
Coates' Canons Blog: Can We Hit the Pause Button on Development Approvals?

By David Owens

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On Monday morning the River City newspaper contains a story on the new phenomenon of internet sweepstakes cafes – how they operate, how they are technically different from video poker, and their rapid proliferation around the state. Towards the end of the article there is a brief quote from the owner of a chain of these establishments that he plans to expand his operations to some vacant buildings in downtown River City.

Enjoying a quick breakfast at the diner, the Mayor of River City almost chokes on her sausage biscuit when she reads this tidbit. **Trouble in River City**. She takes a last gulp of coffee, pays up, and hustles down the block to town hall. Reaching the manager's office nearly out of breath she asks if the town's codes would allow one of these businesses downtown. After a quick consult with the planner, the manager answers that the town codes are totally silent on the issue as nobody in River City had ever heard of a "internet sweepstakes café" prior to the last month or two, much less put anything about them in the zoning ordinance. The mayor asks if the town council can put a hold on the permitting for these cafes while they figure out if they should be allowed at all and if so, where and under what conditions. Is this possible?

Yes. Prior to 2005, it was assumed that the power to adopt moratoria was implied by the state's enabling statutes for local development regulations, but there was nothing in the statutes other than an authorization of moratoria on adult businesses. The statutes now explicitly allow cities and counties to impose temporary moratoria, but add a number of safeguards to prevent abuse of this powerful development management tool.

G.S. 153A-340(h) and 160A-381(e) allow temporary development moratoria to be placed on any city or county development approval. This includes zoning permits, land subdivision plats, building permits, sign permits, and any other approvals required prior to development. But this authority comes with several important limitations.

The first requirement is for a public hearing prior to adoption. If there is an imminent threat to public health and safety, the moratorium may be adopted without notice and hearing, but that situation is rare. Otherwise, a moratorium with a duration of sixty days or less requires a public hearing with a single published notice; a moratorium with a duration of more than sixty days (and any extension of a moratorium so that the total duration is more than sixty days) requires a public hearing with two published notices, just as is required for other land use regulations.

The second requirement is that the adopting jurisdiction must lay out its rationale and plan of action at the time the moratorium is adopted. The ordinance establishing a moratorium must expressly include the following four items:

1. A clear statement of the problems or conditions necessitating the moratorium, what other courses of action were considered, and why those alternatives were not deemed adequate.
2. A clear statement of the development approvals subject to the moratorium and how the moratorium will address the problems that led to its imposition.
3. An express date for termination of the moratorium and a statement setting forth why that duration is reasonably necessary to address the problems that led to its imposition.
4. A clear statement of the actions, and the schedule for those actions, proposed to be taken by the city or county during the moratorium to address the problems that led to its imposition.

Renewal or extensions of moratoria are also limited by these statutes. Extensions are prohibited unless the city or county has taken all reasonable and feasible steps to address the problems or conditions that led to imposition of the moratorium.

The statutes contain several exemptions from the coverage of moratoria. Absent an imminent threat to public health and

safety, moratoria may not be applied to projects with legally established vested rights. This includes projects that already have building permits, those with approved site specific development plans, and those where substantial expenditures have been made after receipt of a valid permit. The statutes also provide that moratoria do not apply to projects for which complete applications for special or conditional use permits (and preliminary or final plat approvals) have been accepted by the city or county prior to the call for a public hearing to adopt the moratorium. The statutes provide for expedited judicial review of moratoria.

If a town follows these procedures and adopts a moratorium, would the moratorium be vulnerable to a challenge that it unconstitutionally takes a person's property without just compensation? In most cases, no. The United States Supreme Court held in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), that a temporary moratorium is not in and of itself an unconstitutional taking. The Court noted that temporary moratoria are recognized as an "essential tool" that allows time for necessary studies, public participation, and deliberation. The court ruled that the complexity of the issues involved with developing a management plan justified the moratorium at issue in this case. The Court did note that moratoria lasting longer than a year may well warrant special skepticism.

A recent study by the School of Government, **Development Moratoria: The Law and Practice in North Carolina**, reported on the experience of cities and counties in the three years after the adoption of the N.C. statute. It found moratoria are being used, as a third of the responding jurisdictions reported adoption of a moratorium at some point during the three year period. Most moratoria were of relatively short duration, with six months being by far the typical duration. Most were focused on particular types of land uses (much like the internet sweepstakes cafés of our example). A few were based on inadequate public infrastructure for additional development. Most jurisdictions adopted or amended their ordinances during the moratorium to address the issue leading to its imposition. Few moratoria were extended and few jurisdictions had multiple moratoria. The study indicates that cities and counties have taken the restrictions of the 2005 statute seriously and are making responsible use of moratoria.

So, can River City hit the pause button on internet sweepstakes cafés? Yes, if the town moves quickly it can **stop and think it over**. The town will have to call a public hearing, provide notice of the hearing, and develop a clear plan of action to undertake during a focused moratorium of limited duration. The plan of action required needs to lay out what steps the town will take to address the issue while the moratorium is in effect. In this example it may mean a legal review to determine what management options are open for the town, a survey of how other towns have addressed the issue, a review of the town's plans and ordinances to determine where these uses may be appropriately located, identification of potential operational standards that may be needed, and opportunities for public input and advisory board recommendations. The plan should schedule how long this will take and the moratorium length needs to be based on this time estimate. If this is done, River City can adopt a moratorium that will allow the town to preserve the status quo while it studies its options, crafts rules, has public debate and deliberation, and puts appropriate management rules in place.

Note: In 2011 the statutes on development moratoria were amended to limit application of moratoria to residential development. A moratorium may not be imposed on residential development if the purpose of the moratorium is "developing and adopting new or amended plans or ordinances." S.L. 2011-286.

Links

- www.youtube.com/watch?v=s60hOgqLFGg
- www.sog.unc.edu/publications/books/development-moratoria-law-and-practice-north-carolina
- www.youtube.com/watch?v=t2yLMpGPU8A&feature=related