

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

### **NORTH DAKOTA**

This memorandum summarizes North Dakota 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](http://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 North Dakota 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](mailto: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.<sup>1</sup>

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.<sup>2</sup> Several years ago King County, Washington, adopted a property tax increase to fund the acquisition and maintenance of publicly owned parks and recreation facilities.<sup>3</sup> The Los Angeles City Council has imposed a one-year moratorium on the opening of new fast-food restaurants in South Los Angeles.<sup>4</sup> 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.<sup>5</sup>

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

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<sup>1</sup> See, e.g., KELLY D. BROWNELL & KATHERINE BATTLE HORGAN, *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).

<sup>2</sup> 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](http://www.sccgov.org/SCC/docs%2FParks%20and%20Recreation%2C%20Department%20of%20%28DEP%29%2Fattachments%2F47616ctywide_trails_masterplan.pdf).

<sup>3</sup> KING COUNTY, WASH., CODE § 4.08.082 (2009).

<sup>4</sup> 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>.

<sup>5</sup> NAPERVILLE, ILL., CITY CODE § 6-9-7 (2009).

Clara County the acquisition is by forced dedication<sup>6</sup> and involves a partial interest in the 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.<sup>7</sup> 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.<sup>8</sup> A comprehensive analysis of the scope and extent of these federal constitutional limits can be found at [www.nplan.org/nplan/products/takings\\_survey](http://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

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<sup>6</sup> 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](http://www.nplan.org/nplan/products/takings_survey).

<sup>7</sup> *See, e.g., Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>8</sup> *See, e.g., Pa. Coal v. Mahon*, 438 U.S. 104 (1978).

powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in North Dakota, 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 land use restrictions through changes in zoning laws. Section 3 explores the scope of the requirement that existing land uses be “grandfathered” under any new zoning regime.

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

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

North Dakota has done so by adopting a constitutional amendment prohibiting the use of eminent domain for economic development purposes. Before *Kelo v. City of New London*,<sup>9</sup> the North Dakota Supreme Court had embraced an expansive and deferential interpretation of the public use requirement. The court’s expansive interpretation was premised on a presumption that a use is public when the legislature has declared it to be so; this judicial deference was based on respect for a coordinate branch of government.<sup>10</sup> Ultimately, however, the court reserved the final determination of whether a use is a public use to the judiciary.<sup>11</sup> In *City of Medora v. Goldberg*, the court had defined public use as any use that conveys a public advantage or a public benefit.<sup>12</sup> In fact, in 1996 the court upheld a condemnation intended to “stimulat[e] commercial growth and remov[e] economic stagnation” as a valid exercise of eminent domain.<sup>13</sup>

In response to the U.S. Supreme Court’s expansive definition of public use in *Kelo v. City of New London*, however, the North Dakota Constitution was amended to make clear that “a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health.”<sup>14</sup> This constitutional amendment does not address the otherwise expansive interpretation of public use (except to the extent it had previously included economic development) or the court’s deference to legislative determinations of public benefit. Accordingly, the prohibition on the use of eminent domain for economic development purposes is unlikely to impede policy initiatives aimed at

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<sup>9</sup> *Kelo* is discussed in detail in [www.nplan.org/nplan/products/takings\\_survey](http://www.nplan.org/nplan/products/takings_survey).

<sup>10</sup> See *City of Jamestown v. Leever Supermarkets*, 552 N.W.2d 365, 369 (N.D. 1996).

<sup>11</sup> *City of Medora v. Goldberg*, 569 N.W.2d 257, 259 (N.D. 1997).

<sup>12</sup> *Id.*

<sup>13</sup> *City of Jamestown*, 552 N.W.2d at 365.

<sup>14</sup> N.D. CONST. amend. art I, § 16, ¶ 2.

combating childhood obesity since these initiatives will be justified by public benefits independent of economic development goals.

## 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.<sup>15</sup> Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.<sup>16</sup> All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactor test.<sup>17</sup> A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.<sup>18</sup> 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.

The North Dakota Constitution provides that “[p]rivate property shall not be taken or damaged for public use without just compensation.”<sup>19</sup> The North Dakota Supreme Court has stated that this provision guarantees property rights protections “broader than the guarantee of the Fifth Amendment to the United States Constitution.”<sup>20</sup> This constitutional phrase “was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable.”<sup>21</sup>

However, the North Dakota Supreme Court has not articulated the manner and extent to which these protections of use exceed the protections offered by the U.S. Constitution, and the court regularly looks to both state and federal precedents in construing takings claims under the state constitution.<sup>22</sup> In essence, the North Dakota Supreme Court has held that communities have broad authority to enact land use regulations without compensating landowners for restrictions placed upon the use of their property and that land use regulations constitute a taking only when

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<sup>15</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>16</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

<sup>17</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>18</sup> Regulatory takings liability under the U.S. Constitution is discussed in more detail in [www.nplan.org/nplan/products/takings\\_survey](http://www.nplan.org/nplan/products/takings_survey).

<sup>19</sup> N.D. CONST. art. I, § 16.

<sup>20</sup> *Grand Forks-Trail Water Users v. Hjelle*, 413 N.W.2d 344, 346 (N.D. 1987).

<sup>21</sup> *Wild Rice River Estates v. City of Fargo*, 705 N.W.2d 850, 856 (N.D. 2005) (quoting *Grand Forks-Trail Water Users*, 413 N.W.2d at 346).

<sup>22</sup> *See, e.g., S.E. Cass Water Res. Dist. v. Burlington N.R.R.*, 527 N.W.2d 884, 890 (N.D. 1995).

they deprive owners of all or substantially all reasonable uses of their property.<sup>23</sup> Under this standard—which is essentially identical to the federal constitutional standard—the North Dakota Supreme Court has rejected regulatory takings challenges to an ordinance prohibiting exotic dancing in bars,<sup>24</sup> an order prohibiting the staging of a business in an area zoned for single-family residential use,<sup>25</sup> and a twenty-one-month moratorium on building permits.<sup>26</sup> On the other hand, the court has upheld a takings challenge to a zoning ordinance that classified the claimant’s land as a public use zone, under which the property was dedicated solely to governmental uses and any residential, commercial, or industrial use was prohibited; a private landowner, the court said, could not reasonably put his property to a governmental use.<sup>27</sup>

In 2001, the North Dakota legislature passed a takings assessment law requiring agencies to assess possible takings implications of proposed rules that may limit the use of private real property.<sup>28</sup> The assessment must explain why the rule is necessary and estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking. The statute includes the following definition:

In an agency’s analysis of the takings implications of a proposed rule . . . “[r]egulatory taking” means a taking of real property through the exercise of the police and regulatory powers of the state which reduces the value of the real property by more than fifty percent. However, the exercise of a police or regulatory power does not effect a taking if it substantially advances legitimate state interests, does not deny an owner economically viable use of the owner’s land, or is in accordance with applicable state or federal law.<sup>29</sup>

If this statute intended to establish the “reduction by 50 percent” standard as sufficient to establish a regulatory taking, it would represent a significant change in the current regulatory takings law. However, the definition appears to apply only to the standard for undertaking an assessment. Moreover, the exception for regulations that advance legitimate state interests and do not deny an owner of economically viable use indicates that the definition was not intended to alter existing takings standards.

These limits on regulatory takings, like the limits on eminent domain, probably will not affect community efforts to combat childhood obesity because such initiatives are unlikely to deprive landowners of all or substantially all of the reasonable use of their land.

### **3. Grandfathering Prior Nonconforming Uses**

The discussion in Section 2 assumes that the zoning restriction imposed on the landowner does not attempt to prohibit the very use to which the landowner is putting her property. In some

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<sup>23</sup> *Wild Rice River Estates*, 705 N.W.2d at 856.

<sup>24</sup> *McCrothers Corp. v. City of Mandan*, 728 N.W.2d 124 (N.D. 2007).

<sup>25</sup> *City of Minot v. Boger*, 744 N.W.2d 227 (N.D. 2008).

<sup>26</sup> *Wild Rice River Estates*, 705 N.W.2d 850.

<sup>27</sup> *See Rippley v. City of Lincoln*, 330 N.W.2d 505, 507 (N.D. 1983).

<sup>28</sup> N.D. CENT. CODE § 28-32-09(1) (West 2009).

<sup>29</sup> *Id.* § 28-32-09(3).

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 North Dakota generally will not be able to do this without paying compensation.

North Dakota 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. Property owners with prior nonconforming uses are protected by state statute from attempts by counties to apply zoning changes to their nonconforming properties.<sup>30</sup> Although there is no similar statute protecting property owners with prior nonconforming uses from the immediate application of zoning changes made by city governments, the North Dakota Supreme Court has held that prior nonconforming uses are nonetheless protected from subsequent zoning changes.<sup>31</sup> However, the statute specifically permits counties to terminate grandfathered uses when the use is discontinued for a period of more than two years.<sup>32</sup> And the North Dakota Supreme Court has upheld city zoning ordinances that contain similar disuse provisions.<sup>33</sup> In interpreting an ordinance that terminates grandfathered rights after two years of disuse, the court held that mere disuse would implicate a presumption of abandonment, unless the cessation of use was attributable to factors outside the control of the landowner.<sup>34</sup> Finally, even in the absence of a statutory disuse provision, the court has held that prior nonconforming use rights are terminated if abandoned.<sup>35</sup>

Because landowners in North Dakota enjoy the right to continue nonconforming uses that preexist zoning changes intended to prohibit such uses, communities that wish to eliminate currently lawful uses—such as fast-food restaurants—will have to compensate the landowners, wait for the use to be abandoned, or include a provision terminating the prior use rights upon voluntarily discontinuation for a period of years.

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<sup>30</sup> *Id.* § 11-33-13.

<sup>31</sup> *See, e.g.,* *Minch v. City of Fargo*, 332 N.W.2d 71, 74-76 (N.D. 1983); *City of Fargo, Cass County v. Harwood Twp.*, 256 N.W.2d 694 (N.D. 1977).

<sup>32</sup> N.D. CENT. CODE § 11-33-13.

<sup>33</sup> *City of Minot v. Fisher*, 212 N.W.2d 837 (N.D. 1973).

<sup>34</sup> *Id.* at 841.

<sup>35</sup> *Newman Signs v. Hjelle*, 317 N.W.2d 810, 817 (N.D. 1982).