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

NEW YORK

This memorandum summarizes New York 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 York 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. 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. 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.[7] Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution.[8] 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.

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 York, 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." In its decision in *Kelo v. City of New London* the U.S. Supreme Court reaffirmed its past holdings that state and local decision makers enjoy broad discretion to define the concept of "public use," and upheld the condemnation of private property for transfer to another private party for the purpose of economic development.[9] 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.

Like the federal Constitution, the New York Constitution permits the taking of private property for "public use" if just compensation is provided.[10] Although New York courts are the final arbiters of whether a proposed use satisfies the public use requirement, they will defer to reasonable determinations of public benefit made by condemning entities.[11] New York courts have recognized that the provision of traditional government services such "as constructions of streets and highways, the expansion of railroads, the creation or expansion of parks, and the removal of slum conditions creating blight . . . all fulfill the public use or public purpose requirement."[12] Moreover, New York courts have interpreted the public use requirement to permit a taking of property for a *public purpose*, even if the property will not be used directly by

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[9] *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.

[10] N.Y. CONST. art. I, § 7(a) ("Private property shall not be taken for public use without just compensation.").

[11] *See* Goldstein v. N.Y. State Urb. Dev. Corp., 921 N.E.2d 164, 172 (N.Y. 2009) ("It is important to stress that lending precise content to these general terms has not been, and may not be, primarily a judicial exercise. Whether a matter should be the subject of a public undertaking—whether its pursuit will serve a public purpose or use—is ordinarily the province of the Legislature, not the Judiciary, and the actual specification of the uses identified by the Legislature as public has been largely left to quasi-legislative administrative agencies.").

[12] Nasim Farjad, *Condemnation Friendly or Land Use Wise? A Broad Interpretation of the Public Use Requirement Works Well for New York City*, 76 FORDHAM. L. REV. 1121 (2007) (citing case examples from County of Jefferson v. Horbiger, 243 N.Y.S. 30 (App. Div. 1930) (for streets and highways); *In re* N.Y. Cent. R.R., 66 N.Y. 407 (1876) (for railroads); People v. Adirondack Ry., 54 N.E. 689 (N.Y. 1899), *aff'd*, 176 U.S. 335 (1900) (for public parks); and N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153, 154 (N.Y. 1936) (for blighted areas)).

the public.[13] Thus, an "incidental private benefit" will not invalidate the exercise of eminent domain "so long as the public purpose is dominant."[14] However, a merely incidental public benefit coupled with a dominant private purpose will not satisfy the public use requirement.[15] In *Syracuse University v. Project Orange Associates Services Corp.*, for example, the court invalidated a proposed condemnation of land owned by Syracuse University by Project Orange Associates because it concluded that the condemnation was intended primarily to help POA escape the adverse impacts of its bad business decision to build a cogeneration plant on land it had leased from SU for forty years.[16]

In addition to traditional public uses, the New York Constitution expressly authorizes the legislature to permit local governments to use eminent domain for the clearance, replanning, reconstruction, and rehabilitation of "substandard and insanitary areas."[17] Under New York urban renewal laws, eminent domain may be exercised in "substandard or insanitary areas," which are specifically defined to "mean and be interchangeable with a slum, blighted, deteriorated or deteriorating area. . . ."[18] In *Yonkers Community Development Agency v. Morris*, the court stated that "[h]istorically, urban renewal began as an effort to remove 'substandard and insanitary' conditions which threatened health and welfare of the public, in other words 'slums.' . . . [I]t has become clear that the areas eligible for such renewal are not limited to 'slums' as that term was formerly applied, and that among other things economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose."[19] Similarly, the court of appeals upheld the proposed condemnation of private property for the Atlantic Yards project, even though reasonable people might disagree about whether the property subject to condemnation was blighted.[20]

Legislators have introduced several bills intended to limit the use of eminent domain in New York, but none have passed.[21] Therefore, the judicial climate in New York 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 York courts have held that classic uses such as parks, playgrounds, and other recreational facilities are legitimate public uses under the New York Constitution. Second, courts will defer to legislative determinations of public benefit unless they are unreasonable. Finally, the state's broad delegation of authority to exercise the power of eminent domain in substandard and deteriorating areas and the concomitantly broad definition of "blight" opens the door for creative legal solutions to condemning private property for public use.

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[13] Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 331 (N.Y. 1975) ("The fact that the vehicle for renewed use of the land, once it is taken, may be a private agency does not in and of itself change the permissable [*sic*] nature of the taking of the substandard property.").
[14] Matter of Waldo's, Inc. v. Vill. of Johnson City, 543 N.E.2d 74, 76 (N.Y. 1989) (recognizing that relieving serious traffic congestion is a public purpose, even if the road improvements for which private property has been condemned also benefits private businesses).
[15] *See* Matter of Aspen Creek Estates v. Town of Brookhaven, 47 A.D.3d 267, 275-76 (N.Y. App. Div. 2007).
[16] Syracuse Univ. v. Project Orange Assocs. Servs. Corp., 71 A.D.3d 1432 (N.Y. App. Div. 2010).
[17] N.Y. CONST. art. XVIII, §§ 1-2.
[18] N.Y. GEN. MUN. LAW § 502 (2007).
[19] Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 331 (N.Y. 1975).
[20] *Yonkers Cmty. Dev. Agency*, 335 N.E.2d 327.
[21] *See* Terry Pristin, *Lesson on Limits of Eminent Domain at Columbia*, N.Y. TIMES, Jan. 19, 2010, *available at* http://www.nytimes.com/2010/01/20/realestate/commercial/20eminent.html.

2. Land Use Regulation and Compensation

Most government initiatives to combat childhood obesity by creating a healthy living environment will rely on zoning powers, not the exercise of eminent domain. For example, the City of Los Angeles has placed a moratorium on the building of new fast-food restaurants in South Los Angeles. Land use regulations such as these rarely implicate takings concerns, and governments are generally free to adopt such regulations without incurring takings liability.

However, some land use regulations do require compensation. Any land use regulation so severe that it amounts to the functional equivalent of a taking requires payment of just compensation. The U.S. Supreme Court has adopted two bright-line rules and a balancing test to determine whether a land use regulation constitutes a taking under federal law. First, a regulation that imposes a permanent physical occupation on private land is a taking as a matter of law.[22] Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.[23] All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactored test.[24] A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.[25]

The New York Constitution, like the federal Constitution, prohibits the taking of private property for public use without just compensation.[26] When analyzing a regulatory takings claim, New York courts follow federal precedent.[27] Accordingly, New York courts categorize two classes of per se takings: (1) cases of permanent physical occupation and (2) cases in which a regulation denies a landowner all economically viable use of the property. In reality, very few land use regulations satisfy these demanding standards for automatic (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.[28] 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.[29]

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. These run of the mill zoning restrictions are rarely held to require compensation. The Court of Appeals of

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[22] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[23] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[24] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[25] Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.
[26] N.Y. CONST. art. I, §§ 6 & 7.
[27] *See, e.g.*, Consumers Union of U.S. v. State, 840 N.E.2d 68, 84-85 (N.Y. 2005); *see also* Smith v. Town of Mendon, 822 N.E.2d 1214 (N.Y. 2004).
[28] *See* Dawson v. Higgins, 197 A.D. 127, 133 (N.Y. App. Div. 1994). A requirement that a landowner permit the public to use his property as a hike and bike trail will constitute a permanent physical occupation, and therefore will require compensation. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).
[29] *See Smith*, 822 N.E.2d at 1220-21 (rejecting the claim that the imposition of a conservation easement deprived the landowner of all economically viable use of his property); *see also* Friedenburg v. N.Y. York State Dep't of Envtl. Conservation, 3 A.D.3d 86, 93-94 (N.Y. App. Div. 2003) (declining to find a per se taking where wetlands regulation decreased the value of the landowner's property by 95 percent).

New York has made clear that "[a] landowner who claims that land regulation has effected a taking of his property bears the heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and proving every element of his claim beyond a reasonable doubt."[30] The court relies on the U.S. Supreme Court's *Penn Central* factors in analyzing a takings claim involving a regulation that does not implicate one of the bright-line rules. These factors include the economic impact of the regulation, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the governmental action.[31] Ultimately, there is no set formula for identifying a taking; in analyzing takings claims under the state and federal constitutions, New York courts must determine whether justice and fairness require compensation and whether the landowner has been forced to bear a public burden that should be borne by the public as a whole.[32] In applying the *Penn Central* factors with these background principles in mind, the Appellate Division in *Friedenburg v. New York State Department of Environmental Conservation* concluded that the imposition of a conservation easement on the landowner's property constituted a compensable taking because it caused an almost total loss of value and required the landowners to bear all the burden of the regulation.[33]

Because most land use restrictions adopted to combat childhood obesity will not implicate the bright-line rules described above, and compensation is rarely required for land use restrictions that are evaluated under the *Penn Central* factors, unless they deprive the landowner of virtually all the economic value of his land, regulatory takings law is not likely to impede efforts by communities in New York to adopt land use restrictions aimed at combating childhood obesity.

3. Grandfathering Prior Nonconforming Uses

The discussion in Section 2 assumes that the zoning restriction imposed on a landowner does not attempt to prohibit the very use to which she is currently putting her property. 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 New York will generally be able to require landowners to discontinue existing uses after the expiration of a reasonable amortization period.

Although the New York Court of Appeals has recognized that existing uses are protected from immediate cessation by the state constitution, it has also made clear that such uses are allowed "grudgingly" and that municipalities may take reasonable measures to eliminate them.[34] Such measures include the adoption of a reasonable amortization period.[35] Under New York law,

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[30] de St. Aubin v. Flacke, 496 N.E.2d 879, 885 (N.Y. 1986).
[31] *See Consumers Union of U.S.*, 840 N.E.2d at 84-86; Gazza v. N.Y. State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1041-44 (N.Y. 1997).
[32] *Friedenburg*, 3 A.D.3d at 93.
[33] *Id.* at 93-94.
[34] Vill. of Valatie v. Smith, 632 N.E.2d 1264, 1266 (N.Y. 1994).
[35] *Id.*; People v. Miller, 106 N.E.2d 34, 35 (N.Y. 1952).

amortization means "a period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements."[36] The validity of amortization depends on reasonableness, and the burden is on the owner to prove that the loss is substantial.[37] Courts have avoided setting a fixed formula, holding instead that an amortization period is presumed valid and the landowner must overcome that presumption by demonstrating a substantial loss outweighing the public benefit gained.[38] Additionally, courts measure the reasonableness of an amortization period by considering whether an owner had adequate time to recoup her investment in the newly prohibited use.[39]

Moreover, a landowner will lose his right to continue a prior nonconforming use if the prior use is abandoned.[40] Showing an abandonment of a noncomforming use requires providing evidence of an intent to abandon and "some overt act or failure to act, indicating that the owner neither claims nor retains any interest in the subject matter of the abandonment."[41] However, the courts have held that a prior use is abandoned even where there was no "complete cessation of the nonconforming use" or intent to abandon,[42] when there is a substantial cessation of the nonconforming use for a period of one year.[43] Finally, the right to continue a prior nonconforming use does not entail the right to alter or expand that use.[44]

While the practice of grandfathering prior nonconforming uses in New York may present some obstacles to efforts to combat childhood obesity with zoning regulations, municipalities have wide leeway under state law to eliminate these uses. State courts have upheld the use of amortization to eliminate nonconforming uses, and any prior use that is abandoned will be forfeited.

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[36] *Vill. of Valatie*, 632 N.E.2d at 1266.
[37] *Id*.
[38] *Id.*
[39] The New York Court of Appeals has further elaborated, "Reasonableness is determined by examining all the facts, including the length of the amortization period in relation to the investment and the nature of the use. The period of amortization will normally increase as the amount invested increases or if the amortization applies to a structure rather than a use. Presumptively, amortization provisions are valid unless the owner can demonstrate that the loss suffered is so substantial that it outweighs the public benefit gained by the exercise of the police power." Islip v. Caviglia, 632 N.E.2d 1264, 1267 (N.Y. 1994) (holding that landowner violated zoning law when it continued nonconforming use beyond five-year period without showing any financial hardship). *See also* Suffolk Asphalt Supply v. Bd. of Trustees of Westhampton Beach, 2009 N.Y. App. Div. LEXIS 728, *2 (Feb. 3, 2009) (holding that the plaintiff failed to overcome the presumption of reasonableness by failing to submit any evidence as to the amount that it actually invested in the business).
[40] Toys "R" Us v. Silvia, 89 N.Y.2d 411, 421 (1996).
[41] Estate of Cuomo v. Rush, 273 A.D.2d 234, 234-35 (N.Y. App. Div. 2000) (holding that the use of a nightclub on one night out of the year for three years for the purpose of maintaining its nonconforming use as a nightclub constituted an abandonment); Sadler v. Zoning Bd. of Appeals, 240 A.D.2d 505, 506 (N.Y. App. Div. 1997) (upholding a zoning board's determination that an inn's operation of restaurant and bar was not abandoned when the inn used the restaurant and bar for a New Year's Eve party the night before expiration of the one-year period permitted by city ordinance of Union Vale, Code § 90-108).
[42] *Toys "R" Us*, 89 N.Y.2d at 420; Matter of Sigma Gamma Fraternity v. Barilla, 2006 N.Y. App. Div. LEXIS 3333, *1, (Mar. 17, 2006).
[43] Sadler v. Zoning Bd. of Appeals, 240 A.D.2d 505, 506 (N.Y. App. Div. 1997).
[44] Rudolf Steiner Fellowship Found. v. De Luccia, 685 N.Y.2d 192, 194 (1997).