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

ILLINOIS

This memorandum summarizes Illinois 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 Illinois 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 property, while in King County the acquisition is by eminent domain and involves full title. In

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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.

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 Illinois, 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. 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 U.S. 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 Illinois Constitution has always prohibited the use of eminent domain for private use and required the payment of compensation if eminent domain is exercised for public use.[9] The Supreme Court of Illinois has interpreted the protections against governmental takings afforded under the state constitution as similar to the Fifth Amendment of the U.S. Constitution.[10] In addition to private property taken for public use, the Illinois Constitution also requires that "just compensation" be paid for any private property damaged for a public use.[11] The words "or damaged" were added to the Illinois Constitution to compensate landowners whose properties were damaged by state action that did not amount to a taking of property.[12] In this sense, the Illinois Constitution provides greater protection than the federal Constitution, which provides compensation only for governmental acts that amount to a taking of private property.

The Supreme Court of Illinois has consistently employed a restrictive interpretation of the public use requirement, holding that eminent domain was not available for a project that principally benefited a private entity, with only a minimal public benefit.[13] In particular, the court has held that any proposed public benefit must be fairly anticipated in the future compared with the amount of land taken for public use.[14] Further, the court has made clear that while condemning bodies had some discretion in determining what constituted public use, courts had the final say on the issue.[15] In *Limits Industrial Railroad v. American Spiral Pipe Works*, the Supreme Court of Illinois stated that the public use requirement is satisfied where the taken property will be

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[9] ILL. CONST. art. I, § 15.
[10] Forest Preserve Dist. of Du Page County v. W. Suburban Bank, 641 N.E.2d 493, 497 (Ill. 1994).
[11] ILL. CONST. art. I, § 15 ("Private property shall not be taken *or damaged* for public use without just compensation . . . [which] shall be determined by a jury as provided by law.") (emphasis added).
[12] Dep't of Transp. v. Rasmussen, 439 N.E.2d 48, 54 (Ill. App. Ct. 1982) (holding that state action that impaired a landowner's right of access to a highway was a "damaging" that was compensable under the Illinois Constitution).
[13] S.W. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 9-10 (Ill. 2002); Limits Indus. R.R. v. Am. Spiral Pipe Works, 151 N.E. 567, 573 (Ill. 1926).
[14] People *ex rel.* Director of Fin. v. Young Women's Christian Ass'n, 427 N.E.2d 70, 79 (Ill. 1981) (holding that trial court erred in finding "public use" where state seized 50 percent of a property without providing any evidence that it was necessary or reasonably necessary to fulfill some public benefit).
[15] *Id.*

"use[d] by or for the government [or] the general public or some portion of it. . . ."[16] Alternatively stated, eminent domain may not be for the "use by or for particular individuals or for the benefit of certain estates" as a matter of right.[17] The court held in *Limits Industrial* that a railroad could not exercise eminent domain to condemn private property to expand its facilities because the proposed addition of a spur track and freight house provided only a minimal public benefit.[18] Though this restrictive view of public use was first announced in 1926, the Illinois Supreme Court used the same test until the U.S. Supreme Court decided *Kelo v. City of New London* in 2005.[19] In *Southwestern Illinois Development Authority v. National City Environmental*, for instance, the Illinois Supreme Court invalidated an attempt to use eminent domain to provide additional parking for a privately owned racetrack, even though the lower court had found that additional parking was needed to address serious public safety concerns.[20] It also acknowledged that the taking would not permit the public to access the property as a matter of right because, for instance, visitors would still have to pay for parking.[21]

In the wake of the U.S. Supreme Court's decision in *Kelo*, Illinois passed a bill that may limit the use of eminent domain even further.[22] This law prohibits the use of eminent domain to condemn property for private development.[23] Although intended to restrict the exercise of eminent domain, the bill includes several loopholes under which private property may still be taken for private development (these exceptions are discussed below). It also requires condemning authorities to prove that the taking is necessary for a public purpose and that a government entity remains in control or operation of the property.[24]

The requirement of ongoing public control is not absolute. The statute expressly permits the exercise of eminent domain to acquire property for private ownership if the condemning authority can demonstrate by "clear and convincing" evidence that the condemnation is (1) primarily for the benefit, use, or enjoyment of the public, and (2) necessary for a public purpose.[25]

One such instance is to acquire property in a blighted area. Acquisition of property for the elimination of blight is entitled to a rebuttable presumption of a public purpose primarily for the benefit, use, or enjoyment of the public.[26] Thus, it is likely that any property taken for the

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[16] *Limits Industrial R.R.*, 151 N.E. 567, 570.
[17] *Id.*
[18] *Id.* at 573.
[19] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.
[20] 768 N.E.2d at 7-10.
[21] *Id.* at 9.
[22] 2006 Ill. Legis. Serv. P.A. 94-1055 (S.B. 3086) (West).
[23] 735 ILL. COMP. STAT. § 30/5-5-5(a) (2007) ("[A] condemning authority may not take or damage property by the exercise of the power of eminent domain unless it is for a public use, as set forth in this Section.").
[24] *Id.* § 30/5-5-5(b) ("If the exercise of eminent domain authority is to acquire property for public ownership and control, then the condemning authority must prove that (i) the acquisition of the property is necessary for a public purpose and (ii) the acquired property will be owned and controlled by the condemning authority or another governmental entity.").
[25] *Id.* § 30/5-5-5(c); *see, e.g.*, *S.W. Ill. Dev. Auth.*, 768 N.E.2d 1 (noting that public safety concerns would satisfy the public purpose requirement); *Chicago v. R. Zwick Co.*, 188 N.E.2d 489, 491 (Ill. 1963) (noting that taking a land for slum clearance was a "public purpose"). Courts have not yet determined what would constitute "clear and convincing" evidence as to these elements of public use.
[26] 735 ILL. COMP. STAT. § 30/5-5-5(c).

elimination of blight and subsequently transferred to a private developer will be permitted as an allowable exercise of eminent domain. Unlike several other states, Illinois has not passed legislation narrowing its definition of blight; as a consequence, its definition remains quite expansive. Illinois defines "blight" as an area detrimental to the public safety, health, or welfare because of thirteen factors, including such conditions as obsolescence, lack of community planning, declining assessed value, excessive land coverage, and excessive vacancies.[27] It could be argued that many of these factors exist, at least to some degree, in many communities around the country. Moreover, this provision permits use of eminent domain to condemn a particular property that is not blighted, so long as it is located in an area that a governing body has designated as blighted.[28]

It is unclear how post-*Kelo* legislation will affect the court's analysis of permissible "public uses," but because the legislation sought to restrict the expansive use of eminent domain, one can assume that the test will remain restrictive. Nonetheless, the state's restrictive view of the scope of the public use clause is not likely to impede efforts by communities interested in using eminent domain to further the goal of making their physical environment more conductive to healthy, active lifestyles. The construction of parks, playgrounds, and other recreational facilities that are open to the general public amply satisfies the Illinois Supreme Court's restrictive standards for public use. Moreover, while the Illinois legislature has prohibited the use of eminent domain for private development, it has created statutory exceptions that allow property to be taken for private development if it is necessary for a public purpose and primarily for the benefit of the public. Policy initiatives to combat childhood obesity are unlikely to entail transfers to private owners for development. If they do, they will be permitted only if the community can demonstrate that the condemnation is necessary for a public purpose and primarily for the benefit of the public.

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

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[27] 65 ILL. COMP. STAT. § 5/11-74.4-3 (2009). While courts have not individually analyzed each of the thirteen factors in evaluating governing bodies' declarations of lands as "blighted," some courts have generally upheld the determinations. *See, e.g.*, *Chicago v. R. Zwick Co*., 188 N.E.2d 489 (noting that "[s]pecific degrees of deterioration or dilapidation, precise percentages of obsolescence, or mathematical measurements of the extent of overcrowding of residences and of schools and other community facilities which indicate imminent deterioration cannot be stated, for the combinations which will produce the condition at which the legislation is aimed are highly variable," and upholding a blight determination in an area in which the average age of the buildings were seventy-five years old, where "stove heat was predominant," and where many buildings lacked sanitary facilities).

[28] 735 ILL. COMP. STAT. § 30/5-5-5(d) (2007).

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.[29] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[30] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[31] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[32] 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 Supreme Court of Illinois has interpreted article I, section 15, of the state constitution as providing similar protections as the federal Constitution, and the state case law relies on the U.S. Supreme Court's regulatory takings analysis.[33] Thus, in Illinois a land use regulation will be held to be a compensable taking if it deprives the landowner of all economically viable use, if it imposes a permanent physical occupation on the land, or if it is deemed compensable by virtue of the factors outlined in *Penn Central*. Under the *Penn Central* factors, a court will review a takings challenge to traditional zoning regulation under an "essentially ad hoc, factual inquir[y]"[34] 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.[35] These standards are discussed in more detail in the federal memo on regulatory takings, but for purposes of this paper it is sufficient to note that regulations are rarely held to deprive landowners of all economically viable use, and the application of the *Penn Central* factors rarely results in a finding of a compensable taking.

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 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 Illinois will not be able to require the immediate cessation of prior existing uses without paying compensation.

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[29] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[30] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[31] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[32] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[33] Davis v. Brown, 851 N.E.2d 1198, 1204 (Ill. 2006) (applying U.S. Supreme Court precedents in analyzing a takings claim); Forest Preserve Dist. of Du Page County v. W. Suburban Bank, 641 N.E.2d 493, 497 (Ill. 1994) (same).
[34] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[35] *Davis*, 851 N.E. 2d at 1204-05 (articulating and applying the *Penn Central* factors).

Under Illinois law, the right to continue a nonconforming use is considered a property right, and an ordinance may not eliminate that right in a manner that is either unreasonable or not rationally related "to the protection of the public health, morals, safety and general welfare."[36] In particular, a zoning change generally may not be used to require the immediate cessation of an *existing* use of land. The requirement that prior nonconforming uses must be allowed to continue is found in common law. As the Illinois Supreme Court has said, "the right to a nonconforming use is a property right."[37] Any ordinance that fails to recognize this right may be declared void and rescinded.[38]

Although the right to continue a prior existing use is protected in Illinois, the Illinois Supreme Court has held that communities may adopt an amortization period within which a nonconforming use must be discontinued.[39] Like any other ordinance, an amortization ordinance is entitled to the presumption of validity; but that presumption may be struck down by a showing that the public welfare does not require the restriction of use and resulting loss to the property owner.[40] In other words, an ordinance calling for the amortization of a prior nonconforming use must serve the public welfare in such a way that it outweighs the financial loss to the individual property owner who was required to terminate his nonconforming use. In *Village of Oak Park v. Gordon*, Oak Park enacted a zoning ordinance requiring that all rooming houses be removed or converted after a period of five years.[41] The Supreme Court of Illinois held the amortization ordinance invalid because the public benefit failed to outweigh the financial burden to the property owner.[42]

In addition to the possibility of amortization, the continuation of prior nonconforming uses remains subject to certain limitations, which, if violated, will require the landowner to either apply for a variance or come into compliance with the zoning ordinance. The idea is to allow the prior nonconforming use to continue operating in the same manner it had been before the zoning restriction was imposed. Therefore, grandfathering rights may be lost if the property owner seeks to replace or enlarge his prior nonconforming use.[43] In *Gore v. City of Carlinville*, the Supreme Court of Illinois held that where a zoning ordinance prohibited any expansion or improvement of

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[36] Schneider v. Bd. of Appeals of Ottawa, 84 N.E.2d 428, 434 (Ill. 1949) (court did not reach whether the zoning ordinance was void in its entirety and construed the challenged statute to avoid constitutional infirmity); People *ex rel.* Kirby v. Rockford, 2 N.E.2d 842, 845-46 (Ill. 1936) (holding that zoning ordinance, which permitted only single-family residences, as applied to a property with a prior nonconforming use on four lots, was unreasonable where the value of the land was decreased by 70 percent; no evidence that denial of a permit related to the public health, safety, morals, or general welfare).

[37] Brown v. Gerhardt, 125 N.E.2d 53, 56 (Ill. 1955).

[38] *Schneider*, 84 N.E.2d at 434.

[39] Cook County v. Renaissance Arcade & Bookstore, 522 N.E.2d 73 (Ill. 1988).

[40] Vill. of Oak Park v. Gordon, 205 N.E.2d 464, 465 (Ill. 1965).

[41] *Id.*

[42] *Id.* (holding that Oak Park's ordinance, requiring nonconforming lodging houses to be converted into conforming use within five years, was unconstitutional as applied to Gordon's house because Oak Park presented no evidence that requiring Gordon to alter the use of his property would serve the public interest and because applying the ordinance to Gordon's property would cost Gordon $1,200 annually); *Renaissance Arcade & Bookstore*, 522 N.E.2d 82 (holding that zoning of adult entertainment was permissible where adult entertainment companies did not provide evidence of economic harm resulting from having to move locations within a six-month period and where the County provided evidence as to the harmful effects of concentrated adult stores near other commercial or residential areas).

[43] Gore v. City of Carlinville, 137 N.E.2d 368 (Ill. 1956).

a garage within a residential district, a property owner of a nonconforming gas station could not tear it down and rebuild a new one that more appropriately fit the property.[44]

Rights to a prior nonconforming use may also be lost through discontinuance of use, including either change or abandonment.[45] Thus, the landowner may not change the nature or character of her nonconforming use. The land must be used for the same purpose as it was before the zoning ordinance was changed. If the prior nonconforming use was a grocery store, it must remain a grocery store; it cannot be changed to a fast-food chain. Prior nonconforming uses that are abandoned will lose their right to continue as such. Time is not an essential element of proving abandonment.[46] However, it does appear that proof of abandonment requires a showing of intent.[47] In other words, involuntary abandonment is insufficient to cause a grandfathered entitlement to expire. For example, evidence of an attempt to rent out a building will precluded a court from finding the requisite intent necessary for a showing of abandonment.[48] In *Douglas v. Village of Melrose Park*, Douglas leased a nonconforming print shop to a tenant who had recently left.[49] Douglas attempted to rent out the print shop thereafter, but was unable. The Village of Melrose Park then attempted to enforce the zoning ordinance on Douglas, claiming she had abandoned the property.[50] The Supreme Court of Illinois held that Douglas did not abandon the nonconforming use because she had attempted to lease it.[51]

In general, Illinois communities interested in changing zoning ordinances to create a physical environment more conductive to healthy, active lifestyles will not be able to require immediate cessation of prior nonconforming uses without paying compensation. While they may be able to require the prior use to be phased out over time (i.e., amortized), communities should be certain that the public benefit offered by eliminating the nonconforming use outweighs the financial loss imposed on the individual owner. Communities may also wish to simply wait until prior nonconforming uses are abandoned or altered, at which point their grandfathered status is relinquished.

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[44] *Id*.
[45] Brown v. Gerhardt, 125 N.E.2d 53, 56 (Ill. 1955) (noting that "change" and "abandon" are synonymous for the purposes of addressing nonconforming uses); Douglas v. Village of Melrose Park, 58 N.E.2d 864, 865 (Ill. 1945).
[46] *Douglas*, 58 N.E.2d at 865.
[47] *Brown*, 125 N.E.2d 56 (finding that there was no need to address whether an executor could abandon a nonconforming use because there had never been an intention to abandon the use).
[48] *Douglas*, 58 N.E.2d at 865.
[49] *Id.*
[50] *Id.*
[51] *Id.*; *see also Brown*, 125 N.E.2d at 56 (holding that no significant changes were made to a property to demonstrate intent to convert the property from its prior nonconforming use where no structural changes were made to transform a multifamily residence into a single-family residence and that improvements to replace "obsolete plumbing fixtures, plastering, fireplaces and landscaping" were immaterial to intent to abandon).