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

SOUTH DAKOTA

This memorandum summarizes South Dakota 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 South Dakota 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 South Dakota, 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

[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).

exercise of the power of eminent domain. Section 2 addresses limitations on the imposition of 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.

Eminent domain powers in South Dakota are governed by Article VI, § 13, of the South Dakota Constitution, which provides, "Private property shall not be taken for public use, or damaged, without just compensation."[10] South Dakota courts have a long tradition of interpreting this provision in a manner that provides more protection than the takings clause of the federal Constitution.[11] In particular, "public use" has been interpreted narrowly to require that there be a "use or right on the part of the public."[12] The South Dakota Supreme Court has specifically considered a broader definition of "public use" that would encompass all exercises of eminent domain that produce a public benefit, but it rejected this expansive interpretation even after the U.S. Supreme Court ruling in *Kelo*.[13] Although the "use by the public" rule limits the ability of communities to use eminent domain to further broad conceptions of public welfare, it readily encompasses such traditional public uses as public parks, hiking and biking trails, and recreational facilities.

In response to *Kelo*, the South Dakota legislature further limited the ability of local governments to exercise eminent domain power. The resulting statutory limitation on the exercise of eminent domain, adopted in 2006, states that "[n]o county, municipality, or housing and redevelopment commission . . . may acquire private property by the use of eminent domain . . . [f]or transfer to any private person, nongovernmental entity, or other public-private business entity[.]"[14] It also forbids using eminent domain "primarily for enhancement of tax revenue."[15] By precluding the transfer of condemned property to private entities, this provision significantly limits the exercise of eminent domain for any project not directly owned by a governmental entity. For example,

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] S.D. CONST. art. VI, § 13.
[11] Benson v. State, 710 N.W.2d 131, 146 (S.D. 2006).
[12] *Id.* (quoting Ill. Cent. R.R. v. E. Sioux Falls Quarry Co., 144 N.W. 724 (S.D. 1913)).
[13] *Id.*
[14] S.D. CODIFIED LAWS § 11-7-22.1 (2008).
[15] *Id.*

this provision appears to prohibit the use of eminent domain to acquire property for transfer to a private owner to operate a healthy grocery store or a recreational facility.

The combination of narrow constitutional interpretation and newly imposed statutory limitations on the exercise of eminent domain significantly limits the power of communities in South Dakota to pursue innovative policy initiatives to combat childhood obesity. However, the public use restrictions are not so narrow as to prevent local governments from acquiring and maintaining property for something that will clearly be used by the public, such as public recreational infrastructure.

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.[16] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[17] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[18] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[19] 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 South Dakota Constitution also requires compensation beyond compensable takings under the federal Constitution. Specifically, it provides that compensation must be given for damage to private property as well as for its taking.[20] To recover for such a regulatory taking, the damage to the property must be "particular to the owner's land and not of a kind suffered by the public as a whole."[21] This includes loss of access to property, but indirect losses that result from the police power of the state are not compensable.[22] Therefore, the state must compensate a landowner when highway construction impairs access to his property, but compensation is not required when a state project reroutes the highway and this causes a business to have fewer customers

[16] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[17] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[18] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[19] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[20] S.D. CONST. art. VI, § 13.
[21] State v. Henrikson, 548 N.W.2d 806, 808 (S.D. 1996).
[22] *Id.*

because it is no longer located directly on the highway.[23] The damage clause is broad enough to require compensation for "destruction or disturbance of easements of light and air, and of accessibility, or of such other intangible rights as [enjoyed] in connection with and as incidental to the ownership of the land itself."[24]

Notwithstanding the damage provision of the South Dakota Constitution, regulatory takings claims in South Dakota are generally analyzed using the same framework and precedents as are claims raised under the U.S. Constitution. In particular, South Dakota courts follow U.S. Supreme Court precedent and categorize two classes of automatic (per se) takings: (1) cases of permanent physical occupation, and (2) cases in which the regulation denies a landowner of all economically viable use of the land.[25] In reality, very few land use regulations satisfy these demanding standards for per se takings liability. Rather, a zoning restriction will prohibit some uses (such as fast-food restaurants) and permit a range of others, and regulations rarely compel landowners to suffer the permanent occupation of their property by strangers. For regulations that do not implicate one of the two per se rules, South Dakota courts continue to follow federal precedent to determine if a regulatory taking has occurred.[26]

Because South Dakota law mirrors federal law on the issue of regulatory takings, and because the threshold for finding a compensable taking is so high at the federal level, community efforts to combat childhood obesity are unlikely to give rise to valid regulatory takings claims.

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 South Dakota generally will not be able to do this without paying compensation.

South Dakota's requirement that prior nonconforming uses be grandfathered comes from a statute that states:

> The lawful use of land or premises existing at the time of the adoption of the zoning ordinance may be continued, even though the use, lot, or occupancy does not conform to the provisions of the zoning ordinance. If the nonconforming use is discontinued for a period of more than one year, any subsequent use, lot, or occupancy of the land or premises shall be in conformance with such regulation.[27]

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[23] *Id.*
[24] Krier v. Dell Rapids Twp., 709 N.W.2d 841, 847 (S.D. 2006) (citations omitted).
[25] *Id.*
[26] *See* Benson v. State, 710 N.W.2d 131, 153-164 (S.D. 2006) (analyzing federal precedents at length before rejecting a claim that the failure to criminalize road hunting constituted a taking of the property of adjacent landowners).
[27] S.D. CODIFIED LAWS § 11-6-39 (2008).

The South Dakota Supreme Court has characterized this provision by stating that "[z]oning laws may not operate retroactively to deprive property owners of prior vested rights by preventing a use that was lawful before the enactment of the zoning laws."[28] In *Rapp*, the court held that an application for a conditional use permit does not destroy grandfathered protection, and counties are required to grant conditional use permits assuming the prior nonconforming use was lawful at the time of its inception.[29] The right to continue a nonconforming use arises when zoning ordinances are amended, as well as when new ordinances are adopted.[30]

The right to continue a nonconforming use is not unlimited, however. First, the statute makes clear that the right to continue a nonconforming use will be lost if the use is discontinued for more than one year.[31] Moreover, the South Dakota Supreme Court has held that municipalities can impose limitations on nonconforming uses by prohibiting the change, enlargement, or extension of nonconforming uses. [32] Accordingly, in *City of Marion v. Rapp*, the South Dakota Supreme Court held that owner of a nonconforming mobile home lost his right to continue that nonconforming use when he removed the mobile home from his property and tried to replace it with a much larger one. Similarly, in *Wegner Auto Co. v. Ballard*, the court rejected the landowner's attempt to add an aluminum can shredding component to his nonconforming beverage warehouse.[33] According to the court in *Wegner*, "even moderate expansion to meet new needs or to keep up with competition [is] generally not allowed."[34] The forfeiture of the right to continue a nonconforming use due to expansion applies equally to efforts to expand a nonconforming use to adjacent land.[35]

Efforts to combat childhood obesity through land use restrictions may be limited by this grandfathering requirement. For instance, communities will not be permitted to require the immediate cessation of existing food restaurants from a given area. However, the limitation on expansion may prove helpful; because nonconforming uses are not permitted to expand in response to changing economic conditions, nonconforming businesses may find that they cannot compete without expansion and will therefore be forced to comply with zoning ordinances to stay in business.

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Communities in South Dakota will face significant limitations on their attempts to use land use law to combat childhood obesity. First, South Dakota law requires that property taken under eminent domain be put to a use that is open to the general public and prohibits communities from transferring property taken under eminent domain to another private individual. However, these limitations should not interfere with efforts to condemn property for traditional public uses such as parks, playgrounds, and other recreational facilities. In addition, landowners in South Dakota enjoy broad protection to continue to engage in prior nonconforming uses, making it difficult for communities to quickly change the character of a neighborhood through zoning laws. Instead, a

[28] City of Marion v. Rapp, 655 N.W.2d 88, 90 (S.D. 2002).
[29] Jensen v. Lincoln County Bd. of Comm'rs, 718 N.W.2d 606, 615 (S.D. 2006).
[30] Atkinson v. City of Pierre, 706 N.W.2d 791, 797 (S.D. 2005).
[31] S.D. CODIFIED LAWS § 11-6-39.
[32] *Rapp*, 655 N.W.2d at 90.
[33] Wegner Auto Co. v. Ballard, 353 N.W.2d 57, 59 (S.D. 1984).
[34] *Id.*
[35] *Id.*; Brown County v. Meidinger, 271 N.W.2d 15, 18 (S.D. 1978).

community that wishes to eliminate certain unhealthy land uses from a particular area will have to compensate the landowner or wait until the use is discontinued for a year or the landowner attempts to change or expand the use.