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

WYOMING

This memorandum summarizes Wyoming 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 Wyoming 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 Wyoming, 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." In its decision in *Kelo v. City of New London*, the U.S. Supreme Court reaffirmed its past holdings that state and local decision makers enjoy broad discretion to define the concept of "public use," and upheld the condemnation of private property for transfer to another private party for the purpose of economic development.[9] States are free, however, to adopt greater protections for private property owners, and many states have done so by limiting the range of projects that count as public use.

The Wyoming Constitution contains two provisions dealing with the power of governments to exercise eminent domain. Section 32 provides that "[p]rivate property shall not be taken for private use . . . except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes[.]"[10] Section 33 requires just compensation for all takings.[11] The Supreme Court of Wyoming has stated that the listing of the seemingly "private uses" in Section 32 renders them, by constitutional edict, public uses for purposes of the exercise eminent domain.[12] With respect to other uses, the Supreme Court of Wyoming has said that the determination of what constitutes a public use is a question for courts, and that a use can constitute a public use even if the primary beneficiaries are a few private citizens so long as there is some public benefit resulting from the condemnation.[13] Thus, the court has upheld the exercise of eminent domain to provide irrigation ditches to benefit a single landowner[14] and the condemnation of land for flood control purposes that had the incidental benefit of providing recreational opportunities to a limited number of citizens.[15]

In 2007, the Wyoming legislature enacted eminent domain reform to prohibit the transfer of property acquired by eminent domain to private individuals. The statute permits the exercise of eminent domain to acquire private property only for "public buildings or for any other necessary public purpose."[16] The statute further defines "public purpose" to mean "the possession, occupation and enjoyment of the land by a public entity." In particular, "public purpose shall not include the taking of private property by a public entity for the purpose of transferring the

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] WYO. CONST. art. I, § 32.
[11] *Id.* § 33.
[12] Wyoming Res. Corp. v. T-Chair Land Co., 49 P.3d 999, 1002 (Wyo. 2002).
[13] Associated Enters. v. Toltec Watershed Improvement Dist., 656 P.2d 1144, 1148-49 (Wyo. 1983).
[14] Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43, 57 (Wyo. 1913).
[15] *Associated Enters.,* 656 P.2d at 1148-49.
[16] WYO. STAT. ANN. § 1-26-801(a) (2008).

property to another . . . private entity except in the case of condemnation for the purpose of protecting the public health and safety[.]"[17] Condemnation for public health and safety must occur on a case-by-case basis.[18]

Overall, communities in Wyoming will have ample latitude to use eminent domain to obtain property to build traditional public recreation such as parks, playgrounds, and hike and bike trails. The post-*Kelo* eminent domain reforms appear to preclude the use of eminent domain to obtain property to transfer to another private landowner for the purpose of operating, for instance, a healthy grocery store.

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.[19] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[20] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[21] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[22] 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.

Few Wyoming cases discuss regulatory takings. In the few cases that exist, the Wyoming Supreme Court has relied on federal precedent to analyze regulatory takings claims implicating both the state and U.S. constitutions.[23] In *Cheyenne Airport Board v. Rogers*, the court rejected a takings challenge to an airport zoning restriction based on a thorough discussion of federal cases applying the U.S. Constitution.[24] Because Wyoming law appears to mirror federal law on the issue of regulatory takings, and because the threshold for finding a compensable taking is so high at the federal level, community efforts to combat childhood obesity are unlikely to give rise to valid regulatory takings claims.

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[17] *Id.* § 1-26-801(c).
[18] *Id.*
[19] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[20] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[21] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[22] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[23] Cheyenne Airport Bd. v. Rogers, 707 P.2d 717 (Wyo. 1985).
[24] *Id.*

3. Grandfathering Prior Nonconforming Uses

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

Wyoming statute requires grandfathering of prior nonconforming uses.[25] The Wyoming Supreme Court has stated that "[w]hen a zoning ordinance is enacted, it cannot outlaw previously existing nonconforming uses."[26] In describing the zoning powers of county governments, the court has held, "[A county] cannot rezone for a higher use to cut off an existing non-conforming use."[27] Grandfathering protection extends even when the nonconforming use is sporadic.[28] Additionally, the Wyoming Supreme Court has recognized that expectation of a use is sufficient to protect the use through grandfathering; in *Snake River Brewing v. Town of Jackson*, the court held that a brewing company retained an option for off-site parking through grandfathering after a zoning ordinance disallowed off-site parking, even though the company chose to use on-site parking before the zoning change was enacted.[29]

Grandfathering protection can be lost through abandonment. Both case law and statutory law make it clear that once a nonconforming use is discontinued, any future use on that property must conform to zoning regulations.[30] To find abandonment of a nonconforming use, Wyoming courts look for intent to abandon and an overt act or failure to act implying renunciation of the nonconforming use.[31] Importantly, Wyoming courts presume intent to abandon when the nonconforming use is discontinued.[32] Ordinances may prescribe a period of time for abandonment that allows intent to abandon to be presumed.[33]

Grandfathering protection can also be lost through a change in or expansion of the use.[34] However, this limitation has been interpreted to allow grandfathering protection to continue when some changes have been made to the use. In *Donaghy v. Board of Adjustment of Green River*, the Wyoming Supreme Court permitted grandfathering protection to extend to the addition of fiberglass panels to an existing wooden structure, finding that the panels "merely constituted an upgrade in material consistent with the wooden patio structure's past use, as opposed to a

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[25] WYO. STAT. ANN. § 18-5-207 (2008).
[26] Snake River Venture v. Bd. of County Comm'rs of Teton County, 616 P.2d 744, 750 (Wyo. 1980).
[27] River Springs LLC v. Bd. of County Comm'rs of Teton County, 899 P.2d 1329, 1334 (Wyo. 1995).
[28] *Id.* at 1335.
[29] Snake River Brewing Co. v. Town of Jackson, 39 P.3d 397, 408 (Wyo. 2002).
[30] Bd. of County Comm'rs of Teton County v. Crow, 65 P.3d 720, 737 (Wyo. 2003); *see also* WYO. STAT. ANN. § 18-5-207.
[31] *Snake River Brewing*, 39 P.3d at 404.
[32] *Id.* at 405; *see also* River Springs LLC v. Bd. of County Comm'rs of Teton County, 899 P.2d 1329, 1335 (Wyo. 1995).
[33] *Snake River Brewing*, 39 P.2d at 404; *see also River Springs LLC*, 899 P.2d at 1335.
[34] Donaghy v. Bd. of Adjustment of Green River, 55 P.3d 707, 712 (Wyo. 2002).

change or expansion in use."[35] In another case, a new metal storage building constructed on a nonconforming lumberyard was found to be a lawful extension of the prior nonconforming use such that the grandfathering protection was not lost.[36] The court found the new building to be merely an alternative to storing materials outdoors and therefore not an expansion of the nonconforming use.[37]

Overall, grandfathering protections in Wyoming are relatively broad. They encompass expectation interests as well as actual existing uses, providing greater protection to private landowners than what is provided in many states. Moreover, landowners appear to have significant latitude to expand their existing uses without forfeiting their grandfathering protection.

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Communities in Wyoming will not be limited by takings law in their attempts to use eminent domain or land use restrictions to pursue traditional policies aimed at combating childhood obesity. The definition of public use in Wyoming includes publicly owned recreational facilities, and courts have followed federal regulatory takings precedents, which require compensation only in very limited circumstances. However, the transfer of condemned property to another private property owner is prohibited, impeding potential projects such as condemning private property to transfer to another private entity to operate a healthy grocery store or an indoor recreational facility. In addition, landowners enjoy significant protection of existing uses, such that a community wishing to eliminate certain land uses immediately will be required to compensate landowners who are engaged in or have an expectation of engaging in the prohibited use.

[35] *Id.*
[36] State *ex rel.* Epp v. Mayor of Dubois, 894 P.2d 590, 597 (Wyo. 1995).
[37] *Id.*