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

WASHINGTON

This memorandum summarizes Washington 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 Washington 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 dedication[6] and involves a partial interest in the

---

[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.

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 Washington, 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.

Article I, § 16, of the Washington Constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made."[10] Washington state courts have consistently held that this provision is significantly different and more restrictive than the corresponding federal provision.[11] The Constitution also provides that whether a use constitutes "public use" is a matter to be determined by courts without regard to any legislative assertion that the use is public.[12] The Washington Supreme Court has held that "public benefit" does not necessarily mean "public use," and "a beneficial use is not necessarily a public use."[13]

The prohibition on the condemnation of private property for private use has been applied not only in cases in which the entire proposed use would be private, but also in cases in which the property in question would be put to a "mixed" use of traditional public uses and private uses. According to the Washington Supreme Court, "[i]f a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked."[14] The Washington Supreme Court has made it clear that "public interest" is insufficient; the property must be devoted to "public uses."[15] In *In re Westlake Project*, the court refused to allow eminent domain power to be used to condemn land for a downtown retail pedestrian plaza in Seattle—a plan that would have included traditional public uses such as sidewalks and interior

---

[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] WASH. CONST. art. I, § 16.
[11] *See, e.g.*, Manufactured Hous. Communities of Wash. v. State, 13 P.3d 183 (Wash. 2000) (discussing at length the ways in which the public use component of the Washington Constitution is more restrictive than that of the U.S. Constitution).
[12] WASH. CONST. art. I, § 16.
[13] *Manufactured Hous. Communities*, 13 P.2d at 195 (holding that the statutory grant of right of first refusal to tenants of mobile home parks is an impermissible private use, even though it clearly offers a public benefit).
[14] State *ex rel.* Puget Sound Power & Light Co. v. Super. Ct. for Snohomish County, 233 P. 651, 654 (Wash. 1925) (en banc) (as quoted in *In re* Westlake Project, 638 P.2d at 549, 556 (Wash. 1981)).
[15] *In re* Westlake Project, 638 P.2d at 556.

circulation spaces—because the retail project, a private use, was essential to the use, effectively overwhelming the public uses and making the project an impermissible private use.[16]

However, the Washington Supreme Court has recognized that some mixed-use projects constitute public use, so long as the private use is "incidental" to the public use. Thus, "[a]s long as the property was condemned *for the public use*, it may also be put to a private use that is merely incidental to that public use."[17] In *State ex rel. Washington State Convention & Trade Center*, the Washington Supreme Court upheld the use of eminent domain to condemn property for an expansion of the state convention center, even though part of the space would be used for private retail use.[18] Although there is no clear line delineating how much "public use" is sufficient in mixed-use situations, it appears that in order for the use to be valid, a significant majority of it must fall under the definition of "public use."[19] In addition, courts will examine the purpose of the condemnation and invalidate the use of the eminent domain power when "the private use is . . . itself the impetus for the condemnation."[20]

The limitations placed on the eminent domain power by the Washington Constitution and interpretations thereof may interfere with some initiatives that rely on the use of eminent domain to combat childhood obesity. Although communities may use eminent domain for traditional public uses such as parks, playgrounds, recreational areas, and walking and biking trails, other uses may prove more problematic. Projects such as acquiring property to convert to a privately run supermarket selling healthy food may be rejected as an invalid private use, and even traditional public uses such as recreation facilities may be prohibited if they are owned and operated by private parties.

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.[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

[16] *Id.*
[17] State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 966 P.2d 1252, 1255 (Wash. 1998) (emphasis in original).
[18] *Id.*
[19] *See id.* (80 percent public use was sufficient to allow the condemnation).
[20] *Id.* at 1257.
[21] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[22] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

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] As with eminent domain, however, states are free to adopt a regulatory takings framework that provides more protections to property owners than does the U.S. Constitution.

Regulatory takings are also governed by Article I, § 16, of the Washington Constitution. Unlike its analysis in the context of public use, the Washington Supreme Court generally follows federal regulatory takings precedent when determining whether a land use restriction amounts to a compensable taking.[25] Because Washington law mirrors federal law on the issue of regulatory takings, and because the threshold for finding a compensable taking is so high at the federal level, community efforts to combat childhood obesity are unlikely to give rise to valid regulatory takings claims.

3. Grandfathering Prior Nonconforming Uses

The discussion in Section 2 assumes that the zoning restriction imposed on a landowner does not attempt to prohibit the very use to which she is currently putting her property. In some circumstances, a community may wish to prohibit a preexisting use to further its goals of combating childhood obesity. For example, a community may want to eliminate fast-food establishments within a certain distance of schools, including those restaurants that are already operating. Communities in Washington may not be able to do this without paying compensation.

The Washington Supreme Court has stated that "[l]awful nonconforming uses are allowed to continue for some period of time, though the local government may regulate or even terminate the nonconforming use, subject to constitutional limits."[26] However, noting that "[t]he policy [of] zoning legislation is to phase out a nonconforming use,"[27] courts have limited the protection provided to nonconforming uses as merely the right not to have the use immediately terminated.[28] Therefore, prior nonconforming uses are subject to amortization rather than grandfathering under Washington law.

To pass constitutional muster, local governments must provide a reasonable period for amortization that allows the landowner to recoup a reasonable return on his investment.[29] Regulations that fail to provide this reasonable time period will be invalidated.[30] One year has been found to be a sufficient amortization period in cases involving adult stores[31] and a repair shop for construction equipment.[32] The Washington Supreme Court has substantially deferred to

---

[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] *See* Presybtery of Seattle v. King County, 787 P.2d 907, 914-16 (Wash. 2000) (applying state and federal precedents in a regulatory takings case); *see also* Orion Corp. v. State, 747 P.2d 1062 (Wash. 1987) (same).
[26] City of Univ. Place v. McGuire, 30 P.3d 453, 457 (Wash. 2001).
[27] Anderson v. Island County, 501 P.2d 594, 600 (Wash. 1972).
[28] Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 959 P.2d 1024, 1027 (Wash. 1998).
[29] *Id.*
[30] *See id.* at 1029.
[31] World Wide Video of Wash. v. City of Spokane, 103 P.3d 1265, 1276-77 (Wash. Ct. App. 2005).
[32] City of Seattle v. Martin, 342 P.2d 602, 604 (Wash. 1959).

local governments, allowing them to make determinations about reasonable amortization periods and granting exceptions to zoning regulations.[33] Moreover, communities may regulate nonconforming uses, and provide that nonconforming use rights will be lost if the use is abandoned, discontinued, or expanded.[34] In *Choi v. City of Fife*, for example, the court upheld a municipal code provision that terminated a landowner's right to continue using a nonconforming structure if the structure had been vacated for a specified period of time.[35] The court made clear that the term "vacate" was not the equivalent of abandonment and did not, therefore, require proof of intent to abandon.

Because of the deference given to local governments and the allowance of amortization, local governments may be more successful in eliminating undesirable uses through zoning restrictions requiring amortization than using eminent domain to achieve similar results. For instance, regulations prohibiting construction of fast-food restaurants near schools and requiring that existing fast-food restaurants be converted to other uses may be permissible under Washington law assuming the existing restaurants are given a sufficient amortization period.

*****

Overall, Washington law is somewhat more protective of private property rights than is federal law. In particular, the use of eminent domain is limited to a narrow category of public uses, and communities may not require the immediate cessation of a nonconforming use. However, efforts to combat childhood obesity using eminent domain to condemn property for public parks and recreation areas will satisfy the state's narrow definition of public use, and communities may impose a reasonable amortization period on existing uses that they wish to phase out to create healthier communities.

[33] *See, e.g.,* Bartz v. Bd. of Adjustment, 492 P.2d 1374, 1379 (Wash. 1972).
[34] City of Univ. Place v. McGuire, 30 P.3d 453, 457 (Wash. 2001).
[35] Choi v. City of Fife, 803 P.2d 1330, 1331-32 (Wash. Ct. App.), *review denied*, 813 P.2d 583 (Wash. 1991).