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

ALABAMA

This memorandum summarizes Alabama 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 Alabama 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. 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. 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.[7] Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution.[8] 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.

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 Alabama, 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 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," 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."

In the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London*,[9] Alabama was the first state to pass legislation prohibiting the use of eminent domain for private profit. The Alabama Constitution has always prohibited eminent domain for private use and required the payment of compensation if eminent domain is exercised for public use.[10] However, the state constitution lacks a clear definition of "public use." The state code was amended post-*Kelo* to narrow the definition of "public use" from the U.S. Supreme Court's expansive interpretation of the term. The legislature intended to protect private property rights by prohibiting the taking of private property for the private use of another (as opposed to use by the public generally).[11] From the state level down, any "nongovernmental retail, office, commercial, residential, or industrial development or use" cannot be considered a "public use," and accordingly, eminent domain cannot be exercised for any of these purposes.[12] More specifically, the Alabama Code states that municipalities and counties "may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity."[13] In other words, the government is prohibited from using eminent domain to condemn private property and subsequently transfer it to a private entity for the purpose of economic redevelopment. However, the amendments have no effect on the use of eminent domain for the development of such traditionally public uses as parks and recreational areas; in fact, the code expressly states that eminent domain may be exercised for "constructing, maintaining, or operating . . . park and recreation facilities."[14]

Like several other states, Alabama provides an exception to the public use–based restrictions on eminent domain when it comes to the condemnation of blighted properties. If a property is blighted, Alabama allows a housing authority or municipality to seize it, even for uses proscribed

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] ALA. CONST. art. I, § 23.
[11] ALA. CODE § 18-1B-1 (2009).
[12] *Id.* § 18-1B-2.
[13] *Id.* §§ 11-47-170, 11-80-1.
[14] *Id.* § 18-1B-2.

by the statute limiting the definition of public use, as long as it is part of a redevelopment or urban renewal project.[15] In other words, if it can be established that a property or area is blighted, the power of eminent domain remains quite expansive—blighted properties can be acquired and transferred to a private developer. In an effort to limit this power, the Alabama legislature narrowed its previously broad definition of "blight" to include only a specified number of conditions. Thus, circumstances involving condemnation of blighted properties will now arise only in a very limited context. The nine factors listed in the state code are summarized below, and any one of them will constitute blighted property as a matter of law:

1. Structures unfit for human habitation due to unsafe conditions, abandonment, etc.
2. Overcrowding or the existence of dangerous structures or fire hazards
3. A substantial number of properties having defective title
4. Structures without functioning utilities, plumbing, heating, or sewerage
5. Vacant land overgrown with weeds, trash, mosquitoes, rodents, etc., where the owner refuses to fix the problem after appropriate notice
6. A public or an attractive nuisance where the owner refuses to fix the problem after appropriate notice
7. Property with safety or health code violations that have not been rehabilitated
8. Property with tax delinquencies exceeding the value of the property
9. Property that poses public health or safety threats because of environmental contamination[16]

Notwithstanding the active legislative response to *Kelo*, communities in Alabama remain free to combat childhood obesity by using eminent domain to build parks, playgrounds, and other recreation facilities that will be publicly owned and used, thereby promoting healthy, active lifestyles. The power to engage in creative public-private initiatives is significantly constrained, however, by the post-*Kelo* legislation. In response to *Kelo*, the state legislature has prohibited the use of eminent domain for anything that might resemble private development; and further, it closed the loophole of vague blight designations.

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.

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[15] *Id.* §§ 24-2-2, 24-3-2.
[16] *Id.* § 24-2-2.

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 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]

Alabama courts follow the U.S. Supreme Court in evaluating regulatory takings claims. Thus, consistent with the law of *Penn Central*, Alabama courts will make an "essentially ad hoc, factual inquir[y]"[21] that focuses on three factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the government action.[22] Although the application of this test will rarely result in a takings finding, the most recent regulatory takings case to be decided in the Alabama Supreme Court did hold in favor of the landowner. In *Alabama Department of Transportation v. Land Energy*, the court held that the Alabama Department of Transportation must compensate the owner of mineral interests under a surface estate it was condemning to build a road. In particular, the court held that because the DOT's actions made it impossible for the mineral estate holder to extract the minerals, it had interfered with the owner's primary expectation concerning the use of the property and precluded the owner from profiting from its investment.[23] Nonetheless, this case does not seem representative because it was decided largely on the basis of erroneous jury instructions that became "law of the case" because they were not objected to in the trial court. Given that there are no other recent regulatory takings cases in Alabama in which the landowner is awarded compensation, this case appears to be an anomalous application of the *Penn Central* factors.

3. Grandfathering Prior Nonconforming Uses

The discussion in Section 2 assumes that the zoning restriction imposed on the landowner does not attempt to prohibit the very use to which the landowner is 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 that are already operating. Communities in Alabama generally will not be able to do this without paying compensation.

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[17] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[18] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[19] Pa. 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] *Pa. Cent. Transp. Co.*, 438 U.S. at 124.
[22] Ala. Dep't of Transp. v. Land Energy, Ltd., 886 So. 2d 787, 798 (Ala. 2004).
[23] *Id.* at 799.

Under Alabama law, prior nonconforming uses are vested property rights that may not be abrogated by a zoning change except in limited circumstances.[24] In other words, a change in zoning cannot be used to prohibit an *existing* use of land. The grandfathering requirement is based on article I, section 13, of the state constitution, which guarantees due process to those deprived of property due to the enforcement of zoning regulations.[25] Additionally, the right to maintain a legal nonconforming use "runs with the land," in much the same way that a covenant or easement does.[26] Thus, a zoning ordinance that purports to terminate a prior nonconforming use solely because of a change in ownership is unconstitutional.[27]

Although a mere change in ownership will not cause the grandfathered entitlement to expire, continuation of a prior nonconforming use remains subject to certain limitations, which if violated will require the landowner to either apply for a variance or come into compliance with the new zoning ordinance. The idea is to allow the prior nonconforming use to continue operating in the same manner it had been before the zoning restriction was imposed. The property owner may not enlarge, expand, or rebuild a nonconforming use.[28] However, remodeling or repairing a nonconforming structure may be permitted and will not necessarily cause the grandfathered entitlement to expire.[29] If the statute contains guidelines for alterations and the alterations do not increase the nonconformity of the prior nonconforming use, a court will find that the alterations are valid and will not cause the grandfathered entitlement to expire.[30] As an example, in *City of Fairhope*, the city issued a permit for a second story to be built on a nonconforming garage.[31] The current zoning ordinance required the garage to be set back 5 feet from the edge of the property.[32] The addition of a second story was within the alterations guidelines of the ordinance and did not increase the nonconformity, so the Alabama Supreme Court did not consider it to be in violation of the ordinance.[33] On the other hand, the Alabama Supreme Court held that *replacing* mobile homes in a nonconforming mobile home park was more than mere remodeling, and the property owner was found to be in violation of the zoning ordinance.[34] Because the purpose of the zoning ordinance is to "restrict [the use] rather than extend it," the owner cannot completely replace the mobile homes, an act that would likely extend the useful life of the mobile home park.[35] Prior nonconforming uses that have become abandoned will lose their right to continue as such.[36] However, abandonment must be more than a temporary cessation, even for a lengthy period, and must be caused by factors over which the

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[24] Budget Inn of Daphne, Inc. v. City of Daphne, 789 So. 2d 154, 159 (Ala. 2000) ("A municipality may not simply divest a property owner of a vested right, without compensation, and any attempt to do so violates the most fundamental principles of due process.").
[25] ALA. CONST. art. I, § 13; *see also* Quinnelly v. City of Prichard, 291 So. 2d 295, 300 (Ala. 1974).
[26] *Budget Inn of Daphne*, 789 So. 2d at 159.
[27] *Id.*
[28] *Id.* at 160.
[29] City of Foley v. McLeod, 709 So. 2d 471, 473 (Ala. 1998).
[30] *Ex parte* City of Fairhope, 739 So. 2d 35, 39 (Ala. 1999).
[31] *Id*. at 37.
[32] *Id*. at 39.
[33] *Id*.
[34] *McLeod*, 709 So. 2d at 473.
[35] *Id*. at 473-74.
[36] Green v. Copeland, 239 So. 2d 770, 771 (Ala. 1970).

property owner had control.[37] Involuntary abandonment is insufficient to cause a grandfathered entitlement to expire. In *Green*, the city rezoned land containing the plaintiff's restaurant to prohibit the sale of beer while the plaintiff had involuntarily lost his alcohol license.[38] The Alabama Supreme Court held that the plaintiff retained the right to sell beer as part of an existing nonconforming use because the right was not voluntarily abandoned.[39]

In general, communities in Alabama interested in changing zoning ordinances to create a physical environment more conductive to healthy, active lifestyles should be aware of the many protections given to prior nonconforming users. First, there is no amortization period—as long as the property owner does not enlarge, expand, or rebuild his structure, he can continue using it in the same manner he previously had. Second, a change in ownership will not cause the grandfathered entitlement to expire, meaning that subsequent purchasers can also continue using the nonconforming use without needing to apply for a variance. Third, Alabama not only allows a landowner to repair and remodel her nonconforming use, but also allows any action to be taken so long as it does not increase the nonconformity of the prior nonconforming use. Finally, although abandonment will cause a grandfathered entitlement to expire, the abandonment must be more than a temporary cessation and must be voluntary.

[37] *Id*. at 772 (plaintiff retained the ability to sell beer, despite the loss of his license, because the loss was not a voluntary abandonment)).
[38] *Id*. at 770.
[39] *Id.* at 772.