

# MORATORIA

## I. Nature of the tool

Moratoria in land use are temporary, legislatively-enacted periods during which a local government stops giving some type of permit. Moratoria allow local governments to ensure that a community's problems are not compounded during the time the local government needs to formulate and implement a policy response to an issue.<sup>1</sup> Moratoria also prevent developers and landowners from racing to beat planned or imminent land use changes by carrying out development that is poorly planned or harmful to the community.<sup>2</sup> By providing such assistance, moratoria give local governments more time to engage in planning and public participation in land use decisions, thus ensuring better input and dialog with developers and landowners that might be affected by future policy changes.<sup>3</sup>

## II. Relationship to waterfronts

Currently waterfront communities are losing public access at an alarming rate as marinas all over the state shut their doors to the public and convert to dockminiums,<sup>4</sup> fishing businesses close their doors and sell their land for residential development, private but open-to-the-public boat ramps close their doors to the public, and fewer boat repair facilities remain on the water.

Communities, the Department of Community Affairs, and the Florida Legislature have begun to respond to these changes. Assessing the problem, developing solutions, and implementing solutions require time, yet the loss of public access remains rapid. Moratoria present a legal tool that a community may utilize to temporarily halt loss of public access through conversion of recreational and working waterfronts to residential uses until the community can evaluate and implement integrated processes that seek to preserve public water access.<sup>5</sup>

## III. Legal Issues

While the U.S. Supreme Court has stated that a temporary taking of property requires compensation,<sup>6</sup> Supreme Court precedent does not indicate that moratoria on

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<sup>1</sup> Tahoe-Sierra Preservation Council, 216 F.3d 764, 777 (9<sup>th</sup> Cir. 2000).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; Keshbro, Inc. v. City of Miami, 801 So.2d 864, 874-75 (Fla. 2001).

<sup>4</sup> *See, e.g.* St. Petersburg Times, Will Van Sant, County Loses Out in Marina Deal, Again, (May 5, 2006), [www.sptimes.com/2006/05/05/Northpinellas/County\\_loses\\_out\\_in\\_m.shtml](http://www.sptimes.com/2006/05/05/Northpinellas/County_loses_out_in_m.shtml).

<sup>5</sup> Many waterfront communities in Florida also use moratoria on development and repair as a tool for prioritizing after a disaster such as a hurricane. *See, e.g.* Marco Island code of ordinances § 6-178 *et. seq.*; Lee County code of ordinances § 13 ½ - 58.

development necessarily constitute a per se taking of property.<sup>7</sup> Courts apply the takings test from *Penn Central*<sup>8</sup> to determine if a moratorium results in a taking.<sup>9</sup> The *Penn Central* test inquires as to the economic impact of the regulation on the property owner, the reasonable investment-backed expectations of the party frustrated by the regulation, and the character of the government regulation.<sup>10</sup>

Florida law echoes Federal law in finding that moratoria constitute permissible growth management tools.<sup>11</sup> Properly enacted moratoria also do not violate the due process rights of those that had an expectation of developing a parcel according to the rules before the moratorium even if they relied on the prior rules.<sup>12</sup>

In designing a moratorium that is less likely to effect a taking, a local government should bear certain points in mind. First, the moratorium must be strictly time limited.<sup>13</sup> Next, the ordinance establishing the moratorium should include clear purpose statements (“Whereas” clauses) that specify the problem the local government faces in its planning and why the local government needs the moratorium (i.e.—the problem will worsen in the time required to gain public input and develop a policy response and methods to implement the policy response).

#### IV. Pro & Cons

On the positive side, moratoria may give a local government the time to it might need to do the data gathering, research, public meetings, and planning requisite to do proper growth management for the benefit of the public as a whole. If a local government suddenly feels pressured by a growth boom to enact new growth management regulations, these may not developed as carefully as they could be if the local

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<sup>6</sup> *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304, 318-19 (1987).

<sup>7</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

<sup>8</sup> *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>9</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l. Planning Agency*, 535 U.S. 302, 321 (2002).

<sup>10</sup> *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

<sup>11</sup> *See, e.g. Berg v. Dept. of Community Affairs*, Case Nos. 91-7243RP, pp. \*5-\*6, \*14 (Fla. Dept. of Admin. Hrng. May 8, 1992).

<sup>12</sup> The case of *WCI Communities, Inc. v. City of Coral Springs*, 885 So.2d 9 (4<sup>th</sup> DCA 2004), observed that substantive due process challenges to zoning regulations are reviewed under a very deferential standard. *Id.* at 914. This standard only requires that there exist a possible legitimate public purpose for the regulation and that there is a rational basis for belief that the zoning regulation could further the legitimate public purpose. *Id.*

<sup>13</sup> Moratoria often last for one year. If the local government has not, despite good faith efforts, been able to fully create and implement a policy response to the problem that gave rise to the moratorium, the moratorium may be extended to allow additional time. However, too lengthy a moratorium or too many extensions will greatly increase the likelihood of a challenge to the moratorium and a court's finding a taking under the Fifth Amendment to the U.S. Constitution.

government first chooses to place a moratorium on new development to preserve the status quo as planning proceeds more systematically.

Similarly, moratoria allow local governments to refuse to issue development permits that are inconsistent with proposed zoning or planning changes. Absent a moratorium, a local government may not refuse to consider permit applications for development because the application would be inconsistent with future changes to the comprehensive plan.<sup>14</sup>

On the negative side, many interests, particularly real estate and development interests, may vigorously fight a proposed moratorium. These interests often have large sums of money invested in proposed development and related property. A moratorium may cause these interests difficulty as the moratorium will stop developments which may be planned and for which developers may be paying substantial interest on money expended to finance land acquisition.

## V. Best policy practice

On July 20, 2005, the Monroe County, Florida Board of County Commissioners adopted an Interim Development Ordinance<sup>15</sup>. The ordinance, instead of adopting a long series of introductory “whereas” clauses that outline the reasons and findings supporting the policy in the attached ordinance, these findings, justifications, and record of past related activities were incorporated into the main body of the ordinance.<sup>16</sup> Some of these included a list of meetings, including public meetings, that included discussions of the problems of loss of recreational and working waterfronts and public access to waters in the county; statement of the potential for negative impacts on the economy, society, and safety, health, and welfare of the county’s residents if the loss of access is not stopped; the need for analysis of the problem and possible solutions; need to maintain the status quo during analysis and policy development; references to relevant Comprehensive Plan policies directed at preservation of access; statement that the County entered into a contract for needed analysis and policy recommendations, including Comprehensive Plan amendments and Land Development Recommendations; and noting the temporary nature of the moratorium.<sup>17</sup>

The ordinance carefully lays out the activities to which it applies<sup>18</sup> and those activities to which it does not apply.<sup>19</sup> The ordinance specifies how it is implemented through deferral of applications for permits, issuance of permits, and issuance of development orders.<sup>20</sup>

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<sup>14</sup> Gardens Country Club, Inc. v. Palm Beach County, 590 So.2d 488, (4<sup>th</sup> DCA1991).

<sup>15</sup> Monroe County, Florida Ordinance No. 017-2005.

<sup>16</sup> Monroe County, Florida Ordinance No. 017-2005, sec. 9.5-185.2.

<sup>17</sup> This is also addressed later in the ordinance as well. Monroe County, Florida Ordinance No. 017-2005, sec. 9.5-185.10.

<sup>18</sup> Monroe County, Florida Ordinance No. 017-2005, sec. 9.5-185.5.

<sup>19</sup> Monroe County, Florida Ordinance No. 017-2005, sec. 9.5-185.4.

<sup>20</sup> Monroe County, Florida Ordinance No. 017-2005, sec. 9.5-185.6.

