

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

IOWA

This memorandum summarizes Iowa 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 Iowa 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 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.

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 Iowa, 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

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).

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.

The Iowa Constitution requires the payment of compensation if eminent domain is exercised for public use.¹⁰ The Iowa Supreme Court has interpreted the protections against governmental takings afforded under the state constitution as similar to the Fifth Amendment of the U.S. Constitution.¹¹ Although the Iowa Supreme Court views federal cases interpreting the takings clause under the Fifth Amendment as persuasive, they are not binding.¹² Unlike federal takings analysis, however, Iowa law looks at the connection between the purpose and the means to see whether the taking was “reasonable and necessary.”¹³ The Iowa test for necessity is whether the condemning authority can reasonably expect to achieve its public purpose, and the plaintiff bears the burden to disprove this.¹⁴ Therefore, in Iowa, an eminent domain taking must survive a two-step analysis: (1) the taking must involve a valid public purpose, and (2) the taking must be reasonable and necessary to achieve that purpose. The Iowa Supreme Court has held that the development of public infrastructure such as roads, sewer and water lines, and public recreation areas constitutes a valid public use, even if the projects potentially benefit a proposed privately owned shopping mall.¹⁵

In the wake of the U.S. Supreme Court’s decision in *Kelo*, Iowa passed legislation restricting the use of eminent domain by limiting the definition of valid public use in several ways.¹⁶ Under the

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

¹⁰ IOWA CONST. art. 1, § 18.

¹¹ *Harms v. City of Sibley*, 702 N.W.2d 91, 97 (Iowa 2005).

¹² *Id.*

¹³ IOWA CODE ANN. §§ 6A.4, 6A.6 (West 2009) (conferring the authority to condemn property for all public purposes that are “reasonable and necessary”); *Milligan v. City of Red Oak*, Iowa, 230 F.3d 355, 360 (8th Cir. 2000).

¹⁴ *Milligan*, 230 F.3d at 360 (citing *Mann v. City of Marshalltown*, 265 N.W.2d 307, 315 (Iowa 1978)).

¹⁵ *McMurray v. City Council of City of W. Des Moines*, 642 N.W.2d 273, 283 (Iowa 2002).

¹⁶ 2006 Iowa Legis. Serv. 1st Ex. Sess. Ch. 1001, H.F. 2351, § 3 Eminent Domain—Government Authority—Condemnation Procedure (effective July 14, 2006); IOWA CODE ANN. § 6A.22.

new statute, private property may be acquired through eminent domain only for a “public purpose, public use, or public improvement.”¹⁷ A valid “public purpose, public use, or public improvement” is defined as:

(1) Possession, occupation, and enjoyment of property by the general public or governmental entities;

(2) Acquisition of property necessary for a public or private utility, common carrier, or airport;

(3) Private use that is incidental to the public use of the property, as long as the incidental use is not the sole reason for the condemnation; or

(4) To eliminate slum or blighted conditions in that part of an urban renewal area designated as slum or blighted.¹⁸

The first two parts of this definition allow for what may be thought of as traditional public uses, such as infrastructure, parks, and utilities. However, the next two sections provide opportunities for the use of eminent domain for purposes beyond traditional public uses. The “incidental private use” exception would allow a condemning authority to use eminent domain to take a large tract of land for a traditional public purpose, and then lease or sell an “incidental” portion of the acquired tract to a private entity. For example, a city or municipality could use eminent domain to create a public park and then transfer a small piece of the park to a concession stand that sold healthy snacks.

Moreover, a community can exercise its eminent domain authority to eliminate slums or blighted properties. The legislature has enacted two main restrictions on the acquisition of slum or blighted properties: (1) the condemning authority must evaluate slum or blighted properties on a property-by-property basis; (2) if an urban renewal plan calls for the acquisition of an entire slum or blighted area, then 75 percent or more of the area must be in a slum or blighted condition.¹⁹ Despite these restrictions, the actual definition of blight remains somewhat broad, and a community may be able to condemn land for nontraditional purposes (such as operating a healthy grocery store) using eminent domain as long as it falls under the statutory definition of blight. For example, blight can be defined as “the presence of a substantial number of deteriorated structures,” “insanitary or unsafe conditions,” “defective or unusual conditions of title,” or “the existence of conditions which retard the provision of housing accommodations for low or moderate income families.”²⁰ These terms are not defined, and it will be up to the courts to determine what degree of “deterioration” or “insanitary conditions” will be sufficient to constitute blight.

The statute further provides that except in response to blighted or slum conditions, public use does not mean economic development activities resulting in increased tax revenues, increased employment opportunities, privately owned or privately funded housing and residential

¹⁷ IOWA CODE ANN. § 6A.22(1).

¹⁸ *Id.* § 6A.22(2)(a).

¹⁹ *Id.* § 6A.22(2)(5)(a).

²⁰ *Id.* § 6A.22(2)(5)(b)(i).

development, privately owned or privately funded commercial or industrial development, or the lease of publicly owned property to a private party.²¹

Overall, the judicial and statutory climate in Iowa is only moderately favorable to communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles. In response to *Kelo*, the state legislature has prohibited the use of eminent domain for economic development. Additionally, Iowa has restricted the condemnation of blighted properties to a property-by-property assessment; or, if for an urban renewal project, 75 percent or more of the area must be blighted in order to be condemned. However, the definition of blight remains somewhat broad, and property may be taken for private use as long as it remains incidental to the public use of the property.

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.²² Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.²³ All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactor test.²⁴ A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.²⁵ 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 Iowa Supreme Court has interpreted the state constitution as providing similar protections as the federal Constitution, and Iowa courts rely on the U.S. Supreme Court's regulatory takings analysis to evaluate takings claims.²⁶ An automatic taking occurs when the "government requires an owner to suffer a permanent physical invasion of her property—however minor" or when "regulations . . . completely deprive an owner of 'all economically beneficial us[e]' of her property."²⁷ In reality, very few land use regulations actually satisfy these demanding standards for automatic takings liability. When these standards are not met, Iowa courts evaluate takings

²¹ *Id.* § 6A.22(2)(b).

²² *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

²³ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

²⁴ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

²⁵ Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.

²⁶ *Harms v. City of Sibley*, 702 N.W.2d 91, 97 (Iowa 2005).

²⁷ *Id.* at 98.

claims by reference to the factors set forth in *Penn Central*: (1) “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations[,] and (2) the ‘character of the governmental action’— for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good.”²⁸ In *Perkins v. Board of Supervisors of Madison County*, the Iowa Supreme Court rejected a claim by landowners that a zoning amendment permitting a nearby race track to disregard zoning ordinances during the five days of the county fair constituted a taking for which compensation must be paid.²⁹ The court analyzed the harm through the lens of state and federal precedent and concluded that the amendment did not constitute a compensable taking because it did not deprive the property owners of all economically viable use of their land, did not constitute a permanent invasion, and did not deprive them of the fundamental attributes of ownership.³⁰

Because Iowa courts have generally interpreted the state constitution as providing similar protections as the federal Constitution, communities in Iowa will generally be free to adopt land use restrictions intended to combat childhood obesity, as long as these restrictions do not deprive landowners of all economically viable use of their property or impose a permanent physical occupation on the land.

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. Zoning ordinances prohibiting certain types of land use ordinarily do not affect existing uses of land. For example, if an area previously zoned for commercial use were rezoned as single-family residential, then a previously existing fast-food chain would normally be allowed to continue operating. In some circumstances, however, a community may wish to eliminate 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 Iowa generally will not be able to do this without paying compensation.

Under Iowa law, a landowner has a vested right to continue a prior nonconforming use notwithstanding a change in the applicable zoning ordinance.³¹ Further, “accessory uses” allowed under an ordinance are generally permitted in conjunction with continued operation of a nonconforming use.³² In *City of Okoboji v. Okoboji Barz, Inc.*, the Iowa Supreme Court held that a city zoning ordinance could not prevent a nonconforming restaurant from selling alcohol,

²⁸ *Id.* (citations omitted).

²⁹ *Perkins v. Bd. of Supervisors of Madison County*, 636 N.W.2d 58, 69-70 (Iowa 2001).

³⁰ *Id.* at 71.

³¹ *City of Okoboji v. Okoboji Barz, Inc.*, 746 N.W.2d 56, 60 (Iowa 2008); *Quality Refrigerated Servs. v. City of Spencer*, 586 N.W.2d 202, 206 (Iowa 1998).

³² *City of Okoboji*, 746 N.W.2d at 61.

despite having an expired liquor license, because serving alcohol was a permissible accessory use to the restaurant.³³

However, the right to continue a nonconforming use is not absolute. In particular, Iowa courts have recognized that a community may require the phasing out of a prior nonconforming use after a reasonable amortization period.³⁴ The Iowa Supreme Court has noted two factors that will be relevant in determining the constitutionality of an amortization period: (1) whether the period of amortization of the investment was just and reasonable, and (2) whether the nonconforming use was a source of danger to the public health, morals, safety, or general welfare.³⁵ In *Stoner McCray System v. City of Des Moines*, the Iowa Supreme Court rejected a two-year amortization period for a nonconforming billboard because “nothing appears in the record to support the reasonableness of such a limitation.”³⁶ In contrast, in *Board of Supervisors of Cerro Gordo County v. Miller*, the Iowa Supreme Court upheld a zoning ordinance requiring termination of a nonconforming automobile wrecking business after a five-year amortization period because the landowner failed to establish that the application of the amortization period would have a negative impact on his investment.³⁷

Moreover, the right to continue a nonconforming use will be forfeited if the use is abandoned³⁸ or if the property owner seeks to enlarge or expand his prior nonconforming use in a way that is substantial and has a negative impact on the neighborhood.³⁹ To establish abandonment, a community must demonstrate intent to abandon, unless it has adopted an ordinance that eliminates the intent requirement.⁴⁰ Periods of involuntary discontinuance will not cause the loss of the nonconforming use right, regardless of the necessity for demonstrating intent.⁴¹ In contrast, deliberately enlarging or expanding a nonconforming use in a manner that substantially impacts the surrounding property will result in a loss of the nonconforming use right. In *Perkins v. Madison County Livestock & Fair Ass’n*, the Iowa Supreme Court held that the enlargement of a rodeo arena into a figure-eight racetrack for auto racing was a substantial change from its prior nonconforming use as a rodeo arena because the auto races were louder, dustier, and noisier than the rodeo, and the expanded track was much closer to neighboring property.⁴²

Thus, communities in Iowa interested in changing zoning ordinances to create a physical environment more conducive to healthy, active lifestyles may generally do so under Iowa law. Although continuation of a prior nonconforming use is considered a vested property right, the Iowa Supreme Court has recognized that local governments may amortize prior nonconforming

³³ *Id.* at 63.

³⁴ *Stoner McCray Sys. v. City of Des Moines*, 78 N.W.2d 843, 848 (Iowa 1956).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Bd. of Supervisors of Cerro Gordo County v. Miller*, 170 N.W.2d 358, 362 (Iowa 1969).

³⁸ *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 430 (Iowa 1996).

³⁹ *Perkins v. Madison County*, 613 N.W.2d 264, 270 (Iowa 2000) (citing *City of Jewell Junction v. Cunningham*, 239 N.W.2d 183, 186 (Iowa 1989)).

⁴⁰ *See Smith v. Bd. of Adjustment of Cedar Rapids*, 460 N.W.2d 854, 857 (Iowa 1990) (approving an ordinance that eliminates the intent requirement).

⁴¹ *Ernst v. Johnson County*, 522 N.W.2d 599, 603-04 (Iowa 1994) (holding that discontinuance of quarrying due to decrease in demand did not constitute voluntary discontinuance and therefore did not cause the loss of the nonconforming use right).

⁴² *Perkins*, 613 N.W.2d at 270-71.

uses upon a showing that the amortization period is reasonable and the prior use is a danger to public health. Moreover, nonconforming use rights will expire if the use is abandoned or expanded, and communities may adopt provisions calling for the forfeiture of such rights after a period of discontinuation, even absent proof of intent to abandon.