 24, 2015), <http://www.theatlantic.com/health/archive/2015/03/why-the-fast-food-ban-failed-in-south-la/388475/>; Roland Strum et al., *Diet and Obesity in Los Angeles County 2007-2012: Is there a measurable effect of the 2008 "Fast-Food Ban"?*, 133 SOC. SCI. & MED. 205 (2015).

<sup>126</sup> Bassford et al., *supra* note 114, at 4.

<sup>127</sup> Lenny Bernstein, *New fast food restaurants were banned in South L.A. Obesity rates rose dramatically*, THE WASH. POST (Mar. 20, 2015), <https://www.washingtonpost.com/news/to-your-health/wp/2015/03/20/even-banning-new-fast-food-restaurants-doesnt-curb-consumption-or-obesity/>.

<sup>128</sup> Strum et al., *supra* note 125.

<sup>129</sup> The area covered by the ordinance.

<sup>130</sup> *Id.* at 206.

<sup>131</sup> *Id.* at 207.

<sup>132</sup> *Id.* at 209.

<sup>133</sup> L.A., Cal., Ordinance 180103 (Jul. 3, 2008); Bassford et al., *supra* note 114, at 9.

<sup>134</sup> Strum et al., *supra* note 125, at 209.

The South LA rates rose from 63% to 75% compared to the rest of the county, which began at 57% and rose only one percent to 58%.<sup>135</sup> The authors of the study suggested that the results were not necessarily surprising, if for no other reason than the fact that food environments are slow to change. Perhaps the regulation and incentive package needed more time to effectuate change or it was simply ineffective because fast food bans cannot alone reduce obesity. The law may have been poorly constructed or a bad fit for the community it served. Whatever the cause, the South L.A. ordinance and its results call into question whether banning fast food is rationally and reasonably related to the goal of reducing obesity.

There are many possible reasons why this ban resulted in both an increase in new fast food restaurants and in obesity and overweight rates. One of the biggest criticisms of the ordinance was that it did not make practical sense for the area's retail food environment, making it destined for failure.<sup>136</sup> South L.A. had more fast food restaurants than other areas of the city; the outlets were often congregated around bus stops and high schools, and often were part of a strip mall (and accordingly not stand-alone or subject to the ban).<sup>137</sup> Additionally, South L.A. had more small food retail stores (e.g. convenience stores) than other parts of the city, and consequently, many of the residents consumed more discretionary calories from candy, cookies, and soda than other sources and populations.<sup>138</sup> However, the authors of the Rand study opine that the ordinance would not have meaningfully impacted the diets of South L.A. residents in such a short time.<sup>139</sup> Regardless, the first highly publicized fast food ban meant to reduce obesity and improve health clearly failed to achieve those goals, despite the inclusion of provisions geared towards increasing access to healthy foods as well.

## V. POTENTIAL IMPACT FOR PUBLIC HEALTH AND FUTURE REGULATION

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<sup>135</sup> Bernstein, *supra* note 127.

<sup>136</sup> See e.g., Dan Charles, *Why Los Angeles' Fast Food Ban Did Nothing to Check Obesity*, NPR (mar. 25, 2015), <http://www.npr.org/sections/thesalt/2015/03/20/393943031/why-los-angeles-fast-food-ban-did-nothing-to-check-obesity> (noting that the Strum study on the L.A. fast food ban found "[n]o new free-standing fast-food restaurants have opened, but they were rare to start with.").

<sup>137</sup> Bassford et al., *supra* note 114, at 9; Chandler, *supra* note 125.

<sup>138</sup> Strum et al., *supra* note 125, at 210.

<sup>139</sup> *Id.* at 209.

As evidenced by the examples above, many jurisdictions have extensively regulated fast food establishments, some going so far as to ban them completely, based upon concerns for traffic, safety, aesthetics, and town character. While these ordinances are often challenged, courts routinely uphold the regulations, finding that the government has a rational basis for these laws. While most zoning decisions were historically based on protecting the public's health generally (e.g. separation of residential and industrial areas), communities are now moving to include specific health goals (e.g. obesity prevention, improved access to healthy foods) as a basis for zoning. The government's authority and duty to protect the public's health<sup>140</sup> should provide local governments with the greatest authority to regulate as compared with other purposes. A number of public health scholars have argued as much,<sup>141</sup> offering that a jurisdiction's power is at its height when regulating to protect health and safety.<sup>142</sup> Accordingly, a jurisdiction should be able to go further and demand more in order to protect the public's health, particularly when compared to regulating over concerns of aesthetics or protecting town character.

When it comes to traffic control, aesthetics, and character of a municipality, the relationship between a regulation and the desired outcome is fairly easy to understand and find rational. Assuming a regulation is reviewed under a rational basis test,<sup>143</sup> courts will generally uphold such regulations so long the regulation does two things. It must: (1) promote the public health, safety, or general welfare; and (2) be reasonably related to the purported purpose. However, under the dormant commerce clause, where the court finds direct discrimination against interstate commerce (e.g. some laws restricting formula restaurants and retail), courts may inquire further into the purposes of the regulation.<sup>144</sup> In these cases, the inquiry may lead to the invalidation of these ordinances, such as in *Island Silver & Spice, Inc. v. Islamorada*<sup>145</sup> where the protection of Islamorada's "small-town character" was not a legitimate purpose because the court found there was no character to protect. However, generally, courts are usually willing to accept the municipalities

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<sup>140</sup> Lawrence O. Gostin, A THEORY AND DEFINITION OF PUBLIC HEALTH LAW IN PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 5 (2008).

<sup>141</sup> Samia Mair, *supra* note 24.

<sup>142</sup> Samia Mair, *supra* note 24 at 28-9.

<sup>143</sup> Generally, if the claim does not involve fundamental rights, suspect classes, or a heightened test under direct discrimination of interstate commerce under the Dormant Commerce Clause. SALKIN, *supra* note 73.

<sup>144</sup> *Cachia v. Islamorada*, 542 F.3d 839, 842-43 (11th Cir. 2008).

<sup>145</sup> 475 F.Supp. 2d 1281 (S.D. Fla, 2007).

reasoning and values.<sup>146</sup> Though, as evidenced by *In re Bartkowski Investment Group*, when it comes to complete bans of legitimate uses (e.g. billboards, fast food restaurants), some courts require that evidence supporting the ordinance considers and applies to the entire municipality.<sup>147</sup> Rather, if the offered evidence only applies to or considers specific areas, a ban from only those certain zoning districts or areas would be supported and thus legally valid.<sup>148</sup> This may have key impacts for future challenged public health related zoning ordinances.

With the trend toward specific public health bases, comes an additional responsibility to ensure that there is a clear and rational relationship between the means (the regulation) and ends (the goal or purpose). When policy-makers attempt to tackle a problem as complex and pervasive as obesity through land use and licensing regulation, the relationship between the means and the ends may be called into question, particularly where evidence is lacking. While regulations banning fast food restaurants or requiring stores to carry healthy foods appear to promote general health, the effect of actual implemented regulations has, for the most part, yet to be studied, leading everyone to only speculate on their effect. However, what happens when these regulations are actually studied and produce disappointing results as happened in South L.A.?

This question and reality highlights the need to implement and focus on evidence-based and supported public health practices and interventions. While some jurisdictions have started regulating to reduce obesity and improve diets, there has also been a movement towards evidence-based approaches for public health interventions.<sup>149</sup> This approach requires evidence supporting the effectiveness of proposed and implemented regulations, either prior to or following implementation. This shift, combined with the reliance on specific public health goals, necessitates that the evidence from the numerous studies examining obesity, health, and fast food density and proximity, support (or at the very least do not contradict and undermine) the regulations. Studies found the strongest connections between a likelihood of higher BMI and (1) those who lived closer to the nearest fast food restaurant, (2) students who went to schools within a half mile of a fast food restaurant, particularly among black

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<sup>146</sup> See 2 PATRICIA E. SALKIN, SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION, AMERICAN LAW OF ZONING, AM. LAW ZONING § 15:11 (5th ed.) (last updated May 2015).

<sup>147</sup> *In re Bartkowski Inv. Group Inc*, 106 A.3d 230, 243 (Pa. Commw. Ct. 2014).

<sup>148</sup> *Id.*

<sup>149</sup> Ross C. Brownson et al., *Understanding Evidence-Based Public Health Policy*, 99 AM. J. PUB. HEALTH 1576 (2009).

students, and (3) higher fast food density near the home for households earning less than \$40,000 a year.<sup>150</sup>

Accordingly, fast food restaurant bans (which may give rise to higher scrutiny of the relationship in some jurisdictions if the Dormant Commerce Clause is implicated), restrictions on fast food and convenience stores near schools, and targeted interventions in lower income areas are generally supported by existing research. Accordingly, if or when an ordinance targeting one of these populations with the goal of reducing obesity rates is challenged as a violation of substantive due process or equal protection, it will almost certainly survive based on current, existing evidence. Interventions which require or provide incentives for corner stores offering healthier options are additionally supported by some evidence indicating that the more types of healthy offerings available, the more likely customers are to buy them. Consequently, municipalities implementing these ordinances and programs will likely overcome any constitutional challenge, as courts can readily find that the purpose is to promote public health and that the regulation is rationally related to that end.

However, what happens when an ordinance purporting to reduce the detrimental effect of fast food outlets on the community's health is studied, and clearly fails to do so? The 2015 Rand study examined L.A.'s fast food ban (and indirectly the healthy retailer incentive package) from 2007-2012 and found that (1) the number of fast food outlets increased at the same rate as the rest of the city, (2) the obesity and overweight rates of the community significantly increased, particularly compared to the rest of the county, and (3) consumption of fast food increased. As an amendment to the general plan, the prohibition of stand-alone fast food outlets still exists in South L.A., despite these results. The authors of the study suggested that the results were not necessarily surprising, if for no other reason than the fact that food environments are slow to change. While this may be true, during the five-year period studied, 17 new fast food establishments were opened. Perhaps the regulation and incentive package needed more time to effectuate change. Perhaps it was simply ineffective because fast food bans do not reduce obesity, or possibly more likely the law was simply poorly constructed and a bad fit for the community it served. Regardless of the cause, the South L.A. ordinance and its results may call into question the whether banning fast food is rationally and reasonably related to the goal of reducing obesity when similar regulations premised on specific public health goals in other jurisdictions are challenged.

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<sup>150</sup> Reitzel et al., *supra* note 97 at 113–14; David & Carpenter, *supra* note 105 at 508–09.

Research organizations<sup>151</sup> and advocacy groups that encourage jurisdictions to pass zoning or licensing schemes aimed at obesity prevention emphasize the need to examine and consider the community, its food environment, and needs before (and after) implementing any regulations. These factors, along with up-to-date research and studies, must be considered as municipalities seek to implement regulations, as well as evaluation of the regulation once implemented. To assist this effort, the Association of State and Territorial Health Officers (ASTHO) created a toolkit to help jurisdictions implement Evidence-Based Public Health practices and policies.<sup>152</sup> The toolkit includes seven steps, which include a community assessment, survey of existing scientific literature, and importantly an evaluation of the intervention.<sup>153</sup> Following this framework and resources provided by other research groups, decision-makers can help ensure that not only effective, evidence-based interventions are implemented, but also that interventions used are legally supported, regardless of the challenge.

As interventions are implemented and studied, municipalities must be willing to amend or remove ordinances that do not lead to the positive public health gains they promise. Regulating in the name of public health may be one of the strongest bases for land use and business regulation, and justifiably so, but with it comes the responsibility to seek evidence-supported practices in order to be legally supported.

## CONCLUSION

Local governments generally yield broad authority to zone and regulate in order to protect the public's health, safety, morals, and welfare through delegations of the state's police power. For decades, municipalities across the nation have implemented restrictions on fast food and retail food establishments in the name of protecting town character, traffic concerns, and safety. More recently, jurisdictions have used this zoning authority combined with other authorities to require or promote access to healthy foods in an attempt to reduce obesity and increase health.

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<sup>151</sup> See e.g. CHANGELAB SOL., *supra* note 10. ChangeLab Solutions provides a wide array of resources aimed at assisting jurisdictions implement successful, effective, and evidence-backed regulations promoting healthy living.

<sup>152</sup> *Evidence-Based Public Health Toolkit*, ASTHO, 1 <http://www.astho.org/Evidence-Based-Public-Health/Toolkit/Issues-and-Concepts-Executive-Summary/> (last visited Jan. 26, 2016) (citing Ross Brownson et al., EVIDENCE BASED PUBLIC HEALTH (2011)).

<sup>153</sup> *Evidence-Based Public Health Toolkit*, ASTHO, <http://www.astho.org/Evidence-Based-Public-Health/Toolkit/> (last visited Jan. 26, 2016)

Most constitutional challenges are based on substantive due process claims and are subject to a highly deferential rational basis review. Accordingly, courts tend to uphold challenged regulations, as long as there is a legitimate purpose reasonably related to the regulation. When regulations are premised on effectuating stated public health goals, the need to seek and provide evidence demonstrating the link between the means and the ends is heightened for the legal validity of the intervention. Jurisdictions seeking to implement similar ordinances to promote identified public health goals should carefully tailor the regulations to fit with existing evidence and research to effectuate positive public health gains and to ensure the regulations survive potential constitutional challenges.

