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

NEW HAMPSHIRE

This memorandum summarizes New Hampshire 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 New Hampshire 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 New Hampshire, 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," 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.

The New Hampshire Constitution states that "no part of a man's property shall be taken from him, or applied to public uses, without his own consent."[9] In New Hampshire, the question of whether a particular use qualifies as "public use" is a question to be determined de novo by the courts,[10] and the New Hampshire Supreme Court appears to have adopted a more restrictive standard than the U.S. Supreme Court. In assessing public use challenges, the court considers whether the condemned property "will be primarily of benefit to private persons or private uses, which is forbidden, or whether [it] will serve public purposes for the accomplishment of which public money may properly be used."[11]

Moreover, New Hampshire enacted both a constitutional amendment and a corresponding statute to further restrict the powers of eminent domain in response to the *Kelo* decision.[12] The constitutional amendment, which was enacted on November 7, 2006, states that private property cannot be transferred to another person "if the taking is for the purpose of private development or other private use of the property."[13] The new statute, entitled the Eminent Domain Procedures Act, defines public use as the possession, occupation, or enjoyment of real property by the general public, or the removal of public nuisances and menaces to health and safety.[14] It expressly excludes from the definition of public use "public benefits resulting from private

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[9] N.H. CONST. art. 12.
[10] *See, e.g.,* Rogers Dev. Co. v. Town of Tilton, 781 A.2d 1029 (N.H. 2001).
[11] Merrill v. City of Manchester, 499 A.2d 216, 217 (N.H. 1985).
[12] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[13] N.H. CONST. art. 12-a.
[14] N.H. REV. STAT. ANN. § 498-A:2 (2008).

economic development and private commercial enterprise."[15] There are as yet no state court cases interpreting and applying the new constitutional amendment and the new statute.

These new laws probably will not have an effect on efforts to combat childhood obesity as they mainly narrow the definition of "public use." Projects such as public parks and recreational spaces will still fall under this amended definition and therefore not run afoul of these new provisions.

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.[16] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[17] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[18] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[19]

States are free to provide property owners with greater protections than those afforded by the U.S. Constitution, and the New Hampshire Supreme Court appears to view the state constitution as doing just that. In particular, the New Hampshire Supreme Court has said that "'[l]imitations on use create a taking if they are so restrictive as to be economically impracticable, resulting in a substantial reduction in the value of the property and preventing the private owner from enjoying worthwhile rights or benefits in the property.'"[20] The court reinforces the inference that the state constitution may provide greater protections than the U.S. Constitution by relying primarily on state cases in analyzing takings challenges.[21] Nonetheless, even though it maintains the possibility of a more generous regulatory takings regime, the New Hampshire Supreme Court has not expressly articulated any way in which New Hampshire law deviates from the federal standard. Moreover, the court regularly rejects landowners' claims for compensation under the

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[15] *Id.*
[16] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[17] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[18] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[19] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[20] Huard v. Town of Pelham, 986 A.2d 460, 466 (N.H. 2009) (quoting Pennichuck Corp. v. City of Nashua, 886 A.2d 1014 (N.H. 2005)).
[21] *See, e.g.,* Sanderson v. Town of Candia, 787 A.2d 167, 169 (N.H. 2001); *see also* Rowe v. North Hampton, 553 A.2d 1331, 1335-36 (N.H. 1989).

New Hampshire Constitution. For example, in *Rowe v. North Hampton*, the court held that no taking occurred when the zoning board denied a landowner's application for a variance from a wetlands ordinance to construct a home on her property.[22] The court also held that the property still had economic value, even if proposed construction were not allowed on the wetlands, and therefore the burden on the landowner was not too heavy.[23]

Given that most land use restrictions do not implicate compensation concerns under the U.S. Constitution, and the New Hampshire Supreme Court has not articulated a more protective standard under the state constitution, it is unlikely that New Hampshire communities will be obligated to compensate landowners for the adoption of land use restrictions aimed at combating childhood obesity. Nor has New Hampshire enacted any statutory protections extending regulatory takings protections. Thus regulatory takings doctrine is not likely to impede community efforts to combat childhood obesity.

3. Grandfathering Prior Nonconforming Uses

The discussion in Section 2 assumes that the zoning restriction imposed on the landowner does not attempt to prohibit the very use to which the landowner is 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 New Hampshire generally will not be able to do this without paying compensation.

New Hampshire law protects the rights of property owners to continue existing and lawful uses of their property, regardless of changes in zoning laws that may purport to prohibit these uses.[24] These prior nonconforming uses are "grandfathered" under the zoning change, and a government cannot order their immediate cessation. Grandfathered uses lose their protections from subsequent zoning changes, however, if they are altered for a purpose or in a manner substantially different from their prior uses.[25]

However, New Hampshire communities may require certain prior nonconforming uses to be discontinued within a reasonable time. The New Hampshire Supreme Court has held that "given a reasonable public purpose, a town may require a nonconforming use to be discontinued within a reasonable time."[26] The public purposes supporting amortization must relate to the prevention of a public or private nuisance. Thus, the court has upheld an ordinance requiring the discontinuance of an automobile junkyard where the landowner's burning of automobiles, causing "black, oily, rubbery smoke" and "considerable noise," constituted a nuisance.[27] Similarly, the court has permitted a community to limit the scope of a landowner's right to

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[22] *Rowe*, 553 A.2d at 1333.
[23] *Id.* at 1336.
[24] N.H. REV. STAT. § 674:19 (2008); *see also* Guy v. Town of Temple, 956 A.2d 272, 279 (N.H. 2008).
[25] N.H. REV. STAT. § 674:19; *see also* Conforti v. City of Manchester, 677 A.2d 147 (N.H. 1996).
[26] Flanagan v. Town of Hollis, 293 A.2d 328, 329 (N.H. 1972).
[27] McKinney v. Riley, 197 A.2d 218, 222 (N.H. 1964).

operate his gravel pit, in order to prevent its infinite expansion.[28] But a provision requiring the discontinuance of a nonconforming use will be deemed unreasonable if no public purpose supports it.[29] In addition, the court has held that even if supported by a valid public purpose, an amortization provision that is not aimed at a harmful activity and that substantially deprives the owner of use of her property would constitute a taking that requires compensation. Thus, in *Loundsbury*, the court held that a city could not proscribe an amortization period for billboards because these signs are not nuisances. If the city did choose to prohibit the billboards, it would be required to compensate the owner.

Grandfathered uses lose their statutory protection if they are abandoned, expanded, or substantially changed. In *McKenzie v. Town of Eaton Zoning Board of Adjustment*, the Supreme Court of New Hampshire held that the intent to abandon was not required in order to revoke grandfathered protection.[30] The zoning ordinance in question stated that nonconforming structures destroyed by fire, wind, or other casualty would be considered abandoned if not rebuilt within a year. The landowner did not rebuild her destroyed, nonconforming shed within the one-year time frame and therefore lost her grandfathered protection. The court also recognized that the ordinance was rationally related to the goal of reducing nonconforming uses.

An expansion of a nonconforming use will be evaluated by the New Hampshire Supreme Court within the context of the zone in which it is located. Some expansions will be allowed where the expansion is a "natural activity, closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance creating the nonconforming use."[31] In *Severance v. Town of Epsom*, the landowners expanded their use of a nonconforming dwelling from seasonal use to year-round use. This change was not enough to cause them to lose grandfathered protection because the court found that the increase in the amount or intensity of use was not an improper expansion. But the Supreme Court of New Hampshire also held in *Hurley v. Town of Hollis* that a nonconforming use cannot be moved to a new building.[32] Here, a nonconforming tool shop could not move to a new building, even if the new building would have the improved effect of creating greater setbacks that more closely conformed to the zoning ordinance.

Nonconforming use protection is also lost where there is a change in nature of purpose of the use. For example, a nonconforming movie theater could continue to operate, but not if the landowners began to use the space for live entertainment.[33] And a nonconforming motel could not raze its existing structure and build another motel twice the original size.[34]

So, while nonconforming uses are protected by New Hampshire law, they are closely monitored. A use that constitutes a nuisance may be required to cease after a reasonable period of time. A use that is not a nuisance may still be limited by prohibitions on expansion, abandonment, and change in use.

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[28] *Flanagan*, 293 A.2d at 329.
[29] Loundsbury v. City of Keene, 453 A.2d 1278, 1280 (N.H. 1982).
[30] McKenzie v. Town of Eaton Zoning Bd. of Adjustment, 917 A.2d 193, 197 (N.H. 2007).
[31] Severance v. Town of Epsom, 923 A.2d 1057, 1060 (N.H. 2007).
[32] Hurley v. Town of Hollis, 729 A.2d 998, 1002-03 (N.H. 1999).
[33] Conforti v. City of Manchester, 677 A.2d 147, 150 (N.H. 1996).
[34] New London Land Use Assoc. v. New London Zoning Bd., 543 A.2d 1385, 1388 (N.H. 1988).