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Development Moratoria Resurrected in the Highlands

By Guliet D. Hirsch

Since 1985, state law has prohibited municipalities from imposing development moratoria except in cases of demonstrable, clear and imminent danger to health. N.J.S.A. 40:55D-90b. This bright-line statutory prohibition "has now been in effect for such a number of years and the provisions are so unequivocal that municipalities have ceased to enact the type of moratoria prescribed by subsection a." Cox & Koenig, *New Jersey Zoning and Land Use Administration* §34-8.5 (Gann 2013).

In the Highlands region, development moratoria have been revived in the form of "checklist ordinances," which prevent applications from being deemed complete until zoning is enacted that conforms with the Highlands Regional Master Plan.

Hirsch is a partner in the land use department of Archer & Greiner PC. Her practice involves representing developers in local and state applications and litigation.

Historical Perspective

Although undefined in the statutes, the "ordinary and well understood meaning" of "moratorium" is "a period of permissive or obligatory delay." See *Toll Brothers v. West Windsor Twp.,* 312 N.J. Super. 540, 548 (App. Div. 1998), citing cases dealing with moratoria in other settings. Prior to the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. (MLUL), the municipal power to enact reasonable moratoria to provide time to revise master plans or zoning ordinances had been sustained. See, for example, *Monmouth Lumber Co. v. Ocean Twp.,* 9 N.J. 64 (1952); *N.J. Shore Builders Assoc. v. Twp. of Ocean*, 128 N.J. Super. 135 (App. Div. 1974); *Deal Gardens v. Loch Arbour Bd. of Trustees*, 48 N.J. 492 (1967); and *Cappture Realty Corp. v. Bd. of Adjustment of Bor. of Allenwood Park,* 126 N.J. Super. 200 (Law Div. 1973), aff'd, 133 N.J. Super. 216 (App. Div. 1975).

After adoption of the MLUL in 1975, municipal zoning moratoria were substantially limited. Section 90 of the MLUL used the strongest language possible to prohibit development moratoria for the purpose of preparing a master plan and development regulations. The statute did, however, allow the adoption of a reasonable interim zoning ordinance, pending adoption of a new master plan or new development regulations, but only for a period of one year, with a potential one-year extension for good cause and upon a showing of diligence (L. 1975, c. 291, § 77). In 1979, this section was amended by adding a clause extending the period for an interim ordinance through May 31, 1979 (L. 1979, c. 7).

The current MLUL section 90 is the result of an amendment adopted in 1985. That amendment continued, without change, the prohibition of development moratoria for the purpose of preparing a master plan or development regulations. Development moratoria and interim zoning ordinances are now permitted only upon proof of a clear and imminent health danger (L. 1985, c. 516). The courts have strictly construed this provision. See *Toll Brothers v. West Windsor Twp.*, 312 N.J. Super. 540 (App. Div. 1998); *N.J. Shore Builders Assoc. v. Twp. of Middletown*, 234 N.J. Super. 619 (Law Div. 1989).

The greatest test to date of the legislative prohibition of development moratoria occurred in the *Toll Brothers v. West Windsor* case. West Windsor had implemented timed growth controls to deal with explosive residential growth. Under the timed growth control ordinance, the

township planning board could grant site plan and subdivision approvals for "basic rights" and "additional rights." "Basic rights" allowed immediate construction of a specific percentage of the approved dwelling units. After dwellings allowed as part of "basic rights" had been completed, the developer could then construct a specific percentage of "additional rights" each year, varying from 6.6 percent to 10 percent of the approved dwellings.

West Windsor Township argued that its timed growth ordinance did not provide a moratorium on development since it did not prohibit the processing of applications. The court disagreed:

> We conclude that this argument is invalid and contrary to legislative intent. It offends common sense to believe that a moratorium on applications is prohibited, but a moratorium on full implementation of an approved application is valid. Statutes are to be read sensibly rather than literally and should not be construed in a manner that would lead to unreasonable or anomalous results.

Toll Brothers, 312 N.J. Super. at 550.

Development Moratoria in the Highlands

After adoption of the Highlands Regional Master Plan (RMP), municipalities with land in the Preservation Area were required to obtain Highlands Council approval of land use ordinances and master plans through the conformance process. See N.J.S.A. 13:20-14. Municipalities and counties with land in the Planning Area had the option, but not obligation, to pursue conformance approval. N.J.S.A. 13:20-15. The objective of the conformance process is for the municipality to adopt amendments to the master plan, zoning ordinance and other plans/documents to assure that future development will conform with the Highlands RMP. To date, the Highlands Council has conditioned conformance approval upon later adoption of the identified amendments.

Of the 44 municipalities that have received Highlands Council conformance approval, between Sept. 23, 2010, and Jan. 17, 2013, only one town, High Bridge Borough, has adopted the mandated Highland Area Land Use Ordinance. In the other 43 towns, since zoning has not been changed, development applications must be reviewed for consistency with pre-Highlands ordinance standards. The Highlands Council has dealt with this anomaly by requiring towns to adopt "checklist ordinances." The "checklist ordinance" works by ensuring that no development application is deemed complete until either the Highlands Area Land Use Ordinance has been adopted *or* the Highlands Council has determined the proposed development to be consistent with the Highlands RMP.

It may be suggested that since the checklist ordinance provides the option of a Highlands Council consistency determination, that it does not prohibit development but merely adds a step to processing. This suggestion ignores the futility of a Highlands consistency review where pre-Highlands zoning is in effect. The Highlands RMP regulates development primarily by allowing public sewer and water service only in the Existing Community Zone. See Highlands RMP Objectives 2J4a, 2J4d and 2K3c. The Existing Community Zone comprises 17 percent of the Highlands region, but only 10 percent of the zone is vacant and theoretically available for development. The vast majority of the Highlands region must be developed on individual septic systems and wells at densities of one dwelling on between 7.4 acres and 106.4 acres in the Planning Area and one dwelling on between 25 acres and 88 acres in the Preservation Area. Obviously, if municipal zoning was already this restrictive, there would be no need for a conformance process and no need for conforming towns to adopt a 98-page Model Highlands Land Use Ordinance. Thus, the option of having an application deemed complete due to consistency with the Highlands RMP is not a real option. It is an exercise in futility. Thus, since the checklist ordinance prohibits development until zoning amendments are adopted, it imposes a classic moratorium prohibited by the MLUL.

The checklist ordinance approach also raises concerns under the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1, because it requires agency review before municipal review. In the Planning Area, the Highlands Act does not delegate any authority to the Highlands Council to review development applications. See, N.J.S.A. 13:20-17. In the Preservation Area, Highlands Council review may occur after, not before, the decision by the local board. See N.J.S.A. 13:20-17.

Implications

The strategy behind the checklist ordinance requirement is clear. Since towns are taking years to fulfill the conformance approval conditions the agency has imposed, development must be put on hold until a Highlands area land use ordinance can be adopted. Whether this is a laudable goal or not, the approach flies in the face of the long-recognized prohibition of development moratoria. The longer a checklist ordinance is left in place, the greater the risk that property owners will challenge it. Although, in theory, the Highlands Act requires the state to defend a town in such a challenge, there is nothing in the Highlands Act that allows the state to pay a damage award in the event the court finds a temporary regulatory taking. See *Arkansas Game & Fish Comm'n v. United States*, 133 S.Ct. 511 (2012), where the court held that even temporary interference with property rights may result in a compensable taking. For this reason alone, the Highlands Council should not encourage or require towns to adopt checklist ordinances, and no town should adopt one at the behest of the Highlands Council.

Many towns entered the conformance process based on the incentive of full reimbursement for planning costs and substantially reduced affordable housing obligations. Once the consequences of full conformance became clear, most of the 44 towns took little or no action to comply with Highlands Council conditions. Whatever the reason for this very slow response, towns with land in the Highlands Planning Area continue to have the option, and not the obligation, to bring zoning into conformance with the Highlands RMP. By adopting a checklist ordinance, a town effectively gives up its option to conform and fully delegates its authority over land use within its borders to the Highlands Council. Aside from these practical consequences, adoption of the checklist ordinance violates state law and may result in liability for damages.■