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

CONNECTICUT

This memorandum summarizes Connecticut 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 Connecticut 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

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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

property, while in King County the acquisition is by eminent domain and involves full title. In contrast, the Los Angeles and Naperville ordinances are two distinct examples of land use restrictions. The Los Angeles ordinance limits what landowners can do with their private property, while the Naperville ordinance imposes an affirmative requirement on private landowners.

These four specific initiatives illustrate the two primary tools available to communities that seek to use land use initiatives to prevent childhood obesity: They can rely on their power of eminent domain, on their land use regulatory authority, or both. The first option—relying on the power of eminent domain to acquire ownership interests in real property—may be used to provide public infrastructure such as parks, playgrounds, and recreational trails to promote healthy, active lifestyles. The second option—adopting land use restrictions applicable to private property—may be used to limit undesirable land uses (such as fast-food restaurants) in vulnerable neighborhoods or to require private property owners to do certain things on their property (such as install bicycle parking structures or stock healthy food in corner stores).

Communities that set out to combat childhood obesity by changing their physical environment using eminent domain or land use regulation will face limitations from both federal and state law in both contexts. The federal limitations come from the Fifth Amendment to the U.S. Constitution, which states: "[N]or shall private property be taken for public use without just compensation." This prohibition is interpreted in two parts. First, private property may not be taken unless it is for public use.[7] Second, if a land use restriction imposes such a burden on private property that the courts conclude it is the equivalent of a taking, the government must pay just compensation.[8] A comprehensive analysis of the scope and extent of these federal constitutional limits can be found at www.nplan.org/nplan/products/takings_survey. In addition to the federal constitutional limitations, every state imposes its own restrictions on the exercise of eminent domain and the imposition of land use regulations by its communities. These limitations, contained in state constitutions as well as statutes, may be more protective of private property than the federal Constitution, and they generally take three forms. First, state laws might incorporate a narrower definition of "public use," such that a legislative objective that satisfies the public use requirement of the federal Constitution would be invalid under state law. Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution. Finally, state law may require a community to tolerate certain negative aspects of the physical environment (such as fast-food restaurants) that it would rather eliminate, just because those elements were present before the community undertook its reform initiative—commonly referred to as "grandfathering."

Communities interested in using land use initiatives to change their physical environment and thereby combat childhood obesity have to be aware of these restrictions on their eminent domain powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Connecticut, including constitutional and

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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).

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 Connecticut Constitution tracks that of the federal Constitution, stating that "the property of no person shall be taken for public use, without just compensation therefor."[9] The Connecticut courts "continue[] to afford the [Connecticut] public use clause a broad construction."[10] In doing so, the Connecticut courts have construed the test for public use as "whether [the use] primarily serves, in a reasonable manner, to promote the public welfare."[11] Furthermore, the Connecticut courts give substantial weight to the findings of the condemning authority and will overturn only if they find "gross error" or "extreme wrong."[12] 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.

On October 1, 2007, the Connecticut legislature restricted what constitutes a public use. These restrictions apply only to redevelopment agencies seeking to implement urban renewal projects, and they prohibit such agencies from using eminent domain for the primary purposes of increasing local tax revenue.[13] In addition, the new law limits the area that can be classified as a "redevelopment area" for purposes of exercising the power of eminent domain. A "redevelopment area" is an area that is "deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community."[14] Finally, the statute imposes stricter procedures for adopting and implementing a redevelopment plan.

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[9] CONN. CONST. art. I, § 11.
[10] Kelo v. City of New London, 843 A.2d 500, 522 (Conn. 2004).
[11] *Id.* at 524, n. 32.
[12] *Id.* at 523.
[13] CONN. GEN. STAT. ANN. § 8-193 (West 2009).
[14] *Id.* § 8-125(2).

As defined in the statute, a redevelopment plan must include (A) a description of the current state of the proposed redevelopment area, including a specification of each parcel proposed to be acquired; (B) the location and extent of the proposed land uses; (C) the location and extent of streets and other public works within the redevelopment area; (D) schedules showing the number of families displaced by the proposed improvement, the method of temporary relocation of such families, and the availability of reasonable replacement housing; (E) present and proposed zoning regulations in the redevelopment area; (F) a description of how the area is deteriorated, deteriorating, substandard, or detrimental to the safety, health, morals or welfare of the community; and (G) any other detail necessary to give the redevelopment agency adequate information.[15] Upon completion of the redevelopment plan, the planning agency must provide notice to the public and hold a public hearing regarding the proposed plan.[16] Following such a hearing, the planning agency may approve the redevelopment plan provided that it finds true six factors:

> (1) The area in which the proposed redevelopment is to be located is a redevelopment area; (2) the carrying out of the redevelopment plan will result in materially improving conditions in such area; (3) sufficient living accommodations are available within a reasonable distance of such area or are provided for in the redevelopment plan for families displaced by the proposed improvement, at prices or rentals within the financial reach of such families; (4) the redevelopment plan is satisfactory as to site planning, relation to the plan of conservation and development of the municipality adopted under section 8-23 and, except when the redevelopment agency has prepared the redevelopment plan, the construction and financial ability of the redeveloper to carry it out; (5) the planning agency has issued a written opinion in accordance with subsection (a) of this section that the redevelopment plan is consistent with the plan of conservation and development of the municipality adopted under section 8-23; and (6) (A) public benefits resulting from the redevelopment plan will outweigh any private benefits; (B) existing use of the real property cannot be feasibly integrated into the overall redevelopment plan for the project; (C) acquisition by eminent domain is reasonably necessary to successfully achieve the objectives of such redevelopment plan; and (D) the redevelopment plan is not for the primary purpose of increasing local tax revenues. No redevelopment plan for a project that consists predominantly of residential facilities shall be approved by the redevelopment agency in any municipality having a housing authority organized under the provisions of chapter 128 except with the approval of such housing authority.[17]

Furthermore, for each parcel of land sought to be acquired under the redevelopment plan through eminent domain, there must be a public hearing, and the acquisition must be approved by a majority of the planning agency.[18] However, even under these stricter Connecticut

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[15] *Id.* § 8-125(3).
[16] *Id.* § 8-127(b).
[17] *Id.*
[18] *Id.* § 8-127a.

standards, the "public use" definition would have little effect on efforts to condemn private property for public parks or recreational facilities.[19]

Hartford's brownfields initiative is an example of a condemnation for a traditional public use. Since the mid-1980s, 30 percent of the land in Hartford had been abandoned due to migration of the city's manufacturing industry.[20] One of these abandoned sites, located near a middle school, had become a dump full of tires, mattresses, oil cans, and other debris. Through an urban renewal initiative program, the site was cleaned up and turned into a 1.74-acre open green space for the local community that includes a playground, nature path, and community garden.[21] Land transformation projects such as this will not run afoul of these new provisions.[22]

Overall, then, the legal climate in Connecticut 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, Connecticut jurisprudence has a generous regard for what constitutes "public use." Second, the new legislative restrictions on public use will not affect uses such as public parks or recreational facilities.

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 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. Connecticut courts follow U.S. Supreme Court precedent and 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.[23] 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.[24] And regulations have been held to deprive a landowner of all

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[19] The only case, thus far, applying the amended statute was a lower court case that only cited to the section providing for review of compensation for the taken land. Hous. Auth. v. CB Alexander Real Estate, 944 A.2d 1010, 1013 (Conn. App. Ct. 2008). However, in its opinion, the court indicated that it would continue to follow the "well established principles that govern the taking of real property by eminent domain." *Id.* at 1015.

[20] U.S. Environmental Protection Agency, *EPA Brownfields Success Story, Hartford, CT*, EPA 500-F-03-009, May 2003, *available at* http://www.epa.gov/swerosps/bf/success/hartford.pdf.

[21] The United States Conference of Mayors, *Mayors' Guide to Fighting Childhood Obesity*, at 16, *available at* http://usmayors.org/chhs/healthycities/documents/guide-200908.pdf.

[22] *Id.*

[23] Rural Water Co. v. Zoning Bd. of Appeals, 947 A.2d 944 (Conn. 2008) (demonstrating that Connecticut follows Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)); Eamiello v. Liberty Mobile Homes Sales, Inc., 546 A.2d 805 (Conn. 1988) (demonstrating that Connecticut follows Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

[24] *See Eamiello*, 546 A.2d at 816-19.

economically viable use of her property only in cases where the landowner was effectively prohibited from making any use of the property.[25]

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, Connecticut courts continue to follow federal precedent to determine if a regulatory taking has occurred.[26] In Connecticut, regulatory takings are referred to as "inverse condemnations."[27] "An inverse condemnation claim accrues when the purpose of government regulation and its economic effect on the property owner render the regulation substantially equivalent to an eminent domain proceeding."[28]

In particular, Connecticut courts will review a takings challenge to a run of the mill zoning regulation under an "essentially ad hoc, factual inquir[y]"[29] 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.[30] The lack of a reasonable investment-backed expectation can be determinative. For example, in *Rural Water Co. v. Zoning Board of Appeals,* a landowner purchased property as a well lot and continued to use the property as a well lot for twenty years. Despite having a letter from an original owner stating that the current owner had always intended to use the lot as a building lot, the court found the property owner had no investment-backed expectation to use the property as a building lot, and therefore the regulation prohibiting building on his lot was not a taking.[31]

These limits on regulatory takings, like the limits on eminent domain, probably will not affect community efforts to combat 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 Connecticut generally will not be able to do this without paying compensation.

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[25] *See Rural Water Co.*, 947 A.2d at 955-56.
[26] *See generally Rural Water Co.*, 947 A.2d 944; *Eamiello*, 546 A.2d 805.
[27] *Rural Water Co.*, 947 A.2d at 955.
[28] *Id.*
[29] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
[30] *See Rural Water Co.*, 947 A.2d at 957.
[31] *Id.* at 956-57.

General Statutes section 8-2(a) protects the rights of property owners to continue existing and lawful uses of their property, regardless of changes in zoning laws that may prohibit this use.[32] These prior nonconforming uses are "grandfathered" in under the zoning change, and a government cannot order their immediate cessation.[33] Additionally, amortizing or phasing out nonconforming uses is prohibited as conflicting with the right provided by Connecticut statute.[34]

In fact, Connecticut law protects a landowner's right to implement a nonconforming use whenever the use was available before the zoning regulations became effective, even if it was not yet actually present on the land.[35] In *Carbone*, a landowner purchased property intending to build a two-family house on an interior lot.[36] The court found that this intention established "a vested right which adheres to the land itself," and even though the house was not yet constructed, the Connecticut Supreme Court held that the landowner had established a nonconforming use in the right to develop his property and the zoning law was inapplicable.[37] However, in *Pleasant View Farms Development v. Zoning Board of Appeals*, the Supreme Court of Connecticut held that the property owner did not have the right to operate a used car dealership where one was not yet operating prior to the effective date of the zoning regulations.[38] Though the owner had been operating the used car dealership for more than a decade, the court found no link to the used car dealership predating the 1958 zoning ordinance.[39] Therefore, without a specific variance allowing a used car dealership, the owner was ordered to discontinue the nonconforming use.[40] From these two cases, it appears that the determinative factor is establishing a link from the nonconforming use to a time that predates the zoning ordinance.

In Connecticut, the grandfathering statute provides that the protection cannot be lost solely as a result of nonuse, but instead requires intent to abandon on the part of the property owner.[41] In *Blum v. Lisbon Leasing Corp.*, the Supreme Court of Connecticut found intent to abandon where the property owner ceased use of a nonconforming car retail shop and tried to change the building into different retail establishments.[42]

Additionally, the Connecticut Supreme Court has held that some changes to the use are not within the scope of a valid nonconforming use.[43] How the court evaluates a change depends on

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[32] CONN. GEN. STAT. ANN. § 8-2(a) (West 2009); *see, e.g.,* Bauer v. Waste Mgmt. of Conn., Inc., 662 A.2d 1179, 1190 (Conn. 1995).
[33] CONN. GEN. STAT. ANN. § 8-2(a).
[34] Gold Diggers, LLC v. Town of Berlin, 469 F. Supp 2d 43, 52 (D. Conn. 2007) (following Connecticut law).
[35] Carbone v. Vigliotti, 610 A.2d 565 (Conn. 1992).
[36] *Id.* at 566.
[37] *Id.* at 572.
[38] Pleasant View Farms Dev., Inc. v. Zoning Bd. of Appeals, 588 A.2d 1372, 1376 (Conn. 1991).
[39] *Id.*
[40] The Connecticut Supreme Court found that, despite having broad variances for both a retail or rental business, and a warehouse for trucks and machinery, without a specific variance for a used-car dealership or "a link to the use that predates . . . the effective date of the current . . . zoning regulations," the owner must discontinue the non-conforming use. *Id.*
[41] CONN. GEN. STAT. ANN. § 8-2 (West 2009); *see* Blum v. Lisbon Leasing Corp., 377 A.2d 280, 283 (Conn. 1977).
[42] *Blum*, 377 A.2d at 283.
[43] Bauer v. Waste Mgmt. of Conn., Inc., 662 A.2d 1179, 1191-93 (Conn. 1995).

whether it classifies the change as a change in the use or as a change in the structure.[44] "Whereas a nonconforming structure cannot be increased in size in violation of zoning ordinances, i.e., nonconforming additions may not be made to the nonconforming structure, . . . certain changes in nonconforming uses represent permissible intensifications within the scope of the valid nonconforming use."[45] For example, in *Bauer v. Waste Management*, the court held that the nonconforming landfill—classified as a structure—could not increase in height past the height limit of the zoning ordinance.[46] However, a nonconforming use can continue as long as the current activity is within the scope of the original nonconforming use.[47]

> In deciding whether the current activity is within the scope of a nonconforming use consideration should be given to three factors: (1) the extent to which the current use reflects the nature and purpose of the original use; (2) any differences in the character, nature and kind of use involved; and (3) any substantial difference in effect upon the neighborhood resulting from differences in the activities conducted on the property.[48]

For example, in *Zachs v. Zoning Board of Appeals*, the Connecticut Supreme Court found that antennae and transmitter upgrades to a radio broadcasting station were not impermissible changes because there were no changes in the nature or purpose; "[s]uch changes cannot reasonably be said to involve differences in the character of the nonconforming use rather than increases in the volume of business within the scope of the original use"; furthermore, adverse effects on the neighborhood were "sparse."[49] While the *Zachs* court did not address this issue, the structure prong was likely not implicated because the additions did not violate any provisions the originals had not violated at the time of the enactment of the ordinance. This proposition is supported by dicta in *Bauer*. There, the Connecticut Supreme Court intimated that had the landfill exceeded the height limitations prior to their enactment, the continuing growth of the landfill would have been permissible.[50]

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

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[44] *Id.*
[45] *Id.* at 1192.
[46] *Id.* at 1191-93.
[47] Zachs v. Zoning Bd. of Appeals, 589 A.2d 351, 355 (Conn. 1991).
[48] *Id.*
[49] *Id.*
[50] *Bauer*, 662 A.2d at 1190.