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

ARKANSAS

This memorandum summarizes Arkansas 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 Arkansas 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

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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

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 powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Arkansas, including constitutional and

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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).

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." 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.

Arkansas is one of the few states that have not adopted statutory or constitutional reforms to limit the scope of the eminent domain power in the wake of the *Kelo* decision.[10] Thus, the state constitution sets the current legal standard for the scope of the eminent domain power in Arkansas.

Article 2, section 22, of the Arkansas Constitution provides that "[t]he right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."[11] Like the U.S. Supreme Court, the Arkansas Supreme Court has interpreted the public use requirement broadly. In *Linder v. Arkansas Midstream Gas Services Corp.*, for example, the Arkansas Supreme Court upheld the exercise of eminent domain by a private gas company for the purpose of constructing and maintaining a natural gas pipeline, even though that pipeline would be used by only a few royalty owners and others.[12] The court explained that "the character of a taking, whether public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised."[13] Because Arkansas Midstream Gas was a "common carrier" and therefore subject to the requirement that it provide services for "all alike," the court concluded that the fact

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2115-16 (2009).
[11] ARK. CONST. art. 2, § 22.
[12] 2010 WL 841119 (Ark. Mar. 11, 2010).
[13] *Id.*

that only a few would take advantage of their access to the pipeline did not undermine the conclusion that the condemnation was for a public use.[14]

Public infrastructure intended to promote healthy outdoor activity, such as parks and playgrounds, is a quintessential public use. The Arkansas legislature has expressly granted municipalities and counties the authority to take land by eminent domain for the purpose of building parks.[15] Moreover, the Arkansas Supreme Court has held that land condemned for use as a park may be leased to private parties for the purpose of creating and operating the park.[16] In *Pfeifer v. City of Little Rock*, the court upheld the condemnation of land to be leased to a private foundation to create the Clinton Presidential Park, which includes the Clinton Presidential Library and Museum.[17] The court recognized the broad discretion enjoyed by condemning entities to determine what type of park should be built, as well as the amount of land necessary for building such a park. In addition, the court recognized that the condemning entity's broad discretion extends to "deciding what property is necessary now and for the future."[18]

In addition, Arkansas law provides the authority for municipalities, through their local housing authorities, to undertake comprehensive redevelopment projects in blighted areas.[19] "Blight" is broadly defined to include

> areas, including slum areas, with buildings or improvements which by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors are detrimental to the safety, health, morals, or welfare of the community.[20]

Where blighted conditions exist, the municipal housing authority is authorized to use eminent domain as part of a redevelopment project.[21] To proceed with a redevelopment plan, the housing authority must have its plan approved by the local municipality. In *Gray v. Urban Renewal Agency*, the Arkansas Supreme Court upheld the use of eminent domain when "directed toward clearance, reconstruction and rehabilitation of a blighted area."[22] The court allowed the taking of a dilapidated home for redevelopment when the land in question would be sold to a private developer of high-rise buildings.[23]

However, the concept of public use is not unlimited. "Without the consent of the owner, private property cannot be taken for private use, even under the authority of the legislature."[24] In *City of Little Rock v. Raines*, the Arkansas Supreme Court rejected the City's attempt to use eminent

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[14] *Id.*
[15] ARK. CODE ANN. § 18-15-201 (West 2008); *see also id.* § 18-15-301 (granting a somewhat wider range of powers to municipalities).
[16] Pfeifer v. City of Little Rock, 57 S.W.3d 714, 725 (Ark. 2001).
[17] *Id.* at 716-18.
[18] *Id.* at 721-25.
[19] ARK. CODE ANN. § 14-169-604.
[20] *Id.*
[21] *Id.* § 14-169-605.
[22] Gray v. Urb. Renewal Agency, 585 S.W.2d 31, 32 (Ark. 1979).
[23] *Id*. at 32-33.
[24] City of Little Rock v. Raines, 411 S.W.2d 486, 493 (Ark. 1967).

domain to convey the property to a private entity to develop an industrial park, holding that such a transfer was of questionable constitutionality and that, therefore, the statute under which the City claimed eminent domain powers should be interpreted narrowly as not conveying such powers.[25]

Finally, the Arkansas Supreme Court vests the final question of whether private property is being taken for a public or private use in the judiciary, and has held that the issue of public use is a judicial question that the landowner has a right to have determined by the courts.[26]

Overall, the judicial climate in Arkansas is favorable to communities seeking to use their eminent domain powers to promoting healthy, active lifestyles by building parks, playgrounds, and other recreation facilities that will be publicly owned and used. Moreover, precedent suggests that communities may be able to use eminent domain in partnership with private entities to provide public parks and recreation space. Although courts have the final say on whether a proposed use constitutes a public use, public parks and recreation areas—even those that are privately owned—will likely pass judicial muster.

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.

As noted above, the Arkansas Constitution specifies that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."[31] The Arkansas

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[25] *Id.* at 493-95.
[26] Pfeifer v. City of Little Rock, 57 S.W.3d 714, 721 (Ark. 2001).
[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] ARK. CONST. art. 2, § 22.

Supreme Court looks to federal takings law to implement this constitutional prohibition.[32] Thus, a land use regulation will constitute a taking in Arkansas if it denies an owner all economically viable use of his property[33] or if it imposes a permanent physical occupation on the property.[34] Other regulations, however, that merely decrease the value of a landowner's property will generally not implicate the compensation requirement of the Arkansas or federal Constitution.[35]

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 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 Arkansas will generally not be able to compel the immediate cessation of existing land uses without paying compensation, but they may adopt zoning ordinances that provide for the elimination of existing nonconforming uses over a specified period of time.

The Arkansas Supreme Court has held that landowners enjoy a vested right to continue existing, lawful uses of their property notwithstanding the enactment or amendment of a zoning ordinance prohibiting the existing use.[36] This right attaches when the landowner has in good faith substantially undertaken acts in preparation for such use.[37] In *Blundell v. City of West Helena*, for example, the Supreme Court of Arkansas found that a partially developed mobile home park could continue construction because of "substantial use" prior to a zoning change that prohibited mobile homes in the area.[38] Yet the court made clear that intent, preliminary contracts, or contemplated use do not allow property owners to evade zoning ordinances.[39]

Rights to continue nonconforming uses are not unlimited, however. Landowners may not expand their nonconforming uses or extend the uses to adjacent property. In *Evans v. City of Little Rock*, for example, the Arkansas Supreme Court rejected the landowner's claim that his right to

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[32] *See* Barrett v. Poinsett County, 811 S.W.2d 324, 325 (Ark. 1991) (applying the *Penn Central* factors to a takings claim); J. W. Black Lumber Co. v. Ark. Dep't of Pollution Control & Ecology, 717 S.W.2d 807, 810-11 (Ark. 1986) (same).

[33] El Paso Prod. Co. v. Blanchard, 269 S.W.3d 362, 370-71 (Ark. 2007) (concluding that the prohibition on seismic testing by the owner of a mineral interest without the permission of the surface estate owner did not constitute a complete deprivation of economic value).

[34] *See* Forest Glade Mgmt. v. City of Hot Springs, 2008 WL 4876230 (Ark. Ct. App. Nov. 12, 2008).

[35] Richardson v. City of Little Rock Planning Comm'n, 747 S.W.2d 116, 117 (Ark. 1988) ("We have frequently held that the private use of property can be restricted by zoning regulations."); City of W. Helena v. Bockman, 256 S.W.2d 40, 41-42 (Ark. 1953) ("In all cases in which zoning ordinances have been upheld, it is recognized that such legislation frequently, if not generally, operates to reduce the value of property the use of which is restricted. But these cases are to the effect that such damage does not constitute the taking . . . and that it is not required that the owner be compensated for this loss of value.").

[36] Blundell v. City of W. Helena, 522 S.W.2d 661, 666 (Ark. 1975).

[37] *Id*. at 666-67 (discussing the substantial use test).

[38] *Id.* at 667 (finding that "[t]he substantial use test requires that the steps taken toward implementation be of a substantial nature or involve substantial investment or substantial obligations on the part of the owner.").

[39] Potter v. City of Tontitown, 264 S.W.3d 473, 482-83 (Ark. 2007) (finding that a landowner had not demonstrated substantial use where he had engaged in only preliminary work and planning for a proposed land use).

continue operating a nonconforming commercial use in a residential neighborhood did not entail the concomitant right to extend that commercial operation to the landowner's additional lots in the same neighborhood.[40] Nor may a landowner resume a nonconforming use if the use has been abandoned.[41] In *Branch v. Powers*, the Arkansas Supreme Court held that the landowner had abandoned the nonconforming commercial use of his garage when he used the garage for storage of retail goods that were sold elsewhere for eleven years. Thus, the court rejected his claimed right to resume the commercial use of the garage.[42]

In addition, the Arkansas Supreme Court has upheld the validity of ordinances that require nonconforming uses to be discontinued within a specified period of time.[43] The reasonableness of the amortization period is determined on the facts of each case, by weighing the public interest against the rights of the private owner.[44] Relevant factors include "expected business losses, decrease in real property value, cost of removal, and original cost."[45] In *City of Fayetteville v. McIlroy Bank & Trust*, the Arkansas Supreme Court determined that a seven-year amortization period was reasonable for phasing out billboards by weighing the aesthetic considerations of not having billboards against the fact that the billboards had a remaining useful life of between five and fifteen years and had little salvage value.[46] Finally, while abandonment generally entails both nonuse and intent to abandon, communities in Arkansas may adopt ordinances that terminate the right to continue a nonconforming use if the use is discontinued for a specified period, which may be as short as thirty days, regardless of intent to abandon.[47]

In general, then, communities in Arkansas will not be able to implement policies aimed at combating childhood obesity by requiring the immediate cessation of existing land uses, such as fast-food restaurants. Communities may, however, adopt reasonable amortization periods in which those uses must be phased out or adopt time periods in which mere nonuse will constitute abandonment. Otherwise, landowners are entitled to continue nonconforming uses so long as they do not extend, expand, or abandon those uses.

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[40] Evans v. City of Little Rock, 253 S.W.2d 347 (Ark. 1953).
[41] Branch v. Powers, 197 S.W. 928 (Ark. 1946).
[42] *See id.*; *see also Blundell*, 522 S.W.2d at 668 (suggesting that abandonment of a nonconforming use could terminate the nonconforming status).
[43] *See, e.g.,* Fisher Buick v. City of Fayetteville, 689 S.W.2d 350 (Ark. 1985); Donrey Comm'ns Co. v. City of Fayetteville, 660 S.W.2d 900, 905 (Ark. 1983).
[44] *Fisher Buick,* 689 S.W.2d at 351.
[45] *Id.*
[46] 647 S.W.2d 439, 440 (Ark. 1983).
[47] *See* Anderson v. City of Paragould, 695 S.W.2d 851, 852 (Ark. Ct. App. 1985) (upholding a thirty-day discontinuance provision).