State of New York
Department of State

Legal Memorandum

Moratoria

Introduction

Discussions about moratoria have become commonplace in the area of land use planning. This paper discusses a number of different issues including five common threads found in cases dealing with moratoria.

When a municipality is first adopting zoning or is amending its current zoning, landowners may "race" in order to establish land uses prior to the effective date of the new land use regulations. This establishment of protected non-conforming uses defeats the very purpose of the new or amended zoning laws.

In order to protect the integrity of a new or amended zoning law, many communities have adopted interim or stop gap legislation to forestall landowners from racing to establish uses prior to the effective date of the new land use regulations. In the interim, a municipality is afforded some time in order to develop or revise its well-considered or comprehensive plan, and to adopt land use legislation which is in accord with the new or revised comprehensive plan.

Norman Williams says, "The preparation of a useful and realistic zoning ordinance takes a long time, especially if it is based upon a genuine plan for the community; and situations frequently arise in unzoned communities where so long a delay would result in substantial harm. True, by the 1970's most communities have had plenty of opportunity to pass a zoning law, if such protection is desired, and in such situations a developer may argue (not wholly unreasonably) that he has taken action on the assurance that the community was unzoned. On the other hand, no community can accept an argument of vested rights based on mere expectation, or there will be no public control of the future environment. Moreover, much of the remaining attractive open environment is in communities still unzoned. In recognition of this problem, many communities have moved quickly in such a situation — or in advance, to forestall the possibility of such a situation — by adopting an interim zoning ordinance, frankly in order to hold the line until a permanent ordinance can be worked out." Norman Williams, *American Planning Law* (Chicago; Callaghan & Company, 1974), p. 601.

Does the enabling legislation say anything about moratoria?

Section 261 of the Town Law is the enabling legislation that provides towns with the authority by ordinance to regulate and restrict:

> . . . the height, number of stories and size of buildings and other structures, the percentage of the lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; . . .

Section 263 of the Town Law says that such regulations shall be made in accordance with a comprehensive plan and designed:

> . . . to lessen congestion in the streets, to secure safety from fire, flood, panic and other dangers, to promote health and general welfare, to provide adequate light and air, to prevent the overcrowding of land, to avoid undue concentration of population, to make provision for, so far as conditions may permit, the accommodation of solar energy systems and equipment and access to sunlight necessary therefor, to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements.

Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

No mention is made of moratoria!

What if the municipality doesn't have zoning or a comprehensive plan? What if the municipality wants to update its comprehensive plan and amend its zoning to reflect the updated plan? After all, zoning must be in accordance with a comprehensive plan. Times may have changed such that development has become rampant or such that the zoning has become outdated; the comprehensive plan must be updated before the zoning can remedy the development ills sought to be alleviated.

Once word gets out that a municipality is considering new zoning restrictions based on a new comprehensive plan, the individual land owners will race to establish uses allowed by current law. This has come to be known as the race for diligence. By excavating the land, digging the foundation and beginning to construct the building, the landowners obtain "vested rights" under the old ordinance. He or she obtains what amounts to non-conforming use status. Success in this "race for diligence" would render the new zoning an exercise in futility.

In order to prevent this "race for diligence," municipalities looked around for a tool. No such tool was found under the enabling statutes. Using their general power to legislate for the health, safety and general welfare of the community, municipalities developed "Moratoria on the Issuance of Building Permits," also known as "Stop-gap Zoning" or "Interim Regulations." Later, "Moratoria on Subdivision Approval" were developed.

Most of the decisions in New York (including those decided by the New York State Court of Appeals), most of the decisions in other jurisdictions and most experts in land use law say that the moratorium is a justifiable exercise of the police power. The courts have reasoned that since the local legislative body must take the time to follow proper procedures, such as providing minimal notice of any contemplated new zoning and of any required public hearings, it seems reasonable that the local legislature implicitly has the power to protect the public interest through the use of a moratorium.

These ordinances are used by municipalities in order to hold the status of the area being zoned or rezoned temporarily in abeyance as the planning and legislative process proceeds. They "hold the line," but as Justice Holmes said in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." So where do we draw the line? When if ever, can we use a moratorium? How far can a moratorium go? How long can a moratorium be for? Is it a taking of property? What is the purpose of a moratorium?

We'll try to answer these questions with the answers we have received from moratorium cases decided in New York State.

Authority of Municipalities to Enact a Moratorium

There is no express statutory authority in New York State for the enactment of a moratorium on building permits or subdivision review. A review of applicable cases strongly suggests that a municipality does have the power to enact a moratorium, however. Among the key elements requisite for a legally defensible moratorium are:

1) a short term measured by the action to be accomplished during the term;
2) a plan under consideration, which because of its existence, may precipitate action by landowners which is detrimental to the plan (race for diligence);
3) a situation where the advantages to be gained by the municipality outweigh the hardship on the landowners in general;
4) strict adherence to the procedure laid down by the enabling acts; and
5) a time certain when the moratorium will expire.

There are early cases in New York where moratoria have been struck down. In such cases a strong element of "reasonableness" entered the picture (reasonableness as to the time the legislation is effective and reasonableness as to its purpose), or it was found that procedural requisites were not complied with.

The courts have disallowed moratoria where little or no progress toward adopting new zoning has been made, where it applied to only a small number of landowners, where the municipality was considering buying the land to which the moratorium applied, where the time period was relatively long or unfixed, or where the procedure for adopting the local law or ordinance had not been complied with.

In *Hasco* v. *Dassler,* 143 N.Y.S.2d 240 (1955) the Supreme Court in Westchester County upheld a 60-day moratorium on building permits which was enacted by the City of New Rochelle. The court held 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." The court adopted the reasoning of *Downham* v. *City Council of Alexandria,* E.D. Va., 58 F.2d 784, which held that the City of Alexandria, Virginia had the power to enact a zoning moratorium. The court in *Downham* v. *City Council of Alexandria* said, "It seems to the court that it would be a rather strict application of the law to hold that a city, pending the necessary preliminaries and hearings incident to proper decisions upon the adoption and the terms of a zoning ordinance, 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."

1. The cases require a short term measured by the action to be accomplished. *Rubin* v. *McAlevey,* 29 A.D.2d 874, 288 N.Y.S.2d 519 (1968), which was affirmed by the Second Department, upheld a moratorium on building permits that was enacted for 90 days, extended for 30 days and then extended until the last day of the year. The court found that the moratorium was limited to a reasonable time and therefore constitutional. The court reasoned that a moratorium is a sensible and practical way to ensure that the new zoning ordinance will be effectual. The court also pointed out that the procedural time requirements of section 265 of the Town Law were complied with.

Lake Illyria Corp. v. *Town of Gardiner,* 43 A.D.2d 386, 352 N.Y.S.2d 54 (1974), is a Third Department case from Ulster County decided in 1974 which, although it invalidated the moratorium complained of, is important for what it said. The case involved an annually enacted local law which prohibited all use of property except for residential uses unless a variance were approved by the town board. The Town of Gardiner enacted the moratorium every year for four years but had not made any progress toward developing a comprehensive plan other than to appoint a zoning commission. The court held that "A course of conduct such as that followed by the town herein is plainly contrary to the purpose of interim or 'stop gap' zoning. Under the present circumstances, the absence of justification for such an exercise of power renders this four-year delay unreasonable." Essentially the court found that four years of denying all use of land (except for residential purposes) to a petitioner who sought permission for a commercial use, was not justified by anything, especially where the town had not made any meaningful progress toward developing a comprehensive plan except to appoint a zoning commission. The court said that the variance procedure involving the town board without the benefit of a comprehensive plan, could also be construed to be spot zoning — citing *Ridgers* v. *Village of Tarrytown,* 276 A.D.1019, 302 N.Y. 115, 96 N.E.2d 731 (1951).

The opinion did say however, that "Local governments have the authority to enact reasonable stop-gap or interim zoning measures to halt, for a reasonable time, construction in areas under consideration for zoning or rezoning." The court reasoned that, "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."

The Second Department invalidated a moratorium in *Lakeview Apartments* v. *Town of Sanford,* 108 A.D.2d 914, 485 N.Y.S.2d 801 (1984). The town did not have a comprehensive zoning law and decided to enact a moratorium on building permits. For seven years this moratorium disallowed multi-family dwellings and industrial and commercial uses. While the court acknowledged moratoria as a valid stop-gap measure, it found seven years unreasonable.

2. The cases require a plan under consideration, which because of its existence may precipitate action by landowners which is detrimental to the plan. In *Oakwood Island Yacht Club* v. *City of New Rochelle,* 59 Misc.2d 355, 298 N.Y.S.2d 807 (1969), which was affirmed by the Second Department, the City of New Rochelle adopted a six month moratorium on building permits for any uses on petitioner's island because the city applied for a state grant to purchase the island. Petitioners had already received site plan approval from the planning board and applied for a building permit. The permit was denied on the ground that seven days prior to receiving the permit application, the six month moratorium went into effect. The city later extended the moratorium another six months. The court cited cases which demonstrated that at that time there was a split of authority in this state as to whether or not a municipality had the power to adopt a moratorium even when such law was strictly limited in time and was adopted in conjunction with a pending comprehensive plan or ordinance. In this case the court held the moratorium an unconstitutional deprivation of property without due process, reasoning that the city prohibited petitioner from obtaining a building permit solely because the city may in the future want to obtain the property. Nine months had passed without any condemnation proceedings, while in the meantime petitioner was being denied all use of its land. The court also took note that no precedents were cited by the city in support of the constitutionality of the ordinance. The Court of Appeals affirmed.

The New York State Court of Appeals upheld what in *effect* was a moratorium on subdivision plat approval in *Golden* v. *Planning Board of Town of Ramapo,* 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972). In this case the town amended its zoning to set up a special permit program whereby in order to receive your permit you would need to attain a score of 15 developmental points which were awarded on the basis of having (1) public sanitary sewers or approved substitutes, (2) drainage facilities, (3) public parks or recreation facilities (including public schools), (4) state, county or town roads — major, secondary or collector, and (5) firehouses. These requirements only applied to residential uses.

The town was experiencing a population explosion and realized that it did not have enough resources to provide these five services immediately. So, it set up a plan wherein the town would begin providing these services throughout the entire town over the course of 18 years. Thus a developer might have to wait up to 18 years for subdivision approval. The plan did allow the developer, to provide the required services at his or her own expense; this enabled the developer to accumulate 15 points and receive the special permit. Alternatively, upon application to the town board, a developer could receive a variance if the town board determined the developer's plan was consistent with the town development plan.

The Court of Appeals upheld this scenario saying, "A reading of the relevant statutory provisions reveals that there is no specific authorization for the 'sequential' and 'timing' controls adopted here. That, of course, cannot be said to end the matter, for the additional inquiry remains as to whether the challenged amendments find their basis within the perimeters of the devices authorized and purposes sanctioned under current enabling legislation. Our concern is . . . with the effects of the statutory scheme taken as a whole and its role in the propagation of a viable policy of land use and planning." The court analyzed the purposes of the zoning enabling laws set out in section 263 of the Town Law and came to the conclusion that the recital of *purposes attests to the drafters' attempts to specify a valid constitutional predicate* more than to detail authorized zoning purposes. The court said that "considering the activities enumerated in section 261 . . . and relating those powers to the authorized purposes detailed in section 263, the challenged amendments are proper zoning techniques, exercised for legitimate zoning purposes." The court broadly construed section 261 to include by way of implication, the authority to control the growth of population. The court also remarked that legislative enactments are presumed to be constitutional.

The court held that "where it is clear that the existing physical and financial resources of the community are inadequate to furnish 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." The court found that these amendments proposed a restriction of certain duration and were founded upon factual estimates.

3. The courts have required that the advantages to be gained by the municipality outweigh the hardship on the owners in general. The courts will not tolerate a moratorium which befalls only a small number of landowners. The burden must be shared by the community, and the benefits to be gained must outweigh the hardship on the community.

In a 1969 case called *Westwood Forest* v. *Village of S. Nyack,* 23 N.Y.2d 424, 297 N.Y.S.2d 129, 244 N.E.2d 700 (1969), the New York State Court of Appeals said that a village might be able to impose a moratorium on the issuance of building permits if the moratorium were reasonably limited as to time; but, "whatever the right of a municipality to impose a temporary restraint of beneficial enjoyment, where the interference is necessary to promote the ultimate good either of the municipality as a whole or of the immediate neighborhood, such restraint must be kept within the limits of necessity and may not prevent permanently the reasonable use of private property for the only purposes to which it is practically adapted." In this case the offending ordinance permanently barred new multiple dwellings throughout the village in order to alleviate the burden on the village's sewage disposal plant and not because of any change in the comprehensive plan. The court took note of the fact that the landowner's land was not adaptable to any other use allowed under the zoning, that the nature of the sewage problem was general to the community and not caused by the landowner, and that the municipal-wide prohibition on multi-family dwellings was enacted in response to this particular landowner's plans to construct a 68-unit garden apartment development. 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 a 1977 Court of Appeals case *Charles* v. *Diamond,* 41 N.Y.2d 318, 392 N.Y.S.2d 594, 360 N.E.2d 1295, our highest State Court says, that notwithstanding the fact that there is no express authority for municipal moratoria, towns, cities and villages have this power. Judge Jason writes, "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. We have held that police power enactments must be reasonable and that unreasonable exercises of the police power result in a deprivation of property without due process. A police power regulation to be reasonable must be kept within the limits of necessity." The court then reaffirmed a three part test which it previously announced in *Matter of Belle Harbor Realty Corp.* v. *Kerr,* 35 N.Y.2d 507, 364 N.Y.S.2d 160, 323 N.E.2d 697 (1974), for measuring whether the necessary limits were exceeded. To justify interference with the beneficial use of property the municipality must establish that:

1) it acted in response to 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.

The court went on to say that, "Indeed, we have sustained development restrictions, pursuant to a general community plan, for periods as long as 18 years," citing *Golden* v. *Ramapo* , 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972), and that "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," citing *French* v. *City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976).

In this case, in May 1972, the Village of Camillus gave the landowner a building permit for three apartment buildings provided he hooked into the village sewer system. The State then told the land owner, also in May 1972, that he couldn't hook into the village sewer system because the system was not up to New York State effluent standards. The landowner claimed a taking especially in light of the fact that the village could not rectify this problem until 1980 at the earliest, and also in light of the fact that the problem existed since 1966. The court said that under these facts such a delay can be justified if the village establishes:

1) the exact nature of the sewer system problem;
2) the capacity of the village to raise necessary capital;
3) that remedial steps are of sufficient magnitude to require extensive preparations such as preliminary studies, applications for state and federal assistance, the raising of capital and the letting of work contracts; and
4) the diligence and good faith of its municipal officials.

The landowner must establish more than mere financial loss; he must establish that the restriction on use is so great as to deprive him of any reasonable use of the property to which any owner would be generally entitled. 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." Finally the court said that the landowner may be able to establish that the ordinance is unconstitutional as applied to him, where the remedy will be to allow him to create his own sewer system provided it complies with state standards.

4. The courts have required strict adherence to the procedures which are required for the enactment of local laws and ordinances. In *LoConti* v. *City of Utica,* 52 Misc.2d 815, 276 N.Y.S.2d 720 (1966), the Supreme Court in Oneida County agreed that the City of Utica had the power to enact a four month and seven day moratorium on building permits, but nevertheless invalidated the moratorium in question for failure to provide adequate notice. The court cited section 156 of the Second Class Cities Law which required that a minimum 10 day notice appear in the official city newspaper. However, the court stated that "The city may . . . enact further stop-gap or interim legislation, which if in compliance with the statute, may, under some circumstances, accomplish the intended beneficial results to the community."

In *Tempkin* v. *Karageuzoff,* 43 A.D.2d 820, 351 N.Y.S.2d 141, *aff'd.* 34 N.Y.2d 324, 357 N.Y.S.2d 470 (1974), the Appellate Division First Department struck down a moratorium because it didn't comply with section 200 of the New York City Charter. This section gave the New York City Board of Estimate the authority to make zoning amendments upon the recommendation of the City Planning Commission. In this case the Board of Estimate was considering zoning amendments which had been recommended by the City Planning Commission. In order to prevent a "race for diligence" the Board of Estimate enacted a moratorium. Although the moratorium was enacted in order to maintain the status quo in case the zoning were changed, the court held that the Board of Estimate could not enact even a short-term interim zoning resolution unless it had been recommended by the City Planning Commission. The Court of Appeals, at 357 N.Y.S.2d 470 affirmed the ruling saying however 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."

5. The courts have required a time certain for the expiration of a moratorium. Although I am not going to discuss section 25-0202 of the Environmental Conservation Law, which imposed a moratorium on the alteration of wetlands, I will just mention that *Matter of Marine Equities Corp.* v. *Biggane,* 49 A.D.2d 907, 373 N.Y.S.2d 622 (2d Dept. 1975), and *Matter of New York City Housing Authority* v. *Commissioner of Environmental Conservation,* 83 Misc.2d 89, 372 N.Y.S.2d 146 (Sup.Ct., Queens Co. 1975), upheld moratoria as reasonable and found no taking even where the moratorium in the second case lasted almost two years.

However in *Russo* v. *New York State Department of Environmental Conservation,* 55 A.D.2d 935, 391 N.Y.S.2d 11 (1977) 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.

I only mention these cases for the proposition that both the duration and the purpose of a moratorium are used by the Courts to determine reasonableness.

Later Cases

We now turn to the more recent cases.

In *Dune Associates* v. *Anderson,* 119 A.D.2d 574, 500 N.Y.S.2d 741 (1986), the Second Department held that a moratorium on subdivision plat approval tolled the 45 day default approval provided for in section 276(4) of the Town Law. The moratorium was found to be a reasonable measure designed to temporarily halt development while the town considered comprehensive zoning changes and therefor is a valid stop-gap or interim zoning measure. In light of a later New York State Court of Appeals decision, discussed in the next paragraph, towns and villages are cautioned to adopt a local law specificially superseding the default approval provisions contained in section 276 of the Town Law, and section 7-728 of the Village Law when adopting a moratorium on subdivision approvals.

Dune Associates v. *Anderson, supra* was followed by the Second Department in *Turnpike Woods, Inc.* v. *the Town of Stoney Point,* 121 A.D.2d 715, 503 N.Y.S.2d 898 (1986) where the town enacted a six month moratorium on subdivision approval. The case went up on appeal and the Court of Appeals reversed on procedural grounds. The court held it didn't comply with section 22 of the Municipal Home Rule Law which requires a local government when using its power to supersede the Town Law to specify the section of Town Law being superseded, in this case section 276(4) relating to default approval.

The court stated it didn't reach any issue in respect to the constitutionality under the takings issue raised in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles,* 107 S.Ct. 2378, 96 L.Ed.2d 250, 55 U.S.L.W. 4781 (1987).

Are moratoria temporary takings for which compensation must be paid? This agency says no. The courts have said no, but in *First English* the issue has once again been raised and I'm addressing it here.

In June 1986, the U.S. Supreme Court ruled in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles* that where land use regulations are so restrictive as to amount to a taking, the landowners must be compensated for the period of time the regulations were in effect. The Fifth Amendment forbids the government to take private property without just compensation. Although the government may exercise its eminent domain power to condemn private property for public use, the Constitution requires that compensation be paid. *First English* extends the Fifth Amendment to temporary regulatory takings (if adjudged to be such). The case merely holds that where a regulation is proven to be so stringent as to amount to a taking, even a temporary taking, the remedy is not simply to invalidate the law; the remedy must include compensation for the time period before it is finally determined that the regulation constitutes a taking.

In this case, the church owned a campground called Lutherglen, which was used as a retreat and recreation area for handicapped children. This campground is located within a drainage channel for a watershed area owned by the National Forest Service. In July 1977, a forest fire destroyed 3,860 acres of the watershed creating a flood hazard. In February 1978, a flood occurred and destroyed Lutherglen. In response, the County of Los Angeles adopted an interim ordinance in January 1979. This ordinance provided that effective immediately no buildings could be constructed or reconstructed within the interim flood protection area which included the church's campground. The church challenged the ordinance as denying it all use of its property, and demanded damages, not invalidation. The California courts rejected this claim because of precedent in that state (*Agins* v. *Tiburon,* 24 Cal.3d 266, 598 P.2d 25 (1979), *aff'd.* 447 U.S. 255 (1980)) which held that the remedy available for a regulatory taking is invalidation, and that it would then be up to the legislature to either continue the regulation and buy the land or to terminate the regulation.

The U.S. Supreme Court said that temporary takings that deny a landowner all use of his property are not different in kind from permanent takings, and that once a court determines a taking has occurred, the court must award damages for the period of time that the ordinance was in effect. The court said, "We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." As the New York State Court of Appeals had already said in *Westwood Forest* v. *Village of S. Nyack* supra, and in *Charles* v. *Diamond,* supra, the U.S. Supreme Court said that the Fifth Amendment is designed to prevent some people alone from bearing public burdens. The court noted that the United States has been required to pay compensation for household interests of shorter duration, and that the measure of damages should be the owner's loss and not the taker's gain.

The court states, "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective . . . We limit our holding to the facts presented, and of course do not deal with the quite dif-

ferent questions that would arise in the case of normal delays in obtaining building permits, change in zoning ordinances, variances, and the like which are not before us." The court assumed for purposes of the opinion that a taking occurred. They didn't decide whether a taking occurred however, and remanded the case for such a determination. The court held that for purposes of the Fifth Amendment an aggrieved party may seek damages without seeking invalidation of the ordinance. If the law is invalidated then compensation is necessary.

The court also mentioned that the state could avoid a conclusion that a taking had occurred by establishing that the denial of all use was insulated as part of the state's authority to enact safety regulations.

The Supreme Court did not say that the ordinance in *First English* was a taking. The case did not change the rules for determining when a taking has occurred. The rules still require the landowner to establish that all reasonable use of his or her property has been denied by the law. The decision as to whether a particular law constitutes a taking depends on the facts and circumstances of each particular case; it is not at all common for courts to find that a law constitutes a taking, and this case hasn't changed this. As the Court of Appeals said in *Golden* v. *Planning Board of Ramapo,* supra, "The fact that the ordinance limits the use of, and may depreciate the value of the property will not render it unconstitutional, however, 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. Diminution, in turn, is a relative factor and though its magnitude is an indicia of a taking, it does not of itself establish a confiscation." It is well settled law that a reduction in the economic value of property — even a substantial reduction — due to a zoning law or other regulation, does not necessarily constitute a taking. In order to constitute a taking the law must so affect the property as to destroy all reasonable economic use. A mere diminution in value will not suffice for compensation; it's all or nothing.

Conclusion

Moratoria have been upheld in New York where they are of reasonable and limited duration, where legitimate efforts are being pursued to enact or amend land use regulations, and where all procedural requirements have been complied with. The courts generally have not struck down moratoria which are reasonable and limited as to duration, reasonable as to purpose, and comply with procedural requirements.

A municipality, when enacting a moratorium, should consider allowing uses of property which will not frustrate the purpose of the moratorium and should consider providing a relief mechanism to ensure that some reasonable use may be made of property subject to the moratorium.

Today, the use of moratoria is very, very common, and the shortest ones are least likely to be challenged. Moratoria of reasonable duration have been upheld, ostensibly as reasonable delays.

How long a moratorium can last and still be considered a reasonable delay, depends on the circumstances of each case. In *Schafer* v. *City of New Orleans,* 743 F.2d 1086 (1984), the Fifth Circuit upheld a moratorium for ten and one-half months. A recent search in Westlaw yielded one hundred and seventy-seven cases to help us.

Among the key elements requisite for a legally defensible moratorium are:

1) a short term measured by the action to be accomplished during the term;
2) a plan under consideration, which because of its existence, may precipitate action by landowners which is detrimental to the plan;
3) a situation where the advantages to be gained by the municipality outweigh the hardship on the landowners in general;
4) adherence to proper procedure for the enactment of local laws and ordinances; and
5) a time certain when the moratorium will expire.

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