

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

UTAH

Communities in Utah have been quite successful in instituting land use regulations to reduce obesity and encourage healthy living. Under the state's "A Healthier You" (AHY) Legacy Awards program, Utah has recognized a number of communities for steps taken to combat obesity in a variety of ways, including land use programs, education programs, and health screenings for low-income individuals.¹ Land use projects undertaken by Utah communities include improvements to trails in Santa Clara, Provo City, Salt Lake City, Hyde Park, and other areas; an ordinance requiring subdivisions to provide sidewalks and streetlights in Healthy Dixie; and the organization of a community garden in Midvale City.² Utah's laws governing local governments' power to regulate land use have been instrumental in encouraging creative land use solutions to the problem of obesity.

This memorandum summarizes Utah 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 Utah 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

¹ Utah Dep't of Health, A Healthier You Legacy Awards, <http://health.utah.gov/ahy> (last visited Oct. 29, 2010).

² *Id.*

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.³

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.⁴ Several years ago King County, Washington, adopted a property tax increase to fund the acquisition and maintenance of publicly owned parks and recreation facilities.⁵ The Los Angeles City Council has imposed a one-year moratorium on the opening of new fast-food restaurants in South Los Angeles.⁶ 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

³ 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).

⁴ 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.

⁵ KING COUNTY, WASH., CODE § 4.08.082 (2009).

⁶ 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>.

minimum number of bicycle parking facilities in all new commercial, residential, and public property developments, to encourage biking as an alternative to driving.⁷

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 dedication⁸ 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.⁹ 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.¹⁰ 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

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

⁸ 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.

⁹ *See, e.g., Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁰ *See, e.g., Pa. Coal v. Mahon*, 438 U.S. 104 (1978).

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 Utah, 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.” 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.¹¹ 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 Utah Constitution provides that “[p]rivate property shall not be taken or damaged for public use without just compensation.”¹² Utah courts have made it clear that this provision is largely interpreted in accordance with the corresponding federal provision.¹³ Although the Utah Constitution provides additional protection for damage to property, making it slightly broader than the federal provision,¹⁴ Utah courts interpret the damage provision as providing compensation for takings claims resulting from “direct and necessary consequences” of government action.¹⁵ In *Farmers New World Life Insurance Co.*, Bountiful City’s construction caused contamination of a pond and the destruction of fish.¹⁶ The Supreme Court of Utah found that the contamination was not a direct consequence of the construction and thus did not require

¹¹ *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.

¹² UTAH CONST. art. I, § 22.

¹³ See *Smith v. Prince Dev. Co.*, 125 P.3d 945, 949 (Utah 2005) (calling Fifth Amendment analysis “virtually identical” to analysis under the Utah Constitution).

¹⁴ *Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995).

¹⁵ *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1245 (Utah 1990).

¹⁶ *Id.* at 1244-45.

compensation.¹⁷ Similarly, in *State by Road Commission v. Williams*, the Supreme Court of Utah found that the damage provision did not necessitate compensation, even though construction had depreciated the value of a homeowner's property value.¹⁸

The Utah legislature was the first in the country to respond to *Kelo*, adopting legislation removing the power of eminent domain from redevelopment agencies in anticipation of the U.S. Supreme Court's ruling in *Kelo*.¹⁹ However, this reform was quickly modified in 2007 when Utah enacted House Bill 365.²⁰ The statute currently allows redevelopment agencies to condemn private property in urban renewal areas in certain circumstances and with certain limitations. In particular, an agency may not condemn single-family residential owner-occupied property or commercial property unless a large majority of the surrounding landowners sign a petition requesting the agency to condemn the property and a two-thirds majority of the agency board members vote in favor of using eminent domain for the property.²¹

Utah courts have had little occasion to interpret the scope of the public use provision in the state constitution. In *Town of Perry v. Thompson*, the Utah Supreme Court indicated that the phrase should be given a "liberal interpretation."²² In *Utah County, By & Through County Board of Equalization of Utah County*, the court noted that courts should give broad deference to a legislative determination of public use.²³

The Utah legislature has filled this gap by enacting a statutory list of acceptable public uses. The current statutory definition of "public use" allows the eminent domain power to extend to "[a]ll public uses authorized by the Government of the United States,"²⁴ as well as "all other public uses for the benefit of any county, city, or town, or its inhabitants."²⁵ Although the list of permissible uses of eminent domain includes "bicycle paths and sidewalks adjacent to paved roads," it expressly excludes "a park whose primary use is as a trail, path, or other way for walking, hiking, bicycling, or equestrian use; or to connect other trails, paths, or other ways for walking, hiking, bicycling, or equestrian use."²⁶

Thus, Utah law imposes some restrictions on the authority of communities to use eminent domain to restructure the physical environment to promote healthy, active lifestyles. The current statutory restriction on the use of eminent domain for the purpose of building walking, hiking, and biking trails will be a significant impediment, although communities can build such trails as long as they are adjacent to roadways. Otherwise, communities in Utah are free to combat childhood obesity by using eminent domain to build traditional parks, playgrounds, and other recreation facilities that will be publicly owned and used, thereby promoting the goal of making their physical environment more conducive to healthy, active lifestyles.

¹⁷ *Id.* at 1246.

¹⁸ *State by Road Comm'n v. Williams*, 452 P.2d 881, 882-84 (Utah 1969).

¹⁹ S.B. 184, 56th Leg., 2005 Gen. Sess. (Utah 2005).

²⁰ H.B. 365, 57th Leg., 2007 Gen. Sess. (Utah 2007).

²¹ UTAH CODE ANN. § 17C-2-601(2)(C) (2008).

²² *Town of Perry v. Thomas*, 22 P.2d 343, 346 (Utah 1933).

²³ *Utah County, By & Through County Bd. of Equalization of Utah County*, 709 P.2d 265, 295-96 (Utah 1985).

²⁴ UTAH CODE ANN. § 78B-6-501(1).

²⁵ *Id.* § 78B-6-501(3)(f).

²⁶ *Id.* § 78B-6-501(3)(d), (11)(a)-(b).

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.²⁷ Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.²⁸ All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.²⁹ A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.³⁰ 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.

Utah courts essentially follow federal precedent in determining when a regulation of land use constitutes a taking.³¹ Although the Utah Supreme Court has left open the possibility that the Utah Constitution provides broader protection for property owners than the federal Constitution, it has declined to determine for certain whether that is so.³² Thus, in Utah, even when the courts are reviewing a takings claim brought solely pursuant to the state constitution, the courts will apply essentially the same considerations as federal courts.³³ As the Utah Supreme Court said in *MSICO*, a regulatory taking occurs “when some significant restriction is placed upon an owner’s use of his property for which ‘justice and fairness’ require that compensation be given.”³⁴ This requires “substantial interference with private property which destroys or materially lessens its value, or by which the owner’s right to its use and enjoyment is in any substantial degree abridged or destroyed.”³⁵ In *MSICO*, while seeking a building construction permit, the condominium’s homeowners’ association had an agreement to use an adjacent lot for snow

²⁷ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

²⁸ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

²⁹ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

³⁰ Regulatory takings liability under the US Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.

³¹ See *B.A.M Dev. v. Salt Lake County*, 87 P.3d 710 (Utah Ct. App. 2004) (applying federal precedent to the landowner’s takings claim); see also *Diamond B-Y Ranches v. Tooele County*, 91 P.3d 841, 845 n.2 (Utah Ct. App. 2004) (“In light of the similarity of the state and federal clauses . . . we primarily analyze this case using federal precedent.”).

³² See *Williams v. Pub. Serv. Comm’n of Utah*, 754 P.2d 41, 54 n.12 (Utah 1988) (“Although Williams refers to the Utah Constitution in his brief, he does not separately treat or brief the taking issue under the Utah Constitution. See Utah Const. art. I, §§ 7, 22. We therefore make no judgment concerning the possibility of a different standard for takings under the Utah Constitution, but reserve the possibility of doing so for a later case.”).

³³ *View Condo. Owners Ass’n v. MSICO, LLC*, 127 P.3d 697, 705 (Utah 2005).

³⁴ *Id.* (citation omitted).

³⁵ *Id.* (citation and internal quotation omitted).

storage for the condominium, but the city and the owner of the lot agreed to an alternative plan that allowed the lot to be used for single-family housing.³⁶ The homeowners' association argued that the alternative plan was an unconstitutional taking because the snow storage easement was necessary for the city's approval for the condominium.³⁷ The Supreme Court of Utah found that the alternative plan did not prevent the condominium's homeowners' association "from engaging in any and all permissible uses."³⁸ Moreover, the court made clear that most regulations would not constitute compensable takings:

Many statutes and ordinances regulate what a property owner can do with and on the owner's property. Those regulations may have a significant impact on the utility or value of property, yet they generally do not require compensation under article I, section 22. Only when governmental action rises to the level of a taking or damage under article I, section 22 is the State required to pay compensation.³⁹

Because Utah 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.

2. 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 Utah generally will not be able to do this without paying compensation.

The Utah Supreme Court has stated that "a zoning ordinance which required the discontinuance forthwith of a nonconforming use would be a deprivation of property without due process of law."⁴⁰ Under Utah statute, "a nonconforming or noncomplying structure may be continued by the present or a future property owner."⁴¹ This statute forbids local governments from requiring immediate termination of a prior nonconforming use without paying compensation. Landowners may obtain injunctions prohibiting the forced demolition of nonconforming uses.⁴²

However, landowners may be forced to amortize nonconforming uses. Under Utah statute, "[t]he legislative body may provide for . . . the termination of all nonconforming uses . . . by providing a formula establishing a reasonable period during which the owner can recover or amortize the amount of his investment in the nonconforming use[.]"⁴³ Thus, communities may establish

³⁶ *Id.* at 699-700.

³⁷ *Id.* at 701.

³⁸ *Id.* at 706.

³⁹ *Id.* at 705 n.6.

⁴⁰ *Gibbons & Reed Co. v. N. Salt Lake City*, 431 P.2d 559, 563 (Utah 1967).

⁴¹ UTAH CODE ANN. § 10-9a-511(1)(a) (2008).

⁴² *Swenson v. Salt Lake City*, 398 P.2d 879, 881 (Utah 1965).

⁴³ UTAH CODE ANN. § 10-9a-511(2)(b).

reasonable time periods for the elimination of nonconforming uses.⁴⁴ In *M&S Cox*, the Utah Supreme Court upheld an amortization period that was calculated by dividing the residual value of the property by the average monthly net rental income, thus determining the number of months that the nonconforming use would be permitted to remain.⁴⁵ Courts are relatively deferential to local government determinations of reasonable amortization periods, and those determinations will be upheld if the local government body does not act “illegally, arbitrarily, or capriciously.”⁴⁶ This deferential standard of review suggests that if local governments calculate amortization periods in a reasonable and consistent manner, they will have considerable leeway to require amortization of nonconforming land uses.

Utah law provides significant opportunities for local communities to undertake initiatives to combat childhood obesity through land use regulations. “Public use” for the purposes of eminent domain is given a broad definition, and eminent domain regulations are liberally interpreted to allow local governments significant leeway. However, statutory restrictions on the definition of public use will preclude communities from condemning private property to build hiking and biking trails that are not adjacent to public roadways. Utah law does not impose any additional restrictions on regulatory takings apart from those present under federal law. Rather than forced grandfathering of prior nonconforming uses, local governments may impose amortization periods in which those uses must be eliminated, and courts are very deferential to local government determinations of what constitutes a reasonable amortization period.

⁴⁴ See *M&S Cox Invs. v. Provo City Corp.*, 169 P.3d 789, 796-97 (Utah Ct. App. 2007).

⁴⁵ *Id.* at 792.

⁴⁶ *Id.*