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

PENNSYLVANIA

This memorandum summarizes Pennsylvania 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 Pennsylvania 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—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 Pennsylvania, 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." 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.

Article I, section 10, of the Pennsylvania Constitution provides, "[n]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." This provision requires both that the property be taken only for a public purpose and that it be taken "only in such an amount and to such an extent as these purposes reasonably require."[10] Thus, a community can condemn private property if "the interests of the public . . . require such interference; and . . . the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[11] Whether a proposed purpose qualifies as a public purpose is a matter of law to be determined by the courts.[12] Whether a proposed taking is excessive is a question of fact to be determined by the trial court.[13]

After *Kelo*, the Pennsylvania Supreme Court made clear that it takes the requirement of public use seriously. In *Middletown Township v. Lands of Stone*, the court rejected the township's proposed condemnation of a landowner's farm for recreational purposes, concluding that the recreational justification was a pretext for conservation and that the township did not have legal authority to condemn land for conservation purposes.[14] The court emphasized the need for the purported public purpose to be the "true" purpose of the condemnation, not "mere lip service."[15] Thus, "a taking will be seen as having a public purpose only where the public is to be the primary and paramount beneficiary of its exercise."[16] In considering whether a primary public

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] Town of Cornplanter v. McGregor, 745 A.2d 725, 726-27 (Pa. Commw. Ct. 2000).
[11] United Artists' Theater Circuit v. City of Philadelphia, 635 A.2d 612, 617 (Pa. 1993).
[12] Middletown Twp. v. Lands of Stone, 939 A.2d 331, 337-38 (Pa. 2007) (citing *In re* Bruce Ave., 266 A.2d 96, 99 (Pa. 1970)).
[13] Beaver Falls Mun. Auth. *ex rel.* Penndale Water Line Extension v. Beaver Falls Mun. Auth., 960 A.2d 933, 940 (Pa. Commw. Ct. 2008).
[14] *Middleton Twp.*, 939 A.2d 331.
[15] *Id.* at 337-38.
[16] *Id.* at 337.

purpose was properly invoked, the court looks beyond the proffered explanation of the community for the "real or fundamental purpose" behind a taking.[17] As in *Kelo*, the court stated that evidence of the real or fundamental purpose can be found in long-range or comprehensive plans.[18] In *Middletown Township*, the court looked carefully at the record and concluded that the evidence was insufficient to demonstrate that the township had taken the land "according to a carefully developed plan which effectuates the stated purpose" of recreational use.[19] Accordingly, the condemnation was invalid.

The elimination of blight has long been recognized as a valid public purpose in Pennsylvania, and prior to 2006 condemnation to eliminate blight was considered a valid public purpose notwithstanding the government's intent to transfer ownership to a private entity.[20] Moreover, blight was broadly defined Pennsylvania's Urban Redevelopment Law to include any property that was currently being used for "economically or socially undesirable land uses."[21] Blight designations were afforded broad deference by the courts.[22]

In response to *Kelo*, however, the Pennsylvania legislature adopted the Property Rights Protection Act (PRPA) in 2006.[23] This reform prohibits the condemnation of private property to use it for private enterprise.[24] Although this prohibition is subject to exceptions, including an exception for property designated as blighted, the definition of blight is substantially narrowed in the new statute.[25] Under the PRPA, a single "unit of property" can be declared blighted for the purpose of eminent domain only if it meets one of twelve enumerated criteria.[26]

Overall, the judicial climate in Pennsylvania remains favorable to communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles. First, traditional public uses such as parks, playgrounds, and hike and bike trails are unlikely to implicate the 2006 reform because they will generally be owned by local governments, not private enterprises. Second, although the PRPA limits the use of eminent domain for anti-obesity projects that attempt to transfer private property to another private owner (for instance, for a grocery store selling healthy food), the exception for blighted property provides some (albeit more limited) flexibility to do so in certain circumstances.

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[17] Belovsky v. Redev. Auth., 54 A.2d 277, 283 (Pa. 1947).
[18] *Middleton Twp.*, 939 A.2d at 338.
[19] *Id.* at 340.
[20] *In re* Redev. Auth. of Philadelphia, 938 A.2d 341, 346 (Pa. 2007) ("The elimination of blight is a valid public purpose that, in the absence of bad faith, is completely separate from any [particular] use of the property subsequent to the taking."); *see also* Belovsky v. Redev. Auth. of Philadelphia, 54 A.2d 277, 282-83 (Pa. 1947) (holding that condemnation for the purpose of eradication of blight is not invalid simply because it will be transferred to private ownership).
[21] 35 PA. STAT. ANN. § 1702(a) (West 2009).
[22] Oliver v. City of Clairton, 98 A.2d 47, 51 (Pa. 1953).
[23] 26 PA. CONS. STAT. ANN. § 201 et seq. (West 2009) (e.g., property can be declared blighted if it constitutes a public nuisance, has been abandoned, or has been designated as unfit for human habitation). For a general discussion of the PRPA, see Anthony B. Seitz, *The Property Rights Protection Act: An Overview of Pennsylvania's Response to* Kelo v. City of New London, 18 WIDENER L.J. 205 (2008).
[24] 26 PA. CONS. STAT. ANN. § 204(a).
[25] *Id.* § 204(b).
[26] *See id.* § 205(b).

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.[27] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[28] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[29] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[30] 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 Pennsylvania Supreme Court has consistently followed federal regulatory takings precedent in interpreting Article I, § 10, of the Pennsylvania Constitution.[31] Thus, in Pennsylvania a community must compensate a landowner for land use regulations that impose a permanent physical occupation on her property or deprive her of all economically beneficially use of her property.[32] Since most land use regulations do not fall into one of these relatively rare categories, the regulation will be examined according to the *Penn Central* factors: (1) the regulation's economic effect on the landowner, (2) the extent to which the regulation interferes with reasonable investment-backed expectations, and (3) the character of the government action.[33]

Applying these factors, the Pennsylvania Supreme Court has upheld many land use regulations against claims for compensation. For example, in *United Artists' Theater Circuit*, the court rejected the claim that the designation of private property as a historic site, and the concomitant limitation on development, constituted a regulatory taking. The court acknowledged that the regulations "could arguably deprive the owner of the most profitable use of his property," but it nonetheless rejected the challenge because it did "not see the possibility that the owner is wholly deprived of any profitable use."[34]

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[27] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[28] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[29] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[30] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[31] United Artists' Theater Circuit v. City of Philadelphia, 635 A.2d 612, 616 (Pa. 1993) ("An examination of our case law reveals that this Court has continually turned to federal precedent for guidance in its 'taking' jurisprudence, and indeed has adopted that analysis used by the federal courts.").
[32] Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751, 763-64 (Pa. 2002).
[33] *Id.*
[34] *United Artists' Theater Circuit*, 635 A.2d at 618.

In *Machipongo Land & Coal*, the Pennsylvania Supreme Court rejected a takings challenge to a finding that private property was not suitable for surface mining.[35] And in *Miller & Son Paving*, the court held that a landowner was not entitled to payment from the township that had prevented the operation of a quarry because "other viable uses [of the land] existed."[36]

Thus, in Pennsylvania communities have wide latitude to adopt land use restrictions intended to combat childhood obesity without implicating takings liability. Those regulations that do not impose a permanent physical occupation or deprive a landowner of all economically viable use of his property will rarely be held to be takings for which compensation must be paid.

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 Pennsylvania generally will not be able to do this without paying compensation.

Pennsylvania law protects the rights of landowners to continue to engage in existing, lawful uses of their property nothwithstanding the adoption of land use regulations that purport to make such uses unlawful. In *Pennsylvania Northwestern Distributors v. Township of Moon*, the Supreme Court of Pennsylvania held that a zoning ordinance requiring a landowner to discontinue an existing use upon the expiration of an amortization period was unconstitutional.[37] The property owner opened an adult bookstore before the passage of a zoning ordinance requiring all "adult commercial enterprises" to terminate within ninety days.[38] The Supreme Court rejected the township's attempt to require the landowner to discontinue the prior nonconforming use, holding that "the amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the Pennsylvania Constitution."[39] Prior nonconforming use rights "are, in this Commonwealth, of constitutional dimension. . . . [T]he continuance of nonconforming uses is countenanced because the refusal so to do would be of doubtful constitutionality."[40] Moreover, the right to expand a nonconforming use as required to maintain economic viability or to take advantage of increases in trade is also constitutionally protected.[41] In *Eitnier v. Kreitz Corp.*, the Supreme Court of Pennsylvania held that the doctrine of continuation of nonconforming uses meant that the landowner was allowed to construct a new building as part of the natural expansion and growth of his business.[42]

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[35] *Machipongo Land and Coal Co.*, 799 A.2d at 763-64.
[36] Miller & Son Paving v. Plumstead Twp., 717 A.2d 483 (Pa. 1998).
[37] Pa. N.W. Distrib. v. Zoning Hearing Bd. of Moon, 584 A.2d 1372, 1376-77 (Pa. 1991).
[38] *Id*. at 1373.
[39] *Id*. at 1376.
[40] Smalley v. Zoning Hearing Bd. of Middletown Twp., 834 A.2d 535, 539 (Pa. 2003).
[41] Humphreys v. Stuart Realty Corp., 73 A.2d 407, 409 (Pa. 1950).
[42] Eitnier v. Kreitz Corp.,172 A.2d 320, 322 (Pa. 1961).

The right to continue a nonconforming use is a vested property right that runs with the land[43] and "cannot be abrogated or destroyed unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain."[44] Abandonment is more than mere discontinuence—it requires proof of intent to abandon.[45] Discontinuence for a period of time may give rise to a presumption of intent to abandon.[46]

Unlike many jurisdictions, a mere change in use will not destroy grandfathered protection where the new use is not included in a higher use classification under the ordinance.[47] Therefore, a nonconforming textile manufacturer was permitted to change its use to storage and wholesale and not lose its grandfathering rights.[48] Similarly, a sandwich shop with limited customer seating was permitted to change into a pizza restaurant with seating for forty.[49] In fact, the Pennsylvania Supreme Court has held that the use of property as a day camp and swim club was a permissible continuance of the prior nonconforming use as an amusement park.[50]

Thus, in Pennsylvania landowners enjoy broad protections of their rights to continue nonconforming uses. A community that wishes to outlaw existing uses as part of an initiative to combat childhood obesity will most likely have to compensate the landowner to do so. Otherwise, the landowner will enjoy a vested right to continue, expand, and even change the use, which right can be extinguished only if the use becomes a nuisance or the landowner abandons it.

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[43] Pappas v. Zoning Bd. of Adjustment of Philadelphia, 589 A.2d 675, 676 (Pa. 1991).
[44] Keystone Outdoor Adver. v. Dep't of Transp., 687 A.2d 47, 51 (Pa. Commw. Ct. 1996).
[45] *Pappas*, 589 A.2d at 676.
[46] Latrobe Speedway v. Zoning Hearing Bd. of Unity Twp., 720 A.2d 127, 132 (Pa. 1998).
[47] Stoner v. Pottsville Zoning Bd. of Adjustment, 198 A.2d 510, 511 (Pa. 1964).
[48] *Id*.
[49] *Pappas*, 589 A.2d at 677-78.
[50] Appeal of Indianhead, Inc., 198 A.2d 522, 525 (Pa. 1964).