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

## NEVADA

This memorandum summarizes Nevada 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 Nevada 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

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 Nevada, including constitutional and statutory provisions that limit the eminent domain power or require communities to compensate

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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).

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 the community pays a fair market price and puts 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 takings language of the Nevada Constitution generally tracks that of the federal Constitution, stating "[p]rivate property shall not be taken for public use without just compensation having been first made."[9] The Nevada Supreme Court has broadly interpreted the phrase "public use," noting that this interpretation is in keeping with the U.S. Supreme Court jurisprudence.[10]

Nevada's response to *Kelo v. City of New London* is still evolving.[11] Because the Nevada legislature was not in session when *Kelo* was decided, activists undertook a ballot initiative to amend the constitution to prohibit the exercise of eminent domain for purposes of transferring the condemned property to other private owners. This initiative also contained a provision requiring that the condemned property be put to public use within five years or be offered to the original owner for repurchase. That initiative passed by a wide margin.

However, in order to amend the Nevada Constitution, voters must ratify the amendment twice. So the proposed amendment was placed on the ballot for a second time in November 2008. While the original ballot initiative was pending for a second vote, the Nevada legislature convened in 2007 and embarked on a strategy for more limited eminent domain reform. The first component of this strategy was to enact a statute that lists acceptable public uses and prohibits the exercise of eminent domain for the purposes of transferring the property to a private owner.[12] This statute contains several exceptions to this prohibition, though, including an exception for condemnations in which the private entity that takes ownership of condemned property uses the property primarily to benefit a public service.[13] Moreover, this statute continues to recognize

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[9] NEV. CONST. art I, § 8.
[10] City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 10 (Nev. 2003).
[11] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[12] NEV. REV. STAT. § 37.010(2) (2007).
[13] *Id.* § 37.010(2)(a).

"redevelopment" as a valid public purpose.[14] Finally, this statute extends the time by which the condemned property must be put to public use to fifteen years.[15]

While the 2006 ballot initiative was awaiting its second vote, the 2007 statute was the legally effective standard. However, if approved a second time in 2008, the ballot initiative would become a constitutional amendment, which would supersede the 2007 statute. Therefore, the 2007 legislature proposed the language of the statutory reform for adoption as a constitutional amendment. This process also takes two years—the Nevada legislature must approve a proposed constitutional amendment twice before it can be placed on the ballot for voter ratification.

In November 2008, the ballot initiative was on the ballot for approval a second time. The voters ratified the initiative with 61 percent support. Because the action amended the Nevada Constitution, this eminent domain reform superseded the statutory reform, and it currently establishes the scope of the eminent domain power in Nevada.

However, in 2009 the legislature again approved the statutory reform for placement on the ballot. Therefore, the statutory reform will appear on the ballot in November 2010. If it passes, the statutory language will be incorporated into the Nevada Constitution, and the earlier ballot initiative–driven constitutional amendment will be repealed.

A separate statute, Nevada's Community Redevelopment Law, declares the state's policy to be the promotion of "the sound development and redevelopment of blighted areas" and authorizes the use of public funds and eminent domain powers to further this policy when necessary.[16] This statute defines blight broadly, permitting a community to conclude that an area is blighted if it satisfies four of eleven factors.[17] These factors include (1) structures unfit or unsafe for their purposes that are conducive to transmission of disease and crime due to defective design and character of physical construction; (2) an economic dislocation, deterioration, or disuse; (3) the existence of inadequate streets, open spaces, and utilities; (4) a growing or total lack of proper utilization of some parts of the area resulting in a stagnant and unproductive condition of land; (5) prevalence of depreciated values; and others.[18] These factors are extremely expansive and encompass economic considerations as well as health and safety concerns. The various eminent domain reforms currently pending in Nevada do not purport to repeal this statute.

Prior to the Supreme Court's decision in *Kelo* and the subsequent introduction of the competing ballot initiatives seeking to limit the definition of "public use," the Nevada Supreme Court upheld the condemnation of blighted property for redevelopment purposes, even though the redevelopment plan called for the transfer of the condemned property to other private owners.[19] The court in *City of Las Vegas Downtown Redevelopment Agency v. Pappas* held that the rights of private property owners are constitutionally satisfied when they receive just compensation for

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[14] *Id.* § 37.010(1)(q).
[15] *Id.* § 37.270.
[16] *Id.* § 279.424.
[17] *Id.* § 279.388.
[18] *Id.* § 279.388(1).
[19] City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 10 (Nev. 2003).

their properties, and that ownership by the public is "not an indispensible prerequisite to the lawful exercise of the power of eminent domain."[20]

Although the state of eminent domain law in Nevada is somewhat unsettled, it is unlikely that the outcome of the 2010 ballot initiative will have a negative impact on state and local initiatives to combat childhood obesity. Projects such as public parks and recreational spaces will still fall under the broad definition of "public use" and therefore will not run afoul of eminent domain provisions. In the event that a proposed initiative requires the exercise of eminent domain in order to transfer ownership of private property to another private owner, the authority to engage in redevelopment in response to blight provides some latitude for local governments to pursue such policy initiatives.

## 2. Land Use Regulation and Compensation

Most government initiatives designed to combat childhood obesity by creating a healthy living environment will rely on zoning powers, not the exercise of eminent domain. Land use regulations such as these rarely implicate takings concerns, and governments are generally free to adopt such regulations without incurring takings liability.

Some land use regulations, however, 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.[21] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[22] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[23] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[24]

For the most part, the Nevada Supreme Court appears to rely on federal precedent in evaluating both state and federal takings claims.[25] However, states are free to offer more protections to property owners than are provided by the U.S. Constitution, and the Nevada Supreme Court has suggested that state's constitution might do so. In *McCarran International Airport v. Sisolak*,[26] the landowner claimed that dramatic height restrictions imposed on his property to protect airport flight patterns constituted a permanent physical occupation. After evaluating the claim under the federal Constitution and agreeing with the landowner, the court noted that the Nevada Constitution "contemplates expansive property rights in the context of takings claims" and held

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[20] *Id.* at 11.
[21] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[22] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[23] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[24] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[25] *See, e.g.,* Flamingo Paradise Gaming v. Chanos, 217 P.3d 546 (Nev. 2009); McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006) (en banc).
[26] *McCarran Int'l Airport*, 137 P.3d 1110.

that a compensable taking occurs under the Nevada Constitution if the condemnor fails to follow the statutory procedures requiring the payment of compensation before property rights are invaded or appropriated.[27]

But most zoning regulations do not fall into one of the two per se categories requiring compensation under the U.S. and Nevada Constitutions, in that they are neither permanent physical occupations nor deprive the landowner of all viable economic uses. 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, as explained further in www.nplan.org/nplan/products/takings_survey. In addition, Nevada has not adopted a regulatory takings reform statute to enhance property owners' protections against restrictive land use regulations.

Thus, the constitutional limits on land use restrictions will present obstacles to policy initiatives only when those initiatives impose a permanent physical occupation on real property or deprive an owner of all economically viable use of his land. Since those circumstances will rarely result from land use regulations adopted to combat childhood obesity, neither the U.S. nor Nevada Constitution is likely to serve as an impediment to such initiatives.

### 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, 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 Nevada generally will not be able to do this without paying compensation.

Nevada 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 these uses.[28] Although the Nevada Supreme Court has not addressed the issue of prior nonconforming uses at length, and there are few reported cases analyzing the scope of the grandfathering protection or its limits, the court has made clear that prior nonconforming uses enjoy some protection from subsequently enacted zoning ordinances. In *Pederson v. Ormsby County*, for example, the Supreme Court of Nevada held that "zoning ordinances do not limit the right of a land owner to continue the use of the land in existence at the time of the adoption of the ordinance."[29] It is also clear, however, that this protection is limited by a community's authority to impose amortization periods and to require discontinuation of the use if it is expanded, extended, or altered. Thus, subsequent cases have upheld zoning ordinances that require the nonconforming use to be discontinued at the expiration of a five-year amortization period[30] or in the event the use is "increased, enlarged,

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[27] *Id.* at 1127.
[28] Pederson v. Ormsby County, 478 P.2d 152, 154 (Nev. 1970).
[29] *Id.*
[30] *See, e.g.,* Flick Theater v. City of Las Vegas, 752 P.2d 235 (Nev. 1988).

extended, or altered" from its originally nonconforming state.[31] In *City of Las Vegas v. 1017 South Main Corp.*, the Nevada Supreme Court held that an adult entertainment business that had been grandfathered under an ordinance prohibiting the operation of such businesses within 1000 feet of a school or church lost its grandfathered status when it "altered" its video viewing booths to permit viewing of live nude dancers.[32]

Thus, while prior nonconforming uses enjoy some protection from immediate cessation under Nevada law, their protected status is limited to the precise use and size that preexisted the zoning change. Moreover, communities may impose an amortization period on prior nonconforming uses that they wish to eliminate in their efforts to combat childhood obesity.

[31] City of Las Vegas v. 1017 S. Main Corp., 885 P.2d 552 (Nev. 1994).
[32] *Id.* at 554-58.