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

TEXAS

This memorandum summarizes Texas 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 Texas 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 Texas, 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.

Article I, section 17, of the Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. . . ."[10] Although Texas courts defer to reasonable legislative determinations of public use, the issue of what constitutes public use is ultimately a question of law to be resolved by the courts.[11] The Texas Supreme Court has stated that it defines the term "public use" liberally, but it has nonetheless consistently rejected the broadest reading of the term, in which public use is equated with the public welfare or good.[12] In essence, the test for public use in Texas is whether "there results to the public some definite right or use in the business or undertaking to which the property is devoted."[13] This test is one of character, not extent.[14] Thus it does not matter whether the use is limited to the citizens of a local neighborhood or whether only a small number of citizens is likely to take advantage of the right. What is important is whether the right is of the character that is open to use by all those who choose to avail themselves of it. Thus, in *Bordan v. Tresplacios Rice & Irrigation Co.*, the Texas Supreme Court held that the appropriation of water by an irrigation district was a public use, even though the district served only those living within the district and not all of the public.[15] In contrast, in *Maher v. Lasater*, the Texas Supreme Court rejected a proposed condemnation of private property to provide a means of egress to one landlocked parcel, declaring that "a mere declaration by the Legislature cannot change a private use or private purpose into a public use or public purpose."[16]

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] TEXAS CONST. art. I, §17.
[11] *See* Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 833 (Tex. 1958).
[12] *See, e.g.*, Davis v. City of Lubbock, 326 S.W.2d 699, 706 (Tex. 1959).
[13] *Id.*
[14] Tenngasco Gas Gathering Co. v. Fischer, 653 S.W.2d 469, 474–76 (Tex. App. 13th Dist. 1983) (upholding a condemnation of private property for the purpose of building a gas pipeline to transport gas for a private company).
[15] 143 S.W.2d 79 (Tex. 1940).
[16] 354 S.W.2d 923 (Tex. 1962).

In response to *Kelo*, the Texas legislature adopted the Limitations on the Use of Eminent Domain Act on November 18, 2005.[17] The act prohibits the taking of private property for the purpose of confering a private benefit on a particular private party, or for a public use that is merely a pretext to confer a private benefit on a particular private party; or for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas.[18] This limitation, however, expressly preserves the power of local governments to use eminent domain for transportation projects, public buildings, and parks (among other things).[19]

Thus, although the Texas Supreme Court has adopted a somewhat narrow definition of "public use," and the Texas legislature adopted a further restriction on the use of eminent domain in response to *Kelo*, communities seeking to use eminent domain to pursue projects aimed at combating childhood obesity should not be significantly impeded by these limitations. Most anti-obesity projects, such as public parks, playgrounds, and hike and bike trails, fit comfortably within the court's definition of "public use" and are exempted from the statutory reform measure. Even a proposal to condemn private property to convey to another landowner for use as a grocery store selling healthy food is likely to satisfy the court's public use test, and it may not be prohibited by the statutory reform if the proponents of the project can persuade a court that the primary purpose is the public purpose of access to healthy food, not to benefit the private landowner.

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.[20] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[21] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[22] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[23] As with eminent domain, however,

[17] TEX. GOV'T CODE ANN. § 2206.001 (West 2009).
[18] *Id.* § 2206.00(b).
[19] *Id.* § 2206.001(c).
[20] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[21] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[22] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[23] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.

states are free to adopt a regulatory takings framework that provides more protections to property owners than does the U.S. Constitution.

As noted above, the Texas Constitution states that "[n]o person's property shall be taken, *damaged* or destroyed for or applied to public use without adequate compensation being made. . . ."[24] The Texas Supreme Court has acknowledged that the inclusion of the word "damage" in the Texas Constitution suggests that it might provide more expansive protections of private property than does the U.S. Constitution. Nonetheless, the court has not yet held that the Texas Constitution is more protective (preferring to reserve the issue) and has consistently applied the state and federal constitutions using the same standards.[25]

Thus, in Texas courts follow U.S. Supreme Court precedent and 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.[26] In reality, very few land use regulations satisfy these demanding standards for per se takings liability.[27]

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 strangers. For regulations that do not implicate one of the two per se rules, Texas courts continue to follow federal precedent to determine if a regulatory taking has occurred. In particular, Texas courts will review a takings challenge to a run of the mill zoning regulation under an "essentially ad hoc, factual inquir[y]" 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.[28]

Because Texas 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.

To supplement a landowner's constitutional protections against burdensome land use restrictions, the Texas legislature adopted the Private Real Property Rights Preservation Act (PRPRPA) in

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[24] TEX. CONST. art. I, §17 (emphasis added).
[25] *See* Sheffield Dev. Co. v. Glenn Heights, 140 S.W.3d 660, 669 (Tex. 2004) ("As the court of appeals noted, it could be argued that the differences in the wording of the two provisions are significant, but neither Sheffield nor the City makes this argument. Both agree that in applying the Texas constitutional provision in this case, we should look to federal jurisprudence for guidance, as we have in the past, and so we do.") (internal citations omitted); Mayhew v. Sunnyvale, 964 S.W.2d 922, 932 (Tex. 1998) ("The Mayhews urged in their application for writ of error that Texas takings jurisprudence follows the federal standards. Accordingly, for purposes of this case, we assume, without deciding, that the state and federal guarantees in respect to land-use constitutional claims are coextensive, and we will analyze the Mayhews' claims under the more familiar federal standards.").
[26] *See* Hallco Texas, Inc. v. McMullen County, 221 S.W.3d 50, 56 (Tex. 2006) (explaining the general takings analysis); *Sheffield Dev. Co.*, 140 S.W.3d at 669–73 (same).
[27] *Sheffield Dev. Co.*, 140 S.W.3d at 671.
[28] *Hallco*, 221 S.W.3d at 56, *citing and quoting* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

1995.[29] The PRPRPA protects private property owners in several ways: (1) by expanding the definition of "taking" to include diminution in value by 25 percent or more, (2) by requiring local governments to analyze the taking-related impact of a regulatory action before it proceeds with the action, and (3) by permitting landowners to challenge regulations that have the requisite diminution effect. Although the PRPRPA appears to apply broadly to most types of governmental actions (e.g., ordinances, rules, policies, and guidelines), its expansive exemptions undermine the sweep of its coverage. For example, the PRPRPA exempts all regulatory actions taken to eradicate a public or private nuisance or to fulfill an obligation mandated by state or federal law.[30] Most important for purposes of this paper, it also exempts virtually all regulatory actions taken by municipalities.[31]

With respect to covered actions, the PRPRPA expands the definition of a "taking" beyond the constitutional standards to include governmental action that

> (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and
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> (ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

For covered governmental entities and covered actions, the PRPRPA requires that the governmental entity prepare a Takings Impact Assessment (TIA) for all actions likely to result in a taking. In addition, the PRPRPA provides two remedies for affected landowners—the right to sue a covered governmental entity for a declaration that a covered action constitutes a taking under the act and the right to challenge a covered action that was taken without the preparation of a TIA.[32] The only remedy to which the landowner is entitled in either case is a recission of the challenged action, although the local government may choose to pay compensation in lieu of recission if its action is found to be a taking.[33]

In general, neither the Texas Constitution nor the PRPRPA is likely to impede efforts by communities in Texas to pursue initiatives to combat childhood obesity that rely on land use restrictions. First, because Texas courts essentially follow federal precedent in applying their constitutional takings provisions, traditional land use restrictions are unlikely to give rise to compensation requirements under the constitution. Second, because most municipal regulations are not subject to the limitations enacted in the PRPRPA, cities will not be impeded by its expansive definition of takings. Finally, even those local governments that are subject to the

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[29] TEX. GOV'T CODE ANN. §§ 2007.001–2007.045 (West 2009).
[30] *Id.* §2007.003(b)(4), (6).
[31] *Id.* §2007.003(b). Only municipal actions that affect a city's extraterritorial jurisdiction differently than the city itself are covered by the PRPRPA. *Id.* §2007.003(a)(3).
[32] *Id.* §§ 2007.021, 2007.044.
[33] *Id.* §§ 2007.023(a), 2007.024(c), 2007.044.

PRPRPA will not be obligated to pay compensation if a covered action decreases the value of real property by 25 percent or more—at most they will be faced with recission of the offending action.

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 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 Texas generally will not be able to require the immediate cessation of a prior use without paying compensation.

Texas law protects the right of landowners to continue an existing land use not withstanding the enactment of an ordinance purporting to prohibit that use, as long as the use is not a nuisance.[34] As the Texas Supreme Court has stated:

> As a general rule, the restrictions of a zoning ordinance or regulation may not be made retroactive. Such regulations must relate to the future rather than to existing buildings and uses of land, and ordinarily they may not operate to remove existing buildings and uses not in conformity with the restrictions applicable to the district, at least where such buildings and uses are not nuisances and their removal is not justified as promoting the public health, morals, safety, or welfare.[35]

The right to continue nonconforming uses, however, is not unlimited. In 1972 the Texas Supreme Court held that communities may require such uses to be discontinued within a specified amortization period, as long as the amortization period is reasonable.[36] In *City of University Park v. Benners*, the city passed a zoning ordinance in 1940 that effectively terminated the commercial use of two lots that had been used for commercial purposes since 1925.[37] The ordinance provided that any nonconforming use must be removed or converted to a conforming use prior to January 1, 1965. The court held that municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power, and that providing the property owner 25 years' notice that the nonconforming use would have to terminate was sufficient time to permit the property owner to recoup any loss in property value caused by the zoning ordinance.[38] Following *Benners*, Texas courts have consistently held that amortization is a valid technique to allow property owners to recoup their investment in property that became nonconforming as a result of changes in a community's zoning ordinance.[39]

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[34] *See, e.g.*, City of Carthage v. Allums, 398 S.W.2d 799, 801–02 (Tex. Civ. App. 1966) ("A zoning ordinance cannot deprive the owner of the use to which the property was put before the enactment of the ordinance.").
[35] City of Corpus Christi v. Allen, 254 S.W. 759, 761 (Tex. 1953) (citations omitted).
[36] City of University Park v. Benners, 485 S.W.2d 773, 777–78 (Tex. 1972).
[37] *Id.* at 775.
[38] *Id.* at 779.
[39] *See, e.g.*, Bd. of Adjustment v. Patel, 887 S.W.2d 90, 93 (Tex. App.-Texarkana 1994, writ denied) (period of amortization to be determined by amount of investment at time motel became nonconforming); Bd. of Adjustment v.

In addition, Texas courts have upheld ordinances that call for the forfeiture of prior nonconforming use rights if the nonconforming use is discontinued or abandoned.[40] To demonstrate abandonment, a community must show both discontinuance of use and intent to abandon.[41] Some Texas courts have interpreted discontinuance provisions as also requiring a showing of intent to abandon.[42]

Communities seeking to eliminate existing uses to combat childhood obesity will run into difficulties in Texas. Existing uses are protected under Texas law and may not be required to cease immediately without paying compensation. However, Texas permits communities to adopt reasonable amortization provisions to phase out existing uses and to provide that such uses will be forfeited if discontinued or abandoned.

Patel, 882 S.W.2d 87, 89–90 (Tex. App.-Amarillo 1994, writ denied) (same); Bd. of Adjustment v. Winkles, 832 S.W.2d 803, 806 (Tex. App.-Dallas 1992, writ denied) (increase in inventory after business became nonconforming does not increase period of amortization); Williams v. City of Fort Worth, 782 S.W.2d 290, 294 (Tex. App.-Fort Worth 1989, writ denied) (recognizing amortization as a valid method of forcing property owners to comply with zoning restrictions); City of Houston v. Harris County Outdoor Adver., 732 S.W.2d 42, 49–50 (Tex. App.-Houston 1987, no writ) (same); Neighborhood Comm. on Lead Pollution v. Bd. of Adjustment, 728 S.W.2d 64, 71 (Tex. App.-Dallas 1987, writ ref'd n.r.e.) (period of amortization determined by investment remaining at time property becomes nonconforming).

[40] *See, e.g.*, Tellez v. City of Socorro, 296 S.W.3d 645 (Tex. App-El Paso, 2009).

[41] City of Dallas v. Fifley, 359 S.W.2d 177, 182 (Tex. Civ. App. 1962).

[42] *See* Plemons-Eakle Neighborhood Ass'n v. City of Amarillo, 694 S.W.2d 218, 221–22 (Tex. App.-Amarillo 1985).