

ZONING AGAINST UNHEALTHY FOOD SOURCES IN NEW YORK CITY

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CONTENTS

Introduction	1
Zoning in New York City	2
Zoning Changes	3
National Context	3
Examples	6
Legal Challenges	8
Considerations for Using Zoning to Decrease Access to Unhealthy Foods in NYC.....	9
Need #1: Identify Appropriate Targets	10
Need #2: Identify Appropriate Zones.....	11
Need #3: Address Potential Community Trade-offs	12
Conclusion.....	12
References	13

INTRODUCTION

Zoning is the most commonly used technique for determining how land can be used within a local geographic community.ⁱ In response to the growing incidence of obesity across the United States, there have been increasing calls for using zoning to limit the presence of unhealthy food sources. Frieden, et al, for example, are among many public health advocates recommending communities use zoning to “limit the density of fast-food establishments” and “establish buffer zones between schools and recreation areas and businesses such as fast-food restaurants, convenience stores, and mobile food vendors.”ⁱⁱ The interest in removing or limiting these types of food retailers is motivated by evidence that neighborhood characteristics affect rates of obesity. For example, greater density of neighborhood fast-food outlets is associated with increased obesity.^{iii, iv} It is theorized that imposing limits on food establishments could encourage restaurants to improve the nutritional quality of their food, or at least provide alternative healthy meals. It is also thought that imposing limits will open the market to competition from healthier restaurants.^v

A companion call to restricting unhealthy food sources has been for an increase in the availability of healthy food sources. New York City has undertaken this latter strategy through a number of programs, such as the FRESH program,¹ Green Carts,² and Health Bucks.³ Zoning is

¹ The Food Retail Expansion to Support Health (FRESH) program provides zoning and financial incentives to promote the establishment and retention of neighborhood grocery stores in underserved communities throughout the five boroughs.

<http://www.nyc.gov/html/misc/html/2009/fresh.shtml>

² Green Carts are mobile food carts that offer fresh produce in certain New York City areas. http://www.nyc.gov/html/doh/html/cdp/cdp_pan_green_carts.shtml

³ Health Bucks, worth \$2 each, are developed and distributed by NYC Health Department to low-income residents and can be used to purchase fresh fruits & vegetables at participating farmers markets. http://www.nyc.gov/html/doh/html/cdp/cdp_pan_health_bucks.shtml#hb

also often discussed in obesity prevention as a means for promoting physical activity. This paper focuses solely on the strategy of using land use zoning to limit unhealthy food sources, and more specifically on the goal of restricting fast-food retailers and/or formula restaurants (i.e., restaurants that have standardized menus, food preparation, décor, etc.).

ZONING IN NEW YORK CITY

In New York State, the power to control land use is primarily a city, town or village function.^{vi} New York City was one of the early leaders in zoning, establishing design standards in the 1890s to ensure that light, air, water, and sewage were available to residents of tenement houses.^{vii} The *Zoning Resolution of 1916* defined commercial, retail, and residential areas of the city. Zoning proponents at the time intended to protect the interests of property owners and create a more orderly and organized city. Separating residential districts from noxious industrial uses was also believed to be an important public health strategy.^{viii}

To this day, New York City's zoning map is mainly divided into three zoning districts: residential (R), commercial (C), and manufacturing (M). These zones are indicated on the city's official zoning map. Within each district, the following characteristics are regulated: the types of uses allowed; the density (i.e., the ratio of land to building floor area); overall density; density of individual uses; number of dwelling units; amount of open space; any required parking; lot coverage, and distance from buildings and lot lines. The NYC Department of Buildings has primary responsibility for enforcing the Zoning Resolution and for interpreting its provisions.

A mixed use district (MX) is a special zoning district in which new residential and non-residential (commercial, community facility and light industrial) uses are permitted as-of-right, which means that if the Department of Buildings is satisfied that the structure would meet all relevant provisions of the Zoning Resolution and the Building Code, a building permit is issued and construction may begin. No additional approval or action is required by the City Planning Commission or the Board of Standards and Appeals.

ZONING CHANGES

Changes to New York City's overall zoning text or zoning map, such as restricting certain kinds of uses (like fast-food restaurants), require legislative action. These changes are sometimes called "rezonings" and can be initiated by a taxpayer, community board, borough board, borough president, the Land Use Committee of the City Council, the City Planning Commission, or the Mayor. Zoning map changes may be adopted only after public review by the affected community board(s), borough president(s), the City Planning Commission and the City Council. Changes to the zoning maps, including district designations and boundaries are subject to the City's Uniform Land Use Review Procedure (ULURP).⁴ Zoning text amendments must be approved by the Commission and adopted by the City Council. Amendments to the Zoning Resolution are not subject to ULURP but go through a similar public review process.

NATIONAL CONTEXT

Over the last century, zoning has become a standard tool in town and city planning across the US. One positive outcome is that zoning has helped establish that property rights must sometimes yield to the common good. However, traditional zoning practices have also concentrated certain undesirable uses in central cities. In many cases, zoning also has created the long distances between different uses that are a fundamental characteristic of sprawl (which has implications for air quality, obesity rates, and other public health concerns).^{ix} In response, new zoning concepts have been developed to do more than simply separate uses. For example, **incentive zoning** allows developers to vary from typical zoning regulations in return for providing certain benefits or amenities to the municipality. A classic example of incentive zoning in New York City has been the authorization for builders to exceed height limits in the

⁴ ULURP is New York's City's process for soliciting public input for major land use revisions. See <http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml> for more information about ULURP.

building of an office or residential tower in exchange for the provision of public open space, such as a plaza. More recently, incentive zoning has been used in the FRESH program, which brings fresh food retailers into low-income areas lacking sufficient food outlets.

Performance zoning^x considers the impact of a proposed use. Under performance zoning, proposed uses whose impacts would exceed specified standards are prohibited unless the impacts can be mitigated. Performance zoning is often used to address issues such as noise, dust, vibration, and lighting. It is also used by communities to regulate environmental impacts, such as stormwater runoff, scenic and visual quality impacts, and defined impacts on municipal character.

As new zoning strategies have been developed, the public health community has also found it has “a strong legal basis for using local zoning and land use powers to achieve the public health goal of limiting the availability of consumer products proven to be harmful to health.”^{xi} Limiting the places where tobacco and alcohol can be sold has been one of the most successful implementations of zoning for improved health outcomes. In the fight against obesity, zoning has been proposed to both promote opportunities for physical activity and to curtail the availability of fast food. It has been particularly noted that anti-fast-food zoning may be helpful in addressing the disproportionately high rates of obesity in low-income communities, and communities of color. A Columbia University study by Kwate, et al, for example, found that predominantly Black areas in New York City had higher densities of fast food than predominantly White areas, regardless of income.^{xii} Zoning could therefore play a role in addressing community-level disparities.

Ashe, et al,^{xiii} who in their 2003 paper, *Land Use Planning and the Control of Alcohol, Tobacco, Firearms, and Fast Food Restaurants*, identified many of the “zoning for health” proposals currently discussed in obesity-prevention circles suggested that zoning be used to :

- Prohibit the distribution of toys and promotional games (as has recently been done in Santa Clara, CA and has now been proposed in San Francisco), the presence of play equipment, or the presence of video or other games at fast food outlets;
- Require fast food outlets to locate a minimum distance from youth-oriented facilities such as schools and playgrounds;
- Limit the total number or per capita number of fast food outlets in a community;
- Limit the proximity of all fast food outlets to each other;
- Charge a fee to fast food outlets and use the proceeds to mitigate the impact of poor nutritional content (e.g., construct parks, fund after-school programs, or provide nutrition education);
- Prohibit drive-through service.

The more recent and influential Institute of Medicine report, *Local Government Actions to Prevent Childhood Obesity*, recommends that local jurisdictions:⁵

- Restrict fast food establishments near school grounds and public playgrounds.
- Restrict mobile vending of calorie-dense, nutrient-poor foods near schools and public playgrounds.
- Implement zoning designed to limit the density of fast food establishments in residential communities.

⁵ Available at

<http://www.iom.edu/Reports/2009/ChildhoodObesityPreventionLocalGovernments.aspx>

EXAMPLES

Most currently implemented provisions against fast food and formula restaurants have come about as a result of concerns regarding “neighborhood character” or traffic congestion rather than concerns about obesity. The examples below nevertheless illustrate approaches communities can take to limit these types of establishments. The two moratoriums listed at the end, however, were brought about in the context of community health concerns.

BANS

A small minority of localities have outright bans on formula and fast food restaurants. Bans are typically only feasible in locations where no such restaurants currently exist. A community may immediately ban a type of use through eminent domain or paying “just compensation” to the banned business but this is rarely done. Most commonly, communities implementing a ban allow the banned use to continue to exist as a “legal nonconforming use” until the business changes or attempts to expand its use in some way. Communities may also allow a nonconforming use or structure to remain in place over a set period.

- Concord, MA, bans both fast food restaurants and “drive-in” service.
- Carlsbad, CA, and Newport, RI have zoning laws banning drive-through service.

LIMITS

More often, jurisdictions limit the presence of certain types of retailers within certain areas, such as business districts, tourist areas, and near schools.

- Ogunquit, ME and Nantucket, MA, ban “formula” restaurants in their downtown areas.

- Port Jefferson, NY and Solvang, CA, ban formula fast food restaurants from the historic commercial districts.
- Arden Hill, MN, and Detroit, MI, require that restaurants preserve a minimum distance between the restaurant and the nearest school campus.
- Stockton, CA, and Seattle, WA, ban mobile vending near schools and parks.
- Port Townsend, WA, and Chesapeake City, MD, prohibit formula businesses everywhere except a single highway commercial zone on the outskirts of town.

Another type of limit is to impose quotas or limit on the density of certain establishments, as has been done in these examples:

- San Francisco, CA, Fredericksburg, TX, and Bristol, RI, require formula businesses wishing to open in their downtowns to request special, conditional permits.
- Berkeley, CA, has implemented a quota system in its Elmwood Commercial Districts that limits the number of “Food Service Establishments,” which includes “quick service restaurants.”
- Bainbridge Island, WA, limits the density of formula take-out food restaurants.
- Warner, NH, requires a specified distance between fast food outlets in its commercial district.

MORATORIA

A third strategy, implemented in Los Angeles and Baldwin Park, California, has been to pass a time-limited moratorium on new fast food establishments.

- In July 2008, the Los Angeles City Council passed a 1-year moratorium on new fast-food restaurants in a 32-square mile, low-income part of the city.

- In August 2010, Baldwin Park, CA (the reputed birthplace of the "drive-thru" restaurant) implemented a nine-month ban on the construction of any new drive-in food retailers.

LEGAL CHALLENGES

Several courts have upheld laws aimed at fast food outlets. The Center for Law and the Public's Health advises that in most cases, a zoning ordinance or decision on this issue (and other issues) will be reviewed by the courts under the rational basis standard. Under this standard, the regulation will be upheld if it has a rational relationship to a legitimate governmental purpose of promoting the public health, safety, morals, or general welfare. To be unconstitutional, the ordinance or decision would have to be arbitrary, capricious, or not rationally related to a legitimate government purpose.^{xiv}

In New York, 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), 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. New York also appears to allow limits on the number of restaurants in a particular area. New York courts, however, have found against community attempts to require that a restaurant or its food affirmatively "advance the public health or general welfare."^{xv}

The Center for Law and the Public's Health suggests that over time, a body of judicial law may develop that specifically recognizes that addressing obesity is a valid objective of zoning. Toward that end, they recommend that the goal of addressing obesity be included in all levels of land use regulation including enabling legislation, comprehensive plans, municipal codes, and zoning ordinances. The more this justification is cited, it will become more broadly accepted. One limitation, however, may be that while there is ample evidence that living near fast food

outlets is associated with higher obesity rates, the impact of fast food regulations on a neighborhood is not yet known.

CONSIDERATIONS FOR USING ZONING TO DECREASE ACCESS TO UNHEALTHY FOODS IN NYC

In recent years, two proposals have been made to the New York City Council for restricting the presence of fast food retailers near city schools. In 2006, City Councilman Joel Rivera (D-Bronx) proposed a bill to limit fast-food establishments. Rivera's plan was modeled on a plan implemented by former mayor Rudolf Giuliani that targeted the pornography business, forcing purveyors to relocate to side streets away from major avenues and schools.^{xvi} In 2009, Councilman Eric Gioia (D-Queens) proposed a measure to prevent fast food restaurants from opening new outlets within 500 feet of schools. Existing fast food establishments were exempt from the proposed zoning law.^{xvii} Neither of these proposals was successful. In 2010, New York City Council Speaker Christine Quinn spoke out in favor of zoning against fast food restaurants and also sought to promote the concept of zoning for health in the recent revising of the City Charter. It does not appear that the Speaker's suggestions will be among the Charter Revision amendments that will be considered in November 2010 elections.

These proposals indicate there is growing interest in zoning against fast food, but also that accomplishing this may take some time. Amending the zoning text requires approvals from multiple political bodies in New York. The difficulty of accomplishing this task is not itself a sufficient reason for shying away from the challenges of making zoning changes. The changes required toward implementation of the FRESH program are one recent example of a successful zoning change effort. However, given the controversial nature of banning a particular type of business, preparation as described below is likely needed.

NEED #1: IDENTIFY APPROPRIATE TARGETS

One of the few studies addressing the impact of a specific zoning ordinance on obesity or eating habits was done by the Rand Corporation following the Los Angeles moratorium.^{xviii} It concluded that restrictions on fast-food chain restaurants in South Los Angeles (both the moratorium and future more permanent efforts) are unlikely to improve the diet of residents or reduce obesity because the majority of the residents' excess calories actually come from snack foods (purchased in the abundant area convenience stores) rather than fast food establishments.⁶ The study authors have also cautioned that there is a misconception that restaurants provide "healthier" food than fast food establishments. They indicate that in fact many restaurant offerings far exceed the calories in a single fast-food hamburger.

These findings suggest that while fast food seems like an obviously problematic category, if the zoning goal is obesity-reduction, it is important to identify the source of excess calories within a given community and to assure that the zoning text includes these. A study by Rundle et al found an average density of 31 "BMI-unhealthy food outlets" per square kilometer in New York City.^{xix} In that category they included fast-food restaurants, convenience stores, bodegas and meat markets, pizzerias, bakeries, and candy and nut stores. Groups planning a zoning ordinance proposal will want to weigh whether the zoning language should be broadly inclusive (which will draw more opposition but could be more effective) or more specific (which then may have only very targeted utility across the city).

⁶ Others have also noted the possible role of fast food outlets near places of employment, which may be outside of a zone identified through the prevalence of obesity among residents.

NEED #2: IDENTIFY APPROPRIATE ZONES

The National Policy and Legal Analysis Network to Prevent Childhood Obesity (NPLAN) has developed a Model Healthy Food Zone Ordinance⁷ to support communities in prohibiting new fast food restaurants from locating within a certain distance from any school or other designated location children are likely to frequent, such as parks, playgrounds, or youth centers. They suggest this strategy of concentrating on schools may be more politically palatable, like the current “drug-free zones.” They also note, however, that this ordinance is “best employed by communities that are *planning new schools* or have existing schools *that do not currently have fast food restaurants located near them*. These communities can use this ordinance to ensure that *the school zones remain free of fast food restaurants*.” Various studies on the density of unhealthy food retailers (restaurants and stores) in New York City indicate there are geographic zones within Staten Island, the Bronx, and the outer reaches of Queens that have no or very low density of fast food. But for the most part, the neighborhoods with high obesity prevalence also have a high density of fast food restaurants and it seems unlikely there will be schools that are not currently near unhealthy food sources. If advocates identify such a zone, however, that area may be particularly ripe for such a proposal.

In communities that already have fast food near schools NPLAN says the ordinance can be used “to prevent additional restaurants from locating near schools.” Rundle has noted, however, that multiple studies have failed to show an association between “density of unhealthy food and BMI or obesity.” This is to say that in an area like New York City, with already high levels of fast food, diminishing that density in such an incremental fashion may not yield the desired results. Advocates will want to consider the value of preventing additional restaurants against the resource costs of mounting a zoning change effort.

⁷ Available at <http://www.nplanonline.org/nplan/products/model-healthy-food-zone-ordinance>)

NEED #3: ADDRESS POTENTIAL COMMUNITY TRADE-OFFS

In the current economic climate, concerns around job loss and other economic damages will be a significant objection to zoning against fast food. Advocates may want to gather evidence that other, healthier retailers will come into an area. It has also often been noted that national fast food chain stores are often the only stores that provide needed neighborhood amenities like free access to bathrooms and a place for older adults to take a seat or socialize for only the cost of a cup of coffee. Advocates may want to identify other neighborhood establishments that could be asked to fill this role.

CONCLUSION

This paper was developed to help inform the strategy of anti-obesity advocates interested in pursuing zoning changes to limit or ban fast food restaurants. An interim step may be to simply create the opportunity for such interventions. Advocates may want to aim for obtaining authorization for community boards to impose restrictions on certain types of restaurants if they so desire. This direction would offer the opportunity to create local zoning strategies that best meet the diverse retail conditions across the five boroughs. Their effectiveness could be evaluated and help inform a citywide effort. We also note that an alternative strategy to explore may be to limit advertising on unhealthy food. However, the evidence base and strategies for such a restriction are beyond the scope of this paper. Lastly, the advocacy community may wish to revive the City Council Speaker's proposal of working toward comprehensive planning for health.

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