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

WISCONSIN

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

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

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

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

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

Each of these initiatives targets an important aspect of the physical environment, and each involves a different type of government action. The Santa Clara County and King County initiatives require the local governments to acquire property rights in private property—in Santa Clara County the acquisition is by forced dedication[6] and involves a partial interest in the property, while in King County the acquisition is by eminent domain and involves full title. In

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

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

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

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

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

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

contrast, the Los Angeles and Naperville ordinances are two distinct examples of land use restrictions. The Los Angeles ordinance limits what landowners can do with their private property, while the Naperville ordinance imposes an affirmative requirement on private landowners.

These four specific initiatives illustrate the two primary tools available to communities that seek to use land use initiatives to prevent childhood obesity: They can rely on their power of eminent domain, on their land use regulatory authority, or both. The first option—relying on the power of eminent domain to acquire ownership interests in real property—may be used to provide public infrastructure such as parks, playgrounds, and recreational trails to promote healthy, active lifestyles. The second option—adopting land use restrictions applicable to private property—may be used to limit undesirable land uses (such as fast-food restaurants) in vulnerable neighborhoods or to require private property owners to do certain things on their property (such as install bicycle parking structures or stock healthy food in corner stores).

Communities that set out to combat childhood obesity by changing their physical environment using eminent domain or land use regulation will face limitations from both federal and state law in both contexts. The federal limitations come from the Fifth Amendment to the U.S. Constitution, which states: "[N]or shall private property be taken for public use without just compensation." This prohibition is interpreted in two parts. First, private property may not be taken unless it is for public use.[7] Second, if a land use restriction imposes such a burden on private property that the courts conclude it is the equivalent of a taking, the government must pay just compensation.[8] A comprehensive analysis of the scope and extent of these federal constitutional limits can be found at www.nplan.org/nplan/products/takings_survey.

In addition to the federal constitutional limitations, every state imposes its own restrictions on the exercise of eminent domain and the imposition of land use regulations by its communities. These limitations, contained in state constitutions as well as statutes, may be more protective of private property than the federal Constitution, and they generally take three forms. First, state laws might incorporate a narrower definition of "public use," such that a legislative objective that satisfies the public use requirement of the federal Constitution would be invalid under state law. Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution. Finally, state law may require a community to tolerate certain negative aspects of the physical environment (such as fast-food restaurants) that it would rather eliminate, just because those elements were present before the community undertook its reform initiative—commonly referred to as "grandfathering."

Communities interested in using land use initiatives to change their physical environment and thereby combat childhood obesity have to be aware of these restrictions on their eminent domain powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Wisconsin, 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 Wisconsin Constitution states that "[t]he property of no person shall be taken for public use without just compensation therefor."[10] The definition of public use has evolved over time in Wisconsin courts; although early cases appear to have embraced a narrow interpretation of the term, more recent cases conform to the broader federal standard.

Early Wisconsin cases forbade the condemnation of private property that resulted in the transfer of land to other private owners. In *Schumm v. Milwaukee County*, the Wisconsin Supreme Court held that the requirement of public use precluded the county from condemning land for a war memorial that was to be run by a nonprofit corporation.[11] In a later case, the court stated that the term "public use" "implie[d] a possession, occupation and enjoyment of the land by the public, or public agencies."[12] However, in an apparent retreat from *Schumm*, the court added, "The fact that the property may not long remain in the ownership of the city does not in itself indicate that the use will not be a public use and that the city may not be invested with the power of eminent domain in acquiring it."[13] In its most recent comment on the matter, the Wisconsin Supreme Court rejected the argument that the proposed transfer of condemned property to a private owner invalidated the condemnation under the public use clause, because the sale or leasing of the land to private interests was incidental to the condemnation's main purpose.[14] Although the question of what constitutes a public use is a judicial one for the courts to decide, the question whether it is necessary to take a particular property for that public use is inherently a matter for the legislature.[15]

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] WIS. CONST. art. I, § 13.
[11] Schumm v. Milwaukee County, 45 N.W.2d 673, 678 (Wis. 1954).
[12] David Jeffrey Co. v. City of Milwaukee, 66 N.W.2d 362, 370 (Wis. 1954).
[13] *Id.* at 375.
[14] Grunwald v. Community Dev. Auth. of West Allis, 551 N.W.2d 36, 45 (Wis. 1996).
[15] TFJ Nominee Trust v. State Dep't of Transp., 629 N.W.2d 57, 64 (Wis. 2001).

In response to *Kelo*, the Wisconsin legislature enacted statutory reform that prohibits the condemnation of nonblighted property for transfer to another private party.[16] There has not yet been any case law interpreting this provision. While it is clear that this provision represents a slight step back from more recent court cases adopting a broad interpretation of the public use clause, it is unlikely to significantly affect the ability of local governments to use their eminent domain powers to combat childhood obesity since communities are still free to condemn private property for publicly owned recreation facilities.

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.[17] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[18] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[19] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[20] 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.

Wisconsin courts have interpreted the state's regulatory takings law as providing similar protections as the federal Constitution, and the body of case law relies on the U.S. Supreme Court's regulatory takings analysis.[21] Because Wisconsin 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 she is currently putting her property. In some

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[16] WIS. STAT. § 32.03(6) (2008).
[17] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[18] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[19] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[20] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[21] *See* Zealy v. City of Waukesha, 548 N.W.2d 528, 531-32 (Wis. 1996) (applying federal precedents to a regulatory takings claim).

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

A Wisconsin statute provides for grandfathering of prior nonconforming uses:

> The continued lawful use of a building, premises, structure, or fixture existing at the time of the adoption or amendment of a zoning ordinance may not be prohibited although the use does not conform with the provisions of the ordinance. The nonconforming use may not be extended. The total structural repairs or alterations in such a nonconforming building, premises, structure, or fixture shall not during its life exceed 50 percent of the assessed value of the building, premises, structure, or fixture unless permanently changed to a conforming use. If the nonconforming use is discontinued for a period of 12 months, any future use of the building, premises, structure, or fixture shall conform to the ordinance.[22]

In the words of the Wisconsin Supreme Court, "The statute which empowers cities to enact zoning ordinances exempts from their restrictions valid nonconforming uses."[23] This protection runs at law with the property and does not terminate simply because the property changes hands.[24] Nonetheless, "nonconforming uses are closely limited and are not to be enlarged in derogation of the general scheme of the ordinance, and hence the right to continue them may be lost by such acts or omissions as moving the structure to a different though near-by location, failing to appeal the administrator's denial of a permit to continue the prior use, as well as by abandonment."[25]

Communities may provide that the right to continue nonconforming use will be forfeited if the nonconforming use is discontinued for a period of time. In cases where the zoning ordinance has prescribed such a discontinuance period, the government need not prove intent to abandon if the time requirements are met.[26] The Wisconsin Supreme Court has upheld forfeiture of the right to continue a nonconforming use when residential buildings in a manufacturing area had been vacant for more than a year[27] and when a nonconforming industrial building was vacant for twenty-two months while listed for sale.[28]

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[22] WIS. STAT. § 62.23(7)(h) (2008).
[23] City of Lake Geneva v. Smuda, 249 N.W.2d 783, 786 (Wis. 1977).
[24] *Cf.* Columbia County v. Bylewski, 288 N.W.2d 129, 138 (Wis. 1980) (the county "did not have the authority to order the [landowner] to remove the old mobile home situated on the property when he purchased it because it was located on the property prior to the municipality's enactment of [the zoning ordinance] and thus was exempt from the ordinance restriction as a nonconforming use.").
[25] State *ex rel.* Brill v. Mortenson, 94 N.W.2d 691, 694-95 (Wis. 1959).
[26] State *ex rel.* Peterson v. Burt, 166 N.W.2d 207, 210-11 (Wis. 1969).
[27] *Id.* at 210.
[28] *Brill*, 94 N.W.2d at 694.

Grandfathering protection can also be lost where the nonconforming use is expanded, enlarged, or excessively altered. Therefore, the Wisconsin Supreme Court ruled against a trailer park owner seeking to add an additional space.[29] To determine whether alterations are significant enough to lose grandfathering protection, courts look to see if they change the value of the property by 50 percent or more.[30] This rule has been applied both in cases where the owner made the alterations[31] and where the alterations were a result of an accident.[32]

Thus, communities in Wisconsin will not be permitted to enact zoning ordinances that require the immediate cessation of an existing use. They may, however, provide that the right to continue such uses will be lost if discontinued. Moreover, in light of the law's close construction of the right to continue a nonconforming use, such right will be lost if the use is altered, expanded, or abandoned.

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In sum, communities in Wisconsin have substantial latitude to use land use restrictions or eminent domain to pursue initiatives to combat childhood obesity. The concept of public use is broad enough to encompass traditional public recreational infrastructure, and Wisconsin law does not impose limitations on regulatory takings apart from those already imposed under federal law. Although Wisconsin law requires grandfathering of prior nonconforming land uses, that protection can be lost through discontinuance, expansion, and alteration of the use, and Wisconsin courts have been relatively willing to find these to have taken place.

[29] Town of Yorkvill v. Fonk, 88 N.W.2d 319, 323 (Wis. 1958).
[30] *See, e.g.,* Columbia County v. Bylewski, 288 N.W.2d 129, 138 (Wis. 1980); State *ex rel.* Covenant Harbor Bible Camp v. Steinke, 96 N.W.2d 356, 362 (Wis. 1959).
[31] *Columbia County*, 288 N.W.2d at 138 (owner removed old nonconforming mobile home and substituted a new one).
[32] *Covenant Harbor Bible Camp*, 96 N.W.2d at 361-62 (alteration was a result of fire damage).