Moratorium ordinances: call for clarification answered

by Jonathan E. Drill, Esq.

(N.J.S.A. 40:55D–90), the section of the Municipal Land Use Law ("MLUL") on moratoriums and interim zoning, is divided into subsections (a) and (b). The expiration of subsection (b) of the statute in 1979 created confusion among land use practitioners and municipal attorneys with respect to the interpretation of the law regarding zoning moratoriums. Some believed that all zoning moratoriums were prohibited. Others believed that only certain zoning moratoriums were prohibited. Still others believed that all reasonable zoning moratoriums were permitted subject to the limitations imposed by case law. For this reason, Superior Court Judge Eugene D. Serpentelli called for the state Legislature to clarify the law in *N.J. Shore Builders Assoc. v. Dover Township Committee*, 191 N.J. Super 627, 631 (Law Div. 1983) ("Dover Township").

The state Legislature answered this call for clarification in 1986 by amending subsection (b) of (N.J.S.A. 40:55D–90). While new issues have arisen under this amendment, one thing is now clear: *all* zoning moratoriums are now *prohibited* except under very limited circumstances. This article will explore the law regarding zoning moratoriums both prior to and after the recent amendment.

The law before the amendment: confusion

(N.J.S.A. 40:55D–90), as it existed prior to the 1986 amendment,[1] provided:

> (a) **The prohibition of development** in order to prepare a master plan and development regulations is prohibited.
> (b) **A municipality may adopt a reasonable interim zoning ordinance** not related to the land use plan element of the municipal master plan without special vote as required pursuant to subsection (49a). of this act, pending the adoption of a new or substantially revised master plan or new or substantially revised development regulations. Such interim zoning ordinances shall not be valid for a period longer than one year unless extended by ordinances for a period no longer than an additional year for good cause and upon the exercise of diligence in the preparation of a master plan, development regulations or substantial revisions thereof, as the case may be, provided, however, that, notwithstanding the provisions of this section or of any ordinance heretofore adopted pursuant to this section, any such extending ordinance in effect on January 31, 1979 shall be valid until May 31, 1979.

As Judge Serpentelli explained, three interpretations of subsection (a) were possible:

1. **The subsection prohibits** all zoning moratoriums.
2. **The subsection prohibits** only zoning moratoriums which preclude construction during the process of adoption of a master plan and development regulations. All other reasonable zoning moratoriums are permitted within limits of case law.
3. **The subsection expired** with subsection (b) on May 31, 1979. Since (N.J.S.A. 40:55D–90) is no longer in effect, we have returned to the common law which would permit reasonable zoning moratoriums in all cases subject to the limitations imposed by case law.

The first interpretation was rejected by Judge Serpentelli in *Dover Township, supra.*, and correctly so. For case law subsequent to the enactment of subsection (a) held that certain moratoriums are permissible. See: *Redeb Amusement, Inc., v. Twp. of Hillside*, 191 N.J. Super. 84 (Law Div. 1983, Feller, J.) (moratorium on the licensing of video game establishments upheld); and *Plaza Joint Venture v. Atlantic City*, 174 N.J. Super. 231, 237 (App. Div. 1980) ("municipalities have power to enact a reasonable moratorium on *certain* land uses while studying a problem and preparing permanent regulations").

As to the third interpretation, there is nothing to indicate that old subsec-

tions (a) and (b) of (N.J.S.A. 40:55D–90) were not severable. In fact, *Pop Realty Corp. v. Springfield Twp. Bd. of Adj.*, 176 N.J. Super. 441, 448–449 (Law Div. 1980, Feller, J.) provides support for the proposition that the subsections were severable and that only subsection (b) expired on May 31, 1979. In that opinion Judge Milton A. Feller sets forth *both* subsections of the statute and then states:

> **The section dealing with interim zoning** makes it equally clear a land use element of a master plan must be adopted by the municipality. The same section also clearly implies the state Legislature's desire that municipalities carefully approach the preparation of a master plan and, thus allows interim zoning ordinances in the event such preparation takes a while to complete. This section was in effect in 1977 when the ordinance in question was adopted. It has not been in effect since May 31, 1979, the final date set for municipalities to implement the new Land Use Law Act by the adoption of zoning ordinances in accordance therewith.

The quotation refers exclusively to subsection (b), thereby implying that only subsection (b) expired on May 31, 1979, leaving subsection (a) intact. Furthermore, Judge Feller, subsequently, in *Redeb Amusement, supra.*, espoused the view that subsection (a) was still in effect. The *Redeb* holding (that (N.J.S.A. 40:55D–90) is applicable to the moratorium at issue there because the moratorium was not on land development and was not for the purpose of preparing a zoning plan or zoning regulation) is premised on subsection (a) still being in effect. Moreover, Judge Feller referred to subsection (a) as the "(N.J.S.A. 40:55D–90) prohibition." (*Redeb Amusement, supra.*, at 100). Most significantly, the Legislature did not act to remove subsection (a) from the books. The Legislature must be presumed to have read the *Dover Township* opinion and, not having invalidated subsection (a), intended that the same remain in effect.

The second interpretation of (N.J.S.A. 40:55D–90(a)), that subsection (a) prohibits only zoning moratoriums which preclude development and construction during the process of adoption of master plans and developmental regulations was, therefore, most likely the correct one. Not only does this interpretation rest on a literal reading of the statute as it then existed, but as Judge Serpentelli in *Dover Township, supra.*, at 630, noted:

> **Arguably, it has received** support in *Plaza Joint Venture*, (*supra*) . . . where the court said:
>
> And, it is now well settled that municipalities have power to enact a reasonable moratorium on certain land uses while studying and preparing permanent regulations. (at 237)
>
> The state Appellate Division made this statement in 1980 while (N.J.S.A. 40:55D–90(a)) was in effect which expressly prohibited all zoning moratoriums during the process of adoption of a master plan and development regulations. Therefore, the language of the court must be reconciled to the language of the statute. The second interpretation accomplishes the reconciliation by reading the opinion to permit all reasonable moratoriums on certain uses which are not expressly precluded by the statute's literal terms.

Although the New Jersey Supreme Court had the opportunity to settle the issue of the interpretation of (N.J.S.A. 40:55D–90) in *Schiavone Construction Co., v. Hackensack*, 98 N.J. 258, 263 (1985), it refrained from doing so. And, while a careful review of the statute as it existed prior to the 1986 amendment, as well as a thorough analysis of the case law,would lead one to the conclusion that the second interpretation contained in Judge Serpentelli's *Dover Township* opinion was the correct statement of the law regarding zoning moratoriums prior to the 1986 amendment, it is easy to understand how and why land use practitioners and municipal attorneys could differ in their interpretation of the law at that time. More importantly, it is easy to understand why the Legislature amended the law in 1986.

After the amendment

The 1986 amendment[2] deleted in total the old subsection (b) of (N.J.S.A. 40:55–90), replacing it with the following:

> (b) **No moratorium on applications for development** or interim zoning ordinances shall be permitted except in cases where the municipality demonstrates on the basis of a written opinion by a (sic) qualified health professional that a clear imminent danger to the health of the inhabitants of the municipality exists, and in no case shall the moratorium or interim ordinance exceed a six-month term.

Subsection (a) of the statute was left intact and provides:

> (a) **The prohibition of development** in order to prepare a master plan and development regulations is prohibited.

Clarification

It is now clear that not only is subsection (a) in full force and effect, but that *all* zoning moratoriums are *prohibited* except under very limited circumstances. The statute now expressly prohibits all zoning moratoriums except in cases where the municipality demonstrates on the basis of the written opinion by a qualified health professional that a clear imminent danger to the health of the inhabitants of the municipality exists. Not surprisingly, some view the amendment as permitting for the first time zoning moratoriums while others view the amendment as limiting for the first time those zoning moratoriums which may be adopted. This difference in opinion regarding the effect of the prior law was exactly why the *Dover Township* court called for clarification of the law.

New issues under the amendment

While the 1986 amendment has certainly clarified the law concerning zoning moratoriums, new issues have now

arisen. For example: 1) What constitutes a "clear imminent danger" justifying the imposition of a moratorium?; 2) Does the amendment suspend the normal presumption of validity attaching to a municipal ordinance when a moratorium is attacked or, at least, shift the burden of proof to the municipality in any litigation challenging a moratorium?; 3) Are the reasons which a municipality may raise in defending a moratorium limited to those contained in the health officers' written opinion? May the municipality defend a moratorium using information obtained through investigations done *after* the opinion is written and/or *after* the moratorium is adopted?; 4) What does the phrase "qualified health professional" mean?; 5) Upon the expiration of a six-month moratorium, may a municipality extend the moratorium or enact a new one? The remainder of this article will discuss opinions on how these issues should be decided under the 1986 amendment.

Examination of five issues

1. **What constitutes a "clear imminent danger" under the new amendment?**

The issue of what constitutes a "clear imminent danger" was recently discussed in *N.J. Shore Builders v. Wall Township,* Docket No. L–80253–87 P.W. (Letter Opinion February 24, 1988) (LaBrecque, J.). The facts in *Wall Township* are rather straightforward. On June 10, 1987, Wall Township enacted a six-month moratorium on applications for development, effective retroactively to May 27, 1987, on the basis of a written opinion by the Monmouth County health officer that "in accordance with the tone and language of the Municipal Land Use Law, there is no doubt that an imminent public health hazard exists in Wall Township that is being caued by a shortage of potable water." (*Id.* at 1).

The New Jersey Shore Builder's Association filed suit immediately thereafter claiming, among other things, that "imminent" meant "immediate," and that there was no clear immediate danger to anyone's health by the shortage of potable water. The Builder's Association noted that the potable water problem in Wall Township would be solved by 1990 when the Manasquan Reservoir would be completed as Wall Township has contractual rights to have all of its water needs supplied by the reservoir. The Builder's Association claimed that there simply was no clear present and immediate danger by reason of the potable water situation. The township argued that if the Legislature intended "imminent" to mean "immediate," the statute would have been drafted that way. The township further argued that "immediate" means "immediate"; "imminent" was intended by the Legislature to include a situation where a danger to public heatlh was "hanging over the township's head" as the township claimed was the case here.

Finally, the Builder's Asocition sought a ruling that Wall Township was prohibited from enacting a new moratorium or extending the old moratorium once the November 27, 1987 six-month expiration date was reached. The township asserted in response that the enactment of a new moratorium or an extension of the old one was *not* an issue in the case as Wall Township had not indicated it would attempt to do so and would not actually attempt to do so.

The case proceeded on an expedited basis. All discovery and the trial, itself, was completed within approximately six weeks from the date of the enactment of the moratorium. The court, however, did not issue its decision until February 24, 1988, after the moratorium had expired by its own terms on November 27, 1987. Although the case was now technically moot,[3] the court rendered a decision striking down the ordinance.

The court held that the Legislature, in adopting the amendment, was responding to Judge Serpentelli's call for clarification in *Dover Township* (*Id.* at 4). Under common law, there was a three-pronged test which had to be satisfied before a moratorium could be adopted: 1) the situation must be exigent; 2) the causes must be adequately explored; and 3) it must be demonstrated that other less extreme solutions have been investigated and found not to be feasible (*Dover Township, supra.*, at 633). Judge LaBrecque held that it is "inconceivable" that the Legislature, in adopting the amendment in 1986,

> **. . . intended to reverse both its own prior stringent positions** on moratoriums and overrule the years of common law which strictly limited the moratoriums use as a planning tool, but rather it is more reasonable to assume that the legislature was responding to *Dover Township, supra.*, to further restrict the use of the moratorium as a planning tool and to narrow the application of *Dover Township, supra. Wall Township, supra.*, at 4.

The court further held:

> **From the plain language of the statute**, it is reasonable to assume that the Legislature intended the moratorium to be a last resort device, interpreted thusly, if there are viable less extreme solutions there can be no "clear imminent danger to the health of the inhabitants" (*Id.* at 5).

Judge LaBrecque found that the water shortage problems had been long in coming, with sufficient advance warning to all municipalities in the crit ical areas, and that no alternative solutions, "all of which are less extreme that the moratorium," had been investigated and found to be not feasible prior to the adoption of the moratorium (*Id.*). As such, the court held that there was no clear imminent danger to the health of the inhabitants of Wall and, thus, the moratorium was invalid. The court did not comment upon the issue of whether the township could lawfully extend the old moratorium or enact a new one, presumably because the township had not done either of those things.

This author agrees, for the reasons expressed by Judge LaBrecque, with the holding in *Wall Township* that the Legislature intended to "further restrict the use of the moratorium as a planning tool" as well as the holding that "if there are viable less extreme solutions there can be no clear imminent danger to the health of the inhabitants." This author respectfully disagrees, however, with the dicta in the opinion to the effect that prior to the adoption of the amendment in 1986 the law on moratoriums had returned to the common law after subsection (b) of the statute had expired on May 31,

1979. See: *Wall Township, supra.*, at 4. If this was the case, reasonable zoning moratoriums would have been permitted in all cases for the period from June 1, 1979 until the effective date of the amendment, March 22, 1986, subject only to the limitations imposed by case law. Judge LaBrecque apparently believes that the third interpretation offered by Judge Serpentelli in *Dover Township, supra.*, at 629–631 was correct. This author, for the reasons set forth above, *supra.*, at 58, believes that the second interpretation was correct. Again, this difference in opinion regarding the effect of the prior law was precisely why Judge Serpentelli called for clarification of the law in *Dover Township* and why the Legislature answered that call in 1986 by amending (N.J.S.A. 40:55D–90).

2. **Has the amendment suspended the normal presumption of validity attaching to a municipal ordinance or, at least, shifted the burden to the municipality to prove its moratorium is valid?**

The well-settled general rule for considering the validity of a municipal ordinance is that the ordinance is presumed to be valid and the burden of proof is upon the person challenging the ordinance to establish that the ordinance is arbitrary, capricious or unreasonable. Although the issues of burden of proof and presumption of validity do not appear to have been litigated in *Wall Township, supra.*, the court stated the general rule regarding municipal ordinance validity in the beginning of its legal discussion in its opinion (*Id.* at 4).

In this author's opinion, at the very least, the 1986 amendment appears to have shifted the burden to the municipality to prove that a moratorium ordinance is valid. Additionally, it seems that the amendment has gone even further, and suspended the normal presumption of validity attaching to municipal ordinances. These conclusions are supported by the language of the amendment which creates a new rule that "no moratorium ordinance . . . shall be permitted." It could be argued that the amendment creates a "statutory" presumption of *invalidity*.

Others have argued, however, that the absence of express language providing for the suspension of the presumption of validity, indicates that the Legislature did not intend to alter this well-settled legal principle. This author does not agree and notes that the language of the amendment is direct and specific. The language of the amendment provides that "no moratorium ordinance . . . shall be permitted *except* in cases *where* the *municipality demonstrates* . . . that a clear imminent danger . . . exists." This plain and unambiguous language expressly places the burden on the municipality to support the validity of its moratorium by "demonstrating" that an exigent situation exists, justifying an exception of the new rule that "no moratorium ordinance . . . shall be permitted." The conclusion that the presumption of validity has been suspended and that the burden of proof has been shifted to the municipality is further supported by the fact that the Legislature amended the statute to further limit and restrict the use of the moratorium as a planning tool. Shifting the burden and suspending the presumption are consistent with the intent to limit and restrict the use of moratoriums.

Further, a recently decided United States Supreme Court case, *Nollan v. California Coastal Comm.*, 483 U.S. _____, 97 L. Ed. 2d. 677, 107 S. Ct. 3141 (1987), may very well have altered the traditional presumption of validity in many land use regulation cases, moratorium ordinance cases included. *Nollan, supra.*, at 688, fn 3, held that the test for validity of a land use regulation in a taking context, as distinguished from a due process or equal protection context, is whether the regulation "substantially advances" a "legitimate" state interest sought to be achieved, *not* whether the state could "rationally have decided" that the measure adopted might achieve the state's objective. *Nollan* discards the "rational relation" test for consideration of land use regulations in a taking context, replacing same with an intermediate level of scrutiny. As such, it would appear that the normal presumption of validity may no longer be valid in moratorium ordinance cases as challenges to same are most definitely rooted in a taking context.

3. **Are the reasons that a municipality may raise in defending a moratorium limited in any way?**

The issue here is twofold. The amendment provides that a municipality may adopt a moratorium, an exception to the general rule that no moratorium is permitted, only where the municipality "demonstrates on the basis of a written opinion by a qualified health professional that a clear imminent danger . . . exists." First, in defending a moratorium, may a municipality raise reasons not included in the written opinion? Second, may the municipality defend a moratorium using information obtained through investigations done *after* the opinion is written and/or *after* the moratorium is adopted?

It would appear that the language "on the basis of a written opinion" is intended to insure that municipalities carefully study the circumstances surrounding, and review the reasons for, the adoption of a moratorium *prior* to adoption of the moratorium. The language *requires* municipal officials, *before* adopting such a serious and potentially harmful device as a moratorium, to base the decision on a specific written opinion. That opinion should include an analysis of any and all investigations done, the results thereof, and the reasons that a moratorium is necessary. To allow a municipality to later raise additional reasons not mentioned in the written opinion, would defeat the very purpose of the written opinion requirement.

Similarly, it seems that only an investigation done prior to the adoption of a moratorium should be permitted to be relied upon. The *Wall Township* decision provides some guidance on this issue. In *Wall Township, supra.*, at 3, the township took the position that it could explore alternatives to resolve the water supply problem after the adoption of the moratorium and rely upon such investigation in support of the moratorium. The court held that "clearly, none of the . . . alternatives have been explored, in depth, prior to the adoption of the present moratorium." (*Id*). In striking down the moratorium on the basis that the "proofs of this case do not demonstrate that the alternative solutions, all of which are less extreme than the moratorium, have been investigated and found to be not feasible." *Id.* at 5, the court im-

plicitly held that only an investigation done *prior* to the adoption of a moratorium would be permitted to be relied upon. To allow a municipality to rely upon an investigation of alternatives done after the adoption of a moratorium would defeat one of the purposes of the amendment.

4. **What does the phrase "qualified health professional" mean?**

While perhaps one of the least important issues relating to the merits of a moratorium, the issue of the meaning of "qualified health professional" is significant because an otherwise valid moratorium could be defeated if its adoption was based on the written opinion of an individual who is not a "health professional" and/or is not "qualified". Nothing in the MLUL, let alone (N.J.S.A. 40:55D–90), provides any guidance here. *Wall Township, supra.*, provides no guidance either. While the *Wall Township* court appears to have accepted the Monmouth County health officer as a "qualified health professional," it seems that the issue was not in dispute there.

The term "health professional" appears to refer to a "professional" who practices in the field of "health." Black's Law Dictionary defines "public heatlh" as the healthful and sanitary condition of the people or community as a whole. Thus, a person working in a field related to the healthful and sanitary condition of the people or community as a whole would seem to be working in the "health" field. While the word "professional" is not defined in Black's Law Dictionary, it is defined in Webster's New Collegiate Dictionary as being engaged in a profession, which is defined as "a calling requiring specialized knowledge and often long and intensive academic preparation." (N.J.S.A. 40A:11–2), defining "professional services" in terms of the local Public Contracts Law, may also be instructive here. This statute defines "professional services" as meaning services rendered by a person:

> **. . . authorized by law to practice** a recognized profession, whose practice is regulated by law, and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training.

The term "health professional" thus seems to mean a person who is engaged and practices in a field relating to the healthful and sanitary conditions of people and the community as a whole and who underwent specific academic training and who poses specialized knowledge.

What does the word "qualified" mean and how does it relate to the term "health professional?" The amendment could have merely provided that a written opinion be obtained from a "health professional." The amendment, however, requires more. The opinion must be from a "qualified" health professional. Thus, while related to health professional, the word "qualified" is a distinct and added requirement.

"Qualified" is defined in Black's Law Dictionary as "adapted; fitted; entitled; susceptible; capable; competent . . ." This dictionary definition of "qualified" focuses on competence and capability. (N.J.S.A. 26:3–20), concerning the appointment of inspectors and employees to local boards of health, is entitled "qualifications," and provides:

> **No local board shall appoint** any person as health officer, public health laboratory technician, sanitary inspector, food and drug inspector, milk inspector, meat inspector or plumbing inspector nor employ a person to do work ordinarily performed by a health officer, public health laboratory technician, or an inspector of any of the classes named, who is not the holder of a proper license as such.

The statute focuses on licensure with respect to the qualifications needed for appointment to office. (N.J.S.A. 26:1A–41) establishes the types of licenses which the state Commissioner of Health shall issue: health officer license; sanitary inspector license; plumbing inspector license; food and

drug inspector license; milk inspector license; meat inspector license; and public health laboratory technician license.

It certainly seems that the *Wall Township* court was correct in accepting the Monmouth County health officer as a "qualified" health professional as it is likely that (N.J.S.A. 40:55D–90) requires no more than an individual being licensed as required by (N.J.S.A. 26:3–20) and provided in (N.J.S.A. 26:1A–41). If the Legislature intended to require an individual to have certain specified credentials, over and above being licensed, to be deemed "qualified," one would expect that the Legislature would have expressly required same in the statute. As such, it seems that the phrase "qualified health professional" could be interpreted as a *licensed* health professional, licensed pursuant to (N.J.S.A. 26:1A–41). See also: (N.J.A.C. 8:7–1.1), concerning licensing of persons for public health positions.

The question remaining is whether an individual who does not hold a (N.J.S.A. 26:1A–41) license, but whose qualifications and credentials exceed the licensing requirements or, at least, would entitle him to a license, is "qualified" for purposes of (N.J.S.A. 40:55D–90). A sensible interpretation of the amendment would be that such a non-licensed individual (perhaps a physician or other person holding an advanced degree in a health field) would satisfy the status of "qualified," especially if the individual had more training, education or experience than the licensed individual. Likewise, a sensible interpretation of the amendment would be that a non-licensed individual with less training, education and experience than a licensed individual would not be "qualified" within the meaning of the amendment.

The problem is that any test which is utilized, other than licensure, is very subjective. Thus, a municipality would be well-advised to avoid the risk of having an otherwise valid moratorium defeated, on the basis of the technicality of its health professional not being "qualified," by ensuring that the health professional who renders the written opinion be, at the very least, licensed in accordance with (N.J.S.A. 26:1A–41).

5. **Upon the expiration of a six-month moratorium, may a municipality enact a new moratorium or extend the existing one?**

As set forth above, *supra*., at 59, the court in *Wall Township* did not reach the issue of the legality of extending a moratorium or enacting a new one upon expiration of an existing six-month moratorium. This author believes that the 1986 amendment prohibits the enactment of a new moratorium or extension of the existing one upon expiration of a six-month moratorium.

Case law prior to the adoption of the MLUL recognized the existence of municipal power to enact "reasonable" moratoriums. In *Compara v. Clark Twp.*, 82 N.J. Super 392, 397 (Law Div. 1964) (Feller, J.), the court went so far as to hold that a moratorium lasting 31 months was reasonable. Ten years later, in *N.J. Shore Builders v. Ocean Township*, 128 N.J. Super. 135, 137 (App. Div. 1974) (*Ocean Township*), the Appellate Division held that, while a six-month moratorium was reasonable, no opinion would be expressed as to whether a moratorium of longer duration would be reasonable and whether any extension of the six-month moratorium would be valid. The *Ocean Township* court called on the Legislature to set standards governing moratoriums.

The Legislature responded to this call in 1975 by enacting (N.J.S.A. 40:55D–90), authorizing municipalities to adopt "reasonable" interim zoning ordinances which ordinances could "not be valid for a period longer than one year unless extended by ordinance for a period no longer than an additional year for good cause." Thus, the statute, as adopted in 1975, established stricter and narrower standards governing moratoriums than permitted under common law. The statute specifically restricted the extension of and duration of moratoriums.

The recent 1986 amendment expressly provides that "*in no case* shall the moratorium or interim ordinances exceed a six-month term." The amendment has thus further narrowed the standards governing moratoriums, further restricting the duration of same and eliminating authorization to extend same. The amendment is absolute and mandatory in its terms. In "no case shall the moratorium . . . exceed a six-month term." As such, it appears that the proper interpretation of the amendment has to be that not only is a municipality prohibited from adopting a moratorium of greater than six months in duration, but that a municipality is prohibited from extending a moratorium beyond six months and adopting a new moratorium upon expiration of a six-month moratorium.

Future temporary taking issue

An interesting issue which will probably surface in the future is whether and to what extent a zoning moratorium, enacted *contrary* to (N.J.S.A. 40:55D–90), is deemed a "temporary taking" of a landowner's property, resulting in an award of inverse condemnation damages. Recently, the United States Supreme Court in *First Lutheran Church v. Los Angeles County*, 482 U.S. _____, 96 L.Ed. 2d. 250, 107 S. Ct. 2378 (1987), held that where a regulatory action is ultimately invalidated by the courts and where the regulation, while in effect, has worked a taking of all use of the property, payment of the fair value for the use of the property during such period is constitutionally required. This payment is commonly referred to as "inverse condemnation" damages. See: *Rieder v. State Dept. of Transp.*, 221 N.J. Super. 547, 553 (App. Div. 1987). While *First Lutheran Church, supra*., also held that a defense available to a taking claim is that the regulation was enacted as part of the government's authority to enact safety regulations, it would appear that if an ordinance is struck down on the basis of there *not* being a "clear imminent danger to the health of the inhabitants of the municipality," this defense would fail as a matter of law.

The New Jersey Supreme Court held long ago in *Lomarch Corp. v. Mayor of Englewood*, 51 N.J. 108 (1968) that a municipality had to make payment of adequate compensation to a landowner for the temporary taking and deprivation of use of his property resulting from the adoption of an ordinance which froze the development of his property for a one-year period. The Appellate Division distinguished *Lomarch*, however, in *Orleans Builders & Developers v. Byrne, 186 N.J. Super. 432, 447–448 (App. Div. 1982)*. The *Orleans* court there held that a morato-

rium on building adopted by the state Legislature to protect the public health and safety is non-compensable (*Id.*, at 448). Significantly, however, *Orleans* involved a case where a moratorium was upheld, not invalidated. Further, the moratorium was enacted by the state Legislature, not by a local municipality. Finally, as suggested above, if an ordinance is invalidated as *not* having been adopted on the basis of a "clear imminent danger" to health, it would seem that as a matter of law the moratorium was not enacted to protect the public health and safety. As such, it seems that *Orleans* does not bar inverse condemnation damages in a case where a moratorium is struck down as not having been adopted on the basis of a "clear imminent danger" to health.

Conclusion

While some land use practitioners and municipal attorneys view the recent amendment to the law as permitting for the first time zoning moratoriums and others view the amendment as limiting for the first time zoning moratoriums, and while many unsettled issues stemming from the amendment remain to be litigated, one thing is now clear: *all* zoning moratoriums are not *prohibited* except under very limited circumstances. Our Legislature has answered the court's call for clarification of the law concerning zoning moratoriums by amending (N.J.S.A. 40:55D–90(b)).

Municipalities would be well-advised to proceed cautiously prior to enacting a moratorium ordinance. If, prior to the enactment of the moratorium, an appropriately qualified individual does not render the requisite written opinion based upon a thorough and complete investigation which correctly concludes that no other less restrictive alternatives are possible, the municipality will be hard-pressed to sustain its burden in defending the moratorium in court and, most significantly, may expose itself to a judgment not only declaring the moratorium invalid but awarding inverse condemnation damages to the party challenging the moratorium. While any such "temporary taking" would presumably not exceed a six-month period, as the amendment limits the length of any moratorium to that term, this would serve as little solace to such a municipality.

Footnotes

1. (N.J.S.A. 40:55D–90) was originally adopted in 1975 by L.1975, ch. 291, sec. 77, effective August 1, 1976. The statute, in its original form, is set forth in *Pop Realty Corp. v. Springfield Twp. Bd. of Adj.*, 176 N.J. Super. 441, 448 (Law Div. 1980). (N.J.S.A. 40:55D–90) was amended by L. 1979, ch. 7, sec. 1, approved January 30, 1979, effective January 31, 1979. The statute, in this amended form, is set forth in the body of this article at pg.57, column 2.

2. (N.J.S.A. 40:55D–90) was amended by L. 1985, ch. 516, sec. 20, approved January 21, 1986, effective March 22, 1986. The statue, in this amended form, is set forth in the body of this article at page 58. column 3.

3. When the November 27, 1987 expiration date of the moratorium passed and no decision had yet been rendered by the court, the parties feared that Judge LaBrecque might decline to rule on the issue as the case was technically moot. Fortunately, the court reached the merits of the case and provided guidance to land use practitioners and municipalities throughout the state. As the case presented a question of substantial public interest and was capable of repetition but could evade review because of the six month limit upon any moratorium which is enacted, it was entirely appropriate for the court to rule on the technically moot issue. See: *In re Conroy*, 190 N.J. Super. 453, 458–460 (App. Div 1983), *rev'd on other grounds*, 98 N.J. 321, 342 (1985); Pressler, Current N.J. Court Rules, Comment *R.* 2:8–2.

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