Municipal Services Moratoria: Tools or Weapons in the Growth-Services Squeeze?

This article collects cases dealing with moratoria upon the provision of municipal services. It sifts through the case law to assess the future legal appropriateness of this recently popular and controversial local government device for coping with the difficulties in providing services arising out of rapid urban growth.

The moratorium is an increasingly popular, low-cost municipal tool for solving growth-related municipal services problems. By definition a "period of permissive or obligatory delay,"[1] a moratorium halts land development in order to give local government an opportunity to accommodate the current needs of its citizens for services and to plan for the future needs of its growing population. This temporary halting of land development results in growth control, prompting much debate and litigation. To assess the legal validity of moratoria requires the resolution of a dilemma: should we allow the free interaction of moratoria and municipal growth policy, or should we choose an order, *i.e.*, that needs generated by growth *must* determine the provision of services and that the reverse, moratoria used to effect growth policy, cannot be allowed? Even if we require a certain order, the actual determination of which is the horse and which the cart in a particular moratorium situation is often elusive. These questions are focal points in much of this article.

Two interrelated problems lead cities to turn to moratoria. These are inadequacy of municipal services and urban sprawl. Inadequate services have both natural, environmental causes and socio-economic causes. Natural causes include shortages, such as drought,[2] and limi-

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[1] BLACK'S LAW DICTIONARY 1160 (Rev. 4th ed. 1968). Black's definition of "moratorium" applies to the debtor-creditor situation; wide use of the term in the municipal services context is a recent development. For the purpose of this article, "moratorium" may be defined as a general, systematic refusal to extend a municipal service into a developing area, or a refusal to zone such an area for development until such service is deemed adequate by the authority imposing the moratorium.

[2] A natural condition such as a dry cycle might cause stored water to drop to a level which can barely fill the existing population's needs. *See, e.g.*, Swanson

tations upon the ability of delicately balanced ecosystems to absorb the effects of increased services.[3] The socio-economic factor underlying inadequate services stems from rapid population growth. Even where nature imposes no barriers, demand can outstrip the financial capacity of a municipality to build the facilities necessary to extend a particular service.[4] Increased per capita consumption of services exacerbates the problem.

Cities also have imposed moratoria in response to the difficulties generated by urban sprawl. "Urban sprawl" describes the modern phenomenon of the rapidly developing, low-density urban fringe. Apart from increased demand, sprawl imposes substantial economic burdens on the city. Roads, sewers, water mains, and other services are extended outward at high cost. Low density and geographical dispersion reduce the efficiency of these extensions. By diverting limited funding and facilities from the existing populations to service outlying areas, sprawl causes the more central and densely populated areas to suffer reduced services and maintenance of service facilities. In addition, urban sprawl consumes prime agricultural land and valuable open space with little compensating benefit to the pre-existing community.[5]

Moratoria can be effective remedies for urban sprawl or inadequate services, but they are not without their costs. By their very nature, moratoria trap landowners between high taxes and frustrated development plans. Not unexpectedly, moratoria are often challenged at either the planning or implementation stages. In addition to the cost imposed upon individual landowners, moratoria can inflict serious costs on the city as a whole. A moratorium may backfire, aggravating the very problems the city is attempting to solve. When development jumps over an area frozen by the moratorium, to an area even farther from the central core of the city, the results are sprawl that is more widely scattered and greater extension costs, or

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v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 516, 128 Cal. Rptr. 485, 487 (1st Dist. 1976).

[3] For example, people in heavily populated areas now recognize that their environment can absorb only a limited amount of sewage without suffering serious water pollution. *See, e.g.*, Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1373 (D. Md. 1975).

[4] *See, e.g.*, Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 227-8, 529 P.2d 582, 583, 118 Cal. Rptr. 158, 159 (1974), *appeal dismissed*, 427 U.S. 901 (1976).

[5] Roads, utility trunk lines, and other facilities have to be extended over longer distances and in patterns which are not necessarily the most economical. Unnecessary branches and stubs of main trunk lines for sewer and water, for example, may have to be provided. Furthermore, in building main trunk lines for a sprawling pattern of development, it is harder to anticipate ultimate demand.

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a shift of the cost burden onto another jurisdiction.[6]

The purpose of this article is to examine the treatment courts have given local efforts to control growth through moratoria. Section I analyzes the origins and dimensions of the duty to provide municipal services. Section II examines the arguments advanced in opposition to modern moratoria and the relative success of each, particularly as they relate to the question of motive behind the moratorium. Finally, section III explores the legal significance of motive, suggests methods for distinguishing permissible from impermissible motives, and argues that some presently recognized distinctions are in fact not useful in the urban context.

I. THE DUTY TO PROVIDE MUNICIPAL SERVICES

The courts first developed the concept of a duty to furnish services to all inhabitants of an area in cases involving refusals by the local service-supplying entity to extend its services to individual landowners in varied circumstances.[7] An understanding of these cases provides the necessary foundation for an examination of the modern moratorium cases.

Although the character and magnitude of modern urban problems limit the applicability of the principles developed in these early service extension cases, the underlying consideration remains the same. In order to live on urban parcels of land, most people must rely upon a public or private entity to provide certain essential services. Without such services, residential development will not occur since it is impractical to provide them on an individual basis. But developers can be unwelcome newcomers, who are relatively powerless against the resident population or existing local government which controls the distribution of services. To prevent arbitrary refusals to extend services, the courts imposed certain duties on public and private service companies.

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[6] For statistical studies indicating that a shift of development activity to jurisdictions outside the moratorium area has occurred with significant frequency, see M. Rivkin, *Growth Control via Sewer Moratoria*, 33 URB. LAND 10, 14 (1974).

[7] *See* Lukrawka v. Spring Valley Water Co., 169 Cal. 318, 324-25, 332, 146 P. 640, 642-43, 645 (1915). Other early extension refusal cases include: Richards v. City of Tustin, 225 Cal. App. 2d 97, 37 Cal. Rptr. 124 (4th Dist. 1964); Boies & Soule v. East Bay Mun. Util. Dist., 186 Cal. App. 2d 843, 9 Cal. Rptr. 464 (1st Dist. 1960); Auchmoody v. Manhattan Beach, 53 Cal. App. 726, 200 P. 803 (2d Dist. 1921); Marr v. City of Glendale, 40 Cal. App. 748, 181 P. 671 (2d Dist. 1919); Cozzens v. North Fork Ditch Co., 2 Cal. App. 404, 413-14, 84 P. 342, 346 (3d Dist. 1905); Haugen v. Albina Light & Water Co., 21 Or. 411, 28 P. 244 (1891). For a discussion of similar issues in a slightly different context, see Russell v. Sebastian, 233 U.S. 195, 206, 209 (1914); Butte County Water Users' Ass'n v. Railroad Comm'n, 185 Cal. 218, 230, 234, 196 P. 265, 270, 271 (1921). For a contrary view, see City of Colorado Springs v. Kitty Hawk Dev. Co., 154 Colo. 535, 392 P.2d 467, 471-72 (1964); Mongiello v. Borough of Hightstown, 17 N.J. 611, 112 A.2d 241 (1955).

A. Early Case Law: The Balancing Test

One of the early cases, *Lukrawka v. Spring Valley Water Company*,[8] gives the flavor of the early factual settings and a representative look at the judicial attitudes of the day. The plaintiffs in *Lukrawka* were residents of a section of San Francisco bordered by water mains. The defendant, a privately owned water company, refused to extend service into this area, even though plaintiffs required only 2000 feet of extensions and defendant's reservoir contained ample water.[9] Spring Valley contended that, as a privately held company, it had no obligation to expand services contrary to its desires.[10] The California Supreme Court held otherwise. It found that the franchise granted by the state imposed an implicit duty upon the company to make all extensions that were reasonable. The court also found that the contract required the company to keep prospective population increases in view and to take reasonable measures to insure control of a sufficient water supply.[11] The court emphasized, however, that the duty to extend did not give the landowner an absolute right to an extension. The suppliers should consider several factors to determine whether the demanded extension was reasonable: length of the extension, expense, supply, needs of the community making the demand, and the effect upon the community as a whole. In the case at bar, the court weighed these competing factors and found for plaintiff.[12]

Other courts have used similar balancing tests, but the scales have not invariably tipped in favor of the property owners. In some instances, a balancing of the factors, particularly expense, has resulted in a finding that the extension was unreasonable.[13] Closely related

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[8] 169 Cal. 318, 146 P. 640 (1915).

[9] *Id.* at 321-22, 146 P. at 641-42.

[10] *Id.* at 324, 146 P. at 642.

[11] *Id.* at 324-25, 332, 146 P. at 642-43, 645.

[12] *Id.* at 332-34, 146 P. at 646.

[13] Public Serv. Comm'n v. Brooklyn & C.B. Light & Water, 122 Md. 612, 90 A.2d 89 (1914) (no duty to extend mains when cost is so great that company is unable to pay for extension without endangering existing service and causing financial disaster to company). *See* Boies & Soule v. East Bay Mun. Util. Dist., 186 Cal. App. 2d 843, 9 Cal. Rptr. 464 (1st Dist. 1960) (water district had duty to make classifications and rules with respect to water pressure required for extensions; conditions for extension were found reasonable as matter of fact); Reid Dev. Corp. v. Parsippany-Troy Hills Tp., 31 N.J. Super. 459, 107 A.2d 20, 22-23 (App. Div. 1954). In *Reid*, an ordinance required developers to install water main extensions at their own expense. The court stated that matters of enlargement of facilities are generally within the governmental agency's discretion. Discretion is governed largely by need and economic considerations. Plaintiff developer's request in effect asked defendant city to take a stake in plaintiff's speculation, without assurance as to return on the capital expended. The court did not find the municipality's refusal to make the extension arbitrary, unreasonable, or an abusive exercise of discretion. *Id.* 107 A.2d at 23. (The ordinance's scheme for charges was invalid, however, because of a lack of statu-

to the concept of the duty to make reasonable extensions is the proposition that geographically remote users cannot compel extensions of mains to their property.[14] This remote users doctrine appears to be no more than a rule that when the distance is great enough, the factor of length is enough to make an extension unreasonable regardless of other considerations.

A public trust notion also appeared in the service extension cases. A water company that appropriates water to be sold or otherwise furnished for irrigation and other useful purposes holds that water upon a public trust. Therefore, it owes a public duty independent of contract rights.[15] But this duty is not unlimited. At least one court has said that a restriction of water service to those inside the company's territory, unless there was a surplus, was not a derogation of the public trust, but a regulation pursuant to the performance of the trust.[16]

B. Transition from Small Scale Refusals to Moratoria

The character of the service extension cases has acquired new dimensions. In the past, refusals to extend often affected only a limited number of individuals. Each case contained peculiar circumstances of its own. The size and composition of the affected populations have now changed. The plaintiffs in the modern moratorium cases are seldom isolated or remote users; they are instead likely to be property owners on the developing suburban fringes or owners of unimproved land encircled by developed areas. Today, local government's concern is not so much the cost of extending a main or other capital facility as it is the adverse effect of additional demand upon limited supplies.[17] Modern moratoria typically cover vast tracts of

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tory authority to impose costs of extending mains upon owners. *Id.*) *Cf.* Auchmoody v. Manhattan Beach, 53 Cal. App. 726, 200 P. 803 (2d Dist. 1921) (availability of water supply sufficient for plaintiff's needs warranted court's determination that city was negligent in not supplying plaintiff with adequate water); Haugen v. Albina Light & Water Co., 21 Or. 411, 28 P. 244 (1891) (water company compelled to serve property abutting on one of its mains).

[14] Marr v. City of Glendale, 40 Cal. App. 748, 181 P. 671 (2d Dist. 1919) (plaintiff's property was one mile north of city's boundary and above any reservoir; to supply water would have been costly; in addition, a private company could conveniently serve plaintiff.); Lawrence v. Richards, 111 Me. 95, 88 A. 92 (1913); Rose v. Plymouth Town, 110 Utah 358, 173 P.2d 285 (1946) (no duty to extend even to property within city limits when the cost greatly disproportionate to city's revenue).

[15] Cozzens v. North Fork Ditch Co., 2 Cal. App. 404, 413, 84 P. 342, 346 (3d Dist. 1905) (water appropriation rights case).

[16] Leavitt v. Lassen Irrigation Co., 157 Cal. 82, 92, 106 P. 404, 408 (1909) (dictum). *See also* Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1382 (D. Md. 1975) (under a public trust doctrine requiring it to maintain its waters in unpolluted condition, state attempting to remedy water pollution through use of sewer hookup moratoria).

[17] *See, e.g.*, Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 516, 128 Cal. Rptr. 485, 487 (1st Dist. 1976); Smoke Rise, Inc. v. Washington Subur-

land and affect correspondingly large numbers of people. Those to whom extensions are denied often do not have an alternate economical source of supply, or they are prohibited, in conjunction with the moratorium, from supplying the service themselves.[18] So, unlike older service refusals, which often merely increased the cost of development,[19] the moratorium confronts the landowner with the possibility of no development at all.

Another difference between the older and the current cases lies in the status of the parties. In the past, litigation often arose out of a privately owned utility's refusal to extend service.[20] The defendants in today's moratorium cases are more frequently public entities.[21] In earlier cases, the courts emphasized that the private nature of the utility's endeavor gave it no less a duty than would fall upon a public body.[22] When a public entity is the defendant, however, the courts must define what that public duty is.[23] Further complicating the

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ban Sanitary Comm'n, 400 F. Supp. 1369, 1373 (D. Md. 1975); Pacific Boulevard Assocs. v. City of Long Beach, 48 App. Div. 2d 857, 368 N.Y.S.2d 867 (1975).

Limited supplies remains, of course, in part a question of costs, but it is of a greater magnitude. Indeed, occasionally the necessary expenditure will be prohibitive—*i.e.*, not just extending a sewer pipe but building an additional treatment plant; not simply hiring additional teachers but building several new schools. These expenditures may be difficult to make when the community is hesitant about growth.

[18] *See, e.g.*, Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1390 (D. Md. 1975) (private septic systems prohibited in certain areas of counties subject to the sewer moratoria). *But see* Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 230, 529 P.2d 582, 585, 118 Cal. Rptr. 158, 161 (1974), *appeal dismissed*, 427 U.S. 901 (1976) (moratorium ordinance permitted exemption for developers who arranged to provide satisfactory temporary alternatives to permanent school facilities, to serve the additional pupils). In many cases, once a service extension is refused, there are no practical alternatives open to the developer. Note, *Control of the Timing and Location of Government Utility Extensions*, 26 STAN. L. REV. 945, 947 n.15 (1974).

[19] *See, e.g.*, Boies & Soule v. East Bay Mun. Util. Dist., 186 Cal. App. 2d 843, 9 Cal. Rptr. 464 (1st Dist. 1960) (district specified facilities that owner would be required to provide to obtain services).

[20] *See* cases cited note 7 *supra*.

[21] *See* Rivkin, *supra* note 6, at 10. A glance at the names of the defendants in most of the recent cases cited in this article also indicates this to be true.

[22] *See* Lukrawka v. Spring Valley Water Co., 169 Cal. 318, 324, 146 P. 640, 642-43 (1915) (private water company owed a *public* duty).

[23] People v. City of Los Angeles, 83 Cal. App. 2d 627, 189 P.2d 489 (2d Dist. 1948), is not a moratorium case but it foreshadows the scope of modern solutions to services problems. A California Court of Appeal upheld a judgment requiring a number of cities lacking their own sewage systems to pay proportionate shares toward the construction of a new multi-city sewage system, designed to abate an ocean pollution nuisance. The court stated that municipalities are under a primary obligation to dispose of the sewage that accumulates within their boundaries, and that there is an equally binding obligation to avoid any injury to others in the disposal of such sewage. *Id.* at 643, 189 P.2d at 498-99. From a public policy perspective, municipalities are expected to provide high quality services—*e.g.*, good schools, sewage treatment that minimizes environmental damage. When these expectations cannot be met, cities sometimes

modern cases is the fact that the municipalities charged with delivering public services are often the same governmental bodies that are charged with making growth and land use decisions in general.[24]

II. THE MODERN LITIGATION

At the onset of the 1970s, cities found themselves facing several difficult challenges. Rapid suburban expansion exerted great pressure upon public services. In cities like San Jose, California, schools became seriously overcrowded, and capital to expand the facilities was limited.[25] Elsewhere, entire watersheds faced a sewage treatment crunch as population growth strained the facilities from one direction, and rising water quality standards pressured them from the other.[26] Some cities confronted impending water shortages, aggravated in some cases by drought and inadequate storage reservoirs.[27] Lacking the financial resources to expand the output of services to meet rapidly rising demand on one hand, and higher standards on the other, local governments were forced to seek lower cost solutions.

The moratorium offers a method of attacking the services problem at minimal cost, and in the 1970s, a host of local governments seized upon it as an escape from their dilemma.[28] The simplicity of the theory behind the moratorium is appealing: since we cannot provide adequate services, we will delay the addition of new customers until we can.

Moratoria vary in form, depending upon which stage in the construction approval process the ban is placed. A moratorium may ban new water or sewer hookups,[29] or alternatively, it may freeze new

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resort to moratoria. Thus private challenges to moratoria should be viewed in the context of these policy notions.

[24] *See* notes 77, 81-83 & accompanying text *infra*.

[25] *See, e.g,* Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 227-28, 529 P.2d 582, 583, 118 Cal. Rptr. 158, 159 (1974), *appeal dismissed*, 427 U.S. 901 (1976).

[26] *See, e.g.*, Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1373, 1387 (D. Md. 1975); Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724, 729-32, 130 Cal. Rptr. 196, 198-200 (1st Dist. 1976); Rivkin, *supra* note 6, at 11. Statutory standards for water quality exist on both the federal and state levels. *E.g.*, Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1376 (Supp. II 1972); Porter-Cologne Water Quality Control Act, CAL. WATER CODE §§ 13379-13998 (West Supp. 1976).

[27] *See, e.g.*, Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 516, 128 Cal. Rptr. 485, 487 (1st Dist. 1976).

[28] Rivkin, *supra* note 6, at 11. Rivkin offers several factors contributing to the extensive use of sewer moratoria in the past few years: higher density suburban growth, citizen and builder protest (moratoria can be a compromise), federal and state legislation, and the rising cost of sewage treatment facilities capable of meeting current standards. *Id.*

[29] *See, e.g.*, Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1375 (D. Md. 1975); Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 516-17, 128 Cal. Rptr. 485, 488 (1st Dist. 1976).

authorizations for extending utility trunk lines into unserviced areas.[30] A city or county can temporarily ban the issuance of new building permits or ban subdivision approvals.[31] Zoning is yet another point at which it is possible to effect a services moratorium. A city can prohibit all rezoning for residential use,[32] or it can simply prohibit rezoning for a higher density until services are determined to be adequate.[33]

Moratoria also vary according to the context in which they are imposed. In some instances, municipalities have adopted moratoria as emergency measures, concerned only with the services problem and the need for an immediate solution.[34] Other cities enacting moratoria have had similar concerns, but viewed the action as a temporary means of buying time to develop long range solutions, rather than as solutions in themselves.[35] In still other areas, authorities have adopted moratoria pursuant to pre-existing comprehensive plans for development.[36] A particular moratorium may not fall into any one of these categories; the context of its adoption may contain elements of each.

Landowner and developer challenges to moratoria can be grouped under two broad headings: constitutional and statutory. Often interwoven with these arguments is the common law concept of the duty

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[30] *See, e.g.*, Robinson v. City of Boulder, ___Colo.___, 547 P.2d 228 (1976).

[31] *See, e.g.*, Owens v. Glenarm Land Co., 24 Ariz. App. 430, 539 P.2d 544 (1975). *See also* Construction Indus. v. City of Petaluma, 522 F.2d 897, 901 (9th Cir. 1975).

[32] *See, e.g.*, Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 228-29, 529 P.2d 582, 585, 118 Cal. Rptr. 158, 161 (1974), *appeal dismissed*, 427 U.S. 901 (1976).

[33] *See, e.g.*, Board of Supervisors v. Williams, 216 Va. 49, 216 S.E.2d 33, 35 (1975). The method by which a services moratorium is carried out should not affect its validity (if enacted by a governmental body with the authority to use that method). If the service is one such as water, where extensions are usually applied for prior to construction, *see, e.g.*, Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 516, 524, 128 Cal. Rptr. 485, 487-88, 492 (1st Dist. 1976), a general, systematic refusal to grant such applications will achieve a moratorium on development. For a service such as schools, where construction proceeds without any sort of application for "school service" in the area, the municipality must impose the moratorium on another level, such as zoning. *See, e.g.*, Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 228-29, 529 P.2d 582, 585, 118 Cal. Rptr. 158, 161 (1974), *appeal dismissed*, 427 U.S. 901 (1976). There is no apparent reason why a zoning moratorium should be less valid than a water permit moratorium, since the type of moratorium chosen is dictated by the construction approval procedures.

[34] *See, e.g*, Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 516, 128 Cal. Rptr. 485, 487 (1st Dist. 1976).

[35] *See, e.g.*, Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1373, 1385 (D. Md. 1975).

[36] *See, e.g.*, Robinson v. City of Boulder, ___Colo.___, 547 P.2d 228 (1976); Board of Supervisors v. Williams, 216 Va. 49, 216 S.E.2d 33, 35 (1975). The existence of a comprehensive plan adds an extra measure of validity to enactments pursuant to it. *See* Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969).

to make reasonable extensions developed in the earlier service extension cases.

The judicial response to the legal challenges raised to moratoria seems to hinge on a number of factors. Motivation or purpose for the moratorium is a primary consideration. Purpose is the foundation for analyses of reasonableness which the courts must undertake in deciding due process, equal protection, and inverse condemnation issues. The municipalities have offered various justifications for moratoria. Generally, these justifications relate directly to a particular services problem which led the municipality to invoke its moratorium power. On occasion, however, the courts have looked beyond the proffered motivation, when plaintiffs have claimed some other motive to be the actual purpose.[37]

Closely tied to purpose or motive is the element of good faith on the part of the responsible municipal authority imposing the moratorium. A city's good faith efforts to remedy an inadequacy in its services and increase its capacity to provide them often appear to be grasped by the courts as an indicator that the true purpose of the moratorium is to improve services and not to implement an anti-growth policy.[38] Duration of the moratorium may also have signifi-

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[37] *See* Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1384-85 (D. Md. 1975) (plaintiff unsuccessfully claimed sewer authorities, local and state, were acting pursuant to unspoken, local anti-growth policy); Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 524, 128 Cal. Rptr. 485, 493 (1st Dist. 1976) (no evidence that water moratorium was to implement no-growth policy).

[38] Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1373-77 (D. Md. 1975). The *Smoke Rise* court outlined in detail the extensive efforts of the sewer authorities to improve sewage treatment and increase sewage capacity in the basins restricted by the moratoria, and thus distinguished the case from Belle Harbor Realty Corp. v. Kerr, 43 App. Div. 2d 727, 350 N.Y.S.2d 698 (1973). In *Belle Harbor,* lack of adequate sewer facilities was asserted as a ground for the revocation of building permits. The revocation was held to be a denial of due process, but, according to the *Smoke Rise* court, the fact that there were no plans for the improvement of the system was the critical factor in the decision. 400 F. Supp. at 1384.

In Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 229-30 n.1, 529 P.2d 582, 584-85 n.1, 118 Cal. Rptr. 158, 160-61 n.1 (1974), *appeal dismissed,* 427 U.S. 901 (1976), the ordinance which effected the moratorium also called for a study of the growth problems of the city and possible solutions. Although the court did not state that the study was a prerequisite for validity, it said, "Certainly there is nothing irrational in the voters' determination to permit residential construction, pending completion of a thorough study of problems of residential development, only by those owners whose property has already been found suitable for such construction." *Id.* at 232-33, 118 Cal. Rptr. at 163, 529 P.2d at 587. *Cf.* Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 524, 128 Cal. Rptr. 485, 493 (1st Dist. 1976) (court warned that municipal officials must exert every reasonable effort to augment water supplies). These courts have not explicitly stated that good faith or lack thereof controlled the results, but several cases can be cited where no good faith efforts were mentioned, and the moratoria were struck down. *See, e.g.,* Robinson v. City of Boulder, ___Colo, ___,

cance. Like good faith, duration may serve as a barometer of whether the municipality is truly attempting to solve its services problems in a reasonable time, or is merely delaying growth.[39] The factors of motivation for the moratorium, good faith efforts to solve the ser-

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547 P.2d 228 (1976); Board of Supervisors v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975).

Golden v. Planning Bd. of the Town of Ramapo, 30 N.Y.2d 359, 373 n.7, 334 N.Y.S.2d 138, 148 n.7, 285 N.E.2d 291, 298-99 n.7 (1972), *appeal dismissed*, 409 U.S. 1003 (1972), comes closest to saying that good faith is indispensable. The court said that the good faith of the town's intent to construct service facilities must be *assumed*.

But it also stated that, "[w]hile these [timing] controls are typically proposed as an adjunct of regional planning . . . the preeminent protection against their abuse resides in the mandatory on-going planning and development requirement, present here, which attends their implementation and use . . . ." *Id.* at 379-80, 334 N.Y.S.2d at 153, 285 N.E.2d at 303. *Accord*, Associated Home Bldrs., Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976). In remanding the case, the court sets out a process by which a trial court can determine if a moratorium has a real and substantial relationship to the regional welfare, a necessary component of proper police power exercise. First, the court must forecast the probable effect and duration of the moratorium, by ascertaining how far existing facilities fall short of standards and determining whether appropriate agencies have undertaken to construct improvements and the expected date of completion of such improvements. Second, the court must weigh the interests of current residents who wish to improve facilities against those of outsiders seeking a place to live. Finally, the court must determine whether the moratorium, in light of its probable impact, will reasonably accommodate those competing interests. *Id.* at 608-09, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57. The court does not state what would be required to show a good faith undertaking to construct improvements or what factors, *e.g.*, city's revenue, would bear on the question. It places the burden of showing lack of good faith upon plaintiff, saying good faith must be presumed. But the court hedges, stating that a *real and substantial* relationship to public welfare is required, and that such a relationship cannot be *assumed*. *Id.* Thus, no court seems to have clearly resolved the issue of how good faith affects the validity of a moratorium. For a discussion of the duty to augment domestic water supply to accommodate growth, see Note, *The Thirst for Population Control: Water Hookup Moratoria and the Duty to Augment Supply*, 27 HASTINGS L. J. 753 (1976).

[39] A relatively short and definite duration seems to work in favor of the validity of a moratorium. Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 233, 529 P.2d 582, 587-88, 118 Cal. Rptr. 158, 163-64 (1974), *appeal dismissed*, 427 U.S. 901 (1976) (two year period set by moratorium ordinance held not to significantly infringe right to travel). *Builders Association* should be compared with Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1385-90 (D. Md. 1975), where the court required a showing of reasonableness of duration to overcome plaintiff's due process challenge and held that in light of the severity of the problem and the complexity of the intergovernmental relations among the federal government, two counties, two states, and a metropolitan sewer district, the five years during which the moratoria had been in effect at the time of the litigation was reasonable. The court could not find fault with the delays undergone in order to secure federal funding (75%) for sewage facilities. *See* CAL. WATER CODE § 355 (West 1971) (duration of water moratoria limited to time required to alleviate emergency and replenish or augment supplies of water). *See also* New York City Housing Auth. v. Commissioner of Environmental Conservation Dep't, 83 Misc. 2d 89, 372 N.Y.S.2d 146 (N.Y.S.Ct. 1975) (moratorium on wetlands development, pending study and protective measures, in effect slightly less than two years held reasonable).

vices problem, and duration of the moratorium appear to play a significant role in the courts' responses to almost all the constitutional and statutory challenges to the moratoria, and thus should be kept in mind throughout the succeeding discussion.

A. The Constitutional Arguments

1. Due Process

A constitutional argument frequently advanced by moratorium opponents is the claim that they are deprived of the use of their property without due process of law.[40] At the root of this claim is the contention that the moratorium is an improper or unreasonable exercise of the police power. This claim strikes at the motivation behind the moratorium, asserting that there is no real purpose, or a purpose not related to a genuine attempt to deal with a problem in the provision of the service in question.[41] For example, plaintiff developers may attack sewer hookup moratoria on the ground that the sewer authorities were acting pursuant to an unspoken, local anti-growth policy. The premise of this argument would be that a sewer moratorium is reasonable if related to a goal of improving sewage treatment, but not if designed to implement an anti-growth policy.[42]

Another due process claim is that the moratorium is an arbitrary means of solving the service shortage problem. This argument strikes at the reasonableness of the moratorium itself as a means related to the goal, rather than the legitimacy of the goal. Thus, contentions of arbitrariness and abuse of discretion arise where there is an asserted lack of standards to guide the granting of development privileges.[43] Procedural due process, including notice and hearing, may also enter the question of validity of the moratorium as a means.[44] The dura-

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[40] U.S. CONST. amend. XIV, § 1.

[41] *See* Berman v. Parker, 348 U.S. 26, 34-35 (1954) (plaintiff argued that taking of property to rid area of slums is permissible purpose under the due process clause, but that taking of property to develop a more attractive and better balanced community is not; court held both purposes within police power).

[42] *See* Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1383-84 (D. Md. 1975).

[43] Owens v. Glenarm Land Co., 24 Ariz. App. 430, 539 P.2d 544 (1975). Even if a moratorium ordinance sets forth standards to guide its application, the ordinance may nevertheless be subject to a claim of arbitrariness on the ground that the standards are unconstitutionally vague. Vague standards result in a potential for arbitrary enforcement, a sufficient basis for declaring the statute void. *See* Associated Home Bldrs., Inc. v. City of Livermore, 18 Cal. 3d 582, 596-600, 557 P.2d 473, 481-83, 135 Cal. Rptr. 41, 49-51 (1976) (court interpreted the moratorium ordinance's general standards, *e.g.*, "satisfactory solution" to problems of "educational facilities," to incorporate specific standards established by the school board, regional water quality control board, and other responsible agencies, and held ordinance not unconstitutionally vague).

[44] San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 210-11, 218, 529 P.2d 570, 573, 578, 118 Cal. Rptr. 146, 149, 154 (1974), *appeal dis-*

tion of the moratorium may also be challenged as unreasonable with respect to the city's purpose.[45]

In the majority of cases, the courts have refused to invalidate moratoria on the basis of the due process claims of landowners. Courts have found a reasonable purpose in the use of a moratorium to improve sewage treatment capacity and thus improve water quality,[46] or to avert a threatened water shortage.[47] The common thread in these situations is that there exists an inadequacy of the service and no present ability to augment the service in order to serve additional people without harming existing users. The protection of existing users is within the police power.[48] On the other hand, at least one case indicates that if a city lacks standards for approving or disapproving particular development projects, courts will invalidate moratoria on arbitrariness grounds.[49]

Some courts have upheld moratoria in the face of due process challenges, but have warned in dictum against the use of a moratorium to institute a general no-growth policy.[50] Such a policy has

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missed, 427 U.S. 901 (1976) (due process requirements of notice and hearing held not to apply to enactment of a general zoning ordinance by initiative); Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 228, 529 P.2d 582, 584, 118 Cal. Rptr. 158, 160 (1974), *appeal dismissed*, 427 U.S. 901 (1976) (court summarily rejected assertion that moratorium could not constitutionally be enacted by initiative, citing *San Diego Bldg. Contractors*, decided the same day). *See* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 672 (1976) (zoning ordinance enacted by referendum not an unconstitutional delegation of legislative power).

[45] Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1385-90 (D. Md. 1975). *See* note 39 *supra*.

[46] Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1383-85 (D. Md. 1975).

[47] Swanson v. Marin Mun. Water Dist., 56 Cal. App. 512, 523-24, 128 Cal. Rptr. 485, 492 (1st Dist. 1976).

[48] *Id.* at 522-23, 128 Cal. Rptr. at 491-92; *cf.* Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1382-83 (D. Md. 1975).

[49] Owens v. Glenarm Land Co., 24 Ariz. App. 430, 539 P.2d 544 (1975) (dictum). *See* note 83 *infra*.

[50] Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1384 (D. Md. 1975) (court stated that "broad and unfounded" decision to limit growth clearly would be an impermissible motivation for moratoria). *Cf.* Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 523-24, 128 Cal. Rptr. 485, 492 (1st Dist. 1976). The *Swanson* court said, "Since District has neither the power nor the authority to initiate such a policy [no-growth], the imposition of any restriction on the use of its water supply for that purpose would be invalid." *Id.* at 524, 128 Cal. Rptr. at 493. The court implies that if such a policy had been proven, a violation of statutory authority would have resulted, but the court does not indicate whether a due process violation would also have occurred. *But cf.* Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969) (regulation of sewer connections approved by court as tool to make growth orderly and rational, if used within confines of general plan). *Norbeck* was followed in *Smoke Rise*, where the court held that the prohibition on private sewage systems, imposed in conjunction with the moratoria, was valid under the due process clause. This prohibition was designed to guide growth so that neither the economy nor the

so far not been proven in a due process case,[51] although the result in a recent decision suggests that these dicta would be extended into holdings in a case where a no-growth policy was proved to be the actual motivation and a due process challenge was made. The case involved a growth policy found in fact to be the sole basis of the motivation for a water and sewer moratorium. Since the municipality had the means and capacity to provide the services, the court rejected the possibility that a services inadequacy had been the city's justification. The court held the moratorium invalid, stating that a public utility, or city acting as such, is bound to serve all.[52]

In short, to withstand due process challenges, a moratorium must be a reasonable attempt to improve municipal services. Although this has not been difficult for municipalities to show, courts have recently demonstrated some willingness to look closely at assertions of services inadequacy forming the basis of claims of reasonableness, to determine whether these assertions have substance. They may look to indicators such as good faith effort to improve service facilities. A plain desire to limit growth may, therefore, supply due process grounds for striking down a moratorium in a future case. In addition, a municipality must use specific standards for approving and disapproving particular development projects, to prevent arbitrariness. The duration must be reasonable in view of the problem to be solved by the moratorium.

2. Inverse Condemnation

A claim arising under a constitutional protection closely related to due process is that by enacting the moratorium, the local government is taking private property for a public purpose without just compensation.[53] When property is heavily regulated under the police power, the extent of the deprivation of use and economic value may be so great that it requires compensation as a taking through inverse condemnation.[54] The contention of plaintiffs is that moratoria so completely preclude the use of their property that in essence the property has been condemned to secure a benefit for the general

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environment would suffer as sewer and water services were extended. The ordinance provided that if public systems existed or were planned within the next ten years in a particular area (the entire region was divided and categorized in such terms), private systems would not be permitted. 400 F. Supp. 1369, 1390-92 (D. Md. 1975).

[51] *See* note 37 *supra.*

[52] Robinson v. City of Boulder, ___Colo.___, 547 P.2d 228 (1976). The court reserved the question whether a comprehensive plan might provide justification for a moratorium. *See* note 83 *infra.*

[53] U.S. CONST. amend. V.

[54] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415).

public, and that therefore the city must compensate them by an exercise of eminent domain. The asserted public benefit or purpose may be a general improvement in the particular service involved, such as the assurance of adequate water supplies in the case of a water hookup moratorium.[55] Alternatively, the purpose may be environmental quality, such as the attainment of water quality for an entire region by means of a sewer hookup moratorium.[56]

Moratoria have survived inverse condemnation claims. The courts have followed various lines of reasoning in determining that a particular moratorium does not result in a taking without just compensation. In *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*,[57] the state had adopted sewer moratoria in suburbs of Washington, D.C., in order to deal with water pollution, under a public trust doctrine. The court held that the state had a duty pursuant to its police power to address water pollution problems. To dispose of the taking claim, the court set forth a harm-benefit test. Since the moratoria did not result in a direct public benefit (*e.g.*, a park), but were rather an exercise of the police power to remedy a harm to the public health, safety, and welfare, there was no taking.[58] The court also attached significance to the temporary nature of the moratoria.[59]

Another court rejected an inverse condemnation claim upon a somewhat different line of reasoning. The court held that since a potential user has no absolute right to receive water service and since the power to supply water is limited by the supply and the demands of existing consumers, the challenged water hookup moratorium had not caused a taking.[60]

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[55] *See* Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 522, 128 Cal. Rptr. 485, 491 (1st Dist. 1976) (it may be inferred that the claimed "public purpose" was conserving water for existing users and alleviating the emergency water shortage).

[56] *E.g.*, Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1382 (D. Md. 1975).

[57] *Id.*

[58] *Id.* at 1382.

[59] *Id.* at 1383. The court said that because the moratoria were only temporary and also because less sewage-intensive uses were permitted (though admittedly less profitable), the land was not rendered worthless or useless. *Id.*

[60] Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 522-23, 128 Cal. Rptr. 485, 491-92 (1st Dist. 1976). *See* Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969) (broad test of comprehensive rezoning is substantial relationship to public health, comfort, and welfare, and this zoning enjoys a strong presumption of validity; burden of showing that refusal to furnish sewerage lacked the proper relationship was not met here, in light of county's carefully considered plan to guide growth); Golden v. Planning Bd. of the Town of Ramapo, 30 N.Y.2d 359, 380, 334 N.Y.S.2d 138, 154, 285 N.E.2d 291, 303 (1972), *appeal dismissed*, 409 U.S. 1003 (1972) (temporary restriction (18 years) not a taking). *Cf.* N.Y. City Housing Auth. v. Commissioner of Environmental Conservation Dep't, 83 Misc. 2d 89, 372 N.Y.S.2d 146 (N.Y.S.Ct. 1975) (moratorium on development until adoption of land use regulations for tidal lands found reasonable and not a taking).

To summarize, inverse condemnation challenges to moratoria are unlikely to be successful under tests currently applied by courts. Since moratoria are temporary measures, they do not permanently deprive land of its economic value. In practice, some moratoria may block the path of development for an indefinite period, but it would be difficult to show that even these moratoria are permanent measures. Furthermore, if a harm-benefit test is used, municipalities can easily assert that their moratoria are designed to remedy a public harm stemming from services shortages, not to produce a direct, public benefit, and therefore, no taking occurs.

3. Equal Protection

Equal protection of the law is yet another constitutional argument directed at moratoria.[61] The core of the argument is that the moratorium creates an unreasonable classification. A legislative classification must be drawn along lines reasonably related to a legitimate state purpose to be valid under the equal protection clause.[62] Moratorium opponents argue that the distinctions made by local government fail to meet this standard of reasonableness in one of three basic situations. First, a moratorium may allow those owners who have already obtained zoning for residential use by the effective date of the moratorium to build, while prohibiting all other owners from building.[63] Similarly, a city may permit hookups for owners of land fronting on existing mains and deny all other extensions of water service.[64] Second, a municipality may allow one area to proceed with development, while imposing a moratorium upon another, with little apparent reason for the distinction.[65] These two situations form distinctions between classes of builders or potential users. The third classification at which an equal protection challenge may be levelled is the one between existing users and prospective users of the service.[66] In all of these situations, the landowners who are denied permission to develop are deprived of equal protection unless the city

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[61] U.S. CONST. amend. XIV, § 1.

[62] Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (single-family zoning classification is "economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a . . .'" legitimate state objective.); Reed v. Reed, 404 U.S. 71 (1971).

[63] *See, e.g.*, Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 232, 529 P.2d 582, 587, 118 Cal. Rptr. 158, 163 (1974), *appeal dismissed*, 427 U.S. 901 (1976).

[64] *See, e.g.*, Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 523, 128 Cal. Rptr. 485, 492 (1st Dist. 1976).

[65] *See, e.g.*, Board of Supervisors v. Williams, 216 Va. 49, 216 S.E.2d 33, 41 (1975).

[66] *See, e.g.*, Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 522, 128 Cal. Rptr. 485, 491 (1st Dist. 1976).

has made this classification reasonably to further a purpose in line with the general objective of the moratorium.

The equal protection challenges of landowners have been unsuccessful. The courts have generally found that the classifications made by the moratoria were not irrational distinctions, but were reasonable in terms of the objective of the moratoria. In cases where owners of land situated on existing mains, or those who have already obtained residential zoning by the effective date of the moratorium, may proceed with development and others may not, the city may reasonably argue that it is easier to calculate eventual service needs for the former category of owners. If the objective of the moratorium is to assure adequate supplies to meet projected needs, that classification is rationally related to the objective.[67] In *Builders Association of Santa Clara-Santa Cruz Counties v. Superior Court of Santa Clara County*,[68] the court reasoned that the voters' determination (in the enactment of a moratorium by initiative) to allow residential building only where property had already been zoned for it was certainly rational, pending a study of the school overcrowding problems which motivated the use of a moratorium. The initial assignment of a residential zoning classification to property indicates that a finding of suitability for residential use was made; to distinguish between this property and property not yet zoned residential is entirely consistent with the valid moratorium objective of ensuring that development will occur only on land for which adequate municipal services are obtainable. Therefore, the classification was reasonable and valid under the equal protection clause.[69]

Although the courts have been reluctant to hold that a moratorium was a discriminatory or arbitrary exercise of discretion,[70] in one case a moratorium was struck down upon that ground.[71] The city had refused plaintiffs' request for higher density zoning, yet nearby land, which the trial court regarded as similarly situated to plaintiffs', had been rezoned to higher density. In both instances, the land was located in an area that defendant county board of supervisors had determined should not yet become a high density area. The board had reached this determination under a policy that intensified development should be restrained in any area until adequate services were secured. This policy and the corresponding determination were the professed bases for the denial of plaintiffs' zoning request. The court found the denial unreasonable, basing its finding on

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[67] *Id.* at 523-24, 128 Cal. Rptr. at 492.

[68] 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974), *appeal dismissed*, 427 U.S. 901 (1976).

[69] *Id.* at 232-33, 529 P.2d at 587, 118 Cal. Rptr. at 163.

[70] *But see* Owens v. Glenarm Land Co., 24 Ariz. App. 430, 539 P.2d 544 (1975). *See* note 83 *infra*.

[71] Board of Supervisors v. Williams, 216 Va. 49, 216 S.E.2d 33, 40-41 (1975).

evidence that public facilities were, or soon would be, available to serve plaintiff developers' land. It further reasoned that some services such as roads and schools should follow development anyway, thus apparently finding the board's policy at least partly unsound.[72] The fact that nearby, similarly designated land was allowed higher density zoning suggested arbitrariness and discrimination, even if the objective had been found entirely valid.[73]

Therefore, rationality is an easy test for a municipality to meet. A distinction between owners for whom the city has already taken some (or all) necessary steps to provide services, and other owners for whom such steps have not been taken, is rational. In order to successfully claim a denial of equal protection, plaintiffs will have to show that there is no arguable reason for distinguishing their property from property on which a municipality permits development.

4. Right to Travel

The constitutional right to travel argument has, so far, rarely appeared in the moratorium cases.[74] *Builders Association of Santa*

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[72] *Id.* 216 S.E.2d at 38. *See* Golden v. Planning Bd. of the Town of Ramapo, 30 N.Y.2d 359, 392, 334 N.Y.S.2d 138, 164, 285 N.E.2d 291, 310 (1972), *appeal dismissed*, 409 U.S. 1003 (1972) (dissenting opinion) (suggesting attempt to have facilities precede development is historically impractical).

[73] Board of Supervisors v. Williams, 216 Va. 49, 216 S.E.2d 33, 40-41 (1975). On the other hand, if services could be extended to some areas of a city at a lower cost than to other areas, a moratorium which affected the latter areas but left the former free to develop seems reasonably related to a goal of reducing the costs of service extension or allocating limited supplies, and therfore valid. *Cf.* Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 128 Cal. Rptr. 485, (1st Dist. 1976). In *Swanson*, the plaintiff directed an equal protection challenge to the distinction between those already receiving water service and those barred from getting water hookups by the moratorium, on the ground that both classes will use the water for the same purposes. The court rejected the argument, stating that there is no absolute right to receive water and be treated like existing consumers. There is a right to receive only those extensions that are reasonable. *Id.* at 522, 128 Cal. Rptr. at 491.

[74] *But see* Associated Home Bldrs., Inc. v. City of Livermore, 18 Cal. 3d 582, 602-03, 557 P.2d 473, 484-85, 135 Cal. Rptr. 41, 52-53 (1976). The court held that plaintiffs' infringement on right to migrate claim must be tested by the standard of reasonable relationship to the general welfare of the community and surrounding region. The strict constitutional test, or compelling state interest test, is reserved for legislation penalizing travel and resettlement and does not apply to this ordinance, which only increases the difficulty of establishing one's residence in the community of one's choice. Application of the strict test to ordinances increasing difficulty of migration would lead to wholesale invalidation of zoning, the court said. The court remanded the case, however, since there was no evidence of the effect of the moratorium on surrounding communities. *Id.* at 602-03, 557 P.2d at 484-85, 135 Cal. Rptr. at 52-53.

Construction Indus. v. City of Petaluma, 375 F.Supp. 574 (N.D. Cal. 1974), did not involve the question of a refusal to extend municipal services, but the issue of a water shortage arose in the analysis of a right to travel claim. The City of Petaluma instituted a growth-limiting ordinance whereby the number of new housing starts per year was limited and allocated among developers. The City offered a water shortage as a compelling justification for the population limita-

Clara-Santa Cruz Counties v. Superior Court of Santa Clara County[75] dealt briefly with such a claim, but the court concluded that plaintiff had not shown any significant infringement on the right to travel. The duration of the moratorium, intended to ease the burden of seriously overcrowded schools, was only two years. The moratorium merely redirected newcomers to areas of the city where schools were less crowded, and housing was not significantly reduced.[76]

B. Statutory Challenges

In addition to raising constitutional challenges, a plaintiff may argue that the enactment of the moratorium was beyond the statutory or common law authority of the responsible governmental body. Such an attack may proceed along one of several channels. In some instances, a city may be acting both as a municipal government and a public utility. If the city attempts to pursue its planning or legislative function while acting in the capacity of a public utility, it opens itself to a claim that, while acting as a public utility, it lacks the authority to disapprove extensions of water service on the basis of a growth policy embodied in a comprehensive plan.[77] Distinct from that claim is the contention that the moratorium has been imposed by the proper entity, acting in the proper capacity, but without having met statutory prerequisites for a moratorium.[78] Still another argument is that the means by which the moratorium is effected are impermissible. For example, developers in one case claimed that the use of the subdivision power to delay building pending developers' showing of adequate domestic water was improper.[79]

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tion and its impingement on constitutional rights. The federal district court said that if people do have the right to immigrate where they wish, then the matter of dealing with the natural burdens they create falls entirely within the discretion of city officials or the city electorate. They must meet these burdens in some way, however, and may not limit services by defeating bonds at the polls. The court believed that the water inadequacy was the result of an artificial limitation on the acquisition of additional water supplies. Likewise, it said the sewer facilities were adequate and did not furnish compelling justification. *Id.* at 582-83. On appeal, the Ninth Circuit reversed. The court did not reach the question of services, however, as it held that the plaintiffs lacked standing to raise the constitutional right to travel claim. 522 F.2d 897, 904 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

The *Petaluma* decisions and the right to travel in general have received extensive treatment. To supplement the brief discussion above, *see generally* Note, *Petaluma's Right to Control Growth*, 8 SW. U. L. REV. 910 (1976); Note, *The Right to Travel and Exclusionary Zoning*, 26 HASTINGS L.J. 849 (1975).

[75] 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974), *appeal dismissed*, 427 U.S. 901 (1976).

[76] *Id.* at 233, 529 P.2d at 587-88, 118 Cal. Rptr. at 163-64.

[77] *See* Robinson v. City of Boulder, ___ Colo. ___, 547 P.2d 228 (1976).

[78] *E.g.*, Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 520, 128 Cal. Rptr. 485, 490 (1st Dist. 1976).

[79] Owens v. Glenarm Land Co., 24 Ariz. App. 430, 539 P.2d 544 (1975).

Courts have invalidated some moratoria for lack of statutory or common law authority on the part of the responsible entity. The success of this claim depends upon the particular statutes and facts involved in each case. With one notable exception,[80] these challenges have ordinarily met with more success than the constitutional claims. On questions of statutory or common law authority, the courts look at the particular sources of the local government's moratorium power, and may find such power wanting in several respects. First, power to enact a moratorium may be absent altogether. For example, power to pass zoning ordinances is conferred only upon certain agencies, by state enabling acts.[81] If a city holds itself out as a public utility, providing services, it must be bound by the constraints upon the authority of any other public utility, and may not use a moratorium to implement its zoning and planning objectives.[82] Second, the authority may be present but the means employed impermissible, as in the case of a board of supervisors which uses the subdivision approval power to insure the availability of domestic water.[83]

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[80] *See* Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 519-22, 128 Cal. Rptr. 485, 489-91 (1st Dist. 1976). A California statute authorizes water hookup moratoria if the water district finds that a "current shortage" exists. The court interpreted this language to include "threatened shortage," reasoning that the statutory language implied that the District was entitled to act before water ran out. *See* CAL. WATER CODE §§ 350-358 (West 1971).

[81] Gilgert v. Stockton Port Dist., 7 Cal. 2d 384, 60 P.2d 847 (1936). *See, e.g.*, CAL. GOV'T CODE § 65850 (West Cum. Supp. 1977) (empowering legislative bodies of cities and counties to enact zoning ordinances).

[82] Robinson v. City of Boulder, ___ Colo. ___, 547 P.2d 228 (1976). Since the area of land in question was unincorporated and thus subject to county, not city, control, the court reserved the question of whether the City's authority to make land use planning decisions under its comprehensive plan relieved it of its proprietory duties as a public utility. The court did state, however, that the City could refuse service only for a utility-related reason, in its public utility capacity, suggesting, perhaps, that even if the comprehensive plan can supply the reason for the refusal, the reason must nevertheless be services-related. (The comprehensive plan here did guide services extensions.) *Cf.* Gilgert v. Stockton Port Dist., 7 Cal. 2d 384, 60 P.2d 847 (1936) (a port district is not among agencies empowered to pass zoning ordinances by legislative enabling act and state constitution, and may not enact such ordinances); Community College v. Fox, 20 Pa. Commw. Ct. 335, 342 A.2d 468, 478, 481-82 (1975) (not within the authority of state department, entrusted with responsibility of approving municipal sewage system plans, to carry out land use policy, *i.e.*, that development should not be induced or accelerated, in the course of granting such approval).

[83] *See, e.g.*, Owens v. Glenarm Land Co., 24 Ariz. App. 430, 539 P.2d 544 (1975), which considered the question whether the county board of supervisors could condition subdivision plat approval upon proof by the applicant of the availability of domestic water. The court said first, that the Board lacked such authority under the controlling statute, but secondly, even if it did have such authority, the Board had established no regulations or standards for the exercise of the authority, and therefore the exercise was arbitrary. The court also stated that it was not faced with the question of the Board's *authority to enact an ordinance* pertaining to the availability of water, and confined its holding to the plat approval power. *Id. But see* Golden v. Planning Bd. of the

Finally, a municipality or service district may have the statutory authorization to impose a moratorium only if it makes certain preliminary findings, such as the existence of an emergency shortage. In reviewing such findings, one court gave great weight to the factual determination of a water district that an emergency existed.[84] When seeking to determine whether basic legal authority is lacking or is misused, however, as in the first two situations, the courts review the facts and law more closely.[85]

In short, statutory challenges to moratoria have been more successful than constitutional claims. Courts have demonstrated a willingness to review moratoria closely to determine whether the municipality lacks basic statutory or common law authority to impose a moratorium. In contrast, the generally liberal constitutional tests accord to moratoria a strong presumption of validity.

III. VALID MORATORIA: THE EMERGING STANDARDS

A. The Important Legal Considerations

The courts have been hesitant in giving approval to moratoria, although many have been upheld. Approvals have come in some cases only after pages of thoughtful discussion, in which judges occasionally balked and expressed uncertainty as to the desirability of the result or carefully narrowed the reach of the result. Since the results have not been uniform, it is useful to examine the differences in the cases to see what principles can be isolated. Viewing the moratorium cases against the backdrop of the traditional zoning and other land use cases, it seems the courts are observing a stricter standard of review in moratorium cases than traditionally observed in land use cases.

Courts have generally not examined in great depth the specific justifications for a particular zoning designation. Frequently, the underlying motives are treated superficially or completely ignored. In all but the most blatant cases of abuse, courts will uphold a zoning ordinance if it could conceivably achieve any reasonable police power objective. Zoning ordinances, therefore, meet equal protection, due process, and even inverse condemnation tests with ease.[86] Zon-

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Town of Ramapo, 30 N.Y.2d 359, 369-74, 334 N.Y.S.2d 138, 144-48, 285 N.E.2d 291, 296-99 (1972), *appeal dismissed*, 409 U.S. 1003 (1972) (allowed use of subdivision power to effect moratorium in order to assure adequate services prior to development).

[84] Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 519, 128 Cal. Rptr. 485, 489 (1st Dist. 1976). *See* note 80 *supra*.

[85] *See, e.g.*, Owens v. Glenarm Land Co., 24 Ariz. App. 430, 539 P.2d 544 (1975); Robinson v. City of Boulder, ___Colo.___, 547 P.2d 228 (1976).

[86] *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) ("[I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the

ing is accepted as the conventional means of municipal planning; it is tested with a gentle and reserved hand.

A quite different judicial attitude is emerging from the moratorium cases. As opposed to land use cases in general, the moratorium decisions reflect close attention to the municipality's proffered justification and underlying motives.[87] Whether the courts are actually applying a stricter standard of review in the moratorium cases is not certain.[88] A comparison of the moratorium and the zon-

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public health, safety, morals, or general welfare.") For a discussion of the constitutionality of down-zoning, *see generally* Comment, *Sizing Up Just Compensation Relief for Down-Zoning After* HFH *and* Eldridge, this volume.

For purposes of this discussion, a zoning ordinance used to effect a services moratorium will be considered as a moratorium, in contrast to other types of zoning. *See* note 33 *supra.*

[87] Sometimes the consideration of motive is explicit. *See* Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1384-85 (D. Md. 1975) (local anti-growth policy would be impermissible motivation for the moratoria, court said, but since defendants established pollution control as their objective, actions were within lawful authority and reasonable); Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 524, 128 Cal. Rptr. 485, 493 (1st Dist. 1976) (court warned in dictum that it would be abuse of authority to use water moratorium to implement no-growth policy but found no evidence this had been done); Robinson v. City Boulder, ___Colo.___, 547 P.2d 228 (1976) (motive for moratorium on water and sewer services was to implement growth policy); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969) (policy of planning growth and preserving open space on outskirts of community was basis for sewer moratorium). *Cf.* Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972), in which the court said:

> We are disturbed by the admission here that there was never any professional or scientific study made as to why six, rather than four or eight, acres was reasonable to protect the values cherished by the people of Sanbornton. On reviewing the record, we have serious worries whether the basic motivation of the town meeting was not simply to keep outsiders, provided they wished to come in quantities, out of the town.

Id. at 962. The court upheld the six-acre minimum lot requirement because it was a temporary measure to deal with ecological and population pressures. *Id.*

In other cases, the consideration of motive is implicit in the courts' reasoning. *See* Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974), *appeal dismissed*, 427 U.S. 901 (1976) (serious inadequacy in school facilities and fact that moratorium directed study of growth problems and solutions indicated that genuine shortage was motivation). *Cf.* Golden v. Planning Bd. of the Town of Ramapo, 30 N.Y.2d 359, 376-80, 334 N.Y.S.2d 138, 151-54, 285 N.E.2d 291, 301-03 (1972), *appeal dismissed*, 409 U.S. 1003 (1972) (after stating, in effect, that it would not consider motive, the court said it must nevertheless determine whether the regulation was outside area of permissible purposes).

[88] *Cf.* Robinson v. City of Boulder, ___Colo.___, 547 P.2d 228 (1976); Board of Supervisors v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975) with Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969). In *Robinson* and *Williams*, the courts struck down moratoria under circumstances not unlike those in *Norbeck*—each case involved a desire to limit and guide growth pursuant to a comprehensive plan. In *Norbeck*, the court did not mention the duty of a public utility to make reasonable extensions. *Williams* also contains no mention of this duty, yet the court looked critically at

ing ordinance as land use planning tools may lend insight into the greater level of judicial concern over the use of moratoria.

Through years of litigation, cities have succeeded in establishing zoning as a legitimate tool to determine and effectuate the best use of each parcel of land. A city may group land uses into types and separate them into geographical segments or neighborhoods. For instance, a city may segregate commercial uses from residential and isolate single family homes from other types of residential units.[89] In theory, at least, such arrangements are designed to promote the health, safety, and welfare of all the residents. The courts have clothed municipalities with broad police powers to zone and plan in this manner, in the belief that the public benefits generally outweigh the individual hardships inflicted upon private property interests.[90]

Moratoria are likewise used to institute land use planning in many instances. Like zoning, they determine the paths of residential (or other) development, where it shall and shall not occur. So used, their avowed purpose is to protect the health, safety, and welfare of the local population by easing or averting service problems through the control of growth. But there are several critical distinctions between these two methods of land use control.

Zoning usually does not stop all development within a given area. When it does, as in the case of open space zoning, its enactment stems from a determination that the open space will best serve the health and welfare of the residents, for instance by advancing recreational or scenic values.[91] Moratoria, on the other hand, halt development without a view to such a corresponding benefit, but merely because of an inability to provide services for the property. To comply with a zoning ordinance, a landowner has only to develop the property for the required use; the options are narrowed, but development is not entirely proscribed. In contrast, a moratorium cuts off all development options for a specified or perhaps indefinite period of time.

A city might claim that it adopted its moratorium to promote the good of all, and thereby attempt to pull the moratorium up to the status of a zoning ordinance. It could assert that the moratorium is

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the Board's adherence to its comprehensive plan, finding this adherence insufficiently rigorous. *Robinson* struck down the moratorium for failure of the City to observe its duty as a public utility, to serve all. Thus, *Norbeck* seems to use the loose standard applied to general zoning and land use ordinances, *Robinson* the strict standard applied to public utilities, and *Williams* something in between.

[89] *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926).

[90] *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 9-10 (1974); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Berman v. Parker, 348 U.S. 26, 35 (1954).

[91] *See* CAL. GOV'T CODE § 65850 (West Cum. Supp. 1977) (allowing open space zoning) and CAL. GOV'T CODE § 65560 (West Cum. Supp. 1977) (defining types of open space to be included in local open space plans).

merely another means of land use planning, which should receive the same liberal treatment accorded zoning. To say that moratoria and zoning both promote the good of all, however, constructs an incomplete comparison. The zoning process is indeed an attempt to promote the general good, but it accomplishes this through an essential process of determining the best use of all the land.[92] The moratorium process encompasses no such determination, except in a negative sense.[93] It strains the concept of use to argue that the prohibition on development for lack of adequate services is a use in the zoning sense. A moratorium promotes the good of the existing residents by keeping additional residents out altogether or limiting their numbers, a result which zoning leads to only unintentionally, if at all. Zoning is in theory land use control by the majority to serve the good of all, including incoming residents. In contrast, moratoria, although enacted for good reasons, are potentially the weapons of tyranny or exclusivity in the hands of a majority determined to preserve the status quo. Under these circumstances, the duty of the courts to protect the interests of the minority seems greater when reviewing moratoria than when inspecting zoning ordinances.

The potential for abuse of the moratorium is not lost on the judiciary.[94] Recognition of the precise scope of this potential provides an avenue of insight into the expanding role of judicial review in these cases. One aspect of the abuse potential is the temptation to use moratoria for general land use control unrelated to services problems. Even when the initial justification for a moratorium is clearly services-related, the municipality may easily allow the moratorium to continue in effect beyond the period of time when it is reasonably justified as a measure to improve services. Once enacted, a moratorium acquires inertia. Public support, rooted in the intense awareness of a services shortage, may encourage municipal officials to extend a moratorium, especially if a majority of the citizens or officials favors a limitation of growth. Opponents may thus find it difficult to overturn a measure which by definition is supposed to be only temporary, but which lingers in spite of the fact that the city may now be able to provide services.[95]

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[92] *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 5, 9 (1974).

[93] The decision to enact a moratorium is based on the municipality's conclusion that, because of an inadequacy in its services (or a plain desire to limit growth), the land should not be put to any use at all, at least for the present time.

[94] In Swanson v. Marin Mun. Water Dist., 56 Cal. App. 3d 512, 128 Cal. Rptr. 485 (1st Dist. 1976), the court observed: "[W]e are not unmindful of the somewhat dire consequences which flow from our decision in this matter. Politically, the power to 'cut off one's water' by the simple expedient of imposing a moratorium . . . is a potent weapon in effecting a no-growth policy within a community." *Id.* at 524, 128 Cal. Rptr. at 492-93.

[95] *See* Golden v. Planning Bd. of the Town of Ramapo, 30 N.Y.2d 359, 373 n.7, 381, 334 N.Y.S.2d 138, 148 n.7, 154-55, 285 N.E.2d 291, 298-99 n.7, 304

The temptation to enact or extend moratoria for growth-related reasons is present because moratoria are simple devices for limiting growth altogether, whether or not the aim is to improve services. They are not likely to result in endless confrontations between the city council and landowners trying to secure variances for individual parcels of property, since the city can stand on its asserted services-shortage justification in all cases and since moratoria are broad in their territorial application. Thus, because of the simplicity of moratoria, those who impose them wield great power over land use.

This discussion has assumed that for cities to use moratoria for general growth control purposes is in fact an abuse. Though this is not necessarily true, the courts have shown an inclination to regard it as an abuse.[96] The reason for their attitude may be revealed by a further inspection of the ramifications of using moratoria for growth control.

The right to own and use private land freely has long been protected by the courts from all intrusions except those promoting the good of all.[97] For a landowner, it is a frustrating prospect to hold a piece of property on which it is perfectly legal to build, but where any such building is totally precluded by a moratorium which bars the extension of water (or sewers or schools) to serve the property. Furthermore, this prospect rudely upsets the normal expectation of a purchaser of land, that services will in time be extended to it,[98] with the consequence that the value may drop and prevent resale at a reasonable price. An element of dishonesty may also be involved; if a city has set out to limit growth, it should not mask this goal with a purported desire to solve a services problem if such a problem does not really exist.[99]

For all of these reasons, the courts tend to view the use of the moratorium power for general growth control purposes as abusive, inflicting harm upon individual property owners and prospective residents.[100] The frustrated expectation of receiving services, an element of the moratorium cases but not other types of land use cases,

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(1972), *appeal dismissed*, 409 U.S. 1003 (1972) (court recommends remedy of declaratory judgment to landowners caught by inertia of a town's continuing failure to carry out its promise to construct services in reasonable time). *See* note 38 *supra*.

[96] *See* notes 50 & 87 *supra*.

[97] Appeal of the Township of Concord, 439 Pa. 466, 268 A.2d 765, 766 n.1 (1970, *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[98] *See* text accompanying notes 7-12 *supra*.

[99] *See* note 74 *supra*.

[100] *See* National Land and Inv. Co. v. Kohn, 419 Pa. 504, 528, 215 A.2d 597, 610 (1965) ("Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. . . . Zoning is a means by which a governmental body can plan for the future—it may not be used to deny the future.")

perhaps explains the greater concern which the courts express over the question of motive in the moratorium cases. As they did in the early cases in which they developed the duty of reasonable extension, the courts recognize that some protection is needed for individuals seeking services from the municipality controlling those services.[101] This protection has heightened significance today, as cities attempt to keep out large numbers of prospective residents.[102]

The courts now analyze the service extension refusals or moratoria as land use control problems, using theories of due process, equal protection, inverse condemnation, and statutory authority. But the moratorium cases are not pure land use cases. They are essentially service refusal cases, not unlike the early cases. They have acquired the character of land use cases because the moratorium is an adaptation of a simple service refusal to a large-scale planning tool, capable of dealing with rapid urban population growth.

Therefore, unless the courts are to abandon the legal notion of the duty of a public utility to make all reasonable extensions, the moratorium cannot be used as freely as zoning. Motive is indeed important in the moratorium cases, because unless a services inadequacy makes an extension unreasonable, the utility has a duty to extend. In the older service refusal cases, the courts did not count comprehensive growth plans among the factors governing reasonableness. Now that such plans have become a major factor in local decision-making, perhaps they should be so counted.[103] If anything is to remain of the duty to make reasonable extensions, however, a growth plan or policy should be a factor only when it is based on a desire to provide adequate services. It is evident from their concern with motive that, under the surface, the courts continue to grapple with the duty of reasonable extension and the policy considerations inherent in the duty, resulting in the sterner hand with which the courts review the moratorium cases.

B. Criteria for Valid Moratoria

When a pressing services problem motivates a moratorium, the courts have upheld it. Growth control motives, on the other hand, can be grounds for striking it down. But these two motives are not mutually exclusive, and, in fact, there is a whole spectrum of motives to be considered. Perhaps the biggest obstacle to consistent results is the confusion which has been present in the characterization of motivations. If courts are to decide moratorium cases on the basis of

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[101] *See* notes 7-11 *supra.*

[102] Los Angeles Times, Sept. 6, 1976, § 2, at 1, col. 1 (Goleta, California, effectively stops growth by means of water moratorium); *id.*, July 13, 1975, § 2, at 3, col. 1 (Santa Barbara, California, sets population ceiling of 85,000).

[103] One court has raised and reserved this question. *See* note 82 *supra.*

the city's motivation for imposing the moratorium, as they have indicated a willingness to do, permissible motives must be clearly and logically separated from impermissible ones.

Attempting to draw lines on the basis of whether population "growth control" is involved actually confuses the issue, because it does not pursue the analysis far enough, to a true distinction. Since every moratorium involves some limitation upon growth, the word "growth" diverts attention from the real question—*why* the municipality is limiting growth. Thus a better way to ascertain the validity of moratoria is to examine the motives in light of their relation to the particular moratoria used as means to achieve those objectives.

A refusal to extend a particular service, in order to be valid, should be directed toward a perceived problem in the provision of that service. The strongest case for validity arises when a municipality acts to remedy an imminent shortage of supply. The authorities are in agreement that this is a legitimate goal for a moratorium.[104] If such a moratorium were not permitted, new and existing users would be likely to suffer harm, and courts are reluctant to force municipalities into a position where such harm is unavoidable. Although the municipality could in some cases remedy the shortage, the cost of increasing supply is often prohibitive.[105]

To limit the use of moratoria to cases of current and pressing inadequacies would deprive local governments of the full usefulness of a legitimate tool for solving problems in the provision of services. These problems do not manifest themselves only at the urban fringe, at the outermost ends of the water mains or sewer pipes. To view geographical expansion as the only problem is shortsighted. Services may be totally inadequate to meet the needs of already dense areas.[106] It may be far more efficient to increase service capacity in developed areas before extending services outward, thus phasing the growth of the entire region. The municipality should have the discretion to do so. Phasing and ordering of growth may in essence be a form of dealing with actual or potential shortages in services caused

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[104] *See* note 80 *supra;* Builders Ass'n v. Superior Court 13 Cal. 3d 225, 232-33, 529 P.2d 582, 587, 118 Cal. Rptr. 158, 163 (1974), *appeal dismissed*, 427 U.S. 901 (1976). The short, limited nature of the moratorium in *Builders Association* (two years) and the fact that it was enacted by initiative are possible indicators that the decision should be held to its facts. The court's reasoning, however, broadly suggests that in any case where a current, pressing inadequacy, showing no prospect of resolving itself, is the motivating factor, a moratorium of reasonable duration, however enacted, will be approved. The courts will not force a local government to do the impossible, accept new residents for whom it cannot provide basic services, to the detriment of both the new and existing residents.

[105] *See* Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1387 (D. Md. 1975) (sewer authorities were attempting to obtain federal funding to finance large portion (75%) of additional sewage facilities); Rivkin, *supra* note 6, at 11-12.

[106] *See* note 5 *supra.*

by inefficient growth patterns. The better reasoned cases suggest that phasing of growth to remedy service provision problems is an acceptable motive for a moratorium.[107] A phased-growth justification requires a more careful look by the courts, however, to assure that it is based upon legitimate service needs.[108]

The cases indicate that when a municipality seeks to limit growth for a reason unrelated to services, such as the preservation of small-town character, a moratorium as a means does not bear a close enough relation to the end. The courts will not sustain this type of moratorium.[109]

Since a moratorium acts directly upon a particular service, the problem with which it deals should also be rooted in that service. The objective of a moratorium should be grounded in a recognition that in some way, the physical or economic environment of a municipality is inadequate to supply its residents with services. Moratoria are powerful tools for insuring adequate services to old and new

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[107] *See* Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1391 (D. Md. 1975) (citing *Norbeck*). *But see* Board of Supervisors v. Williams, 216 Va. 49, 216 S.E.2d 33, 40-41 (1975). *Williams* should be held to its facts. The Board of Supervisors in that case was hamstrung by its failure to follow its own phased growth plan in the case of some non-party developers. *See* notes 71-73 & accompanying text *supra*.

[108] Good faith becomes critical in such an inquiry. In Justice Mosk's dissenting opinion in Associated Home Bldrs., Inc. v. City Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976), he expresses concern for potential newcomers, rather than landowners prevented from developing. He states that nothing compels a city to construct services improvements and "in these circumstances, procrastination produces its own reward: continued exclusion of new residents." *Id.* at 617, 557 P.2d at 493, 135 Cal. Rptr. at 61. Mosk then presents a dilemma: "Whatever the motivation, total exclusion of people from a community is both immoral and illegal. . . . Courts have a duty to prevent such practices, while at the same time recognizing the validity of genuine conservationist efforts." *Id.* at 623, 557 P.2d at 497, 135 Cal. Rptr. at 65.

[109] Construction Indus. v. City of Petaluma, 375 F. Supp. 574, 583 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897, 904 (9th Cir. 1975) (on ground plaintiff lacked standing), *cert. denied*, 424 U.S. 934 (1976). The court stated:

> [T]hey contend . . . that its citizens' desires to protect its 'small town character' are sufficiently compelling reasons to justify the exclusionary ordinances. . . . [M]ay a municipality capable of supporting a natural population expansion limit growth simply because it does not prefer to grow at the rate which would be dictated by prevailing market demand[?] It is our opinion that it may not.

375 F. Supp. at 583. *But cf.* Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (large-lot zoning ordinance was rationally related to preservation of town's rural character and did not deny equal protection to low-income plaintiffs); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969) (court upheld plan to regulate sewer connections, based on policy of preserving portion of county with geographic setting and natural amenities making it suitable for "preservation as a self-identifiable community . . . which would . . . hold back spreading urban intrusion into the country." *Id.* 254 A.2d at 705.) *Norbeck* may be regarded as a phased growth case, since the court approved guiding growth as a permissible goal, but no services inadequacy was shown.

residents; municipalities should guard against the misuse of them to serve other objectives.

CONCLUSION

In cases arising many years before cities began to impose moratoria on service extensions, the courts developed the concept of the duty of a public utility to make all reasonable extensions. Cities began to use moratoria in the current decade in response to the modern problems of rapid urban growth and the service inadequacies resulting from such growth. Landowners have mounted constitutional and statutory challenges to moratoria in the courts, but conflicts in the resulting decisions leave unresolved questions regarding the validity of moratoria. The most critical of these questions is what motives are permissible goals for moratoria. Dealing with a current services inadequacy is clearly a permissible motive. Phasing or limiting of growth, however, is permissible only when it is based on a genuine need to solve a services-related problem. Courts should not permit local governments to use moratoria for general growth control not based on services needs.

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