

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

MONTANA

This memorandum summarizes Montana 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 Montana before undertaking a particular policy initiative. If there are important cases, statutes, or analysis that we have omitted from this memorandum, please inform us by sending an email to info@phlpnet.org.

State and local governments are increasingly concerned with the rise in childhood obesity rates among their citizens. In response, they are turning their attention to policies that might combat this alarming trend. Many of these policies involve changing the physical environment in which children spend their days. This physical environment encompasses both public and private spheres. The public sphere includes the network of roads, sidewalks, and recreational paths that make up the community, as well as the various parks, playgrounds, open spaces, public gardens, and lighting that most people think of as public infrastructure. The private sphere includes the various types of development that exist on private property in the community, such as single-family homes, multifamily dwellings, apartment complexes, restaurants, grocery stores, health clubs, and all manner of other private developments.

In many communities, neither the public nor the private physical environment encourages active living and healthy eating. Indeed, the infrastructure in many communities actively discourages or effectively impedes healthy life choices. Too many children grow up in communities that lack parks, playgrounds, and safe, well-lit open spaces to play, have no full-service grocery stores or sit-down healthy restaurants, but are saturated with formula restaurants selling high-calorie, high-fat foods and corner stores selling junk food and sugary drinks. Studies suggest that communities can combat childhood obesity by changing the physical environment in which

children live. Positive environment changes would promote active and healthy lifestyles, by fostering development of infrastructure such as public parks and playgrounds, full-service grocery stores, and well-lit open spaces, and would eliminate the negative influences of the community infrastructure, such as fast-food restaurants and dark, overgrown vacant lots.¹

Communities around the country have already begun to adopt policies and programs designed to change their physical environment, using various strategies and tools. For example, Santa Clara County, California, has adopted a Countywide Trails Master Plan that details the county's commitment to acquiring dedicated easements over private property to create a 500-mile trail system throughout the county to provide recreational and fitness opportunities for its citizens.² Several years ago King County, Washington, adopted a property tax increase to fund the acquisition and maintenance of publicly owned parks and recreation facilities.³ The Los Angeles City Council has imposed a one-year moratorium on the opening of new fast-food restaurants in South Los Angeles.⁴ This zoning ordinance provides a respite during which the city can adopt and implement policies designed to encourage the opening of healthy eating alternatives in the area, which is currently saturated with fast-food restaurants and plagued by high obesity rates. Finally, Naperville, Illinois, has adopted an ordinance requiring developers to include a minimum number of bicycle parking facilities in all new commercial, residential, and public property developments, to encourage biking as an alternative to driving.⁵

Each of these initiatives targets an important aspect of the physical environment, and each involves a different type of government action. The Santa Clara County and King County initiatives require the local governments to acquire property rights in private property—in Santa Clara County the acquisition is by forced dedication⁶ and involves a partial interest in the

¹ See, e.g., KELLY D. BROWNELL & KATHERINE BATTLE HORGAN, *FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS, AND WHAT WE CAN DO ABOUT IT* (2004); L. D. Frank, M. A. Anderson & T. L. Schmid, *Obesity Relationships with Community Design, Physical Activity, and Time Spent in Cars*, 27 AM. J. PREVENTIVE MED. 87 (2004) (showing that neighborhood walkability was related to obesity in adults); Simone A. French et al., *Environmental Influences on Eating and Physical Activity*, 22 ANN. REV. PUB. HEALTH 309 (2001); P. Gordon-Larsen, M. C. Nelson, P. Page & B. M. Popkin, *Inequality in the Built Environment Underlies Key Health Disparities in Physical Activity and Obesity*, 117 PEDIATRICS 417 (2006) (demonstrating that proximity of recreation facilities is correlated with the risk of overweight and obesity in children); James O. Hill & John C. Peters, *Environmental Contributions to the Obesity Epidemic*, 280 SCI. 1371 (1998); Kate Painter, *The Influence of Street Lighting Improvements on Crime, Fear, and Pedestrian Street Use after Dark*, 35 LANDSCAPE & URB. PLAN. 193 (1996); see also L. V. Moore, A. V. Diez Rous, J. A. Nettleton & D. R. Jacobs, *Associations of the Local Food Environment with Diet Quality: A Comparison of Assessments Based on Surveys and Geographic Information Systems*, 167(8) AM. J. EPIDEMIOLOGY 917 (2008) (ePub) (showing that the availability of supermarkets in neighborhoods was associated with a better-quality diet).

² Santa Clara County Trails Plan Advisory Committee, Santa Clara County Board of Supervisors, Final Countywide Trails Master Plan (Nov. 1995), available at http://www.sccgov.org/SCC/docs%2FParks%20and%20Recreation%2C%20Department%20of%20%28DEP%29%2Fattachments%2F47616ctywide_trails_masterplan.pdf.

³ KING COUNTY, WASH., CODE § 4.08.082 (2009).

⁴ Kim Severson, *Los Angeles Stages a Fast Food Intervention*, N.Y. TIMES, Aug. 12, 2008, available at <http://www.nytimes.com/2008/08/13/dining/13calo.html>.

⁵ NAPERVILLE, ILL., CITY CODE § 6-9-7 (2009).

⁶ A community can require a landowner to dedicate an easement for public use as a condition of a development permit only when that dedication shares an essential nexus with and is roughly proportionate to the impacts caused by the proposed development. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). This constraint is discussed in detail in www.nplan.org/nplan/products/takings_survey.

property, while in King County the acquisition is by eminent domain and involves full title. In contrast, the Los Angeles and Naperville ordinances are two distinct examples of land use restrictions. The Los Angeles ordinance limits what landowners can do with their private property, while the Naperville ordinance imposes an affirmative requirement on private landowners.

These four specific initiatives illustrate the two primary tools available to communities that seek to use land use initiatives to prevent childhood obesity: They can rely on their power of eminent domain, on their land use regulatory authority, or both. The first option—relying on the power of eminent domain to acquire ownership interests in real property—may be used to provide public infrastructure such as parks, playgrounds, and recreational trails to promote healthy, active lifestyles. The second option—adopting land use restrictions applicable to private property—may be used to limit undesirable land uses (such as fast-food restaurants) in vulnerable neighborhoods or to require private property owners to do certain things on their property (such as install bicycle parking structures or stock healthy food in corner stores).

Communities that set out to combat childhood obesity by changing their physical environment using eminent domain or land use regulation will face limitations from both federal and state law in both contexts. The federal limitations come from the Fifth Amendment to the U.S. Constitution, which states: “[N]or shall private property be taken for public use without just compensation.” This prohibition is interpreted in two parts. First, private property may not be taken unless it is for public use.⁷ Second, if a land use restriction imposes such a burden on private property that the courts conclude it is the equivalent of a taking, the government must pay just compensation.⁸ A comprehensive analysis of the scope and extent of these federal constitutional limits can be found at www.nplan.org/nplan/products/takings_survey. In addition to the federal constitutional limitations, every state imposes its own restrictions on the exercise of eminent domain and the imposition of land use regulations by its communities. These limitations, contained in state constitutions as well as statutes, may be more protective of private property than the federal Constitution, and they generally take three forms. First, state laws might incorporate a narrower definition of “public use,” such that a legislative objective that satisfies the public use requirement of the federal Constitution would be invalid under state law. Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution. Finally, state law may require a community to tolerate certain negative aspects of the physical environment (such as fast-food restaurants) that it would rather eliminate, just because those elements were present before the community undertook its reform initiative—commonly referred to as “grandfathering.”

Communities interested in using land use initiatives to change their physical environment and thereby combat childhood obesity have to be aware of these restrictions on their eminent domain powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Montana, 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 language of the Montana Constitution generally tracks the language of the federal Constitution, holding that “private property shall not be taken or damaged for public use without just compensation.”⁹ This provision does not specify the limits of the phrase “public use.” However, Montana’s general eminent domain statute enumerates forty-five public uses for which the power of eminent domain may be used.¹⁰ These range from building canals and aqueducts to strip mine restoration. Only those public uses enumerated by statute are valid.¹¹ The statute incorporates references to parks and recreation facilities defined elsewhere that meet the definition of public use.¹² The statute also includes two purposes more general in nature: (1) all public uses authorized by the U.S. government, and (2) any publicly owned buildings and facilities for the benefit of a county, city, or town or its inhabitants.¹³

Although the list is long, Montana courts have held that any use not falling into one of the categories is not a permissible public use. In *McCabe Petroleum Corp. v. Easement & Right-of-Way Across Township*, the Supreme Court of Montana held that the development of oil wells was not a valid public use for which eminent domain could be used.¹⁴ The court noted that the legislature could have added the development of oil wells as a public use in section 70-30-102, but did not do so. Therefore, the local government could not condemn an access easement and right-of-way to serve an oil and gas lease.¹⁵

In order to condemn property for a valid public use, the community must also demonstrate that the taking is *necessary* to the public use.¹⁶ Under Montana law, “necessary” does not mean

⁹ MONT. CONST. art. 2, § 29.

¹⁰ MONT. CODE ANN. § 70-30-102(4), (45) (2009).

¹¹ *McCabe Petroleum Corp. v. Easement & Right-of-Way Across Twp.*, 87 P.3d 479, 483 (Mont. 2004).

¹² MONT. CODE ANN. § 70-30-102(14). The code references a provision authorizing acquisition of land for “public recreational purposes.” *Id.* § 7-16-2105.

¹³ *Id.* § 70-30-102(2), (7).

¹⁴ *McCabe Petroleum Corp.*, 87 P.3d at 481.

¹⁵ *Id.* at 481-82.

¹⁶ MONT. CODE ANN. § 70-30-111(2). Interestingly, if the property to be taken is already in public use, the condemnor must also show that the proposed new use is “more necessary” than the existing use. *Id.* § 70-30-111(3).

absolute or indispensable, but merely “reasonable, requisite, and proper for the accomplishment of the intended objective.”¹⁷ Moreover, the first item to be considered in determining necessity is the least public cost.¹⁸ Thus, in *Park County v. Adams*, the court held that a statutorily authorized TV District need not exhaust all alternative locations before condemning land on which its TV tower and transmitter was already located, after the landowner refused to renew the prior lease.¹⁹ In addition, the government must make an offer to purchase before proceeding with a condemnation action.²⁰

Even before the *Kelo* decision and resulting post-*Kelo* legislation, the list of valid public uses in section 70-30-102 did not include “economic development.” However, the list does include urban renewal projects for blighted areas within cities. A “blighted area” is defined through a list of potential characteristics that includes, for example, obstacles to “sound growth.”²¹

Montana has generally looked unfavorably on economic development as a goal of eminent domain. In 1995, in *City of Bozeman v. Vaniman*, the Supreme Court of Montana held that the city could not use eminent domain to condemn private land for a highway information/visitor center if the Bozeman Area Chamber of Commerce, a private corporation, was going to use part of the building for its corporate offices and pay the city for the use of this space.²² Though a highway visitor’s center is listed as a valid public use in the eminent domain statute, the court held that the Chamber’s use of the property was both private and not de minimus, and therefore would negate the public use aspect of the project. Accordingly, the court upheld the lower court’s order excising the Chamber from the visitor center project.²³

After the U.S. Supreme Court decided *Kelo*, the Montana legislature amended its eminent domain laws to make clear that “a city or town may not serve as a pass-through entity by using its power of eminent domain . . . to obtain property with the intent to sell, lease, or provide the property to a private entity.”²⁴ Even before this amendment, a decision such as *Kelo* probably could not be reached in Montana because of the existing statutory restrictions on eminent domain. This amendment goes further than many states’ laws since it does not distinguish between transfer to a private party for purely economic purposes as opposed to public purposes.

Nevertheless, neither the older restrictions on eminent domain nor the new amended statute will pose significant barriers to efforts to curb childhood obesity in Montana. Although any project that involves the acquisition of land solely for the purpose of transferring to a private party is prohibited, public parks and recreational areas are undoubtedly public uses under governing Montana definitions, and those championing such initiatives will not, therefore, encounter problems with these restrictions on eminent domain.

¹⁷ *Park County v. Adams*, 100 P.3d 640, 643 (Mont. 2004).

¹⁸ *State Dep’t of Highways v. Standley Bros.*, 699 P.2d 60, 63 (Mont. 1985).

¹⁹ *Park County*, 100 P.3d at 644.

²⁰ MONT. CODE ANN. § 70-30-111(4).

²¹ *Id.* § 7-15-4206.

²² *City of Bozeman v. Vaniman*, 898 P.2d 1208 (Mont. 1995).

²³ *Id.* at 1211-12.

²⁴ MONT. CODE ANN. § 7-15-4259.

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.²⁵ Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.²⁶

Most zoning regulations do not fall into the categories that constitute per se takings, in that they are neither permanent physical occupations nor do they deprive the landowner of all viable economic uses. Rather, a zoning restriction will generally prohibit some uses (such as fast-food restaurants) and permit a range of others. These land use restrictions—the vast majority of regulations—are evaluated under an ad hoc multifactor test derived from the U.S. Supreme Court's decision in *Penn Central*.²⁷ When analyzed under the *Penn Central* factors, these run of the mill zoning restrictions are rarely held to require compensation. A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.²⁸

The Montana Supreme Court has interpreted the Montana Constitution's takings clause to offer the same protections against burdensome land use regulations as the Fifth Amendment of the federal Constitution.²⁹ Thus, both permanent physical invasion and complete elimination of a property's value are per se takings.³⁰ Other regulatory action that results in economic damage to property is analyzed under the *Penn Central* factors, balancing: "(1) the character of the governmental action; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the economic impact of the regulation on the claimant."³¹

The court applied this standard in *Buhmann v. State* and held that a state regulation banning commercial hunting operations in exotic game parks while simultaneously prohibiting licensed owners of exotic game from transferring ownership of that game did not amount to a regulatory

²⁵ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

²⁶ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

²⁷ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

²⁸ Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.

²⁹ *Buhmann v. State*, 201 P.3d 70, 85-86 (Mont. 2008).

³⁰ *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 201 P.3d 8, 27 (Mont. 2008).

³¹ *Id.*

taking, despite the fact that existing exotic game businesses suffered significant economic losses as a result of the statute.³² The court balanced the *Penn Central* factors and held that the lack of investment-backed expectation and the reasonableness of the government action outweighed the significant loss in value.³³

Thus, takings liability for the imposition of land use restrictions in Montana will mirror those that apply under the U.S. Constitution. Because the limits rarely require compensation for general land use regulations, these limitations are unlikely to interfere with community efforts to combat childhood obesity.

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.

Montana law protects the rights of property owners to continue existing and lawful uses of their property, regardless of changes in zoning laws that may prohibit this use, if the zoning change was made pursuant to county authority. Landowners subject to county zoning authority are protected by the grandfathering provision of Montana Code section 76-2-208, which provides “any lawful use . . . at the time any zoning resolution is adopted . . . may be continued although such use does not conform to the provisions of such resolution.”³⁴ The statute conferring zoning authority on cities contains no such grandfathering limitation. Presumably, then, cities in Montana may adopt zoning regulations that require the immediate cessation of prior nonconforming uses.³⁵

Even in circumstances in which prior nonconforming uses are protected, however, the landowner’s rights to continue a use will be lost if the landowner expands or substantially changes the use that has been grandfathered. In *Russell v. Flathead County*, for example, the landowner changed the use of the property from farm equipment repair to heavy commercial equipment repair and substantially increased the volume of activity on the land from a few vehicles at a time to twenty to thirty vehicles at a time. The Supreme Court of Montana held that this change represented an impermissible expansion of the grandfathered use.³⁶

Thus, prior nonconforming uses are protected by statute from zoning changes adopted by counties, but not from zoning changes adopted by cities. Such protection may be lost if the use is

³² *Buhmann*, 201 P.3d at 74, 94.

³³ *Id.* at 91-93.

³⁴ MONT. CODE ANN. § 76-2-208 (2007).

³⁵ It is not uncommon, however, for a city in Montana to include a grandfathering provision in its zoning ordinance. *See, e.g.*, *Kensmoe v. City of Missoula*, 480 P.2d 835 (Mont. 1971) (interpreting the grandfathering provision of the Missoula City Code to protect Kensmoe’s right to replace her uninhabitable trailer with a new one).

³⁶ *Russell v. Flathead County*, 67 P.3d 182, 188 (Mont. 2003).

changed or expanded. Although eminent domain and regulatory takings may not pose obstacles to Montana's efforts to combat childhood obesity, statutory grandfathering of prior nonconforming uses potentially could.