Not in My Backyard: A Critiqne of Current Indiana Law on Land Use Moratoria

THADDEUS R. AILES*

INTRODUCTION

In three recent cases,[1] a federal district court and the Seventh Circuit Court of Appeals held that under Indiana law, a temporary moratorium placed on building permits by a local government is actually a zoning ordinance and therefore is *invalid* unless it satisfies the statutory requirements for enacting a zoning ordinance. In each of the three cases, a local government had enacted a temporary moratorium on building permits in an attempt to preserve the status quo (i.e., prevent an undesired land use from coming into the community) while the local government proceeded through the steps required by Indiana statutory law for enacting a zoning ordinance. In all three of the cases, the federal courts struck down the moratoria, holding that the moratoria were invalid because the local governments did not enact them in accordance with the steps laid out by Indiana statute for enacting a zoning ordinance. The result was that the counties were forced by the courts to grant permits to the plaintiff developers and allow land uses which the counties did not want and were in the process of legislating against.[2] In the first case, *Pro-Eco, Inc. v. Board of Commissioners*,[3] Jay County tried unsuccessfully to keep the plaintiff, Pro-Eco, from putting a landfill in the county. In the second case, *Triple G Landfills, Inc. v. Board of Commissioners*,[4] Fountain County tried unsuccessfully to prevent Triple G Landfills, Inc. ("Triple G") from putting a landfill in the county. The third case, *Sagamore Park v. City of Indianapolis*,[5] involved an off-track betting facility which the local government did not want in the particular location where the plaintiff wanted to put it.

Due to the courts' decisions in these three cases, Indiana municipalities[6] are now unable to refuse to grant a building or improvement permit to a developer

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* J.D. Candidate, 1997, Indiana University School of Law—Bloomington; B.S., 1994, Butler University. I thank Professor Jeffrey E. Stake for his helpful comments and suggestions, and Thomas A. Jensen, Richard S. Pitts, Cedric Hustace, and Rosemary G. Spalding, attorneys who worked on the three main cases discussed in this Note, for helping me begin my research.

1. Although there were just three cases, there were actually five decisions: three at the district court level and two on appeal to the Seventh Circuit.

2. For a more complete discussion of the facts in each of the three cases, see *infra* part I.B.

3. 776 F. Supp. 1368 (S.D. Ind. 1990), *aff'd*, 956 F.2d 635 (7th Cir. 1992), *aff'd*, 57 F.3d 505 (7th Cir. 1995) (affirming denial of further relief on subsequent appeal), *cert. denied*, 116 S. Ct. 672 (1995).

4. 774 F. Supp. 528 (S.D. Ind. 1991), *aff'd*, 977 F.2d 287 (7th Cir. 1992).

5. 885 F. Supp. 1146 (S.D. Ind. 1994).

6. Because the local government entities which issue moratoria are sometimes counties, sometimes towns, and sometimes cities, this Note will often use the general term "municipalities" to include all three possibilities.

unless the municipality has already gone through the very time-consuming comprehensive planning and zoning process and legislated against the particular land use *before* the developer applies for the permit. This rule expects an unrealistic amount of foresight on the part of local governments, as the local government officials might not even consider the possibility of a particular land use in their community until someone actually applies for a permit for that use.[7] It is also likely that, according to these three cases, many moratoria in Indiana have been instituted by local governments illegally.[8] Thus, it may just be a matter of time before many more Indiana counties are sued by developers who have been denied permits.

This Note will make two basic arguments. First, as a technical matter, a temporary moratorium such as the defendants in *Pro-Eco*, *Triple G*, and *Sagamore Park* used is not a zoning ordinance and should therefore not be treated as such by the courts. Second, as a practical matter, municipalities should not be handcuffed when dealing with uses of land which they just had not contemplated. In other words, a community should not have to be burdened forever with an undesired land use just because the local government did not have time to go through the lengthy process of enacting a comprehensive plan and zoning ordinance before the developer applied for a building permit. The local government should be able to preserve the status quo while it goes through the procedures which Indiana statutory law requires for the enactment of a zoning ordinance. Only if municipalities have this ability will they be able to effectively determine just what gets put in their backyards.

Part I of this Note will provide background information necessary for understanding the issues which will be discussed. This information will include a discussion of the requirements of comprehensive planning and zoning and factual summaries of the three main cases which are the subject of this Note. Part II will discuss the benefits of allowing municipalities to use temporary moratoria to preserve the status quo while going through the planning and zoning processes. Part III will make the argument that a temporary moratorium is not a zoning ordinance and should therefore not have to satisfy the statutory requirements which a zoning ordinance must satisfy. Part IV will discuss the source of an Indiana municipality's authority to enact a temporary moratorium. Part V will discuss the impact of the Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*,[9] a Takings Clause case, on the use of temporary moratoria.

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7. Even if the possibility of this land use does occur to local government officials before the application for a permit, as it did in the three Indiana cases, this "advance notice" still does the local government no good, under the courts' rulings, unless it is so far in advance that the local government has time to create a comprehensive plan (if one does not exist already) and enact a zoning ordinance.

8. Telephone Interview with Thomas A. Jensen, Attorney, McHale Cook & Welch, Indianapolis (Oct. 3, 1995).

9. 482 U.S. 304 (1987).

I. BACKGROUND

A. Comprehensive Planning and Zoning

Section 601(a) of Title 36, Article 7, Chapter 4 of the Indiana Code states:

> The legislative body having jurisdiction over the geographic area described in the zoning ordinance has exclusive authority to adopt a zoning ordinance under the 600 series. However, no zoning ordinance may be adopted until a comprehensive plan has been approved for the jurisdiction under the 500 series of this chapter.[10]

To understand this statute, it is first necessary to understand the basic land use terms involved. A comprehensive plan is generally defined as an official public document adopted by the local government as a policy guide to decisions about the physical development of the community.[11] The comprehensive plan sets forth, in a general way, how the leaders of local government want the community to develop in the future.[12] The plan is geographically and functionally comprehensive.[13] It covers all of the geographic area of the community and all of the physical elements that determine future community development. A comprehensive plan usually contains both textual policy and a map. The text states the land use policies adopted by the plan. The map indicates where development proposed by land use policies should occur.[14]

The process of preparing a comprehensive plan begins with a survey and analysis of the data that provide the basis for the plan's policies.[15] The plan commission preparing the comprehensive plan performs research and analysis of a wide range of present and projected physical, economic, and sociological conditions of the municipality.[16] The second phase of the plan preparation process is the setting of policies for the plan. The plan commission develops a set of policies, goals, and objectives which make up the principal sections of the comprehensive plan.[17] The third stage of the planning process is implementation of the plan.[18] Implementation involves developing public support for the plan via public hearings and other forms of citizen participation,[19] securing adoption of

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10. IND. CODE § 36-7-4-601(a) (1993).

11. DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 2.9 (2d ed. 1986).

12. *Id.*

13. DANIEL R. MANDELKER, LAND USE LAW § 3.01 (3d ed. 1993).

14. *Id.*

15. *Id.* § 3.02.

16. HAGMAN & JUERGENSMEYER, *supra* note 11, § 2.10.

17. *Id.*

18. *Id.*

19. Indiana law requires the plan commission to give notice and hold one or more public hearings on the plan before the plan commission can approve a comprehensive plan. The commission must publish a schedule stating the time and place of each hearing, and the entire plan must be on file and available for examination by the public for at least ten days before the hearing. IND. CODE § 36-7-4-507 (1993).

the plan, and action by the local legislative body to implement the policies and objectives.[20]

The tool with which the local government implements the policies and objectives of the comprehensive plan is a zoning ordinance. The zoning ordinance implements the policies and objectives of the comprehensive plan through zoning regulations that create land use districts and specify the land uses permitted in these districts.[21] Zoning ordinances comprehensively designate compatible land uses to zoning districts throughout the community.[22] A zoning ordinance contains a text and a map. The map designates the location of zoning districts, and the text contains use, density, and site development regulations for the land use permitted in each district, as well as administrative and enforcement provisions.[23] A zoning ordinance divides the municipality into a number of zoning districts that separate residential, commercial, and industrial uses.[24]

The preparation for enacting a zoning ordinance is frequently a cumbersome and time-consuming process.[25] Thus, municipalities have often sought a means whereby the status quo of an area being zoned may be temporarily retained so as to prevent the establishment of uses and structures which would be inconsistent with the proposed ordinance when ultimately adopted.[26] The effectiveness of comprehensive planning and zoning is undermined if land development proceeds in an uncontrolled fashion during the planning and zoning process.[27] Therefore, interim or short-term development controls are needed to freeze or limit land use activity while planning proceeds and until permanent controls implementing the plan can be adopted.[28] The adoption of a building permit or development approval moratorium is an increasingly frequently used approach by local governments to preserve the status quo until a new comprehensive plan or zoning ordinance can be adopted and implemented.[29] Over the years, many states have passed specific statutes authorizing and regulating interim controls, but the majority remain silent.[30] Indiana belongs to this "silent majority."

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20. HAGMAN & JUERGENSMEYER, *supra* note 11, § 2.10.

21. MANDELKER, *supra* note 13, § 3.01.

22. *Id.* § 1.03.

23. *Id.*

24. *Id.* In addition to going through the process of determining the substantive nature of the zoning ordinance, a plan commission in Indiana must give notice and hold a public hearing before the commission certifies a proposed zoning ordinance to the local legislative body. IND. CODE §§ 36-7-4-602(a)(4), -604 (1993).

25. Michael J. Volpe, Comment, *Stop-Gap and Interim Legislation, a Device to Maintain the Status Quo of an Area Pending the Adoption of a Comprehensive Zoning Ordinance or Amendment Thereto*, 18 SYRACUSE L. REV. 837, 837 (1967).

26. *Id.* at 837-38.

27. 3 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 22.01[1] (rev. 1996).

28. *Id.*

29. HAGMAN & JUERGENSMEYER, *supra* note 11, § 9.5.

30. 3 ROHAN, *supra* note 27, § 22.01[1].

B. Factual Summaries of the Cases

The first case to deal with the moratoria issue was *Pro-Eco, Inc. v. Board of Commissioners*.[31] In 1989, Pro-Eco, Inc. prepared to purchase a farm in Jay County, Indiana, and transform it into a sanitary landfill.[32] At this time, Jay County did not have in force a comprehensive plan or zoning ordinance. When the Board of Commissioners of Jay County learned of Pro-Eco's plans in early 1989, the Board held several meetings in February and March to discuss the public's concern with landfills. As a result of these discussions, the Board adopted an ordinance barring anyone from developing any property as a sanitary landfill until the Board was able to enact a comprehensive land use plan. The ordinance gave the Board three years to adopt such a plan.[33]

The ordinance also created an Area Land Use Management Committee and empowered the Committee to study Jay County's need for area-wide planning, specifically focusing on sanitary landfills, and it allowed the Committee 180 days to complete its task.[34] The ordinance further recognized a nexus between the public health, safety, and welfare of the citizens of Jay County and the regulation, location, construction, and operation of public commercial sanitary landfills. In addition, the Commissioners expressed a concern that the operation of a sanitary landfill, prior to the adoption and implementation of proper controls, might create serious irreversible environmental damage.[35]

Pro-Eco then sued the Board, alleging that the ordinance violated Indiana law as well as several provisions of the United States Constitution. Both parties moved for summary judgment. The district court granted Pro-Eco's motion and denied the Board's motion on the ground that the Board violated Indiana law in enacting the ordinance.[36] The district court found that the ordinance was a zoning ordinance on the ground that it was "an attempt by the county to regulate the use of a piece of property."[37] The district court further held that because the Board enacted the ordinance without first enacting, pursuant to statute, a comprehensive plan, the Board had violated Indiana law.[38] The Seventh Circuit affirmed the district court's decision.[39]

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31. 776 F. Supp. 1368 (S.D. Ind. 1990), *aff'd*, 956 F.2d 635 (7th Cir. 1992), *aff'd*, 57 F.3d 505 (7th Cir. 1995) (affirming denial of further relief on subsequent appeal), *cert. denied*, 116 S. Ct. 672 (1995). All three of these cases (*Pro-Eco*, *Triple G*, and *Sagamore Park*) were in federal court, as opposed to state court, because the plaintiffs in all three cases also alleged violations of federal constitutional law provisions, such as the Due Process Clause, the Commerce Clause, the Takings Clause, and the Equal Protection Clause. In all three cases, however, the courts decided the cases on state law grounds.

32. *Pro-Eco*, 956 F.2d at 635.

33. *Id.* at 636.

34. *Id.*

35. *Id.*

36. *Pro-Eco*, 776 F. Supp. at 1368. The district court and the Seventh Circuit also used the term "moratorium" to refer to the ordinance.

37. *Id.* at 1371.

38. *Id.*

39. *Pro-Eco*, 956 F.2d at 636.

The next case to deal with the moratoria issue was *Triple G Landfills, Inc. v. Board of Commissioners.*[40] In July 1989, Triple G Landfills, Inc. purchased an option to buy a 189-acre tract in Fountain County, Indiana, on which it hoped to build a sanitary landfill. At this time, Fountain County did not have in force a comprehensive plan. When local residents learned of Triple G's plans, they were "less than thrilled."[41] On July 31, the Board of Commissioners of Fountain County convened a special meeting to discuss Triple G's possible construction of a landfill in Fountain County.[42] Members of the public in attendance at the meeting expressed concern about Triple G's plans. As a result of that concern, the Commissioners took action to block Triple G. Over the next six months, they enacted a series of measures designed to restrict landfill construction in the county.[43] The final measure, an ordinance, prohibited prospective landfill operators from constructing or operating a landfill without a county permit, and the ordinance imposed siting standards which effectively precluded Triple G from developing a landfill in Fountain County.[44]

Triple G sued the Board, seeking a declaratory judgment that the ordinance was invalid under state law and the federal constitution, and a permanent injunction against its enforcement.[45] The district court granted summary judgment to Triple G, on the ground that the ordinance violated Indiana Code section 36-7-4-601(a),[46] because the ordinance was "an attempt to zone in the absence of a pre-existing comprehensive zoning plan."[47] The Seventh Circuit affirmed the district court's decision.[48]

The third case to deal with the issue of whether a moratorium is a zoning ordinance was *Sagamore Park v. City of Indianapolis.*[49] In 1989, the Indiana General Assembly enacted Public Law 341-1989(ss) (the "Act"), thereby creating the Indiana Horse Racing Commission ("IHRC") and authorizing pari-mutuel wagering on horse races in Indiana.[50] The Act also provides for the establishment and licensing of satellite wagering facilities.[51] On July 14, 1994,

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40. 774 F. Supp. 528 (S.D. Ind. 1991), *aff'd*, 977 F.2d 287 (7th Cir. 1992).

41. *Triple G*, 977 F.2d at 288.

42. *Triple G*, 774 F. Supp. at 529.

43. *Triple G*, 977 F.2d at 288.

44. *Id.* Although Fountain County, unlike Jay County, did not *call* its ordinance a "moratorium," the Seventh Circuit held that it was *effectively* a moratorium on all landfill development in Fountain County. *Id.* at 292. This author agrees with the court's determination that this regulation is effectively a moratorium and should therefore be treated as such. However, this author *disagrees* with how the court decided to *treat* moratoria.

45. *Triple G*, 774 F. Supp. at 530.

46. *See supra* text accompanying note 10.

47. *Triple G*, 774 F. Supp. at 532. The district court also held that the ordinance was preempted by state law, but the Seventh Circuit only addressed the issue on which this Note speaks: whether the ordinance was a zoning ordinance. *Triple G*, 977 F.2d at 291.

48. *Triple G*, 977 F.2d at 288.

49. 885 F. Supp. 1146 (S.D. Ind. 1994).

50. IND. CODE § 4-31-1 (1993).

51. *Id.* § 4-31-5.5-1 (1993). Satellite wagering facilities are recreational facilities which have a minimum seating capacity of 400 persons, receive and display on multiple screens simulcast pari-mutuel horse races from live horse-racing facilities in Indiana and elsewhere,

the IHRC issued Sagamore Park a license to own and operate a satellite wagering facility at a location near the Lafayette Square shopping mall in Indianapolis.[52] On May 23, 1994, however, the City-County Council had adopted a resolution which established a ninety-day moratorium on the issuance of improvement location permits ("ILPs") or zoning certifications for use of property for satellite wagering facilities.[53] The City-County Council also directed the Department of Metropolitan Development ("DMD"), which has decision-making authority on ILP applications, to work with the Council to propose amendments to the Commercial Zoning Ordinance regarding satellite wagering facilities.[54]

Sagamore Park applied for an ILP on July 21, 1994.[55] The DMD denied the application the same day. Sagamore Park then brought suit, seeking a declaratory judgment that the moratorium was invalid under state law and the federal constitution.[56] The district court granted declaratory judgment to Sagamore Park, on the ground that the moratorium was invalid because it was a zoning ordinance which was not enacted as required by statute for zoning ordinances.[57]

II. BENEFITS OF ALLOWING TEMPORARY MORATORIA[58]

There are several benefits to be derived from allowing municipalities to use temporary moratoria to preserve the status quo while a municipality goes through the comprehensive planning and zoning process. First, the ability to adopt a temporary moratorium allows a municipality to respond effectively to surprises.

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have full dining service available to all patrons, and display other sporting events on multiple screens during those times when pari-mutuel horse races are not being broadcast. Patrons can engage in pari-mutuel wagering at satellite facilities. *Sagamore Park*, 885 F. Supp. at 1148. Satellite wagering is often also referred to as "off-track betting."

52. *Sagamore Park*, 885 F. Supp. at 1148.

53. *Id.* An improvement location permit is required prior to the alteration of any structure. IND. CODE § 36-7-4-801(b) (1993); Improvement Location Permit Ordinance of Marion County, Indiana, City-County Council General Ordinance No. 134. The purpose of the ILP requirement is to ensure that the new or renovated structure will comply with applicable zoning regulations. *Sagamore Park*, 885 F. Supp. at 1149.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1150. A key difference between *Sagamore Park* and the two earlier cases, *Pro-Eco* and *Triple G*, is that the municipality in *Sagamore Park* had a comprehensive plan. Thus, *Sagamore Park* actually takes the courts' anti-moratoria doctrine a step *further* than the prior two cases had, as it demonstrates that even having a comprehensive plan is not enough to save a municipality from having its temporary moratorium crumpled up and thrown away by the federal courts; the municipality has to follow *all* the steps laid out in the 600 series of Indiana Code 36-7-4 to be left alone, not just the comprehensive planning part.

58. *Webster's Third New International Dictionary* defines "moratorium" as "a suspension of activity; a temporary ban on the use or production of something." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Philip Babcock Gove ed., 1986). Although the term "temporary moratorium" may therefore seem redundant, as the word "temporary" is already included in the definition, this Note will nevertheless use these two words together on occasion in order to make clear that the type of measure this Note is supporting is of an interim, not permanent, nature.

Without this ability, a town or county is "handcuffed" in dealing with new uses of land that community leaders just had not contemplated. Under the courts' rulings,[59] Indiana counties cannot prevent a land use which they had not legislated against before the developer applied for its permit. A community should not, however, have to be burdened forever with an undesired land use just because the local government did not have time to go through the lengthy process of preparing and enacting a comprehensive plan and zoning ordinance before the developer applied for a permit. Also, a local government should have the ability to respond quickly to an emergency situation involving the health, safety, or welfare of its citizens. Allowing local governments to use temporary moratoria gives them the ability to deal effectively with land uses they had not expected and thus protect the interests of their citizens.

Second, the use of temporary moratoria to preserve the status quo during the planning and zoning process can protect the effectiveness of the subsequently-enacted zoning ordinance. The ultimate effectiveness of planning is undermined if land development proceeds in an uncontrolled fashion during the planning period.[60] A moratorium on development activity protects the planning process by deterring the establishment of uses that would or might be inconsistent with needs ultimately identified by planning studies.[61] Thus, local governments can use temporary moratoria to ensure that the effectiveness of the planning and zoning is not destroyed before it is implemented.

Third, a temporary moratorium provides an opportunity for increased public participation and debate.[62] A moratorium can allow time for public debate on the issues, goals, and policies of planning, and the zoning ordinances proposed to implement the plans. The planning process can thus be brought out into the open for full democratic debate and citizen participation, thereby assuring a greater relationship between the laws and planning policies and the real goals and needs of the people.[63] Open public discussion of proposed zoning ordinances should help to eliminate costly errors and the possibility of meeting a hostile or indifferent public attitude which jeopardizes adoption and implementation of the plan.[64]

Fourth, the ability to use temporary moratoria to preserve the status quo eliminates the incentive for hasty planning. If a municipality does not have the power to enact a temporary moratorium on development, it may enact restrictive permanent controls in the shortest time possible to limit the number of intervening uses that might not conform to the new planning scheme.[65] This hasty process decreases the chances for a thorough public airing of proposed

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59. The phrase "the courts' rulings," when used in this Note, refers to the decisions of the federal courts in *Pro-Eco*, *Triple G*, and *Sagamore Park*.

60. 3 ROHAN, *supra* note 27, § 22.01[1].

61. *Id.* Under the law of nonconforming uses, those uses that preexist changes in the law are permitted to continue. *Id.* § 22.01[1] n.2.

62. *Id.* § 22.01[1].

63. Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URB. L. 65, 66 (1971).

64. *Id.* at 95.

65. 3 ROHAN, *supra* note 27, § 22.01[1].

legislation.[66] Temporary moratoria can eliminate the need for hasty adoption of permanent controls in order to avoid the establishment of nonconforming uses and structures.[67] Because the local government has the ability to preserve the status quo, there is no reason to hurry through the planning process.

Fifth, the use of temporary moratoria can prevent the activity that the courts have characterized as a "race for diligence."[68] Public knowledge that the local government has made, or is about to make, studies to alter existing land use controls frequently triggers development activity that may frustrate planning efforts.[69] Developers race to acquire building permits and beat the enactment of a new zoning ordinance which, they fear, will be more restrictive than the current controls.[70] This "race for diligence" is neither in the best interest of the community nor individual property owners.[71] This problem also ties in with the problems of hasty planning and lack of public discussion, as the threat of developers racing to beat the zoning ordinance gives incentive to local governments to plan hastily and secretly. The use of temporary moratoria can eliminate the "race for diligence" threat and thereby allow local governments to plan thoroughly and openly.

Sixth, the ability of municipalities to use temporary moratoria would take away the incentive developers now have, due to the courts' rulings, to look for counties that do not have a comprehensive plan and take advantage of them. If counties are able to protect themselves temporarily despite their lack of a comprehensive plan, then developers will have no incentive to select a county due to its lack of a comprehensive plan. One possible counterargnment to this is that the risk of such an occurrence is what gives counties incentive to plan. However, this risk works as an effective incentive only if the risk is realized by those who are intended to be "motivated" and soon enough to make a difference. It is doubtful that this is very often the situation; if the counties in *Pro-Eco*, *Triple G*, and *Sagamore Park*, for example, had considered that a landfill or off-track betting facility might be put in their communities, they likely would have gone through the steps specified by Indiana statute to make sure they were completely safe. The local governments in these three cases, however, did not realize the risk of undesired development in their communities until it was too late to prevent the undesired land use by enacting a zoning ordinance.

There are, of course, arguments *against* allowing municipalities to use temporary moratoria.[72] One such argument is that municipalities with the ability to use temporary moratoria may "abuse the privilege" and just use moratoria to accomplish their land use objectives instead of going through the time-consuming procedures for enacting comprehensive plans and zoning

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66. *Id.*

67. Freilich, *supra* note 63, at 66.

68. Volpe, *supra* note 25, at 839.

69. 3 ROHAN, *supra* note 27, § 22.01[1].

70. *Id.*; *see also* Volpe, *supra* note 25, at 838.

71. Volpe, *supra* note 25, at 839.

72. If there *were not* any arguments against allowing temporary moratoria, it would seem likely that the courts would not have struck them down in *Pro-Eco*, *Triple G*, and *Sagamore Park*.

ordinances.[73] While this is probably the strongest argument against allowing the use of temporary moratoria, it is refutable. First, the type of temporary moratoria this Note supports could not be used by municipalities perpetually. The moratorium would exist only long enough to allow the municipality to enact a comprehensive plan or zoning ordinance. Second, landowners can still protect themselves against unreasonable government activity via other claims, such as the ones the plaintiffs in the three main cases brought.[74] These other federal and state protections against government intrusion on private land use should be enough to preserve the balance between the property owner's ability to use his property as he desires and the public's ability to effectively maintain community standards.

Another possible argument, already mentioned above, against moratoria is that not allowing them created incentives for counties to *do* a comprehensive plan.[75] The reasoning is that if local governments know that without a comprehensive plan they are powerless to prohibit an undesired land use, they will be scared into preparing and enacting a comprehensive plan. However, while prohibiting the use of temporary moratoria may provide incentive for local governments to plan, it also provides incentive for them to plan *hastily* and *secretly*. Thus, as discussed above, we still need temporary moratoria in order to allow local governments to plan thoroughly and openly.

Also, in some situations this incentive to plan may be an incentive for inefficient behavior by the local government, as there may be no other reason for the local government to do a comprehensive plan. For example, due to counties' current inability to keep out an undesired land use if they do not have a comprehensive plan, a landfill developer may select a particular county as a landfill site due to the county's lack of a comprehensive plan. By selecting a county which has no comprehensive plan, the developer can eliminate the risk of having its venture foiled by a local government's rejection of the landfill. However, outside of this benefit the developer receives by locating in this county, there may be no reason to put a landfill in this county. In other words, it may be that this county is an inefficient place for a landfill, so no one would want to put a landfill there except for the fact that the county has no comprehensive plan. In this way, refusing to allow counties to use temporary moratoria to protect themselves against undesired land uses can lead to inefficient placement of particular land uses. Also, because a county must go

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73. The Seventh Circuit adopted this argument in *Pro-Eco*, 956 F.2d at 638.

74. The plaintiffs in *Pro-Eco*, *Triple G*, and *Sagamore Park* alleged violations of the Takings Clause of the Federal Constitution, the Due Process Clause, the Equal Protection Clause, and the Commerce Clause, as well as that the defendants' moratoria were preempted by state law. *Pro-Eco*, 776 F. Supp. at 1368; *Triple G*, 774 F. Supp. at 530; *Sagamore Park*, 885 F. Supp. at 1149. A landowner can argue that a regulation or control as applied to his land is a taking of property because it does not allow him a reasonable use of his land. MANDELKER, *supra* note 13, § 1.03. The courts will also strike down interim controls that clearly serve improper regulatory purposes. DANIEL R. MANDELKER, LAND USE LAW § 6.07 (2d ed. 1988). *Morales v. Haines*, 349 F. Supp. 684 (N.D. Ill. 1972), held, for example, that a one-year suspension of building permits for subsidized housing was an equal protection violation.

75. *See supra* text accompanying note 72 for initial discussion of this argument.

through the comprehensive planning process in order to avoid being selected by a developer much as a lion selects a gazelle, the county has an incentive to create a comprehensive plan, even though there might not be any other reason for the county to do a plan at this time. Because comprehensive plans and zoning ordinances cost time and money to enact, this incentive to go through the planning process and incur these costs prematurely[76] is an incentive for inefficient behavior.

Another answer to the incentive-to-plan argument against moratoria is that, according to *Sagamore Park*, just having a comprehensive plan is not enough, anyway.[77] The moratorium, to be valid, has to satisfy all the requirements of a zoning ordinance.[78] Thus, just having a comprehensive plan would not have saved the counties in *Pro-Eco* and *Triple G*. To be protected, the local governments must foresee every undesirable land use which may arise in the future and enact a zoning ordinance against every one of these uses before someone applies for a permit for one of these uses. The current law, as a result of the courts' rulings, thus requires much more of Indiana municipalities than that they just prepare and adopt a comprehensive plan.

One other reason that some courts and legislatures are less than enthusiastic about allowing local governments to use moratoria is that during the early years of zoning an inadequate understanding of how municipalities should use moratoria gave moratoria a bad name and thereby hampered their development.[79] The early "interim ordinance"[80] was not a truly temporary control designed to protect the planning process until the adoption of a permanent ordinance, but a permanent, hasty control usually designed to avoid comprehensive planning.[81] This is not, however, the type of interim control this Note supports. A moratorium should be temporary, and it should only be in effect long enough to achieve its purpose, which is to preserve the status quo while the local government goes diligently through the planning and zoning process as required by statute. In *Almquist v. Town of Marshan*,[82] the Supreme Court of Minnesota stated that a moratorium on the issuance of land use permits will be valid if: (1) it is adopted by the local government in good faith, (2) it is not discriminatory,

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76. The planning is premature, and thus inefficient, if the costs of creating a comprehensive plan at this time outweigh the benefits of having a plan. In making this determination of whether costs or benefits are greater, one should not include in the "benefit" category the fact that having a comprehensive plan will protect the county from being selected by a developer due to lack of a comprehensive plan. Whether this incentive to plan is good or bad depends on whether there are sufficient reasons to plan *other than* the reason provided by the incentive itself.

77. *See supra* note 57.

78. The requirements are listed in the 600 series of Indiana Code 36-7-4. *See also supra* note 24.

79. *See* Freilich, *supra* note 63, at 80.

80. The term "interim ordinance" refers to moratoria and other temporary land use controls.

81. Freilich, *supra* note 63, at 80.

82. 245 N.W.2d 819 (Minn. 1976).

(3) it is of limited duration,[83] (4) it is for the purpose of the development of a comprehensive zoning plan, and (5) the local government acts promptly to adopt such a plan.[84] Requiring a moratorium to satisfy these standards will prevent municipalities from using moratoria improperly.

III. WHY A TEMPORARY MORATORIUM IS NOT A ZONING ORDINANCE

The courts in *Pro-Eco*, *Triple G*, and *Sagamore Park* based their decisions to invalidate the municipalities' moratoria on their conclusion that the moratoria were zoning ordinances, which were therefore invalid because they were not enacted according to the steps required by statute for zoning ordinances.[85] The key issue in each case was whether the moratorium was a zoning ordinance. The courts' basic reason for deciding that the moratorium in each case *was* a zoning ordinance was that the moratorium regulated land use,[86] so therefore it must be *zoning*. However, the authorities which have defined "zoning" are quite clear that zoning involves more than just *regulating* land, and the authorities are also quite consistent in their definitions.

There are no controlling precedents in the decisions of the Indiana state courts on the issue of whether a temporary moratorium used by a local government to preserve the status quo pending the adoption of a comprehensive plan or zoning ordinance *is* a zoning ordinance and therefore subject to the 600 series of Indiana Code 36-7-4.[87] In *K.G. Horton & Sons v. Board of Zoning Appeals*,[88] the Indiana Supreme Court held that an attempt by the county commissioners of Madison County to extend, for the ninth time, a one-year "interim" zoning ordinance was beyond the board's power and void. *Horton*'s holding, though, is inapplicable to the issue of whether a temporary moratorium is valid. The most important distinction between *Horton* and the issue in *Pro-Eco*, *Triple G*, and *Sagamore Park* is that the ordinance challenged in *Horton* was not a temporary moratorium used to preserve the status quo pending the adoption of a comprehensive plan or

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83. The length of time a moratorium should last will vary with the needs of the community in each particular case. Courts in other states have invalidated four- and five-year freezes, but courts have generally upheld periods of three years or less. 3 ROHAN, *supra* note 27, § 22.02[2].

84. *Almquist*, 245 N.W.2d at 826. One modification which would improve the *Almquist* five-part test is that the "purpose" requirement (part four) should also include the enactment of a zoning ordinance. Including the enactment of a zoning ordinance as a permissible purpose for a moratorium would allow a municipality which already has a comprehensive plan, such as the defendant in *Sagamore Park*, to use a moratorium to protect the effectiveness of a subsequent zoning ordinance.

85. *Pro-Eco*, 776 F. Supp. 1368; *Pro-Eco*, 956 F.2d 635; *Triple G*, 774 F. Supp. 528; *Triple G*, 977 F.2d 287; *Sagamore Park*, 885 F. Supp. 1146.

86. The moratorium in each case "regulated" land use by prohibiting a particular use. Indiana Code § 36-1-2-15 defines "regulate" as "license, inspect, or prohibit."

87. The 600 series of Indiana Code 36-7-4 provides the requirements with which zoning ordinances must comply.

88. 135 N.E.2d 243 (Ind. 1956).

zoning ordinance. The ordinance in *Horton* really *was* "zoning."[89] The Indiana Supreme Court did not address the issue of whether a county has the authority to adopt a temporary moratorium designed to preserve the status quo pending adoption of a comprehensive plan or zoning ordinance. Because the Indiana courts have not answered the question of whether such a temporary moratorium is a zoning ordinance subject to Indiana Code section 36-7-4-601(a)[90] and the rest of the 600 series, we must look to other authority to determine the proper definition of "zoning."

Indiana's zoning statute defines "zoning ordinance" as "an ordinance adopted under the 600 series of [Indiana Code] 36-7-4 or under prior law."[91] Because the moratoria used by the municipalities in *Pro-Eco*, *Triple G*, and *Sagamore Park* were not adopted, nor intended to be adopted, under the complex provisions that provide for classification by district included in the 600 series of Indiana Code 36-7-4, these moratoria fall outside the statutory definition of "zoning ordinance."

The *Indiana Law Encyclopedia*'s definition of "zoning," which the courts cite in all three cases, is "the *regulation by districts* of the building development and uses of property, and *its essence is a territorial division* according to the character of land and structures and their peculiar suitability for particular uses and the uniformity of use within the division."[92] The moratoria used by the local governments in *Pro-Eco*, *Triple G*, and *Sagamore Park*, however, neither regulated *by districts* nor *divided territory* according to its suitability for particular uses. Thus, what these municipalities were doing does not fall under the *Indiana Law Encyclopedia* definition, which the courts cite, strangely enough, to support their decisions.

Another authority defines "zoning" as:

> the *division of* a municipality or other local community *into districts*, and the regulation of buildings and structures according to their construction and the nature and extent of their use, or the regulation of land according to its nature and uses. It is a legislative act representing a legislative judgment as to how the land within a community should be utilized and *where the lines of demarcation between the several use zones should be drawn*, which is very precise and legally restricts present or immediate land use. The *very essence of zoning* is the *territorial division of land into use districts* according to the character of the land and buildings, the suitability of land and buildings for particular uses, and uniformity of use.[93]

Once again, the moratoria in *Pro-Eco*, *Triple G*, and *Sagamore Park* did not divide their municipalities into districts, draw "lines of demarcation" between use zones, or divide any territory according to its character. Thus, this authority's

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89. The ordinance involved a "rezoning" of real estate from residential to business uses for the proposed establishment of a wholesale grocery warehouse. *Id.* at 244. Thus, the ordinance classified property and regulated it by district, which is what "zoning" is. *See infra* text accompanying notes 92-95.

90. *See supra* text accompanying note 10.

91. IND. CODE § 36-7-1-22 (1993).

92. 30 IND. L. ENCYCLOPEDIA *Zoning* § 1, 635 (1960) (emphasis added).

93. 83 AM. JUR. 2D *Zoning and Planning* § 2 (1992) (emphasis added) (footnotes omitted).

definition of "zoning" does not fit what these local governments were doing, either.

Yet another authority defines "zoning" as "the separation of a municipality into districts or 'zones' and the regulation of each district as to the structure, nature and use of its buildings and land."[94] A common thread running throughout these definitions seems to be that "zoning" is the classification and regulation of land by district. As pointed out above, two of these necessary elements of zoning ("classification" and "by district") were not present in the moratoria adopted by the local governments in *Pro-Eco*, *Triple G*, and *Sagamore Park*.

Courts in other jurisdictions have also been consistent in defining the term "zoning." In *City of Moline Acres v. Heidbreder*,[95] the court defined zoning as "[t]he division of a city by legislative regulation into districts and the prescription and application in each district of regulations having to do with structural and architectural designs of buildings and of regulations prescribing use to which buildings within designated districts may be put."[96] The court in *De Benedetti v. River Vale Township*[97] defined zoning as "territorial division according to the character of the lands and structures and their peculiar suitability for particular uses, among other considerations, and uniformity of use within the division."[98] The Supreme Court of Maine, in *Fisher v. Dame*,[99] defined zoning as "the division of a municipality into districts and the prescription and reasonable application of different regulations in each district."[100]

A common aspect to all of these definitions is that "zoning" is the division of land and the prescription of uses for the separate parcels of land.[101] Courts have used this standard definition of "zoning" to determine that municipal ordinances that regulate operations concerning land, rather than legislate particular uses of land according to defined districts, are not zoning ordinances.[102] The courts' decisions in *Pro-Eco*, *Triple G*, and *Sagamore Park*, in determining that the

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94. 6 ROHAN, *supra* note 27, § 37.01[1]. This definition, too, is cited by the Seventh Circuit in *Pro-Eco*, 956 F.2d at 638.

95. 367 S.W.2d 568 (Mo. 1963).

96. *Id.* at 572 (quoting BLACK'S LAW DICTIONARY 1793 (4th ed. 1957)).

97. 91 A.2d 353 (N.J. App. 1952).

98. *Id.* at 355 (quoting Collins v. Board of Adjustment, 69 A.2d 708, 710 (N.J. 1949)).

99. 433 A.2d 366 (Me. 1981).

100. *Id.* at 372 n.9 (quoting Benjamin v. Houle, 431 A.2d 48 (Me. 1981)).

101. *See also* Proffett v. Valley View Village, 123 F. Supp. 339, 343 (N.D. Ohio 1953), *rev'd on other grounds*, 221 F.2d 412 (6th Cir. 1955); Karp v. Zoning Bd., 240 A.2d 845, 850 (Conn. 1968); Stephans v. Board of County Comm'rs, 397 A.2d 289, 292 (Md. App. 1979), *aff'd in part and rev'd in part*, 408 A.2d 1017 (Md. 1979); 101A C.J.S. *Zoning and Land Planning* § 2 (1979); 1 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 1.13 (4th ed. 1996).

102. In *Barefield v. Davis*, 251 So. 2d 699, 700 (Fla. Dist. Ct. App. 1971), the court said that a resolution by the board of county commissioners prohibiting additional mobile home parks in a particular area and providing for extension of existing mobile home parks in this area only by a board-issued permit was not a zoning ordinance and was not governed by any general law of municipal zoning. In *City of Astoria v. Nothwang*, 351 P.2d 688, 691 (Or. 1960), the court said that an ordinance relating to the parking of trailer houses, auto homes, and camp cars was not a zoning ordinance where its primary purpose was to promote public health, safety, and sanitation by forbidding the use of parked vehicles as living quarters.

moratoria those municipalities used were "zoning," were inconsistent with other courts' definitions of "zoning."

In *Schafer v. City of New Orleans*,[103] the Fifth Circuit Court of Appeals upheld a city ordinance which prohibited the issuance of building permits for fast-food restaurants in a particular neighborhood until the city could complete a study of the area. In addition to holding for the city on the federal constitutional issues,[104] the Fifth Circuit affirmed the district court's holding that the moratorium was not a zoning ordinance and therefore did not need to conform to Louisiana's constitutional and statutory provisions for the adoption of zoning ordinances.[105] The Fifth Circuit also recognized that "[i]nterim development controls such as this moratorium have been found to play an important role in municipal planning" and that "[t]hey may, as here, be used to preserve the status quo while study of the area and its needs is completed."[106] Because studies of and changes in land use control "cannot be completed instanter . . . a moratorium may be necessary to prevent a plan's defeat before it is formulated."[107]

The district court in *Pro-Eco* distinguished *Schafer* on the grounds that, unlike Jay County, the City of New Orleans had a comprehensive zoning ordinance,[108] and that New Orleans "was not operating under the specific language of the Indiana statute."[109] However, the fact that New Orleans had a comprehensive zoning ordinance is not a "critical difference" from the situation in *Pro-Eco*, because New Orleans's comprehensive zoning ordinance *conflicted with* the city's moratorium.[110] Because the *Schafer* court upheld the moratorium despite the direct conflict between the moratorium and the comprehensive zoning ordinance, and because the court did not otherwise comment on the importance of the comprehensive zoning ordinance's existence, it is reasonable to infer that the comprehensive zoning ordinance's existence was not crucial to the court's holding in *Schafer*. The *Pro-Eco* court's distinguishing of *Schafer* on the grounds that Louisiana did not have Indiana's specific statutory language is also not persuasive, as the statutory language cited in *Schafer*[111] would have invalidated the moratorium if the statute were applicable, but the *Schafer* court said the statute did not *apply*. The Fifth Circuit's treatment of New Orleans's moratorium in *Schafer* is a good example of how courts should treat temporary moratoria enacted to preserve the status quo while the local government goes through the planning and zoning process.

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103. 743 F.2d 1086 (5th Cir. 1984).

104. The Fifth Circuit held that the city's action did not deprive landowners of due process or deny them equal protection. *Id.* at 1090.

105. *Id.* at 1087.

106. *Id.* at 1090.

107. *Id.*

108. The court called this the "critical difference." *Pro-Eco*, 776 F. Supp. at 1372.

109. *Id.*

110. In 1970, the city adopted a comprehensive zoning ordinance permitting the landowners' property in the particular area at issue and other property in the same area to be used for a variety of commercial purposes, including operation of fast-food restaurants. *Schafer*, 743 F.2d at 1087-88. In 1984, the city adopted the moratorium at issue, which *prohibited* the issuance of building permits for fast-food restaurants in this area. *Id.* at 1088.

111. *See id.* at 1089 nn.1-2.

The courts' opinions in the three cases place a great deal of weight on the fact that a moratorium and a zoning ordinance share a common objective: regulating the use of land. Having an objective in common, though, does not make two things the *same* thing. For example, a quarterback and an offensive lineman on a football team have the same "essential object"[112] of scoring touchdowns, but they are nevertheless two different players with two very different roles.[113] Just as these two football players have a common objective and yet separate identities and roles, so do a moratorium and zoning ordinance have separate identities and roles.

On a related note, the courts in *Pro-Eco*, *Triple G*, and *Sagamore Park* also incorrectly treat the terms "zoning" and "regulating" as if they were synonymous. The courts' decisions establish that any ordinance which regulates the use of a piece of property is an act of zoning.[114] This is a poor rule, because "regulating" and "zoning" are not synonymous. While all zoning necessarily involves regulation, not all regulation involves zoning. Regulation is just one element of zoning. Zoning is the classification and regulation of land by districts.

The courts in *Pro-Eco* and *Triple G*, however, argue that regulation *by districts* is not a necessary element of zoning.[115] According to the district court in *Pro-Eco*, "[t]o say, as does the County, that this ordinance is not a zoning ordinance because it does not purport to regulate the county by districts is to ignore the general notion that an object of zoning is to regulate the use of land."[116] However, to say that a moratorium is not a zoning ordinance because it does not regulate the county by districts is not, contrary to the district court's argument, to *ignore* the "general notion" that an object of zoning is to regulate the use of land; rather, it is simply to not make this "general notion" *dispositive*. In other words, that an object of zoning is to regulate the use of land does not mean that the definition of zoning does not also require that the regulation be *by districts*.

The Seventh Circuit dismissed the "by districts" requirement in *Pro-Eco* by saying that a regulation which was enacted after a comprehensive plan and which did what Jay County's moratorium did would "certainly" be a zoning ordinance, so therefore the court could not agree that a zoning ordinance must regulate a county by districts.[117] The court, however, did not explain *why* an ordinance which does what Jay County's moratorium did and which is enacted after a

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112. These words come from the *Indiana Law Encyclopedia* definition of "zoning," which the courts cite in all three cases. 30 IND. L. ENCYCLOPEDIA, *supra* note 92, § 1, at 635.

113. Interestingly enough, the use of these two particular football positions, quarterback and offensive lineman, allows a further analogical comparison between football and land use. Just as an offensive lineman protects the quarterback and gives him time to do his job, a temporary moratorium protects a pending zoning ordinance from having its purpose frustrated while it is in the process of being enacted. Thus, the moratorium allows the zoning ordinance to "do its job."

114. *Sagamore Park*, 885 F. Supp. at 1150.

115. *See Pro-Eco*, 776 F. Supp. at 1371; *Pro-Eco*, 956 F.2d at 638; *Triple G*, 774 F. Supp. at 532-33; *Triple G*, 977 F.2d at 291.

116. *Pro-Eco*, 776 F. Supp. at 1371.

117. *Pro-Eco*, 956 F.2d at 638.

comprehensive plan would "certainly" be a zoning ordinance. The court did not explain why a zoning ordinance does not have to regulate a county by districts.

In *Triple G*, the Seventh Circuit dismissed the "by districts" requirement on the basis that Indiana has a statute[118] which gives zoning bodies the authority to "establish one or more districts."[119] The court went on to say that "[a]ccordingly, Indiana law clearly recognizes that an ordinance can be a zoning ordinance even if it creates only a single district."[120] However, the court failed to explain how the Fountain County ordinance *establishes* or *creates* a *district.* Indiana Code section 36-7-4-601(d)(1) does not say that an ordinance which does not actually create, or "mark off," a district or districts may nevertheless be a *zoning* ordinance; the statute merely says that a zoning ordinance may mark off only *one* district—that is, the ordinance does not *have* to mark off *more* than one.

The courts' rule that any ordinance which constitutes an attempt to regulate the use of a piece of property is an act of zoning is vastly overbroad. This definition of zoning, along with the requirement that zoning ordinances must be enacted according to the steps laid out in the 600 series of Indiana Code 36-7-4 and only after a comprehensive plan is enacted, drastically diminishes a local government's ability to enact and enforce ordinances on any subject which conceivably could touch upon the use of land.[121] The local goverument is left powerless to respond quickly to an emergency situation involving the health, safety, or welfare of its citizens, as it must enact a comprehensive plan before it does anything, and even if the municipality already *has* a comprehensive plan, the local government must still go through the time-consuming steps required by statute for enacting a zoning ordinance before it can take action.

The moratoria used by the local governments in *Pro-Eco, Triple G,* and *Sagamore Park* were not *zoning* ordinances, they were *permitting* ordinances. They did not divide the county into districts or classify the county's districts and prescribe proper land uses for each district. They simply were designed to preserve the status quo to allow the local governments the time and opportunity to go through the statutorily required planning and zoning process. Unless courts recognize this distinction between temporary moratoria and zoning ordinances, the courts will continue to unnecessarily frustrate the effectiveness of the planning and zoning process.

IV. AUTHORITY TO ENACT A TEMPORARY MORATORIUM

Because a temporary moratorium is not a zoning ordinance, Indiana's Home Rule Act[122] provides municipalities with the authority to enact temporary moratoria. The Home Rule provision of Indiana Code 36-1-3-3(b) provides that

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118. IND. CODE § 36-7-4-601(d)(1) (1993).

119. *Triple G,* 977 F.2d at 291.

120. *Id.*

121. For example, under the courts' definition of zoning, municipalities could be prohibited from enacting ordinances preventing parking on certain streets, because such ordinances would "regulate the use of a piece of property." Brief and Appendix of Appellants at 27, Triple G Landfills, Inc. v. Board of Comm'rs, 977 F.2d 287 (7th Cir. 1992) (No. 91-3507).

122. IND. CODE §§ 36-1-3-1 to -9 (1993).

any doubt as to the existence of a power of local government is to be resolved in favor of its existence.[123] The Home Rule Act also states that a local government has "[a]ll . . . powers necessary or desirable in the conduct of its affairs, even though not granted by statute."[124] The limitation on this power is that a local government cannot exercise a power that is "expressly denied by the Indiana Constitution or by statute" or "expressly granted to another entity."[125] Also, if there is a "constitutional or statutory provision requiring a specific manner for exercising a power," a local government exercising this power "must do so in that manner."[126]

The district court in *Pro-Eco* ruled that the Home Rule Act did not apply to the temporary moratorium which Jay County issued, on the grounds that there was a statutory provision requiring a specific manner for exercising this power and Jay County failed to exercise the power in that manner.[127] The court reasoned that because Indiana Code section 36-7-4-601(a)[128] requires a local government to adopt a comprehensive plan before adopting a zoning ordinance, and because Jay County did not adopt a comprehensive plan before enacting its moratorium, Jay County failed to exercise its power in the manner required by statute. Thus, there was "no doubt to resolve" under Indiana Code section 36-1-3-3(b), so the Home Rule Act did not apply.[129]

The court reached this result, however, only because the court first determined that the moratorium was a zoning ordinance. As the court recognized, "[i]f [the moratorium] is not a zoning ordinance the inquiry is over."[130] In other words, the court's argument that the Home Rule Act does not provide a local government the authority to enact a temporary moratorium is correct only if a moratorium such as Jay County's is a zoning ordinance. If a moratorium is not a zoning ordinance, then its enactment without prior adoption of a comprehensive plan does not violate any "statutory provision requiring a specific manner for exercising a power." Because a temporary moratorium enacted to preserve the status quo during the planning and zoning process is not a zoning ordinance, the Home Rule Act provides local governments with the authority to enact such a moratorium.

V. *FIRST ENGLISH*

The Fifth Amendment states, in pertinent part, that "private property [shall not] be taken for public use, without just compensation."[131] Thus, if a government action constitutes a "taking" of private property, then the government must

123. *Pro-Eco*, 776 F. Supp. at 1371.
124. IND. CODE § 36-1-3-4(b)(2) (1993).
125. *Id.* § 36-1-3-5(a) (1993).
126. *Id.* § 36-1-3-6(a) (1993).
127. *Pro-Eco*, 776 F. Supp. at 1372. The Seventh Circuit also held that the Home Rule Act did not apply to the moratorium issued by Jay County. *Pro-Eco*, 956 F.2d at 639.
128. *See supra* text accompanying note 10.
129. *Pro-Eco*, 776 F. Supp. at 1372.
130. *Id.* at 1371.
131. U.S. CONST. amend. V.

compensate the property owner for the property owner's loss. Before 1987, courts had applied this compensation requirement to government condemnations of private property in the exercise of the power of eminent domain and to regulations which permanently denied a landowner all use of his land. In *First English Evangelical Lutheran Church v. County of Los Angeles*,[132] however, the Supreme Court held that the compensation requirement can also apply to *temporary* regulations.[133] The Court held that if a particular ordinance would be a taking if it were permanent, then it is a taking even though it is temporary, and therefore the government must compensate the landowner for the temporary loss of his property.[134] Thus, *First English* created a potential obstacle for local governments desiring to use temporary moratoria to preserve the status quo during the zoning process. Most temporary moratoria, however, will be able to clear this obstacle and thus avoid triggering the compensation requirement of the Fifth Amendment.

The Supreme Court's holding in *First English* is limited to situations in which a regulation denies a landowner "all use" of his property.[135] Thus, the *First English* requirement of compensation for temporary takings does not apply to a temporary moratorium which does not deny all use of the land. Most land use regulations do not deny all use of a landowner's property.[136] An ordinance enacting a temporary moratorium can easily be designed so that it does not block all reasonable use of land.[137] By allowing some use of land, either on the face of the ordinance or by administrative relief provision, a temporary moratorium will be able to stay clear of *First English*'s compensation requirement.

Furthermore, a temporary moratorium which *does* deny all use of the land is most likely still immune from the compensation requirement if the temporary moratorium is of short duration (less than one year). In *First English*, the Court stated that its decision does not apply to "the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[138] A temporary moratorium which denies reasonable use of property seems properly characterized as a "normal delay" incident to the zoning process where the moratorium is of relatively short duration, closely tied to, and enacted in support of, a proposed zoning plan or zoning change.[139] In such situations, the temporary

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132. 482 U.S. 304 (1987).

133. *Id.* at 318. In *First English*, a flood destroyed a church's campground buildings. In response to the flood, Los Angeles County adopted an interim ordinance prohibiting the construction or reconstruction of any building or structure in an interim flood protection area that included the land on which the church's buildings had stood. Shortly after the ordinance was adopted, the church sued the county, alleging that the ordinance denied the church all use of its property and seeking to recover monetary damages for this loss of use. *Id.* at 304.

134. *Id.* at 318, 322.

135. *See id.* at 318, 321, 322.

136. MANDELKER, *supra* note 13, § 8.25.

137. Edward H. Ziegler, Jr., *Interim Zoning and Building Moratoria: Temporary Taking Claims After* First English, 12 ZONING & PLAN. L. REP. 97, 102 (1989).

138. *First English*, 482 U.S. at 321. The Court also stated, in prefacing its holding, that "[h]ere we must assume that the Los Angeles County ordinance has denied appellant all use of its property *for a considerable period of years*." *Id.* at 322 (emphasis added).

139. Ziegler, *supra* note 137, at 99.

moratorium would have the effect of simply delaying issuance of a building permit pending the effective date of a proposed comprehensive plan or zoning ordinance.[140] This delay may be viewed as simply action incidental to the normal zoning process.[141] In a post-*First English* case, *S.E.W. Friel v. Triangle Oil Co.*,[142] the Maryland Court of Appeals upheld the constitutionality of a nine-month moratorium enacted in support of a comprehensive revision of the county's comprehensive plan which prohibited, except by special exemption, building permits for all development within the county. Because the plaintiff had not sought monetary damages, the court did not directly rule on the temporary taking claim, but the court did indicate its support for characterization of the temporary moratorium as a normal delay incident to the zoning process.[143] Because the Court limited its holding in *First English* to regulations which deny "all use" of the land and because the Court also exempted "normal delays," a municipality enacting a temporary moratorium can avoid the compensation requirement simply by allowing some reasonable use of land or by limiting the duration of the moratorium to less than a year.

CONCLUSION

The courts should allow local governments to use temporary moratoria to preserve the status quo while the local government goes through the process of enacting a comprehensive plan or a zoning ordinance. There are many benefits to be derived from allowing municipalities to use temporary moratoria in this manner. First, the ability to adopt a temporary moratorium allows a municipality to respond effectively to surprises and thus avoid being "handcuffed" in dealing with new uses of land that community leaders just had not contemplated. Second, the use of temporary moratoria to preserve the status quo during the planning and zoning process can protect the effectiveness of the subsequently-enacted zoning ordinance. Third, a temporary moratorium provides an opportunity for increased public participation and debate. Fourth, the ability to use temporary moratoria to preserve the status quo eliminates the incentive for hasty planning. Fifth, the use of temporary moratoria can prevent the "race for diligence." Sixth, the ability of municipalities to use temporary moratoria would take away the incentive developers now have, due to the courts' rulings, to look for counties that do not have a comprehensive plan and take advantage of them.

A temporary moratorium is not a zoning ordinance. Although the courts in *Pro-Eco*, *Triple G*, and *Sagamore Park* decided that the moratorium in each case was a zoning ordinance because the moratorium regulated land use, other authorities which have defined zoning are quite clear that zoning involves more than just *regulating* land. Regulation is just one element of zoning. Zoning is the classification and regulation of land by districts. A temporary moratorium is significantly different from a zoning ordinance and can, if used properly,

140. *Id.*
141. *Id.*
142. 543 A.2d 863 (Md. App. 1988).
143. Ziegler, *supra* note 137, at 100.

complement a zoning ordinance very well. The Home Rule statute provides Indiana municipalities with the authority to enact temporary moratoria to preserve the status quo during the planning and zoning process, and planners can easily avoid the compensation requirement of *First English* by simply not prohibiting all land use.

Allowing municipalities to use temporary moratoria to preserve the status quo is good public policy. Until *Pro-Eco*, *Triple G*, and *Sagamore Park*, temporary moratoria were also clearly allowable as a matter of law. Unless the courts recognize the public benefits of using temporary moratoria and the legal differences between a temporary moratorium and a zoning ordinance, the courts will continue to unnecessarily hinder the effectiveness of the planning and zoning process.