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

ARIZONA

This memorandum summarizes Arizona 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 Arizona 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. 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. 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.[7] Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution.[8] 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.

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 Arizona, 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

Arizona, like many other states, has sought to limit the types of uses that qualify as "public use" for purpose of eminent domain. The Arizona Private Property Rights Protection Act of 2006 (known as Prop 207) specifically defines "public use" as including "the possession, occupation, and enjoyment of the land by the general public"[9] and "the acquisition of property to eliminate a direct threat to public health or safety caused by the property in its current condition, including the removal of a structure that is beyond repair or unfit for human habitation or use."[10] The statute specifically excludes from the definition of "public use" "public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health."[11]

The question whether a particular use qualifies as a public use is a question of law, not of policy.[12] Thus courts, rather than legislative or regulatory bodies, ultimately determine whether a given use qualifies as public use. For example, in *Bailey v. Myers,* an Arizona Court of Appeals found that condemning a business to permit redevelopment by private developers did not constitute public use.[13] However, the court noted that "the mere fact that the property being taken will ultimately be conveyed to a private property does not, by itself, dictate a conclusion that the use is private and not public."[14] The *Bailey* court provided a laundry list of factors that are relevant to the public use inquiry, and even then made clear that the list was illustrative, not exhaustive.[15]

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[9] ARIZ. REV. STAT. ANN. § 12-1136-5(a)(i) (West 2008).
[10] *Id.* § 12-1136-5(a)(iii).
[11] *Id.* § 12-1136-5(b).
[12] *Id.* § 12-1132(A) ("[T]he question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.").
[13] Bailey v. Myers, 76 P. 3d 898, 904 (Ariz. Ct. App. 2003).
[14] *Id.* at 903.
[15] *Id.* at 904 ("There are many factors that may be considered in evaluating the private or public character of the intended use of property. For example, for what purpose or purposes will the property be used? Will title to the property be held by a public entity? If one or more private parties will own or lease the property, will the property be used for private profit, non-profit or public purposes? Will the end use of the property provide needed public services? What degree of control will the condemning authority retain over the use of the property? What are the anticipated public uses or benefits? What is the ratio of public to private funds to be expended for the redevelopment? Will the community as a whole benefit or only a few of its members? Who stands to gain most by the taking, private parties or the public? Are private developers the driving force behind the redevelopment project? Is profit the overriding motivation? Are there public health or safety issues involved? Is there a true slum or blight to be removed? Is the property to be taken unique? To what extent, if any, will the proposed taking result in loss, detriment, or harm to members of the community? How necessary is the property to the achievement of the public purposes? Do the anticipated public purposes or benefits outweigh the private purposes or benefits of taking the property? Has the protection afforded private-property owners under Article 2, Section 17 been fully considered?").

As noted above, the statute provides that condemnation of property to eliminate a direct threat to public health constitutes a public use. This includes condemnation of private property to redevelop areas classified as "slums." When instituting eminent domain actions for "slum clearance and redevelopment,"[16] the local government must establish "by clear and convincing evidence" that condemnation of each parcel is necessary to eliminate a direct threat to public health and safety.[17]

In general, Prop 207 will not be an impediment to local communities that seek to exercise their eminent domain powers to acquire land for public recreation facilities such as parks, playgrounds, walking and biking trails, and other recreational facilities, since these facilities will be open to and enjoyed by the general public. Although courts have the final say on whether a proposed use constitutes a public use, public parks and recreation areas will surely pass judicial muster. Indeed, the restrictions are designed to prevent local governments from using their condemnation powers to promote economic development goals, not to obstruct local governments from pursuing the public health goals of providing increased opportunities for physical activity. As part of the Healthy Arizona 2010 incentive, the state has established a policy to "[p]rovide and promote use of physical and social environments that encourage and enable young persons to engage in safe and enjoyable physical activity."[18] Eminent domain is likely to play a significant role in implementing this policy.

2. Land Use Regulation and Compensation

The Arizona Constitution states that "[n]o private property shall be taken or damaged" without just compensation.[19] Notwithstanding this potentially broad language, Arizona courts have interpreted this provision consistently with the federal Constitution.[20] Thus, a takings claim made under the Arizona Constitution will be resolved looking to U.S. Supreme Court precedent and standards. 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, then—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]

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[16] Arizona defines a "slum area" as a place in which there is a predominance of buildings or improvements and where the public health, welfare, or safety is threatened. ARIZ. REV. STAT. ANN. § 36-1471(18)(West 2009).
[17] *Id.* § 12-1132(B).
[18] ARIZONA DEPARTMENT OF HEALTH SERVICES, HEALTHY ARIZONA 2010: COLLABORATING FOR A HEALTHIER FUTURE—TWELVE FOCUS AREAS—PHYSICAL ACTIVITY, Objective #2, Strategy 3.4 (2007), *available at* http://www.azdhs.gov/phs/healthyaz2010/pdf/physical.pdf.
[19] ARIZ. CONST. art. 2, § 17.
[20] *See, e.g.*, Barker v. Maricopa County, 2008 WL 5057754 (Ariz. Ct. App. Nov. 25, 2008) ("The analysis under both constitutional provisions is the same."); Ranch 57 v. Yuma, 731 P.2d 113, 121 (Ariz. Ct. App. 1986).
[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] Pa. 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.

However, the Prop 207 appears to dramatically expand private landowners' rights to compensation for land use regulations. That statute entitles private property owners to just compensation when the state or a political subdivision of the state reduces "the existing rights to use, divide, sell or possess private real property" through the enactment or application "of any land use law enacted after the date the property is transferred to the owner."[25] Although it is too soon to know for certain how local governments and courts will react to this expansive legislation (to date, there are no reported cases interpreting or applying Prop 207), the statutory language is clear: Any land use regulation that reduces existing rights to use the property will require compensation. Thus, it seems that local governments that wish to pursue initiatives aimed at curbing childhood obesity that rely on zoning to preclude certain uses, such as fast-food restaurants, will likely be required to pay compensation to affected landowners.

At least one Arizona community has responded to Prop 207 by proposing "optional" or "voluntary" zoning changes. The City of Flagstaff has hired consultants to work with its planning commission to completely overhaul the zoning ordinance applicable to its historic core.[26] But the new code, if enacted, will be entirely voluntary; property owners who do not like the changes incorporated into the new zoning ordinance will be free to use their properties as permitted under the existing code.[27] By making zoning changes optional, Flagstaff will avoid having to pay compensation under Prop 207.

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 that are already operating. Communities in Arizona generally will not be able to do this without paying compensation.

Arizona law provides more protection than the law of many other states and federal law in the area of grandfathering prior nonconforming uses of property. State law requires prior nonconforming uses to be grandfathered and does not allow municipalities to require waiver of the right to continue nonconforming use as a precondition for the issuance of permits.[28] In addition to protecting prior nonconforming uses, Arizona law requires that the owner of a property engaged in a nonconforming use must be permitted to make "reasonable repairs and alterations" to the property.[29] Additionally, the protection of prior nonconforming uses travels with the land rather than the landowner; the protection continues even if the land is transferred to someone else as long as the use of the land remains the same.[30]

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[25] ARIZ. REV. STAT. ANN. § 12-1134(a) (West 2008).
[26] Joe Ferguson, *New Code Shows Good Flag Form*, ARIZ. DAILY SUN, Oct. 11, 2009.
[27] *Id.*
[28] City of Tucson v. Clear Channel Outdoor, Inc., 105 P.3d 1163, 1165 (Ariz. 2005) (quoting ARIZ. REV. STAT. ANN. § 9-462).
[29] ARIZ. REV. STAT. ANN. § 9-462.02.
[30] Rotter v. Coconino County, 818 P.2d 704, 707 (Ariz. 1991).

Ordinances that fail to comply with state grandfathering restrictions—either by requiring amortization or otherwise restricting the ability to continue a conforming use—are liable to be rescinded. According to the Arizona Supreme Court, "[a]ny ordinance that eliminates nonconforming uses solely by virtue of its enactment is generally held unconstitutional as a taking of property without due process of law."[31] Arizona courts have found that ordinances requiring amortization run afoul of state law and must be invalidated.[32] The Arizona Supreme Court illustrated this point in *Scottsdale v. Scottsdale Associated Merchants* by affirming summary judgment for the defendant and thus rescinding a city ordinance.[33] The court found that a city ordinance on signs violated state law by requiring conformity or removal of signs, but not providing compensation.[34] The court disagreed that amortization was "within the spirit of the law" and that purchase or condemnation is necessary when eliminating nonconforming uses.[35]

The Arizona Supreme Court has placed some limits, however, on the absolute right to continue a prior nonconforming use. Two deserve our attention here. First, any change in the use of the property that renders it different from the initial nonconforming use removes grandfathering protection and allows the municipality to insist that the new use conform to zoning regulations.[36]

Second, the right to continue a prior nonconforming use may be lost if the property is abandoned or not used for more than one year.[37] In both cases, the cessation of the use must be in part within the control of the property owner.[38] In *City of Glendale v. Aldabbagh,* the Arizona Supreme Court determined that lower courts must find "[s]ome conduct within the control of and attributable to the property owner" to justify abandonment.[39] Here, the City of Glendale determined an adult entertainment facility to be abandoned after a year of nonuse, though the cause of the nonuse was an injunction by the city during litigation.[40] The court remanded for a trial court to find if wrongdoing by Aldabbagh contributed to the closure of the club and, if so, to find in favor of Glendale.[41]

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When examining limitations on the ability of local governments in Arizona to combat childhood obesity, the definition of public use necessary for the exercise of eminent domain power does not appear to be a significant limitation, even in cases where the property will be transferred to a private owner (assuming, of course, that the new private owner is putting the land to public use). Although the Arizona Constitution may require compensation for damage to property as well as its outright taking, compensation required for regulatory takings is likely to be no more than the

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[31] *Id.* at 706.
[32] *See* Scottsdale v. Scottsdale Associated Merchants, Inc., 583 P.2d 891, 892 (Ariz. 1978); *see also Rotter*, 818 P.2d at 706.
[33] *Scottsdale*, 583 P.2d at 893.
[34] *Id.*
[35] *Id.*
[36] Outdoor Systems, Inc. v. City of Mesa, 819 P.2d 44, 53 (Ariz. 1991) ("[t]he ownership and leasehold interests in [a] parcel are protected by the nonconforming use statute so long as the 'existing property' is put 'to its continued use for the purpose used at the time the ordinance or regulation [took] effect.'").
[37] City of Glendale v. Aldabbagh, 939 P.2d 418, 420 (Ariz. 1997).
[38] *Id.* at 421.
[39] *Id.*
[40] *Id.* at 419.
[41] *Id.* at 422.

depreciation in the value of the property. Arizona's laws requiring grandfathering of prior nonconforming uses may pose the most difficulty to local governments wishing to rid their communities of certain types of land uses, such as fast-food restaurants. However, given an explicit state policy in favor of increasing physical spaces that promote healthy living, local governments are likely to be shown considerable deference in their use of land use restrictions to combat childhood obesity.