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

RHODE ISLAND

This memorandum summarizes Rhode Island 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 Rhode Island 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—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 Rhode Island, 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.

Article 1, § 16, of the Rhode Island Constitution mirrors the language of the U.S. Constitution. Accordingly, the Rhode Island Supreme Court has held that it imposes the same two limitations on the power of eminent domain: (1) private property may be taken only for public use, and (2) the taking must be accompanied by just compensation.[10] Whether a taking constitutes a public use is a judicial question.[11] But once the nature of the use is established as public, the necessity and expediency of the taking to further the public use is purely a legislative question in which the courts do not engage.[12]

The Supreme Court of Rhode Island has traditionally embraced an expansive view of the concept of public use. In *Romeo v. Cranston Redevelopment Agency*, it held that the meaning of the concept must evolve with the "changing conceptions of the scope and functions of government."[13] Moreover, the Rhode Island Constitution authorizes the use of eminent domain for redevelopment purposes, including the sale of condemned property to "private persons for private use."[14]

Nonetheless, Rhode Island courts are mindful of their obligation to examine proffered public uses for validity, and, in the wake of *Kelo*, the Rhode Island Supreme Court seems to have taken a renewed interest in judicial scrutiny of legislative claims of public use. In *Rhode Island Economic Development Corp. v. The Parking Group*, the Rhode Island Supreme Court rejected the Economic Development Corp.'s claim that its condemnation of an easement in a privately owned airport parking lot was intended to serve the public purpose of providing public parking. After carefully examining the record, which revealed that the condemnation would not, in fact, increase the number of available parking spaces, the court concluded that the effort to condemn

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] R.I. Econ. Dev. Corp. v. The Parking Co., 892 A.2d 87, 96 (R.I. 2006).
[11] *Id.*
[12] *Id.*
[13] Romeo v. Cranston Redev. Agency, 254 A.2d 426, 431 (R.I. 1969).
[14] RI. CONST. art. 6, § 18.

the property was motivated by a desire to evade a prior contractual obligation and increase revenues, which are not valid public purposes.[15]

Thus, in Rhode Island, communities seeking to condemn private property to pursue initiatives to combat childhood obesity will not be unduly limited by the requirement that their condemnations serve a legitimate public purpose, as long as the true public purpose for the condemnation is a valid function of local governments. Condemning private property for public recreation facilities, such as parks, playgrounds, and walking and biking trails that are publicly owned and openly accessible are quintessential examples of public use. In addition, the concept of public use in Rhode Island is expansive and evolving, and may go beyond those traditional public purposes to include other uses related to combating childhood obesity. However, Rhode Island courts are vigilant against pretextual claims of public purpose, so communities should carefully plan for and target truly legitimate public health goals.

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 multi-factored 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.

Rhode Island 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.[20] In reality, very few land use regulations satisfy these demanding standards for per se takings liability. A

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[15] *R.I. Econ. Dev. Corp.*, 892 A.2d at 105-07.
[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] Alegria v. Keeney, 687 A.2d 1249, 1252-54 (R.I. 1997) (analyzing and applying federal precedents); Woodland Manor III Assocs. v. Keeney, 713 A.2d 806, 811 (R.K. 1998) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992)).

permanent physical occupation occurs only where there is a compelled physical occupation of property pursuant to governmental coercion that will last indefinitely.[21] And regulations have been held to deprive a landowner of all economically viable use of her property only in cases where the landowner was effectively prohibited from making any use of the property.[22] In *Annicelli v. Town of South Kingstown*, for example, the town was required to compensate the landowner after designating his property as part of a "high flood danger" district because the record revealed that "all reasonable and beneficial use of [his] property ha[d] been rendered an impossibility."[23]

Most zoning regulations do not fall into the per se takings categories. 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. These run of the mill zoning restrictions are rarely held to require compensation. For regulations that do not implicate one of the two per se rules, Rhode Island courts continue to follow federal precedent to determine if a regulatory taking has occurred.[24] In particular, Rhode Island courts will review a takings challenge to a run of the mill zoning regulation under an "essentially ad hoc, factual inquir[y]"[25] that focuses on three factors: (1) the economic impact of the regulation on the property owner; (2) the character of the governmental action, in particular whether it amounts to a physical invasion or mere regulation of land use; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations.[26]

Most of the recent regulatory takings cases in Rhode Island involve denials of permission to fill and develop wetlands. In these cases, the Rhode Island courts have made clear their view that the Penn Central factors afford communities great leeway in regulating land use to promote the public interest without incurring compensation liability. For example, in *Palazzolo v. State*, the landowner was denied a permit to fill a wetlands and develop a subdivision on the property. After years of litigation, including an appeal to the United States Supreme Court, the landowner eventually lost his takings challenge because the land still retained residual, albeit much lower, value without the large subdivision.[27]

Because Rhode Island 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

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[21] *Woodland Manor III Assocs.,* 713 A.2d at 811.
[22] Annicelli v. Town of S. Kingstown, 463 A.2d 133, 140 (R.I. 1983) ("[W]e have said that a zoning ordinance is not confiscatory merely because the property cannot be put to its most profitable use.").
[23] *Id.*
[24] *Alegria*, 687 A.2d at 1252-54.
[25] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
[26] *Alegria*, 687 A.2d at 1252-54; *see also* Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 713-14 (R.I. 2000).
[27] Palazzolo v. State, 2005 WL 1645974 (R.I. Super. Ct. July 5, 2005).

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 Rhode Island generally will not be able to do this without paying compensation.

Rhode Island law protects the rights of landowners to continue to engage in existing, lawful uses of their property notwithstanding the enactment or amendment of a zoning ordinance prohibiting the existing use. The Zoning Enabling Act provides that "[a]ny city or town adopting or amending a zoning ordinance under this chapter shall make provision for any use, activity, structure, building or sign or other improvement, lawfully exisiting at the time of the adoption or amendment of the zoning ordinance, but which is nonconforming by use or nonconforming by dimension."[28] Although a community may permit a landowner to expand a nonconforming use, the right to continue such use does not necessarily embrace the right to expand it.[29] A landowner who impermissibly expands a nonconforming use will forfeit his right to continue that use.[30] In *Town of Richmond*, the Supreme Court of Rhode Island found that a landowner lost his right to continue using his property as a campground when he expanded the number of campsites and enlarged a road, thereby impermissibly expanding the nonconforming use.[31]

The right to continue a nonconforming use runs with the land, but it will be lost if the landowner expands or abandons the nonconforming use.[32] Proof of abandonment requires proof of intent to abandon and at least one overt act.[33] In *Duffy v. Midler*, the Supreme Court of Rhode Island held that the right to continue using land as a horse farm was abandoned when the owners requested a zone change to develop their property into condominiums.[34] Similarly, in *Souza v. Zoning Board of Review of Warren*, the Supreme Court of Rhode Island held that a change from a woodworking, plumbing, and heating shop to an auto body works was a substantial change in use causing the loss of nonconforming use protection. [35] But in *Town of Coventry v. Glickman*, the court held the town failed to prove that the federal government intended to abandon its nonconforming use as a housing subdivision.[36] Therefore, the court permitted the government to sell the nonconforming homes to private parties.[37] Similarly, in *Washington Arcade Associates v. Zoning Board of Review of North Providence*, the court held that a nonconforming concrete manufacturing plant was not abandoned when it was merely discontinued for a number of years.[38]

Thus, because landowners in Rhode Island are entitled to continue existing lawful uses even though a newly adopted or amended zoning ordinance prohibits that use, communities seeking to

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[28] R.I. GEN. LAWS § 45-24-39 (2008).
[29] 842 Elmwood Ave., LLC v. Carlson, 2006 WL 2406003 (R.I. Super. Ct. Aug. 9, 2006).
[30] Town of Richmond v. Wawaloam Reservation, 850 A.2d 924, 933 (R.I. 2004).
[31] *Id*. at 935.
[32] Town of Coventry v. Glickman, 429 A.2d 440, 442 (R.I. 1981) ("A mere change in ownership does not destroy the nonconforming use.").
[33] Washington Arcade Assocs. v. Zoning Bd. of Review of N. Providence, 528 A.2d 736, 738 (R.I. 1987).
[34] Duffy v. Milder, 896 A.2d 27, 38 (R.I. 2006).
[35] Souza v. Zoning Bd. of Review of Warren, 248 A.2d 325, 326-27 (R.I. 1986).
[36] *Glickman*, 429 A.2d at 442.
[37] *Id*.
[38] *Washington Arcade Assocs.*, 528 A.2d at 738.

prohibit certain land uses to combat childhood obesity will not be able to require landowners to immediately discontinue existing uses without paying compensation for the loss of the right to continue such uses.