

Supreme Court Declines to Create Categorical Takings Rule for Temporary Land-Use Restrictions

The United States Supreme Court has ruled that, when determining whether temporary land-use restrictions constitute a “taking” of property requiring compensation under the Fifth Amendment of the U.S. Constitution, each restriction must be considered on a case-by-case basis.

The late 1950s saw a marked rise in the level of land development in the Lake Tahoe Basin (Basin), and also a marked decline in the trademark clarity of Lake Tahoe’s blue waters. Land development had led to the replacement of much natural land, which tends to absorb water and soften the erosive effect of rainfall, with impervious surfaces such as asphalt, which produce more runoff. For this reason, land development was highlighted as the probable reason for the increased nutrient loading of Lake Tahoe and its concomitant diminished clarity.

In response to these concerns, the States of California and Nevada adopted the Tahoe Regional Planning Compact (Compact) in 1968, which created the Tahoe Regional Planning Agency (TRPA) “to coordinate and regulate development in the Basin and to conserve its natural resources.” In 1980, the Compact was amended to direct TRPA to develop regional air quality, water quality, soil conservation, vegetation preservation, and noise standards, and adopt a regional plan to carry out those standards. The Compact classified land by districts, including “high hazard” or “sensitive” lands, which have steeper slopes and thus produce more runoff, and “Stream Environment Zones” (SEZ), which are areas near streams or wetlands that, in their natural state, act as filters for much of the debris that was finding its way into Lake Tahoe. In 1981 and 1983, as TRPA was having difficulty meeting the Compact’s deadlines for carrying out its duties, TRPA enacted two ordinances that “effectively prohibited all construction on sensitive

lands in California and on all SEZ lands in the entire Basin for 32 months, and on sensitive lands in Nevada (other than SEZ lands) for eight months.”

The ordinances were challenged in 1984 by the Tahoe Sierra Preservation Council, a nonprofit organization representing about 2,000 landowners in the Basin, and a class of 400 individual owners of vacant parcels on SEZ, high hazard, or sensitive lands in the Basin (collectively, the “landowners”). The individuals had purchased their lands before the Compact existed, under the impression that the construction of single-family homes on their properties would be allowed if “they complied with all reasonable requirements for building.” The landowners alleged that by temporarily banning such construction, the ordinances temporarily deprived them of all economically viable use of their properties, and pointed to the Supreme Court’s decisions in *Lucas v. South Carolina Coastal Council* and *First English Evangelical Church of Glendale v. County of Los Angeles* as establishing that such deprivation was a “taking” that requires compensation. After a protracted series of appeals, the Ninth Circuit eventually held that the ordinances did not effect a “taking.”

The Supreme Court began its analysis by highlighting the distinction between “physical” and “regulatory” takings. The Fifth Amendment explicitly requires compensation for a physical taking, or actual acquisition of property for a public purpose, such as condemnation. “But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* [categorical] rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by essentially ad hoc, factual inquiries, designed to allow ‘careful examination and weighing of all the relevant circumstances.’”

The court observed that two main issues exist in a regulatory takings situation: when a regulation goes “too far” so as to constitute a taking; and “how compensation is measured once a regulatory taking is established.”

On the issue of whether a taking occurred, the court first rejected the landowners’ arguments that *First English* and *Lucas* established a categorical rule where any regulation prohibiting development on property would constitute a taking. The court noted that, aside from the fact that the inquiry is always determined on a case-by-case basis, *First English* had actually identified two situations where such a regulation would not be a taking: (1) when the governmental entity’s action was for the purpose of protecting public safety; and (2) when “normal delays” involving such approvals as zoning changes, permits, and variances were involved. Thus, the court observed, *First English* “implicitly rejected” a categorical rule for regulatory takings.

The court noted that *Lucas* actually did establish a categorical rule, but that rule did not advance the landowners’ cause because the *Lucas* rule only applies to permanent regulations. In *Lucas*, the court had held that a state statute permanently banning development on the defendants’ unimproved property was a regulatory taking because the statute resulted in a permanent and “complete elimination of value” or a “total loss.” The *Lucas* rule did not apply to the landowners’ situations, however, because the Lake Tahoe moratoria were only temporary, and a finding that the value of the landowners’ property was “completely eliminated” would require the court to “effectively sever a 32-month segment from the remainder of each landowner’s fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria.” The court explained that this could not be done because if a court only looked at the time a particular regulation was in effect, “every delay would become a total ban; the

moratorium and the normal permit process alike would constitute categorical takings." Instead, a complete ban is one that covers the whole property interest, both geographically *and* chronologically.

The court next turned to the question of whether, "in the interests of fairness and justice," it should create a new rule to cover the landowners' situation. The court discussed three categorical rules that were suggested by the landowners: (1) any temporary deprivation of economic use of one's property is a taking; (2) the same rule, with an exception for normal delays for zoning, permits, or variances; or (3) allow a short (one year or so) period for deliberations, but any longer prohibition would be a taking.

However, the court declined to create any such *per se* rule. The court initially reiterated that it has consistently "eschewed any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." The court also noted several specific problems that would be created by a categorical rule. Turning to the first, and broadest, possible rule, the court observed that such a rule would apply to ordinary legal processes, such as zoning and building permit requirements, and "would render routine government processes prohibitively expensive or encourage hasty decision-making."

The second and third proposed rules were rejected because, although they would have a lesser impact on existing governmental processes, they would still seriously impact the planning process. Noting that "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," the court opined that placing categorical restrictions on moratoria might "force officials to rush through the planning process or to abandon the practice altogether," and provide

landowners with “incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.”

Additionally, the court noted its past precedent holding that, in the interest of allowing for “well-reasoned decisions” by a land-use authority, a regulatory takings case is not “ripe,” or ready to be heard in court, until a land-use authority has had the chance to exercise its “full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.” In other words, a developer or landowner cannot sue to overturn a land-use regulation until it has, for example, attempted to obtain a building permit but has been denied because of the regulation. In light of this requirement, a per se rule would “create a perverse system of incentives,” because landowners would be required to wait for their claims to ripen, but then the government would be required to compensate them for that delay.

The court went on to observe that the interest in allowing enough time for proper decision making applied even more strongly where a regional plan, such as the TRPA plan, was involved, because of the difficulty of formulating a cohesive plan covering a large area. While noting that “any moratorium that lasts for longer than one year should be viewed with special skepticism,” the court nevertheless held that a categorical rule was “too blunt an instrument” for such complicated, fact-based situations.

The court also clarified the precise scope of its decision, explaining that its refusal to formulate a categorical rule for temporary moratoria did not mean that such regulations could never be a taking, but instead, merely recognized that “the temporary nature of a land-use restriction...should not be given exclusive significance one way or another, and temporary land-use regulations must be examined on a case-by-case basis.

The court declined to address the second issue of what compensation should be awarded, because the landowners had relied solely on an argument for a categorical rule, and had failed to present an argument based on case-specific factors. Because the landowners' only argument had been rejected by the court, there was no basis upon which the court could rule that a taking had occurred, so the issue of compensation was irrelevant.

Tahoe-Sierra Preservation Council Inc et al v Tahoe Regional Planning Agency, et al,
122 S. Ct 1465 (April 23, 2002).

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