Georgetown Environmental Law & Policy Institute's
Takings-Net
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On Tuesday, April 23, the U.S. Supreme Court issued its decision in Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency. The Court affirmed the judgment of the U.S. Court of Appeals for the Ninth Circuit and rejected the claim that the TRPA had effected a Lucas-type categorical taking by imposing a complete ban on development for 32 months on a substantial portion of the property subject to TRPA's jurisdiction.

This represents the first clear win for environmentalists in a Supreme Court regulatory takings case in fifteen years - reason enough to throw a major celebration! A few preliminary thoughts.

The Court has said several important, positive things about takings law. First, and most importantly, the Court has affirmed the so-called parcel as a whole rule, that is, that a taking claim must be evaluated in relation to the claimant's entire property, not just the restricted portion. The Court made clear that the parcel rule applies in the temporal dimension (as in Tahoe), in the spatial dimension (where use of one part of a property is prohibited, but not others), and in the functional dimension (where the permitted intensity of use is restricted). In one sense, the Court's holding simply reaffirms what many believed was always the law. But many claims have been filed in recent years challenging the parcel rule, and the Supreme Court itself seemed open to reconsidering the rule. The Court has slammed the door on that idea, cutting off one of takings claimants' favorite theories for expanding takings doctrine.

In support of its conclusion on the parcel issue, the Court reasoned that there is and should be a sharp distinction between takings claims based on physical occupations of private property and takings claims based on restrictions on the use of private property. A taking claim based on a physical occupation focuses only on the portion of the

property subject to the occupation, the Court said, but that has no bearing on the application of the parcel rule in the context of a regulatory use restriction. By emphasizing the differences between these two types of takings claims (and the narrow scope of the physical occupation theory in general), the Court has provided helpful guidance in addressing arguments by takings claimants that certain regulatory use restrictions (e.g., restrictions on water diversions, wildlife protection regulations) should be regarded as physical occupations.

Another important feature of the decision is the Court's conclusion that the Lucas case is triggered, not simply by a prohibition on use, but by elimination of value. Furthermore, the Court said, to show a sufficient adverse impact on value, the claimant must demonstrate a "permanent obliteration" of value. Even a 95% reduction in the value of property, the Court made clear, is insufficient to demonstrate a Lucas taking. Because essentially no regulation reduces the value of property to zero (a point that almost certainly applied in Lucas itself, as Justice Rehnquist points out in his dissent), one is left to wonder whether Tahoe effectively overrules Lucas.

Yet another important feature of the decision is the Court's recognition of the extent to which regulation can enhance property values by conferring a reciprocity of advantage on all property owners. The Court found no evidence that the Tahoe moratorium had in fact reduced property values and concluded that property values should generally increase during a moratorium. After all, the Court reasoned, the purpose of a moratorium is to protect environmental quality, which should logically make the community a more attractive place to live and invest. The Court's discussion of the reciprocity issue should heighten attention to this issue in all types of regulatory takings cases.

Finally, the Court's decision is striking because of the Court's emphasis on the need to craft a law of takings that protects the integrity of the local government land use decision-making process. No fixed, outer limit should be placed on planning moratoria under the Takings Clause, the Court emphasized, because otherwise planners might be forced "to rush through the planning process." Likewise, the Court said, the "strict ripeness requirement" in takings law is designed to foster careful and informed

decision making. On the other hand, an unfortunate feature of the Court's decision is the support it apparently offers for the vague and unprincipled Penn Central test as an alternative to the Lucas test. No Penn Central claim was before the Court in this case and, therefore, the Court's comments are necessarily somewhat vague and, in a strict sense, dictum. Nonetheless, the Court's descriptions of the Penn Central test appear to make predictable application of the test an enormous challenge. Obviously, the interests of landowners, government, and the general public are not well served by a lawless law of takings. The U.S. Supreme Court - and in the meantime the lower federal and state courts - have a good deal of work ahead of them to make sense of the Penn Central test and decide how it relates to (the now diminished) Lucas categorical test. The Court's decision also highlights but certainly does not resolve several other questions. One such issue is whether the claimant's lack of investment expectations> may be a potentially relevant factor in a Lucas-type case, an issue which has sharply divided the U.S. Court of Appeals for the Federal Circuit, for example. The Supreme Court did not explicitly address expectations because the case did not present the issue. On the one hand, the Court's general descriptions of the Penn Central and Lucas tests could be read to suggest that investment expectations are relevant under Penn Central, but not under Lucas. On the other hand, the Court's opinion pointedly footnoted Justice's Kennedy's concurring opinion in Lucas in which he said expectations are relevant in a Lucas case, and Justice Rehnquist, in dissent, also cited Kennedy's concurring opinion, apparently with approval. Another outstanding issue is the validity and content of the so-called substantially advance takings test. The trial court in this case concluded (not surprisingly, the issue was not really contested) that the moratorium substantially advanced the goal of addressing the serious pollution problem facing Lake Tahoe. The Ninth Circuit has firmly embraced this ostensible takings test; most courts have not. The issue was not directly addressed on appeal, including in the U.S. Supreme Court. The Court referred to the substantially advance argument as a possible alternative "theory" of recovery, but said the argument was barred by the trial court's uncontested factual findings. The Tahoe

decision leaves the validity of this test (isn't it really a due process issue?) and the standard of review (ordinary due process rational basis, or something else?) completely up in the air. In sum, Tahoe is one step in a process of legal evolution, the ultimate direction of which is not entirely clear. The Court has clarified some issues and reaffirmed at least one important principle, the parcel as a whole rule. In the process, the Court has dealt the so- called property rights movement a serious setback.

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