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

CALIFORNIA

This memorandum summarizes California 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 California 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

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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).

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

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

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

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

Communities interested in using land use initiatives to change their physical environment and thereby combat childhood obesity have to be aware of these restrictions on their eminent domain

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[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.

[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).

powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in California, 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.[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 California Constitution provides that "[p]rivate property may be taken or damaged for a public use and only when just compensation . . . has first been paid."[10] The Supreme Court of California has noted that "it has been said that the concept of public purpose is a broad one. . . . To be serviceable it must expand when necessary to encompass changing public needs."[11] In particular, the court defines "public use" as "a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government."[12] Establishing a benefit to private persons from a public project is not sufficient to demonstrate that the project does not serve a public purpose.[13] Thus, California courts have recognized the public purpose in providing parking for private enterprises[14] and in acquiring property for use by a private university.[15] And the California Supreme Court has held that the acquisition and operation of a professional sports franchise can constitute a valid public use.[16]

In 1975, following an intensive study by the California Law Revision Commission, the California legislature adopted a comprehensive statutory scheme covering virtually every aspect of eminent domain law.[17] This law specifies that the property may be taken for "a proposed

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] CAL. CONST. art. I, § 19.
[11] City of Oakland v. Oakland Raiders, 646 P.2d 835 , 842 (Cal. 1982).
[12] Bauer v. Ventura County, 289 P.2d 1, 6 (Cal. 1955).
[13] Redev. Agency v. Hayes , 266 P.2d 105 (Cal. Ct. App. 1954).
[14] Larson v. City & County of San Francisco, 313 P.2d 959 (Cal. Ct. App. 1957).
[15] Univ. of S. Cal. v. Robbins, 37 P.2d 163 (Cal. Ct. App. 1934).
[16] City of Oakland v. Oakland Raiders, 646 P.2d 835 , 842-43 (Cal. 1982).
[17] CAL. CIV. PROC. CODE § 1240.010 et seq. (West 2010).

project" if three things have been established: "(1) The public interest and necessity require the project; (2) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and (3) The property sought to be acquired is necessary for the project."[18]

The statute further provides that no public entity may condemn property unless it has first adopted a resolution of necessity that meets all statutory requirements. In support of such a resolution, the government must make the following findings: (1) that the project for which the property is to be acquired is necessary; (2) that the property is necessary for the public project; (3) that the project is located in such a manner as to offer the greatest public benefit with the least private detriment; and (4) that an offer to purchase the property has been made.[19] The government's findings in the resolution of necessity are accorded substantial deference by reviewing courts.[20] Once the government has adopted a resolution of necessity, the condemned property must be used for the purpose stated in the resolution, unless the government adopts a resolution authorizing a different use by at least a two-thirds majority.[21] In addition, condemned property must be put to the specified public use within ten years. If it is not, the government must sell the property to a private purchaser, giving preference to the person from whom the property was acquired.[22]

In addition, California law provides substantial latitude for governments to undertake comprehensive redevelopment projects in response to blighted conditions.[23] "Blight" is broadly defined to include areas that are predominantly urbanized and suffering from economic or physical conditions that render the areas serious physical and economic burdens on surrounding communities.[24] Where blighted conditions exist, governments are authorized to use eminent domain as part of their comprehensive redevelopment plans to provide "environment[s] for the social, economic, and psychological growth and well-being of all citizens."[25] To proceed with a comprehensive redevelopment plan, governments must make specific findings supporting the existence of blight according to definitions set forth in the Health and Safety Code. Failure to make the requisite findings will result in invalidation of the plan.[26]

In response to the U.S. Supreme Court's decision in *Kelo*, California amended its Constitution to protect the owners of private owner-occupied residences from condemnation for sale to another private person.[27] This prohibition does not apply, however, if the condemnation and transfer are undertaken to protect the public health and safety, or for a public work or improvement.[28] "Public work or improvement" is defined as including public infrastructure, parks, and recreation

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[18] *Id.* §1240.030.
[19] *Id.* §1245.230.
[20] City of Stockton v. Marina Towers, 88 Cal. Rptr. 3d 909, 917 (Cal. Ct. App. 2009).
[21] CAL. CIV. PROC. CODE § 1245.245.
[22] *Id.* §1245.245 (f), (g).
[23] CAL. HEALTH & SAFETY CODE §§ 33030-33039 (West 2010).
[24] *Id.*
[25] *Id.* § 33071.
[26] Neilson v. City of Cal. City, 146 Cal. App. 4th 633, 642-46 (Cal. Ct. App. 2007).
[27] CAL. CONST. art I, § 19(b).
[28] *Id.*

services.[29] Thus, this recently enacted limitation on the use of eminent domain to condemn private residences will not impede a community's ability to use eminent domain to provide public infrastructure to encourage healthy, active lifestyles.

Overall, then, the judicial climate in California is favorable for communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles. First, California courts have defined the concept of public use broadly and have consistently deferred to local governments' findings in their resolutions of necessity. Public recreation facilities such as parks, playgrounds, and walking and biking trails, are quintessential examples of public use. Second, the state law's broad definition of "blight" opens the door for creative legal solutions to condemning private property for public use. Finally, although California adopted constitutional reform to narrow the definition of "public use" after the Supreme Court's decision in *Kelo*, those reforms are aimed at protecting private residences from condemnation for transfer to another private party. Moreover, they do not apply if the condemnation is for the purpose of creating a park or public recreation facility. Thus, in California, communities that possess general eminent domain powers will not be impeded by limits on the concept of public use in their attempts to provide public infrastructure to promote healthy, active lifestyles.

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.[30] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[31] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[32] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[33] 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.

California courts have interpreted article I, section 19, of the California Constitution as providing similar protections as the federal Constitution, and California cases rely on U.S. Supreme Court

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[29] *Id.* §19(c)(5).
[30] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[31] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[32] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[33] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.

precedent in analyzing state takings claims. Thus, in California, any time a community adopts a land use regulation that imposes a permanent physical occupation on a private landowner or deprives the owner of all economically beneficial use of her property, the government will be obligated to pay compensation to the landowner.[34] In reality, very few land use regulations actually satisfy these demanding standards for automatic takings liability. A permanent physical occupation occurs only where there is a compelled physical occupation of property pursuant to governmental coercion that will last indefinitely.[35] Regulations have been held to deprive a landowner of all economically viable use of her property only in cases where the landowner was completely prohibited from building on the property.[36]

Most zoning regulations do not fall into these two categories. Rather, a zoning restriction will prohibit some uses (such as fast-food restaurants) and permit a range of others. These run of the mill zoning restrictions are rarely held to require compensation. In particular, a court will review a takings challenge to a run of the mill zoning regulation under an "essentially ad hoc, factual inquir[y]"[37] that focuses on three factors: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action, in particular whether it amounts to a physical invasion or mere regulation of land use.[38]

In addition to these factors, the California Supreme Court has identified a number of "additional, nonexclusive" factors that can be relevant to the takings inquiry.[39] These include

> (1) whether the regulation interferes with interests that are sufficiently bound up with the reasonable expectations of the claimant to constitute property for Fifth Amendment purposes; (2) whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner's primary expectation; (3) the nature of the State's interest in the regulation and, particularly, whether the regulation is reasonably necessary to the effectuation of a substantial public purpose; (4) whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader; (5) whether the government is acquiring resources to permit or facilitate uniquely public functions; (6) whether the regulation permits the property owner to profit and to obtain a reasonable return on investment; (7) whether the regulation provides the property owner benefits or rights that mitigate whatever financial burdens the law has imposed; (8) whether the regulation prevents the best use of the land; (9) whether the regulation

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[34] *See* Cynwar v. City & County of San Francisco, 90 Cal. App. 4th 637, 651-59 (Cal. Ct. App. 2001) (explaining the per se rules and relying on *Loretto* and *Lucas*).
[35] *Id*. at 653-59 (holding that an ordinance restricting the right of landlords to evict tenants may constitute a permanent physical occupation).
[36] *See, e.g.,* Monks v. City of Rancho Palos Verdes, 176 Cal. App. 4th 463 (Cal. Ct. App. 2008) (holding that the city must compensate the landowner for its prohibition on building in landslide zone).
[37] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[38] *See* Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 860-63 (Cal. 1997) (discussing and applying the *Penn Central* factors); Shaw v. County of Santa Cruz, 170 Cal. App. 4th 229 (2008) (outlining relevant factors and citing *Penn Central*).
[39] *Shaw*, 170 Cal. App. 4th 229, 261 n.38.

extinguishes a fundamental attribute of ownership; and (10) whether the government is demanding the property as a condition for the granting of a permit.[40]

The factors are not intended to be used as a checklist, but rather to be applied only as appropriate.

Ultimately, there is no set formula for identifying a taking. It is clear, however, that under this multifactored test, run of the mill regulations are rarely held to be takings for which compensation is required.

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. For example, the fast-food restaurant moratorium in South Los Angeles prohibited the opening of *new* fast-food restaurants but did not require any *existing* fast-food restaurant to cease operations. In some circumstances, however, 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 California will not be able to demand the immediate cessation of existing lawful uses without paying compensation.

California law protects the rights of landowners to continue to engage in existing, lawful uses of their property notwithstanding the enactment or amendment of a zoning ordinance prohibiting the existing use.[41] In other words, a government that wishes to prohibit an *existing* use of land through a zoning change cannot order its immediate cessation. Rather, landowners must be permitted to continue existing nonconforming uses for a period of time sufficient to allow them to amortize their investments in their existing uses.[42] The reasonableness of the amortization period is determined by the facts of each case; the key question is whether the amortization period permits the landowner to recoup her investment in the nonconforming use. Several factors will be relevant. They include "the nature of the nonconforming use; the character of the structure; the location; what part of the individual's total business is concerned; the time periods; salvage; depreciation for income tax purposes; and depreciation for other purposes; and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area."[43]

However, the right to continue a nonconforming use is limited to the continuation of the *same* use. The owner cannot intensify or expand his nonconforming use or move it to a new location.[44] In *Rehfeld v. City & County of San Francisco*, the California Supreme Court held that the enlargement of a nonconforming grocery store into a vacant lot behind the store constituted an

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[40] *Id.*
[41] Hansen Bros. Enters. v. Bd. of Supervisors, 907 P.2d 1324, 1335 (Cal. 1996).
[42] *See* Edmonds v. County of Los Angeles, 255 P.2d 772 (Cal. 1953).
[43] Metromedia, Inc. v. City of San Diego, 610 P.2d 407, 427 n.30 (Cal. 1980).
[44] *Hansen Bros. Enters.*, 907 P.2d at 1336.

impermissible expansion of the nonconforming use, notwithstanding the fact that there was no evidence that the expansion would undermine the public interest.[45]

Moreover, the right to continue a nonconforming use is extinguished if the use is voluntarily abandoned.[46] Mere cessation of use does not constitute abandonment. Rather, abandonment of a nonconforming use requires a showing of both an intent to abandon and "an overt act, or failure to act, which carries the implication the owner does not claim or retain any interest in the right to the nonconforming use."[47]

Thus, communities in California that wish to adopt land use restrictions to combat childhood obesity will not be able to change zoning ordinances in such a way as to immediately eliminate existing undesirable land uses. Rather, a community may implement a reasonable amortization period or wait until the prior nonconforming use is forfeited by intensification or abandonment.

[45] Rehfeld v. City & County of San Francisco, 21 P.2d 419 (Cal. 1993).
[46] *Hansen Bros. Enters.*, 907 P.2d at 1336.
[47] *Id.* at 1327 (holding that the discontinuance of rock quarrying for 180 days did not constitute abandonment of the right to quarry in the future).