

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

NEBRASKA

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

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

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

fostering development of infrastructure such as public parks and playgrounds, full-service grocery stores, and well-lit open spaces, and would eliminate the negative influences of the community infrastructure, such as fast-food restaurants and dark, overgrown vacant lots.¹

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

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

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

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

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

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

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

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

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; this is 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 Nebraska, 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 Nebraska Constitution provides that “property of no person shall be taken or damaged for public use without just compensation therefor.”¹⁰ The Nebraska Supreme Court has held that the concept of public use is not as extensive as the concept of public interest.¹¹ Accordingly, the court concluded that a city could not condemn easements on privately owned land to drill wells and transport water for two private companies.¹² In contrast, the exercise of the power of eminent domain to provide water for city residents falls neatly into the “usual case of a taking by eminent domain.”¹³ So too does the provision of typical public infrastructure, such as parks and recreation facilities.¹⁴

In response to the U.S. Supreme Court decision in *Kelo*, the Nebraska legislature enacted a statute further restricting the use of eminent domain. This statute, effective July 14, 2006, prohibits communities from condemning property primarily for an economic development purpose.¹⁵ Economic development purpose is defined as “for subsequent use by a commercial for-profit enterprise or to increase tax revenue, tax base, employment, or general economic conditions.”¹⁶ However, the statute provides for several exceptions, including an exception for leasing property to a private party who occupies an incidental part of public property or a public facility, and for taking private property for community development based on a finding of blight.¹⁷ The definition of blight includes obstacles to “sound growth” or conditions that constitute an “economic or social liability.”¹⁸

⁹ *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.

¹⁰ NEB. CONST. art. I, § 21.

¹¹ *Burger v. Beatrice*, 147 N.W.2d 784, 788-92 (Neb. 1967).

¹² *Id.* at 791-92.

¹³ *Id.* at 790.

¹⁴ *Id.*

¹⁵ NEB. REV. STAT. ANN. § 76-710.04(1) (West 2008).

¹⁶ *Id.* § 76-710.04(2).

¹⁷ *Id.* § 76-710.04(3)(c), (g).

¹⁸ *Id.* § 18-2103.

Thus, the public use requirement is unlikely to constrain communities in Nebraska from using eminent domain to build parks, playgrounds, and other public infrastructure to promote healthy, active lifestyles. Any initiatives that require transfer of condemned property to a private for-profit business will be unlawful under the post-*Kelo* reform statute, unless the private entity uses an incidental part of a public facility. But communities should be able to exercise their power of eminent domain in partnership with nonprofit entities to further their goals of combating childhood obesity.

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 multifactor 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.

Although the Nebraska Supreme Court has acknowledged that the state constitution provides for compensation when land is damaged as well as taken by an exercise of eminent domain, for the purpose of determining when a taking has occurred the court considers the state constitutional provision as coterminous with the federal takings clause.²³ Thus, Nebraska courts categorize two classes of automatic (per se) takings: (1) cases of permanent physical occupation and (2) cases in which the regulation denies a landowner of all economically viable use of the land.²⁴ In reality, very few land use regulations satisfy these demanding standards for per se takings liability.

Most zoning regulations do not fall into the per se takings categories. Rather, a zoning restriction will prohibit some uses (such as fast-food restaurants) and permit a range of others, and regulations rarely compel landowners to suffer the permanent occupation of their property by

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 *Strom v. City of Oakland*, 583 N.W.2d 311, 316 (Neb. 1998).

²⁴ *Scofield v. State, Dep't of Natural Res.*, 753 N.W.2d 345, 358-59 (Neb. 2008).

strangers. For regulations that do not implicate one of the two per se rules, Nebraska courts continue to follow federal precedent to determine if a regulatory taking has occurred.²⁵

In particular, Nebraska courts will review a takings challenge to a run of the mill zoning regulation under an “essentially ad hoc, factual inquir[y]”²⁶ that focuses on three factors: (1) the economic impact of the regulation on the property owner; (2) the character of the governmental action, in particular whether it amounts to a physical invasion or mere regulation of land use; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations.²⁷ Rarely will a land use regulation be found to be a taking pursuant to the *Penn Central* factors. As the Nebraska Supreme Court observed in *Strom v. City of Oakland*, “land-use regulations which substantially advance legitimate state interests do not effect a taking merely because the regulation caused a diminution in property value alone.”²⁸

Because Nebraska law mirrors 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.

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 he is currently putting his 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 Nebraska generally will not be able to do this without paying compensation.

Nebraska law protects the rights of property owners to continue existing and lawful uses of their property, regardless of changes in zoning laws that may prohibit this use.²⁹ The right to maintain a legal nonconforming use “runs with the land,” meaning it is an incident of ownership of the land and is not a personal right. Therefore, a change in the ownership or tenancy of a nonconforming business or structure that takes advantage of the nonconforming rights does not affect the current landowner’s right to continue the nonconforming use.³⁰ However, the landowner must have made a substantial investment in the property to claim a valid nonconforming use. So in *Saunders County v. Moore*, the Supreme Court of Nebraska held that the landowner did not have a valid nonconforming trailer park where he had run electrical wires and done some preliminary road work, but no concrete had been poured and no trailers were present.³¹ On the other hand, in *Board of County Commissioners of Sarpy County v. Petsch*, the same court held that the landowner had a valid nonconforming trailer park where he had installed

²⁵ *Id.* at 359.

²⁶ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

²⁷ *Scofield*, 753 N.W.2d at 358-60.

²⁸ *Strom*, 583 N.W.2d at 318.

²⁹ *Saunders County v. Moore*, 155 N.W.2d 317, 319 (Neb. 1967).

³⁰ *The Lamar Co. v. City of Fremont*, 771 N.W.2d 894 (Neb. 2009).

³¹ *Moore*, 155 N.W.2d at 320.

thirteen trailers and space for fifty-nine more was staked out before the new zoning regulation went into effect.³²

But a county does not need to allow the nonconforming use to continue indefinitely. In fact, the Nebraska Supreme Court has stated that “ordinances which limit and plan for the elimination of nonconforming uses are generally considered a proper exercise of a municipality’s power.”³³ Thus, in *City of Lincoln v. Bruce*, the court upheld an ordinance providing that the discontinuance of a nonconforming use for a period of two years forfeited the right to reestablish such a nonconforming use thereafter.³⁴ And in *Wolf v. City of Omaha*, the court upheld a zoning ordinance that required the amortization of dog kennels.³⁵ The court concluded that the city could phase out the dog kennel as long as the time period was not “arbitrary and unreasonable,” and in this case an amortization period of five years was considered reasonable.³⁶

Thus, communities in Nebraska will not be able to pursue initiatives to combat childhood obesity that rely on the immediate elimination of existing use. But an ordinance that plans for the eventual elimination of that use, either through discontinuance or amortization, will be upheld by the courts.

³² Bd. of County Comm’rs of Sarpy County v. Petsch, 109 N.W.2d 388, 390 (Neb. 1961).

³³ Mossman v. City of Columbus, 449 N.W.2d 214 (Neb. 1989).

³⁴ City of Lincoln v. Bruce, 375 N.W.2d 118 (Neb. 1985).

³⁵ Wolf v. City of Omaha, 129 N.W.2d 501, 515 (Neb. 1964).

³⁶ *Id.*