

# Model Ordinance for Healthier Toy Giveaway Meals

Developed by the National Policy & Legal Analysis Network to  
Prevent Childhood Obesity (NPLAN)

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*Support provided by a grant from the Robert Wood Johnson Foundation.  
June 2010.*

## Introduction

Today, one-third of American children and adolescents are obese or overweight.<sup>1</sup> American children consume an average of one-third of their calories from eating out,<sup>2</sup> and one-third of American children eat fast food every day, according to a 2004 study.<sup>3</sup> Studies link eating out with obesity and higher caloric intakes; children eat almost twice as many calories when they eat a meal at a restaurant as they do when they eat a meal at home.<sup>4</sup> In a recent study, 93 percent of children's meals at the 25 largest chain restaurants failed to meet a set of nutrition standards based in large part on key recommendations from the *Dietary Guidelines for Americans*.<sup>5</sup>

Fast food restaurants spend millions of dollars to attract young consumers. The Federal Trade Commission recently found that in 2006, fast food restaurants spent more than \$520 million marketing to children – more than twice the amount spent marketing any of the other food categories included in the survey.<sup>6</sup> That year, fast food restaurants sold more than 1.2 billion children's meals with toys to children ages 12 and younger.<sup>7</sup>

NPLAN's *Model Ordinance for Healthier Toy Giveaway Meals* provides local governments with one way to steer restaurants toward providing healthier options for children by setting a nutritional standard for foods, beverages, and meals that are accompanied by children's toy giveaways. This standard is drawn from authoritative, evidence-based nutrition guidelines and was developed under the close supervision of a panel of nutrition experts. In April 2010, Santa Clara County in California enacted an ordinance similar to NPLAN's model.<sup>8</sup>

### State and Local Regulation of Restaurants

To determine whether your community can implement the model ordinance, it is important to review both state and local law.

### ***State Retail Food Laws***

In most communities, state law regulates the health and safety requirements for restaurants. To help improve food safety nationwide, the U.S. Food and Drug Administration (FDA) has developed a model Food Code that sets forth sanitation and food-handling requirements for restaurants and other food establishments.<sup>9</sup> Forty-eight states and three U.S. territories have adopted some form of the model Food Code to regulate food retail sales.<sup>10</sup> Some states have adopted the model Food Code without alteration; other states have made changes. Because state law varies, before a community enacts NPLAN's model ordinance it is important to review the state retail food code to determine whether the state law permits its enactment.

### ***Local Laws Regulating Restaurants***

Cities and counties also regulate restaurant operations through zoning and other measures. Zoning codes determine where commercial establishments, such as restaurants, can operate in a community. Some cities and counties also have the authority to regulate other aspects of restaurant operations through their “police power,” the term used to describe the power of government to regulate private conduct to protect and further the public’s health, safety, or general welfare. In many states, local governments have considerable discretion when enacting regulations, including those affecting business operations.<sup>11</sup> For example, some cities:

- Have required restaurants to post calories and other nutrition information on their menus;<sup>12</sup>
- Require restaurants to recycle or compost their waste;<sup>13</sup>
- Prohibit restaurants from preparing and serving food containing artificial trans fats;<sup>14</sup>
- Prohibit restaurants from serving take-out food in containers made of polystyrene foam;<sup>15</sup> and
- Prohibit smoking in restaurants and other food establishments.<sup>16</sup>

Whether a local government has the power to regulate restaurants – and implement this model ordinance – is usually determined by state law. Because local government police power varies considerably, it is important to review state law to determine whether your city or county can implement the model ordinance.

### **Enacting the Ordinance**

The language in the model ordinance is designed to be tailored to the needs of an individual community. The language written in *italics* provides different options or explains the type of information that needs to be inserted in the blank spaces in the ordinance. The “comments” provide additional information and explanation. In considering which options to choose, the

community should balance public health benefits against practical and political considerations in the particular jurisdiction. One purpose of including a variety of options is to stimulate broad thinking about the types of provisions a community might wish to explore, even beyond those described in the model. NPLAN is interested in learning about novel provisions that communities are considering; the best way to contact us is through our website: **[www.nplan.org](http://www.nplan.org)**.

An appendix (“Appendix: Enforcement Provisions”) accompanies this model, outlining a range of enforcement options. Though options vary according to local law and custom, enforcement clauses are a significant and necessary component of any ordinance.

## An Ordinance of the [City Of \_\_\_\_\_] Regulating Children's Toy Giveaways at Restaurants and Amending the [ Municipality ] Municipal Code

The [ Municipality ] does ordain as follows:

**SECTION I. Findings.** The [ Municipality ] hereby finds and declares as follows:

WHEREAS, 16 percent of American children and adolescents ages two to 19 are obese, and 32 percent are obese or overweight, which translates into 12 million children and adolescents who are obese (BMI  $\geq$  95<sup>th</sup> percentile) and more than 23 million who are either obese or overweight (BMI  $\geq$  85<sup>th</sup> percentile);<sup>17,18,19</sup>

WHEREAS, \_\_\_\_\_ percent of children in \_\_\_\_\_ are overweight; *[Insert obesity statistics for the community. If local statistics are not available for your community, you can use state statistics from the Centers for Disease Control and Prevention. See [www.cdc.gov/obesity/data/trends.html](http://www.cdc.gov/obesity/data/trends.html).]*

WHEREAS, according to a report by the Federal Trade Commission (FTC) that surveyed the marketing practices of a substantial majority of U.S. food companies, marketing to children by fast food restaurants exceeded \$520 million in 2006, more than twice the amount spent marketing any of the other food categories included in the FTC survey;<sup>20</sup>

WHEREAS, in 2006, fast food restaurants sold more than 1.2 billion children's meals with toys to children ages 12 and younger;<sup>21</sup>

WHEREAS, on a typical day, 133 million Americans eat out,<sup>22</sup> including the nearly one-third of U.S. children ages four to 19 who eat fast food every day;<sup>23</sup>

WHEREAS, as of August 2008, 93 percent of children's meals at the 25 largest chain restaurants failed to meet a set of nutrition standards developed by a panel of nutrition experts and based in large part on key recommendations from the *Dietary Guidelines for Americans*;<sup>24</sup>

WHEREAS, on average, children consume nearly twice as many calories from a restaurant meal (770) as they do from a home-cooked meal (420);<sup>25</sup>

WHEREAS, there is a causal association between frequently eating fast food, excess energy intake, weight gain, overweight, and obesity;<sup>26, 27, 28, 29, 30, 31, 32, 33</sup>

WHEREAS, risk factors for heart disease, such as high cholesterol and high blood pressure, occur with increased frequency in overweight children compared with children with a healthy weight;<sup>34</sup>

WHEREAS, type 2 diabetes, previously considered an adult disease, has increased dramatically in children, and obesity is a primary cause of type 2 diabetes;<sup>35</sup>

WHEREAS, the Centers for Disease Control and Prevention estimates the medical cost of obesity in the United States at \$147 billion each year;<sup>36</sup>

NOW THEREFORE, [ Municipal Legislators (*e.g., city council*) ] intend, in adopting this ordinance, to promote children's health by setting healthier standards for restaurants to meet when offering children's toys in conjunction with the purchase of food.

**SECTION II.** [ Article / Chapter ] of the [ Municipality ] Municipal Code is hereby amended to read as follows:

**Sec. One. Purpose.** The purpose of this [ article / chapter ] is to promote children's health by setting nutrition standards for restaurants to meet when offering children's toys in conjunction with the purchase of food.

**Sec. Two. Definitions.** The following words and phrases, whenever used in this [ article / chapter ], shall have the meanings defined in this section:

- (a) "Restaurant" means a retail food establishment that prepares, packages, serves, and vends food directly to the consumer.

**COMMENT:** The "Restaurant" definition is adapted from the definition of a food establishment in the FDA Model Food Code. Localities may wish to use an existing definition in their municipal code.

- (b) "Children's Toy" means:

- (1) any digital or physical premium, other than a single use article, that is designed or intended primarily for use by children 12 years of age or younger; or
- (2) any coupon, voucher, ticket, token, code, or password redeemable for any item listed in subsection (1).

For purposes of this subsection, a “single use article” means utensils, tableware, carry-out utensils, bulk food containers, and other items such as bags, containers, placemats, stirrers, straws, toothpicks, and wrappers that are designed and constructed for onetime, one-person use, after which they are intended for discard.

**COMMENT:** The “Children’s Toy” definition is drawn from the federal Consumer Product Safety Improvement Act of 2008, 15 U.S.C.A. § 2057c, which defines a “Children’s Product” as a “consumer product designed or intended primarily for children 12 years of age or younger” and enumerates factors to use in determining whether a product falls within the definition. The factors to be considered are:

- (1) A statement by a manufacturer about the intended use of such product, including a label on such product if such a statement is reasonable.
- (2) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger.
- (3) Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger.
- (4) The Aged Determination Guidelines issued by the Consumer Product Safety Commission staff in September 2002, and any successor to such guidelines.<sup>37</sup>

(c) “Food Item” means the complete contents of any food listed, displayed, or offered for sale by the Restaurant, not including beverages.

(d) “Meal” means any combination of single Food Items and/or beverages offered together for a single price [*, or a single a la carte Food Item offered or reasonably viewed as composing a full meal*].

**COMMENT:** Some restaurants serve entrees, such as personal pizzas, that can be considered full meals. If a community wishes to consider those entrees under the “Meal” standards, it can add the language in italics to the definition of “Meal.”

### Sec. Three. Children’s Toys with Healthier Food.

(a) No Restaurant may provide, for free or a nominal price, a Children’s Toy contingent on the purchase of a Food Item or Meal if the Food Item or Meal includes any of the following:

- (1) Excessive Calories. More than 200 calories for a single Food Item or more than 490 calories for a Meal;

- (2) Excessive Sodium. More than 480 milligrams of sodium for a single Food Item or more than 600 milligrams of sodium for a Meal;
- (3) Excessive Fat. More than 35 percent of total calories from fat, except for fat contained in nuts, seeds, peanut butter or other nut butters, or an individually served or packaged egg, or individually served or packaged low-fat or reduced fat cheese;
- (4) Excessive Saturated Fat. More than 10 percent of total calories from saturated fats, except for saturated fat contained in nuts, seeds, peanut butter or other nut butters, an individually served or packaged egg, or individually served or packaged low-fat or reduced fat cheese;
- (5) Transfat. More than 0.5 grams of trans fat;
- (6) Excessive Sugars. More than 10 percent of calories from added caloric sweeteners; or
- (7) A beverage that fails to meet the criteria in subsection (b) below.

**COMMENT:** The Model Ordinance sets baseline nutrition standards by limiting calories, fats, and sugar. One option to raise the standards is to require that the food contain some positive nutritional benefit. A community that wishes to require higher standards could add the following requirement:

A Food Item must contain one or more of the following:

- (1) 10 percent of the Dietary Reference Intake of one of the following nutrients: vitamin A, vitamin C, vitamin E, calcium, magnesium, potassium, iron, or fiber; provided that the nutrient is provided naturally and without fortification;
- (2) one-half of a serving of non-fried fruit or vegetable, based on Food and Drug Administration serving sizes; or
- (3) a grain product that is 51% or more by weight whole grain ingredients or for which a whole grain is the first ingredient.

A Meal must contain the following:

- (1) 25 percent of the Dietary Reference Intake of one of the following nutrients: vitamin A, vitamin C, vitamin E, calcium, magnesium, potassium, iron, or fiber; provided that the nutrient is provided naturally and without fortification; or
- (2) one serving of a non-fried fruit or vegetable, based on Food and Drug Administration sizes.

- (b) Beverages. A Restaurant may not provide a Children’s Toy contingent on the purchase of a beverage if the beverage includes any of the following:
- (1) Excessive Calories. More than 150 calories.
  - (2) Excessive Fat. More than 35 percent of total calories from fat.
  - (3) Excessive Saturated Fat. More than 15 percent of calories from saturated fat.
  - (4) Excessive Sugars. More than 10 percent of calories from added caloric sweeteners.
  - (5) Added Non-Nutritive Sweeteners; or
  - (6) Caffeine, with the exception of trace amounts of naturally occurring caffeine substances.

**COMMENT:** The Model Ordinance prohibits providing a Children’s Toy **contingent on the purchase of** a Food Item or Meal. Thus, the Ordinance does not prohibit a restaurant from giving children crayons or a children’s menu to draw on while waiting for food to be served, since those items are given to children as a matter of course and not contingent on the purchase of food.

#### Sec. Four. Implementation.

- (a) The \_\_\_\_\_ [ agency, department, or official ] shall implement, administer, and enforce this [ article / chapter ]. The \_\_\_\_\_ is hereby authorized to issue all rules and regulations consistent with this [ article / chapter ] and shall have all necessary powers to carry out the purpose of this [ article / chapter ].
- (b) The following classes of employees are authorized to issue citations for violation of this [ article / chapter ]: [ enumerate classes of employees ].

#### Sec. Five. Enforcement and Remedies.

##### **SEE APPENDIX: ENFORCEMENT PROVISIONS**

A draft ordinance based on this model is not complete without including enforcement provisions. Realistic and meaningful enforcement is essential. An unenforceable law or a law with trivial penalties that are easily absorbed as the “cost of doing [illegal] business” can be worse than no law at all because an unenforced—or unenforceable—law undermines the legitimacy of the municipality’s laws in general.

Each municipality must consider its own practices and philosophy on enforcement—and state law—when choosing which options to include. Municipalities often include multiple options to provide maximum enforcement flexibility. A list of enforcement options that many municipalities will want to contemplate accompanies this model ordinance in “Appendix: Enforcement Provisions.”

### **SECTION III. Statutory Construction & Severability.**

This [ article / chapter ] shall be construed so as not to conflict with applicable federal or state laws, rules or regulations. Nothing in this [ article / chapter ] authorizes any City agency to impose any duties or obligations in conflict with limitations on municipal authority established by federal or state law at the time such agency action is taken.

In the event that a court or agency of competent jurisdiction holds that federal or state law, rule, or regulation invalidates any clause, sentence, paragraph, or section of this [ article / chapter ] or the application thereof to any person or circumstances, it is the intent of the [ Municipal Legislators (*e.g., city council*) ] that the court or agency sever such clause, sentence, paragraph, or section so that the remainder of this [ article / chapter ] remains in effect.

- <sup>1</sup> Ogden CL, Carroll MD and Flegal KM. “High Body Mass Index for Age Among US Children and Adolescents, 2003-2006.” *Journal of the American Medical Association*, 299(20): 2401-2405, 2008.
- <sup>2</sup> Lin B, Guthrie J, Frazao E. “Nutrient Contribution of Food Away from Home.” In *American’s Eating Habits: Changes and Consequences*, Frazao (ed). Washington, DC: US Department of Agriculture, 1999. Available at: [www.ers.usda.gov/publications/aib750/aib750l.pdf](http://www.ers.usda.gov/publications/aib750/aib750l.pdf).
- <sup>3</sup> Bowman S, Gortmaker SL, Ebbeling CB, et al. “Effects of Fast Food Consumption on Energy Intake and Diet Quality Among Children in a National Household Survey.” *Pediatrics*, 113(1): 112-118, 2004.
- <sup>4</sup> Zoumas-Morse C, Rock CL, Sobo EJ, et al. “Children’s Patterns of Macronutrient Intake and Associations with Restaurant and Home Eating.” *Journal of the American Dietetic Association*, 101(8): 923-925, 2001.
- <sup>5</sup> Wootan MG, Batada A, and Marchlewicz E. *Kids’ Meals: Obesity on the Menu*. Washington, DC: Center for Science in the Public Interest, 2008. Available at: <http://cspinet.org/new/pdf/kidsmeals-report.pdf>.
- <sup>6</sup> Federal Trade Commission. *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self Regulation*. 2008, p. 20. Available at: [www.ftc.gov/os/2008/07/P064504foodmktgreport.pdf](http://www.ftc.gov/os/2008/07/P064504foodmktgreport.pdf). This FTC report surveyed industry members that produced the foods most frequently advertised to children, including packaged foods such as snacks, baked goods, cereals, prepared meals; candy and chilled desserts; dairy products; fruits and vegetables; and fast food. *Id.* at ES-1.
- <sup>7</sup> *Id.* at 19.
- <sup>8</sup> More information on the Santa Clara Ordinance is available at: [www.sccgov.org/keyboard/attachments/BOS%20Agenda/2010/April%2027,%202010/202926863/TMPKeyboard203046978.pdf](http://www.sccgov.org/keyboard/attachments/BOS%20Agenda/2010/April%2027,%202010/202926863/TMPKeyboard203046978.pdf).
- <sup>9</sup> FDA Model Food Code, Preface § 3 (2005).
- <sup>10</sup> North Carolina and Kentucky have yet to adopt the FDA Food Code but are actively pursuing Food Code adoption rulemaking. U.S. Food & Drug Admin., *Real Progress in Food Code Adoptions*, available at: [www.cfsan.fda.gov/~ear/fcadopt.html](http://www.cfsan.fda.gov/~ear/fcadopt.html).
- <sup>11</sup> Ziegler E, Rathkopf A and Rathkopf D. 1 Rathkopf’s *The Law of Zoning and Planning* § 1:2 (4th ed. 2009).
- <sup>12</sup> Philadelphia, PA, among others, has required restaurants to post calories on their menus. Phil. Health Code ch. 6-100. In March 2010, Congress enacted the “Patient Protection and Affordable Care Act,” which will require chain restaurants nationwide to post calories on their menus. PL 111-148, 124 Stat. 119, § 4205.
- <sup>13</sup> The City and County of Honolulu, HA, among other cities, requires restaurants of a certain size to recycle and to compost food waste. § 9-3.5 R.O.H. 1990.
- <sup>14</sup> The City of New York, among others, has prohibited restaurants from preparing and serving food containing artificial trans fats. New York City Health Code § 81.08.
- <sup>15</sup> The City and County of San Francisco, prohibits restaurants from packaging take-out foods in containers made from polystyrene foam. S.F. Envir. Code ch. 16.
- <sup>16</sup> Columbia, South Carolina, along with many other cities and states, ban smoking in restaurants. Columbia Code of Ordin. Ch. 8, Div. 5, §§ 8-215 – 8-221.
- <sup>17</sup> Government agencies, foundations, and researchers often use different terms to describe obesity in children and adolescents. The Robert Wood Johnson Foundation uses the term “obese” for children and adolescents who have a body mass index (BMI) at or above the 95th percentile for their gender and age. The Robert Wood Johnson Foundation uses the term “overweight” for children and adolescents with a BMI at or above the 85th percentile but below the 95th. The Institute of Medicine also uses the term “obese” to describe children and adolescents at or above the 95th percentile but uses the term “at risk for obesity” to describe those with BMI at or above the 85th percentile but below the 95th.
- <sup>18</sup> US Census Bureau. *Statistical Abstract of the United States: 2006*. 2005. Available at: [www.census.gov/prod/2005pubs/06statab/pop.pdf](http://www.census.gov/prod/2005pubs/06statab/pop.pdf).
- <sup>19</sup> Ogden CL, Carroll MD and Flegal KM. “High Body Mass Index for Age Among US Children and Adolescents, 2003-2006.” *Journal of the American Medical Association*, 299(20): 2401-2405, 2008.  
  
Federal Trade Commission. *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self Regulation*. 2008, p. 20. Available at: [www.ftc.gov/os/2008/07/P064504foodmktgreport.pdf](http://www.ftc.gov/os/2008/07/P064504foodmktgreport.pdf). This FTC report surveyed industry members that produced the foods most frequently advertised to children, including packaged foods such as snacks, baked goods, cereals, and prepared meals; candy and chilled desserts; dairy products; fruits and vegetables; and fast food. *Id.* at ES-1.
- <sup>20</sup> *Id.* at 19.
- <sup>21</sup> 2008 Restaurant Industry Pocket Factbook. Washington, DC: National Restaurant Association, 2008. (No authors given.) Available at: [www.restaurant.org/pdfs/research/2008forecast\\_factbook.pdf](http://www.restaurant.org/pdfs/research/2008forecast_factbook.pdf).
- <sup>22</sup> Bowman S, Gortmaker SL, Ebbeling CB, et al. “Effects of Fast Food Consumption on Energy Intake and Diet Quality Among Children in a National Household Survey.” *Pediatrics*, 113(1): 112-118, 2004.

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- <sup>24</sup> Wootan MG, Batada A, and Marchlewicz E. Kids' Meals: Obesity on the Menu. Washington, DC: Center for Science in the Public Interest, 2008. Available at: <http://cspinet.org/new/pdf/kidsmeals-report.pdf>.
- <sup>25</sup> Zoumas-Morse C, Rock CL, Sobo EJ, et al. "Children's Patterns of Macronutrient Intake and Associations with Restaurant and Home Eating." *Journal of the American Dietetic Association*, 101(8): 923-925, 2001.
- <sup>26</sup> Binkley JK, Eales J and Jekanowski M. "The Relation Between Dietary Change and Rising US Obesity." *International Journal of Obesity*, 24(8): 1032-1039, 2000.
- <sup>27</sup> Jeffery RW and French SA. "Epidemic Obesity in the United States: Are Fast Food and Television Viewing Contributing?" *American Journal of Public Health*, 88(2): 277-280, 1998.
- <sup>28</sup> Ma Y, Bertone ER, Stanek EJ, et al. "Association Between Eating Patterns and Obesity in a Free-living US Adult Population." *American Journal of Epidemiology*, 158(1): 85-92, 2003.
- <sup>29</sup> McCrory MA, Fuss PJ, Hays NP, et al. "Overeating in America: Association Between Restaurant Food Consumption and Body Fatness in Healthy Adult Men and Women Ages 19 to 80." *Obesity Research*, 7(6): 564-571, 1999.
- <sup>30</sup> McCrory MA, Fuss PJ, Saltzman E, et al. "Dietary Determinants of Energy Intake and Weight Regulation in Healthy Adults." *Journal of Nutrition*, 130 (Supplement): 276S-279S, 2000.
- <sup>31</sup> Lin B, Guthrie J, Frazao E. "Nutrient Contribution of Food Away from Home." In *American's Eating Habits: Changes and Consequences*, Frazao (ed). Washington, DC: US Department of Agriculture, 1999. Available at: [www.ers.usda.gov/publications/aib750/aib750l.pdf](http://www.ers.usda.gov/publications/aib750/aib750l.pdf).
- <sup>32</sup> Bowman et al., *supra* note 7.
- <sup>33</sup> Kant AK and Graubard BI. "Eating Out in America, 1987-2000: Trends and Nutritional Correlates." *Preventive Medicine*, 38(2): 243-249, 2004.
- <sup>34</sup> US Department of Health and Human Services, Office of the Surgeon General. *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity*. 2001. Available at: [http://surgeongeneral.gov/topics/obesity/calltoaction/fact\\_adolescents.htm](http://surgeongeneral.gov/topics/obesity/calltoaction/fact_adolescents.htm).
- <sup>35</sup> *Id.*
- <sup>36</sup> Centers for Disease Control and Prevention. Press Release: New Community Recommendations Show Ways to Reduce Burden. 2009. Available at: [www.cdc.gov/media/pressrel/2009/r090727.htm](http://www.cdc.gov/media/pressrel/2009/r090727.htm).
- <sup>37</sup> 15 U.S.C.A. §2057c.