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

SOUTH CAROLINA

This memorandum summarizes South 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 South 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—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 South 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

[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.

Local government power to use eminent domain in South Carolina is governed by article I, section 13, of the South Carolina Constitution, which prohibits the taking of private property for public use without just compensation.[10]

South Carolina courts have consistently interpreted the constitution's public use clause restrictively. In particular, the South Carolina Supreme Court has made clear that for a use to constitute public use "it must appear that the public has an enforceable right to a definite and fixed use of the property."[11] As the court stated in *Karesh v. City Council of Charleston*:

> While in other jurisdictions the power of eminent domain may be exercised for a public purpose, benefit or the public welfare, the courts of South Carolina have adhered to a strict interpretation of our constitutional provision. . . . Our controlling decisions are to the effect that "public use" means just that[.][12]

In *Karesh*, the court rejected the city's attempt to use eminent domain to condemn land to transfer it to a private developer for construction of a convention center that was to serve as an adjunct to an existing hotel.[13] In doing so, the court stated that "[m]ere benefit to the public or permission by the owner for use of the property by the public are not enough to constitute a public use, but it must appear that the public has an enforceable right to a definite and fixed use of the property."[14]

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] S.C. CONST. art. I, § 13(A).
[11] Toumey Hosp. v. City of Sumter, 134 S.E.2d 744, 747 (S.C. 1964).
[12] Karesh v. City Council of Charleston, 247 S.E.2d 342, 344 (S.C. 1978).
[13] *Id.* at 345.
[14] *Id.*

Moreover, after *Kelo* the South Carolina Constitution was amended to emphasize that "public use" is a narrow criterion in South Carolina, and that it does not include economic development unless the property is open for use by the public. Article I, section 13, now states that "[p]rivate property must not be condemned by eminent domain for any purpose or public benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use."[15] The amended provision contains an exception for "the limited purpose of the remedy of blight," and further defines blight narrowly to include only property that constitutes "a danger to the safety and health of the community."[16]

Thus, communities in South Carolina cannot use the power of eminent domain to condemn private property for any project that is not open to the public, unless the property satisfies the constitution's narrow definition of blight. This interpretation of the public use clause is significantly more restrictive than the public use clause of the U.S. Constitution.

Most initiatives to combat childhood obesity that will rely on eminent domain powers, however—such as parks, playgrounds, and walking and biking trails—are just the sort of facilities dedicated to public use that will satisfy even South Carolina's restrictive standards.

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.[17] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[18] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[19] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[20] 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.

In analyzing takings claims premised on land use regulations that restrict a property owner's right to use his property as he wishes, the South Carolina Supreme Court follows federal

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[15] S.C. CONST. art. I, § 13(A).
[16] *Id.* § 13(B).
[17] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[18] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[19] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[20] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.

precedent. As the court has stated, "South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone's property interests amounts to a constitutional taking."[21] Whether zoning restrictions are severe enough to amount to a taking is analyzed under an "ad hoc, factual inquir[y]"[22] that examines "the character of the government's action, the economic impact of the action, and the degree to which the action interferes with the owner's investment-backed expectations."[23] Under this inquiry, land use regulations that restrict the uses to which a landowner can put his land are rarely held to require compensation. In *Denene, Inc. v. City of Charleston*, for example, the South Carolina Supreme Court rejected a claim for compensation from bar owners after a zoning ordinance prohibited landowners from selling alcohol between the hours of 2 a.m. and 6 a.m.[24] South Carolina legislators have made numerous efforts to pass laws that more vigorously protect private property from regulatory takings; to date, however, none of these efforts have been successful.[25]

Local governments in South Carolina are unlikely to be forced to compensate private landowners for losses caused by changes in zoning regulations or other land use restrictions.

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

In South Carolina, a landowner has a vested right to continue a prior nonconforming use notwithstanding the adoption or amendment of a zoning ordinance prohibiting that use, so long as the use is not a "detriment to the public health, safety, or welfare."[26] The property owner seeking to continue a prior nonconforming use has the burden of proving that the use in question actually existed prior to the enactment of the ordinance.[27]

The right to continue a nonconforming use, however, is not unlimited. Rather, communities may require that the use be discontinued after a reasonable period of time if the nonconforming use is detrimental to public health, safety, or welfare, provided the amortization provision of the zoning ordinance is "reasonable."[28] To determine the reasonableness of an amortization provision,

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[21] Hardin v. S.C. Dep't of Transp., 641 S.E.2d 437, 441 (S.C. 2007).
[22] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[23] *Hardin*, 641 S.E.2d at 441.
[24] Denene, Inc. v. City of Charleston, 596 S.E.2d 917 (S.C. 2004).
[25] Bradford W. Wyche, *An Overview of Land Use Regulation in South Carolina*, 11 SOUTHEASTERN ENVTL. L.J. 183, 196 (2003).
[26] Whaley v. Dorchester County Zoning Bd. of Appeals, 524 S.E.2d 404, 409 (S.C. 1999).
[27] *Id.* at 410.
[28] Collins v. City of Spartanburg, 314 S.E.2d 332, 333 (S.C. 1984).

courts balance the public gain against the private loss.[29] Using this balancing test, a two-year amortization period for sexually oriented businesses,[30] a two-year amortization period for video poker machines,[31] and a five-year amortization period for storage yards, auto wrecking, and junkyards[32] have all been found valid and reasonable. In contrast, a one-year amortization period that applied to all nonconforming uses regardless of their effect on public safety, health, morals, or welfare was found to amount to an unconstitutional taking.[33] South Carolina courts are largely deferential to local zoning bodies in their determinations of whether a prior nonconforming use presents a danger to public health, safety, or welfare such that it can be amortized rather than grandfathered, as well as to their determinations regarding how long of an amortization period should be granted. However, the determinations must be detailed enough to tailor the amortization to the danger of allowing the prior nonconforming use to continue.[34]

Moreover, the right to continue a nonconforming use will be lost if the nonconforming use is abandoned, regardless whether it is a danger to public health and safety.[35] Abandonment is more than mere discontinuance; it requires proof of intent to abandon.[36]

South Carolina law regarding amortization indicates that local authorities may be successful in requiring amortization of businesses such as fast-food restaurants under the public health, safety, or welfare justification. Amortization periods of two years or more have generally been found to be reasonable, and the party challenging the amortization period will have the burden of proving that its private loss exceeds public gain.

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Under South Carolina law, local governments likely have significant leeway to enact initiatives to combat childhood obesity through land use regulation. Although the South Carolina Constitution embodies a more narrow public use clause than the federal Constitution, the provision is still broad enough to encompass the traditional public uses of parks, playgrounds, and hike and bike trails. Regulatory takings in South Carolina have been interpreted in the same manner as regulatory takings under federal law, and courts have been very deferential to the power of local governments to limit land uses in service of the public good. Finally, although landowners have a vested right to continue nonconforming uses, communities can require those uses to cease after a reasonable amortization period if the use is a danger to public health.

[29] Centaur, Inc. v. Richland County, 392 S.E.2d 165, 169 (S.C. 1990) (quoting *Collins*, 314 S.E.2d at 333).
[30] *Id.*
[31] Bugsy's Inc. v. City of Myrtle Beach, 530 S.E.2d 890, 895 (S.C. 2000).
[32] *Collins*, 314 S.E.2d at 333.
[33] James v. City of Greenville, 88 S.E.2d 661, 665 (S.C. 1955).
[34] *See id*.
[35] Conway v. City of Greenville, 173 S.E.2d 648, 652-53 (S.C. 1970).
[36] *Id.*