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

INDIANA

This memorandum summarizes Indiana 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 Indiana 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 Indiana, 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 U.S. Constitution has very little to say about the meaning of the phrase "public use," and under federal law this requirement barely constrains communities. 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.

In the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London*,[9] Indiana passed legislation prohibiting the use of eminent domain for economic development.[10] Although the Indiana Constitution has always required that just compensation be paid for any personal property taken by the government, the state constitution contains no language requiring that property be taken for a public use.[11] At first blush, this omission would appear advantageous to communities desiring to use eminent domain to promote healthy, active lifestyles—if there is no requirement for public use, then presumably land may be taken for private use. However, in their analyses of governmental takings, Indiana courts have held that the state constitution affords the same protections as those granted under the Fifth Amendment of the U.S. Constitution.[12] Therefore, the state constitution should be read as requiring a valid public use before the government can exercise eminent domain to condemn private property.

Because the term "public use" is not found in the state constitution, the legislature has expressly defined the term for the purposes of eminent domain. "Public use" means the

1. Possession, occupation, and enjoyment of property by the general public for the purpose of providing the public with fundamental services, including but not limited to highways, parks, and certified technology parks;
2. Leasing of a highway, certified technology park, park, or other by a public agency that retains ownership of the parcel by written lease with right of forfeiture; or
3. Use of property to operate a utility or pipeline.[13]

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] 2006 Ind. Legis. Serv. P.L. 163-2006 (H.E.A. 1010).
[11] IND. CONST. art. I, § 21.
[12] B&M Coal Corp. v. United Mine Workers of Am., 501 N.E.2d 401, 404 (Ind. 1986); Smyth v. Carter, 845 N.E.2d 219, 223 n.1 (Ind. Ct. App. 2006).
[13] IND. CODE ANN. § 32-24-4.5-1 (West 2006).

With the exception of a certified technology park, this definition allows for only what may be thought of as traditional public uses, such as infrastructure, parks, and utilities, which have not been further defined by Indiana courts. Economic development is not included as a valid public use under this provision; and as an added measure of protection, the legislature expressly prohibited economic development, increased tax revenues, and general economic health from qualification as a public use.[14]

Certified technology parks are essentially areas designated by the government to attract businesses engaged in high technology activities for the purposes of economic development.[15] If an area is so designated, the government is permitted by statute to use eminent domain to condemn property and lease it to a private entity.[16]

Like many other states, Indiana provides an exception to its economic development restriction for the acquisition of blighted property. After *Kelo*, however, the state code was amended to narrow the definition of blight.[17] As a consequence, only structures that are a public nuisance, unsafe for human habitation, dangerous to the safety of persons or property, unfit for its intended use, abandoned, etc., may be considered blighted.[18] Additionally, the acquisition of blighted property must be for more than merely increasing tax revenues.[19] This is an effective restriction on what may be considered blight, and a community wishing to use eminent domain to condemn a blighted property must make sure that the property meets all the statutory requirements.

Overall, the judicial and statutory climate in Indiana will not impose a significant hurdle for communities interested in using eminent domain to further the goal of making their physical environment more conductive to healthy, active lifestyles. Because such projects generally involve the development of traditional public infrastructure such as parks, playgrounds, and walking or biking paths, the statutory prohibition on the use of eminent domain for economic development will not apply.

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

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[14] *Id.*
[15] IND. CODE ANN. § 36-7-32-11 (West 2008).
[16] *Id.*
[17] IND. CODE ANN. § 32-24-4.5-7 (West 2006).
[18] *Id.* § 32-24-4.5-7(1) (courts have not further interpreted these general categories).
[19] *Id.* § 32-24-4.5-7(2).

imposes a permanent physical occupation on private land is a taking as a matter of law.[20] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[21] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[22] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[23] 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 Indiana Supreme Court has interpreted the state constitution as providing similar protections as the federal Constitution, and the state court's body of case law relies on the U.S. Supreme Court's regulatory takings analysis.[24] Although the Indiana Supreme Court reserves the power to find greater restrictions on regulatory takings in the state constitution, it has not done so.[25]

Indiana law also provides private property owners with an additional procedural protection against potentially unconstitutional regulatory takings. [26] Under this statute, the Indiana attorney general must review regulatory actions to determine whether the rule constitutes a taking of property without just compensation paid to the owner. This additional layer of protection for private property owners does not expand the substantive protections against regulatory takings afforded under the Indiana Constitution, but rather seeks to keep the government accountable for its actions. The attorney general must consider

1. The extent to which people should have understood from the published rule their interests would be affected;
2. The extent to which the issues in the adopted rule differed from the issues in the published rule; and
3. The extent to which the effects of the adopted rule differ from the would-be effects of the published rule.[27]

To date, there have not been any cases interpreting this statute in the context of a regulatory taking. Based on the face of the statute, localities wishing to employ land use regulations to promote active, healthy lifestyles should make sure (a) that those affected by the regulation properly understand how their interests will be affected and (b) that the adopted rule is as similar as possible to the previously published rule.

3. Grandfathering Prior Nonconforming Uses

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[20] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[21] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[22] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[23] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[24] Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570, 577-78 (Ind. 2007).
[25] Bd. of Zoning Appeals, Bloomington, Ind. v. Leisz, 702 N.E.2d 1026, 1032 (Ind. 1998).
[26] IND. CODE ANN. § 4-22-2-32 (West 2006).
[27] *Id.*

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 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 that are already operating. Communities in Indiana generally will not be able to do this without paying compensation.

Under Indiana law, the right to continue using a nonconforming use is a vested property right; and an ordinance may not take that right away without implicating due process or takings clauses of the federal Constitution.[28] In other words, the general rule is that a nonconforming use may not be terminated by a new zoning ordinance.[29] In this regard, Indiana law is protective of private property rights.

Although the general requirement is that a prior nonconforming use must be grandfathered, the Indiana Supreme Court, in passing, has recognized that a locality may require the phasing out of a prior nonconforming use after an acceptable amortization period.[30] However, no examples of permissible amortization ordinances are given, and the Indiana Supreme Court merely stated that amortization periods could not be held unconstitutional per se under the federal Constitution.[31] Because the Indiana Supreme Court has not expressly permitted amortization periods as a valid exercise of zoning under the state constitution, localities should be cautious when seeking to amortize certain nonconforming uses.

In addition to the possibility of amortization, the continuation of prior nonconforming uses remain subject to certain limitations, which if violated will require the landowner to either apply for a variance or come into compliance with the zoning ordinance. The idea is to allow the prior nonconforming use to continue operating in the same manner it had been before the zoning restriction was imposed. Therefore, grandfathering rights can be lost if the property owner seeks to enlarge or expand his prior nonconforming use.[32] In *Ragucci v. Metropolitan Development Commission of Marion County*, the Indiana Supreme Court upheld a trial court's finding that expansion of a prior nonconforming apartment from five units to eight units was a violation of the plain meaning of the zoning ordinance.[33]

Rights to a prior nonconforming use can also be lost through abandonment.[34] Abandonment is not simply discontinuation of use, but requires intent to abandon and a voluntary act or failure to act signifying abandonment.[35] In other words, unintentional abandonment is insufficient to cause a grandfathered entitlement to expire. In *Stuckman v. Kosciusko County Board of Zoning*

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[28] Metro. Dev. Comm'n of Marion County v. Pinnacle Media, LLC, 836 N.E.2d 422, 425 (Ind. 2005).
[29] *Id.*
[30] *Leisz*, 702 N.E.2d at 1032.
[31] *Id.*
[32] Ragucci v. Metro. Dev. Comm'n of Marion County, 702 N.E.2d 677, 678 (Ind. 1998).
[33] *Id.* at 678-85.
[34] Stuckman v. Kosciusko County Bd. of Zoning Appeals, 506 N.E.2d 1079, 1082 (Ind. 1987).
[35] *Id.*

Appeals, the Indiana Supreme Court upheld a zoning ordinance that required a nonconforming use to come into compliance after a period of one year of discontinued use.[36]

A municipality interested in eliminating prior nonconforming uses may also impose procedural hurdles to maintaining a nonconforming use, such as requiring registration.[37] Failure to comply with these hurdles may result in losing the right to the nonconforming use.[38] In *Board of Zoning Appeals, Bloomington, Indiana v. Leisz*, the City of Bloomington required registration of nonconforming houses in which more than three unrelated people lived.[39] The Leiszs purchased the property under the impression they were an allowed nonconforming use, but when they failed to register, the City notified them they were not in compliance with the ordinance.[40] In finding for the City, the Indiana Supreme Court held that the requirement of registration was not a constitutional taking.[41] However, the right to impose procedural hurdles is not absolute, and if a procedural hurdle goes too far, it may be viewed as taking consistent with case law under the Fifth Amendment to the U.S. Constitution.[42]

In general, communities interested in changing zoning ordinances to create a physical environment more conductive to healthy, active lifestyles should be encouraged under Indiana law. Although continuation of a prior nonconforming use is a vested property right that is protected under the constitution, the Indiana Supreme Court has recognized that localities may eliminate nonconforming uses in certain circumstances. Though amortization is not prohibited as a valid exercise of zoning under the state constitution, localities should be cautious when trying to amortize a prior nonconforming use because the Indiana Supreme Court has not directly ruled on the issue. However, localities in Indiana are permitted to impose various procedural hurdles that prior nonconforming uses must meet in order to retain their grandfathered entitlements.

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[36] *Id.* (holding that a property owner's discontinuation of moving junk cars into an automobile graveyard did not constitute abandonment where the owner did not remove the old junk cars because the graveyard was still being used for storage).
[37] Bd. of Zoning Appeals, Bloomington, Ind. v. Leisz, 702 N.E.2d 1026, 1029 (Ind. 1998).
[38] *Id.*
[39] *Id.* at 1027.
[40] *Id.*
[41] *Id.* at 1031.
[42] *Id.* at 1029.