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

DELAWARE

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

---

[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

property, while in King County the acquisition is by eminent domain and involves full title. In contrast, the Los Angeles and Naperville ordinances are two distinct examples of land use restrictions. The Los Angeles ordinance limits what landowners can do with their private property, while the Naperville ordinance imposes an affirmative requirement on private landowners.

These four specific initiatives illustrate the two primary tools available to communities that seek to use land use initiatives to prevent childhood obesity: They can rely on their power of eminent domain, on their land use regulatory authority, or both. The first option—relying on the power of eminent domain to acquire ownership interests in real property—may be used to provide public infrastructure such as parks, playgrounds, and recreational trails to promote healthy, active lifestyles. The second option—adopting land use restrictions applicable to private property—may be used to limit undesirable land uses (such as fast-food restaurants) in vulnerable neighborhoods or to require private property owners to do certain things on their property (such as install bicycle parking structures or stock healthy food in corner stores).

Communities that set out to combat childhood obesity by changing their physical environment using eminent domain or land use regulation will face limitations from both federal and state law in both contexts. The federal limitations come from the Fifth Amendment to the U.S. Constitution, which states: "[N]or shall private property be taken for public use without just compensation." This prohibition is interpreted in two parts. First, private property may not be taken unless it is for public use.[7] Second, if a land use restriction imposes such a burden on private property that the courts conclude it is the equivalent of a taking, the government must pay just compensation.[8] A comprehensive analysis of the scope and extent of these federal constitutional limits can be found at www.nplan.org/nplan/products/takings_survey. In addition to the federal constitutional limitations, every state imposes its own restrictions on the exercise of eminent domain and the imposition of land use regulations by its communities. These limitations, contained in state constitutions as well as statutes, may be more protective of private property than the federal Constitution, and they generally take three forms. First, state laws might incorporate a narrower definition of "public use," such that a legislative objective that satisfies the public use requirement of the federal Constitution would be invalid under state law. Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution. Finally, state law may require a community to tolerate certain negative aspects of the physical environment (such as fast-food restaurants) that it would rather eliminate, just because those elements were present before the community undertook its reform initiative—commonly referred to as "grandfathering."

Communities interested in using land use initiatives to change their physical environment and thereby combat childhood obesity have to be aware of these restrictions on their eminent domain powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Delaware, including constitutional and statutory provisions that limit the eminent domain power or require communities to compensate

---

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).

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 government for public use. A community may wish to combat childhood obesity by providing children with more opportunities to engage in active play. To do this, it might want to purchase private property and convert it into a park, a playground, a path for biking or hiking, or some other publicly owned property designed to encourage children to live more actively. Ideally, the community could negotiate an acceptable purchase price with the current owner of the property, and the sale would be entirely voluntary. Occasionally, however, the owner of the parcel that the community wants to use for public recreation 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 fair market prices and put the property to public use. The federal constitution has very little 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 Delaware Constitution provides that no "man's property [shall] be taken or applied to public use without the consent of his representatives, and without compensation being made."[9] Although the Superior Court of Delaware has said that this provision is essentially coterminous with the U.S. Constitution,[10] it has also made clear that the ultimate determination of what constitutes a public use is ultimately a judicial question.[11] Moreover, the Superior Court has endorsed an exacting scrutiny of projects that purport to serve a public purpose but also entail substantial private benefits.[12] According to Delaware courts, a challenged use qualifies as a public use or purpose so long as the dominant or underlying purpose of the project is to benefit the general public. In such cases, even if a substantial portion of the project serves a private interest, the exercise of eminent domain will be valid.[13] The Superior Court applied this principal in *Wilmington Parking Authority v. Ranken* to uphold the exercise of eminent domain to establish a public parking garage, even though a significant portion of the garage was leased to private parties for commercial use.[14] In contrast, in *Wilmington Parking Authority v. Land with Improvements*, the Superior Court invalidated the exercise of eminent domain to build a parking garage when the trial court had determined that the paramount benefit of the garage was to the *Wilmington News-Journal* and the city's primary purpose was to retain the *News-Journal*.[15] Thus, in Delaware, courts are obligated to scrutinize the primary purpose of a project if the exercise of eminent domain would entail substantial benefit to a private party. This scrutiny is

---

[9] DEL. CONST. art. 1, § 8.
[10] *See* Wilmington Parking Auth. v. Land with Improvements, 521 A.2d 227, 231 (Del. Super. Ct. 1986).
[11] Wilmington Parking Auth. v. Ranken, 105 A.2d 614 (Del. Super. Ct. 1954).
[12] *See, e.g., Land with Improvements,* 521 A.2d at 231.
[13] *Id.*
[14] *Ranken*, 105 A.2d 614.
[15] *See, e.g., Land with Improvements,* 521 A.2d at 231.

unlikely to serve as an impediment to projects undertaken to combat childhood obesity, however, because these projects—such as parks, playgrounds, and walking trails—rarely provide substantial benefits to private entities. Moreover, to the extent such a project would entail substantial private benefits, the community's power to use eminent domain should be upheld as long as it can demonstrate that its primary purpose is to combat childhood obesity.

After the U.S. Supreme Court's decision in *Kelo v. City of New London*,[16] the Delaware Code was amended to limit the use of eminent domain for economic development purposes. This provision defines public use to encompass the use of land by the general public, public agencies, and common carriers, and specifically excludes "the generation of public revenues, increase in tax base, tax revenues, employment or economic health, through private land owners or economic development" from the definition of public use.[17] This provision further authorizes the exercise of eminent domain for the removal of blighted areas and structures that are beyond repair or unfit for human habitation or use, and for the acquisition of abandoned real property, if doing so eliminates "a direct threat to public health and safety caused by or related to the real property in its current condition."[18] If condemned property is to be owned, occupied, or developed by a private entity, the condemning authority must demonstrate by clear and convincing evidence that the use of eminent domain complies with the definition of public use in the statute.[19] Since policy initiatives undertaken to combat childhood obesity will not be motivated by economic development concerns, these amendments should not affect a community's authority to use eminent domain for such initiatives.

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.[20] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[21] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[22] A regulation that does not satisfy one of the bright-line rules will

---

[16] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[17] DEL. CODE ANN. tit. 29, § 9501A(a)(2009).
[18] *Id*.
[19] *Id*. § 9501A(c).
[20] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[21] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[22] Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

rarely be considered a taking under the U.S. Constitution.[23] 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.

Delaware courts do not appear to have interpreted the Delaware Constitution as providing more robust protections for private property rights than does the U.S. Constitution. Many recent regulatory takings decisions of the Superior Courts have been issued in unpublished opinions.[24] These decisions essentially apply federal precedents to resolve both state and federal takings claims. The courts have made clear that the determination of whether a land use regulation constitutes a compensable taking "depends upon essentially ad hoc, factual inquiries into the circumstances of a particular case, rather than any set formulation" and applies the factors of the *Penn Central* case.[25] Thus, "[t]o determine whether there has been a temporary or partial regulatory taking, the factors are: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."[26] As with federal takings claims, therefore, most basic land use regulations will not constitute compensable takings.

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

Delaware law protects the right 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.[27] In other words, a community that wishes to prohibit an existing use of land through zoning change cannot order its immediate cessation without compensating the landowner. However, provisions in zoning ordinances permitting the continuation of a nonconforming right are strictly construed in Delaware, while provisions for limiting nonconforming uses are liberally construed.[28] Thus, while a landowner may continue a nonconforming use, he may not change the use to another nonconforming use or undertake a significant change in the nature of the prior nonconforming use.[29] Moreover, the right to continue

---

[23] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[24] *See, e.g., In re* 244.5 Acres of Land: The Village, LLC v. Del. Agric. Lands Found., 2001 WL 168101 (Del. Super. Ct. Jan. 19, 2001) (unpublished opinion).
[25] Goldberg v. City of Rehoboth Beach, 565 A.2d 936, 944 (Del. Super. Ct. 1989) (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).
[26] Wilmington Hospitality, LLC v. New Castle County, 2005 WL 1654024, at *3 (Del. Super. Ct. May 24, 2005).
[27] Hooper v. Del. Alcoholic Beverage Control Comm'n, 409 A.2d 1046, 1049 (Del. 1979).
[28] *Id.*
[29] *Id*. at 1050.

a nonconforming use will be lost if the existing use is abandoned.[30] Abandonment requires intent by the owner to "to abandon or relinquish the use with an overt act, or failure to act shows the commutation of that intention."[31]

Delaware protects private owners by grandfathering their lawful nonconforming use, but the right to continue a nonconforming use will be interpreted narrowly, and a community's efforts to limit the nonconforming use will be interpreted liberally. Therefore, while communities wishing to eliminate existing uses to combat childhood obesity must wait for the owner of such uses to alter or abandon them, courts will construe favorably their attempts to prove that the use has been altered or abandoned.

---

[30] Auditorium v. Bd. of Adjustment of Mayor & Council of Wilmington, 91 A.2d 528 (Del. 1952).
[31] *Id*.