

# Stop the World - We Need A Plan!

## *Moratorium Madness*

There is a madness that has descended upon planning in this country and it goes by the name of moratorium. Community after community has been torn asunder by the notion it can stop the world to write a plan that, well, stops the world. Though usually well-intended by local officials who adopt them, moratoriums are the latest tool of those who would have no change, the defenders of the status quo who want the world for themselves. Moratoriums, indeed, are no more than reactionary measures that can only be described as anti-planning. They are a dragon that will consume all planning and destroy it as a rational process if we don't put a moratorium on moratoriums.

One might ask why it is moratoriums are almost always employed in communities with long histories of planning and zoning. This pre-supposes a failure of planning that raises other questions. If planning failed before, why should we expect different results now? Is it really a failure of planning or simply a change in the goals of those in charge? If it's the latter, then what assurance is there the plan won't change with every election? If plans change with every election, how is planning any different than politics? Is the price of poor planning to be paid by landowners who propose to comply with it? How do landowners comply if the goals keep changing and the plans are no more than the latest land use platform of some politician? Moratoriums, once ventured upon, quickly become a slippery slope down into a world where planning is no more than slick imagery used to portray the exercise of raw political power.

## *Moratoriums Are Reactionary Attempts to Close the Gates of Paradise*

Moratoriums are, in a word, reactionary. Planning is thoughtful. Planning is a process intended to involve, as much as possible, the entire community, with a prerequisite being no predetermined ends. Moratoriums, by contrast, are entirely driven by predetermined ends, their very enactment always being in response to perceived threats from some form of development that would actually implement the current plan, a plan a majority of the community has suddenly decided it no longer likes and wants to stop. If there be any doubt, consider that moratoriums never lead to higher density or make it easier to grow. Rather, they are specifically designed to do the opposite. They are tools of anti-growth forces determined to forestall change.

The constituency for change is always tiny compared to the power and economic interests of those who like things as they are. After all, who benefits more than me if my neighbor is unable to develop his land? There are always more neighbors than proponents. Sincere local officials all too often succumb, for this reason, to the temptation to first stop everything when what they should be doing is planning. The winners are the "haves" who want things as they are. The losers are the few voters who own land and those faceless, nameless, voteless future residents who might want to move to the community - the "have nots." Planning becomes the excuse for what is anything but planning. It becomes the facade for a raw power grab by those wanting to close the gates to their new found Paradise behind them. Hence, the language of "preservation" that always accompanies these efforts.

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### *Planning Emergency or Simply An Excuse for War?*

None of this to suggest improper motives on the part of local officials. No community should have to throw itself open to any form of development. Conserving what is good about a community while it grows is a worthy objective and arguably necessary to maintaining culture and values. Many, perhaps even most, local officials are driven by such considerations. Unfortunately, moratoriums eliminate any possibility of achieving the balance so essential to this planning. They instead exacerbate the conflicts by creating two camps - one of those landowners severely impacted and one of those existing residents tremendously benefiting by the sudden halt of development. The result is a pressure cooker environment where rational decision making is next to impossible given the special interests now involved and the very large stake each has in the outcome of the moratorium. Well meaning local leaders are dragged against their will into a hot cauldron of controversy where only the votes count, compromise having become impossible.

Yet, it's all so completely unnecessary. The very concept of a "planning emergency" that undergirds the law allowing for moratoriums is silly. Emergencies don't require two years of planning. Rather, they demand action. A zoning amendment can be done almost as rapidly as a moratorium but communities determined to slow growth seldom choose this option for one very important reason - moratoriums avoid the burden of proof and the environmental analysis that must go into zoning changes. They are a quick and dirty way to kill projects that, although they comply with existing zoning, don't enjoy popular support. Time is money and the ability to simply say no for two years ends many a project with no tests required on the part of the community doing the dirty work. Some communities have done repeat moratoriums less than a year apart - a complete abuse of the system.

There is simply no such thing as a planning emergency if one is honest about it. State law imposes so many additional planning requirements above and beyond zoning that any project can be slowed or stopped if there is good cause using environmental statutes. Additionally, planning statutes in some states, New York being a prime example, offer virtually no vested rights in development approvals unless an applicant has expended significant sums of money in construction. Planning and engineering don't count and only a very foolish applicant will rely upon such approvals when new laws are pending. Moratoriums are, therefore, completely superfluous from the standpoint of legitimate planning. Their only value is to an illicit form of planning intended to stop projects cold while permanent measures to kill projects are put in place. They are the tools of demagogic NIMBY's and special interests who do not want to be burdened with the need to prove their case.

### *Stealing Savings and Retirements*

Moratoriums are also unfair on another level. Equity in land can only be effectively recovered with a fair return on investment when markets are at their peak. Peaks don't last. Landowners who may have owned their properties for decades and now need to cash in the equity for retirement have a limited window of opportunity every real estate cycle to do. This window,

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unfortunately for them, is exactly the time when communities are most often tempted to slam it shut with moratoriums. Moratoriums, therefore, don't just foreclose the ability to sell for two years – they take away the value at precisely the point where landowners can come out whole. For farmers and others whose savings are invested in the land they own, this clearly constitutes a taking. Worse, it is an unchallengeable form of taking, there being neither a condemnation process to assure fair value nor a zoning process to assure balance through a burden of proof. Moratoriums make it possible to literally steal the savings and retirement funds of those who worked the land so long to create the environment so appealing to those doing the stealing.

Moratoriums are, too, counterproductive. They are anti-planning. Planning is by nature long-term thinking and cannot be produced in a vacuum where all life is first sucked out of a community for a prescribed period. Moreover, one cannot be thoughtful in an environment where two camps of special interests have been sent to battle over your work. The very availability of moratoria also discourages planning ahead. No community thinking it can stop what it doesn't like at any time with a simple moratorium has any incentive to plan ahead. Politics is the art of procrastination and risk avoidance. There is, to the politician who knows no better from experience, seemingly no easier way to punt zoning issues down the field than a moratorium. It gets an angry public of “last man in, close the door” types off his or her back and delays the day of reckoning. Why plan ahead and take the risks of a zoning process when such a tool is available when needed? But, again, this is anything but planning.

### ***Ending the Madness - Slaying the Dragon***

What can be done? First, eliminate the moratorium madness by taking away the authority to enact them. They are completely unjustified and a disincentive to planning on every level. They have no place in a fair planning and zoning process. This demands legislative changes in the case of New York State or a court decision finally recognizing the great harm moratoriums are doing to planning. Some recent decisions suggest judicial patience with communities who are abusing their authority to routinely extend and repeat moratoriums is growing thin. One can hope, therefore, some court will soon finally do what so urgently needs to be done by slaying the moratorium dragon.

Secondly, communities ought to think about adopting “pending law” rules that eliminate threats from developers trying to beat the enactment of new zoning rules. Pennsylvania, for example, has long had a “pending ordinance doctrine” that effectively applies new zoning standards from the moment they are formally proposed and before they are adopted. New York State communities could conceivably do this under Municipal Home Rule Authority, much the same as they do with respect to advertising of new laws and ordinances that would otherwise require publication in full. Such a local law might, for example, simply provide “the standards of any local law or ordinance hereafter enacted to amend existing subdivision and zoning statutes of the Town of Anytown shall apply from the date of the first advertisement of a public hearing on the same.” This would provide an effective alternative to the blunt force moratorium device and while providing an incentive to get at the job of community planning sooner rather than later.

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### *It's the Law Stupid!*

A longer term solution is to require local planning and put the burden on communities to keep up with change. Those who don't plan must live with their failure and adapt - the best possible incentive for planning. Every community with zoning should be required to have a comprehensive plan that is updated no less than every 10 years. Combined with a requirement that all zoning be based upon a comprehensive plan, this would eliminate any need for a moratorium. It would be a self-enforcing mechanism. Communities who failed to plan ahead would find their zoning subject to successful challenges. There would be no excuse for not planning ahead. Fairness and deliberation would be restored to a process demeaned by the moratorium.

Finally, there must be a corollary system of vested rights that makes sense and creates a level playing field for landowners. New York State's system is absurd and creates perverse incentives for landowners to avoid planning ahead, just as it does for communities. Unlike other states where preliminary approvals allow reasonable periods (e.g., five years in Pennsylvania) for a landowner to develop his or her own property, New York State only gives six months and accords almost no value even to a final approval if the landowner has not completed major portions of the project. Landowners are, therefore, encouraged to hold back from slowly developing their own properties and instead sell properties in bulk to developers who must then hurry up to get their projects completed, creating crisis conditions. A smart law would provide for five or more years of protection so planning and development could be done more slowly or properties resold with approvals and time to do it right. Now, the incentive is to go in for the quick kill - to sell properties to someone with the resources to make a quick buck. This is, once again, the opposite of good planning.

Will moratoriums finally be rejected in favor of planning ahead? One can only hope so. Mixing planning and democracy is, however, not easily done. It demands adherence first and foremost to the requirements of law and the obligation to protect the property rights of all, not just some. Unfortunately, democracy, while the best system of all, also embodies in itself the greatest threat to these rights. It is the "tyranny of the majority." Jefferson said "the tyranny of the legislature is really the danger most to be feared." Tocqueville, too, observed "if ever the free institutions of America are destroyed, that event may be attributed to the omnipotence of the majority." When a legislature such as a Town Board enacts a moratorium that, by fiat, exerts the will of a majority desiring no change and casts aside property rights, rights to travel and the needs of future generations, it embarks on the course of tyranny. We must get back to the law and the principles of a Magna Carta that advanced the radical idea not even the King could arbitrarily take away the rights of landowners - they could only do themselves acting together, which is the very foundation of planning.