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**Model Ordinance Regulating Where Sugar-Sweetened Beverages May Be Sold**

The National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN) is a project of ChangeLab Solutions. ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

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## Introduction and Report

This Model Ordinance Regulating Where Sugar-Sweetened Beverages May Be Sold (Model Ordinance) is based on ChangeLab Solutions’ legal research and analysis, as well as the research and evidence base linking excessive consumption of sugar-sweetened beverages (SSBs) with overweight/obesity and chronic disease. It is intended to be used as one potential policy intervention to reduce consumption of SSBs and to complement other policy and programmatic work to increase healthy food and beverage options.

This Introduction and Report summarizes our nonpartisan analysis of the research on these issues and the rationale for regulating certain aspects of retail sales of SSBs as a possible policy intervention. It is intended for broad distribution to the public for the purpose of education and dissemination of information. Our presentation of this Model Ordinance, including this Introduction and Report, is based on our independent and objective analysis of the relevant law, evidence, and available data, and should enable readers to draw their own opinions and conclusions about the merits of this Model Ordinance.

### The Obesity Epidemic and the Role of Sugar Sweetened Beverages

More than two thirds of adults[[1]](#endnote-1) and nearly one third of youth aged two to nineteen years[[2]](#endnote-2) in the U.S. are overweight or obese. Over the last thirty years, obesity and overweight rates have soared in all age groups, particularly among children–more than doubling for preschoolers and more than tripling for children ages 6 to 11 and adolescents ages 12 to 19.[[3]](#endnote-3),[[4]](#endnote-4) After decades of steady increase, adult[[5]](#endnote-5) and childhood[[6]](#endnote-6) obesity rates appear to have leveled off, with no significant increase (or decrease) in recent years. Nonetheless, existing obesity rates are still staggeringly high, especially for low-income people and people of color. African-American and Latino adults have higher obesity and overweight rates than the overall U.S. population.[[7]](#endnote-7) Similarly, 21 percent of Latino children and adolescents and 24 percent of African-American children and adolescents are obese, while 14 percent of white children are obese.[[8]](#endnote-8) Variation in obesity rates across income is complex, but generally obesity rates decline as income increases for both adults and children.[[9]](#endnote-9),[[10]](#endnote-10)

The rise of overweight and obese over the last 30 years corresponds to increases in calorie consumption. American adults consume as much as 570 more calories per day on average than 30 years ago, an increase of over 30 percent.[[11]](#endnote-11) Children are also consuming more calories—on average about 108 more calories per day, an increase of approximately 6 percent.[[12]](#endnote-12) This increased calorie consumption has not been offset by increases in physical activity. In fact, less than half of adults[[13]](#endnote-13) and less than one third of adolescents[[14]](#endnote-14) in the U.S. meet physical activity guidelines of 150 minutes a week and an hour a day, respectively.[[15]](#endnote-15)

Many of these additional calories are coming from sugar-sweetened beverages.[[16]](#endnote-16) Sugar-sweetened beverages (“SSBs”) are beverages that have added caloric sweeteners of any kind, and include sweetened fruit juices, fruit drinks,[[17]](#endnote-17) carbonated sodas, sports drinks, energy drinks, and flavored milks.[[18]](#endnote-18) Between 1977 and 2001, energy intake from SSBs for all age groups increased 135 percent.[[19]](#endnote-19) While SSB consumption has decreased in recent years, particularly among children and adolescents,[[20]](#endnote-20) consumption rates remain high.

On any given day, roughly half of the American population over age two drinks at least one SSB and 25 percent consume at least 200 calories from SSBs.[[21]](#endnote-21) One study by the Centers for Disease Control found that 63 percent of high school students report consuming at least one SSB on a daily basis.[[22]](#endnote-22) In another study, 81 percent of children ages 6-11 consumed at least one SSB on the surveyed day.[[23]](#endnote-23) The most common SSBs consumed by children and adolescents were fruit drinks and non-diet carbonated soft drinks.[[24]](#endnote-24) The disparities in obesity rates by income and race and ethnicity are mirrored in SSB consumption. African-Americans and Mexican-Americans report consuming more SSB calories than whites for both sexes and most age groups.[[25]](#endnote-25) African-American children and adolescents are more likely to consume 500 or more calories a day from fruit drink SSBs than whites; and low-income children more likely to consume 500 or more calories a day from all SSBs than high-income children.[[26]](#endnote-26)

Close to 50 percent of SSB calories consumed by all ages are consumed outside of the home. Of these SSBs consumed out of the home, 43 percent are purchased in stores, 35 percent are purchased in restaurants (including fast-food), and over 20 percent are purchased in places like vending machines, street vendors, and cafeterias.[[27]](#endnote-27) SSBs are sold in a wide variety of retail establishments, not just by food retailers. One survey of over 1,000 retail stores in the U.S. whose primary merchandise was not food found that 20 percent sold SSBs, often in arms reach of the cash register.[[28]](#endnote-28),[[29]](#endnote-29)

While children and adolescents have lower out of home SSB consumption rates compared to adults, as much as 40 percent of the calories from SSBs and fruit juices consumed by children and adolescents are consumed outside of the home.[[30]](#endnote-30) Adolescents who live closer to food retailers are more likely to purchase and consume SSBs on a daily basis.[[31]](#endnote-31) This association holds true for a variety of retailers, including convenience stores, grocery stores, and restaurants (including fast food restaurants).[[32]](#endnote-32) Adolescents often make these purchases before and after school, both alone and while with friends.[[33]](#endnote-33) Not only teenagers are buying and consuming SSBs. A study of fourth through sixth grade students in a Philadelphia neighborhood who shopped at corner stores before and after school found that SSBs accounted for 88 percent of all beverages purchases and 16 percent of calories per purchase.[[34]](#endnote-34)

While living near any food retailer is associated with increased SSB consumption, research shows variations by retailer type in the association between residential proximity to food retailers and the prevalence obesity and overweight. Adolescents who live in neighborhoods with more chain super markets tend to have a lower body mass index and are less likely to be overweight, but adolescents who live in neighborhoods with more convenience stores tend to have higher a body mass index and are more likely to be overweight.[[35]](#endnote-35) Researchers have found conflicting results when examining the association between overweight or obese and school proximity to fast food restaurants.[[36]](#endnote-36)

These variations point to larger inequities in the food environment that create barriers to accessing healthy foods. The disparities in obesity rates and SSB consumption are again mirrored in access to healthy foods: low-income, African-American, and Hispanic neighborhoods have fewer chain supermarkets than middle-income and white neighborhoods[[37]](#endnote-37) but more convenience stores and small grocery stores.[[38]](#endnote-38) While all of these retail outlets sell SSBs and other unhealthy foods that contribute to obesity, supermarkets, particularly large chain stores, are more likely to offer healthful items, like fresh fruits and vegetables, and often at lower cost.[[39]](#endnote-39)

SSB consumption is consistently associated with long-term weight gain and increased obesity rates among adults, and children and adolescents.[[40]](#endnote-40),[[41]](#endnote-41),[[42]](#endnote-42),[[43]](#endnote-43) Conversely, intervention research suggests that reductions in SSB consumption are significantly associated with weight loss.[[44]](#endnote-44),[[45]](#endnote-45) Associations between soda consumption and overweight have been found in children as young as two years old; one study found that the odds of 2-year olds who consumed at least one soda a day being overweight increased more than three-fold compared to children who consumed no soda.[[46]](#endnote-46)

SSB consumption has also been consistently found to be associated with an increased risk in adults of chronic diseases such as diabetes,[[47]](#endnote-47),[[48]](#endnote-48),[[49]](#endnote-49),[[50]](#endnote-50),[[51]](#endnote-51) metabolic syndrome,[[52]](#endnote-52) and heart disease.[[53]](#endnote-53),[[54]](#endnote-54) A recent study of youth with type 1 diabetes found that increased consumption of sugar-sweetened beverages was associated with increased risk of cardiovascular disease risk factors.[[55]](#endnote-55) SSB consumption in children is associated with dental caries,[[56]](#endnote-56),[[57]](#endnote-57) asthma,[[58]](#endnote-58) decreased milk consumption,[[59]](#endnote-59),[[60]](#endnote-60),[[61]](#endnote-61) and inadequate intake of nutrients, including calcium, iron, folate, magnesium, and vitamin A.[[62]](#endnote-62),[[63]](#endnote-63),[[64]](#endnote-64),[[65]](#endnote-65) Soda consumption in particular is also associated with lower bone mineral density[[66]](#endnote-66) and a higher risk of bone fracture among girls.[[67]](#endnote-67),[[68]](#endnote-68)

Some published research has not found associations between SSB consumption and adverse health outcome. A meta-analysis of 12 studies of SSB consumption and weight gain among children and adolescents found no significant association.[[69]](#endnote-69) Similarly, a risk analysis found no relationship between BMI and consumption of soda sold in vending machines in schools.[[70]](#endnote-70) Two studies analyzing different federal data sets also reported no negative association between SSB consumption (specifically soda) and calcium intake.[[71]](#endnote-71),[[72]](#endnote-72) Much of the published research reporting no adverse effect of SSB consumption on nutrition and health is funded by the beverage industry and has been refuted by subsequent research.[[73]](#endnote-73)

Many factors contribute to the obesity epidemic and there is no single solution. However, the weight of the evidence suggests that SSB consumption is a contributing factor to high rates of overweight and obesity among all age groups and that policy and program solutions that reduce SSB consumption can help to address this issue.

### Regulation of the Sale of Sugar-Sweetened Beverages as a Policy Solution to Reduce Consumption of Unhealthy Beverages

No single policy or program will substantially reduce SSB consumption or radically improve health; rather, a collection of strategies are needed to create environments where people can be healthy. As part of a multipronged effort to reduce obesity and related chronic health conditions, many communities are exploring a range of programmatic and policy approaches to reduce SSB consumption. These approaches include media campaigns, organizational wellness initiatives, limiting sales of SSBs on government property, restricting sales of SSBs in schools, taxing SSB sales, and retail-based strategies such as limiting SSB portion sizes. A discussion of the myriad of approaches to restricting SSB consumption can be found on our website at: [*www.changelabsolutions.org/publications/ssb-playbook*](http://www.changelabsolutions.org/publications/ssb-playbook)*.*

ChangeLab Solutions has developed this Model Ordinance as a tool to help communities that are ready to adopt policy measures that more broadly reduce access to SSBs, particularly for children and adolescents. The Model Ordinance offers options for restricting sales of SSBs by retailers that cater primarily to children and their caretakers, and limiting the location, number and density of retailers selling SSBs. The Model Ordinance may be particularly appropriate for communities that already restrict SSB sales in schools, a policy approach with demonstrated success.[[74]](#endnote-74),[[75]](#endnote-75),[[76]](#endnote-76),[[77]](#endnote-77) Adopting the Model Ordinance may help such communities further reduce out of home SSB consumption by children and adolescents.[[78]](#endnote-78)

Policies that regulate sales of SSBs can implicate tensions between the government’s duty to protect individual liberty and its duty to promote and protect public health and wellbeing. Opponents of SSB-related policies often argue that the restrictions unnecessarily and excessively intrude on personal freedoms and are part of a broader paternalistic effort to legislate lifestyles.[[79]](#endnote-79),[[80]](#endnote-80),[[81]](#endnote-81) A common argument is that individuals should be left to exercise individual choice and responsibility when it comes to what they eat and drink. These policies are cast as creating a dangerous slippery slope: what personal liberty will be restricted next in the name of public health? Public health advocates counter that choices are not made in a vacuum but are influenced by the broader environment and collective action is needed to increase opportunities to make healthy choices.[[82]](#endnote-82)

Communities considering restricting sales of SSBs near schools and other places children frequent may find such policies are more acceptable when coupled with other strategies to provide healthier food alternatives to children. Such strategies include: working with schools to provide more nutritious food options on campus; providing economic development or zoning incentives for healthier food in restaurants and stores; and promoting farmers’ markets and community gardens. Model policies of this type are available on our website at: [*www.changelabsolutions.org*](http://www.changelabsolutions.org)*.*

## Legal Issues

To determine whether your community can implement the Model Ordinance, it is important to review both state and local law. Below we discuss some of the key legal issues that this Model Ordinance may raise.

### Police Power

The police power is the primary source of authority for non-federal health-related statutes, regulations, and ordinances. “Police power” is the term used to describe the power of government to regulate private conduct to protect and further the public’s health, safety, or general welfare. In many states, local governments have considerable discretion when enacting regulations, including those affecting business operations. [[83]](#endnote-83) Whether a local government has the power to regulate retailers – and to implement this Model Ordinance – is usually determined by state law. In addition, many states have empowered Boards of Health to adopt certain regulations to protect the public health. Because local government police power, and the authority granted to local Boards of Health, varies considerably, it is important to review state law to determine whether your city or county can implement the Model Ordinance.

### Local Zoning Laws

A number of the provisions in the Model Ordinance regulate the location of businesses that sell SSBs; such restrictions on the location of businesses are typically adopted within the municipal zoning code. Cities and counties use zoning and other land use measures to regulate the growth and development of the community in an orderly manner. Most zoning divides a community into districts and determines how the land in each district may be used. For example, a community may limit the use of land in a residential district to housing. Some communities may zone to permit a particular use in a district, but require a permit or approval by the planning commission or similar agency before allowing the use at a specific location within the district. In that district, the use is referred to as a “conditional use.” Zoning applies to lands, not individual owners or users. Once a piece of land has been zoned for a particular use, it will remain zoned that way unless the zoning law is changed, regardless of who owns the land.

Local governments have considerable discretion when enacting zoning regulations. Governments enact zoning laws under their “police power.”[[84]](#endnote-84) Example of local governments using zoning law to promote public health include zoning code provisions that: specify farmers markets or urban agriculture as an allowed use in specified zones; prohibit tobacco or alcohol retailers from operating near schools; or require specified businesses provide adequate bicycle parking to receive a land use entitlement. Many local governments use local zoning laws to protect the health, safety, and general welfare of children. In a majority of states, zoning laws prohibit liquor stores or adult businesses from locating near schools.[[85]](#endnote-85) Some communities have used zoning laws to limit the proximity of fast food restaurants to schools[[86]](#endnote-86) and other places children frequent[[87]](#endnote-87) or to limit mobile food vendors from operating near schools and public parks.[[88]](#endnote-88)

Because, by its nature, land use regulation cannot be done with scientific precision, courts presume that zoning ordinances are valid. Provided there is a reasonable basis for different zoning treatment of similar lands, land uses, or land users, courts will generally uphold zoning regulations, even in the absence of evidence that the different zoning treatment will have its intended effect.[[89]](#endnote-89) A community that articulates a purpose for a land use regulation – such as protecting residents’ health – may choose to address a problem incrementally or direct a solution to one group of land users and not another. As a result, so long as the local government has the authority under state enabling law to enact zoning regulations, a court would likely uphold a zoning law that restricts the location of retailers that sell SSBs, even if the city does not similarly limit other retailers.

**What about existing retailers that sell SSBs?**

This Model Ordinance imposes new restrictions on all retailers that sell SSBs, and application of those restrictions to existing retailers requires careful planning. Zoning regulations are primarily tools to shape a community over time, and changes in zoning law typically “grandfather” in existing businesses and apply only to new businesses. Therefore, zoning may be a more appropriate approach for communities planning new development or with few retailers already selling SSBs. In areas that are already developed or that have a high number of existing retailers selling SSBs, a zoning approach may have a delayed impact.

Zoning typically categorizes land uses in one of three ways: those that are permitted, those that are prohibited, and those that are permitted subject to conditions via a conditional use permit. Land uses that were lawful under prior laws but do not meet new regulations are often referred to as “nonconforming uses.” Generally, communities have three options when addressing nonconforming uses: (1) “grandfather in” existing businesses by granting legal and nonconforming status; (2) phase out the use over time through amortization; or (3) end the use immediately through eminent domain.

A community may allow nonconforming uses to continue by granting legal and nonconforming status unless and until the business ceases operations, changes or attempts to expand its use in some way (as defined by the ordinance). The intent is that eventually, over time, the prohibited use will cease to exist in that area.[1]

While this Model Ordinance uses this strategy as a default option, communities that desire a more immediate change to the retail environment may instead opt to amortize the use by allowing nonconforming businesses to operate for a set period of time after the new restrictions are adopted.[2] The grace period is determined on a case-by-case basis by balancing appropriately (1) the public’s interest – the harm to the public caused by continuing the nonconformity – and (2) the economic impact on the property owner – allowing the owner to receive a fair return on his or her investment.[3] The amortization period may be short for a business that has operated at that location for several years, and longer for a newer business that has not had time to recoup its investment.

A community may end a use immediately through “eminent domain” or paying the business owner “just compensation” for the value of the business. A city may end a use without paying compensation if it finds that the continuation of a nonconforming use poses a threat to the public’s health or safety.[4] This method is often quite costly and can be controversial, so communities rarely use it to eliminate nonconforming uses.

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[1] Rathkopf AH, Rathkopf DA and Ziegler EH. *Rathkopf’s The Law of Zoning and Planning*, § 73:6. Thomson Reuters, 2009 (4th ed.).

[2] *Id*. at § 74:18.

[3]  *Id.* at § 74:24.

[4]  *Id.* at § 74:16.

**Using Licensing to Implement Retail Policies**

Although this Model Ordinance includes language that can be incorporated into an existing Zoning Code, or used to directly regulate retail businesses to restrict SSB sales, these policies could also be implemented through licensing. Health advocates and elected officials are increasingly using licensing as a strategy to shape the way land is used and how businesses operate. A discussion of licensing and zoning can be found on our website at: [*www.changelabsolutions.org/publications/licensing-zoning*](http://www.changelabsolutions.org/publications/licensing-zoning)*.*

Licensing is a regulatory policy through which an entity engaged in a specified business or profession must obtain a license from the government in order to legally operate. [1] A “license” (sometimes called a permit) is defined as “a right or permission granted in accordance with law . . . to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful.” [2]  To obtain the license, the business must agree to abide by certain conditions and operational standards, or risk penalties for noncompliance, including suspension or revocation of the license. The conditional nature of licenses means that they are also an efficient way for governments to enforce existing state and federal laws, in addition to newly adopted conditions of operation. [3] For example, local tobacco retailer licensing ordinances have been extremely effective in enforcing existing statewide tobacco laws, such as the prohibition of selling tobacco to minors. [4] As a policy approach, licensing can effectively complement existing and future programmatic work.

A licensing scheme designed to regulate sales of SSBs would most likely be added to existing business license systems. However, such business license systems are not typically designed to address the sale of a single category of product. The few license systems that do address a particular type of product – namely, tobacco and alcohol – are meant to enforce a system of existing state laws that restrict sales, which do not exist for SSBs. As restrictions on SSB sales become more widely employed, a licensing scheme may be the most efficient and effective enforcement system. In addition, as governments look for ways to improve efficiencies, more comprehensive business licensing is one way to begin to streamline regulatory processes for businesses that typically are subject to several layers of regulation.

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[1] Some governments require a “permit” for regulatory purposes; the terms “permit” and “license” have basically the same meaning in this context.

[2] *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1978 (2011) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1304 (2002)); *See also Gibbons v. Ogden*, 22 U.S. 1, 213 (1824) (“The word ‘license’ means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing”).

[3] *See* McLaughlin I. *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool*. Tobacco Control Legal Consortium. 2010, p. 2. Available at: [*http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-retailer-2010.pdf*](http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-retailer-2010.pdf)*.*

[4] The Center for Tobacco Policy & Organizing and American Lung Association. *Tobacco Retailer Licensing is Effective*. 2011. Available at: [*www.center4tobaccopolicy.org/CTPO/\_files/\_file/Tobacco%20Retailer%20Licensing%20is%20Effective%20March%202011.pdf*](http://www.center4tobaccopolicy.org/CTPO/_files/_file/Tobacco%20Retailer%20Licensing%20is%20Effective%20March%202011.pdf)*.*

### Regulatory Takings

Since the Model Ordinance will impose new restrictions on existing businesses, some retailers may argue that it constitutes a “regulatory taking.” The Fifth Amendment to the United States Constitution (and similar provisions in State Constitutions) prohibits the government from taking private property without just compensation. Although this often applies to physical seizures of property—when, for example, the government needs to use the underlying land to build a road or some other structure to benefit the public—regulations that severely impact business operations may constitute a “regulatory taking” in violation of the federal or a state constitution. Opponents of this Model Ordinance may claim that prohibiting certain business from selling SSBs constitutes a “regulatory taking” that is unlawful unless the government provides compensation to the affected businesses. Although this is a complex area of law, as a legal matter this would most likely come down to a balancing test—balancing the extent of the intrusion and the government’s interest. In this case the government interest is very compelling (reducing access to unhealthy food items as a means to reduce overweight, obesity, and chronic disease). Extensive analyses of the federal takings doctrine, as well as a state-by-state analysis, as applied to this and other policies, can be found on our website at: [*www.changelabsolutions.org/publications/limits-government-power-over-private-property*](http://www.changelabsolutions.org/publications/limits-government-power-over-private-property)*.*

### Vested Rights

A “vested right” is a right that has so completely accrued to a person or business that the government’s ability to alter that right is restricted. Zoning and other land use laws often implicate vested rights if the government attempts to impose new zoning requirements on businesses that already operate under existing law; as a result, many land use laws “grandfather” nonconforming uses. The law of vested rights is closely related to regulatory takings law, discussed above, but is more likely to be raised if restrictions are imposed via a zoning code (as opposed to through licensing or via direct regulation.)

## Adopting the Model Ordinance

The Model Ordinance offers four options for regulating where SSBs may be sold; communities can choose to adopt any combination of the regulations. By including a variety of options, we intend to stimulate broad thinking about the types of provisions a community might wish to explore, even beyond those described in the model. In considering which options to choose, communities should balance public health benefits against practical and political considerations in their particular jurisdiction.

### First Steps: Assessing the Location of Retailers Selling SSBs in the Community

The Model Ordinance prohibits retailers from selling SSBs if they are located within a certain distance (as determined by the community) of schools, and (again, as determined by the community) parks, child care centers, libraries, and other locations children frequent. Because this is a new policy approach to combat childhood obesity, there is not yet a “best practice” distance to recommend to communities. Communities have taken different approaches to similar distance restrictions on unhealthy food outlets. Detroit prohibits fast food restaurants within 500 feet of any school.[[90]](#endnote-90) The City of Arden Hills, Minn., prohibits fast food restaurants within 400 feet of any public, private, and parochial school; church; public recreation area; or any residentially zoned property.[[91]](#endnote-91) Seattle has banned mobile food vendors within 200 feet of public parks and 1,000 feet of schools,[[92]](#endnote-92) while Los Angeles bans vendors on streets within 500 feet of schools.[[93]](#endnote-93)

Before enacting the Model Ordinance, we recommend that the community conduct a census and mapping study to identify where retailers selling SSBs, including fast food restaurants, mobile vendors, and neighborhood corner and convenience stores, are located in proximity to schools and other places children frequent.[[94]](#endnote-94),[[95]](#endnote-95) This study would help to identify (1) the current landscape of SSB retail availability; (2) whether a restrictive ordinance would be beneficial to the community; and (3) what buffer distance would be most appropriate for the community. Geographic information systems (GIS) mapping tools can be useful for completing these studies.

### Tailoring the Model Ordinance

This Model Ordinance offers four regulatory provisions to choose from: (1) restricting sales of SSBs near locations that youth frequent; (2) restricting the total number of retailers selling SSBs; (3) restricting the density of retailers and density of retailers selling SSBs; and (4) restricting sales of SSBs by retailers that cater primarily to children and their caretakers. The Model Ordinance also includes relevant definitions, and evaluation, implementation, and enforcement related provisions.

Once a community has decided which regulation(s) to adopt, it will need to determine where within the existing municipal code the provisions in the ordinances best fit. The first three provisions regulate the location of SSB sales; such location restrictions are typically (although not necessarily) found in a municipality’s zoning code. The fourth provision, restricting SSB sales by certain retailers, may fit best in the business or health sections of the municipal code, or the section(s) where existing SSB related provisions are located.

The language in the Model Ordinance is designed to be tailored to the needs of an individual community. All ordinances should include “Findings” of fact that support the legislation. The “Findings” for this Model Ordinance are in Appendix A. In addition, an ordinance should include definitions of any relevant terms used in the regulatory provisions. Definitions for this Model Ordinance are found in Section [XX.010]. The adopting municipality should make other amendments as necessary for consistency, and follow the appropriate procedures for amending the law.

### Implementing the Model Ordinance

Several government agencies will likely be involved in implementing and enforcing the requirements of this Model Ordinance. Among other things, the local government will be responsible for providing retailer education and outreach, monitoring compliance, enforcing violations, and evaluating the impact of the regulations on sales and consumption of SSBs. This will likely include deciding which agencies will handle which tasks. Working with those agencies early in the policy adoption process will be critical to the success of the policy. Some of these duties are already handled by various government agencies to implement and enforce other laws; some may require the creation of new processes. Finally, it is critical to the success of any policy to educate and reach out to the businesses affected by this ordinance. The Model Ordinance includes mandatory educational/outreach components that can be tailored to suit the conditions in your community.

## Conclusion

Regulating the location of businesses that sell SSBs is a promising policy intervention to reduce consumption of unhealthy beverages and the resulting chronic health conditions, particularly among children and adolescents. Coupled with other policy and program interventions, this policy can form part of a comprehensive obesity prevention strategy.

**AN ORDINANCE OF THE [*CITY / COUNTY*] OF [\_\_\_\_] AMENDING THE [*MUNICIPAL/COUNTY*] CODE TO PROVIDE REGULATIONS FOR RETAIL ESTABLISHMENTS SELLING SUGAR-SWEETENED BEVERAGES**

Language written in the Model Ordinance in *italics* provides different options or explains the type of information that needs to be inserted in the blank spaces in the ordinance. The “Comments” provide additional information and explanation. The “Customizing Tips” provide guidance on how to custom tailor the Model Ordinance.

The [*City/County*] of [ \_\_\_\_ ] does ordain as follows:

**COMMENT:** This introductory boilerplate language should be adapted to the conventional form used in the jurisdiction.

**SECTION I. See APPENDIX A: Findings.**

**COMMENT on Findings:** A draft ordinance based on this model legislation should include “Findings” of fact that support the purposes of the legislation. The Findings section is part of the ordinance and legislative record, but it usually does not become codified in the municipal code. The Findings contain factual information supporting the need for the law – in this case, documenting the high rates of consumption of Sugar-Sweetened Beverages and associated health effects. A list of findings supporting this model legislation appears in “Appendix A: Findings.” Communities may select Findings from that list to insert here, along with additional Findings addressing the specific conditions in the particular community.

**SECTION II.** The [\_\_\_\_] [*Municipal/County*] Code is hereby amended by [*amending/adding*] Sections [xxx] as follows:

**Sec. [XX.010]. DEFINITIONS.**

**CUSTOMIZING TIP:** The definitions of Caloric Sweetener, [Department,] Non-Caloric Sweetener, Person, Sugar-Sweetened Beverage, and SSB Retailer should be included in all ordinances, regardless of which of the four regulatory provisions in Sec. XX.020 are adopted. The definition of Youth Populated Area should be included if the ordinance adopts the regulation in Sec. XX.020(a), which prohibits the sale of SSBs near such areas. The definitions of Selling Area and Youth Oriented Business should be included if the ordinance adopts the regulation in Sec. XX.020(c), which prohibits the sale of SSBs in such businesses.

(--) “Caloric Sweetener” means any substance containing calories, suitable for human consumption, that humans perceive as sweet, and includes, without limitation, sucrose, fructose, glucose, other sugars, and fruit juice concentrates. “Caloric Sweetener” excludes Non-Caloric Sweeteners.

(--) “Department” means [ \_\_\_\_\_ ], and any agency or Person designated by the [*City / County*] to enforce or implement the provisions of this *[ordinance]*.

**comment on definition of “Department”:** The term “Department” is used in the ordinance to refer to the city or county agency charged with primary responsibility for implementation and enforcement of the ordinance. The primary enforcing agency may designate additional agencies to assist in administering and/or enforcing the ordinance.

(--) “Nonalcoholic Beverage” means any beverage that contains less than one-half of one (.05) percent alcohol per volume.

(--) “Non-Caloric Sweetener” means any substance that contains fewer than five (5) calories per serving, suitable for human consumption, that humans perceive as sweet, and includes, without limitation, aspartame, saccharin, stevia, and sucralose.

**COMMENT on definition of “Non-Caloric Sweetener”:**
The Food and Drug Administration (FDA) regulates the use of terms like “no-calorie” and “calorie free” as nutrient content claims. This definition of “Non-Caloric Sweetener” aligns with the FDA’s definition. (21 C.F.R. 101.60.) For a discussion of calorie content claims, see section 101.60 of the following: [*www.access.gpo.gov/nara/cfr/waisidx\_08/21cfr101\_08.html*](http://www.access.gpo.gov/nara/cfr/waisidx_08/21cfr101_08.html)*.*

(--) “Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

**comment on the definition of “Person”:** The Municipal Code may contain a definition of “person” and, if so, the definition provided here can be omitted.

(--) “Selling Area” means the [*floor area / combined floor area and shelf space*] of a store where products of any type are displayed and offered for retail sale.

**COMMENT on measuring Selling Area:** Sec. XX.020(c) prohibits “Youth Oriented Businesses” from selling Sugar-Sweetened Beverages. The definition for “Youth Oriented Business,” below, is based on the percentage of Selling Area a retail business devotes to items designed for children. You may want to use an alternative metric, such as a minimum number of products or varieties of products, to determine what constitutes a “Youth Oriented Business.”

Selling Area has been incorporated into this ordinance because it can be calculated and applied to all stores regardless of size, and can be relatively easily verified. There are two options in this definition to calculate the Selling Area: floor area or floor area combined with shelf space. Floor area alone is simpler to calculate and administer. You should choose a calculation that will work for your community.

Whatever method is adopted, the Department should be able to readily calculate the measurement to check compliance, and should also be able to explain the calculations to retailers.

 (--) “Sugar-Sweetened Beverage” and “SSB” mean:

**COMMENT on definition of “Sugar-Sweetened Beverage”:**

The following definition is very broad and intended to include all beverages containing any amount of added Caloric Sweetener, with specific and limited exceptions. The definition can be tailored to meet community needs; which beverages to include is a policy decision.

Subparagraph (2) lists some beverages that are exempt from the regulation. Which beverages to exclude is a policy decision; this list of exemptions can be modified at the discretion of policymakers and public health professionals.

The default definition of Sugar-Sweetened Beverage includes all beverages with any amount of added Caloric Sweetener; it is not necessary to specifically exempt beverages that do not contain added Caloric Sweetener. For example, plain water, coffee, or tea, with no added Caloric Sweetener do not need to be included in the exemption list. On the other hand, if you would like to exempt flavored milk, you would need to include language to effectuate that exemption (see below).

This definition only applies to nonalcoholic beverages, which is defined. As an alternative to the definition included, the term “nonalcoholic beverages” could be defined to mean those beverages that are not subject to taxation under the State’s alcoholic beverage tax, if applicable.

Some jurisdictions may prefer to include a specific list of beverage types subject to regulation. For a comprehensive list of the types of beverages that may merit regulation, see Healthy Eating Research’s *Recommendations for Healthier Beverages*, released in March 2013 and available at: [*www.healthyeatingresearch.org/images/stories/comissioned\_papers/her\_beverage\_recommendations.pdf*](http://www.healthyeatingresearch.org/images/stories/comissioned_papers/her_beverage_recommendations.pdf)*.*

1. Any Nonalcoholic Beverage, carbonate or noncarbonated, which contains any added Caloric Sweetener.

**COMMENT on milk with added Caloric Sweetener:**Some jurisdictions may wish to exempt milk with added Caloric Sweetener, such as chocolate or strawberry milk, in order to be in line with school policies or for other reasons.

Many public schools serve these milks to students as part of the National School Lunch program. Under the Healthy, Hunger-Free Kids Act of 2010, the U.S. Department of Agriculture (USDA) updated the meal patterns and nutrition standards for the National School Lunch and School Breakfast Programs, including the fluid milk requirements. The USDA allows school to offer unflavored or flavored fat-free milk and unflavored low-fat (one-percent milk fat or less).[1]

The public health community is divided over whether flavored milk has a net positive impact on health. Research funded by the dairy industry suggests that flavored milk consumption among children is associated with greater calcium intake and lower consumption of other sugar-sweetened beverages, as compared with children who do not drink flavored milk.[2] On the other hand, the Institute of Medicine recently found that most Americans, except girls between the ages 9-18, obtain sufficient calcium and vitamin D (both found in milk) from their diets. This same IOM study indicated that more calcium and vitamin D consumption is not necessarily better and cautioned against over-consumption of the nutrients.[3] This guidance, combined with a growing concern about overconsumption of added sugars and calories, leads some in the public health community to argue against encouraging flavored milk consumption, especially among children.

Flavored milks are Sugar-Sweetened Beverages, which are as a whole linked to weight gain and chronic disease. Due to the lack of independent research clearly demonstrating a net positive health impact of flavored milk consumption, this model treats flavored milk as a

sugar-sweetened beverage that is subject to the tax. As a matter of policy, you may wish to include an exemption for flavored milk, and if so, consider the following definitions:

“Milk” means any beverage whose principal ingredient by weight is natural liquid milk, which is secreted by an animal and consumed by humans. For purposes of this definition, “milk” includes natural milk concentrate and dehydrated natural milk, whether or not reconstituted.

“Milk substitute” means a plant-based beverage in which the principal ingredients by weight are (i) water and (ii) grains, nuts, legumes, or seeds. For purposes of this definition, “milk substitutes” include but are not limited to soy milk, almond milk, rice milk, coconut milk, hemp milk, oat milk, hazelnut milk, flax milk.

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[1] *See* National School Lunch and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010, 78 Fed. Reg. 39068 (Interim Final Rule, June 28, 2013) (to be codified at 7 CFR 210.11).

[2] Johnson RK, Frary C, and Wang MQ. “The Nutritional Consequences of Flavored-Milk Consumption by School-Aged Children and Adolescents in the United States.” *Journal of the American Dietetic Association*, 102(6): 853–856, 2002.

[3] Institute of Medicine, Food and Nutrition Board. Dietary Reference Intakes: Calcium, Vitamin D. Washington DC: National Academies Press, 2010.

1. Exceptions. “Sugar-Sweetened Beverage” and “SSB” do not include:
2. A beverage consisting of one hundred (100) percent natural fruit or vegetable juice with no added Caloric Sweetener. For purposes of this paragraph, “natural fruit juice” and “natural vegetable juice” mean the original liquid resulting from the pressing of fruits or vegetables, or the liquid resulting from the dilution of dehydrated or concentrated natural fruit juice or natural vegetable juice;

**COMMENT on juices:**Whether to exempt diluted juices from regulation is a matter of policy. Jurisdictions should note the following when deciding whether to exempt diluted juice beverages:

* + Many diluted juice beverages do not contain any vitamins or minerals that would make the beverage healthier. These beverages use the juice as a Caloric Sweetener.
	+ Diluted juice beverages may contain added Caloric Sweetener in addition to water and other ingredients. If some diluted beverages are exempt, jurisdictions should carefully consider whether diluted juice beverages with Caloric Sweetener should be regulated.[1]

If diluted juice is exempted from the definition of Sugar-Sweetened Beverage, please note that those beverages will be exempted from all regulation under this ordinance; in addition, for consistency, you might also consider excluding fruit juice concentrate from the definition of Caloric Sweetener.

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[1] See the FDA’s food labeling regulations pertaining to beverages containing fruit or vegetable juice (21 C.F.R. 101.30), available at: [*www.gpo.gov/fdsys/pkg/CFR-2008-title21-vol1/content-detail.html*](http://www.gpo.gov/fdsys/pkg/CFR-2008-title21-vol1/content-detail.html)*.*

1. A dietary aid, which means a liquid product manufactured for use as:
2. An oral nutritional therapy for persons who cannot absorb or metabolize dietary nutrients from food or beverages;
3. A source of necessary nutrition used as a result of a medical condition; or

1. An oral electrolyte solution for infants and children formulated to prevent dehydration due to illness;
2. Infant formula; and
3. Sweetened Medication.

**COMMENT on threshold amount:**Some jurisdictions may want to exempt lower calorie beverages despite the fact that they contain caloric sweetener, because they are seen as a healthier alternative to higher calorie beverages.

If your community wants to exempt lower calorie beverages from regulation even though they do contain added Caloric Sweetener, the definition of Sugar-Sweetened Beverage can be amended to exclude beverages that fall under a threshold amount of added Caloric Sweetener. To do so, add the following to this list of exceptions:

(e) Beverages containing less than [\_\_\_] grams of added Caloric Sweetener per [\_\_] ounces of beverage.

If you decide to include such a threshold exemption, the exact threshold amount is a policy decision for your jurisdiction. A threshold amount of 4.2 grams of added caloric sweetener per 8 ounces would be the equivalent of one teaspoon of white granular sugar per 8 ounces. It is also important to consider practical and administrative issues if you use this exemption: will the businesses in your jurisdiction be able to administer the policy effectively and efficiently?

 (--) “SSB Retailer” means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, Sugar Sweetened Beverages, and includes, without limitation, any Person that sells, offers for sale, or distributes Sugar Sweetened Beverages from a vending machine, or a Person that leases, furnishes or services these machines. “SSB Retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of Sugar Sweetened Beverages sold, offered for sale, exchanged, or offered for exchange.

**COMMENT on definition of “SSB Retailer”**: The definition of “SSB Retailer” is meant to include any natural person or legal entity that is under the jurisdiction of the adopting governmental entity and that sells SSBs, potentially including government-operated facilities like a snack bar or vending machine at a city park.

(--) “Youth Populated Area” means a parcel of land [in the [*City / County*] of \_\_\_\_\_\_ ] that is occupied by:

1. a private or public kindergarten, elementary, middle, junior high, or high school;
2. [a playground open to the public;]
3. [a youth center, defined as a facility where children, ages 6 to 17, inclusive, come together for programs and activities;] [; and]
4. [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_].

**COMMENT on definition of “Youth Populated Area”:** Sec. XX.020(a) prohibits the sale of Sugar-Sweetened Beverages near Youth Populated Areas. The intent of the regulation is to limit the availability of Sugar-Sweetened Beverages in places where children and adolescents with spending power may travel on their own, for example, on the way to and from school or after-school programs.

The sites included in the definition of “Youth Populated Area” can be modified to meet the community’s needs and could also include: licensed child-care facilities or preschools, libraries open to the public, recreation facilities open to the public, and/or parks open to the public or to all residents of a private community.

(--) “Youth Oriented Business” means any business that devotes [*50 percent*] or more of Selling Area to products designed and intended for children, including, but not limited to: children’s toys and games; children’s clothing and shoes; or children’s books.

**COMMENT on definition of “Youth Oriented Business”:** Sec. XX.020(c) prohibits “Youth Oriented Businesses” from selling Sugar-Sweetened Beverages. The exact percentage of selling area can be changed to meet community needs, as can the types of merchandise or businesses that are included in the calculation.

The definition as written applies to businesses selling products designed and intended for children under the age of 12. This is similar to federal Consumer Products Safety standards, which define a “Children’s Product” as a “consumer product designed or intended primarily for children 12 years of age or younger” and outlines four factors to consider in determining whether a product fits the definition.[1]  We have limited the definition in this way because adolescents often purchase and use products that are also intended for adults and therefore businesses often sell products that are used by both adolescents and adults. A community that so desired could expand the definition to include products designed and intended for children and adolescents.

Communities could also decide to include businesses of which the primary purpose is to provide education, entertainment, or amusement to children (for example, children’s museums, amusement parks, carnivals, zoos, aquariums, water parks, and/or arcades).

Alternatively, a municipality could decide to limit SSB sales in a different retail category, for example, pharmacies. While the research in this area is limited, it suggests that SSBs are widely available in pharmacies. A survey of retail stores in the US whose primary merchandise is not food found that 89 percent of the pharmacies surveyed sold SSBs.[2]  Similarly, a survey of pharmacies in Minneapolis found that they carried, on average, nearly four different kinds of SSBs.[3]  A growing number of municipalities are choosing to restrict sales of tobacco in pharmacies and, in some cases, other health care businesses.[4]  (A Model Ordinance prohibiting the sale of tobacco in pharmacies can be found on our website at*: www.changelabsolutions.org/publications/model-TRL-Ordinance*. These municipalities have concluded that sales of tobacco, a product with clearly documented negative health impacts, are incompatible with the healthcare role of pharmacies. Following this rationale, a municipality could choose to restrict SSB sales in pharmacies.

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[1] *See* 15 U.S.C. 2052(2) (2013); 16 CFR 1200.2 (2013). A discussion of children’s products is available on the U.S. Consumer Product Safety Commissions’ website at [*www.cpsc.gov/Business--Manufacturing/Business-Education/childrens-products/*](http://www.cpsc.gov/Business--Manufacturing/Business-Education/childrens-products/)*.*

[2] Farley TA, et al. “The Ubiquity of Energy-Dense Snack Foods: A National Multicity Study.” *American Journal of Public Health*, 100(2): 306-311, 308, 2009. Available at: [*www.ncbi.nlm.nih.gov/pmc/articles/PMC2804650/pdf/306.pdf*](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2804650/pdf/306.pdf)*.*

[3] *See* Whitehouse A et al. “Availability of Snacks, Candy, and Beverages in Hospital, Community Clinic and Commercial Pharmacies.” *Public Health Nutrition*, 15(6): 1117-23, 1120, 2012. Available at: *[http://dx.doi.org/10.1017/S1368980011003600](http://dx.doi.org/10.1017/S1368980011003600%22%20%5Ct%20%22_blank).*

[4] *See* *Prohibiting the Sale of Tobacco Products in Pharmacies*. St. Paul, MN: Tobacco Control Legal Consortium, 2012. Available at: [*http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-prohibiting-tobacco-pharmacies-2012.pdf*](http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-prohibiting-tobacco-pharmacies-2012.pdf)*.*

**Sec. [ XX.020]. REGULATIONS FOR RETAIL ESTABLISHMENTS SELLING SUGAR-SWEETENED BEVERAGES.**

**COMMENT on Regulations**: The following sections provide four options for regulating where Sugar-Sweetened Beverages may be sold: (1) Section XX.020(a) prohibits SSB Retailers from operating near places where children and adolescents frequently congregate; (2) Section XX.020(b) limits the total number of SSB Retailers in the community; (3) Section XX.020(c) limits how closely to one another SSB Retailers can locate in the community; and (4) Section XX.020(d) prohibits certain businesses that cater primarily to children and their caretakers from selling SSBs. A community may choose from among these options and include only those strategies that are most appropriate for its needs.

**CUSTOMIZING TIP:** Once a community has decided which regulation(s) to adopt, it will need to determine where within the existing municipal code the provisions in the ordinances best fit. Traditionally, regulations like Sections XX.020(a), (b), and (c), that restrict the location of a business, are placed in the municipal zoning code, but a community may decide that they fit better in a different part of the code. Section XX.020(d) may fit best in the portion of the municipal code where existing SSB related provisions are located. If regulatory provisions are placed in different sections of the municipal code (rather than in an entirely new chapter), the ordinance will need to include clear language to that effect. Please contact ChangeLab Solutions for additional information on appropriately customizing this ordinance.

1. No SSB Retailer shall be located within [\_\_\_\_] feet of the boundary of any Youth Populated Area as measured by a straight line from the nearest point of the property line of the parcel on which the Youth Populated Area is located to the nearest point of the property line of the parcel on which the SSB Retailer is located.

**COMMENT on location restrictions:** In some instances, a site that falls under the definition for Youth Populated Area may itself include a SSB Retailer on premises. For example, a playground may have a snack bar or a youth center may have a vending machine in the lobby. As written, this provision would not allow new SSB Retailers to operate near a Youth Populated Area; existing SSB Retailers sited near a Youth Populated Area would be granted legal nonconforming status and allowed to continue operate so long as it meets the requirements of Sec. XX.030. Sales by businesses within the Youth Populated Area would be governed by Sec. XX.020(d).

**COMMENT on community census and mapping:** Municipalities may wish to undertake a census and mapping study of where SSB Retailers are operating. This type of study can provide valuable information to use in determining the appropriate set back distance from schools and other Youth Populated Areas, as well as appropriate density restrictions.

**COMMENT on setback distance:** The municipality will need to decide on the appropriate size of the buffer zone. A community mapping study can help determine an appropriate buffer zone.

Communities have taken varied approaches to the size of similar buffer zones for fast food restaurants and mobile food vending operations near schools. Detroit prohibits fast food restaurants within 500 feet of any school. [1] The City of Arden Hills, Minn., prohibits fast food restaurants within 400 feet of any public, private, and parochial school; church; public recreation area; or any residentially zoned property.[2] Seattle has banned mobile food vendors within 200 feet of public parks and 1,000 feet of schools,[3] while Los Angeles bans vendors on streets within 500 feet of schools.[4]

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[1] *Detroit, Mich., Municipal Code § 61-12-91 (2013).*

[2] Arden Hills, Minn., Municipal Code § 1325.04(1)(A) (2013).

[3] *Seattle, Wash., Municipal Code § 15.17.130 (20013).*

[4] *L.A., Cal., Municipal Code § 80.73(b)(2)(A)(5) (2013).*

1. The total number of SSB Retailers within the [*City / County*] of [\_\_\_\_\_\_] shall be limited to one for each [\_\_\_\_\_] inhabitants.

**COMMENT on number restrictions:** This section is designed to prevent the oversaturation of SSB Retailers relative to population, as is done with other products that harm public health, such as fast food, tobacco and alcohol. The language of this section is analogous to California Business and Professions Code § 23817.5, which regulates the number of off-sale beer and wine retailers in a community to one per 2,500 inhabitants. The number of allowable SSB Retailers per inhabitants should be selected to meet the needs of the community.

1. For the purposes of this subsection, the total population of the [*City / County*] shall be determined by the most current published total available from the U.S. Census Bureau or the California State Department of Finance, whichever has been most recently updated.

**COMMENT on determining population:** This subsection is analogous to California Business and Professions Code § 23817.9, which dictates how the population will be measured to assist in determining the number of off-sale beer and wine retailers in a community. Each municipality should adapt this subsection as needed.

1. Whenever it is made to appear to the Department by satisfactory evidence that the population in the [*City / County*] has increased by more than [\_\_\_\_\_\_] or multiples of [\_\_\_\_\_\_] inhabitants, the Department may approve the siting of additional SSB Retailers, so long as other terms and conditions of this section are met.

**COMMENT on population increases:** This subsection is analogous to California Business and Professions Code § 23817.10. Each municipality should adapt this subsection as needed; the number of allowable SSB Retailers per inhabitant should be selected to meet the needs of the community.

1. No SSB Retailer shall operate on a site within [*500*] feet of a site occupied by another SSB Retailer, as measured in a straight line from the shortest distance between parcel boundaries.

**COMMENT on density restrictions:** This subsection limits the density of the SSB Retailers in any particular neighborhood. In essence, it disallows SSB Retailers from occupying more than one corner of an intersection in a typical city grid. The exact number of feet between SSB Retailers can be changed to meet the needs of the community.

1. No Youth Oriented Business within the [*City / County*] of [\_\_\_\_\_\_] shall sell Sugar Sweetened Beverages.

**COMMENT on restrictions on Youth Oriented Businesses**: This subsection is meant to prevent businesses that cater primarily to children from selling SSBs. As noted above, the exact definition of Youth Oriented Business can be changed to meet the needs of the community. Also, a community could choose to limit SSB sales in a different category of retail business, for example, pharmacies. The language of this provision could also be modified so that rather than completely prohibiting sales in Youth Oriented Businesses, such businesses are limited in the amount of Selling Area they can devote to SSBs.

**Sec. [ XX.030]. EXISTING RETAILERS: LEGAL AND NONCONFORMING STATUS.**

**COMMENT on Existing Retailers:** This Model Ordinance imposes new restrictions that apply to all retailers that sell SSBs. Generally, communities have three options for addressing existing retailers: (1) “grandfather ” such businesses to allow them to operate until the cease or substantially change operations; (2) phase out over time; or (3) end immediately. When regulations are imposed through the zoning code, the most common approach is to grandfather in existing businesses by granting legal and nonconforming status so long as the business does not change or attempt to expand. This is the approach taken in this Model Ordinance. A community that wishes to see more immediate change can instead choose to amortize and phase out or eliminate existing SSB Retailers through eminent domain.

1. SSB Retailers lawfully existing prior to [*insert the effective date of the legislation*] may continue to operate under the following conditions:
2. The SSB Retailer operates in accordance with all applicable federal, state, and local laws; and
3. The SSB Retailer operates continuously in the same location, without substantial increase in intensity of operation or square footage.
4. A break in continuous service shall not be interpreted to include the following:

**COMMENT on continuous service:** Each municipality should adopt time periods in this subsection to meet the needs of the community.

1. A period of up to [*90 days*] associated with a change of ownership in a bona fide sales transaction;
2. The restoration and/or replacement of a legal nonconforming structure wholly or partially destroyed by a catastrophic event or sudden cause which is beyond the control of the property owner, and which could not otherwise have been prevented by reasonable care and maintenance of the structure is permitted; or
3. A temporary closure for not more than [*30 days*] for repair, renovation, or remodeling.

**Sec. [ XX.040]. EVALUATION.**

The [*Department of Health/other government agency*] shall develop criteria and components for an evaluation and assessment of the impact that the requirements and prohibitions imposed by this *[ordinance]* have on sales, purchases and consumption of Sugar-Sweetened Beverages. The evaluation shall seek to determine the impact of this *[ordinance]* on consumer purchasing and consumption behavior, and health outcomes.

**Sec. [ XX.050]. IMPLEMENTATION AND ENFORCEMENT.**

**COMMENT on Implementation and Enforcement:** A draft ordinance based on this model is not completewithout including implementation and enforcement provisions. Realistic and meaningful enforcement is essential. An unenforceable law or a law with trivial penalties that are easily absorbed as the “cost of doing [illegal] business” can be worse than no law at all because an unenforced—or unenforceable—law undermines the legitimacy of a municipality’s laws in general.

The following sections contain sample language that should be adapted as appropriate. Before including any clause, it is essential to research state and local law to determine whether and how these sample clauses may be used in a particular jurisdiction.

It may be possible to implement the substantive provisions of the ordinance through an existing regulatory system, such as business licensing for Retail Establishments. For those restrictions imposed through an existing zoning code, enforcement systems likely already exist and are utilized by government staff to enforce other requirements of the zoning code. Alternatively, your community may want to institute a new regulatory system in order to implement and enforce the substantive requirements imposed.

1. The [*enforcing* *agency, department or official*] shall implement, administer, and enforce this *[ordinance]*. The [\_\_\_\_\_\_\_\_\_\_\_] is hereby authorized to issue all rules and regulations consistent with this *[ordinance]* and shall have all necessary powers to carry out the purpose of this *[ordinance]*. The [\_\_\_\_\_\_\_\_\_\_\_] shall have all necessary powers to enforce this *[ordinance]*.
2. The following classes of employees are authorized to issue citations for violation of this *[ordinance]*: [*enumerate classes of employees*].
3. The [*agency, department or official*] shall develop and conduct an SSB Retailer outreach and education program designed to inform SSB Retailers about the requirements of this *[ordinance]* and the link between Sugar-Sweetened Beverages and obesity and chronic disease. Any written materials and trainings developed pursuant to this subsection shall be offered in [*language*], in addition to English. Nothing in this section shall create a right of action in any licensee or other Person against the [*City / County*] or its agents.

**COMMENT on SSB Retailer outreach and education program:** Subsection (c) requires the implementing agency to develop and implement an SSB Retailer outreach and education program. The model language can be modified to add more direction and less discretion to the agency, if desired. However, municipalities are wisely wary of placing mandatory requirements upon themselves: if a self-imposed mandatory requirement is not met, the municipality can sometimes be sued to force compliance. Subsection (c) provides that no person can sue the government for failure to conduct the education and outreach program. Note that regardless of what the agency does or does not do in regard to a program, the law remains in full force.

**Sec. [XX.060]. Violations.** Each beverage sold or offered for sale in violation of this *[ordinance]* shall constitute a separate violation. Each day of a continuing violation of this *[ordinance]* shall constitute a separate violation.

**Sec. [XX.070]. Civil Enforcement by Injunctive Relief.** The [*city attorney or county counsel*] is hereby authorized to bring an action for injunctive relief to enjoin a violation of this ordinance.

**Sec. [XX.080]. Civil Enforcement by Civil Penalties.**

1. Any Person who violates this *[ordinance]* may be liable for a civil penalty, not to exceed $[\_\_\_\_\_\_\_\_\_\_\_] per violation, and not to exceed $[\_\_\_\_\_\_\_\_\_\_\_] in total for each thirty (30) day period.
2. The [*city attorney or county counsel*] may bring a civil action to recover civil penalties for the violations of this *[ordinance]*.
3. Except as otherwise required by law, all monies received by the [*city or county*] in payment of civil penalties for violation of this *[ordinance]* shall be deposited in [*specify a dedicated fund for public health issues or obesity specifically*] and used exclusively to [\_\_\_\_\_\_\_\_\_\_\_].
4. The [*city attorney or county counsel*] also may seek recovery of the attorney's fees and costs incurred in bringing a civil action pursuant to this section.

**Sec. [XX.090]. Administrative Enforcement and Penalties.**

1. Any Person who violates any of the provisions of section [\_\_\_\_\_\_\_\_\_\_\_] shall be subject to an administrative penalty, not to exceed $[\_\_\_\_\_\_\_\_\_\_\_] for each violation, and not to exceed $[\_\_\_\_\_\_\_\_\_\_\_] in total for each thirty (30) day period. Administrative penalties authorized by this section shall be assessed, enforced and collected in accordance with section [*specify section of local municipal code providing for administrative enforcement*].
2. Where an officer or employee designated in section [\_\_\_\_\_\_\_\_\_\_\_] determines that there has been a violation of any of the provisions of section [\_\_\_\_\_\_\_\_\_\_\_], the officer or employee may issue an administrative citation to the Person responsible for the violation. For purposes of this section, the owner of the SSB Retailer is the Person responsible if an officer, employee or agent of the SSB Retailer commits the violation.

**COMMENT on administrative citations:** Many jurisdictions already have an administrative citation provision in the municipal code. If so, a jurisdiction can tailor this section to conform to the existing provisions. If not, extend subsection (b) to include additional language outlining the citation requirements, such as:

“The citation shall inform the Person responsible of the date, time, place and nature of the violation and the amount of the proposed penalty, and shall state that the penalty is due and payable to the [*treasurer*] within [\_\_\_\_\_\_\_\_\_\_\_] business days from the date of the notice, if not contested within the time period specified. The citation shall also state that the Person responsible has the right, pursuant to section [\_\_\_\_\_\_\_\_\_\_\_] to request administrative review of the citing officer or employee's determination as to the violation and assessment of penalties, and shall set forth the procedure for requesting administrative review.”

**Sec. [XX.100]. Criminal Enforcement.** Any Person who violates this *[ordinance]* is guilty of a misdemeanor, punishable by a fine of not more than [\_\_\_\_\_\_\_\_\_\_\_] or by imprisonment in the [*city or county*] jail for a period of not more than [\_\_\_\_\_\_\_\_\_\_\_], or by both such fines or imprisonment.

**COMMENT on Criminal Enforcement:** If a community wishes to make the criminal sanction an infraction instead of a misdemeanor, substitute the following provision for language above:

“Any Person who violates this *[ordinance]* is guilty of an infraction, punishable by a fine of not more than $[\_\_\_\_\_\_\_\_].”

**Sec. [ XX.101]. SEVERABILITY.** If any provision of this *[ordinance]*, any rule or regulation made under this *[ordinance]*, or the application of this *[ordinance]* to any Person or circumstance is held invalid by any court of competent jurisdiction, the remainder of the *[ordinance]*, rule or regulation, and the application of the provision to other Persons or circumstances shall not be affected. The invalidity of any section or sections or parts of any section of this *[ordinance]* shall not affect the validity of the remainder of the *[ordinance]*.

**SECTION III.** This ordinance and the legal requirements set forth herein shall take effect and be in force from and after [*date*].

**COMMENT on effective date:** The appropriate effective date will depend on how existing SSB Retailers are treated. If existing SSB Retailers are granted legal and nonconforming status in Sec. XX.030, then the effective date can be the soonest date possible following adoption of the ordinance. If existing SSB Retailers are not grandfathered in (i.e., are phased out), then the effective date will need to provide appropriate time for compliance and/or phasing out. Note that different regulatory provisions can have different effective dates.

1. Flegal KM et al. “Prevalence of Obesity and Trends in Body Mass Index Among US Adults, 1999-2010.” *Journal of the American Medical Association*, 307(5): 491-497, 2012. Available at: [*http://jama.jamanetwork.com/article.aspx?articleid=1104933*](http://jama.jamanetwork.com/article.aspx?articleid=1104933)*.*  [↑](#endnote-ref-1)
2. Ogden CL et al. “Prevalence of Obesity and Trends in Body Mass Index Among US Children and Adolescents, 1999-2010.” *Journal of the American Medical Association*, 307(5): 483-490, 2012. Available at: [*http://jama.jamanetwork.com/article.aspx?articleid=1104932*](http://jama.jamanetwork.com/article.aspx?articleid=1104932)*.*  [↑](#endnote-ref-2)
3. Ogden CL, Flegal KM, Carroll MD, et al. “Prevalence and Trends in Overweight among US Children and Adolescents, 1999–2000.” *Journal of the American Medical Association*, 288(14): 1728–1732, 1731, 2002. Available at: [*http://jama.jamanetwork.com/article.aspx?articleid=195387*](http://jama.jamanetwork.com/article.aspx?articleid=195387)*.*  [↑](#endnote-ref-3)
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5. Flegal et al., *supra* note 1, at 496. [↑](#endnote-ref-5)
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94. The Health Services Department in Contra Costa County, California has conducted this type of SSB Retailer mapping study in the cities of Richmond and San Pablo. *See* Brunner W et al. “The Impact of Sugar-Sweetened Beverage Consumption on the Health of Richmond Residents.” Contra Costa Health Services, p. 10-11, 2011. Available at: [*http://cchealth.org/nutrition/pdf/ssb\_report\_richmond.pdf*](http://cchealth.org/nutrition/pdf/ssb_report_richmond.pdf)*. See also* Brunner W et al. “The Impact of Sugar-Sweetened Beverage Consumption on the Health of San Pablo Residents.” Contra Costa Health Services, p. 11-13, 2011. Available at: [*http://cchealth.org/nutrition/pdf/ssb\_report\_sanpablo.pdf*](http://cchealth.org/nutrition/pdf/ssb_report_sanpablo.pdf)*.* [↑](#endnote-ref-94)
95. The following resources provide guidance for communities to conduct food assessments:

Siedenburg K and Pothukuchi K. “What’s Cooking in Your Food System: A Guide to Community Food Assessment.” *Community Food Security Coalition.* 2002. Available at: [*www.foodsecurity.org/pub/whats\_cooking.pdf*](http://www.foodsecurity.org/pub/whats_cooking.pdf)*.* This Guide includes case studies of nine Community Food Assessments; tips for planning and organizing an assessment; guidance on research methods and strategies for promoting community participation; and ideas for translating an assessment into action for change.

*How to Create and Implement Healthy General Plans*. ChangeLab Solutions*,* 2008. Available at: [*www.changelabsolutions.org/publications/toolkit-healthy-general-plans*](http://changelabsolutions.org/publications/toolkit-healthy-general-plans)*.* Section II: Assessing Existing Health Conditions has general information about assessing and mapping nutrition-related community features such as food retail.

Cohen B, Andrews M, and Scott Kantor L. *Community Food Security Assessment Toolkit*. U.S.D.A. Econ. Research Service, Publication No. E-FAN-02-013, July 2002. Available at: [*www.ers.usda.gov/publications/efan-electronic-publications-from-the-food-assistance-nutrition-research-program/efan02013.aspx#.UZE45lGPNzo*](http://www.ers.usda.gov/publications/efan-electronic-publications-from-the-food-assistance-nutrition-research-program/efan02013.aspx#.UZE45lGPNzo). This comprehensive publication explains mapping assessments and contains guidance and charts for conducting assessments. [↑](#endnote-ref-95)