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

LOUISIANA

This memorandum summarizes Louisiana 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 Louisiana 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

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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).

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 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

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[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.

[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).

powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Louisiana, 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 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 Louisiana the definition of "public use" is limited by the state's constitution.[10] Public use is restricted to three things: (1) a public right to a particular (limited) use of the property (like putting a public sidewalk on private property); (2) quintessentially public property (like parks, roads, bridges, museums, etc.); and (3) the removal of a threat to public health or safety.[11] Louisiana does not allow the taking of private property solely for economic development.[12] This limited definition of "public use" should not hinder childhood obesity initiatives, as most of these involve quintessential public uses like parks and bike trails. Where municipal governments may have some difficultly is in taking land for pro-health private uses, such as opening a grocery store in a low-income neighborhood. Initiatives of this kind might fall under public use because they are aimed at removing a threat to public health, but courts have yet to flesh out which kinds of threats to public health are permissible to target with eminent domain. Furthermore, the constitutional text explicitly authorizes removal of a threat "*caused* by the existing use or disuse of the property," suggesting that this provision is aimed at uses that are traditional public nuisances.[13]

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] LA. CONST. art. 1, § 4(B)(2). Louisiana uses the term "public purpose" in place of "public use": "Property shall not be taken or damaged by the state or its political subdivisions except for public purposes." *Id.* § 4(B)(1).
[11] *Id.* § 4(B)(2).
[12] *Id.* § 4(B)(3). There is, however, an exception granting the legislature the power to authorize acquisition of property for the promotion of local industry. *Id.* art. 6, § 21.
[13] *Id.* art. 1, § 4(B)(2)(c) (emphasis added).

Louisiana has also granted municipalities, through a community redevelopment agency, the power to remedy blight.[14] A blighted area is defined as one that, by reason of dangerous health conditions, poor layout, or deterioration, substantially impairs growth or constitutes an economic or social liability, and is a menace to public health, welfare, or morals.[15] As part of a comprehensive redevelopment plan,[16] a municipality may undertake individual redevelopment projects to remedy blight.[17] A redevelopment project may include the taking of land through eminent domain.[18] However, any redevelopment project undertaken pursuant to this statute is limited by the grant of authority given the government in the state constitution, which, as above, means that land may not be taken for the purpose of economic development.

In 2006, the Louisiana legislature amended the state constitution to prohibit the condemnation of private property for use by any private person or entity or for transfer of ownership to any private person or entity.[19] The amendments also provide that "[n]either economic development, enhancement of tax revenue, nor any incidental benefit to the public shall be considered in determining whether the taking . . . is for a public purpose."[20] In *New Orleans Redevelopment Authority v. Johnson,* the Louisiana Appellate Court for the Fourth Circuit noted that legislators were concerned for their constituencies after the U.S. Supreme Court's decision in *Kelo* and the devastation rendered by Hurricane Katrina when they adopted the amendments.[21] The court made clear that the amendments overturned prior legal decisions that permitted the condemnation of non-blighted property for economic development purposes, but did not alter the existing authority of local governments to use eminent domain to respond to conditions of blight, even in cases where the condemning authority intends to convey the property to another private entity.[22] In *Johnson*, the court allowed the condemnation of blighted property and its sale to another private entity, holding that the property was not taken for the predominant use of a private party but for the public purpose of removing a threat to the public health or safety.[23]

Overall, then, the legal climate in Louisiana is favorable for communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles. Although Louisiana delineates a specific list of acceptable public uses—leaving less room for broad interpretation than might otherwise be the case—that list explicitly encompasses most of the initiatives envisioned by a comprehensive plan to combat obesity. Nevertheless, projects such as land acquisition for grocery store development may be problematic in Louisiana since the constitution explicitly forbids the taking of land solely for private economic development and permits rehabilitation of blighted or dangerous land only if that land is the source of the blight.

2. Land Use Regulation and Compensation

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[14] Parish Redevelopment Law, LA. REV. STAT. ANN. § 33:4625 (2008).
[15] *Id.* § 33:4625(P)(8)(i).
[16] *Id.* § 33:4625(P)(11).
[17] *Id.* § 33:4625(P)(9).
[18] *Id.* § 33:4625(H)(1).
[19] LA. CONST. art. 1, § 4(B)(1).
[20] *Id.* § 4(B)(3).
[21] New Orleans Redev. Auth. v. Johnson, 16 So. 3d 569, 579 (La. Ct. App. 2009).
[22] *Id.* at 582-83.
[23] *Id.*

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.

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.[24] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[25] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[26] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[27] 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.

Louisiana takings law does not appear to be more protective of private property than federal takings law. The Louisiana Constitution specifies that "every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property," but "this right is subject to reasonable statutory restrictions and the reasonable exercise of the police power."[28] Furthermore, "[p]roperty shall not be taken or damaged by the state . . . except for public purposes and with just compensation"[29] This means that not only is the state responsible for property it actually takes, but also property that it partially damages in such a way as to be the legal equivalent of a physical taking. In reality, very few land use regulations will physically compromise a landowner's property. This is especially true for zoning regulations, which may restrict use but do not generally impose affirmative obligations of physical access.

Most zoning regulations will prohibit some uses and permit a range of others (such as restricting an area to residential homes or certain kinds of limited commercial use). In Louisiana, these run of the mill zoning restrictions are rarely held to be the legal equivalent of a taking, and therefore do not generally require compensation. For example, in *Major v. Pointe Coupee Parish Police Jury*, a landowner had engaged in negotiations to sell his property for use as a FEMA trailer park when his Parish passed an ordinance prohibiting trailer parks.[30] The Louisiana Appellate Court for the First Circuit found that this did not amount to a taking, even though the ordinance effectively killed the landowner's potential sale.[31] The court noted that the property still retained some economic value and the owners had "not been deprived of all practical uses for their

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[24] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[25] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[26] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[27] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[28] LA. CONST. art. 1, § 4(A).
[29] *Id.* § 4(B)(1).
[30] Major v. Pointe Coupee Parish Police Jury, 978 So. 2d 952, 954-55 (La. Ct. App. 2007).
[31] *Id.* at 957.

property or their opportunities to sell or lease their property."[32] In *Standard Materials, Inc. v. City of Slidell*, the same court succinctly stated that "[a]n unconstitutional taking of private property does not result merely because an owner is unable to develop it to its maximum economic potential."[33] In *Standard Materials*, Slidell made changes to its zoning ordinance effectively halting development of a manufacturing facility by a concrete business, which had already begun construction.[34] As in *Major*, the appeals court found that the property still retained some economic value, and therefore the zoning regulation did not result in a taking.[35]

Predicting the type of land use regulations that rise to the level of a taking is not an easy task. There remains no bright-line test for determining when a regulation rises to the level of a taking for constitutional purposes, but the Louisiana Supreme Court has identified several factors to assist in establishing whether a taking has occurred: (1) whether a person's legal right with respect to a thing or object has been affected; (2) whether the property, either a right or a thing, has been taken or damaged; and (3) whether the taking or damaging was for a public purpose.[36]

Limits on regulatory takings in Louisiana will probably not affect community efforts to adopt land use restrictions to combat childhood obesity, so long as the restrictions do not deprive the landowner of all economically viable use of his land.

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. Implementation of a new zoning ordinance will normally cause some existing structures to become "nonconforming." Landowners are typically permitted to continuing their nonconforming uses. 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 Louisiana will generally not be permitted to require the immediate cessation of prior nonconforming uses without paying compensation.

Although state law explicitly exempts only one category of nonconforming use (historical businesses) from municipal zoning regulations,[37] Louisiana law generally 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.[38] The Louisiana Supreme Court, though it has not explicitly ruled that grandfathering is required, has highlighted the "doubtful constitutionality of compelling immediate removal of objectionable buildings and

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[32] *Id.*
[33] Standard Matls. Inc. v. City of Slidell, 700 So. 2d 975, 984 (La. Ct. App. 1997) (citing Dep't of Social Servs. v. City of New Orleans, 676 So. 2d 149, 154 (La. Ct. App. 1996)).
[34] *Id.* at 981.
[35] *Id.* at 984-85.
[36] Dep't of Transp. & Dev. v. Chambers Inv. Co., 595 So. 2d 598, 603 (La. 1992).
[37] LA. REV. STAT. ANN. § 33:4722(C) (2008) ("[N]o regulation shall change the status of premises which have been continuously used for commercial purposes since January 1, 1929, without interruption for more than six consecutive months at any one time.").
[38] *See* Redfearn v. Creppel, 455 So. 2d 1356, 1359 (La. 1984) (interpreting the nonconforming use section of the City of New Orleans zoning ordinance).

uses already [existing]."[39] In other words, a government that wishes to prohibit an *existing* use of land through a zoning change cannot order its immediate cessation. The right to continue a nonconforming use may be lost under certain circumstances, such as abandonment of the use or alteration of the property such that the use is no longer the same as the grandfathered nonconforming use.[40] In fact, although the Louisiana Supreme Court acknowledges the justice in permitting continuance of prior nonconforming uses, that same court has held that "[b]ecause a nonconforming use is inconsistent with [the purpose of zoning], it should, consistently with the property rights of the individuals affected and substantial justice, be viewed narrowly and have all doubts resolved against continuation or expansion of the nonconformity."[41] For example, in *Craig v. City of New Orleans Board of Zoning Adjustments*,[42] the Louisiana Appellate Court for the Fourth Circuit looked to a zoning ordinance that stated that nonconforming uses may not be intensified.[43] The court then determined that an owner shifting his house from a location that housed both him and long-term tenants to a location that housed only short-term transients was an "intensification" of the use, and thus the entire nonconforming use was lost.[44] A nonconforming use can also be abandoned after a period of disuse, but in Louisiana courts leave the length of the time period up to the municipality writing the ordinance.[45]

Zoning ordinances in Louisiana will typically contain provisions allowing continuation of a prior nonconforming use. This right is protected by the courts, which look to local zoning ordinances to determine if and how the right to continue the nonconforming use can be lost. Efforts to use zoning regulations to restrict or eliminate existing businesses or otherwise alter property use in order to combat childhood obesity will likely be hampered by these provisions.

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[39] *Id.* at 1358-59.
[40] *Id.* at 1359.
[41] *Id.*
[42] Craig v. City of New Orleans Bd. of Zoning Adjustments, 903 So. 2d 530 (La. Ct. App. 2005).
[43] *Id.* at 537.
[44] *Id.*
[45] *See, e.g.*, FQCPRQ v. Brandon Invs., 930 So. 2d 107, 110 (La. Ct. App. 2006) (looking to the zoning ordinance of New Orleans to determine the requisite period for abandonment, in this case six months).