DATE: May 26, 2015

TO: City Council

FROM: Kelly Stachowicz, Assistant City Manager  Danielle Foster, Housing & Human Services Superintendent

SUBJECT: Ordinance Establishing the Default Beverages Offered with Children’s Meals

Recommendations
1. Hold a public hearing; and
2. Introduce the draft ordinance (Attachment 1) establishing the default beverages offered with children’s meals.

Fiscal Impact
This item is being processed using existing staff resources. If the ordinance is adopted, staff aims to use existing resources in the initial introduction and certification process of the program, which will redirect existing staff time. If there is ongoing non-compliance by a restaurant, they would be subject to the noticing and citation process of code enforcement.

City Council Goals
Ensure a safe and healthy community. Pursue and promote polices that encourage healthy lifestyles. Objective 5D: Require restaurants to make milk or water the default beverage in kids’ meals.

Background and Analysis
California and the nation are experiencing a childhood obesity epidemic. In Davis, one-quarter of all children in grades 5, 7 and 9 are overweight or obese. In 2012, more than half of all Davis 5th, 7th, and 9th graders failed to meet the CA Fitness Standards.

Sugary beverages play a central and unique role in the obesity epidemic. Studies have found a significant link between sugary drink consumption and weight gain in children. Soda and sugary beverages are the single largest source of calories in children's diets, and provide nearly half of kids' added sugar intake.

Communities are enacting policies to increase access to healthy beverages for children, such as adopting standards for beverages provided in parks, recreational facilities, and city-sponsored programs. Restaurants serve as another important venue within cities where changing local policies on healthy beverages could contribute to the fight against childhood obesity. Cities can promote good health for their youngest residents and support parents in purchasing healthy beverages for their children by adopting a policy that requires restaurants to offer water or milk
as part of any kids' meal unless a customer specifically requests an alternative beverage. First 5 Yolo has been working to explore whether the City of Davis could adopt such a policy.

Attached to this staff report is information provided by First 5 Yolo (Attachment 2) regarding sugary beverages and options for the city to explore related to the impact of such beverages on children. The City has previously adopted nutritional standards related to the sale of food in vending machines and concession stands at its parks and pool facilities (Attachment 3). Initially the City’s goal was to provide food compliant with the nutritional standards in 100% of its concession stand and vending at Arroyo Pool, but subsequently determined that 50% at all of the pool sites was more acceptable due to public feedback and decreases in revenue. The general feedback the city has received is that the public is interested in having options at the pool sites.

The Social Services Commission took action at their September 2014 meeting to unanimously recommend that the City Council support an initiative to require the default option for drinks that accompany children’s meals to be milk or water, allowing juice, soda, or other drinks to still be available upon request should the parent wish to have that option. The Commission also included in its motion a recommendation that the City look for opportunities to provide increased health education to the community. Lastly, members of the commission requested that draft ordinance language return to them for consideration if the Council acted to proceed with this policy.

Subsequently the City Council heard this item and directed staff to conduct public outreach on this issue and return with a draft ordinance for consideration. Staff has completed outreach on this item, including:

- Mailing a letter to all food establishments in Davis detailing information on the discussion, invitation to a public meeting, and a link to a public survey.
- Creating and distributing a survey aimed at collecting local comments from food establishments on this potential ordinance.
- Holding a public meeting to discuss the potential ordinance and hear feedback (questions and concerns) from local food establishments.
- Mailing a second letter to food establishments which have a kids’ meal inclusive of a beverage, explaining the proposed ordinance.

Staff did not receive any direct feedback on this issue. No one emailed or called about the potential ordinance and no one attended the public meeting. Three responses were received on the public survey. Of the responses received, one was against the potential ordinance and the other two were in support.

Staff has proceeded with drafting an ordinance consistent with Commission and Council direction. The draft ordinance includes water and milk as the default beverages for children’s meals. While staff and First 5 Yolo discussed and considered juice as an option, the draft ordinance does not include this option because according to the American Academy of Pediatrics, their guidelines suggest that children one to six years old have no more than six fluid ounces of juice per day and children ages seven to eighteen have no more than eight to twelve fluid ounces of juice per day, ideally divided into two or more servings. Given that most juice boxes are packaged at greater than six ounces per container, staff felt that including this option might be problematic for ordinance compliance.
Another challenge with the juice option is differentiating between 100% juice with no sugar added and other juices that are sold on the market. In the interest of promoting healthy choices and simplifying enforcement of the ordinance, staff is not recommending that juice be included as an option in this ordinance. If there is interest in adding this option back into the draft ordinance, staff would recommend the following language:

(3) 100 percent (100%) juice, with no added sweeteners, in a serving size of no more than six fluid ounces.

While there has not been as much research on the impact of juice on children, the critical aspect to consider is the amount of sugar being provided through this option.

To implement the proposed ordinance, as laid out in Sections 17.02.02 and 17.02.03 in the attached, staff is proposing a self-certification process for all food establishments initially to record which businesses are selling children’s meals inclusive of a drink. After the initial certification, only establishments that sell children’s meals inclusive of a beverage would be required to provide annual certification of their ongoing compliance with the ordinance. Beyond the self-certification, enforcement of the ordinance would be on a complaint basis, similar to code enforcement. Establishments receiving valid complaints would receive a notice to correct and potentially fines if action to comply is not taken. (The first fine would be $100 and would increase upon subsequent violations.) This approach was the result of conversations with representatives of the Yolo County Health Department and First 5 Yolo.

First 5 representatives will be present at the meeting for additional information and their written information is attached.

At their April 5, 2015 meeting, the Social Services Commission voted unanimously to recommend that the City Council adopt the attached ordinance as proposed.

Attachments
1. Draft Ordinance Establishing the Default Beverages Offered with Children’s Meals
2. A. Creating Successful Healthy Restaurant Policies
   B. First 5 Yolo Fact Sheet (Sugary Beverages)
   C. How Cities Can Promote Healthy Restaurant Beverages
3. A. City of Davis Resolution 10-186 - Nutritional Standards HEAL
   B. Revised City of Davis Resolution 12-02 Modifying Compliance Level for Nutritional Standards
AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DAVIS
ADDING ARTICLE 17.02 TO CHAPTER 17 OF THE DAVIS MUNICIPAL CODE
ESTABLISHING DEFAULT BEVERAGES OFFERED WITH CHILDREN’S MEALS

WHEREAS, the City Council desires to promote healthy meal options for children and families and contribute to building a healthier community;

WHEREAS, an important goal of the City of Davis is to foster an active and healthy lifestyle and implement innovative approaches to social problems;

WHEREAS, families in the City of Davis often have limited time to obtain and prepare healthy food, making dining out an appealing and sometimes necessary option;

WHEREAS, a recent 2013 study of the most profitable fast food restaurant chains in the U.S. found that only three percent (3%) of the assessed meal combinations met the expert nutrition standards for children’s meals;

WHEREAS, sugar-sweetened beverages alone make up to nine percent (9%) of the calories children consume daily, and evidence suggests sugar-sweetened beverages are linked to obesity;

WHEREAS, obesity-related health conditions include type 2 diabetes, heart disease, stroke, high blood pressure, high cholesterol, certain cancers, asthma, low self-esteem, and depression, according to the U.S. Department of Health and Human Services and the Centers for Disease Control and Prevention;

WHEREAS, obesity-related health conditions have serious economic costs, with a 2006 study commissioned by the California Center for Public Health Advocacy estimating that the total annual health care costs attributed to overweight and obesity-related health conditions in Yolo County neared $58.3 million;

WHEREAS, the City Council of the City of Davis believes that limiting the sugary beverages offered with children’s meals will contribute to the overall health and wellbeing of the City of Davis.

NOW, THEREFORE, the City Council of the City of Davis does hereby ordain as follows:

SECTION 1. The City Council hereby adopts the recitals of this Ordinance as true and correct and such recitals are hereby incorporated by reference as though fully set forth in the text of this Ordinance.

SECTION 2. Article 17.02 is hereby added to the City of Davis Municipal Code to read in full as set forth in the attached Exhibit “A,” incorporated herein by this reference.
SECTION 3. If any section, subsection, subdivision, paragraph, sentence, clause or phrase added by this Ordinance, or any part thereof, is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this Ordinance or any part thereof. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof irrespective of the fact that any one or more subsections, subdivisions, paragraphs, sentences, clauses or phrases are declared unconstitutional, invalid or ineffective.

SECTION 4. The City Clerk shall certify to the adoption of this Ordinance and shall cause the same or a summary thereof to be published as required by law.

SECTION 5. This Ordinance shall take effect and be in full force and effect thirty (30) days from and after the date of its final passage and adoption.

INTRODUCED on the 26th day of May, 2015, and PASSED AND ADOPTED by the City Council of the City of Davis on this _____ day of ______________, 2015, by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

Daniel M. Wolk
Mayor

ATTEST:

Zoe S. Mirabile, CMC
City Clerk
EXHIBIT “A”

ARTICLE 17.02 CHILDREN’S MEALS

17.02.01 Definitions.

For purposes of this Article, the following words and phrases shall have the following meanings:

(a) “Children’s Meal” means a combination of food items, or food item(s) and a beverage, sold together at a single price, primarily intended for consumption by children.

(b) “Restaurant” means a food establishment that serves food to customers for consumption on or off premises, including fast-food and full-service dining establishments. It includes, but is not limited to, drive-through or walk-up counters, coffee shops, cafes, pizza parlors, and dine-in establishments. A restaurant, for purposes of this Article, may provide alcoholic beverage sales for drinking on premises provided that such sales are ancillary to food service.

(c) “Default beverage” means the beverage automatically included or offered as part of a children’s meal, absent a specific request by the purchaser of the children’s meal for an alternative beverage.

17.02.02 Default Beverages In Children’s Meals.

(a) On and after September 1, 2015 a restaurant that sells a children’s meal that includes a beverage shall make the default beverage offered with the children’s meal one of the following:

(1) Water, sparkling water, or flavored water, with no added natural or artificial sweeteners;

(2) Milk or non-dairy milk alternatives.

(b) Nothing in this Section prohibits a restaurant’s ability to sell, or a customer’s ability to purchase, a substitute or alternative beverage instead of the default beverage offered with a children’s meal, if requested by the purchaser of the children’s meal.

(c) All restaurants shall complete an initial self-certification certifying whether they offer children’s meals and if so, certifying that they comply with the provisions of this Section 17.02.02. Subsequently, restaurants that sell children’s meals shall complete an annual self-certification, certifying that they comply with the provisions of this Section 17.02.02, as may be modified from time to time at the discretion of the City.
17.02.03 **Enforcement.**

In addition to all other available remedies at law, this Article shall be enforceable through the use of the administrative citation procedures set forth in Davis Municipal Code Chapter 1, Article 1.02.

17.02.04 **Construction.**

This section shall be construed so as not to conflict with applicable federal or state laws, rules, or regulations. Nothing in this section authorizes any City agency to impose any duties or obligations in conflict with limitations on municipal authority established by federal or state law.
Creating Successful Healthy Restaurant Policies

Understanding the Laws Regulating Restaurants

Concerned about the obesity epidemic and the related health implications and costs, communities around the country are looking at ways to encourage healthier eating. More than two-thirds of adults and nearly a third of children are overweight or obese. On average, Americans eat as many as a third of their meals in restaurants. Consequently, communities are looking for strategies to improve the health of the food offered in restaurants.

A growing number of communities have adopted or are considering policies to increase the availability of healthier food at restaurants. Some cities have selected a legislative or regulatory approach. For example, prior to the adoption of the Affordable Care Act – which mandates that chain restaurants provide nutrition information to consumers – New York City, San Francisco, and Philadelphia adopted laws requiring certain restaurants to disclose calorie counts on menus. Other cities have used their zoning power to limit the availability of fast food. Los Angeles recently adopted a zoning law that restricts the density of stand-alone fast food restaurants in an area within the city. Concord, Mass., and Calistoga, Calif., have banned fast food restaurants entirely.
Other communities have focused more on programmatic efforts. Somerville, Mass., for example, has implemented a “healthy restaurant program,” offering incentives to restaurants that agree to provide consumers with a certain number of entrées that meet particular health standards. In exchange for offering consumers the healthier meals, restaurants receive benefits, such as training and free publicity.

Regardless of the approach, community members need to understand the regulatory framework that governs restaurants so their approach conforms to the law. Restaurants are regulated by federal, state, and local laws. Understanding this framework can ensure that communities adopt strategies that comport with the law and therefore have a stronger likelihood of success.

Federal Law

Food, Drug, and Cosmetic Act

The Food, Drug, and Cosmetic Act (FDCA), enacted in 1938, generally prohibits the misbranding or mislabeling of food. In 1990, Congress adopted the Nutrition Labeling and Education Act (NLEA), which amended the FDCA by clarifying and strengthening the Food and Drug Administration’s (FDA) legal authority to: (1) require general nutrition labeling on foods, specifying what and how nutritional information must be disclosed, and (2) establish the circumstances under which particular nutrient and health claims may be made about food. Most consumers are familiar with the general nutrition labeling requirements from the Nutrition Facts charts required on most prepackaged food. As described below, some of the FDCA’s provisions apply to restaurants.

Nutrition Labeling: Federal Calorie Disclosure Law

Until recently, the FDCA’s general nutrition labeling provisions did not apply to restaurants. The Affordable Care Act amended the FDCA to require new nutrition disclosure requirements for certain restaurants and vending machines. The law applies to chain restaurants or similar retail food establishments that have at least 20 locations doing business under the same name (regardless of the type of ownership of the locations) and offering substantially the same menu items for sale. These restaurants must:

- List the number of calories for every standard menu item and suggest total daily calories on a menu, menu board, or drive-through menu board;
- List the calories per serving next to each item, if the food is provided at a salad bar, buffet, cafeteria, or similar self-service facility (including self-service beverages); and
- Make available, through a brochure, poster, or other means, additional serving size information, including: the total number of calories, calories derived from fat, the amount of total fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, total protein, and any additional nutrient information identified by the Secretary of Health and Human Services as necessary for consumers to make healthy choices.

On April 6, 2011, the FDA solicited public comments for its proposed rule implementing the new law. On May 24, it issued some technical corrections to the proposed rule. The FDA is expected to issue the final rule in 2012.

The law expressly prohibits or preempts state and local governments from imposing any requirements for the nutrition labeling of food that are not identical to the FDCA’s requirements for the chain restaurants covered by the Act. Thus, states and cities may impose laws that are identical to the federal law, but may not require chain restaurants with at least 20 outlets to post any nutritional information on their menus that differs from what is required by the FDCA. The law does not prohibit state and local governments from imposing nutrition labeling requirements on restaurants that are not covered by the Act, but it allows any such
entity to formally opt in to these requirements (and therefore, opt out of any state or local law). The FDA has issued guidance detailing the procedure for voluntary registration.

The FDCA contains enforcement provisions to ensure that food is not mislabeled. Generally, the FDA may enjoin sales of the food or pursue civil or criminal penalties. Federal law allows states to take action against mislabeled food in their jurisdiction, but they must give at least 30 days notice to the FDA before proceeding. These enforcement mechanisms existed prior to the adoption of the menu-labeling provisions and were not designed specifically to address menu labeling.

**Nutrient-Content and Health Claims**

The FDCA also regulates labeling on foods that makes particular nutrient or health claims. Any restaurant that makes nutrient-content or health claims about food on its menus, posters, or signs must comply with the requirements spelled out in the FDCA and its regulations. These requirements, which existed prior to the recent reform, apply to all restaurants (members of a chain or not).

**Nutrient-Content Claim**

A nutrient-content claim is a labeling claim that expressly or by implication “characterizes the level of any nutrient.” The mandatory nutrition labeling disclosures themselves, required of chain restaurants, are not considered nutrient-content claims. The FDA regulations specify what terms may be used when making a nutrient-content claim and what nutrient content must be present in the food in order to use the term. Thus, when a restaurant makes a nutrient-content claim on its menu, such as that an item is “low-fat,” it must comply with the FDCA’s nutrient-content claims requirements for restaurants. Upon request, the restaurant must disclose the nutrition information that is the basis for the claim – for example, that “low-fat” means “this meal contains 10 grams of fat.”

Restaurants may determine the nutrient levels of the food they serve by using nutrient databases, cookbooks, analyses, or other reasonable bases that provide assurance that the food meets the nutritional requirements for the claim. Currently, the FDA does not dictate standardized type, size, or placement requirements for presenting information that supports a nutrient claim, but states, “[l]abeling that is easily accessible to consumers, that contains all required nutrition information, and that is presented clearly and legibly” would conform to its requirements. When the FDA issues the final regulations implementing the menu-labeling provisions, it could make additional changes to these regulations.

**Health Claim**

A health claim is a claim on a food label that expressly or by implication, including third-party references, written statements, or symbols, “characterizes the relationship of any substance . . . to a disease or a health-related condition.” The FDCA uses the term “substance” to mean a specific food or component of food. For example, the FDA considers using the term “heart-healthy” next to an entrée on a menu to be a health claim. It contains the two required elements: (1) a reference to a nutrient or substance – the nutrients in the entrée, and (2) a reference to a disease or health-related condition – heart disease. Similarly, the use of a heart symbol constitutes an implied health claim.

The FDCA strictly regulates when a substance may be eligible for a health claim, what nutrient content must be present in the food to make the claim, and what nutrient information a restaurant must disclose in reference to the health claim. A restaurant may not make a health claim for foods that exceed specified levels of total fat, saturated fat, cholesterol, or sodium. The FDA authorizes a health claim only when it determines, based on the totality of publicly available scientific evidence, that there is significant scientific agreement among qualified experts that the claim is supported by evidence.
State and Local Laws

State and local governments also regulate restaurants. The extent to which a city or county can pass laws regulating restaurants depends on the extent of the police power—the power of the government to regulate private conduct to protect and further the public’s health, safety or general welfare—granted under its state constitution or statutes. Because of variations in state law, some the following types of laws may be passed at the state level, while others may be passed at the local level.

State Retail Food Codes

All states have laws setting health and safety standards for restaurants. Forty-nine states have laws based on the FDA’s model Food Code versions from 1993 or later.28 Updated most recently in 2009, the model Food Code uses the latest scientific evidence to set forth sanitation and food-handling requirements for restaurants, retail food stores, vending operations, and food service operations in institutions such as schools, hospitals, nursing homes and child care centers.29 Briefly, the model code establishes definitions; sets sanitation standards for personnel, food operations, and equipment and facilities; and provides for food establishment plan review, permit issuance, inspection, and permit suspension.30 State legislatures adopt the model Food Code either “as is,” or with changes. Although the food codes are state law, they are frequently implemented at the local or regional level through county health, agriculture, or similar agencies. Restaurants apply to their local county health department or other designated agency for an operating permit. The local environmental health officer (or comparable employee) is responsible for inspecting the restaurant, ensuring that employees have received proper food safety training, monitoring compliance, and enforcing the law.

State Food, Drug and Cosmetic Acts

Some states have adopted their own food, drug, and cosmetic acts. California, for example, adopted the Sherman Food, Drug, and Cosmetic Act, with provisions that are identical to the FDCA.31 Under the law, California can enforce regulations related to mislabeled or misbranded food within its borders.32 In addition, the California department of health can authorize local county health departments to enforce the regulations relating to retail food establishments, including restaurants.33

Zoning Laws

Cities and counties use zoning and other land use measures to regulate growth and development in an orderly manner. Zoning divides an area into districts and determines how the land in each district may be used. State laws give most cities and counties the power to enact zoning laws. Many use that power to regulate where restaurants may locate.

Other Operating Licenses or Permits

Most communities require restaurants to obtain additional permits or licenses to operate. In some communities, state law determines the type of permits or licenses; in others, a mix of state and local law does so. For example, a restaurant may need a business license, a fire inspection clearance or permit, a building permit, a particular type of waste permit, or other type of license.

Other Local Laws Affecting Restaurants

State and local laws also may regulate other health and environmental aspects of restaurants. Many states ban smoking in restaurants.34 In states that do not ban smoking, cities that are empowered to do so have banned smoking.35 California restricts restaurant use of trans fats, as does New York City.36 Some communities have other laws regulating restaurant environments. For example, Honolulu requires restaurants to recycle or compost their waste,37 and San Francisco prohibits restaurants from serving take-out food in containers made of polystyrene foam.38
Finally, some communities have laws encouraging restaurants to serve healthier food. NPLAN has a model ordinance requiring restaurants that give away toys with children’s meals to meet certain nutrition standards. NPLAN’s Model Ordinance for Healthier Toy Giveaway Meals, is available at: www.phlpnet.org/childhood-obesity/products/model-ord-healthy-toy-giveaway. Santa Clara County, Calif., enacted an ordinance based on NPLAN’s model. Watsonville, Calif., requires new restaurants to contain certain healthy food options in order to obtain a building permit.

Policy Recommendations

Establish a Healthy Restaurant Recognition Program

A number of states and communities have adopted or are considering adopting restaurant recognition programs to encourage restaurants to offer healthier fare to consumers. Restaurants choose to participate in the program. These programs generally require restaurants to offer a certain number of menu items that meet established nutritional standards. The healthy items are identified as such on the menu. In exchange, these programs offer restaurants free publicity, nutrition training, nutrition analysis of menu items, and other benefits. NPLAN’s toolkit to help communities establish a healthy restaurant program, Putting Health on the Menu: A Toolkit for Creating Healthy Restaurant Programs, is available at: www.phlpnet.org/childhood-obesity/products/healthy-restaurant-programs.

Restaurant recognition programs are unlikely to be considered preempted by the federal law. As described above, the federal law prohibits states and political subdivisions of states from establishing “any requirement” for nutrition labeling of food for restaurants of chain of 20 or more outlets. Restaurant recognition programs are voluntary programs; restaurants choose whether to participate in the programs. Once they choose to participate, they may be contractually bound to follow the program requirements— which may include labeling on the menu to inform customers that designated entrées meet certain nutrition standards. But, because the programs are not mandatory, they do not impose a requirement that is likely to fall within the federal law’s preemption clause.

Because all restaurants, however, are subject to the nutrient and health claim requirements of the FDCA, it is important that health departments design their restaurant recognition programs to be consistent with the law’s requirements. While the FDA has issued guidance on the application of the FDCA to restaurants, it decides whether a statement is a nutrient or health claim on a case-by-case basis. Thus, there is no guarantee that a community’s restaurant program would be exempt from FDA scrutiny. As a result, when implementing a healthy restaurant recognition program, the safest course is to assume that any identification of healthy entrées on the menu would be considered at least a nutrient claim and possibly a health claim as well. Accordingly, the programs should:

- Use established nutrition standards, such as those contained in the U.S. Dietary Guidelines for Americans, to determine what qualifies as a healthy menu item, side dish, or beverage;
- When using a dietary guideline based on specific levels for intake of a nutrient based on total daily consumption, divide the total by four (three meals and a snack per day) to determine the appropriate value for an individual meal;
- Use symbols such as a star or check, not a heart, to identify the healthy menu items;
- Ensure that proper nutrition analysis—using nutrient databases, cookbooks, analyses, or other reasonable means—support any menu item identified as consistent with the program’s nutrition standards;
- Ensure that restaurants make nutrition information related to the identified menu items available in writing to consumers;
- Ensure that no identified entrees exceed the FDA-specified levels of total fat, saturated fat, cholesterol, or sodium permitted in health claims.
Enact a State or Local Menu Labeling Law to Allow Local Enforcement

Under the new federal law, states and localities empowered to do so under state law may pass laws identical to the federal law. States and communities that do so may monitor and enforce the law within their jurisdictions. As a practical matter, states and localities are in a better position than the FDA to monitor and enforce menu-labeling in their communities. Vermont has enacted a menu-labeling law that is identical to the federal law for that purpose. Similarly, King County, Wash., recently amended its pre-existing menu-labeling law to be identical to the federal law so that it may monitor its local restaurants.

States and localities also may pass menu-labeling laws to address those restaurants not subject to the federal menu-labeling law. But, as noted above, restaurants subject to a state or local law but not to the federal law may opt to comply with either the federal or non-federal law.

Establish Fast Food Zoning Restrictions

Communities also may use their zoning power to regulate the types and density of certain types of restaurants. Local governments have considerable discretion when enacting zoning regulations, including those restricting the location, density, or number of fast food restaurants. For example, Concord, Mass., and Carmel, Calif., ban all fast food restaurants. Recently, the Los Angeles City Council adopted a ban on new freestanding fast food restaurants in the South Central part of Los Angeles. Detroit prohibits fast food restaurants within 500 feet of schools. NPLAN has a model ordinance limiting fast food restaurants near schools. NPLAN’s Model Healthy Food Zone Ordinance: Creating a Healthy Food Zone Around Schools by Regulating the Location of Fast Food Restaurants, is available at: www.nplan.org/nplan/products/model-healthy-food-zone-ordinance.

Governments enact zoning laws under their police power. Provided there is a reasonable basis for different zoning treatment of similar lands, land uses, or land users, courts will generally uphold the regulations, even in the absence of evidence that the different zoning treatment will have its intended effect. When drafting zoning restrictions, communities should ensure that they have articulated a rational basis – protecting the health, safety, or general welfare of their citizens – to justify the difference in treatment.

Conclusion

Americans love to dine out and eat on average a third of their meals in restaurants. But deciding to eat a meal out shouldn’t mean having to eat an unhealthy meal. Innovative cities are adopting policies to make healthy options more readily available. With a clear understanding of the laws regulating restaurants, communities can be sure to adopt strategies that comport with the law and have a stronger likelihood of success.
Creating Successful Healthy Restaurant Policies


3 New York State Restaurant Assoc. v. New York City Board of Health, 3D IR (2009).

4 21 U.S.C. § 343(q)(5)(H)(viii) (2010). Vending machines will require "a sign in close proximity to each article of food or the selection button that includes a clear and conspicuous statement disclosing the number of calories contained in the article of food," unless the vending machine allows a prospective purchaser to examine the Nutrition Facts Panel before purchasing the food item or otherwise provides visible nutrition information at the point of purchase.


7 Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Correction. 76 Fed. Reg. 100,30050 (May 24, 2011) (to be codified at 21 C.F.R. pts. 11 and 111).


10 Voluntary Registration by Authorized Officials of Non-Covered Retail Food Establishments and Vending Machine Operators Electing To Be Subject to the Menu and Vending Machine Labeling Requirements Established by the Patient Protection and Affordable Care Act of 2010, 75 Fed. Reg. 43182-04 (July 23, 2010).


15 21 U.S.C. § 343(c)(1)(A) (2010); emphasis added.


19 FDA Food Labeling Guide, question no. 9, supra note 18.

20 Id.


22 FDA Food Labeling Guide, question no. 40, supra note 18.


North Carolina has adopted a law based upon the 1976 Model Foodservice Code. The District of Columbia, Puerto Rico, and the Virgin Islands have also adopted versions of the Food Code. Of the 345 federally recognized tribes with food service operations, as of February, 2010, only 63 have adopted a tribal food code, 54 of which are based on the FDA Model Food Code.
Childhood Obesity: A Health Crisis for Local Children
California, and the nation, is experiencing a childhood obesity epidemic. In Davis, one quarter of all children in grades 5, 7 and 9 are overweight or obese. In 2012, more than half of all 5th, 7th, and 9th graders failed to meet the fitness standards.

Sugar Sweetened Beverages: Sugary drinks play a central and unique role in the obesity epidemic. Studies have found a significant link between sugary drink consumption and weight gain in children.

- Soda and sugary drinks are the single largest source of calories in children’s diets, and provide nearly half of kids’ added sugar intake.
- 41% of children (ages 2–11 years) and 62% of adolescents (ages 12–17 years) in California drink at least one soda or other sugar-sweetened beverage every day.
- A child’s risk for obesity increases an average of 60 percent with every additional daily serving of soda.
- Containing almost 16 teaspoons of sugar in every 20-ounce serving, sweetened beverages are the largest single source of added sugar in the American diet.
- Marketers spend close to $500 million dollars a year to reach children and adolescents with messages about sugary drinks, more than they spend on any other category.
- Scientific evidence consistently supports the conclusion that drinking soda and other sugar-sweetened beverages increases a person’s risk of being overweight or obese. As a result, reducing the amount of sugar-sweetened beverages people drink is an important strategy to reverse the obesity epidemic in California and across the country.
- These beverages are the single leading contributor to the obesity epidemic. They have contributed 43 percent of the new calories that Americans consume from 1977-2001.
- Our bodies absorb the sugar much faster when we consume liquids as compared to solids, raising blood sugar levels in just 30 minutes. At the same time, since our bodies do not notice added calories from liquids we don’t fill up.
- The latest research shows that drinking 2 cans of soda a day for just two weeks leads to increases in cholesterol and other contributors to heart disease and diabetes.
A DIET HIGH IN SUGAR PUTS YOU AT INCREASED RISK OF:

- Cardiovascular disease
- Non-alcoholic fatty liver disease
- Overweight and obesity
- Type 2 diabetes
- A decline in the intake of essential nutrients (vitamins A, E, C, all B vitamins, magnesium, iron, zinc and calcium).

Kids’ Meals and Sugary Drinks:
Many cities are enacting policies to increase access to healthy beverages for children, such as adopting standards for beverages provided in parks, recreational facilities, and city-sponsored programs. Restaurants serve as another important venue within cities where changing local policies on healthy beverages could contribute to the fight against childhood obesity.

Children consume nearly 20% of their daily calories from fast food and sit-down restaurants, many of which offer kids’ meals that include a beverage. The beverages most frequently offered with kids’ meals are sugary drinks, such as soda and sweetened fruit drinks. These sugary drinks increase a child’s risk for obesity and associated chronic health conditions.

Drinks that are included or offered with kids’ meals are called the “default beverage”. Studies demonstrate that people are more likely to select the default beverage option offered with kids’ meals rather than request an alternative. Establishing healthy beverage defaults such as low-fat milk or water is likely to increase the consumption of healthy beverages among children who eat kids’ meals. Several national chains including Subway, Chipotle, Arby’s, and Panera have stopped including sugary drinks in their kids’ meals. McDonalds recently announced that it will soon stop listing soda as an option on menu boards for its Happy Meals.

What Cities Can Do:
Cities can promote good health for their youngest residents and support parents in purchasing healthy beverages for their children by adopting the following standards for beverages sold as part of restaurant kids’ meals:

- Offer water or low-fat milk as part of a kids’ meal unless a customer specifically requests an alternate beverage.
- Display water and low-fat milk prominently on menus and menu boards with information about kids’ meals.
In Davis, one-fifth of the 122 restaurants offer kids’ meals that include a sugar-sweetened beverage as the default drink, while only four offer healthier choices such as low-fat milk, water and 100 percent fruit juice as the default beverage choice in the kids’ meals.

The following Davis restaurants include a sugary drink with their kids’ meals:

Applebees  
Beach Hut Deli  
Bistro 33  
Black Bear Diner  
Café Bernardo  
Carl’s Junior  
De Vere’s Irish Pub  
Del Taco  
Habit Burger  
Jack in the Box  
Lampost Pizza  
Paesano’s  
Panda Express  
Plutos  
Round Table Pizza  
Sudwerk  
Taco Bell  
Togo’s
How Cities Can Promote the Sale of Healthy Restaurant Beverages for Children

August 2013

To address California’s childhood obesity crisis, many cities are enacting policies to increase access to healthy beverages for children. Cities have adopted standards for beverages provided in parks, recreational facilities, and city-sponsored youth programs, which mirror those set by California law for public schools. Though no city to date has adopted beverage standards for restaurants, restaurants serve as another important venue within cities where healthy beverage standards would contribute to the fight against childhood obesity. Today, children consume nearly 20% of their daily calories from restaurants, the majority of which make sugar-sweetened beverages the default choice with kids’ meals. Some cities have recognition programs for restaurants with healthy menu items, but only a handful of California restaurants have improved the nutritional quality of the beverages offered with kids’ meals. Cities can further promote the health of their youngest and most vulnerable residents by establishing beverage standards for restaurant kids’ meals.

A Health Crisis for California’s Children

California’s youth are developing chronic diseases, including obesity, at alarming high rates. In 2010, one-third of California’s 2- to 5-year-olds were classified as overweight or obese, as were nearly 40% of the state’s 5th, 7th, and 9th grade students. Compared to their normal-weight peers, overweight and obese youth are more likely to have at least one risk factor for heart disease, such as hypertension, high cholesterol, or prediabetes. Additionally, rates of type-2 diabetes among California’s youth are expected to rise in the coming years, as experts predict that 1 in 3 youth born nationally born in the year 2000 and after will develop diabetes in his or her lifetime. To help reverse these disturbing trends in illness among California’s youth, cities can join schools in establishing healthy beverage standards for places where youth frequently eat and drink.

Restaurant Meals: A Source of Unhealthy Food for Children

Today, children consume almost 20% of their daily calories (more than 250 total calories) at fast-food and sit-down restaurants. Often, foods purchased from these establishments typically have very poor nutritional value. Restaurant foods frequently contain more fat, sodium, and cholesterol than foods prepared at home, and they also contain less calcium, fiber, and iron. As a result, children who eat at restaurants have poorer diets than children who do not. In addition, eating at restaurants is associated with higher consumption of sugar-sweetened beverages among children and adolescents.

Sugar-Sweetened Beverages and Chronic Disease Among California’s Children

Drinking one or more sugar-sweetened beverages daily increases a child’s odds of being overweight or obese by 55%. In addition, consumption of sugar-sweetened beverages is associated with elevated levels of triglycerides in the blood, which increase a child’s risk for heart disease later in life.

Kids’ Meals

Many chain restaurants cater to their young consumers through a special children’s meal or children’s menu. Kids’ meals were first developed in the 1970s as a strategy for marketing to young children; today, 41 of the 50 top chain restaurants sell meals designed for children. Children’s meals typically contain an entrée, a side item, and a beverage, and they are often heavily marketed to youth through association with popular movies, TV shows, entertainment venues. Another popular marketing tactic involves including a toy in kids’ meals. Although some restaurants have taken some steps to make the food offered in kids’ meals healthier, a recent study found that there is still much work to be done: only 3% of all kids’ meal combinations at top chain restaurants meet nutrition standards adapted from the Dietary Guidelines for Americans.

The majority of kids’ meals sold by top chain restaurants include a beverage. Often, the beverages most frequently offered with kids’ meals are sugar-sweetened beverages, which increase a child’s risk for obesity. Soft drinks are the most common kids’ meal beverage, offered by 78% of top chain restaurants. The next most frequent beverage offerings are fruit juice (58%) and whole milk (43%). Whole milk does not contain added sugar, it does contain higher amounts of fat. In contrast, only 40% of top chains offer low-fat milk and only one chain offers water. Though most establishments include several drink options in kids’ meals, studies of Burger King, Wendy’s, and Taco Bell have shown that employees most frequently offer soda first when a kids’ meal is ordered. The restaurants in these chains, however, comprise only a small fraction of all restaurant establishments in
California. The majority of restaurants in California today still offer a sugar-sweetened beverage as a default option in their kids’ meals.

Innovations to Date: Action by Restaurants and Local Policy Makers

The nutritional quality of kids’ meals can be improved by ensuring that only healthy drinks (water, low-fat milk, or 100% fruit juice) are provided as default beverage options. Studies demonstrate that people are more likely to select the default option rather than request an alternative; therefore, establishing healthy beverage defaults would likely substantially increase the consumption of healthy beverages among children who eat kids’ meals. After Disney established healthy default beverage options for its kids’ meals, two-thirds of parents accepted the default beverage rather than requesting a different option. Healthy beverage defaults would serve as one important step toward improving the nutritional quality of kids’ meals, thereby reducing the amount of added sugar that children consume away from home.

In 2006, the Walt Disney Company changed its beverage defaults for kids’ meals to 100% fruit juice, water, or low-fat milk. This change affected all Disney parks and resorts worldwide, including California’s Disneyland. Since then, seven chain restaurants with locations in California have improved their kids’ meals by changing the default beverages to healthy options:

- Darden Restaurants (In CA: Olive Garden, Red Lobster, Yard House, Seasons 52, The Capital Grille, and Eddie V’s): 1% milk, with free refills
- Subway Restaurants: Low-fat milk or 100% fruit juice

Beginning in September 2013, McDonald’s implemented an eight year plan to offer healthy beverages in Happy Meals and deliver wellness messages to children. Beverages offered in Happy Meals will only include water, milk and juice in each of the 20 major markets where McDonald’s exists by 2018. Images of soda will be removed from Happy Meal menu boards and will not be featured within in-store or external advertising targeting children. All future McDonald’s advertisements directed towards children will focus on healthy eating and healthy lifestyle messages. These new advertisements will include a nutrition or children’s wellness message on one panel of each Happy Meal box or bag four times each year. In addition, McDonald’s also plans to design Happy Meal containers and other food packages or offer new healthy menu items to create excitement for children regarding healthy beverage and food choices.

At the local policy level, Santa Clara County and the City and County of San Francisco passed ordinances in 2010 establishing nutrition standards for kids’ meals that include a toy. These standards define a healthy beverage as one with less than 10% of calories from caloric sweeteners and less than 35% of calories from fat. The Santa Clara County ordinance also stipulates that a healthy beverage may not exceed 120 calories and may not contain caffeine or non-nutritive sweeteners. To date, the impact of these policies has been only partially assessed. An evaluation of the San Francisco ordinance showed that restaurants typically removed toys from kids’ meals rather than change food offerings; the evaluation did not examine the effect of the ordinance on purchasing patterns.

Recommendation for Cities

Cities can promote good health for their youngest residents and support parents in purchasing healthy beverages for their children by adopting the following standards for beverages sold as part of restaurant kids’ meals:

- Offer water, low-fat milk, or 100% fruit juice (in age-appropriate quantities) as part of a kids’ meal unless a customer specifically requests an alternate beverage.
- Display water, low-fat milk, and 100% fruit juice prominently on menus and menu boards with information about kids’ meals.

“Parents need to feel confident that enjoying a meal at a restaurant doesn’t mean sacrificing their children’s health.”
– Michelle Obama

The American Academy of Pediatrics (AAP) recommends limiting 100% fruit juice consumption to 6 ounces per day for kids 1-6 and 12 ounces per day for kids.
References
RESOLUTION NO. 10-186, SERIES 2010

RESOLUTION ESTABLISHING NUTRITIONAL STANDARDS FOR VENDING MACHINES AND CITY-OPERATED CONCESSIONS LOCATED AT PARKS AND RECREATIONAL FACILITIES

WHEREAS, the City of Davis joined the Healthy Eating Active Living Cities Campaign with the adoption of Resolution 09-150 - Establishing Davis’ Commitment to Obesity Prevention; and

WHEREAS, in Resolution 09-150, the City of Davis agrees to consider setting nutritional standards for food offered at city events, city-sponsored meetings, served at city facilities and concessions, and city programs; and

WHEREAS, the HEAL Davis Network has been working over the past ten (10) months to study and support increased access to nutritious food within the City of Davis, thus having the City model healthy eating habits through the provision of healthier food choices.

NOW, THEREFORE, BE IT RESOLVED that effective February 1, 2011 a minimum of 50% of all food, beverages and snacks authorized for sale in vending machines and city-operated concessions located at parks and recreation facilities shall meet the following nutritional standards as partially defined by California SB19 – the Pupil Nutrition Healthy and Achievement Act of 2001, and California SB12 – the School Nutrition Standards and SB965– the Healthy Beverage Bill as a first step to transition to the provision of healthy food options to the public:

**Food and Snacks**
- Have no more than 35% of its calories from fat
- Have no more than 10% of its calories from saturated fat
- Have no more than 35% sugar by weight

**Beverages**
- Must be fruit- and/or vegetable-based drinks that are composed of no less than 50 percent real juice and have no added caloric sweeteners; bottled drinking water, milk (full, soy, lactose-free) and electrolyte replacement beverages
- Flavored milk must be no more than 35% sugar by weight
- Other drinks shall not be calorically sweetened more than 42 grams of added sweetener per 20-ounce serving

BE IT FURTHER RESOLVED that the City shall implement the nutritional standards at 100% of all food, beverages and snacks authorized for sale in one city-operated pool concession site and 90% at one vending machine as early as feasible as a pilot project during 2011, and report back to the Recreation and Park Commission with a full evaluation of the implementation of said standards within a one year timeframe; and

BE IT FURTHER RESOLVED that the City shall continue to diligently research and explore alternative food, beverage and snacks products that comply with the above stated nutritional
standards for future implementation, and shall encourage the public to make healthier food choices through increased public education and awareness; and

BE IT FURTHER RESOLVED that City Council authorizes city special events (holiday functions, youth special events), co-sponsored organizations and other entities leasing city property to be excluded from complying with the above stated nutritional standards; and

BE IT FURTHER RESOLVED that city-operated concessions at Arroyo, Community, Manor Pool and Playfields Park complexes shall be exempt from provisions of Resolution 07-177 which prohibit the use of city funds to purchase individual serving bottled water.

PASSED AND ADOPTED by the City Council of the City of Davis this 14th day of December, 2010 by the following vote:

AYES: Greenwald, Krovoza, Souza, Swanson, Saylor

NOES: None

ATTEST:

Zoe S. Mirabile, CMC
City Clerk

Don Saylor
Mayor
RESOLUTION NO. 12-002, SERIES 2012

RESOLUTION MODIFYING THE COMPLIANCE LEVEL FOR NUTRITIONAL
STANDARDS OF VENDING MACHINES AND CITY-OPERATED CONCESSIONS
LOCATED AT PARKS AND RECREATIONAL FACILITIES

WHEREAS, in September 2009, the City of Davis joined the Healthy Eating Active Living
Cities Campaign with the adoption of Resolution 09-150 - Establishing Davis’ Commitment to
Obesity Prevention; and

WHEREAS, in December 2010, with Resolution 10-186, the City of Davis established
nutritional standards for food offered at vending machines and city-operated concessions located
at parks and recreation facilities; and

WHEREAS, in Resolution 10-186, the City approved a minimum of 50% of all food, beverages
and snacks authorized for sale in vending machines and city-operated concessions located at
parks and recreation facilities shall meet the following nutritional standards as partially defined
by California SB19 – the Pupil Nutrition Healthy and Achievement Act of 2001, and California
SB12 – the School Nutrition Standards and SB965- the Healthy Beverage Bill as a continuation
of efforts to the provision of healthy food options to the public:

Food and Snacks
a. Have no more than 35% of its calories from fat
b. Have no more than 10% of its calories from saturated fat
c. Have no more than 35% sugar by weight

Beverages
a. Must be fruit- and/or vegetable-based drinks that are composed of no less than 50
percent real juice and have no added caloric sweeteners; bottled drinking water;
milk (full, soy, lactose-free) and electrolyte replacement beverages;
b. Flavored milk must be no more than 35% sugar by weight

c. Other drinks shall not be calorically sweetened more than 42 grams of added
sweetener per 20-ounce serving.

WHEREAS, the City of Davis conducted a pilot program at the Arroyo Pool complex by
implementing a 100% compliance level to all food, beverages and snacks authorized for sale, and
now desires to modify the compliance to a 50% level, similar to all other city-operated
concession sites.

NOW, THEREFORE, BE IT RESOLVED that effective January 10, 2012, the City shall
implement nutritional standards at a 50% compliance level for all city-operated concession sites
and 90% at vending machines located at parks and recreation facilities superseding the
provisions of Resolution 10-186 which required one aquatic facility to operate at a 100%
compliance level; and
BE IT FURTHER RESOLVED that City Council shall continue to diligently research and explore alternative food, beverage and snack products that comply with the above stated nutritional standards for future implementation, and shall encourage the public to make healthier food choices through increased public education and awareness.

PASSED AND ADOPTED by the City Council for the City of Davis this 10th day of January, 2012 by the following vote:

AYES: Greenwald, Souza, Swanson, Wolk, Krovoza

NOES: None

[Signature]
Joseph F. Krovoza
Mayor

[Signature]
Zoe S. Mirabile, CMC
City Clerk