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

## MICHIGAN

This memorandum summarizes Michigan 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 Michigan before undertaking a particular policy initiative. If there are important cases, statutes, or analysis that we have omitted from this memorandum, please inform us by sending an email to info@phlpnet.org.

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State and local governments are increasingly concerned with the rise in childhood obesity rates among their citizens. In response, they are turning their attention to policies that might combat this alarming trend. Many of these policies involve changing the physical environment in which children spend their days. This physical environment encompasses both public and private spheres. The public sphere includes the network of roads, sidewalks, and recreational paths that make up the community, as well as the various parks, playgrounds, open spaces, public gardens, and lighting that most people think of as public infrastructure. The private sphere includes the various types of development that exist on private property in the community, such as single-family homes, multifamily dwellings, apartment complexes, restaurants, grocery stores, health clubs, and all manner of other private developments.

In many communities, neither the public nor the private physical environment encourages active living and healthy eating. Indeed, the infrastructure in many communities actively discourages or effectively impedes healthy life choices. Too many children grow up in communities that lack parks, playgrounds, and safe, well-lit open spaces to play, have no full-service grocery stores or sit-down healthy restaurants, but are saturated with formula restaurants selling high-calorie, high-fat foods and corner stores selling junk food and sugary drinks. Studies suggest that communities can combat childhood obesity by changing the physical environment in which

children live. Positive environment changes would promote active and healthy lifestyles, by fostering development of infrastructure such as public parks and playgrounds, full-service grocery stores, and well-lit open spaces, and would eliminate the negative influences of the community infrastructure, such as fast-food restaurants and dark, overgrown vacant lots.[1]

Communities around the country have already begun to adopt policies and programs designed to change their physical environment, using various strategies and tools. For example, Santa Clara County, California, has adopted a Countywide Trails Master Plan that details the county's commitment to acquiring dedicated easements over private property to create a 500-mile trail system throughout the county to provide recreational and fitness opportunities for its citizens.[2] Several years ago King County, Washington, adopted a property tax increase to fund the acquisition and maintenance of publicly owned parks and recreation facilities.[3] The Los Angeles City Council has imposed a one-year moratorium on the opening of new fast-food restaurants in South Los Angeles.[4] This zoning ordinance provides a respite during which the city can adopt and implement policies designed to encourage the opening of healthy eating alternatives in the area, which is currently saturated with fast-food restaurants and plagued by high obesity rates. Finally, Naperville, Illinois, has adopted an ordinance requiring developers to include a minimum number of bicycle parking facilities in all new commercial, residential, and public property developments, to encourage biking as an alternative to driving.[5]

Each of these initiatives targets an important aspect of the physical environment, and each involves a different type of government action. The Santa Clara County and King County initiatives require the local governments to acquire property rights in private property—in Santa Clara County the acquisition is by forced dedication[6] and involves a partial interest in the

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[1] *See, e.g.,* KELLY D. BROWNELL & KATHERINE BATTLE HORGEN, FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS, AND WHAT WE CAN DO ABOUT IT (2004); L. D. Frank, M. A. Anderson & T. L. Schmid, *Obesity Relationships with Community Design, Physical Activity, and Time Spent in Cars*, 27 AM. J. PREVENTIVE MED. 87 (2004) (showing that neighborhood walkability was related to obesity in adults); Simone A. French et al., *Environmental Influences on Eating and Physical Activity*, 22 ANN. REV. PUB. HEALTH 309 (2001); P. Gordon-Larsen, M. C. Nelson, P. Page & B. M. Popkin, *Inequality in the Built Environment Underlies Key Health Disparities in Physical Activity and Obesity*, 117 PEDIATRICS 417 (2006) (demonstrating that proximity of recreation facilities is correlated with the risk of overweight and obesity in children); James O. Hill & John C. Peters, *Environmental Contributions to the Obesity Epidemic*, 280 SCI.1371 (1998); Kate Painter, *The Influence of Street Lighting Improvements on Crime, Fear, and Pedestrian Street Use after Dark*, 35 LANDSCAPE & URB. PLAN. 193 (1996); *see also* L. V. Moore, A. V. Diez Rous, J. A. Nettleton & D. R. Jacobs, *Associations of the Local Food Environment with Diet Quality: A Comparison of Assessments Based on Surveys and Geographic Information Systems,* 167(8) AM. J. EPIDEMIOLOGY 917 (2008) (ePub) (showing that the availability of supermarkets in neighborhoods was associated with a better-quality diet).

[2] Santa Clara County Trails Plan Advisory Committee, Santa Clara County Board of Supervisors, Final Countywide Trails Master Plan (Nov. 1995), *available at* http://www.sccgov.org/SCC/docs%2FParks%20and%20Recreation%2C%20Department%20of%20%28DEP%29%2Fattachments%2F47616ctywide_trails_masterplan.pdf.

[3] KING COUNTY, WASH., CODE § 4.08.082 (2009).

[4] Kim Severson, *Los Angeles Stages a Fast Food Intervention*, N.Y. TIMES, Aug. 12, 2008, *available at* http://www.nytimes.com/2008/08/13/dining/13calo.html.

[5] NAPERVILLE, ILL., CITY CODE § 6-9-7 (2009).

[6] A community can require a landowner to dedicate an easement for public use as a condition of a development permit only when that dedication shares an essential nexus with and is roughly proportionate to the impacts caused by the proposed development. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). This constraint is discussed in detail in www.nplan.org/nplan/products/takings_survey.

property, while in King County the acquisition is by eminent domain and involves full title. In contrast, the Los Angeles and Naperville ordinances are two distinct examples of land use restrictions. The Los Angeles ordinance limits what landowners can do with their private property, while the Naperville ordinance imposes an affirmative requirement on private landowners.

These four specific initiatives illustrate the two primary tools available to communities that seek to use land use initiatives to prevent childhood obesity: They can rely on their power of eminent domain, on their land use regulatory authority, or both. The first option—relying on the power of eminent domain to acquire ownership interests in real property—may be used to provide public infrastructure such as parks, playgrounds, and recreational trails to promote healthy, active lifestyles. The second option—adopting land use restrictions applicable to private property—may be used to limit undesirable land uses (such as fast-food restaurants) in vulnerable neighborhoods or to require private property owners to do certain things on their property (such as install bicycle parking structures or stock healthy food in corner stores).

Communities that set out to combat childhood obesity by changing their physical environment using eminent domain or land use regulation will face limitations from both federal and state law in both contexts. The federal limitations come from the Fifth Amendment to the U.S. Constitution, which states: "[N]or shall private property be taken for public use without just compensation." This prohibition is interpreted in two parts. First, private property may not be taken unless it is for public use.[7] Second, if a land use restriction imposes such a burden on private property that the courts conclude it is the equivalent of a taking, the government must pay just compensation.[8] A comprehensive analysis of the scope and extent of these federal constitutional limits can be found at www.nplan.org/nplan/products/takings_survey. In addition to the federal constitutional limitations, every state imposes its own restrictions on the exercise of eminent domain and the imposition of land use regulations by its communities. These limitations, contained in state constitutions as well as statutes, may be more protective of private property than the federal Constitution, and they generally take three forms. First, state laws might incorporate a narrower definition of "public use," such that a legislative objective that satisfies the public use requirement of the federal Constitution would be invalid under state law. Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution. Finally, state law may require a community to tolerate certain negative aspects of the physical environment (such as fast-food restaurants) that it would rather eliminate, just because those elements were present before the community undertook its reform initiative—commonly referred to as "grandfathering."

Communities interested in using land use initiatives to change their physical environment and thereby combat childhood obesity have to be aware of these restrictions on their eminent domain powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Michigan, including constitutional and statutory provisions that limit the eminent domain power or require communities to compensate landowners for validly adopted land use restrictions. Section 1 addresses limitations on the exercise of the power of eminent domain. Section 2 addresses limitations on the imposition of

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[7] *See, e.g.,* Kelo v. City of New London, 545 U.S. 469 (2005).
[8] *See, e.g.,* Pa. Coal v. Mahon, 438 U.S. 104 (1978).

land use restrictions through changes in zoning laws. Section 3 explores the scope of the requirement that existing land uses be "grandfathered" under any new zoning regime.

## 1. Eminent Domain and the Requirement of Public Use

Eminent domain is the forced sale of private land to the public for public use. A community may wish to combat childhood obesity by providing children with more opportunities to engage in active play. Ideally, a community that wants to convert private property to a public use negotiates an acceptable purchase price with the current owner of the property, and the sale is entirely voluntary. Occasionally, however, the owner of the parcel does not wish to sell. In these circumstances, many communities have the authority to compel the landowner to sell the property, as long as they pay a fair market price and put the property to public use. The federal Constitution has very little to say about the meaning of the phrase "public use," and under federal law this requirement barely constrains communities. States are free, however, to adopt greater protections for private property owners, and many states have done so by limiting the range of projects that count as public use.

Under the Michigan statute authorizing exercise of eminent domain by a public corporation or state agency, the power is limited to situations "necessary for a public improvement or for the purposes of its incorporation or for public use."[9] Acquisition of land for parks and other public recreation is explicitly authorized elsewhere in the statutes and is not controversial.[10] What may be more at issue are public-private partnerships.

Before 2006, the Michigan Supreme Court interpreted both the state constitution and the eminent domain statute as requiring an affirmative showing of necessity for the proposed action.[11] In *County of Wayne v. Hathcock*, the court found that, although condemnation of land for the creation of a business park to create jobs, enlarge the tax base, enhance the County's image, and transform the economic infrastructure qualified as public use under the (former) statute, the County had not demonstrated the necessity of the action and was therefore prohibited from the exercise of eminent domain by the state's constitution.[12]

In 2006, the Michigan legislature amended the state constitution to make clear that public use does not include taking private property for transfer to a private entity for the purpose of economic development or tax revenues, and that the burden of proof is on the condemning authority to demonstrate that the proposed use is a public use.[13] These changes are also reflected in the current statute. The eminent domain statute, codifying *County of Wayne*, precludes the

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[9] MICH. COMP. LAWS ANN. § 213.23(1) (West Supp. 2009). The text appears to authorize eminent domain independently for "public improvements" and "public use." However, neither is further defined in the statute. Public improvements are discussed elsewhere in the Michigan code, for example, in the Revenue Bond Act of 1933 authorizing public corporations to "purchase, acquire, construct, improve, enlarge, or repair 1 or more public improvements." *Id.* § 141.104. The Michigan Supreme Court has also implicitly held these to be distinct concepts. County of Wayne v. Hathcock, 684 N.W.2d 765, 773 (Mich. 2004) (noting that the exercise of power in the case did not concern a public improvement or incorporation and was therefore analyzed as whether necessary for public use).
[10] *E.g.*, MICH. COMP. LAWS ANN. §§ 123.61, 41.421.
[11] *Hathcock*, 684 N.W.2d at 776.
[12] *Id.* at 770-71, 787.
[13] MICH. CONST. art. 10, § 2.

forced transfer of private property by the government to another private entity unless the proposed use "is invested with public attributes sufficient to fairly deem the entity's activity governmental."[14] What qualifies as a public attribute is narrowly construed:

> (a) A public necessity of the extreme sort exists that requires collective action to acquire property for instrumentalities of commerce, including a public utility or a state or federally regulated common carrier, whose very existence depends on the use of property that can be assembled only through the coordination that central government alone is capable of achieving.
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> (b) The property or use of the property will remain subject to public oversight and accountability after the transfer of the property and will be devoted to the use of the public, independent from the will of the private entity to which the property is transferred.
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> (c) The property is selected on facts of independent public significance or concern, including blight, rather than the private interests of the entity to which the property is eventually transferred.[15]

In many states, municipalities are given broad authority to use eminent domain in combating blight. Not so in Michigan. Municipalities in Michigan *are* given the authority to take blighted land by condemnation.[16] However, blight is narrowly defined to include only property that (1) has been declared a nuisance, (2) is a safety hazard to people or other property, (3) has had utilities disconnected for over one year, (4) is a tax-reverted property owned by the municipality, (5) has not been occupied for five years and has not been kept up to local maintenance codes, or (6) is an immediate health or safety threat that has not been repaired for at least one year.[17] In response to *Kelo v. City of New London*,[18] the Michigan legislature also amended the state's constitution to require municipalities that condemn blighted property to demonstrate by clear and convincing evidence that the taking of *each particular property* is for the public use.[19]

Thus, in Michigan, political subdivisions that enjoy general eminent domain power will be able to use that power to condemn private property for public recreation facilities, such as parks, playgrounds, and walking and biking trails. However, programs involving transfer of property to a private party will be subject to the constitutional and statutory provisions narrowly defining acceptable public uses. Furthermore, Michigan law will seriously restrict the use of blight condemnation to effect changes by eliminating properties that may contribute to childhood obesity.

## 2. Land Use Regulation and Compensation

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[14] MICH. COMP. LAWS ANN. § 213.23(2), (4).
[15] *Id.* § 213.23(2)(a)-(c).
[16] *Id.* § 125.73(a).
[17] *Id.* § 125.72(b).
[18] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[19] MICH. CONST. art. 10, § 2.

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.

Some land use regulations, however, do require 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.[20] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[21] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[22] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[23]

The same is true of Michigan state law. Any time a government entity adopts a land use regulation that imposes a permanent physical invasion on a private landowner or deprives the owner of all economically beneficial use of her property the government will be obligated to pay compensation to the landowner.[24] In reality, very few land use regulations actually satisfy these demanding standards for automatic takings liability. The Michigan courts have not detailed exactly what constitutes a physical invasion, but it is usually a compelled physical occupation of property pursuant to governmental coercion that will last indefinitely. The demolition of a building on property clearly qualifies as a permanent physical invasion.[25] Similarly, a direct physical invasion of property could apply to the government's rerouting of a river to flood lands, but not something like dust or noise from a nearby highway.[26]

Most zoning regulations result in neither a physical invasion nor a deprivation of all economic value. Rather, a zoning restriction will prohibit some uses (such as fast-food restaurants) and permit a range of others. Large, comprehensive regulation schemes such as zoning are rarely held to require compensation. In Michigan, a court will review a regulatory takings challenge under an ad hoc, factual inquiry involving the three *Penn Central* factors: "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations."[27] For example, the Michigan Court of Appeals ruled that designation of a portion of property as protected wetlands and denial of a permit to fill was not a taking.[28] The court analyzed all three

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[20] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[21] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[22] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[23] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[24] K&K Constr. v. Dep't of Natural Res., 575 N.W.2d 531, 535 (Mich. 1998) (explaining the per se rules and relying on *Lucas* and *Penn Central*); *see also* Lingon v. City of Detroit, 739 N.W.2d 900, 907 (Mich. Ct. App. 2007) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." (quoting Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005)).
[25] *Lingon*, 739 N.W.2d at 908.
[26] Spiek v. Dep't of Transp., 572 N.W.2d 201, 209-10 (Mich. 1998).
[27] K & K Constr. v. Dep't of Natural Res., 575 N.W.2d 531, 535 (Mich. 1998) (citing *Penn Central*).
[28] K & K Constr. v. Dep't of Envtl. Quality, 705 N.W.2d 365, 369, 386 (Mich. Ct. App. 2005).

factors and held that the wetlands regulation was broadly applied and benefited the general public and landowners alike,[29] that the property retained significant value relative to the loss of the right to develop the wetlands portion,[30] and that the property owners had no reasonable investment-backed expectation.[31]

General regulations will rarely be held to be takings for which compensation is required. Furthermore, it should be made clear that limits on regulation that result in a finding that a taking has occurred do not prohibit such regulations, but merely make them subject to a takings analysis to find whether the taking was proper under state law and what compensation is owed. As a practical matter, however, a ruling that regulation amounts to a taking usually results in a change to the regulation. Nevertheless, these limits on regulatory takings, like the limits on eminent domain, probably will not affect community efforts to combat childhood obesity.

### 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. For example, the fast-food restaurant moratorium in South Los Angeles prohibited the opening of *new* fast-food restaurants, but did not require any existing fast-food restaurant to cease operations. But some zoning regulations will restrict current uses.

Michigan law protects the rights of landowners to continue to engage in existing, lawful uses of their property notwithstanding the enactment or amendment of a zoning ordinance prohibiting the existing use.[32] This principle is codified in the Zoning Enabling Act, which requires "[i]f the use of a dwelling, building, or structure or of the land is lawful at the time of enactment of a zoning ordinance or an amendment to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment."[33] In other words, a government that wishes to prohibit an *existing* use of land through a zoning change cannot order its immediate cessation. Rather, landowners must be permitted to grandfather nonconforming uses indefinitely.[34]

Mere intent to engage in a subsequently prohibited use does not give rise to a vested right. Michigan law establishes that there must be, before the adopted regulation, "construction beyond preliminary preparation to establish a prior nonconforming use."[35] Furthermore, the preparatory activities must be of a "substantial character" prior to the zoning changes. The Michigan Supreme Court has found that things like fully constructed roads, monuments, or even the installation of mobile homes do not meet the "substantial character" requirement.[36]

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[29] *Id.* at 369, 385.
[30] *Id.* at 369, 381.
[31] *Id.* at 369, 383.
[32] Heath Twp. v. Sall, 502 N.W.2d 627, 630 (Mich. 1993).
[33] MICH. COMP. LAWS ANN. § 125.3208(1) (West Supp. 2009).
[34] Central Adver. Co. v. City of Ann Arbor, 201 N.W.2d 365, 373 (Mich. Ct. App. 1972) ("amortization of nonconforming uses is improper," citing the Michigan Supreme Court's interpretation of an earlier version of the Zoning Enabling Act).
[35] *Sall*, 502 N.W.2d at 632.
[36] *Id.* at 630-34.

Even if a nonconforming use existed prior to the regulation, the right to continue that use may be lost by a property owner. A municipality may establish, within its zoning ordinance, "terms for the completion, resumption, restoration, reconstruction, extension, or substitution of nonconforming uses."[37] Since continuation of a prior nonconforming use is an exception to zoning regulations (and implicitly counter to the zoning decision), courts interpret the nonconforming use narrowly.[38] Additionally, the Michigan Supreme Court has held that a nonconforming use can be lost by abandonment, as a matter of common law.[39] Abandonment of a nonconforming use requires both cessation of the nonconforming use and the intent to abandon it.[40] Thus, to prove, say, that a nonconforming fast-food restaurant had been abandoned, the state would have to provide some form of evidence not only that the activity had ceased, but also that the owner of the property had intended to relinquish the right.

Although eminent domain and regulatory takings may not pose obstacles to Michigan's efforts to combat childhood obesity, statutory grandfathering of prior nonconforming uses potentially could. However, the existence of statutorily permitted restrictions on extension, restoration, and reconstruction, along with the possibility of abandonment, may offer a solution to this problem.

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[37] MICH. COMP. LAWS ANN. § 125.3208(2).
[38] Jerome Twp. v. Melchi, 457 N.W.2d 52, 54 (Mich. Ct. App. 1990) ("A change in the nature and size of a nonconforming use is an extension of a prior nonconforming use and constitutes a nuisance per se.").
[39] Dusdal v. City of Warren, 196 N.W.2d 778, 781 (Mich. 1972).
[40] *Id.*