

May 11, 2017

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Planning Board  
Boxborough Town Hall  
29 Middle Road  
Boxborough, MA 01719

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PLANNING BOARD  
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Re: Temporary Development Moratorium

Dear Members of the Planning Board:

You have requested an opinion as to whether the Town of Boxborough may implement a moratorium on the issuance of building permits for the purpose of conducting a water study to evaluate the long and short term impacts of future development on the Town's water supply. If such a moratorium is allowed, you requested guidance as to the process to implement such a moratorium and whether the moratorium would apply to site plan approval applications currently pending before the Planning Board. By way of background, I understand that the Planning Board recently received a letter dated March 20, 2017 from a number of residents requesting that the Planning Board "declare a moratorium on approving permits for building any development, small or large," until a water study is completed which clearly explains the long and short term impacts of future development on the Town water supply. I understand that there is no municipal or water district water supply available to property owners in the Town, and that all potable water in the Town comes from private wells. I also understand that the Town, like many communities in Massachusetts, has recently experienced drought conditions, although as far as I am aware no evidence has been provided to quantify the effect of those conditions on Town water supplies. The apparent concern, as implied in the letter, is that the Town's water supply, stressed by drought conditions, may be losing its capacity to provide for both existing uses and new development. I am not aware of any determinations that have been made about the current status of the Town's or the area's water supply, either as a whole or with reference to specific properties or areas.

In my opinion, the Town may implement a lawful temporary moratorium on the issuance of building permits for the purpose of conducting studies and planning for future growth in relation to the capacity of the Town's water supply provided that the Town is able to demonstrate, based on reliable, quantitative data, that the recent lack of precipitation (or other cause) has or is likely to have a negative impact on the area water supply such that sufficiency of water for existing and potential uses of property may be threatened. Such a temporary moratorium would be enacted through a zoning amendment to the Town's bylaws pursuant to G.L. c. 40A, §5. You are correct that the Planning Board has no authority to "declare" such a moratorium, as the residents' letter can be read to request. Consistent with G.L. c.40A, §6, if adopted by Town Meeting and approved by the Attorney General, such a moratorium would apply to any building or special permit issued after the first publication of notice for a public hearing on the proposed moratorium as required by

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G.L. c.40A, §5. Site plan approval is required prior to the issuance of a building permit in the Town, and thus it is possible that the moratorium could apply to the development at 700-800 Mass. Ave. currently before the Board for site plan approval.

The Zoning Act, G.L. c.40A, empowers a municipality to enact a development moratorium through its zoning bylaws. Collura v. Arlington, 367 Mass. 881, 886-887 (1975). Like any zoning bylaw, a development moratorium must satisfy constitutional standards applicable to all zoning bylaws. “[D]ue process requires that a zoning bylaw bear a rational relation to a legitimate zoning purpose.” Zuckerman v. Town of Hadley, 442 Mass. 511, 516 (2004). With respect to imposing a moratorium on development, the general rule is as follows: “A municipality may impose reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies.” Sturges v. Chilmark, 380 Mass. 246, 252 (1980) (upholding Chilmark’s zoning bylaw which limited rate of development due to concerns that development would impact subsoil conditions affecting water supplies and sewage disposal); Collura v. Arlington, 367 Mass. 881 (1975) (upholding Arlington’s amendment to the zoning bylaw which temporarily suspended the construction of apartment buildings in certain areas while it reviewed its comprehensive plan); W.R. Grace & Co.-Conn v. Cambridge City Council, 56 Mass. App. Ct. 559 (2002) (upholding Cambridge’s zoning amendment which imposed a twenty-three month moratorium on all development in one area of the City due to general planning concerns and to conduct a planning study); but see Zuckerman v. Town of Hadley, 442 Mass. 511 (2004) (striking down Hadley’s zoning bylaw which regulated for an unlimited amount of time the number of building permits issued for single-family homes). The burden is on the municipality to show a rational reason for its action. W.R. Grace & Co., 56 Mass. App. Ct. at 567.

As noted above, Massachusetts cases provide general guidance for determining if there is a reasonable basis for a temporary moratorium. Please bear in mind, however, that the determination of a reasonable basis for a temporary moratorium is very fact-specific, and there is no caselaw in Massachusetts that I am aware of concerning what must be shown to demonstrate a reasonable basis for enacting a temporary moratorium in response to a perceived or threatened water shortage. In opining on what must specifically be shown to support a temporary moratorium in this instance, below, I have extrapolated from available case law, and a court could make a different determination.

First, “[a] showing must be made, on the record, that there is a reasonable basis for the enactment.” See Sturges, 380 Mass. at 257. The Town should be able to produce evidence demonstrating that the proposed moratorium has some reasonable prospect of a tangible benefit to the community. The Town can meet its burden by demonstrating that limiting development through the bylaw is a reasonable response to specific, focused, tangible concerns. Id. The Town should, in my opinion, be able to point to reliable, quantitative evidence from which reasonable people could conclude that unchecked development in the Town, in light of current and predicted climate

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conditions, could have an imminent and significant negative effect on the capacity of the Town's water supply to provide for existing uses and future development. For instance, scientific studies showing the effect of the recent drought conditions on water supplies in the surrounding area might form a sufficient basis for a temporary moratorium on development to study the effect on actual water supplies in the Town of Boxborough, and allow the Town time to adopt regulation as needed to address the effect. Please note, however, that the Town is not required to be able to prove that development must be slowed to protect diminishing water supplies before adopting a temporary moratorium on development to study the effect of development on the Town's water supply.

Second, a moratorium must constitute a reasonable, narrowly tailored method to address the identified concern. For example, the Supreme Judicial Court upheld the Town of Arlington's zoning bylaw that restricted the construction of apartment buildings for two years while Arlington conducted a planning study in Collura, 367 Mass. 881. Likewise, the Appeals Court upheld the City of Cambridge's twenty-three month moratorium on development in an area while it engaged a consultant and formed a working group to examine planning in W.R. Grace & Co., 56 Mass. App. Ct. 559. It is important to note in this regard that the term of a moratorium on development must be consistent with the time in which the Town can complete an investigation into the cause for concern and draft regulations appropriate to what it learns. A limitation on the rate of development for an indefinite amount of time is likely to fail judicial review. Zuckerman, 442 Mass. 511. The Attorney General has recently approved temporary zoning moratoria for periods of up to 18 months, but, as noted above, that standard is tied to the amount of time in which the Town can reasonably be expected to conduct the necessary studies and draft and adopt adequate regulation to address the concern underlying the moratorium, and may vary depending upon the concern in question.

Accordingly, I recommend that if the Town is interested in adopting such a moratorium, it first determine if there is a sufficient basis for doing so, and what use and/or development should be limited or temporarily halted. For instance, the Town should consider whether a moratorium on all types of development, such as single family homes, is necessary or whether a more narrowly tailored development moratorium could accomplish the Town's goals. The Town should also consider whether it could also narrowly tailor the moratorium by confining it to certain areas of Town. Once the basis for a moratorium is established, the Town should then determine a reasonable method to evaluate the extent and effect of the perceived water shortage and its relation to current and future needs, and what time would reasonably be required to craft and adopt development regulations to address the findings. This is needed to determine the time period for the moratorium.

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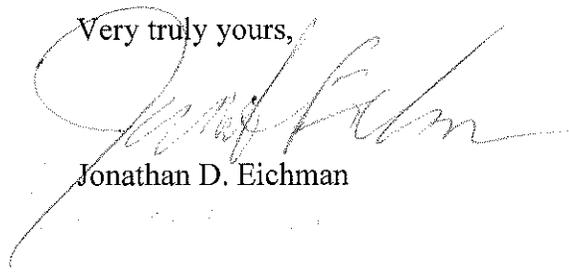
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We would be happy to assist with the above process as required. Please contact me with questions or for further assistance.

Very truly yours,



Jonathan D. Eichman

JDE/eon

cc: Board of Selectmen  
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