**ST. MARY'S COUNTY GOVERNMENT**
**OFFICE OF THE COUNTY ATTORNEY**
*David A. Weiskopf, County Attorney*
*Neil Murphy, Deputy County Attorney*



# MEMORANDUM

TO: Solar Task Force

FROM: David A. Weiskopf, County Attorney

RE: Temporary Moratorium on new utility-scale solar projects

DATE: November 30, 2020

**Question:** Whether a temporary moratorium on new utility-scale solar projects throughout St. Mary's County is within the County Commissioners' traditional police powers and land use authority. The Solar Task Force is suggesting the moratorium last until the passage of new zoning and regulatory requirements. The ban should last for no more than six months and not apply to projects that have already begun the siting process.

**Answer:** Yes. The County Commissioners are acting within their statutory authority granted by the Maryland Code Land Use Article. Moreover, temporary zoning moratoria are generally upheld by courts as a legitimate exercise of the police power of local governments.

**Analysis:** The proposed moratorium is within the authority granted to the County Commissioners under State law. The local jurisdiction is authority to "regulate the construction, alteration, repair, or use of buildings, structures, or land" in the County or within zoning districts. Md. Code Land Use § 4-201(b). In addition to its baseline zoning authority, a local jurisdiction "may impose any additional conditions or limitations that the legislative body considers appropriate to improve or protect the general character and design of: (1) the land and improvements being zoned or rezoned; or (2) the surrounding or adjacent land and improvements." Md. Code Land Use § 4-103(a). The Maryland General Assembly has recognized that in exercising local zoning authority, a jurisdiction "will displace or limit economic competition by owners and users of property through the planning and zoning controls set forth in this division and elsewhere in the public general and public local laws." Md. Code Land Use § 4-101(b).

The seminal case upholding zoning moratoria is Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). In *Tahoe-Sierra*, the Supreme Court upheld a 32-month ban (composed of two consecutive moratoria) of development in the Lake Tahoe Basin that was imposed while a comprehensive plan was being developed. The basis for the development ban was a concern of nutrient loading in Lake Tahoe due to impervious cover caused by development. 535 U.S. at 309. Before the Supreme Court, Petitioners made a facial attack on the ordinances and sought a "rule requiring compensation whenever the government imposes such a moratorium on development." Id. at 320. The Court rejected this approach and concluded that the appropriate analysis in determining whether a taking has occurred with a

zoning or development moratorium is the factors set forth in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). The *Penn Central* factors are the economic impact of the government action, the extent to which the action interferes with "distinct investment-backed expectations," and the "character" of the governmental action. 438 U.S. at 123. *Penn Central* dictates that "ad hoc, factual inquiries" are to be used. Id.at 124. This allows a reviewing court to conduct "careful examination and weighing of all relevant circumstances." *Tahoe-Sierra,* 535 U.S. at 322 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001)). The length of the delay is only one of the considerations for a reviewing court, but likely the most important factor. Id. at 204. However, the court did note that it "may be true that a moratorium lasting more than one year should be viewed with skepticism, but the District Court found that the . . . delay was not unreasonable." Id. at 304.

The Court noted that "moratoria like Ordinance 81-5 and Resolution 83-21 are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development." Id. at 337-38. Imposing a per se rule that requiring compensation for takings during all moratoria "may force officials to rush through the planning process or to abandon the practice altogether." Id. at 339. The Court also noted that "the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel." Id. at 340.

Although there have been no tests of zoning moratoria in Maryland since *Tahoe-Sierra* was decided in 2002, two moratoria have previously been upheld. See Friel v. Triangle Oil Co., 76 Md. App. 96, 101-04 (1988) (upholding a temporary (less than 9 months) zoning moratorium); Ungar v. State, 63 Md. App 472, 481-82 (1985) (upholding a temporary sewer moratorium). In other jurisdictions, moratoria were generally upheld as long as they were found to be reasonable. See Plaza Joint Venture v. Atlantic City, 174 N.J. Super. 231, 416 A.2d 71 (N.J. Super. 1980) (upholding a moratorium on particular land uses while the jurisdiction was studying a problem and preparing regulations); Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 583 (1976) (upholding a building permit moratorium under the "fairly debatable" test). However, if the underlying concerns regarding the moratorium are unreasonable, the ban may be overturned on appeal. See Cellular Telephone Co. v. Village of Tarrytown, 209 A.D.2d 57, 624 N.Y.S.2d 170 (2d Dep't 1995) (overturning a local law prohibiting antennas because it was based upon unproven fears).

Post *Tahoe-Sierra,* challenges to moratoria have generally been upheld. See *Frick v. City of Salina,* 290 Kan. 869, 235 P.3d 1211 (2010) (upholding an almost three year moratorium on the construction of driveways, culverts, or similar improvements in public rights-of-way because there was not a deprivation of all economically viable use of the property); Biggers v. City of Bainbridge Island, 162 Wash. 2d 683, 169 P.3d 14 (2007) (invalidating a moratorium on shoreline development, but noting specifically that the original brief moratorium had been extended to several years, thus constituting an unconstitutional "rolling moratoria").

Under the relevant *Tahoe-Sierra* and *Penn Central* analyses, the proposed zoning moratorium is valid and legal. The moratorium in limited in duration to six (6) months, and the moratorium

simply limits one particular use of property rather than constituting a full ban on development and elimination of all financial backed expectations of property owners.

It is important that the proposed zoning ordinance follow proper procedures set forth in County law required for zoning ordinances. See, e.g., *Vinton v. Falcun Corp.*, 306 S.E.2d 867 (Va. 1983) (invalidating a moratorium that was enacted as an emergency amendment to the zoning ordinance, which was not permissible under county law). The ordinance should make clear the public health, safety, and welfare concerns that the Commissioners are trying to use their police power to address.