

## Temporary Regulatory Takings

A recent U.S. Supreme Court case represents a landslide in the erosion of property and development rights.

**W**hen government regulation of private property becomes effectively indistinguishable from the permanent seizure of that property, the law requires that just compensation be paid to the owner. This right to compensation for regulatory takings has also been extended to temporary takings since at least 1987. However, in its April 2002 decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the U.S. Supreme

Court by a 6-3 margin rejected an opportunity to establish a sound principle upon which future determinations of temporary regulatory taking might be more easily decided. As a result, the court also failed to protect more firmly property owners' rights to compensation in the face of lengthy prohibitions on all use of an owner's land. This groundbreaking ruling has significant real-world implications for developers, farmers, real estate agents, and others involved in private property development.

The *Tahoe-Sierra* case arose from what ended up being a 32-month moratorium prohibiting construction in the Lake Tahoe Basin while the local planning agency completed a comprehensive regional development plan. The length of the moratorium far exceeded deadlines imposed by law for completing the planning. In a move that appears to reverse recent trends, the Supreme Court decided in *Tahoe-Sierra* that the moratorium was not a regulatory taking.

In arriving at the *Tahoe-Sierra* decision, the court rejected three possible approaches by which a regulatory taking might be determined: that all temporary deprivations of economically viable use of private property constitute compensable takings; that all such temporary deprivations beyond a certain length of time are compensable takings; and that all such temporary deprivations are compensable takings, with the exception of normal delays in obtaining building permits, zoning variances, and other traditional requirements. All three options represented relatively clear definitions of a temporary taking.

In his dissenting opinion, Chief Justice William H. Rehnquist advocated the third approach and argued that

blanket moratoria to facilitate comprehensive planning are not traditional limitations on property rights; typical delays incident to obtaining permits and zoning variances would constitute traditional limitations, in his view. Rehnquist's alternative theory would have provided sufficient security to landowners while permitting government agencies to exercise their traditional regulatory powers. The majority, however, steadfastly refused to apply any such fixed principle for determining when compensation was due as a result of temporary deprivations of use. The court, instead, preferred to rely on the 1978 case *Penn Central Transportation v. New York City*, in which the court was content to rely on "essentially ad hoc, factual inquiries" in order "to allow careful examination and weighing of all the relevant circumstances."

Such a flexible approach is unsatisfying when there is an alternative that could yield more consistent and predictable results. After all, the very essence of private property lies in the security of tenure and private control. But this security of tenure is compromised by an approach that relies heavily on the subjective and inherently unpredictable discretion of a judge. In fact, the most significant aspect of the case is precisely its seeming reversal of what otherwise has been a trend toward clarifying the acceptable limits of regulation.

According to tradition, a taking occurs if regulation advances no legitimate state interest, denies the property owner all economically viable use of the land, or forces a small group of people to bear burdens that, in all fairness, should be borne by the public as a whole. In the 1987 case *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the Supreme Court recognized that "temporary" takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." Similarly, in June 2001, the Supreme Court held in *Palazzolo v. Rhode Island* that governments could not burden property by "repetitive or unfair land-use procedures in order to avoid a final decision" and, thus, prevent or substantially delay development permits. Nonetheless, the *Tahoe-Sierra* decision permitted a three-year prohibition to stand without compensation. The court's failure to embrace a reliable principle regarding moratoria during lengthy planning processes renders property rights less secure than they were before the *Tahoe-Sierra* decision. The force of both the *First English* and the *Palazzolo* rulings is now in question.

One subtle but potentially disruptive element of the *Tahoe-Sierra* decision lies in its potential implications for en-



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JEFFREY B. TEICHERT is the owner of Teichert Law Office, PC, a land use, real estate, and environmental law firm in Bellingham, Washington.

vironmental or other regulations that prevent all activities on a distinct portion of a tract. In *Palazzo*, the Supreme Court acknowledged that its rulings in earlier cases had held that a devaluation of land caused by regulation should be measured against the value of the entire tract to determine if the regulation was a taking, but added that it had "at times expressed discomfort with the logic of this rule." That statement caused many observers to believe that the Supreme Court might decide in the near future that a regulation depriving an owner of a distinct segment of property constitutes a taking of that segment. The *Tahoe-Sierra* decision makes it unlikely that the court will issue such a ruling regarding a partial taking, at least in the near term. In *Tahoe-Sierra*, the court held that "[a]n interest in property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety." In other words, a partial deprivation of time is considered similar to a partial deprivation of space. The court held that "[t]he starting point for the court's

analysis should have been to ask whether there was a total taking of the entire parcel[.]" If there is not a permanent taking of the entire tract, the court will apply the flexible *Penn Central* balancing test, leaving the owner's rights insecure. Furthermore, the *Tahoe-Sierra* decision suggests that the court does not recognize or call for compensation for losses due to a taking of time or of a distinct space, unless the regulation amounts to a taking of the owner's entire interest. But it could be argued that the fact that the property owner may regain the use of his or her property after a lengthy moratorium should not prevent the courts from recognizing that property rights have been taken, given the inherently finite duration of ownership.

While the *Tahoe-Sierra* case is certainly not a victory for private property and development rights, it has some positive language for owners and developers. Notwithstanding that the court has chosen to apply a flexible balancing test rather than a more determinate legal standard, it has stated that "extraordinary delay" may create an unconstitutional taking, depending on the specific circumstances. Additionally, the opinion hinted that its analysis

could be limited to comprehensive planning and not apply to delays in granting an individual building permit. There is a "reciprocity of advantage" for all property owners in comprehensive planning in which "each of us is burdened somewhat by such restrictions, [but] we, in turn, benefit greatly from the restrictions that are placed on others," the court stated. Long delays in processing an individual permit application fit better within the principle discussed in the *Penn Central* case, that a taking occurs when the government forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The court found in *Tahoe-Sierra* that "the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel."

This language provides some broad principles that a creative attorney can use to argue in a specific case that a temporary deprivation of the use of private property has effected a taking, particularly if the delay is in processing an individual permit application. ■

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