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

MASSACHUSETTS

This memorandum summarizes Massachusetts 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 Massachusetts before undertaking a particular policy initiative. If there are important cases, statutes, or analysis that we have omitted from this memorandum, please inform us by sending an email to info@phlpnet.org.

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State and local governments are increasingly concerned with the rise in childhood obesity rates among their citizens. In response, they are turning their attention to policies that might combat this alarming trend. Many of these policies involve changing the physical environment in which children spend their days. This physical environment encompasses both public and private spheres. The public sphere includes the network of roads, sidewalks, and recreational paths that make up the community, as well as the various parks, playgrounds, open spaces, public gardens, and lighting that most people think of as public infrastructure. The private sphere includes the various types of development that exist on private property in the community, such as single-family homes, multifamily dwellings, apartment complexes, restaurants, grocery stores, health clubs, and all manner of other private developments.

In many communities, neither the public nor the private physical environment encourages active living and healthy eating. Indeed, the infrastructure in many communities actively discourages or effectively impedes healthy life choices. Too many children grow up in communities that lack parks, playgrounds, and safe, well-lit open spaces to play, have no full-service grocery stores or sit-down healthy restaurants, but are saturated with formula restaurants selling high-calorie, high-fat foods and corner stores selling junk food and sugary drinks. Studies suggest that communities can combat childhood obesity by changing the physical environment in which

children live. Positive environment changes would promote active and healthy lifestyles, by fostering development of infrastructure such as public parks and playgrounds, full-service grocery stores, and well-lit open spaces, and would eliminate the negative influences of the community infrastructure, such as fast-food restaurants and dark, overgrown vacant lots.[1]

Communities around the country have already begun to adopt policies and programs designed to change their physical environment, using various strategies and tools. For example, Santa Clara County, California, has adopted a Countywide Trails Master Plan that details the county's commitment to acquiring dedicated easements over private property to create a 500-mile trail system throughout the county to provide recreational and fitness opportunities for its citizens.[2] Several years ago King County, Washington, adopted a property tax increase to fund the acquisition and maintenance of publicly owned parks and recreation facilities.[3] The Los Angeles City Council has imposed a one-year moratorium on the opening of new fast-food restaurants in South Los Angeles.[4] This zoning ordinance provides a respite during which the city can adopt and implement policies designed to encourage the opening of healthy eating alternatives in the area, which is currently saturated with fast-food restaurants and plagued by high obesity rates. Finally, Naperville, Illinois, has adopted an ordinance requiring developers to include a minimum number of bicycle parking facilities in all new commercial, residential, and public property developments, to encourage biking as an alternative to driving.[5]

Each of these initiatives targets an important aspect of the physical environment, and each involves a different type of government action. The Santa Clara County and King County initiatives require the local governments to acquire property rights in private property—in Santa Clara County the acquisition is by forced dedication[6] and involves a partial interest in the

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[1] *See, e.g.,* KELLY D. BROWNELL & KATHERINE BATTLE HORGEN, FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS, AND WHAT WE CAN DO ABOUT IT (2004); L. D. Frank, M. A. Anderson & T. L. Schmid, *Obesity Relationships with Community Design, Physical Activity, and Time Spent in Cars*, 27 AM. J. PREVENTIVE MED. 87 (2004) (showing that neighborhood walkability was related to obesity in adults); Simone A. French et al., *Environmental Influences on Eating and Physical Activity*, 22 ANN. REV. PUB. HEALTH 309 (2001); P. Gordon-Larsen, M. C. Nelson, P. Page & B. M. Popkin, *Inequality in the Built Environment Underlies Key Health Disparities in Physical Activity and Obesity*, 117 PEDIATRICS 417 (2006) (demonstrating that proximity of recreation facilities is correlated with the risk of overweight and obesity in children); James O. Hill & John C. Peters, *Environmental Contributions to the Obesity Epidemic*, 280 SCI.1371 (1998); Kate Painter, *The Influence of Street Lighting Improvements on Crime, Fear, and Pedestrian Street Use after Dark*, 35 LANDSCAPE & URB. PLAN. 193 (1996); *see also* L. V. Moore, A. V. Diez Rous, J. A. Nettleton & D. R. Jacobs, *Associations of the Local Food Environment with Diet Quality: A Comparison of Assessments Based on Surveys and Geographic Information Systems,* 167(8) AM. J. EPIDEMIOLOGY 917 (2008) (ePub) (showing that the availability of supermarkets in neighborhoods was associated with a better-quality diet).

[2] Santa Clara County Trails Plan Advisory Committee, Santa Clara County Board of Supervisors, Final Countywide Trails Master Plan (Nov. 1995), *available at* http://www.sccgov.org/SCC/docs%2FParks%20and%20Recreation%2C%20Department%20of%20%28DEP%29%2Fattachments%2F47616ctywide_trails_masterplan.pdf.

[3] KING COUNTY, WASH., CODE § 4.08.082 (2009).

[4] Kim Severson, *Los Angeles Stages a Fast Food Intervention*, N.Y. TIMES, Aug. 12, 2008, *available at* http://www.nytimes.com/2008/08/13/dining/13calo.html.

[5] NAPERVILLE, ILL., CITY CODE § 6-9-7 (2009).

[6] A community can require a landowner to dedicate an easement for public use as a condition of a development permit only when that dedication shares an essential nexus with and is roughly proportionate to the impacts caused by the proposed development. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). This constraint is discussed in detail in www.nplan.org/nplan/products/takings_survey.

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 Massachusetts, including constitutional and statutory provisions that limit the eminent domain power or require communities to compensate landowners for validly adopted land use restrictions. Section 1 addresses limitations on the exercise of the power of eminent domain. Section 2 addresses limitations on the imposition of

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[7] *See, e.g.,* Kelo v. City of New London, 545 U.S. 469 (2005).

[8] *See, e.g.,* Pa. Coal v. Mahon, 438 U.S. 104 (1978).

land use restrictions through changes in zoning laws. Section 3 explores the scope of the requirement that existing land uses be "grandfathered" under any new zoning regime.

1. Eminent Domain and the Requirement of Public Use

Eminent domain is the forced sale of private land to the public for public use. 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. 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.

Massachusetts has not narrowed its definition of "public use" beyond the federal definition. Indeed, under Massachusetts law, "public use" essentially means "any municipal purpose."[9] Thus, in Massachusetts, political subdivisions authorized to use eminent domain may condemn private property for public recreation facilities, such as parks, playgrounds, and walking and biking trails. In fact, Massachusetts has granted municipalities the authority to take land specifically for parks and playgrounds.[10] As a general rule, "private property cannot be seized ostensibly for a public use and then diverted to a wholly private use."[11] This does not mean that land cannot be taken and sold to a private owner, but rather that the intended use of the land cannot be overtly and essentially a private one.[12]

In addition, Massachusetts municipalities may remedy "blighted open areas," which is broadly defined to include areas "detrimental to the safety, health, morals, welfare, or sound growth of a community" because of geographical (like a large gorge) or economic conditions.[13] Each municipality has been granted a redevelopment authority,[14] by which it has the power to remedy blighted open areas by undertaking an "urban renewal project."[15] Land deemed blighted under an

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[9] MASS. GEN. LAWS ANN. ch. 40, § 14 (West 2005).
[10] *Id.* Massachusetts courts have also declared takings to be for public use in other contexts. *See, e.g.*, Ballantine v. Falmouth, 294 N.E.2d 524 (Mass. 1973) (to establish off-street parking lots); Burnham v. Beverly, 35 N.E.2d 242 (Mass. 1941) (taking for municipal airport); Wright v. Commonwealth, 190 N.E. 593 (Mass. 1934) (for use by school department); Walker v. Medford, 172 N.E. 248 (Mass. 1930) (to build a public street); Byfield v. Newton, 141 N.E. 658 (Mass. 1923) (a lot for a public schoolhouse).
[11] Omartian v. Mayor of Springfield, 238 N.E.2d 48, 51 (Mass. 1968).
[12] *See id.* ("It also is not improper for a body making an eminent domain taking to make a reasonable business contract in the public interest in anticipation of, or because of, the effects of that taking.").
[13] MASS. GEN. LAWS ANN. ch. 121B, § 1.
[14] *Id.* § 4.
[15] *Id.* § 46.

urban renewal project may be taken by eminent domain.[16] Moreover, the taking of land for the purpose of remedying blight constitutes a public use of that land.[17]

To condemn private property for public use, a government entity must adopt an "order of taking."[18] This order must contain (1) a description of the land taken, (2) the state's interest in the property (whether the taking is of the whole property or an easement), and (3) the purpose of the taking.[19] Any condemnation undertaken by a municipality must be approved by a majority of the municipality's governing body.[20] That body must also, by a two-thirds vote, appropriate money for the purpose of compensating the aggrieved landowner.[21]

Therefore, communities seeking to combat childhood obesity in Massachusetts may employ eminent domain for traditional purposes of building public parks and playgrounds, as well as for more cutting-edge land use projects, such as condemning private land and transferring it to another private owner for use as a grocery store to serve underserved populations.[22]

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.[23] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[24] Most zoning regulations, however, do not impose a permanent physical occupation on the landowner's property, and most will prohibit some uses (such as fast-food restaurant) and permit a range of others (all other commercial enterprises). These run of the mill zoning restrictions—

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[16] *Id.* § 1.
[17] Opinion of the Justices, 135 N.E.2d 665, 667 (Mass. 1956); *see also* Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence, 531 N.E.2d 1233 (Mass. 1988) (holding that land is not blighted merely because it is vacant, but finding that a lower court's finding of blight was supported by substantial evidence (e.g., the land taken lacked "sufficient street capacity to support further development . . . or to lessen traffic congestion in the neighborhood," the "soil, subsoil, surface water, and water table conditions necessitate[d] site development costs," and a host of other facts)).
[18] MASS. GEN. LAWS ANN. ch. 79, § 1.
[19] *Id.*
[20] *Id.* ch. 40, § 14.
[21] *Id.*
[22] *See, e.g.*, *Benevolent & Protective Order of Elks*, 531 N.E.2d at 1246 ("The taking of land pursuant to a valid redevelopment plan is not void merely because the disposition of that land indirectly benefits private individuals.").
[23] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[24] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

the vast majority of regulations—are evaluated under an ad hoc multifactored test.[25] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[26]

The Massachusetts Supreme Court follows the U.S. Supreme Court in analyzing regulatory takings claims.[27] For example, in *Giovanella v. Conservation Commission of Ashland*, the Massachusetts Supreme Court applied *Lucas* and *Penn Central* to a landowner's claim that the City's denial of his application for a building permit deprived him of all economically viable use of a portion of his two contiguous lots. After holding that both lots should be considered together as the operative base unit for the regulatory takings claims, the court concluded that the denial did not deprive the landowner of all economically viable use under *Lucas*, and proceeded to analyze the takings claim using the *Penn Central* factors. Application of the *Penn Central* factors entails an "essentially ad hoc, factual inquir[y]"[28] that is guided by three factors: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action, in particular whether it amounts to a physical invasion or mere regulation of land use.[29] Under those factors, the court held that the limitation clearly did not rise to the level of a taking.[30]

Given that Massachusetts courts will follow the lead of federal courts in analyzing regulatory takings claims, takings law is unlikely to impose a significant impediment to efforts by Massachusetts communities to regulate land uses to combat childhood obesity. While permanent physical occupations will require compensation, as will regulations that deprive a landowner of all economically viable use, standard land use regulations, such as prohibitions on the operation of fast-food restaurants, are unlikely to incur takings liability.

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. 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. But some zoning regulations will restrict current uses.

Massachusetts law protects the rights of landowners to continue to engage in existing, lawful uses of their property notwithstanding the enactment or amendment of a zoning ordinance

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[25] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[26] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[27] *See* Giovanella v. Conservation Comm'n of Ashland, 857 N.E.2d 451 (Mass. 2006) (applying U.S. Supreme Court precedents to regulatory takings claim); Gove v. Zoning Bd. of Appeals of Chatham, 831 N.E.2d 865 (Mass. 2005) (same); Daddario v. Cape Cod Comm'n, 681 N.E.2d 833, 836-37 (Mass. 1997) (same).
[28] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[29] *Giovanella*, 857 N.E.2d at 455.
[30] *Id.* at 461-63.

prohibiting the existing use.[31] In other words, a government that wishes to prohibit an *existing* use of land through a zoning change cannot order its immediate cessation without paying compensation.[32] The right to continue a nonconforming use runs at law with the land, and thus does not expire when the property transfers ownership.[33]

Nonconforming use rights can be lost, however. Property owners lose their right to continue a nonconforming use if they change or extend that use, or if the use or structure is abandoned or not used for a period of two years or more.[34] Massachusetts courts use a fact-intensive, three-part inquiry to determine whether a nonconforming use has been changed or substantially extended: (1) whether the current use reflects the nature and purpose of prior nonconforming use, (2) whether there is a difference in quality or character of the use, and (3) whether the current use is different in kind in its effect on the neighborhood.[35] For example, an individual who had a nonconforming use to make concrete at his house from time to time lost that right when he escalated his concrete manufacturing to the point that it became his primary business.[36] To constitute an abandonment, the discontinuance of a nonconforming use must result from "the concurrence of two factors, (1) the intent to abandon and (2) voluntary conduct, whether affirmative or negative, which carries the implication of abandonment."[37] For example, if a fast-food restaurant, operating as a nonconforming use, instead began selling groceries in place of prepared foods and filed taxes as a grocery store, Massachusetts courts are likely to conclude that the landowner has abandoned his nonconforming fast-food restaurant. Finally, a right to continue a prior nonconforming use will be lost if the landowner discontinues that use for two years, regardless of intent to abandon.[38]

Thus, communities in Massachusetts will not be able to order the immediate cessation of a prior nonconforming use without incurring takings liability. Rather, landowners are entitled to continue nonconforming uses until these uses are abandoned or discontinued for two years or more, or until the landowner attempts to change or extend the use. If a community in Massachusetts wishes to demand cessation of use before one of these events transpires, it will have to pay compensation for the loss of the prior nonconforming use right.

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[31] MASS. GEN. LAWS ANN. ch. 40A, § 6 (West 2005).
[32] *Id.*
[33] Derby Refining Co. v. City of Chelsea, 555 N.E.2d 534, 538 (Mass. 1990).
[34] MASS. GEN. LAWS ANN. ch. 40A, § 6.
[35] Ka-Hur Enters. v. Zoning Bd. of Appeals of Provincetown, 676 N.E.2d 838, 841 n.2 (Mass. 1997); Jasper v. Michael A. Dolan, Inc., 242 N.E.2d 540, 545 (Mass. 1968) (holding that a market's decision to sell all alcoholic beverages rather than just beer and wine constituted a change in nature and purpose and in quality and character); Town of Bridgewater v. Chuckran, 217 N.E.2d 726, 727-28 (Mass. 1966); Superintendent & Inspector of Bldgs. v. Villari, 213 N.E.2d 861 (Mass. 1966) (holding that making of minor repairs that were incidental to operating a gas station did not change the original nature or purpose of the gas station); Marblehead v. Rosenthal, 55 N.E.2d 13, 15 (Mass. 1944) (holding that an increase in sales, no matter how big of an increase, is a change in the original nature or purpose).
[36] Town of Bridgewater v. Chuckran, 217 N.E.2d at 728.
[37] *Derby Refining Co.*, 555 N.E.2d at 538 (holding that mere nonuse or transfer of property does not alone constitute abandonment); Burlington Sand & Gravel v. Harvard, 528 N.E.2d 889 (Mass. App. Ct. 1988) (finding abandonment of sand and gravel operations where access to it had been blocked off with earthen barrier for three years); Bartlett v. Bd. of Appeals, 505 N.E.2d 193 (Mass. App. Ct. 1987) (upholding a finding of abandonment where the previous owner did not rent out two of three rooms on a property for a ten-year period).
[38] *Ka-Hur*, 676 N.E.2d 838 (explaining the difference between abandonment and discontinuance).