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THE USE OF DEVELOPMENT MORATORIA IN NEW YORK STATE

Amy Lavine[1]

I. INTRODUCTION

Zoning moratoria—also referred to as "interim zoning" or "stop-gap zoning"—have long been used by local governments in New York State and across the country to preserve the status quo and temporarily suspend new development projects. Moratoria are typically enacted to give municipalities time to study and make considered decisions regarding the need to adopt or amend comprehensive land use plans, zoning ordinances, or other land-use regulations, and to avoid the pressure of applicants rushing to submit permit requests before new, and often stricter, regulations are put into place.[2] Moratoria may also be used where local governments lack the infrastructure or facilities needed to serve new development; in such cases, "[t]he purpose of the moratorium is to allow the local government to plan, finance, and construct the necessary infrastructure so that both new and existing development receive adequate levels of public services."[3] An unstated purpose of many moratoria, however, is to indefinitely suspend certain types of unwanted development, and when this is the case questions regarding takings and due process may arise.[4]

In New York, moratoria have been enacted or proposed in order to suspend numerous types of developments until appropriate regulations could be crafted, covering such things as cell towers,[5] adult entertainment facilities,[6] wind energy facilities,[7] golf courses,[8] waste disposal facilities,[9] billboards,[10] high voltage power lines,[11] mining and drilling operations,[12] outdoor wood burning furnaces,[13] and "big box" stores.[14] Moratoria have also been used more broadly to temporarily halt all development and demolitions[15] (sometimes in only certain districts),[16] and to suspend subdivision approvals.[17]

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Editorial Offices:
50 Broad Street East, Rochester, NY 14694
Tel.: 585-546-5530 Fax: 585-258-3768

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Generally, development moratoria are considered valid exercises of the police power so long as they are rationally related to public health and safety issues, and are limited to a reasonable duration.

Although about a dozen states have enacted development moratoria statutes,[18] New York has no specific statutory guidance. However, local governments are required through common law to conform to constitutional requirements and related procedural regulations. Generally, development moratoria are considered valid exercises of the police power so long as they are rationally related to public health and safety issues, and are limited to a reasonable duration.[19] Although the Supreme Court held, in the landmark 2002 case of *Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency,*[20] that development moratoria do not amount to per se takings, moratoria may still be challenged as takings under the economic and regulatory balancing test established in *Penn Central Transp. Co. v. New York*.[21]

This article is intended to provide practitioners with a review of the legal issues raised by the use of development moratoria in New York. Part II provides a brief national overview of moratoria, including a discussion of *Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency* and a description of moratoria statutes from several other states. Part III discusses New York case law related to development moratoria, including the authority to adopt moratoria, the length of time moratoria may remain in effect, the validity of moratoria, and vested rights. Part IV concludes with practical strategies for the adoption and use of moratoria in New York.

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II. MORATORIA: THE NATIONAL PERSPECTIVE

A. SUPREME COURT TAKINGS JURISPRUDENCE

Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency,[22] decided in 2002, required the U.S. Supreme Court to consider whether development moratoria violate the Fifth Amendment's prohibition on uncompensated takings of property. The moratorium at issue arose from an upsurge in development and impervious surface cover around Lake Tahoe, which led to increased runoff and threatened to destroy the exceptional clarity and beauty of the lake. To protect the lake from further damage, the Tahoe Regional Planning Agency placed a moratorium on new development until it could complete a regional water quality plan. In the end, the moratorium was in place for 32 months. Landowners who were prevented from developing their property during this time challenged the moratorium on its face and claimed that they were due compensation for the taking of their property rights. They argued that the prohibition on development amounted to a "total taking" of their property under *Lucas v. South Carolina Coastal Council*.[23]

The Supreme Court refused to provide any categorical rule regarding the abstract question of whether temporary moratoria constitute takings. The Justices rejected the property owners' attempt to equate the *temporary* deprivations of their entire parcels with the *permanent* takings that gave rise to the categorical *Lucas* rule against total takings. They could not sever, as it were, a limited period of time from the owners' fee simple estates, as the properties had to be understood as "the parcel as a whole," in a temporal as well as geographic sense.[24] The appropriate analysis, the Court explained, required a balancing of the particular regulatory and economic circumstances at issue, as was done in *Penn Central Transp. Co. v. New York*.[25] The Court suggested that unnecessarily long or repeatedly extended moratoria might fail this test, but dismissed this argument because 32 months was a reasonable duration for the moratoria, given the breadth and importance of the Agency's efforts to create a water quality plan.

To support its decision in *Tahoe-Sierra,* the Court also relied on its decision in *First English Evangelical Lutheran Church v. County of Los Angeles*.[26] Although it held in that case that temporary takings must be compensated, it did not reach the question of whether a temporary taking had actually occurred, and on remand, the California courts determined that the landowners were not entitled to any compensation. As the Court explained in *Tahoe-Sierra,* the "decision in *First English* surely did not approve, and implicitly rejected, the categorical sub-

mission that petitioners are now advocating."[27] Indeed, the Court in *First English* specifically declined to discuss "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[28]

The U.S. Supreme Court has acknowledged that moratoria are an essential tool for successful development.

Perhaps of greatest interest to planners was a clear acknowledgement from the U.S. Supreme Court that moratoria are an "essential tool for successful development" that facilitate informed decision making and allow land use planners "to preserve the status quo" pending the formulation of development strategies.[29] As the Court explained, "To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth."[30]

B. MORATORIA ENABLING STATUTES

Only a handful of states have enacted moratorium enabling statutes.[31] These statutes may likewise be viewed as limitations on the ability of local governments to fully utilize the moratorium tool. For example, some statutes impose procedural requirements. In Arizona, notice must be given and a public hearing must be held before a moratorium may be enacted or extended,[32] and in Oregon, notice must also be given to the state Department of Land Conservation.[33] Many of the development moratoria statutes also impose temporal limits on moratoria. In California, for example, if a planning commission is preparing a zoning ordinance or if a new territory is annexed to a city, the legislative body may enact a 45-day interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time.[34] The moratorium may be extended for ten months and subsequently for a year, but only after proper notice and hearing.[35] The enabling statute in Colorado authorizes the enactment of moratoria for not more than six months,[36] while its Washington State counterpart permits the adoption of six-month interim ordinances with the possibility of six-month renewals if the longer period is justifiable.[37] Minnesota's interim zoning statute allows one-year moratoria with renewal for an additional year.[38]

In addition to varying time limitations on moratoria, some states also limit the types of situations in which municipalities may enact moratoria. Although many states permit moratoria to facilitate preparation of master plans,[39] New Jersey does not.[40] New Jersey's statute authorizes moratoria only where there is an asserted imminent health threat to the public.[41] The Arizona statute requires findings either that the measure is needed because of a shortage of necessary public infrastructure or that it is justified by other "compelling needs."[42] Under Oregon's moratoria law, a determination of "compelling need" must be based on findings that the existing regulations are "inadequate to prevent irrevocable public harm[,]" the geographical area encompassed by the moratorium is sufficiently limited, and that less restrictive alternative methods would be ineffective.[43]

III. THE USE OF MORATORIA IN NEW YORK

As previously mentioned, there is no specific statutory authorization for the adoption and implementation of moratoria in New York (although some legislative proposals have been made, as will be discussed below). Nevertheless, the authority to enact moratoria as police power regulations has long been recognized and supported by the New York courts.[44] Several important limits must be observed for a moratorium to be upheld, however: (1) it must be rationally related to a valid public purpose; (2) it must not amount to a taking of property without just compensation; (3) it must comply with the statutory procedures for enacting local laws; (4) it must not be preempted by state law; and (5) it must be limited to a definite and reasonable term. Additionally, a moratorium may be found inapplicable to certain property owners if they can establish vested rights to build under the prior regulations.

A. SUBSTANTIVE DUE PROCESS

Like other land use regulations enacted pursuant to local governments' police powers, zoning moratoria may violate property owners' substantive due process rights if they are arbitrary or capricious or have no rational relationship to protecting the public health, safety, or welfare. Generally, valid public purposes have been found for moratoria intended: to prepare or amend a comprehensive plan or zoning ordinance;[45] to study the need for zoning regulations for an emerging use;[46] and to make water, sewer, road, or other public infrastructure improvements.[47] In a case involving the revocation of building permits in order to prevent a city's sewerage facilities from becoming overloaded, the Court of Appeals explained that "[t]o justify interference with the beneficial employment of property the municipality must

establish that it has acted in response to a dire necessity, that its action is reasonably calculated to alleviate the relevant crisis condition, and that it is presently taking steps to rectify the problem."[48] Although the Appellate Division had held in the property owner's favor, reasoning that the city was at fault for failing to provide adequate sewerage, the Court of Appeals reversed and suggested that the health and safety concerns motivating the permit revocation were reasonable and proper.[49] The court in that case also explained that "a municipality may not invoke its police powers solely as a pretext to assuage strident community opposition." Similarly, it has been held that a city's speculative desire to purchase property in the future cannot support a moratorium intended to prevent the present owners of the property from developing it.[50] A moratorium may also be found to be unreasonable if it "single[s] out one landowner to bear a heavy financial burden caused by a general community condition."[51]

In addition to having a valid public purpose, a moratorium must also be reasonably formulated to advance that interest. A moratorium on cell tower construction was found to be unreasonable because there was no evidence that cell towers produced any public health or safety problems; rather, the moratorium was based on bare perceptions of the village residents regarding health.[52] However, the District Court for the Western District of New York found no substantive due process violation where a moratorium on wind energy facilities, enacted to safeguard aesthetic interests, applied to relatively unobtrusive wind energy substations.[53] Even though these facilities were basically identical to other types of substations, the court explained that "If the aim is to prevent wind towers from being built ... , certainly it makes some sense to prohibit the construction of wind tower support facilities, such as substations, as well.[54]

Cases may occur where the duration or impact of a moratorium is so great as to render it a taking of property.

B. TAKINGS

As discussed above, the Supreme Court has recognized that moratoria may, under certain circumstances, amount to takings of land without just compensation. However, under the later case of *Lingle v. Chevron,* the Supreme Court clarified the distinction between takings of property under the Fifth Amendment and violations of substantive due process.[55] This is a significant distinction, especially in the context of moratoria, where constitutional claims more often assert that a moratorium is unreasonable than that it interferes with the property's economic use to such a degree as to constitute a taking.

Nevertheless, cases may occur where the duration or impact of a moratorium is so great as to render it a taking of property (rather than an irrational or unreasonable restriction on land use). In a California case, for example, a moratorium that prevented property owners from building on their land for 30 years was held to be a *Lucas*-type total taking because it deprived the owners of all economically beneficial use of their property.[56] In New York, the Court of Appeals held in 1989 that a moratorium on the demolition or conversion of single-room occupancy (SRO) units amounted to an unconstitutional physical and regulatory taking.[57] The physical taking was premised on the city's abrogation of the owners' rights to exclude others (the SRO tenants) from their property, and the regulatory taking was found because the regulations prohibited commercial development of the properties and limited them to their less profitable use as SRO units. The court also held that the moratorium did not substantially advance the city's purported interest in alleviating homelessness, because the units were not set aside for low-income or homeless individuals. In a footnote, the court explained that the temporary nature of the measure did not diminish the city's takings liability: "even if the local law be viewed as a temporary provision, it results in a deprivation of the owners' quintessential rights to possess and exclude and, therefore amounts to a physical taking. Under *[First English],* where, as here, the governmental action resulted in a per se taking, the offending action constitutes a taking for whatever time period it is in effect."[58] Judge Bellacosa penned a strong dissent in the case, emphasizing the temporary and emergency nature of the moratorium.

Property owners seeking to challenge moratoria as takings in the federal courts must comply with the ripeness requirements of *Williamson County,*[59] which will frequently bar them from federal court review. In *Ecogen v. Town of Italy,* for example, the District Court for the Western District of New York held that a wind energy developer's as-applied taking claim arising from a town's moratorium on construction of wind turbine towers was unripe because the developer had failed to seek a hardship exception under the law. However, the court recognized that "there is some authority that significant hardships occasioned by governmental delay in acting can warrant judicial intervention, even if the plaintiff has not obtained a final decision on its application."[60] Accordingly, although the court refused to grant the developer an injunction against enforcement of the moratorium, it ordered the town to either grant an exception or end the moratorium within 90 days.

C. PROCEDURE FOR ADOPTING A MORATORIUM

In some New York cases, moratoria have been treated by the courts as roughly equivalent to zoning actions and have therefore been subject to the notice, hearing, and other procedural requirements prescribed under state and local zoning laws.[61] A moratorium may also need to be referred to the county planning commission in some circumstances.[62] After a moratorium has been properly enacted, a municipality must also follow the proper procedures for granting a variance from its provisions, and any such variance must comport with the goals of the stop-gap measure.[63]

D. PREEMPTION

Despite local governments' police powers, a development moratorium will be invalid if it directly conflicts with a state law, unless it complies with the procedural provisions in the Municipal Home Rule Law allowing local governments to supersede general provisions of the state municipal laws.[64] In *Turnpike Woods, Inc. v. Stony Point*,[65] for example, the Court of Appeals held that the subdivision statute preempted a six-month moratorium because the statute required subdivision regulations to be acted on within 45 days, and the moratorium did not declare any intent to supersede the state law. However, a moratorium on subdivision review was later upheld by the Second Department in *Matter of Laurel Realty, LLC v. Town of Kent*.[66]

Particularly long moratoria and multiple extensions thereof may trigger a closer examination by the courts.

E. LENGTH OF TIME MORATORIA CAN BE IN EFFECT

The duration of a moratorium must be reasonable. Moratoria are inherently temporary tools, and "[a] municipality may not use a 'moratorium' as a *de facto* means of achieving a desired legislative purpose."[67] Case law does not establish a bright-line test regarding moratoria time frames; rather, reasonableness takes into account the length of time necessary for good faith efforts to resolve the problem that triggered the moratorium.[68] Under various circumstances, the courts have held that moratoria lasting for 90 days,[69] six months,[70] or eight months[71] were reasonable. In one case, development restrictions lasting 18 years were upheld.[72]

Practitioners should be cautioned, however, that particularly long moratoria and multiple extensions thereof may trigger a closer examination by the courts, and run the risk of being considered unreasonable and unconstitutional, whether under substantive due process or takings grounds. For example, a decision from the Third Department explained that after a fourth extension, there was an "abuse of such a process by long delay[.]" The court particularly emphasized the municipality's lack of progress in establishing a comprehensive zoning law.[73] Similarly, in a Second Department case, a five-year moratorium was held to be excessive and unreasonable when a town failed to offer any satisfactory reasons for its delay in enacting a zoning ordinance.[74] Another Second Department case held that a development moratorium was unreasonably long when it had been in effect for three years and there was no indication as to when it might end.[75] In another case, instead of holding a moratorium on wind turbine development invalid where it had been in place for two years, the District Court for the Western District of New York ordered the town to either render a decision on the developer's hardship exception or enact a new comprehensive zoning plan within 90 days and end the moratorium.[76]

F. VESTED RIGHTS

A property owner's detrimental reliance may in certain circumstances establish a "vested right" to proceed under the law as it existed prior to a moratorium.[77] This can occur when all necessary approvals were received from the governing authorities and construction began, or significant investments were made, before the moratorium was enacted.[78] In *Temkin v. Karagheuzoff*, for example, the Court of Appeals held that the petitioners had a vested right to construct a nursing home where they had received all necessary approvals and had nearly completed the building's foundation work when the city enacted a moratorium suspending the construction of nursing homes and health-related facilities.[79]

Vested rights may also exist where a property owner is entitled to a zoning or land use approval, but the municipality uses unlawful dilatory tactics to prevent the project. In *Pokoik v. Silsdorf*, which did not involve a moratorium but rather an amendment to a zoning ordinance, the Court of Appeals held that the landowner was entitled to a permit under the requirements in place when he submitted his application. As the court explained, the village could not impose its later-enacted regulations on him because his initial permit application had been improperly denied.[80] The Second Department has explained that this "special facts exception" is available only where a land use approval has been unlawfully withheld or the municipality has engaged in undue delay.[81]

G. A STATUTE IN NEW YORK?

Over the years, a number of bills have been introduced in the State Legislature to address the subject of moratoria. To date, these efforts have been thwarted as planning and municipal advocates have explained that the case law has established a flexible and reasonable framework that is well understood by planners and municipal officials and that any effort to craft a legislative approach is more appropriately viewed as a limitation as opposed to an authorization. Further, there is scant evidence of abuse in the use of moratoria across the state. However, two bills were proposed in 2010 to codify rules for the use of moratoria in zoning and planning.[82] The bills are similar and seek to lay out a comprehensive scheme to govern the purpose, scope, and duration of moratoria and to provide for judicial review.[83]

The bills would limit the acceptable reasons for enacting moratoria to: "(a) emergency conditions affecting public health or safety; (b) prevent a shortage of or adverse impacts on public facilities; (c) prevent adverse impacts upon natural resources; or (d) conduct land use planning studies, in order to prepare or revise comprehensive plans or land use regulations."[84] Moratoria would have to include specific findings justifying their enactment, and their temporal and geographic scope would have to be limited to the time and area reasonably necessary to advance the purposes of the interim measure. However, moratoria enacted for planning purposes would in no case be permitted to last longer than one year, with one possible six-month extension, and interim measures enacted in response to public health emergencies would be limited to a year, with year-long extensions permitted as long as the emergency continues.[85] These bills failed to garner widespread support.

IV. PRACTICAL STRATEGIES FOR THE ADOPTION AND USE OF MORATORIA IN NEW YORK

One excellent resource on moratoria in New York is a technical memorandum published and updated by the New York State Department of State. The memorandum offers the following advice: (1) adopt the moratorium as a local law, rather than a zoning ordinance or a zoning amendment; (2) follow the procedural notice and hearing requirements for adopting or amending local laws, including both statutory and local regulations; (3) clearly state the purpose of the moratorium, the activities and geographic areas affected, whether it applies to already granted applications, and its duration; (4) if the moratorium affects subdivision approvals, the local law should specify that it intends to toll the default approval provisions in the state's subdivision laws; (5) beyond stating the moratorium's purpose, explain its urgency and necessity in the preamble to the local law; and (6) include a process whereby landowners can apply for a hardship exception or similar relief.[86]

Local governments should also make sure that moratoria are enacted only after a process that provides opportunities for all interested stakeholders to engage. Many moratoria are spurred by development applications for undesired land uses, and alternative approaches such as mediation or conditional approvals may help to prevent costly and drawn-out legal battles. Additionally, local governments need to be prepared to respond effectively and quickly to their development problems during the pendency of a moratorium; otherwise, they may "ultimately fail if there aren't enough resources for proper planning to take place during the development pause."[87]

NOTES

1. Amy Lavine is a staff attorney at the Government Law Center of Albany Law School.
2. American Planning Association, Growing Smart Legislative Guide Book 8-179 (Stuart Meck, FAICP, ed., 2002).
3. American Planning Association, supra n. 2 at 8-180.
4. American Planning Association, supra n. 2 at 8-180.
5. *See, e.g.,* Cellular Telephone Co. v. Village of Tarrytown, 209 A.D.2d 57, 624 N.Y.S.2d 170 (2d Dep't 1995) (holding cell tower moratorium invalid because there was no evidence that cell towers caused any health or safety problems); Jake Palmateer, *Town issues cell-tower moratorium,* THE DAILY STAR (Oneonta, N.Y.), Aug. 13, 2009.
6. *See, e.g., Troy Bans New Adult Businesses for One Year,* THE TIMES UNION (Albany, N.Y.), May 8, 2010; John Boccacino, *Chili extends freeze on adult businesses,* THE ROCHESTER DEMOCRAT AND CHRONICLE, Feb 10, 2010; Janice L. Habuda, *Wider moratorium proposed on "adult" businesses,* THE BUFFALO NEWS, Oct. 19, 2007.
7. *See, e.g.,* Ecogen, LLC v. Town of Italy, 438 F. Supp. 2d 149 (W.D. N.Y. 2006); Steve Orr, *Steuben wind turbine project back in court,* THE ROCHESTER DEMOCRAT AND CHRONICLE, Mar. 11, 2010 (noting that the board has been pursuing a moratorium on wind energy development); Karen Robinson, *Town to study wind-energy code issue,* THE BUFFALO NEWS, Feb. 9, 2010.
8. *See, e.g.,* David Winzelberg, *Moratoriums: Stunted Growth,* LONG ISLAND BUSINESS NEWS, Jun. 1, 2007 (noting that the "Town of Huntington has a moratorium on developing golf courses, for instance; this has stopped the Hakimian Organization's plans for 30 single-family homes on a 42-acre, nine-hole golf course, and also spurred a Hakimian lawsuit").
9. *See, e.g.*, Town of Corinth, Local Law No. 1-2007, available at http://www.townofcorinthny.com/locallaws/Local%20Law%20No%207.pdf; Meghan Rubado, Armory Square Sewage Plant Project Delayed; Onondaga County, DEC Want More Time to Hear Concerns of Environmentalists, THE POST STANDARD (Syracuse, N.Y.), Jan. 25, 2008; Robert Marchant, Puglisi rival talks trash over purchase of Cortlandt sanitation site, THE JOUR-

NAL NEWS (Westchester County, N.Y.), Nov. 1, 2009 (noting a one-year moratorium on composting operations).

10. *See, e.g.*, Meghan Rubado, Commission Seeks to Halt Digital Billboards; Syracuse Council to Vote on Moratorium Pending Study on Their Impact on Driver Safety, THE POST STANDARD (Syracuse, N.Y.), Jul. 28, 2008; Gail Franklin, Fruscione seeks to lift ban on billboards, THE BUFFALO NEWS, Dec. 18, 2006.
11. *See, e.g.,* Greg Clary, *Con Ed says tree cutting practices prevented snow outages,* THE JOURNAL NEWS (Westchester County, Mar. 2, 2010) (discussing moratorium on tree cutting around power lines); Alaina Potrikus, *Overflow Crowd Protests Power Line,* THE POST STANDARD (Syracuse, N.Y.), May 12, 2006 (noting that the Hamilton Town Board enacted a one-year moratorium on power line development).
12. *See, e.g.*, Joseph A. Phillips, *Nassau OK's development moratorium,* THE TROY RECORD, Mar. 21, 2010 (noting that the town council adopted a 120-day moratorium on large development as a response to a decision handed down the previous month in state Supreme Court, where Justice Michael Lynch invalidated the comprehensive plan that prohibited commercial mining in town); Nick McCrea, *Drilling Down to the Science; Is Fear Preventing Real Hydrofracking Debate?,* THE POST STANDARD (Syracuse, N.Y.), May 2, 2010 (discussing a proposed state-wide moratorium on certain types of natural gas drilling)
13. *See, e.g., Niagara News Briefs,* THE BUFFALO NEWS, Nov. 19, 2008 (noting that the council "imposed a four-month moratorium on any further installation [of outdoor, wood-fired boilers] 'until reasonable regulations' can be adopted into the City Code"); Jeff Murray, *Big Flats may limit outdoor furnaces,* THE STAR-GAZETTE (Elmira, N.Y.), Nov. 7, 2006.
14. *See, e.g.*, Home Depot U.S.A., Inc. v. Village of Rockville Centre, 295 A.D.2d 426, 743 N.Y.S.2d 541 (2d Dep't 2002) (holding that a village did not impose a moratorium in bad faith when it enacted a six-month moratorium on buildings over 40,000 square feet); Rossi v. Town Bd. of Town of Ballston, 49 A.D.3d 1138, 854 N.Y.S.2d 573 (3d Dep't 2008) (upholding a moratorium on large commercial and residential projects).
15. *See, e.g.,* David Winzelberg, *Sick of McMansions, Town of Oyster Bay bans building,* LONG ISLAND BUSINESS NEWS, Aug. 10, 2007; Cynthia Benjamin, *"McMansions" targeted,* THE ROCHESTER DEMOCRAT AND CHRONICLE, Mar. 5, 2006 (discussing a moratorium on demolitions intended to prevent the construction of large new homes); Nancy A. Fisher, *With Lewiston sewage over limit, building moratorium considered,* THE BUFFALO NEWS, Jan. 29, 2008.
16. *See, e.g.,* Paintball Sports, Inc. v. Pierpont, 284 A.D.2d 537, 727 N.Y.S.2d 466 (2d Dep't 2001) (involving a moratorium on the issuance of approvals in business districts); Rubin v. McAlevey, 54 Misc. 2d 338, 282 N.Y.S.2d 564 (Sup 1967), judgment aff'd, 29 A.D.2d 874, 288 N.Y.S.2d 519 (2d Dep't 1968) (upholding moratoria on development in districts under immediate consideration for rezoning).
17. *See, e.g.,* Laurel Realty, LLC v. Planning Bd. of Town of Kent, 40 A.D.3d 857, 836 N.Y.S.2d 248 (2d Dep't 2007) (holding that a subdivision moratorium was valid and enacted for a reasonable period of time).
18. *See, e.g.,* Cal. Gov. Code § 65858; Colo. Rev. Stat. § 30-28-121; Ky. Rev. Stat. §§100.201, 100.328; Me. Rev. Stat. Ann. tit. 30-A § 4356; Minn. Stat. Ann. § 394.34; Mont. Code Ann. § 76-2-206; N.H. Rev. Stat. Ann. § 674.23; N.J. Stat. Ann. § 40:55D-90; Or. Rev. Stat. Ann. § 197.520; S.D. Cod. Laws § 11-2-10; Utah Code Ann. § 10-9a-504; Wash. Rev. Code Ann. §§36:70.795, 35:63.200; Wis. Stat. Ann. § 62.23.
19. *See, e.g.,* Hasco Elec. Corp. v. Dassler, 143 N.Y.S.2d 240 (Sup 1955) ("the local legislative body was vested with the authority to enact reasonable stop-gap or interim legislation prohibiting the commencement of construction for a reasonable time during consideration of proposed zoning changes").
20. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517, 10 A.L.R. Fed. 2d 681 (2002).
21. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (setting out a balancing test for regulatory takings that considers "three factors: (1) the economic impact of the regulation; (2) the existence of reasonable, investment-backed expectations; and (3) the character of government action").
22. *Tahoe-Sierra,* supra n. 20.
23. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).
24. *Tahoe-Sierra,* supra n. 20, 535 U.S. at 331.
25. *Tahoe-Sierra,* supra n. 20, 535 U.S. at 330; *Penn Cent.*, supra n. 21.
26. First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).
27. *Tahoe-Sierra,* supra n. 20, 535 U.S. at 329.
28. *First English,* supra n. 26, 482 U.S. at 321.
29. *Tahoe-Sierra,* supra n. 20, 535 U.S. at 337-38 ("In fact, the consensus in the planning community appears to be that moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development. Yet even the weak version of petitioners' categorical rule would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values.").
30. *Tahoe-Sierra,* supra n. 20, 535 U.S. at 339.
31. *See* American Planning Association, supra n. 2 at 8-179 to 8-183.
32. American Planning Association, supra n. 2 at 8-180 (citing Ariz. Rev. Stat. §§11-833, 9-463.06).
33. Or. Rev. Stat. § 197.520.
34. Cal. Gov. Code § 65858.
35. Cal. Gov. Code § 65858.
36. Colo. Rev. Stat. Ann. § 30-28-121.
37. Wash. Rev. Code Ann. § 35.63.200.
38. Minn. Stat. Ann. § 394.34.
39. *See, e.g.,* Colo. Rev. Stat. Ann. § 30-28-121; Me. Rev. Stat. tit. 30A § 4356.
40. N.J. Stat. Ann. § 40:55D-90.
41. N.J. Stat. Ann. § 40:55D-90.
42. Ariz. Rev. Stat. §§9-463.06, 11-833.
43. Or. Rev. Stat. § 197.520.
44. *See, e.g.,* Hasco Elec. Corp. v. Dassler, 143 N.Y.S.2d 240 (Sup 1955); People ex rel. St. Albans-Springfield Corporation v. Connell, 257 N.Y. 73, 177 N.E. 313 (1931) ("We

are not required to say that a merely temporary restraint of beneficial enjoyment is unlawful where the interference is necessary to promote the ultimate good either of the municipality as a whole or of the immediate neighborhood. Such problems will have to be solved when they arise. If we assume that the restraint may be permitted, the interference must be not unreasonable, but on the contrary must be kept within the limits of necessity."). The courts of other states have not always found local governments to have an implied power to enact stop-gap zoning restrictions. *See, e.g.,* Naylor v. Township of Hellam, 565 Pa. 397, 773 A.2d 770 (2001) (holding that the township had no authority to enact the moratorium).

45. *See, e.g.,* Hasco Elec. Corp. v. Dassler, 143 N.Y.S.2d 240 (Sup 1955); 119 Development Associates v. Village of Irvington, 171 A.D.2d 656, 566 N.Y.S.2d 954 (2d Dep't 1991); Noghrey v. Acampora, 152 A.D.2d 660, 543 N.Y.S.2d 530 (2d Dep't 1989).
46. *See, e.g., Ecogen,* supra n. 7.
47. *See, e.g.,* Belle Harbor Realty Corp. v. Kerr, 35 N.Y.2d 507, 364 N.Y.S.2d 160, 323 N.E.2d 697 (1974).
48. *Belle Harbor,* supra n. 47.
49. *Belle Harbor,* supra n. 47.
50. Oakwood Island Yacht Club, Inc. v. City of New Rochelle, 59 Misc. 2d 355, 298 N.Y.S.2d 807 (Sup 1969), aff'd, 36 A.D.2d 796, 320 N.Y.S.2d 505 (2d Dep't 1971), order aff'd, 29 N.Y.2d 704, 325 N.Y.S.2d 745, 275 N.E.2d 330 (1971).
51. Charles v. Diamond, 41 N.Y.2d 318, 392 N.Y.S.2d 594, 360 N.E.2d 1295 (1977).
52. Cellular Telephone Co. v. Village of Tarrytown, 209 A.D.2d 57, 624 N.Y.S.2d 170 (2d Dep't 1995).
53. *Ecogen,* supra n. 7.
54. *Ecogen,* supra n. 7.
55. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).
56. Monks v. City of Rancho Palos Verdes, 167 Cal. App. 4th 263, 84 Cal. Rptr. 3d 75 (2d Dist. 2008), as modified on denial of reh'g, (Oct. 22, 2008) and review denied, (Dec. 17, 2008).
57. Seawall Associates v. City of New York, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059 (1989).
58. Seawall Associates, supra n. 57.
59. *See* Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) (requiring plaintiffs in regulatory takings cases to have obtained a final decision and sought available state law remedies in order to establish standing in federal court).
60. *Ecogen,* supra n. 7 (citing Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991)).
61. *See, e.g.,* B & L Development Corp. v. Town of Greenfield, 146 Misc. 2d 638, 551 N.Y.S.2d 734 (Sup 1990) ("a moratorium is either zoning, or, if not zoning per se, so similar to zoning in quality that zoning procedures must be followed prior to enactment"); Temkin v. Karageuzoff, 43 A.D.2d 820, 351 N.Y.S.2d 141 (1st Dep't 1974), order aff'd, 34 N.Y.2d 324, 357 N.Y.S.2d 470, 313 N.E.2d 770 (1974) (holding that the Board of Estimate did not have the authority, without prior approval from the planning commission, to enact interim zoning regulations); Lo Conti v. City of Utica, Dept. of Bldgs., 52 Misc. 2d 815, 276 N.Y.S.2d 720 (Sup 1966) ("in effect, the [building moratorium] ordinance enacted by the City of Utica is similar to a zoning statute[.] The procedure laid down by the Legislature for the enactment of change in any zoning regulations or ordinance must be strictly complied with.").
62. Caruso v. Town of Oyster Bay, 172 Misc. 2d 93, 656 N.Y.S.2d 809 (Sup 1997), aff'd as modified, 250 A.D.2d 639, 672 N.Y.S.2d 418 (2d Dep't 1998) (citing N.Y. Gen. Mun. Law § 239-m(3)).
63. Held v. Giuliano, 46 A.D.2d 558, 364 N.Y.S.2d 50 (3d Dep't 1975).
64. N.Y. Mun. H. R. Law § 22.
65. Turnpike Woods, Inc. v. Town of Stony Point, 70 N.Y.2d 735, 519 N.Y.S.2d 960, 514 N.E.2d 380 (1987).
66. *Laurel Realty,* supra n. 17.
67. *Ecogen,* supra n. 7. *See also Cellular Telephone Co.,* supra n. 5; Alfano v. Zoning Bd. of Appeals of Village of Farmingdale, 902 N.Y.S.2d 662 (App. Div. 2d Dep't 2010) (citing *Paintball Sports,* supra n. 16); Alscot Investing Corp. v. Incorporated Village of Rockville Centre, 64 N.Y.2d 921, 488 N.Y.S.2d 629, 477 N.E.2d 1083 (1985).
68. *See, e.g.,* Lakeview Apartments of Hunns Lake, Inc. v. Town of Stanford, 108 A.D.2d 914, 485 N.Y.S.2d 801 (2d Dep't 1985) (finding the moratorium to be invalid as it was enacted for an excessive period of time regarding the purpose, even though some progress had been made); Lake Illyria Corp. v. Town of Gardiner, 43 A.D.2d 386, 352 N.Y.S.2d 54 (3d Dep't 1974).
69. Dune Associates, Inc. v. Anderson, 119 A.D.2d 574, 500 N.Y.S.2d 741 (2d Dep't 1986).
70. Noghrey v. Acampora, 152 A.D.2d 660, 543 N.Y.S.2d 530 (2d Dep't 1989).
71. *Laurel Realty,* supra n. 17.
72. *Charles,* supra n. 51 (citing Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, 63 A.L.R.3d 1157 (1972)).
73. *Lake Illyria,* supra n. 68.
74. Mitchell v. Kemp, 176 A.D.2d 859, 575 N.Y.S.2d 337 (2d Dep't 1991).
75. Russo v. New York State Dept. of Environmental Conservation, 55 A.D.2d 935, 391 N.Y.S.2d 11 (2d Dep't 1977).
76. *Ecogen,* supra n. 7.
77. *See, e.g., Alscot Investing Corp.,* supra n. 67 (holding that there was no detrimental reliance on the village's prior sign code because the petitioner filed his application after the moratorium was put into effect); Temkin v. Karagheuzoff, 34 N.Y.2d 324, 357 N.Y.S.2d 470, 313 N.E.2d 770 (1974).
78. *Temkin,* supra n. 77.
79. *Temkin,* supra n. 77.
80. Pokoik v. Silsdorf, 40 N.Y.2d 769, 390 N.Y.S.2d 49, 358 N.E.2d 874 (1976).
81. Mascony Transport and Ferry Service, Inc. v. Richmond, 71 A.D.2d 896, 419 N.Y.S.2d 628 (2d Dep't 1979), order aff'd, 49 N.Y.2d 969, 428 N.Y.S.2d 948, 406 N.E.2d 803 (1980).
82. A. 1924, 2009-2010 Reg. Sess. (N.Y.2009), *available at* http://assembly.state.ny.us/leg/?bn=A01924; S. 294, 2009-2010 Reg. Sess. (N.Y.2009), *available at* http://assembly.state.ny.us/leg/?bn=S00294.
83. A. 1924, supra n. 82.
84. A. 1924, supra n. 82.
85. A. 1924, supra n. 82.

86. State of New York, Dept. of State, James A. Coon Local Government Technical Series, Land Use Moratoria (2010), *available at* http://www.dos.state.ny.us/lgss/pdfs/moratoria.pdf.
87. Winzelberg, supra n. 8.

FROM THE STATE COURTS

DETERMINATION THAT ACQUISITION OF PROPERTY FOR DEVELOPMENT OF NEW COLUMBIA UNIVERSITY CAMPUS WAS SUPPORTED BY SUFFICIENT PUBLIC USE, BENEFIT OR PURPOSE UPHELD BY NEW YORK COURT OF APPEALS.

The Empire State Development Corporation (ESDC) issued a determination that it should use its power of condemnation to purchase 17 acres of privately owned land in the Manhattanville section of West Harlem, for use in the construction of a new urban campus (the Project) for Columbia University (Columbia). Columbia had begun to purchase property in the area several years previously. Two studies of the area commissioned by ESDC had concluded that it was blighted. ESDC sponsored the Project as a "land use improvement project" pursuant to the state Urban Development Corporation Act, and as a "civic project" under a different subdivision of the same Act. As required by the Eminent Domain Procedure Law, ESDC specified the public uses, benefits and purposes of the Project by stating that the Project would address the city and statewide "need for educational, community, recreational, cultural and other civic facilities" and would enable New York City and the State to maintain their positions as "global center[s] for higher education and academic research." ESDC further determined that Manhattanville "suffer[ed] from long-term poor maintenance, lack of development and disinvestment" and that the Project would help curb the "current bleak conditions [that] are and have been inhibiting growth and preventing the site's integration into the surrounding community." ESDC further noted that the Project would create several thousand temporary and permanent jobs, would generate over $200 million in state and local tax revenue, and would create much-needed public space and bring about improvements to public infrastructure.

Several business owners in the affected area challenged ESDC's findings and determinations in the Appellate Division pursuant to the Eminent Domain Procedure Law. A plurality of that court concluded that the determination that the Project had a public use, benefit or purpose was unsupported by the record, and the court annulled ESDC's determination. *Kaur v. New York State Urban Development Corp.*, 72 A.D.3d 1, 892 N.Y.S.2d 8 (1st Dep't 2009).

On appeal, the Court of Appeals reversed. The court began its review by noting that determinations as to blight and public purpose are the province of the legislature, and are entitled to deference by courts. Two separate reports prepared by ESDC consultants, consisting of a voluminous compilation of documents and photographs, had concluded that the area was blighted. The de novo review of the record undertaken by the Appellate Division plurality as to ESDC's findings of blight was improper, said the Court of Appeals. It could not be said that ESDC's finding was irrational or baseless; ESDC had considered a wide range of factors, including physical, economic, engineering and environmental conditions. Because there was record support for ESDC's determination that the Project site was blighted, the Appellate Division plurality erred when it substituted its view for that of the legislatively designated agency.

The business owners contended that ESDC had acted pretextually and in bad faith in arriving at its determination of blight, noting that the first consultant hired by ESDC to study conditions in the Project area had been previously hired by Columbia to prepare its Environmental Impact Statement. But, said the Court of Appeals, the record did not indicate that the study conducted by the consultant was compromised simply because it had separately prepared an EIS for Columbia. Furthermore, noted the court, ESDC had, as a measure of caution, hired a second consultant, who had never previously been affiliated with Columbia, to perform a blight study. The second consultant arrived at conclusions similar to those of the first consultant, based on independent research and data.

The court rejected the business owners' contention that the statutory term "substandard or insanitary area," appearing in the Urban Development Corporation Act and pursuant to which ESDC had made its findings of blight, was unconstitutionally vague on its face. Blight, said the court, is an elastic concept that does not call for an inflexible, one-size-fits-all definition. In defining "substandard or insanitary area" as a "slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area," the Act provided adequate meaning to the term.

Although the Appellate Division plurality had agreed with the business owners' assertion that there was no evidence that the Project area had been blighted before Columbia had acquired the majority of the property therein, this contention, said the Court of Appeals, was unsupported by the record. A study begun in 2003, when Columbia was only beginning to acquire property in the area and before either of ESDC's consultants had been

retained, unequivocally concluded that there was ample evidence of deterioration of building stock and substandard and unsanitary conditions. Moreover, ESDC's second consultant found that since 1961, the area had suffered from a longstanding lack of investment interest.

The Court of Appeals also held, in the alternative, that the Project was properly qualified as a "civic project" within the meaning of the Urban Development Corporation Act. The court noted that the statutory definition of a "civic project" specifically includes providing facilities for educational purposes. The Appellate Division plurality's holding that the expansion of a private university did not come within the statutory language was without statutory support, said the Court of Appeals. Both the language of the statute and ESDC's history supported the contention that "civic projects" may involve private entities. In this case, said the court, the advancement of education, the improvement of public spaces and infrastructure, and the creation of an estimated 6,000 permanent jobs left no doubt that the Project qualified as a "civic project."

The last argument addressed by the court was that the business owners were denied procedural due process when ESDC (1) failed to turn over certain documents during the administrative process pursuant to the owners' request under the Freedom of Information Law (FOIL); and (2) closed the record before the litigation arising from that request was resolved. The court held that the owners had an opportunity to comment on the proposed Project in a meaningful manner, orally and through written submissions, and at a meaningful time—well before ESDC issued its findings and determination. Prior to ESDC's determination, the owners had access to over 8,000 pages of documents, including the two blight studies commissioned by ESDC. The owners had made extensive written submissions following a two-day public hearing, and ESDC prepared a 75-page "Response to Comments" which extensively addressed the concerns raised by the owners. The court conceded that the owners had prevailed in their FOIL litigation, in that ESDC was ordered to turn over five additional documents. But, continued the court, the owners had failed to show that the withholding of these documents deprived them of a meaningful opportunity to be heard during the administrative process, or that the documents were material. The court also noted that the owners had not moved to vacate the automatic stay following the ruling granting their FOIL requests. *Kaur v. New York State Urban Development Corp.*, 2010 WL 2517686 (N.Y. 2010).

VIOLATION OF OPEN MEETINGS LAW DID NOT REQUIRE ANNULMENT OF ZONING BOARD OF APPEALS' DETERMINATION.

Brendan Cunney owned land in the village of Grand View. He obtained site plan approval for new construction, and built a house in accordance with the approved plan. Because of an error in the topographical data used by his architect, the completed house exceeded an applicable height restriction by three feet. He was denied a certificate of occupancy, and applied to the zoning board of appeals for a variance. After a public hearing, the board granted the variance subject to conditions: Cunney's pool house was to be removed and an unobstructed view was to remain on the northerly side of the property.

Cunney commenced an Article 78 proceeding to review the board's determination, alleging that the conditions imposed on the grant of the variance were unreasonable and inconsistent with the spirit and intent of the zoning law, and that the board had violated the Open Meetings Law in making its determination. The court upheld the conditions, but annulled the determination on the ground that the Open Meetings Law had been violated, and remanded the matter to the board. The board appealed.

The Appellate Division reversed. The court agreed that the board had violated the Open Meetings Law by failing to vote on Cunney's variance application in public session, and that the courts have discretionary power to declare void any action taken in violation of the Open Meetings Law, on good cause shown. However, the court continued, Cunney had failed to show good cause. The record did not suggest that the board's failure to comply with the Law was anything more than mere negligence, and so it was error to annul the board's determination. *Cunney v. Board of Trustees of Village of Grand View*, 72 A.D.3d 960, 900 N.Y.S.2d 110 (2d Dep't 2010).

COUNTY COULD NOT CONDEMN LAND UNDER HIGHWAY LAW RATHER THAN EMINENT DOMAIN PROCEDURE LAW.

Cortland County planned a construction project to replace culverts on a local road. The county wanted to acquire approximately a third of an acre out of a 270-acre parcel owned by Lisa and Dean Miller. Efforts to negotiate a sale were unsuccessful, and the county legislature authorized the county attorney to acquire the land under the Eminent Domain Procedure Law (EDPL). The county brought an action for condemnation, and the Millers responded that the county had failed to comply with the procedural requirements of the EDPL. The county asserted that it was pursuing the taking under article 6 of the Highway Law and that the EDPL did not apply. The

Supreme Court, Cortland County, agreed and further concluded that, in any event, the taking was de minimis and thus would have been exempted by the EDPL from the hearing requirements of the EDPL. Three commissioners were appointed pursuant to Highway Law § 120 to determine compensation, and the Millers appealed.

The Appellate Division reversed. The court noted that the EDPL had been enacted to replace a vast array of procedures with a uniform and exclusive procedure for the exercise of eminent domain. Provisions in other statutes that are inconsistent with the EPDL must give way, the court said. The fact that the county was attempting to acquire the land under the Highway Law, despite the county legislature's authorization to proceed under the EDPL, was reason enough to dismiss the county's action. Moreover, Highway Law § 120 was inconsistent with the EDPL in several respects, including hearing requirements and who determines compensation. Those aspects of the Highway Law no longer governed a taking in New York, and it was error to utilize procedures from Highway Law § 120 that were at odds with the EDPL.

The court declined to uphold the judgment below on the alternative ground that the taking was de minimis and therefore exempt from the EDPL's hearing requirements. The court expressed reluctance to retroactively find compliance with the EDPL in view of the fact that the county had opted to attempt to pursue condemnation under a separate statute with different procedures. In any event, the court was unpersuaded that the record supported a de minimis determination in light of the close proximity of the project to land with significant historic remains (there were two letters in the record from Native American groups articulating concerns), together with the fact that the county had expanded the scope of the project from what was originally proposed and such expansion resulted in the State Office of Historic Preservation suspending its earlier approval. *In re Acquisition of Real Property by County of Cortland*, 72 A.D.3d 1436, 899 N.Y.S.2d 467 (3d Dep't 2010).

CONDEMNATION BY ELECTRIC CORPORATION OF PROPERTY OWNED BY SYRACUSE UNIVERSITY SET ASIDE AS LACKING SUFFICIENT PUBLIC PURPOSE.

Syracuse University (SU) commenced a proceeding in the Appellate Department, seeking to annul the determination of Project Orange Associates Services Corporation (POASC), authorizing the condemnation of real property owned by SU on which a cogeneration facility and steam plants were located, as well as certain underground steam distribution mains originating from the those facilities. In 1990, Project Orange Associates, LLC (POA), an affiliate of POASC, had entered into a series of 40-year lease agreements with SU that allowed POA to construct a cogeneration facility on property owned by SU and to assume operation of two existing steam plants located there. In exchange, POA agreed to sell steam at prices substantially below what SU was paying to produce steam at the existing steam plants. SU used that steam and sold excess steam to neighboring not-for-profit entities. POA was able to provide that steam at a reduced price because of its expected profits from the sale of electricity under a 40-year contract between POA and Niagara Mohawk Power Corporation (NIMO) that required NIMO to purchase electricity produced at the cogeneration facility.

The threat of a NIMO bankruptcy in 1998 caused POA and NIMO to reach a settlement that allowed NIMO to discharge its obligation to purchase electricity from POA in exchange for a significant settlement that permitted POA to provide SU with steam at a significantly reduced rate until July 2008. By 2008, POA took steps to renegotiate its lease agreements with SU, which were unsustainable based on the demise of POA's contractual relationship with NIMO. POA brought a declaratory judgment action against SU in connection with one of its agreements with SU, and in addition twice sought emergency judicial relief adjusting the steam price, withheld payment to the contractor responsible for operating the cogeneration facility, and disputed certain water and electric charges for the facility. In May 2008, POASC was incorporated as an electric corporation, and approximately one year later provided notice of its intent to condemn the subject property.

SU's main contention was that the public purpose of the condemnation was illusory. The Appellate Department agreed, stating that the underlying basis for the exercise by the POASC of its eminent domain powers was "undoubtedly" the outdated business model of its affiliate, POA. The proposed condemnation was the last in a series of attempts to free POA from an unfavorable contractual agreement with SU. Thus, the condemnor was virtually the sole beneficiary of the condemnation, and this was reason to invalidate the condemnation, especially since the public benefit was incrementally incidental to the private benefit of the condemnation. The court noted in particular that the cogeneration facility contributed a minimal amount of electricity to the total energy needs of the state, that there was 50% more generation than load in the area in which POASC was located, and that SU continued to operate the steam plants after POA's default. The court also noted that as an electric corporation, POASC's power of eminent domain was limited by state law to acquisition of such real estate as might be necessary for its corporate purposes. These purposes, by statute, did not include steam distribution. The court thus concluded that in any event POASC lacked statutory authority to acquire the steam plants. *Syracuse University v. Project Orange Associates Services Corp.*, 71 A.D.3d 1432, 897 N.Y.S.2d 335 (4th Dep't 2010).

ZONING BOARD OF APPEALS' DENIAL OF DE MINIMUS AMENDMENT TO VARIANCE WAS ARBITRARY AND CAPRICIOUS.

The Zoning Board of Appeals of the Town of Oyster Bay (ZBA) granted an application of Alex Bout for an area variance in connection with a proposed addition to his home. Neighboring landowners complained, alleging that the footprint of the addition was larger than permitted by the variance, and that the side yard was narrower than permitted by the variance. The ZBA held a hearing, and denied Bout's application for an amended area variance, holding that the application contained a request to maintain a side yard at a width 16 inches less than it had previously approved, and that the footprint of the addition was "larger" than it had previously approved.

Bout commenced an article 78 petition seeking review of the denial. The Supreme Court transferred the proceeding to the Appellate Division, which in the interest of judicial economy decided the case on the merits even though the case was erroneously transferred.

There was no basis in the record, said the court, for the ZBA's conclusion that the application sought permission to maintain a side yard 16 inches narrower than previously approved. Even if the neighboring landowners' uncertified survey was correct, the application requested, at most, an amended variance permitting the petitioners to maintain the side yard at a width only 3.6 inches less than the previously approved side yard requirement, i.e., 7.7 feet wide rather than the previously approved 8 feet, and to increase the overall footprint of the addition by a mere 8%, i.e., 6 inches larger than planned on one side and approximately 18 inches larger on the other side. The requested amendments to the variance were *de minimis*. Since the ZBA did not explain its reasons for reaching a different result on essentially the same facts as it had faced when making its prior decision, under the circumstances, its determination to deny the application for an amended variance was arbitrary and capricious, and had to be annulled. *Bout v. Zoning Bd. of Appeals of Town of Oyster Bay*, 71 A.D.3d 1014, 897 N.Y.S.2d 205 (2d Dep't 2010).

UNCONDITIONAL DENIAL OF CHURCH'S APPLICATION FOR SPECIAL EXCEPTION PERMIT AND PARKING VARIANCE WAS AN ABUSE OF DISCRETION.

Walk in Love for Jesus Church conducted religious services on its property in a residential zoning district in the town of Hempstead. The town's zoning ordinance expressly permitted religious uses in residential districts, but in 2007 the ordinance was amended to require a "special exception permit" for the establishment or expansion of a religious use in any zoning district. The amendment provided that the town could grant such a permit if the proposed use would not cause "significant negative impacts," including traffic congestion or a lowering of property values. Upon a finding of significant negative impacts, the town could deny the permit unless such impacts could be substantially mitigated by imposition of appropriate conditions. The church applied for a special exception permit so that religious services could continue to be held on its premises, and also sought area variances for off-street parking and the installation of a sign. As a condition for the grant of its application, the church proposed that only 46 people would be allowed to enter the sanctuary, and that while services were being held in the sanctuary, no other area of its premises would be used. After a public hearing, the town's Board of Appeals denied the application in its entirety. On judicial review, the denial was upheld.

On appeal, the Appellate Division reversed, holding that the denial of the application was arbitrary and capricious. The court noted that, unlike a use variance, a special exception allows an owner to put his property to a use that is expressly permitted under the applicable zoning ordinance, subject only to conditions imposed to minimize its impact on the surrounding area. The church had suggested such conditions. While religious institutions are not exempt from zoning laws, greater flexibility is required in evaluating an application for a religious use than an application for another use, and every effort to accommodate a religious use must be made. A local zoning board is required to suggest measures to accommodate a proposed religious use while mitigating adverse effects on the surrounding community as much as possible. The record in the case at bar reflected that the Board of Appeals suggested no measures to accommodate the church's proposed use while mitigating adverse effects. Despite the conditions proposed by the church, the board simply denied the application in its entirety even though the proposed use could have been substantially accommodated. Furthermore, said the court, the evidence was insufficient to rebut the presumed beneficial effect of the proposed religious use. The court remanded the case to the board with directions to grant the church's application under reasonable conditions allowing its proposed use while mitigating adverse effects on the surrounding community. *Capriola v. Wright*, 73 A.D.3d 1043, 900 N.Y.S.2d 754 (2d Dep't 2010).

