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

NORTH CAROLINA

This memorandum summarizes North Carolina 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 North Carolina 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 property, while in King County the acquisition is by eminent domain and involves full title. In

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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.

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; this is 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 North Carolina, 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. 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.

North Carolina is the only state whose constitution does not contain an express provision against the taking of private property without just compensation.[9] Nonetheless, the North Carolina Supreme Court has held that in the exercise of the sovereign power of eminent domain, private property can be taken only for public use and upon payment of just compensation.[10] Whether a condemnor's intended use of the land is for the public use or benefit is a question of law for the courts.[11] The North Carolina Supreme Court has held that courts must consider whether a proposed condemnation satisfies two separate tests: a public use test and a public benefit test.[12] Under the public use test, the dispositive determination is "whether the general public has a right to a definite use of the property sought to be condemned." The "public's right to use, not the public's actual use" is the key factor in making the required determination. Under the "public benefit test," the dispositive determination is "whether some benefit accrues to the public as a result of the desired condemnation." If the proposed condemnation would "contribute to the general welfare and prosperity of the public at large" and if that contribution cannot readily be furnished without the aid of governmental power, then the public benefit test is satisfied.[13] Under this two-part test, the Supreme Court of North Carolina upheld the condemnation of private property for the purpose of providing telephone service to a single customer, concluding that once the telephone line is laid, every member of the public will have use of the line and that telephonic interconnectedness is a public benefit.[14] Moreover, the statutory provision authorizing public condemners to exercise the power of eminent domain for public use expressly provides that the establishment or enlargement of parks, playgrounds, and other recreational facilities constitute public uses.[15]

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[9] Long v. City of Charlotte, 293 S.E.2d 101, 107 (N.C. 1982).
[10] State Highway Comm'n v. Batts, 144 S.E.2d 126, 133 (N.C. 1965).
[11] Piedmont Triad Airport Auth. v. Urbine, 554 S.E.2d 331, 332 (N.C. 2001), *cert denied*, 535 U.S. 971 (2002).
[12] Carolina Tel. & Tel. Co. v. McLeod, 364 S.E.2d 399, 401 (N.C. 1988).
[13] *Id.* at 402.
[14] *Id.* at 403.
[15] N.C. GEN. STAT. § 40A-3 (2009).

In response to the U.S. Supreme Court's decision in *Kelo v. City of New London*,[16] however, North Carolina enacted a constitutional amendment limiting local communities' authority to condemn property for economic development purposes.[17] North Carolina's urban redevelopment law expressly grants to urban redevelopment commissions the power to use the right of eminent domain for urban redevelopment purposes, but only where the property to be taken is a blighted parcel.[18] The post-*Kelo* reforms narrowed the definition of blighted property in North Carolina to:

> (2a) "Blighted parcel" shall mean a parcel on which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare; provided, no parcel shall be considered a blighted parcel nor subject to the power of eminent domain, within the meaning of this Article, unless it is determined by the planning commission that the parcel is blighted.[19]

Overall, then, the judicial climate in North Carolina is relatively favorable for communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles. First, the North Carolina Supreme Court employs a relatively broad definition of "public use," and the statute authorizing local governments to exercise the power of eminent domain expressly provides for the condemnation of private property for the development and expansion of parks and playgrounds. Second, urban redevelopment may include the exercise of the power of eminent domain over blighted parcels, which may permit local governments a broader range of options for combating childhood obesity.

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

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[16] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[17] N.C. GEN. STAT. § 40A-1(a).
[18] *Id.* § 160A-515.
[19] *Id.* § 40A-1.

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.

Although North Carolina does not have an express constitutional provision against the "taking" or "damaging" of private property for public use without payment of just compensation, the courts allow recovery for a taking on constitutional as well as common law principles.[24] The North Carolina Supreme Court has developed an "ends-means" test for determining when a land use regulation constitutes a compensable taking.[25] Courts will first determine whether the ends sought (i.e., the object of the legislation) is within the scope of the police power, and then determine whether the means chosen to regulate are reasonable.[26] The reasonableness inquiry encompasses the central takings question of whether the restriction goes so far as to effect a taking of the property.[27] The North Carolina courts follow Supreme Court precedent to determine when a restriction on land use rises to the level of a compensable taking.[28] Thus, North Carolina courts will recognize a compensable taking when a land use restriction deprives a landowner of all economically beneficial or productive use of the land[29] or imposes a compelled physical invasion of the land.[30]

In addition, North Carolina courts apply the *Penn Central* factors to determine when a land use restriction constitutes "a substantial interference with elemental rights growing out of the ownership of the property" by leaving property with no practical use or reasonable value.[31] For example, in *Responsive Citizens in Opposition to Flood Plain Ordinance v. City of Asheville*, landowners challenged the city's flood plane ordinance, claiming that it "substantially deprived" them of "the right to reasonable use of their property and to cause the value of the property to depreciate to a fraction" of its value.[32] The ordinance compelled the property owners to construct

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[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] Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville, 302 S.E.2d 204, 208 (N.C. 1983).
[25] *Id.*
[26] *Id.*
[27] *Id.* at 209.
[28] *See* King by & through Warren v. State, 481 S.E.2d 330, 333-34 (N.C. Ct. App. 1997) (citing and applying Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).
[29] Finch v. City of Durham, 384 S.E.2d 8, 15 (N.C. 1989).
[30] *See* King by & through Warren, 481 S.E.2d at 333-34.
[31] *Finch*, 384 S.E.2d at 15-16 (applying the practical use and reasonable value standard with reference to *Penn Central*).
[32] Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville, 302 S.E.2d 204, 206, 256 (N.C. 1983).

and substantially improve the property located in the flood hazard to prevent or minimize flood damage.[33] The court stated that a zoning ordinance was "unreasonable and confiscatory" if the owner of the affected property was deprived of all "practical" use of the property and the property was rendered of no "reasonable value."[34] The court also made clear that "the mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid."[35] Thus the court held that the land use regulation did not constitute a compensable taking.[36]

Ultimately, although there is no set formula for determining whether a regulation is a taking under North Carolina law, the courts essentially follow federal takings precedents. Under those precedents, land use regulations rarely constitute compensable takings.

3. Grandfathering Prior Nonconforming Uses

The discussion in Section 2 assumes that the zoning restriction imposed on a landowner does not attempt to prohibit the very use to which she is currently putting her property. In some circumstances, a community may wish to prohibit a preexisting use to further its goals of combating childhood obesity. For example, a community may want to eliminate fast-food establishments within a certain distance of schools, including those restaurants that are already operating. Communities in North Carolina will not be able to require the immediate cessation of an existing nonconforming use without paying compensation.

Early North Carolina Supreme Court cases suggested that landowners did not acquire protected property rights in continuing existing nonconforming use. In two early cases, *Wake Forest v. Medlin* and *Ahoskie v. Moye*, the North Carolina Supreme Court upheld ordinances forcing the termination of nonconforming uses without amortization periods.[37] In *Wake Forest*, the North Carolina Supreme Court upheld an ordinance that required the immediate cessation of the use of land for a gas station.[38] In *Moye*, the Supreme Court of North Carolina upheld a similar ordinance providing that no filling stations could operate within 150 feet of the Ahoskie school district, beginning immediately with the passage of the ordinance.[39] Subsequently, however, the North Carolina Supreme Court has recognized the doctrine of vested rights as a constitutional limitation on zoning powers, stating that "a lawfully established nonconforming use is a vested right and is entitled to constitutional protection."[40]

Similarly, the North Carolina legislature has adopted statutes protecting existing nonconforming rights from changes in zoning ordinances. Section 160A-385(b) of the North Carolina General Statutes provides that amendments in zoning ordinances shall not be applicable or enforceable

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[33] *Id*. at 210, 264.
[34] *Id*.
[35] *Id.* at 210, 265.
[36] *Id.* at 211, 265.
[37] *See* State v. Joyner, 211 S.E.2d 320, 324 (N.C. 1975) (discussing Wake Forest v. Medlin, 154 S.E. 29 (N.C. 1930), and Ahoskie v. Moye, 156 S.E. 130 (N.C. 1930)).
[38] *Wake Forest*, 154 S.E. at 31.
[39] *Ahoskie*, 156 S.E. at 132.
[40] Godfrey v. Zoning Bd. of Adjustment of Union County, 344 S.E.2d 272, 279 (N.C. 1986).

without consent of the owner with regard to buildings and uses for which building permits have been issued or a vested right has been established.[41] This provision protects landowners who are lawfully using their property in a particular way or who have obtained valid approvals to develop their property in a particular way.[42]

However communities may regulate the expansion and continuation of nonconforming uses. As a North Carolina appellate court has said: "non-conforming uses are not favored by the law. Most zoning schemes foresee elimination of non-conforming uses either by amortization, or attrition or other means. In accordance with this policy, zoning ordinances are strictly construed against indefinite continuation of non-conforming uses."[43] Accordingly, communities can prohibit the expansion or enlargement of nonconforming uses, or provide for their cessation on discontinuance for a specified period, voluntary abandonment, or the expiration of a reasonable amortization period.[44]

Thus, communities in North Carolina will not be permitted to order the immediate cessation of a prior nonconforming use if the landowner has a building permit or a valid approval of development plans, without compensating the landowner. But they may adopt extensive limitations on the nonconforming use right intended to eliminate the use in the future or constrain the use to its current state.

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[41] N.C. GEN.STAT. § 160A-385(b) (2007).
[42] *Id.* § 160A-385.1.
[43] CG&T Corp. v. Bd. of Adjustment of Wilmington, 411 S.E.2d 655, 659-60 (N.C. Ct. App. 1992).
[44] *See, e.g.*, Jirtle v. Bd. of Adjustment for Bisco, 622 S.E.2d 713, 715-16 (N.C. Ct. App. 2005) (applying the Town of Brisco ordinance that states that "it is the intent of this ordinance to permit these nonconforming uses to continue until they are removed, discontinued or destroyed . . ." and "the nonconforming use of land shall not be enlarged or increased nor shall any nonconforming use be extended to occupy a greater area of land than occupied by such use at the time of the passage of this ordinance.").