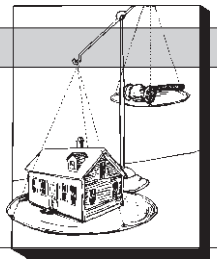
No More Building!



by Janet Stearns

"Why not just stop these haphazard, piecemeal deals until we can take a look at the whole picture?" one city councilor asked recently as she proposed a six-month moratorium on approvals of new developments. This sentiment is being heard throughout the nation, as municipalities are using temporary building moratoriums to try to slow the rapid pace of development.

Despite legal challenges by developers and the construction industry, courts have generally supported these temporary ordinances as valid exercises of municipal authority – as long as the ordinances didn't go too far. This article reviews a few of those decisions.

Legitimate Concerns Versus "Takings"

At the heart of the moratorium issue is the questions of where legitimate public interest impedes on the rights of property owners to use and profit from their land. In May of 1989, in First English Evangelical Lutheran Church v. Los Angeles, the California Court of Appeals upheld an ordinance that banned construction in a flood zone until the city could determine what kind of structures could be built safely in such as area. The church challenged the ordinance because it wanted to use some of its land within the flood zone as a campground for handicapped children. Not surprisingly, the California court determined that in this case the protection of life in the face of questions about flooding and building safety was a valid exercise of municipal police power æ that is, it fell within the city's implicit realm of authority governing matters of public security, health, safety, and welfare.

The First English case earlier received attention when the United States Supreme Court (which considered the case before sending it back to the California Court of Appeals for a decision) declared that a plaintiff in such a case might be entitled to monetary compensation if a city's action constituted a temporary "raking" of the plaintiff's property by effectively rendering someone's land essentially useless or without value. The question of whether such a taking has occurred has long been a central issue in such cases, because the Bill of Rights prohibits the government from taking private property without compensating for it. Moratoriums or other regulatory statutes so restrictive as to be seem as a taking have been declared unconstitutional.

Prior to the Supreme Court's opinion on the First English case, however, courts would simply invalidate any such ordinance, without ordering any compensation to the plaintiff. The Supreme Court's decision that such takings can entitle plaintiffs to monetary compensation raised the stakes in such cases considerably. The extent to which such compensation will actually be granted, of course, remains to be seen.

What is "Reasonable?"

A court's opinion of what constitutes a town's reasonable domain of interest æ is often crucial when it considers a challenge to a moratorium. Its opinion regarding what constitutes a reasonable length of time for such moratoriums also can be important.

In 1988, for instance, Maine's high court upheld an ordinance passed by the town of Rangeley declaring a halt to multi-family construction for 12 months or the adoption of a comprehensive plan, whichever occurred first. The court upheld the legislation because it bore a rational relationship to the protection of public health, safety, and welfare. And in Connecticut, the state Supreme Court validated a similar non-month moratorium on business development in Westport, despite the absence of any state laws explicitly authorizing towns to pass such restrictions. In Bernhard v. Planning and Zoning Commission (1984), the Connecticut court found that the Westport regulation was reasonable limited in scope and duration.

However, a recent case went to other way in the New York Court of Appeals, which invalidated a six-month moratorium because it conflicted with a state statute prescribing the reasonable time period for subdivision approval. And in Rhode Island, a federal court found a local ordinance imposing a moratorium on building permits to be unconstitutional because it had been in effect for three years. In this case, Q.C. Construction v. Verrengia (1988), the town stopped development in a certain area to prevent overburdening the public sewers. The court found this to be an unconstitutional taking, primarily because the resolution was in effect for more than three years during which the town took no action to improve its sewer capacity. Nevertheless, the court declined to follow the U.S. Supreme Court's holding in First English that would call for monetary damages to the construction company.

Another important factor seems to be how closely related a moratorium is to the problem it is designed to solve. In 1988, for instance, the New York Court of Appeals invalidated a New York City ordinance calling for a five-year moratorium on building demolitions. In Seawall Associates v. City of New York, New York's highest court found that the ban on demolition was not rationally related to its supposed purpose æ to preserve the city's single room only housing stock in order to assist homeless persons æ and declared it to be an unconstitutional taking of property. Although not explicitly cited as a reason, the length of the moratorium probable was also a factor contributing to the court's holding.

Catch Them Early

Although building moratoriums are becoming more prevalent, court challenges to them are few and far between. This is probably because most developers would rather sit and wait out a short-term moratorium than undertake lengthy litigation. However, as the Q.C. Construction and Seawall cases show, when municipalities establish moratoriums that range too widely or last unreasonable long, the change of a successful challenge rises.

Nevertheless, short-term moratoriums are rarely challenged successfully, and for this reason the construction industry would do well to keep a close eye on municipal efforts to adopt such regulations and to become involved in writing the regulations. Early involvement in the legislative and regulatory process is far less costly and time-consuming than extensive litigation after a moratorium has been completed. ■

Correction: The November Legal Column on "New Handicapped Housing Rules" incorrectly stated that the rules for multi-family units applied to buildings to be first occupied after March 12, 1992. The correct date is March 12, 1991.

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