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

MISSISSIPPI

This memorandum summarizes Mississippi 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 Mississippi 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.

*****

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

---

[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).

Clara County the acquisition is by forced dedication[6] and involves a partial interest in the 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

---

[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.

[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).

powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Mississippi, 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 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," 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.

The Mississippi Constitution permits the taking of property for public use with compensation, but does not define the phrase "public use."[9] The constitution explicitly leaves the question what counts as public use to be resolved by the judiciary "without regard to the legislative assertion that the use is public."[10] However, the Mississippi Supreme Court has separated the issue of what uses satisfy the public use requirement from the issue whether the exercise of eminent domain is *necessary* to further the public goal.[11] The condemning entity bears the burden of proving that a proposed use is a public use, while the landowner has the burden of establishing that the use is not necessary to the public interest identified by the condemnor.[12] While the threshold question of whether a use is public is ultimately a matter for judicial determination, the legislative decision that a particular action is necessary to further that use is afforded great deference. In *Horne v. Pearl River Valley Water Supply District*, the court rejected a landowner's claim that the condemnation of 5 acres of land for the construction of service centers, restaurants, and stores around a public reservoir was not "necessary" for the public use, even though these facilities might someday be leased to private interests. The court made clear that "when land is taken for a public purpose which is primary and paramount, such a taking will not be defeated by

[9] MISS. CONST. art. 3, § 17.
[10] *Id.* The court takes this role seriously and requires an affirmative proof on the part of the condemning agency to support public use. *See* Morley v. Jackson Redev. Auth., 632 So. 2d 1284, 1289 (Miss. 1994) (noting the agency had offered no evidence of public use other than a bare assertion of "slum clearance").
[11] Lemon v. Miss. Transp. Comm'n, 735 So. 2d 1013, 1021-23 (Miss. 1999).
[12] *Id.* at 1022.

the fact that incidental thereto a private use or benefit will result which would not of itself warrant the exercise of the power."[13]

The legislature has enumerated certain specific purposes for which public corporations may exercise the right of eminent domain. For municipalities, the grant of authority broadly includes "any other case where the land is to be used for public purposes" in addition to specified purposes such as streets, sidewalks, and parks.[14] Because municipalities have the right to exercise eminent domain in this broadest sense, the only limits are those imposed by the judiciary's obligation to determine the scope of the "public use" phrase in the constitution.

There is no one articulated test for the meaning of "public use," but the Mississippi Supreme Court has provided some guidance. In *Pearl River Valley Water Supply District v. Brown*, the court upheld the taking of land surrounding a public reservoir for public use, even though some of the land would go to private businesses such as restaurants and motels, because "all of the proposed uses are those customarily provided for the public at such recreational reservoirs."[15] The court also approved pollution and access control as sufficient goals to meet the definition of public use.[16] As long as "the primary and paramount purpose of the taking is for public use . . . it will not be defeated because some incidental private benefit or use results."[17] Other examples of court-approved public use include flood control,[18] urban renewal and slum clearance,[19] and highway construction.[20]

Urban renewal is a particularly expansive concept in Mississippi. Mississippi law provides substantial latitude for governments to undertake urban renewal projects in response to blighted conditions,[21] including the exercise of eminent domain.[22] "Blighted area" is broadly defined to include areas that, because of physical or economic conditions that substantially impair the growth of the municipality, are economic or social liabilities or are menaces to health and safety.[23] To undertake an urban renewal project to remedy blight, a municipality must first find

---

[13] Horne v. Pearl River Valley Water Supply Dist., 162 So. 2d 504, 507 (Miss. 1964).
[14] MISS. CODE ANN. § 21-37-47 (2007). This right also extends to legislatively created commissions "operating as an agency of any municipality." *Id.* This, for example, may include a public improvement district created under § 19-31 of the Mississippi Code. *See id.* § 19-31-17(m) (authorizing delegation of municipal eminent domain powers).
[15] Pearl River Valley Water Supply Dist. v. Brown, 156 So. 2d 572, 576 (Miss. 1963).
[16] *Id.* at 577.
[17] *Id.*
[18] Winters v. City of Columbus, 735 So. 2d 1104, 1107-08 (Miss. Ct. App. 1999).
[19] Jackson Redev. Auth. v. King, Inc., 364 So. 2d 1104, 1113 (Miss. 1978); Paulk v. Hous. Auth., 195 So. 2d 488, 490 (Miss. 1967).
[20] Roberts v. Miss. State Highway Comm'n, 309 So. 2d 156, 159 (Miss. 1975).
[21] *See* MISS. CODE ANN. § 43-35-15 (2009) (a nonexhaustive enumeration of powers available to municipalities for urban renewal projects).
[22] *Id.* § 43-35-17.
[23] *Id.* § 43-35-3(i). It is important to note that the blighted area must be the source of the conditions leading to the menace to public health. *Id.* In other words, a menace such as childhood obesity will likely not arise from conditions described in the urban renewal context. However, the broad powers of municipalities to deal with urban blight may present opportunities for urban planning that can take such considerations into account.

(1) that blighted areas exist within the municipality, and (2) that the project is necessary in the interest of "public health, safety, morals or welfare of the residents" of the municipality.[24]

Overall, then, the legal climate in Mississippi is likely to be favorable for communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles.[25] Although the question of permissible public use is left to the judiciary, the Mississippi Supreme Court has liberally interpreted public uses to include the types of projects that would be used to combat childhood obesity such as parks, recreational areas, and urban renewal.

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.[26] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[27] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[28] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[29]

Land use regulation under the Mississippi Constitution is evaluated in much the same manner, although the state's constitution may offer broader protection for property owners.[30] In *Jackson*

---

[24] *Id.* § 43-35-11.

[25] One word of caution: In 2009, the Mississippi legislature passed major land use reform, which would have prohibited the use of eminent domain for economic development projects, tax revenue, or public-private partnerships. H.B. 803, An Act to Amend Section 11-27-1, Mississippi Code of 1972, to Prohibit Use of the Power of Eminent Domain Except for a Public Use: and for Related Purposes, 2009 Reg. Sess. (Miss. 2009), *available at* http://billstatus.ls.state.ms.us/documents/2009/html/HB/0800-0899/HB0803SG.htm (full text of Senate Bill 803 as sent to the governor of Mississippi). The governor vetoed the legislation on March 24, 2009, so those reforms did not become law. See http://www.msmec.com/mx/hm.asp?id=AtTheCapitol. However, the Mississippi Senate nearly overrode the veto, which suggests that new reforms may be successful in the future.

[26] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[27] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[28] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[29] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.

[30] *See* Smith v. Miss. State Highway Comm'n, 184 So. 814, 815 (Miss. 1938) (holding that highway construction interfering with ingress and egress to property resulting in some diminution in value is "damage within the meaning of the [state] Constitution.").

Municipal Airport Authority v. Evans, the Mississippi Supreme Court has held that regulations that "merely restrict the enjoyment and use of property" do not amount to a forced dedication for public use and are therefore not compensable.[31] The court went on to hold that enforcement of a zoning limitation on tree height amounted to a compensable taking when the owners were required to remove the offending trees.[32] *Evans* suggests that the Mississippi constitutional requirements for compensation are broader than the *Penn Central* balancing test, which considers the property as a whole.[33] However, the Mississippi Supreme Court has subsequently distinguished *Evans* and held that similarly restrictive zoning ordinances do not constitute compensable takings.[34] A key factor in *Evans* was the fact that the airspace was "dedicated to public use" for the airport, suggesting that an ordinance restricting tree height for reasons of health or safety would not amount to a taking.[35] Absent that kind of clear dedication to public use, Mississippi courts have consistently denied takings claims for most land use regulations.[36]

Because most land use restrictions adopted to combat childhood obesity will not implicate the bright-line rules described above, and compensation is rarely required for land use restrictions that are evaluated under the *Penn Central* factors, regulatory takings law is not likely to impede efforts by communities in Mississippi to adopt land use restrictions aimed at combating 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. Communities in Mississippi will probably be able to effect such changes, if not immediately, then by use of an amortization schedule.

Zoning ordinances in Mississippi generally protect the rights of landowners to continue to engage in existing, lawful uses of their property notwithstanding the enactment or amendment of

---

[31] Jackson Mun. Airport Auth. v. Evans, 191 So. 2d 126, 133 (Miss. 1966).
[32] *Id.* at 132-33.
[33] *See Penn Cent. Transp. Co.*, 438 U.S. 104.
[34] *See* Red Roof Inns v. City of Ridgeland, 797 So. 2d 898, 900-01 (Miss. 2001) (distinguishing a zoning ordinance requiring the removal of nonconforming signage from *Evans* on the basis that the regulation did not dedicate the property to public use but merely restricted the use and enjoyment); Citizens for Equal Property Rights v. Bd. of Supervisors, 730 So. 2d 1141 (Miss. 1999) (holding that zoning regulations restricting development in airport flight path were not per se takings but a question for the court on a case-by-case basis).
[35] *Jackson Mun. Airport Auth.*, 191 So. 2d at 132-33.
[36] *See*, *e.g.*, Croke v. Southgate Sewer Dist., 857 So. 2d 774 (Miss. 2003) (injunction to force mobile home park to connect to city sewer was not a compensable taking); Tippitt v. City of Hernando, 909 So. 2d 1190, 1194 (Miss. Ct. App. 2005) (rezoning does not amount to compensable taking unless owner is deprived of use and enjoyment or denied all economically viable use).

a zoning ordinance prohibiting the existing use.[37] In other words, a government that wishes to prohibit an *existing* use of land through a zoning change cannot order its immediate cessation, but rather landowners must be permitted to grandfather nonconforming uses. However, it is not clear that the Mississippi Constitution *requires* such grandfathering.[38] Moreover, Mississippi law permits zoning ordinances to force the discontinuance of a nonconforming use through an amortization scheme.[39]

Although the constitution does not definitively require zoning authorities to grandfather prior existing uses, the right is a fairly strong one, once found.[40] For a nonconforming use to be grandfathered, it must have predated the adoption of the regulation and must be more than "occasional use for certain purposes."[41] The right to continue a nonconforming use is a property right that, once established, survives a change in ownership.[42] However, the right may be lost by abandonment or change in use.[43] The constitution does not require the zoning ordinance to permit the owner to rebuild or reconstruct a nonconforming property that has been destroyed.[44] Nor must owners be permitted to enlarge, expand, or extend nonconforming uses.[45]

Where protected, in determining whether a prior nonconforming use exists, Mississippi courts are fairly generous. In *Barrett v. Hinds County*, the Mississippi Supreme Court held that a lawyer who occupied and established his law offices in a property acquired in a tax sale could have established a prior nonconforming use, even though he had no right to possession of the property at the time the adverse zoning ordinance was adopted.[46] Ruling that the lawyer had taken possession under color of title based on the tax sale (which, unknown to the lawyer, did not grant immediate right to possess), the court remanded the case for determination of whether the law office had been sufficiently established and not abandoned. Similarly, in *Heroman v. McDonald*, the court held that a property owned by the V.F.W. and used variously for meetings, receptions,

---

[37] *See* Barrett v. Hinds County, 545 So. 2d 734, 737 (Miss. 1989) ("In recognition of the landowner's rights, many zoning ordinances have had incorporated into their provisions exemption of uses and structures existing at the time of the adoption of the zoning ordinance, which uses and structure did not conform to the new requirements of the zone in which they were located.").

[38] The court in *Barrett* noted that "[i]n some constitutional challenges to zoning restrictions, the courts have upheld the ordinance as reasonable because of the exemption of pre-existing uses," but did not make clear that this is a constitutional requirement in Mississippi. *Barrett*, 545 So. 2d 734, 737 (Miss. 1989).

[39] *See* Red Roof Inns v. City of Ridgeland, 797 So. 2d 898, 899-900 (Miss. 2001) (upholding the constitutional validity of a municipal zoning ordinance that capped the amortization of prior nonconforming use at five years).

[40] *See id.* ("This court has to weigh the rights of the governmental entity to regulate private property rights under zoning ordinance against an individual's assertion of a constitutionally based property right. . . . [T]his court holds that the constitutional right must prevail."); *see also* Heroman v. McDonald, 885 So. 2d 67, 71 (Miss. 2004) ("[c]ontinuation of a nonconforming use is a right that is one of the many rights guaranteed to property owners in Mississippi by the common law.").

[41] *Barrett*, 545 So. 2d at 737.

[42] *Heroman*, 885 So. 2d at 71; Faircloth v. Lyles, 592 So. 2d 941, 945 (Miss. 1991) (invalidating an ordinance that prohibited the transfer of nonconforming uses from one owner to the next).

[43] *Barrett*, 545 So. 2d at 737.

[44] *See* Palazzola v. City of Gulfport, 52 So. 2d 611, 612-13 (Miss. 1951) (upholding an ordinance that prohibited reconstruction of prior nonconforming use if the structure is more than 50 percent damaged).

[45] *See Heroman*, 885 So. 2d at 71 (noting that nonconforming uses will be forfeited if expanded or enlarged).

[46] *Barrett*, 545 So. 2d at 738-39.

and dinners, as well as periodic rental of the second floor for residential use, retained its right to nonconforming use despite the varied and changing nature of the use.[47] Because the property had consistently been used in the same general manner, despite the ebbs and flows of the particular uses, the court held that the prior nonconforming use was neither abandoned nor changed in such a way as to forfeit the right under the ordinance.[48]

The constitutionality of amortization was addressed in *Red Roof Inns v. City of Ridgeland*, where a municipal sign ordinance required the removal of nonconforming signs on an amortization schedule based on original construction costs.[49] Signs with a construction cost greater than $7,000 were given a maximum of five years for removal.[50] When Ridgeland forced the removal of the Red Roof Inn signs after the five-year period, the appellant challenged the constitutionality of the ordinance.[51] The Mississippi Supreme Court held that the amortization scheme was a constitutionally valid exercise of the police power, giving great deference to the legislative nature of the decision.[52]

Abandonment usually requires a significant period of nonuse and intent to abandon the nonconforming use.[53] Further, the Mississippi Supreme Court has found that a change in nonconforming use does not necessarily mean that abandonment has occurred.[54] For example, in *Heroman v. McDonald*, the court found that a change from primary use of a reception hall for nonprofit purposes to commercial purposes did not constitute abandonment.[55]
While the practice of grandfathering prior nonconforming uses in Mississippi may present some obstacles to efforts to combat childhood obesity with zoning regulations, municipalities have wide leeway under state law to eliminate these uses. The state supreme court has upheld the use of amortization to eliminate nonconforming uses as well as fairly restrictive regulations on changes or rebuilding of use.

---

[47] *Heroman*, 885 So. 2d at 69-70.
[48] *Id.* at 71-72.
[49] Red Roof Inns v. City of Ridgeland, 797 So. 2d 898, 899 (Miss. 2001).
[50] *Id.*
[51] *Id.*
[52] *Id.* at 900-01 (quoting with approval the Maryland Court of Appeals' holding in a similar case that such ordinances are legitimate where "the earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned," *Grant v. Mayor & City Council of Baltimore*, 129 A.2d 363, 365 (Md. 1957)).
[53] *See, e.g.*, Heroman v. McDonald, 885 So. 2d 67, 71 (Miss. 2004) (describing the City of Pass Christian ordinance provisions for abandonment). *Cf.* Stone v. Lea Brent Family Invs., 998 So. 2d 448, 456 (Miss. Ct. App. 2008) (discussing the components of abandonment of an easement).
[54] *Heroman*, 885 So. 2d at 71.
[55] *Id.* at 72.