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

MARYLAND

This memorandum summarizes Maryland 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 Maryland 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

---

[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

---

[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 Maryland, 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.

The legislature has not enacted substantive eminent domain reform in response to *Kelo*.[10] Thus, the Maryland Constitution establishes the only meaningful substantive limits on eminent domain powers in the state. The Maryland Constitution provides that private property shall not be taken for public use without just compensation.[11] The Court of Appeals of Maryland has noted that "[t]he State of Maryland's jurisprudence in this instance is very similar to that of the federal government."[12] While the decision of whether a particular use is "public" is ultimately for the judiciary, Maryland courts will give weight to the determinations of the legislative and executive branches.[13]

The meaning of public use under the Maryland Constitution "is broader than literal use by members of the public."[14] The operative inquiry is whether the condemned property is open for use by the public, not how many members of the public might actually use the property.[15] Thus, the Maryland Court of Appeals has upheld condemnations of private property to build branch lines used only by one railroad[16] and for public streets that serve very few homes and end in a

---

[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2172 (2009) (listing Maryland as having adopted ineffective legislative reform).
[11] MD. CONST. art. 3, § 40.
[12] Mayor & City Council of Baltimore City v. Valsamaki, 916 A.2d 324, 337 (Md. 2007).
[13] Green v. High Ridge Ass'n, 689 A.2d 125, 129 (Md. 1997).
[14] *Id.* at 129.
[15] *Id.*
[16] *See* Riden v. Phila., B.&W.R.R., 35 A.2d 99 (Md. 1943).

dead end.[17] In addition, the Court of Appeals held in *Mayor of Baltimore City v. Valsamaki* that economic development is a valid public purpose if it is carried out pursuant to a comprehensive plan.[18] On the other hand, a condemnation that has the predominant effect of benefiting private interests is not a valid public use within the meaning of the Maryland Constitution.[19]

Overall, the legal climate in Maryland is favorable to communities interested in using eminent domain to further the goal of making their physical environment more conductive to healthy, active lifestyles. Although the Court of Appeals of Maryland prohibits condemnations that serve predominantly to benefit private interests, the qualifier "predominantly" allows for condemnations that serve broad public interests with an incidental private benefit. Moreover, the Court of Appeals has interpreted the Maryland Constitution as including economic development among permissible public uses. Thus communities wishing to use eminent domain to create parks, playgrounds, and hike and bike trails will encounter no obstacles in the state's eminent domain laws. And those communities wishing to partner with private entities to provide these types of public uses should be able to do so as well.

2. Land Use Regulation and Compensation

Most government initiatives seeking to combat childhood obesity by creating a healthy living environment will rely on zoning powers, not the exercise of eminent domain. For example, the City of Los Angeles has placed a moratorium on the building of new fast-food restaurants in South Los Angeles. Land use regulations such as these rarely implicate takings concerns, and governments are generally free to adopt such regulations without incurring takings liability.

However, some land use regulations do require compensation. Any land use regulation so severe that it amounts to the functional equivalent of a taking requires payment of just compensation. The U.S. Supreme Court has adopted two bright-line rules and a balancing test to determine whether a land use regulation constitutes a taking under federal law. First, a regulation that imposes a permanent physical occupation on private land is a taking as a matter of law.[20] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[21] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[22] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[23] As with eminent domain, however, states are free to adopt a regulatory takings framework that provides more protections to property owners than does the U.S. Constitution.

The Court of Appeals of Maryland has interpreted the regulatory takings provision of the state constitution as essentially coterminous with the federal Constitution, and it relies on the U.S. Supreme Court's regulatory takings analysis in evaluating state takings claims.[24] As the court

---

[17] *See* Anne Arundel County v. Burnopp, 478 A.2d 315 (Md. 1984).
[18] Mayor of Baltimore City v. Valsamaki, 916 A.2d 324, 356 (Md. 2006).
[19] Prince George's County v. Collington Crossroads, Inc., 339 A.2d 278, 287 (Md. 1975).
[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] MD. CONST. art. 3, § 40; *see* Neifert v. Dep't of the Env't, 910 A.2d 1100, 1118 n.3 (Md. 2006).

said in *Neifert v. Department of the Environment*, "the Fifth and Fourteenth Amendments to the United States Constitution and Article III, § 40, of the Maryland Constitution have the same meaning and effect, and it is well established that the decisions of the Supreme Court are practically direct authorities for both provisions."[25]

In particular, most takings challenges—except those involving permanent physical occupation or the deprivation of all economically viable use—will be reviewed under the "essentially ad hoc, factual inquir[y]"[26] that focuses on three factors: (1) the economic impact of the regulation on the property owner; (2) the character of the governmental action, in particular whether it amounts to a physical invasion or mere regulation of land use; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations.[27]

Because Maryland law mirrors federal law on the issue of regulatory takings, and because the threshold for finding a compensable taking is so high at the federal level, community efforts to combat childhood obesity are unlikely to give rise to valid regulatory takings claims. Thus, any locality in Maryland wishing to use land use regulations to combat childhood obesity should be familiar with federal case law.

3. Grandfathering Prior Nonconforming Uses

The discussion in the Section 2 assumes that the zoning restriction imposed on the landowner does not attempt to prohibit the very use to which the landowner is currently putting her property. Zoning ordinances prohibiting certain types of land use ordinarily do not affect existing uses of land. For example, if an area previously zoned for commercial use were rezoned as single-family residential, then a previously existing fast-food chain would normally be allowed to continue operating. In some circumstances, though, 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 Maryland will not be able to demand the immediate cessation of an existing lawful use without paying compensation.

In Maryland, a lawful existing use is "a vested right entitled to constitutional protection."[28] However, nonconforming uses are not favored because they are inconsistent with the purposes and goals of the zoning ordinance.[29] As a result, the right to continue a prior nonconforming use is subject to certain limitations. In particular, nonconforming uses are subject to "limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment."[30] Although a landowner may not impermissibly expand his nonconforming use,[31] intensification of a nonconforming use is permissible so long as the nature or character of that use remains

---

[25] *Neifert*, 910 A.2d at 1118.
[26] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[27] *Neifert*, 910 A.2d at 1118-19.
[28] Trip Assocs. v. Mayor & City Council of Baltimore, 898 A.2d 449, 456 (Md. 2006) (citing and quoting Amereihn v. Kotras, 71 A.2d 865, 869 (Md. 1950)).
[29] Colati v. Jirout, 47 A.2d 613, 615 (Md. 1946).
[30] County Council of Prince George's County v. E. L. Gardner, 443 A.2d 114, 119 (Md. 1982).
[31] Purich v. Draper Props., 912 A.2d 598, 608 (Md. 2006). Other examples include "limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment." *Id.* (quoting Grant v. Baltimore, 212 Md. 301, 307 (1957)).

substantially the same.[32] To illustrate this difference, the Court of Appeals of Maryland, in *Jahnigen v. Staley*, held that physical expansions such as constructing new piers near a preexisting pier were impermissible extensions of nonconforming use, but an increase in the number of rowboats was a permissible intensification.[33] In addition to termination of nonconforming uses due to impermissible expansion, prior nonconforming uses that are abandoned will lose their right to continue.[34] However, mere cessation of use does not constitute abandonment; rather, intention and action, or failure of action, is required to show abandonment.[35] The length of time a landowner ceases a prior conforming use may prove intent to abandon, as may an overt act or a failure to act that shows the landowner no longer retained an interest in continuing the prior nonconforming use.[36]

In Maryland, nonconforming uses may also be terminated by amortization. The Court of Appeals of Maryland has held that "[s]o long as an amortization period provides for a reasonable relationship between the amortization and the nature of the nonconforming use, an ordinance prescribing such amortization will not be unconstitutional."[37] Courts have not been entirely clear as to what constitutes a "reasonable relationship" between the amortization and the nature of the nonconforming use, but as an example, the Court of Appeals of Maryland has held that five years to remove nonconforming billboards was valid and not arbitrary.[38]

In general, communities in Maryland interested in changing zoning ordinances to create a physical environment more conductive to healthy, active lifestyles should be encouraged by the ways prior nonconforming uses may be terminated. In addition to termination due to voluntary abandonment or impermissible expansion, communities may also phase out nonconforming uses as long as the amortization period provides a reasonable relationship between the amortization and the nature of the nonconforming use.

---

[32] *Trip Assocs.*, 898 A.2d at 459.
[33] Jahnigen v. Staley, 225 A.2d 277, 281–82 (Md. 1967). The Montgomery County Department of Permitting Services found the construction of a canopy over and the addition of an additional pump within an automobile filling station to be "intensifications" of a prior nonconforming use. *Purich*, 912 A.2d at 603.
[34] *Purich*, 912 A.2d at 608.
[35] Beyer v. Mayor & City Council of Baltimore City, 34 A.2d 765, 769 (Md. 1943).
[36] *Id.* at 768 (finding abandonment of use when the owner of a junk shop moved all of the store's equipment out and stored furniture in the space instead).
[37] *Trip Assocs.*, 898 A.2d at 457.
[38] Grant v. Mayor & City Council of Baltimore, 129 A.2d 363, 370 (Md. 1957).