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

NEW MEXICO

This memorandum summarizes New Mexico 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 New Mexico 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; 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 powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in New Mexico, 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. 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 relevant provision of the New Mexico Constitution tracks that of the federal Constitution, stating that "[p]rivate property shall not be taken or damaged for public use without just compensation."[9] The legislature has further defined "public use" to include:

> (1) public buildings and grounds; (2) canals, aqueducts, reservoirs, tunnels, flumes, ditches, conduits for conducting or storing water for drainage, the raising of banks of streams and the removing of obstructions; (3) roads, streets, alleys and thoroughfares; (4) public parks and playgrounds; (5) ferries, bridges, electric railroads or other thoroughfares or passways for vehicles; (6) canals, ditches, flumes, aqueducts and conduits for irrigation; (7) electric lines; (8) utility plants; (9) the production of sand, gravel, caliche and rock used or needed for building, surfacing or maintaining streets, alleys, highways or other public grounds or thoroughfares; and (10) public airports or landing fields incident to the operation of aircraft.[10]

However, the New Mexico courts have declared that the judiciary makes the final determination of what constitutes a public use, although "a legislative declaration of public use should be treated with great deference."[11] The few New Mexico cases to address the public use issue have taken a case-by-case approach, requiring in each instance "a real and substantial relation to the public use."[12] The New Mexico Supreme Court has rejected the proposition that coal mining and lumbering are sufficient "public uses" to justify the exercise of eminent domain by private

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[9] N.M. CONST. art. 2, § 20.
[10] N.M. STAT. ANN. § 42A-3-1 (West 2009).
[11] *See* Kennedy v. Yates Petroleum Corp., 681 P.2d 53, 56 (N.M. 1984).
[12] *Id.*

entities.[13] Rather, it adheres to a narrow interpretation of the term, whereby a mere "public benefit" may constitute a public use only in very limited circumstances.[14]

The New Mexico legislature repealed and amended parts of the New Mexico Municipal Code in 2007 to limit the eminent domain powers of municipalities in response to *Kelo v. City of New London*.[15] These amendments expressly confer the power to exercise eminent domain for the purpose of providing parks and recreation areas.[16] However, the 2007 amendments also abolished the Community Development Code and prohibited the use of eminent domain for urban redevelopment purposes.[17] This change may hamper the ability of cities to condemn properties for the installation of grocery stores in underserved urban areas and implement other policies and regulations in service of promoting healthy lifestyles that are dependent on the use of eminent domain.

Overall, the legal climate in New Mexico is generally favorable for communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles. Although New Mexico courts adhere to a somewhat limited definition of jurisprudence "public use," it is clear that parks, playgrounds, and other recreational facilities will satisfy that definition. Providing opportunities for healthy food choices, on the other hand, may not be sufficiently traditional in its public benefits to qualify. Moreover, although the New Mexico legislature has substantially limited the purposes for which municipalities can exercise their eminent domain powers, the statute expressly sanctions the use of these powers for parks. Finally, the prohibition on eminent domain for urban redevelopment could adversely affect a municipality's power to use eminent domain for purposes other than 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 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

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[13] *See* Gallup Am. Coal Co. v. Gallup S.W. Coal Co., 47 P.2d 414 (N.M. 1935) (rejecting a legislative determination that the importance of coal mining as a public interest justified the condemnation of private property to help the industry).

[14] *See, e.g.*, Kaiser Steel Corp. v. W. S. Ranch Co., 467 P.2d 986, 994 (N.M. 1970) (holding that the beneficial use of water is a constitutionally sanctioned public use and therefore that a corporation had the right to condemn right-of-way over adjacent private property for purpose of laying pipeline); *see also* Threlkeld v. Third Judicial Dist. Court In & For Otero County, 15 P.2d 671, 673 (N.M. 1932).

[15] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.

[16] *See* N.M. STAT. ANN. § 3-18-10 (West 2010) (listing the permissible purposes for the exercise of eminent domain power by a municipality, including parks and excluding economic development).

[17] *See id.* § 3-60 (repealed 2007); *id.* § 3-60A-3.

imposes a permanent physical occupation on private land is a taking as a matter of law.[18] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[19] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[20] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[21] 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.

New Mexico 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.[22] In reality, very few land use regulations satisfy these demanding standards for per se 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.[23] And regulations have been held to deprive a landowner of all economically viable use of her property only in cases where the landowner was effectively prohibited from making any use of the property.[24]

Most zoning regulations do not fall into the per se takings categories. 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, New Mexico's regulatory takings jurisprudence closely parallels federal precedent.[25] The test applied by the New Mexico courts is whether the regulation is "(1) reasonably related to a proper purpose, and (2) does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of his property."[26] Although the language varies somewhat from the federal takings cases, this test encompasses a similar scope and "does not materially vary from the federal jurisprudence."[27]

Still, the inclusion of a compensation requirement for "damaged" property in the takings clause of the New Mexico Constitution provides some additional protection against regulatory takings

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[18] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[19] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[20] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[21] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[22] E. Spire Communications v. Baca, 269 F. Supp. 1310, 1325 (D.N.M. 2003).
[23] *See* City of Albuquerque v. Chapman, 419 P.2d 460, 463 (N.M. 1966). ("[A] city's taking is complete where an entry is made upon property by the condemner and an act committed which indicated an intent to appropriate the property.").
[24] *See* Aragon & McCoy v. Albuquerque Nat'l Bank, 659 P.2d 306, 310 (N.M. 1983).
[25] *See* New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1169 (N.M. Ct. App. 2005) (citing several other cases that interpret the New Mexico takings clause as consistent with the federal takings clause). In New Mexico, as in many other states, regulatory takings claims are also referred to as inverse condemnation claims. *See* Estate & Heirs of Sanchez v. County of Bernalillo, 902 P.2d 550, 551 (N.M. 1995).
[26] *Estate & Heirs of Sanchez*, 902 P.2d at 552. In that same case, the court, citing *Aragon*, also emphasized that the regulation must "deprive[] the owner of *all beneficial use of his property*" to be unconstitutional. *Id.* (emphasis added).
[27] New Mexicans for Free Enterprise, 126 P.3d at 1169.

as compared to the federal takings clause.[28] This additional protection, however, is generally available only in cases in which public projects impose consequential damages on nearby private property.[29] However, the New Mexico courts will not compensate individual owners for consequential damages unless the consequential damages are "different in kind, not merely in degree, from [injuries] suffered by the public in general."[30] If the "regulation in question affects an interest shared or enjoyed by the public generally," the damage is not different in kind.[31] The court further restricts compensable damage to injury to the property itself; compensable damage "does not include a mere infringement of the owner's personal pleasure or enjoyment."[32] In *Estate & Heirs of Sanchez v. County of Bernalillo*, the New Mexico Supreme Court made clear that land use restrictions (i.e., zoning regulations) did not cause the type of particularized injury necessary to sustain an action for compensation due to "damage."[33] Since the policies and regulations to combat childhood obesity will rely on generally applicable land use regulations, this additional protection should not prove overly burdensome in implementing these policies.

Although New Mexico law compensates regulatory takings in marginally more circumstances than does federal law, New Mexico law largely mirrors federal law on the issue; thus, the threshold for finding a compensable taking is high. As such, community efforts to combat childhood obesity are unlikely to give rise to valid regulatory takings claims.

3. Grandfathering Prior Nonconforming Uses

The discussion in Section 2 assumes that the zoning restriction imposed on a landowner does not attempt to prohibit the very use to which he is currently putting his 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 New Mexico generally will not be able to do this without paying compensation.

New Mexico law protects the rights of property owners to continue existing and lawful uses of their property, regardless of changes in zoning laws that may prohibit this use.[34] These prior nonconforming uses are "grandfathered" in under the zoning change, and a community cannot order their immediate cessation.[35] However, the vested right accrues to existing uses, not contemplated uses; the mere intention to put the property to a particular nonconforming use is

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[28] N.M. CONST. art. II, § 20.
[29] *See, e.g.*, Bd. of County Comm'rs v. Harris, 366 P.2d 710 (N.M. 1961) (holding that property owners were entitled to damages after the government had lowered the grade of an abutting highway by 20 inches, making ingress to and egress from their property very difficult).
[30] Pub. Serv. Co. v. Catron, 646 P.2d 561, 563 (N.M. 1982).
[31] *Estate & Heirs of Sanchez*, 902 P.2d at 551.
[32] Pub. Serv. Co. v. Catron, 646 P.2d 561, 563 (N.M. 1982) ("[T]he property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use.").
[33] *Estate & Heirs of Sanchez*, 902 P.2d at 553–54.
[34] Tex. Nat'l Theatres v. City of Albuquerque, 639 P.2d 569, 571 (N.M. 1982); KOB-TV v. City of Albuquerque, 111 P.3d 708, 714 (N.M. Ct. App. 2005).
[35] *KOB-TV*, 111 P.3d at 714.

not enough to garner protection.[36] Moreover, "there are methods that the government can use to terminate a nonconforming use, including . . . abandonment[] and amortization."[37]

Under New Mexico law, communities may establish an amortization period after which nonconforming uses must be discontinued.[38] In essence, amortization "grants a grace period for the property use to come into conformance with the new regulations."[39] "[T]he dispositive inquiry [for determining whether an amortization period is lawful] is whether the amortization period is reasonable."[40] If the period is reasonable, amortization is a constitutional alternative to just compensation.[41] In determining reasonableness, New Mexico courts look at evidence relating to the circumstances and balance the public gain against the individual loss. Factors considered in this analysis may include:

> (1) the nature of the structure located on the property; (2) the nature of the use; (3) the location of the property in relation to surrounding uses; (4) the character of and uses in the surrounding neighborhood; (5) the cost of the property and improvements; (6) the benefit to the public by requiring the termination of the nonconforming use; (7) the burden on the property owner by requiring termination of the nonconforming use; . . . (8) the length of time that use has been in existence and the length of time the use has been nonconforming[; (9)] the ability and cost of relocation[; (10)] the ability of the business to continue to operate[; (11)] the depreciation value of the asset[;] and [(12)] the useful life of the use.[42]

Although a reasonable amortization period is allowed generally, legislation affords special protection to outdoor advertising structures, requiring the local zoning authority to compensate owners for the removal of outdoor signs and billboards.[43]

Abandonment is another way a private owner can lose her right to the nonconforming use. The key to establishing abandonment is evidence of intent to abandon the nonconforming use through an act or a failure to act that indicates abandonment.[44] "However, intent is not required if an ordinance contains a specific provision stating that a discontinuance, which persists for a specified time period will automatically terminate the right to resume the non-conforming use."[45] Furthermore, the New Mexico Supreme Court has held that a change of use constitutes

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[36] City of Las Cruces v. Huerta, 692 P.2d 1331, 1334 (N.M. Ct. App. 1984).
[37] *KOB-TV*, 111 P.3d at 719.
[38] N.M. STAT ANN. § 3-21-6 (West 2009) (delegating to the local zoning authority the power to provide "the manner in which zoning regulations, restrictions and the boundaries of districts are . . . determined, established and enforced.").
[39] *KOB-TV*, 111 P.3d at 719.
[40] Temple Baptist Church v. City of Albuquerque, 646 P.2d 565, 572 (N.M. 1982).
[41] *Id.*
[42] *KOB-TV*, 111 P.3d at 719.
[43] N.M. STAT. ANN. § 42A-1-34 (West 2010); Battaglini v. Town of Red River, 669 P.2d 1082 (N.M. 1983).
[44] *See, e.g.*, Tex. Nat'l Theatres v. City of Albuquerque, 639 P.2d 569, 574 (N.M. 1982); City of Las Cruces v. Neff, 338 P.2d 731, 732 (N.M. 1959).
[45] Romero v. Rio Arriba County Comm'rs, 149 P.3d 945, 949 (N.M. Ct. App. 2006); *see also Tex. Nat'l Theatres*, 639 P.2d at 574.

discontinuance.[46] In essence, the right to continue a prior nonconforming use will be lost if the use is substantially changed or expanded. However, a New Mexico landowner may resume his prior nonconforming use if it is destroyed by forces beyond the owner's control.[47]

Although eminent domain and regulatory takings may not pose obstacles to community initiatives to combat childhood obesity in New Mexico, statutory protection of the right to continue prior nonconforming uses may slow the implementation of plans that seek to change the character of certain areas by eliminating existing land uses. However, New Mexico courts are eager to bring nonconforming property into conformance, and thus have recognized that nonconforming uses can be required to conform within a reasonable amortization period, and will be forfeited if changed or abandoned.

[46] *Tex. Nat'l Theatres*, 639 P.2d at 574.
[47] *Neff*, 338 P.2d at 732.