Restrictions and Limitations on Building Moratoria

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A consistent refrain has been that Plymouth should impose a residential building moratorium to slow down development. There are two problems with this idea; general limitations on building are considered to be violative of the Massachusetts and U.S. Constitutions and partial limitations are difficult to obtain and usually result in even more development. The following is an overview of the regulatory, legal, and practical landscape for such moratoria in Massachusetts.

Standard of Review for Building Moratoria

All proposed zoning bylaw changes (including moratoria and rate of development restrictions) must be approved by the State Attorney General. When reviewing municipal zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003).

General Moratoria to Limit Development Are Unconstitutional

Under Massachusetts law, moratoria intended to limit development generally "do not serve a permissible public purpose and are therefore unconstitutional." Zuckerman v. Hadley, 442 Mass. 511, 520-21 (2004), *citing* Sturges v. Chilmark, 380 Mass. 246, 257 (1980). And because municipalities have no power to adopt a zoning by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]", general moratoria cannot be approved by the Attorney General. Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

Addressing the issue of constitutionality, the Massachusetts Supreme Judicial Court (SJC) has stated that while a town may use its zoning bylaw to allow itself breathing room to plan for the channeling of normal growth, it may not turn that breathing room into a choke hold against further growth. Simon v. Needham, 311 Mass. 560, 565 (1942) ("zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed"); Johnson v. Edgartown, 425 Mass. 117, 120 (1997) (general welfare transcends one town's "parochial interests"). These decisions follow a century old holding from the U.S. Supreme Court addressing a Massachusetts municipal zoning restriction designed to prevent new residents. In that case, the Supreme Court held that while a town may not want a new wave of permanent home seekers, it does not serve the general welfare of the Commonwealth to permit one particular town to deflect that wave onto its neighbors. Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (zoning regulation invalid "where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way").

There Are Significant Restrictions on Limited Moratoria

Limited moratoria are those which address a specific geographic area or problem. Under Massachusetts law they may be allowed when there is a need for "study, reflection and decision on a subject matter of [some] complexity..." W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 569 (2002) (allowing city's temporary moratorium on building permits in two districts). But there are critical limitations to such moratoria.

To meet Constitutionality requirements (both state and federal), towns must first establish that there is a "reasonable basis" for a by-law creating a moratorium which "has some reasonable prospect of a tangible benefit to the community". Sturges v. Chilmark, 380 Mass. 246, 257 (1980). This has been further interpreted to mean that the proposed moratorium it is intended to allow a municipality time to prepare a solution to a specific issue or problem. Zuckerman v. Hadley, 442 Mass. 511, 520-21 (2004). For example, in 2024, the Attorney General approved a building moratorium for the Town of Hadley applicable to a single newly approved multi-family housing zone in order to allow time to develop new design standards.

In an effort to justify broader moratoria, some municipalities have asserted that proposed bylaws restricting (or limiting) residential growth meet this standard. The basis for their argument has been that a significant influx of people causes undue strain on the community, both fiscally and culturally, and thus placing limitations on such growth addresses a specific issue and provides a tangible benefit for the. However, that position has been expressly rejected by the courts.

In Zuckerman v. Hadley, the town argued that it needed to impose a rate of growth restriction bylaw (a lesser restriction than a moratorium which limits the number of residential building permits allowed each year) was in the public interest and advanced legitimate zoning purposes because it allowed the town to support an increasing population and provide public facilities while continuing to preserve its rural characteristics. The SJC disagreed. Noting that Hadley was no different than other rural and suburban communities presented with demands of development, it ruled that, "Restraining the rate of growth for a period of unlimited duration, and not for the purpose of conducting studies or planning for future growth, is inherently and unavoidably detrimental to the public welfare, and therefore not a legitimate zoning purpose." Zuckerman v. Hadley, 442 Mass. 518.

The courts have also ruled that imposition of a moratorium in order to address the need for, and cost of, increased public services or infrastructure does not meet Constitutional requirements. Rejecting this approach in as clear terms as possible, the SJC stated that "prevent[ing] the entrance of newcomers in order to avoid burdens upon the public services and facilities . . . is not a valid public purpose." Id. at 520, *quoting* Beck v. Raymond, 118 N.H. 793, 801 (1978). *Accord* National Land & Inv. Co. v. Easttown Bd. of Adjustment, 419 Pa. 504, 532 (1965) ("zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid").[1]

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[1] Similarly, courts have rejected the argument that that the need to increase specific types of municipal expenditures, such as education costs, justify new zoning restrictions. In Bevilacqua Co. v. Lundberg, No. 19 MISC 000516 (HPS), 2020 WL 6439581, at *8–9 (Mass. Land Ct. Nov. 2, 2020), the court ruled that the Gloucester City Council's denial of a special permit to construct an eight-unit multi-family building based on the potential fiscal impact

In addition to requiring a reasonable basis for a moratorium, Massachusetts also requires that they be limited in time. As noted above, a moratorium is permitted only to allow a municipality time to address a specific issue. Zuckerman v. Hadley, 442 Mass. 520-21. Accordingly, a proposed moratorium must identify a particular issue, present a plan to address that issue, and set a reasonable time in which to accomplish that resolution. Sturges v. Chilmark, 380 Mass. 257. The time allotted will be dependent upon the issue, but the Commonwealth has set a standard of not allowing any restriction longer than 2 years. For example, the Town of Hadley moratorium approved in 2024 by the Attorney General was for only one year, and terminated automatically after that, even if design standards were not finalized. Had the moratorium been open ended, allowing it to continue if the review committee did not timely approve design standards, it would have been deemed unconstitutional.

Other Legal Issues

In addition to the other grounds stated above, building moratoria, particularly those relating to multi-family housing, are also subject to legal challenge on discrimination grounds.

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of the proposed development on public schools was "legally untenable." Id. at *9. Because the right to a public education is mandated and guaranteed by the Massachusetts Constitution (*see* McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 621 (1993) and Hancock v. Comm'r of Education, 443 Mass. 428, 430 (2005)), "[a denial of] a special permit to build housing because the occupants of that housing might include children who will attend public schools is [a denial of the children's] constitutional right under the Massachusetts Constitution to a public education." Bevilacqua Co., 2020 WL 6439581, at *8 (*citing* McDuffy and Hancock).

Similarly, in 160 Moulton Drive LLC v. Shaffer, No. 18 MISC 000688 (RBF), 2020 WL 7319366, at *13-15 (Mass. Land Ct. Dec. 11, 2020), the Town of Lynnfield sought to deny a change of use from a restaurant to an apartment building on the grounds that it would be "substantially more detrimental" than the existing use. The town argued that the proposed use was a financial detriment to the town because the cost of educating the number of school-aged children projected to live in the apartments would be greater than the increased tax revenue. The Land Court rejected this argument stating, "The Town cannot deny a permit on the grounds that its own property tax scheme is insufficient to provide for the needs of its inhabitants. Whether the Town has enough funds to provide public education for its school-aged children is simply not a matter for the Board to consider in reviewing special permit applications." Id. at *14 (*citing* Bevilacqua Co., 2020 WL 6439581 at *8-9).

Municipalities are obligated to comply with the provisions of FHA and G.L. c. 151B. These statutes broadly prohibit discrimination in housing based on certain characteristics including race, color, religion, sex, gender identity, sexual orientation, familial status, national origin, handicap and ancestry. *See* 42 U.S.C. § 3604 and G.L. c. 151B, § 4, ¶¶ 4A and 6.

It is important to note that a town doesn't need to intentionally discriminate in order to be in violation the FHA and the Massachusetts Anti-Discrimination laws. Rater, they prohibit towns from using their zoning powers in a discriminatory manner, meaning in a manner that has the purpose **or effect** of limiting or interfering with housing opportunities available to members of a protected class. That means that a zoning rule, neutral on its face, can still be considered discriminatory if it "disproportionately disadvantages members of a protected class." Burbank Apartments Tenant Ass'n v. Kargman, 474 Mass. 107, 121 (2016) (recognizing disparate impact discrimination under G.L. c. 151B). *See also* Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015) (recognizing disparate impact discrimination under the FHA). For example, zoning efforts intended to restrict multi-family housing (and affordable housing in particular) may be considered discriminatory based on their impact on those with children. As such, any housing related zoning restriction will automatically receive a high level of scrutiny and may ultimately be rejected or subject to legal challenge.

Practical Challenges

Beyond the legalities, building moratoria tend not to accomplish what their proponents want – to reduce residential building.

First, a moratorium would not stop building that is already approved. As a result, when the prospect of a moratorium is announced (it would have to be approved by a 2/3 Town Meeting vote), many property owners who are even considering future development would file for subdivision approval. If such construction is permitted as a matter of right, the Town has no choice but to approve it. And once an application is approved, a property remains subject to the zoning in existence at the time of approval for the next 8 years.

Moreover, history has shown that once someone has invested the financial resources necessary to obtain such an approval they tend to proceed with construction (or sell the rights to someone else who does so). This is what occurred in 1988 when Plymouth introduced a growth management bylaw. The result is that proposing a moratorium tends to lead to a significant influx of new building, more than if no such proposal were made.

Second, a moratorium would not prevent the construction of new 40B housing. That is because such projects are approved at the state level and are not subject to any municipal zoning ordinance (which would include a moratorium). In fact, when a town takes away the ability to develop projects under town zoning developers undertake more 40B projects, which tend to be of greater density.

Third, even if a moratorium could be obtained, it can only be for a limited time. For those unable to wait up to 2 years, they tend to sell to larger outside entities who have the resources to buy up property and wait. That often results in projects that are less in tune with the needs of the community.

Fourth, any moratorium must be limited to the geographic area where a problem exists. This has the effect of shifting development to other areas in Town, often those we want to protect from development.

Conclusions

Plymouth is facing the same challenges as many other communities; increasing numbers of new residents placing a strain on infrastructure and services. But the courts have unequivocally stated that restricting development to avoid these issues would be unconstitutional. So, rather than once again try and avoid addressing growth that we cannot prevent, Plymouth needs to try and shape such growth in the manner best suited for our sustainable future.

**** This analysis has been prepared as a general overview for informational purposes. It may not be used as legal guidance by any person(s) for any specific circumstance. This analysis represents only the views of the author in their individual capacity, and not as a representative or official of the Town of Plymouth.***