

# Takings Law

## A Primer for Public Health Advocates

One of government's most formidable tools is the power to take private property for public use as long as the landowner is compensated. Because this power is controversial, government generally tries to use it sparingly and with great care.

Takings law controls government expropriation of property and sometimes covers regulations that stringently dictate or limit the way property is used. Takings law places important constraints on the ability of localities to regulate how land is used. This fact sheet highlights key issues that may come up for public health advocates and policymakers when they consider using this powerful tool.

### Two approaches for creating healthier environments

Two of the approaches local governments employ to improve land use may raise takings-related questions.

NPLAN commissioned Professors Lynn Blais and Gerald Torres to develop a comprehensive federal and fifty-state analysis of how takings law might apply to some of the land use ideas that cities are pursuing in their quest to prevent obesity. This fact sheet provides highlights from their report, which is available in full at [www.nplan.org](http://www.nplan.org).

First, if government can't make a land use improvement by buying land or providing incentives to land owners, it might use *eminent domain*, which is the forced sale of private land to the government for public use. Another word for eminent domain is *taking*. This approach is often controversial—especially in light of the legacy of urban renewal programs in which government agencies used eminent domain to take large swaths of private property, displacing entire communities of color. Nonetheless, the responsible use of eminent domain can help create healthier neighborhoods and communities by, for example:

- Taking property to create a public park to encourage physical activity
- Taking property to convert into a city-run garden
- Taking a vacant retail building to transfer to a grocer committed to selling fresh and healthy foods

Second, a local government can enact *land use regulations* to change the allowable uses of private property. Possible land use regulations that could support community health include:

- Prohibiting the establishment of new fast food restaurants in a community
- Limiting the density of fast food restaurants
- Limiting the proximity of fast food restaurants to schools and other child-sensitive locations
- Requiring businesses to install bicycle parking
- Requiring developers to include sidewalks and bicycle lanes in new subdivisions
- Requiring food retailers to make fresh fruits and vegetables available for purchase
- Requiring food retailers to devote a certain amount of floor or shelf space to foods designated as healthy

Sometimes such regulations can restrict an owner's rights so much that they become, in effect, a taking.

## Takings law and appropriating property (eminent domain)

Occasionally a community wants to convert private property to a public use, but the landowner does not want to sell. Generally, local governments have the authority to compel the landowner to sell the property as long as certain conditions are met. The Takings Clause of the U.S. Constitution allows the government to use eminent domain to take private property if it pays a fair market price and puts the property to public use.

Eminent domain controversies often turn on the definition of "public use." If a municipality uses eminent domain to convert private property into public infrastructure—roads, schools, government buildings, and parks—it is clearly putting the property to "public use." But what if a municipality wants to take private property, say a vacant building, to transfer it to another property owner, for example, a grocery store operator?

*Suppose a city recognizes that having a full-service grocery store in an underserved neighborhood is profoundly important for families' health. The city might not want to or know how to operate a supermarket itself, but a grocery company might be willing to develop and run a supermarket if the city made land available at a subsidized price. If the city identifies a vacant building that would be an ideal location for a supermarket, could it use eminent domain to force the building's owner to sell to the city in order for the city to transfer ownership to the grocer? Under federal law, the answer is likely yes, but many state laws would not allow this use of eminent domain.*

The U.S. Supreme Court has interpreted the federal Takings Clause to define *public use* loosely. In *Kelo v. the City of New London*, the Court upheld a government plan requiring several homeowners to sell their residential property to a private real estate developer who was revitalizing a 90-acre area encompassing a former U.S. Naval Center. The Court ruled that the forced transfer of land from one private landowner to another was valid because the planning process had been comprehensive, transparent, and specifically authorized by state statute—and because the intent was to benefit the general public and not anyone personally.

*"[N]or shall private property be taken for public use without just compensation."*  
*—U.S. Constitution  
Takings Clause,  
5th Amendment.*

Every state's takings law mirrors the federal Takings Clause to some extent. In response to the *Kelo* decision, a significant majority of states modified their takings laws to be more protective of private property than federal law. Many states have restricted government from taking private property for economic development purposes, to increase tax revenues, or for use by another private owner. Most states still allow takings to solve serious blight and nuisance problems.  
**Practically speaking, state rather than federal law is likely to determine the extent to which a local government can use eminent domain to improve a community's physical environment.**

Remember, if a taking is permitted under state and federal laws, the government must still pay a fair price for the property.

## Takings law and property use regulations

In addition to using the power to take private property for public use, municipalities in most states can regulate how private land is used in their communities. Through zoning laws, local governments set basic criteria for land use, including the physical characteristics of buildings; development density; and permitted uses within residential, commercial, industrial, and other zones. Local governments can also regulate how land is used by creating business permit requirements or passing other laws.

In some instances, a land use regulation limits an owner's use of private property so much that the regulation is equivalent to a taking and requires just compensation from the government. This is known as a *compensable regulatory taking*.

Under the federal Takings Clause, a compensable regulatory taking occurs if there is a permanent physical occupation of private property by the government; if a regulation bans all economically viable uses of a piece of private property; or if a regulation “goes too far,” depriving the owner of so much of the land’s value that the government should be required to pay just compensation.

The first two situations are relatively rare, but the third arises more frequently. To decide the third type of case, courts use a balancing test to weigh the interests of the property owner against the benefits of the regulation. Under federal law, the government generally wins because the deprivation has to be extreme in order to constitute a compensable regulatory taking.

*Suppose a city has just enacted a zoning code provision that forbids new chain restaurants from opening in the city. A landlord sues the city, arguing that her land just decreased in value by 20 percent because she cannot lease empty buildings to chain restaurants, which are among her most common tenants. Is this a compensable regulatory taking? Probably not. Although the regulation has limited one use of the land, many other uses remain, so a court is unlikely to say that the landowner’s deprivation is extreme.*

Just as with eminent domain, many states have passed regulatory takings laws that are more protective of private property than the federal law. Generally, these come in one of two guises.

First, a state might require local governments to pay just compensation even when the land use restriction would not be considered a compensable regulatory taking under the federal Takings Clause. Such state laws typically require compensation if the restriction decreases the market value of the property by a threshold amount (often 25 percent) or more.

Second, many states protect existing businesses from new regulations either by allowing them to continue operating as they were (often called “grandfathering in prior nonconforming uses”) or by giving them a specified period of time in which to start conforming with the new regulations (referred to as *amortization*). For example, in some states, a new local provision limiting the number or density of chain restaurants might apply only to future—and not existing—establishments. In other states, such a local provision might give existing chain restaurants a five-year grace period before the municipality can deem any of them a nonconforming use.

## Conclusion

Local governments have many options to regulate the uses of land to benefit public health. Federal and state takings laws do set some limitations. In certain instances, the government will need to be prepared to pay compensation if a taking has occurred. In other instances, policymakers should consider tailoring proposals to avoid or withstand claims of takings under state and federal laws. The report developed for NPLAN by Lynn Blais and Gerald Torres is a valuable starting point for lawyers who advise advocates and government officials working to improve the physical environment in their communities.

For the comprehensive report on federal and state takings law, go to [www.nplanonline.org/nplan/products/takings-based-limitations-50-state](http://www.nplanonline.org/nplan/products/takings-based-limitations-50-state).

## Take-Away Points About Takings

- Government may engage in takings, so long as it pays adequate compensation and puts the property to public use.
- Takings can be physical, when the government confiscates land.
- Takings can be regulatory, involving such extreme regulation that the government must compensate the landowner for deprivation.
- State takings law can be considerably more restrictive for government than federal law.



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