

2020 Town Law Conference

Exploring Local Moratoria in Wisconsin

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What we will cover

- Focus on temporary moratoria in the land use and community planning context.
- “*Development moratoria*” and more.

What we will not cover

- Mining moratoria.
- Moratoria on gas/electric service disconnects.
- Moratoria on connections to the municipal wastewater treatment facility.
- U.S. eviction moratorium.
- Etc.

Function of Moratoria

- Can be an important planning tool.
- Allow communities to suspend the development approval process for a brief period of time while studies are completed and plans and ordinances are prepared or revised.
- Allow the planning process to occur unhindered by ongoing development that could frustrate the objectives of the planning process.

Function of Moratoria

- Limit the number of nonconformities that could be created upon the adoption of a new zoning ordinance.
- Eliminates the "*race of diligence*".
 - Property owner seeks building permits based on existing zoning *after* the nature of the proposed new zoning becomes known but *before* adoption of the new zoning.
 - Faced with this "*race*," a community may hastily adopt a new zoning ordinance without studies and receiving sufficient public input.

Function of Moratoria

- There needs to be a legitimate planning justification for a moratorium.

Regulatory Takings

- *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).
 - Two moratoria that prohibited virtually all development for 32 months **did not** constitute a *per se* taking of property requiring compensation.
 - “... landowners must wait...so that planners can make well-reasoned decisions....”
 - Focus on “*the parcel as a whole.*”
 - *Penn Central* 3 factor balancing test applies.

Authority to Impose Moratoria

- Towns, counties, cities, and villages *are* “*creatures of the State*” and need to look to State law for authority to enable them to act.
- Until 2012 the zoning and planning enabling laws in Wisconsin provided little guidance on the appropriate use of moratoria.
- The courts provided limited guidance.

Pre-2012 Authority

- Wis. Stat. § 62.23(7)(da), entitled "Interim zoning," states:
 - *"The common council of any city which has not adopted a zoning ordinance may, without referring the matter to the plan commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as is an ordinary ordinance but shall be effective for no longer than 2 years after its enactment."*

Pre-2012 Authority

- Narrow authorization -- applies only to cities, villages and towns exercising zoning "*which have not adopted a zoning ordinance.*"
 - What about communities with zoning?
 - What about comprehensive plan?
 - What about subdivision ordinance?
 - Can the authority for moratoria be inferred from other authority?
 - What about counties?

Pre-2012 Authority

- *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis.2d 157, 540 N.W.2d 189 (1995).
 - City enacted a moratorium by resolution (rather than by ordinance) on the issuance of building permits for one particular property.
 - Court questioned legality of a moratoria but accepted it as valid for purposes of its review.
 - Court infers that moratoria are valid if enacted by ordinance.

Pre-2012 Authority

- *Lake City Corp. v. City of Mequon*, 199 Wis.2d 353, 544 N.W.2d 600 (Ct. App. 1996).
 - Court of Appeals questioned whether a city which already had a comprehensive zoning ordinance could adopt a moratorium.
 - Court did not answer question but said arguably there is implied authority for *all* cities, not just those without zoning, to impose moratoria.
 - Wis. Supreme Court did not provide any guidance on this issue.

Pre-2012 Authority

- *Wisconsin Realtors Assoc. v. Town of West Point*, 2008 WI App 40 (rev. denied 2008 WI 124).
- Town of West Point in Columbia County adopted a temporary moratorium ordinance on the acceptance, review, approval of applications for land divisions while the Town completed a comprehensive plan update.
- The Town, under county zoning, relied on Wis. Stat. § 236.45(2) enabling local regulation of subdivisions/land divisions for authority.

Pre-2012 Authority

- Wis. Realtors Assoc., and Wis. Builders Assoc., sued arguing § 236.45(2) did not authorize a town-wide moratorium because:
 - (1) § 236.45 authorizes only prohibitions on development “*in areas,*” not all areas of a municipality;
 - (2) Town’s ordinance failed to make applicable all the provisions of Ch. 236; and
 - (3) Allowing moratorium under Ch. 236 would render meaningless the express grant of authority of § 62.23(7)(da) to freeze existing uses while preparing a “*comprehensive zoning plan*”.

Pre-2012 Authority

- The Wisconsin Court of Appeals disagreed and held the Town's moratorium ordinance was authorized by the general language of Wis. Stat. § 236.45(2).
- Wis. Supreme Court declined to review the case.

Legislative Guidance

- Efforts by interest groups to develop a proposal for moratoria enabling legislation did not result in an agreement.
- Ultimately Wis. Realtors Assoc. succeeded in passage of 2011 Wis. Act 144.

2011 Wis. Act 144

- Created Wis. Stat. § 66.1002.
- Enables the use of “*development moratoria*” by cities, villages, and towns.
- Defines “*development moratorium*” as: “*a moratorium on rezoning or approving any subdivision or other division of land by plat or certified survey map that is authorized under Ch. 236.*”

2011 Wis. Act 144

- Applies to communities:
 - With a comprehensive plan;
 - Preparing a comprehensive plan;
 - Preparing a “*significant amendment*” to comp. plan due to substantial change in conditions; or
 - Eligible for delay of consistency requirement (ended 2012)
 - **And** moratorium needed due to:
 - Inadequate public facilities and/or
 - Significant threat to public health/safety.

Procedures under Act 144

- Inadequate public facilities:
 - Governing body obtains written report from a registered engineer stating the possible shortage or overburdening of public facilities justifies need for moratorium.
 - Governing body adopts resolution stating moratorium needed to prevent shortage in, or overburdening of, public facilities located in the municipality and that would otherwise occur without the moratorium.

Procedures under Act 144

- Significant threat to public health/safety:
 - Governing body obtains written report from a registered engineer or public health professional stating proposed rezoning or land division presents such a significant threat public health or safety that moratorium is justified.
 - Governing body adopts resolution stating moratorium needed to address significant threat to public health or safety presented by proposed rezoning or land division.

Procedures under Act 144

- Ordinance must:
 - describe need for moratorium;
 - describe specific action to be taken to alleviate need for moratorium;
 - specify length of time moratorium will be in effect and explain why that length selected;
 - describe geographic area of moratorium;
 - provide exemption for rezonings/land divisions that have no or slight impact on problem giving rise to moratorium.

Procedures under Act 144

- The local government must hold public hearing on proposed moratorium ordinance providing at least 30 days notice of the hearing.
- Detailed notice requirements outlined in statute.

Length of Act 144 Moratorium

- Long enough to address problem giving rise to moratorium.
- May not exceed 12 months.
- Ordinance may be amended once to extend moratorium for up to 6 months if necessary to address problem giving rise to moratorium.

Act 144 Moratorium

- Limited to moratoria on rezonings and/or land divisions.
 - What about other actions?
 - Building permits.
 - Driveway permits.
 - Zoning amendments that are not a rezoning.
 - Etc.
 - What about other authorities for enacting moratoria?
 - “*Interim zoning*” under Wis. Stat. § 62.23(7)(da).
 - *Town of West Point* case.

2011 Wis. Act 143

- Created Wis. Stat. 66.1010.
- Prohibits local governments from enacting or enforcing an ordinance that places a moratorium on evicting tenants from residential or commercial properties.

2015 Wis. Act 391

- Added language to Wis. Stat. § 59.69 (4) expressly prohibiting counties from enacting a “*development moratorium*” (as defined in Wis. Stat. § 66.1002 (1) (b)).
- Does not limit county authority to impose a moratorium that is not a “*development moratorium.*”

Public Health Moratoria

- City/county board of health authority
 - Wis. Stat. §§ 251.04, 323.14.
 - Trempealeau County Board of Health moratorium on nonmetallic mining (frac sand).
 - Eau Claire County frac sand mining moratorium.

General thoughts

- Enact land use moratoria by ordinance and not by resolution.
- Purpose of moratorium must be for conducting studies for updating/amending plans or regulatory controls to prevent incompatible uses after plan/controls are adopted.
 - Community needs a rational planning basis for moratorium.

General thoughts

- While moratorium could apply to entire community, it is best to apply only to the area(s) where needed.
- Should be kept as short as possible.
 - No more than what is needed to complete task.
- Need not prohibit all development.
 - A variance or exception procedure may be necessary.

Moratoria: What's the Objective?

- Hypothetical situation:
 - A very vocal group of citizens want the Town Board to adopt a moratorium to stop an unwanted land use.
 - NIMBY
 - BANANA
 - If the objective is to stop a project, other laws that protect private property owners may come into play that can make it difficult to stop a project.

Other laws to consider

- State/Federal preemptions limiting local authority to regulate certain uses:
 - Large-scale Livestock Facility Siting Law.
 - Telecommunication facilities.
 - Wind Facility Siting Law.
 - Large-scale Solar Installations.
 - Etc.

Other laws to consider

- Laws protecting property owners if the rules change:
 - Vested rights.
 - Down zoning.
 - Nonconformities.

Vested Rights

- "*Vested rights*" refers to the government's permission to develop property that cannot be taken back by a subsequent governmental act.
- A right vests when a proposed development is protected from changes in local regulations, such as zoning, by the local governing body.

Vested Rights

- *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis.2d 157, 540 N.W.2d 189 (1995).
 - Developer must apply for a building permit in order to obtain vested rights.
 - Application for permit must be in strict and complete conformance with all applicable zoning and building code requirements in effect at time of application.

2009 Wis. Act 376

- Amended Wis. Stat. § 236.(1)(b) stating plats must comply with local ordinance in effect on date plat submitted.
- If an ordinance is revised after plat submitted, new requirements cannot apply to the plat.

2013 Wis. Act 74

- Created Wis. Stat. § 66.10015 entitled “*Limitation on development regulation authority.*”
- Applies to cities, villages, towns, and counties.
- If a person submits an application for an activity related to a project, the local government shall approve, deny, or conditionally approve the application based solely on ordinances or other local requirements in effect on date local government receives the application, unless the applicant and the local government agree otherwise.

2013 Wis. Act 74

- Act 74 used the term “*land development*” rather than “*project.*” 2015 Wis. Act 391 replaced this term with “*a project.*”
 - A “*project*” was defined in Act 74 as “*a specific and identifiable land development that occurs on defined and adjacent parcels of land, which includes lands separated by roads, waterways, and easements.*”
- Applies to all activities related to the project (building permit, zoning approval, driveway permit, stormwater permit, etc.).

2013 Wis. Act 74

- If project requires more than one approval or approvals from more than one local government and the applicant identifies the full scope of the project at time of filing the application for first approval required, the existing requirements applicable in each local government at the time of filing the application for the first approval shall be applicable to all subsequent approvals, unless applicant and local government agree otherwise.
- 2017 Wis. Act 68 clarified language so it applies to projects requiring more than one approval or approvals from one or more local governments.

Down zoning

- 2015 Wis. Act 391 amended 66.10015 by placing limitation on down zoning.
- Defines “*down zoning*” as a zoning ordinance that affects an area of land in one of the following ways:
 - Decreases development density of the land to be less dense than was allowed under its previous usage;
 - Reduces permitted uses of the land specified in a zoning ordinance or other land use regulation to fewer uses than allowed under previous usage. Wis. Stat. § 66.10015(1)(as).

Down zoning

- Under Act 391, enactment of a down zoning ordinance requires approval by at least 2/3rds of the members of the elected governing body.
- If the ordinance is requested, or agreed to, by the property owner, the ordinance may be enacted by a simple majority of the members of the governing body.

Nonconformities

- Nonconformities arise when local governments amend the applicable zoning ordinance so existing development no longer conforms to the requirements of the amended zoning ordinance.
- Typical nonconformities.
 - Uses.
 - Structures.
 - Lots.

Nonconforming *Uses*

- Wisconsin's zoning enabling statutes originally focused on nonconforming uses of structures and specified that local zoning ordinances may not prohibit the use of buildings existing at the time a new zoning ordinance is adopted even though the use does not conform to the provisions of the new ordinance.

Nonconforming *Uses*

- Total structural repairs or alterations of the nonconforming use of a building shall not during the life of the building exceed 50 percent of the assessed value of the building unless it is permanently changed to a conforming use.

Nonconforming *Uses*

- 2013 Wis. Act 347 added Wis. Stat. § 62.23(7)(ham) stating that a manufactured home community that is a legal nonconforming use continues to be a legal nonconforming use notwithstanding the repair or replacement of homes or infrastructure within the community.

Nonconforming *Structures*

- 2011 Wis. Act 170 introduced a statutory definition of “*nonconforming structure*”:
 - “*a dwelling or other building that existed lawfully before the current zoning ordinance was enacted, but does not conform with one or more of the development regulations in the current zoning ordinance.*”
 - “*Development regulations*” means “*the parts of a zoning ordinance that applies to elements including setback, height, lot coverage, and side yard.*”

Nonconforming *Structures*

- Act 170 states that zoning ordinances “*may not prohibit, or limit based on cost, the repair, maintenance, renovation, or remodeling of a nonconforming structure.*”
 - Eliminates the 50% rule for nonconforming structures.

Nonconforming *Structures*

- 2015 Wis. Act 223 amended Wis. Stat. § 62.23(7)(hc)1. (intro.) to add that cities, villages, and towns zoning under village powers cannot prohibit the replacement of a nonconforming structure if the structure will be replaced at the size, location, and use that it had immediately before the damage or destruction occurred.

Substandard *Lots*

- 2017 Wis. Act 67 amended Wis. Stat. 66.10015 to define a “*substandard lot*”:
 - “*A legally created lot or parcel that met any applicable lot size requirements when it was created, but does not meet current lot size requirements.*”
 - Some local governments refer to substandard lots as “*nonconforming lots.*”

Substandard *Lots*

- Act 67 prohibits local governments from conveying an ownership interest in a substandard lot or from using a substandard lot as a building site if the substandard lot does not have any structures placed partly upon an adjacent lot and the substandard lot is developed to comply with all other ordinances of the local government.

Substandard *Lots*

- Act 67 also prohibits local governments and state agencies from enacting or enforcing any ordinance or administrative rule or taking any other action that requires one or more lots to be merged with another lot, for any purpose, without the consent of the owners of the lots that are to be merged.
 - Legislative response to *Murr v. Wisconsin* 582 U.S. ____ (2017)

Thanks!

- Questions?
- Feel free to contact me at bwohm@wisc.edu.