

A COUNTY CAN PASS A MORATORIUM AND STUDY THE IMPACT OF HORIZONTAL GAS DRILLING BEFORE IT BEGINS

It is clear that horizontal gas drilling will impact our roads, our water, noise, air pollution, among other things. It will also make some people a lot of money. Communities that have already experienced horizontal gas drilling say that unless we act before it happens, the social costs will fall on local communities. Municipal officials have a responsibility to see that those social costs are not foisted off on our tax payers. A moratorium is way to pause the drilling while we study the impact and resources affected.

There are conflicting opinions on whether Counties or Towns can do a moratorium. In part, this is a result of how moratorium law developed. In the US and in NY some laws are spelled out in statutory form but also some law, just as valid, is called common law. The legal principles of common law have developed over time and are found in the decisions of Judges. An example is negligence law. If you create a dangerous situation, such as driving recklessly and you cause an accident that results in someone else being injured, that person can sue you for negligence. It isn't written up in a specific statute but it is just as enforceable in a Court of Law. The same is true of the law of moratoria. Its rules and principles are not found in statute, they are found in the common law.

Courts tell us that a moratorium is a common device that municipalities use to put a temporary hold on an activity – often a residential or industrial development – so that the public safety, health and well being, *including the social costs of development*, can be considered. In the case of a town moratorium, a court described a moratorium in the following way: “The moratorium . . . is a valid stopgap or interim measure, reasonably designed to temporarily halt development while the Town considered updates to its master plan and comprehensive changes to its Zoning Ordinance.” Laurel Realty LLC v. Planning Board of Town of Kent 40 A.D. 3d 857 (2d Dept 2007) The time frame for the moratorium must be reasonable and extensions have been upheld when it was shown they were needed. The municipality can do a reasonable investigation into what, if any, actions it should take before the resumption of the development project.

Careful, comprehensive planning is one of the fundamental objectives underpinning all land use regulation and it therefore follows that municipalities should have the ability to slow down the growth process in order to ensure that their policies are well thought out and not determined in an ad hoc, de facto basis, so that changes are not rendered moot by immediate development. Matter of Home Depot USA, Inc. v. Village of Rockville Centre, 295 A.D. 2d 426 (2d Dept 2002). A moratorium enacted solely because of public opposition to a project will not withstand court challenge. Matter of Cellular Tower v. Village of Tarrytown, 209 A.D. 2d 57 (2d Dep 1995) On the other hand a moratorium has been upheld where it was rationally related to a legitimate governmental purpose [such as] preserving a town's aesthetic character. Ecogen, LLC v. Town of Italy, 438 F. Supp.2d 149 (WDNY 2006)

One misunderstanding, which is promoted by those who want gas drilling to happen as soon as possible, is that a moratorium is an attempt to regulate gas drilling. We cannot deny that *under present law*, ONLY THE DEC CAN REGULATE GAS DRILLING. A moratorium is NOT a regulation of gas drilling. A moratorium is a stopgap measure, a pause. It does not say how tall drilling rigs can be, how thick the well casings must be, or other things that would constitute a regulation of gas drilling.

CAN A COUNTY HAVE A MORATORIUM? Legal research showed several examples of county moratoria. Leeandy Development v. Town of Woodbury, 134 F. Supp. 2d 537 (SDNY 2001) discussed an Orange County Moratorium of 1996 on new sewer connections without county approval. The moratorium was not challenged in the lawsuit. Johnson v. Wing, 12 F. Supp. 2d 311 (SDNY 1998) mentions Westchester County extended its moratorium on evictions for nonpayment to all homeless recipients. Hudson Valley Properties & Rentals v. Ursuline Provincialate, 221 A.D.2d 507 (2d Dept 1995), refers to Dutchess County's Department of Health moratorium on all subdivisions in the City of Beacon in excess of 4 or 5 lots. RM Investors Corp. v. Maggi, 104 Misc 2d 41 (County Ct of NY, Trial & Spec. Term Rockland County, 1980) refers to Rockland County's 5 year moratorium on sale of property purchased for delinquent taxes. None of these moratoria were invalidated in these cases.

So, a county can have a moratorium. During the interim period of the moratorium the community will have time to study the impacts and consequences of gas drilling and perhaps pass laws and rules that a county government is responsible for. Such as:

1. County roads and property taxes seem to be the most obvious since the Environmental Conservation Law explicitly acknowledges municipal responsibility for those. ECL §23-0303(2).
2. County Law Article 5 also gives a county responsibility for water quality management (§220-a), flood control & soil conservation (§223), EMS training (§223-b). The lawyer from the Oil and Gas Accountability Project said that gas drilling is an industrial activity and there will be industrial scale injuries and accidents. Emergency response teams will have to handle a whole new range of emergencies including chemical and gas fires (which are not put out with water) and industrial injuries from burns, torn limbs, etc. Also counties are responsible for solid waste management: resource recovery (§226-b).
3. Under Municipal Home Rule Law, which applies to counties, counties also have power to protect and enhance its physical and visual environment (Article 2, §10 (a) (11), safety, health and well-being of persons or property therein. (a)(12). Also Counties specifically have responsibility for control of floods or the conservation of soil (§10 (b) (8), the regulation or prohibition of the dumping of garbage . . . or other waste material in or adjacent to creeks or streams in watershed areas improved under any flood control or soil erosion program, (§10 (b) (11)). Also it is very important to get baseline data on what's in public water supplies *now*, because without it you can't prove if it has been polluted.

Remember that the attorneys representing people with leases want drilling to happen as quickly as possible. They are representing their clients when they try to discourage legislators from enacting a moratorium that will delay the payment of royalties. But the gas isn't going anywhere while we consider the need to implement increased bonding for roads, or rules to deal with the dumping of solid waste or waste water. DEC permit review process doesn't include what will be done with waste water. That may be the county's responsibility. Slowing down the development until we know more will benefit everyone. Because even those who have signed gas drilling leases expect their elected officials to act for the general benefit of the population and property in their county or town. We municipal officials have a responsibility to protect health and well-being of our people and their property.

Mary Jo Long, Esq.
607-639-2783