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

NEW JERSEY

This memorandum summarizes New Jersey 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 New Jersey 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; this is 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 New Jersey, 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.

The language of the New Jersey Constitution tracks that of the federal constitution, stating that "[p]rivate property shall not be taken for public use without just compensation."[9] Like the federal "public use" clause, the New Jersey courts "have granted wide latitude . . . in determining what property may be condemned for 'public use.'"[10] In doing so, the New Jersey courts have construed the test for public use as "anything that 'tends to enlarge resources, increase the industrial energies, and . . . manifestly contribute[] to the general welfare and the prosperity of the whole community.'"[11] Furthermore, the courts have held that "public use" is synonymous with "public benefit," "public advantage," or "public utility."[12] Finally, the New Jersey courts give wide discretion to the condemning body,[13] and "[t]he exercise of such discretion will not be upset by the courts in the absence of an affirmative showing of fraud, bad faith or manifest abuse."[14] With such a broad definition and deference to the condemning agency, condemnations for public parks or recreational areas will not be denied under the established "public use" jurisprudence.

In addition, the New Jersey Constitution specifically recognizes that "[t]he clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use."[15] "Thus, a valid redevelopment determination satisfies the public purpose requirement."[16]

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[9] N.J. CONST. art. I, ¶ 20.
[10] Twp. of W. Orange v. 769 Assoc., L.L.C., 800 A.2d 86, 91 (N.J. 2002).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] City of Trenton v. Lenzner, 109 A.2d 409, 413 (N.J. 1955).
[15] N.J. CONST. art. VIII, § 3, ¶ 1.
[16] Vineland Const. Co. v. Twp. of Pennsauken, 928 A.2d 856, 868 (N.J. Super. Ct. App. Div. 2007).

Furthermore, the New Jersey Constitution permits governmental entities to delegate their redevelopment authority to public and private corporations.[17] Thus, a municipality may authorize a private corporation to undertake the redevelopment of a blighted area.[18]

The redevelopment of blighted areas is governed by the Local Redevelopment and Housing Law (LRHL), which both defines the concept of redevelopment and establishes standards for determining that an area is blighted and therefore subject to redevelopment.[19] In that statute, "redevelopment" is defined as

> clearance, replanning, development and redevelopment; the conservation and rehabilitation of a structure or improvement, the construction and provision for construction of residential, commercial, industrial, public or other structures and the grant or dedication of spaces as many be appropriate or necessary in the interest of the general welfare for streets, parks, playgrounds, or other public purposes, including recreational and other facilities incidental or appurtenant thereto, in accordance with the redevelopment plan.[20]

The "Blighted Areas Clause" of the statute establishes the criteria under which an area can be deemed blighted and therefore subject to condemnation for redevelopment purposes:

> [a] delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing . . . the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found:
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> a. The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or have such characteristics as to be conducive to unwholesome living or working conditions;
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> b. The discontinuance of the use, abandonment, of falling into disrepair of buildings previously used for commercial, manufacturing, or industrial purposes;
>
> c. Land that is owned by the government or redevelopment entity, or unimproved land that has remained vacant for ten years and is not likely to be developed;
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> d. Areas which by are detrimental to the safety, health, morals, or welfare of the community;
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> e. A growing lack or total lack of proper utilization of areas resulting in a stagnant condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare;

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[17] N.J. CONST. art. VIII, § 3, ¶ 1.
[18] *Vineland Constr. Co.*, 928 A.2d at 868.
[19] N.J. STAT. ANN. § 40A:12A (West 2009).
[20] *Id.* § 40A:12A-3.

f. Areas, in excess of five contiguous acres, whereon buildings or improvements have been destroyed by fire or natural disaster in such a way that the aggregate assessed value of the area has been materially depreciated;

g. In any municipality in which an enterprise zone has been designated pursuant to the "New Jersey Urban Enterprise Zones Act";

h. The designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or regulation.[21]

The New Jersey Supreme Court has held that these criteria must be interpreted in conformance with the essential characteristic of blight—"deterioration or stagnation that negatively affects surrounding properties"—and that failure to use property to its fullest productivity does not constitute blight.[22] However, nonblighted parcels may be included in the redevelopment plan "if necessary for rehabilitation of a larger blighted area."[23]

Municipal redevelopment designations are entitled to judicial deference provided that they are supported by substantial evidence on the record. If a designation is supported by substantial evidence, "it is not for the courts to 'second guess' a municipal redevelopment action, 'which bears with it a presumption of regularity.'"[24]

After designating an area for redevelopment, the authority may design and implement a redevelopment plan. The redevelopment plan must be "sufficiently complete to indicate its relationship to definite municipal objectives as to appropriate land uses, public transportation and utilities, recreational and municipal facilities, and other public improvements; and to indicate proposed land uses and building requirements in the redevelopment area or area in need of rehabilitation, or both."[25]

Overall, then, the legal climate in New Jersey 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, New Jersey jurisprudence has a generous regard for what constitutes "public use." Second, the laws regarding blighted areas and redevelopment will not adversely affect uses such as public parks or recreational facilities; in fact, the redevelopment laws could be a benefit.

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. Land use

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[21] *Id.* § 40A:12A-5.
[22] Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 458-60 (N.J. 2007).
[23] Levin v. Twp. Comm. of Bridgewater Twp., 274 A.2d 1, 19 (N.J. 1971) (interpreting the predecessor statute to the LRHL); *Gallenthin*, 924 A.2d at 464.
[24] Concerned Citizens of Princeton, Inc. v. Mayor & Council, 851 A.2d 685, 700 (N.J. Super. Ct. App. Div. 2004) (quoting Forbes v. Bd. of Trs. of Twp. of S. Orange Vill., 712 A.2d 255 (N.J. Super. Ct. App. Div. 1998)).
[25] N.J. STAT. ANN. § 40A:12A-3.

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. New Jersey courts follow U.S. Supreme Court precedent and categorize two classes of automatic (per se) takings: (1) cases of permanent physical occupation and (2) cases in which the regulation denies a landowner of all economically viable use of the land.[26] In reality, very few land use regulations satisfy these demanding standards for per se 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.[27] And 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.[28]

Most zoning regulations do not fall into the per se takings categories. Rather, a zoning restriction will prohibit some uses (such as fast-food restaurants) and permit a range of others, and regulations rarely compel landowners to suffer the permanent occupation of their property by strangers. For regulations that do not implicate one of the two per se rules, New Jersey courts continue to follow federal precedent to determine if a regulatory taking has occurred.[29]

In particular, New Jersey courts will review a takings challenge to a run of the mill zoning regulation under an "essentially ad hoc, factual inquir[y]"[30] that focuses on three factors: (1) the economic impact of the regulation on the property owner; (2) the character of the governmental action, in particular whether it amounts to a physical invasion or mere regulation of land use; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations.[31] Applying these factors, New Jersey courts have held that a valid claim for compensation for a regulatory taking requires a showing that the landowner has been "deprived of all or substantially all of the beneficial value of the totality of his property."[32]

Because New Jersey law mirrors federal law on the issue of regulatory takings, and because the threshold for finding a compensable taking is so high at the federal level, community efforts to combat childhood obesity are unlikely to give rise to valid regulatory takings claims.

3. Grandfathering Prior Nonconforming Uses

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[26] Mansoldo v. State, 898 A.2d 1018, 1023 (N.J. 2006) (demonstrating that New Jersey follows *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)); Rohaly v. N.J. Dep't of Envtl. Protection & Energy, 732 A.2d 524, 526 (N.J. Super. Ct. App. Div. 1999) (demonstrating that New Jersey follows *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).
[27] *Rohaly*, 732 A.2d at 527.
[28] *Mansoldo*, 898 A.2d at 1023.
[29] *Id.* ("This Court has stated that protection from governmental takings under the New Jersey Constitution is coextensive with protection under the Federal Constitution."). In New Jersey, as in many other states, regulatory takings claims are also referred to as inverse condemnation claims. *See id.* at 1022.
[30] Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
[31] *Mansoldo*, 898 A.2d at 1023-24; Twp. of Montville v. MCA Assocs., L.P., No. A-4327-06T2, 2008 WL 3822061, at *6 (N.J. Super. Ct. App. Div. Aug. 18, 2008).
[32] *See, e.g.,* Orleans Bldrs. & Developers v. Byrne, 453 A.2d 200, 208 (N.J. Super Ct. App. Div. 1982).

The discussion in Section 2 assumes that the zoning restriction imposed on a landowner does not attempt to prohibit the very use to which he is currently putting his 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 New Jersey generally will not be able to do this without paying compensation.

New Jersey law protects the rights of property owners to continue existing and lawful uses of their property, notwithstanding a subsequent change in a zoning ordinance that renders that use unlawful.[33] Legislation specifically entitles any nonconforming use or structure to be continued in operation and to be repaired in the event of partial destruction.[34] As a result, the New Jersey Supreme Court has held that amortization ordinances—ordinances that order the property owner to cease a nonconforming use within a reasonable period of time—are invalid.[35] This protection of nonconforming uses, however, applies only to changes in municipal zoning ordinances. It does not entitle landowners to continue nonconforming uses that violate requirements imposed by state laws.[36]

Moreover, the statutory protection of prior nonconforming uses in light of subsequent zoning changes is not without limit. Because nonconforming uses are inconsistent with the objectives of uniform zoning, the New Jersey courts have held that "an existing nonconforming use will be permitted to continue only if it is a continuance of substantially the same kind of use as that to which the premises were devoted at the time of the passage of the zoning ordinance."[37] This means, in essence, that the right to continue a prior nonconforming use will be lost if the use is substantially changed or expanded. These limitations on the right to continue nonconforming uses apply to structures as well: Landowners may not substantially change or expand nonconforming structures, even if their use does not change at all.

Insubstantial changes or expansions will not invalidate prior nonconforming uses or structures. For example, in *Arkam Machine & Tool Co. v. Township of Lyndhurst*, the court held that the change from a single manufacturing company to two small manufacturing companies occupying the same space did not count as a substantial change.[38] Conversely, in *Kensington Realty Holding Corp. v. Jersey City*, the court held that a change from a doctor's office to a funeral home was substantial and therefore no longer entitled to prior nonconforming status.[39] "[T]he law is, generally, that neither nonconforming uses nor structures may be expanded . . . in other than unsubstantial ways."[40]

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[33] N.J. STAT. ANN. § 40:55D-68 (West 2009).
[34] *Id.* It is important to note that the right to repair applies only in cases of partial, not total, destruction. If the fair market value of the destroyed portion of the property exceeds 50 percent of the total value of the property, the destruction is considered total. *See* Krul v. Bd. of Adjustment, 298 A.2d 308, 311 (N.J. Super. Ct. Law Div. 1972).
[35] United Adver. Corp. v. Raritan, 93 A.2d 362, 366-67 (N.J. 1952).
[36] Do-Wop Corp. v. City of Rahway, 773 A.2d 706, 710 (N.J. 2001) (holding that § 40:55D-68 did not entitle a landowner to continue a nonconforming use that was outlawed by a subsequently enacted state statute).
[37] Avalon Home & Land Owners Ass'n v. Borough of Avalon, 543 A.2d 950, 952 (N.J. 1988).
[38] Arkam Mach. & Tool Co. v. Twp. of Lyndhurst, 180 A.2d 348, 350 (N.J. Super. Ct. App. Div. 1962).
[39] Kensington Realty Holding Corp. v. Jersey City, 191 A. 787, *aff'd*, 196 A. 691 (N.J. 1937).
[40] Borough of Belmar v. 201 16th Ave., 707 A.2d 1106, 1110 (N.J. Super. Ct. Law Div. 1997).

As noted above, New Jersey courts favor conformity over nonconformity. Thus, where there is doubt about whether the enlargement or change is substantial rather than insubstantial, the New Jersey Supreme Court has declared that the dispute is to be resolved against the enlargement or change.[41]

While the New Jersey jurisprudence expressly states that a "nonconforming use is separate and distinct from a nonconforming lot or structure,"[42] there are few cases that explain the distinction.[43] However, from the case law it appears that the only permissible expansions are those that would fall within the structural restrictions of the ordinance and would not increase the nonconforming use.[44] For example, in *Avalon Home*, a hotel's planned reconstruction would have changed the physical configuration of the hotel and would have expanded the overnight guest capacity. Because these changes would have increased the nonconforming use, the New Jersey Supreme Court ruled that the reconstruction qualified as an impermissible expansion.[45]

Finally, the right to continue a nonconforming use or structure is terminated if the use or structure is abandoned. The key to establishing abandonment is evidence of intent to abandon the nonconforming use.[46] "Abandonment must be evidenced by something more than a mere cessation of the use for a substantial period of time. Thus, an attempt by a municipality to declare that all nonconforming uses will be deemed abandoned after they have been discontinued for more than one year, or a similar time frame, is invalid."[47] For example, in *Borough of Saddle River v. Bobinski*, the court found that even though a barn had stood unused for twenty-seven years, the owners did not have the subjective intent to abandon the property.[48] That the owners regularly maintained the barn proved that they did not abandon the land.[49]

Although eminent domain and regulatory takings may not pose obstacles to community initiatives to combat childhood obesity in New Jersey, statutory protection of the right to continue prior nonconforming uses may slow the implementation of plans that seek to change the character of certain areas by eliminating existing land uses. However, because New Jersey courts are eager to bring nonconforming property into conformance, these impediments will not be as significant as they might otherwise be.

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[41] Town of Bellville v. Parrillos, Inc., 416 A.2d 388, 391-92 (N.J. 1980).
[42] Foster-Hyatt Group, Inc. v. W. Caldwell Planning Bd., 415 A.2d 349, 350 (N.J. Super. Ct. App. Div. 1980).
[43] 36 DAVID J. FRIZZEL, *Land Use Law, in* NEW JERSEY PRACTICE SERIES § 22.7 (3d ed. 2009).
[44] *See* Conselice v. Borough of Seaside Park, 817 A.2d 988, 992 (N.J. Super. Ct. App. Div. 2003); FRIZZEL, *supra* note 43, at § 22.7.
[45] *Avalon Home*, 543 A.2d at 953.
[46] Poulathas v. Atl. City Zoning Bd., 660 A.2d 7, 9 (N.J. Super. Ct. App. Div. 1995).
[47] FRIZZEL, *supra* note 43, at § 22.3 (citing State v. Accera, 116 A.2d 203, 205 (N.J. Super. Ct. App. Div. 1953)).
[48] Borough of Saddle River v. Bobinski, 259 A.2d 727, 728 (N.J. Super. Ct. Ch. Div. 1969).
[49] *Id.* at 728-29.