Takings-Based Limitations on the Power of State and Local Governments to Change Land Use Patterns to Combat Childhood Obesity

KENTUCKY

This memorandum summarizes Kentucky takings law and the manner in which it limits the power of the state and its local political subdivisions to either condemn land to use for anti-obesity initiatives or adopt land use regulations to implement such initiatives. It should be read with our overview memo, which can be found at www.nplan.org/nplan/products/takings_survey. Our goal in this memo is to inform state and local decision makers considering exercising their powers of eminent domain or adopting land use restrictions as part of an effort to combat childhood obesity. The analysis that follows addresses the limitations placed on eminent domain and zoning authority by applicable takings law. It assumes that the governmental entity considering using eminent domain or regulatory zoning authority has been delegated such powers by the state.

This memorandum does not purport to provide legal advice. The analysis we provide is preliminary and not the sort of case-specific, detailed analysis necessary to ensure that a proposed policy will be insulated from takings liability. It does not substitute for consultation with a lawyer, and we urge any political decision maker to confer with an attorney knowledgeable about land use and takings law in Kentucky before undertaking a particular policy initiative. If there are important cases, statutes, or analysis that we have omitted from this memorandum, please inform us by sending an email to info@phlpnet.org.

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State and local governments are increasingly concerned with the rise in childhood obesity rates among their citizens. In response, they are turning their attention to policies that might combat this alarming trend. Many of these policies involve changing the physical environment in which children spend their days. This physical environment encompasses both public and private spheres. The public sphere includes the network of roads, sidewalks, and recreational paths that make up the community, as well as the various parks, playgrounds, open spaces, public gardens, and lighting that most people think of as public infrastructure. The private sphere includes the various types of development that exist on private property in the community, such as single-family homes, multifamily dwellings, apartment complexes, restaurants, grocery stores, health clubs, and all manner of other private developments.

In many communities, neither the public nor the private physical environment encourages active living and healthy eating. Indeed, the infrastructure in many communities actively discourages or effectively impedes healthy life choices. Too many children grow up in communities that lack parks, playgrounds, and safe, well-lit open spaces to play, have no full-service grocery stores or sit-down healthy restaurants, but are saturated with formula restaurants selling high-calorie, high-fat foods and corner stores selling junk food and sugary drinks. Studies suggest that communities can combat childhood obesity by changing the physical environment in which

children live. Positive environment changes would promote active and healthy lifestyles, by fostering development of infrastructure such as public parks and playgrounds, full-service grocery stores, and well-lit open spaces, and would eliminate the negative influences of the community infrastructure, such as fast-food restaurants and dark, overgrown vacant lots.[1]

Communities around the country have already begun to adopt policies and programs designed to change their physical environment, using various strategies and tools. For example, Santa Clara County, California, has adopted a Countywide Trails Master Plan that details the county's commitment to acquiring dedicated easements over private property to create a 500-mile trail system throughout the county to provide recreational and fitness opportunities for its citizens.[2] Several years ago King County, Washington, adopted a property tax increase to fund the acquisition and maintenance of publicly owned parks and recreation facilities.[3] The Los Angeles City Council has imposed a one-year moratorium on the opening of new fast-food restaurants in South Los Angeles.[4] This zoning ordinance provides a respite during which the city can adopt and implement policies designed to encourage the opening of healthy eating alternatives in the area, which is currently saturated with fast-food restaurants and plagued by high obesity rates. Finally, Naperville, Illinois, has adopted an ordinance requiring developers to include a minimum number of bicycle parking facilities in all new commercial, residential, and public property developments, to encourage biking as an alternative to driving.[5]

Each of these initiatives targets an important aspect of the physical environment, and each involves a different type of government action. The Santa Clara County and King County initiatives require the local governments to acquire property rights in private property—in Santa Clara County the acquisition is by forced dedication[6] and involves a partial interest in the

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[1] *See, e.g.,* KELLY D. BROWNELL & KATHERINE BATTLE HORGEN, FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS, AND WHAT WE CAN DO ABOUT IT (2004); L. D. Frank, M. A. Anderson & T. L. Schmid, *Obesity Relationships with Community Design, Physical Activity, and Time Spent in Cars*, 27 AM. J. PREVENTIVE MED. 87 (2004) (showing that neighborhood walkability was related to obesity in adults); Simone A. French et al., *Environmental Influences on Eating and Physical Activity*, 22 ANN. REV. PUB. HEALTH 309 (2001); P. Gordon-Larsen, M. C. Nelson, P. Page & B. M. Popkin, *Inequality in the Built Environment Underlies Key Health Disparities in Physical Activity and Obesity*, 117 PEDIATRICS 417 (2006) (demonstrating that proximity of recreation facilities is correlated with the risk of overweight and obesity in children); James O. Hill & John C. Peters, *Environmental Contributions to the Obesity Epidemic*, 280 SCI.1371 (1998); Kate Painter, *The Influence of Street Lighting Improvements on Crime, Fear, and Pedestrian Street Use after Dark*, 35 LANDSCAPE & URB. PLAN. 193 (1996); *see also* L. V. Moore, A. V. Diez Rous, J. A. Nettleton & D. R. Jacobs, *Associations of the Local Food Environment with Diet Quality: A Comparison of Assessments Based on Surveys and Geographic Information Systems,* 167(8) AM. J. EPIDEMIOLOGY 917 (2008) (ePub) (showing that the availability of supermarkets in neighborhoods was associated with a better-quality diet).

[2] Santa Clara County Trails Plan Advisory Committee, Santa Clara County Board of Supervisors, Final Countywide Trails Master Plan (Nov. 1995), *available at* http://www.sccgov.org/SCC/docs%2FParks%20and%20Recreation%2C%20Department%20of%20%28DEP%29%2Fattachments%2F47616ctywide_trails_masterplan.pdf.

[3] KING COUNTY, WASH., CODE § 4.08.082 (2009).

[4] Kim Severson, *Los Angeles Stages a Fast Food Intervention*, N.Y. TIMES, Aug. 12, 2008, *available at* http://www.nytimes.com/2008/08/13/dining/13calo.html.

[5] NAPERVILLE, ILL., CITY CODE § 6-9-7 (2009).

[6] A community can require a landowner to dedicate an easement for public use as a condition of a development permit only when that dedication shares an essential nexus with and is roughly proportionate to the impacts caused by the proposed development. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). This constraint is discussed in detail in www.nplan.org/nplan/products/takings_survey.

property, while in King County the acquisition is by eminent domain and involves full title. In contrast, the Los Angeles and Naperville ordinances are two distinct examples of land use restrictions. The Los Angeles ordinance limits what landowners can do with their private property, while the Naperville ordinance imposes an affirmative requirement on private landowners.

These four specific initiatives illustrate the two primary tools available to communities that seek to use land use initiatives to prevent childhood obesity: They can rely on their power of eminent domain, on their land use regulatory authority, or both. The first option—relying on the power of eminent domain to acquire ownership interests in real property—may be used to provide public infrastructure such as parks, playgrounds, and recreational trails to promote healthy, active lifestyles. The second option—adopting land use restrictions applicable to private property—may be used to limit undesirable land uses (such as fast-food restaurants) in vulnerable neighborhoods or to require private property owners to do certain things on their property (such as install bicycle parking structures or stock healthy food in corner stores).

Communities that set out to combat childhood obesity by changing their physical environment using eminent domain or land use regulation will face limitations from both federal and state law in both contexts. The federal limitations come from the Fifth Amendment to the U.S. Constitution, which states: "[N]or shall private property be taken for public use without just compensation." This prohibition is interpreted in two parts. First, private property may not be taken unless it is for public use.[7] Second, if a land use restriction imposes such a burden on private property that the courts conclude it is the equivalent of a taking, the government must pay just compensation.[8] A comprehensive analysis of the scope and extent of these federal constitutional limits can be found at www.nplan.org/nplan/products/takings_survey. In addition to the federal constitutional limitations, every state imposes its own restrictions on the exercise of eminent domain and the imposition of land use regulations by its communities. These limitations, contained in state constitutions as well as statutes, may be more protective of private property than the federal Constitution, and they generally take three forms. First, state laws might incorporate a narrower definition of "public use," such that a legislative objective that satisfies the public use requirement of the federal Constitution would be invalid under state law. Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution. Finally, state law may require a community to tolerate certain negative aspects of the physical environment (such as fast-food restaurants) that it would rather eliminate, just because those elements were present before the community undertook its reform initiative—commonly referred to as "grandfathering."

Communities interested in using land use initiatives to change their physical environment and thereby combat childhood obesity have to be aware of these restrictions on their eminent domain powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Kentucky, including constitutional and statutory provisions that limit the eminent domain power or require communities to compensate landowners for validly adopted land use restrictions. Section 1 addresses limitations on the exercise of the power of eminent domain. Section 2 addresses limitations on the imposition of

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[7] *See, e.g.,* Kelo v. City of New London, 545 U.S. 469 (2005).
[8] *See, e.g.,* Pa. Coal v. Mahon, 438 U.S. 104 (1978).

land use restrictions through changes in zoning laws. Section 3 explores the scope of the requirement that existing land uses be "grandfathered" under any new zoning regime.

1. Eminent Domain and the Requirement of Public Use

Eminent domain is the forced sale of private land to the public for public use. Ideally, a community that wants to convert private property to a public use negotiates an acceptable purchase price with the current owner of the property, and the sale is entirely voluntary. Occasionally, however, the owner of the parcel does not wish to sell. In these circumstances, many communities have the authority to compel the landowner to sell the property, as long as they pay a fair market price and put the property to public use. The federal Constitution has very little to say about the meaning of the phrase "public use." In its decision in *Kelo v. City of New London* the U.S. Supreme Court reaffirmed its past holdings that state and local decision makers enjoy broad discretion to define the concept of "public use," and upheld the condemnation of private property for transfer to another private party for the purpose of economic development.[9] States are free, however, to adopt greater protections for private property owners, and many states have done so by limiting the range of projects that count as public use.

The Kentucky Constitution also requires the payment of compensation when private property is taken for public.[10] Prior to the U.S. Supreme Court's decision in *Kelo v. City of New London*, the Supreme Court of Kentucky held that it was unconstitutional to condemn private property for a commercial purpose such as private development, specifically stating, "no 'public use' is involved where the land of A is condemned merely to enable B to build a factory or C to construct a shopping center."[11] In the wake of *Kelo*, which significantly broadened the definition of "public use," the Kentucky legislature reinforced its position by passing legislation that expressly defined public use as

(a) Ownership of the property by the government;

(b) Possession, occupation, or enjoyment of the property by the government;

(c) To eliminate slum or blighted areas;

(d) Public utilities or transportation purposes; or

(e) Other uses expressly authorized by statute.[12]

As an added measure of protection, the Kentucky legislature expressly prohibited the transfer of the land between private entities for the purpose of economic development that only indirectly benefits the public (e.g., increasing tax revenue, creating jobs, or promoting the general economic health of the community).[13]

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] KY. CONST. §§ 13, 242.
[11] City of Owensboro v. McCormick, 581 S.W.2d 3, 7-8 (Ky. 1979).
[12] KY. REV. STAT. ANN. § 416.675(2) (West 2009).
[13] *Id.* § 416.675(3).

However, the statutory provision does not prohibit the transfer of property to private entities that occupy an incidental area within a public use, provided that the property is not condemned primarily for the purpose of facilitating an incidental private use.[14] Presumably, the "incidental private use" exception would allow a condemning authority to use eminent domain to take a large tract of land for a traditional public purpose, and then lease or sell an "incidental" portion of the acquired tract to a private entity. For example, a city or municipality could use eminent domain to create a public park and then transfer a small piece of the park to a concession stand that sold healthy snacks.

Despite the seemingly narrow restrictions Kentucky has placed on the transfer of private property to private entities, there remains a large loophole for the acquisition of blighted property. The statute allows blighted property to be acquired and transferred to private entities, and in doing so defines blight broadly—e.g., "inadequate street layout," "faulty lot layout," "unsanitary or unsafe conditions," or "deterioration in site improvements."[15] Further, "slum" or "blight" is not evaluated on a parcel-by-parcel basis, which has the effect of allowing healthy property to be acquired through eminent domain and subsequently transferred to a private entity. As an example, the Kentucky Supreme Court has stated that eliminating blight by developing the property to educate medical students attending a municipal university could clearly be considered a public use of the property.[16]

Overall, the judicial and statutory climate in Kentucky is moderately favorable to communities interested in using eminent domain to further the goal of making their physical environment more conductive to healthy, active lifestyles. In response to *Kelo*, the state legislature expressly prohibited the use of eminent domain for the transfer of property to a private entity. However, options remain for a locality to legally condemn a tract of land and transfer an incidental part of it to a private entity, or alternatively to condemn property under the broad definition of blight.

2. Land Use Regulation and Compensation

Most government initiatives to combat childhood obesity by creating a healthy living environment will rely on zoning powers, not the exercise of eminent domain. For example, the City of Los Angeles has placed a moratorium on the building of new fast-food restaurants in South Los Angeles. Land use regulations such as these rarely implicate takings concerns, and governments are generally free to adopt such regulations without incurring takings liability.

However, some land use regulations do require compensation. Any land use regulation so severe that it amounts to the functional equivalent of a taking requires payment of just compensation. The U.S. Supreme Court has adopted two bright-line rules and a balancing test to determine whether a land use regulation constitutes a taking under federal law. First, a regulation that imposes a permanent physical occupation on private land is a taking as a matter of law.[17] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of

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[14] *Id.*
[15] *Id.* § 99.340(2).
[16] City of Owensboro v. McCormick, 581 S.W.2d 3, 7 (Ky. 1979) (citing Craddock v. Univ. of Louisville, 303 S.W.2d 548 (Ky. 1957)).
[17] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

law.[18] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[19] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[20] As with eminent domain, however, states are free to adopt a regulatory takings framework that provides more protections to property owners than does the U.S. Constitution.

The Supreme Court of Kentucky has interpreted section 13 of the Kentucky Constitution as providing similar protections as the federal Constitution, and the body of case law relies on the U.S. Supreme Court's regulatory takings analysis.[21] Thus, in Kentucky a land use regulation will be held to be a compensable taking if it deprives the landowner of all economically viable use, if it imposes a permanent physical occupation on the land, or if it is deemed compensable by virtue of the factors outlined in *Penn Central*. Under the *Penn Central* factors, a court will review a takings challenge to traditional zoning regulation under an "essentially ad hoc, factual inquir[y]"[22] that focuses on three factors: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action, in particular whether it amounts to a physical invasion or mere regulation of land use.[23] Regulations are rarely held to deprive landowners of all economically viable use, and the application of the *Penn Central* factors rarely results in a finding of a compensable taking.

Because the Kentucky Constitution does not offer property owners protections beyond those provided by the federal Constitution, regulatory takings law is not likely to impede community efforts to combat childhood obesity by limiting land uses (such as the operation of a fast-food restaurant) that contribute to the problem.

3. Grandfathering Prior Nonconforming Uses

The discussion in Section 2 assumes that the zoning restriction imposed on a landowner does not attempt to prohibit the very use to which she is currently putting her property. In some circumstances, a community may wish to prohibit a preexisting use to further its goals of combating childhood obesity. For example, a community may want to eliminate fast-food establishments within a certain distance of schools, including those restaurants that are already operating. Communities in Kentucky generally will not be able to do this without paying compensation.

Kentucky law expressly protects the right of a landowner to continue a prior use even if a subsequent zoning change would make that use unlawful.[24] Moreover, the statute permits a

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[18] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[19] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[20] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[21] *See* KY. CONST. § 13; *see also* Natural Res. & Envt'l Protection Cabinet v. Stearns Coal & Lumber Co., 678 S.W.2d 378, 381-82 (Ky. 1984).
[22] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[23] *Natural Res. & Envt'l Protection Cabinet*, 678 S.W.2d at 381. These three *Penn Central* standards are discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[24] KY. REV. STAT. ANN. § 100.253(1) (West 2009).

landowner to change a grandfathered nonconforming use to another nonconforming use of the same or more restricted classification.[25] However, the statute makes clear that grandfathered rights will be lost if the property owner seeks to enlarge or extend his prior nonconforming use.[26]

In addition to the limitation on expansion provided under the statute, Kentucky courts have held that the right to continue operating a prior nonconforming use will be lost if the landowner changes the character of his nonconforming use or abandons the prior use. For example, in *Feldman v. Hesch*, the landowner had a protected right to continue using his property, which had been rezoned for residential use only, to store milk trucks incident to his milk business. As part of this storage, he engaged in incidental maintenance and repair activities. Later, a subsequent owner began using the garage to repair and recondition used cars for sale offsite. A Kentucky Court of Appeals held that the change was significant enough to constitute a forfeiture of the right to continue the nonconforming use.[27] In order to establishing that a nonconforming use has been abandoned, a community must prove intent to abandon.[28] In *City of Middlesboro v. Howard*, for example, the Supreme Court of Kentucky held that failure to pay a revenue-generating fee (i.e., license) did not constitute sufficient intent to abandon, and consequently the nonconforming use was permitted to continue.[29] However, the court has also held that a grocery store's nonconforming use was lost due to abandonment when the property had not been used as a grocery store for almost five years.[30]

Kentucky law does not permit communities to impose an amortization period as a mechanism for eliminating nonconforming uses because such amortization periods would conflict with the state statute protecting prior nonconforming uses.[31] In *City of Paducah v. Johnson*, the Supreme Court of Kentucky invalidated a city ordinance that provided a two-year amortization period for the discontinuance of junkyards. Therefore, a locality should not attempt to terminate a nonconforming use through amortization.

In general, communities in Kentucky interested in pursuing childhood obesity initiatives that would require immediately eliminating land uses that are currently lawful will have to wait until the landowner forfeits her right to continue the use through enlargement or extension, change in use, or intentional abandonment, or condemn the landowner's right to continue the use and pay compensation.

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[25] *Id.* § 100.253(2).
[26] *Id.*
[27] Feldman v. Hesch, 254 S.W.2d 914, 916 (Ky. Ct. App. 1953).
[28] City of Middlesboro Planning Comm'n v. Howard, 551 S.W.2d 556, 557 (Ky. 1977).
[29] *Id.* at 556.
[30] Att'y Gen. v. Johnson, 355 S.W.2d 305, 308 (Ky. 1962).
[31] City of Paducah v. Johnson, 522 S.W.2d 447, 448 (Ky. 1975).