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

OKLAHOMA

This memorandum summarizes Oklahoma 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 Oklahoma 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 property, while in King County the acquisition is by eminent domain and involves full title. In

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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.

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; this is 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 Oklahoma, including constitutional and statutory provisions that limit the eminent domain power or require communities to compensate landowners for validly adopted land use restrictions. Section 1 addresses limitations on the exercise of the power of eminent domain. Section 2 addresses limitations on the imposition of

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

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

1. Eminent Domain and the Requirement of Public Use

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

The Oklahoma Constitution provides that "private property may not be taken or damaged for public use without just compensation."[10] However, unlike the federal Constitution, the Oklahoma Constitution also specifically prohibits the taking of private property for private use with limited exceptions.[11] The Oklahoma Supreme Court has found that the Oklahoma Constitution provides private property protection to Oklahoma citizens beyond that which is afforded them by the Fifth Amendment to the U.S. Constitution.[12] In *Board of County Commissioners of Muskogee County v. Lowery*, the county sought a right-of-way easement for a water pipeline to serve the residents of a district for the purpose of economic development.[13] The Oklahoma Supreme Court rejected the proposed condemnation, holding that under the Oklahoma Constitution the transfer of property from one private party to another to further "economic development alone does not constitute a public purpose and therefore, does not constitutionally justify the County's exercise of eminent domain."[14]

However, Oklahoma does permit the transfer of blighted private property from one private owner to another for the purpose of economic development.[15] Oklahoma has adopted a fairly wide definition of blight. In particular, blighted conditions are those that "substantially impair or arrest the sound development and growth of the municipality or constitute an economic or social liability or are a menace to the public health, safety, morals or welfare in its present condition

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] OKLA. CONST. art. 2, § 24.
[11] *Id.* § 23 (the exceptions include private ways of necessity and drains and ditches across lands of others for agricultural, mining, or sanitary purposes, inter alia).
[12] *See, e.g.*, Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639, 651 (Okla. 2006) ("To the extent that our determination may be interpreted as inconsistent with the U.S. Supreme Court holding in *Kelo v. City of New London* . . . Article 2 §§23 & 24 of the Oklahoma Constitution, which conclude provide private property protection to Oklahoma citizens beyond that which is afforded them by the Fifth Amendment to the U.S. constitution.").
[13] *Id*. at 642-43.
[14] *Id*. at 650.
[15] *Id*.

and use."[16] The statute lists several factors relevant to making the blight determination.[17] Oklahoma courts draw a distinction between blight removal and economic development, "with the former constituting the public purpose that constitutionally justifies the subsequent sale of the property for private use."[18] Therefore Oklahoma law allows the exercise of eminent domain and the transfer of private property to another private owner when it is determined there is blight.[19]

Thus, communities in Oklahoma have substantial latitude to use eminent domain to build parks, playgrounds, and hiking and biking trails intended to promote healthy, active lifestyles.[20] Such publicly owned and openly accessible facilities are quintessential examples of public uses. While communities may not condemn property and transfer it to another private owner for the sole purpose of economic development, policies aimed at combating childhood obesity clearly have other, more public motivations.

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. Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law. All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test. A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[21] 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.

Oklahoma courts follow federal precedent in determining whether a land use restriction constitutes a compensable taking. Thus, when a government entity adopts a land use regulation that compels a property owner to permit a physical invasion on her property or "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of common good" and leave the property idle, a regulatory taking has occurred.[22] In reality, very

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[16] OKLA. STAT. ANN. tit. 11, § 40-113 (West 2009).
[17] *Id*.
[18] Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639, 650 (Okla. 2006).
[19] *Id*.
[20] *See, e.g.*, OKLA. STAT. ANN. tit. 27, § 5 (". . . shall have the power to condemn lands in a manner as railroad companies, for highways, rights-of-ways, building sites, cemeteries, public parks and other public purposes.").
[21] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[22] *In re* Initiative Petition No. 283, 142 P.3d 400, 407 (Okla. 2006).

few land use regulations actually satisfy these demanding standards for automatic takings liability.[23]

Most zoning regulations do not fall into the automatic takings categories. Rather, a zoning regulation will regulate and restrict some uses and permit a range of others. Although very few reported Oklahoma cases discuss the scope of state regulatory takings jurisprudence, it appears to be coterminous with federal regulatory takings jurisprudence. For example, in *Edmonson v. Pierce*, the State Supreme Court of Oklahoma went through a rigorous analysis of federal regulatory taking cases before determining that the state's ban on cockfighting did not constitute a compensatory taking.[24]

Because Oklahoma law appears to mirror 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 the landowner does not attempt to prohibit the very use to which the landowner 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 Oklahoma generally will not be able to demand the immediate cessation of an existing nonconforming use without paying compensation.

Notwithstanding the enactment or amendment of a zoning ordinance prohibiting the existing use, Oklahoma law protects the rights of landowners to continue to engage in existing lawful uses of their property.[25] In *Bankoff*, the Supreme Court of Oklahoma held that the landowner was entitled to continue using his land as a landfill even though current regulations prohibited that use.[26] Specifically, the court stated that "[i]t is axiomatic that under ordinary circumstances a zoning enactment cannot be applied retroactively to require the destruction of an existing structure or a substantial change in an existing lawful use of property."[27] A prior nonconforming use will survive change in ownership, as long as the nonconforming use remains substantially the same.[28]

But the right to continue a nonconforming use is not unlimited. A landowner will forfeit his right to continue a prior nonconforming use if he substantially changes the nature, character, or purpose of the use.[29] This standard appears to permit landowners significant latitude to alter the

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[23] *Id*. at 406-07 ("The regulation of the use of a parcel of private property, if it substantially interferes with the use or enjoyment of the property, can become a taking, but generally zoning laws do not rise to the level of a taking of private property requiring just compensation.").
[24] Edmondson v. Pearce, 91 P.3d 605, 616-20 (Okla. 2004).
[25] Bankoff v. Bd. of Adjustments of Wagoner County, 875 P.2d 1138, 1141 (Okla. 1994).
[26] *Id*.
[27] *Id*.
[28] Triangle Fraternity v. City of Norman *ex rel.* Norman Bd. of Adjustment, 63 P.3d 1, 8 (Okla. 2002).
[29] *Id*. at 6.

use of the nonconforming property. For example, in *Triangle Fraternity*, a fraternity sought approval to use a house in a neighborhood zoned for single-family residences as a room and board facility for college men.[30] The house had been used originally as a sorority and later a retired women's boarding house.[31] The Oklahoma Supreme Court found that the fraternity was an extension of the prior nonconforming use because the proposed use was "substantially the same as the property's former use."[32] Similarly, in *Royal Baking Co. v. Oklahoma City*, the Supreme Court of Oklahoma held that the use of a building on a landowner's business property as a repair shop for the business's trucks did not impermissibly enlarge the property owner's nonconforming use.[33] The court held that "the business has not changed in kind. The neighborhood will not be changed or seriously injured by the enlarged incidental use. . . . By allowing a degree of elasticity in the application of the ordinance so that no arbitrary or unreasonably burden is imposed . . . we can avoid the necessity of declaring the ordinance unconstitutional."[34]

However, municipalities have the authority to provide for the termination of nonconforming uses by establishing an amortization period or by designating conditions or circumstances that will cause the use to cease.[35]

In general, communities in Oklahoma will not be able to require the immediate cessation of prior nonconforming uses. Moreover, landowners appear to have latitude to readjust nonconforming uses without forfeiting their right to continue the use. Cities, at least, have the authority to plan for the termination of such uses over time.

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[30] *Id*. at 5.
[31] *Id*. at 4.
[32] *Id*. at 1.
[33] Royal Baking Co. v. Oklahoma City, 75 P.2d 1105, 1108 (Okla. 1938).
[34] *Id*.
[35] OKLA. STAT. ANN. tit. 11, § 44-107.1(a) (West 2009).