

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

ALASKA

This memorandum summarizes Alaska 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 child 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 Alaska 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 government 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 sphere encourages active living and healthy eating to the extent necessary to combat childhood obesity. 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 store 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 the 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

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).

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 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. 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. 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.⁷ Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution.⁸ 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.

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

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.

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).

particular limitations applicable to communities in Alaska, 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 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 Alaska Constitution states that “[p]rivate property shall not be taken or damaged for public use without just compensation.”⁹ Although the state constitution does not define “public use,” Alaska statutes define a wide range of uses within constitutional bounds, including roadways, public buildings, and public grounds.¹⁰ Interpreting the statute, the Alaska Supreme Court has allowed the use of eminent domain for the construction of a new public school,¹¹ highway projects,¹² and sewer lines.¹³ In general, local governments in Alaska enjoy broad powers of eminent domain.

However, 2006 amendments, adopted in response to *Kelo v. City of New London*,¹⁴ restrict the use of eminent domain in two important ways.¹⁵ The first limitation prohibits the use of the power of eminent domain to acquire private property from a private person for the purpose of transferring title to another private person for economic development purposes.¹⁶ Among several exceptions to this general limitation, however, are situations in which a private party has been authorized by statute to exercise the power of eminent domain or to receive condemned property, and situations where the transfer is made to a common carrier (albeit privately owned).¹⁷ The second limitation prohibits the use of eminent domain to develop a recreational facility if the property to be condemned is a personal residence or land attached to and within 250 linear feet

⁹ ALASKA CONST. art. I, § 18.

¹⁰ ALASKA STAT. § 09.55.240(a) (2009).

¹¹ Greater Anchorage Area Borough v. 10 Acres, 563 P.2d 269, 272 (Alaska 1977).

¹² Stewart & Grindle, Inc. v. State, 524 P.2d 1242, 1244 (Alaska 1974).

¹³ City of Fairbanks v. Metro Co., 540 P.2d 1056, 1057-59 (Alaska 1975).

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

¹⁵ ALASKA STAT. § 09.55.240(a)-(b).

¹⁶ *Id.* § 09.55.240(d).

¹⁷ *Id.*

of a personal home.¹⁸ For purposes of this limitation, recreational facilities include a “park, trail or pedestrian pathway, greenbelt, amusement park, fresh water boat harbor, sports facility, playground, infrastructure.”¹⁹ However, the statute specifically permits the state legislature to override both of these limitations on the power of eminent domain, as long as it does so in a separate statute enacted expressly and solely to authorize a condemnation that would otherwise be prohibited by the general statute.²⁰

Overall, the judicial climate in Alaska is favorable to communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles. Alaska law permits the condemnation of private nonresidential property for the creation of parks and recreational facilities. And communities may condemn residential property for such uses as long as they secure statutory authorization to do so.

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 rarely implicate takings concerns, and state and local governments are generally free to adopt such regulations without incurring takings liability.

However, some land use regulations do require compensation. Alaska courts follow U.S. Supreme Court precedent and categorizes two classes of per se takings: “(1) cases of physical invasion and (2) cases where a regulation denies a landowner of all economically feasible use of the property.”²¹ Cases of physical invasion are generally easily determined. In contrast, Alaska courts rarely find a per se taking where a regulation denies a landowner of all economically feasible use of the property because regulations rarely strip property of all value. In *Balough*, the Alaska Supreme Court found that the property owner did not meet the requirements of a per se taking when the city rezoned its land.²² The rezoning ordinance did not physically invade the property, and the court determined that the property owner had other “economically feasible use[s] of her property,” which was rezoned as a residential area.²³ Similarly, in *Beluga Mining Co. v. State Department of Natural Resources*, the court found that there was not a per se taking because the mere temporary delay of a property owner’s right to mine did not deprive him of that right.²⁴

If the case does not fall within one of those two categories of per se takings, Alaska courts engage in a case-by-case inquiry to determine whether the governmental action is a taking.²⁵ In evaluating a regulatory takings challenge, Alaska courts consider four factors (known as the *Sandberg* factors): (1) the character of the governmental action, (2) its economic impact, (3) its

¹⁸ *Id.* § 09.55.240(a).

¹⁹ *Id.* § 09.55.240(h)(5).

²⁰ *Id.* § 09.55.240(f).

²¹ *Balough v. Fairbanks N. Star Borough*, 995 P.2d 245, 265 (Alaska 2000).

²² *Id.* at 266.

²³ *Id.*

²⁴ *Beluga Mining Co. v. State Dep’t of Natural Res.*, 973 P.2d 570, 575 (Alaska 1999).

²⁵ *Balough*, 995 P.2d at 265.

interference with reasonable investment-backed expectations, and (4) the legitimacy of the interest advanced by the regulation or land use decision.²⁶ Consideration of these factors rarely leads to a finding of a compensatory taking. As the Alaska Supreme Court has said, “a ‘taking’ may more readily be found when the interference with the property can be characterized as a physical invasion by government, than when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”²⁷ In *R & Y, Inc. v. Municipality of Anchorage*, for example, the Alaska Supreme Court found no regulatory taking where the owners were prohibited from building on a portion of their property due to wetlands protection regulation because the economic damage was “minor.”²⁸ Specifically, the court found that the regulation requiring a 20-foot setback diminished the value of the entire property only from 1.5 percent to 2 percent.²⁹

The Alaska Constitution prohibits not only the taking of private property without just compensation, but also “damage” of private property by the government.³⁰ However, in 2001 the Alaska Supreme Court rejected an argument that the “damage” clause requires compensation for relatively minor impacts on private property rights, holding that such a rule would be “inconsistent with established takings doctrine and the economic policies underlying that doctrine.”³¹

3. Grandfathering Prior Nonconforming Uses

The discussion in Section 2 assumes that the zoning restriction imposed on landowners does not attempt to prohibit the very use to which she is currently putting her property. This is true for the fast-food restaurant moratorium in South Los Angeles, for example; there, the zoning ordinance prohibits the opening of new fast-food restaurants but does not require any existing fast-food restaurant to cease operations. In some circumstances, however, 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. It appears that communities in Alaska may not be able to do this without paying compensation.

Although the Alaska Supreme Court does not appear to have spoken directly to the issue, various opinions of that court indicate that landowners in Alaska have a vested right in the continuation of substantial nonconforming uses notwithstanding a zoning amendment that makes such uses unlawful. For example, in *Commercial Fisheries Entry Commission v. Apokedak*, the court upheld a statute prohibiting commercial fishing without a permit and allowed only those persons who had previously fished commercially with a gear license to apply for a commercial fishing permit. In so doing, the court analogized the limitation on permits to grandfathering under zoning

²⁶ *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 293 (Alaska 2001).

²⁷ *Dep’t of Natural Res. v. Artic Slope Reg’l Corp.*, 834 P.2d 134, 142 (Alaska 1991); *see also Anchorage v. Sandberg*, 861 P.2d 554, 558 (Alaska 1993).

²⁸ *R & Y, Inc.*, 34 P.3d at 290.

²⁹ *Id.* at 295.

³⁰ *Sandberg*, 861 P.2d at 557; *see also R & Y*, 34 P.3d at 292.

³¹ *R & Y*, 34 P.3d at 296.

ordinances, stating that “[a]n extensive body of case law has developed protecting nonconforming uses that exist prior to the passage of zoning ordinances.”³² Similarly, in *Earth Movers of Fairbanks, Inc. v. Fairbanks North Star Borough*, the court appeared to endorse the concept of vested rights in nonconforming uses when it said in a footnote: “A nonconforming use has been defined as a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the area in which it is situated. Such a use has also been described as a vested property right that zoning ordinances generally may not abrogate.”³³ Finally, in *Balough v. Fairbanks North Star Borough*, the court cited *Earth Movers of Fairbanks* for the proposition: “We have . . . held that a person can have a vested property right despite a zoning change if that person has a nonconforming use.”³⁴ While none of these cases actually entail the protection of a nonconforming prior use from a subsequent zoning change that attempts to eliminate that use, they suggest that the Alaska Supreme Court would hold such an attempt unlawful. Moreover, the reported cases in which an Alaskan landowner claims grandfathered status after a zoning amendment all seem to involve zoning ordinances that protect prior nonconforming uses.³⁵ This suggests that communities may feel compelled by the court’s general statements about vested rights in prior uses to provide protection for prior nonconforming uses in their zoning ordinances.³⁶

Notwithstanding its general endorsement of the concept of a landowner’s vested rights in prior nonconforming uses, the Alaska Supreme Court has made clear its view that “nonconforming uses are to be restricted and terminated as quickly as possible because those uses frustrate a local government’s implementation of consistent and logical land use planning.”³⁷ Thus, zoning ordinance provisions protecting nonconforming uses are interpreted narrowly, and provisions detailing the factors that terminate the vested rights to a nonconforming use are interpreted broadly.³⁸ In *Kelly Supply Co. v. City of Anchorage*, for example, the Alaska Supreme Court made it clear that courts should define nonconforming “use” narrowly and upheld a finding that changing a use from a hospital to a blood bank constituted a discontinuance of the prior nonconforming use.³⁹ Similarly, in *Cizek v. Concerned Citizens of Eagle River Valley, Inc.*, the Alaska Supreme Court stated that sporadic, unauthorized use does not satisfy the requirement of continuous use, and that such sporadic use for over one year constituted discontinuance.⁴⁰

In general, communities in Alaska interested in changing zoning ordinances to create a physical environment more conductive to healthy, active lifestyles should be aware of the many protections given to prior nonconforming users. Such uses are grandfathered as long as they are

³² Commercial Fisheries Entry Comm’n v. Apokedak, 606 P.2d 1255, 1267 n.49 (Alaska 1980).

³³ *Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough*, 865 P.2d 741, 742 n.1 (Alaska 1993).

³⁴ *Balough v. Fairbanks N. Star Borough*, 995 P.2d 245, 261 (Alaska 2000).

³⁵ See, e.g., *Griswold v. City of Homer*, 34 P.3d 1280 (Alaska 2001) (interpreting HCC 21.64.010, which protects prior nonconforming uses); *Balough*, 995 P.2d 245 (interpreting FNSBCO 18.56.020, which protects prior nonconforming uses).

³⁶ See *Kelly Supply Co. v. City of Anchorage*, 516 P.2d 1206 (Alaska 1973).

³⁷ *Cizek v. Concerned Citizens of Eagle River Valley, Inc.*, 41 P.2d 140, 143 (Alaska 2002).

³⁸ *Balough*, 995 P.2d at 271.

³⁹ *Kelly Supply Co.*, 516 P.2d at 1207-08.

⁴⁰ *Cizek*, 49 P.3d at 234.

not altered or discontinued, and a change in ownership will not cause the grandfathered entitlement to expire.