



The National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN) is a project of ChangeLab Solutions, a nonprofit organization that provides legal information on matters relating to public health. The legal information in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

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Introduction

Rising Obesity Rates in Children

Today, 16.3 percent of children and adolescents ages 2 to 19 are obese, and 31.9 percent are obese or overweight.¹ While the obesity epidemic has many causes, one factor contributing to the increase in obesity is the easy access children and youth have to low-nutrient, high-calorie foods. Because children consume a significant portion of their daily calories during and soon after the school day, many school districts and communities are restricting students' access to low-nutrient foods at school.²

The Need for Restricting Fast Food Restaurants Near Schools

Efforts to improve the nutritional quality of foods provided to children at school are undermined when students leave campus to buy fast food from restaurants nearby, or when they buy fast food on their way to or from school. A recent study found that students with fast food restaurants near (within a half-mile of) their schools (1) consumed fewer servings of fruits and vegetables, (2) consumed more servings of soda, and (3) were more likely to be

overweight or obese than were youths whose schools were not near fast food restaurants.³

One strategy that local governments can employ to help support schools' efforts to improve student health is to prohibit fast food restaurants from locating near schools. This strategy is aimed particularly toward middle and high school students who may leave campus during lunchtime or get to and from school on their own. But it can also support parents of younger children in their efforts to feed their children healthier food, and the strategy can work in conjunction with Safe Routes to Schools programs.⁴ By enacting measures to prohibit the location of fast food restaurants near schools, communities can prevent children from substituting low-nutrient, high-calorie food for the healthier options served at school. Communities may also choose to extend the prohibition to parks, community centers, libraries, and other locations children frequent.

Limitations of the Ordinance

As explained more fully below, this strategy 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. Communities that already have fast food available near schools can use this ordinance to prevent additional restaurants from locating near schools.

Restricting Access to Other Outlets Providing Unhealthy Food

Of course, fast food restaurants are not the only outlet from which children access low-nutrient, high-calorie foods before, during and after school. Mobile food vendors (selling from portable vehicles, such as trucks and carts) and neighborhood corner and convenience stores also frequently locate near schools, providing students with ready access to unhealthy food. The model ordinance provides an option for communities to also ban mobile food vending near schools. A number of cities, including Stockton, Calif., and Seattle, have banned mobile vending near schools and parks.⁵ Communities that choose to ban mobile vendors near schools may wish to include an exception for fresh fruit and vegetable vendors or other vendors selling healthy foods.

Convenience and neighborhood stores also often provide students with access to unhealthy foods. Unfortunately, many communities, particularly low-income communities, lack full-service supermarkets; convenience and neighborhood stores are the community's only option for groceries.⁶ A community could choose to prohibit these stores from locating near schools or work with the stores to provide healthier food options for the neighborhood. The public health community is actively exploring ways to improve the quality of food at these stores.⁷ Because these neighborhood stores raise a number of issues outside the scope of this ordinance, NPLAN

does not include an option to ban corner stores within this model ordinance.

Understanding State and Local Regulation of Fast Food

Restaurants and mobile food vendors are regulated by both state and local law. Generally, state law regulates the health and sanitation aspects of restaurants and mobile vendors, while local law, through zoning and other measures, regulates the location of food service establishments.

State Health and Safety Laws

The U.S. Food and Drug Administration (FDA) developed a model Food Code to improve food safety nationwide. The model Food Code prescribes sanitation and food-handling requirements for restaurants and other food establishments – including mobile vending facilities – in order to ensure that food offered to the public is “unadulterated, prepared in a clean environment, and honestly presented.”⁸ Forty-eight of the 50 states have adopted some form of the model Food Code.⁹ In most communities nationwide, state law regulates the health and sanitation aspects of fast food restaurants and at least some forms of mobile food vending. Because state law varies, however, it is important to review the state law governing the local community to ensure that the state law does not affect the community’s ability to regulate fast food restaurants and mobile food vendors.

Local Zoning Laws

Cities and counties use zoning and other land use measures to regulate the growth and development of the community in an orderly manner. Zoning divides a community into districts and determines how the land in each district may be used. For example, a community may limit the use of land in a residential district to housing. In that district, housing is a “permitted” use. Some communities may zone to permit a particular use in a district, but require a permit or approval by the planning commission or similar agency before allowing the use at a specific location within the district. In that district, the use is referred to as a “conditional use.”

Local governments have considerable discretion when enacting zoning regulations, including those restricting the location of fast food restaurants. Governments enact zoning laws under their “police power” – the power of the government to regulate private conduct to protect and further the public’s health, safety, or general welfare.¹⁰ Because, by its nature, land use regulation cannot be done with scientific precision, courts presume that zoning ordinances are valid. Provided there is a reasonable basis for different zoning treatment of similar lands, land uses, or land users, courts will generally uphold the regulations, even in the absence of evidence that the different zoning treatment will have its intended effect.¹¹

A community that articulates a purpose for a land use regulation – such as protecting residents’ health – may choose to address a problem incrementally or direct a solution to one group of land users and not another. As a result, so long as the local government has the authority under state enabling law to enact zoning regulations, a court would likely uphold a zoning law that restricts the location of fast food restaurants near schools, even if the city does not similarly limit other food outlets.

Many local governments already limit fast food restaurants to commercial or other nonresidential districts. Some communities further restrict “formula” restaurants (which include chain fast food restaurants). For example, the community of Calistoga, Calif., prohibits all formula restaurants, and Concord, Mass., bans all fast food and drive-through restaurants.¹² Other communities regulate the density of formula restaurants by limiting the total number of formula restaurants permitted or mandating a certain distance between formula restaurants.¹³ In addition, in a majority of states, liquor stores or adult businesses may not be located near schools.¹⁴ The model Healthy Food Zone Ordinance regulates the location of fast food restaurants near schools for the same reason – to protect the health, safety, and general welfare of children.

Implementing the Healthy Food Zone Ordinance

Assessing the Location of Fast Food Within the Community

The model Healthy Food Zone Ordinance prohibits the location of fast food restaurants within a certain distance (as determined by the community) of schools, and (again, as determined by the community) parks, child care centers, libraries, and other locations children frequent. Before enacting the ordinance, we recommend that the community conduct a mapping study or assessment to identify where fast food restaurants, mobile vendors, and neighborhood corner and convenience stores are located in proximity to schools.¹⁵ This study would help to identify (1) the current landscape of fast food; (2) whether a restrictive ordinance would be beneficial to the community; and (3) what buffer distance would be most appropriate for the community. If the community is contemplating a ban on mobile food vendors, a study would also help it determine an appropriate distance for that ban. Geographic information systems (GIS) mapping tools can be useful for completing these studies.

Because this is a new policy approach to combat childhood obesity, there is not yet a “best practice” distance to recommend to communities. Communities have taken different approaches. Detroit prohibits fast food restaurants within 500 feet of any school.¹⁶ The City of Arden Hills, Minn., prohibits fast food restaurants within 400 feet of any public, private,

and parochial school; church; public recreation area; or any residentially zoned property.¹⁷ Similarly, communities that prohibit mobile food vendors near schools have selected different sized zones. Seattle has banned mobile food vendors within 200 feet of public parks and 1,000 feet of schools, while Phoenix bans vendors on streets within 600 feet of schools between the hours of 7:00 a.m. and 4:30 p.m.¹⁸

Implementing the Ordinance

The method of implementation of the ordinance will vary according to how the community regulates the location of fast food restaurants (e.g., whether through zoning, conditional use permits, or in some combination). The local jurisdiction will need to determine where within its existing code the provisions in the ordinances fit, make other amendments as necessary for consistency, and follow the appropriate procedures for amending the zoning law.

The language in the model ordinance is designed to be tailored to the needs of an individual community. The language written in *italics* provides different options or explains the type of information that needs to be inserted in the blank spaces in the ordinance. The “comments” provide additional information and explanation. In considering which options to choose, communities should balance public health benefits against practical and political considerations in their particular jurisdiction. One purpose of including a variety of options is to stimulate broad thinking about the types of provisions a community might wish to explore, even beyond those described in the model. NPLAN is interested in learning about novel provisions communities are considering; the best way to contact us is through our website: www.nplanonline.org.

Providing Alternatives to Fast Food Restaurants

Communities restricting fast food restaurants and mobile food vendors near schools and other places children frequent may find that policies restricting fast food will be more acceptable where these policies are coupled with other strategies to provide healthier food alternatives to children. Such strategies include working with schools to provide more nutritious food options on campus, promoting farmers’ markets and community gardens, and providing economic development or zoning incentives for healthier food purveyors. Model language for these types of policies are available on our website at: www.nplanonline.org.

What about existing fast food restaurants located near schools?

Land use planning and zoning regulations are primarily tools to shape a community over time; they do not result in overnight changes to the landscape. As a result, the Healthy Food Zone Ordinance is most effective as a preventive tool. It 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.

Although there are ways in which a community may eliminate or limit the operations of existing fast food restaurants located near schools, these can be cumbersome and costly, and they usually require implementation over time. Uses that were lawful under prior laws but do not meet new regulations are considered “nonconforming uses.” Generally, communities have three options when addressing nonconforming uses.

First, a community may allow nonconforming uses to continue to exist as a “legal nonconforming use” unless the business changes or attempts to expand its use in some way (as defined by the ordinance). Typically, the business cannot be expanded or cease and resume operations. The intent is that eventually, over time, the prohibited use will cease to exist in that area.¹⁹ **Because most communities employ this strategy, the model ordinance uses this strategy.**

Second, a community may “amortize” the use, that is, allow a nonconforming use or structure to remain in place over a set period.²⁰ The grace period is determined on a case-by-case basis by balancing appropriately (1) the public’s interest – the harm to the public caused by continuing the nonconformity – and (2) the economic impact on the property owner – allowing the owner to receive a fair return on his or her investment.²¹ The amortization period may be short for a business that has operated at that location for several years, and longer for a newer business that has not had time to recoup its investment.

Third, a community may end a use immediately through “eminent domain” or paying the business owner “just compensation” for the value of the business. Alternatively, a city may end a use if it finds that the continuation of a nonconforming use poses a threat to the public’s health or safety.²² This method is often quite costly and can be controversial, so communities rarely use it to eliminate nonconforming uses.

NPLAN Model Healthy Food Zone Ordinance:

Creating a Healthy Food Zone Around Schools by Regulating the Location Of Fast Food Restaurants [and Mobile Food Vendors]

COMMENT: This model ordinance is intended to amend a jurisdiction’s existing zoning code. A jurisdiction that adopts some or all of its provisions must consider where they would best fit into its existing code, and must cross-reference appropriate existing provisions that stipulate the means of enforcing zoning ordinances, as well as provisions concerning notification, fines, and penalties.

The [Municipality] does ordain as follows:

SECTION I. FINDINGS. The [Municipality] hereby finds and declares as follows:

See APPENDIX A: Findings

A draft ordinance based on this model should include “findings” of fact that support the need for the municipality to enact the law. The findings section is part of the ordinance, but it usually does not become codified in the local government code. The findings contain factual information supporting the need for the law – in this case, documenting the need for regulating children’s access to non-nutritious food. A list of findings supporting this model ordinance appears in “Appendix A: Findings.” Findings from that list may be inserted here, along with additional findings addressing the need for the ordinance in the particular community.

NOW THEREFORE, it is the intent of the [*City/City Council*], in enacting this ordinance to promote children’s health by regulating the distance between schools [*and other locations frequented by children*] and fast food restaurants [*and mobile vendors*] serving low-nutrient, energy-dense foods.

SECTION II. [Article / Section] of the [Municipality] Municipal Code is hereby amended to read as follows:

Sec. One. PURPOSE. The purposes of this [article / chapter] are to promote the health of children by regulating the location and operation of Fast Food Restaurants near schools [*and other locations frequented by children*] and to support efforts of the school district(s) to create healthy food environments for students.

Sec. Two. DEFINITIONS. The following words and phrases, whenever used in this [*article / chapter*], shall have the meanings defined in this section unless the context clearly requires otherwise:

“Fast Food Restaurant” means a retail food establishment where food and beverages are: (1) prepared in advance of customer orders or are able to be quickly prepared for consumption

on or off the premises; (2) are ordered and served over counters or at drive-through windows; and (3) paid for before being consumed.

COMMENT: Generally, state law regulates the health and sanitation of restaurants/food service establishments. A municipality may prefer to use the state law definition of or term used to refer to a restaurant or food facility in the ordinance, along with the additional content identifying the food facility as a limited service/fast food establishment.

Sec. Three. PROHIBITING FAST FOOD RESTAURANTS NEAR SCHOOLS.

COMMENT: NPLAN offers two options for prohibiting fast food restaurants from locating near schools. A municipality should select the option that is consistent with its existing zoning code

Option One (for communities that do not require a use permit for Fast Food Restaurants):

- (a) No Fast Food Restaurant may be located within [*insert appropriate distance for community*] feet of the nearest property line of any public, charter, or private kindergarten, elementary, middle, junior high or high school, or a licensed child-care facility or preschool [*list additional facilities if appropriate, such as playgrounds, youth centers, recreational facilities, arcades, parks, libraries, or residentially zoned parcels*].

Option Two:

- (a) A Fast Food Restaurant is allowed only as a conditional use in the following zones: commercial; _____ [*add other zoning districts*] subject to the following regulations:

- (1) In any district where a Fast Food Restaurant is permitted or a conditional use, the Fast Food Restaurant may not be located within [*insert appropriate distance for community*] feet of the nearest property line of any public or private kindergarten, elementary, middle, junior high, or high school, or a licensed child-care facility or preschool [*list additional facilities if appropriate, such as playgrounds, youth centers, recreational facilities, arcades, parks, libraries, or residentially zoned parcels*].

COMMENT: In order to determine the appropriate size of the healthy food zone a municipality may wish to undertake a mapping study of where existing fast food

restaurants are in relation to schools and other areas named in the ordinance. Detroit prohibits fast food restaurants within 500 feet of any school.²³ The City of Arden Hills, Minn., prohibits fast food restaurants within 400 feet of any public, private, or parochial school, church, public recreation area, or any residentially zoned property.²⁴

Sec. Four. CONTINUATION OF PREEXISTING LIMITED SERVICE/FAST FOOD RESTAURANTS.

- (a) Fast Food Restaurants lawfully existing or having an approved *[building]* permit to operate prior to _____ *[insert the effective date of the legislation]* may continue to operate under the following conditions:
- (1) The restaurant operates in accordance with all applicable federal, state, and local laws;
 - (2) The restaurant does not seek a modification to its permit that would allow any intensification of use;
 - (3) The restaurant operates continuously in the same location, without substantial increase in intensity of operation or square footage;
- (b) A break in continuous service shall not be interpreted to include the following:
- (1) A period of up to 90 days *[or other period acceptable to the community]* associated with a change in ownership;
 - (2) The restoration and/or replacement of a legal nonconforming structure wholly or partially destroyed by a catastrophic event or sudden cause which is beyond the control of the property owner, and which could not otherwise have been prevented by reasonable care and maintenance of the structure is permitted; or
 - (3) A temporary closure for not more than 30 days for repair, renovation, or remodeling.

COMMENT: Most municipalities' zoning codes include provisions restricting the alterations of nonconforming communities. Municipalities may prefer to use those existing provisions.

SECTION III. [Article / Section] of the [Municipality] Municipal Code is hereby amended to read as follows:

Sec. One. PURPOSE. The purposes of this [article / chapter] are to promote the health of children by regulating the location and operation of Mobile Food Vendors near schools *[and other locations frequented by children]* and to support efforts of the school district(s) to foster healthy food environments for students.

Sec. Two. DEFINITIONS. The following words and phrases, whenever used in this [article / chapter], shall have the meanings defined in this section unless the context clearly requires otherwise:

“Mobile Food Vendor” means any person who sells food or beverages for human consumption via any temporary or readily transportable means, including from a mobile food facility, such as a catering truck, cart, pushcart, wagon, trailer, or other wheeled conveyance; any portable table or stand; or on foot.

COMMENT: In many communities, mobile vending may be regulated at both the state level, in the state’s retail food code, and at the local level. At the local level, a municipality may regulate mobile vendors by requiring a particular permit or license, regular health and safety inspections, or adherence to other regulations. This definition captures the many different forms that mobile vending takes. In many communities, the term is already defined within existing local laws. A community may prefer to use its existing definition.

Sec. Three. Mobile Food Vending Near Schools prohibited

- (a) Mobile Food Vendors may not offer for sale or give away any food or beverages *[between the hours of 7:00 a.m. and 7:00 p.m.]* within *[insert appropriate distance for community]* feet of the nearest property line of any public or private kindergarten, elementary, middle, junior high or high school, or a licensed child-care facility or preschool *[list additional facilities if appropriate, such as playgrounds, youth centers, recreational facilities, arcades, parks, libraries, or residentially zoned parcels]*.

COMMENT: The municipality will need to determine: (1) whether to limit the ban to school day hours and (2) the size of the buffer zone. Some communities only ban vending during the hours when school and after school programs are in session. Phoenix bans street vendors near schools between 7:00 a.m. and 4:30 p.m.²⁵ A community may find that the school day ban appropriately protects student health while preserving economic opportunities for mobile vendors.

Communities have taken varied approaches to the size of the buffer zone. In Seattle, mobile vendors are banned from locating within 1,000 feet of a public school, while Phoenix bans street vendors within 600 feet of schools.²⁶ The mapping study discussed above will assist communities in determining an appropriate buffer zone.

- (b) A violation of this section shall be grounds for the [*insert appropriate Enforcement Agency, (e.g. Police Chief, Department of Health etc.)*] denial, refusal to renew, suspension, or revocation of the permit or license to operate.

COMMENT: The municipality will have existing methods for enforcing its vending regulations. Generally, these enforcement mechanisms include fines or penalties such as suspending or revoking the permit or license to operate.

SECTION IV. STATUTORY CONSTRUCTION AND SEVERABILITY.

This [article / chapter] shall be construed so as not to conflict with applicable federal or state laws, rules, or regulations. Nothing in this [article / chapter] authorizes any City agency to impose any duties or obligations in conflict with limitations on municipal authority established by federal or state law at the time such agency action is taken.

In the event that a court or agency of competent jurisdiction holds that a federal or state law, rule, or regulation invalidates any clause, sentence, paragraph or section of this [article / chapter] or the application thereof to any person or circumstances, it is the intent of the [City Council] that the court or agency sever such clause, sentence, paragraph, or section so that the remainder of this [article / chapter] remains in effect.

- 1 Ogden C, Carroll M and Flegal K. “High Body Mass Index for Age Among US Children and Adolescents, 2003-2006.” *Journal of the American Medical Association*, 299(20): 2401–2405, 2008.
- 2 Efforts to increase the nutritional quality of food offered to children at school are being made at the federal, state, and school level. For more information, see Levi J, Vinter S, Richardson L, et al. *F as in Fat: How Obesity Policies are Failing America*. Washington, DC: Trust for America’s Health, 2009, p. 31–38. Available at: <http://healthyamericans.org/reports/obesity2009/Obesity2009Report.pdf>.
- 3 Davis B and Carpenter C. “Proximity of Fast-Food Restaurants to Schools and Adolescent Obesity.” *American Journal of Public Health*, 99(3): 505–510, 2009.
- 4 For more information on Safe Routes to Schools programs, see the National Center for Safe Routes to Schools available at: www.saferoutesinfo.org.
- 5 Seattle, Wash., Municipal Code § 15.17.010 (2009); Stockton, Cal. Municipal Code §7-049.5 (2009).
- 6 Powell LM, Slater S, Mirtcheva D, Bao Y, Chaloupka FJ. Food store availability and neighborhood characteristics in the United States. *Prev Med*. 2007 Mar;44(3): 189-95.
- 7 For more information, see the Healthy Corner Stores Network available at: www.healthycornerstores.org.
- 8 FDA Model Food Code, Preface § 3 (2005).
- 9 North Carolina and Kentucky have yet to adopt the FDA Food Code but are actively pursuing Food Code adoption rulemaking. U.S. Food & Drug Admin. *Real Progress in Food Code Adoptions*. Available at: www.cfsan.fda.gov/~ear/fcadopt.html.
- 10 Ziegler E, Rathkopf A and Rathkopf D. 1 Rathkopf’s *The Law of Zoning and Planning* § 1:2 (4th ed. 2009).
- 11 Ziegler E, Rathkopf A and Rathkopf D. 1 Rathkopf’s *The Law of Zoning and Planning* § 4:1 (4th ed. 2009).
- 12 Calistoga, Cal. Municipal Code §17.22.040 (2009); Town of Concord, Mass. Zoning By-laws § 4.7.1 (2008).
- 13 See Arcata, Cal. Land Use Code §9.42.164 (2008) (limiting the total number of formula restaurants permitted within the community to nine); Westwood Village Specific Plan, Section 5B, Westwood Village, Los Angeles, CA (2004) (regulating the density of fast food establishments to every 400 feet, with one exception.) Available at: <http://cityplanning.lacity.org/complan/specplan/sparea/wwdvillagepage.htm>.
- 14 See *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 121(1982), (“ . . . there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals and the like by exercise of reasonable zoning laws.”); Ziegler E, Rathkopf A and Rathkopf D. 1 Rathkopf’s *The Law of Zoning and Planning* § 24:48 (4th ed. 2009) (“A majority of states have now enacted statutes prohibiting liquor outlets within a prescribed distance of various categories of protected institutions, with certain exceptions and variations.”).
- 15 The following resources provide guidance for communities to conduct food assessments:
 - Siedenbug K and Pothukuchi K. “What’s Cooking in Your Food System: A Guide to Community Food Assessment.” *Community Food Security Coalition*. 2002. Available at: www.foodsecurity.org/pubs.html#cooking. This Guide includes case studies of nine Community Food Assessments; tips for planning and organizing an assessment; guidance on research methods and strategies for promoting community participation; and ideas for translating an assessment into action for change.
 - “How to Create and Implement Healthy General Plans.” *Planning for Healthy Places*. 2008. Available at: www.healthypartners.org/toolkit_gpz.html. Section II: Assessing Existing Health Conditions has general information about assessing and mapping nutrition-related community features such as food retail.
 - “Community Food Security Assessment Toolkit.” *U.S.D.A. Econ. Research Service*, Publication No. E-FAN-02-013 (July 2002). Available at: www.ers.usda.gov/publications/efan02013/. This comprehensive publication explains mapping assessments and contains guidance and charts for conducting assessments.
- 16 Detroit, Mich., Municipal Code § 61-12-91 (2008).
- 17 Arden Hills, Minn., Municipal Code § 1325.04(1)(A) (2006).

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- ¹⁸ Seattle, Wash., Municipal Code § 15.17.010 (2009); Phoenix, Ariz., Municipal Code §131-24 (2009); *see also* Phoenix, Ariz., Municipal Code §10-166 (2009) (banning mobile food vendors operating on private property from vending within 300 feet of schools between 6:00 a.m. and 5:00 p.m.).
- ¹⁹ Ziegler E, Rathkopf A and Rathkopf D. 4 Rathkopf's The Law of Zoning and Planning § 73:6 (4th ed. 2009).
- ²⁰ Ziegler E, Rathkopf A and Rathkopf D. 4 Rathkopf's The Law of Zoning and Planning § 74:18 (4th ed. 2009).
- ²¹ Ziegler E, Rathkopf A and Rathkopf D. 4 Rathkopf's The Law of Zoning and Planning § 74:24 (4th ed. 2009).
- ²² Ziegler E, Rathkopf A and Rathkopf D. 4 Rathkopf's The Law of Zoning and Planning § 74:16 (4th ed. 2009).
- ²³ Detroit, Mich., Municipal Code § 61-12-91 (2008).
- ²⁴ Arden Hills, Minn., Municipal Code § 1325.04(1)(A) (2006).
- ²⁵ Phoenix, Ariz., Municipal Code § 31-24 (2009).
- ²⁶ Seattle, Wash., Municipal Code § 15.17.010 (2009); *see also* Phoenix, Ariz., Municipal Code § 31-24 (2009).