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

OHIO

This memorandum summarizes Ohio 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 Ohio 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 Ohio, 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, local government has the authority to compel the landowner to sell the property, as long as it pays a fair market price and puts the property to public use. The federal Constitution has very little to say about the meaning of the phrase "public use," and under federal law this requirement barely constrains communities. 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.

Ohio has adopted several reforms to provide more protection for private property owners. Most of these reforms are aimed at the use of eminent domain to facilitate economic development, however, and therefore impose little or no obstacle to the exercise of eminent domain to provide publicly owned active recreational opportunities for children. These publicly owned and openly accessible facilities are quintessential examples of permissible public use.

Under the Ohio Constitution, private property can be condemned only when taken (1) in time of war or other public exigency, imperatively requiring its immediate seizure; (2) for the purpose of making or repairing roads, which shall be open to the public; or (3) for public use.[9] Ohio has adopted a statutory list of presumed public uses:

> utility facilities, roads, sewers, water lines, public schools, public institutions of higher education, private institutions of higher education that are authorized to appropriate property, . . . public parks, government buildings, port authority transportation facilities, projects by an agency that is a public utility, and similar facilities and uses of land.[10]

In 2006, the Ohio Supreme Court declined to interpret its constitutional public use clause with the "sweeping breadth" that the U.S. Supreme Court adopted in *Kelo v. City of New London*.[11] Instead, the court rejected the claim that economic development is, without more, sufficient to qualify as public use.[12] Moreover, the court made clear that when the state takes an individual's private property for transfer to another individual or to a private entity rather than for use by the

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[9] OHIO CONST. art. I, § 19.
[10] OHIO REV. CODE ANN. § 163.01 (West 2009).
[11] Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006). *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[12] *Norwood*, 853 N.E.2d at 1123 ("We hold that although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution.").

state itself, judicial review of the taking should be particularly probing.[13] In *Norwood*, the court invalidated a city's attempt to condemn private property and transfer it to a private development company in order to bring economic value to the city.[14]

Notwithstanding the court's rejection of the *Kelo* standard, the overall judicial climate in Ohio is favorable for communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy active lifestyles. Local political entities that enjoy general eminent domain power will be able to use that power to condemn private property for public recreation facilities, such as parks, playgrounds, and walking or biking trails. Only projects justified by economic returns to the community or involving the transfer of property to a private party for economic development reasons are significantly restricted.

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.[15] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[16] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test adopted by the U.S. Supreme Court in *Penn Central*.[17] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[18]

The Ohio Supreme Court employs the same bright-line tests as the U.S. Supreme Court in determining when a per se taking has occurred.[19] For example, in *State* ex rel. *Shelly Materials v. Clark City*, the landowner claimed that the denial of his application for a conditional use permit to mine gravel and sand deprived him of all economically viable use of his property. The Ohio Supreme Court rejected the claim for compensation, concluding that some economically viable

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[13] *Id.* at 1139.
[14] *Id.* at 1146.
[15] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[16] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[17] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[18] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[19] *See* State *ex rel.* Shelly Matls. v. Clark City, 875 N.E.2d 59, 64-65 (Ohio 2007) (quoting and citing *Loretto* and *Lucas* when explaining the per se rules).

use remained, and that the sand and gravel were not a separate estate for purposes of determining whether all economically viable use remained.[20]

In reality, very few land use regulations actually satisfy these demanding standards for automatic takings liability. Most zoning regulations do not deprive a landowner of all economically viable use of his property or require him to suffer a permanent physical occupation of his property. Rather, most zoning restrictions will prohibit some land uses and permit a range of others. The U.S. Supreme Court analyzes such regulations by considering the economic impact of the regulation, the degree of interference with the landowner's reasonable investment-backed expectations, and the character of the government action (e.g., whether the regulation entails a physical invasion of the affected property).[21] The Ohio Supreme Court applies the same factors to claims of regulatory takings that do not implicate one of the bright-line rules.[22] Application of these factors to a regulation of land use rarely results in a finding that compensation is required.

Because Ohio courts follow the lead of the U.S. Supreme Court in analyzing regulatory takings claims, communities in Ohio are unlikely to incur takings liability for land use regulations intended to combat childhood obesity, unless the regulations require a permanent physical occupation of the land or deprive the landowner of all economically viable use. Since neither is likely, these limits on regulatory takings, like the limits on eminent domain, probably will not affect community efforts to combat childhood obesity.

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.

Ohio law protects a landowner's right to continue to use "one's property in a lawful business and manner which does not constitute a nuisance and which was lawful at the time such business was established."[23] In other words, a government that wishes to prohibit an existing use of land through zoning change cannot order its cessation—either immediately or after an amortization period—unless the nonconforming use constitutes a nuisance.[24] This law is codified in section 713.15 of the Ohio code requiring that "[t]he lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or an amendment to the ordinance, may be continued, although such use does not conform with the

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[20] *See id.* at 68.
[21] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[22] See State *ex rel.* Gilmour Realty v. Mayfield Heights, 910 N.E.2d 455, 459 (Ohio 2009) (applying the *Penn Central* factors to a regulatory takings claim); *see also* State *ex rel.* Duncan v. Middlefield, 898 N.E.2d 952 (Ohio 2008) (same).
[23] Pschesang v. Terrace Park, 448 N.E.2d 1164, 1165 (Ohio 1983).
[24] N. Ohio Sign Contractors Ass'n v. City of Lakewood, 513 N.E.2d 324, 328-29 (Ohio 1987).

provisions of such ordinance. . . ."[25] Furthermore, the government must permit the owner to reasonably complete a nonconforming use begun before the zoning ordinance and also restore, reconstruct, extend, or substitute such a use.[26] The right to continue a nonconforming use is lost if the owner voluntarily discontinues the use for a period of two years (the period may be shortened to as little as six months by the local government).[27]

The nonconforming use must exist prior to the zoning ordinance prohibiting the use. Courts will interpret the prior use narrowly when assessing the landowner's right to continue such use. In *Pschesang v. Terrace Park*, the Supreme Court of Ohio held that the owner's nonconforming use of his property as a dentist's office was not grandfathered under the 1963 ordinance zoning the area residential.[28] Although the owner had operated his business prior to the 1963 ordinance, the court ruled that the business was not permitted under the previous ordinance, which permitted only "resident physicians."[29] Private property is grandfathered when its use was a lawful nonconforming use in existence before the zoning ordinance.[30]

Protection for a nonconforming use may be lost when the use is enlarged or expanded. A purely aesthetic change in the property will not relinquish a landowner's grandfathered right to use, but an actual expansion of the scope or size of the nonconforming use will. In *Davis v. Miller*, the Supreme Court of Ohio held that a landowner could not extend his nonconforming quarry on one parcel of the land to another parcel of land on the other side of a dividing highway because of zoning regulations.[31] However, in *Burt Realty Corp. v. City of Columbus*, the same court held that a landowner with deteriorating, nonconforming buildings could replace them without losing his grandfathering protection.[32]

Another way of losing one's rights to continue a nonconforming use is through abandonment or voluntary discontinuation of the use. In *City of Whitehall* ex rel. *Fennessy v. Bambi Motel*, the court applied the two-year requirement of section 713.15 to the owner of a motel property that had operated as an apartment house (per stipulation by the owner) for at least four years after the ordinance prohibiting its use as a motel.[33] The court held that the owner, by stipulating to the abandonment, had lost the right to continue the nonconforming use.[34]

Although eminent domain and regulatory takings may not pose obstacles to Ohio's efforts to combat childhood obesity, statutory grandfathering of prior nonconforming uses potentially could. Ohio provides strong protections for prior nonconforming uses, and only abandonment or alteration amounting to expansion will cause the owner to forfeit his right to continue using the property in a nonconforming manner.

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[25] OHIO REV. CODE ANN. § 713.15 (West 2009).
[26] *Id.*
[27] *Id.*
[28] *Pschesang*, 448 N.E.2d at 1166.
[29] *Id.*
[30] City of Whitehall *ex rel.* Fennessy v. Bambi Motel, 723 N.E.2d 633, 640 (Ohio Ct. App. 1998).
[31] Davis v. Miller, 126 N.E.2d 49, 51 (Ohio 1995).
[32] Burt Realty Corp. v. City of Columbus, 257 N.E.2d 355, 359 (Ohio 1970).
[33] *City of Whitehall* ex rel. *Fennessy*, 723 N.E.2d at 640.
[34] *Id.*