

**Please note: This packet is intended for general information purposes only and should not take the place of a thorough review of pertinent statutes, consultation with legal counsel, or other specific guidance on this subject.**

## Moratorium Ordinances

**This packet includes the following attachments:**

Title 30-A M.R.S.A. [Section 4356](#)

[Title 1 M.R.S.A. Section 302](#)

"[Ordinance Enactment](#) ," *Maine Townsman*, "Legal Notes," April 1989

"[Municipalities May Give Ordinances a Retroactive Effect](#)," Gary Wood, Esq. 1988

Sample [Town of Arundel's Moratorium Ordinance](#)

[Growth Caps: The Light Turns Yellow, Not Green](#) ," Christopher Vaniotis, Esq.,  
*Maine Townsman*, July 2000

**Important issues and considerations include:**

### I. Statutory Authority and Requirements

A moratorium is an ordinance that "temporarily defers" land use activity or development in order to give officials time and the opportunity to plan for accommodating or managing development. Development moratoria are specifically authorized by 30-A M.R.S.A. § 4356, subject to certain requirements set forth in the statute. These statutory requirements are express limitations on municipal home rule authority (see *Perkins v. Town of Ogunquit*, 1998 ME 42). Therefore, any development moratorium must comply with these requirements; municipalities have no other legal alternative for temporarily halting development for which they may be unprepared.

The principal statutory requirement for a development moratorium is that it be necessary either (1) to prevent a shortage or overburdening of public facilities (e.g., sewer, water, roads, schools, public safety), or (2) because existing plans, ordinances or regulations, if any, are inadequate to prevent serious public harm. Either of these rationales will suffice, though a municipality should cite both as justification for a moratorium if there is a factual basis for doing so. In order to create a record for a reviewing court in the event the ordinance is challenged, every moratorium ordinance should include a preamble that recites the facts which demonstrate the necessity for the moratorium. While factual justification is critical, courts will not second-guess a municipality's determination of necessity; a moratorium, like any other municipal ordinance, is presumed valid, and the challenger must establish "the complete absence" of any facts supporting the need for a moratorium (*Minster v. Town of Gray*, 584 A.2d 646 (Me. 1990)).

### II. Limited Duration; Extensions

The statute limits the duration of development moratoria to a definite term of not more than 180 days. A moratorium may be extended for additional 180-day periods, though, if the municipality finds that (1) the problem necessitating the moratorium

still exists, and (2) reasonable progress is being made to alleviate the problem. Both findings are important, but the second clearly implies an affirmative duty on the municipality's part to address the underlying circumstances and to do so in a responsible, timely fashion.

The municipality's legislative body (town meeting or council) is the party that must enact a moratorium. However, in municipalities where the town meeting is the legislative body, the municipal officers (board of selectmen) may, in lieu of the town meeting, extend a moratorium in compliance with these provisions, after notice and hearing.

### **III. Pending Proceedings; Retroactivity**

Under 1 M.R.S.A. § 302, "pending proceedings" (i.e., permit applications for which substantive review has commenced) are not affected by the adoption of new ordinances, including moratoria. Thus, a development moratorium passed after an application has been filed and substantive review has begun ordinarily will not apply to that proposal. However, the Maine Supreme Court has held that this rule of "prospectivity" may be overcome and that, with careful planning and drafting, a moratorium can apply retroactively to pending or already permitted projects (see "Municipalities May Give Ordinances a Retroactive Effect," 1988, linked above).

How far back in time a moratorium ordinance can be applied is an open issue. We have advised (and continue to advise) that a moratorium ordinance should not apply any earlier than the date that the moratorium ordinance was proposed. However, the Maine Supreme Judicial Court recently approved the retroactive application of an ordinance amendment. In *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, 2004 Me. LEXIS 67, the Town adopted an amendment to a zoning ordinance in September 2000 that purported to be effective retroactively to September, 1999 – well before the date of the ordinance amendment's introduction (in June, 2000) and well before the filing of the application that the Planning Board ultimately denied. While the Law Court held that the ordinance amendment could not be effective retroactive to that date (since the Town charter specified that ordinances become effective 30 days after enactment), it did hold that the ordinance amendment could be applied to applications pending on the specified date – a date earlier than the June 2000 application and earlier than the June proposal and enactment of the ordinance amendment.

### **IV. Form and Contents**

A development moratorium is a type of ordinance and should be in the form of an ordinance and acted upon as such (see "Ordinance Enactment," linked above). A valid moratorium ordinance should recite its factual basis, cite its legal authority (30-A M.R.S.A. § 4356), define its terms (especially the type of "development" to which it applies), and prohibit both development and the processing of applications and the issuance of permits for development. It also may specify the penalties for violation (see 30-A M.R.S.A. § 4452), although this is arguably not necessary. Linked above, see the Town of Arundel's Moratorium Ordinance.

### **V. Moratorium vs. "Slow-Growth" Ordinance**

There long has been a debate among municipal attorneys as to whether a "slow-growth" ordinance, such as a cap on building permits or on sewer user permits, is a moratorium ordinance and must meet the requirements of 30-A M.R.S.A. § 4356 for moratoria. Recently, the Maine Supreme Judicial Court held that a building permit

limitation ordinance is not invalid as a matter of law. In *Home Builders Association of Maine v. Town of Eliot*, 2000 ME 82, 750 A.2d 566, the Law Court upheld the Town's "Permit Limitation Ordinance" against an attack that it failed to meet the requirements of § 4356 and was unconstitutionally vague. However, the decision in *Town of Eliot* is specific to that ordinance and to the facts of that case. Because the *Eliot* ordinance did not prevent all development but allowed a number of housing starts; because the ordinance was consistent with the State Growth Management Act's goals of encouraging orderly growth and development and of planning for anticipated growth and development; and because the ordinance's cap on permits was not an unreasonable limit, the Law Court upheld the ordinance. Shortly thereafter, the Maine Superior Court upheld the Town of Wells' "Residential Growth Control Ordinance" against a similar challenge. (*Inland Golf Properties, Inc. v. Inhabitants of Town of Wells* (Me. Super. Ct. Dkt. No. AP-98-040, York Cty. May 11, 2000).) Most recently, the Federal District Court for the District of Maine relied upon the Law Court's decision in *Home Builders Association of Maine v. Town of Eliot* and upheld the Town of York's growth limitations (*Currier Builders v. Town of York*, Maine, 146 F.S.2d 71 (D. Me. 2001)). If your municipality is contemplating such a slow growth ordinance, be sure to consult with your town attorney to evaluate whether the proposed ordinance is defensible under the *Town of Eliot* decision.

#### **VI. Temporary Moratorium not a "Taking" Under Federal constitution**

In a recent opinion, the U. S. Supreme Court has held that a local temporary land use moratorium did not constitute a taking of property without just compensation and therefore did not violate the U.S. Constitution (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465). However, whether a regulation such as a temporary moratorium ordinance is a "taking" that would entitle a party to damages and attorneys fees is fact-specific – it depends upon an analysis of the facts in a particular situation on a case-by-case basis.

#### **VII. Legal Counsel**

Moratoria often are prompted by unanticipated and controversial development proposals, and they sometimes suspend projects that are far along in the planning stage. They may adversely affect powerful interests with the will and wherewithal to mount a serious legal challenge. To defend against this prospect and ensure that a moratorium holds fast, the municipality should retain local legal counsel from the outset to assist in drafting and in advising municipal officials.

Date of last revision: 9/04

**The statutes referenced here may have been amended during the last legislative session, and we will update them when the text becomes available.**