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Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?

Paul A. Diller and Samantha Graff

A growing number of cities and counties have emerged as leaders in the fight against obesity in the United States and have enacted innovative policies to address this epidemic. Much of this local strategy focuses on how retail food establishments — namely, chain restaurants, corner stores, supermarkets, farmers markets, and mobile vendors — affect public health. Recognizing the enormous influence a community’s food environment has on the quality and quantity of what people eat, cities and counties have sought to encourage food retail establishments to promote healthier options through regulations and incentives.

Understanding the importance of local governments in the fight against obesity, leading think tanks and public officials have recommended a range of policy options to municipalities for improving access to healthy food and decreasing the prevalence of unhealthy food in various retail food settings.¹ Public health advocacy organizations and a few leading jurisdictions have contributed additional ideas.² Many national policy recommendations relating to retail food regulations, however, do not address whether the local government has authority to enact such proposals. Indeed, the authority of municipalities to adopt retail-food-related ordinances varies significantly from state to state. Municipal authority depends largely on state delegation of power and the effect of preemptive state laws.

This article seeks to explain the legal authority of cities and counties to enact retail-food-related poli-

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cies. The first section highlights policy proposals that have recently gained attention. Next, the article outlines leading approaches to determining municipal authority among the states. The final section describes general principles of state preemption and then identifies the types of state laws most likely to raise preemption issues for municipalities considering obesity prevention strategies.

Proposals for Regulating Retail Food Establishments for Obesity Prevention

Regulating retail food establishments can be a powerful tool for improving a community’s food environment, especially in low-income “food deserts” — areas that lack full-service supermarkets and restaurants and are saturated with fast-food restaurants and liquor stores.³ Municipalities confronting unprecedented obesity rates are exploring myriad regulatory strategies for increasing the availability and accessibility of nutritious food, and decreasing the ubiquity of fast-food and obesogenic packaged food (see Tables 1 and 2).

Municipal Authority

As a matter of federal constitutional law, local governments exist at the pleasure of the state as mere “convenient agencies.”⁴ States need not give local entities any inherent power and may abolish them at will. In practice, however, all states rely on local governments to assist in service provision and other public functions. Most states grant cities or counties some form of “home rule,” allowing for broad local policymaking authority. In many home-rule states, cities or counties exercise the “police power” — that is, the authority to regulate for the health, safety, and welfare of the community — concurrently with the state legislature.⁵

Home rule stands in contrast to Dillon's Rule, an older form of dividing state and local power that allows municipalities to exercise only those powers expressly delegated by state law.⁶ For instance, state zoning enabling acts expressly delegate to localities the power to set basic criteria for the uses of land, including the physical characteristics of buildings; the density of development; and permitted uses within residential, industrial, and other zones. Since municipalities in Dillon's Rule states may exercise only expressly delegated zoning power, rather than a more general police power, their ability to enact creative land use regulations to improve public health is likely to be more limited than that of home-rule municipalities. Only about 10 states, most of them in the South, still follow Dillon's Rule or a modified version thereof.⁷

Home-rule regimes are roughly divided into two categories: "imperio" and "legislative," depending on the state's constitutional or statutory home-rule provisions.⁸ In imperio states, the courts distinguish between regulatory subjects that are "statewide" or "local." Cities and counties in these regimes may have wide latitude to regulate local subjects but have limited authority over statewide subjects.⁹ Examples of local subjects include zoning laws in Colorado and municipal elections in California.¹⁰ Given that the imperio system draws a somewhat artificial distinction between matters of statewide and local concern, many states have moved toward a legislative home-rule model in recent years.¹¹

In a legislative home-rule system, the state delegates the whole of the police power — or something close to it — to municipalities, but reserves the right to trump, or "preempt," local authority as it sees fit.¹² A city in a legislative regime may enact a regulation pursuant to its police power so long as it is not preempted by state law. Courts in legislative states do not consider whether a city ordinance regulates a matter of statewide or local concern. As a result, preemption is critical to determining the extent of local power in legislative home-rule states.¹³

With regard to the obesity-prevention proposals listed in Tables 1 and 2, the first question a locality must ask is whether it has been given the authority to regulate a given topic area. Depending on the type of state and the subject matter, local power to enact one of these proposals could derive from the delegation of home-rule powers or from an explicit, limited power, such as a state's zoning enabling act. If a locality appears to have the authority to pursue a given obesity-prevention regulation, it must then tackle the question of preemption.

Preemption

State preemption of local laws can be either express or implied. Express preemption is a fairly straightforward legal concept. For instance, if a state legislature enacts a statute clearly stating that "no city may regulate restaurant menu displays," a court will invalidate a local ordinance regulating restaurant menu displays as preempted.¹⁴ Implied preemption, on the other hand, is more complicated and sometimes more controversial. Implied preemption occurs when a local ordinance legislates in an area that the state legislature has not expressly preempted. Despite the absence of expressly preemptive legislation, courts may declare local ordinances invalid on the basis of a conflict with state law, or because the ordinance invades a "field" deemed completely occupied by state law. For instance, if state law extensively regulates the health and safety standards of grocery stores, a local ordinance that seeks to regulate some aspect of store management might be considered impliedly preempted.¹⁵

Determining whether a local ordinance is impliedly preempted is not always a straightforward judicial exercise. Courts employ inconsistent and sometimes contradictory tests to decide these issues. Judiciaries across states vary significantly in how they apply the doctrine of implied preemption. Some take a more aggressive — and, therefore, anti-localist — approach and others require a more express statement of preemptive intent from the legislature before finding a local ordinance invalid.¹⁶ On occasion, a residual judicial devotion to Dillon's Rule seeps into preemption decisions, even in states with home rule provisions.¹⁷

Preemption and Local Food-Retail Regulation

In addition to answering questions of basic local authority, cities and counties considering obesity-prevention measures must determine whether preemption threatens the legality of their chosen policies. While any analysis must be state-specific, some general observations follow.

With respect to the "business operations" and "zoning" obesity-prevention proposals listed in Tables 1 and 2, most state legislatures have not expressly preempted these matters. The most prominent exception is mobile vending, including fruit and vegetable stands, which some states regulate at the state level.¹⁸ In contrast, municipal taxation and fee-assessment authority is often highly circumscribed by state law. Many states either prohibit certain kinds of municipal taxes altogether or limit the incremental amount by which cities or counties may increase a tax.¹⁹ Localities considering proposals like a tax on sugar-sweetened

Table 1

Regulatory Strategies Promoting Healthy Food Options

	Examples	General Ideas
Business Operations	<ul style="list-style-type: none"> • New York City committed to issuing 1,000 permits over two years to “green cart” vendors who only sell fresh uncut produce. These vendors are required to operate in designated areas otherwise lacking access to fresh produce. <i>New York City, N.Y., Admin. Code § 17-307(b)(4)</i>. • Baldwin Park passed a resolution requiring all city vending machines to carry products that meet certain nutrition standards pertaining to fat, saturated fat, sugar, and calories. <i>Baldwin Park, Cal., Res. No. 2008-014</i>. • Minneapolis requires “grocery stores” to carry certain categories of staple foods, including fresh produce, in order to obtain and retain a business license. <i>Minneapolis, Minn., Mun. Code § 203.10</i>. • Watsonville has a two-tiered award system for restaurants that garner a threshold number of points based on a list of healthy eating options. <i>Watsonville, Cal., Mun. Code § 14-29</i>. 	<ul style="list-style-type: none"> • Enact a streamlined permit program for mobile vendors who sell fresh produce in designated “food deserts.” • Set procurement standards for government-run food facilities. • Require food retailers to obtain a license that promotes in some way the sale of healthy food and beverages. • Establish a healthy restaurant certification program that rewards restaurants for reducing the sale and advertising of obesogenic foods and beverages. • Set maximum prices for specified healthy food and beverages. • Enact a menu labeling law that is identical to the federal law (thus enabling local enforcement) and/or that applies to food service establishments that are not covered under the federal law.
Taxes and Fees	<ul style="list-style-type: none"> • New York City provides financial incentives — including real estate tax deductions and a sales tax exemption to developers and store operators — to encourage new full-service grocery stores. <i>New York City Indus. Dev. Agency, FRESH Financial Incentives, available at <http://www.nycedc.com/FinancingIncentives/TaxExemptions/fresh/Pages/fresh.aspx></i>. 	<ul style="list-style-type: none"> • Offer tax incentives and subsidies to attract healthy food purveyors.
Zoning	<ul style="list-style-type: none"> • Des Moines allows the establishment of community gardens on city rights-of-way and city property. <i>Des Moines, Iowa, Mun. Code §§ 74-201, 74-202</i>. • Fresno deems farmers’ markets an accepted use in residential districts in its zoning code. <i>Fresno, Cal., Mun. Code § 12-105(F)(4.5)</i>. • New York City provides incentives to developers of full-service grocery stores, exempting them from zoning requirements regarding the allowable size of stores and the provision of parking spaces. <i>New York, N.Y., Zoning Res. §§ 62-00 - 63-60</i>. 	<ul style="list-style-type: none"> • Establish comprehensive land-use protections for farmers’ markets and community gardens. • Encourage healthier stores and restaurants to move into an area by exempting them from certain zoning requirements. • Establish “conditional uses” that promote healthy food access. For instance, make selling fresh produce a “conditional use” for corner stores or make accepting Supplemental Nutrition Assistance Program benefits (formerly food stamps) a “conditional use” for farmers’ markets.

beverages, therefore, need to investigate whether such a tax might run afoul of state law.

Most obesity-prevention policies have faced little express preemption so far because they have not yet been adopted by a large number of jurisdictions. With increasing local adoption of such policies, however, it is more likely that interest groups opposed to them may seek preemption at the state level. A striking example of this dynamic occurred in the context of menu labeling legislation, a topic that a handful of state legislatures expressly preempted after local ordinances were considered or adopted. While some state legislatures responded by adopting statewide menu labeling standards, Georgia, Tennessee, and Utah did the opposite:

their state legislatures expressly forbade localities from adopting menu labeling ordinances but did not adopt any statewide standards.²⁰ (Subsequently, Congress enacted federal menu labeling standards as part of the Patient Protection and Affordable Care Act, 21 U.S.C. § 343(q)(5)(H), which require nutritional disclosure of chain restaurants with 20 or more locations. The federal law fills much of the void left by the Georgia, Tennessee, and Utah laws because it applies within all states. But municipalities in these states that want to regulate smaller chains remain hampered by their state preemption provisions.)

It is also likely that some of the policies that regulate business operations will be attacked as impliedly pre-

Table 2

Regulatory Strategies Restricting Unhealthy Food Options

	Examples	General Ideas
Business Operations	<ul style="list-style-type: none"> Philadelphia prohibits the use of artificial trans fat in restaurant food. <i>Phila., Pa., Heath Code § 6-307.</i> Santa Clara County enacted an ordinance setting nutrition standards for restaurant meals that include a toy or other incentive item. <i>Santa Clara County, Cal., Health & Welfare Code § A-18.</i> Phoenix bans mobile street vendors within 600 feet of schools between 7:00 a.m. and 4:30 p.m. <i>Phoenix, Ariz., Mun. Code § 131-24.</i> 	<ul style="list-style-type: none"> Regulate the ingredients in restaurant food. Limit toy giveaways with unhealthy food. Restrict the sale of certain foods near schools. Require grocery stores to have “healthy check-out aisles,” free of obesogenic food and beverages. Prohibit food sales in non-retail-food outlets such as toy and electronic stores. Set minimum prices for specified obesogenic food or beverages. Require food retailers to obtain a license that limits in some way the sale of obesogenic food and beverages.
Taxes and Fees	<ul style="list-style-type: none"> Chicago imposes a tax on soft drink sellers at the rate of three percent of the gross receipts from sales of bottled and canned soft drinks, and nine percent of the cost price of fountain soft drinks. <i>Chicago, Ill., Mun. Code § 3-45.</i> 	<ul style="list-style-type: none"> Impose excise taxes or regulatory fees of at least one penny per ounce on sugar-sweetened beverages and earmark the revenues to fund obesity prevention programs.
Zoning	<ul style="list-style-type: none"> Detroit bans fast food restaurants within 500 feet of schools. <i>Detroit, Mich., Mun. Code § 16-12-91.</i> Westwood Village regulates the density of fast food restaurants to at most one per every 400 feet. <i>Westwood Village, Cal., Specific Plan § 5B.</i> 	<ul style="list-style-type: none"> Prohibit new fast food restaurants from opening near child-oriented locations or in already saturated neighborhoods. Regulate the density of fast food restaurants or liquor stores. Ban drive-through windows.

empted in the courts once more municipalities adopt them. Opponents may argue that state retail food codes preempt local regulations of restaurants and grocery stores. Almost all states have retail food codes, largely patterned on the Food and Drug Administration’s model code, that apply to both restaurant and grocery store settings.²¹ These codes attempt to ensure that food retailers preserve minimum sanitary standards. Many states rely on county and city agencies to enforce these regulations. A restaurant facing a local ban on trans fats or a grocery store facing a requirement of healthy checkout aisles might argue that the state’s retail food code has occupied the field of restaurant or grocery store regulation completely and thus precluded local ordinances in the area.

Most field preemption arguments against local regulatory anti-obesity policies are unlikely to succeed because the main intent of state food codes is to ensure minimum food safety standards. Local anti-obesity regulations, by contrast, aim to promote access to healthful food or limit the availability of obesogenic foods that are otherwise “safe” under the state food code. Only when the “field” regulated by a state food code is defined extremely broadly is a field preemption argument likely to prevail. Additionally, in

many states, food retail codes empower local boards of health to enact their own regulations so long as they do not conflict with the state code.²² These express grants of authority likely bolster local authority to regulate and would help defeat an implied preemption challenge.

The proposal to license retail food stores on the basis of healthy food options may raise special problems in states where licenses are administered on a statewide basis and cities or counties do not already regulate licensing.²³ Additionally, some states have adopted programs to provide grants and loans to grocery stores that offer fresh produce in underserved communities.²⁴ These programs arguably occupy the field of providing incentives to grocery stores to sell healthier foods, but this argument may be unsuccessful absent any expressly preemptive language in state law.

Conclusion

In most states, there is solid legal authority at the municipal level to adopt obesity-prevention strategies. Preemption may emerge as a threat in the political realm over time as interest groups opposed to local obesity-prevention action urge state legislatures — or

perhaps even Congress — to preempt expressly the ordinances they dislike. Various industries have used preemption to undermine public health campaigns in areas such as tobacco, firearm, alcohol, and pesticide control.²⁵ Similarly, some food industry advocates have used preemption to fight nutrition policy. Further efforts are likely with increasing local regulation. Proponents of obesity-prevention strategies, therefore, must not only advocate for adoption of such policies locally, but must also remain vigilant of attempts to trump such policies at the state and federal level.

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1. See Institute of Medicine and National Research Council of the National Academies, *Local Government Actions to Prevent Childhood Obesity*, 2009, available at <http://www.nap.edu/openbook.php?record_id=12674&page=R1> (last visited December 15, 2010); United States Conference of Mayors, *Mayors' Guide to Fighting Childhood Obesity*, 2009, available at <<http://www.leadershipforhealthycommunities.org/images/stories/guide-200908.pdf>> (last visited December 15, 2010); White House Task Force on Childhood Obesity, *Solving the Problem of Childhood Obesity within a Generation*, Report to the President, May 2010, available at <<http://www.letsmove.gov/obesitytaskforce.php>> (last visited December 15, 2010).
2. For examples of policy ideas from advocacy organizations, see the model ordinances at www.nplanonline.org and the nutrition policy page at www.cspinet.org. For examples of leading jurisdictions, see Tables 1 and 2.
3. See M. Gallagher Research & Consulting Group, *Examining the Impact of Food Deserts on Public Health in Chicago* (2006).
4. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).
5. See, e.g., *State of Utah v. Hutchinson*, 624 P.2d 1116 (1980) (discussing Utah's delegation of "general welfare" or "police" power to cities and counties) (citing Utah Code Ann. § 17-5-77 (1953)). In some states, only some subset of cities or counties — those with a minimum population or those that have adopted a home-rule charter — enjoy home-rule powers. In addition, in some states cities and counties can merge to form one home-rule entity — e.g., "Louisville/Jefferson County Merger," available at <<http://www.louisvilleky.gov/YourGovernment/Merger.htm>> (last visited December 15, 2010) (explaining 2003 merger of Louisville, Ky., with its surrounding county).
6. J. F. Dillon, *The Law of Municipal Corporations* § 9b, at 93 (2nd ed. 1873).
7. States still adhering to Dillon's Rule in large part include Alabama, Arkansas, Nevada, New Hampshire, Vermont, Virginia, and West Virginia, and, to a lesser extent, Idaho, North Carolina, and Tennessee. See D. Krane et al., eds., *Home Rule in America* (Washington, D.C.: CQ Press, 2001).
8. R. Briffault and L. Reynolds, *Cases & Materials on State and Local Government Law* (West 2009): at 34-36.
9. See, e.g., *County of Riverside v. Superior Court*, 66 P.3d 718 (2003) (invalidating state law that interfered with county's control over its employees' pay).
10. *City of Northglenn v. Ibarra*, 62 P.3d 151, 155-56 (Colo. 2003); Cal. Const. art. XI, § 5(b).
11. See, e.g., *City of La Grande v. Public Employees Retirement Bd.*, 576 P.2d 1204, 1213-15 (Or. 1978), *aff'd on reh'g*, 586 P.2d 765 (concluding that it is not "generally useful" to classify subjects of legislation as local or statewide because such an inquiry calls for a "political judgment" rather than a legal determination).
12. In those states with an initiative system, laws passed by state voters also trump local ordinances.
13. P. Diller, "Intrastate Preemption," *Boston University Law Review* 87 (2007): 1113-1176, at 1126. Because there is no "local" realm that the state may not regulate in legislative states, local ordinances in such states are almost never immune to statewide preemption.
14. To be sure, the question of whether a state law expressly preempts a certain local ordinance is not always easy to answer. *Id.*, at 1115 n.8; see also C. Nelson, "Preemption," *Virginia Law Review* 86 (2000): 225-305, at 263 ("[T]he distinction between 'express' and 'implied' preemption is surprisingly elusive.").
15. *Cal. Grocers Ass'n v. City of Los Angeles*, 98 Cal. Rptr.3d 34 (Cal. Ct. App. 2009) (invalidating Los Angeles's grocery worker retention ordinance in light of state retail food code's provisions that regulate grocery stores).
16. See Diller, *supra* note 13, at 1140 (discussing different doctrinal approaches).
17. For instance, in a ruling that invalidated Atlanta's initial effort to extend domestic partnership to city employees, the Georgia Supreme Court purported to construe "strictly" city powers, and resolve "any doubt concerning the existence of a particular power" against the city, *City of Atlanta v. McKinney*, 454 S.E.2d 517, 521 (Ga. 1995), despite the fact that Georgia has a Municipal Home Rule Act that is supposed to grant broad authority to cities. Ga. L. 1965, p. 298, *codified at* Ga. Code Ann. § 36-35-1 *et seq.*
18. See, e.g., Ga. Comp. R. & Regs. § 40-7-1-.02 (including fruit and vegetable stands within retail food establishments regulated by state Department of Agriculture).
19. See, e.g., S.C. Code Ann. § 4-10-20 (allowing counties to add one percent to South Carolina's five-percent sales tax).
20. Compare Cal. Health & Safety Code § 114094(j), with Ga. Code Ann. § 26-2-373; 2010 Tenn. Pub. Acts ch. 614; Utah Code Ann. [2 section symbols] 10-8-44.5; 17-50-329.
21. See United States Food & Drug Administration, "Real Progress in Food Code Adoptions," available at <<http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/ucm108156.htm>> (last visited December 15, 2010) (noting that 49 of 50 states have adopted retail food codes premised on FDA versions going back to 1993).
22. See, e.g., Wash. Rev. Code § 70.05.060(3).
23. See Briffault and Reynolds, *supra* note 8, at 428-429 (noting that licenses are often seen as "[a]ffirmative state permission of certain activity" and, therefore, additional local regulations of that activity may be legally suspect).
24. See, e.g., La. Rev. Stat. Ann. § 3:296 (Louisiana Healthy Food Retail Act of 2009).
25. See National Policy & Legal Analysis Network to Prevent Childhood Obesity and Public Health Law Center, *The Consequences of Preemption for Public Health Advocacy*, Fact Sheet, 2010, available at <http://www.nplanonline.org/system/files/Preemption_PublicHlthAdvcy_FINAL_20100330.pdf> (last visited December 15, 2010).