NEW YORK STATE OF OPPORTUNITY.

Division of Local Government Services

Land Use Moratoria

JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES

A Division of the New York Department of State

Kathy Hochul, Governor **Robert J. Rodriguez, Secretary of State**

NEW YORK STATE DEPARTMENT OF STATE
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001
http://www.dos.ny.gov

Revised: 2010
Reprinted: 2023

James A. Coon

The James A. Coon Local Government Technical Series is dedicated to the memory of the former Deputy Counsel of the Department of State.

Jim Coon devoted his career to assisting localities in their planning and zoning, and to helping shape the state municipal statutes. His outstanding dedication to public service was demonstrated by his work and his writings, including the work, *All You Ever Wanted to Know About Zoning*. Jim also taught land use law at Albany Law School. His contributions in the area of municipal law were invaluable, and immeasurably improved the quality of life of New Yorkers and their communities.

CONTENTS

INTRODUCTION

A land use moratorium is a local enactment which temporarily suspends a landowner's right to obtain development approvals while the community considers and potentially adopts changes to its comprehensive plan and/or its land use regulations to address new circumstances not addressed by its current laws.

A moratorium on development therefore preserves the *status quo* while the municipality updates its comprehensive plan. A moratorium is designed to halt development temporarily, pending the completion and possible adoption of more permanent, comprehensive regulations.

The objective of municipal land use controls is to promote community planning values by properly regulating land development. It follows that land use controls work best when built upon a carefully considered comprehensive plan. It takes time to put together or to update a good community plan. During this time, demand for a particular use of land may arise for which there are inadequate or nonexistent controls. If the community allows development during that time, the ultimate worth of the eventual plan could be undermined. For these reasons, moratoria and other forms of interim zoning controls are often needed to "freeze" development until a satisfactory final plan or regulations are adopted.

THE CONCEPT OF MORATORIA

The enactment of temporary restrictions on development has been held to be a valid exercise of the police power where the restrictions are reasonable and related to public health, safety or general welfare[1]. Local governments can enact a moratorium for a broad range of reasons.

Why adopt moratoria?

- Prevent rush to development
- Prevent inefficient and ill-conceived growth
- Address a new kind of use (ie- wind farms, solid waste facilities, big box stores) in comprehensive plans and land use laws
- Prevent hasty decisions that would disadvantage landowners and the public
- Prevent immediate construction that might be inconsistent with the provisions of a future plan

The moratorium may be general, imposing a ban on all development approvals throughout the community, or specific to one land use or to a particular zoning district. For example, a moratorium can halt: the review of projects currently before boards; acceptance of new development applications (site plan, subdivision, special permit); and/or issuance of water and sewer connection permits.

Municipalities that adopt moratoria often exempt certain activities. A common exemption is for landowners whose construction applications have been approved. Construction of single-family homes and minor additions to them, such as garages, have been exempted from the moratorium.

LAND-USE MORATORIA DISTINGUISHED FROM GENERAL POLICE POWER MORATORIA

Land Use Moratoria

The most common type of moratorium is on land use approvals. Land use moratoria are designed to preserve the status quo while planning or zoning changes are made: these moratoria are often known as "stopgap" or "interim" zoning. These enactments are appropriate mechanisms for addressing long range community planning and zoning objectives. Moratoria can also be imposed on other land use controls including subdivision plat review and issuance of building permits.

The New York zoning enabling laws do not contain any specific mention of "moratorium" or "moratoria." Early on in the history of zoning, however, the New York Court of Appeals gave some indication that *any* zoning regulation could temporarily and lawfully limit an owner's ability to use land profitably, so long as the regulation furthers the community's long-range planning goals.[2]

> ***"it would be a rather strict application of the law to hold that a city . . . cannot . . . take reasonable measures temporarily to protect the public interest and welfare until an ordinance is finally adopted. Otherwise, any movement by the governing body . . . would . . . precipitate a race of diligence between property owners , and the adoption later of the zoning ordinance would in many instances be . . . like locking the stable after the horse is stolen."***
> [Downham v. Alexandria]

By enacting a land use moratorium, the local

government temporarily suspends a landowner's right to build or to obtain development approvals while the community considers adopting changes to its comprehensive plan and/or its land use regulations. Quite often these contemplated changes will address new circumstances not dealt with in the municipality's current land use laws. A moratorium on development can preserve the *status quo* while the municipality updates its comprehensive plan or its zoning.

"Stopgap zoning" is addressed in a number of early zoning cases that arose in other states. In perhaps the most widely cited of these, *Downham v. City Council of Alexandria*,[3] the court stated, "it would be a rather strict application of the law to hold that a city, pending the necessary preliminaries and hearings . . . cannot, in the interim, take reasonable measures temporarily to protect the public interest and welfare until an ordinance is finally adopted. Otherwise, any movement by the governing body of the city to zone would, no doubt, frequently precipitate a race of diligence between property owners, and the adoption later of the zoning ordinance would in many instances be without effect to protect residential communities--like locking the stable after the horse is stolen."

In the case of *Lo Conti v. City of Utica, Dept. of Buildings*,[4] the Supreme Court, Oneida County recognized the validity of a moratorium in concept, but struck down the City of Utica's moratorium on building permits due to the city's failure to comply strictly with the notice provisions of the State enabling legislation. The judge aptly stated:

> "In order to prevent a race by property owners to obtain building permits when it has become common community knowledge that a zoning ordinance is being considered which may affect the uses to which they may put their property, municipalities have adopted interim or stop-gap ordinances which impose a moratorium on the issuance of certain types of permits during the pendency of the proposed new zoning ordinance. The validity of this type of ordinance has been upheld by the courts."

General Police Power Moratoria

Where immediate health and safety problems are at issue, the general "police power", not zoning, is the appropriate source of authority for a moratorium. The police power is the authority possessed by municipal governments to take action to advance the public health, safety and welfare. While land use regulation itself is an exercise of the police power, the term is more commonly employed in reference to other forms of municipal laws or ordinances.

A municipally-imposed moratorium on development activity can address inadequacies in public infrastructure, or deal with dire threats to the community health, safety or welfare. In *Belle Harbor Realty Corp. v. Kerr*,[5] the Court of Appeals upheld the revocation of a building permit due to an inadequate municipal sewer system. The court found that the revocation was a legitimate exercise of general police power and was not limited by constraints on zoning authority. The Court articulated a three-prong test to address temporary restrictions imposed by a municipality under the general police power in response to an immediate health and safety problem. To justify temporary interference with the beneficial use of property, the municipality must establish that:

> 1) It acted in response to a dire necessity;
> 2) Its action is reasonably calculated to alleviate or prevent a crisis condition; and
> 3) It is presently taking steps to rectify the problem.

"When the general police power is invoked under such circumstances it must be considered an emergency measure and is circumscribed by the exigencies of that emergency" said the Court.[6] The three-prong test may not apply when the landholder retains reasonable use of the property.[7]

In the case of *Charles* v. *Diamond*,[8] a landowner challenged a moratorium on sewer connections to the village sewer system which prevented him from developing an apartment complex. The moratorium, read in combination with another village law requiring that such buildings had to be connected to the village sewage system, effectively halted all apartment construction until the village corrected the deficiencies in its sewer system. Without reaching the merits, the Court of Appeals recognized:

> "A municipality has ample power to remedy sanitation problems including difficulties presented by inadequate treatment or disposal of sewage and waste. Inadequate systems of sewage disposal present not only ecological and aesthetic problems, but may pose direct and immediate health hazards. The 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. Temporary restraints necessary to promote the overall public interest are permissible. Permanent interference with the reasonable use of private property for purposes for which it is suited is not."[9]

The Court in *Charles v. Diamond* held that where a municipality first requires that new development hook-up to public sewers and then imposes a temporary restraint on residential sewer connections, the municipality can be sued for damages if it engages in unreasonable delay in improving its public sewer system and be assessed consequential damages resulting from such delay. Writing for the majority, Judge Jasen concluded:

> "[W]here the municipality has affirmatively barred substantially all use of private property pending remedial municipal improvements, unreasonable and dilatory tactics, targeted really to frustrate all private use of property, are not justified. The municipality may not, by withholding the improvements that the municipality has made the necessary prerequisites for development, achieve the result of barring development, a goal that would perhaps be otherwise unreachable."

In *Westwood Forest Estates, Inc. v. Village of South Nyack*,[10] the Court of Appeals struck down a village zoning regulation which prohibited the construction of apartments in the village. The zoning ordinance had been enacted in order to forestall any future problems with the village's inadequate sewerage system. The Court reasoned that the village could have addressed the immediate problem through more appropriate police power regulations affecting all users of the sewer system. Instead, the village chose to use its zoning power, improperly in the court's view, to single out a particular type of land use. The court found it impermissible to single out one landowner to bear a heavy financial burden because of a general condition in the community. In his opinion, Judge Breitel indicated that "a moratorium on the issuance of any building permits, reasonably limited as to time," would have been a more legally defensible approach for the village to have taken.

With these three decisions, the Court of Appeals

drew a clear distinction between emergency actions to address immediate health or safety problems, on the one hand, and zoning or land use actions intended to address long-term issues of growth and development, on the other. By distinguishing the police power issue from the zoning issue, the Court of Appeals sharpened the focus on the standards applicable to land use moratoria. Land use moratoria are appropriate mechanisms for addressing long-range community planning and zoning objectives. But where immediate health and safety problems are at issue, they are not a permissible approach. Instead, other police power controls must be used. Those controls, whether legislative or administrative in nature, must not single out particular types of land use, but must instead address the immediate problem itself, and in a way which is fair to all landowners.

"GROWTH-CAPPING" LAWS

"Growth-capping" laws are designed to limit, *but not to halt*, development, pending the upgrading of capital improvements in the community. These laws control development by allowing a pre-determined amount of growth within a defined period. The purpose of growth-capping laws is to assure that development does not outpace planned improvements. In contrast, a moratorium is designed to *halt* development for a certain period, to maintain the status quo.

The purpose of growth capping laws is to assure that development does not outpace planned improvements. By contrast, a moratorium is designed to halt development for a certain period, to maintain the status quo.

The landmark "growth-capping" decision is *Golden v. Planning Board of the Town of Ramapo*,[11] decided by the Court of Appeals in 1972. In its decision, the Court upheld the town's 18-year phased-development plan, which placed growth restrictions of varying durations on certain areas of the town. The restrictions could be lifted prior to expiration only if a developer were to provide certain public improvements during the interim period. The majority opinion did not employ the term "moratorium." Development was possible under certain conditions, so the law did not impose a moratorium. Nonetheless, the Court set forth a principle that would later be applied to moratoria as well: "where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth' . . . "

The town enacted a zoning amendment which prohibited residential subdivision plat approval until certain public infrastructure had first been installed either by the town or the developer by means of securing a special permit or a variance. To acquire a special permit, the developer was required to accumulate 15 points based on the provision of five essential facilities or services: (1) public sanitary sewers or approved substitutes; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) State, county or town roads-major, secondary or collector; and, (5) firehouses. The plan allowed the developer to provide the required services at his or her own expense; this enabled the developer to accumulate 15 points and receive approval of the special permit and subdivision plat. Without contributing towards these town's facilities, a developer might have to wait up to 18 years to obtain subdivision approval.

Phased growth was necessary because the town's "basic services and improvements are inadequate and their reasonable cost cannot be presently absorbed" by town residents. The court recognized that "[t]he undisputed effect of these integrated efforts in land use planning and development is to provide an over-all program of orderly growth and

adequate facilities through a sequential development policy commensurate with progressing availability and capacity of public facilities." Any delay in residential development occasioned by phased growth amendment was temporary. The Court concluded: "In sum, where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth' and hence, the challenged ordinance is not violative of the Federal and State Constitutions."

In 1989, the Town of Clifton Park adopted a "Phased Growth Law" that limited the number of building permits obtainable in any year in a designated development area to 20% of the total units approved for any given project. The development area encompassed roughly 10% of the town's total land area. By its terms, the law was to remain in effect until a particular highway interchange was to have been completed, but in no case could it exceed five years. Upon challenge, the Appellate Division, Third Department, held the law to be a legitimate exercise of the Town's zoning power. The court said it addressed a situation where there existed "ample evidence that the designated area has a major traffic problem and the new home construction in the area is the primary contributor to this congestion."[12]

"Phased growth" laws generally do not amount to a total prohibition on construction, and are mentioned here by way of contrast with true moratoria. The courts have held that the capping of development is a valid exercise of the zoning power when it is employed in a fair and reasonable manner, even if the limitation lasts longer than an outright moratorium would.

BASIC REQUISITES OF LAND USE MORATORIA

As stated above, the New York zoning enabling statutes contain no mention of the word "moratorium." In holding moratoria to be lawful, the cases have suggested that five (5) key elements are requisite for a legally defensible moratorium. The land use moratorium should:

1) have a reasonable time frame as measured by the action to be accomplished during the term;

2) have a valid public purpose justifying the moratoria or other interim enactment;

3) address a situation where the burden imposed by a moratorium is being shared substantially by the public at large;

4) strictly adhere to the procedure for adoption laid down by the enabling acts; and

5) have a time certain when the moratorium will expire.

1) **Reasonable Time Frame.**

The courts will look carefully to see that the terms of a moratorium express a relatively short but specific duration, and that the duration is closely related to the municipal actions necessary to address the underlying issues. The U.S. Supreme Court has recognized the difficulty of selecting a fixed time frame for moratoria.[13] However, courts have historically had little patience with municipal delay in carrying out the comprehensive planning, law adoption or facilities expansion for which the moratorium was enacted. The courts have disallowed moratoria where the time period was excessively long or unfixed.

In its 1974 decision in *Lake Illyria Corporation v.*

Town of Gardiner,[14] the Appellate Division, Third Department, struck down a moratorium. In order to halt development pending the adoption of a new comprehensive zoning ordinance, the Town had since 1968 annually enacted moratoria prohibiting any use of property except for residential purposes unless a variance was obtained. The plaintiff brought suit, challenging the validity of the latest local enactment renewing the moratorium. The Court's opinion stated:

> "The purpose of 'stop-gap' zoning is to allow a local legislative body, pending decision upon the adoption of a comprehensive zoning ordinance, to take reasonable measures temporarily to protect the public interest and welfare until an ordinance is finally adopted. Otherwise, the eventual comprehensive zoning ordinance might be of little avail."
>
> "While it might be deemed a proper exercise of power for the town to freeze building uses when the town is [a]ctively engaged in the enactment of a comprehensive zoning law, the present case demonstrates the potential abuse of such a process by long delay...., and throughout this period of time the only [m]eaningful progress towards the preparation of a comprehensive plan has taken place relatively recently...."
>
> "A course of conduct such as that followed by the Town herein is plainly contrary to the purpose of interim or 'stopgap' zoning. Under the present circumstances, the absence of justification for such an exercise of power renders this four-year delay unreasonable."[15]

Until the *Lake Illyria* decision, the courts had recognized the validity of moratoria for the purpose of a community's development of permanent new zoning regulations. *Lake Illyria*, however, made it a distinct requirement that, during the moratorium on land use approvals, the community must be actively engaged in the development of either a comprehensive plan or land use regulations.

In dealing with the issue of the reasonable duration of a moratorium in *Lakeview Apartments v. Town of Stanford*,[16] the Appellate Division, Second Department, in 1985 struck down the town's moratorium which had lasted more than five years because it exceeded a reasonable duration. What was unusual about the decision was that the length of time was held to be unreasonable even though the Town had made documented progress toward a permanent set of regulations. The Town showed that it had adopted a master plan in 1980 and had completed the preliminary draft of a zoning ordinance in 1983.

In the 1991 case, *Duke v. Town of Huntington*,[17] the Town had been developing a planning document, a Local Waterfront Revitalization Plan (LWRP), for many years when it enacted a moratorium prohibiting the construction of docks. Although it was originally to have expired within ten months, the moratorium was extended twice, to cover a total period of almost three years, triggering a court challenge. While recognizing the general usefulness of moratoria, the court nonetheless invalidated the Town's temporary restriction. The court took this action because the Town's long delay in developing a permanent LWRP, combined with a lack of real progress, made the delay occasioned by the moratorium on the shore owner's right to build a dock excessive and unconstitutionally void.

In *Mitchell v. Kemp*,[18] the Appellate Division, Second Department, upheld the finding of the Supreme Court, Dutchess County, that the Town of Pine Plains's five-year moratorium exceeded a reasonable period of time for enacting a comprehensive, new zoning regulation.

In *Ecogen, LLC v. Town of Italy*,[19] the court upheld

the Town's moratorium on wind energy projects. The moratorium had been in effect for over two years, but in view of the specific technical nature of the use involved, the court agreed to allow the Town an additional 90 days to either enact a comprehensive zoning plan or render a decision on the project sponsor's variance application.

What constitutes a reasonable duration for a moratorium, even where the municipality is fulfilling its duty to be working on a new plan or permanent legislation to address the issue at hand? Moratoria of six months, as well as of one year, have been upheld by the courts. It is unclear whether a moratorium lasting longer than a year would be considered reasonable, but that may depend, to an extent, on the subject matter addressed by the moratorium.

2) **Valid Public Purpose**.

The enactment of moratoria, like all exercises of the police power, must be justified by a valid public purpose. A moratorium on land uses or development will be considered a valid interim measure if it is reasonably designed to temporarily halt development while the municipality considers comprehensive zoning changes and the enactment of measures to specifically address the matters of community concern.

The moratorium must be enacted for a permissible purpose: to study and/or adopt a new plan or new regulations.

The purpose section of the local law or ordinance should state what the municipality hopes to accomplish during the moratoria. For example,

To develop or amend:

- A Comprehensive Plan
- Zoning Regulations
- Subdivision Regulations
- Site Plan Regulations
- Other Land Use Regulations

Or, to make improvements to:

- Road System
- Water or Sewer Infrastructure

The decision in *Lake Illyria Corporation v. Town of Gardiner*[20] has frequently been cited for the proposition that a community must be actively engaged, among other things, in the revision of its comprehensive plan during a land use moratorium. A comprehensive plan addresses issues of growth and development on a community-wide basis. In the *Lake Illyria* case, the Third Department pointed out:

> " The purpose of 'stop-gap' zoning is to allow a local legislative body, pending decision upon the adoption of a comprehensive zoning ordinance, to take reasonable measures temporarily to protect the public interest and welfare until an ordinance is finally adopted. Otherwise, the eventual comprehensive zoning ordinance might be of little avail."

In *Oakwood Island Yacht Club* v. *City of New Rochelle*, the City of New Rochelle adopted a six month moratorium on building permits to halt development on an island within the city limits. The city halted the development because it had applied for a State grant to purchase the island. Petitioners, who had received site plan approval, applied for but were denied a building permit because the six month moratorium was in effect. The supreme court, in a decision affirmed by the Court of Appeals, held that the moratorium unconstitutionally deprived the owner of the property due process of law. Although the court recognized that a municipality may lawfully enact "stop-gap" legislation pending a revised comprehensive plan, the city's desire to acquire

the property was not a valid public purpose for a moratorium. The court said: “There is neither case authority nor statutory authority for adopting an ordinance to prevent a property owner from building upon his property because the municipality in the future may seek to obtain it by condemnation.”[21]

In order to update their comprehensive plans to address the subject of cellular telephone facilities, some communities enacted moratoria on the processing of cellular applications pending completion of the planning process and the enactment of new regulations pertaining to towers. The public purpose for enacting moratoria on cellular facilities was important to courts in deciding cases on their validity. In the case of *Cellular Telephone v. Town of Harrison,*[22] a 90-day moratorium on review or approval of cellular telephone antennae facilities was upheld as a reasonable measure designed to give the town a short period to enact zoning changes to address the increasing number of cellular telephone antenna applications. By contrast, the Appellate Division in *Cellular Telephone v. Village of Tarrytown,*[23] invalidated a moratorium on cellular telephone towers because it was not adopted for a proper and reasonable purpose. The court found that local officials were motivated by public opposition and the unsubstantiated fears of health risks from telecommunications signals, rather than a land use planning purpose.

3) **Balancing benefits and detriments of the moratorium to the municipality.**

The advantages to the municipality must outweigh the potential hardships to landowners.

The municipality should be prepared to show that the burden imposed by a moratorium is being shared substantially by the public at large, as opposed to being visited upon a minority of landowners.

This principle was explained by the Court of Appeals in *Charles v. Diamond,*[24] a case that dealt with restrictions on residential sewer connections. The court recognized that, in judging a moratorium on development, "the crucial factor and perhaps even the decisive one is whether the ultimate economic cost of the benefit is being shared by the members of the community at large, or rather, is being hidden from the public by the placement of the entire burden upon particular property owners".

In the *Charles* case, the Court concluded that "only where the municipality has acted, or refused to act, and the social cost of a benefit has been placed entirely upon particular landowners rather than spread throughout the jurisdiction, does it become necessary to review discretion and set aside unconstitutional confiscation . . . no single factor, by itself controls the determination of whether a particular municipal action is reasonable.”

4) **Strict adherence to procedures for the enactment of local laws and ordinances.**

Whether enacted as local laws or ordinances, moratoria must strictly adhere with the procedural requirements of the Municipal Home Rule Law[25] or the rules for adoption or amendment of zoning in the State zoning enabling acts. These rules are found in Town Law sections 264 and 265, Village Law section 7-706 and 7-708, and in individual city charters. When enacting moratoria, municipalities should follow the procedures for enactment including newspaper notice, public posting, county referral, public hearing and filing after adoption of a local law.

Moratoria on zoning approvals are subject to referral to the county planning agency under General Municipal Law section 239-m. In the case of *B & L Development v. Town of Greenfield*[26], the court invalidated a one-year moratorium on the issuance of building permits and construction approvals because the town did not follow the procedural requirements for amending zoning. The

court held that the moratorium law was subject to all of the statutory procedural requisites of zoning laws, including county referral pursuant to General Municipal Law section 239-m and notification of adjacent municipalities pursuant to Town Law section 264.

In the 1997 case of *Caruso v. Town of Oyster Bay*,[27] the court held that the town board had no jurisdiction to adopt a local law establishing a moratorium on the issuance of building permits for new home construction in a defined area of the town. The Town had failed to properly refer the law first to the county planning commission, as required by General Municipal Law section 239-m.

Where the moratorium acts as an amendment to zoning, it must be referred to the county planning agency under General Municipal Law section 239-m.

In *Temkin v. Karagheuzoff*,[28] the Appellate Division invalidated a "stop-gap" zoning amendment that effectively imposed a moratorium on the issuance of building permits for new nursing homes. Although the moratorium was enacted to maintain the status quo in case the zoning regulations were changed, the court held that the Board of Estimate could not enact even a short-term interim zoning resolution without complying with the NYC Charter, which required the recommendation of the City Planning Commission. The amendment was struck down because the court found that the City of New York failed to follow proper procedures in enacting the stop-gap zoning. The Court of Appeals affirmed,[29] stating that "there is no question here of the right of a government to adopt interim or stop-gap zoning. The only contention is that when such resolutions are adopted, they must be adopted in accordance with the law."[30]

Not all moratoria on land use approvals can be categorized as zoning. Where non-zoning moratoria are adopted by local law, the procedures of Municipal Home Rule Law sections 20 through 27 must be followed.[31]

One example is the moratorium on the processing or approval of subdivision plats by planning boards. Of particular concern is that the State subdivision statutes provide for default approval of a subdivision if the planning board fails to meet certain time frames. A moratorium which suspends action on subdivision applications may delay action beyond the time frames. Therefore, it is has become common practice for municipalities to adopt the moratorium by a local law which supersedes and suspends the applicable default approval provisions in Town Law or Village Law.

In 1987, the Court of Appeals dealt with a moratorium on subdivision approvals in the landmark case of *Turnpike Woods, Inc., v. Town of Stony Point.*[32] The town had adopted a local law temporarily suspending the authority of the town planning board to approve subdivision plat applications. Following refusal by the planning board to consider his application, a developer sued for a default approval. Under Town Law section 276 default approvals may be secured by the developer if the planning board fails to make a decision on a subdivision application within the time period required by the statute. The developer claimed the town had not followed proper local law adoption procedures under the Municipal Home Rule Law in attempting to supersede that default approval provision. The Court of Appeals agreed with the developer and struck down the moratorium law.

Moratoria are "Type II Actions" under the State Environmental Quality Review Act (SEQRA) regulations, which means that SEQRA does not apply to the enactment of moratoria (6 NYCRR section617.5(c)(30)). The proposed adoption of a

The State Environmental Quality Review Act (SEQRA) does not apply to moratoria.

moratorium does not require a determination of significance or the preparation of any other SEQRA documents.

5) **Time certain for expiration of moratorium**. The courts have required a time certain for the expiration of a moratorium. In *Russo* v. *New York Stale Department of Environmental Conservation,*[33] it was held that where there was a moratorium on the alteration of wetlands for over three years and no indication as to when it would end, *the court could inquire as to the constitutionality of the moratorium;* the court said that the duration cannot be unreasonable and ordered DEC to set a date certain for the termination of the moratorium on the alteration of wetlands.

VARIANCES FROM THE MORATORIUM

In addition to the procedural rules for *enacting* a moratorium, the courts have addressed the question of the procedure to be followed *during* a moratorium.

A moratorium law often contains a mechanism that allows landowners to apply for relief from the moratorium. If the moratorium affects zoning, appeals from the moratorium are taken to the zoning board of appeals using the statutory standards for granting use or area variances. In the case *Held v. Giuliano,*[34] the Appellate Division, held that applications for variances from an interim zoning ordinance must meet the same statutory standards for variances as though the interim zoning was permanent.[35]

It is quite common in moratorium laws that variances from the strict terms of the moratorium are granted by the *governing board* rather than by the zoning board of appeals. If the governing board will be considering variances in moratoria related to zoning instead of a board of appeals, the moratoria must supersede State statutes pertaining to the variance authority of boards of appeals. The drafters of land use moratoria should bear in mind that this procedure will require proper use of the supersedure power, as the enabling laws provide that only the board of appeals may grant variances.

THE "TAKINGS" ISSUE

As we have seen, the courts have established strict rules, both as to the procedural as well as to the substantive requisites of moratoria. The substantive rules might be said to embody a particular adaptation of the general principle that any enactment affecting private property rights must "bear a substantial relation to the public health, safety, morals, or general welfare."[36] If, however, a land use regulation operates to deprive the owner of all beneficial economic use of the property, may that owner be entitled to monetary compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution?

Early cases recognized the principle of *inverse condemnation* (i.e., a regulatory taking).[37] Until 1987, however, the courts had not considered *temporary* land use controls (such as moratoria) to amount to a deprivation of all beneficial use in the property. In cases where a regulation went "too far," and impacted an owner unfairly, the remedy was to strike down the local enactment and allow the owner to build.[38] In 1987, the United States Supreme Court changed that rule with its decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[39] *First English* involved a challenge, brought against a county's moratorium on the construction or reconstruction of buildings within an "interim flood protection area." The moratorium effectively made it impossible for the church to rebuild a campground that had been previously destroyed by a flood.

In *First English*, the U.S. Supreme Court held for the first time that temporary takings that deny a landowner all use of his/her property are not different in kind from permanent takings. Once a court determines that a taking has occurred, it must award damages for the period of time the restrictive regulation was in effect.

Whether a moratorium is a compensable taking, as it relates to specific property, depends on the facts of each case.

Significantly, the Supreme Court left it to the trial level courts to determine in each case whether a temporary taking has actually occurred, i.e., whether the regulation denied the owner all use of his/her property. The latter principle was further clarified by the Court in its 1992 decision in *Lucas v. South Carolina Coastal Council*,[40] where it held that a taking could only occur in "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted."

Could land use moratoria amount to compensable takings of property according to the rules established in *First English* and *Lucas*? Theoretically, yes, but, in practice, such determinations will rest on the facts of each case.

In its 2002 decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[41] the Supreme Court firmly rejected the argument that a temporary moratorium on development, enacted for reasonable purposes, necessarily constitutes a deprivation of the owner's beneficial use of his or her property. In *Tahoe-Sierra*, an interstate regional planning agency had adopted moratoria on all construction in certain areas surrounding Lake Tahoe, pending the adoption of a permanent land use plan and revised development restrictions designed to protect the water quality of the lake. In ruling against the claims of landowners, the Court held that one cannot separate out a finite stretch of time in the life of a parcel and compensate the owner simply because the owner is deprived of the property's beneficial use during that stretch of time alone. Instead, the analysis must be the same as that which is applied in all regulatory takings arguments: the courts must weigh all the relevant factors affecting the "parcel as a whole." In *Tahoe-Sierra*, the Supreme Court held that a moratorium, like most other land use regulations, is subject to an inquiry that considers the circumstances of each case. Moratoria are not, therefore, *categorically* takings. Indeed, many parcels will emerge from a moratorium with *enhanced* value, owing to the better land use regulations then in place.

In evaluating whether a land use regulation takes all economic value of property, the language used by the Court of Appeals in *Golden* is worth noting: "The fact that the ordinance limits the use of, and may depreciate the value of the property will not render it unconstitutional . . . unless it can be shown that the measure is either unreasonable in terms of necessity or the diminution in value is such as to be tantamount to a confiscation . . . "

The New York courts appear to have applied a case-specific balancing analysis even prior to *Tahoe-Sierra*. Since the *First English* case was decided, at least one community's moratorium has been upheld against a takings claim. Quoting language from earlier cases, the Appellate Division, Second Department, stated that a moratorium adopted by the Village of Irvington constituted "'a reasonable measure designed to temporarily halt development while the [Village] considered comprehensive zoning changes and was therefore a valid stopgap or interim measure.'"[42] The moratorium was held not to effectuate an unconstitutional taking of private property.

However, in *Seawall Associates v. City of New York*,[43] the Court of Appeals *did* hold a moratorium to be an unjust taking. The City of

New York had adopted a local law placing a five-year moratorium on conversion, alteration or demolition of single-room-occupancy units in multiple dwellings. The law also required the owners to restore such units to habitable conditions and to lease them at controlled rents for an indefinite period. The Court of Appeals held that the law effectuated an unconstitutional taking under the Fifth and Fourteenth Amendments. The Court viewed the NYC law as locking the owners of "SRO's" into maintenance of a use that did not allow them any ability to realize an economic return on their investment.

If a landowner feels that a moratorium law as applied constitutes a taking, the landowner must first exhaust all available administrative procedures before bringing a lawsuit. In the 1990 case of *Hawes v. State*,[44] the State Legislature had enacted a moratorium on development along Beaverdam Creek in the Town of Brookhaven, to allow the Department of Environmental Conservation time to study the creek for possible inclusion in the State's Wild, Scenic and Recreational Rivers System. A landowner filed an action claiming the moratorium effectuated an unjust taking. The Appellate Division, Second Department, dismissed the case, stating that it was possible for the owner to have applied to DEC for a permit first, before going to court. The permit, if granted, could have exempted the parcel from the moratorium on the basis that the proposed development would not be contrary to the policy of the Wild, Scenic and Recreational Rivers Act. Since the owner had not so applied, the taking claim could not be heard.

VESTED RIGHTS

Landowners who are aware that a moratorium is under consideration may act promptly to acquire "vested rights" in a use before the moratorium takes effect. Under ordinary circumstances, a moratorium enacted in good faith and according to proper procedures is viewed much the same as any zoning amendment: a property is bound by the moratorium the day it takes effect, unless the property owner has acquired a "vested right" to build or use the property beforehand.[45] A moratorium may not be used to stop building operations begun under a valid building permit and which continued in good faith when the property owner had secured vested rights.

Under what circumstances, then, might an owner be able to claim a right to build or to use the property according to the law as it existed prior to the effective date of a moratorium? The Court of Appeals has established a rule regarding vested rights that applies to land use regulations in general. The rule was first articulated in *People v. Miller*,[46] and has most definitively been restated by the Court in *Ellington Construction Corp. v. Zoning Board of Appeals of the Incorporated Village of New Hempstead*,[47] to wit:

> "where a more restrictive zoning ordinance [ie- a moratorium] is enacted, an owner will be permitted to complete a structure or a development which an amendment has rendered nonconforming only where the owner has undertaken **substantial construction** and made **substantial expenditures** prior to the effective date of the amendment."

The application of this "substantial construction, substantial expenditures" test will, of course yield results particular to each set of facts. In two cases in particular, the lower courts declined to find vested rights. In *Pete Drown, Inc. v. Town Board of the Town of Ellenburg*,[48] the Town, which had no zoning regulations, passed a local law establishing a moratorium on the construction of new commercial buildings. About a year later the moratorium was replaced by a comprehensive zoning law that prohibited the incineration of commercial or hazardous waste. During the moratorium a landowner had spent more than $850,000 on a project to site a commercial waste incinerator, including purchase and storage of the

incinerator itself, pending the lifting of the moratorium and approval of the project. In a lawsuit, the owner claimed to have acquired vested rights to operate the incinerator. The Appellate Division disagreed and held that there had been no substantial construction or change to the land itself and that there was no showing that the owner could not recoup its expenditures in the marketplace--presumably by selling the stored incinerator. While the absence of substantial construction in and of itself would have been sufficient to defeat the owner's claim of vested rights, the court also held that the owner's expenditures, recoverable as they were, did not constitute the "serious loss" required by the courts in prior cases.

In *Steam Heat, Inc. v. Silva*,[49] the Appellate Division, Second Department, upheld the New York City Board of Standards and Appeals's determination that a landowner had not accomplished substantial completion of his building before a moratorium went into effect, even though there was evidence that he had made some expenditures. The Court sustained the finding that the construction which occurred was of the "most basic and impermanent nature with rudimentary detailing and flimsy and inexpensive materials" and therefore insubstantial.

DRAFTING A MORATORIUM LAW

By now, there is sufficient case law on the subject of moratoria to furnish guidance to those community officials desiring to draft one. The following precepts should be followed:

(a) Adopt the moratorium in the form of a *local law*, the simplest and strongest form of municipal enactment, even if the existing zoning regulations are in the form of an ordinance. Although it is possible to amend an existing ordinance via a new ordinance in cities and towns, the use of a local law will avoid any uncertainty surrounding basic legal authority.

(b) In a municipality with an existing zoning ordinance or local law, the moratorium should be treated as an amendment to that ordinance or local law. The applicable procedural requirements--e.g., notice, hearing and possible county referral--must be strictly followed.

(c) The moratorium should clearly define the activity affected, and the manner in which it is affected. Does the moratorium affect construction itself? Does it affect the issuance of permits? (The permitting official will want to know this.) Does it affect actions by boards or commissions within the municipality? May project review continue, or must it, too, be stopped?

(d) If the moratorium supersedes any provision of either the Town Law or the Village Law, then the moratorium must be adopted by local law, using Municipal Home Rule Law procedures. It must also state, with specificity, the section of the Town or Village Law being superseded. In particular, where the moratorium suspends subdivision approvals, it must be made clear in the moratorium law that the "default approval" provisions of the subdivision statutes of the Town or Village Law (as the case may be) are superseded.

(e) Establish a valid public purpose for the moratorium with a preamble that recites the nature of the particular land use issue, as well as the need for further development of the issue in the community's comprehensive plan and/or in its current land use regulations. Refer to the fact that time is needed for community officials to comprehensively address the issue without having to allow further development during that time. Such a statement will help make it clear that the benefits to the community outweigh the potential burden to the landowners.

(f) Be sure the moratorium states that it is to be in effect for a defined period of time. The moratorium should be for a time no longer than

absolutely necessary for the municipality to place permanent regulations in effect.

(g) The moratorium should include a mechanism allowing affected landowners to apply to a local board for relief from its restrictions, or it should contain a clear reference to the fact that an owner may make use of the existing variance procedures under the current zoning regulations. If a board other than a zoning board of appeals will execute this authority, the moratorium should enacted using the supersession authority (see "(d)" above).

CONCLUSION

As communities continue to grow, the pressures for further development may well increase. Ideally, a community's comprehensive plan and its land use regulations will be adequate to deal with those pressures. But the ideal is rarely the fact. Such pressures may lead to calls for a halt to particular types of development, or to development in particular areas, until municipal leaders have had a reasonable opportunity to formulate a comprehensive regulatory approach. Moratoria will, therefore, continue to be adopted. It is hoped that this publication, along with others in such areas as comprehensive planning, zoning and subdivision control, will serve as a useful guide to those community officials involved in the process.

ENDNOTES

1. *Charles v. Diamond*, 41 N.Y.2d 318, 324 (1977).

2. See *People ex rel. St. Albans-Springfield Corp. v. Connell*, 257 N.Y. 73 (1931); *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222 (1938).

3. 58 F.2d 784 (D.C. Va., 1932).

4. 52 Misc.2d 815 (Sup. Ct., Oneida Co., 1966). The validity of this type of moratoria had been upheld by the Courts even earlier. In sustaining a 60 day moratorium in *Hasco Electric Corp. v. Dassler*, 143 N.Y.S.2d 240 (Sup. Ct., West. Co., 1955), the Supreme Court stated that it "was inclined to the opinion that the local legislative body was vested with the authority to enact reasonable stop-gap or interim legislation prohibiting the commencement of construction for a reasonable time during consideration of proposed zoning changes."

5. 35 N.Y.2d 507 (1974).

6. 35 N.Y.2d at 512.

7. "Mere financial loss is not enough, but the restriction on use must be so great as to deprive the owner of any reasonable use of the property to which any owner would be generally entitled to put the property." *Charles v. Diamond* 41 N.Y.2d 318, 326 (1977).

8. 41 N.Y.2d 318 (1977).

9. 41 N.Y.2d at 323-324 (citations omitted).

10. 23 N.Y. 2d 424 (1969).

11. 30 N.Y.2d 359 (1972).

12. See *Albany Area Builders Association v. Town of Clifton Park*, 172 A.D.2d 54 (3rd Dept., 1991).

13. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 341-342 (2002): "It may well be true 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 [Tahoe Regional Planning Agency] to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable."

14. 43 A.D.2d 386 (3rd Dept., 1974).

15. 43 A.D.2d at 388.

16. 108 A.D.2d 914 (2nd Dept., 1985).

17. 153 Misc.2d 521 (Sup. Ct., Suffolk Co., 1991).

18. 176 A.D. 2d 859 (2nd Dept., 1991).

19. 438 F. Supp.2d 149 (W.D.N.Y., 2006).

20. 43 A.D.2d 386 (3rd Dept., 1974).

21. See *Oakwood Island Yacht Club, Inc. v. City of New Rochelle*, 59 Misc.2d 355 (Sup. Ct., Westch. Co., 1969), *affirmed* 36 A.D.2d 796 (2nd Dept. 1971), *affirmed* 29 N.Y.2d 704 (1971).

22. 11/30/95 N.Y.L.J. p. 35 col. 3 (Sup. Ct. Westchester Co.)

23. 209 A.D.2d 57 (2nd Dept. 1995).

24. 41 N.Y.2d 318 (1977).

25. Municipal Home Rule Law section 10 and sections 20 -27.

26. 146 Misc.2d 638 (Sup. Ct., Saratoga Co., 1990).

27. 172 Misc.2d 93 (Sup. Ct., Nassau Co., 1997).

28. 43 A.D.2d 820 (1st Dept. 1974) affd 34 N.Y.2d 324 (1974).

29. 34 N.Y.2d 324 (1974).

30. 34 N.Y.2d at 328.

31. See *Pete Drown, Inc. v. Tn. Bd. of the Tn. of Ellenburg*, 229 A.D.2d 877 (3rd Dept., 1996).

32. 70 N.Y.2d 735 (1987).

33. 55 A.D.2d 935 (2nd Dept. 1977)

34. 46 A.D.2d 558 (3rd Dept., 1975).

35. Those standards are now set forth in the State enabling statutes, General City Law section 81-b, Town Law section 267-b, Village Law section 7-712-b. The courts will apply them in the same manner as for variances in general. See *Montgomery Group, LLC v. Town of Montgomery*, 4 A.D.3d 458 (2nd Dept., 2004).

36. See *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

37. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

38. See *Agins v. Tiburon*, 24 Cal.3d 266 (Sup. Ct. of Calif., 1979), aff'd on oth. grds., 447 U.S. 255 (1980).

39. 482 U.S. 304 (1987).

40. 505 U.S. 1003 (1992).

41. 535 U.S. 302 (2002).

42. See *119 Development Associates v. The Village of Irvington*, 171 A.D.2d 656 (2nd Dept., 1991).

43. 74 N.Y.2d 92 (1989), *cert. den.*, 493 U.S. 976 (1989).

44. 161 A.D.2d 745 (2nd Dept., 1990); see also, *Timber Ridge Homes at Brookhaven, Inc., v. State*, 223 A.D.2d 635 (2nd Dept., 1996).

45. See *Matter of West Lane Properties v. Lombardi*, 139 A.D.2d 748 (2nd Dept., 1988); *Home Depot, U.S.A., Inc. v. Village of Rockville Centre*, 295 A.D.2d 426 (2nd Dept., 2002).

46. 304 N.Y. 105 (1952).

47. 77 N.Y.2d 114, 122 (1990) (emphasis added). See also *Masi Management, Inc. v. Town of Ogden*, 180 Misc.2d 881 (Sup. Ct., Monroe Co., 1999).

48. *Supra*, note 9.

49. 230 A.D.2d 800 (2nd Dept., 1996).