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### ***Abstract***

This instructional paper gives local leaders an overview of ways in which to implement a moratorium on development in their communities. The paper covers such topics as: defining moratoria on development, the purpose of creating a moratorium on development, how and when to implement the moratorium, the authority under which communities are able to implement the moratorium, a description of what limitations and concerns may come up, and examples of municipalities putting moratoria into action.

### ***Resource***

#### **MORATORIUM ON DEVELOPMENT**

#### **SERIES III: Innovative Tools and Techniques, Issue Number 1**

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#### **DEFINITION**

A moratorium on development is a local law or ordinance that suspends the right of property owners to obtain development approvals while the community takes time to consider, draft and adopt land use plans or rules to respond to new or changing circumstances not adequately dealt with by its current laws. A moratorium is sometimes used by a community just prior to adopting its first comprehensive plan and zoning code.

Development moratoria may be general or specific. A general moratorium imposes a ban on the consideration and approval of all development and building applications in the community. Hardship exemptions may be provided and certain actions exempted; otherwise, all development applications for subdivision, site plan, special

permits, wetland permits and building permits are suspended until new land use regulations are adopted.

A specific moratorium may prevent development approvals in a particular geographic area or of a certain type. Specific moratoria have been passed, for example, to suspend development approvals on an island, owned by one person. Similarly, moratoria have suspended the right to process proposals for nonresidential or multifamily construction. They have been enacted to affect only the construction of docks, in one instance, or cellular telephone antennas, in another.

## **PURPOSE**

A moratorium on development preserves the status quo for a reasonable time while the municipality develops and adopts a land use strategy to respond to new or recently perceived problems. The moratorium prevents developers and property owners from rushing to develop their land under current land use rules that the community is in the process of changing. By so doing, it helps to accomplish the purpose of the new rules by giving them the broadest possible applicability and preventing development that is inconsistent with them.

In a community with no comprehensive plan or zoning, where development pressures are mounting quickly, a development moratorium serves the same purpose. In this instance, developers are prevented from making land use choices for the community until the new plan and zoning code are put in place.

## **WHEN**

Local legislatures adopt moratoria in two situations. First, when they decide to adopt their first zoning code or comprehensive plan, or to significantly amend the existing code or plan, they may adopt a moratorium on all development until the new zoning code or plan is enacted. Second, when localities are confronted by a new or recently understood problem that may require an amendment to a particular zoning provision or the addition of new zoning provisions, they may adopt a moratorium on development projects that relate to that particular problem.

Moratoria on development may be used, for example, prior to the adoption of a local overlay zone, a new subdivision ordinance, the designation of a critical environmental area or the adoption of an environmental constraints ordinance. The moratorium prevents the negative impacts of the wrong type of development that the new ordinance or regulation is designed to prevent or mitigate.

## **AUTHORITY**

There is no specific statutory authorization to adopt a moratorium on development. The courts have pointed to two separate sources of authority, while consistently confirming the municipal power to enact moratoria.

For communities that have adopted a comprehensive plan and a zoning code, the adoption of a moratorium can be considered an implied power. The community is implicitly authorized to take those actions it deems reasonable to encourage the most appropriate use of the land throughout the municipality. In light of new or changing circumstances, a moratorium may be necessary to allow the community to achieve this express purpose of zoning and land use planning.

For communities that have not yet adopted a comprehensive plan and zoning code, the authority to adopt a moratorium is either implied in their delegated authority to adopt zoning or it is implied in the municipal police power to protect the community in advance of zoning. Some courts have held that a development moratorium is a form of zoning, implying that it is part of the statutorily delegated power to adopt and amend zoning provisions. Alternatively, a community's authority to adopt a moratorium has been referred to as a police power measure appropriate to prevent conditions that threaten the community's health, safety, welfare and morals.

## **IMPLEMENTATION**

A moratorium is, from one perspective, the most extreme land use action that a municipality can take because it suspends completely the rights of owners to use their property. Seen in this light, it is advisable to precede the adoption of a moratorium by findings that confirm the necessity of this action. What are the conditions that mandate the imposition of a moratorium? Are no other alternatives, less burdensome on property rights, available? Why are the existing land use plans and ordinances not adequate? What recent circumstances have occurred that justify the adoption of the moratorium? How serious and urgent are these circumstances? What hard evidence is there to document the necessity of the moratorium?

When adopting a moratorium, the municipality may set forth how the situation that gave rise to the moratorium is to be dealt with. What local bodies are responsible? What studies are to be done? What resources are being made available to complete those studies? Can deadlines be established for various steps in the process? The more specific and legitimate this plan and timetable are, the more likely the moratorium will be found to be reasonable.

Based on this action plan and timetable, a date can be selected for the expiration of the moratorium. A moratorium can be extended if the timetable cannot be met; however, the reasonableness of the action is enhanced by setting a date for expiration that is legitimate under the circumstances.

A moratorium should be adopted in conformance with all procedures required of any zoning or land use action, including notice, hearing, the formalities of adoption and filing. While a moratorium does not require an environmental review under the State Environmental Quality Review Act, if it affects adjacent municipalities or county facilities, it may be subject to review by those governments before it can be formally adopted.

It may be appropriate to exempt certain types of development from the application of the moratorium. These might include construction applications that have been

approved and begun but where the developers' rights to proceed have not legally vested. Additionally, actions such as area variances or minor subdivision approvals may be allowed without compromising the integrity of the new strategy being developed.

General state law requires local agencies to follow specific procedures and to adhere to strict time tables in reviewing and approving certain applications. This is so, for example, when approving subdivision and site plan applications. In some instances, projects are deemed to be approved if the agency does not act within the stipulated period. These are known as default provisions. One New York appellate court has held that a moratorium automatically suspends statutory time periods and default provisions. To be certain, however, that these time requirements and default provisions do not apply when a moratorium is adopted, the local legislature may stipulate that each specific time period and all default provisions applicable to the development approvals and permits suspended by the moratorium are superseded by the local law adopting it.

## **LIMITATIONS AND CONCERNS**

Since development moratoria affect property rights so severely, they must be reasonable or run the risk of being challenged, voided by the courts and, perhaps, resulting in a damage award against the locality. Reasonableness is best established if the community can document that it is facing a true emergency. Several court decisions sustaining moratoria refer to the "dire necessity" that justifies them. Such a necessity arise not only when health and safety risks are confronted, but also when the community is facing a significant new land use problem that its existing regulations were not designed to handle.

For the same reason, when specific action plans and timetables are established to deal with the necessity or emergency, the reasonableness of the locality's moratorium is demonstrated. Similarly, a community needs to make reasonable progress in carrying out the plan and adhering to the schedule so its actions are seen to be reasonable. Moratoria that have been extended for up to three years have been sustained by a showing that the community was diligently pursuing its plan and timetable and shorter moratoria have been voided because the community was making little or no progress. In the same way, the plan must be calculated to deal directly with the necessity or emergency at hand; otherwise, its reasonableness may be questioned.

Moratoria do not apply to approved projects where the developer has completed construction or has completed substantial construction in reliance on a development approval or permit. Such developers are said to have vested rights in their permits and to be immune from changes in applicable regulations. Other property owners, who have made less progress, are said to have no legitimate or enforceable expectation that the rules applicable to the development of their land might not change in the interest of protecting the public health, safety or welfare.

## **CITATIONS:**

1. In *Duke v. Town of Huntington*, 153 Misc. 2d 521, 581 N.Y.S.2d 978 (Sup.Ct.,Suffolk Co., 1991), the property owner challenged a moratorium prohibiting construction of any docks. The court held the moratorium unreasonable under the circumstances.
2. In *B & L Development Corp. v. Town of Greenfield*, 146 Misc. 2d 638, 551 N.Y.S.2d 734 (1990), the court struck down a one year moratorium on all building permits and land use approvals including subdivision and site plans. The court found that in adopting the moratorium, the Town had failed to notify the county government under General Municipal Law § 239-m and adjacent communities under Town Law § 264 and to follow its own requirements for adopting zoning provisions.
3. In *Cellular Telephone Co. v. Tarrytown*, 209 A.D.2d 57, 624 N.Y.S.2d 170, (2nd Dep't, 1995) the court struck down a moratorium prohibiting the construction of cellular antenna.
4. The authority of local governments to supersede general state law can be found at Municipal Home Rule Law § 10(1)(ii)(d)(3). Provisions that must be followed to properly supersede a general state law are found at Municipal Home Rule Law §22(1) and discussed in *Turnpike Woods v. Town of Stony Point*, 519 N.Y.S.2d 960.

#### **REFERENCES:**

1. Moratoria, Legal Memorandum, NYS Department of State, Office for Local Government Services, 162 Washington Ave., Albany, NY 12231; (518) 473-3355.

#### ***USE CAUTION WHEN ADOPTING MORATORIUM ON DEVELOPMENT***

*While the Town of Huntington was preparing a Local Waterfront Revitalization Plan, it enacted a moratorium prohibiting construction of any docks until 60 days after the adoption of the Waterfront Plan. After seven years, however, the plan was still in an "embryonic stage" with "no expectation of one in the indefinite future." A waterfront property owner obtained permits to construct a dock from the Department of Environmental Conservation and the Army Corps of Engineers, but was denied a local building permit because of the moratorium.*

*In his challenge to the local law, the court struck down the moratorium as unreasonable under the circumstances. The court recognized the right of the municipality to act in times of "dire necessity." However, the fact that the Town had been "working" on its waterfront plan for seven years was a controlling circumstance in its decision to invalidate the moratorium.*

*In Tarrytown, New York, a moratorium was adopted to prohibit the construction of cellular telephone antennas. When the moratorium was adopted, the Village admitted, in its findings, that there was no hard evidence that cellular telephone transmission facilities are harmful to human health or safety. It found, instead, that citizens perceive that radio frequency emissions may adversely affect their health. When the moratorium was challenged, the court noted that "a municipality may not invoke its police powers solely as a pretext to assuage strident community opposition."*