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Tahoe Case: When Environmental Regulations Go “Too Far”

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Abstract: This article reviews a recently decided United States Supreme Court case which held that a thirty-two month moratorium on development did not constitute a taking per se. The Court, building on logic from other recent decisions, found that moratoria are an effective land use tool, which prevent inefficient land development and consequently lead to increased land value. This article analyzes the court’s decision to hold that moratoria are never takings per se, instead holding that a court shall perform an ad hoc analysis to determine a moratorium’s constitutionality.

A recent U.S. Supreme Court case upheld a 32 month moratorium on development and resolved questions regarding regulatory takings that have been vigorously debated for years. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, [535 U.S. ____ (2002)] the court answered questions that had been raised but not resolved as recently as last year in the case of *Palazzolo v. Rhode Island* [121 S.Ct. 2448 (2001)]. First, some background.

Local governments are often discouraged from acting to protect the environment because they are concerned that their regulations may go too far and constitute a regulatory taking. As early as 1922, the U.S. Supreme Court held “that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” [*Pennsylvania Coal Co. V. Mahon*, 260 U.S. 393 (1922)] Occasionally, courts find that a regulation adopted to protect the public interest is so burdensome that it effectively takes title to the land. The constitutions of the United States and each of the 50 states allow local governments to appropriate private land interests for public purposes but require that they compensate the affected owners by paying them the market value of the land interest taken. [N.Y. Const. Art. I, § 7] Particularly onerous regulations have, from time to time, been called regulatory takings, forcing the regulator to pay just compensation for the values taken during the time the regulation remains in effect.

The doctrine of regulatory takings limits governmental authority that is otherwise extremely broad in scope. Local land use and environmental regulations, in fact, enjoy several legal preferences. They are presumed to be constitutional. Those who

challenge them are said to have a particularly heavy burden of proof that the regulation is arbitrary or capricious, a tough burden to carry. The courts use a rational basis test to measure local laws affecting land use saying that any rational basis justifying the adoption of the law is sufficient to overcome a claim that it is arbitrary. Local land use and environmental laws are legislative acts. Normally, judges defer to legislative judgments and do not heavily scrutinize legislative acts. When local laws leave no viable economic use, when they are not justified by legitimate public interests, or when they violate fundamental property rights, such as the right to exclude the public from the owner's possession, these laws risk being invalidated as regulatory takings and causing the regulator to pay just compensation.

In *Palazzolo v. Rhode Island*, [121 S.Ct. 2448 (2001)] the U.S. Supreme Court held that a landowner is not precluded from attacking a regulation that was in place when he acquired title to the land. Palazzolo owned a 20 acre parcel, most of which was salt marsh subject to tidal flooding. Development would have required significant fill, up to six feet in some places, to support any development. Under the Rhode Island coastal wetland regulations, development on the tidal wetlands portion of this site was prohibited unless the owner secured a special exception permit for an activity that serves a compelling public purpose which benefits the public as a whole. The responsible state agency denied Palazzolo's application to fill 11 of 18 tidal wetland acres for a private beach club. Palazzolo had acquired title to the coastal property after the tidal wetlands regulations had been adopted. Under case law in some states, this fact would preclude a landowner from challenging the preexisting regulation as a taking. In *Gazza v. DEC*, for example, the New York Court of Appeals held that "a promulgated regulation forms part of the title to property as a preexisting rule of state law" precluding the owner from raising a takings challenge against that rule. [89 NY 603 (1997)]

A majority of the U.S. Supreme Court in *Palazzolo* could not agree on whether the existence of a regulation at the time of purchase should be considered in determining whether the regulation interferes with the purchaser's investment-backed expectations, one of several factors used to determine if a taking has occurred. Without guidance on that issue, the Supreme Court remanded the case to the Rhode Island courts for a determination as to whether a taking had in fact occurred.

The U. S. Supreme Court also refused to consider Palazzolo's claim that the relevant parcel to use in a takings case is the land affected by the regulation, in this case the 18 wetland acres in his 20 acre parcel. The majority decision recognized that determining the parcel of land that should be considered when a takings claim is raised is the "persisting question of what is the proper denominator in the takings fraction." Since this issue was not presented in the petition for certiorari to the Court, the majority refused to consider it.

The questions left open by the *Palazzolo* case were addressed in 2002 in the case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*. [535 U.S. ____ (2002)] In *Tahoe*, the U.S. Supreme Court held that a moratorium on all development lasting 32 months was not, by itself, a taking. At issue in the *Tahoe* case

was the validity of a moratorium on development adopted by the Tahoe Regional Planning Agency to protect the unique environment and tourist-based economy of the Tahoe region. The Agency was created by a novel compact between the legislatures of California and Nevada. The compact gave land use authority over development in the region to the Lake Tahoe Regional Planning Agency. This area had previously been regulated by agencies of two states, five counties and several municipalities, as well as the Forest Service of the Federal Government. The objective of the regional agency was to coordinate and regulate development in the Lake Tahoe Basin and to conserve its natural resources.

In creating the Agency, the legislatures of the two states were motivated by the threat posed by development to the clarity of Lake Tahoe which had begun to cloud as early as the late 1950s. The culprit was locating development in the wrong place, particularly in the steeper drainage areas near streams and wetlands. These resources act as filters for much of the nitrogen, phosphorous, and other pollution that water runoff carries. By 1980, it was obvious that the initial land use regulations adopted by the Agency had failed. After the withdrawal of support by the State of California, the Agency's structure was redefined by amendments to the compact law in that year. The Agency was directed by the two states to develop environmental threshold carrying capacities including standards for air quality, water quality, soil conservation, vegetation preservation, and noise. This new legislation halted temporarily all development in critical environmental areas in region, giving the Agency the time it required to consider, draft, adopt, and implement needed new regulations. That moratorium lasted for 32 months.

The legal challenge to this moratorium was launched by a nonprofit corporation representing 400 owners of land in the critical environmental areas of the Basin who had purchased their parcels prior to the 1980 changes in the compact legislation. They claimed that the moratorium on the development of their properties was a regulatory taking. Their essential argument was that, even though the regulation does not take the future right to develop, the temporary taking of all development rights, for the 32 month period, itself violates the constitution.

The owners' argument raised an issue that had been hotly debated for years. Are property rights in a single parcel of land severable for the purpose of takings law? If property rights are defined in segments and one of those segments, such as the present right to develop, is totally prohibited by a regulation, does that regulation constitute a total taking under *Lucas v. South Carolina Coastal Council* [505 U.S. 1003 (1992)]? If property rights are to be segmented in this way for takings analysis, then it would be possible to argue that regulations that prohibit use of a portion of the physical property, as in the *Palazzolo* case, or that limit the functional enjoyment of the property – the extent to which the owner can use the land – might constitute takings as well.

Broadly stated, the question was whether a regulation that totally limits the use a portion of the land, whether limited by time, use, or space, deprives its owner of all economically beneficial use under the constitution. Specifically, the legal question

addressed by the *Tahoe* case was whether a moratorium on development of land constituted a regulatory taking, *per se*, that is, without any further inquiry into the circumstances. The landowners argued for a categorical rule which would classify a development moratorium as a taking without considering the moratorium's length, the severity of the problems addressed, the good faith of the agency involved, or what it did to conduct the required studies, analyze the underlying problems, and draft appropriate new regulations.

The U.S. Supreme Court rejected the plaintiffs' arguments and refused to declare that a moratorium is a categorical taking, regardless of the circumstances. In arriving at this conclusion, the Court also rejected the plaintiff's argument that property interests should be segmented, in time, use, or function, for the purpose of determining whether the interests have been taken. The decision resolved the long standing debate on this matter, affirming the 'parcel as a whole rule' adopted by the Court in *Penn Central v. City of New York*. [438 U.S. 104 (1978)] "Logically, ' the Court noted, "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."

The *Tahoe* court held that a moratorium, like most other land use regulations, is subject to an ad hoc inquiry that considers the circumstances of the case such as the character of the regulation, the public interest to be achieved, the extent to which it interferes with the owner's investment-backed expectations, and how severely they are affected by the regulation. In other words, a moratorium may be a taking, under the circumstances of a particular case, but is not categorically so. In the *Tahoe* case, the Court noted that the lower federal courts had concluded that the 32 month period was not unreasonable and that the Agency had acted in good faith during that time to do what needed to be done before the moratorium could be lifted. It further recognized that the consensus of land use planners is that moratoria are an essential tool of successful development.

Moratoria prevent landowners from rushing to develop, causing inefficient and ill-conceived growth before a comprehensive plan can be adopted. They prevent regulators from making hasty decisions which would disadvantage landowners as well as the public. The Court recognized that land values can actually increase during a moratorium and that the public and all landowners are reciprocally benefited by moratoria because they protect everyone's interest against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted. Of course, moratoria can be enacted that are not reasonable in these ways and they are vulnerable, under *Tahoe*, to challenge.

The *Tahoe* case did not squarely raise the issue of whether the fact that a landowner takes title to property after a regulation is adopted is relevant to that owner's taking claim. Justice Scalia stated in *Palazzolo* that "the fact that a restriction existed at the time the purchaser took title ... should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." In her concurring opinion, Justice O'Connor noted that "Today's holding does not mean that the timing of

the regulation's enactment relative to the acquisition of title is immaterial....” She cited *Penn Central* for the proposition that several factors are considered in determining whether a regulation constitutes a taking, including whether it interferes with the landowner's legitimate investment-backed expectations. She noted that “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.”

In *Tahoe*, the majority decision quotes O'Connor's statement on this matter in full and calls her comments “instructive.” It appears likely that, in future cases, the court will consider as instrumental the fact that an owner has purchased land after a regulation is adopted in determining whether the owner's investment-backed expectations are violated.