

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL  
**GOVERNMENT LAW ONLINE**

---

**LOCAL MORATORIA:  
A VALID PLANNING TECHNIQUE**

**JUNE 2002**



Government Law Center  
Albany Law School

80 New Scotland Avenue  
Albany, NY 12208  
[www.als.edu](http://www.als.edu)

GOVERNMENT LAW ONLINE publications are available at [www.governmentlaw.org](http://www.governmentlaw.org)

*Reprinted from the Empire State Report, at 16 (June 2002)*

# **LOCAL MORATORIA: A VALID PLANNING TECHNIQUE**

**Patricia E. Salkin, Esq.  
Associate Dean and Director**

**JUNE 2002**

These materials are copyright by Albany Law School (ALS) on behalf of its Government Law Center or ALS licensors and may not be reproduced in whole or in part in or on any media or used for any purpose without the express, prior written permission of Albany Law School or the licensor. Neither Albany Law School, the Government Law Center or any licensor is engaged in providing legal advice by making these materials available and the materials should, therefore, not be taken as providing legal advice.

All readers or users of these materials are further advised that the statutes, regulations and case law discussed or referred to in these materials are subject to and can change at any time and that these materials may not, in any event, be applicable to a specific situation under consideration. The information provided in these materials is for informational purposes only and is not intended to be, nor should it be considered to be, a substitute for legal advice rendered by a competent licensed attorney or other qualified professional. If you have any questions regarding the application of any information provided in these materials to a particular situation, you should consult a qualified attorney or seek advice from the government entity or agency responsible for administering the law applicable to the particular situation in question.

# Local Moratoria: A Valid Planning Technique

Patricia E. Salkin



On April 23, 2002, the U.S. Supreme Court handed local governments a major victory in continuing efforts to plan for smart growth (Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency, 535 U.S. 2002). Recognizing that locally enacted moratoria, or temporary delays in the issuance of building permits pending further study, are an essential tool of successful development, the High Court said, "To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth." The Court went on to warn, however, that although a moratorium in effect for more than one year was held to not be an unconstitutional taking based on the facts in the case before it, whether a general rule limiting the allowable duration of a moratoria is a good idea is a task best left to the state legislatures.

The Tahoe case does not present an across-the-board victory, nor does it bless every moratoria under every set of circumstances. The Court clearly states that although there was no per se regulatory taking of the petitioners' land in the present case, "...we do not hold that the temporary nature of a land-use restriction precludes a finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other." The Court opts to follow Justice O'Connor's approach in last year's case of *Palazzolo v Rhode Island* (533 U.S. at 636) where she suggests that the determination of whether a government regulation constitutes a temporary taking "requires careful examination and weighing of all the relevant circumstances." This type of

inquiry can only occur when there is a case-by-case factual inquiry rather than a strict statutorily crafted time frame.

Absent a statute in New York, the courts have long upheld the validity of locally enacted moratoria as "...a sensible and practical way to insure that decisions on land usage...can be effective..." (ref. *Rubin v McAlevey*, 54 Misc. 2d 338, aff'd 29 A.D.2d 874). Generally, so long as municipalities follow proper procedures for the enactment of moratoria, and so long as the moratorium remains in effect for a "reasonable" period of time and the municipality can demonstrate that a planning process is ongoing, the courts will uphold these local laws, also referred to as "stop gap" or "interim zoning."

Just as some moratoria have been upheld by the courts, many have been struck down as overly burdensome in duration or invalid since there was no "good faith" planning effort taking place while the moratoria remained in effect. What is clear from the rhetoric on land use list serves is that the planning communities are claiming victory in the U.S. Supreme Court, and those often associated with pro "property rights" sympathies are concerned about "moratoria madness."

Only ten states have chosen to regulate the use of local moratoria by statute. These laws vary in their approach to specific time limits for moratoria, ranging from a short span of six months (renewable) to a lengthy three years. While a state statute could provide some clear temporal parameters for the use of moratoria, such an approach could also prove unrealistic given the underlying planning needs for a particular area (such is the example in the Tahoe case that involved an inter-state compact and

regional planning agency charged with developing a plan for the protection and preservation of a significant natural resource). The U.S. Supreme Court recognized that "the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel."

This language reiterates the recognition of the importance of regional land use planning. The debate on moratoria will undoubtedly find its way into the state legislative process in New York. In all likelihood, non-governmental real estate development advocates will seek the legislative solution mentioned by the U.S. Supreme Court. Municipal and preservation advocates will attempt to preserve the status quo in New York, a common-law or judicial inquiry into the reasonableness of the duration of locally adopted land use moratoria.

The American Planning Association's recently released *Growing Smart Legislative Guidebook* offers three alternative legislative approaches to dealing with moratoria that may be of some drafting assistance (see, Chapter 8). Whether a legislative solution is right for New York, the U.S. Supreme Court did validate a long-standing and important planning tool that can help to ensure quality communities across the State.

*Patricia E. Salkin is Associate Dean and Director of the GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL. She has written and lectured extensively on the subject of smart growth.*