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

MINNESOTA

This memorandum summarizes Minnesota 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 Minnesota 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

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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.

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—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 Minnesota, 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

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[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. A community may wish to combat childhood obesity by providing children with more opportunities to engage in active play. 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," and under federal law this requirement barely constrains communities. 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 Minnesota Constitution parallels the federal Constitution, stating that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."[9]

But Minnesota has restricted the exercise of eminent domain by statute beyond the limitations imposed by the state or federal constitutions. The statutory basis for eminent domain is explicit: "Eminent domain may only be used for a public use or public purpose."[10] The statute also defines "public use" or "public purpose" to be exclusively

> (1) the possession, occupation, ownership, and enjoyment of the land by the general public, or by public agencies;
> (2) the creation or functioning of a public service corporation; or
> (3) mitigation of a blighted area, remediation of an environmentally contaminated area, reduction of abandoned property, or removal of a public nuisance.[11]

In 2006, Minnesota amended its eminent domain statute in light of *Kelo v. City of New London*[12] to narrow the definition of "public use" with regard to condemnation for economic development.[13] Specifically, Minnesota law now precludes economic development—e.g. increased tax revenues, job creation, or "general economic health"—from unilaterally constituting "public use."[14]

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[9] MINN. CONST. art. 1, § 13.
[10] MINN. STAT. ANN. § 117.012, subdiv. 2 (West 2006). This requirement applies to all political subdivisions. *Id.* subdiv. 1.
[11] MINN. STAT. ANN. § 117.025, subdiv. 11(a) (West 2009).
[12] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[13] For a short history of the legislative findings and motivation, see Deborah Dyson, *Eminent Domain: Public Use*, HOUSE RESEARCH (Minn. House of Rep. Research Dep't, St. Paul, Minn.), Aug. 2006.
[14] MINN. STAT. ANN. § 117.025, subdiv. 11(b).

However, these statutory restrictions should impose little or no obstacle to the exercise of eminent domain to provide outdoor recreational opportunities for children or other traditional uses of eminent domain to combat childhood obesity. Parks, playgrounds, and hiking trails will satisfy the eminent domain statute because they will be owned by the public and available to the public for use and enjoyment. Moreover, by definition, the goal advanced in combating childhood obesity is not exclusively economic. Thus, in Minnesota, political subdivisions that enjoy general eminent domain power will be able to use that power to condemn private property for public recreation facilities, such as parks, playgrounds, and walking and biking trails. These publicly owned and openly accessible facilities are quintessential examples of public use.[15]

Minnesota also specifies procedural requirements for the exercise of eminent domain. The Supreme Court has held that a condemning authority must demonstrate both the public purpose of the taking and its necessity.[16] However, such determinations are legislative in nature, and courts are highly deferential, overturning them only if they are arbitrary or unreasonable.[17] Minnesota courts have defined arbitrary or unreasonable takings as those done "capriciously, irrationally, and without basis in law or under conditions which do not authorize or permit the exercise of the asserted power."[18] The Minnesota Supreme Court in *Wensmann Realty, Inc. v. City of Eagan* explicitly held that the preservation of open or recreational space is a reasonable public use.[19] In *Wensmann Realty*, Eagan declined to amend its comprehensive plan to allow the owner of a golf course to develop his land for residential purposes.[20] The court held this was reasonable in light of the city's stated goals of preserving open space and reaffirming historical land use.[21]

Political subdivisions may exercise eminent domain to eliminate a public nuisance.[22] Public nuisance is defined as "a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public."[23] Though on its face the broad definition of a nuisance seems to invite an argument that businesses contributing to childhood obesity fit the definition, it should be noted that the definition is found in the criminal code, establishing the maintenance of a nuisance as a misdemeanor and rendering such an argument unlikely.[24]

In addition, Minnesota law provides some latitude for governments to condemn property to combat blight. Blight is loosely defined as an area of urban use where more than 50 percent of the buildings are structurally substandard.[25] Where blighted conditions exist, municipalities may

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[15] In fact, Minnesota explicitly authorizes creation of special political subdivisions known as "park districts." MINN. STAT. ANN. § 398.01 (West 1997). These districts are authorized to acquire land by eminent domain. *Id.* § 389.08.
[16] Lundell v. Coop. Power Ass'n, 707 N.W.2d 376, 380 (Minn. 2006).
[17] *Id.* at 381.
[18] Hous. & Redev. Auth. v. Minneapolis Metro. Co., 104 N.W.2d 864, 874 (Minn. 1960).
[19] Wensmann Realty v. City of Eagan, 734 N.W.2d 623, 631 (Minn. 2007).
[20] *Id.* at 629.
[21] *Id.* at 630-31.
[22] MINN. STAT. ANN. § 117.025, subdiv. 11(a)(3) (West Supp. 2009).
[23] *Id.* § 609.74. The statute also separately includes physical obstruction in the definition and incorporates any other statute specifically defining a nuisance. *Id.*
[24] *Id.*
[25] *Id.* § 117.025, subdiv. 6.

condemn that property under the definition of "public use."[26] But, the municipality must make all possible efforts to avoid taking those buildings in a blighted area that are not structurally substandard unless there is no feasible alternative.[27]

Overall, then, the legal climate in Minnesota 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, Minnesota jurisprudence has long had a generous regard for what constitutes public use. Second, the new legislative restrictions on public use are not likely to affect uses such as public parks or recreational 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 imposed 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.[28] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[29] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[30] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[31]

Although the Minnesota Constitution differs from the federal Constitution in providing that "[p]rivate property shall not be taken, *destroyed or damaged* for public use without just compensation,"[32] the Minnesota Supreme Court has generally adopted the *Penn Central* factors to resolve regulatory takings claims.[33] In particular, a court will review a takings challenge to traditional zoning regulation under an "essentially ad hoc, factual inquir[y]"[34] 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

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[26] *Id.* subdiv. 11(a)(3).
[27] *Id.* § 117.027, subdiv. 1.
[28] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[29] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[30] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[31] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[32] MINN. CONST. art. I, §13 (emphasis added).
[33] *See* Wensmann Realty v. City of Eagan, 734 N.W.2d 623, 632-33 (Minn. 2007) (outlining relevant factors and citing *Penn Central*).
[34] *Penn Cent. Transp. Co.*, 438 U.S. at 124.

character of the governmental action, in particular whether it amounts to a physical invasion or mere regulation of land use.[35]

However, the court has left open the possibility that the takings clause of the Minnesota Constitution can be construed to provide broader protections than the takings clause of the federal Constitution.[36] In *Johnson v. City of Minneapolis*,[37] the court concluded that the City's course of dealings with the landowner implicated these broader protections. In that case, the City of Minneapolis had engaged in prolonged negotiations with a developer to turn a portion of the downtown into a mall.[38] The negotiations, breakdown in negotiations, and subsequent lawsuit lasted ten years.[39] During that time the area of land identified for development remained earmarked as land to be taken by eminent domain, which diminished the landowner's ability to rent and sell those properties.[40] As a result, the Minnesota Supreme Court held that, although the facts may not require compensation under the U.S. Constitution, under the *state* constitution a taking had occurred, and compensation must be made.[41] The court made clear, however, that its decision would have limited precedential effect: "By our decision today, we do not adopt a sweeping rule that property owners are entitled to compensation for any diminishment in value or loss of income caused by the prospect that their property will be condemned at some future date. Rather, our decision is limited to the particular facts presented."[42]

These limits on regulatory takings, like the limits on eminent domain, probably will not affect community efforts to combat childhood obesity. However, regulation appearing to single out a landowner or enacted in bad faith may be problematic under *Johnson*, even if the action does not constitution a taking under federal law.

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

Minnesota 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. In addition, a city cannot attempt to accelerate the elimination of nonconforming

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[35] *See Wensmann Realty,* 734 N.W.2d at 632-33 (outlining relevant factors and citing *Penn Central*).
[36] *See* State by Humphrey v. Strom, 493 N.W.2d 554, 558 (Minn. 1992).
[37] 667 N.W.2d 109 (Minn. 2003).
[38] *Id.* at 111.
[39] *Id.* at 111-13.
[40] *Id.*
[41] *Id.* at 116.
[42] *Id.*

uses.[43] Rather, landowners must be permitted to grandfather nonconforming uses indefinitely.[44] This rule does not apply, however, if the nonconforming use is a public nuisance.[45]

However, a nonconforming use may be lost by a property owner. While the rights to continued use by repair, replacement, restoration, maintenance, or improvement are all protected by statute,[46] the zoning authority "need not allow expansion or enlargement of preexisting nonconforming uses."[47] Furthermore, a municipality may "impose upon nonconformities reasonable regulations to prevent and abate nuisances and to protect the public health, welfare, or safety."[48] Minnesota law also specifies that a nonconforming use may be lost if the nonconforming use is discontinued, or the property is unoccupied, for a period of more than one year.[49] Third, if a natural cause such as fire or flood damages the use by more than 50 percent of its market value and the owner does not apply for a building permit within 180 days, then the use may also be lost.[50]

In *SLS Partnership v. City of Apple Valley*, the Minnesota Supreme Court held that the City of Apple Valley could not eliminate a trailer park by attempting to retroactively define trailer homes as "structures" falling under a zoning ordinance adopted before the allegedly nonconforming use.[51] Implicit in this ruling was the finding that the rotation of the mobile homes under the ordinary course of business was within the prior nonconforming use and did not constitute an expansion or abandonment of the use.[52] Conversely, in *Freeborn County v. Claussen*, the court held that construction of an additional building is clearly an expansion of use, even though the additional building was merely for storage to support the existing concrete business.[53]

Although eminent domain and regulatory takings may not pose obstacles to Minnesota's efforts to combat childhood obesity, statutory grandfathering of prior nonconforming uses potentially could. Minnesota's protection of the right to continue nonconforming use is relatively strong, and, in the absence of a finding of nuisance, a zoning authority must rely on obsolescence, exhaustion, or destruction to eliminate the prior nonconforming use.

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[43] SLS P'ship, Apple Valley v. City of Apple Valley, 511 N.W.2d 738, 742 (Minn. 1994).
[44] MINN. STAT. ANN. § 462.357, subdiv. 1c (West Supp. 2009).
[45] *Id.* subdiv. 1d.
[46] *Id.* subdiv. 1e(a).
[47] *SLS P'ship*, 511 N.W.2d at 742.
[48] MINN. STAT. ANN. § 462.357, subdiv. 1e(b).
[49] *Id.* subdiv. 1e(a)(1).
[50] *Id.* subdiv. 1e(a)(2).
[51] *SLS P'ship*, 511 N.W.2d at 742-43.
[52] *Id.*
[53] Freeborn County v. Claussen, 203 N.W.2d 323, 326 (Minn. 1972).