As Governments Move to Pause Data Center Development, Legal Challenges Are Likely to Follow

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Temporary restrictions on data center development are gaining traction nationwide, but many moratoria may be vulnerable to statutory, procedural, and constitutional challenges.

State and local governments across the country are increasingly considering moratoria and other temporary restrictions on new data center development in response to constituents' speculation about grid capacity, water use, and environmental impacts. Although these measures are often presented as short-term planning tools, they can raise significant legal issues depending on the authority of the enacting body, the status of pending projects, and the scope and duration of the restriction. For developers, investors, operators, and other stakeholders, the immediate question is not only whether a proposed moratorium will be enacted, but whether it can withstand challenge. Below are five legal considerations and practical takeaways.

Legal Considerations

1. The Government May Lack Authority to Adopt the Moratorium

A moratorium may be vulnerable if the state or local body lacks authority under the governing state-law framework. In some states, local authority is narrowly construed.[1] In others, local home-rule authority is broader, but is still subject to state law, preemption principles, and procedural limits.[2] Under either approach, a moratorium may be subject to challenge where a locality singles out data centers without adequate legal grounding, conflicts with state law or an established permitting regime, or adopts temporary development restrictions without required notice, hearings, findings, or other procedural steps.

2. The Moratorium May Impermissibly Interfere with Vested Rights

A moratorium may also be challenged if it is applied to a project that already has vested rights under applicable law. Vesting rules vary significantly by jurisdiction. Depending on the state, certain rights may

vest upon submission of a complete permit application or the issuance of a permit or similar approval, while other states require both governmental approval and substantial good-faith reliance.[3] This issue is particularly important for data center projects, which often involve significant early-stage investment in land control, utility coordination, engineering, and other project commitments well before vertical construction begins. If a project crossed the relevant vesting threshold before the moratorium took effect, the government may have limited ability to halt it.

3. The Moratorium May Give Rise to a Regulatory Takings Claim

Even where vested-rights arguments are unavailable, a moratorium may still be vulnerable as a regulatory taking. Temporary development restrictions are not automatically unconstitutional takings, but they are not insulated from challenge simply because they purport to be temporary.[4] Courts may consider the duration of the restriction, the economic impact on the property owner, the extent of interference with reasonable investment-backed expectations, and the character of the government action.[5] Takings arguments may be stronger where a moratorium is repeatedly extended, selectively applied, or functions as a de facto prohibition rather than a short-term planning tool.

4. The Moratorium May Unduly Burden Interstate Commerce

A moratorium may also violate the Dormant Commerce Clause if it discriminates against or unduly burdens interstate commerce. Data centers are closely tied to interstate markets and infrastructure, often serving customers across state lines and relying on regional power, fiber, and communications networks. A challenge may merit consideration where a moratorium favors in-state economic interests, targets interstate-serving facilities in purpose or effect, or imposes burdens on interstate commerce that are excessive in relation to the local benefits asserted.[6]

5. The Moratorium May Be Vulnerable to Due Process, Equal Protection, and Other Constitutional Limits

Finally, a moratorium may be unlawful if it is arbitrary, irrational, or selectively applied. Even where a restriction does not amount to a taking or directly burden interstate commerce, it may still face scrutiny under substantive due process, equal protection, or similar state constitutional limits. Those arguments may be stronger where a government singles out data centers without a sound factual basis, treats similar land uses differently without a reasonable basis, or adopts a restriction driven more by political pressure than by defensible planning or regulatory objectives.[7]

Practical Takeaways

Moratoria on data center development are gaining momentum. Stakeholders evaluating new or pending projects should treat a moratorium as a legal event, not simply a political development.

Early analysis is critical, including review of:

- the authority of the enacting body;
- compliance with required procedures;

- the project's vesting status;
- the factual record supporting the restriction; and
- potential constitutional issues.

Data center moratoria may seem politically appealing in some jurisdictions, but they are not immune from challenge.

Vorys is advising clients on data center siting, zoning, permitting, moratoria, and related litigation and constitutional issues.

[1] *See, e.g., Tabler v. Bd. of Supervisors*, 221 Va. 200, 204, 269 S.E.2d 358, 360–61 (1980).

[2] *See, e.g., Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, ¶ 9, 766 N.E.2d 963, 966.

[3] *See, e.g., Snohomish Cty. v. Pollution Control Hr'gs Bd.*, 187 Wash. 2d 346, 362–63, 386 P.3d 1064, 1072 (2016); *Gibson v. Oberlin*, 171 Ohio St. 1, 5–6, 167 N.E.2d 651, 654 (1960); *Matter of Exeter Bldg. Corp. v. Town of Newburgh*, 26 N.Y.3d 1129, 1130–31, 47 N.E.3d 71, 72 (2016); *In re 244.5 Acres of Land the Vill., L.L.C. v. Del. Agric. Lands. Found.*, 808 A.2d 753, 757–58 (Del. 2002).

[4] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency,* 535 U.S. 302, 341–42 (2002).

[5] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Tahoe-Sierra*, 535 U.S. at 341–42.

[6] *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

[7] *See, e.g., Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).