

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

MAINE

This memorandum summarizes Maine 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 Maine 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 property, while in King County the acquisition is by eminent domain and involves full title. In

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.

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 Maine, 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

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,” 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.

The Maine Constitution has always required the payment of compensation whenever the power of eminent domain was exercised for public use.⁹ The Supreme Judicial Court of Maine has held that the language of the Maine Constitution should be interpreted similarly to the takings clause of the Fifth Amendment of the U.S. Constitution.¹⁰ Therefore, a community in Maine that wishes to use eminent domain to condemn property should be familiar with federal interpretation of the term “public use.” However, the Supreme Judicial Court has also suggested that the “exigency” requirement in the Maine Constitution imposes an additional hurdle: “The exercise of the State’s power of eminent domain ‘must be for a public use and upon a public exigency’ to meet this State’s constitutional requirements.”¹¹ Although the court notes this additional requirement, it has not interpreted the term “public exigency” to demand a higher standard of public interest in any case. Rather, Maine courts defer to legislative judgments of what constitutes a public exigency under a rational basis standard of review.¹² Courts will invalidate a taking under this standard only if they find that the governing body made a bad faith determination that a public exigency existed or abused its power.¹³ Therefore, at the constitutional level at least, a locality or state agency seeking to condemn land using eminent domain will enjoy broad deference in determining whether a proposed project constitutes a “public use.”

However, in the wake of the U.S. Supreme Court’s decision in *Kelo v. City of New London*,¹⁴ Maine passed legislation prohibiting the use of eminent domain for economic development.¹⁵

⁹ ME. CONST. art. 1, § 21.

¹⁰ *MC Assocs. v. Town of Cape Elizabeth*, 773 A.2d 439, 442 n.2 (Me. 2001) (“In this matter, the state and federal claims require the same analysis.”).

¹¹ *Blanchard v. Dep’t of Transp.*, 798 A.2d 1119, 1126 (Me. 2002).

¹² *Dyer v. Dep’t of Transp.*, 951 A.2d 821, 826-27 (Me. 2008).

¹³ *Compare id.* at 827 (rejecting a claim of bad faith where the claimants failed to present any evidence aside from personal opinion to controvert the government’s determination that the taking was necessary), *with Finks v. Me. State Highway Comm’n*, 328 A.2d 791, 797 (Me. 1974) (finding an abuse of power where the governing body acted beyond the scope of its legislative grant of discretion).

¹⁴ *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.

The effect of this legislation has been to provide property owners with added protection against communities seeking to condemn private property using eminent domain. The statute expressly prohibits the use of eminent domain for three purposes:

1. For the purposes of private retail, office, commercial, industrial, or residential development;
2. Primarily for the enhancement of tax revenue; or
3. For transfer to an individual or a for-profit business entity.¹⁶

This provision responds directly to the U.S. Supreme Court's decision in *Kelo* and seeks to prevent the use of eminent domain for the transfer of private property to a commercial developer. Although the statute would appear to prevent the use of eminent domain for economic development, the use of "primarily" as a qualifier in part (b) suggests that there is some latitude to use eminent domain for an acceptable primary purpose, even if a secondary purpose is to enhance tax revenues.

The statute contains two exceptions to the limitation on the use of eminent domain. First, the limitation does not apply upon a finding of blight.¹⁷ Blight is broadly defined. Moreover, if the condemnation is for an urban renewal or a development plan, then designations of blight need not be made on a parcel-by-parcel basis, meaning that nonblighted property may be condemned.¹⁸ Second, there are no limitations on the use of eminent domain if the property is being acquired for utilities.¹⁹

Overall, the judicial and statutory climate in Maine is favorable to communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles. Condemnations for parks, playgrounds, and walking trails are all consistent with the constitutional and statutory definitions of public use. While the state legislature has expressly prohibited the use of eminent domain for economic development and for the transfer of property to a private entity, these limitations are unlikely to prove burdensome to communities seeking to combat childhood obesity since most such initiatives will not entail transfers to private owners.

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.

¹⁵ 2006 Me. Legis. Serv. ch. 579 (H.P. 1310) (L.D. 1870), General Provisions—Eminent Domain (adopted Apr. 13, 2006); ME. REV. STAT. ANN. tit. 1, § 816 (2005).

¹⁶ ME. REV. STAT. ANN. tit. 1, § 816. These three exclusions have not yet been further interpreted by courts in the state.

¹⁷ *Id.* § 816(2).

¹⁸ *Id.* §§ 203, 205.

¹⁹ *Id.* § 816(3).

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.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 multifactor 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 Supreme Judicial Court of Maine has interpreted the state's constitution as providing the same regulatory takings protections as the federal Constitution, and the court's cases analyze federal and state takings claims by reference to the U.S. Supreme Court's regulatory takings analysis.²⁴ Thus, in Maine a land use regulation will be held to be a compensable taking if it deprives the landowner of all economically viable use, if it imposes a permanent physical occupation on the land, or if it is deemed compensable by virtue of the factors outlined in *Penn Central*.²⁵

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 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. Neither the Maine Constitution nor a generally applicable statutory provision protects existing uses from the effects of subsequent zoning changes. However, many communities in Maine have adopted provisions protecting prior nonconforming uses—either grandfathering them or calling for their amortization over time.²⁶ In addition, state law expressly protects prior nonconforming uses from zoning changes adopted by the Saco River Corridor Commission.²⁷

In Maine, then, courts generally must look to the relevant zoning ordinance to determine the legal status of nonconforming uses.²⁸ If the ordinance calls for the grandfathering of

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 *MC Assocs. v. Town of Cape Elizabeth*, 773 A.2d 439, 442 (Me. 2001).

²⁵ These standards are discussed in more detail in www.nplan.org/nplan/products/takings_survey.

²⁶ *See, e.g., Turbat Creek Preservation v. Town of Kennebunkport*, 753 A.2d 489 (Me. 2000) (town zoning ordinance permitting the continuation of nonconforming uses unless the use is abandoned for 12 months).

²⁷ ME. REV. STAT. ANN. tit. 38, § 958 (2005).

²⁸ *Chase v. Town of Wells*, 574 A.2d 893, 894 (Me. 1990).

nonconforming uses or their amortization over a specified period of time, then that is what courts will permit. In other words, the determination of whether to grandfather or amortize is made on an ordinance-by-ordinance basis.

However, courts will interpret provisions permitting the continuation of a nonconforming use strictly. Thus, in *Rockland Plaza Realty Corp. v. City of Rockland*, the Supreme Judicial Court stated that “[n]onconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary. The policy of zoning is to abolish nonconforming uses as swiftly as justice will permit.”²⁹

In general, communities in Maine interested in changing zoning ordinances to create a physical environment more conducive to healthy, active lifestyles have favorable options under Maine law. Except in the Saco River Corridor, continuation of a prior nonconforming use is not protected by constitution or statute. Moreover, the Supreme Judicial Court of Maine has demonstrated a general opposition toward the continuation of nonconforming uses.

²⁹ *Rockland Plaza Realty Corp. v. City of Rockland*, 772 A.2d 256, 262 (Me. 2001), *quoting* *Mayberry v. Town of Old Orchard Beach*, 599 A.2d 1153, 1154 (Me. 1991).