



Administrative Assistant to the Selectmen

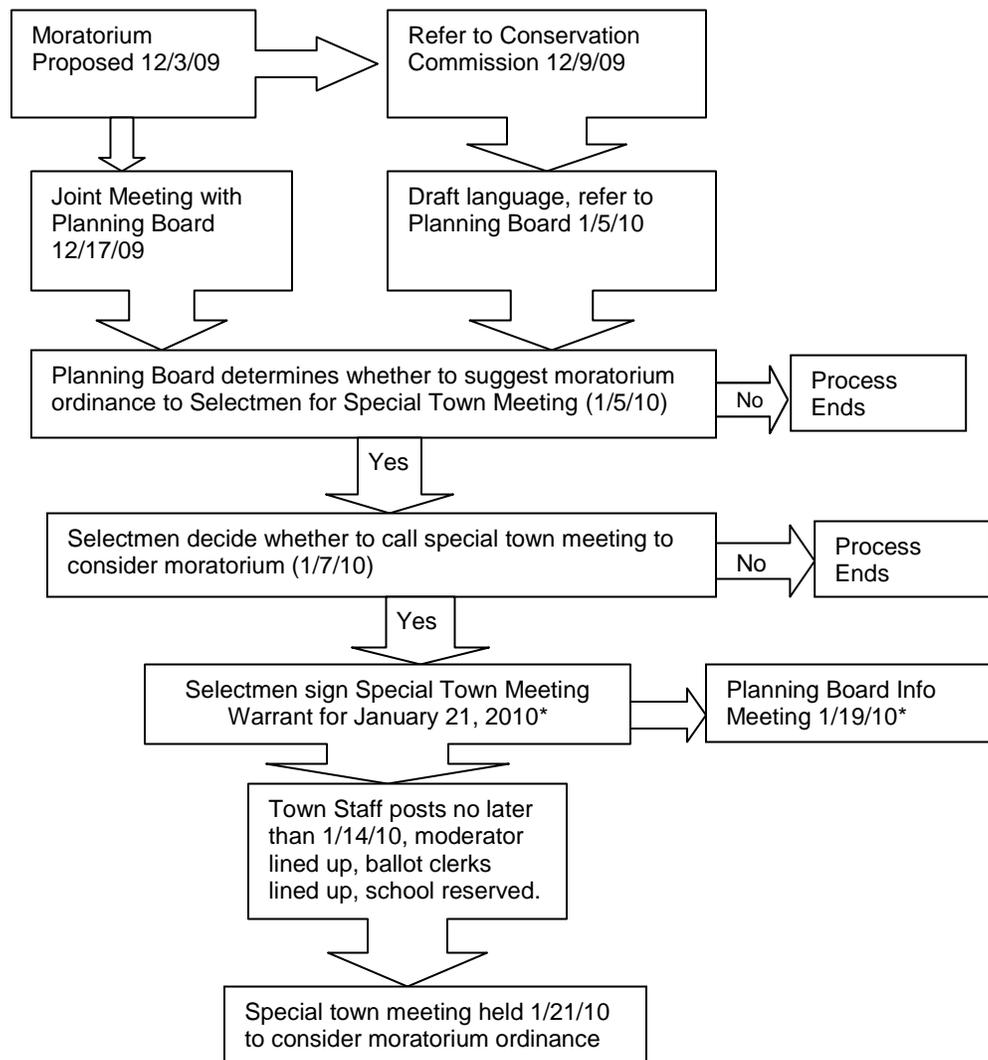
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To: Selectmen
From: Stu Marckoon
Re: Moratorium – Time Line
Date: December 7, 2009

The timeline for a town meeting for ordinance enactment often gets bogged down because there are so many options. During my career here, we've only dealt once with a moratorium – that being back in the mid 90's and having to do with rock quarrying.

I'll start with a chart and a time frame, and then pass along information on moratoria from the Maine Municipal Association manual.



*Pending available and appropriate meeting space

The above assumes an open town meeting with no public hearing prior to the open town meeting. It would be scheduled to coincide with the Selectmen's meeting date. If it snows hard, canceling the town meeting is difficult. There are numerous other paths to take, which could include a public hearing prior to the special town meeting, referendum voting, etc.

The following is from Maine Municipal Association's website on moratoria.

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 [4301](#), [4314](#), [4356](#) and [4360](#)
- [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](#)
- [Sample Town of Durham'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 (as defined in 30-A M.R.S.A. § 4301) 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 the initial moratorium ordinance. However, in municipalities where the town meeting is the legislative body, the municipal officers (board of selectpersons) have the authority to adopt an ordinance extending a moratorium in compliance with these provisions, after notice and hearing. No town meeting vote is necessary to adopt an ordinance that extends a moratorium, only to enact the initial moratorium.

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 recommend that a moratorium ordinance should not apply any earlier than the date that the moratorium ordinance was proposed. However, the Maine Supreme Court has approved the retroactive application of an ordinance amendment that reaches back to an earlier date than that. In *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183, 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 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 ordinances from the towns of Arundel and Durham.

V. Moratorium vs. "Rate of Growth" Ordinance

For years there has been a debate among municipal attorneys as to whether a “slow-growth” or “rate of growth” ordinance, such as a cap on building permits or on sewer user permits, is a moratorium ordinance which must meet the requirements of 30-A M.R.S.A. § 4356. In *Home Builders Association of Maine v. Town of Eliot*, 2000 ME 82, 750 A.2d 566, the Maine Supreme 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 the *Home Builders Association* case 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 Maine Supreme 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 Maine Supreme Court’s decision in *Home Builders Association*, 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 Home Builders Association decision.

“Rate of growth” ordinances (as defined in 30-A M.R.S.A. § 4301) are now also governed by some specific requirements in 30-A M.R.S.A. §§ 4314 and 4360.

VI. Temporary Moratorium not a “Taking” Under Federal constitution

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*, 535 U.S. 302, 122 S.Ct. 1465 (2002). 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 money 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: 11/09

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

The Legal References in the above material are as follows;

30-A MRSA 4301 (Definitions)

11. Moratorium. "Moratorium" means a land use ordinance or other regulation approved by a municipal legislative body that, if necessary, may be adopted on an emergency basis and given immediate effect and

that temporarily defers all development, or a type of development, by withholding any permit, authorization or approval necessary for the specified type or types of development.

30-A MRSA § 4356

4356. Moratoria

Any moratorium adopted by a municipality on the processing or issuance of development permits or licenses must meet the following requirements.

1. Necessity. *The moratorium must be needed:*

A. To prevent a shortage or an overburden of public facilities that would otherwise occur during the effective period of the moratorium or that is reasonably foreseeable as a result of any proposed or anticipated development; or

B. Because the application of existing comprehensive plans, land use ordinances or regulations or other applicable laws, if any, is inadequate to prevent serious public harm from residential, commercial or industrial development in the affected geographic area.

2. Definite term. *The moratorium must be of a definite term of not more than 180 days. The moratorium may be extended for additional 180-day periods if the municipality adopting the moratorium finds that:*

A. The problem giving rise to the need for the moratorium still exists; and

B. Reasonable progress is being made to alleviate the problem giving rise to the need for the moratorium.

3. Extension by selectmen. *In municipalities where the municipal legislative body is the town meeting, the selectmen may extend the moratorium in compliance with subsection 2 after notice and hearing.*

1 MRSA § 302

§302. Construction and effect of repealing and amending Acts

The repeal of an Act, resolve or municipal ordinance passed after the 4th day of March, 1870 does not revive any statute or ordinance in force before the Act, resolve or ordinance took effect. The repeal or amendment of an Act or ordinance does not affect any punishment, penalty or forfeiture incurred before the repeal or amendment takes effect, or any action or proceeding pending at the time of the repeal or amendment, for an offense committed or for recovery of a penalty or forfeiture incurred under the Act or ordinance repealed or amended. Actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby. For the purposes of this section, a proceeding shall include but not be limited to petitions or applications for licenses or permits required by law at the time of their filing. For the purposes of this section and regardless of any other action taken by the reviewing authority, an application for a license or permit required by law at the time of its filing shall be considered to be a pending proceeding when the reviewing authority has conducted at least one substantive review of the application and not before. For the purposes of this section, a substantive review of an application for a license or permit required by law at the time of application shall consist of a review of that application to determine whether it complies with the review criteria and other applicable requirements of law.

30-A MRSA § 4314

§4314. Transition; savings clause

1. Comprehensive plan. A municipal comprehensive plan adopted or amended by a municipality under former Title 30, chapter 239, subchapter 5 or 6 remains in effect until amended or repealed in accordance with the procedures, goals and guidelines established in this subchapter.

2. Shoreland and floodplain zoning ordinances. Notwithstanding section 4352, subsection 2, any portion of a zoning ordinance that is not consistent with a comprehensive plan adopted in accordance with the procedures, goals and guidelines established in this subchapter is no longer in effect 24 months after adoption of the plan unless the ordinance:

A. Does not regulate land use beyond the area required by Title 38, chapter 3, subchapter 1, article 2-B; or

B. Is adopted pursuant to and complies with the provisions of Title 38, section 440 and complies with the requirements of the Federal Flood Insurance Program.

3. Rate of growth, zoning and impact fee ordinances. After January 1, 2003, any portion of a municipality's or multimunicipal region's rate of growth, zoning or impact fee ordinance must be consistent with a comprehensive plan adopted in accordance with the procedures, goals and guidelines established in this subchapter. The portion of a rate of growth, zoning or impact fee ordinance not directly related to an inconsistency identified by a court or during a comprehensive plan review by the office in accordance with section 4347-A, subsection 3-A remains in effect. For purposes of this subsection, "zoning ordinance" does not include an ordinance that applies townwide that is a cluster development ordinance or a design ordinance prescribing the color, shape, height, landscaping, amount of open space or other comparable physical characteristics of development. The portion of a rate of growth, zoning or impact fee ordinance that is not consistent with a comprehensive plan is no longer in effect unless:

A.

B.

C. The ordinance or portion of the ordinance is exempted under subsection 2;

D. The municipality or multimunicipal region is under contract with the office to prepare a comprehensive plan or implementation program, in which case the ordinance or portion of the ordinance remains valid for up to 4 years after receipt of the first installment of its first planning assistance grant or for up to 2 years after receipt of the first installment of its first implementation assistance grant, whichever is earlier;

E. The ordinance or portion of the ordinance conflicts with a newly adopted comprehensive plan or plan amendment adopted in accordance with the procedures, goals and guidelines established in this subchapter, in which case the ordinance or portion of the ordinance remains in effect for a period of up to 24 months immediately following adoption of the comprehensive plan or plan amendment;

F. The municipality or multimunicipal region applied for and was denied financial assistance for its first planning assistance or implementation assistance grant under this subchapter due to lack of state funds on or before January 1, 2003. If the office subsequently offers the municipality or multimunicipal region its first planning assistance or implementation assistance grant, the municipality or multimunicipal region has up to one year to contract with the office to prepare a comprehensive plan or implementation program, in which case the municipality's or multimunicipal region's ordinances will be subject to paragraph D; or

G. The ordinance or portion of an ordinance is an adult entertainment establishment ordinance, as defined in section 4352, subsection 2, that has been adopted by a municipality that has not adopted a comprehensive plan

4. Encumbered balances at year-end.

30-A MRSA § 4360

§4360. Rate of growth ordinances

1. Ordinance review and update. *A municipality that enacts a rate of growth ordinance shall review and update the ordinance at least every 3 years to determine whether the rate of growth ordinance is still necessary and how the rate of growth ordinance may be adjusted to meet current conditions.*

2. Differential ordinances. *A municipality may enact rate of growth ordinances that set different limits on the number of building or development permits that are permitted in designated rural areas and designated growth areas.*

3. Ordinance requirements. *A municipality may adopt a rate of growth ordinance only if:*

A. The ordinance is consistent with section 4314, subsection 3;

B. The ordinance sets the number of building or development permits for new residential dwellings, not including permits for affordable housing, at 105% or more of the mean number of permits issued for new residential dwellings within the municipality during the 10 years immediately prior to the year in which the number is calculated. The mean is determined by adding together the total number of permits issued, excluding permits issued for affordable housing, for new residential dwellings for each year in the prior 10 years and then dividing by 10;

C. In addition to the permits established pursuant to paragraph B, the ordinance sets the number of building or development permits for affordable housing at no less than 10% of the number of permits set in the ordinance pursuant to paragraph B; and

D. The number of building or development permits for new residential dwellings allowed under the ordinance is recalculated every 3 years.

The reference to section 4452 (30-A) is not included, that only involves penalties and is not pertinent to the present discussion and is a very long section.

Conclusion

The above information is offered without recommendation one way or the other, but only as a resource into deciding whether a moratorium should be considered.

Respectfully submitted,

Stu Marckoon, Adm. Asst. to the Selectmen