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

HAWAII

This memorandum summarizes Hawaii 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 Hawaii 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

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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).

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 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

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[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 Hawaii, 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.

As of 2009, Hawaii had not passed any legislation or constitutional referendums in response to the U.S. Supreme Court's decision in *Kelo v. City of New London*.[9] The Hawaii Constitution states: "Private property shall not be taken or damaged for public use without just compensation."[10] The Hawaii Supreme Court has determined that this provision is coterminous with the Fifth Amendment to the U.S. Constitution, and that accordingly, the U.S. Supreme Court's interpretation of public use is persuasive authority for review of the Hawaii constitutional provision.[11] Although the Hawaii Supreme Court reserves the right to interpret the state constitution to afford greater protection to property owners than required by the federal constitution, it has not yet advanced any doctrine that offers substantially greater protection.[12] In fact, in 2008 the court expressly embraced the *Kelo* decision when faced with a constitutional challenge to the exercise of eminent domain based on public use. In *County of Hawaii v. C&J Coupe Family Ltd*, the court held that legislative determinations of public purpose are entitled to substantial deference and that "the fact that condemned property will be transferred from one private party to another does not, a fortiori, invalidate [a] taking."[13]

At the same time, the court also embraced its obligation to look behind purely pretextual findings of public use.[14] In *County of Hawaii v. C&J Coupe Family*, the court made it clear that while the

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[9] *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2172 (2009); Steven J. Eagle & Lauren A. Perotti, *Coping with* Kelo*: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799, 832 (2008). *Kelo* is discussed in more detail in www.nplan.org/nplan/products/takings_survey.

[10] HAW. CONST. art. 1, § 20.

[11] Haw. Hous. Auth. v. Lyman, 704 P.2d 888, 896 (Haw. 1985).

[12] *Id.* at 896-97.

[13] County of Haw. v. C&J Coupe Family, 198 P.3d 615, 638-45 (Haw. 2008).

[14] *Id.* at 637-38.

government's stated public purpose warrants deference, it need not be taken at face value where there is evidence that the stated purpose might be pretextual.[15] In that case, the county made a deal with a private developer who wished to build a residential development near the ocean. As part of the deal, the county agreed it would condemn private property by eminent domain for the stated purpose of building a road as long as the private developer would pay for the road. The bypass was necessary for the development of the residential community. However, the property owners subject to the eminent domain proceedings challenged it as being primarily for the benefit of the private developer.[16] The Hawaii Supreme Court remanded the case for an express determination by the lower court of whether the asserted public purpose was pretextual, notwithstanding the fact that the use to which the property was put—a public highway bypass—was a classic "public use."[17]

Overall, however, the constitutional and judicial climates in Hawaii remain favorable to communities interested in using eminent domain to further the goal of making their physical environment more conductive to healthy, active lifestyles. Hawaii passed no legislative or constitutional responses to *Kelo*, and the judiciary has historically given deference to legislative determinations of public use. Although the substantial level of deference appears to have been slightly scaled back, the pretext defense would seem to apply in only a limited number of cases (when the action is "clearly and palpably of a private character"[18]); and as long as the condemnation is rationally related to the stated public purpose, it is likely to pass muster.

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. 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 physical taking requires payment of just compensation. This type of functional taking includes instances where the regulation deprives the property owner of all economic beneficial or productive use of the land,[19] or when the regulation imposes a physical occupation on the landowner's property (which can be as "minute" an invasion as installing cable facilities in a landlord's apartment building).[20] This is true under the Fifth Amendment of the U.S. Constitution, as well as under article 1, section 20, of the Hawaii Constitution, which states that "private property shall not be taken or damaged for public use without just compensation."[21] The Hawaii Supreme Court has interpreted the state constitution as providing similar protections as the federal Constitution, and the court relies

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[15] *Id.* at 644.
[16] *Id.* at 615-24.
[17] *Id.* at 652-53.
[18] *Id.* at 638 (quoting Haw. Hous. Auth. v. Ajimine, 39 Haw. 543, 550 (1952)).
[19] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).
[20] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[21] HAW. CONST. art. 1, § 20.

heavily on U.S. Supreme Court precedent in evaluating regulatory takings challenges.[22] Thus, communities in Hawaii have broad latitude to adopt land use restrictions to combat childhood obesity as discussed in the federal regulatory takings memo. At this point, Hawaii takings law imposed no additional limitations on this latitude.

3. Grandfathering Prior Nonconforming Uses

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

Counties serve as the primary governmental body below the state level in Hawaii. As such, Hawaiian counties are the locus of land use regulatory power. Hawaiian law expressly prohibits counties from enacting land use regulations that require existing uses to be discontinued immediately.[23] Counties may choose to amortize or phase out nonconforming uses over a reasonable period of time, as long as those uses are not residential (single family or duplex) or agricultural.[24] Residential and agricultural nonconforming uses may not be discontinued or amortized.[25] The right to engage in a prior nonconforming use will be lost if the use is discontinued.[26] Although the term "discontinued" is not defined in the statute, it appears that individual cities may enact ordinances to give more specific meaning to the term. For example, in Honolulu "any nonconforming use that is discontinued for any reason for 12 consecutive months, or for 18 months during any three-year period, shall not be resumed."[27]

Localities wishing to fight childhood obesity through the implementation of zoning changes will find Hawaii's legal climate favorable. By permitting localities to phase out prior nonconforming uses, localities are given more control over what types of businesses and restaurants can be located near children.

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[22] Pub. Access Shoreline Haw. v Haw. County Planning Comm'n, 903 P.2d 1246, 1272 (Haw. 1995); Hasegawa v. Maui Pineapple Co., 475 P.2d 679, 683 & n.7 (Haw. 1970).
[23] HAW. REV. STAT. §46-6.
[24] *Id.*
[25] *Id.* § 46-4(a).
[26] *Id.*
[27] REV. ORDINANCES HONOLULU (LAND USE ORDINANCE) § 21-4.110(c)(2); Save Diamond Head Waters v. Hans Hedemann Surf, 211 P.3d 74, 84 (Haw. 2009).