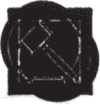

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Supreme Court Tightens Purse on Regulatory Takings

Decision has attorneys rethinking strategies, cost-benefit analysis

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A regulation that temporarily restricts the use of privately owned land is not a per se taking under the Fifth Amendment, but must be evaluated on a fact-intensive, case-by-case basis to determine whether it mandates compensation, the Supreme Court has held. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency.*

Attorneys who litigate regulatory taking cases say the decision did not necessarily make new law, but it may cause them to adjust their litigation strategies and rethink the economics of pursuing such actions.

"Before this decision, some landowners and their attorneys may have been more willing to challenge moratoria on development, thinking their cases would only be about quantifying damages," says Jerome Pesick, Southfield, MI, Co-Chair of the Regulatory Takings Subcommittee of the Section of Litigation's Condemnation, Zoning and Land Use Litigation Committee. "Now it's much more clear that such challenges will be long and drawn out, which will probably have a chilling effect on landowners."

"If the government decides to defend its regulation, the property owners will be looking at protracted litigation."

For land use planners, *Tahoe-Sierra* may thaw some of the chill that earlier decisions had on their efforts, says Douglas T. Kendall, Washington, DC, Executive Director of the Community Rights Counsel, which submitted an amicus brief in the case.

An organization of landowners with real estate interests around Lake Tahoe had claimed that the regional planning agency had effected a taking of their property by imposing two temporary moratoria on development along the lake.

The planning agency said the moratoria were necessary to preserve the status quo while planners formulated conservation-minded land use plans. The two moratoria remained in effect for 32 months, although the dissent argued that the actual restriction on development lasted more than six years.

Such moratoria are treated as a valid exercise of state police powers and generally are encouraged to help local governments orchestrate community land use projects. But they raise constitutional questions under the Fifth Amendment's prohibition on taking private lands for public use without just compensation.

"Just as a part of good government, officials should do all they can to link the scope of moratoria to the particular planning processes for which they are being imposed."

The landowners in *Tahoe-Sierra* viewed the temporary ban on all economic development as takings under the Supreme Court's 1992 landmark case, *Lucas v. South Carolina Coastal Council*. In *Lucas*, the state permanently banned the plaintiff from building on his beachfront property after Hurricane Hugo swept through the region. The Court said the regulation deprived the plaintiff of "all economically beneficial uses of his land" and was therefore a *per se* taking that required compensation.

Citing *Lucas*, the landowners in *Tahoe-Sierra* argued that the moratoria effected a per se taking, leaving the amount of just compensation as the only issue to resolve.

The Court disagreed. It limited the holding in *Lucas* to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." Anything less than a "complete elimination of value" or a "total loss" would require a fact-intensive determination of whether a taking had occurred.

The Court contrasted the facts in *Lucas* and explained that the moratoria had not completely extinguished the value of the landowners' property. With a finite duration, the regulation affected only a portion of the parcel's temporal dimension and did not deprive the owner of all economically beneficial use.

The Court also distinguished "regulatory" takings from "physical" takings where the government takes possession of a property interest for some public purpose and is categorically compensable. Regulations that merely restrict the uses of private property are takings only if they go "too far," a determination that requires a case-by-case analysis of "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."

Attorneys litigating in the wake of *Tahoe-Sierra* need to pay particular attention to the Court's discussion of the "property as a whole" concept, Kendall says. "*Tahoe-Sierra* has ruled definitively that lower courts are to apply the parcel-as-a-whole rule in regulatory takings cases. With that settled, you can expect developers to start focusing on the factors that go into determining what precisely is the parcel as a whole."

Attorneys defending regulations against Fifth Amendment challenges should retain an appraiser to determine if the moratoria will have a relatively low impact on property values, Kendall adds. To ameliorate any negative effects the regulation might have, "they should also look at the reciprocity advantage or what the landowner may gain through the planning process."

Kendall and Pesick caution planners and their attorneys not to read *Tahoe-Sierra* as a license to overreach. "Just as a part of good government, officials should do all they can to link the scope of a moratorium to the particular planning process for which it is being imposed," Kendall says.

Tahoe-Sierra represents a rare setback for what has become known as the property rights movement, says Jill S. Gelineau, Portland, OR, Co-Chair of the Regulatory Takings Subcommittee of the Section of Litigation's Condemnation, Zoning and Land Use Litigation Committee. "Since the mid-eighties, the Supreme Court has taken a renewed interest in the Fifth Amendment and in protecting private property rights."

"Now attorneys representing private property owners will have to advise their clients that, if the government decides to defend its regulation, the property owners will be looking at protracted litigation," Pesick says.

The decision "reinforces what I have always told my clients: It is a rare, rare facial challenge in a regulatory takings case that will ever be successful," Gelineau says. Such cases "need a client who is willing to stand on principal" because the cost involved in pursuing such a fact-intensive challenge can be prohibitive, she says.

But private property owners can still prevail, Gelineau says, if they can survive summary judgment. Jurors are likely to be property owners themselves and are "likely to be incredulous that this can happen," she says.

Kendall, however, says the decision is "good news for planners and small governments seeking to enact reasonable plans and land use controls. If you are acting in a reasonable manner and not completely destroying property values, you should not find yourself losing a regulatory takings claim."

Citations:

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

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).