METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

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Legal Opinion: 2008-04

To: William S. Paul, M.D.
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Date: December 23, 2008

You requested a legal analysis of the Metropolitan Board of Health's proposed regulation governing menu labeling, which is attached to this opinion, to answer the following questions:

QUESTION

1. Does the Metropolitan Board of Health have the authority to adopt a regulation governing menu labeling?

2. Has the proposed regulation governing menu labeling been preempted by state or federal law?

3. Is the proposed regulation likely to be held constitutional?

ANSWER

A. Yes. Both the Metropolitan Charter and state law give the Board the authority to adopt regulations it determines are necessary to protect public health. It is the opinion of the Department of Law that, if the Board determines that regulating menu labeling to require disclosure of caloric content is necessary to protect public health, it is within its authority, if not its duty, to do so.

B. No. There is no state law that preempts the proposed menu labeling regulation. It is the opinion of the Department of Law that, based on the language of the Nutrition Labeling and Education Act of 1990, there is no federal law at present that preempts the proposed menu labeling regulation. This conclusion is supported by the U.S. Food and Drug Administration's industry guidance statement regarding this act and the conclusion of the only federal court that has analyzed this issue to date, the United States District Court in the Southern District of New York.

C. Yes. It is the opinion of the Department of Law that the regulation is constitutional in that it does not violate the First Amendment protection of free speech, the Equal Protection Clause, or the Interstate Commerce Clause.

ANALYSIS

I. AUTHORITY OF THE METROPOLITAN BOARD OF HEALTH

Prior to the formation of the Metropolitan Government, the Tennessee General Assembly established the framework of government in Davidson County through the passage of private acts. In the Private Acts of 1909, Chapter 339, the General Assembly created and established a Board of Health for Davidson County with the power to make such rules and regulations as they should deem necessary and proper for the protection of public health. Tenn. Priv. Acts, Chap. 339 § 7. The constitutionality of this act was upheld in *Gamble v. State.* 333 S.W.2d 816, 386-387 (Tenn. 1960)(Upholding the constitutionality of a Davidson County Health Department regulation requiring immunization against poliomyelitis, the Tennessee Supreme Court said: "A statute which confers discretion on an executive officer or board without establishing any standards is a delegation of legislative power and is unconstitutional; but, when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative objective sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations). This 1909 Private Act was amended in 1943 to create a "Director of Health" whose job it was to:

> (P)erform all duties at present or hereafter prescribed by the statutes of the State of Tennessee pertaining to the public health, and such further duties, not in conflict with said statutes as the County Board of Health, by resolutions adopted from time to time may require him to perform. Said Director of Health shall likewise perform all duties and responsibilities and exercise all the prerogatives of county health officers and jail physicians now or hereafter prescribed by the statutes of Tennessee.

1943 Tenn. Priv. Acts, Ch. 110 § 8.

The Metropolitan Charter was approved by referendum in June 1962 and was implemented on April 1, 1963.[1] When the Metropolitan Charter became effective, all the functions of Davidson County became functions of the Metropolitan Government. *Metropolitan Charter §§* 1.01 and 1.05.[2] Tennessee Code Annotated, Title 7, provides that a metropolitan government has all the powers of a city and all the powers of a county. Tenn.

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[1] In 1953, the Constitution of the State of Tennessee was amended to permit consolidated city and county governments. Tenn. Const. Art. XI, §9. In 1957 the General Assembly adopted the enabling legislation. Tenn. Code Ann. §§ 7-1-101 through 7-3-508 (1957). The purpose of that act was to provide for a metropolitan government that could "fulfill the unique and urgent needs of a modern metropolitan area." Tenn. Code Ann. § 7-1-102(a).

[2] The Metropolitan Government has the powers specifically given or necessarily implied. *City of Lebanon v. Baird,* 756 S.W.2d 236, 241 (Tenn. 1988)("In the almost 200 years of this State's existence, a substantial and comprehensive body of law controlling the exercise of municipal powers has evolved. Fundamental in this law is that municipalities may exercise only those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes.").

Code Ann. § 7-2-108(a)(1)(A) and (B); *See also, Metropolitan Charter* § 2.02. The powers of a city include the exercise of general police powers and the authority to prevent and regulate all conduct that is detrimental to the health or welfare of its inhabitants. Tenn. Code Ann. § 6-2-201(22)(1991)[3]; *See also, Metropolitan Charter* § 2.01(7) ("To make regulations to secure the general health of the inhabitants and to prevent, abate and remove nuisances."). One of the primary duties of local government is to pass regulations that exercise police powers in the interest of public health and safety. *Penn-Dixie Cement Corp. v. City of Kingsport*, 225 S.W.2d 270, 275 (Tenn. 1949), citing 37 Am.Jur. *Municipal Corporations* § 288 at 927 ("We can conceive of no higher duty to be performed by a municipality than that of conserving the health of its inhabitants.").

The Metropolitan Charter established the Metropolitan Board of Health ("the Board") with the duty to "adopt reasonable rules and regulations... as necessary for the protection of the health of the people ..." and not in conflict with any Metropolitan ordinance. *Metropolitan Charter* §§ 20.21, 10.101 and 10.104(3). The Metropolitan Charter also provides that the Board, through its chief medical director, is responsible for the "functions previously assigned by law to the health officers or the health departments of the City of Nashville and Davidson County, or such as hereafter may be assigned to the city or county health officers or city health departments or county health departments in Tennessee." *Metropolitan Charter* § 10.103(6). The State of Tennessee defined specific powers and duties for all county boards of health in 1985 and gave these boards the authority to "[a]dopt rules and regulations as may be necessary or appropriate to protect the general health and safety of the citizens of the county." Tenn. Code Ann. § 68-2-601(f)(3)(1985)[4]. The state also gave the Board the authority to enforce county-wide regulation violations. Tenn. Code Ann. § 68-2-608 (1985).[5]

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[3] A city's authority includes the power to "(d)efine, prohibit, abate, suppress, prevent and regulate all acts, practices, conduct, businesses, occupations, callings, trades, uses of property and all other things whatsoever detrimental, or liable to be detrimental, to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the municipality, and exercise general police powers."

[4] "Regulations of a county board of health supersede less stringent or conflicting local ordinances." It is the opinion of the Department of Law that "local ordinances" in this Tennessee Code section refers to the ordinances of smaller cities within the area of the Metropolitan Government and to other ordinances of cities within counties that are not metropolitan governments.

[5] The Board can pursue identified violations through an order from the Director of the Metropolitan Public Health Department, and subsequently, through legal or equitable remedies Tenn. Code Ann. § 68-2-608.

> (a)(1) Whenever it appears to the county health director that a condition or activity exists or is threatened that may violate the laws, regulations, resolutions, ordinances, permits or licenses that are within the enforcement responsibility of the county health director, the county health director may, after notice and opportunity for a hearing, issue an order for any of the following:
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> (A) Cessation of the activity;
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> (B) Correction of the condition or activity;
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> (C) Removal of the condition in whole or in part;
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> (D) Revocation, suspension or imposition of conditions on a license or permit; or

Private acts that establish the powers of municipalities are presumed valid, even in the presence of later-passed general legislation, if there is any way to construe them to avoid a direct conflict.[6] The state statute adopted in 1985 did not repeal the earlier private acts pertaining to the Metropolitan Government's board of health and director of health.[7] This state action also did not invalidate the Metropolitan Charter authority granted to the Board as the statute specifically grandfathered county boards of health and the regulations of those Boards that were in existence on July 1, 1985. Tenn. Code Ann. § 68-2-601(g). To the extent the 1909, 1943, and 1985 acts of the state legislature give the Board broad regulatory authority over matters of public health concern, the acts are not inconsistent and can be exercised in unison.

It is the opinion of the Department of Law that both the Metropolitan Charter and state law give the Board the authority to adopt regulations it determines are necessary to protect public health. If the Board determines that regulating menu labeling to disclose caloric content is necessary to protect public health, it is within its authority, if not its duty, to do so.

II. PREEMPTION

A. STATE LAW. The Board, in its exercise of its broad public health regulatory police powers, cannot pass regulations that conflict with state law. Tenn. Code Ann. §§ 68-2-601(f)(3)("The regulations shall be at least as stringent as the standard established by a state law or regulation as applicable to the same or similar subject matter."); *Metropolitan Charter* § 10.104(3). No state law has been found that expressly or impliedly conflicts with the proposed menu labeling regulation. To date, the State of Tennessee has not adopted laws or regulations for menu labeling in food service establishments. Likewise, state laws governing food service

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(E) Abatement of a nuisance that involves a violation of the health laws of the state and that can be reasonably expected to adversely affect the health of the public.

(2) Any person served with an order pursuant to subdivision (a)(1) shall immediately comply with the order at the person's own expense.

....

(c) The county health director may petition the appropriate chancery court for injunctive relief and any other remedy available at law or equity as necessary to enforce the provision of an order issued pursuant to this section, or to otherwise require compliance with the laws, regulations, resolutions, ordinances, permits or licenses that are within the enforcement responsibility of the county health director. It shall not be necessary that an order be issued prior to seeking relief in chancery court. The court shall have the power to assess the cost of corrective measures against any and all persons failing to comply with the order.

[6] *Lawrence County v. Hobbs*, 250 S.W.2d 549, 552 (Tenn. 1952)(County officials were permitted to rely on the validity of a private act providing for the compensation of the Clerk and Master until the private act was found invalid.); *Kentucky-Tennessee Clay Company v. Huddleston*, 922 S.W.2d 539, 542 (Tenn. App. 1995)("Although private acts are superseded as far as necessary in order to give effect to a general statutory scheme of statewide applicability, ... if by a reasonable construction, two acts can stand together, there is no implied repeal.")(citation omitted).

[7] "Repeals by implication are not favored ... and will be recognized only when no fair and reasonable construction will permit the statutes to stand together." *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995).

establishments under the Hotel, Food Service Establishment and Public Swimming Pool Inspection Act of 1985 and governing retail food stores under the Tennessee Food, Drug and Cosmetic Act do not conflict with the proposed regulation. Tenn. Code Ann. § 68-14-303 (2000); Tenn. Code Ann. § 53-8-205 (1986). These acts condition operating permits on safe and sanitary food handling practices to ensure that the food served is safe for human consumption.[8] The health and welfare focus of the proposed menu labeling regulation does not conflict with the safety requirements of these regulations.[9]

B. FEDERAL LAW. The Board also cannot pass regulations that are preempted by federal law. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 2383 (1992). Whether federal law preempts the regulation requires an examination of:

- An amendment to the Federal Food, Drug, and Cosmetic Act ("FD & C Act") known as the Nutrition Labeling and Education Act of 1990 ("NLEA") and
- A proposed amendment to the FD & C Act known as the Labeling Education and Nutrition Act of 2008 ("NLEA 2008"). 21 U.S.C. §§ 343(q),(r) (2008), 343-1(a)(4) and (5) (2004); H.R. 7187, 110th Cong. (2d Sess. 2008).

In determining whether a regulation has been preempted by federal law, courts determine whether Congress intended to preempt the subject matter or, rather, intended to allow the states and local governments also to adopt laws in that field.[10]

1. Nutrition Labeling and Education Act of 1990

While the NLEA preempts state and local governments from enacting nutrition labeling regulations that apply to some foods[11], it is the opinion of the Department of Law

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[8] Rules of Tenn. Dep't of Health, Bureau of Health Services Adm'n, Div. of General Envtl. Health, Chapter 1200-23-1: Food Service Establishment; Rules of Tenn. Dep't of Agric., Div. of Food and Dairy, Chapter 0080-4-9: Retail Food Store Sanitation.

[9] The state has granted authority to the Board to inspect, report, regulate, and enforce violations of these statutes pursuant to state-funded grants. Metropolitan Council Resolution Nos. RS2008-445; RS2004 -625. Under the Metropolitan Charter, the Board of Health is authorized to "[c]ontract with other governmental agencies, or with public or private institutions, subject to confirmation by the council by resolution for such services as will further the program and policies of the board." Metropolitan Charter §§ 10.104(8) and (11).

[10] Pre-emption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' " and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"(citations omitted).

Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 98, 112 S.Ct. 2374, 2383 (1992); *See also, LeTellier v. LeTellier*, 40 S.W.3d 490, 497 (Tenn. 2001), citing *Watson v. Cleveland Chair Co.*, 789 S.W.2d 538, 542 (Tenn. 1989).

that the NLEA does not preempt nutrition labeling for food served in restaurants, establishments where food is sold for immediate consumption, or for food ready for immediate consumption that is processed, prepared, and sold by a retailer.[12]

This conclusion is supported by the fact that the U.S. Food and Drug Administration ("FDA") has reached the same conclusion stating that regulations that are not expressly preempted by the NLEA come within the governing powers of the state or the political subdivisions of a state. Specifically, in April of 2008, the FDA's Office of Nutrition, Labeling, and Dietary Supplements posted industry guidance entitled *A Labeling Guide for Restaurants and Other Retail Establishments Selling Away-From-Home Foods.*[13] The FDA determined that state and local governments can require restaurants to abide by nutrition labeling regulations for restaurant food exempt under § 343(q) (nutrition labeling) and § 343(r)(1) (claims) of the NLEA. *Id.* at question 106. The United States Supreme Court gives great deference to administrative interpretations of statutory schemes the administrative agency oversees. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845, 104 S.Ct. 2778, 2782-2783 (1984).

To date, only one court, the United States District Court in the Southern District of New York, has opined on whether the NLEA preempts state and local efforts to regulate menu labeling in food service establishments. This court has reviewed the question twice and concluded that the NLEA does not preempt nutrition labeling for food served in restaurants:

- *New York State Rest. Ass'n v. New York City Bd. of Health*, 509 F.Supp.2d 351, 352-53 (S.D.N.Y. 2007)("NYSRA I"); and

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[11] The NLEA by its terms either expressly preempts state and local government regulation, or does not preempt at all. For example, the NLEA preempts nutrition labeling on most foods and nutrient content claims (i.e., 'high fiber', 'low fat', etc.) and health claims on most foods. U.S. Department of Health and Human Services, Food and Drug Administration, Division of Field Investigations, Office of Regional Operations, Office of Regulatory Affairs, *Guide to Nutrition Labeling and Education Act (NLEA) Requirements* (August 1994), *available at* http://www.fda.gov/ora/inspect_ref/igs/nleatxt.html; *See also*, 21 U.S.C. §§ 343(q),(r), 343-1(a)(4) and (5).

[12] 21 U.S.C. § 343-1(a)(4) and (5)

(a) Except as provided in subsection (b) of this section, no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce—

....

(4) any requirement for nutrition labeling of food that is not identical to the requirement of section 343(q) of this title, except a requirement for nutrition labeling of food which is exempt under subclause (i) or (ii) of section 343(q)(5)(A) of this title, or

(5) any requirement respecting any claim of the type described in section 343(r)(1) of this title, made in the label or labeling of food that is not identical to the requirement of section 343(r) of this title, except a requirement respecting a claim made in the label or labeling of food which is exempt under section 343(r)(5)(B) of this title.

[13] U.S. Department of Health and Human Services, Food and Drug Administration, Center for Food Safety and Applied Nutrition (April 2008), *available at* http://www.cfsan.fda.gov/~dms/labrguid.html.

- *New York State Rest. Ass'n v. New York City Bd. of Health*, Slip Copy, 2008 WL 1752455, 2-5 (S.D.N.Y. 2008)("NYSRA II").

In both cases, this court found that Congress' purpose in enacting the NLEA was to create two regulatory schemes -- the regulation of mandatory nutritional information on nutrition panel food labels under § 343(q) and the regulation of voluntary food claims that some manufacturers choose to add to their food labels under § 343(r). *NYSRA I* at 361-63; *NYSRA II*, 2008 WL at 2; 21 U.S.C. § 343(q) and (r). The court also recognized that the NLEA amendment that added these two sections was passed in conjunction with two accompanying express preemption provisions. *NYSRA I*, at 361; 21 U.S.C. § 343-1(a)(4) and (5). The court found that the NLEA exempts restaurants from regulation under § 343(q), but restaurants "are subject to FDA regulation [under § 343(r)] if they choose to make a nutrient content claim." *NYSRA II*, 2008 WL at 3. Therefore, if a restaurant makes a nutrient content claim, it is subject to NLEA's express preemption provisions. 21 U.S.C. § 343-1(a)(4) and (5).

Using this statutory interpretation, the court found that the New York City Board of Health's ("the City") first attempt to pass food service establishment menu labeling regulations was expressly preempted by federal law. *NYSRA I*, 509 F.Supp.2d at 352-53. This was because the City only applied the regulation to restaurants that had already voluntarily disclosed caloric information to their customers. The court held that this offended "the federal statutory scheme for voluntary nutritional claims." *Id.* The City did not appeal this decision. The City amended the regulation, making its application "mandatory for all restaurants of a certain size and type." *NYSRA II*, 2008 WL at 1. The NYSRA brought a subsequent lawsuit and the Southern District Court of New York held that this regulation was not preempted because the NLEA "explicitly leaves to state and local governments the power to impose mandatory nutrition labeling by restaurants." *Id.* at 4; *See also*, 21 U.S.C. § 343-1(a)(4) and (5).

The Board modeled its food service establishment definition after the language that was upheld by the court in *NYSRA II*. In New York, the City's regulation applies to any:

> food service establishment within the City of New York that is one of a group of 15 or more food service establishments doing business nationally, offering for sale substantially the same menu items, in servings that are standardized for portion size and content, that operate under common ownership or control, or as franchised outlets of a parent business, or do business under the same name. ...

NYSRA II, 2008 WL at 1 (citations omitted). The Board's proposed regulation applies to food service establishments:

> located within Nashville/Davidson County, that is one of a group of fifteen (15) or more food service establishments doing business anywhere in the United States, even if only locally, offering for sale substantially the same menu items, in servings that are standardized for portion size and content, that operate under common ownership or control, or as franchised outlets of a parent business, or do business under the same name.

Based upon the language of the NLEA, it is the opinion of the Department of Law that a court is likely to find that a Board adopted regulation on menu labeling has not been preempted by federal law.[14]

2. Proposed Labeling Education and Nutrition Act of 2008

H.R. 7187, 110th Cong. (2d Sess. 2008)[15] is currently pending in Congress. If adopted in its present form, it is likely that it will partially preempt this area of regulation. The bill's purpose is to accomplish nationally the same regulatory goal as the Board's proposed regulation. This bill would require mandatory nutrition labeling in food service establishments that are part of a chain that operate twenty or more establishments under the same trade name. *Id.* Although the bill's preemption language is unclear at this point, if adopted it is likely to require all state and local government regulations governing chains of twenty or more locations to be regulated identically to the proposed amendment.[16] Therefore, if the Board adopts the proposed regulation and then this federal legislation is adopted in it current form, the Board's regulation would require an amendment to exclude its applicability to chains of twenty or more locations.[17] The Board's regulation would remain valid for chains with 15 to 19 establishments as the bill leaves state and local governments with the authority to regulate chains with fewer than twenty locations.

III. CONSTITUTIONALITY

The final question is whether the proposed regulation will withstand constitutional scrutiny. It is the opinion of the Department of Law that the Board's proposed regulation governing menu labeling is constitutional. The rationale used by Congress and state and local governments across the country that either have passed similar regulations, or are working to, is very similar to the rational used by the Board: to support the promotion of informed

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[14] Whether menu labeling is preempted by federal law has not been addressed by any state or federal court in Tennessee. Neither the United States District Court for the Middle District of Tennessee nor the U.S. Court of Appeals for the 6th Circuit is bound by the Southern District Court of New York's opinion.

[15] "A bill to amend the Federal Food, Drug, and Cosmetic Act to extend the food labeling requirements of the Nutrition Labeling and Education Act of 1990 to enable customers to make informed choices about the nutritional content of standard menu items in large chain restaurants"

[16] 21 U.S.C.A. § 343-1(a)

(a) Except as provided in subsection (b) of this section, no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce— ...

H.R. 7187, 110th Cong. (2d Sess. 2008)

(4) any requirement for nutrition labeling of food that is not identical to the requirement of section 403(q) of this title, except a requirement for nutrition labeling of food which is exempt under sub-clause (i) or (ii) of section 403(q)(5)(A), other than food served in an establishment that is not part of a chain that operates 20 or more establishments under the same trade name...

[17] Restaurants already in compliance with the Board's proposed regulation would also comply with NLEA 2008 if adopted.

decision making and to reduce and prevent obesity.[18] When considering First Amendment, equal protection, and interstate commerce issues, the Supreme Court has upheld similar public interest, police power regulations using a deferential "rational basis" review.[19]

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[18] H.R. 7187, 110th Cong. (2d Sess. 2008); SB 1420, Gen. Assem., Reg. Sess. (Ca. 2008)(In September 2008 Governor Schwarzenegger signed SB 1420, making California the first state in the nation to require menu labeling at chain restaurants with at least nineteen locations); New York City Health Code §*81.50*; City of Philadelphia, Bill No. 080167-A (2008); Multnomah County Board of County Commissioners, acting as Board of Health, Policy Order 08-114 (July 2008): Center for Science in the Public Interest, *Nutrition Labeling in Chain Restaurants, State and Local Bills/Regulations – 2007-2008* (June 25, 2008), *available at* http://www.cspinet.org/nutritionpolicy/MenuLabelingBills2007-2008.pdf; Jennifer L. Pomeranz and Kelly D. Brownell, *Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws*, AMERICAN JOURNAL of PUBLIC HEALTH, September 2008 (Vol 98, No. 9) at 1578.

> Consuming fast food is positively associated with weight gain, insulin resistance, and increased risk for obesity and type 2 diabetes. ... The National Institutes of Health postulated that weight gain results because "a single meal from one of these restaurants often contains enough calories to satisfy a person's caloric requirement for an entire day."
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> ...
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> Studies have shown that consumers routinely consult food labels ... and this information influences food purchasing habits by decreasing the purchase of less-healthful items.
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> .....
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> Consumers are unable to correctly estimate the calorie content of restaurant food. One study found that 9 of 10 people underestimated the calorie content of certain items by an average of 600 calories (almost 50% less than the actual calorie content). ... Another study revealed that even professional nutritionists underestimated the calorie content of restaurant food by 220 to 680 calories (28% to 48% less than the actual calorie content).
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> ... (citations omitted).

[19] *Railway Exp. Agency v. People of State of N.Y.*, 336 U.S. 106, 109-110, 69 S.Ct. 463, 465 (1949)(Prohibiting advertising vehicles to improve vehicular and pedestrian safety was a valid use of police powers because the regulation was related to the purpose of its enactment.); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651, 105 S.Ct. 2265, 2282 (1985) (Requiring attorney advertising to disclose that clients will have to pay costs, even though the case was taken on a contingent-fee basis, was reasonably related to the State's interest in preventing deception of consumers); *Duckworth v. Arkansas*, 314 U.S. 390, 396, 62 S.Ct. 311, 314 (1941)(State permit requirement aimed at preventing the unlawful distribution or use of liquor was valid because sates may adopt effective measures to regulate commerce for local protection if the regulation does not conflict with any act of Congress or interfere with the free flow of commerce among the states beyond what is reasonably necessary to protect the local public interest.); *See also*, Brian L. Porto, Annotation, *Validity, Construction, and Operation of Municipal Ordinances Proscribing or Restricting Smoking in Restaurants*, 105 A.L.R.5th 333 (2003)("The American constitutional scheme authorizes municipalities, in the exercise of their police power, to use discretion to determine what regulations of the public health, safety, welfare, and morals are necessary and appropriate to serve the public interest. Courts may neither interfere with a municipality's exercise of police power unless the municipality abuses discretion, or acts arbitrarily or unreasonably, nor may

FREE SPEECH. In *NYSRA II* the court rejected a challenge based on the First Amendment's freedom from compelled speech. The court found that the regulation would only implicate commercial speech, which is subject to "less stringent constitutional requirements than other forms of speech." *NYSRA II,* 2008 WL at 6 (citations omitted). The court found this was particularly true where the regulation required disclosure of, not the restriction of, speech. *Id.*; *See also, Zauderer,* 471 U.S. at 651, 105 S.Ct. at 2282 (The Supreme Court stated that " in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception.'" ... (citations omitted); *But see, Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 564, 100 S.Ct. 2343, 2351 (1980)(Where government attempts to restrict commercial speech and "the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed."). As a result, the court applied the rational basis test and found "that the required disclosure of caloric information is reasonably related to the government's interest in providing consumers with accurate nutritional information and therefore does not unduly infringe on the First Amendment rights of NYSRA members." *NYSRA II,* 2008 WL at 1.

EQUAL PROTECTION. This is a regulation that treats similarly those who are similarly situated. Restaurant owners are not considered members of a protected class.[20] Traditionally, the courts have been highly deferential, using the rational basis test, to analyze government interests justifying economic and social regulations. *Railway Exp. Agency,* 336 U.S. at 109-110, 69 S.Ct. at 466 ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."). Under a rational basis test, a court is likely to determine, as they did in *NYSRA II,* that the Board's regulation is reasonably related to its public health objective.

INTERSTATE COMMERCE. When drafting the NLEA, Congress considered interstate commerce issues and expressly preempted areas of interstate commerce concern. 21 U.S.C.A. § 343-1(a). "[W]here there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce." *Railway Exp.,* 336 U.S. at 111, 69 S.Ct. at 466. This is because Congress and the Supreme

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courts review the wisdom or the correctness of municipal ordinances. Courts may, however, decide whether: (1) a challenged ordinance is a proper exercise of municipal police power; (2) the facts of a particular case justify the assertion of municipal police power; and (3) the ordinance at issue is rationally related to legitimate objects of the police power, including the public health, safety, welfare, and morals, and aims to protect them.") (citation omitted)(emphasis added).

[20] *City of New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 2516-2517 (1976)("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.); *See also, City of Tucson v. Grezaffi,* 23 P.3d 675, 681-682 (Ct.App.Div.2 2001).

Court recognize that "there are many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity and because of the practical difficulties involved, may never be adequately dealt with by Congress." *Duckworth,* 314 U.S. at 392, 62 S.Ct. at 312.

CONCLUSION

It is the opinion of the Department of Law that:

- The Metropolitan Charter and state law give the Board the authority to adopt regulations it determines are necessary to protect public health as long as the regulation is not preempted by state or federal law and is not unconstitutional.
- State law does not preempt the Board's proposed regulation.
- Federal law, including the NLEA, does not preempt the Board's proposed regulation.
- The proposed regulation is constitutional in that it does not violate the First Amendment protection of free speech, the Equal Protection Clause, or the Interstate Commerce Clause.

Therefore, if the Board determines that regulating menu labeling to require disclosure of caloric content is necessary to protect public health, it is within its authority, if not its duty, to do so.

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY

Keri K. Fowler
Assistant Metropolitan Attorney

Mary Johnston /sc
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Approved by:

Sue B. Cain
Sue B. Cain
Director of Law

cc: Karl F. Dean, Mayor
✓Vice Mayor Diane Neighbors

PROPOSED

REGULATIONS of the METROPOLITAN BOARD OF HEALTH GOVERNING MENU LABELING IN COVERED FOOD SERVICE ESTABLISHMENTS

DRAFT
NOVEMBER 6, 2008

(I) *Definitions and construction of words and terms used in this regulation.*

(A) *Covered food service establishment* shall mean a food service establishment as defined by Tennessee Code Annotated § 68-14-302 or a retail food store as defined by Tennessee Code Annotated § 53-8-203, located within Nashville/Davidson County, that is one of a group of fifteen (15) or more food service establishments doing business anywhere in the United States, even if only locally, offering for sale substantially the same menu items, in servings that are standardized for portion size and content, that operate under common ownership or control, or as franchised outlets of a parent business, or do business under the same name.

(B) *Food item tag* shall mean a label or tag that identifies any food or drink item displayed for sale at a covered food service establishment.

(C) *Menu* shall mean a printed list or pictorial display of a food item or items and their price(s) that are available for sale from a covered food service establishment and shall include menus distributed or provided outside of the establishment.

(D) *Menu board* shall mean any list or pictorial display of a food item or items and their price(s) posted in and visible within a covered food service establishment or outside of a covered food service establishment for the purpose of ordering from a drive-through window.

(E) *Menu item* shall mean any individual food or drink item, or combination of food or drink items, listed or displayed on a menu board or menu or identified by a food item tag that is/are sold by a covered food service establishment.

(G) *Substantially the same menu items* shall mean that sixty percent or more of the menu items served in at least fifteen (15) locations of a covered food service establishment are the same and are prepared using a standard recipe.

(II) *Scope and applicability.* This section shall apply to menu items that are served at a covered food service establishment. However, this section shall not apply to menu items that are listed on a menu or menu board for less than 30 days in a calendar year.

(III) *Statement of dietary guidelines.* The following statement shall be posted, at least once, on menus and menu boards in a font and format that is at least as prominent, in size and appearance, as that used to post either the name or price of the menu item: **The United States Department of Agriculture recommends that adults limit daily calorie intake to 2000 calories per day; however individual calorie needs may vary.**

(IV) *Posting calorie information for menu items.*
(A) All menu boards, menus, and food item tags in any covered food service establishment shall bear the total number of calories derived from any source for each menu item they list. Such information shall be listed clearly and conspicuously, adjacent or in close proximity such as to be clearly associated with the menu item, using a font and format that is at least as prominent, in size and appearance, as that used to post either the name or price of the menu item.

(B) If a food service establishment provides a salad bar, buffet line, or similar self-serve arrangement, the calorie content of each menu item **per standard serving** of that menu item shall be listed in accordance with paragraph (IV)(A) of this regulation, however the calorie content of each individual menu item may be listed on the food item tag rather than the menu or menu board.

(V) *Calculating Calorie Content.*

(A) *Calculating calories.* Calorie content values (in kcal) required by this regulation shall be based upon a verifiable analysis of the menu item, which may include the use of nutrient databases, laboratory testing, or other reliable methods of analysis, and shall be rounded to the nearest ten (10) calories for calorie content values above 50 calories and to the nearest five (5) calories for calorie content values 50 calories and below. Upon request, documentation of the calorie calculation must be provided.

(B) *Range of calorie content values for different flavors, varieties and combinations*

(i) *Different flavors and varieties.* For menu items offered in different flavors and varieties, including, but not limited to, beverages, ice cream, pizza, and doughnuts, the range of calorie content values showing the minimum to maximum numbers of calories for all flavors and varieties of that item shall be listed on menu boards and menus for each size offered for sale, provided however that the range need not be displayed if calorie content information is included on the food item tag identifying each flavor or variety of the food item displayed for sale, in accordance with paragraph (IV) of this regulation.

(ii) *Combinations.* For combinations of different food items listed or pictured as a single menu item, the range of calorie content values showing the minimum to maximum numbers of calories for all combinations of that menu item shall be listed on menu boards and menus. If there is only one possible calorie total for the combination, then that total shall be listed on menu boards and menus.

(VI) *Disclaimer.* This regulation is not intended to provide or be used to support a private cause of action by any individual, other than an individual, entity, or agency authorized to enforce this regulation, against a covered food service establishment for compliance or non-compliance with this regulation. This regulation does not prohibit a covered food service establishment from including a statement on a menu or menu board that there may be

variations in calorie content values across actual servings based on slight variations in serving size, quantity of ingredients, or special ordering.

(VII) *Effective date.* This regulation shall take effect on December 31, 2009.

(VIII) *Severability.* If any provision of this regulation, or its application to any person or circumstance, is held invalid by any court of competent jurisdiction, the remaining provisions or the application of the regulation to other persons or circumstances shall not be affected.