TAHOE-SIERRA PRESERVATION COUNCIL
v.
TAHOE REGIONAL PLANNING AGENCY:

WHAT DID IT DECIDE, AND WHAT DID IT NOT?

by

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If you believe all you read, then the U.S. Supreme Court just saved Lake Tahoe — agreed by all to be a national treasure — from environmental degradation. (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 2002 DJDAR 4399,) That made for good headlines, but it was factual fantasy. The *Tahoe-Sierra* case was *not* about *whether* to protect environmental treasures. Don't be fooled by editorial commentary saying that it was. The only issue before the Court was *how* — in the context of a constitutional democracy — to engage in environmental protection and *who* should pay for it. Should it be society at large that benefits from draconian regulations, or should it be the faultless individuals whose property winds up in the path of these regulations?

The Court decided it was OK to make randomly selected landowners foot the bill so the rest of us could enjoy Lake Tahoe. I dissent — and so should you. You could be the next target of this kind of land grab. Aside from the unfairness to the individual landowners, however, the decision adds little to (or subtracts little from, depending on your viewpoint) general takings jurisprudence.

The facts behind the headlines need to be understood. Lake Tahoe was changing. And the problem — a loss of some of the lake's storied clarity — was at least in part the increasing development in the area around the lake. California and Nevada decided they needed a new

plan for development and preservation in the area and authorized the Tahoe Regional Planning Agency (TRPA) to prepare it.

To preserve the status quo, TRPA enacted a freeze on the development of land it considered hazardous to the lake's clarity. That was in 1981. The properties involved were quarter acre, single family lots in subdivisions that had already been partially developed. In other words, there were no large tracts involved. And these small lots were generally owned by different individuals. There were no major developers involved here, just moms and pops who wanted a home for vacation or retirement.

That initial freeze lasted two years. It wasn't enough for TRPA to complete its job. Two subsequent freezes (one formal, one informal) extended the period to 32 months. That brings the story down to 1984. At that point, TRPA adopted its new plan for the region. That new plan made the "temporary" freeze on these parcels permanent. However, because the rest of the 1984 plan granted additional development rights to others in the area, a federal court enjoined its operation. That injunction remained in effect until 1987, when TRPA adopted another plan. That one still exists today, and it continues to freeze virtually all of the lots that were involved in the *Tahoe-Sierra* litigation.

Twenty one years, and counting. *That* is the "temporary" period that the individual victims of TRPA's planning activities have suffered. So the next time someone says the delay was only temporary, keep in mind that the problem is definitional. A significant number of the people who began that litigation in 1984 have died in the interim.

So what does the decision stand for?

First, good planning is a good idea. I suspect, however, that there is not universal agreement about what constitutes "good" planning. Although the press coverage (and the planning/environmental

spin on the decision) focuses on the pristine nature of Lake Tahoe and the need to preserve what TRPA refers to as "the crown jewel of the Sierras," the planning is strange, to say the least. The "good" planning in this case prevented individual owners of small (quarter acre) lots in the hills from developing anything — unless something was already built on their lot. So some of those who were frozen out were literally next door (sometimes on both sides) to lots with homes on them. Beyond that, the Los Angeles Times recently reported (and illustrated graphically with the kind of aerial photo the "good" planners like to avoid) that development on the lakeshore — by those with wealth or political clout or both — continues apace. Thirty-million dollar homes "in excess of 10,000 square feet have continued to sprout on the shoreline. Among the denizens are financier Michael Milken, Mike Love of the Beach Boys and heirs to the Singer sewing machine fortune." And the same goes for commercial lakeshore development, as "a veritable alpine village of new hotels, restaurants and shops is rising . . . ." (Eric Bailey, "Lake Stays Blue but Critics of Panel See Red," Los Angeles Times, p. B5, May 13, 2002.) "Good planning?" Tell it to the *Tahoe-Sierra* mom and pop plaintiffs who were shut out for the benefit of Michael Milken and his pals, and are now *de facto* subsidizing those huge homes and their private docks.

Second, moratoria can be useful tools. Please note that the Court expressly refused to validate *all* moratoria, just as it refused to condemn them all. In the Court's words:

> "In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case." (Slip op., p. 17.)

Thus, amid all the cheering from the planning/environmental fraternity, the rule they got was that each

moratorium is subject to attack and examination on its own facts. The Court noted more than once that the *Tahoe-Sierra* plaintiffs might have won such a challenge if they had made it. The reason the Court was faced with an all-or-nothing decision was that the plaintiffs made a facial challenge, rather than one keyed to their individual circumstances as the regulations were applied to them. What the Supreme Court refused to do in this case was to adopt a blanket rule that all moratoria are always takings, with only the amount of compensation in issue.

What the Court made clear is that it doesn't like categorical rules in this field.

Was this an important decision? I doubt it.[1] It *would* have been an important decision if the Court had ruled in favor of the landowners. In that case, it would have established a rule that *all* moratoria are *per se* takings. In other words, adoption of a moratorium would be the equivalent of adoption of a declaration of taking; the only issue would be the amount of compensation due.[2]

However, the decision the Court rendered merely says that moratoria can be useful planning tools and, whether any individual moratorium is a taking will have to be determined on a case-by-case basis. Hardly earth-shaking. Indeed, no real change from the rule as it stood before the decision came down.

So what did the Supreme Court think it was doing? Making the world safe for the planning community. The majority opinion is littered with generalities about the need for good municipal planning. But nothing is said about the resulting cost or who would have to bear it. For a decision by the so-called liberal, or progressive, wing of the Court, the opinion is curiously devoid of any concern for individuals. It is a bloodless, lifeless, soulless bureaucratic screed, callously nullifying cherished constitutional rights of individuals who have done nothing wrong.

This country is governed by a Constitution. That document outlines how our government functions and places parameters around its actions. In its Bill of Rights, the Constitution enumerates specific things that the government may not do. Importantly, the Bill of Rights is designed to protect individuals against the overreaching actions of even well-intended government agencies. Nothing in the Bill of Rights so much as hints at protecting the government (or the general collective) against the exercise of constitutional rights by individuals.

One of the cornerstones of the Bill of Rights is the protection of the rights of those who own property. The importance of that protection cannot be overstated. Throughout history, countries in which private property was protected have flourished. Those in which it was not have languished — or worse.

This country has long gotten past the idea that the Fifth Amendment's protection of private property from uncompensated takings is limited to actual physical seizure. The reality of the modern regulatory state is what prompted Justice Oliver Wendell Holmes, Jr. to conclude for the Court some eighty years ago that when land use regulation "goes too far" the courts will recognize it as a taking of property that must be compensated.

In the Tahoe context, that should have required looking at the reality of what TRPA did to these hundreds of landowners who were frozen out to preserve the aesthetic sensibilities of the rest of us. Twenty one years and counting. No use, and no ability to sell to anyone else for anything approaching fair value. After all, who buys land that cannot be used? Answer: government scavengers who pick up these lots at distress, below-market prices in violation of the "just compensation" guarantee.

The Supreme Court failed this test of constitutional courage. Faced with a clear preclusion of all use of these lots for decades, the Court first wrote its own issue to be decided, thus slicing

the period of denial of use so that it could deal with only a mere 32 month period, and then concluded that it could not develop any hard and fast rules for 32 month periods.

With respect, that result ignores both the Constitution and reality. For all the platitudes about the need for planning, this case was solely about ends and means. No one challenged the end of preserving Lake Tahoe. The only question was how that would be done.

There were multiple answers. (1) Have California and Nevada dip into their respective general funds. After all, if Lake Tahoe is a "crown jewel," the task of protecting crown jewels rests with the Crown, not with randomly selected individuals. If the populace at large isn't willing to fund the protection, then perhaps it isn't worthwhile doing after all. (2) Levy a special tax on those whose homes and businesses were already built around the lake, or those whose lots were freed for development. Those people would stand to benefit substantially by restricting further development and cleaning up the lake. Those who got the benefit should also shoulder the burden. (3) Stick it to the absentee owners of small, undeveloped lots. Politically, this was a whole lot easier. Most were powerless individuals, and some of them weren't even aware of what was happening.

The Supreme Court decided that preservation of this national treasure for the benefit of the rest of the country (not to mention those who are already enjoying their homes and businesses around the lake) would be funded on the backs of these randomly selected individuals who simply hadn't gotten around to pulling building permits before the curfew bell rang.

To all those who believe this is a good idea, keep looking over your shoulder. The next one who gets caught by the planners' pet idea *du jour* could be you. For, as the liberals who cheer this opinion never tire of telling us, when the constitutional rights of one class of

persons are not secure, neither are the rights of anyone else. It's only a question of time.

[1] For those who ascribe this thought to sour grapes because I argued the losing side of the case, I should reiterate that when the Court decided *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), in which I represented the prevailing party, I also concluded that the decision added little to the body of jurisprudence. It would only have done so if the Court had ruled the other way there. The same is true here.

[2] As I told the Court, although such a rule would make all moratoria takings, economics would prevent most short-term, rational moratoria from ever being challenged judicially. The extent of the injury (and, consequently, the amount of the potential recovery) would be too small to provoke landowners to litigation or to attract counsel to prosecute such *de minimis* cases.