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

COLORADO

This memorandum summarizes Colorado 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 Colorado 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

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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).

Clara County the acquisition is by forced dedication[6] 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.[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

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[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.

[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).

powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Colorado, 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.

Although in 2006 Colorado enacted legislation seeking to narrow the definition of "public use" from the federal Constitution's definition, this action does not limit a community's power to condemn property to build parks and playgrounds that will be open for use by the public. Colorado Revised Statutes section 38-1-101 states that "public use" does not include the taking of private property for transfer to a private entity for economic development or enhancement of tax revenue.[9] While this restriction is intended to address the increased interest in urban renewal projects initiated by private developers, Colorado courts continue to apply it quite strictly. For example, a Colorado appellate court held in 2007 that a public road going only to a private cemetery was not a public use: "[T]he public purpose [of the cemetery road] is to benefit the private parties; a few, select members of the public will gain access to a private cemetery. . . . [S]uch a private benefit does not constitute a valid public purpose."[10] However, even under these stricter Colorado state standards, the public use definition would have little effect on efforts to condemn private property for public parks or recreational facilities, so long as they are open to all members of the general public. For example, in *Town of Telluride v. San Miguel Valley Corp.*—decided after the public use restriction went into effect—the Colorado Supreme Court held that "condemnation of property for open space and parks constitutes a lawful, public, local, and municipal purpose."[11]

Moreover, to the extent that initiatives to combat childhood obesity can be paired with urban redevelopment projects that target deteriorating and/or unsafe neighborhoods, even this restriction on eminent domain powers may not pose a barrier to the initiatives since the new

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[9] COLO. REV. STAT. ANN. § 38-1-101 (West 2009).
[10] Bd. of County Comm'rs v. Kobobel, 176 P.3d 860, 865-66 (Colo. Ct. App. 2007).
[11] Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161 (Colo. 2008).

statute contains an exception for urban renewal projects involving the eradication of blight. Colorado law provides that the only valid public purpose for which an urban renewal plan may be adopted is to eliminate or prevent the spread of blight.[12] The Colorado General Assembly defines "blighted area" broadly:

> "Blighted Area" means an area that, in its present condition and use and, by reason of the presence of at least five of the factors specified in sections 31-25-103(2)(a) to 2(*l*), to include an area that substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability, and is a menace to the public health, safety, morals, or welfare.[13]

Some of the factors in sections 31-25-103(2)(a) to 2(*l*) are deteriorated, or deteriorating structures; defective or inadequate street layout; faulty lot layout; unsanitary or unsafe conditions; and inadequate public improvements or utilities.[14] To proceed with a comprehensive redevelopment plan, governments must make specific findings supporting the existence of those factors.[15] Courts give wide deference to findings of blight and will overturn only if they find that the local authority abused its discretion.[16] This broad definition could apply to many areas where communities might want to use eminent domain to combat childhood obesity.

Overall, then, the judicial climate in Colorado is favorable for communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles. First, public parks and recreational facilities classify as "public uses," even under the more stringent Colorado definition. Second, the state law's broad definition of "blight" opens the door for creative legal solutions to condemning private property for public use.

2. Land Use Regulation and Compensation

Most government initiatives to combat childhood obesity by creating a healthy living environment will rely on regulation powers, not the exercise of eminent domain. For example, in the City of Centennial, Colorado's zoning laws prohibit the building of new fast-food restaurants without express authorization.[17] Land use regulations such as these rarely implicate takings concerns, and governments are generally free to adopt such regulations without incurring takings liability.

Some land use regulations, however, do require compensation. Any time a government entity adopts a land use regulation that imposes a permanent physical occupation on a private landowner or deprives the owner of all economically beneficial use of her property, the

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[12] COLO. REV. STAT. ANN. § 31-25-105.5.
[13] *Id.* § 31-25-105.5(5)(a).
[14] *Id.* § 31-25-103(2).
[15] *Id.* § 31-25-105.5(2)(a)(I).
[16] *Id.* § 31-25-105.5(2)(a)(III).
[17] CENTENNIAL, COLO., LAND DEV. CODE § 11-1-4806A (2005).

government will be obligated to pay compensation to the landowner.[18] In reality, very few land use regulations satisfy these demanding standards for automatic takings liability. A permanent physical occupation occurs only where there is a compelled physical occupation of property pursuant to governmental coercion that will last indefinitely.[19] For example, in *Loretto* the U.S. Supreme Court found that a law requiring a landlord to permit a cable company to install cable equipment was a permanent physical occupation.[20] Regulations have been held to deprive a landowner of all economically viable use of her property only in cases where the landowner was effectively prohibited from making any use of the property.[21] For example, in *Palazzolo v. Rhode Island* the Supreme Court found that a law depriving the owner of the use of 18 of his 20 acres and 92 percent of the value of the land did not deprive the landowner of all the economically viable use of the property.[22] However, despite these demanding standards, some regulations seeking to curb childhood obesity may require compensation. For example, a requirement that a new development provide public access for a hike and bike trail constitutes a permanent physical occupation and will require compensation.[23]

Most zoning regulations do not fall into these two categories. Rather, a zoning restriction will prohibit some uses (such as fast-food restaurants) and permit a range of others. These run of the mill zoning restrictions are rarely held to require compensation. In particular, Colorado courts will review a takings challenge to a run of the mill zoning regulation under an "essentially ad hoc, factual inquir[y]"[24] that focuses on three factors: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action, in particular whether it amounts to a physical invasion or mere regulation of land use.[25]

While Colorado courts have interpreted Colorado's takings clause consistently with the federal clause, the Colorado Constitution provides one specific additional protection.[26] The Colorado Constitution states that "private property shall not be taken *or damaged* for public or private use without just compensation."[27] This additional protection of private property does not provide landowners with compensation for regulations that impose costs on the landowner that fall short of a compensable taking. Rather, Colorado courts interpret the damage provision to provide recovery to landowners whose land is substantially damaged by public improvements made to lands abutting their lands.[28] To establish compensable damage, mere depreciation in value is not sufficient.[29] For example, in *City of Pueblo v. Strait* the court held that compensation to a property owner is proper when a viaduct, built in a public road, obstructed access to his

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[18] *See* Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs, 38 P.3d 59 (Colo. 2001) (explaining that Colorado follows the Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992), line of federal cases).
[19] *See id.* at 63.
[20] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[21] *See Animas Valley Sand & Gravel,* 38 P.3d at 66.
[22] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).
[23] *See* Nollan v. Cal. Coastal Comm'n., 483 U.S. 825 (1987).
[24] Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
[25] State Dep't of Health v. Mill, 887 P.2d 993 (Colo. 1994).
[26] *Animas Valley Sand & Gravel*, 38 P.3d at 64.
[27] COLO. CONST. art. 2, § 15 (emphasis added).
[28] *Animas Valley Sand & Gravel,* 38 P.3d at 63-64.
[29] Pub. Serv. Co. v. Van Wyk, 27 P.3d 377, 388 (Colo. 2001).

property.[30] Additionally, the damage must be different in kind from that suffered by the general public.[31] For example, in *Public Service*, the noise, electromagnetic fields, and radiation complained of by the landowners was shared by the general public and therefore did not satisfy the damage requirement. [32]

In addition to the limits on regulatory takings established under the U.S. Constitution, Colorado has a statute further limiting the government's powers. Article 20 of title 29 deals with "regulatory impairment of property rights" and primarily addresses conditions on land use approval.[33] This 1999 statute holds that an "essential nexus" and a "legitimate local government interest" is required before a dedication or payment that is "roughly proportional" to the proposed use or development can be imposed. This regulatory taking statute codifies the U.S. Supreme Court's line of cases dealing with conditions on land use approval, but limits this test to charges that are "determined on an individual and discretionary basis."[34] The statute explicitly declines to apply this test to "any legislatively formulated assessment, fee, or charge that is imposed on a broad class of property owners by a local government."[35]

These limits on regulatory takings, like the limits on eminent domain, probably will not affect community efforts to combat childhood obesity. While Colorado imposes additional limits, such as the damage clause and the limits on land use approval conditions, it remains very difficult for a landowner to establish a right to compensation for the effects of general land use regulations.

3. Grandfathering Prior Nonconforming Uses

The discussion in Section 2 assumes that the zoning restriction imposed on a landowner does not attempt to prohibit the very use to which she is currently putting her property. In some circumstances, however, a community may wish to prohibit a preexisting use to further its goals of combating childhood obesity. For example, a community may want to eliminate fast-food establishments within a certain distance of schools, including those that are already operating. Communities in Colorado generally will not be able to do this without paying compensation.

Colorado 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 this use.[36] These prior nonconforming uses are "grandfathered" in under the zoning change, and a government cannot order their immediate cessation.[37] For example, in *City of Greeley v. Ellis*, the property owner operated a mobile home park and junkyard.[38] When the county adopted a zoning ordinance limiting the number of mobile homes allowed on each lot, the property owner was allowed to continue his nonconforming use.[39]

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[30] City of Pueblo v. Strait, 36 P. 789 (Colo. 1894).
[31] *Pub. Serv. Co.*, 27 P.3d at 388.
[32] *Id.*
[33] COLO. REV. STAT. ANN. § 29-20-203 (West 2009).
[34] Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (citing the *Nollan/Dolan* test).
[35] *Id.*
[36] City of Greeley v. Ellis, 527 P.2d 538, 539 (Colo. 1974).
[37] COLO. REV. STAT. ANN. § 30-28-120.
[38] *City of Greeley,* 527 P.2d at 539.
[39] *Id.* at 542.

This protection is lost, however, where the nonconforming use has been abandoned.[40] Abandonment may be shown by either a manifestation of intent to abandon the nonconforming use or y discontinuing the nonconforming use for a period of time defined by a local zoning ordinance.[41] For example, in *Hartley v. City of Colorado Springs*, the landowners leased their nonconforming wood and coal yard to tenants who ceased using the yard for more than a year.[42] Because a local zoning ordinance provided that a one-year cessation constituted abandonment, the Colorado Supreme Court held that the city's decision to terminate the Hartleys' grandfathered protection was not defective.[43]

Additionally, municipal ordinances "may legally restrict the right to extend or enlarge a non-conforming use."[44] However, the Colorado Revised Statutes limit this power: "[S]uch [nonconforming] use may be extended throughout the same building if no structural alteration of such building is proposed or made for the purpose of such extension."[45] For example, in *City of Greeley*, the court held that the city's zoning code may legally restrict Ellis from expanding both the area and quantity of use of his nonconforming mobile home park.[46]

Although eminent domain and regulatory takings may not pose obstacles to Colorado's efforts to combat childhood obesity, statutory grandfathering of prior nonconforming uses potentially could. However, the availability of termination by cessation and the limitations on expansion may offer a solution to this problem.

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[40] *Hartley v. City of Colo. Springs*, 764 P.2d 1216, 1221 (Colo. 1988).
[41] *Id.* at 1226.
[42] *Id.*
[43] *Id*. at 1227.
[44] *See City of Greeley,* 527 P.2d 538 at 541-42 (upholding a county zoning resolution prohibiting expansion of nonconforming use).
[45] COLO. REV. STAT. ANN. § 30-28-120(1) (West 2009).
[46] *City of Greeley*, 527 P.2d at 541-42.