



Land Use and Development Information Memo

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MORATORIA: A CONTROVERSIAL LAND USE TOOL

Increasingly, local governments throughout the State are using a land use tool that has had widespread application in the New York metropolitan area and the Hudson Valley – the moratorium. Hailed by those who want to slow down growth and feared by supporters of development, the rules governing the use of this tool are not always well understood.

Most municipalities examine their land use controls infrequently. Unfortunately, land use patterns are constantly changing; in some areas slowly, in others more rapidly. Some of these changes are a result of demographics, some arise from economic trends and others have no easily identifiable cause. The result is land use rules that are a mismatch with the community's needs and desires.

In the Capital District, for instance, how many communities are prepared to address the changes that may result from the privatization of the Harriman Office Campus or the so-called "Tech Valley" initiatives? Other communities may find a sudden interest in waterfront development or the arrival or departure of a large employer may dramatically change land use patterns.

More and more, communities are seeking to take control of their destinies and establish a framework for future development. Whenever a community becomes serious about amending its land use laws and changing the "rules of the

game," one of the obvious questions is what will happen in the interim period until that happens?

Changing land use rules can be a cumbersome process. Aside from achieving a consensus on the change, there are many procedural requirements that must be met. A community may have to update or adopt a comprehensive plan and conduct environmental impact reviews and public hearings. As a result, the changes will certainly take months and may even drag into years.

Sensing the possibility of a change, land owners and developers may want to take advantage of existing land use rules to get project approvals. Due to the delay between concept and implementation, the objectives of the new land use rules can be seriously undermined by projects that are already in the pipeline or rushed into the pipeline in a race to beat the clock.

One approach to this dilemma is the implementation of a moratorium. The moratorium is a legal way of calling a time out on land use development in areas where the rules may change. It freezes the progress of projects for a period of time. In theory, that period of time is used by the locality to make decisions on new land use rules and implement those decisions. When the processing of the project review becomes "unfrozen" there are a new set of land use rules that apply. Some projects

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that were in the pipeline may well be able to proceed, albeit somewhat delayed, while others may have to undergo major modifications or be abandoned altogether.

Since moratoria are extreme measures, they require a delicate balancing of interests - the interests of land owners to develop their property according to an established set of rules and the interests of the locality to control and steer land use in a direction that benefits the community as a whole. The law has set certain outside parameters on the use of a moratorium that must be observed. If these are not met, a municipality risks having the moratorium succumb to a legal challenge. But decision makers would be well advised that pushing to the outer boundaries of those limits, even if legally supportable, may yield a grossly unfair result.

Aside from the desire of most local officials to act fairly, there are other good reasons to avoid taking extreme actions. Major changes to land use rules will almost always require some consensus in the community. If they are implemented without such consensus they run the risk of being reversed when the composition of the governing board changes.

The following are the basic elements that a community must adhere to when enacting a moratorium. How a community deals with these elements varies depending upon the circumstances in the locality.

What uses will be affected by the moratorium? The moratorium might only affect certain uses that are of concern. For instance, if there is concern about the development of "big box" stores, then there is no reason to prevent residential subdivisions from being approved. Similarly, the moratorium could be limited to specific geographic areas of a town.

How long will the moratorium last? There are no black and white rules governing the length of a moratorium. The length should be tailored to the problem giving rise to the moratorium. If the problem is discrete and capable of solution within a six-month period, a moratorium that lasts for years is not likely to withstand a challenge and will likely experience declining support in the community. Once a moratorium is imposed, the local government is obligated to tackle the issue giving rise to it. Inaction on a municipality's part will also make the moratorium vulnerable and will make it more difficult to extend the term of the moratorium.

What happens to projects in the pipeline? A moratorium will always impact projects that have not filed applications yet but what about those that are in the middle of the approval process? Life does not stand still and there will rarely be a moment when projects affected by a moratorium will not be pending before the land use boards. Here, the law provides a boundary that a municipality cannot cross by way of a concept called vested rights. A person will have vested rights in a project if the project has been fully approved and that person has made a substantial investment in the project.

Short of projects that have vested rights, the municipality has discretion to determine which projects can proceed and which will have to await the lifting of the moratorium. For instance, a municipality could decide that a subdivision that has received preliminary approval can proceed to final approval, but one that has just gone through the concept approval stage must wait. Where the line is drawn involves a balance of equities that may take into account the length of the moratorium, the size of the project, and the sensitivity of the area to development.

The use of a land use moratorium often raises strong emotions on both sides of the argument. Nonetheless, it is a legitimate land use tool, the absence of which could create significant problems in implementing new land use rules. Municipalities must recognize, however, that it is an extreme measure and should only implement it where needed and, even then, should do so carefully and with a view towards fairly balancing the equities of affected parties. Those with questions about the foregoing should contact their Bond, Schoeneck & King attorney or any one of the following:

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