nplan | NATIONAL POLICY & LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY

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

WEST VIRGINIA

This memorandum summarizes West Virginia 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 West Virginia 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 West Virginia, 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.

The West Virginia Constitution provides that "[p]rivate property shall not be taken or damaged for public use, without just compensation . . . ascertained in such manner as may be prescribed by general law[.]"[10] The question of whether a particular use constitutes a public use is a legal question for the courts to resolve. But "[w]hether it is expedient, appropriate, or necessary to provide for a public service of a particular kind of character is a legislative, not a judicial, question."[11]

Although the West Virginia Supreme Court originally took a narrow view of what counts as "public use," this narrow view "has broadened over time."[12] Now, the court essentially follows federal precedent in concluding that the public use requirement of the West Virginia Constitution embraces a "broad sphere of permissible governmental activity in areas where the Legislature determines that government action is a necessary supplement to private enterprise to alleviate social problems."[13] In *Charleston Urban Renewal Authority v. Courtland Co.*, for example, the West Virginia Supreme Court held that the condemnation of blighted property for a legitimate urban redevelopment plan constituted a valid public use.[14]

In response to *Kelo*, the West Virginia legislature enacted eminent domain reform that made clear that public use may not be "construed to mean the exercise of eminent domain primarily for private economic development" and further prohibits the use of eminent domain "when the primary purpose of the taking is economic development that will ultimately result in ownership or control of the property transferring to another private entity, other than one having the power of eminent domain."[15] Because the exclusion prohibits the exercise of eminent domain *primarily*

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] W. VA. CONST. art. III, § 9.
[11] Potomac Valley Soil Conservation Dist. v. Wilkins, 423 S.E.2d 884, 888 (W. Va. 1992).
[12] Charleston Urb. Renewal Auth. v. Courtland Co., 509 S.E.2d 569, 577 (W. Va 1998).
[13] *Id.*
[14] *Charleston Urban Renewal Auth.*, 509 S.E.2d 569.
[15] W. VA. CODE § 54-1-2(11) (2008).

for private economic development, it should serve as no barrier to the exercise of eminent domain actions for policy initiatives aimed at combating childhood obesity since that public health goal will be the primary objective of the condemnation. Thus, the statutory restriction on the use of eminent domain for economic development purposes is unlikely to have much impact on efforts to use eminent domain to combat childhood obesity.

In sum, the West Virginia Supreme Court has interpreted the state constitution as permitting a broad array of public benefits to satisfy the public use restriction on the eminent domain power, and the 2006 statutory reforms limit eminent domain only when the primary purpose of a condemnation is private economic development. Communities seeking to use eminent domain to combat childhood obesity by providing public recreational infrastructure will not be impeded by these limitations on the condemnation power. Moreover, even initiatives aimed at condemning private property to transfer to a private owner for the provision of healthy food choices are likely to survive challenge under the statutory reforms since private economic development will not be the primary motivating factor.

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] 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.

Regulatory takings in West Virginia are also governed by Article III, § 9, of the West Virginia Constitution. Although case law is limited, it appears that the West Virginia Supreme Court applies federal precedent in analyzing takings claims under the West Virginia Constitution. Thus, in *DeCoals, Inc., v. Board of Zoning Appeals of Westover*, the court looked to federal takings law

[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.

in rejecting a takings claim by a coal company against "a rather stringent"[20] zoning ordinance that prohibited all coal dust, thereby rendering it impossible for the coal company to operate its coal tipple in the area.[21] In *Grady v. City of St. Albans*, the court discussed the general scope of regulatory takings law in West Virginia, indicating that the court would follow federal law if a zoning ordinance was challenged as a regulatory takings.[22] Finally, in *McFillan v. Berkeley County Planning Commission*, the West Virginia Supreme Court rejected a landowner's claim for compensation when he was denied permission to expand his mobile home park on the basis of federal regulatory takings precedent.[23] Because West Virginia law appears to mirror federal law on the issue of regulatory takings, and because the threshold for finding a compensable taking is so high at the federal level, community efforts to combat childhood obesity are unlikely to give rise to valid regulatory takings claims.

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

West Virginia law protects the right of landowners to continue an existing land use notwithstanding the enactment of an ordinance purporting to prohibit that use.[24] The West Virginia Supreme Court of Appeals has "mandated that a nonconforming use cannot be prohibited if the purpose of the use remains the same after the ordinance is enacted."[25] West Virginia courts have upheld grandfathering protection for salvage yards,[26] a building for the elderly and physically handicapped,[27] and a mobile home park.[28] The right to continue a nonconforming uses survives even if the property is conveyed to another owner.[29] Additionally, if a landowner has made significant expenditures in pursuit of a land use before a land use regulation prohibiting that use takes effect, his right to continue the use may become vested before the use is completed.[30]

The right to continue a nonconforming use may be lost if the nonconforming use is discontinued for a period of time.[31] Communities may prescribe the time period of abandonment that will

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[20] Grady v. City of St. Albans, 297 S.E.2d 424, 428 (W. Va. 1982) (characterizing the zoning ordinance in DeCoals, Inc., v. Bd. of Zoning Appeals of Westover, 284 S.E.2d 856 (W. Va. 1981)).
[21] *DeCoals*, 284 S.E.2d 856.
[22] *Grady*, 297 S.E.2d at 428-29.
[23] McFillan v. Berkeley County Planning Comm'n, 438 S.E.2d 801, 809 (W. Va. 1993).
[24] W. VA. CODE § 8A-7-10(c) (2008).
[25] *McFillan*, 438 S.E.2d at 806.
[26] Poole v. Berkeley County Planning Comm'n, 488 S.E.2d 349, 351 (W. Va. 1997).
[27] HRDE, Inc. v. Zoning Officer of Romney, 430 S.E.2d 341, 345 (W. Va. 1993).
[28] *McFillan*, 438 S.E.2d at 806.
[29] *Poole*, 488 S.E.2d at 353.
[30] *HRDE*, 430 S.E.2d at 345.
[31] *See, e.g.,* Longwell v. Hodge, 297 S.E.2d 820, 824 (W. Va. 1982).

destroy the nonconforming use.[32] West Virginia courts have found abandonment of prior nonconforming uses when the use was abandoned for one year,[33] as well as when a nonconforming restaurant was closed for five years for renovations.[34]

In addition, landowners are not entitled to expand their nonconforming uses. The West Virginia Supreme Court has stated that "the nonconforming use is limited to use existing at the time the regulation was adopted[,] and it ordinarily may not be expanded into other areas of the property where the nonconforming use did not previously exist."[35] Accordingly, the court has held that a grocery store was not permitted to turn a residential zoned lot into additional parking.[36]

Local governments wishing to rid their communities of unwanted land uses may run into difficulties due to West Virginia's grandfathering protections. Although it is clear that West Virginia law will permit a large range of regulations that prohibit future uses of land, these regulations cannot be used to destroy uses that are already taking place in compliance with the zoning regulations applicable at the time the use was begun.

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Overall, West Virginia provides a good legal environment for local governments to use land use policies to combat childhood obesity. "Public use" is broadly defined, allowing local governments to exercise their eminent domain powers for almost any purpose. State law regarding regulatory takings generally mirrors federal law and is therefore solicitous of a wide range of land use restrictions. Although West Virginia provides statutory protection for existing uses in the wake of zoning ordinances intended to prohibit them, protections for prior uses do not permit expansion of the use and will be lost if the use is abandoned.

[32] Par Mar v. City of Parkersburg, 398 S.E.2d 532, 534 (W. Va. 1990).
[33] *Id.*
[34] *Longwell*, 297 S.E.2d at 823.
[35] McFillan v. Berkeley County Planning Comm'n, 438 S.E.2d 801, 807 (W. Va. 1993).
[36] Stop & Shop, Inc. v. Bd. of Zoning Appeals of Westover, 399 S.E.2d 879, 881 (W. Va. 1990).