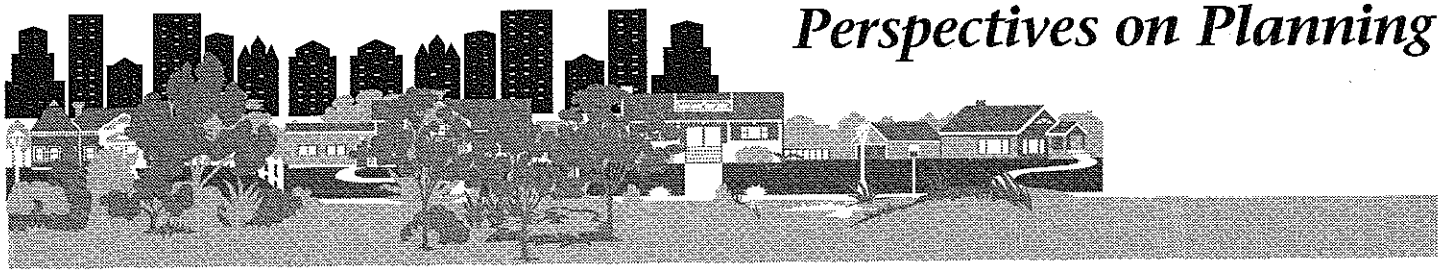

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Moratoria for Planning Purposes--More Questions than Answers

by Brian W. Ohm, J.D.

A temporary moratorium, also known as an interim control ordinance, can be an important planning tool. Many communities throughout Wisconsin have imposed moratoria on new development as they engage in planning processes to address issues of growth and change. These moratoria have taken various forms, including moratoria on rezonings, building permits, and subdivision plats. As communities consider the adoption of moratoria, however, many questions often arise. The zoning and planning enabling laws in Wisconsin provide little guidance on the appropriate use of moratoria. The courts have also provided limited guidance. In light of questions which arise when adopting a moratoria, as summarized below, better guidance is needed to insure the proper use of moratoria.

The Function of Moratoria

The planning process often raises the need for communities to suspend the development approval process for a brief period of time while studies are completed and plans and ordinances are prepared or revised. Moratoria allow the planning process to occur unhindered by ongoing development which could frustrate the objectives of the planning process. Moratoria limit the number of nonconformities that could be created upon the adoption of a new zoning ordinance. Finally, moratoria work to eliminate what is known as the "race of diligence"--instances where a property owner seeks building permits based on existing zoning *after* the nature of the proposed new zoning becomes known but *before* adoption of the new zoning. Faced with this "race," a community may hastily adopt a new permanent zoning ordinance without doing the necessary studies and receiving sufficient public input. In sum, there needs to be a legitimate planning justification for a moratorium.

Local Authority to Impose a Moratorium

Despite the strong planning rationale for moratoria noted above, many questions often arise regarding the legal authority of local communities to impose moratoria. Cities, villages and towns with village powers have express authority to freeze existing uses while the community prepares a comprehensive zoning plan. (A comprehensive zoning plan is one element of a master plan.) Section 62.23(7)(da) of the Wisconsin Statutes, entitled "Interim zoning," states:

"The common council of any city which has not adopted a zoning ordinance may, without referring the matter to the plan commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as is an ordinary ordinance but shall be effective for no longer than 2 years after its enactment."

This authorization, however, is rather narrow. It applies only to cities "which have not adopted a zoning ordinance." In a recent case entitled *Lake City Corp. v. City of Mequon*, 199 Wis.2d 353, 544 N.W.2d 600 (Ct. App. 1996), the Wisconsin Court of Appeals questioned whether a city which already had a comprehensive zoning ordinance could adopt a moratorium. The court did not provide a definitive answer to its question but said that arguably there is implied authority for *all* cities, not just those without any zoning, to impose moratoria. While the Wisconsin Supreme Court reversed the Court of Appeals decision in the case on other grounds, it did not provide any guidance on the propriety of moratoria.

The wording of section 62.23(7)(da), also raises several other questions about the authority of cities, villages, and towns with village powers to impose moratoria. For example, do these communities have the authority to enact a moratorium during the time that it takes to prepare a master plan which does not include a comprehensive zoning plan? Do communities have the authority to impose a moratoria while the community prepares a new subdivision ordinance? Can the authority for moratoria be inferred from other authority? These questions have not been answered by either the courts or the legislature.

The Wisconsin Supreme Court also questioned the legality of

a moratorium in another recent case, *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis.2d 157, 540 N.W.2d 189 (1995). In the *Lake Bluff* case, the city enacted a moratorium by resolution (rather than by ordinance) on the issuance of building permits for one particular property. The Court, however, accepted the moratorium as valid for purposes of its review and did not provide any answers to the questions surrounding the validity of the moratorium. The Court seemed satisfied with the city's explanation that the moratorium would be valid if enacted by ordinance.

Counties are also imposing temporary moratoria as part of their planning processes. Counties, however, have no express statutory authorization to impose an interim control ordinance. The absence of express enabling authority does not mean that counties cannot impose moratoria. What it does mean is that the authority for counties to impose moratoria is not clear. (Some states have statutes which expressly prohibit moratoria for planning purposes. Wisconsin does not.)

The authority for a county to impose a moratorium must be derived from the general language of the land use enabling legislation for counties. There are no reported court cases in Wisconsin on the issue of county authority to impose a moratorium. There are cases in other states which have held that in the absence of express enabling legislation for moratoria, the general delegation of authority under the planning and zoning enabling legislation is sufficient authority to impose a moratorium. One of the leading cases nationally is a Minnesota case, *Almquist v. Town of Marshan*, 245 N.W.2d 819 (Minn. 1976). However, there are also cases in other states which have held the opposite. Counties in Wisconsin therefore run a risk that if they impose a moratorium, a court could find that the county did not have the legal authority to do so. Express statutory authorization would provide better guidance.

Takings

Another issue that arises when communities enact moratoria is whether a moratorium which denies the development of private property for a temporary period of time constitutes a "taking" of property without compensation in violation of the Wisconsin and the United States Constitutions

Since the United States Supreme Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), establishing a remedy for the "temporary taking" of property, some people argue that moratoria automatically constitute a taking of private property. This argument is misplaced. The use of the term "temporary" in *First English* does not mean that regulations which are labeled "temporary" and which deny all economically viable use of property for a limited period of time, are automatically a taking. Rather, the term "temporary" in *First English* refers to the period of time before it is finally determined that the regulation constitutes a taking of property. Under *First English*, when a governmental regulation constitutes a "taking," the public must monetarily compensate the property owner for his or her loss during the time the regulation was in effect. Government cannot just rescind the regulation and avoid financial liability.

In a Minnesota court case, *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. Ct. App. 1992), the court determined that a moratorium which deprived a property owner of all use of their property for a two year period did not automatically constitute a taking. While this decision is very helpful in clarifying the takings issue, the case does not stand for the proposition that a two year moratorium will never constitute a taking. In balancing all the factors for determining whether a governmental regulation constitutes a taking, it is conceivable that given the particular facts of a situation, a two year moratorium could constitute a taking. The context and the duration of the moratorium is therefore critical. The shorter the moratorium the less likely it will constitute a taking. In absolutely no circumstances should a moratorium exceed two years.

"Helpful Hints"

When enacting a moratorium, communities should observe the following:

□Moratoria should be enacted by ordinance and not by a resolution.

□The purpose of the moratorium must be for conducting studies for the purposes of updating/amending comprehensive plans or regulatory controls to prevent what may become nonconforming/incompatible uses after the plan/controls are adopted. There needs to be a rational planning base for what the community is doing.

□While a moratorium could apply to the entire community, it is best to focus the ordinance so it applies only to the area or areas where it is needed.

□Keep the duration for the moratorium as short as possible. Set the length of time to no more than what is needed to complete the required task.

□The ordinance need not prohibit all development such as the issuance of building permits to minor alterations or repairs of a structure.

□Include exceptions to meet particular local situations. A broad variance or exception procedure may be necessary where, as a practical matter, a community has a number of developments well along the road to completion.

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