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## Pop-Up Potential: The Effect of Regulatory Laws on the Innovation of Pop-Up Restaurants

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**POP-UP POTENTIAL: THE EFFECT OF REGULATORY LAWS ON THE  
INNOVATION OF POP-UP RESTAURANTS**

*By: Alexandra Lauren Lizano†*

ABSTRACT

*Pop-up restaurants have risen in popularity over the past decade in the United States. As used in this Comment, a pop-up restaurant is when an existing restaurant space temporarily loans that space to another chef or restaurant for a limited period of time. This Comment seeks to explore the potential benefits and exploit the drawbacks of pop-up restaurants as property solutions in large cities. Pop-up restaurants thrive in the landscape of the sharing economy, and as such, legal scholars pose that it is imperative to understand this new type of economic scheme to efficiently regulate the entities within it. The beneficial services that pop-ups offer must be weighed against the drawbacks in order to determine if they are worthy of creating adaptive permitting regimes in particular cities. Should a city choose to regulate pop-ups, this Comment poses that such regulation would be most effective at the municipal level. Furthermore, this Comment examines two successful regulatory models—those of San Francisco and New York—and suggests that they can serve as a guide to cities that do not currently regulate pop-up restaurants.*

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## I. INTRODUCTION

Julya Shin and Steve Joo operate a pop-up restaurant called “Nokni” in Alameda County, California.<sup>1</sup> Nokni was “popping up” in various restaurant and bar spaces outside of the stated business hours of the tenant restaurants.<sup>2</sup> On Tuesday, August 21, 2018, an inspector for the Alameda County Environmental Health Department observed Nokni’s activity in yet another existing restaurant’s space.<sup>3</sup> The inspector shut Nokni down by issuing a cease-and-desist notice that stated: “Pop-ups are illegal.”<sup>4</sup>

A pop-up restaurant (“pop-up”) is a temporary dining establishment, often branded as “limited edition” because the experience is limited in time.<sup>5</sup> A pop-up can refer to anything from selling simple meals in an empty parking lot to a celebrity chef taking over an established restaurant space.<sup>6</sup> These pop-ups range in duration from one night only to a few weeks or even a few months long.<sup>7</sup> The phenomena of pop-up restaurants has gained incredible traction over

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1. Jonathan Kauffman, *Alameda County Cracks Down on Pop-Up Restaurants*, S.F. CHRON. (last updated Aug. 22, 2018, 9:08 PM), <https://www.sfchronicle.com/restaurants/article/Alameda-County-declares-pop-up-restaurants-illegal-13175453.php>.

2. *Id.*

3. *Id.*

4. *Id.*

5. Ryan Bradley, *How Pop-Ups Took Over America’s Restaurants*, GQ (Mar. 8, 2018, 3:25 PM PDT), <https://www.gq.com/story/pop-ups-america-restaurants>.

6. *Id.*

7. Katy McLaughlin, *Pop-Ups are Taking Over the Kitchen*, WALL STREET J. (Mar. 23, 2012, 12:01 AM ET), <https://www.wsj.com/articles/SB1000142405297020427630457726381365489278>

8.

the past ten years, and while the high turnover and increased adaptability of chefs have been continuously evolving,<sup>8</sup> the laws and regulations that govern most pop-ups—or the lack thereof—have not.

Over the past decade, pop-up restaurants became increasingly popular because of the cost-efficiency to chefs, media attention, and exclusivity to customers.<sup>9</sup> In fact, the National Restaurant Association listed pop-up restaurants as the second hottest restaurant concept in its 2019 culinary forecast.<sup>10</sup> However, Nokni provides a timely illustration of the complex problems for pop-up restaurants: The way the applicable laws are written does not necessarily allow for pop-up restaurants to operate successfully, if at all.<sup>11</sup>

This Comment seeks to provide a holistic picture of the effects that pop-up restaurants can have on a community or city. Section II will examine the sharing economy in which pop-ups exist. Pop-ups also play a key role in local economies, proving beneficial to chefs and localities in which pop-ups are allowed to operate. Section III of this Comment will assess pop-up restaurants in the context of offering potential solutions to problems created by traditional property laws. Section IV provides examples of successful pop-up regulations by comparing the law in different cities. More cities can follow the examples set by those successes to adopt laws and regulations that allow pop-ups to exist in their most successful capacity.

## II. POP-UP RESTAURANTS AND THE ECONOMY

### A. *The Sharing Economy*

Pop-ups are entities in the sharing economy,<sup>12</sup> and as such, it is necessary for cities to understand the tenets of the sharing economy in order to create effective regulations. The sharing economy is the term used to describe the collaboration that results from peer-to-peer sharing of “underutilized assets, from spaces to skills to things, for

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8. Bradley, *supra* note 5.

9. Gregory Dicum, *At Pop-Ups, Chefs Take Chances with Little Risks*, N.Y. TIMES (Feb. 11, 2010), <https://www.nytimes.com/2010/02/12/dining/12sfdine.html>; Bradley, *supra* note 5.

10. *What's Hot 2019 Culinary Forecast*, NAT'L REST. ASS'N at 7, <https://restaurant.org/Downloads/PDFs/Research/WhatsHot/WhatsHotFinal2019.pdf>.

11. Kauffman, *supra* note 1.

12. See generally Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHI. L. REV. DIALOGUE 16, 24 (2015).

monetary gain on a scale that would not be achievable without modern technology.”<sup>13</sup> Usually, this means private individuals exchanging services for a fee, typically via the internet.<sup>14</sup>

There are four characteristics of sharing-economy businesses.<sup>15</sup> The first is technology and the use of the internet.<sup>16</sup> Sharing economy businesses rely on the internet and social media to advertise, build an image, and operate their platforms.<sup>17</sup> Technology helps facilitate transactions today that would not have existed ten years ago.<sup>18</sup> The second characteristic is that businesses in the sharing economy engage people who possess the “sharing mentality.”<sup>19</sup> That requires “people who are willing to share . . . excess capacity with strangers, as long as they are provided with some reputational information and are compensated.”<sup>20</sup> Third, users must trust the technology and other participants in the system.<sup>21</sup> Fourth and finally, sharing economy businesses operate at their peak in dense urban environments, like cities.<sup>22</sup> City life has certain qualities such as “scale, proximity, amenities, and specialization” that create distinct value to the operation of such businesses.<sup>23</sup> This urban density advances innovation because cities allow individuals the flexibility to add new ideas to older work and create environments that “spur[] the creation of new goods and services[.]”<sup>24</sup> Further, dense cities with large populations are petri dishes for word-of-mouth recommendations, which are crucial in attracting people to sharing economy businesses.<sup>25</sup> This type of recommendation is no longer predominantly literal word-

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13. Bernard Marr, *The Sharing Economy - What It Is, Examples, and How Big Data, Platforms and Algorithms Fuel It*, FORBES (Oct. 21, 2016, 2:16 AM), <https://www.forbes.com/sites/bernardmarr/2016/10/21/the-sharing-economy-what-it-is-examples-and-how-big-data-platforms-and-algorithms-fuel/#204dca5a7c5a>; Abby Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. 31, 34 (2016).

14. Michele Finck & Sofia Ranchordas, *Sharing and the City*, 49 VAND. J. TRANSNAT’L L. 1299, 1313 (2016).

15. *Id.* at 1314.

16. *Id.*

17. *Id.*

18. John O. McGinnis, *The Sharing Economy as an Equalizing Economy*, 94 NOTRE DAME L. REV. 330, 334 (2018).

19. Finck & Ranchordas, *supra* note 14, at 1314.

20. *Id.*

21. *Id.*

22. *Id.* at 1315.

23. Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL’Y REV. 215, 218 (2016).

24. *Id.* at 223–24.

25. *Id.* at 234.

of-mouth recommendations, but rather spread across various social media platforms such as Facebook, Twitter, and Instagram.<sup>26</sup>

A prime example of a sharing economy business is Airbnb.<sup>27</sup> Airbnb is an online service that matches property owners with individuals interested in short-term lodging.<sup>28</sup> The four characteristics of a successful sharing economy enterprise are present. With the use of technology, people seeking to rent a space in someone's home are able to view all the available options and compare and contrast what is best for them.<sup>29</sup> Through the same online platform, property owners can access "standard form legal contracts and insurance against damage to their property."<sup>30</sup> The sharing mentality exists on both sides of the transaction. The property owner who has extra space in their home is incentivized by the potential for additional income.<sup>31</sup> And the traveler is able to find lodging accommodations that are less expensive than traditional hotels.<sup>32</sup> Naturally, the entire business hinges on trust.<sup>33</sup> Renting a room in a stranger's home is risky, but through the Airbnb platform hosts are ranked and rated by other guests, thereby reducing the perceived risk because a potential guest can see if guests before them had a positive experience.<sup>34</sup> Airbnb fundamentally relies on customers spreading the word about the business,<sup>35</sup> which is most efficient in large cities.<sup>36</sup>

One problem that sharing economy businesses face is incremental innovation.<sup>37</sup> Incremental innovation is an idea borrowed from the legal realm of intellectual property. Incremental innovation refers to the fact that older technology receives patent protection against several subsequent generations of newer technology, providing no protection to the later technology.<sup>38</sup> Under this theory, later technology is harmed by the protection in place for its predecessor.<sup>39</sup>

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26. Schindler, *supra* note 12, at 18.

27. McGinnis, *supra* note 18, at 334.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 334–35.

32. *Id.* at 335.

33. *Id.*

34. *Id.*

35. *Id.*

36. Davidson & Infranca, *supra* note 23, at 234.

37. See Beth Kregor, *Food Trucks, Incremental Innovation, & Regulatory Ruts*, 82 U. CHI. L. REV. DIALOGUE 1, 7–9 (2015).

38. Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1623 (2003).

39. *Id.*

This can be translated to sharing economies and the regulatory landscape that they face.<sup>40</sup> As with older patented technology, a governmental entity will create stringent standards for one product or service. Later, however, unexpected innovation within the same product or service will be harmed by those earlier standards.<sup>41</sup> For example, government entities, often municipalities, will create laws that govern restaurants, taxis, or hotels.<sup>42</sup> Later, innovation in the industries such as pop-up restaurants, Uber, and Airbnb will experience problems transitioning into the market as they face being forced into compliance with laws that were created for similar businesses at a different time.<sup>43</sup>

Currently, sharing economy businesses “take advantage of existing local regulatory disjunctions and barriers to entry created by local law.”<sup>44</sup> These political conflicts are known as “sharing wars.”<sup>45</sup> A sharing war is the concept that once up and running, a sharing economy business can skip over many of the traditional political obstacles that other businesses face.<sup>46</sup> Essentially, sharing economy enterprises can structure their entire businesses to avoid local regulations.<sup>47</sup> For example, “the short-term rental sector . . . thrives in the shadow of land-use regulation,” meaning entities can purposely skirt regulations because such regulations can restrict business potential by driving up the costs of permits and fines.<sup>48</sup> Localities can better regulate sharing economy enterprises to avoid these sharing wars.

Thus far, there are three distinct approaches that cities have taken to regulating sharing economy businesses.<sup>49</sup> The first approach entails cities banning sharing economy businesses outright.<sup>50</sup> For example, a city or municipal code would explicitly say “pop-up restaurants are illegal.” The downside to prohibition is that it cuts the city off from experiencing any of the economic or social benefits that a sharing

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40. Kregor, *supra* note 37, at 8.

41. *Id.*

42. *See id.*

43. *Id.* at 9.

44. Davidson & Infranca, *supra* note 23, at 239.

45. Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 948 (2015).

46. *Id.*

47. Davidson & Infranca, *supra* note 23, at 239.

48. *Id.* at 243.

49. Stemler, *supra* note 13, at 64.

50. *Id.*

economy platform can contribute.<sup>51</sup> The second approach is for cities to force older regulations to apply to sharing economy businesses.<sup>52</sup> The current regulations tend to be “ill-fitted for the specifics of the sharing economy, and as a result, regulators enforce those regulations sporadically—turning a blind eye in some instances and enforcing rules in others.”<sup>53</sup> The downside to this approach, of course, is that patchwork enforcement puts both businesses and consumers in a worse position.<sup>54</sup> Finally, the third approach is for authorities to create new regulations designed to help regulate the sharing economy.<sup>55</sup> While this may sound ideal, such a reactionary approach makes it extraordinarily difficult to create stable and lasting regulations.<sup>56</sup>

Regulation at the local level is currently the most promising method of effectively regulating the sharing economy.<sup>57</sup> Legal scholars urge city authorities to “consider how regulations might nurture the development of a sharing sector that . . . confer[s] a range of benefits that are broadly distributed.”<sup>58</sup>

#### *B. Pop-Ups as a Function of the Sharing Economy*

Pop-up restaurants are a function of the sharing economy.<sup>59</sup> The following descriptions demonstrate how pop-ups exhibit all four characteristics of a sharing economy business. Pop-ups largely rely on technology in order to put themselves on the map.<sup>60</sup> More and more chefs use websites and social media to advertise and solicit reservations.<sup>61</sup> Many use technology platforms to facilitate payment at the end of the meal as well.<sup>62</sup> “[T]he use of the Internet and sharing websites has transformed the concept [of pop-ups] by expanding the potential audience and reducing transaction costs such as marketing expenses.”<sup>63</sup>

Those who possess the sharing mentality form pop-ups. Pop-ups that operate in an existing restaurant space provide benefits to both the

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51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 65.

57. *Id.* at 64; Davidson & Infranca, *supra* note 23, at 254.

58. Davidson & Infranca, *supra* note 23, at 276.

59. *See generally* Schindler, *supra* note 12, at 24.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*



pop-up restaurateur and the tenant restaurant. Specifically, pop-up restaurateurs get a space to operate, and the owners of the existing space can negotiate to receive “a percent of the profits to cover water, sewer, electricity gas and any other associated expenses.”<sup>64</sup> The existing restaurant space also gets the benefit of the pop-up attracting new customers to that space.<sup>65</sup> Mutual trust between the pop-up and the existing restaurant is a necessary component for a successful pop-up restaurant. Additionally, mutual trust between the pop-up and customers is crucial because pop-ups depend on word-of-mouth recommendations to spread the word about their existence and the quality of their product.<sup>66</sup>

The problem is that laws regulating sharing economy businesses, especially pop-up restaurants, are either non-existent or “overwhelming,” which “result[s] either in noncompliance or in preventing entrance into the market.”<sup>67</sup> Pop-ups may be one of the biggest offenders of skirting the borders of the law to avoid land use regulation. For example, a pop-up that is legal—meaning the city allows it to operate—would also have to comply with zoning laws, business licensing, food and health code laws, various tax laws, insurance coverages, and liquor licenses, just to name a few.<sup>68</sup> These laws were not designed with pop-up restaurants in mind,<sup>69</sup> and thus, a pop-up restaurateur is incentivized to go “underground” or ignore the laws entirely.<sup>70</sup> In this way, the pop-up’s ephemeral nature creates a loophole for accountability.<sup>71</sup> However, when pop-ups operate in a capacity that ignores the law, market inefficiencies result.<sup>72</sup>

An efficient market means that “prices at any time ‘fully reflect’ all available information[.]”<sup>73</sup> Therefore, prices in a market with little to no known information, or markets that ignore available information, are inefficient, resulting in losses to all parties. To avoid these market

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64. Lorri Mealy, *Everything You Need to Know About Starting a Pop-Up Restaurant*, THE BALANCE: SMALL BUS. (Sept. 26, 2018), <https://www.thebalancesmb.com/how-to-start-a-pop-up-restaurant-2888300>.

65. *Id.*

66. Schindler, *supra* note 12, at 24.

67. Erez Aloni, *Pluralizing the “Sharing” Economy*, 91 WASH. L. REV. 1397, 1440 (2016).

68. Schindler, *supra* note 12, at 22–23.

69. *See* Stemler, *supra* note 13, at 64–65.

70. Schindler, *supra* note 12, at 23.

71. *See id.*

72. Aloni, *supra* note 67, at 1439–1440.

73. Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 554 (1984).

inefficiencies, there is a need for laws that recognize and better incorporate the positive impacts that pop-up restaurants can have on the economy. Therefore, localities either need to create or amend laws for these operations to have a beneficial effect on the locality's economy.<sup>74</sup> These localities should consider that pop-up restaurants can have a positive economic effect and that by tailoring laws specific to pop-ups, the state or county or municipality can capitalize on those positive effects.

### *C. Effects on Localities*

Having established that pop-ups are a facet of the sharing economy, this Section will focus on the benefits of sharing economy businesses generally, using pop-ups as a running example throughout. This Section will also consider the drawbacks specific to pop-ups. These are the benefits and drawbacks that need to be weighed by a municipality in order to determine if pop-ups should be permitted.

#### 1. Benefits of Pop-up Restaurants in Municipalities

There are many positive benefits that a pop-up restaurant can have on the economy of the locale in which it is "popping up."<sup>75</sup>

One benefit is the ability to create jobs by combining the current "capacity of individuals and their real and personal property."<sup>76</sup> Put simply, introduction of a new business means new jobs. Because sharing economy businesses operate at their fullest potential in cities, and cities are where unemployment is the most severe, the benefit of adding jobs to the economy, even in part-time work, is invaluable.<sup>77</sup> Pop-ups can offer such temporary employment.<sup>78</sup>

Another benefit of the sharing economy is the environmental impact.<sup>79</sup> The restaurant industry is an excellent example of the sharing economy's ability to reduce capital-intensive infrastructure. Constructing an entirely new building strains the environment because the reliance on new construction materials increases the output of

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74. Aloni, *supra* note 67, at 1401.

75. *See* Stemler, *supra* note 13, 40–42.

76. *Id.* at 40.

77. *Id.*; Davidson & Infranca, *supra* note 23, at 260.

78. Mark Hamstra, *The Uber-ization of Staffing*, RESTAURANT HOSPITALITY (Mar. 8, 2017), <https://www.restaurant-hospitality.com/technology/uber-ization-staffing>.

79. Stemler, *supra* note 13, at 41.

carbon dioxide emissions.<sup>80</sup> Construction is also an infamous source of water waste.<sup>81</sup> A pop-up restaurant eliminates the need to construct a new building because it is popping up in a pre-existing space.<sup>82</sup>

A broad benefit of the sharing economy is that it provides a greater variety of products and services,<sup>83</sup> and these businesses spread the wealth.<sup>84</sup> For example, a pop-up restaurant can offer a new dining option which will attract people to a certain area. Those customers may end up visiting other establishments in the area, like other shops or hotels.<sup>85</sup>

Even though localities can reap these potential benefits, most still do not know how to effectively regulate and integrate pop-ups. “Different local governments will naturally have varying political and economic incentives to foster or resist sharing.”<sup>86</sup> One city may understand the economic benefits and prioritize bringing sharing economy business into their municipality, while other cities may find sharing economy businesses a potential threat to existing businesses that outweighs any benefits.<sup>87</sup>

For example, technology-rich cities, like San Francisco and Washington D.C., find value in sharing-economy businesses.<sup>88</sup> Not only are they pleasing to consumers, but they also benefit the municipality by contributing to “branding and economic development strategy.”<sup>89</sup>

Cities like these have also harnessed their technological capabilities by attracting members of the millennial generation.<sup>90</sup> Another benefit of sharing economy businesses is millennial approval. Millennials embrace the sharing economy.<sup>91</sup> “Millennials resonate with the idea of the sharing economy since it perfectly fits their budgets.”<sup>92</sup>

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80. *How Buildings Impact the Environment*, BOSS, <https://bosscontrols.com/buildings-impact-environment/> (last visited Sept. 22, 2019).

81. *Id.*

82. Schindler, *supra* note 12, at 17.

83. Stemler, *supra* note 13, at 42.

84. Davidson & Infranca, *supra* note 23, at 259.

85. *Id.*

86. *Id.* at 248.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Inara Scott & Elizabeth Brown, *Redefining & Regulating the New Sharing Economy*, 19 U. PA. J. BUS. L. 553, 554 (2017).

92. Ann Hynek, *How Millennials Are Driving the Sharing Economy*, MKT. REALIST (Mar. 1, 2016), <https://marketrealist.com/2016/03/millennials-driving->

Millennials do not own as much property as previous generations because they do not want permanence. Instead, they want “flexibility, availability, and choice over the stability and permanence associated with ownership.”<sup>93</sup> The millennial generation prefers access as opposed to ownership and experiences as opposed to things.<sup>94</sup> A 2016 study suggests that the new priorities of millennial chefs have resulted in new dining experiences and restaurant operations.<sup>95</sup> Over 50% of millennial chefs are more inclined to take risks when it comes to creating dishes.<sup>96</sup> Additionally, 54% get inspiration for their menus from social media, notably Instagram.<sup>97</sup> They also have different priorities from previous generations: they prioritize things like local sourcing, green initiatives, and animal welfare.<sup>98</sup> These preferences and priorities align with the innovation of pop-ups.

The idea of a pop-up restaurant is increasingly attractive not just to the millennial chef but also to the millennial customer. “As attention spans shortened and experiences became the new status symbols, disappearing restaurants gained more cultural capital than their stodgily static alternatives.”<sup>99</sup> Spurred by millennial approval, pop-up restaurants as a part of the sharing economy are on the rise, and legal scholars understand the need to regulate it.<sup>100</sup> Being proactive in the regulation of pop-ups ensures that they abide by regulations without getting lost in the shadows. By writing laws that allow pop-up restaurants to prosper, legislators can control the sharing economy in a desirable and profitable way. Cities have the capability to create regulations that will harness the benefits of pop-ups because they each have the distinct advantage of understanding local preferences.<sup>101</sup>

One very specific benefit that pop-ups can offer cities is a solution to the problem of vacant storefronts. In big cities, like New York or San Francisco, the vacant storefront is now a prevalent issue. A pop-

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93. *Id.*; Shelly Kreiczer-Levy, *Share, Own, Access*, 36 YALE L. & POL’Y REV. 155, 157 (2017).

94. Stemler, *supra* note 13, at 39–40.

95. *Study: Millennial Chefs Shake Up the Industry*, FULL-SERVICE RESTAURANTS MAG. (Nov. 10, 2016), <https://www.foodnewsfeed.com/chefs/study-millennial-chefs-shake-industry>.

96. *Id.*

97. *Id.*

98. *Id.*

99. Bradley, *supra* note 5.

100. See Aloni, *supra* note 67, at 1440; Scott & Brown, *supra* note 91, at 554.

101. Davidson & Infranca, *supra* note 23, at 254.

up restaurant can offer a property solution to landlords—if marketed correctly—because of high popularity and quick turnover.<sup>102</sup>

It is normal to have a few temporary vacancies as businesses move out, in, and around cities. In fact, a 5% vacancy rate is a sign of a healthy market within the real estate industry.<sup>103</sup> However, too many vacant storefronts negatively affect the atmosphere of the entire area.<sup>104</sup> This deters businesses and individuals from purchasing in an area for fear that their business will never get off the ground without other successful businesses around.<sup>105</sup>

Vacant storefronts are also off-putting to city residents. In some cities, residents have noticed increased crime rates where there are a higher number of vacant storefronts and expressed safety concerns.<sup>106</sup> Others are frustrated because empty storefronts are wasted potential; residents would rather see coffee shops or bookstores in the place of vacant spaces.<sup>107</sup>

Vacant storefronts occur for a multitude of reasons. The first reason is that landlords choose whether or not they want to rent these spaces out.<sup>108</sup> When a space is vacant, the landlord can hold out for tenants who are willing to pay the landlord's desired amount in rent.<sup>109</sup> A landlord does not want to give space to a temporary pop-up if they think that a better, long-term tenant will come along.<sup>110</sup>

Another contributing factor is that landlords are currently in a position to raise rent because less expensive leases from ten to twenty-

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102. Bradley, *supra* note 5.

103. Cameron Sperance & Joseph Pimentel, *Fed Up with Vacant Storefronts, Residents Force Cities to Punish Retail Landlords*, BISNOW (Aug. 12, 2018), <https://www.bisnow.com/national/news/retail/fed-up-with-vacant-storefronts-residents-force-cities-to-punish-retail-landlords-91715>.

104. *See id.*

105. Kenneth L. Turchi, *Municipal Zoning Restrictions on Adult Entertainment: Young, Its Progeny, and Indianapolis' Special Exceptions Ordinance*, 58 IND. L.J. 505, 505 n.1 (1984).

106. Cornell Barnard, *SF Officials Say Too Many Empty Storefronts are Contributing to Blight*, ABC 7 NEWS (Feb. 5, 2018), <https://abc7news.com/realestate/sf-officials-say-too-many-empty-storefronts-are-contributing-to-blight/3039743/>.

107. Sperance & Pimentel, *supra* note 103.

108. *Id.*

109. Abigail Savitch-Lew, *Diagnosing NYC's Vacant Storefront Problem*, CITY LIMITS (Dec. 5, 2017), <https://citylimits.org/2017/12/05/diagnosing-nycs-vacant-storefront-problem/>.

110. Derek Thompson, *How Manhattan Became a Rich Ghost Town*, THE ATLANTIC (Oct. 15, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/new-york-retail-vacancy/572911/>.

five years ago are expiring.<sup>111</sup> For example, after September 11, 2001, leases in New York City had to be affordable to keep people in the city.<sup>112</sup> Now, those leases are beginning to expire, and landlords can take advantage of keeping the space open until they find a tenant willing to pay more for the space.<sup>113</sup> Along the same lines, in 2015, rent in New York reached a peak high.<sup>114</sup> During this time period, people bought up spaces, operating under the short-sighted assumption that they could charge peak rent indefinitely.<sup>115</sup> However, since 2018, the market has changed, and potential tenants are unwilling to pay those prices.<sup>116</sup> Astronomical rent in popular cities like New York, Boston, Los Angeles, and San Francisco<sup>117</sup> has made it too difficult for store and restaurant owners to buy or lease desirable spaces long-term.<sup>118</sup> Large chain businesses may not be as affected by these higher rent prices, but small businesses lack that kind of flexibility.<sup>119</sup> Residents value small businesses because they prefer to know who is operating in their community; they want the businesses in their city to reflect the “culture of the neighborhood.”<sup>120</sup>

Another reason why empty storefronts have been taunting cities is because of absentee owners.<sup>121</sup> In big cities, it is common for businesspeople from other countries to own entire buildings.<sup>122</sup> Consequently, such landlords do not understand the market in the area and do not place enough value on stability or consistency.<sup>123</sup> They can change the terms of a lease quickly and abruptly, making the rent unpredictable and the space undesirable.<sup>124</sup>

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111. Steve Cuzzo, *Why a Booming Manhattan is Full of Empty Storefronts*, N.Y. POST (Apr. 26, 2014, 10:11 PM), <https://nypost.com/2014/04/26/the-hidden-proof-the-economy-is-still-awful/>.

112. *Id.*

113. *Id.*

114. Sperance & Pimentel, *supra* note 103.

115. *Id.*

116. *Id.*

117. *Id.*

118. Corey Kilgannon, *This Space Available*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/interactive/2018/09/06/nyregion/nyc-storefront-vacancy.html>.

119. Savitch-Lew, *supra* note 109.

120. *Id.*

121. Cuzzo, *supra* note 111.

122. *Id.*

123. *Id.*

124. *See id.*

Vacancies also occur because the demand simply is not what landlords and owners expected.<sup>125</sup> Long-term tenants are avoiding leasing empty storefronts for the same reason that pop-up restaurants pop up under the radar—they want to avoid the bureaucratic headache of all the permitting.<sup>126</sup> In big cities, lessees face high taxes, burdensome regulations, and worry that their business may not attract the popularity needed to keep the space afloat. This apprehension prompts caution in deciding where to lease.

Regardless of what combination of causes contribute to the vacant storefront problem, more empty storefronts mean “fewer neighborhood services.”<sup>127</sup> Fewer neighborhood services leads to a decline in foot traffic and a decrease in demand in that area, which creates a positive feedback loop for more vacancies.<sup>128</sup>

Currently, cities combat vacant storefronts with vacancy fees.<sup>129</sup> A vacancy fee is a monthly or annual fee that the city assesses the landlord for leaving the space vacant.<sup>130</sup> The rationale is that if there is not going to be a business operating in the space that the city can tax, the next best option is to tax the empty space.<sup>131</sup> While vacancy fees can help, they are not the ideal solution because the municipality is blindly charging tenants an inefficient price.<sup>132</sup>

Instead of having empty spaces with vacant storefronts or inefficient vacancy fees, pop-up businesses, especially pop-up restaurants, can offer short-term solutions to this type of property problem.<sup>133</sup> Pop-up stores offer a different solution through short-term leases in months instead of years.<sup>134</sup> People are drawn to the experience of the pop-up because it is just that—an experience.<sup>135</sup> Even brands like Nordstrom and Nike, big companies that can afford to put stores wherever they want them, began doing pop-up events because of the success of pop-up businesses.<sup>136</sup> Pop-up restaurants provide a better solution because they bring the best of both worlds. They have the excitement that comes with a pop-up event but also can

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125. *Id.*

126. *Id.*

127. Savitch-Lew, *supra* note 109.

128. *Id.*

129. Sperance & Pimentel, *supra* note 103.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*; Savitch-Lew, *supra* note 109.

134. Sperance & Pimentel, *supra* note 103.

135. *Id.*

136. *Id.*

change and adjust neighborhood-by-neighborhood and create buzz and excitement wherever they pop up. City residents want to see the culture of the city reflected in the businesses around them,<sup>137</sup> and pop-up restaurants can adapt their cuisine to whatever culture is relevant in that area at that time.

Urban planner Marcus Westbury had tremendous success with the short-term lease model.<sup>138</sup> Westbury created a non-profit that convinces property owners to allow the organization to take over vacant commercial space and then rent the space out to shops, galleries, and cafes on a thirty-day rental basis.<sup>139</sup> The non-profit then cleans the space out in between the short-term tenants in order to keep the space desirable for continued rental.<sup>140</sup> While Westbury has seen success with this model, there are concerns with its application to pop-up restaurants. If the space does not already have a commercial kitchen, a restaurant is going to struggle to come in and make the necessary adjustments to succeed in just thirty days.<sup>141</sup> And if the space does already exist in restaurant form, most landlords are only willing to lease it at above-average rent.<sup>142</sup>

However, spaces that have shifted to cater to pop-up restaurants “ha[ve] created entire multimillion- and even billion-dollar real estate interests.”<sup>143</sup> Pop-up restaurants have seen tremendous success at “New York’s South Street Seaport” and “Chicago’s Merchandise Mart.”<sup>144</sup> Pop-up restaurants in the form of food stalls have also created business for manufacturers of pop-up stalls, like the San Francisco company, Cubert.<sup>145</sup> “High turnover is now a virtue. Which means the latest food trend isn’t an ingredient or a cuisine; it’s a length of time. The most successful pop-up operations are those that can burn brightly, then quietly (and quickly) disappear to make room for something new.”<sup>146</sup> The quick turnover that makes pop-ups so

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137. Savitch-Lew, *supra* note 109.

138. Megan McArdle, *The Paradox of Empty Storefronts*, THE ATLANTIC (Aug. 31, 2009), <https://www.theatlantic.com/business/archive/2009/08/the-paradox-of-empty-storefronts/24169/>.

139. Justin Fox, *Why are Commercial Real Estate Markets so Often Gridlocked?*, TIME (Aug. 28, 2009), <http://business.time.com/2009/08/28/why-are-commercial-real-estate-markets-so-often-gridlocked/>.

140. *Id.*

141. McArdle, *supra* note 138.

142. *Id.*

143. Bradley, *supra* note 5.

144. *Id.*

145. *Id.*

146. *Id.*



successful is the same reason that they offer a property solution to vacant storefronts. Pop-ups can come in quickly, generate excitement in the area, and bring business back to the location.

## 2. Drawbacks of Pop-up Restaurants in Municipalities

Pop-up restaurants have the potential to provide tremendous benefits. Naturally, those benefits will have to be measured against the drawbacks of such operations. There are a number of drawbacks that should be considered.

First, it is possible for pop-up restaurants to fall out of favor with their customer base.<sup>147</sup> That leads to the question: Why create an entire regulatory regime for something that may not be around for all that long? Pop-up restaurant failures are usually the result of bottom-line economics.<sup>148</sup> A traditional restaurant would not expect to see real profits within the first five years of opening.<sup>149</sup> Pop-ups differ in the sense that they can cut down on capital costs because of their temporary nature and not having to build anything from the ground up, but they do have to make sacrifices to see profit. This sacrifice often comes in the form of *prix fixe* menus.<sup>150</sup> This means fixed menu items are sold at a fixed price, earning the nickname “no-choice restaurants.”<sup>151</sup> As pop-ups become more popular, chefs can get away with more extravagant fixed menus and charging higher prices.<sup>152</sup> However, in London, pop-up restaurants have largely fallen out of favor because of such price increases.<sup>153</sup> The risk that pop-ups decline in popularity may likewise exist if pop-ups become a fixture in American society.

Second, consumer safety is one of the primary concerns with pop-up restaurants and sharing economy businesses as a whole.<sup>154</sup> For example, with Airbnb, people are staying at or inviting other people, strangers, to stay at their private homes; likewise, Uber operates by individuals getting into a stranger’s car.<sup>155</sup> While companies like these have been praised for convenience and good experiences, a central

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147. K. St. C., *Is No-Choice a Good Choice?*, THE ECONOMIST (Jan. 6, 2012), <https://www.economist.com/prospero/2012/01/06/is-no-choice-a-good-choice>.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Stemler, *supra* note 13, at 43.

155. *Id.*

concern is whether these platforms put people in vulnerable positions by exposing them to safety risks.<sup>156</sup> For a pop-up restaurant, the vulnerability comes from feeding people food using restaurant procedures or preparation instruments that may not have been approved by health and safety authorities. In order to better protect consumers, regulators have tried to impose bans or additional permits, some of which may not necessarily make sense to that business, resulting in inefficient regulation.<sup>157</sup>

Third, pop-ups can create jobs or temporary work but may not necessarily provide the same protections of more permanent employment.<sup>158</sup> For example, microbusinesses often cannot offer benefits like paid sick leave, contributions to 401(k) plans, or insurance coverage.<sup>159</sup> Without these benefits, it is often unattractive for individuals to consider work within these microbusinesses as it may not be worth the hours or pay.

A fourth and final drawback of pop-up restaurants is their reliance on technology. Food-sharing technological platforms have quickly gained attention and scrutiny.<sup>160</sup> Similar to underground supper clubs (meals usually hosted inside a private home or non-commercial kitchen space),<sup>161</sup> platforms that match diners with private chefs willing to cook for the diner in their private home have become common.<sup>162</sup> Because of the increase in popularity, there has been a surge of city-based investigation into such platforms.<sup>163</sup> Cities have tried to impose tax and health code violations onto the food-share platform itself; however, food-share firms have resisted.<sup>164</sup> The firms argue that they themselves are only a network service and not the restaurant or chef.<sup>165</sup> While that argument may work for technological platforms, pop-up restaurants in existing restaurant spaces cannot use the same defense. Therefore, the most legitimate pop-ups are subject to harsher regulatory enforcement mechanisms.

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156. *Id.*

157. *Id.*

158. *Id.* at 47.

159. Stemler, *supra* note 13, at 47; see Rauch & Schleicher, *supra* note 45, at 925.

160. Rauch & Schleicher, *supra* note 45, at 934.

161. Schindler, *supra* note 12, at 17.

162. Rauch & Schleicher, *supra* note 45, at 934.

163. *Id.*

164. *Id.* at 934–35.

165. *Id.*

Further, pop-ups' reliance on technology to the point of necessity<sup>166</sup> has created a large gap in service to poorer communities.<sup>167</sup> Even though the temporary jobs created by sharing economy businesses can help unemployed or partially employed individuals in poorer areas, society does not lend itself to placement of pop-ups in such areas.<sup>168</sup> One of the key disconnects is that technology-heavy practices are more difficult to operate in poor communities.<sup>169</sup> For example, a pop-up restaurant most often gets the word out about prices, dates, and menus by social media. After the meal, a customer often has to pay by credit card via an online, remote payment system like Square. Even if a pop-up operates in a pre-existing restaurant space, it is unlikely that the permanent restaurant is going to also grant the pop-up access to use their cash register or accounting platform. In this sense, everything from advertising to payment is biased against technology-poor communities and residents.

Along these lines is the idea that pop-ups are not reaching their fullest potential because they have the ability to perform a needed service in poorer communities: filling in the gaps created by food deserts. A food desert is an area that lacks access to nutritious food options like supermarkets.<sup>170</sup> Food deserts often arise in urban areas left behind after a mass movement of middle-class, mostly white Americans, to suburbs.<sup>171</sup> After this demographic moved out of the cities, supermarkets followed, leaving those in the inner city without healthy food choices.<sup>172</sup> Another type of food desert forms in rural regions where the large geographical spaces between people make it impracticable for the area to support a large chain supermarket.<sup>173</sup> Nutritious pop-up restaurants could offer a potential solution to food deserts by providing better options for people in these areas. However, because pop-ups do not currently operate in these areas, the potential in pop-ups as a solution is completely untapped.

The potential for pop-ups to fall out of favor, consumer safety concerns, lack of employment benefits, and technology-heavy dependence are the drawbacks of pop-up restaurants. Local

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166. Stemler, *supra* note 13, at 38.

167. Rauch & Schleicher, *supra* note 45, at 954–55.

168. *See id.* at 954–56.

169. *Id.* at 955.

170. Emily M. Broad Leib, *All (Food) Politics is Local: Increasing Food Access Through Local Government Action*, 7 HARV. L. & POL'Y REV. 321, 324 (2013).

171. *Id.*

172. *Id.*

173. *Id.*

governments would have to weigh these against the benefits to determine if creating a regulatory scheme to govern such operations is worth the time and effort. Implementation would depend on each particular city and whether the residents would embrace or disapprove of pop-up culture. But if they approve, the benefits seem to outweigh the drawbacks.

#### D. *Economic Benefits to Creative Chefs*

Pop-up restaurants are desirable to chefs and those entering the restaurant industry because of the relatively low startup costs in comparison to brick-and-mortar restaurants.<sup>174</sup> Pop-ups “are morphing into a multipurpose tool, used by different strata of the restaurant industry to test concepts, market new brands, engage with a younger audience, or prove to landlords, lenders and investors that they are worth the risk.”<sup>175</sup>

For example, opening a 1,500 square-foot restaurant with a liquor license in San Francisco, California, can cost a restaurateur between \$300,000 and \$500,000.<sup>176</sup> In New York City, New York, startup costs to open a small restaurant in Brooklyn could reach up to \$450,000.<sup>177</sup> In Austin, Texas, to get a mid-size restaurant up and running for one year it could cost restaurateurs up to \$1.24 million, with an estimate of \$500,000 allocated towards buying land and construction.<sup>178</sup> For many chefs starting out this is not feasible.<sup>179</sup> Thus, the pop-up restaurant offers young chefs the opportunity “to experiment without the risk of bankruptcy.”<sup>180</sup>

Some chefs have seen the best-case-scenario of a pop-up restaurant play out to their benefit.<sup>181</sup> That is, after a successful run operating a pop-up restaurant, many of these establishments can become long-term tenants in the form of permanent, brick-and-mortar restaurants.<sup>182</sup>

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174. McLaughlin, *supra* note 7.

175. *Id.*

176. *Id.*

177. Linda Ray, *How Much Money Does It Take to Start a Small Restaurant in New York City?*, CHRON.COM, <https://smallbusiness.chron.com/much-money-start-small-restaurant-new-york-city-37536.html> (last visited Feb. 14, 2019).

178. Sofia Sokolove, *So You Want to Open a Restaurant in Austin?*, AUSTIN MONTHLY (Oct. 31, 2016), <https://www.austinmonthly.com/AM/November-2016/So-You-Want-to-Open-a-Restaurant-in-Austin/index.php?cparticle=2&siarticle=1&requiressl=true#artanc>.

179. McLaughlin, *supra* note 7.

180. Dicum, *supra* note 9.

181. McLaughlin, *supra* note 7.

182. Sperance & Pimentel, *supra* note 103.

Many of these pop-up restaurants that began in large cities have become some of the most successful restaurants in that city.<sup>183</sup> Examples include Saison in San Francisco, Coquine in Portland, Bruno Pizza in New York, and Otaku Ramen in Nashville.<sup>184</sup>

Therefore, chefs operate in the pop-up capacity because of the economic feasibility and flexibility that a pop-up restaurant can provide.

### III. TRADITIONAL PROPERTY PROBLEMS

#### A. *Permitting*

The nature and appeal of a pop-up restaurant is that it can pop up in a variety of different places.<sup>185</sup> Depending on the municipality, permitting regulations can serve as a rather large obstacle to the flexibility of a pop-up restaurant.<sup>186</sup>

Permitting schemes are mechanisms that enforce property values by regulating social norms in an area.<sup>187</sup> When an individual or group deviates from what is the acceptable norm, it interrupts the feeling of stability in the area, which causes property values to decline.<sup>188</sup> Pop-up restaurants challenge those social norms.<sup>189</sup> A locality's decision to permit or ban is based on the norm in the community and the perception of a pop-up restaurant as beneficial or not.<sup>190</sup>

Transgressive behavior, also known as property law breaking or "DIY urbanism,"<sup>191</sup> is when individuals break property laws (like zoning laws and permitting schemes) in order to push the community to embrace a new value.<sup>192</sup> A classic example of transgressive behavior is the phenomenon of "guerilla gardening."<sup>193</sup> Guerilla

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183. Katie Chang, *8 of the Best Pop-Ups that Became Full-Time Restaurants*, FOOD & WINE (June 22, 2017), <https://www.foodandwine.com/fwx/food/8-best-pop-ups-became-full-time-restaurants>.

184. *Id.*

185. Schindler, *supra* note 12, at 17–18.

186. See Sarah Schindler, *Unpermitted Urban Agriculture: Transgressive Actions, Changing Norms, And The Local Food Movement*, 2014 WIS. L. REV. 369, 386–87 (2014).

187. *Id.* at 384.

188. *Id.*

189. *Id.* at 386.

190. *Id.* at 386–87.

191. Celeste Pagano, *DIY Urbanism: Property and Process in Grassroots City Building*, 97 MARQ. L. REV. 335, 337–38 (2013).

192. Schindler, *supra* note 186, at 387–89.

193. *Id.* at 389.

gardening occurs when individuals plant flowers or vegetable gardens on property that does not belong to them, such as small areas of dirt or planter boxes owned by the municipality.<sup>194</sup> While technically not permissible by law, guerilla gardening creates aesthetic enhancement that promotes the idea that vacant land can and should be used in a productive way.<sup>195</sup>

The pop-up restaurant industry closely parallels this scenario because a pop-up restaurant will pop-up in a space that does not belong to the chef popping up<sup>196</sup> and often lacks permission from the locality. The idea is that pop-up restaurants can bring value to a kitchen or space that is not in use at the time the operator intends to pop-up. “Pop-ups often enliven vacant and underused space, efficiently contributing to the vibrancy, diversity, and culture of the food industry and the community.”<sup>197</sup> This transgressive behavior is embraced when it is deemed socially acceptable and as enhancing the community, but alternatively, the behavior is condemned when it is not socially acceptable and does not enhance the community.<sup>198</sup> Thus, depending on the locality and its values, a pop-up restaurant may either be permitted or banned.

The logical question becomes: Why take the risk of breaking the law in the first place? The answer is because it is easier, it is less expensive, and it avoids the frustration of bureaucratic dealings.<sup>199</sup> Chefs create pop-up restaurants in the first place because brick-and-mortar restaurants are too expensive, and chefs do not want to deal with the bureaucratic headache.<sup>200</sup> The process of complying with numerous regulatory laws and obtaining permits is so frustrating that people perceive that the locality cannot or will not effectively regulate them.<sup>201</sup> As a result, these individuals have the attitude that if you want something done right, you have to do it yourself, even if that means breaking the law.<sup>202</sup> Chefs in this position also do not have the

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194. Joe Robinson, *Guerilla Gardener Movement Takes Root in L.A. Area*, L.A. TIMES (May 29, 2008, 12:00 AM), <http://www.latimes.com/local/la-hm-guerrilla29-2008may29-story.html>.

195. Schindler, *supra* note 186, at 389.

196. *See id.*

197. Schindler, *supra* note 12, at 27.

198. Schindler, *supra* note 186, at 387.

199. *Id.* at 389.

200. *Id.* 389–90; Aloni, *supra* note 67.

201. Schindler, *supra* note 186, at 390.

202. *Id.* at 389–90; Pagano, *supra* note 191, at 339.

financial or political clout to change the system, so instead of fighting for change, they are incentivized to ignore the laws.<sup>203</sup>

However, it is impractical to allow pop-ups to pop up without any kind of restrictions whatsoever. Turning a blind eye and not regulating these entities is not a solution.<sup>204</sup> A huge concern, of course, is the cleanliness of the kitchens in these operations.<sup>205</sup> Regulated restaurants have to comply with laws related to sanitation and food safety.<sup>206</sup> Logically, if a pop-up restaurant operates unregulated, it would not have had to comply with the health and safety laws. The temporary nature of such an establishment also creates a loophole for liability. If a health problem were to occur, the restaurant—and therefore, the liability—could disappear.

### B. *Alternatives*

When inefficient permitting systems do not allow for pop-ups to conveniently operate in the space of pre-existing restaurants, chefs get creative in exploring alternatives. This Section explores two such alternatives: food trucks and supper clubs.

#### 1. Food Trucks

One alternative that chefs turn to is operating food trucks. Food trucks are popular for the same reasons that pop-up restaurants are—they are an affordable option that is appealing to customers.<sup>207</sup>

However, food trucks come with their own criticisms.<sup>208</sup> One of the biggest complaints about food trucks in large cities is that the trucks cause congestion, creating a nuisance.<sup>209</sup> Food trucks parked on city streets increase pedestrian and vehicle traffic.<sup>210</sup> Another common complaint is that food trucks do not pay their fair share of property taxes.<sup>211</sup> Whereas brick-and-mortar restaurants pay property taxes that contribute to the city's income, food trucks are exempt from these

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203. Schindler, *supra* note 186, at 390.

204. Schindler, *supra* note 12, at 31–32.

205. *Id.* at 32.

206. STEVEN BARTH, HOSPITALITY LAW 327–52 (John Wiley & Sons, Inc. ed., 3d ed. 2009).

207. Elan Shpigel, *Chicago's Over-Burdensome Regulation of Mobile Food Vending*, 10 NW. J.L. & SOC. POL'Y 354, 381 (2015).

208. *Id.* at 381–82.

209. *Id.* at 382.

210. *Id.*

211. *Id.* at 381–82.

property taxes.<sup>212</sup> Therefore, food trucks do not contribute to the city's income in the same way a traditional restaurant would.<sup>213</sup>

One of the most central issues that food trucks face is the allegation that they pose a risk to the success of traditional restaurants.<sup>214</sup> As a response to this problem, cities have created measures to ensure food trucks jump through regulatory hoops if they want to continue to operate.<sup>215</sup> For example, Los Angeles has a history of regulating food trucks so extensively that the regulations can force the food trucks out of business.<sup>216</sup> One Los Angeles regulation prohibits food trucks from parking within 100 feet of a brick-and-mortar restaurant's entrance.<sup>217</sup> Another regulation requires the food truck to move every thirty minutes when parked in a residential area and every sixty minutes when parked in a commercial area.<sup>218</sup> Regulations like these make it extremely difficult to operate a food truck with cuisine that actually needs to be cooked.<sup>219</sup> The time that it takes to park, prepare and store the food, cook, make a sale, allow the kitchen to cool, and then prepare and secure the kitchen for motion significantly limits what can be sold from a food truck.<sup>220</sup> Outside of Los Angeles, Chicago is known for "the most restrictive food truck operating laws in the country."<sup>221</sup> Miami and New York City also have a reputation for strict food truck or "mobile food vehicle" regulations.<sup>222</sup>

Therefore, food trucks may not be as desirable as they initially seem because they carry similar, if not stricter, regulatory burdens to pop-ups. Similar to pop-up restaurants being forced to fit into an existing regulatory scheme for traditional restaurants, a new generation of food trucks has been forced into a pre-existing and ill-fitting regulatory regime created by old and outdated food truck laws.<sup>223</sup>

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212. *Id.* at 383–84.

213. *See id.*

214. *See id.* at 381–82.

215. *See* Kregor, *supra* note 37, at 4.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 5.

220. *See id.*

221. Diana Laskaris, *A Taste for Pop-Ups and Food Trucks*, 34 GPSOLO 14, 15 (2017).

222. *See id.* at 15–16.

223. Kregor, *supra* note 37, at 7.



## 2. Supper Clubs

Another alternative that chefs can resort to when pop-ups and food trucks have been regulated out of feasibility are supper clubs. A supper club is an event where an individual or team of people prepare and serve food cooked in a space that has a non-commercial kitchen.<sup>224</sup> Often, such facilities do not receive any kind of formal health or safety inspection.<sup>225</sup> Supper clubs in their “most illegal form” exist when an individual sells a meal out of their private home.<sup>226</sup>

Such an operation likely violates several laws.<sup>227</sup> For example, the kitchen may have never been inspected by a health authority, which is a violation of health codes.<sup>228</sup> If the chef owns an animal with hair, that hair could be around the food storage, preparation, or cooking space, which is also a health issue.<sup>229</sup> A supper club may violate zoning laws if it is considered a business run from a private, residential home.<sup>230</sup> There can be issues with safety codes in the event of a fire.<sup>231</sup> Additionally, it is likely that the individual running the supper club is not paying income or sales tax, which could amount to tax evasion.<sup>232</sup> When these types of supper clubs are discovered or reported, they are often shut down rapidly, and the individual running the operation can face liability.<sup>233</sup>

Because of the amount of liability, a supper club is not a viable alternative to operating a legal restaurant. However, when regulatory laws do not allow for pop-ups to operate and also force food trucks out of business, individuals who cannot afford to start a brick-and-mortar restaurant are faced with limited options. Therefore, some resort to secret supper clubs to get the experience and experimentation they need to decide if they can take the risk on a traditional restaurant.

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224. Schindler, *supra* note 12, at 17.

225. *Id.*

226. *Id.* at 22.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 23.

232. *Id.*

233. *Id.*

*C. Solutions for Pop-ups*

Pop-ups require a non-traditional solution because they are not a traditional restaurant.<sup>234</sup> Legal scholars have suggested that the solution lies outside of the existing permitting structures.<sup>235</sup>

One suggested solution that falls within the realm of business-as-usual practices for localities is low-cost, conditional use permits.<sup>236</sup> However, this solution has its own problems.<sup>237</sup> The amount of detail involved with such a permit carries the same bureaucratic frustrations of time, money, and inefficiency.<sup>238</sup> Thus, pop-up restauranteurs are still faced with the decision of either complying with the system or breaking the law by popping up anyway.<sup>239</sup> These detailed conditional permits may not offer a complete solution to every problem, but they do help.<sup>240</sup>

Another solution is to have the locality formulate regulations that better fit the pop-up restaurant.<sup>241</sup> Proponents of this solution have called for “a cohesive set of rules, clearly articulated and fairly enforced[.]”<sup>242</sup> This may require that localities take the time to reflect on the ordinances and regulations of their jurisdictions and consider if those laws are still appropriate.<sup>243</sup> Ideally, pop-up restauranteurs want cohesive regulations, unchanging from one locality to another.<sup>244</sup> Clear articulations of predictable standards create a more stable environment for better developing businesses.<sup>245</sup>

## IV. CITY TO CITY COMPARISON

The purpose of this Section is to analyze the laws cities have in place that successfully implemented pop-up restaurant regulations and procedures for those who wish to pop up in pre-existing spaces. The structure of pop-up laws in cities like San Francisco and New York can serve as a regulatory model for cities that want to embrace pop-up restaurants. While San Francisco and New York have taken different

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234. Schindler, *supra* note 186, at 391–92.

235. *Id.*

236. *Id.* at 391.

237. *Id.*

238. *Id.*

239. *Id.* at 391–92.

240. *Id.* at 392.

241. Laskaris, *supra* note 221, at 17.

242. *Id.*

243. *Id.*

244. *Id.*

245. *See id.*

regulatory approaches, both have seen relative success with pop-up restaurants that can be translated to other big cities in the United States, like Austin, Texas.

Notably, the regulation of pop-up restaurants and other temporary food service establishments and mobile food vendors lies with the discretion of the municipality. As a result, some states may have neighboring cities, one of which may allow pop-ups to operate and the other may not. Therefore, potential restaurateurs should take caution before operating in a municipality that may explicitly restrict pop-ups.

#### A. *San Francisco*

The California Health and Safety Code is the starting point for laws related to the foodservice industry.<sup>246</sup> The California Health and Safety Code contains the California Retail Food Code that applies to establishments that sell food across the entire state.<sup>247</sup> The way that certain statutes are written within the California Retail Food Code are restrictive of pop-up restaurants.

Not surprisingly, a food facility is prohibited from operating without a valid permit.<sup>248</sup> A food facility is defined as any permanent or temporary operation that “stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level.”<sup>249</sup> However, most permits are non-transferrable. “A permit shall be valid only for the person, location, type of food sales, or distribution activity and, unless suspended or revoked for cause, for the time period indicated.”<sup>250</sup> This statute is one of the laws that makes it incredibly hard for a pop-up restaurant to operate. Because these permits are person, location, and time-period specific, the law restricts outside persons from coming into a permitted space and operating in that space. For example, if the permit is issued to Restaurant A at a specific address so that the restaurant can operate between the hours of 8:00 am until 10:00 pm, it would not be permissible under California law for pop-up Restaurant B to come to that specific address and operate as its own entity or outside of the permitted hours of business. Often the only viable way for restaurants to justify renting their space to pop-ups is by renting the space outside of the

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246. See CAL. HEALTH & SAFETY CODE PT. 7 (West, Westlaw current with all laws through Ch. 333 of 2019 Reg. Sess.).

247. See *id.* §§ 113700–114475.

248. § 114381(a).

249. § 113789(a).

250. § 114381(c).

restaurant's normal business hours. This way, the permitted restaurant would suffer no loss in profit. However, under this law, that would be illegal.

In fact, this non-transferrable permit statute is the law that the pop-up restaurant, Nokni, was cited in violation of when a county health inspector shut the pop-up down.<sup>251</sup> According to a supervisor at the Alameda County Department of Environmental Health, "the widespread assumption that the event is legal as long as chefs are cooking in a licensed commercial kitchen is incorrect."<sup>252</sup> While popping up in the already-permitted restaurant space is prohibited, the law does allow for pop-ups to operate in commercial kitchen spaces that are licensed for multiple tenants or to take their talents to public event spaces such as street fairs where they can rent a stall.<sup>253</sup> However, pop-up restaurateurs would run into similar issues regarding overpriced rent and burdensome regulatory mazes.

The caveat within the California Health and Safety Code, of which San Francisco has taken advantage, is the provision that specifically gives local governing bodies the ability to make their own regulations.<sup>254</sup> Specifically, local authorities can choose whether or not to "prohibit[ ] any type of food facility."<sup>255</sup> While some municipalities, like those in Alameda County, have chosen to interpret the existing law as prohibiting pop-ups, San Francisco has created a permitting system to bring such operations into compliance with municipal laws.<sup>256</sup> The San Francisco Department of Public Health has a separate food safety program for "'pop-ups' and other non-traditional food facilities."<sup>257</sup> Specifically, the permitting program only applies to pop-ups that intend to operate "no more than three (3) days per week out of a currently licensed food facility in San Francisco."<sup>258</sup> While the pop-up permits issued are specific to the intended pop-up location, the pop-up operator can apply to transfer to another location for an additional fee.<sup>259</sup>

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251. Kauffman, *supra* note 1.

252. *Id.*

253. *Id.*

254. § 113709.

255. *Id.*

256. See *Food Safety Program: "Pop-Up" and other Non-traditional Food Facilities*, S.F. DEP'T OF PUB. HEALTH, <https://www.sfdph.org/dph/EH/Food/Permits/PopUps.asp> (last visited Dec. 27, 2018).

257. *Id.*

258. *Id.*

259. *Id.*

The San Francisco pop-up permitting program has detailed and specific steps that a pop-up restaurateur must take to be considered legitimate.<sup>260</sup> These steps include: (1) verification that the pop-up is operating in an existing permitted kitchen; (2) payment of a fee; (3) certification that food safety steps have been taken; (4) a copy of the menu; (5) the floor plan of the location; (6) a transport operation plan that details how equipment will be transported to the location to ensure food safety from one location to another; and (7) a facility operation plan detailing the pop-up operations and food handling precautions.<sup>261</sup>

The specificity of the health and safety precautions set forth by the San Francisco pop-up permitting guidelines has allowed pop-ups to flourish in the city. The success has been so overwhelming and the dining experience so positive that Alameda County is currently revising its interpretation of the California Health and Safety Code by using San Francisco's pop-up permitting model as a guide.<sup>262</sup> The switch from anti-pop-up to pro-pop-up was largely motivated by the opportunities that pop-ups bring to communities.<sup>263</sup> An Alameda County supervisor noted, "[P]op-ups are part of the new economy in this area and provide a lot of opportunities[.]"<sup>264</sup>

San Francisco County is currently the only county in California that has a completely separate pop-up program.<sup>265</sup> Notably, the county-wide permitting system is unique because San Francisco County only encompasses the City of San Francisco, meaning county and city authorities work within the same geographic region.<sup>266</sup> Because San Francisco had such success, other counties in California have taken note and are beginning to use it to create similar programs of their own. This is a promising sign that municipalities in other states can also use the San Francisco model to take advantage of the opportunities that pop-up restaurants can offer.

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260. *Id.* (listing the seven steps to approval, including various fees, certificates, permits, and plans).

261. *Id.*

262. Janelle Bitker, *Alameda County Introduces Plan to Allow Pop-Up Restaurants*, EATER S.F. (Oct. 8, 2018, 11:07 AM PDT), <https://sf.eater.com/2018/10/8/17952160/alameda-county-allow-pop-up-restaurants-pop-ups-december>.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Cities Within Each County*, CAL. STATE ASS'N OF CTYS, <http://www.counties.org/cities-within-each-county> (last updated 2014).

### B. *New York*

New York City, unlike San Francisco, does not have a specific permitting program in place for pop-up restaurants. Instead, New York City governs pop-ups (at least those popping up in another restaurant's space) as one of many different temporary food service establishments that must receive a permit.<sup>267</sup> The New York City Department of Health and Mental Hygiene facilitates the permit process.<sup>268</sup> Temporary food service establishments are any place where food is provided directly to the consumer at a fixed location for no more than fourteen consecutive days, as a single event, or a recurring event that does not exceed three days per week in the same location.<sup>269</sup> Under this regulation, pop-ups are treated more as an "event" and less as an establishment.

Various pop-ups have taken advantage of this accommodation and have used the short time frame of fourteen days as a marketing advantage. For example, the Southside Seaport features a pop-up restaurant called Food Lab.<sup>270</sup> In its coveted space in the Seaport District, Food Lab is a new pop-up featuring chefs from around the world who curate new menus, each chef being featured two weeks at a time.<sup>271</sup>

Along a more commercial vein, companies like Amazon have worked with New York City's pop-up regulations and created pop-up restaurants as a form of advertisement.<sup>272</sup> The Carnegie Deli was an institution and a traditional restaurant in New York City for seventy-nine years before it closed in 2016.<sup>273</sup> As a marketing strategy to

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267. *Temporary Food Service Establishment Permit*, N.Y.C. DEP'T OF SMALL BUS. SERVS., <https://www1.nyc.gov/nycbusiness/description/temporary-food-service-establishment-permit> (last visited Dec. 27, 2018).

268. *Id.*

269. *Id.*

270. *Seaport Food Lab*, SEAPORT DISTRICT NYC, <https://www.seaportdistrict.nyc/things-to-do/to-see/foodlab.html> (last visited Dec. 27, 2018).

271. Stefanie Tuder, *South Street Seaport's Food Future, Explained*, EATER N.Y. (May 16, 2017, 4:52 PM), <https://ny.eater.com/2017/5/16/15646354/south-street-seaport-restaurants-nyc>.

272. Michelle Young, *Carnegie Deli Making Return to NYC as Pop Up for Marvelous Mrs. Maisel*, UNTAPPED CITIES (Nov. 25, 2018), <https://untappedcities.com/2018/11/25/carnegie-deli-making-a-temporary-return-to-nyc-as-pop-up-for-marvelous-mrs-maisel/>.

273. Michael Balsamo, *NYC's Famed Carnegie Deli says Goodbye After 79 Years*, USA TODAY (Dec. 30, 2016, 9:21 AM), <https://www.usatoday.com/story/money/business/2016/12/30/nycs-famed-carnegie-deli-says-goodbye-after-79-years/95992992/>.

promote season two of the Amazon original series *The Marvelous Mrs. Maisel*, Amazon sponsored an eight-day Carnegie Deli pop-up restaurant.<sup>274</sup> Because the pop-up restaurant was intended to promote the show, the menu items were named after characters, and the prices were reminiscent of prices in 1958—no menu item cost more than 99 cents.<sup>275</sup> All of the proceeds from the pop-up were donated as well.<sup>276</sup>

The success of pop-ups in New York can be attributed to the clear requirement that they be regulated as temporary food service establishments. While this differs greatly from San Francisco in the sense that pop-ups do not have their own unique regulatory scheme, it is still efficient because it controls the permitting and benefits from revenue at the city level.

### C. Austin

Austin, Texas is a good city to illustrate the potential of established regulatory models because of its growth and potential to capitalize on pop-up restaurants. In October 2018, Austin was the fastest growing city in the country.<sup>277</sup> This ranking was based on “jobs and economy, and sociodemographics.”<sup>278</sup> Notably, the ranking took into account the “city’s job and population growth, the increase in the number of startups and businesses, and the poverty rate.”<sup>279</sup> This ranking criteria is instructive because these are important factors that make city environments amenable to pop-ups. As such, the high population rise and increase of new businesses makes Austin a suitable city for comparison.

Currently there are a number of pop-up restaurants operating in Austin. The website *Eater* monitors which pop-ups will “pop up” and when.<sup>280</sup> *Eater* describes, “Pop-ups are like food trucks: it’s a way to

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274. Mike Pomranz, *New York’s Iconic Carnegie Deli Returns as a Pop-Up Thanks to “The Marvelous Mrs. Maisel”*, FOOD & WINE MAG. (Nov. 27, 2018), <https://www.foodandwine.com/news/carnegie-deli-pop-up-reservations-marvelous-mrs-maisel>.

275. *Id.*

276. *Id.*

277. Amanda O’Donnell, *Austin is the No. 1 Fastest-Growing Large City in the Country, List Says*, STATESMAN (Oct. 2, 2018, 4:17 PM), <https://www.statesman.com/news/20181002/austin-is-no-1-fastest-growing-large-city-in-country-list-says>.

278. *Id.*

279. *Id.*

280. See Nadia Chaudrey, *Try These Austin Pop-Ups Before They Disappear*, EATER (Jan. 31, 2019, 12:00 PM), <https://austin.eater.com/2017/11/30/16618298/best-pop-ups-austin-restaurants>.

test the culinary waters to see what gets diners really excited.”<sup>281</sup> The list of Austin pop-ups is updated throughout the year so that diners can keep track of all the new pop-ups in the city.<sup>282</sup> Even though pop-ups seem to be a hit in Austin, there is very little, if any, regulation of these entities. This Comment suggests that because Austin is a large city with the means to foster pop-up restaurant growth, it should follow the example of San Francisco or New York in adopting a regulatory model to effectively govern and promote such operations.

At the city level, the Austin Municipal Code regulates “temporary food establishments” and “mobile food establishments,” neither of which would include a pop-up restaurant.<sup>283</sup>

A “temporary food establishment shall mean a food establishment that operates for a period of no more than 14 consecutive days in conjunction with a single special event or celebration. A farmers market vendor is not a temporary food establishment.”<sup>284</sup> Austin limits these temporary food establishments to six events per calendar year “for a total of 84 days in a calendar year.”<sup>285</sup> The trouble with this provision, though similar to New York’s provision, is the contingency on “conjunction with single special event or celebration.”<sup>286</sup> If the food establishment has to rely on some special event, then the regulation inhibits a pop-up from freely popping up, which is one of the key characteristics that attracts restaurateurs to pop-ups. Further, the practical enforcement of other requirements in the Code also pose obstacles. For example, the Code requires that a “temporary food establishment shall provide only single-service articles for use by consumers.”<sup>287</sup> This makes creating an up-scale dining experience difficult in terms of plates, silverware, cups, and other practicalities of restaurant dining.

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281. *Id.*

282. *Id.*

283. *See generally* Austin, Tex., Code of Ordinances § 10-3-91 (2019), [https://library.municode.com/tx/austin/codes/code\\_of\\_ordinances?nodeId=TIT10P\\_UHESESA\\_CH10-3FOFOHA\\_ART4MOFOES](https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT10P_UHESESA_CH10-3FOFOHA_ART4MOFOES); Austin, Tex., Code of Ordinances § 10-3-96 (2019).

284. Austin, Tex., Code of Ordinances § 10-3-1(B)(19) (2019), [https://library.municode.com/tx/austin/codes/code\\_of\\_ordinances?nodeId=TIT10P\\_UHESESA\\_CH10-3FOFOHA\\_ART1GEPR](https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT10P_UHESESA_CH10-3FOFOHA_ART1GEPR).

285. Austin, Tex., Code of Ordinances § 10-3-96(B) (2019), [https://library.municode.com/tx/austin/codes/code\\_of\\_ordinances?nodeId=TIT10P\\_UHESESA\\_CH10-3FOFOHA\\_ART4MOFOES\\_S10-3-96TEFOES](https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT10P_UHESESA_CH10-3FOFOHA_ART4MOFOES_S10-3-96TEFOES).

286. *Id.*

287. Austin, Tex., Code of Ordinances § 10-3-96(F) (2019), [https://library.municode.com/tx/austin/codes/code\\_of\\_ordinances?nodeId=TIT10P\\_UHESESA\\_CH10-3FOFOHA\\_ART4MOFOES\\_S10-3-96TEFOES](https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT10P_UHESESA_CH10-3FOFOHA_ART4MOFOES_S10-3-96TEFOES).



However, a pop-up does not neatly fall within the definition of “mobile food establishments” either. A mobile food establishment is confined to “a restricted unit that offers only prepackaged food in individual servings,”<sup>288</sup> or an “unrestricted unit” such as “vehicles with three sides and a cover.”<sup>289</sup> As written, this provision seems to apply exclusively to something like a food truck.

Because these two definitions do not accommodate the notion of pop-up restaurants as used in this Comment, the Austin Municipal Code appears to do little in the way of permitting or regulating pop-ups. Travis County is not any more helpful in this regard. Travis County has its own Code, which contains an entire chapter on “food establishment permits.”<sup>290</sup> Travis County requires all “food service establishments” to obtain a permit in order to operate.<sup>291</sup> The relevant portion of the definition of “food service establishment” is “a restaurant, retail food store, satellite or catered feeding location, catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people, market, vending location, (machine), self-service food market, conveyance used to transport people, institution, or food bank.”<sup>292</sup> While thorough, this definition seemingly only creates a permitting requirement on the base restaurant and not the pop-up itself. A pop-up feasibly could be considered a “catering operation” because it is similar in nature in the sense that it involves preparing food at a remote location for an event. However, the County Code leaves “catering operation” undefined.

Even if the County were to create permitting regulations for pop-ups, county-wide enforcement mechanisms could run into similar problems that Alameda County in California experienced before choosing to amend its regulations. One of the biggest challenges in regulating at the county level is that enforcement personnel are understaffed.<sup>293</sup> In California, “[t]he reason more pop-ups may not have been shut down . . . is that the county doesn’t have enough staff

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288. Austin, Tex., Code of Ordinances § 10-3-1(B)(14)(a) (2019), [https://library.municode.com/tx/austin/codes/code\\_of\\_ordinances?nodeId=TIT10P\\_UHESESA\\_CH10-3FOFOHA\\_ART1GEPR](https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT10P_UHESESA_CH10-3FOFOHA_ART1GEPR).

289. Austin, Tex., Code of Ordinances § 10-3-1(B)(14)(b), (b)(ii) (2019), [https://library.municode.com/tx/austin/codes/code\\_of\\_ordinances?nodeId=TIT10P\\_UHESESA\\_CH10-3FOFOHA\\_ART1GEPR](https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT10P_UHESESA_CH10-3FOFOHA_ART1GEPR).

290. See Travis Cty., Tex. Code ch. 247 (2018), [https://www.traviscountytexas.gov/images/commissioners\\_court/Doc/county-code/subtitle13/chap247.pdf](https://www.traviscountytexas.gov/images/commissioners_court/Doc/county-code/subtitle13/chap247.pdf).

291. *Id.* § 247.001(1).

292. *Id.* § 247.002(14)(A).

293. See generally Kauffman, *supra* note 1.

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to properly enforce California code.”<sup>294</sup> Therefore, if Austin pop-ups are being regulated at the Travis County-level, it is likely inefficient because of the staff member to geographic area ratio. Thus, this Comment posits that Austin pop-ups can be more efficiently regulated by the city.

The most direct solution for Austin is to amend the Municipal Code’s temporary food establishment definition to include pop-up restaurants. This means following the model set by New York. Such an amendment would provide a clear guideline as to the length, duration, and permitting requirements for pop-up restaurants, allowing Austin to capitalize on its pop-ups through permitting fees. It would also provide perceived security to pop-up diners if their chosen dining experience is regulated through permitting and approved by the City. However, should pop-ups continue to expand as Austin continues to grow, the City may consider creating a unique set of pop-up guidelines, like San Francisco. Such a model would vastly improve clarity to pop-up restaurateurs about what authority they need to follow.

#### V. CONCLUSION

Pop-up restaurants have become a chef’s best friend in the sense that they can provide a relatively inexpensive test-case to try new recipes, menus, and experiences. Diners are drawn to pop-ups because their temporary nature provides a sense of urgent exclusivity to have a new and different experience. Because of this increase in popularity and rise in frequency, a regulatory scheme by which to regulate these operations has become necessary if a city wishes to capitalize on them. City officials or those in charge of creating regulations can use the extensive research done on the sharing economy to better understand how pop-ups should be efficiently regulated. Pop-ups offer a variety of beneficial services such as creating jobs, providing a solution to vacant storefronts, increasing attention drawn to the municipality, and spurring the local economy. However, the benefits of pop-ups must be weighed against the drawbacks in order to determine if they are worth permitting in cities and regulating at the municipal level. This Comment proposed that the benefits outweigh the drawbacks and pop-ups should be regulated on a municipality-specific level. If a city like Austin chooses to embrace the advantages of the pop-up trend, there are various regulatory models that have been successful in larger cities

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294. *Id.*

like San Francisco and New York, as these cities are examples of different, but efficient, regulators of pop-up restaurants.