

FOCUS ON MUNICIPAL & ZONING LAW

Temporary zoning and planning moratoriums

Municipal governments throughout New York frequently enact temporary moratoriums on the issuance of zoning and land use approvals to control growth and development. Temporary moratoriums enable New York's cities, towns and villages to suspend otherwise permitted construction or development by withholding the issuance of permits while the municipality reviews its laws and adopts new laws governing growth and development. Generally, when a municipality identifies a problem relating to the growth or development of an area within its jurisdiction, it will impose a moratorium, while it institutes a planning study, and either enacts a new comprehensive plan, or otherwise corrects the perceived problem in accordance with the findings of the study. The moratorium maintains the *status quo*, while preventing the continuance of development applications under the present regulations, before the new, presumably more appropriate, regulations go into effect. However, despite the frequency of moratoriums, New York does not have any statewide statute or legislation explicitly authorizing municipalities to enact temporary moratoriums. Thus, a local planning and zoning board's power to enact temporary moratoriums derives from general New York case law.

New York courts have consistently held that temporary restraints of property rights are a valid exercise of the police power. *See, e.g., People ex rel. St. Albans Springfield Corp. v. Connell*, 257 N.Y. 73, 83 (1931) ("We are not required to say that a merely temporary restraint of beneficial enjoyment is unlawful where the interference is necessary to promote the ul-

timate good either of the municipality as a whole or of the immediate neighborhood.") In *Belle Harbor Realty Corp. v. Kerr*, 35 N.Y.2d 507 (1974), the New York Court of Appeals developed a three prong test to determine whether a government action restricting property rights constituted a valid use of the police power, holding that "[t]o justify interference with the beneficial enjoyment of property the municipality must establish that it has acted in response to a dire necessity, that its action is reasonably calculat-



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ed to alleviate or prevent the crisis condition, and that it is presently taking steps to rectify the problem." *Id.* at 512. Similarly, the Court recognized a municipality's right to enact moratoriums in *Charles v. Diamond*, 41 N.Y.2d 318, 324 (1977), since "[t]he municipal power to

act in furtherance of the public health and welfare may justify a moratorium on building permits or sewer attachments which are reasonably limited as to time."

To determine the validity of a temporary land use or planning moratorium, New York courts look at the reasonableness of the moratorium in purpose and duration, as well as whether the local agency acted in good faith on a case by case basis.

In the field of moratoriums, it is well settled that the enactment of a moratorium upon certain land use or development within a municipality will be considered a valid stopgap or interim measure where it is reasonably designed to temporarily halt development while the municipality

considers, *inter alia*, comprehensive zoning changes (*see, 119 Dev. Assocs. v. Village of Irvington*, 171 A.D.2d 656; *Matter of Dune Assocs. v. Anderson*, 119 A.D.2d 574). However, the moratorium must be for a valid and reasonable purpose and 'the life of such legislation may not exceed a reasonable period of time' (*Mitchell v. Kemp*, 176 A.D.2d 859, 860, *supra*; *Matter of Lakeview Apts. v. Town of Stanford*, 108 A.D.2d 914; *Matter of New York City Hous. Auth. v. Commissioner of Envtl. Conservation Dept. of State of N. Y.*, 83 Misc 2d 89); *Cellular Tel. Co. v. Village of Tarrytown*, 209 A.D.2d 57, 66 (2d Dept. 1995)).

Although a moratorium of six months duration, with a six months extension provision, has been upheld by the courts, *see, Home Depot U.S.A., Inc. v. Vill. of Rockville Ctr.*, 295 A.D.2d 426 (2d Dept. 2002), and a moratorium enacted for an excess of six years has been struck down,

see, Lakeview Apartments of Hunns Lake, Inc. v. Stanford, 108 A.D.2d 914 (2d Dept. 1985), there is no black letter rule for the permissible duration of temporary moratoriums. Therefore, to determine the validity of a moratorium, the Courts must evaluate each moratorium that is challenged on a case by case basis.

In *Land Master Montg I, LLC v. Town of Montgomery*, 2006 N.Y. Slip Op. 26367 (Sup. Ct. Orange Co. 2006), petitioners submitted applications to build affordable housing in the only area of the Town of Montgomery (the "Town") where multifamily housing was permitted. The Town thereafter imposed a moratorium suspending the approval of any residential development plans that exceeded three



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dwelling units. The moratorium continued for two and one-half years, during which time the Town enacted a new comprehensive plan and zoning laws which effectively eliminated multifamily home construction in the Town. Although the issue of the duration of the moratorium was rendered moot (since it had already ended), the Court noted that it found “the successive continuation of this moratorium for a period of some two and one-half years to be disturbing, and cautions that such measures may not be used ‘in bad faith ... [to delay] a landowner’s application ...’ [citation omitted].” *Id.* at 10.

In *Mitchell v. Kemp*, 176 A.D.2d 859 (2d Dept. 1991), the Town of Pine Plains enacted a moratorium for nearly five years while it enacted a zoning ordinance. The Appellate Division held the moratorium was unconstitutional, affirming the Supreme Court. The Court reasoned that while “‘interim or stopgap legislation is permissible in order to maintain the status quo pending the preparation and enactment of a comprehensive zoning ordinance[,] ... the life of such legislation may not exceed a reasonable period of time’ [citations omitted]. The Town here has failed to offer any satisfactory reasons for the nearly five-year delay in enacting a zoning ordinance.” *Id.* at 860.

The United States Supreme Court has recently discussed development moratoriums in *Tahoe Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (U.S. 2002). In this case, Tahoe Regional Planning Agency (the “TRPA”) was studying the impact of development and growth on the Lake Tahoe region design a strategy for environmentally sound growth. In order to prevent any negative impact on the region before their actions were completed, the TRPA enacted two temporary moratoriums on all development lasting a total of 32 months. In upholding the validity of the moratoriums, the court held that “any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable. Formulating a general

rule of this kind is a suitable task for state legislatures.” *Id.* at 341 - 342. The Court further stated, “the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the ‘temptation to adopt what amount to per se rules in either direction must be resisted’ [citation omitted].” *Id.* at 342.

Only about 20 percent of the states have decided to enact legislation codifying their state’s standards for moratoriums. *See, Id.* California, Colorado, Kentucky, Michigan, Minnesota, New Hampshire, Oregon, South Dakota, Utah, Washington and Wisconsin have all enacted some form of moratorium legislation, ranging from six months to three years in durational limitation.

The New York Legislature currently has before it two bills that would that would create comprehensive standards for land use and zoning moratoriums. Bill No. A.1509 was introduced by Assemblyman Thiele (2nd Assembly District, Suffolk County) on Jan. 9, 2007, and S.1130 was introduced by Senators Little (48th Senate District), Larkin (39th Senate District), Morahan (38th Senate District), and Seward (51st Senate District). The bills are substantially similar, and the intent behind both is to eliminate “confusion and uncertainty as to the acceptable scope, duration, adoption, appeal procedures and applicability of such moratoriums.” Bill Number: A.1509 Sponsor’s Memo. “It is the legislature’s intent to adopt a comprehensive detailed statutory scheme to authorize municipalities to enact local laws or ordinances that provide for municipal enactment of moratoriums of limited duration on the issuance of some or all of the following: building permits, site plan approvals, special use permits and subdivision plats, and to establish the purposes for which such moratoriums may be enacted, and to establish appropriate limitations on their scope and duration.” Assemb. 1509, 2007-2008 Reg. Sess. (N.Y. 2007).

New York’s proposed moratorium legislation is very broad and would enable local governments to enact moratoriums for a wide variety of purposes, such as: “(a) emergency condi-

tions affecting public health or safety; (b) prevent a shortage of or adverse impacts on public facilities; (c) prevent adverse impacts upon natural resources; or (d) conduct land use planning studies, in order to prepare or revise comprehensive plans or land use regulations.” S. 1130, 2007-2008 Reg. Sess. (N.Y. 2007).

This is not the first time that New York State has enacted land use and zoning legislation to codify a well known common law or case law based standards; prime examples being the standards for area and use variances, codified in 1993 as General City Law §81_b, Town Law §267-b, and Village Law §7-712-b, which are based on well established New York Court decisions. *See, Otto v. Steinhilber*, 282 N.Y. 71 (1939) (where the Court articulated the standard for use variances that would be codified almost verbatim more than 50 years later). The codification of moratorium common law would be consistent with this legislative trend. Further, the codification of moratorium common law would add certainty to the process, and thereby lessen the potential for litigation over the validity of moratoriums. It would also create a degree of certainty and consistency for municipalities and property owners alike

The immediate future of the moratorium bills is not certain, and if history proves to be a guide for the future, neither of these bills will be passed this Legislative term. In both the 2004-2005 and 2005-2006 Regular Sessions, S.1130 passed the Senate, but failed in committee in the Assembly. Currently, S.1130 has been referred to the Committee on Cities by the Senate. A.1509 is a new bill, and currently has been referred to the Committee on Local Governments by the Assembly. Regardless of the outcome in the State Legislature, this area will be of continued concern and scrutiny as municipalities address development issues in the future.

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