

# Moratoria and Musings on Regulatory Takings: *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*

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## I. INTRODUCTION

In April of this year, the U.S. Supreme Court handed landowners their first defeat in over a decade by holding that a thirty-two-month development moratorium imposed on certain land surrounding Lake Tahoe was not, on its face, a per se regulatory taking of property. But the opinion, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>1</sup> exists in something of a vacuum. That is so because *Tahoe-Sierra* is not a natural extension of the Court's recent jurisprudence, but the Court neither reversed nor significantly contracted existing precedent. The opinion simply stands by itself, adding little and leaving largely intact the law on total regulatory takings after *Lucas v. South Carolina Coastal Council*.<sup>2</sup> Furthermore, *Tahoe-Sierra* has no affect on the application of either *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,<sup>3</sup> which held that compensation is the proper remedy for a regulatory taking, or the recent decision of *Palazzolo v. Rhode Island*,<sup>4</sup> which disposed entirely of the notice issue, at least with respect to categorical takings. Indeed, the Court was at pains to make clear that the Tahoe landowners made "only a facial attack" (as opposed to an as-applied challenge) on the moratoria ordinance and resolutions, and, therefore, faced "an uphill battle" that was made "especially steep by their desire for a categorical rule requiring compensation whenever the government impose[d] such a moratorium on development."<sup>5</sup> In short, the Court held that *Tahoe Sierra*

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<sup>1</sup> 122 S. Ct. 1465 (2002). For a thorough review of the facts and judicial history of the case, see J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and Its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1 (2002).

<sup>2</sup> 505 U.S. 1003 (1992).

<sup>3</sup> 526 U.S. 687 (1999).

<sup>4</sup> 533 U.S. 606 (2001).

<sup>5</sup> *Tahoe-Sierra*, 122 S. Ct. at 1477.

presented a very narrow question of law and that the plaintiffs argued it in a most difficult manner.

In response to this narrow question, the Court held that the mere enactment of a temporary moratorium does not *always* effect a categorical taking of property.<sup>6</sup> The Court, however, clearly rejected the argument that moratoria never do so.<sup>7</sup> According to the Court, the outcome will depend upon the facts of the case. Consequently, the Court concluded that the appropriate challenge is as-applied, and the proper analytical framework is likely that set out in *Penn Central Transportation Co. v. City of New York*.<sup>8</sup> Under that rubric, the factors to be weighed and balanced are (1) the rationale for the moratorium land and its length (the "morphed" interpretation of the "character of the governmental action"); and (2) its economic impact on the landowner, in particular the interference with her distinct (some would have it "reasonable"), investment-backed expectations.<sup>9</sup>

Whether or not this is unfortunate depends, of course, on one's point of view, but it is certainly not calamitous. Clearly, the majority that gave us not only *Lucas*, but also *Nollan v. California Coastal Commission*,<sup>10</sup> *Dolan v. City of Tigard*,<sup>11</sup> and *Palazzolo* had already showed signs of strain when two members of the *Palazzolo* majority split over the application of the notice rule to partial takings. Justice Scalia would never consider a landowner's notice of existing regulations, arguing that the land use restriction should be as constitutional to the first owner as it is to the last.<sup>12</sup> Justice O'Connor, however, would consider what the landowner knew or should have known when she acquired the property, arguing it would be unfair to do otherwise.<sup>13</sup> Observed from this perspective, the Court's narrow decision in *Tahoe-Sierra* merely confirms the Court's aversion to categorical rules and its preference for the balancing approach that has characterized most regulatory takings

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<sup>6</sup> See *id.* at 1478, 1489.

<sup>7</sup> *Id.* at 1478 n.16, 1486. The courts that rely on *Tahoe-Sierra* for something more are simply mistaken. See, e.g., *Manke Lumber Co., Inc. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, No. 26580-0-II, 2002 Wash. App. Lexis 1161, at \*24-25 (Wash. Ct. App. May 17, 2002) (noting that *Tahoe-Sierra* held that a "32-Month loan on development [was] not a regulatory taking because it [was] only temporary, not permanent."); *Mays v. Bd. of Trs. of Miami Township*, C.A. Case. No. 18997, 2002 Ohio App. Lexis 3347, at \*8-9 (Ohio Ct. App. June 23, 2002) ("In order to constitute a 'regulatory' taking, the measure involved must be permanent in nature and of such a character and effect that the owner is deprived of all or substantially all economic use of his land that is feasible.").

<sup>8</sup> 438 U.S. 104 (1978).

<sup>9</sup> *Id.* at 124; see also *Tahoe-Sierra*, 122 S. Ct. at 1489.

<sup>10</sup> 483 U.S. 825 (1987).

<sup>11</sup> 512 U.S. 374 (1994).

<sup>12</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 637 (2001) (Scalia, J., concurring).

<sup>13</sup> *Id.* at 633-34 (O'Connor, J., concurring).

jurisprudence since *Pennsylvania Coal Co. v. Mahon*.<sup>14</sup> Indeed, the *Lucas* Court acknowledged that its per se rule would apply only in the “relatively rare” situation where “the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle.”<sup>15</sup> Even *First English Evangelical Lutheran Church v. County of Los Angeles*<sup>16</sup> provided for takings-free delays, when such delays are part of the normal land development process.<sup>17</sup> But the question of whether that exception applied to moratoria as well was an issue virtually from the time *First English* was decided. After *Tahoe-Sierra*, that question has been answered somewhat in the affirmative.

Thirty-two months is, of course, a long “normal” delay. Indeed, the actual delay was far longer, but the Court chose not to deal with that. So, are we to assume that any moratorium of thirty-two months or less passes constitutional muster? No, and it would be irresponsible to do so. The facts and legal posture of *Tahoe-Sierra* were critical to the outcome. The Court had before it a moratorium imposed by a bi-state agency for the purpose of fulfilling its duty to preserve the clarity of Lake Tahoe, a nationally-recognized treasure of unusual and striking beauty.<sup>18</sup> The Court was clearly impressed by the planning and rationale for the moratoria, and, therefore, was not about to strike it down on principle, that is, on a facial attack. It is difficult to believe, however, that the Court would blithely accept, for example, a moratorium of the same period imposed by a local government while amending its comprehensive plan. Reading more into the case from a planning perspective is like looking into a crystal ball, and the proverbial “ground glass” warning applies.

That is really all *Tahoe-Sierra* did. What then can we glean from the sometimes sweeping dicta and other nuances? Several things, none of which the least bit surprising, and none at all certain to command a majority should a case arise in which any one is the principal issue before the Court. First, Justice Stevens does not like categorical rules in the takings context, and he will do his best to eliminate them. Thus, his attack on *Lucas*, from which he vigorously dissented, and his transparent attempt to convert the “all economically viable use” standard into a “no economic value” rule, which would essentially eviscerate *Lucas*, came as no surprise. Second, sensible land use planning is good, and we should all support it. That is, of course, obvious and something even Chief Justice Rehnquist agrees with. In *First English*, for

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<sup>14</sup> 260 U.S. 393 (1922).

<sup>15</sup> *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1018-19 (1992).

<sup>16</sup> 482 U.S. 304 (1987).

<sup>17</sup> *Id.* at 321-22.

<sup>18</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plann'g Agency*, 122 S. Ct. 1465, 1470-73 (2002).

example, the Chief Justice acknowledged the importance of planning and sympathetically recognized that the Court's decision would "lessen to some extent the freedom and flexibility of land-use planners and governing bodies."<sup>19</sup> The difference is that the Chief Justice did not believe the need for good planning curtailed the Court's mandate to protect constitutional rights.<sup>20</sup> Nor, for that matter, did Justice Brennan when some twenty years ago he quipped, "After all, a policeman must know the Constitution, then why not a planner?"<sup>21</sup> The point is simple: the Constitution, not ever-evolving policy considerations, should inform the Court's opinions. Finally, segmentation, also called the denominator or relevant parcel issue, continues to divide the Court. Therefore, the war of footnotes and dicta commenced in *Lucas* and resumed in *Palazzolo* is likely to continue until the Court finally takes a case and resolves it.

## II. CATEGORICAL RULES AND THE QUEST FOR CERTAINTY

The basic thrust of the plaintiffs' argument in *Tahoe-Sierra* was that development moratoria by definition leave most vacant land without any discernible economic use, and, therefore, moratoria are squarely within the *Lucas* categorical rule.<sup>22</sup> The *Lucas* rule provides that when a regulation deprives land of all economically viable use, the Fifth Amendment requires compensation.<sup>23</sup> The rule is, of course, subject to two narrow exceptions,<sup>24</sup> but neither exception was present under the *Tahoe-Sierra* facts. Thus, the landowners argued, the case was easy and they should win. Indeed, the only way to avoid such a result was for the Court to find some basis for taking the case beyond the application of the categorical rule.

One way to move the applicable regulatory takings doctrine from the *Lucas* per se rule to the *Penn Central* balancing test is to identify those characteristics in *Lucas* that require abandoning the categorical analysis. This the *Tahoe-Sierra* Court did by defining the relevant parcel to include more than the challenged moratorium period. A second way is to emphasize that factors, like governmental planning, need to be considered in any decision, and that cannot

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<sup>19</sup> See *First English*, 482 U.S. at 317, 321-22.

<sup>20</sup> *Id.* at 321.

<sup>21</sup> *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).

<sup>22</sup> See Brief for Petitioners, 2000 U.S. Briefs 1167, 32-39, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plann'g Agency*, 122 S. Ct. 1465 (2002) (No. 00-1167).

<sup>23</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992).

<sup>24</sup> *Id.* The so-called *Lucas* exceptions, "nuisance and background principles of a state's law of property," are discussed at length by D. Callies and D. Breemer in *Background Principles, in TAKING SIDES ON TAKING ISSUES* (T. Roberts ed., 2002).

be done in a per se or categorical analysis. This, too, the majority did and did with some enthusiasm. Finally, a third way is to attack the per se rule itself, and Justice Stevens did so at every turn.

The majority began by undermining part of the rationale for the categorical rule by making it very clear that physical takings jurisprudence is, in its view, totally inapposite to regulatory takings. Writing for the majority, Justice Stevens stated:

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. 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 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." . . . This long-standing distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.<sup>25</sup>

Thus, the Court rejected the clear analogy between physical appropriations and regulations that deny landowners all economically beneficial or productive use of their property, even though the Court in *Lucas*, as well as other takings cases, repeatedly emphasized the similarities between the two.<sup>26</sup>

The Court next took on the categorical rule itself. The majority first isolated *Lucas* by reiterating that "[i]n the decades following [*Pennsylvania Coal*] we have 'generally eschewed' any set formula for determining how far is too far,

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<sup>25</sup> *Tahoe-Sierra*, 122 S. Ct. at 1478-79 (citations omitted).

<sup>26</sup> See *Lucas*, 505 U.S. at 1017, 1028-29; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting) ("Police power regulations . . . can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property."); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) ("The total destruction by the Government of all value of these liens . . . has every possible element of a Fifth Amendment 'taking.'"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("[Rendering a legal use] commercially impracticable . . . has very nearly the same effect for constitutional purposes as appropriating or destroying it."); see also Calvert G. Chipchase, Comment, *Lucas Takings: Why Investment-Backed Expectations are Irrelevant when Applying the Categorical Rule*, 24 U. HAW. L. REV. 147, 166-69 (2001) (discussing the justifications and precedent for the categorical rule).

choosing instead to engage in 'essentially ad hoc, factual inquiries.'"<sup>27</sup> It then began to chip away at the "all economically beneficial use" standard—the cornerstone of the categorical rule. The majority did so by attempting to substitute the term "value" for the term "use." For example, Justice Stevens stated that the lots at issue in *Lucas* were rendered "valueless" by the regulation, and that the compensation award represented "the value of the fee simple estate."<sup>28</sup> That is plainly not true. Even with the restrictions, Lucas's lots were extremely valuable, just not very useful. Nevertheless, the majority continued and even expressly reframed the appropriate rule as providing that "the permanent 'obliteration of the value' of a fee simple estate constitutes a categorical taking."<sup>29</sup> The majority tied its revision of the per se rule to footnote eight of the *Lucas* opinion, in which the *Lucas* Court acknowledged that the categorical rule did not apply to situations where there was anything less than a "total loss."<sup>30</sup> The *Tahoe-Sierra* Court, however, failed to disclose that footnote eight was penned as a response to one of the many blistering attacks leveled by Justice Stevens, then in the minority, not a fundamental tenet of the opinion. Nor did it reveal that the distinction drawn in that footnote between a diminution in value of 95% and one of 100% was a quotation taken from Justice Stevens' dissent, not something at all attributable to the *Lucas* majority.<sup>31</sup> The *Lucas* Court, both in analysis and in effect, focused on what use David Lucas could make of his property, not how much the land was worth. Neither judicial sleight of hand, nor the efforts of some commentators, can make it otherwise.

This blatant mischaracterization is unsurprising given that Justice Stevens so vigorously dissented from the application of a per se rule at all. In *Lucas*, he lamented the Court's "illogical expansion of the concept of 'regulatory takings'" in general,<sup>32</sup> and his objection to the categorical rule in particular was even more pronounced. According to Justice Stevens, the categorical rule recognized in *Lucas* was "unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified."<sup>33</sup> Instead, Justice Stevens argued that a takings case necessarily "entails inquiry into [several factors,]" the most important of which being the character of the governmental action.<sup>34</sup> That is so, Justice Stevens reasoned, because a regulation "that targets one or two parcels of land and a regulation that enforces a statewide policy" are

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<sup>27</sup> *Tahoe-Sierra*, 122 S. Ct. at 1481.

<sup>28</sup> *Id.* at 1482.

<sup>29</sup> *Id.* at 1483.

<sup>30</sup> *Id.*

<sup>31</sup> Compare *Lucas*, 505 U.S. at 1019, n.8, with *id.* at 1064 (Stevens, J., dissenting).

<sup>32</sup> *Id.* at 1061 (Stevens, J., dissenting).

<sup>33</sup> *Id.* at 1067.

<sup>34</sup> *Id.* at 1071 (brackets in original).

simply different and must be analyzed distinctly.<sup>35</sup> Furthermore, Justice Stevens added, the purposes of the restriction must inform the examination of its economic impact and the claimant's investment-backed expectations.<sup>36</sup> Because of his preference for a flexible examination of several factors, weighed according to the individual predilections of those on the Court, Justice Stevens is fundamentally at odds with an objective rule that asks only whether the regulation has wholly deprived the owner of the right to make "economically beneficial use" of her land.<sup>37</sup> Accordingly, he made full use of his first opportunity to convert the test from one of use to one of value.

Changing of the *Lucas* rule from the "elimination of economically beneficial use" to the "complete obliteration of all value" would render the per se rule a nullity. Land always has value, regardless of the degree of restriction—particularly in places like the Lake Tahoe region or coastal South Carolina. One cannot help but conclude that the *Tahoe-Sierra* majority, or at least Justice Stevens, is after just such a result. *Lucas*, however, with its clear language and analogy to physical takings, remains a formidable barrier to that goal. In 2001, *Palazzolo* affirmed *Lucas* in both scope and application. *Tahoe-Sierra* neither overruled, nor expressly limited, either opinion. Thus, both continue as the law of the land. Notwithstanding those realities, Justice Stevens may have given courts sharing his aversion to the objective limitations inherent in the *Lucas* rule enough ammunition to engage in their own subtle revisionism. Indeed, relying on *Tahoe-Sierra*, the Kansas State Supreme Court recently held that "[i]f the entire value of the property is not destroyed, then the analysis under *Penn Central* is appropriate."<sup>38</sup> In Kansas, it seems, the categorical rule is now little more than a truism.

As for merely limiting per se rules, the *Lucas* dissent has found an increasingly kindred spirit in Justice O'Connor. To be sure, Justice O'Connor was a part of the *Lucas* majority, and she has not attempted to rewrite the categorical rule. But she has made clear that her "polestar remains the principles set forth in *Penn Central*," where the several factors remain entirely relevant inquiries.<sup>39</sup> For example, Justice O'Connor joined fully in the *Palazzolo* majority opinion, wherein the Court held that a preacquisition

<sup>35</sup> *Id.* at 1073.

<sup>36</sup> *Id.* at 1075.

<sup>37</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

<sup>38</sup> See *McPherson Landfill, Inc. v. Bd. of County Comm'rs of Shawnee County*, 49 P.3d 522, 539 (2002) (emphasis added) (citations omitted); see also *Vellequette v. Town of Woodside*, A091682, 2002 Cal. App. Unpub. Lexis 6690, at \*33 (Cal. Ct. App. July 23, 2002) ("A total loss of all economic value is required to establish a categorical taking."). But see *Mays v. Bd. of Trs. of Miami Township, C.A. Case No. 18997*, 2002 Ohio 3303, at \*8 (Ohio Ct. App. June 28, 2002) (holding, even after *Tahoe-Sierra*, that a taking "may be accomplished through a regulation that prohibits" all economically feasible use of land).

<sup>39</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001).

regulation, other than a background principle of a state's law of property, is irrelevant in a *Lucas* claim and not dispositive in a *Penn Central* claim.<sup>40</sup> Justice O'Connor, however, wrote separately to explain her understanding of what that holding meant to regulatory takings jurisprudence. With respect to *Penn Central* claims, Justice O'Connor argued that the Rhode Island Supreme Court erred only in holding that "the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use restriction."<sup>41</sup> The proper analysis, Justice O'Connor concluded, is to view a preacquisition regulation as something that shapes and defines the claimant's investment-backed expectations, which are in turn but one of three factors to be weighed when determining whether a partial taking has occurred.<sup>42</sup> Indeed, she vigorously objected to Justice Scalia's argument that a claimant's "investment-backed expectations" should not "include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional."<sup>43</sup> Thus, although Justice O'Connor has not abandoned the categorical rule, her preference clearly rests with ad hoc evaluations.

In sum, the *Tahoe-Sierra* majority inveighed against the expansion of categorical rules for regulatory takings and did its best to undercut the application of *Lucas* by substituting "value" for "economically beneficial use." This approach leaves an enormous amount of discretion to judges and removes what certainty comes with clear bright-line rules. The approach also tilts the field steeply in favor of government regulation. Reviewing the opinions of Justice Stevens, it becomes apparent that this is no accident. His opinions reflect profound discomfort with the application of Fifth Amendment takings jurisprudence to property regulations, preferring instead declaratory relief under the Fourteenth Amendment.<sup>44</sup> For example, in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,<sup>45</sup> Justice Stevens argued, "[T]here is nothing in the Constitution that prevents the government from electing to abandon the permanent-harm-causing regulation" without paying compensation.<sup>46</sup> Indeed, Justice Stevens, dissenting from the holding in *Dolan*, revealed his disdain for regulatory takings in general when

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<sup>40</sup> For a detailed summary of the facts and holding of *Palazzolo*, see David L. Callies & Calvert G. Chipchase, *Palazzolo v. Rhode Island: Ripeness and 'Notice' Rule Clarified and Statutory 'Background Principles' Narrowed*, 33 URB. LAW. 907 (2001).

<sup>41</sup> *Palazzolo*, 533 U.S. at 632 (O'Connor, J., concurring).

<sup>42</sup> *Id.* at 633-34.

<sup>43</sup> *Id.* at 637 (Scalia, J., concurring).

<sup>44</sup> See *Dolan v. City of Tigard*, 512 U.S. 374, 406-08 (1994) (Stevens, J., dissenting); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351-53 (1986); *Williamson County Reg'l Plann'g Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 202-06 (1985) (Stevens, J., concurring).

<sup>45</sup> 473 U.S. 172 (1985).

<sup>46</sup> *Id.* at 203-03 (Stevens, J., concurring).



he argued that a claimant had "no right to be compensated for a taking unless the city acquire[d] the property interests that she has refused to surrender."<sup>47</sup> Thus, Justice Stevens would shield the government from its obligation to pay compensation, no matter how extreme the regulation or how long it had been in effect. He may have lost that battle, but Justice Stevens' clear preference for a flexible, ad hoc balancing test is wholly consistent with his bias against regulatory takings, and helps to explain the fact that he has so rarely found any land use restriction that "went too far." This confidence in government at the expense of private landowners is misplaced, as any survey of cases, administrative actions, and written regulations from places as diverse as California, New England, and Hawaii clearly demonstrates.

### III. THE PROCESS OF PLANNING

The Court has for many years recognized and supported the importance of land development planning at the state and local government level.<sup>48</sup> Indeed, the Chief Justice has been one of the strongest advocates for planning and local land use controls,<sup>49</sup> coming as he did from a local government background not shared by other members of the Court. Thus, it is not particularly surprising to see the Court use the importance of planning as a basis for supporting moratoria in general. In addition, two facts, specific to the moratoria at issue in *Tahoe-Sierra*, made it particularly likely that the Court would rely on generalities about the importance of planning to deny the landowners compensation.

First, the Tahoe Regional Planning Agency ("TRPA") justified its moratoria as necessary to facilitate the development of a regional water quality plan and a regional environmental threshold carrying capacity plan, all in accordance

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<sup>47</sup> *Dolan*, 512 U.S. at 408.

<sup>48</sup> See generally *Dolan*, 512 U.S. at 384-85 (recognizing "the authority of state and local governments to engage in land use planning"); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321-22 (1987) (discussing the need for proper planning); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (upholding the constitutionality of the city's Landmarks Preservation Law against a facial and as-applied takings challenge); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding the constitutionality of zoning against a substantive due process challenge); *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

<sup>49</sup> See *Dolan*, 512 U.S. at 384-85; *First English*, 482 U.S. at 321-22; *Penn Central*, 438 U.S. at 148 n.11 (Rehnquist, J., dissenting) ("It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals.") (quoting *Nashville Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 429-30 (1935)).

with an extensive amendment, in order to preserve the clarity of beautiful Lake Tahoe.<sup>50</sup> The history of the amendment, the extra time it took to formulate the plan, that California successfully sued to enjoin its implementation, and the revised plan, all of which took approximately eight years, are well documented in the Court's summary of facts.

Second, much planning law literature supports interim development controls as an essential tool in the planning process. A frequently asserted justification, relied upon by the *Tahoe-Sierra* Court, is the need to avoid a race to obtain land development approvals and rezonings in advance of planning processes that might inhibit such private land development projects.<sup>51</sup> Indeed, the Court noted that "moratoria . . . are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy."<sup>52</sup> The Court then goes on to list several cases in which federal and state courts sustained moratoria ranging from ten to eighteen months without compensation.<sup>53</sup>

The Court, however, was wrong on several points. To begin with, many of the cases upholding moratoria—including several that the Court cited in footnotes—dealt with development restrictions applied only to a single zoning district or a single stretch of land. The TRPA moratoria were (and are) far more extensive, in both scope and sweep. Indeed, none of the moratoria cases cited by the *Tahoe-Sierra* majority lasted even half as long as the TRPA moratoria—most less than a third as long.

Furthermore, the literature cited by the Court refers to interim development controls generally, but the Court wrongly equated that with moratoria specifically.<sup>54</sup> Not all interim development controls are equal. A moratorium is an extreme form of such controls, because it absolutely stops all development. On the other hand, interim zoning and similar measures are more selective in implementing temporary controls while formulating and passing long-term plans. Thus, moratoria should logically be used less often, more selectively, and for shorter periods. Also troubling is that the *Tahoe-Sierra* Court blithely assumed that successful development automatically follows such land use control measures.<sup>55</sup> They may aid the process of planning, but the connection with successful development is weak.

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<sup>50</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plann'g Agency*, 122 S. Ct. 1465, 1470-73 (2002).

<sup>51</sup> See *id.* 1487 n.33.

<sup>52</sup> *Id.* at 1487.

<sup>53</sup> *Id.* at 1487 n.32.

<sup>54</sup> See *id.* at 1487 ("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.").

<sup>55</sup> See *id.*

In addition, the Court seems unable to distinguish between a normal delay in the land development process and the radical interim development control that a moratorium represents. This is a shocking misunderstanding of the land development process, penned by the Justice who also so misunderstood the variance process that an unworkable ripeness test was foisted upon the land development community.<sup>56</sup> The normal delays the *First English* Court spoke of concerned the time needed to carefully review applications to assure that the applications were complete and comported with the applicable land development standards.<sup>57</sup> Only in the most egregious circumstances would the delay for a particular permit take anywhere near the thirty-two months (and counting) set out in this case.

Lastly, the Court's uninformed ramblings about reciprocity of advantage as a basis for general moratoria,<sup>58</sup> rather than selective permit delays, are misplaced. The theory of reciprocity of advantage was never meant to apply to land use regulations, but rather the practice of leaving coal in place in mines to avoid cave-ins for all concerned.<sup>59</sup> The *Tahoe-Sierra* Court had it all backwards. It is those landowners who have relatively immediate plans to develop that need the protection, not the landowning community generally. As for the extra pressure on planners, the "deliberate pace" of local government decision-making should be faster, as commentators have observed for decades.<sup>60</sup>

#### IV. RELEVANT PARCEL IN AN ABSTRACT CONTEXT

We are now left with the question of what parcel or interest is relevant to the takings inquiry. The Ninth Circuit Court of Appeals and the Supreme Court refused to accept on a facial challenge that a moratorium, even one that lasts thirty-two months, effects a categorical taking. The constant refrain from both Courts was that in regulatory taking claims, the focus must be on "the parcel

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<sup>56</sup> See generally *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *Williamson County Reg'l Plann'g Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

<sup>57</sup> See *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987) ("We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.").

<sup>58</sup> See *Tahoe-Sierra*, 122 S. Ct. at 1489.

<sup>59</sup> See *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>60</sup> See, e.g., F. Bosselman, et. al., *THE PERMIT EXPLOSION: COORDINATION OF THE PROLIFERATION* (1976).

as a whole."<sup>61</sup> Indeed, the Supreme Court began its analysis of the appropriate interest by quoting a familiar statement:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .<sup>62</sup>

After stating the general rule, the majority cited the usual cast of cases that amalgamate, rather than separate, property interests for the purpose of takings analysis—*Andrus v. Allard*,<sup>63</sup> *Keystone Bituminous Coal Association v. DeBenedictis*,<sup>64</sup> and, of course, *Penn Central*.

To be sure, those cases—as flawed as they are—support the proposition that courts must analyze the *physical* elements of a particular parcel as a single unit. But the Court was on shaky ground when it attempted to explain why the *temporal* characteristics of real property should be similarly amalgamated, and, in particular, why *First English*—which the Court took great pains to make clear was not in any way qualified by its opinion—did not control the outcome of the case.

The *Tahoe-Sierra* Court began by quoting Justice Brennan's famous dissent in *San Diego Gas & Electric Co. v. City of San Diego*.<sup>65</sup> In that dissent, Justice Brennan proposed a constitutional rule that "the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity *chooses* to rescind or otherwise amend the regulation."<sup>66</sup> As the majority accurately noted in *Tahoe-Sierra*, the Court fully endorsed Justice Brennan's rule in *First English*.<sup>67</sup>

Although this alone would seem enough to dispel the notion that every moment of the potentially infinite life of a fee simple estate must be considered

<sup>61</sup> Compare *Tahoe-Sierra*, 122 S. Ct. at 1481 ("Justice Brennan's opinion for the Court in *Penn Central* did, however, make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on the 'parcel as a whole' . . .") (emphasis in original), with *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plann'g Agency*, 216 F.3d 764, 775 (9th Cir. 2000) ("In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in *the parcel as a whole* . . .") (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 117-18 (1978) (emphasis in original)).

<sup>62</sup> *Tahoe-Sierra*, 122 S. Ct. at 1481 (quoting *Penn Central*, 438 U.S. at 130-31).

<sup>63</sup> 444 U.S. 51 (1979).

<sup>64</sup> 480 U.S. 470 (1987).

<sup>65</sup> 450 U.S. 621 (1981).

<sup>66</sup> *Tahoe-Sierra*, 122 S. Ct. at 1482 (quoting *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting)) (emphasis added).

<sup>67</sup> See *id.* at 1482.

together when evaluating a regulatory taking claim, the majority nevertheless embraced that very idea. The Court rejected the dissent's argument that *First English* settled the temporal segmentation debate in favor of the landowners<sup>68</sup> on the ground that the language in both *San Diego Gas* and *First English* as to the need for compensation, even when the taking is temporary, was preceded by the requirement that there be a taking in the first place.<sup>69</sup> That is true to a certain extent. But the legal principle the majority takes from that factual reality is rebutted repeatedly by the very cases it relied upon. For example, Justice Brennan in *San Diego Gas* noted that "[t]he fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.'"<sup>70</sup> Similarly, the Court in *First English* held that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."<sup>71</sup> It follows that if temporary takings "are not different in kind from permanent takings," when the government has done something to effect a taking, such as prohibit all economically beneficial use on a particular parcel of property, compensation is required. It is difficult to fathom how much more "total" a taking can be when it deprives a landowner of all use options on vacant land—save the "salvage" uses rejected by *Lucas*, such as walking and camping—by way of a moratorium extending for at least thirty-two months. The *Tahoe-Sierra* majority rejected both logic and precedent in holding otherwise.

Finally, the majority accused the *Tahoe* landowners of circular reasoning by asking the Court to "sever a 32-month segment from the remainder of each landowner's fee simple estate,"<sup>72</sup> but failed to see the circularity in its own analysis. As the majority indicated, a total taking of a fee simple estate may well call for compensation as if the parcel were condemned, but that does not mean that government should be relieved from paying something akin to an option price for requiring a landowner to leave land unused for nearly three years and beyond. In the interests of "justice and fairness," the Court essentially conflated the issue of what compensation is due for a temporary taking with the issue of whether a moratorium effects a taking at all. Hopefully, that error was unintentional and can be corrected in the future. But the negative, and entirely plausible, view of the *Tahoe-Sierra* dissenters is that

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<sup>68</sup> See *id.* at 1496-97 (Thomas, J., dissenting).

<sup>69</sup> See *id.*

<sup>70</sup> See *San Diego Gas*, 450 U.S. at 657 (Brennan, J., dissenting).

<sup>71</sup> See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987). For further criticisms of the *Tahoe-Sierra* majority's reading of *First English*, see Breemer, *supra* note 1.

<sup>72</sup> *Tahoe-Sierra*, 122 S. Ct. at 1483.

although the majority only rejected the application of a per se rule to the enactment of all moratoria—and affirmed the possibility that under *Penn Central* a moratorium could result in a taking, it is difficult to see when the majority would ever hold a moratorium to be a taking, given that the “parcel as a whole” is likely to be the infinite duration of a fee simple absolute. Therefore, the “denominator” is now by definition enormous, regardless of the size of the numerator, that is, the duration of the moratorium.

## V. CONCLUSION

It is easy to be irritated by the countless mistakes, misinterpretations, and mischaracterizations in the *Tahoe-Sierra* opinion, regardless of whether one is sympathetic to the interests of government or the rights of landowners. But it is important to remember the context of the issue before the Court. The broad dicta notwithstanding, the Court simply rejected the argument that the mere enactment of a moratorium “imposed during the process of devising a comprehensive land-use plan” always effects a categorical taking. *Tahoe-Sierra* did not empower government to restrict development without compensation, and landowners are not stripped of their constitutional protections merely because the latest tool to limit beneficial or productive uses of land is called a moratorium. In the end, and perhaps despite Justice Stevens’ best efforts, *Tahoe-Sierra* adds little to and takes almost nothing away from takings jurisprudence.

## VI. APPENDIX OF CASES CITING *TAHOE-SIERRA*

1. *Brown v. Legal Fund*, 123 S. Ct. 1406 (2003)
2. *Cooley v. United States*, No. 01-5071, 2003 U.S. App. Lexis 6286 (Fed. Cir. April 1, 2003)
3. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064 (9th Cir. 2003)
4. *Phillip Morris, Inc. v. Reilly*, No. 00-2425, 312 F.3d 24 (1st Cir. 2002)
5. *Espalanade Props. v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002)
6. *Walcek v. United States*, 303 F.3d 1349 (Fed. Cir. 2002)
7. *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002)
8. *Brubaker Asmus. Co. v. United States*, 304 F.3d 1349 (Fed. Cir. 2002)
9. *Barefoot v. City of Wilmington*, 306 F.3d 113 (4th Cir. 2002)
10. *Ken Leahy Constr. v. City of Gladstone*, Nos. 00-35473, 00-35487, 00-35752, 2002 U.S. App. Lexis 25484 (9th Cir. June 4, 2002)
11. *Conti v. United States*, 291 F.2d 1334 (Fed. Cir. 2002)
12. *North Pacific, LLC v. City of Pacifica*, 234 F. Supp. 2d 1053 (N.D. Cal. 2002)

13. Swartz v. Beach, 229 F. Supp. 2d 1239 (D. Wyo. 2002)
14. Holman v. City of Warrenton, 242 F. Supp. 2d 791 (D. Ore. 2002)
15. W.J.F. Realty Corp. v. Town of Southampton, 220 F. Supp. 2d 140 (E.D.N.Y. 2002)
16. Recreation Devs. fo Pheonix v. City of Pheonix, 220 F. Supp. 2d 1054 (D. Ariz. 2002)
17. Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57 (D.D.C. 2002)
18. Heir v. Delaware River Port Auth., 218 F. Supp. 2d 627 (D.N.J. 2002)
19. Currier Builders, Inc. v. Town of York, No. 01-68-P-C, 2002 U.S. Dist. Lexis 9942 (D. Maine July 8, 2002)
20. Rose Acre Farms, Inc. v. United States, No. 92-710C, 2003 U.S. Claims Lexis 71 (Fed. Cl. March 20, 2003)
21. American Pelagic Fishing Co., L.P. v. United States, 55 Fed. Cl. 575 (2003)
22. Appolo Fuels, Inc. v. United States, 54 Fed. Cl. 717 (2002)
23. Reeves v. United States, 54 Fed. Cl. 652 (2002)
24. Bass Enters. Prod. Co. v. United States, 54 Fed. Cl. 400 (2002)
25. Cane Tenn., Inc. v. United States, 54 Fed. Cl. 100 (2002)
26. Seiber v. United States, 53 Fed. Cl. 570 (2002)
27. Arctic King Fisheries v. United States, No. 99-49C, 2002 U.S. Claims Lexis 280 (July 19, 2002)
28. Lost Tree Village Corp. v. City of Vero Beach, 838 So. 2d 561 (Fla. Ct. App. 2002)
29. Covington v. Jefferson County, 53 P.3d 828 (Ida. 2002)
30. McPherson Landfill, Inc. v. Board of County Comm'rs, 49 P.3d 522 (Kan. 2002)
31. W.R. Grace & Co.-Conn v. Cambridge City Council, 779 N.E.2d 141 (Conn. 2002)
32. Haberman v. City of Long Beach, 298 A.D.2d 497 (Sup. Ct. NY. App. Div. 2002)
33. State ex rel. R.T.G., Inc. v. Ohio, 780 N.E.2d 998 (Ohio 2002)
34. Ohio ex rel. Shem v. City of Mayfield Heights, 775 N.E.2d 493 (Ohio 2002)
35. Hasman v. Genesis Outdoor, Inc., 2003 Ohio 923 (Ohio Ct. App. 2003)
36. Mays v. Board of Trs. of Miami Township, 2002 Ohio 3303 (Ohio Ct. App. 2002)
37. Boise Cascade Corp. v. Board of Forestry, 63 P.3d 598 (Ore. Ct. App. 2003)
38. Machipango Land & Coal Co. v. Department of Evtl. Protec., 799 A.2d 751 (Penn. 2002)

39. SDDS, Inc. v. South Dakota, 650 N.W.2d 1 (S.D. 2002)
40. Eggleston v. Pierce County, 64 P.3d 618 (Wash. 2003)
41. Berst v. Snohomish County, 57 P.3d 273 (Wash. Ct. App. 2003)
42. Woodland Manor, III Assocs. v. Reisma, C.A. No. PC89-2247, 2003 R.I. Super Lexis 35 (Feb. 24, 2003)
43. Vellequette v. Town of Woodside, AO91682, 2002 Cal. App. Unpub. Lexis 6690 (July 23, 2002)