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

IDAHO

This memorandum summarizes Idaho 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 Idaho 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 Idaho, 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.

Like the federal Constitution, the Idaho Constitution permits the taking of private property for a public use so long as the government pays just compensation.[10] However, the Idaho Constitution defines "public use" to include traditional public uses, such as infrastructure and transportation, and also "any . . . use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants."[11] The Idaho Supreme Court has interpreted this phrase broadly:

> The notion of a public use is a flexible one depending on the needs and wants of the community, and we note that the public, the legislature, and the courts of this state have demonstrated an awareness of public benefits, including environmental and population concerns, that perhaps were not recognized a century ago.[12]

Accordingly, it has upheld the exercise of eminent domain to benefit private interests as long as it also served one of these broad purposes. For example, the Idaho Supreme Court has noted that the removal of timber from a property fits the definition of public use and would support the exercise of eminent domain for purposes of condemning a right of way across private property to gain access to the timber, even if the use is for the benefit of a private landowner, because the timber is a material resource of the state.[13] It has also permitted an irrigation company to condemn a portion of a privately owned irrigation canal because "[t]he irrigation and reclamation

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] IDAHO CONST. art. I, § 14.
[11] *Id.*
[12] Cohen v. Larson, 867 P.2d 956, 958 (Idaho 1993).
[13] McKenney v. Anselmo, 416 P.2d 509, 514 (Idaho 1966).

of arid lands is a well recognized public use."[14] However, even this broad concept of public use does not support the exercise of eminent domain for purely private benefit.[15]

In the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London*, the Idaho legislature restricted a community's authority to use eminent domain for economic development purposes and for the sole purpose of transferring the property to another private owner.[16] The Idaho state code now expressly prohibits the use of eminent domain for "any alleged public use which is merely a pretext for the transfer of the condemned property . . . to a private party"[17] and for "the purpose of promoting or effectuating economic development."[18] The statute contains an exception to these prohibitions for the use of eminent domain to condemn blighted property. To demonstrate that property is blighted, the condemnor must show that

1. the property poses an "actual identifiable threat to building occupants,"
2. the property contains "identifiable conditions that pose an actual risk" to human health or crime or delinquency, and
3. the "property presents an actual risk of harm to the public health, safety, morals, or general welfare. . . ."[19]

In general, though, the legal climate in Idaho is favorable to communities interested in using eminent domain to further the goal of making their physical environment more conductive to healthy, active lifestyles. The Idaho Constitution permits the use of eminent domain for traditional public uses and specifically to preserve the health its citizens. Since most policy initiatives aimed at combating childhood obesity will entail such traditional public uses as parks and playgrounds, Idaho law should not impose limitations on these initiatives. Moreover, as long as thirty years ago the Idaho Supreme Court noted that where the power of eminent domain is clearly granted, it must "be capable of adapting to the changing times."[20] Arguably, the "changing times" policy would permit the use of eminent domain to combat childhood obesity in new and novel ways. Finally, although the Idaho legislature responded to *Kelo* by prohibiting the use of eminent domain for private transfers and for economic development, and narrowed the blight exception to this prohibition, this legislative reform is not likely to impede legitimate attempts to use eminent domain to combat childhood obesity. Even transfers of condemned property to private individuals are prohibited, but only if the condemnation is a pretext for the private transfer. If a valid governmental interest exists—such as the creation of a healthy food option where none otherwise exists—the transfer would not be prohibited by the post-*Kelo* reform.

2. Land Use Regulation and Compensation

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[14] Canyon View Irrigation Co. v. Twin Falls Canal Co., 619 P.2d 122, 125 (Idaho 1980).
[15] *Cohen*, 867 P.2d at 958 (condemnation of right of way to gain access to a private residence does not constitute public use).
[16] IDAHO CODE ANN. § 7-701A(2)(a)-(b) (2006).
[17] *Id.* § 7-701A.
[18] *Id.* § 7-701A(2)(b).
[19] *Id.* § 7-701A(2)(b)(ii).
[20] Burlington N. v. Finneman, 530 P.2d 940, 942 (Idaho 1974).

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.[21] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[22] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[23] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[24]

The Idaho Supreme Court has held that the language of article 1, section 14, of the Idaho Constitution should be interpreted similarly to the takings clause of the Fifth Amendment of the U.S. Constitution.[25] Specifically, when performing takings analysis under the state or federal Constitution, the court must "determine whether 'justice and fairness' require compensation for any economic injury caused by the government."[26] Although there is no set formula for determining when justice and fairness require compensation, if a property owner is forced to bear a public burden that should be borne by the public as a whole, then compensation must be paid.[27] Accordingly, Idaho courts follow U.S. Supreme Court precedent and categorize two classes of per se takings: (1) cases of permanent physical occupation and (2) cases in which a regulation denies a landowner all economically viable use of the property.[28] In reality, very few land use regulations satisfy these demanding standards for automatic (per se) takings liability. A permanent physical occupation occurs only where there is a compelled physical occupation of property pursuant to governmental coercion that will last indefinitely.[29] And regulations have been held to deprive a landowner of all economically viable use of her property only in cases where the landowner was effectively prohibited from making any use of the property.[30]

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[21] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[22] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[23] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[24] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[25] BHA Invs. v. State, 63 P.3d 474, 480 (Idaho 2003).
[26] *Id.* (citing Kaiser Aetna v. United States, 444 U.S. 164, 174-75 (1979)).
[27] *Id.* (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).
[28] *See* Boise Tower Assocs. v. Hogland, 215 P.3d 494, 503 (Idaho 2009) (applying federal precedent to a state takings claim); *see also* City of Coeur d'Alene v. Simpson, 136 P.3d 310, 317-20 (Idaho 2006) (same).
[29] *See* Covington v. Jefferson County, 53 P.3d 828, 832 (Idaho 2002) For example, the U.S. Supreme Court has held that a requirement that a landowner permit the public to use his property as a hike and bike trail will constitute a permanent physical occupation and therefore will require compensation. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).
[30] *See Boise Tower Assocs.*, 215 P.3d at 503.

Most zoning regulations do not fall into the per se takings categories. Rather, a zoning restriction will prohibit some uses (such as fast-food restaurants) and permit a range of others. These run of the mill zoning restrictions are rarely held to require compensation. The Idaho Supreme Court relies on the U.S. Supreme Court's *Penn Central* factors in analyzing a takings claim involving a regulation that does not implicate one of the bright-line rules. These factors include the economic impact of the regulation, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the governmental action.[31] In the context of a regulation, even one that "downgrades the economic value of private property," the Idaho Supreme Court has held that it "does not necessarily constitute a taking by the government, especially if some residual value remains."[32]

Idaho law also provides private property owners with procedural protections against potential regulatory takings. These protections do not expand the substantive protections against regulatory takings afforded under the Idaho Constitution, but rather seek to keep the government accountable for its regulatory actions. Under Idaho statute, all state agencies and local governments are required to evaluate proposed regulator or administrative actions to "assure that such action does not result in an unconstitutional taking of private property."[33] Upon request, landowners are entitled a written regulatory takings analysis concerning proposed regulatory action that may constitute a taking. The analysis must comply with state standards, including evaluation of a checklist of factors developed by the state attorney general to assess the constitutionality of the proposed regulatory action.[34] The Idaho state attorney general's checklist asks six basic questions that comport with the U.S. Supreme Court's regulatory takings analysis:[35]

1. Does the regulation or action result in either a permanent or temporary physical occupation of private property?
2. Does the regulation or action require a property owner to either dedicate a portion of property or to grant an easement?
3. Does the regulation deprive the owner of all economically viable uses of the property?
4. Does the regulation have a significant impact on the landowner's economic interest?
5. Does the regulation deny a fundamental attribute of ownership?
6. (a) Does the regulation serve the same purpose that would be served by directly prohibiting the use or action? (b) Does the condition imposed substantially advance that purpose?

The requirement applies to zoning amendments as well as initial zoning ordinances and other governmental actions.[36] Governmental actions taken without complying with this statute are voidable.[37] Accordingly, any community seeking to adopt land use restrictions or zoning

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[31] City of Coeur D'Alene v. Simpson, 136 P.3d 310, 318 (Idaho 2006).
[32] Covington v. Jefferson County, 53 P.3d 828, 832 (Idaho 2002).
[33] IDAHO CODE ANN. § 67-8003 (2006).
[34] *Id.* § 67-8003(1)-(2).
[35] LAWRENCE WASDEN, OFFICE OF THE ATT'Y GEN., IDAHO REGULATORY TAKINGS ACT GUIDELINES, app. C (2007), *available at* http://www2.state.id.us/ag/manuals/regulatorytaking.pdf.
[36] In re Application for Zoning Change, 96 P.3d 613, 615 (Idaho 2004).
[37] IDAHO CODE ANN. § 67-8003(3).

amendments should generate a takings analysis to ensure that its action will not result in an unconstitutional taking of private property.

In Idaho, constitutional and statutory regulatory takings requirements are unlikely to impede efforts by local communities to pursue land use restrictions aimed at combating childhood obesity. These restrictions are not likely to entail permanent physical occupations or complete deprivation of all economically viable use, and therefore will not implicate the per se rules requiring compensation. Mere regulations on land use are also unlikely to compel compensation. Finally, the requirement of a written regulatory takings analysis may be cumbersome, but it does not expand the substantive protections afforded private property.

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 Idaho may not use zoning regulations to prohibit a previously existing nonconforming use without paying compensation.[38] For example, if a community wished to prohibit the operation of a fast-food restaurant in a particular area, a previously existing fast-food chain would be permitted to continue operating. Idaho law protects the continuation of prior nonconforming uses under the due process clauses of the state and federal constitutions.[39]

While some states permit a locality to discontinue a prior nonconforming use after giving the landowner an amortization period, Idaho instead requires that prior nonconforming uses be grandfathered.[40] Since there is no amortization period after which a nonconforming use may be discontinued, a prior nonconforming use could, in theory, continue operating as such in perpetuity. However, a landowner may lose the grandfather rights to a nonconforming use by expanding or enlarging the use.[41]

The Idaho Supreme Court has adopted a flexible approach focusing on the character of the expansion and enlargement on a case-by-case basis.[42] A mere "intensification" of a nonconforming use will not render it unlawful, but the construction of additional structures to further a nonconforming use will cause the property owner to lose her grandfathered rights.[43] In *Baxter*, Corbridge owned agricultural property as a nonconforming use, half of which was being used to graze cattle during non-winter months.[44] Corbridge later decided to build a manger to store the cattle while they were not grazing, but the Idaho Supreme Court ruled that the

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[38] Boise City v. Blaser, 572 P.2d 892, 894 (Idaho 1977).
[39] Baxter v. City of Preston, 768 P.2d 1340, 1341-42 (Idaho 1989).
[40] *Id.*
[41] *Id.*
[42] *Id.* at 1342.
[43] *Id.* at 1342-43.
[44] *Id.* at 1341.

construction of a manger was an unlawful expansion of the nonconforming use because it substantially enlarged and expanded the character of the property's use in violation of the zoning ordinance.[45] The court noted that in cases where changes in previously nonconforming uses were held to be unlawful, the change "had the potentiality for greater adverse impacts upon neighboring properties."[46]

Though Idaho's Constitution and statutes are generally favorable to the use of eminent domain and land use restrictions to combat childhood obesity, Idaho courts recognize strong due process protections against changing the laws to prohibit existing uses of affected properties. Thus, communities in Idaho that wish to change the character of a particular land use immediately will be obligated to compensate the owner of the property for his lost right to continue the prior nonconforming use.

[45] *Id.* at 1343.
[46] *Id.* (quoting 4 RATHKOPF, THE LAWS OF ZONING AND PLANNING § 51.06, at 68 (1988)).