

**FEDERAL SUPREME COURT FINDS NO
TAKING IN THIRTY-TWO MONTH MORATORIUM**

By Edward J. Sullivan

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, ___ S.Ct. ___ (2002 W.L. 654431 (U.S.)) (April 23, 2002), a majority of the United States Supreme Court upheld a moratorium on development in the Lake Tahoe Basin against a *per se* takings challenge. Defendant authorized two moratoria while it studied environmental means of preserving the clarity of the waters of the lake. That clarity was threatened by development in the lake basin because of operations on the grounds and by the consequent increase in impervious surfaces. Defendant, an agency created by an interstate compact approved by Congress in 1968 and amended in 1980, began work on development restrictions on steeper slopes and "Stream Environmental Zones" ("SEZs"). As a result of the two moratoria, a 32-month delay in development occurred. A further delay was occasioned when an injunction was granted against the plan that resulted from work done during the moratoria, which lasted for another three years. The court said that that injunction-based moratorium was not before it in this case.

Plaintiff is a landowner organization of 2,000 members, some of whom own land within steep slopes and the SEZ areas. Plaintiff and its members sought damages for alleged takings because of the 32-month moratorium initiated by the agency. The district court found no Penn Central taking, using the three factors in that case (i.e., economic impact on the plaintiff, interference with reasonable investment-backed expectations, and the character of the regulation), chiefly

because there were no individualized facts on any of the property owner claims. However, the district court felt that, though there was some value to the land during the moratorium, the landowners in the basin were deprived of all viable economic use during that period, and compensation was required for that loss under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

Both parties appealed to the Ninth Circuit, defendant challenging the Lucas 32-month moratorium takings claim upheld by the district court, and plaintiff unsuccessfully appealing the district court's denial of its further claim based on the three-year injunction. The Ninth Circuit found no basis for a Lucas claim and reversed the district court. The Ninth Circuit had found a takings analysis based on three dimensions, i.e., the physical (size and shape of the property), the functional (use or disposition of the property), and the temporal (relating to the duration of the regulation at issue), and rejected plaintiff's contentions that any temporal denial of all use constituted a taking. In rendering its decision, the Ninth Circuit distinguished Lucas, which denied all use for the foreseeable future and said that First English Evangelical Church v. Los Angeles County, 482 U.S. 304 (1987), dealt with the remedy for a taking, rather than establishing or elaborating upon a test for a taking, concluding that the three Penn Central factors served the purpose of establishing that test. Plaintiff sought certiorari against the Ninth Circuit decision, which was based only on the 32-month moratorium. The United States Supreme Court granted certiorari and affirmed.

The majority opinion authored by Justice Stevens characterized plaintiff's attack as a facial one, so that plaintiff must show that the "mere enactment" of the regulation effected a taking and the three Penn Central factors need not be

weighed. That opinion cited Justice O'Connor's concurring opinion on Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001), to say that the court eschewed "categorical rules" for takings and drew a careful distinction between physical takings claims (where property was invaded) and regulatory takings claims (where use was restricted), and where the takings analysis is based on "ad hoc, factual inquiries."

The court added:

The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.

In this case, plaintiff relied on the second prong of Agins, contending that all viable economic use of the land was deprived. However, the majority used the Ninth Circuit's three-dimensional analysis of this prong of Agins so as to prevent a too-narrow weighing of property interests in determining whether all viable economic use were deprived. The court noted it had upheld restrictions which allowed use of some, but not all, portions of land, such as the requirement for retention of coal pillars to prevent collapse of buildings or streets or setback regulations, and indicated that these restrictions would not normally cause a taking.

The majority opinion also noted that First English established a rule regarding the *remedy* for a taking, but did not provide guidance as to *when* such a taking occurred. The court also noted that, in First English, on remand, the California court did not find a taking, and the Supreme Court had denied review. The majority further noted that, in First English, the court had exempted from categorical takings those restrictions mandated for safety reasons, as well as

normal delays in issuing permits. Thus, unlike the Lucas decision, the restriction was not "unconditional and permanent." Anything less than a total loss of value, then, requires the application of the Penn Central analysis. To do otherwise, the majority observed, would require every delay, like any permanent denial of use on a portion of a parcel, to be equated to a taking. Instead, the court said it must focus on "the parcel as a whole," concluding:

The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then Penn Central was the proper framework. [Footnote omitted.]

The court noted the Restatement of Property defined a property interest in both its physical and temporal dimensions, so that both must be denied totally to effect a taking, adding that mere fluctuations of value are incidents of ownership and do not necessarily result in a categorical taking. The court also said its standard of "fairness and justice" so as to prevent individuals from bearing the burdens that should be borne by the public as a whole was also to be weighed in determining whether a taking occurred. However, there was no *per se* taking in this case to justify a categorical rule that any deprivation of all use, however brief, could be equated to a taking. To do so, the court observed, would render ordinary governmental exercises of power quite impossible and would encourage hasty decision-making. Such a path would not be consistent with the Supreme Court's approach of weighing all the circumstances. The majority opinion concluded that "fairness and justice" are indefinite terms, but that moratoria are recognized as essential tools to regulate development. In addition, such tools are most prone to singling out individual property owners for unfairness and present

a modicum of confidence that property values will continue to rise. The majority opinion specifically rejected any set time after which a moratorium would result in a taking, preferring to look at the circumstances of each case, and affirmed the decision of the Ninth Circuit in this case.

The Chief Justice, joined by Justices Scalia and Thomas, dissented, characterizing the deprivation of viable economic use in this case as one for six years, instead of 32 months. The dissenters would have found a taking and would have stressed the first Penn Central factor, i.e., the impact of the regulation of the plaintiff. The dissenters suggested that defendant actually caused the six-year development delay as the injunction was issued against defendant's arguably poorly drafted plan so that defendant was the "moving force" behind the entire six-year development delay. Moreover, the dissenters saw a taking as a one-dimensional matter, i.e., all development was prohibited for a time, which would automatically equate to a taking, and saw a danger in encouraging governments to label restrictions to be "temporary" in nature. The dissenters asked rhetorically whether an order to freeze the development in the Lake Tahoe Basin for six years while the defendant agency went about acquiring land would have been seen to be the "practical equivalent" of a taking so as to require compensation. The dissenters also faulted the majority for stressing property value, rather than prohibition on use, for takings purposes. While conceding the statutory period of delay may be a part of the background of state property law under Lucas and might be valid up to approximately one year, the six-year period at issue, according to the dissenters, effected a taking and required compensation.

Justice Thomas, joined by Justice Scalia, also dissented, to deal specifically with the "parcel as a whole" rule, which it opined was not settled law at all. This dissent also suggested that First English did provide substantive takings law, as opposed to confining itself to the remedy for a taking. The dissent would find all deprivation of use, even for a temporary period, to equate to a taking.

Perhaps with the virtue of hindsight, this decision is unsurprising. Justice Stevens, as the senior justice for the majority, assigned the case to himself. He asked in oral argument whether a ten-minute deprivation of use constituted a taking, and counsel for petitioner was logically obliged to answer in the affirmative. That answer effectively ended the case. To some extent, it is Justice Stevens who had the last word through his opinion. On the denial of a petition for rehearing en banc, Judge Kozinski contended that his brethren in the Ninth Circuit majority in this case had adopted Justice Stevens' First English dissent and suggested that the majority of the Supreme Court thought otherwise on the takings question. This was a fairly effective way of signaling to the conservative majority on the court that Justice Stevens' views, adopted by the Ninth Circuit, should be rejected once more in this case if certiorari were requested and granted. However, it is Judge Kozinski who has the dilemma of answered prayers—certiorari review was sought and granted; however, the opinion that resulted was something other than what Judge Kozinski had predicted.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, ___ S.Ct. ___ (2002 W.L. 654431 (U.S.)) (April 23, 2002).