

How Many Calories in that Big Apple?: New York City's First in the Nation Calorie Disclosure Law

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I. INTRODUCTION

This case study documents the successful passage of the nation's first restaurant calorie disclosure law.¹ In an effort to address increases in obesity rates and obesity-related health problems, the New York City Department of Health and Mental Hygiene ("DOHMH") amended the City's Health Code on December 5, 2006 and then again on January 22, 2008 to require that chain restaurants post the number of calories contained in standardized menu items.² The disclosure appears close to each item on the menu or menu board.³ Restaurant patrons are more likely to see and act upon these disclosures, compared to information posted in less obvious locations in restaurants or on websites.⁴

Although several public health practitioners and organizations supported the concept of the disclosure law, its legality was untested in the courts when DOHMH acted.⁵ DOHMH knew it would face an organized and well-funded opposition.⁶ DOHMH nevertheless passed the disclosure law and faced two lawsuits.⁷ The final outcome was that DOHMH

ABOUT THE DEFENSIVE LITIGATION PROJECT

Funded by the Robert Wood Johnson Foundation's Public Health Practice & Policy Solutions, the Project uses case study research methodology to investigate threats of litigation made during the proposal and passage of public health laws. The case studies examine this experience across a range of public health issues. Public health officials, attorneys and advocates provide insight into their decision-making and planning process in anticipation of and in response to legal challenges.

established a version of the disclosure law that was more comprehensive than originally intended.⁸ (The first version applied only to restaurants that voluntarily agreed to post calorie information. The final version applies to most chain restaurants, regardless of whether they want to post calorie information.) Numerous states and municipalities have subsequently passed DOHMH’s disclosure law in their jurisdictions.

The decision by DOHMH to proceed was under-girded by some key factors. First, the scope of the increase in obesity prevalence was (and remains) alarming. The problem had been documented in health surveillance data. Second, several public health organizations have recommended the concept of mandating clear disclosure of calorie information for restaurant meals at the point of purchase. Interviewees for this case study pointed to recommendations in the Food and Drug Administration’s 2004 Keystone Report. Third, organizational changes at DOHMH allowed public health practitioners to identify and focus on environmental risk factors for obesity. Fourth, questions of legality were addressed early on through a comprehensive internal legal review and dialogue that included a well-informed consideration of the potential public health benefits.

II. THE PUBLIC HEALTH PROBLEM: OBESITY RATES AND OBESITY-RELATED HEALTH PROBLEMS IN NEW YORK CITY

More than one-third of adults in the United States are obese,⁹ representing a doubling of the prevalence of obesity nationwide since 1980.¹⁰ An additional thirty-three percent of adults are considered overweight.¹¹ The national statistics among youth are even more alarming. The body mass index of children has increased to the point

where over seventeen percent of children ages six-to-eleven, and adolescents ages twelve-to-nineteen are obese.¹² Health problems related to obesity include cardiovascular diseases and the related conditions of high blood pressure and high cholesterol, liver disease, certain cancers, osteoarthritis and others.¹³

While New York City remains below the national average for overweight and obesity rates, more than half of New York City's adults are overweight or obese.¹⁴ Of particular concern for New York City health officials has been the prevalence of Type 2 Diabetes, which has more than doubled amongst New Yorkers in the past ten years.¹⁵ Obesity is the key underlying risk factor for Type 2 Diabetes. Among New Yorkers who have diabetes, 80% are overweight or obese. There has also been a nationwide increase in of Type 2 Diabetes among children, a condition which until recently occurred almost exclusively in adults.¹⁶

The obesity epidemic is caused, in significant part, by an increase in the number of calories consumed by Americans.¹⁷ Substantial research has focused on the role of restaurants in the uptick in calorie intake. Americans increasingly eat their meals in restaurants.¹⁸ As of 2005, nearly half of all food dollars are spent in restaurants, compared to one-quarter in 1970.¹⁹ At the same time, restaurant patrons consistently underestimate the calories of any given meal.²⁰ One research study found that restaurant patrons underestimate calorie content by an average of more than 600 calories.²¹

III. THE PUBLIC HEALTH LAW: MANDATED DISCLOSURE OF CALORIE INFORMATION AT POINTS OF PURCHASE IN RESTAURANTS

The premise of the disclosure law is simple. If restaurant patrons are aware of calorie information when looking at menus (that is, when actually deciding what to eat) they are more likely to purchase meals with fewer calories.²² The disclosure requires food service establishments in New York City with fifteen or more outlets nationally and that serve standardized meals to post calorie content in close proximity to each item on menus and menu boards.²³ Now when patrons look at the menu board above the counter, the take-away menu or table menu of most chain restaurants in New York City, they see the calorie content for each menu item.²⁴ It is typically shown in the same font as the price and, legally, must be displayed as prominently as the price or name of the item.²⁵

IV. SOME KEY STAKEHOLDERS: PROPONENTS AND OPPONENTS OF THE DISCLOSURE LAW

A. Proponents

The idea of posting calorie information for restaurants meals gained some traction before DOHMH acted December of 2006. An early proponent of the concept was the FDA's Obesity Working Group.²⁶ In August 2003, FDA Commissioner McClellan initiated the formation of the Obesity Working Group and charged it "to confront the current obesity epidemic in the United States and to develop new and innovative ways to help consumers lead healthier lives through better nutrition."²⁷

In January 2004, the Obesity Working Group released a report that largely focused on the use of labels to educate restaurant patrons.²⁸ Entitled *Helping*

Consumers Lead Healthier Lives through Better Nutrition: A Social Sciences Approach to Consumer Information, Food Choices and Weight Management, and commonly referred to as the Keystone Report, it concluded that “the absence of calorie and nutrition labeling of restaurant food represents an information gap” for restaurant patrons.²⁹ The Keystone Report called for research on effective labeling practices for use in restaurants.³⁰ It also noted that some voluntary efforts by restaurants to “offer nutrition information” were problematic.³¹ In these cases, nutrient information was sometimes available “only after purchase” or was presented on “confusing charts or formats and very small type size.”³²

Another early proponent was the Center for Science in the Public Interest (“CSPI”). In March 2003, CSPI worked with New York State Assemblyman Felix Ortiz to file a calorie disclosure bill at the state level.³³ In addition to calories, the bill would have also required the disclosure of saturated fat and sodium content.³⁴ In its support of the bill, CSPI noted that “the high calorie content and large portion sizes of some restaurant foods are key contributors to the skyrocketing rates of overweight and obesity in children and adults.”³⁵ Assemblyman Ortiz’s bill was the second state bill of its kind, preceded only by State Representative Sean Faircloth of Maine.³⁶ Later that same year, state legislators in the District of Columbia, New Hampshire, Pennsylvania and Texas filed similar legislation, with the number of bill filings growing every year since then.³⁷

However, it was not until DOHMH got involved that the concept actually became law. DOHMH has over 6,000 staff members who serve over eight million residents.³⁸ At the time of the law’s passage, Commissioner Thomas Frieden, MD, MPH, led

DOHMH.³⁹ Dr. Frieden is now the Director of the CDC.⁴⁰ Within DOHMH, the calorie disclosure concept originated from the Bureau of Chronic Disease Prevention and Control.⁴¹ The Bureau was, and continues to be, led by Assistant Commissioner Dr. Lynn Silver.⁴² Attorneys from the General Counsel’s Office and members of the Bureau of Food Safety and Community Sanitation, led by Associate Commissioner Eliot Marcus, which conducts health and safety inspections of restaurants, participated.⁴³ Former General Counsel for DOHMH, Wilfredo Lopez, who was involved in a general overhaul of the Health Code at the time, also participated.⁴⁴ The current General Counsel, Thomas Merrill, was involved in some of the meetings as well.⁴⁵

Numerous non-governmental public health organizations, practitioners and researchers supported the calorie disclosure law.⁴⁶ Their support was present in the media and in the official public comments submitted to DOHMH. In fact, of the 2,245 comments submitted during public comments period and hearings, all but twenty-two voiced support.⁴⁷ A complete listing of all of the proponents is beyond the scope of this case study.

B. Opponents

Restaurant industry associations were critical of the calorie disclosure law and, in some cases, blatantly opposed the law and actively sought to lessen its potential effectiveness. Early and very public opposition came from the New York State Restaurant Association (“NYSRA”) and its national partner, the National Restaurant Association (“NRA”). NYSRA has twelve local chapters and about 8,000 members located throughout the state.⁴⁸ Its mission is to “protect, promote, represent and

educate our members to better serve the public, to act as the industry’s liaison with all regulatory agencies governing the commercial foodservice industry” and “to serve as a ‘legislative watchdog’ on federal, state, and municipal levels.”⁴⁹ NRA is similarly oriented, but on a national scale.⁵⁰

Several chain restaurant companies also opposed the calorie disclosure law or sought to weaken its requirements. News media reports of the public hearings before passage of the law in December 2006 describe testimony from representatives of various chains.⁵¹ After passage but prior to implementation of the law, representatives of numerous restaurant chains met with DOHMH staff and sought permission for alternative, arguably less effective posting requirements.⁵²

The National Council of Chain Restaurants, a division of the National Retail Federation, also opposed to the calorie disclosure law.⁵³ The National Council describes its involvement in opposing the calorie disclosure law as “a leadership role by serving as the chief media contact for the chain restaurant industry regarding a lawsuit filed in New York City.”⁵⁴ Despite this claim, the National Council appeared to have less involvement than the NYSRA.

The advocacy group the Center for Consumer Freedom (“CCF”) organized a public relations campaign against the calorie disclosure law. CCF describes its mission as the promotion of “personal responsibility” and protection of “consumer choices.”⁵⁵ The public relations company Berman and Company manages CCF, and describes CCF as an “online campaign” that “speak[s] to a wide variety of audiences, including politicians and their staffs, the major media, industry members, and . . . the general

public.”⁵⁶ Berman and Company’s other clients include members of the food and alcoholic beverage industries.⁵⁷

V. PASSAGE OF THE CALORIE DISCLOSURE LAW

A. Establishment of the Bureau of Chronic Disease Prevention

DOHMH has a long history of chronic disease prevention, starting as early as the 1950s.⁵⁸ In 1968, DOHMH promoted diabetes detection with a telephone number that New Yorkers could call to arrange a diabetes test.⁵⁹ More recently, DOHMH, under Dr. Frieden, passed a no smoking law in December of 2002 that prohibited smoking in virtually all workplaces.⁶⁰ Mayor Michael Bloomberg is also widely recognized for his commitment to public health.

Within DOHMH, the concept of the calorie disclosure law originated from the recently created Bureau of Chronic Disease Prevention and Control under the direction of Dr. Silver.⁶¹ The Bureau’s mission is to address chronic diseases, which “are responsible for the vast majority of deaths and hospitalizations among New Yorkers and also contribute significantly to a diminished quality of life.”⁶² The Bureau scope of work is substantial as it seeks to reduce the incidence of “heart disease, stroke, cancer, diabetes and respiratory diseases” by focusing on a variety of risk factors, including, but not limited to, physical inactivity and poor diet.⁶³

B. City Health Code Overhaul

Another factor that may have contributed to the passage of the calorie disclosure law was the overhaul of the City Health Code that was occurring when the calorie disclosure concept was initially proposed.⁶⁴ DOHMH amends the Health Code nearly

every year, but this revision was a complete top-to-bottom assessment. The overhaul was led by former General Counsel Wilfredo Lopez, who sought input from numerous individuals at DOHMH, including Dr. Silver.⁶⁵ Dr. Silver was particularly interested in how the Code could be amended to address the spike in obesity-related ailments.⁶⁶ General Counsel Lopez supported Dr. Silver in this approach and encouraged her to contribute recommendations for the overhaul and helped her to shape recommendations.⁶⁷

During initial brainstorming, Candace Young, Director of the newly created Physical Activity and Nutrition Program located within the Bureau of Chronic Disease Prevention, recalled reviewing the concept⁶⁸ Previously, CSPI asked New York State Assemblyman Felix Ortiz's to file a bill that would have required restaurants to disclose calorie, sodium and saturated fat information, and Assemblyman Ortiz asked DOHMH to advise him on whether the concept was effective.⁶⁹ After researching the concept, Director Young concluded that such disclosures would very likely educate restaurant patrons and help improve their diets.⁷⁰ Working together, Director Young and Dr. Silver proposed the inclusion of menu labeling on the agenda for revisions of the New York City Health Code to address chronic disease.⁷¹

C. Working Group

With the initial disclosure concept in hand, Dr. Silver convened an informal working group comprised of various public health practitioners within DOHMH to develop the concept further.⁷² She recruited members from the Bureau of Food Safety and Community Sanitation because of its oversight of restaurant regulation and

enforcement.⁷³ General Counsel Wilfredo Lopez supported Dr. Silver's synergetic approach and provided the legal leadership for drafting the proposal.⁷⁴ Commissioner Thomas Frieden supported the effort and was actively involved in key decisions.⁷⁵ The working group simultaneously drafted the New York City trans fat restriction along with the calorie disclosure law.⁷⁶

During this initial stage, the working group examined the exact nature of the public health problem and outlined the potential regulatory concept for responding to that problem.⁷⁷ An important resource at this stage was the FDA's Keystone Report.⁷⁸ The Keystone Report recommended disclosures be made in a clear, simple and obvious manner.⁷⁹ Health surveillance data specific to New York City was available to the working group along with supplemented national surveillance data and research.⁸⁰ Research on trends in calorie consumption in restaurants and awareness of the nutritional content of restaurant meals was also available to the group.⁸¹

The working group concluded that restaurants with multiple locations and fixed menus tended to serve highly standardized portions and some of the unhealthiest foods available, making those restaurants the logical focus of the disclosure law.⁸² Indeed, some chain restaurants already provided calorie information on a voluntary basis.⁸³ So, the working group knew the information was available, but was not being conveyed in a prominent manner.⁸⁴ The working group identified several different ways to specify to which restaurants the measure would apply.⁸⁵ Ultimately, they opted to define the measure as applying to restaurants that made their nutrition information available to

the public in any form.⁸⁶ Note that the more comprehensive version of the calorie disclosure law was passed after the first lawsuit.

D. Consultation with General Counsel and Law Department

Typically, after an initial regulatory concept is sketched out, the agency's General Counsel will become involved.⁸⁷ The program in DOHMH sponsoring a proposed regulation sends a written analysis of the regulatory concept and the public health need to the General Counsel.⁸⁸ The General Counsel then reviews the proposed regulatory language with a solid understanding of the public health problem and latest research.⁸⁹ Although the General Counsel reviews the research, his primary focus is the regulatory language.⁹⁰ First, the General Counsel makes a determination whether the concept is legal, that is, whether DOHMH has the legal authority to pass the regulation, whether it conflicts with other regulations passed by the City, whether the regulation complies with relevant federal and state constitutional constraints on government action and whether any state or federal laws would be preemptive.⁹¹ Second, the General Counsel investigates whether the language of the proposed regulation would achieve the goal being sought.⁹² This second area of analysis often includes a lengthy dialogue between the General Counsel, sponsoring program and other programs that are involved.⁹³ Drafts are passed back and forth until a final version is established.⁹⁴

In the case of the calorie disclosure law, the General Counsel's Office was involved early in the process as a member of Dr. Silver's working group.⁹⁵ Once approved by the Bureau of Chronic Disease Prevention and General Counsel's Office, the calorie disclosure law went to the New York City Law Department, which essentially

functions as a standalone law firm for the City of New York and its agencies.⁹⁶ In reviewing the proposed calorie disclosure law, the Law Department accomplished two primary functions.⁹⁷ First, as is the case with all proposed regulations in New York City, the Law Department checked whether the calorie disclosure law was a proper exercise of the sponsoring agency's authority.⁹⁸ Some important questions included whether the agency had the legal authority under the City's Charter to pass the proposed law, whether it followed the correct procedure for passage and whether the proposed law conflicted with other city regulations.⁹⁹

The second primary function of the Law Department with respect to reviewing the calorie disclosure law was to prepare for litigation because a legal challenge seemed possible.¹⁰⁰ The Law Department represents the City in litigation.¹⁰¹ Because the proposed calorie disclosure regulation was innovative, litigators in the Law Department were given an opportunity to review the regulation to prepare for the possibility of litigation.¹⁰²

E. Publication, Public Comment and Passage of the Calorie Disclosure Law

After receiving the green light from the Law Department, DOHMH proceeded with the actual process of passing the calorie disclosure law.¹⁰³ This process included a series of public notices and forums, review of public comments and lastly, passage.¹⁰⁴ DOHMH first publicly proposed the calorie disclosure law on September 26, 2006 at a Board of Health meeting.¹⁰⁵ A public hearing took place October 30, 2006.¹⁰⁶ After reviewing the comments, the regulation was adopted on December 5, 2006 with an effective date of July 2007.¹⁰⁷

The public hearing and comments were not the only opportunity that stakeholders had to shape the calorie disclosure. Prior to the effective date, restaurants had an opportunity to ask DOHMH to allow them to use “alternative means for making calorie information available to patrons.”¹⁰⁸ So, Dr. Silver and General Counsel Merrill along with others at DOHMH held a series of meetings with representatives from various restaurants that were proposing that alternative displays be considered.¹⁰⁹ Some restaurants proposed that calorie information be posted on stanchions and counter mats rather than on menu boards. DOHMH might have avoided being sued if it had agreed to allow these alternatives, but they would have meant less effective disclosures. Dr. Silver declined to accept any of the alternative disclosure recommendations.¹¹⁰

F. Legal Challenge and Amendment of the Calorie Disclosure Law

Ultimately, a lawsuit was brought by the NYSRA, and a federal district court found that the federal Nutritional Labeling and Education Act preempted the calorie disclosure law.¹¹¹ However, the Court also found that DOHMH could mandate disclosure of calorie information in an alternative way that would not be preempted. Instead of applying the disclosure requirements to restaurants that voluntarily made calorie information publicly available, the Court stated that:

The majority of state or local regulations—those that simply require restaurants to provide nutrition information—therefore are not preempted. Such regulations impose a blanket mandatory duty on all restaurants meeting a standard definition such as operating ten or more restaurants under the same name.¹¹²

With this guidance from the Court, DOHMH withdrew the initial version of the calorie disclosure law and revised it to apply to any restaurant that is “one of a group of

15 or more food service establishments doing business nationally.”¹¹³ DOHMH passed this revised version on January 22, 2008, and NYSRA filed a second lawsuit. This time around the courts ruled in DOHMH’s favor.

VI. OPPOSITION PRIOR TO PASSAGE OF THE DISCLOSURE LAW: THREATS OF ILLEGALITY AND OTHER CLAIMS

Not surprisingly, opposition to the calorie disclosure law was largely rooted in the restaurant industry. The efforts to raise the profile of the opposition in the news media and reach a wide audience were apparent. In addition, opponents spoke at the public hearing, directly with public health practitioners in DOHMH and through industry trade journals and news releases.

A. Legal Objections and Threats Raised by the Opposition

Opponents made several legal threats prior to passage of the disclosure law. The National Council of Chain Restaurants called the disclosure law “unconstitutional.”¹¹⁴ The quote was carried in the news and restaurant trade media around the country.¹¹⁵ Another legal threat reported in the news media was that the disclosure law would “intrude into the rights of free speech.”¹¹⁶

The NRA raised detailed legal threats during the public hearing on October 30, 2006.¹¹⁷ The NRA first argued that the disclosure law violated the dormant commerce clause because it favored New York businesses over national restaurant chains because most of the restaurants that would be required to disclose calorie contents were part of national chains, as opposed to the local corner restaurant.¹¹⁸ This argument seems

misplaced and may have been a bluff. The lawsuits brought by NYSRA did not raise any dormant commerce clause arguments.¹¹⁹

DOHMH responded by stating that the law would not violate the dormant commerce clause because it applied evenhandedly to in-state and out-of-state restaurants.¹²⁰ The fact that it affected more chain restaurants than single location restaurants was unavoidable.¹²¹ Only restaurants serving highly standardized meals could identify the calorie content of their meals in a reliable manner.¹²²

The second legal objection raised by the NRA at the public hearing was preemption. Preemption is a legal doctrine that states if a state (or municipal law) and federal law conflict with one another, the federal law is controlling.¹²³ It argued at the public hearing that federal Nutrition Labeling and Education Act would preempt the disclosure law.¹²⁴ This argument was the cornerstone of the NYSRA lawsuit.

In responding publicly to this legal objection by the NRA, DOHMH stated that the preemptive scope was limited.¹²⁵ DOHMH pointed to comments published by the Food and Drug Administration, which concluded that the Federal Nutrition Labeling and Education Act “exempts restaurant foods that do not bear a claim from mandatory nutrition labeling, [and therefore] state requirements for the nutrition labeling of such foods would not be preempted.”¹²⁶

Not surprisingly, there is no indication that the NRA or NYSRA recommended that DOHMH amend the calorie disclosure law to avoid preemption. It simply argued that federal law was preemptive. The implication was that federal law left no room for the DOHMH to require restaurants to disclose nutritional information.

B. Gauging Threats of Litigation

When asked about the threats of litigation made by opponents, interviewees at DOHMH felt that the legal objections had virtually no effect on them other than to cause them to revisit and confirm previous legal research.¹²⁷ DOHMH basically treated the legal objections as an educational opportunity, just like other comments submitted by the public.¹²⁸ They felt that they adequately researched questions of legality and educated relevant internal stakeholders.¹²⁹ They were aware that the disclosure law was innovative, and that well-funded opposition rooted in the restaurant industry would scrutinize the law for any legal weaknesses.¹³⁰ So, they had prepared carefully.¹³¹

The interviewees for this case study did not initially expect a legal challenge based on the opposition's rhetoric, although they were aware that the disclosure law was untested in the courts.¹³² Neither the news media nor restaurant trade media reported any explicit threats of litigation. The interviewees thought that the ban on trans-fats was much more likely to trigger litigation.¹³³ (The ban was proposed and passed at the same time as the calorie disclosure law.)

This perception changed when Dr. Silver and General Counsel Merrill started meeting with restaurant representatives after the passage of the disclosure law to work out the exact details of the disclosure.¹³⁴ The original law allowed alternative methods for posting to be proposed so long as they met a test for "equal prominence" established in the law and were approved by DOHMH.¹³⁵ Most restaurants wanted the calorie counts to appear in other locations in the restaurant than the menu boards or menus.¹³⁶ When the Department insisted that the information must appear on menu boards and

menus, it became apparent from the meetings in March and April 2007 that litigation was a likely outcome.¹³⁷

DOHMH had the option to appeal the initial trial court decision and may have received a more favorable decision on appeal. DOHMH chose not to appeal because amending the law to comport with the decision offered the surest and most expedient way to get calorie information in New York City restaurants. Specifically, the court recommended a blanket approach that would apply to most chain restaurants, regardless of whether they had voluntarily agreed to disclose the information. DOHMH incorporated that clear guidance into the subsequent version of the disclosure law and by doing so brought about a greater public health benefit.

It is likely, although not confirmed, that DOHMH considered this blanket option when crafting the original version. For purposes of this case study, decisions about the actual legal thinking underlying the structure of the original regulation were treated as confidential attorney-client communications and were not discussed in the interviews.

C. Claims of Ineffectiveness

Most of the opposition raised prior to the passage of the law was based on non-legal policy arguments. Particularly common in the opposition rhetoric was the claim that the law would be ineffective. McDonald's was quoted in the news and said "the company already prints nutritional information on its packaging, tray liners, website and brochures."¹³⁸ Previously, when commenting on the FDA's Keystone Report years earlier, a McDonald's representative similarly stated that "implementing an environmental nutrition intervention point of purchase that has not been carefully

evaluated through research poses risks to the consumer and does not reflect sound public health practices.”¹³⁹

Some opponents extended this argument and described the law as counterproductive. NYSRA stated that “while well-intentioned – [the disclosure law] is set up to hurt the exact restaurant restaurants which have been going above and beyond to provide nutrition information for customers.”¹⁴⁰ NYSRA also stated that the “mandate will actually discourage restaurants from informing customers about the nutrition content of their food, which would represent a step backward for public health.”¹⁴¹ This theme was reiterated at the public hearing. NRA testified that “the proposal penalizes restaurant chains that already lead the way in providing nutritional information and education on healthy lifestyles to our customers and provide this disincentive for other restaurants to provide nutritional information.”¹⁴²

CCF also used the theme of effectiveness in its opposition. The day after the disclosure requirement was first proposed, CCF issued a press release stating that “[New Yorkers] already know the difference between a banana and a banana split, or a milkshake and a diet soda . . . [t]here is no shortage of information, just a deficit in common sense from the government bureaucrats.” CCF tried to cast public debate about the calorie disclosure law in moral terms, by saying that New Yorkers ought to know the difference between healthy and unhealthy restaurant menu items.

To address the rhetoric on effectiveness, DOHMH pointed to the Keystone Report recommendation that restaurants provide “standardized, simple, and understandable nutritional information, including calorie information, at the point-of-

sale in a restaurant setting.”¹⁴³ This was based on the conclusion that some disclosure models, such as websites and placards hung away from menu boards, were ineffective at making patrons aware of calorie information.¹⁴⁴ DOHMH also raised the notion of “consumer choice,” which appeared to answer CCF’s emphasis on the personal responsibility of the consumer. DOHMH stated that “presenting nutrition information on restaurant menus empowers consumers and influences food choices.”¹⁴⁵

D. Bad for Business

Another common, non-legal theme used by the opposition was that compliance would be difficult, if not impossible. Wendy’s restaurant chain stated “the menu boards dictated under the proposal were not feasible because they would have to provide calorie counts for too many combinations of seasonings and ingredients.”¹⁴⁶ Domino’s Pizza restaurant chain similarly stated that their restaurants “offer too many options in its pie crusts and pizza toppings to make a simple list of calorie counts feasible.”¹⁴⁷ Starbucks coffee shops described compliance as “tricky” because “each item . . . has different sizes and different options.”¹⁴⁸

NYSRA cited research that found “70% of restaurant customers customized their orders.”¹⁴⁹ He went on to conclude that the process of preparing food in a restaurant meant that variation in calorie counts was unavoidable.¹⁵⁰ Presumably, he meant to imply that such variation even occurred in chain restaurants. Lastly, he concluded that the cost of compliance would be significant and involve changing menus and laboratory costs.¹⁵¹

DOHMH responded by stating that restaurants could account for small variations in menu items by posting a “median core content for all flavors or varieties.”¹⁵² This is exactly what restaurants that had already voluntarily prepared nutrition information had done. DOHMH stated in its response to public comments that “the publication of nutrition content claims by or on behalf of a food service establishment is an acknowledgement that menu items are sufficiently standardized to provide reasonably accurate calorie counts.”¹⁵³

When opponents cited problems with compliance, they may have been more worried that the disclosure law could cause restaurant patrons to take more time in deciding on their meal. A local owner of a franchise chain expressed this concern at the public hearing. He stated that the disclosure law would “create severe service barriers” and “will slow down the quick-service concept for our customers.”¹⁵⁴ Representatives of chain restaurants and trade associations also raised this claim, but it appears that they did not make this argument in the media or in their public comments. Instead, they emphasized this concern to DOHMH after passage, during brief period from January to March when the exact disclosure format was being finalized.¹⁵⁵ The disclosure law allowed DOHMH to consider alternative disclosure methods on a case-by-case basis.¹⁵⁶ Chain restaurants used this opportunity to argue that the disclosure should not appear right next to the price of the item. They repeatedly argued that it would slow down ordering too much for their business models. They tried to convey the sense that it “was going to destroy the whole fast food industry.”¹⁵⁷

VII. LESSONS LEARNED

From a public health perspective, there is little doubt that the calorie disclosure law had national importance. It was innovative, covered by large media outlets around the country and sought to address a rapidly growing public health problem. Those in the restaurant industry who were opposed feared that other jurisdictions would copy New York City. A representative of the NYSRA concluded shortly after the proposal was first proposed that “[t]his is just the first step . . . if it passes in New York City, there will be a domino effect across the country [and] you’ll begin to see it in Boston, in Oklahoma City, everywhere.”¹⁵⁸ This was no doubt a motivating factor for some opponents and why national proponents and opponents became involved.

This case study suggests that regulating in such an environment warrants preparing a full and accurate understanding of the legal arguments as soon as possible. Opponents may use claims of illegality and unconstitutionality, as they did in this case. Reaching out to public health researchers and practitioners outside of the agency is helpful in this respect. DOHMH received a range of support from various proponents. Numerous public health experts submitted public comments in writing and during the public hearing. Several experts made themselves available to the media to respond to viewpoints expressed by the opposition. During the actual litigation, several parties submitted amicus briefs. In providing guidance on how DOHMH might revise its initial disclosure law to avoid preemption, the court cited recommendations made in an amicus brief submitted by the City of San Francisco.

This case study also suggests effective and meaningful public health regulation may need to occur despite the threat of litigation. DOHMH passed the calorie disclosure law with the concern that litigation was a real possibility. During meetings with restaurant chains in early 2007 when the likelihood of litigation became apparent, the Department did not allow adoption of less prominent disclosure formats. The threat of litigation could very easily have drowned out the appreciation of the potential public health impact of less prominent disclosure formats.

General Counsel Merrill recommends one way for public health law departments to incorporate a full understanding of legal objections or threats without allowing that understanding to dominate decision-making on regulatory oversight. He recommends that the risk of losing in court should not just be evaluated in the abstract. Rather, it should be weighed against the potential value of the proposed public health law. This evaluation process would entail coordination among several members of the health department. It also entails an in-depth evaluation of both the public health threat and whether an agency can effectively respond by exercising a particular facet (or facets) of its regulatory oversight. This process puts the threat into concrete terms as opposed to an abstract evaluation of a legal threat.

In some cases, this task is easy because other states have already passed a particular law, and its effects on reducing a known cause of morbidity or mortality impact has been evaluated. In the case of the calorie disclosure law, the job of identifying a public health value was more difficult. DOHMH relied on internal research and expert recommendations to develop an accurate understanding of the public health

value. In particular, extensive research on the role of restaurant dining on obesity trends was available. The fact that restaurant patrons dramatically underestimate the calorie content of meals appeared to be a possible contributing factor to obesity. From this research, DOHMH concluded that a calorie disclosure requirement had a high potential public health value. In smaller health departments, outside resources and organizations are even more important to form a full and accurate understanding of the potential public health value of a proposed law.

One must also consider and weigh the risk of losing in court. For reasons of confidentiality, the exact nature of the evaluation conducted for the calorie disclosure law is not discussed in this case study, nor was it covered in case study interviews. Yet, some general conclusions can be drawn from this case study about evaluating the risk of a loss in court.

As is the case with assigning a public health value, the task of identifying the risk of winning or losing in court is easier when courts in other states have already evaluated a law. Because the calorie disclosure law was the first of its kind in the country, it was particularly difficult to accurately identify the risk of winning or losing in court. It had simply not been tested in the courts. The substantial legal resources available to DOHMH allowed for a comprehensive assessment of a variety of relevant legal questions. In smaller health departments where such resources are unavailable, outside assistance would be important.

Knowing the actual legal questions and their order of relevance is important when conducting the legal analysis. Arguably, the most important legal question is

whether the proposed law fits within the scope of an agency’s regulatory authority. This was a primary focus for the General Counsel at DOHMH and the New York City Law Department.¹⁵⁹ The conclusion of this research answers the question of whether the governmental authority in question, in this case DOHMH, has the legal authority to regulate. This also answers the question “Is the regulation furthering the legal mandate of the agency?” Once the question of legal authority is established, the legal analysis turns to constitutional limitations. If the proposed law is a municipal regulation, the legal analysis would also investigate whether state law preempts it.

This evaluation process of weighing the value of the public health goal against the threat of losing in court is not required. Nor does it exclude other decision-making factors. But, it can be effective to evaluate threats of litigation because it stops the threat of litigation from predominating decision-making. This is crucial in small municipal health departments and boards of health where the legal analysis is conducted by outside counsel who may have very little experience with public health issues or who tend to be more litigation-adverse.

RESEARCH METHODOLOGY

The Project utilized descriptive case study methodology to examine instances of state and local public health legislation that was opposed with legal rhetoric or faced a direct legal challenge. Descriptive case study methodology is designed to present a complete description of a case within its context. The descriptive case study technique was selected because of the lack of prior research on the issue of defensive public health litigation and the resulting lack of established theory in the area. The primary unit of analysis for each study was the proponent of the public health initiative. Background research for each case study included local and national media coverage, legislative and/or administrative documents, documents generated by the opposition, scholarly articles, legal filings and judicial opinions. A minimum of two in-depth telephone interviews were conducted for each case. Where possible, one interview was of a public health official, and one interview was with an attorney affiliated with the public health official. Given the resources available to conduct the studies interviews with opponents were not conducted.

¹ Institute of Medicine and National Research Council, Local Government Actions to Prevent Childhood Obesity, (September 1, 2009) at 2-4.

² See New York City Health Code, §81.50 (2008).

³ See *id.*

⁴ See *id.*

⁵ See *e.g.* Food and Drug Administration, Calories Count: Report of the Working Group on Obesity (2004) (hereinafter “Keystone Report”), <http://www.fda.gov/Food/LabelingNutrition/ReportsResearch/ucm081696.htm> (last visited October 28, 2009).

⁶ Interview with Thomas Merrill, General Counsel, New York City Dep’t of Health and Mental Hygiene (June 23, 2009) (hereinafter “General Counsel Merrill Interview”); see also *New York State Restaurant Ass’n v. New York City Dep’t of Health and Mental Hygiene*, 798 N.Y.S.2d 711 (2004) (challenging restaurant inspection protocols); *New York State Restaurant Ass’n v. State Tax Comm’n*, 66 A.D.2d 977, 412 N.Y.S.2d 193 (1978) (challenging a tax assessment against restaurant).

⁷ *New York State Restaurant Ass’n v. New York City Board of Health*, 556 F.3d 114, 121 (2nd Cir. 2009). The primary contention of the New York State Restaurant Association was that federal law preempted DOHMH from regulating virtually any aspect of nutrition labeling for restaurants.

⁸ See *id.* 121-22.

⁹ Nat’l Center for Health Statistics, Centers for Disease Control and Prevention, Data Brief, Obesity among Adults in the United States – No Statistically Significant Change Since 2003-2004 (Dec. 4, 2007), <http://www.cdc.gov/nchs/data/databriefs/db01.pdf> (last visited Oct. 30, 2009).

¹⁰ See *id.*

¹¹ See *id.*

¹² Centers for Disease Control and Prevention, NHAES Surveys (1976 – 1980 and 2003-2006), <http://www.cdc.gov/obesity/childhood/prevalence.html> (last visited October 26, 2009).

¹³ Centers for Disease Control and Prevention, National Center for Health Statistics, Prevalence of Overweight and Obesity Among Adults: United States, 2003-2004; see also Dec. of Frieden, *supra* note 12, at 7.

¹⁴ *New York State Restaurant Ass'n v. New York City Board of Health, et al.*, 509 F.Supp.2d 351 (S.D.N.Y. Sept. 11, 2007) (Declaration of Thomas R. Frieden, Comm'r, New York Dep't of Health and Mental Hygiene, Page 3) (hereinafter "Dec. of Frieden").

¹⁵ Dec. of Frieden, *supra* note 12, at 8.

¹⁶ Aviva Must & Sarah E. Anderson, *Effects of Obesity on Morbidity in Children and Adolescents*, 6(1) NUTRITION IN CLINICAL CARE 4 (2003).

¹⁷ Decrease in the physical activity of the average American is also relevant.

¹⁸ Jennifer Pomeranz & Kelly Brownell, *Legal and Public Health Considerations Affecting the Success, Reach and Impact of Menu-Labeling Laws*, 98(9) AM. J. PUB. HEALTH 1578 (2008).

¹⁹ Dec. of Frieden, *supra* note 12, at 14.

²⁰ Scot Burton, et al., *Attacking The Obesity Epidemic: The Potential Health Benefits Of Providing Nutrition Information In Restaurants*, 96(9) AM. J. PUB. HEALTH 1669-75 (2006).

²¹ *See id.*

²² Interview with Dr. Lynn Silver, Assistant Commissioner, Bureau of Chronic Disease Prevention and Control, New York City Dep't of Health and Mental Hygiene (May 27, 2008) (Hereinafter "Dr. Lynn Silver Interview").

²³ *See* New York City Health Code, § 81.50 (2008)

²⁴ *See* Dr. Lynn Silver Interview, *supra* note 25.

²⁶ Keystone Report, *supra* note 5.

²⁷ U.S. Food & Drug Administration, Report of the Working Group on Obesity: Appendix D – August 11, 2003, Charge Memorandum, (August 11, 2003), <http://www.fda.gov/Food/LabelingNutrition/ReportsResearch/ucm081907.htm> (last visited October 26, 2009).

²⁸ U.S. Food & Drug Administration, Report of the Working Group on Obesity: Appendix G - Report from the Division of Market Studies Office of Scientific Analysis and Support, (December 28, 2003), <http://www.fda.gov/Food/LabelingNutrition/ReportsResearch/ucm081998.htm> (last visited October 26, 2009).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Press Release, Center for Science in the Public Interest, NY State Menu Labeling Bill Introduced, Legislation Would Put Nutrition Info on Chain Restaurant Menus, Menu Boards, (March 11, 2003), <http://www.cspinet.org/new/200303111.html> (last visited on Sept. 1, 2009).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Center for Science in the Public Interest, State Restaurant Labeling Bills: 2003-2004, (October 25, 2004), http://cspinet.org/nutritionpolicy/menu_labelingbills.pdf (last visited October 26, 2009).

³⁷ *Id.*

³⁸ New York City Department of Health and Mental Hygiene, Triennial Report, 2004-2006, Public Health in New York City, <http://www.nyc.gov/html/doh/html/about/about.shtml> (last visited October 26, 2009).

³⁹ *Id.*

⁴⁰ Centers for Disease Control and Prevention, The CDC Director, <http://www.cdc.gov/about/leadership/CDCdirector.htm> (last visited October 26, 2009).

⁴¹ Dr. Lynn Silver Interview, *supra* note 25.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ General Counsel Merrill Interview, *supra* note 6.

⁴⁶ See Dr. Lynn Silver, Assistant Commissioner, Bureau of Chronic Disease Prevention and Control, § 81.50 Calorie Posting: Response to Comments (January 22, 2008) (on file with author). Dr. Silver states that the following institutions and individuals as being in support of the calorie disclosure law: American Cancer Society, American Diabetes Ass'n, American Academy of Pediatrics, American Medical Ass'n, American Heart Ass'n, Center for Science in the Pub. Interest, Citizen's Comm'n for Children, New York Health Eating and Physical Activity Alliance, NYS District of the American Academy of Pediatrics, Rudd Center for Food Policy, Institute for Human Nutrition, Public Health Ass'n of New York City, New York City Nutrition Education Network, David Ludwig at Harvard and Boston Children's Hospital, Kyah Duffey at Univ. of North Carolina, Marie St. Onge at Obesity Research Center, Xavier Pi-Sunyer at St. Luke's Hospital, Eric Schlosser, Fast Food Nation Book, Lisa Young Portion Teller Book, Wahida Karmally at Columbia Presbyterian,

⁴⁷ Memorandum from Dr. Lynn Silver & Candice Young to Dr. Thomas R. Frieden Summary and Response to Public Hearing and Comments Received Regarding Amendment of Article 81 of the New York City Health Code Adding a New Section 81.50 to Require Calorie Labeling on Menus and Menu Boards, (Nov. 27, 2006) (hereinafter "Silver & Young Memorandum"), <http://www.nyc.gov/html/doh/downloads/pdf/public/hc-art81-50-1006-response.pdf> (last visited on Sept. 1, 2009).

⁴⁸ New York State Restaurant Ass'n, Who We Are, <http://www.nysra.org/displaycommon.cfm?an=1> (last visited October 26, 2009).

⁴⁹ *Id.*

⁵⁰ National Restaurant Ass'n, About the National Restaurant Ass'n, <http://www.restaurant.org/aboutus/> (last visited October 26, 2009).

⁵¹ See, e.g., Thomas J. Lueck, *Public Speaks on Plan to Limit Trans Fats, Mostly in Favor*, N.Y. TIMES, October 31, 2006, at B1.

⁵² General Counsel Merrill Interview, *supra* note 6.

⁵³ National Council of Chain Restaurants, NCCR Plays Key Media Role in NYC Menu Labeling Lawsuit, http://www.nccr.net/NYC_menu_labeling_lawsuit.asp (last visited October 26, 2009).

⁵⁴ *Id.*

⁵⁵ The Center for Consumer Freedom, About Us, <http://www.consumerfreedom.com/about.cf> (last visited October 26, 2009).

⁵⁶ Berman and Company, Clients, <http://www.bermanco.com/clients.htm> (last visited October 26, 2009).

⁵⁷ *Id.*

⁵⁸ New York City Department of Health and Mental Hygiene, 1950 – 1969: From Infectious To Chronic Disease, www.nyc.gov/html/doh/downloads/pdf/bicentennial/historical-booklet-1950-1969.pdf (last visited October 27, 2009).

⁵⁹ *Id.*

⁶⁰ New York City Department of Health and Mental Hygiene, Bureau of Tobacco Control, Smoke Free Air Act of 2002, <http://www.nyc.gov/html/doh/html/smoke/tc1.shtml#4> (last visited October 27, 2009).

⁶¹ Dr. Lynn Silver Interview, *supra* note 25

⁶² New York City Department of Health and Mental Hygiene, Chronic Disease Prevention & Control, <http://www.nyc.gov/html/doh/html/cdp/cdp.shtml> (last visited October 27, 2009).

⁶³ See *id.*

⁶⁴ Dr. Lynn Silver Interview, *supra* note 6.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ General Counsel Merrill Interview, *supra* note 6.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ The Law Department describes itself as follows:

The New York City Law Department is responsible for all of the legal affairs of the City. It represents the City, the Mayor, other elected officials, and the City's many agencies in all affirmative and defensive civil litigation as well as juvenile delinquency prosecutions brought in Family Court and Administrative Code enforcement proceedings brought in Criminal Court. Law Department attorneys draft and review local and State legislation, real estate leases, procurement contracts, and financial instruments for the sale of municipal bonds. The Department also provides legal counsel to City officials on a wide range of issues such as immigration, education, and environmental policy.

New York City Law Department, About the Law Department, <http://www.nyc.gov/html/law/html/about/about.shtml> (last visited October 28, 2009).

⁹⁷ General Counsel Merrill Interview, *supra* note 6.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *New York State Restaurant Ass'n v. New York City Board of Health*, 509 F.Supp.2d 351, 363 (S.D.N.Y. Sept. 11, 2007).

¹¹² *Id.*

- ¹¹³ NYC Department of Health and Mental Hygiene Notice of Intention To Repeal and Reenact §81.50 of The New York City Health Code, www.nyc.gov/html/doh/downloads/pdf/public/notice-intention-hc-art81-50-1007.pdf (last visited October 28, 2009).
- ¹¹⁴ *New York City May Ask Restaurants to List Calories*, 12(43) FOOD & DRINK WEEKLY 3 (Nov. 6, 2006).
- ¹¹⁵ See e.g. *New York City Officials Want Calorie Count Listed on Some Restaurant Menus*, CHICAGO TRIBUNE, Nov. 2, 2006, at 7; Bob Condor, *Living Well: Doing Fast Foods Right is a Heavy Challenge*, SEATTLE POST-INTELLIGENCER, Nov. 6, 2006.
- ¹¹⁶ Thomas J. Lueck, *City May Ask Restaurants To List Calories*, N.Y. TIMES, Nov. 30, 2006, at B1.
- ¹¹⁷ Silver & Young Memorandum, *supra* note 51.
- ¹¹⁸ See *id.* NRA also argued that the disclosure law would create an “undue burden” on interstate commerce without a countervailing non-economic benefit to justify the burden. The dormant commerce clause is a legal doctrine that seeks to prevent state laws from acting as barriers to interstate commercial activity. See Wendy E. Parmet & Christopher N. Banthin, *Public Health Protection and the Commerce Clause* Controlling Tobacco in the Internet Age, 35(1) N.M. L. REV. 81, 83 (Winter 2005).
- ¹¹⁹ See *New York State Restaurant Ass’n v. New York City Board of Health, et al.* *supra* note 117; *New York State Restaurant Ass’n v. New York City Board of Health*, *supra* note 7.
- ¹²⁰ Silver & Young Memorandum, *supra* note 51.
- ¹²¹ See *id.*
- ¹²² See *id.*
- ¹²³ Cheryl Sbarra, Tobacco Control League Consortium, Legal Authority to Regulate Smoking and Common Threats and Challenges: 2009 (May 2009) at pp. 2-4, <http://tclconline.org/documents/sbarra-update.pdf> (last visited October 28, 2009).
- ¹²⁴ *Id.*
- ¹²⁵ General Counsel Merrill Interview, *supra* note 6.
- ¹²⁶ United States Food and Drug Administration, Guidance for Industry: A Labeling Guide for Restaurants and Other Retail Establishments Selling Away-From-Home Foods (April 2008), <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabeling/Nutrition/ucm053455.htm> (last visited October 28, 2009).
- ¹²⁷ Dr. Silver Interview, *supra* note 51, General Counsel Merrill Interview, *supra* note 6.
- ¹²⁸ See *id.*
- ¹²⁹ See *id.*
- ¹³⁰ See *id.*
- ¹³¹ See *id.*
- ¹³² See *id.*
- ¹³³ See *id.*
- ¹³⁴ General Counsel Merrill Interview
- ¹³⁵ *Id.*
- ¹³⁶ *Id.*
- ¹³⁷ *Id.*
- ¹³⁸ See *Trans Fat, You’re Fired: City Health Officials Work to Enact Plan to Drop Heart-Harming Ingredient from Menus in Area Restaurants*, NEWSDAY, (Sept. 27, 2006); see also *New York City Bans Use of Trans Fats in City Restaurants*, 12(38) FOOD & DRINK WEEKLY 1 (Oct. 2, 2006).
- ¹³⁹ See Dec. of Frieden, *supra* note 12 (quoting from the Declaration of Debra DeMuth, Director for Global Nutrition, McDonald’s).
- ¹⁴⁰ See Press Release, National Restaurant Association, Trans Fat, Menu Labeling Comments Presented by the New York State Restaurant Association at Hearing before New York City Department of Health and Mental Hygiene, Oct. 30, 2006, <http://www.restaurant.org/pressroom/print/index.cfm?ID=1332> (last visited October 28, 2009).
- ¹⁴¹ *Id.*
- ¹⁴² Testimony of Sheila Cohn Weiss, Director of Nutrition Policy of the Nat’l Restaurant Ass’n, Oct. 30, 2006, at 65 #14-20.
- ¹⁴³ Keystone Report, *supra* note 5, at V.B.2.

¹⁴⁴ Dr. Lynn Silver Interview, *supra* note 25.

¹⁴⁵ Lueck, *City May Ask Restaurants to List Calories*, *supra* note 122.

¹⁴⁶ Thomas J. Lueck, *Public Speaks on Plan to Limit Trans Fats, Mostly in Favor*, *supra* note 55.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Press Release, National Restaurant Association, *supra* note 149.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Lueck, *City May Ask Restaurants to List Calories*, *supra* note 122.

¹⁵³ Silver & Young Memorandum, *supra* note 51.

¹⁵⁴ *Id.*

¹⁵⁵ General Counsel Merrill Interview, *supra* note 6

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Paul Frumkin, *Proposed Trans Fat Ban in NYC has Industry Fearful of 'Domino' Effect*, 40(41) NATION'S RESTAURANT NEWS 1 (Oct. 9, 2006).

¹⁵⁹ The Law Department also checked to make sure that the law does not conflict with other laws passed by the City.