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Food System?*

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### Zoning and Land Use Controls: Beyond Agriculture

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# ZONING AND LAND USE CONTROLS: BEYOND AGRICULTURE

*Lisa M. Feldstein, J.D.*

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## ZONING AND LAND USE CONTROLS: BEYOND AGRICULTURE

*Lisa M. Feldstein, J.D.\**

### I. INTRODUCTION

If one were playing a word association game and were asked what comes to mind when the terms “food” and “land use” are given, chances are high that the response would be “agriculture.” Yet every stage in the food system, from being grown or raised through being consumed, is place-based. Put differently, everything that happens with our food system involves land use in some way. Even the acquisition of aquatically sourced foods requires a journey that begins from the shore, and yet it is rare to consider the profound ways in which our every interaction with the food system utilizes or determines the use of land. Zoning and other land use management tools have long affected the availability of food in urban communities, reinforcing or amplifying the creation of food deserts. Some jurisdictions have begun to recognize their power to direct food access through land use legislation, while others continue to treat such decisions as value-neutral.

This essay interrogates food law frameworks by using several examples of land use policies, rules, and laws in order to consider these questions: (1) To what extent has form determined function (land use law determined food access); (2) Is it appropriate for governments to use their land use authority to intervene in the retail food market; and (3) Given competing public policy considerations around this issue, should there be an expectation that food be treated similarly to housing, water, and other essentials in the “bundle of goods” in which government explicitly intervenes?

The essay has three major parts. The first, which comprises sections II, III, and IV, discusses, clarifies, and defines the essay’s framework and terminology. Sections V and VI present and discuss a variety of zoning ordinances for fast food and for grocery stores, which have been compiled from cities around the United States. Finally, Section VII interrogates and reflects upon those questions. The intent is not to provide authoritative answers to the questions posed, but rather to present some thoughts as a catalyst for further consideration of these issues.

### II. HOW WE THINK ABOUT FOOD AND LAND USE REGULATION—AGRICULTURE

Food and land are inextricably linked. After all, most of the food we consume is grown or raised on land. When food and land are mentioned together, the usual assumption is that the reference is to agricultural land. This is a reasonable assumption; a database search of *nytimes.com* found that the word “farmland” appeared approximately 700 times in the *New York Times* during 2012, while the term “urban agriculture” appeared approximately thirty times during the same

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period.<sup>1</sup> Those who study, advocate for, or are otherwise engaged in food systems work have seen the rise in public awareness about where food comes from, how it is grown and raised, and the dangers facing agricultural lands in the United States.

Yet, in reality, agricultural land supports only the beginning of the food cycle. Crops are grown and harvested on agricultural land. They are then transported, generally over land, to processing facilities. From there the food must be distributed—again, transported across land—to merchants who will sell the products in communities around the nation. Putting aside the obvious fact that transportation and processing facilities occupy land, it is important to consider that consumer access points—stores—also occupy land. It goes without saying that urban agriculture has captured the imaginations of urban Americans, and a lively discourse is taking place about how much land to devote to this endeavor, how much of a community's food needs it might be able to meet in this way, what impact urban agriculture has on real estate economies, etc.<sup>2</sup>

We are certainly aware of retail grocery venues; the word “grocery” appeared approximately 2,000 times in the *New York Times* during 2012.<sup>3</sup> Yet, when looking at food retail in urban settings, it can be difficult to think about it separately from the rest of the urban built environment. In context, supermarkets, grocery stores, and corner markets are components of the commercial landscape. They are not something to which one normally gives much independent thought, unless one is trying to find a quart of milk in an unfamiliar neighborhood. Yet, unlike some of the other commercial enterprises that comprise that landscape, grocery stores sell products that are essential for life. Their presence is vital to communities, and whether they are present—and what they are like when they are present—tells us a great deal about a neighborhood and how it is perceived by the locality and the companies that do business there.

To state the obvious: the selling of food is a commercial endeavor. Those who undertake this endeavor are profit-motivated. The perceived market viability of locations and store models are a major factor in the locational siting of grocery stores. As the grocery industry offers very low profit margins (typically one to two percent),<sup>4</sup> these decisions leave little space for error. However, municipal and impartial market studies have found, time and again, that the industry has repeatedly overlooked tens of millions of untapped dollars in low-income

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1. Articles Search, N.Y. TIMES, <http://www.nytimes.com/> (search “farmland” or “urban agriculture” using the search box; then modify the date range to Jan. 1, 2012 to Dec. 31, 2012; then select “Articles” under “Result Type”).

2. See, e.g., Eric Pryne, *When Less Is Greener*, SEATTLE TIMES, Feb. 10, 2013, at D1; Jillian Nolin, *Undercover Chickens*, VIRGINIAN-PILOT, Feb. 10, 2013, at E1, available at <http://www.highbeam.com/doc/1G1-318254936.html>; Jeffrey Betcher, *Updated! SF Urban Ag Approach Challenges Communities*, EXAMINER (June 22, 2012), <http://www.examiner.com/article/sf-urban-agriculture-ordinance-problematic-for-underserved-communities>. It should be noted that urban agriculture does not presently contribute significant amounts to the diets of America's urban residents, and is addressed only incidentally in this essay.

3. Articles Search, N.Y. TIMES, <http://www.nytimes.com/> (search “grocery” using the search box; then modify the date range to Jan. 1, 2012 to Dec. 31, 2012; then select “Articles” under “Result Type”).

4. FOOD MARKETING INSTITUTE, ACCESS TO HEALTHIER FOODS: OPPORTUNITIES AND CHALLENGES FOR FOOD RETAILERS IN UNDERSERVED AREAS 1 (2011), available at [http://www.fmi.org/docs/health-wellness-research-downloads/access\\_to\\_healthier\\_foods.pdf?sfvrsn=2](http://www.fmi.org/docs/health-wellness-research-downloads/access_to_healthier_foods.pdf?sfvrsn=2).

neighborhoods.<sup>5</sup> This seems irrational: Why, in a competitive market, would vendors ignore large, underserved populations?

While an in-depth discussion of this question is beyond the scope of this essay, possible reasons raised in the literature include analytical tools that are improperly calibrated for low-income neighborhoods, concerns about crime rates, racism, and a dearth of suitable development sites.<sup>6</sup> The last of these is directly related to land use, but the larger importance of this question is that the lack of retail groceries in low-income neighborhoods represents a failure of the free market, and government has a long history of intervening to correct market failures in distribution of and access to land-based resources (affordable housing, open space, public schools). With regard to the availability of retail food outlets in low-income communities, some of the constraints are the consequences of land use policies, and many of the means by which local governments can alter the food environment are similarly grounded in land use policies.

### III. FOCUS ON CITIES

This essay focuses on food and land use in urban environments. That rural and suburban populations must contend with substandard food environments is beyond debate; however, the histories and possibilities for addressing these environments are often dissimilar from those of cities. Moreover, much of the research that has been conducted around obesity and access to the components of healthy diets has targeted urban centers of poverty. This research has led to the development of the concept<sup>7</sup> of “food deserts”: places without ready access to healthful, affordable, and culturally appropriate foods. Clearly, the distance measures of “accessible” are

5. See generally Kameshwari Pothukuchi, *Attracting Supermarkets to Inner-City Neighborhoods: Economic Development Outside the Box*, 19 *ECON. DEV. Q.* 232, 233 (2005); *Grocery Gap Analysis*, SOCIAL COMPACT, [http://socialcompact.org/index.php/site/research/category/food\\_access/](http://socialcompact.org/index.php/site/research/category/food_access/) (last visited Feb 14, 2013).

6. See, e.g., LISA M. FELDSTEIN, RICK JACOBUS, & HANNAH BURTON LAURISON, CAL. DEP'T OF HEALTH SERVS., *ECONOMIC DEVELOPMENT AND REDEVELOPMENT: A TOOLKIT FOR BUILDING HEALTHY, VIBRANT COMMUNITIES* 7-13 (2007), available at <http://changelabsolutions.org/sites/default/files/documents/EcDevToolkit.pdf>; FOOD MARKETING INSTITUTE, *supra* note 4, at 5-9; MICHELE VER PLOEG ET AL., U.S. DEP'T OF AGRIC., AP-036, *ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD—MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES: REPORT TO CONGRESS* 39-50 (2009), available at [http://www.ers.usda.gov/media/242675/ap036\\_1\\_.pdf](http://www.ers.usda.gov/media/242675/ap036_1_.pdf); SARAH TREUHAFT & ALLISON KARPYN, POLICYLINK & THE FOOD TRUST, *THE GROCERY GAP: WHO HAS ACCESS TO HEALTHY FOOD AND WHY IT MATTERS* 11 (2010) available at <http://www.policylink.org/atf/cf/%7B97C6D565-BB43-406D-A6D5-ECA3BBF35AF0%7D/FINALGroceryGap.pdf>.

7. The use of the word “concept” is quite deliberate. There is no agreed upon definition of a food desert, and some activists and scholars challenge the idea that food deserts exist at all. See Samina Raja, Changxing Ma, & Pavan Yadav, *Beyond Food Deserts: Measuring and Mapping Racial Disparities in Neighborhood Food Environments*, 27 *J. PLAN. EDUC. & RES.* 469, 469 (2008) (“‘food deserts,’ . . . has been used rather loosely, in some instances referring to areas marked by an absence of supermarkets, in others to areas characterized by limited retail outlets that sell healthful foods.” (citations omitted)); PAULA TARNAPOL WHITACRE, PEGGY TSAI, & JANET MULLIGAN, INST. OF MED. & NAT'L RESEARCH COUNCIL, *THE PUBLIC HEALTH EFFECTS OF FOOD DESERTS: WORKSHOP SUMMARY* 7-9 (2009) available at [http://www.caction.org/research\\_reports/reports/PublicHealthEffects.pdf](http://www.caction.org/research_reports/reports/PublicHealthEffects.pdf). This debate is beyond the scope of this essay.

different in rural and urban contexts; a rural household may routinely travel many miles to access goods and services, while in an urban environment, a mile may be considered a significant distance to travel for the same purposes. More relevant to the instant topic, much of the jurisdictional attention to food deserts has been paid by cities. Thus, this essay focuses on cities.

Even within cities, there is a broad range of land uses devoted to food other than retail. For example, urban agriculture has captured the American imagination over the last five years, at scales ranging from a few pots of herbs on a balcony, to a backyard vegetable garden, to community gardens or pea patches, or even actual farms. Activists in some cities are working to replace (or graft onto) street trees with trees that produce edible fruit, and in some locales guerilla maps are being produced that show existing street trees from which edibles can be harvested.<sup>8</sup> Urban agriculture activist slogans include “Grow your own food: Every available piece of land must be cultivated.”<sup>9</sup>

Nonetheless, urban agriculture is an inefficient means for feeding people. Gardening for enjoyment is a popular pastime, and for those with knowledge and skill it can be an important means of dietary supplementation. However, for those without green thumbs, experience, or knowledge, gardening can take a great deal of time, energy, and money while producing little of the desired result. Additionally, while some urban farms are entering the commercial stream through urban farm stands or CSAs,<sup>10</sup> the scale is small and has little effect in the overall food environment.

Food processing and distribution are also components of the urban food environment. Large-scale food processing facilities have largely moved out of cities, relocating to places where land is cheaper, and loud, pungent uses are less subject to conflict with other uses. At the same time, smaller food processors—artisan makers of bread, salumi and jams, for example—are experiencing a renaissance, and in some places—particularly wealthier neighborhoods with a “foodie” culture—these businesses are thriving.<sup>11</sup>

Although not retail outlets and thus outside of the focus of this essay, food distribution is an important component of the food system and is constructed around the (wholesale) sale of food; it deserves a quick mention here. Food distribution centers remain a land use found in cities. In the past, this was a straightforward function of where farmers, ranchers, and fishermen found the

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8. Caroline Chen, *Pick Summer Fruit from the Trees Outside Your Door*, SF WEEKLY BLOGS (July 11, 2011, 1:31 PM), [http://blogs.sfweekly.com/foodie/2011/07/enjoy\\_free\\_summer\\_fruit\\_from\\_t.php](http://blogs.sfweekly.com/foodie/2011/07/enjoy_free_summer_fruit_from_t.php); Lonny Shavelson, *Guerilla Grafters Bring Forbidden Fruit Back to City Trees*, NPR'S THE SALT BLOG (Apr. 7, 2012, 7:00 AM), <http://www.npr.org/blogs/thesalt/2012/04/07/150142001/guerrilla-grafters-bring-forbidden-fruit-back-to-city-trees>.

9. Poster, Abram Games, *Grow Your Own Food* (1942) available at <http://collections.vam.ac.uk/item/O101087/grow-your-own-food-poster-games-abram/>.

10. CSA stands for Community Supported Agriculture, wherein the farmer sells “shares” of farm product; the buyer is purchasing a growing season’s worth of produce up-front, to be received in weekly distributions. Suzanne DeMuth, *Defining Community Supported Agriculture*, U.S. DEP’T AGRIC. NAT’L AGRIC. LIBR. (Sept. 1993), <http://www.nal.usda.gov/afsic/pubs/csa/csadef.shtml>.

11. Dorothy Kalins et al., *The Taste Makers*, NEWSWEEK, Sept. 26, 2005, at 48; BROOKLYN CHAMBER OF COMMERCE, BROOKLYN LABOR MARKET REVIEW (Winter 2012), available at [http://fiscalpolicy.org/wp-content/uploads/2012/12/BrooklynLaborMarketReview\\_FPI\\_Winter2012.pdf](http://fiscalpolicy.org/wp-content/uploads/2012/12/BrooklynLaborMarketReview_FPI_Winter2012.pdf).

largest concentration of buyers for their products. Today, this is still the case, but much of the viability of these terminal markets lies in their shipping, trucking, and air capacity, allowing produce delivered to these distribution centers to arrive from or be sent to other parts of the nation or even the world. In addition, much of the distribution of foods occurs in one of two models, referred to here as “vertical” and “horizontal.” Horizontal distribution markets work with food that comes from a large number of growers and/or processors and is sold to grocers, restaurants, and so on. These are the distributors found in cities today. Large grocery chains, such as Wal-Mart, Kroger’s, and Safeway utilize a distribution model this author terms “vertical.”<sup>12</sup> Corporations like these contract with growers or processors of raw materials, processing the food in corporate-owned facilities in the latter instance. The corporation then acts as the central distributor for its retail outlets. These distribution centers are generally outside of major cities, both because land costs are lower and because densely trafficked city streets are less likely to slow down the business’s ability to maximize delivery time. Moreover, most chain grocery stores are located in suburbs, making a central city location less efficient than it would be if the stores were located within city limits.<sup>13</sup>

The sale of food at the retail level is the point at which most Americans interact with the food system. It is these businesses that are part of the everyday lives and landscapes of urban Americans and their cities. According to the Food Marketing Institute, at the end of 2011 (most recent figures available), there were 36,569 U.S. supermarkets with \$2 million or more in annual sales; the total supermarket sales for 2011 were nearly \$600 billion.<sup>14</sup> At the end of 2010, there were 579,102 restaurants in the U.S.; of these, 46% were chain restaurants.<sup>15</sup> It is these businesses—retail grocery outlets and restaurants—that are the most frequent targets of, or are most affected by, land use regulation in cities, and they are the basis for the examples below.

#### IV. LAND USE REGULATORY TOOLS USED IN URBAN AREAS

The policy and regulatory mechanisms utilized with the net effect of siting food access locations in localities can be broadly classified into four categories: (1) General/Comprehensive/Master Plans; (2) Area/Specific/Community Plans; (3)

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12. See The Gale Group, Inc., *Grocery Stores Market Report*, HIGHBEAM BUS., <http://business.highbeam.com/industry-reports/retail/grocery-stores> (last visited Mar. 18, 2013); ED BOLEN & KENNETH HECHT, CAL. FOOD POLICY ADVOCATES, NEIGHBORHOOD GROCERIES: NEW ACCESS TO HEALTHY FOOD IN LOW-INCOME COMMUNITIES 37-38 (2003) available at <http://healthycornerstores.org/wp-content/uploads/resources/CFPAreport-NeighborhoodGroceries.pdf>; TREUHAF & KARPYN, *supra* note 6, at 11.

13. See Pothukuchi, *supra* note 5; TREUHAF & KARPYN, *supra* note 6.

14. *Supermarket Facts*, FOOD MARKETING INST., <http://www.fmi.org/research-resources/supermarket-facts> (last visited Feb. 14, 2013). There is no accepted definition for what constitutes a “supermarket.” The Food Marketing Institute has defined the following store formats, based on size, annual sales, and merchandise: traditional supermarket, fresh format, superstore, warehouse store, super warehouse, limited-assortment store, other (small corner and convenience stores), wholesale club, supercenter, dollar store, drug store, mass merchandiser, and military commissary. See *id.*

15. Alex Mindlin, *A Steady Decline in the Number of Restaurants*, N.Y. TIMES, Feb. 21, 2011, at B2, available at [http://www.nytimes.com/2011/02/21/business/21drill.html?\\_r=0](http://www.nytimes.com/2011/02/21/business/21drill.html?_r=0).

Zoning; and (4) Planned Unit Developments.

*General plans*, also known as *comprehensive plans* or *master plans*, are policy documents. A general plan is "the official statement of a municipal legislative body which sets forth its major policies concerning desirable future physical development . . . ."<sup>16</sup> States vary widely in their use of and requirements for local governments to develop such plans. In some states, they are mandatory policy documents, and all subsequent zoning and development must be consistent with the policies of the general plan; in others, they are optional documents and may or may not have consistency requirements.

*Area plans*, *specific plans*, and *community plans* are terms that are used in different places to mean different things. They can be more fine-grained versions of comprehensive plans that are geographically specific, or they can deal with specific issues such as community character. They are sometimes used interchangeably. In some states, one or more of the terms may have a statutory definition. This essay does not discuss these tools in detail, but because there are references to them, it is important to acknowledge the lack of specificity of this terminology.

*Zoning* is the primary tool utilized to implement land use policy. Zoning regulates the use of property in a coherent and articulable manner by dividing a municipality into districts, each of which has permissible and impermissible activities and uses, as well as constraints on the size, location, and positioning of structures. The purpose of zoning is to create orderly growth and change. Virtually every jurisdiction in the United States utilizes some form of zoning. Houston, Texas is the largest and most notorious U.S. example of a city without zoning. However, even Houston regulates land, including characteristics that are normally covered in zoning codes:

The city of Houston does not have zoning but development is governed by codes that address how property can be subdivided. The City codes do not address land use. . . . The Department checks subdivision plats for the proper subdivision of land and for adequate street or right-of-way, building lines and for compliance with Chapter 42, the City's land development ordinance. Development site plans are checked for compliance with regulations that include parking, tree and shrub requirements, setbacks, and access.<sup>17</sup>

The most common type of zoning is Euclidian zoning, named for *Village of Euclid, Ohio v. Ambler Realty Co.*,<sup>18</sup> which features strictly separated uses: Single-family housing, multi-family housing, commercial, industrial, etc. Some jurisdictions permit mixed uses in some or all areas, while others utilize a newer zoning approach known as form-based codes.<sup>19</sup> Whatever scheme is used, the

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16. T.J. KENT, JR., *THE URBAN GENERAL PLAN* 18 (1964).

17. *Development Regulations*, THE CITY OF HOUSTON, [http://www.houstontx.gov/planning/DevelopRegs/dev\\_regs\\_links.html](http://www.houstontx.gov/planning/DevelopRegs/dev_regs_links.html) (last visited Feb. 4, 2013).

18. 272 U.S. 365 (1926).

19. Form-based codes broadly rely on the concept that function follows form: that is, a form-based zoning code focuses on the buildings, rather than the uses. If built environment parameters are clearly developed, then that environment will attract and support uses that can operate within those parameters, excluding those that do not. See *Form-based codes: Implementing Smart Growth*, LOCAL GOV'T COMM'N, [http://www.lgc.org/freepub/docs/community\\_design/fact\\_sheets/form\\_based\\_codes.pdf](http://www.lgc.org/freepub/docs/community_design/fact_sheets/form_based_codes.pdf) (last



authority for zoning is granted under the police power, which gives states the authority to enact regulations to secure the health, safety, morals, and welfare of the community.<sup>20</sup> In the case of Euclidian zoning, the welfare of the public is understood to be protected through the separation of uses deemed incompatible with one another.<sup>21</sup>

Finally, *Planned Unit Developments*<sup>22</sup> (PUDs) are used with increasing frequency. This method of planning combines regulation with a development plan by looking at an area (anywhere from a few acres to hundreds of acres in size) and planning, in detail, what will be located where. The advantage is that the opportunities presented by large-scale development can be maximized, and the land can be best utilized to meet the needs of the occupants. Thus, rather than determining that each housing parcel must measure *x* by *y*, and each house must be set *z* feet back from the front lot line, larger parcels might be created on corners for apartment buildings, and commercial and community spaces can be scattered throughout. For developers seeking to undertake large-scale developments, PUDs can be advantageous in that many decisions are made up-front, and the regulatory (land use) entitlements are granted simultaneously with the development entitlements. Local governments gain the efficiencies of this streamlined process,

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visited Mar. 18, 2013) (“These codes concentrate first on the visual aspect of development: building height and bulk, façade treatments, the location of parking, and the relationship of the buildings to the street and to one another. Simply put, form-based codes emphasize the appearance and qualities of the public realm, the places created by buildings.”).

Form-based codes place a primary emphasis on building type, dimensions, parking location and façade features, and less emphasis on uses. They stress the appearance of the streetscape, or public realm, over long lists of different use types. These codes have the following characteristics:

- Zoning Districts—Form-based codes are defined around districts, neighborhoods and corridors where conventional zoning districts may bear no relationship to the transportation framework or the larger area.
- Regulatory Focus—Form-based codes de-emphasize density and use regulation in favor of rules for building form. They recognize that uses may change over time, but the building will endure.
- Uses—Form-based codes emphasize mixed use and a mix of housing types to bring destinations into close proximity to housing and provide housing choices to meet many individuals’ needs at different times in their lives.
- Design—Greater attention is given to streetscape and the design of the public realm, and the role of individual buildings in shaping the public realm. Form-based codes recognize how critical these public spaces are to defining and creating a “place.”
- Public Participation—A design-focused public participation process is essential to assure thorough discussion of land use issues as the code is created. This helps reduce conflict, misunderstanding and the need for hearings as individual projects are reviewed.

*Id.*

Form-based codes allow for shorter zoning codes written in more universally accessible language and, unlike Euclidian codes, easily accommodate mixed uses. Form-based codes rarely work for entire cities since there are often legitimate reasons for isolating such uses as heavy industrial, but for downtown areas they can be very effective. *Id.*

20. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 745, 781, 793 (2007); *see also* U.S. CONST. amend. X.

21. *See generally Village of Euclid*, 272 U.S. at 390-91.

22. Planned Unit Developments are also referred to as Planned Area Developments, Planned Development Zoning, Planned Unit Districts, Planned Unit Residential Developments, etc. *See* Michael Murphy & Joseph Stinson, *Planned Unit Development*, MUN. RES. & SERV. CENTER WASH., <http://www.mrsc.org/subjects/planning/pud.aspx> (last visited Mar. 18, 2013).

as well as the opportunity to ensure that any desired community benefits are included in the PUD. In rapidly growing states with extensive undeveloped lands, such as Colorado, where PUDs are described in a state statute as “a type of customized zoning district,”<sup>23</sup> land regulation through planned unit development may be utilized more consistently than zoning.<sup>24</sup>

This essay focuses on local—municipal and county—regulation. It is important to note, however, that when considering the transferability of the laws and regulations discussed herein, whether a jurisdiction is located in a Home Rule state or a Dillon’s Rule state may be an important factor.

Briefly, the local jurisdictions of Home Rule states, which are the minority, may enact any laws and regulations addressing any issue that is not expressly retained within the state’s regulatory power. In the roughly thirty-one Dillon’s Rule states,<sup>25</sup> localities are estopped from possessing any power not expressly granted by the state. Thus, whether a local jurisdiction has the authority to enact some of the regulatory tools discussed herein may be subject to the specific powers granted to the locality by the state.

### V. THREE QUESTIONS

As discussed in the Introduction, this essay considers three questions: (1) To what extent has form determined function; that is, to what extent has land use law determined food access? (2) Is it appropriate for governments to use their land use authority to intervene in the retail food market? (3) Given competing public policy considerations around this issue, should there be an expectation that food be treated similarly to housing, water, and other essentials in the “bundle of goods” in which government explicitly intervenes?

Rather than discuss these questions as abstract theory, examples are provided to concretize the context of the discussion of the questions. These examples address fast food establishments, as well as grocery stores (large and small), from the perspective of land use policy.

### VI. FAST FOOD ESTABLISHMENTS

Fast food establishments have been subject to scrutiny for decades. From highly publicized incidents of unsavory contaminants in the products, to living wage concerns, to the linkages asserted between fast food and the obesity epidemic, the industry is often under the microscopes of media, government, and science.<sup>26</sup>

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23. MODEL LAND USE CODE FOR COLO. CNTYS. § 6-103 (2008).

24. Interview with James van Hemert, Executive Director, Rocky Mountain Land Institute, in Denver, Colo. (July 25, 2006).

25. JESSE J. RICHARDSON, JR., MEGHAN ZIMMERMAN GOUGH, & ROBERT PUENTES, IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON’S RULE ON GROWTH MANAGEMENT 17-18 (2003) available at <http://www.brookings.edu/~media/research/files/reports/2003/1/01metropolitanpolicy%20richardson/dillonsrule.pdf>. The Brookings Institution classifies thirty-one states as Dillon’s Rule states, ten as Home Rule states, and eight as hybrids. Florida’s status is “unclear.” *Id.* at 17-18, 41-46.

26. The Center for Science in the Public Interest, a central actor in the debate, analyzes the nutritional content of fast foods and advocates for menu labeling. See *Menu Labeling*, CENTER FOR SCIENCE IN THE PUB. INT., <http://www.cspinet.org/menulabeling/> (last visited Mar. 18, 2013). In 2010 the federal

As the obesity epidemic has intensified, local governments have sought to restrict the reach of these businesses. Some efforts, such as San Francisco's 2010 legislation to ban the giving away of toys with fast food meals that did not meet certain nutritional standards,<sup>27</sup> have invited angry accusations of a "nanny state."<sup>28</sup>

There are, however, an increasing number of jurisdictions that have banned the establishment of new fast food restaurants within their borders.<sup>29</sup> Such ordinances generally grandfather in existing businesses; the prospect of lawsuits being filed against jurisdictions that have sunsetted these businesses is usually too expensive and too controversial.

There are numerous approaches to limiting fast food restaurants. Concord, Massachusetts, banned all fast food and drive-in restaurants in 1981.<sup>30</sup> In other communities, bans on or conditional use requirements<sup>31</sup> for "formula retail" stores (chain stores) and/or formula restaurants prohibit or restrict fast food in all or part of a city.<sup>32</sup> These bans are sometimes enacted to maintain community character,

government passed a menu labeling law as part of the Patient Protection and Affordable Care Act. *See* 21 U.S.C. § 343(q)(5) (2010). California has had menu labeling provisions since 2008. *See California First State in Nation to Pass Menu Labeling Law*, CENTER FOR SCI. IN THE PUB. INT., <http://www.cspinet.org/new/200809301.html> (last visited Mar. 18, 2013). The Yale Rudd Center for Food Policy & Obesity researches and advocates for limits on the marketing of unhealthy foods, especially to children. *See generally* YALE RUDD CENTER FOR FOOD POL'Y & OBESITY, [http://www.yaleruddcenter.org/what\\_we\\_do.aspx?id=409](http://www.yaleruddcenter.org/what_we_do.aspx?id=409) (last visited Mar. 18, 2013). Most recently, Mayor Michael Bloomberg's attempt to limit the size of soft drinks sold in New York City restaurants to sixteen ounces has refocused attention on governmental actions to change the food environment. *See* Michael M. Grynbaum, *New York Plans to Ban Sale of Big Sizes of Sugary Drinks*, N.Y. TIMES, May 30, 2010, <http://www.nytimes.com/2012/05/31/nyregion/bloomberg-plans-a-ban-on-large-sugared-drinks.html>.

27. S.F., CAL., HEALTH CODE §§ 471.1-471.8 (2010).

28. *See San Francisco Happy Meal Toy Ban Takes Effect, Sidestepped By McDonald's*, HUFFINGTON POST, Nov. 30, 2011, [http://www.huffingtonpost.com/2011/11/30/san-francisco-happy-meal-ban\\_n\\_1121186.html](http://www.huffingtonpost.com/2011/11/30/san-francisco-happy-meal-ban_n_1121186.html); Jeff Stier, *The Happy Meal Ban Flops*, NAT'L REV., Dec. 1, 2011, <http://www.nationalreview.com/articles/284509/happy-meal-ban-flops-jeff-stier>.

29. *See* Barbara Feiner, *Los Angeles City Council Halts Development of Fast-Food Restaurants in Socioeconomically Disadvantaged Parts of Community*, ORGANIC AUTHORITY, July 30, 2008, <http://www.organicauthority.com/blog/health/los-angeles-city-council-halts-development-of-fast-food-restaurants-in-socioeconomically-disadvantaged-parts-of-community/>; Manny Fernandez, *Pros and Cons of a Zoning Diet: Fighting Obesity by Limiting Fast-Food Restaurants*, N.Y. TIMES (Sept. 24, 2006), <http://www.nytimes.com/2006/09/24/nyregion/24fast.html>.

30. CONCORD, MASS., ZONING BYLAW § 4.7.1 (2011).

31. Consideration of Conditional Use is a discretionary act that allows a local or county jurisdiction to consider special uses which may be essential or desirable to a particular community, but which are not allowed as a matter of right within a zoning district, through a public hearing process. A conditional use permitting process can provide flexibility within a zoning ordinance. Another traditional purpose of the conditional use permit is to enable a municipality to control certain uses which could have detrimental effects on the community. *See* *Neighborhood Action Grp. v. Cnty. of Calaveras*, 156 Cal. App. 3d 1176, 1183-84 (Cal. Dist. Ct. App. 1984). The conditional use process also allows specific conditions to be attached to the approval of a use, so long as those conditions are rationally related to the use. Common examples of conditions include limits on hours of business or on the playing of live music so as not to disturb neighbors. *See, e.g., The Planner's Training Series: The Conditional Use Permit*, ST. CAL. GOVERNOR'S OFF. PLAN. & RES. (Aug. 1997), <http://ceres.ca.gov/planning/cup/condition.htm>.

32. These include Coronado, CA (limiting number, location, and operation to maintain community character), Carmel-by-the-Sea (restrictions and bans by zoning district, to maintain community character), Port Jefferson, NY (prohibited in select districts, to maintain community character), and McCall, ID (limit as a percentage of total "like" businesses in town). The rationale is unknown. For

especially in historic downtowns or other such attractions,<sup>33</sup> but other jurisdictions have enacted formula retail restrictions as a means of protecting local businesses from competition from multinational corporations,<sup>34</sup> which in turn keeps money circulating through the local economy. In 1978, Detroit limited the density of fast food businesses by requiring a minimum distance of 500 feet between such restaurants and the nearest point of an elementary, junior high, or senior high school.<sup>35</sup> The rationales included concerns about truancy and school delinquency, litter, and noise. Health concerns included exposure to “highly processed, minimally nutritious foods associated with unhealthy diets and air pollution from cars associated with asthma.”<sup>36</sup>

In 1978, health was a decidedly uncommon rationale for restaurant zoning restrictions: Detroit was decades ahead of its time. Today, concerns about obesity and fast food oversaturation of low-income neighborhoods catalyze many local efforts to restrict the density and location of fast food restaurants. Besides such non-zoning strategies as requiring nutritional information be posted in all restaurants, or disallowing toy giveaways, jurisdictions have relied on health rationales in utilizing the following land use-based strategies:

- Limiting or disallowing drive-thrus;
- Limiting the density or location of fast food restaurants;
- Subjecting fast food restaurants to higher levels of scrutiny than other businesses (such as requiring conditional use permits); and
- Requiring healthy menu options as a condition of obtaining a building permit.

The rational bases for limiting drive-thru include the hazard to pedestrians imposed by the constant cross-sidewalk traffic generated by drive-thrus and the air pollution caused by lines of idling cars. Advocates also mention the inherent unhealthfulness of sitting in one’s car for hours—drive-thru service means one needn’t so much as park and walk into the restaurant—and concerns about distracted drivers who are trying to eat a burger, drink a soda, and open a ketchup packet while driving. These arguments are not seen in the rationales given for

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additional information on these and other formula retail restrictions, see *Formula Business Restrictions*, INST. LOCAL SELF-RELIANCE (Dec. 1, 2008), <http://www.ilsr.org/rule/formula-business-restrictions/>.

33. See, e.g., YORK, ME., ZONING ORDINANCE, art. 4.1.1-.1.4 (2007); see also YORK, ME., COMPREHENSIVE PLAN UPDATE VOLUME I, art. 3.4 (2011) (explaining that the ban on formula restaurants and fast food restaurants was related to the town’s desire to “maintain [its] historic character” and for new businesses to “respect the scale and historic building patterns of the area”).

34. See, e.g., S.F., CAL., PLANNING CODE § 703.3(a)(6) (2013) (“Formula retail businesses can have a competitive advantage over independent operators because they are typically better capitalized and can absorb larger startup costs, pay more for lease space, and commit to longer lease contracts. This can put pressure on existing businesses and potentially price out new startup independent businesses.”).

35. See DETROIT, MICH., ZONING ORDINANCE § 61-12-91 (2012); see also *ENACT Local Policy Database*, STRATEGIC ALLIANCE (May 8, 2008), [http://eatbettermovemore.org/sa/policies/policy\\_detail.php?s\\_Search=detroit&policyID=54](http://eatbettermovemore.org/sa/policies/policy_detail.php?s_Search=detroit&policyID=54).

36. Nicky Bassford, Lark Galloway-Gilliam, Gwendolyn Flynn, & Breanna Nicole Morrison, *Fast Food Restaurant Report: Promoting Healthy Dining in South Los Angeles*, Community Health Council, at 19 (2011); see also *ENACT Local Policy Database*, *supra* note 35.

invoking the police power to change drive-thru zoning, however, as they are less firmly grounded in traditional land use concerns and are more likely to be challenged.

Advocates are less vocal about another fact: Drive-thru business comprises approximately fifty to seventy percent of the \$200 billion in annual fast food sales.<sup>37</sup> New franchises, faced with stiff competition from existing businesses and the prospect of sales opportunities equaling less than half those of their competitors, are far less likely to seek to open in locales with such restrictions. For health departments, planning departments, and local advocacy groups seeking to reduce the density of fast food restaurants, eliminating or restricting drive-thrus can be a very effective option.

Another concern about fast food venues that can be addressed by zoning is their disproportionate impact on low-income communities, especially low-income communities of color. For example, the Environmental Systems Research Institute (better known as ESRI) Business Analyst Online found that three predominantly black and low-income South Los Angeles Community Plan areas that were under consideration for a fast food moratorium (and subsequent ban) had 4.97 limited-service restaurants per square mile and 0.44 limited-service restaurants for every full-service restaurant. By way of contrast, the more affluent and predominantly white West Los Angeles community had only 4.13 limited-service restaurants<sup>38</sup> per square mile and 0.39 limited-service restaurants for every full-service restaurant.<sup>39</sup> These differences sound insignificant until the numbers of restaurants they represent are explicated:

Restaurants	South LA	West LA
Limited Service Restaurants	259 or 30%	354 or 28%
Full Service Restaurants	592 or 70%	906 or 72%
Ratio Limited Service/Sq. Mile	4.97	4.13
Ratio Limited Service/Full Service	0.44	0.39

Presented in this way, one can observe that while West Los Angeles has about three full service restaurants for every limited service restaurant, the South Los Angeles ratio runs closer to two full service restaurants for every limited service restaurant.

Framed variously as an environmental justice, civil rights, and health equity issue, utilizing zoning to promote more equitable built environments in low- and higher-income neighborhoods has found broad support amongst advocates as well as public health and planning professionals. Thus, stakeholders in South Los Angeles utilized data about obesity and obesity-related illness, the density of fast

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37. Sam Oches, *2012 QSR Drive-Thru Study: How the Best Drive-Thru Operations in the Industry Make the Wheels Go 'Round.*, QSR MAGAZINE (Oct. 2012), <http://www.qsrmagazine.com/reports/2012-qsr-drive-thru-study>.

38. "Limited Service Restaurant" is the term used by the U.S. Census and the NCAIS system, more descriptive than the term "Fast Food." At Limited Service establishments, patrons generally order or select items and pay before eating. Food and drink may be consumed on premises, taken out, or delivered to customers' locations.

39. NICKY BASSFORD ET AL., CMTY. HEALTH COUNCILS, INC., *FAST FOOD RESTAURANT REPORT: PROMOTING HEALTHY DINING IN SOUTH LOS ANGELES* 7 (2011).

food establishments, best practices from other cities, and context-sensitive solutions to draft a zoning code revision that would limit the siting of new fast food restaurants in the identified districts.<sup>40</sup> The density of fast food establishments was especially damning: community-based research done to confirm the ESRI data found that the data sets used by ESRI significantly undercounted the density of fast food restaurants in the selected corridors. A community-based study found that in two South Los Angeles neighborhoods and a third neighborhood in nearby Central Los Angeles, fast food and carry-out restaurants constitute over fifty percent of all restaurants, a figure higher than the thirty percent found using the ESRI database.<sup>41</sup> In another study, in which researchers simply walked a 0.2-mile stretch of South Figueroa Street, they counted sixteen fast food establishments.<sup>42</sup>

To summarize, fast food establishments are frequently the subject of zoning regulations. Some of these regulations address issues that are traditional uses of land regulations, such as preservation of community character, diversity and density of businesses, and keeping uses perceived as unhealthy or immoral away from schools. What is unusual in the evolution of zoning fast food is that the health, welfare, and morals being addressed are obesity, the pedestrian risk presented by driveways, inequitable neighborhood outcomes, and the temptation of nutritionally subpar food.

## VII. GROCERY STORES

Unlike fast food establishments, which are widely perceived as adding little of value to communities, there is a broad consensus that access to grocery stores selling fresh, reasonably priced, healthy foods in a clean environment is beneficial. In fact, the food justice movement has put as much effort into bringing grocery stores into underserved communities as it has working to get unhealthy options out of the same neighborhoods. Public officials are in substantial agreement with community members and public health practitioners: grocery stores are an important component of complete communities, as necessary as schools and clinics.

It is thus surprising—even shocking—to find zoning ordinances that inhibit access to healthy food. Yet they do exist. The following code sections, from Fresno, California, are offered in their entirety:

SEC. 12-232. – “C-L” LIMITED NEIGHBORHOOD SHOPPING CENTER DISTRICT.

The “C-L” District is intended to serve as planned shopping centers providing for and allowing less intense commercial uses than the “C-1” District. The stores are intended to fit into the residential pattern of development and create no architectural or traffic conflicts. (Added Ord. 78-17, § 3, eff. 3-10-78).

SEC. 12-232.1. - USES PERMITTED.

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40. Andrea Misako Azuma, Susan Gilliland, Mark Vallianatos, & Robert Gottlieb, *Food Access, Availability, and Affordability in 3 Los Angeles Communities*, CENTER DISEASE CONTROL & PREVENTION, (Oct. 25, 2011), [http://www.cdc.gov/pcd/issues/2010/mar/08\\_0232.htm](http://www.cdc.gov/pcd/issues/2010/mar/08_0232.htm).

41. ANDREA AZUMA, *FOOD ACCESS IN CENTRAL AND SOUTH LOS ANGELES: MAPPING INJUSTICE*, AGENDA FOR ACTION 4-5 (2007) available at [http://scholar.oxxy.edu/cgi/viewcontent.cgi?article=1382&context=uep\\_faculty](http://scholar.oxxy.edu/cgi/viewcontent.cgi?article=1382&context=uep_faculty).

42 Bassford et al., *supra* note 36, at 8-9.

A. The uses enumerated in Section 12-232.1-B shall be permitted in the "C-L" District, plus such other uses as the Director may deem to be similar and not more obnoxious or detrimental to the public health, safety, and welfare as listed in Section 12-408-E. All uses shall be subject to the property development standards set forth in Section 12-232.4 and Site Plan Review, Section 12-406.

- B. 1. Antique shop;
- 2. Art gallery;
- 3. Artist studio;
- 4. Book store;
- 5. Clothing store;
- 6. *Confectionery*;
- 7. Dry goods;
- 8. Florist and plant shop;
- 9. Furrier;
- 10. Gift shop;
- 11. Interior decorating;
- 12. Jewelry store;
- 13. Libraries;
- 14. Offices:
  - (a) Business;
  - (b) Medical;
  - (c) Professional;
- 15. Photographic supplies;
- 16. Shoe store;
- 17. Signs subject to the provisions of Section 12-216.5-K;
- 18. Stamp and coin broker;
- 19. Temporary or permanent telephone booths;
- 20. Tobacco products.

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SEC. 12-232.2. - USES PERMITTED SUBJECT TO CONDITIONAL USE PERMIT.

A. The uses enumerated in Section 12-232.2-B shall be permitted subject to a Conditional Use Permit as provided for in Section 12-304. All such uses shall be integrated into the design of the complex and shall not provide drive-through capability.

B. Uses permitted subject to a Conditional Use Permit:

- 1. *Alcohol, the retail sale of, for on-site consumption* pursuant to Sections 12-304-B-24 and 12-326, as applicable.
- 2. *Bakery goods, retail sales only*;
- 3. Banks and savings and loan associations;
- 4. *Banquet Halls*;
- 5. Barbershop;
- 6. Beauty shop;
- 7. Chapels;
- 8. *Delicatessen*;
- 9. Hobby shop, retail sales only;
- 10. *Ice cream*;
- 11. *Restaurants (with or without alcoholic beverages)*;
- 12. Shoe repair shops;
- 13. *Soft drink fountain*;
- 14. Prescription pharmacy.

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SEC. 12-232.3. - USES EXPRESSLY PROHIBITED.

The uses enumerated in Section 12-232.3-B are expressly prohibited in the “C-L” District.

B. 1. Advertising Structure;

1.5. Alcohol, the retail sale of, except as provided in Section 12-232.2-B above.

2. Bicycle shop;

3. *Cafeteria*;

4. *Fruit and vegetable store*;

5. Furniture store;

6. *Grocery store*;

7. Hardware store;

8. Laundry, self-service;

9. *Meat market*;

10. Music and dance instruction;

11. Plant nursery;

12. Photograph store, drive through;

13. Radio and television sales and service;

14. Sporting goods;

15. *Super drug store*;

16. *Supermarket*;

17. Variety store.<sup>43</sup>

Consider: This zoning ordinance specifically identifies uses that are allowed as of right, are allowed subject to conditional use permitting, and are expressly prohibited in districts designated by Fresno as “C-L.” As stated in the ordinance, C-L Districts are intended to serve as planned shopping centers with stores that are intended to fit into the residential pattern of development. In other words, these are neighborhood shopping districts. Such zoning districts are not intended to feature destination, large-format stores such as large supermarkets or department stores. Rather they are small scale, perhaps a strip mall or a block of small stores where residents can run local errands without going to a large mall. The sort of place where one might go to pick up a quart of milk on the way home from work, or perhaps drop the kids off for an ice cream cone while running to the bank. Yet many of the reasons one might patronize such a shopping district—to pick up that milk, or a forgotten item for the evening meal—are illegal to sell within this zone. Within neighborhood commercial zones established under this section of the code *it is illegal to sell the components of a healthy diet*. In the instant case, the city of Fresno legally requires that these neighborhood commercial zones be kept as food deserts.

It is difficult to know what to make of this ordinance. The author has been tracking it since 2005; it has been amended several times since then. Retail alcohol sales used to be a conditional use and are now expressly prohibited, for example.<sup>44</sup> Conversations with planning staff in Fresno have been unhelpful; each planner has

43. FRESNO, CAL., CODE §§ 12-232-232.3(2009) (emphasis added).

44. In 2008, § 12-232.2. read in part: “USES PERMITTED SUBJECT TO CONDITIONAL USE PERMIT. . . . 9. Liquor products (off-sale) . . .” *Excerpts from Chapter 12, Zoning of the Municipal Code of the City of Fresno*, FRESNO METRO MINISTRY, <http://fresnetmin.org/downloads/CityofFresnoPlanZoningExcerpts.pdf> (last visited Mar. 24, 2013).



been surprised to learn that this language is in the code, and pledges to look into it; years later the language remains.

To be clear, this section of Fresno's zoning code is not consistent with neighborhood commercial code sections from the majority of other jurisdictions the author has examined. This code section is offered, not as an example of the typical, but rather as an example of zoning as a powerful tool to prevent the sale of groceries in a community—explicitly creating a food desert. And although the planning staff for the city does not seem, based on conversations with the author, to be intent on creating food deserts, it is also the case that no action has been taken to rectify the problem.

As discussed previously, zoning is the primary implementation tool jurisdictions have for land use policy. Ideally, zoning ordinances clarify and concretize policy goals. Through that lens, the Fresno ordinance, above, indicates a policy perspective that the sale of groceries is incompatible with neighborhood commercial districts. In contrast, Philadelphia, Pennsylvania's policy goals, as described through zoning language, appear to be the opposite of Fresno's. The Philadelphia code defines "Fresh Food Markets" by specifying the amount of sales and display space that must be assigned to non-processed foods such as dairy, meats, poultry, and fish, with an emphasis on fresh fruits and vegetables.<sup>45</sup> The code then goes on to describe incentives that are available to developers of new fresh food markets, or expansion of existing ones. These include exemption from floor area limits amounting to up to fifty percent of the lot area, additional allowances in districts that are regulated by maximum floor area ratios equal up to an additional 25,000 square feet, allowances for additional building height of up to fifteen feet, and exemption from minimum parking requirements for the first 10,000 square feet of market floor area.<sup>46</sup> These incentives translate to significantly reduced development costs for the developer, requiring less startup capital. Because groceries are a low-margin business, these incentives may tip the balance in favor of viability.

New York City's highly publicized FRESH (Food Retail Expansion to Support Health) program, like Philadelphia, offers zoning-based incentives to increase grocery access.<sup>47</sup> New York also provides financing that is linked to FRESH stores opened in the designated FRESH zones.<sup>48</sup> New York's FRESH zoning has many provisions similar to Philadelphia's zoning, including requirements that floor area be devoted to produce, dairy, meats, poultry and fish; reduced parking requirements; and square footage and height bonuses. Interestingly, the square footage bonuses are structured to allow more housing to be constructed above a ground floor grocery store by simply not counting the square footage devoted to the

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45. PHILA., PA., CODE, § 14-601 (2013).

46. *Id.* at § 14-603(7).

47. Special Regulations Applying to FRESH Food Stores, § 63-00 (2009) *available at* [http://www.nyc.gov/html/dcp/pdf/fresh/zoning\\_text\\_amendment\\_2009\\_12\\_09.pdf](http://www.nyc.gov/html/dcp/pdf/fresh/zoning_text_amendment_2009_12_09.pdf).

48. Pennsylvania pioneered fresh food financing, which has since spread to other states and cities, as well as a federal program. *See, e.g.*, The Pennsylvania Fresh Food Financing Initiative, *available at* <http://www.thefoodtrust.org/php/programs/fffi.php>.

store in the total square footage count for the building.<sup>49</sup> Siting in some FRESH-eligible neighborhoods also offers the opportunity for tax benefits. New York's program is more targeted than Philadelphia's, relying on both zoning types and demographics to determine neighborhoods that are FRESH-eligible, even explicitly excluding certain areas.<sup>50</sup> Signage identifying stores as FRESH stores is required,<sup>51</sup> as are transparent windows and doors for at least seventy percent of the store's ground level street wall.<sup>52</sup>

Strictly from an operational perspective, Philadelphia's program appears much less bureaucratic for developers and grocery purveyors. Yet New York's program includes financing strategies that go hand-in-hand with the zoning changes and that acknowledge the slim profit margins of the grocery business.

The final city discussed in this section is very small; a large town in the eyes of some. Santa Rosa, California, is about fifty miles north of San Francisco.<sup>53</sup> In size and density it is very different from the other three. However, it offers a unique example of a trend seen across the nation as cities compete for businesses to occupy vacant retail spaces left empty by the market consolidation of big box stores and the recession. In June of 2012, the Santa Rosa city council changed the zoning rules to allow small grocery stores to locate in any of the city's commercial districts without a conditional use permit, while also granting the same right to large or small grocery stores seeking to locate in downtown Santa Rosa.<sup>54</sup> Procedurally, waiving the requirement for a use permit eliminates the otherwise mandatory public hearing process on the project's merits. Three months later, in September, the council waived the conditional use permit requirement again, this time for large grocery stores moving into existing buildings in the southeast quadrant of the city.<sup>55</sup>

Many communities have rezoned individual commercial buildings or malls to make them more accessible to supermarkets, usually in response to a specific request by a developer or purveyor.<sup>56</sup> In many cases, the change is to allow a larger store than the zoning permits, since grocery stores are large-footprint businesses. However, in virtually all of these instances the rezoning has been limited to a specific property.<sup>57</sup> Santa Rosa's situation is distinguishable because it made

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49. See NEW YORK, NY, ZONING RESOLUTION, Art. VI, ch. 3, § 63-01 (2011); Bridget Moriarity, *Interview: Zoning for Food Access in New York Neighborhoods*, NEXT AM. CITY, July 26, 2012, <http://nextcity.org/daily/entry/interview-zoning-for-food-access-in-new-york-neighborhoods>.

50. Special Regulations Applying to FRESH Food Stores, § 63-00 (2009) available at [http://www.nyc.gov/html/dcp/pdf/fresh/zoning\\_text\\_amendment\\_2009\\_12\\_09.pdf](http://www.nyc.gov/html/dcp/pdf/fresh/zoning_text_amendment_2009_12_09.pdf).

51. *Id.* at § 63-22, 63-23.

52. *Id.*

53. CITY SANTA ROSA CAL., <http://ci.santa-rosa.ca.us/Pages/default.aspx> (Mar. 23, 2013).

54. See *General Plan Amendment and Zoning Code Ordinance Text Amendment for Grocery Stores*, CITY SANTA ROSA, CAL. (June 19, 2012), [http://ci.santa-rosa.ca.us/doclib/agendas\\_packets\\_minutes/Documents/20120619\\_CC\\_Item12.5.pdf](http://ci.santa-rosa.ca.us/doclib/agendas_packets_minutes/Documents/20120619_CC_Item12.5.pdf).

55. Kevin McCallum, *Living Wage Coalition Sues Santa Rosa Over New Grocery Zoning*, PRESS DEMOCRAT (Nov. 12, 2012), <http://www.pressdemocrat.com/article/20121102/ARTICLES/121109882/1350>.

56. See, e.g., Robert Rhoden, *St. Tammany Zoning Commission Approves Rezoning For Grocery Despite Protests*, GREATER NEW ORLEANS TIMES-PICAYUNE (Oct. 3, 2012), [http://www.nola.com/politics/index.ssf/2012/10/over\\_protests\\_st\\_tammany\\_zonin.html](http://www.nola.com/politics/index.ssf/2012/10/over_protests_st_tammany_zonin.html).

57. The legality of this, known as "spot-zoning", is a large topic featuring a robust literature.

wholesale changes to the zoning code and procedures.

When the second set of changes was made, in September, the council cited two rationales for their action: The need to fill existing buildings (an anti-blight, pro-commerce measure), and evidence that the area is a food desert.<sup>58</sup> Spurred by a developer who had informed council members that the direct financial cost and time cost of the conditional use process made opening a grocery store too risky, the council sought to simplify and streamline the process for such businesses. The zoning changes would revive sagging commercial areas, create jobs, and bring much-needed groceries into underserved parts of Santa Rosa.

The underserved were unimpressed. In October, the City's Living Wage Coalition sued the City in Sonoma County Superior Court, claiming the council abused its discretion because the decision violated California's General Plan consistency requirement, it had illegally exempted the changes from environmental review, and there was no evidence that Northeast Santa Rosa was a food desert under the USDA definition.<sup>59</sup> Without commenting on the merits of the case, it is noted that the city Planning Department had drafted general planning and zoning revisions in March and April of 2012, and that, as drafted, these revisions would ease the hurdles and expand the geography in which grocery stores could be sited in Santa Rosa.<sup>60</sup>

Although there is much overlap between these policies and codes, there are important differences as well. It must be noted that the four cities that have generated these zoning changes are very different with regard to size, population, building density, and built environments (see Table 1 and Photos 1-4, below). These points are important as the focus shifts to the last part of this paper, in which the land use frameworks presented are interrogated.

Table 1. Population Density.<sup>61</sup>

	Philadelphia	Fresno	New York	Santa Rosa
Total Population	1,526,006	494,665	8,244,910	167,815
Population Density (per sq. mile)	11,457	4,405	27,013	4,044
City Land Area (sq. mile)	143	112	469	41

58. See *Zoning Code Text Amendments for Southeast Santa Rosa Food Desert*, CITY OF SANTA ROSA, CAL. (Sept. 11, 2012), [http://ci.santa-rosa.ca.us/doclib/agendas\\_packets\\_minutes/Documents/20120911\\_CC\\_Item12.3.pdf](http://ci.santa-rosa.ca.us/doclib/agendas_packets_minutes/Documents/20120911_CC_Item12.3.pdf).

59. *Id.*

60. See *Grocery Store General Plan And Zoning Code Text Amendment*, CITY SANTA ROSA, CAL. [http://ci.santa-rosa.ca.us/departments/communitydev/Pages/GroceryStore\\_GPA.aspx](http://ci.santa-rosa.ca.us/departments/communitydev/Pages/GroceryStore_GPA.aspx) (last visited Feb. 7, 2013) (outlining the "City Council approved General Plan and Zoning Code text amendment [changing] the City of Santa Rosa's policies and regulations pertaining to grocery stores," adopted June 19, 2012).

61. *Geography: Maps & Data*, U.S. CENSUS BUREAU, [http://www.census.gov/geo/www/gazetteer/files/Gaz\\_places\\_national.txt](http://www.census.gov/geo/www/gazetteer/files/Gaz_places_national.txt) (go to <http://www.census.gov/geo/maps-data/>; then follow the hyperlink "Gazetteer Files") (last visited Mar. 20, 2013).

*Photo 1. Aerial view of segment of Fresno, California.*<sup>62</sup>



*Photo 2. Aerial view of segment of Philadelphia, Pennsylvania.*<sup>63</sup>



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62. Aerial View of Fresno, Cal., GOOGLE MAPS,  
<https://maps.google.com/maps?q=Fresno,+CA&hl=en&ll=36.746246,-119.772198&spn=0.005082,0.005209&sll=40.830559,-73.916777&sspn=0.006787,0.010418&oq=Fresno,+&t=h&hnear=Fresno,+California&z=18> (last visited Feb. 6, 2013).

63. Aerial View of Phil., Pa., GOOGLE MAPS,  
<https://maps.google.com/maps?q=Philadelphia,+PA&hl=en&ll=39.942562,-75.16916&spn=0.004863,0.005209&sll=36.746246,-119.772198&sspn=0.005082,0.005209&oq=philadelphia,+&t=h&hnear=Philadelphia,+Pennsylvania&z=18> (last visited Feb. 6, 2013).

*Photo 3. Aerial view of segment of the Bronx, New York.*<sup>64</sup>



*Photo 4. Aerial view of segment of Santa Rosa, California.*<sup>65</sup>



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64. Aerial View of Bronx, N.Y., GOOGLE MAPS, <https://maps.google.com/maps?q=Bronx,+NY&hl=en&ll=40.830559,-73.916777&spn=0.006787,0.010418&sll=37.7577,-122.4376&sspn=0.226918,0.333366&oq=bronx,+&t=h&hnear=Bronx,+New+York&z=17> (last visited Feb. 6, 2013).

65. Aerial View of Santa Rosa, Cal., GOOGLE MAPS, <https://maps.google.com/maps?q=Dudley+Place,+Santa+Rosa,+CA&hl=en&ll=38.450162,-122.745556&spn=0.004967,0.005209&sll=38.440413,-122.714367&sspn=0.056202,0.083342&oq=dudley+Santa+Rosa,+CA&t=h&hnear=Dudley+Pl,+Santa+Rosa,+Sonoma,+California&z=18> (last visited Feb. 6, 2013)..

## VIII. DISCUSSION

*A. To What Extent Has Form Determined Function;  
That Is, to What Extent Has Land Use Law Determined Food Access?*

Any serious consideration of this question must begin with a caveat: Food constitutes a large market segment in the United States. But indeed, as this is a capitalist nation, one can argue that the market has shaped *all* land use in the U.S. To further follow a Marxist conceptualization of the question, the purpose of land use law is to reinforce the hegemony of capital.

To approach the question differently, it makes sense to start from the systems of rules that have been established to regulate place—to reflect on the ways in which jurisdictions are utilizing planning and zoning to improve food access. It is clear, from these examples, that at the present time, land use is perceived as a powerful tool to address what is a poorly functioning system that has resulted in dangerously inequitable access to healthful food. It is dangerous because the choices with which many low-income Americans are presented all lead to increased risk of heart disease, diabetes, obesity, low productivity, and premature death. Thus, it is evident that land use is now a tactic for remaking a broken system. The goal is to create built forms that will serve as the infrastructure for a food system that provides real choices for all—broccoli or snack cakes, rather than chips or snack cakes. Put that way, the question itself seems implausible: How could land use law possibly determine whether a consumer has the choice of broccoli or chips?

Shaping an environment to support a specific economic use is terribly tricky. Even if rational choice theory is applied, there are often factors that stand in opposition to one another. A potential market must contain enough consumer dollars within a reasonable travel distance to make the venture profitable. At the same time, Americans tend to equate greater wealth with the freedom to live more expansively, thus lessening population density. Therefore, a profitable location would have a large, nearby population that is not densely settled. In an industry like food, where profit margins are razor-thin, this “sweet spot” may be quite small.

Lower income urban neighborhoods are, as a rule, zoned to accommodate smaller housing units on smaller lots. The fabric of these neighborhoods is a tighter pattern, with more parcels per block. These are land use decisions that were made to maximize the economic value of urban land. The larger parcels in these neighborhoods are usually occupied by larger apartment buildings; by building vertically, fewer expensive square feet of land are needed to accommodate more people.

At a time when food was relatively more costly than it is today, and most of it was sold from small, privately-owned stores, this built environment was well suited to the economics of groceries. A merchant could rent a small retail space or, if prosperous, purchase a store with living quarters above or behind.

With the consolidation of the grocery industry and the rise of publically held supermarket chains, the competition for profits became far greater. Stores got larger as their product lines increased. Larger stores, many of which were located in suburbs where space was less expensive, were different beasts from the small

urban markets. As the metrics changed, profit margins shifted. Larger stores are more profitable stores. However, within the denser, small lot built environment of lower-income neighborhoods, spaces for larger stores don't exist. The smaller footprint of fast food businesses, however, can slot into these spaces with relative ease. In places where lot sizes are larger, there is far greater flexibility regarding the types of businesses that can be sited. Even if zoning is changed to allow larger uses than the existing land use accommodates, the possibility of realizing that opportunity is dependent upon the availability of adjacent parcels that can be assembled into a viable site. Even in cities like Baltimore, where populations are declining,<sup>66</sup> there is no guarantee that the patterns of depopulation will result in opportunities for site assemblage—or that such opportunities will arise in economically viable locations. In sum, whether it defines, or is defined by, macroeconomic forces, the argument that function does indeed follow land use form, and has thus structured food access, appears to be solid.

*B. Is It Appropriate for Governments to Use Their Land Use Authority  
to Intervene in the Retail Food Market?*

This question invites at least two strands of response. One approach is a sober legal analysis, carefully constructed and appropriately referenced. Another is to explore the subtext: What are the appropriate boundaries to government intervention in the market?

The former is perhaps the more straightforward and less likely to incite passions, and so it is a good place to start. As discussed previously, the authority for zoning—indeed, for land use regulation—is granted under the police power, which gives states the authority to enact regulations to secure the health, safety, morals, and welfare of the community. The police power can be traced to English common law, and is restated in the Tenth Amendment of the U.S. Constitution. The police power is not granted to the states by the federal government; it is an inherent right of the states. All of the states delegate substantial administration and enforcement of the police power to localities. The courts have historically given substantial deference to local governments in their land use administration, and when application of the police power is challenged, the courts use a rational basis test for determining the legitimacy of the actions of the jurisdiction.

Using zoning to restrict fast food as a tactic in response to the obesity crisis may also raise constitutional red flags as action that could trigger the Dormant Commerce Clause. Under the Dormant Commerce Clause, state and local laws that interfere unduly with interstate commerce are unconstitutional.<sup>67</sup> Commercial activity continues to grow increasingly borderless, with most retail dollars spent at stores that are part of chains with multistate or even multinational presence, and

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66. Baltimore's population has been in decline since 1950, when it reached nearly 950,000. Since then it has been in decline. In 1990 the population of Baltimore was 736,014; by 2000 it had shrunk by 11.5%, to 651,154. In the 2010 census the population was smaller still, 620,961, a drop of an additional 4.6%. See *2010 Census Gazetteer Files*, U.S. CENSUS BUREAU, <http://www.census.gov/geo/maps-data/data/gazetteer2010.html> (last visited Mar. 24, 2013) (expand "Places," then select "Maryland" and click "Go").

67. Jackson S. Davis, *Fast Food, Zoning, and the Dormant Commerce Clause: Was it Something I Ate?*, 35 B.C. ENVTL. AFF. L. REV. 259, 273 (2008).

local businesses often engaging in interstate commerce through “virtual” stores accessed on the internet. Because of these changes in the structure of the economy and because many local communities have sought to limit the presence of big box or other chain businesses within their jurisdictions, the courts and legal scholars have returned their attention to the Dormant Commerce Clause. The analysis begins with the question: Is the legislation rationally related to a legitimate state end?<sup>68</sup> Note that, in essence, this is the same rational basis question that is used to evaluate exercise of the police power. If the legislation passes this initial test, the next question looks at whether the legislation is facially discriminatory, or discriminatory in effect or purpose, against businesses from other states. If so, the courts apply a strict scrutiny analysis, and the legislation is usually found invalid. There is a narrow exception for discriminatory laws, which “will be upheld only if it is proven that the law is necessary to achieve an important government purpose.”<sup>69</sup>

There has been further evolution in the analysis used by the courts in Dormant Commerce Clause cases, including the widely cited *Pike v. Bruce Church* balancing approach.<sup>70</sup> The net effect has been general confusion, but scholars looking at the issue believe that the Supreme Court will weigh in at some point as more communities look to zoning as an explicit means of dealing with chronic health epidemics like obesity.<sup>71</sup> Davis argues that, while a fast food zoning ordinance could be vulnerable under the Dormant Commerce Clause, it would likely withstand challenge because improving the public’s health does not have a discriminatory intent.<sup>72</sup> Further, he argues that “economic protectionism, one of the rationales behind the dormant Commerce Clause, would not be a motivating force behind a fast food zoning ordinance. All burdens placed on interstate commerce would be incidental to the overriding goal of changing the built environment to promote healthier lifestyles.”<sup>73</sup> Given that many fast food chains have responded to concerns about obesity by promoting “healthier” menu items, it seems unlikely that a fast food company would pursue such a route, or even if it were to do so, that the analysis would go much beyond whether the jurisdiction’s exercise of its police power was appropriate.

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68. *Id.* at 275.

69. *Id.* at 276 (quoting ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.3.6).

70. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (holding that “[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”) (citations omitted).

71. See Davis, *supra* note 67, at 280, 288.

72. *Id.* at 280.

73. *Id.* at 284-85.



*C. Given Competing Public Policy Considerations Around This Issue, Should There Be an Expectation That Food Be Treated Similarly to Housing, Water, and Other Essentials in the “Bundle of Goods” in Which Government Explicitly Intervenes?*

This question is probably the most controversial, yet seems the most straightforward. Across the political spectrum, there is consensus that government does, in fact, intervene in markets and has a long history of doing so. The issue for which there is no happy solution is what should be regulated, and how strictly. Public education, for example, was established as a right (for boys) as early as 1635, when the Puritans established Boston Latin School.<sup>74</sup> There is robust debate about how much control government should have over educational content, but all but the most hardline Libertarians accept public schools as a permanent fixture of the American landscape. Housing is another area in which government has intervened in direct ways since the New Deal, when underwriting standards were legislated and funding for affordable housing began to be a regular part of the federal budget. Indeed, the home mortgage tax credit, the single largest housing subsidy in the United States, was a federal intervention developed to increase home ownership rates.<sup>75</sup>

The federal government already engages in substantial regulatory activity around food. From food safety, to the recommended dietary allowances, to farm subsidies, to direct assistance to low-income citizens, the government has had a substantial voice in what foods are cultivated and consumed. Indeed, there are those who argue that part of the blame for the obesity epidemic lies with these policies, which have valorized the production of wheat, corn, meat, and soy and the development of new markets to use these products in new ways that have changed the American diet substantially. Whether or not this is the case, it seems clear that there is a long history of government intervention in the food environment. If local government has the right and duty through the police power to do what it can to ensure that food is one of the goods in that “bundle of goods” to which Americans are entitled and is affordable and healthful, it seems negligent not to intervene.

## IX. CONCLUSION

As local governments struggle to address the obesity crisis and create better environments for residents, land use legislation has emerged as one of the more powerful tools available to effect change. By utilizing land use policy and zoning to limit the presence of unsavory uses and encourage more healthy food options, especially in low-income neighborhoods where the balance is often reversed, there are real opportunities to change the food landscape in cities. The application of some of these tools is controversial, and it is important for policy makers, planners and lawyers to think about the food system as a whole, one in which land use does not end at the edge of farmland but continues on into the heart of our cities.

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74. *About BLS*, BOS. LATIN SCH., <http://www.bls.org/history?rc=0> (last visited Mar. 24, 2013).

75. The New Deal was responsible for a sea change in government intervention in housing. *See URBAN COMMUNITIES IN THE 21ST CENTURY* (M. A. Huston, ed., 2010).