View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Fordham University School of Law

Fordham Urban Law Journal

Volume 44
Number 1 *Symposium - Home Rule in an Era of Municipal Innovation*

Article 2

2017

Healthy Zoning

Matthew J. Parlow
Chapman University Fowler School of Law

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj

Part of the Housing Law Commons, and the Property Law and Real Estate Commons

Recommended Citation

Matthew J. Parlow, *Healthy Zoning*, 44 Fordham Urb. L.J. 33 (2017).
Available at: https://ir.lawnet.fordham.edu/ulj/vol44/iss1/2

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

HEALTHY ZONING

Matthew J. Parlow[*]

ABSTRACT

This Article explores local governments' foray into the area of health regulation through their general regulatory and land use powers. Local governments are limited in their powers: they enjoy only those powers that the state permits them and, in some cases, only those that they choose to embrace themselves. Health care and health law have traditionally been the domain of federal and state governments. However, many local governments have begun to use what powers they have to attempt to address obesity and other health problems that plague many communities. In fact, land use law may be the most important and powerful tool at local governments' disposal to create meaningful and positive impacts on our collective health. This Article analyzes the different ways in which local governments are using their general regulatory and land use powers to promote greater health among their citizenry. Many of these health initiatives are controversial. Critics view local government action in this sphere as infringing on a policy area reserved for the federal and state governments or, at the very least, exceeding local government powers. Accordingly, this Article will also identify and address some of the challenges that such local government efforts face.

TABLE OF CONTENTS

Introduction 34
I. The Health Concerns of Local Governments 36
  A. Obesity 37
  B. Asthma 39
II. Local Governments' Innovative Health Policy Initiatives 40
  A. Non-Land Use Health Policies on the Local Level 40

---

[*] Dean and Donald P. Kennedy Chair in Law at Chapman University Fowler School of Law. I would like to thank Dean Nestor Davidson and Moshe Peters and the other editors of the *Fordham Urban Law Journal* for inviting me to speak at their annual Symposium, as well as for their research and editing assistance; and Lindsey Anderson, Evann Derus, Abbey Essman, Ryan Heiden, Rachel Lux, Ann Nano McNamara, Katie Mills, Joe Poehlmann, and Jessica Puhl for their research assistance.

1. Menu-Labeling Laws ... 41
2. "Happy Meal" Bans ... 42
3. Soda Bans ... 44
4. Trans-Fat Bans ... 45
B. Local Land Use Policies Aimed at a Healthier Citizenry ... 45
1. New Urbanism, Smart Growth, and Zoning ... 46
2. Health Elements in General Plans ... 47
3. Siting Grocery Stores in Food Deserts ... 49
4. Restricting Fast Food Restaurants and Liquor Stores ... 50
5. Other Innovative Land Use and Zoning Approaches to Health Policy ... 52
III. Impediments to Local Government Efforts ... 54
Conclusion ... 56

INTRODUCTION

There is an ongoing debate—both descriptive and normative—among local government law scholars about whether local governments[1] have, or should have, robust or limited powers.[2] This debate focuses largely on cities' powers vis-à-vis their respective state governments. This scholarly discourse has provided a forum for the rise of localism, a theory based on a preference for local government control and authority.[3] While this localist focus has been driven by a number of concerns and influences such as efficiency and self-government,[4] one of the primary motivations is the prospect that local governments will further innovative policy initiatives that could inform policy- and decision-making at higher levels of government.[5] Indeed, due to the political strife and gridlock that exists at the state and federal government levels, local governments, in many respects, are better "laborator[ies] of democracy" than Justice Louis Brandeis envisioned the states to be.[6]

---

1. In this article, I use the terms local governments, cities, suburbs, municipalities, and localities interchangeably to refer to local government entities.

2. *See* Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 632-35 (2001); *see also* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 16-20 (1990).

3. *See* Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1988 (2000).

4. *See* Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 294-99 (1993).

5. *See* Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837, 1859-63 (2010). *See generally* Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333 (2009).

6. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

As Professor Charles Tiebout describes in his seminal theory, local governments have tended to be more innovative than states because they compete against each other to attract and retain consumer-voters.[7] Consumer-voters can "vote with their feet" and leave one city for another if the package of goods, services, and taxes offered by a particular municipality is not to their liking.[8] Accordingly, local governments compete with one another by providing residents and businesses with a distinct set of policies, regulations, services, and the like to respond to the needs and interests of consumer-voters.[9] This dynamic creates an efficient local government marketplace where people with similar values and preferences tend to locate in the same municipalities.[10] Such homogeneity provides local governments with the ability to experiment with policies that might not be politically viable at other levels of government.[11] Thus, local governments have pushed innovative policies that could not gain traction on the state or federal level in areas such as marriage equality,[12] climate change,[13] immigration,[14] marijuana legalization,[15] and raising the minimum wage.[16]

One area where local governments have become particularly active in recent years is health policy. This development is noteworthy as an example of local government innovation and experimentation, since health policy has

---

7. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419 (1956).

8. *See id.* at 418. *But see* Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balances in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 615 (2007) (questioning how easily people can move given the expense of moving, proximity to family, and other reasons); Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1115 (2008) (explaining why residents are not as mobile as Tiebout theorized).

9. *See* Tiebout, *supra* note 7, at 419-20.

10. *See* Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1628-32 (2008).

11. *See generally* Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006).

12. *See* Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148-53 (2005) (detailing the City and County of San Francisco's provision of marriage licenses to same-sex couples and the attendant role of local governments to act in this policy area).

13. *See* Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409, 410-11 (2008) (describing how many cities in the United States took direct action to address harmful emissions).

14. *See* Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367, 371-405 (2010) (analyzing local government immigration regulation).

15. *See generally* Patricia E. Salkin & Zachary Kansler, *Medical Marijuana Meets Zoning: Can You Grow, Sell, and Smoke That Here?*, 62 PLAN. & ENVTL. L. 4 (2010) (detailing cities' laws related to medical marijuana).

16. *See* David Neumark, *Living Wages: Protection for or Protection From Low-Wage Workers*, 58 INDUS. & LAB. REL. REV. 27, 28-29 (2004) (detailing various cities' living wage laws).

traditionally been the domain of the federal and state governments.[17] In response to increasing societal health problems—ones that other levels of governments have been unsuccessful in addressing—many municipalities have begun using their general regulatory and land use powers to attempt to improve the health of their residents. These efforts have ranged from the adoption of a universal health care law, as in San Francisco,[18] to the new urbanism movement—an approach that seeks to reduce the reliance on automobiles and promote community integration through pedestrian-friendly, mixed-use development—that have taken root in many American cities.[19] This kind of local government policy experimentation exemplifies the innovation that localism scholars advocate, even though—as discussed further below—it is often met with political resistance and legal challenges.

This Article seeks to highlight the evolution of health policy on a local level and situate it in local government and land use scholarship. Part I explains the reasons why various municipalities have focused on health-related matters. Part II analyzes the ways in which local governments have used their general regulatory and land use powers to positively impact the health of those who live and work within their boundaries. Part III addresses some of the challenges that these local health policy efforts face, and the Article's Conclusion provides some final thoughts.

I. THE HEALTH CONCERNS OF LOCAL GOVERNMENTS

Local governments are increasingly focused on health policy in response to the growing body of evidence that illustrates the impact of the built environment[20] on the health of individuals in a community.[21] Specifically, urban sprawl—and its attendant "complex pattern of land use, transportation, and social and economic development"[22]—has contributed to public health issues such as obesity and asthma.

---

17. *See* Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749, 1752 (2013).

18. *See* Brian P. Goldman, Note, *The San Francisco Health Care Security Ordinance: Universal Health Care Beyond ERISA's Reach?*, 19 STAN. L. & POL'Y REV. 361, 362-67 (2008).

19. *See* Morgan E. Rog, Note, *Highway to the Danger Zone: Urban Sprawl, Land Use, and the Environment*, 22 GEO. INT'L ENVTL. L. REV. 707, 717-19 (2010).

20. *See* Denis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of Community*, 25 IND. L. REV. 685, 710-11 (1991) (explaining that the built environment is the physical space where people live, work, and play—those communities that we have physically built and populate).

21. *See* Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1221-23 (2014).

22. *See* Howard Frumkin, *Urban Sprawl and Public Health*, 117 PUB. HEALTH REP. 201, 201 (2002).

A. Obesity

There is an obesity epidemic both globally and in the United States.[23] In the United States, more than one-third of adults are considered obese.[24] One study found that in 2010, forty-three million preschool children globally were considered obese or overweight—constituting a sixty percent increase in the past two decades.[25] Moreover, low-income, minority, and rural communities experience higher than average rates of disease related to obesity.[26] The costs of obesity on the American health care system are estimated to be between $147 billion and $210 billion annually.[27] Moreover, the chronic diseases associated with obesity—including diabetes and heart disease—are among the leading causes of death in the United States.[28] This obesity epidemic is not confined to the United States. The worldwide obesity rate has almost doubled since 1980,[29] and one international study projected that by 2025, twenty percent of the world's population will be obese.[30]

To be sure, there are many causes of obesity, including factors such as a person's diet and genetic make-up. Nonetheless, in recent years, public health experts, urban planners, and local government officials have come to understand the ways in which the built environment of many metropolitan regions contributes to the increase in obesity rates.[31] Indeed, as some

---

23. *See* Tamara Schulman, Note, *Menu Labeling: Knowledge for a Healthier America*, 47 HARV. J. ON LEGIS. 587, 587 (2010).

24. *See Adult Obesity Facts*, CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/data/adult.html [https://perma.cc/YC5H-P6RV] (citing Cynthia L. Ogden et. al., *Prevalence of Obesity Among Adults and Youth: United States, 2011-2014*, NCHS data brief, no 219, (2015)).

25. *See* Harvard T.H. Chan School of Public Health, *Obesity Trends: Tracking the Global Epidemic*, HARV. SCH. OF PUB. HEALTH, http://www.hsph.harvard.edu/obesity-prevention-source/obesity-trends/#ref1 [https://perma.cc/X9AF-VYWZ]; *see also* Jennifer L. Harris & Samantha K. Graff, *Protecting Children from Harmful Food Marketing: Options for Local Government to Make a Difference*, 8 PREVENTING CHRONIC DISEASE 1, 2-3 (2011) (describing how food marketing leads to greater childhood obesity).

26. *See Access to Healthy Foods in Low-Income Neighborhoods*, YALE UNIV. RUDD CENTER FOR FOOD POL'Y & OBESITY 1, 2 (2008), http://www.ct.gov/dph/lib/dph/hems/nutrition/pdf/yale_rudd_center_access_to_healthy_foods_report_2008.pdf [https://perma.cc/HB68-9EYJ].

27. *See The Healthcare Costs of Obesity*, THE STATE OF OBESITY, http://stateofobesity.org/healthcare-costs-obesity/ [https://perma.cc/Q9AL-LSR7].

28. *See* Marice Ashe et al., *Prevention and Treatment: Solutions Beyond the Individual*, 35 J. L. MED. & ETHICS 138, 138 (2007).

29. HOWARD FRUMKIN et al., URBAN SPRAWL AND PUBLIC HEALTH: DESIGNING, PLANNING AND BUILDING FOR HEALTH COMMUNITIES, at xi, xiv (2004).

30. *See* Joshua Berlinger, *1 in 5 People Will Be Obese by 2025, Study Says*, CNN (Apr. 6, 2016), http://www.cnn.com/2016/04/01/health/global-obesity-study/ [https://perma.cc/X42F-EFAR].

31. *See* William L. Roper et al., *Heath and Smart Growth: Building Health, Promoting Active Communities*, FUNDER'S NETWORK FOR SMART GROWTH AND LIVABLE COMMUNITIES

scholars have posited that "[t]he modern America of obesity [and] inactivity . . . has not happened to us. We legislated, subsidized, and planned it this way."[32] Even if such results were not deliberately designed, there is no doubt that the way in which cities permit and incentivize land use directly impacts the health of those in their communities.[33]

Urban sprawl in particular seems to be a contributing factor to the obesity epidemic. As one reporter quipped, "[a]s communities sprawl into automobile-dependent developments and suburbs, so do their residents' waistlines spread."[34] Urban sprawl has been characterized by four key features: a widely-dispersed population in a low-density development; homes, shops, and workplaces that are distinctly separated; a network of roads with large blocks and poor access; and a lack of identifiable activity centers such as a downtown area.[35] These characteristics, in turn, inevitably lead to—or correspond with—a lack of public transportation, a strong reliance on automobiles, and a decrease in neighborhood schools and recreational opportunities.[36]

This increase in automobile dependence and the lack of meaningful public transportation options have led to a more sedentary culture in the United States.[37] With longer distances to schools, workplaces, and other destinations, more Americans have turned to their cars to fulfill their transportation needs.[38] In this regard, urban sprawl has led to a decrease in walking and bicycling and an increase in automobile usage as a form of transportation.[39] In fact, research shows that more than 90% of all trips in the United States are made by automobiles, even though 28% of those trips were for fewer than one mile and an additional 13% of trips were for fewer

---

1, 2 (2003), http://www.fundersnetwork.org/files/learn/Health_and_Smart_Growth.pdf [https://perma.cc/7JL6-XTL9].

32. *See* FRUMKIN, *supra* note 29, at xi.

33. *See* Roper, *supra* note 31, at 2.

34. Jim Shamp, *Study: Less Need for Cars Drops Weight, Blood Pressure*, HERALD-SUN, Aug. 29, 2003, at B1.

35. *See* Alyson L. Geller, *Smart Growth: A Prescription for Livable Cities*, 93 AM. J. PUB. HEALTH 1410, 1410 (2003).

36. *See id*. Given the development of urban sprawl, localities find it challenging—if not impossible—to create public transportation systems that can work both logistically and within limited budgets.

37. *See id*. at 1410-11.

38. *See* Joe Baird, *CDC Calls Sprawl a Health Risk: Poor City Planning Linked to Diabetes and Asthma*, SALT LAKE CITY TRIB., Nov. 2, 2002, at A1.

39. *See* Frumkin, *supra* note 22, at 205.

than two miles.[40] Even leisurely physical activity appears to have lessened due to urban sprawl.[41]

The lack of access to healthy foods in many urban communities has also led to an increase in obesity rates in those communities. As urban sprawl took root, families moved to the suburbs and so did many of the retail and grocery stores that had previously served various communities within the city.[42] The disappearance of grocery stores in many urban communities created "food deserts"—areas within cities where low-income residents have limited access to healthy food options, such as fruits, vegetables, and non-processed foods.[43] Many low-income residents lack access to reliable transportation—public or private—to access grocery stores in the suburbs, and thus resort to shopping for food at convenience stores, liquor stores, or fast-food restaurants.[44] These options provide mostly high-calorie, high-fat food options.[45] It should come as no surprise that communities marked as food deserts tend to have higher rates of obesity and other attendant health problems because of this lack of access to healthy food options.

B. Asthma

The built environment in many communities—and, specifically, those marked by urban sprawl—also negatively impacts those suffering from asthma and other respiratory ailments. Approximately twenty-four million Americans suffer from asthma.[46] While asthma rates have been increasing in the United States, the disease disproportionately affects low-income, minority communities in major urban centers.[47] However, even in the suburbs, the lack of physical activity and the automobile-dependency

---

40. JAMES A. KUSHNER, HEALTHY CITIES: THE INTERSECTION OF URBAN PLANNING, LAW AND HEALTH, at 110 (2007).

41. *See* Bradford McKee, *As Suburbs Grow, So Do Waistlines*, N.Y. TIMES, Sept. 4, 2003, at F1.

42. *See* M. Nathaniel Mead, *Urban Issues: The Sprawl of the Food Desert*, 116 ENVIRON. HEALTH PERSPECT. A335, A335 (2008).

43. *See id.* Approximately twenty-nine million people in the United States live in communities that lack access to healthy food options. *See* Deborah L. Rhode, *Obesity and Public Policy: A Roadmap for Reform*, 22 VA. J. SOC. POL'Y & L. 491, 497 (2015).

44. *See* Kate Meals, Comment, *Nurturing the Seeds of Food Justice: Unearthing the Impact of Institutionalized Racism on Access to Healthy Food in Urban African-American Communities*, 15 SCHOLAR 97, 121-22 (2012).

45. *See* Kelli K. Garcia, *The Fat Fight: The Risks and Consequences of the Federal Government's Failing Public Health Campaign*, 112 PENN ST. L. REV. 529, 540 (2007).

46. *See Asthma*, CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/fastats/asthma.htm [https://perma.cc/KQG5-NHK5] (noting that 17.7 million adults and 6.3 million children suffer from asthma).

47. *See* Alina Das, *The Asthma Crisis in Low-Income Communities of Color: Using the Law as a Tool for Promoting Public Health*, 31 N.Y.U. REV. L. & SOC. CHANGE 273, 276-81 (2007).

detailed above puts people at greater risk for respiratory ailments.[48] Despite the decrease in automobile emissions in recent years, automobiles are still the greatest source of air pollution because the number of cars and trucks on the road—and the number of miles that they drive—has increased.[49] In fact, motor vehicles are responsible for somewhere between a third and a half of smog in most metropolitan regions.[50] Such air pollution leads to a "higher incidence and severity of respiratory symptoms, worse lung function, more emergency room visits and hospitalizations, more medication use, and more absenteeism from school and work."[51] In these regards, the built environment and urban sprawl have negatively impacted the respiratory health of those living and working in many communities.

II. LOCAL GOVERNMENTS' INNOVATIVE HEALTH POLICY INITIATIVES

Historically, local governments waded into health policy largely to address unsanitary conditions and to ward off outbreaks of diseases such as cholera and tuberculosis.[52] In the 19th and early 20th centuries, public health officials and urban planners worked together to create sewer systems and design zoning plans to keep certain unsanitary land uses away from schools and homes.[53] By the middle of the 20th century, the threats of inadequate sanitation and infectious diseases had subsided, and public health officials shifted their focus away from land use to food safety, venereal diseases, and prenatal and early childhood health care.[54] However, with the rise of urban sprawl—and the attendant chronic health problems to which it contributed—local government officials have refocused on using their general regulatory and land use powers to improve public health within their jurisdictions.[55]

A. Non-Land Use Health Policies on the Local Level

In recent years, local governments have implemented non-land use regulations to promote healthier eating by those who eat within their boundaries. While food regulation is oftentimes viewed as the domain of the state and federal governments, various municipalities have found innovative

---

48. *See* Kushner, *supra* note 40, at 3.

49. *See* Frumkin, *supra* note 22, at 202.

50. *See* Geller, *supra* note 35, at 1411.

51. *See* Frumkin, *supra* note 22, at 202.

52. *See* Wendy C. Perdue et al., *Public Health and the Built Environment: Historical, Empirical, and Theoretical Foundations for an Expanded Role*, 31 J.L. MED. & ETHICS 557, 557-58 (2003).

53. *See id.* at 558.

54. *See id.* at 558-59.

55. *See* Juliana Maantay, *Public Health Matters: Zoning, Equity, and Public Health*, 91 AM. J. PUB. HEALTH 1033, 1033 (2001).

ways to counter negative health trends in their communities through menu-labeling laws, and bans on "happy meals," sugary sodas, and trans-fats.

1. Menu-Labeling Laws

In response to the obesity epidemic, many cities adopted menu-labeling laws to help consumers make healthier—and better-informed—food choices.[56] Studies have shown that most people, including nutritionists, underestimate the amount of calories in some foods.[57] Such underestimation leads people to perceive oversized, high-calorie portions as being normal-sized portions, and thus unknowingly eat far more calories than they originally anticipated.[58] To combat this phenomenon, and encourage well-informed nutritional decision-making, many local governments have adopted laws that mandate disclosure of the amount of calories for each item on a restaurant's menu.[59] In 2006, New York City became the first city to adopt a menu-labeling law.[60] The New York City regulation required that menus display the calorie content value for menu items served in standardized portions.[61] The law applied to any group of fifteen or more food service establishments doing business nationally under the same name and offering the substantially same items on their menus.[62] Failure to comply with the new requirements earned a restaurant a fine between $200 and $2000.[63]

This movement to educate eaters on their caloric intake soon proliferated among municipalities throughout the United States.[64] While the specifics of these laws varied somewhat by jurisdiction, these laws generally targeted larger chain restaurants for at least three reasons. First, restaurant chains

---

56. *See* Ashley Arthur, Note, *Combating Obesity: Our Country's Need for a National Standard to Replace the Growing Patchwork of Local Menu Labeling Laws*, 7 IND. HEALTH L. REV. 305, 314 (2010).

57. *See* Christine Cusick, Comment, *Menu-Labeling Laws: A Move from Local to National Regulation*, 51 SANTA CLARA L. REV. 989, 1017 (2011).

58. *See id.*

59. *See* Arthur, *supra* note 56, at 306.

60. *See* Jodi Schuette Green, Note, *Cheeseburger in Paradise? An Analysis of How New York State Restaurant Association v. New York City Board of Health May Reform Our Fast Food Nation*, 59 DEPAUL L. REV. 733, 746 (2010).

61. *See* Brent Bernell, Article, *The History and Impact of the New York City Menu Labeling Law*, 65 FOOD & DRUG L.J. 839, 845-46 (2010).

62. *See id.* at 845.

63. *See* Jason M. Szanyi, *Brain Food: Bringing Psychological Insights to Bear on Modern Nutrition Labeling Efforts*, 65 FOOD & DRUG L.J. 159, 172 (2010).

64. *See* Michelle I. Banker, *I Saw the Sign: The New Federal Menu-Labeling Law and Lessons from Local Experience*, 65 FOOD & DRUG L.J. 901, 908-09 (2010); *see also* Lainie Rutkow et al., *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 J.L. MED. & ETHICS 772, 775-76 (2008) (describing various state and local menu labeling laws).

tend to use standardized menu items, making it easier to measure or estimate accurate calories per serving.[65] Second, chain restaurants also make up a disproportionate share of restaurant meals in many cities.[66] Third, chain restaurants tend to serve less healthy food that can contribute to obesity.[67] Interestingly, these local laws eventually influenced some states to adopt similar menu-labeling laws.[68] In fact, similar menu-labeling requirements were incorporated into the federal Patient Protection and Affordable Care Act.[69]

2. *"Happy Meal" Bans*

San Francisco adopted an ordinance—known as the "happy meal" ban—that aimed to prevent fast food restaurants from using toy incentives to target children's food preferences. Many fast food companies provide a free toy in kids' meals as an enticement to children to influence their parents to buy them food at these establishments.[70] These promotions can sometimes more than double weekly sales of kids' meals at these restaurants.[71] The most recognizable kids' meal that has a toy incentive is McDonald's Happy Meal, which also happens to be among the unhealthiest kids' meals.[72]

A bit of history regarding marketing junk food to children is helpful to understand San Francisco's impetus in adopting its "happy meal" law. During the 1970s, the federal government—through the Federal Trade Commission ("FTC")—attempted to limit children's exposure to marketing and advertisements of unhealthy food options.[73] Studies showed that children under the age of six were particularly susceptible to such advertising because their cognitive abilities were not sufficiently developed to distinguish commercial advertising from program content.[74] The effectiveness of such advertising led fast food companies to spend more than

---

65. *See* N.Y.C. DEPT. OF HEALTH & MENTAL HYGIENE BD. OF HEALTH, NOTICE OF ADOPTION OF A RESOLUTION TO REPEAL AND REENACT § 81.50 OF THE NEW YORK CITY HEALTH CODE, http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art 81-50-0108.pdf [https://perma.cc/C5N4-55KS].

66. *See id.*

67. *See id.*

68. *See* Banker, *supra* note 64, at 908.

69. *See* Lainie Rutkow et al., *Local Governments and the Food System: Innovative Approaches to Public Health Law and Policy*, 22 ANNALS HEALTH L. 355, 357 (2013).

70. *See* Alexis M. Etow, Comment, *No Toy for You! The Healthy Food Incentives Ordinance: Paternalism or Consumer Protection?*, 61 AM. U. L. REV. 1503, 1511 (2012).

71. *See id.*

72. *See* Cortney Price, Comment, *The Real Toy Story: The San Francisco Board of Supervisors Healthy Food Incentives Ordinance*, 8 J. FOOD L. & POL'Y 347, 350 (2012).

73. *See* Etow, *supra* note 70, at 1509.

74. *See id.*

$650 million each year on marketing aimed at children.[75] However, despite the problems it identified, the FTC eventually abandoned its proposed regulations of junk food marketing because of the threat of legal challenges and political resistance.[76]

In response to this link between unhealthy food and toy incentive marketing to children—and due to the inability of other levels of government to address this concern—San Francisco adopted the Healthy Food Incentives Ordinance, now known as its "happy meal" ban.[77] The ordinance bans restaurants from providing toys, or other incentive items, with a kids' meal that does not meet certain nutritional guidelines.[78] The stated purpose of the law "is to improve the health of children and adolescents in San Francisco by setting healthy nutritional standards for children's meals sold at restaurants in combination with free toys or other incentive items."[79]

San Francisco's law applies to all restaurants that provide take-out or "to go" food services.[80] In order for a restaurant to provide a toy or other incentive item, the kid's meal must not exceed 600 calories; 640 mg of sodium; half a gram of trans fat; thirty-five percent of its total calories from fat; and ten percent of its total calories from saturated fat.[81] Moreover, the kids' meal must contain at least a half-cup of fruit and three-fourths of a cup of vegetables.[82] Accordingly, San Francisco's "happy meal" ban is actually more of an incentive system: that is, the ordinance provides incentives and sets minimum standards encouraging fast food restaurants to provide healthier menu options if they want to market to children through toys or other giveaways.[83] However, if a restaurant or other food service establishment violates this law, San Francisco can impose a fine.[84] While there was not a proliferation of similar laws following the San Francisco ordinance,[85] the "happy meal" ban received much national attention and

---

75. *See id.* at 1505.

76. *See id.* at 1509.

77. *See id.* at 1512; *see, e.g.*, Marisa Lagos, *Happy Meals are Healthier After SF Law, Researchers Find*, SF GATE (July 17, 2014, 1:06 PM), http://blog.sfgate.com/cityinsider/2014/07/17/happy-meals-are-healthier-after-sf-law-researchers-find/ [https://perma.cc/82KK-BX4K].

78. *See* Etow, *supra* note 70, at 1512.

79. SAN FRANCISCO HEALTH CODE, art. 8 § 471.2 (effective Dec. 1, 2011).

80. *See id.* § 471.3(f).

81. *See id.* § 471.4(a)(1)-(5).

82. *See id.* § 471.4(a)(7).

83. *See* Price, *supra* note 72, at 354.

84. *See* SAN FRANCISCO HEALTH CODE, art. 8 § 471.5(a).

85. New York City did consider adopting a similar ordinance. *See* Mitch Lipka, *NYC Considers Banning Free Toys with Fatty Meals*, CBS NEWS, Aug. 21, 2014, http://www.cbsnews.com/news/new-york-city-to-consider-banning-free-toys-with-fatty-foods/ [https://perma.cc/UT3J-K5B9].

raised awareness of the issue of unhealthy food options for children linked to free toys or other incentive items.

3. Soda Bans

Other cities target another culprit that contributes to obesity, diabetes, and heart disease problems facing their communities: sugary sodas.[86] Following the lead of some major school districts, several cities adopted soda restrictions.[87] New York City Mayor Michael Bloomberg's proposal to limit the size of sugar-sweetened beverages sold in the city garnered a lot of national media coverage.[88] On September 13, 2012, the New York City Board of Health approved the Mayor's proposal to cap the size of sugar-sweetened beverages sold in food service establishments to sixteen ounces or less.[89] The law applied to both carbonated and non-carbonated beverages—even though it became popularly-known as a "soda ban"—that exceed certain sweetening metrics.[90] However, only food service and self-serve establishments are subject to the law, so businesses like 7-Elevens and grocery stores are exempt.[91] Businesses which violate the ordinance are subject to a fine of up to $200.[92] Other cities also adopted similar measures to create healthier drink options for those in their jurisdictions.[93]

---

86. *See* Kara Marcello, Note, *The New York City Sugar-Sweetened Beverage Portion Cap Rule: Lawfully Regulating Public Enemy Number One in the Obesity Epidemic*, 46 CONN. L. REV. 807, 813-15 (2013).

87. *See* Michele Simon, *Can Food Companies Be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children's Health*, 39 LOY. L.A. L. REV. 169, 174-78 (2006) (noting the soda ban implemented by the Los Angeles Unified School District); Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591, 610 (2010) (describing the School District of Philadelphia's soda ban); A. Bryan Endres & Nicholas R. Johnson, *United States Food Law Update: Moving Toward a More Balanced Food Regulatory Regime*, 7 J. FOOD L. & POL'Y 383, 393 (2011) (explaining that Chicago Public Schools do not ban sodas district-wide; however, principals are afforded the discretion to ban unhealthy drinks in their schools).

88. *See, e.g.*, *New York Soda Ban*, HUFFINGTON POST, http://www.huffingtonpost.com/news/new-york-soda-ban/ [https://perma.cc/MG9X-VRF6] (listing numerous articles from the Huffington Post on Mayor Bloomberg's soda ban).

89. *See* Marcello, *supra* note 86, at 819.

90. *See id.* at 820.

91. *See id.* at 845.

92. *See id.* at 820.

93. *See, e.g.,* Alison Peck, *Revisiting the Original "Tea Party": The Historical Roots of Regulating Food Consumption in America*, 80 UMKC L. REV. 1, 6-15 (2011) (describing Boston and San Francisco's efforts to ban sugar-sweetened beverages in municipal buildings and on city property, respectively).

4. Trans-Fat Bans

Cities have also used their general regulatory powers to target trans fats, which are solid or semi-solid fats that have been converted from liquid vegetable oils through partial hydrogenation.[94] During the 20th century, the use of trans fats became widespread: more than 45,000 food products—including cookies, crackers, and frozen breakfast items—were made using trans fats.[95] Many food producers use trans fats because they are inexpensive to use, improve taste and texture, and extend the shelf life of the foods.[96] However, trans fats are one of the most problematic types of fat because they contribute to a rise in "bad" cholesterol and a decrease in "good" cholesterol.[97] In response, several local governments moved to ban trans fats in their jurisdictions. For example, after a voluntary trans-fat ban proved unsuccessful, New York City adopted an ordinance in 2006 that required restaurants to cease using trans fats by July 1, 2008.[98] The law applied to both sit-down restaurants and outdoor vendors.[99] Several other cities and states similarly adopted trans-fat bans,[100] and the United States Food and Drug Administration recently announced that it is moving forward with a trans-fat ban.[101]

B. Local Land Use Policies Aimed at a Healthier Citizenry

While local governments have used their general regulatory powers to adopt health policy ordinances, there may be no greater area where cities can positively impact the health of those living and working within their boundaries than land use planning. Perhaps this observation is unsurprising given that, as one scholar notes, "land use is perhaps the most important single power left to local governments."[102] Armed with the power of

---

94. *See* Elizabeth Young Spivey, Note, *Trans Fat: Can New York City Save Its Citizens from This "Metabolic Poison"?*, 42 GA. L. REV. 273, 275-76 (2007).

95. *See id.* at 276.

96. *See* Katharine Kruk, Note, *Of Fat People and Fundamental Rights: The Constitutionality of the New York City Trans-Fat Ban*, 18 WM. & MARY BILL RTS. J. 857, 860 (2010).

97. *See id.* at 861.

98. *See id.* at 863.

99. *See id.* at 874.

100. *See id.* at 857-58.

101. *See* Alexandra Sifferlin, *This is Why FDA is Banning Trans Fats*, TIME, June 16, 2015, http://time.com/3922629/this-is-why-fda-is-banning-trans-fats/ [https://perma.cc/A2WB-D93L].

102. Bradley C. Karkkainen, Comment, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 72 (1997); *see also* Kenneth J. Brown, *Establishing a Buffer Zone: The Proper Balance Between the First Amendment Religion Clauses in the Context of Neutral Zoning Regulations*, 149 U. PA. L. REV. 1507, 1509-10 (2001) ("There may be no power at the disposal of local government more capable of affecting the rights and abilities of individuals and groups to engage in a given activity than zoning"); Nicole Stelle Garnett, *On Castles and Commerce:*

zoning—as an exercise of the police power reserved to the states by the Tenth Amendment and delegated to local governments through most states' constitutions or statutes[103]—cities have attempted to influence and regulate the health of their citizenry. In particular, municipalities have focused on a variety of land use approaches to accomplish this goal: adopting New Urbanism and Smart Growth zoning strategies; incorporating health elements into their general plans; providing incentives to open grocery stores in food deserts; restricting access to fast food restaurants and liquor stores; and experimenting with other innovative zoning approaches to encourage access to healthy food. While "[l]and use planning in the United States has been based on the segregation of uses by type primarily to prevent nuisance or external costs,"[104] cities have demonstrated how they can use their land use powers to influence human behavior and thus effect health policy in a meaningful way.[105]

1. New Urbanism, Smart Growth, and Zoning

In response to urban sprawl and the rising rates of obesity, many cities are embracing New Urbanism and Smart Growth approaches to zoning. New Urbanism emphasizes design elements for the built environment that reduce the reliance on automobiles and promote community integration through higher density development, public transportation, public green spaces, pedestrian-friendly development, and mixed-use neighborhoods.[106] This approach promotes the ability for people to live, work, and play, all in the same community, thus increasing physical activity and reducing the need for automobiles.[107] In this regard, New Urbanism seeks to "afford[ ] an opportunity for people to be active without the need to plan for physical activity."[108] Similarly, Smart Growth is a land use planning movement that promotes building and revitalizing communities through mixed-use, high-

---

Zoning Law and the Home-Business Dilemma, 42 WM. & MARY L. REV. 1191, 1205 (2001) ("land use is perhaps the quintessential local responsibility").

103. *See* Paul A. Diller & Samantha Graff, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?*, 39 J.L. MED. & ETHICS 89, 90 (2011).

104. Dan Tarlock, *Fat and Fried: Linking Land Use Law, the Risks of Obesity, and Climate Change*, 3 PITT J. ENVTL PUB. HEALTH L. 31, 35 (2009).

105. *See* E. Jacob Lubarsky, Article, *Highway to Health: Exploring Legal Avenues to Connecting General Plans and Public Health Standards*, 1 GOLDEN GATE U. ENVTL. L.J. 405, 407-08 (2007).

106. *See* Timothy Polmateer, Note, *How Localism's Rationales Limit New Urbanism's Success and What Regionalism Can Do About It*, 41 FORDHAM URB. L.J. 1085, 1095-97 (2015).

107. *See* Robert H. Freilich & Neil M. Popowitz, *The Umbrella of Sustainability: Smart Growth, New Urbanism, Renewable Energy and Green Development in the 21st Century*, 42 URB. LAW. 1, 3 (2010).

108. Shamp, *supra* note 34, at B1.

density development.[109] To that end, Smart Growth seeks "more efficient use of existing infrastructure, and transportation choices."[110] Moreover, this land use approach aims to advance public health and healthier communities through neighborhood designs—or redesigns—that encourage biking and walking.[111]

The New Urbanism and Smart Growth movements have made significant strides in recent years.[112] While critics remain,[113] one only needs to look at most major cities—and many smaller and mid-size cities—to see the influence of these anti-sprawl, growth management approaches. Cities advance these types of developments for a variety of reasons, but one of their motivations is to improve the health of those who live and work within their boundaries.

2. *Health Elements in General Plans*

Some cities have extended the theories behind the New Urbanism and Smart Growth movements to their general plans[114] by incorporating public health goals into them.[115] A general plan is a city's "policy guide to decisions about the physical development of the community."[116] General plans are forward-looking and seek to create objectives and parameters regarding "how, why, when and where to build, rebuild, and preserve the city."[117] Many states require municipalities to develop such plans for zoning and land use development, including general policies—commonly referred to as elements—to help meet a community's varying needs. These elements explain the physical development of the city—both in its current state and in

---

109. *See* Geller, *supra* note 35, at 1411.

110. *See id.*

111. *See* Patricia E. Salkin, *Squaring the Circle on Sprawl: What More Can We Do? Progress Toward Sustainable Land Use in the States*, 16 WIDENER L.J. 787, 789 (2007).

112. *See* Michael Lewyn, *The (Somewhat) False Hope of Comprehensive Planning*, 37 U. HAW. L. REV. 39, 45-49 (2015).

113. *See* Steve P. Calandrillo et al., *Making "Smart Growth" Smarter*, 83 GEO. WASH. L. REV. 829, 850-67 (2015).

114. For the purposes of this article, I use the term "general plan" to refer to both general plans and comprehensive plans.

115. *See* Peter Stair et al., *How to Create and Implement Healthy General Plans: A Toolkit for Building Healthy, Vibrant Communities*, CHANGELAB SOLUTIONS, IX, 31 (2012), http://www.changelabsolutions.org/sites/default/files/Healthy_General_Plans_Toolkit_Updated_20120517_0.pdf [https://perma.cc/MAV5-BYA9].

116. ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 1, 172 (1986). Indeed, there are differing perspectives on what a general plan is or should be: a land use vision, blueprint, remedy, or process. *See* William C. Baer, *General Plan Evaluation Criteria: An Approach to Make Better Plans*, 63 J. AM. PLAN. ASS'N 329, 333-34 (1997).

117. Laura F. Ashley, Comment, *Re-Building New Orleans: How the Big Easy Can Be the Next Big Example*, 55 LOY. L. REV. 353, 358-59 (2009) (quoting FRANK BEAL & ELIZABETH HOLLANDER, CITY DEVELOPMENT PLANS, IN THE PRACTICE OF LOCAL GOVERNMENT PLANNING 153 (1979)).

the community's aspirations for future development.[118] While states require different elements, all general plans include land use and public facilities elements.[119] Some general plans include elements covering economic development, natural resources, housing, and population and demographics.[120]

In recent years, some cities have added health elements to their general plans.[121] The City of Richmond, California, was the first city to do so.[122] In 2007, Richmond received a grant from the California Endowment Trust to develop a health element to address issues such as diabetes, obesity, and asthma faced by its residents.[123] Richmond's health element makes key findings related to its community's collective health, including the need for more park space, access to healthy food, emergency services, usable public transportation, and walkable neighborhoods, as well as the existence of noise, water, air, and soil pollution.[124] The element then sets forth health-related goals that should inform and influence the city's zoning and land use decision-making: improving access to parks and other recreational open space; expanding access to healthy food options; enhancing medical services; providing safe and reliable public transportation; improving environmental quality; and adopting green and sustainable development and practices.[125] To implement such goals, the health element also contains policies and actions meant to achieve consistency and success across the city.[126]

Since Richmond began pursuing a health element in 2007, other cities have adopted health elements into their general plans.[127] This growing trend signals an awareness of cities' ability to influence health policy through their

---

118. *See* Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. L. REV. 1, 92 (1998).

119. *See* JAMES A. KUSHNER, HEALTHY CITIES: THE INTERSECTION OF URBAN PLANNING, LAW AND HEALTH 1, 20 (2007).

120. *See* Ed Bolen et al., *Smart Growth: A Review of Programs State by State*, 8 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 145, 213 (2002).

121. *See General Plan Update*, HEAL CITIES CAMPAIGN, http://www.healcitiescampaign.org/general_plan.html [https://perma.cc/5N5F-D372] (noting cities with health elements in their general plans).

122. *See Community Health and Wellness, City of Richmond General Plan Element 11*, CITY OF RICHMOND, http://www.ci.richmond.ca.us/DocumentCenter/Home/View/8579 [https://perma.cc/5275-SKS8].

123. *See* Christopher Connelly, *Richmond Plans for a Healthier Future*, RICHMOND CONFIDENTIAL, June 7, 2011, http://richmondconfidential.org/2011/06/07/richmond-plans-for-a-healthier-future/ [https://perma.cc/YLG4-EA3R].

124. *See* CITY OF RICHMOND, *supra* note 122, at 11.12-15.

125. *See id.* at 11.16-17.

126. *See id.* at 11.19-63.

127. *See* HEAL CITIES CAMPAIGN, *supra* note 121 (noting cities that have adopted health elements).

zoning and land use powers. By incorporating a health element into their general plan, these cities have provided not just a policy preference, but a legal basis for improving the health of their citizenry.

3. *Siting Grocery Stores in Food Deserts*

In addition to their general plans, cities are using their zoning powers in an attempt to increase resident access to healthy foods. As detailed above, many low-income communities lack access to grocery stores and other establishments that provide healthy food options—creating the phenomenon of the food desert.[128] There are significant obstacles facing cities that seek to attract grocery stores into these neighborhoods. For example, full-service supermarkets require up to 150,000 square feet.[129] Moreover, grocery stores require a substantial number of parking spaces, and there are rarely vacant lots available in urban areas to accommodate these kinds of square footage and parking needs.[130]

Despite these challenges, many cities have found creative ways to use their zoning and land use powers to provide incentives for grocery stores to locate in their food deserts. For example, New York City established the Food Retail Expansion to Support Health ("FRESH") initiative for the purpose of "establish[ing] and expan[ding] neighborhood grocery stores in underserved communities by providing zoning and financial incentives."[131] In addition to providing tax and other financial incentives (like low-interest loans), the FRESH program uses zoning to encourage grocery stores to locate in certain neighborhoods: reducing the parking required for grocery stores and permitting grocery stores as of right in light manufacturing districts.[132] Similarly, Philadelphia created incentives for grocery stores that carry a qualifying percentage of fresh foods.[133] Philadelphia not only exempts fresh food supermarkets from floor area limits, but it provides such stores with an additional 25,000 in permitted square footage.[134] Philadelphia also exempts grocery stores from minimum parking requirements for the first 10,000 square feet of the store.[135]

---

128. *See* discussion *supra* Part I.A.

129. *See* Caitlin Loftus, *An Apple a Day – If You Can Find One – Keeps the Doctor Away: How Food Deserts Hurt America's Health and How Effective Land Use Regulation Can Eliminate Them*, 35 ZONING & PLAN. L. REP. 1 (2012).

130. *See id.*

131. *Food Retail Expansion to Support Health (FRESH)*, N.Y.C. ECON. DEV. CORP., http://www.nycedc.com/program/food-retail-expansion-support-health-fresh [https://perma.cc/NT2S-YFLR].

132. *See id.*

133. *See* Lisa M. Feldstein, *Zoning and Land Use Controls: Beyond Agriculture*, 65 ME. L. REV. 467, 482 (2013).

134. *See id.*

135. *See id.*

Baltimore also sought to attract more grocery stores. Baltimore amended its general plan to include a goal that all residents should live within one and a half miles from a quality grocery store.[136] Through the use of its zoning powers, Baltimore was able to attract nineteen new grocery stores from 2000 to 2011.[137] Finally, even smaller cities have adopted zoning measures to help site grocery stores in their jurisdiction. The City of Santa Rosa, California, changed its zoning requirements in 2012 to allow grocery stores to locate in any commercial district without a conditional use permit—clearing a significant hurdle for developers in the land use entitlement process.[138] As these examples demonstrate, cities have identified the public health crisis that food deserts create and have responded by using their land use and zoning powers to create incentives for supermarkets to locate in these low-income neighborhoods.

4. Restricting Fast Food Restaurants and Liquor Stores

While cities have created more lenient zoning regulations to attract grocery stores, they have also limited the ability of fast food restaurants and liquor stores to locate within their boundaries.[139] Municipalities recognized the link between these types of establishments and obesity rates and sought to avoid a proliferation of them in their communities. Some cities banned fast food restaurants within their jurisdiction.[140] For example, in 1981, Concord, Massachusetts, banned all fast food restaurants and restaurants with drive-thru services.[141] Other cities banned all chain restaurants—whether they serve fast food or not—in designated areas or throughout their communities (though they almost always grandfathered in existing businesses as permissible nonconforming uses).[142] In 2008, Los Angeles implemented a one-year moratorium on new fast food restaurants in the South Los Angeles neighborhood[143] before banning the development of new

136. *See* Patricia E. Salkin & Amy Lavine, *Regional Foodsheds: Are Our Local Zoning and Land Use Regulations Healthy?*, 22 FORDHAM ENVTL. L. REV. 599, 612 (2011).

137. *See id.*

138. *See* Feldstein, *supra* note 133, at 483.

139. *See* Jim Smith, Note, *Encouraging the Growth of Urban Agriculture in Trenton and Newark Through Amendments to the Zoning Codes: A Proven Approach to Addressing the Persistence of Food Deserts*, 14 VT. J. ENVTL. L. 71, 72 (2012) (noting that many living in food deserts buy their food at convenience or liquor stores, neither of which generally have very healthy food options).

140. *See* Micah L. Berman, *From Health Care Reform to Public Health Reform*, 39 J. L. MED. & ETHICS 328, 335 (2011).

141. *See* Feldstein, *supra* note 133, at 476.

142. *See id.*

143. *See* Allyson C. Spacht, Note, *The Zoning Diet: Using Restrictive Zoning to Shrink American Waistlines*, 85 NOTRE DAME L. REV. 391, 392 (2009) (describing the moratorium).

fast food restaurants in low-income areas in 2011.[144] Other cities have created minimum distance requirements between fast food restaurants and schools to limit the density of fast food restaurants in their neighborhoods.[145]

Municipalities have also sought to limit the proliferation of liquor stores. After the 1992 Los Angeles civil unrest, residents and community groups circulated petitions opposing the rebuilding of more than 200 liquor stores that had been destroyed.[146] In particular, residents sought to require a conditional use permit—a discretionary approval that ensures compatibility with surrounding land uses—to rebuild each of the stores.[147] In response, the city required that owners seeking to rebuild their liquor stores meet specific conditions, such as guaranteeing additional security measures and limiting the amount of floor space dedicated to alcohol sales.[148] As a result, most of the liquor stores were not rebuilt.[149] Following the Los Angeles example, Sacramento and San Marino passed similar ordinances to quell the proliferation of liquor stores in their communities.[150] Other cities adopted other ordinances creating buffer zones around schools, limiting how close a liquor store could be to a school. Others restricted liquor stores' operations, mandating they maintain certain hours of operation, and keep the store well lit and free of litter and graffiti.[151] Other cities tried a dispersion approach: the City of Bell, California, implemented a law that required a minimum of 300 feet between each liquor store.[152]

While there are multiple reasons for these fast food and liquor store ordinances—including preserving neighborhood character or protecting local businesses—the health goals underlying them obviously play a role in their adoption, even when they are not always explicitly acknowledged.[153] In fact, the Los Angeles fast food moratorium in 2008 explicitly identified the desire to attract healthier food options such as grocery stores and sit-

---

144. *See* Emily M. Broad Lieb, *All (Food) Politics is Local: Increasing Food Access Through Local Government Action*, 7 HARV. L. & POL'Y REV. 321, 340 (2013) (detailing the city's subsequent ban).

145. *See* Feldstein, *supra* note 133, at 477.

146. *See* Marice Ashe et al., *Land Use Laws and Access to Tobacco, Alcohol, and Fast Food*, 35 J.L. MED. & ETHICS 60, 61 (2007).

147. *See* Shelley Ross Saxer, *"Down with the Demon Drink!:" Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 SANTA CLARA L. REV. 123, 158-59 (1994).

148. *See id.* at 159-60.

149. *See id.* at 160.

150. *See id.* at 164.

151. *See* Stair et al., *supra* note 115, at 56.

152. *See* Saxer, *supra* note 147, at 165.

153. *See* Christine Fry et. al., *Healthy Reform, Healthy Cities: Using Law and Policy to Reduce Obesity Rates in Underserved Communities*, 40 FORDHAM URB. L.J. 1265, 1266-67 (2013).

down restaurants to combat the detrimental health effects of over concentrated fast food restaurants in the southern portion of the city.[154] This example provides a largely unspoken, though clearly well-known concern for cities: to improve the health of its citizens, a city may need to more carefully regulate the fast food restaurants and liquor stores that contribute to unhealthy lifestyles.

5. *Other Innovative Land Use and Zoning Approaches to Health Policy*

In addition to employing traditional zoning and land use powers, some cities have experimented with innovative approaches to improving community health, such as promoting urban agriculture through their zoning codes. Urban agriculture is "the process of growing and distributing food and other edible products through plant cultivation and animal husbandry within and around city limits."[155] This broad term encompasses activities such as community gardens, backyard farming, and urban beekeeping.[156] Some cities view urban agriculture as part of the solution to food deserts because it promotes the availability of fresh foods in the communities in which the foods are grown and raised.[157] However, many cities' current zoning regulations impede urban agriculture by restricting livestock, urban gardens, the sale of farm products, and even the height of vegetation.[158]

In response, some cities have amended their zoning codes to encourage urban agriculture. For example, some local governments allow residents to keep chickens on their properties in order to provide a sustainable and affordable source of fresh eggs.[159] Baltimore amended its zoning to permit beekeeping so long as each hive is placed on a parcel of at least 2500 square feet.[160] Other cities allowing urban beekeeping addressed concerns regarding the potential disruption to neighbors by imposing setback requirements on hives.[161] Some cities have loosened their zoning restrictions to permit livestock in urban areas, though with distinct setback and minimum lot size requirements.[162]

---

154. *See* Spacht, *supra* note 143, at 393.

155. Elizabeth G. Berg, Comment, *Bringing Food Back Home: Revitalizing the Postindustrial American City Through State and Local Policies Promoting Urban Agriculture*, 92 OR. L. REV. 783, 784 (2014).

156. *See id.* at 784-85.

157. *See* Broad Leib, *supra* note 144, at 322, 332-33.

158. *See* Kate A. Voigt, Note, *Pigs in the Backyard or the Barnyard: Removing Zoning Impediments to Urban Agriculture*, 38 B.C. ENVTL AFF. L. REV. 537, 538 (2011); *see also* Berg, *supra* note 155, at 783, 806.

159. *See* Salkin & Lavine, *supra* note 136, at 620.

160. *See* Berg, *supra* note 155, at 813.

161. *See id*. (noting that setback requirements prescribe the distance that a home on the property must be away from the street).

162. *See* Salkin & Lavine, *supra* note 136, at 621.

Many municipalities have also sought to spur community gardens through changes to their zoning codes or their general plans. For example, the City of Glendale, California, adopted an ordinance that permitted community gardens in residential districts organized by homeowners' associations.[163] Glendale also permitted them by right in commercial and mixed-use districts, when run by non-profit organizations.[164] Similarly, Denver amended its zoning code to permit urban gardening, as well as commercial gardening, within all zoning districts.[165] Seattle also changed its zoning to allow community gardens in all of its zones.[166] Likewise, "Chicago amended its zoning ordinance to allow 'community gardens' up to 25,000 square feet" by right within residential zones and urban farms greater than 25,000 square feet in non-residential zones.[167] Detroit took a different approach, identifying vacant land to be used for community gardens as a goal in its general plan.[168]

As a consequence of these efforts to grow more sustainable, fresh food in their own communities, cities have also had to manage the food's sales and distribution. To do so, municipalities have reformed their zoning codes to permit street vendors, farmers' markets, and farm stands.[169] Portland, Oregon, relaxed its zoning restrictions on street vendors so that vendors can sell on any sidewalk within a commercial zone, as long as they comply with certain cart width requirements, maintain a minimum distance from building entrances, and obtain the permission of the building owners.[170] San Francisco now allows farmers' markets in city parks, subject to administrative approval.[171] Local governments have also loosened restrictions on farm stands. For example, Kansas City and Seattle allow farm stands with few restrictions, while Berkeley amended its zoning code to allow produce to be sold in residential areas as an accessory use.[172]

---

163. *See id.* at 615.

164. *See id.*

165. *See* Berg, *supra* note 155, at 811.

166. *See* Jim Smith, Note, *Encouraging the Growth of Urban Agriculture in Trenton and Newark Through Amendments to the Zoning Codes: A Proven Approach to Addressing the Persistence of Food Deserts*, 14 VT. J. ENVTL. L. 71, 85 (2012).

167. *See* Broad Leib, *supra* note 144, at 338.

168. *See* Berg, *supra* note 155, at 807.

169. See Broad Leib, *supra* note 144, at 335-38.

170. *See* Alfonso Morales & Gregg Kettles, *Healthy Food Outside: Farmers' Markets, Taco Trucks, and Sidewalk Fruit Vendors*, 26 J. CONTEMP. HEALTH L. & POL'Y 20, 34-35 (2009).

171. *See* Salkin & Lavine, *supra* note 136, at 619.

172. *See id.* at 618; Jeffrey P. LeJava & Michael J. Goonan, *Zoning and Land Use Planning*, 41 REAL EST. L.J. 216, 229-30 (2012) (noting that accessory uses are incidental uses to the primary permitted use allowed on a property).

These zoning reforms advanced local health policy goals beyond merely the growth and distribution of healthy foods in neighborhoods. Street vendors, farmers' markets, and farm stands enhance public health by promoting both healthy eating and physical activity.[173] Moreover, by allowing consumers to obtain fresh food at lower prices than traditional grocery stores, they address food affordability, a problem normally exacerbated by the food desert dilemma.[174]

III. IMPEDIMENTS TO LOCAL GOVERNMENT EFFORTS

While local government health policy innovation abounds, municipalities face a number of hurdles in employing their land use and general regulatory powers to affect such initiatives. Some of these impediments stem from policy restrictions. For example, some cities face space challenges when trying to site supermarkets in food deserts within their boundaries. Full-service supermarkets can require up to 150,000 square feet plus additional space for parking.[175] Therefore, finding suitable locations for grocery stores in urban areas is often difficult. In addition, many cities may also find that their general plans and zoning codes are outdated and need significant updating—not always a simple process—in order to advance some of the aforementioned initiatives.[176]

Local governments may also face political resistance to these reforms. Specifically, some residents may not believe that it is the appropriate role for their city to restrict food options through measures such as soda bans and zoning limitations for liquor stores and fast-food restaurants.[177] Indeed, opponents of this type of municipal action criticize the government for overreaching and acting as a "nanny state."[178] Resident resistance may also be exacerbated by the fact that obesity is a complex problem with various contributing factors—thus no one law or ordinance will necessarily produce the desired results.[179]

Yet the most significant impediments to local government efforts in health policy are legal ones: in particular, cities' limited powers as local

---

173. *See* Morales & Kettles, *supra* note 170, at 32 (noting that street vendors, farmers' markets, and farm stands promote physical activity because patrons walk to these food options).

174. *See* Loftus, *supra* note 129, at 1.

175. *See id.*

176. *See* Voigt, *supra* note 158, at 538.

177. *See* Graham M. Catlin, Comment, *A More Palatable Solution? Comparing the Viability of Smart Growth Statutes to Other Legislative Methods of Controlling the Obesity Epidemic*, 2007 WIS. L. REV. 1091, 1093 (2007).

178. *See* Price, *supra* note 72, at 358.

179. *See generally* Christian M. Gunneson, Note, *Why Fast Food Bans are the Wrong Solution to Address America's Obesity Problem and What Should Be Done Instead*, 15 QUINNIPIAC HEALTH L.J. 209, 210 (2012).

governments coupled with the strength of state preemption. Municipalities have long been recognized as "creatures of the state."[180] States thus create—and abolish—local governments and provide them with various powers if they so choose.[181] States generally follow one of two approaches to local government powers: Dillon's Rule or home rule. States that follow Dillon's Rule—approximately ten states do so—provide municipalities with a finite set of powers that are expressly delegated to them.[182] State home rule provisions delegate legislative authority for local matters to charter cities except for those areas reserved by or for the state.[183] Thus, cities in states that follow Dillon's Rule have more limited powers than those in home rule states.[184] Home rule states are usually categorized as either imperio home rule or legislative home rule.[185] In imperio home rule states, municipalities have authority to regulate matters of local concern, but less power to regulate in subjects of statewide interest.[186] Legislative home rule provides cities with all of the Tenth Amendment police powers delegated to their respective states, but the states reserve the right to preempt such local authority.[187] While legislative home rule cities have broader regulatory authority enabling them to adopt health policy ordinances, such action may have tenuous legal footing, because the state may preempt it.

Therefore, the greatest threat to local government experimentation and innovation is state preemption. State preemption of local laws can be either express or implied.[188] Express preemption occurs when states explicitly announce in their constitution or a statute that municipalities cannot legislate or regulate in a particular field because it is reserved for state legislation.[189] Implicit preemption occurs when state courts invalidate local laws, finding that the state intended to occupy a particular field or policy area despite the lack of explicit constitutional or statutory language suggesting such an

---

180. *See* City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923); *see also* Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907).

181. *See* Michael A. Lawrence, *Do "Creatures of the State" Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 VILL. L. REV. 93, 96, 100 (2002).

182. *See* Courtney Walmer, Note, *Governing Hydraulic Fracturing Through State-Local Dynamic Federalism: Lessons from a Florida Case Study*, 42 FLA. ST. U.L. REV. 867, 879 (2015); *see also* Diller, *supra* note 103, at 90.

183. *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1126 (2007).

184. *See id.* at 90.

185. *See id.*

186. *See id.*

187. *See id.*

188. *See* Patrick M. Steel, Note, *Obesity Regulation Under Home Rule: An Argument that Regulation by Local Governments is Superior to Administrative Agencies*, 37 CARDOZO L. REV. 1127, 1148 (2016).

189. *See id.*

intention.[190] Indeed, even in matters generally viewed as local affairs, state courts tend to side with the state over local governments in a preemption challenge.[191]

State preemption has become a tool used by business groups opposed to these new health policies to block or overturn such laws.[192] For example, after San Francisco adopted its "happy meal" ordinance, businesses were successful in lobbying the State of Arizona to pass a law prohibiting local governments from regulating incentive items to their customers—expressly preempting this area of law and policy.[193] Similarly, the State of Tennessee preempted municipal menu-disclosure laws after Davidson County passed one.[194] The State of Ohio also attempted to preempt municipal trans-fat bans after Cleveland adopted one in 2011.[195] The Ohio Restaurant Association lobbied the Ohio legislature to pass a statute expressly preempting local government regulation in this and other health policy areas, such as advertising practices and incentive item giveaways.[196] Cleveland challenged the state preemption as unconstitutional under the Ohio Constitution—which provides cities like Cleveland the ability to regulate in the interest of public health consistent with their police powers—and ultimately prevailed.[197] Nevertheless, the strength and specter of state preemption poses a significant challenge to local government efforts to regulate in the field of health policy.

CONCLUSION

Local governments' foray into health policy has demonstrated innovative approaches to combating obesity and other health-related concerns that the federal and state governments have not been successful in addressing. Indeed, anecdotal evidence suggests that these municipal ordinances are bringing about some of the desired results that cities hoped they would spur. For example, after San Francisco adopted its "happy meal" ban, McDonald's, Jack in the Box, and other fast food restaurants began to include healthier food options in kids' meals.[198] Equally important, this local government health policy experimentation influenced policy on the state and federal levels. For example, the local menu-labeling laws helped catalyze

---

190. *See generally* Diller, *supra* note 183, at 1126.

191. *See generally,* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337 (2009).

192. *See* Rutkow et al., *supra* note 69, at 364.

193. *See* Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 271-73 (2012).

194. *See* Banker, *supra* note 64, at 909.

195. *See* Rutkow et al., *supra* note 69, at 364-65.

196. *See id.* at 365.

197. *See id*. at 366.

198. *See* Etow, *supra* note 70, at 1536.

similar laws statewide in California, Maine, Massachusetts, and Oregon.[199] In addition, such local laws served as models for the menu-labeling requirements in the federal Patient Protection and Affordable Care Act.[200]

In these and other respects, local government laws aimed at health policy have been both noteworthy and successful. However, the threat of state preemption still looms large. In particular, as noted above, state preemption targeted cities' general regulatory powers—thus limiting cities' health policy efforts. The states' preemption focus may be due to the prevailing view that "land use is perhaps the quintessential local responsibility" and power.[201] Yet even in the land use sphere, some state governments have still preempted local governments with regard to certain locally undesirable land uses such as juvenile facilities and prisons.[202] These examples demonstrate that even in the land use sphere—which is viewed as largely sacrosanct for local governments[203]—cities' health policy efforts may be thwarted. State preemption efforts will likely determine whether this type of local government innovation in health policy can flourish—allowing cities to replace states as the laboratories of democracy that Justice Brandeis envisioned.

---

199. *See* Banker, *supra* note 64, at 908-09.

200. *See* Rutkow et al., *supra* note 69, at 357.

201. *See* Garnett, *supra* note 102, at 1205.

202. *See* Ilene S. Lieberman & Harry Morrison, Jr., *Warning: Municipal Home Rule is in Danger of Being Expressly Preempted By . . .* , 18 NOVA L. REV. 1437, 1445 n.60 (1994).

203. *See* Lyn Loyd Creswell, *Airport Policy in the United States: The Need for Accountability, Planning, and Leadership*, 19 TRANSP. L.J. 1, 35 (1990) (land use "is an almost sacrosanct local prerogative").