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

OREGON

This memorandum summarizes Oregon 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 Oregon 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

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 Oregon, including constitutional and statutory provisions that limit the eminent domain power or require communities to compensate

---

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.

[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).

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 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.

Like the U.S. Constitution, the Oregon Constitution requires the compensation of private property owners when property is taken for public use.[9] The Oregon Supreme Court interpreted this provision consistently with the U.S. Constitution in the past. For example, in 1953, the court deferred to a legislative determination that urban redevelopment in response to slums and blight constitutes public use, even though the condemned property might soon be sold to private parties.[10] The Oregon Supreme Court also consistently held that the decision to take property was a legislative decision that was subject to a deferential standard of review.[11]

However, in response to the U.S. Supreme Court's decision in *Kelo v. City of New London*,[12] the citizens of Oregon approved a ballot initiative called Measure 39, which is intended to prohibit the use of eminent domain to transfer title to private parties.[13] The provision specifically forbids government parties to condemn private property used as a residence, business establishment, farm, or forest operation "if at the time of the condemnation" the public body "intends" to convey title to another private party. Thus, the provision does not apply to the condemnation of undeveloped land (except those lands used for forest operations), and it applies only to the intent of the condemning party at the time of the condemnation. Measure 39 also places the determination of whether a taking of property complies with the statute in the hands of the judiciary, without deference to the legislative determination.[14]

---

[9] OR. CONST. art. I, §18; *see* Smith v. Cameron, 210 P. 716, 720 (Or. 1922) (rejecting a bid by private landowners to use eminent domain to enlarge an irrigation ditch running through other landowners' property).
[10] Foeller v. Hous. Auth. of Portland, 256 P.2d 752, 766 (Or. 1953).
[11] *See* Port of Umatilla v. Richmond, 321 P.2d 338 (Or. 1958); State v. Pac. Shore Land Co., 269 P.2d 512 (Or. 1954); City of Eugene v. Johnson, 192 P.2d 251 (Or. 1948).
[12] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[13] OR. REV. STAT. § 35.015(1) (2009).
[14] *Id.* § 35.015(6).

Oregon law provides substantial latitude for communities to undertake comprehensive redevelopment in response to blighted conditions.[15] Measure 39 itself provides that the prohibition on transfer of condemned property to a private party does not apply to "improved or unimproved real property that constitutes a danger to the health or safety of the community by reason of contamination, dilapidated structures, improper or insufficient water or sanitary facilities, or any combination of these factors."[16] In addition, a separate provision of Oregon law called the Urban Redevelopment Law establishes urban renewal and redevelopment of blighted areas as valid governmental purposes.[17] Blight is broadly defined to include "areas that, by reason of deterioration, faulty planning, inadequate or improper facilities, deleterious land use or the existence of unsafe structures, or any combination of these factors, are detrimental to the safety, health or welfare of the community."[18] Where blighted conditions exist, the government is authorized to redevelop and use urban renewal activities to stimulate the residential construction correlated to economic activity.[19] Those undertakings "will aid the production of better housing and more desirable neighborhood and community development at lower costs and will make possible a more stable and larger volume of residential construction, which will assist materially in maintaining full employment."[20]

Notwithstanding the active legislative response to *Kelo*, communities in Oregon remain free to combat childhood obesity by using eminent domain to build parks, playgrounds, and other recreation facilities that will be publicly owned and used, thereby promoting healthy, active lifestyles. Counties[21] and municipalities[22] have the explicit power to use eminent domain in order to build public parks and recreation area purposes. The power to engage in creative public-private initiatives is significantly constrained, however, by the post-*Kelo* legislation. In response to *Kelo*, the state legislature has prohibited the use of eminent domain for anything that might resemble private development, except in response to blight or other factors that satisfy the exception to Measure 39.

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] *Id.* §457.020(5) ("That the acquisition, conservation, rehabilitation, redevelopment, clearance, replanning and preparation for rebuilding of these areas, and the prevention or the reduction of blight and its causes, are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern.").
[16] *Id.* § 35.015(2)(a).
[17] *Id.* § 457.020(1).
[18] *Id.* § 457.010(1).
[19] *Id.* § 457.020(7).
[20] *Id*.
[21] *Id.* § 203.135.
[22] *Id.* § 223.005.

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.[23] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[24] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[25] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[26]

Oregon courts have interpreted article 1, section 18, of the state constitution consistently with the U.S. Constitution. Thus, in *Coast Range Conifers v. State*, the Oregon Supreme Court recognized the two categories of per se takings—a permanent physical occupation and a regulation that leaves the owner with no economically beneficial use—and also recognized that some regulations "can go too far" and become tantamount to a governmental appropriation of property.[27] In *Coast Range Conifers*, where a government regulation prevented a landowner from logging the timber on 9 acres of land, the court held that the plaintiff's ability to log 31 acres of the 40-acre parcel "established that the regulation does not deprive the plaintiff's property of all its economic value."[28] Similarly, in *Dodd v. Hood River County*, the Oregon Supreme Court found that there was no taking because the land retained "some substantial beneficial use."[29] Specifically, even though the landowners could no longer build a residence on their property, the timber on the property could still be sold at a profit.[30]

Oregonians briefly flirted with an extraordinarily protective regulatory takings regime. In 2004, the citizens adopted Measure 37 through a ballot initiative.[31] Measure 37 applied to any newly enacted or enforced land use regulation that negatively affected the fair market value of any private property. Landowners who could establish such a negative impact were entitled to compensation or to a waiver of the land use restriction. Thousands of claims for compensation were filed around the state as a result of this initiative.

In 2007, voters approved Measure 49, which substantially rolled back the reach of Measure 37 in two ways.[32] First, it replaced the two remedies (compensation or waiver) available to landowners who had already filed claims under Measure 37 with the more limited remedy of an approval for development of a limited number of home sites. Second, Measure 49 limited the reach of the new property rights protections to those regulations that limit residential use of property or limit

---

[23] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[24] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[25] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[26] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[27] Coast Range Conifers v. State *ex rel.* Or. State Bd. of Forestry, 117 P.3d 990, 995 (Or. 2005).
[28] *Id*. at 999.
[29] Dodd v. Hood River County, 855 P.2d 608, 614 (Or. 1993).
[30] *Id*. at 612.
[31] OR. REV. STAT. § 197.352 (2005).
[32] *Id.* § 195.305.

farming and forestry practices. The Oregon Supreme Court has held that Measure 49 lawfully supersedes Measure 37.[33]

Thus, under Measure 49, a community will be obligated to pay compensation whenever it adopts a land use regulation that negatively affects the fair market value of land used for residential, farming, or forestry purposes. These limitations are unlikely to have a significant effect on the ability of Oregon communities to implement policy initiatives to combat childhood obesity, as these initiatives are unlikely to entail land use restrictions on private residential land or limitations on landowners' abilities to engage in farming or forestry on their land. To the extent the initiatives do entail such land use restrictions, the communities will not be prohibited from adopting them, but their implementation will entail compensation costs.

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 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. Cities in Oregon have wide latitude to prohibit prior uses through zoning laws, while counties are generally prohibited from doing so without paying compensation.

Oregon law establishes different land use regulatory authority for cities and counties.[34] The statutory scheme outlining the power of cities to engage in land use regulation contains no limitation on the power of cities to prohibit existing land uses. Moreover, there do not appear to be any published cases establishing a right to continue prior nonconforming uses under Oregon common law or constitutional law.

By contrast, the provision applicable to counties expressly protects the rights of landowners to continue to engage in existing, lawful uses of their property notwithstanding the enactment or amendment of a zoning ordinance prohibiting that existing use.[35] In particular, the statute states:

> The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply

[33] Corey v. Dep't Land Conserv. & Dev., 184 P.2d 1109 (Or. 2008).
[34] *See* City of Mosier v. Hood River Sand, Gravel & Ready-Mix, 136 P.3d 1160, 1169-71 (Or. Ct. App. 2006) (discussing the different statutory schemes applicable to cities and counties in Oregon).
[35] Clackamas County v. Holmes, 508 P.2d 190, 192 (Or. 1973) ("A nonconforming use is one which lawfully existed prior to the enactment of a zoning ordinance and which may be maintained after the effective date of the ordinance although it does not comply with the use restrictions applicable to the area.").

with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.[36]

In other words, an Oregon county that wishes to prohibit an existing use of land through a zoning change cannot order its immediate cessation. The right to continue a prior nonconforming use remains until it is abandoned or changed.[37] Abandonment requires more than mere lack of use. For example, in *Polk County v. Martin*, the landowner operated a nonconforming rock quarry on his property, but production was sporadic at best.[38] In the five years preceding the passage of a zoning ordinance, the quarry's production was almost nonexistent.[39] Nonetheless, the Supreme Court of Oregon found that the owner had not abandoned his prior use since he never intended to abandon the rock quarry.[40] Additionally, the court held that the landowner did not need to make any financial commitments or capital improvements to maintain his right to use the rock quarry.[41] Similarly, in *Bither v. Baker Rock Crushing Co.*, the Supreme Court of Oregon held that an increase in use at a nonconforming rock quarry did not result in loss of entire protection.[42] The court held that only activities that constituted an increase over the level that existed at the time of adoption of the zoning ordinance should be enjoined.[43]

It appears, then, that cities in Oregon have wide latitude to engage in land use regulation to combat childhood obesity. No statutory provision prohibits the immediate implementation of land use regulations that render unlawful prior nonconforming uses, and Oregon courts do not seem to have recognized a constitutional or common law vested right in a prior nonconforming use. Counties, by contrast, are constrained by statute from outlawing prior nonconforming uses to implement policy initiatives to combat childhood obesity.

---

[36] OR. REV. STAT. § 215.130(5) (2009).
[37] *Id.* § 215.130(7).
[38] Polk County v. Martin, 636 P.2d 952, 954 (Or. 1981).
[39] *Id*. at 955.
[40] *Id*.
[41] *Id.* at 958-59.
[42] Bither v. Baker Rock Crushing Co., 440 P.2d 368, 369 (Or. 1968).
[43] *Id.*