

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

DISTRICT OF COLUMBIA

This memorandum summarizes District of Columbia 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 the District of Columbia 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.

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 dedication⁶ and involves a partial interest in the

¹ See, e.g., KELLY D. BROWNELL & KATHERINE BATTLE HORGAN, *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 in the District of Columbia, including constitutional and statutory provisions that limit the eminent domain power or require communities to compensate

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).

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.

Because the District of Columbia is a federal enclave rather than a state, its government’s eminent domain power is governed by congressional authorization rather than state constitutional provision. Because of this, the success of initiatives to use land use regulations to combat childhood obesity may lie more in the ability to lobby Congress than in the scope of existing regulations. However, the existing regulations provide a significant amount of leeway in terms of what type of projects are acceptable under the doctrine of public use.

Under the D.C. Code, the government has authority to condemn property “for sites of schoolhouses, fire or police stations, rights-of-way for roads, highways, streets and alleys or parts thereof, rights-of-way for water mains or sewers, or any other authorized municipal use.”¹⁰ Courts have strictly construed this provision, interpreting the “other authorized municipal use” provision as a means for Congress to authorize subsequent purposes, not for the District to authorize additional uses on its own.¹¹ Therefore, the mere appropriation of money is enough to give the District government power to condemn property for any of the enumerated reasons, but additional authorization apart from appropriation is required for purposes that are not specifically enumerated.¹²

However, it does not appear that authorization is particularly difficult to obtain. The District has used its eminent domain power for a number of purposes, including building a new professional baseball stadium;¹³ track extensions for the Philadelphia, Baltimore, and Washington Railroad

⁹ *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.

¹⁰ D.C. CODE § 16-1311 (2008).

¹¹ See *Rollins Outdoor Adver. v. District of Columbia*, 434 A.2d 1384, 1385–86 (D.C. 1981) (quoting *MacFarland v. Elverson*, 32 App. D.C. 81 (1908)).

¹² *Id.* at 1386.

¹³ D.C. CODE § 10-1601.02(c)(3).

Company;¹⁴ and the general elimination of blight.¹⁵ The D.C. Court of Appeals has embraced the broad definition of “public use” articulated in *Kelo v. City of New London*.¹⁶ In *Franco v. National Capital Revitalization Corp.*, the D.C. Court of Appeals held that economic development and job creation were legitimate public uses for the exercise of eminent domain.¹⁷ Although acknowledging that property owners may challenge proposed condemnations by alleging that the proffered public use is pretextual,¹⁸ the D.C. Court of Appeals made clear that courts will generally defer to legislative determinations of public use and are reluctant to find that government officials acted in bad faith or with pretextual motives.¹⁹

In short, there do not appear to be independent legal constraints on the exercise of eminent domain in the District of Columbia beyond those articulated in *Kelo*,²⁰ and the definition of “public use” is broad enough to cover economic development projects. Therefore, it is likely that projects seeking to use eminent domain to acquire land for parks, bike and walking trails, and other uses that benefit the community and combat childhood obesity will be considered valid public uses. Moreover, the concept of public use embraced by *Kelo* includes the possibility of transferring condemned property to other private owners for public benefit. Thus, even projects such as acquiring land and selling it to a private party to run a grocery store are not likely to run afoul of the public use requirement. In fact, the District has a history of supplying public land to private developers to operate healthy food stores. In 2001, the District sold land in one of the city’s poorest neighborhoods to a private developer with the requirement that the developer lease part of the space to a supermarket.²¹ In 2007, a supermarket was completed and opened on that property nearly a decade after the last full-service supermarket in the area had closed.²² It bears remembering, however, that the D.C. Code has been interpreted to require congressional authorization for the exercise of eminent domain for projects outside the specifically enumerated purposes.

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.

¹⁴ *Id.* § 9-1203.06.

¹⁵ *Id.* § 42-3171.02.

¹⁶ 545 U.S. 469 (2005); *see Franco v. Nat’l Capital Revitalization Corp.*, 930 A.2d 160, 167 (D.C. 2007).

¹⁷ *Franco*, 930 A.2d at 169.

¹⁸ *See id.*

¹⁹ *See, e.g., Siegel v. District of Columbia*, 892 A.2d 387 (D.C. 2006).

²⁰ 545 U.S. 469 (2005).

²¹ U.S. CONFERENCE OF MAYORS, MAYORS’ GUIDE TO FIGHTING CHILDHOOD OBESITY 9 (2008), *available at* <http://www.usmayors.org/chhs/healthycities/documents/guide-20080326.pdf>; *see also* D.C. HUNGER SOLUTIONS, HEALTHY FOOD, HEALTHY COMMUNITIES: AN ASSESSMENT AND SCORECARD OF COMMUNITY FOOD SECURITY IN THE DISTRICT OF COLUMBIA (July 2006), *available at* <http://www.dchunger.org/pdf/healthfoodcomm.pdf>.

²² U.S. CONFERENCE OF MAYORS, *supra* note 21, at 9.

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.²³ Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.²⁴ All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactor test.²⁵ A regulation that does not satisfy one of the bright line rules will rarely be considered a taking under the U.S. Constitution.²⁶ 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 courts of the District of Columbia follow Supreme Court precedent in determining whether a land use regulation constitutes a compensable taking.²⁷ Following the U.S. Supreme Court's decision in *Penn Central*, D.C. courts will make an “essentially ad hoc, factual inquiry” that focuses on three factors: “(1) the character of the government action; (2) the economic impact of government regulation on the property owner; and (3) the owner's reasonable investment-backed expectations.”²⁸ Land use regulations that fall short of actual takings by leaving some reasonable economic use for the property do not require compensation, even when the remaining use is not the most profitable use or the use desired by the property owner.²⁹ In *Embassy Real Estate Holdings*, the land owner claimed that he had been subject to a regulatory taking because a historical preservation regulation prevented the renovations that he had intended when he purchased the property.³⁰ Even though the plaintiff had invested \$12 million in the renovation, the court held that the regulation was not a compensable taking because there were other options for the redevelopment of the property and the plaintiff's initial investment was speculative.³¹

Ultimately, there is no set formula for identifying a taking. It is clear, however, that under this multifactor test, run of the mill regulations are rarely held to be takings for which compensation is required. Therefore, land use regulations, such as bans on opening new fast-food establishments or requiring convenience stores to stock healthy food, are likely allowable without any significant regulatory takings limitation or requirement to pay compensation.

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

²³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

²⁴ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

²⁵ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

²⁶ Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.

²⁷ *Embassy Real Estate Holdings v. D.C. Mayor's Agent for Historic Pres.*, 944 A.2d 1036, 1052–53 (D.C. 2008).

²⁸ *Id.* at 1052.

²⁹ *Id.* at 1053.

³⁰ *Id.* at 1052.

³¹ *Id.*

operating. Policy makers in the District of Columbia generally will not be able to do this without paying compensation. The D.C. Code provides:

The lawful use of a building or premises as existing and lawful at the time of the original adoption of any regulation heretofore adopted . . . may be continued although such use does not conform with the provisions of such regulation, provided no structural alteration, except such as may be required by law or regulation, or no enlargement is made or no new building erected.³²

This provision authorizes land owners to continue a prior nonconforming use as a matter of right.³³ At first glance, this provision appears to give property owners significant protection to continue prior existing uses of their property in the face of subsequent regulations outlawing or restricting those uses.

The right to continue a nonconforming use is not unlimited, however. Rather, D.C. courts construe the right narrowly to promote the overall goals of the zoning scheme.³⁴ To acquire a right to continue a nonconforming use, the prior use must have been more than “accessory use.”³⁵ In addition, “an extension of or change in [the] nonconforming use triggers applicable zoning regulations.”³⁶ Therefore, the building may not be expanded, even if the expansion itself would be in conformity with zoning regulations.³⁷ Protection for prior nonconforming uses may also be lost through abandonment of the premises.³⁸ To establish abandonment, it must be demonstrated that the landowner had the intent to abandon and engaged in some overt act or failure to act that “carries the implication of abandonment.”³⁹ Under this definition, an owner does not abandon his prior nonconforming use by seeking approval from the Board of Zoning to change from one nonconforming use to another.⁴⁰ Lastly, as is evident from the language of the statute itself, no new building may be placed on the property.⁴¹ In short, “any interpretation of the zoning regulations which expands the prerogatives of nonconforming users is generally undesirable.”⁴²

The protection of nonconforming uses may impose some obstacles to land use initiatives seeking to combat childhood obesity by limiting uses of existing property. However, the D.C. courts have been very deferential to the Board of Zoning Adjustment in interpreting the zoning restrictions

³² D.C. CODE § 6-641.06a (2008).

³³ *C&P Bldg. Ltd. P’ship v. D.C. Bd. of Zoning Adjustment*, 442 A.2d 129, 130 (D.C. 1982).

³⁴ *Id.* at 131 (“Both this court and the Zoning Commission have stressed that nonconforming uses are not favored and must be regulated strictly so that the goals of the districting scheme . . . are not undercut.”).

³⁵ Accessory use is defined as “a use customarily incidental and subordinate to the principal use and located on the same lot therewith.” *Id.* at 130 n.2. In *C&P Bldg. Ltd. P’ship*, the court held that the landowner’s use of the building as office space was an accessory use to the primary nonconforming use as a telephone exchange. *Id.* at 132 n.4.

³⁶ *Id.* at 130.

³⁷ *Lenkin v. D.C. Bd. of Zoning Adjustment*, 428 A.2d 356, 359 (D.C. 1981) (rejecting petitioner’s argument that rather than enlarging a nonconforming use, he was enlarging a conforming use in a building that housed a nonconforming use).

³⁸ *George Washington Univ. v. D.C. Bd. of Zoning Adjustment*, 429 A.2d 1342, 1345 (D.C. 1981).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ D.C. CODE § 6-641.06a (2008).

⁴² *C&P Bldg. Ltd. P’ship v. D.C. Bd. of Zoning Adjustment*, 442 A.2d 129, 131 (D.C. 1982).

and deciding where the line is between prior nonconforming use and different use.⁴³ Any changes made in the use of nonconforming property may present an opportunity to challenge the change as something that removes the protection of the nonconforming use.

In using land use restrictions to combat childhood obesity, government officials in the District of Columbia are unlikely to encounter significant issues apart from those posed under federal law. The definition of “public use” is broad and encompasses pretty much any use that benefits the public. No additional compensation is required for land use restrictions that pose limitations on the use of property not rising to the level of takings. Although prior nonconforming uses are protected, the nonconforming use may not be changed or expanded without losing grandfathered protection. The District has already taken action by transferring city-owned property to a private developer for construction of a supermarket, and it is likely that government officials in the District will have considerable freedom to continue many different efforts to combat childhood obesity through land use restrictions.

⁴³ See, e.g., *id.*; see also *Lenkin v. D.C. Bd. of Zoning Adjustment*, 428 A.2d 356, 359 (D.C. 1981).