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

## TENNESSEE

This memorandum summarizes Tennessee 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 Tennessee 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 Tennessee, including constitutional and

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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).

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.

Tennessee's Constitution provides "[t]hat no man's . . . property [shall be] taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor."[10] The Tennessee courts follow the lead of the U.S. Supreme Court in "affording great weight" to a community's determination that a proposed use is a public use.[11] Moreover, they have held that the concept of public use is a broad one, which does not require that the condemned property be available for direct use by the public.[12] The key determinant is whether the use provides a public benefit.[13]

In the wake of the U.S. Supreme Court's decision in *Kelo*, the Tennessee legislature in 2006 enacted statutory restrictions on the use of eminent domain. These restrictions provide that "'[p]ublic use' shall not include either private use or benefit, or the indirect public benefits resulting from private economic development and private commercial enterprise[.]"[14] The statute creates several exceptions to this prohibition, including public transportation,[15] utilities held by either private or public entities,[16] and the implementation of "an urban renewal or redevelopment plan in a blighted area[.]"[17] The statute includes an additional exception for "[p]rivate use that is merely incidental to a public use, so long as no land is . . . taken primarily for . . . permitting the

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[10] TENN. CONST. art. 1, § 21.
[11] Metro. Gov't of Nashville & Davidson County v. Allen Family Trust, 2009 WL 837731 (Tenn. Ct. App. Mar. 27, 2009).
[12] Johnson City v. Clonginger, 372 S.W.2d 281, 285-86 (Tenn. 1963).
[13] City of Knoxville v. Heth, 210 S.W.2d 326 (Tenn. 1948).
[14] TENN. CODE ANN. § 29-17-102(2) (2008).
[15] *Id.* § 29-17-102(2)(A).
[16] *Id.* § 29-17-102(2)(B).
[17] *Id.* § 29-17-102(2)(C).

incidental private use[.]"[18] Courts are specifically instructed that, in interpreting the eminent domain provisions of the state code, the law "shall be construed to protect the private property rights of individuals[.]"[19]

Other statutory provisions within the eminent domain law indicate that the 2006 amendments may not significantly impair the ability of local governments to use eminent domain for projects that seek to combat childhood obesity. For instance, property taken by eminent domain "may be sold, leased, or otherwise transferred" to public, quasi-public, or private entities "provided the entity transferring the land received at least fair market value for such land."[20] This provision indicates that the transfer of land to a private party, such as someone looking to run a grocery store or an indoor recreation facility on the land, will be a valid transfer. Moreover, the broad definition of "blighted areas" suggests that local governments may act under their eminent domain powers to address a number of issues affecting the "safety, health, morals, or welfare of the community."[21]

Thus, the Tennessee Constitution encompasses a broad definition of public use, and the statutory reforms adopted in response to *Kelo* are aimed at prohibiting the use of eminent domain primarily for private benefit or economic development. Since most community initiatives aimed at combating childhood obesity will use eminent domain to obtain land for traditional public uses, such as parks, playgrounds, recreational areas, or hike and bike trails, these statutory reforms are unlikely to serve as impediments.

### 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.[22] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[23] All other land use regulations—the vast majority of regulations—are evaluated under an

[18] *Id.* § 29-17-102(2)(D).
[19] *Id.*
[20] *Id.* § 29-17-1203(a).
[21] *Id.* § 13-20-201(a) ("'Blighted areas' are areas . . . with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, lack of ventilation, light and sanitary facilities, deleterious land use, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.").
[22] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[23] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

ad hoc multifactored test.[24] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[25] 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.

Tennessee courts have consistently applied the same standards to regulatory takings as those applied under federal law.[26] Because Tennessee law mirrors federal law on the issue of regulatory takings, and because the threshold for finding a compensable taking is so high at the federal level, 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 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 Tennessee generally will not be able to do this without paying compensation.

Landowners in Tennessee are statutorily protected from changes in zoning ordinances that would seek to prohibit existing nonconforming uses.[27] Moreover, the statute expressly permits existing businesses to expand without losing their nonconforming rights.[28] In a case involving the expansion of a bed and breakfast, the court stated that "[p]roperty owners whose property qualifies as a nonconforming use . . . may expand their business operations or may even reconstruct their business premises, as long as they continue to be engaged in the same business."[29] Accordingly, court found that the owners could expand their bed and breakfast, but could not construct a bar adjacent to the bed and breakfast because a bar is not the "same business" as the existing nonconforming use and thus would change the nature of that use.[30] In another case, the court found an expansion of a nonconforming use to be permissible where the expansion was "necessary to the conduct of the business."[31] Applying the "necessary to the conduct of the business" standard, the court found that a billboard company would not lose its nonconforming use rights by demolishing and replacing its billboards because the company "must upgrade and maintain [the billboards] according to prevailing industry standards in order

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[24] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[25] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[26] *See, e.g.,* Consol. Waste Sys. v. Metro. Gov't of Nashville & Davidson County, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *8-9 (Tenn. Ct. App. June 30, 2005); STS/BAC Joint Venture v. City of Mt. Juliet, No. M2003-00171-COA-R3-CV, 2004 WL 2752809, at *4 (Tenn. Ct. App. Dec. 1, 2004); Varner v. City of Knoxville, No. E2003-02650-COA-R3-CV, 2004 WL 2309142, at *4 (Tenn. Ct. App., Oct. 14, 2004).
[27] Lamar Tenn. v. City of Hendersonville, 171 S.W.3d 831, 835 (Tenn. Ct. App. 2005).
[28] TENN. CODE ANN. § 13-7-208(c) (2008).
[29] Lafferty v. City of Winchester, 46 S.W.3d 752, 757 (Tenn. Ct. App. 2000).
[30] *Id.* at 760.
[31] Outdoor W. of Tenn. v. City of Johnson City, 39 S.W.3d 131, 136 (Tenn. Ct. App. 2000).

to keep [its] advertising clients."[32] In short, businesses with nonconforming use rights will be able to expand their nonconforming uses as long as the nature of the use remains the same or they can convince a court that the expansion is necessary to the business.

Notwithstanding this strong statutory protection, rights to continue prior nonconforming uses will be lost if the use is abandoned. Abandonment requires intent by the landowner, as well as an affirmative action taken by the landowner indicative of abandonment.[33]

Local governments seeking to change land uses in an area quickly to combat childhood obesity will not be able to require existing uses to cease without paying compensation. Moreover, prior nonconforming uses will be able to remain in business and even to expand, as long as the use is not abandoned.

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Local governments seeking to combat childhood obesity through eminent domain land use restrictions in Tennessee will have substantial leeway but will also encounter some significant takings-based restrictions. The definition of public use in Tennessee is broad enough to encompass most of the health and active lifestyle initiatives that communities may wish to undertake, and transfers of property taken under eminent domain to private individuals may even be permissible in some circumstances. Tennessee law mirrors federal law in the context of regulatory takings, and federal law permits communities to impose most land use restrictions without incurring takings liability. The most significant obstacles facing Tennessee communities derive from the strong protections afforded to existing uses. These protections will make it difficult or expensive for communities to seek to eliminate unhealthy land uses immediately.

[32] *Id.*
[33] Chadwell v. Knox County, 980 S.W.2d 378, 381 (Tenn. Ct. App. 1998).