

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

FLORIDA

This memorandum summarizes Florida 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 Florida 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 dedication⁶ and involves a partial interest in the property, while in King County the acquisition is by eminent domain and involves full title. In

¹ See, e.g., KELLY D. BROWNELL & KATHERINE BATTLE HORGAN, *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 Florida, 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

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.

In the wake of the U.S. Supreme Court’s decision in *Kelo v. City of New London*, Florida passed both statutory and constitutional amendments significantly circumscribing the power of communities to use eminent domain for economic development purposes. Private property is protected under the Florida Constitution—“No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . . .”¹⁰ The constitution does not expressly prohibit the taking of private property for economic development or for the transfer to another private owner. On May 11, 2006, the Florida legislature passed House Bill 1567, which made it very difficult for communities to condemn private property for either of those purposes. In particular, this statute requires communities to wait at least ten years after condemning private property before transferring the land to another private party.¹¹ After ten years in state custody, a competitive bidding process must take place before the property can be transferred to another owner.¹² However, the legislature carved out five narrow exceptions to this rule.¹³ Property taken for any of the following reasons is not subject to the ten-year restriction:

1. For use in providing common carrier systems
2. For use as a road or toll road
3. For public services or utilities
4. For use in providing public infrastructure
5. For the purpose of providing goods and services to the public, if the transferee is a lessee of an incidental part of a public property or facility¹⁴

⁹ *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.

¹⁰ FLA. CONST. art. X, § 6(a).

¹¹ FLA. STAT. ANN. § 73.013(1) (West 2009).

¹² *Id.* § 73.013(1)(g).

¹³ *Id.* § 73.013(1)(a)-(e).

¹⁴ *Id.*

The first four exceptions make clear that the limitations on the power of eminent domain are not intended to impede a community's ability to provide for traditional public uses, even if the provision of those uses requires the transfer of condemned property to another private party. Since many local initiatives that rely on the power of eminent domain to promote healthy lifestyles will involve such traditional public uses as parks, playgrounds, and hike and bike trails, this reform is not likely to interfere with these initiatives. Moreover, the fifth exception would allow a locality to use eminent domain to take a large tract of land for a traditional public purpose and then lease an "incidental" portion of the acquired tract to a private entity, so long as the private entity provided goods or services to the public. For example, a city or municipality could use eminent domain to create a public park and subsequently lease a small piece of the park to a concession stand that sold healthy snacks.

There is one more exception to the ten-year restriction on alienability: If fewer than ten years have passed, condemned land may be transferred (after notice and bidding) to another person if two conditions are met. First, the condemning authority must document that the property is no longer needed for the purpose for which it was acquired, and second, the original owner must be given the chance to repurchase the property at the same price he or she received from the condemning authority.¹⁵ Because the land must first be offered back to the original owner and because there must be a competitive bidding process, this provision may not be helpful, and a locality should not rely on it in hopes of transferring condemned land to a private entity.

Unlike most states, Florida did not include a blight exception in its prohibition on the use of eminent domain for economic development. In addition to imposing a ten-year restriction on alienability, House Bill 1567 prohibits the use of eminent domain to eliminate a public nuisance, slum, or blight conditions.¹⁶ In the past, communities were permitted to legally condemn land and sell it to a private developer for the purposes of eliminating blight, which was defined as "synonymous with urban decay."¹⁷ As it stands now, the elimination of public nuisance and blight is no longer a valid public purpose for which private property may be taken by eminent domain, as it does not satisfy the public purpose requirement of article X, section 6(a), of the Florida Constitution.¹⁸

In addition to statutory reform, the citizens of Florida amended the state's constitution to limit the government's eminent domain power. The amendment became effective on January 2, 2007, and required the approval of a three-fifths supermajority to pass any future law that would allow private property taken by eminent domain to be conveyed to a private entity.¹⁹ In other words, any future law granting an exception to the state's general prohibition against using eminent domain for private development must be passed by a three-fifths majority in both houses; the support of a mere simple majority is not sufficient. This additional layer of protection reinforces Florida's commitment to its post-*Kelo* statutory reforms.

¹⁵ *Id.* § 73.013(1)(f).

¹⁶ *Id.* § 73.014(1)-(2).

¹⁷ *City of Hollywood Redev. Agency v. 1843, LLC*, 980 So. 2d 1138, 1141-44 (Fla. Dist. Ct. App. 2008).

¹⁸ FLA. STAT. ANN. § 73.014(1)-(2).

¹⁹ FLA. CONST. art. X, § 6(c).

Notwithstanding these significant post-*Kelo* reforms, communities in Florida still enjoy broad discretion to condemn property for traditional public purposes, such as parks, playgrounds, and hike and bike trails. The post-*Kelo* reforms, however, will make it more difficult or even impossible for communities to pursue more innovative projects that require transferring the condemned property to another private owner, unless the community can demonstrate that the project provides public infrastructure.

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. Land use regulations such as these rarely implicate takings concerns, and governments are generally free to adopt such regulations without incurring takings liability.

Some land use regulations, however, 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 multifactor test.²² A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.²³

Florida courts follow U.S. Supreme Court precedent and categorize two classes of per se takings: (1) cases of permanent physical occupation and (2) cases in which a regulation denies a landowner all economically viable use of the property.²⁴ In reality, very few land use regulations satisfy these demanding standards for automatic (per se) takings liability. A permanent physical occupation occurs only where there is a compelled physical occupation of property pursuant to governmental coercion that will last indefinitely.²⁵ 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.²⁶

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. For regulations that do not implicate one of the two per se rules, Florida has additional statutory protections that require compensation for regulatory burdens not rising to the level of a

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

²³ Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.

²⁴ *See Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 59 (Fla. 1994) (Barkett, C.J., concurring) (demonstrating that Florida follows *Lucas* and *Loretto*).

²⁵ *See Tampa-Hillsborough County Expressway Auth.*, 640 So. 2d at 59 (Barkett, C.J., concurring).

²⁶ *See id.*

taking under the state or federal Constitution. In other words, even if a land use regulation does not implicate compensation liability under state and federal constitutional analysis, communities may still be liable under Florida statute. The Bert J. Harris, Jr., Private Property Rights Protection Act (enacted in 1995) provides relief to owners who are inordinately burdened by a government regulation.²⁷ To have a cause of action under the act, a landowner must show that an existing use (or vested right to a specific use) of property has been inordinately burdened by a land use restriction. Such inordinate burden exists when

1. the owner is permanently unable to use the property according to his reasonable, investment-backed expectations due to the restrictions directly imposed by the regulation; or
2. the owner unfairly, permanently bears a disproportionate share of a burden imposed for the good of the public when considering the unreasonable uses of the land the owner is left with.²⁸

If a landowner prevails on a claim under the act, he will be entitled to damages at least equal to the actual loss to the fair market value of the property caused by the government. However, damages are not limited to actual loss.²⁹

The act contains several exclusions, under which the landowner will not have a cause of action and the community will not be liable for compensation. For example, if the government action is taken in response to a common law public nuisance, it cannot be considered an inordinate burden.³⁰ A common law public nuisance is “an interference with a right common to the general public.”³¹ Blight may constitute a public nuisance.³² However, when exercising its authority to regulate land to eliminate a public nuisance, the government shoulders the burden to prove the purpose of its regulation was to control a public nuisance in order to avoid having to compensate the owners.³³ In addition, any regulation that only temporarily burdens property is not considered an inordinate burden.³⁴ The court is the ultimate arbiter in determining whether the regulation is temporary or permanent in nature.

Although the Bert J. Harris Act is now fifteen years old, there remain more questions than answers concerning its reach and application. To date, the Florida Supreme Court has not decided a case interpreting the act, and a Westlaw search revealed only a few appellate court decisions applying it. In none of those decisions did the landowner prevail.³⁵ Key among the

²⁷ FLA. STAT. ANN. § 70.001(2) (West 2009).

²⁸ *Id.* § 70.001(3)(e); *see also* *Citrus County v. Halls River Dev.*, 8 So. 3d 413, 421 (Fla. Dist. Ct. App. 2009) (discussing the Bert J. Harris Act).

²⁹ FLA. STAT. ANN. § 70.51.

³⁰ *Id.* § 70.001(3)(e).

³¹ 1 STATE ENVTL. LAW § 3:1 (2008).

³² *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 867 (Fla. 2001).

³³ *Id.*

³⁴ FLA. STAT. ANN. § 70.001(3)(e).

³⁵ *See City of Jacksonville v. Coffield*, 18 So. 3d 589, 595 n.4 (Fla. Dist. Ct. App. 2009) (stating “[w]e have found no case in which an appellate court has affirmed relief granted pursuant to the Act” and collecting cases). For a general discussion of the Harris Act, *see* Susan L. Trevarthen, *Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims*, 78 Fla. B.J. 61 (July-Aug. 2004).

reasons that landowners do not prevail under the act seems to be their inability to establish that the government action has burdened an *existing use* of the property. The act specifies that

[t]he term “existing use” means an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.³⁶

Appellate courts in Florida have interpreted this phrase very narrowly. For example, in *City of Jacksonville v. Coffield*, the District Court of Appeal for the First District overturned the trial court’s conclusion that the landowner’s intention to subdivide his property into eight lots to build single family houses was a “reasonably foreseeable, nonspeculative land use[.]”³⁷ In fact, in a case predating the enactment of the Bert J. Harris Act, the Fourth District has held that possession of a valid building permit does not necessarily create a vested property right.³⁸ Moreover, in *M&H Profit v. City of Panama City*, the District Court of Appeal for the First District held that the act provides only an as-applied challenge, and that the landowner’s facial challenge to the ordinance could not proceed.³⁹ Accordingly, it rejected a landowner’s suit for compensation under the Bert J. Harris Act after the city enacted zoning ordinances imposing height restrictions and additional setback allowances on commercial property.⁴⁰

The Florida Land Use and Environmental Dispute Resolution Act provides procedural relief to landowners who have been burdened by a regulation not quite rising to the level of a taking.⁴¹ It provides for the appointment of a special master to seek mutually acceptable resolutions to land use disputes arising out of development orders or enforcement actions. In particular, a landowner who believes she has been inordinately burdened by a land use development order or enforcement action can file a request for relief from a special magistrate, who holds a hearing and, based on factual findings, may take a variety of actions ranging from “land swaps or exchanges”⁴² to issuance of a variance or an exception for the landowner to compensation from the government.⁴³ The Dispute Resolution Act applies only to development orders or enforcement actions that have unreasonably or unfairly burdened the landowner’s use of property.⁴⁴ To evaluate what constitutes an unreasonable or unfair burden, the statute provides a nonexhaustive list of factors, including:

1. The history of the property (e.g., when it was purchased, for how much, how it was initially used)

³⁶ FLA. STAT. ANN. § 70.001(3)(b).

³⁷ *City of Jacksonville*, 18 So. 3d at 595.

³⁸ *See City of Boynton Beach v. Carroll*, 272 So. 2d 171, 173 (Fla. Dist. Ct. App. 1973).

³⁹ *M&H Profit v. City of Panama City*, 28 So. 3d 71, 75-77 (Fla. Dist. Ct. App. 2009).

⁴⁰ *M&H Profit*, 28 So. 3d 71.

⁴¹ FLA. STAT. ANN. § 70.51(4)-(19).

⁴² *Id.* § 70.51(19)(b)(4).

⁴³ *Id.* § 70.51(19)(b)(9).

⁴⁴ *Id.* § 70.51(3).

2. The development and use of the property (e.g., was it subdivided and sold)
3. The history of environmental protection (e.g., how the land was classified)
4. The present nature of the property
5. The reasonable expectations of the owner during acquisition or right before the regulation
6. The public purpose of the government action, and whether any alternatives are available
7. Uses and restrictions placed on similar property
8. Any other relevant information⁴⁵

The Florida judiciary has discretion in determining when these factors “tip the scale” in favor of the property owner. The Florida Supreme Court has not yet fleshed out these factors.⁴⁶

The legal landscape in Florida creates ongoing uncertainty concerning the availability of traditional zoning strategies for communities interested in combating childhood obesity. The Bert J. Harris Act imposes liability for land use restrictions that inordinately burden existing uses of land, and the Land Use and Environmental Dispute Resolution Act offers landowners alternative dispute mechanisms for their challenges to proposed land use restrictions. While these acts do not seem to have increased the actual award of compensation to landowners in Florida, it is likely that they have discouraged zoning initiatives that might otherwise have been undertaken. Given the chilling effect of these acts, it is difficult to know for certain how the legislation would be applied to traditional land use initiatives 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 Florida generally will not be able to do this without paying compensation or providing for an amortization period that gives a landowner the opportunity to collect on her investment.

Implementation of a new zoning ordinance will normally cause some existing structures to become “nonconforming,” such as a steel mill in an area zoned for light industry. Landowners are typically permitted to continuing their nonconforming uses.⁴⁷ For example, if an area previously zoned for commercial use were rezoned as single-family residential, a previously existing fast-food chain would be permitted to continue operating. Florida law recognizes “grandfathering” prior nonconforming uses under the general principle that “zoning regulations do not generally operate to limit the right of a landowner to continue such uses of land and structures as were in existence at the time of the adoption of the regulations. . . .”⁴⁸ Common law

⁴⁵ *Id.* § 70.51(18)(a)-(h).

⁴⁶ John D. Echeverria & Thekla Hansen-Young, *Litigating Takings and Other Legal Challenges to Land Use and Environmental Regulation: Article: The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, 28 STAN. ENVTL. L.J. 439, 469 (2009).

⁴⁷ *State v. Danner*, 33 So. 2d 45, 47 (Fla. 1947).

⁴⁸ *Fortunato v. City of Coral Gables*, 47 So. 2d 321, 322-23 (Fla. 1950).

confers the authority by which prior nonconforming uses may be grandfathered.⁴⁹ The underpinning theory is “that it would [otherwise] be an injustice and unreasonable hardship to compel the immediate removal or suppression of an otherwise lawful business or use already established.”⁵⁰

The Courts of Appeals for the First and Second Districts of Florida have recognized that the termination of a grandfathered nonconforming use can constitute a compensable taking as well.⁵¹ In *Lewis v. City of Atlantic Beach*, the court rejected the City’s attempt to terminate the landowner’s prior nonconforming use when the property changed ownership. The court noted there might be times when the termination of a grandfathered nonconforming use rises to the level of a taking for constitutional purposes, which requires the payment of compensation.⁵²

Grandfathered prior nonconforming uses could, in theory, operate in perpetuity. Nonconforming uses, however, are generally not favored since they detract from the effectiveness of comprehensive zoning laws.⁵³ It is expected that nonconforming uses will be gradually eliminated over the course of time.⁵⁴ In order to make zoning ordinances more effective, Florida generally allows prior nonconforming uses to be eliminated in several ways: “by attrition (amortization), abandonment, and acts of God. . . .”⁵⁵ “The concept of grandfathered nonconforming use relates to the property and the use thereof, not to the type of ownership or leasehold interest in the property,” so that a change in ownership will not terminate the grandfathering.⁵⁶

Attrition (amortization) contemplates the eventual elimination of a nonconforming use by requiring its termination at the expiration of a specified period of time, after which the landowner has been given a sufficient opportunity to realize a return on his investment.⁵⁷ Although the Florida Supreme Court has not ruled on whether amortizing prior nonconforming uses is permissible, the court recognized the authority of a city to require the discontinuance of a nonconforming use if the ordinance can be justified as a reasonable exercise of its police power.⁵⁸ Applying Florida state law, the Fifth Circuit in *Standard Oil* upheld a Tallahassee ordinance that required nonconforming gas stations to be discontinued within six months.⁵⁹ The zoning ordinance in question prohibited gas stations from being located within a certain distance of the State Capitol, public schools, and other governmental buildings. The court reasoned that

⁴⁹ *Id.* at 322; *Danner*, 33 So. 2d at 47.

⁵⁰ *Fortunato*, 47 So. 2d at 322-23.

⁵¹ *Lewis v. City of Atlantic Beach*, 467 So. 2d 751, 754 (Fla. Dist. Ct. App. 1985); *3M Nat’l Adver. Co. v. City of Tampa Code Enforcement Bd.*, 587 So. 2d 640, 641 (Fla. Dist. Ct. App. 1991) (citing *Lewis*).

⁵² *Lewis*, 467 So. 2d at 755-56.

⁵³ *3M Nat’l Adver. Co.*, 587 So. 2d at 641; Fla. Att’y Gen. Advisory Legal Op. AGO 97-65 (Sept. 25, 1997).

⁵⁴ *3M Nat’l Adver. Co.*, 587 So. 2d at 641.

⁵⁵ *Lewis*, 467 So. 2d at 754-55; *see also* *Bixler v. Pierson*, 188 So. 2d 681 (Fla. Dist. Ct. App. 1966).

⁵⁶ *Lewis*, 467 So. 2d at 754.

⁵⁷ *Id.* at 755.

⁵⁸ *Adams v. Hous. Auth. of Daytona Beach*, 60 So. 2d 663, 666 (citing *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410, 412-13 (5th Cir. 1950)). *Cf.* *Haire v. Fla. Dep’t of Agric. & Consumer Servs.*, 870 So. 2d 774, 783 n.8 (Fla. 2004) (distinguishing amortization from disallowing eminent domain to condemn all real property within a project area for proposed public housing); *Baycol, Inc. v. Downtown Dev. of Fort Lauderdale*, 315 So. 2d 451, 457 (Fla. 1975).

⁵⁹ *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410, 412-13 (5th Cir. 1950).

this was a reasonable exercise of the zoning power of a municipality because it related to the safety and general welfare of the community.⁶⁰

Along these lines, a locality may be able to require the discontinuation of fast-food restaurants located in proximity to schools if it could make a showing that the discontinuation was reasonably related to the safety and general welfare of the community. Before the locality can extinguish the nonconforming use, however, the owner must be given a reasonable opportunity to realize a return on her investment.⁶¹ With few exceptions, Florida courts have not ruled on what length of time constitutes a reasonable period necessary for a landowner to amortize her investment.⁶² Consequently, communities should take care to ensure that any amortization period imposed on a prior nonconforming use affords the property owner reasonable time in which to recoup her initial investment. If a court determines the amortization period was unreasonable, it may require payment of compensation.

Nonconforming uses may also be eliminated by abandonment. Localities may require that nonconforming uses cannot be reestablished after they have been abandoned for a certain period of time.⁶³ In *Peters*, the Florida Supreme Court held that the sale of liquor at a bar could not be reestablished after the use had been discontinued for over six months because the bar operator had been incarcerated for illegal gambling. Some jurisdictions require that the abandonment must be voluntary; however, in Florida it is unclear whether the owner's intent to abandon must be shown. In *Peters*, it appears as if the abandonment was involuntary, due to the bar operator's incarceration, but the Florida Supreme Court also notes that no effort was made to renew the original liquor license within the six-month discontinuance period.⁶⁴ Therefore, an argument could be made that failure to renew the liquor license constituted voluntary abandonment. Abandonment must also be more than a temporary cessation.⁶⁵ In a different case, *City of Miami Beach*, the Florida Supreme Court held that merely shutting down a business for the purpose of making repairs does not constitute discontinuance for the purpose of the ordinance.⁶⁶

Florida law is very protective of property rights. House Bill 1567 (with results seen in section 73.013) and the Florida Land Use and Environmental Dispute Resolution Act, constrain eminent domain authority and impose procedural obligations and substantive liability on state and local governments for land use restrictions that would not otherwise constitute takings. Prior nonconforming uses are grandfathered and must be permitted to terminate voluntarily or through amortization. Thus, communities in Florida that wish to rely on land use restrictions and eminent domain to pursue initiatives to combat childhood obesity will face significant hurdles.

⁶⁰ *Id.*

⁶¹ *Lamar Adver. v. City of Daytona Beach*, 450 So. 2d 1145, 1150 (Fla. Dist. Ct. App. 1984).

⁶² In *Lamar Advertising*, the Fifth District held that ten years was a sufficiently reasonable period of time for a billboard owner to realize a return on her investment. 450 So. 2d at 1150.

⁶³ *Peters v. Thompson*, 68 So. 2d 581 (Fla. 1953).

⁶⁴ *Id.* at 584.

⁶⁵ *City of Miami Beach v. State ex rel. Parkway Co.*, 174 So. 443, 445 (Fla. 1937).

⁶⁶ *Id.*

