

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

GEORGIA

This memorandum summarizes Georgia 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 Georgia 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

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

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.

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 Georgia, including constitutional and

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).

statutory provisions that limit the eminent domain power or require communities to compensate landowners for validly adopted land use restrictions. Section 1 addresses limitations on the exercise of the power of eminent domain. Section 2 addresses limitations on the imposition of land use restrictions through changes in zoning laws. Section 3 explores the scope of the requirement that existing land uses be “grandfathered” under any new zoning regime.

1. Eminent Domain and the Requirement of Public Use

Eminent domain is the forced sale of private land to the public for public use. A community may wish to combat childhood obesity by providing children with more opportunities to engage in active play. Ideally, a community that wants to convert private property to a public use negotiates an acceptable purchase price with the current owner of the property, and the sale is entirely voluntary. Occasionally, however, the owner of the parcel does not wish to sell. In these circumstances, many communities have the authority to compel the landowner to sell the property, as long as they pay a fair market price and put the property to public use. The federal Constitution has very little to say about the meaning of the phrase “public use,” and under federal law this requirement barely constrains communities, especially after the Supreme Court’s decision in *Kelo v. City of New London*. 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.”

Georgia is one of the states that enacted post-*Kelo* eminent domain reform. This new legislation permits communities to condemn property for public use,⁹ but with certain limitations. The municipality must take substantial steps toward putting the property to its public use within five years; if it does not, the owner may be entitled to have the land returned or receive additional compensation.¹⁰ Further, condemned property may not be used for any nonpublic use for at least twenty years.¹¹ In addition, the Georgia legislature narrowed the definition of “public use” to specifically exclude economic benefits.¹² However, even under these stricter Georgia state standards, the “public use” definition would have little effect on efforts to condemn private property for public parks or recreational facilities, as long as the condemning entity intended to implement the public use in a timely fashion.

Georgia’s statutory limitation on the use of eminent domain powers contains an exception for governmental responses to blight. Thus, local governments may exercise the power of eminent domain, even for economic development purposes, in response to blighted conditions.¹³ Georgia law narrowly defines “blight” as an urbanized or developed property that meets at least two of six listed criteria: (1) it has unsafe, uninhabitable, or abandoned structures; (2) it has inadequate

⁹ GA. CODE ANN. § 22-1-2(a) (West 2008).

¹⁰ *Id.* § 22-1-2(c).

¹¹ *Id.* § 22-1-2(b).

¹² *Id.* § 22-1-1(9)(B).

¹³ *Id.* § 22-1-1(9)(A)(vi); *see also* *Chestatee Pyrites Co. v. Cavenders Creek Gold Mining Co.*, 46 S.E. 422, 423 (Ga. 1903) (stating that “[t]he right of eminent domain . . . lies dormant until the legislature sets it in motion. As the legislature can not in every case supervise the condemnation, it may confer the power upon agencies. . . . The power thus conferred is always to be strictly construed, and will not be permitted to be exercised except where it is affirmatively granted.”).

provisions for ventilation, light, air, or sanitation; (3) it poses an imminent harm to life or other property due to a state-declared emergency; (4) it meets specific standards of environmental contamination; (5) it is the site of repeated illegal activity of which the owner should have known; or (6) maintenance of the property fails to comply with a state, county, or municipal code for more than a year after notice of the code violation.¹⁴ In addition, the property must be conducive to ill health, transmission of disease, infant mortality, or criminal activity in the surrounding area.¹⁵ Where blighted conditions exist, governments are authorized to use eminent domain as part of a comprehensive redevelopment plan.¹⁶ However, the municipality's governing body must approve any redevelopment plan.¹⁷

Thus, notwithstanding Georgia's statutory response to *Kelo*, local entities should have no impediment to exercising the power of eminent domain in order to build public recreational facilities since the legislation was enacted to limit the use of eminent domain for economic development, and these public projects have obvious noneconomic 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.

Some land use regulations, however, do require compensation. Any time a government entity adopts a land use regulation that imposes a permanent physical occupation on a private landowner or deprives the owner of all economically beneficial use of her property, the government will be obligated to pay compensation to the landowner.¹⁸ 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. For example, in *Loretto* the U.S. Supreme Court found that a law requiring a landlord to permit a cable company to install cable equipment was a permanent physical occupation.¹⁹ 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. For example, in *Palazzolo v. Rhode Island* the Supreme Court found that a law depriving the owner of the use of 18 of his 20 acres and 92 percent of the value of the land did not deprive the landowner of all the

¹⁴ GA. CODE ANN. § 22-1-1(1)(A).

¹⁵ *Id.* § 22-1-1(1)(B).

¹⁶ *Id.* § 8-4-2.

¹⁷ GA. CONST. art. IX, § 2, ¶ VII(a); GA. CODE ANN. § 8-4-5.

¹⁸ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

¹⁹ *Loretto*, 458 U.S. 419.

economically viable use of the property.²⁰ However, despite these demanding standards, some regulations seeking to curb childhood obesity may require compensation.

For land use regulations that do not implicate one of the per se takings rules, Georgia courts employ an “essentially ad hoc, factual inquir[y]” to determine whether compensation is required.²¹ This inquiry mirrors the inquiry under the federal constitution, and will turn in large part on the severity of the economic impact of the regulation and the degree to which the regulation interferes with quintessential property interests.²² In this regard, “[c]ourts generally conclude that so long as an ordinance allows some permissible use, a party will not be able to satisfy its burden of showing a complete lack of economically viable use.”²³ For example, in *Greater Atlanta Homebuilders Association v. DeKalb County*, the Greater Atlanta Homebuilders Association challenged a zoning ordinance that prohibited the felling of certain trees on the grounds that it amounted, in effect, to a taking for homebuilders.²⁴ The Supreme Court of Georgia held that this did not amount to a taking because the ordinance did not prevent homebuilders from developing the land; it restricted only the manner in which trees were managed during development.²⁵ Thus, while there is no set formula for determining when a zoning ordinance amounts to a compensable taking, courts will generally not require compensation for standard land use restrictions that permit ongoing, albeit limited, use of the property. Regulations aimed at combating childhood obesity that merely limit land use options will generally not require compensation.

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 he is currently putting his property. For example, the fast-food restaurant moratorium in South Los Angeles prohibited the opening of *new* fast-food restaurants but did not require any existing fast-food restaurant to cease operations. In some circumstances, however, 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

²⁰ *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

²¹ *Mann v. Ga. Dep’t of Corrs.*, 653 S.E.2d 740, 743 (Ga. 2007) (quoting *Pa. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

²² *Pa. Cent. Transp. Co.*, 438 U.S. at 124; *Mann*, 653 S.E.2d at 743. To illustrate the importance of economics, consider two cases: *Mann v. Georgia Department of Corrections* and *Mann v. State*. In *Mann v. State*, Mann, a sex offender, was living (essentially) rent free with his parents. *Mann v. State*, 603 S.E.2d 283, 285 (Ga. 2004). He was told by his probation officer that he would have to leave because his residence was within 1000 feet of a child care center, in violation of state statute. *Id.* Mann sued, alleging that his being forced to move amounted to a taking, but the court disagreed, finding that because Mann was living rent free, he had no economic stake in the house and thus no property interest to protect. *Id.* at 285-86. Conversely, in a later case, *Mann v. Georgia Department of Corrections*, the same Mann had moved to a home that was not within 1,000 feet of a child care center. *Mann v. Ga. Dep’t of Corrs.*, 653 S.E.2d 740, 742 (Ga. 2007). Thereafter, a child care center opened up within the 1,000 foot radius, and Mann was again instructed to move. *Id.* This time the court found that the forced move amounted to a regulatory taking because his property interest in a *purchased* home was significant. *Id.* at 743-44.

²³ *Greater Atlanta Homebldrs. Ass’n v. DeKalb County*, 588 S.E.2d 694, 697 (Ga. 2003).

²⁴ *Id.* at 696.

²⁵ *Id.* at 697.

establishments within a certain distance of schools, including those that are already operating. Communities in Georgia generally will not be able to do this without paying compensation.

Georgia law guarantees 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 that use, at least for a reasonable time.²⁶ Thus, prior nonconforming uses are not absolutely protected from subsequent land use restrictions. Although there are no cases elaborating on the meaning of “reasonable time,” such an inquiry is likely to be very fact-specific, considering, for example, the property’s existing use, the extent of economic investment in that use, and the amount of time that the property had been put to such use. In addition to amortizing prior nonconforming uses, governmental entities in Georgia may prohibit landowners from expanding or extending prior nonconforming uses.²⁷ Finally, the right to use property in a nonconforming manner will be lost if the prior use is abandoned.²⁸ To prove abandonment, a community must offer proof of intent to abandon the use, which is manifested in some overt act or omission.²⁹

Thus, communities in Georgia may implement anti-obesity measures that rely on phasing out prior nonconforming uses, as long as such uses are permitted to continue for a reasonable time. In the meantime, landowners can be prohibited from extending or expanding nonconforming uses, and any nonconforming use that is abandoned becomes unlawful.

²⁶ *Flippen Alliance for Cmty. Empowerment, Inc. v. Brannan*, 601 S.E.2d 106, 110 (Ga. Ct. App. 2004) (“a governing authority can require a nonconforming use to be terminated in a reasonable time”); *see also* *Gifford-Hill & Co. v. Harrison*, 191 S.E.2d 85 (Ga. 1972).

²⁷ *See, e.g., Troutman v. Aiken*, 96 S.E.2d 585 (1957) (upholding an ordinance that prohibited the extension of nonconforming uses “on the same or adjoining property”); *see also* *Cox v. City of Sasser*, 684 S.E.2d 385 (Ga. Ct. App. 2009) (holding that the building of a modular home is an unlawful extension of a landowner’s right to have a nonconforming mobile home on his property, in violation of the statutory prohibition on extending nonconforming use).

²⁸ *Ansley House, Inc. v. City of Atlanta*, 397 S.E.2d 419, 421 (Ga. 1990).

²⁹ *Id.*