The Supreme Court Upholds Moratoria

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency
No. 00-1167, 535 U. S. ___, 122 S. Ct. 1465 (2002)

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Land development moratoria are alive and well following the Supreme Court's 6-3 decision in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency on April 23, 2002. In a lengthy opinion that surprised and delighted environmentalists while disappointing property rights advocates, Justice John Paul Stevens stressed the importance of moratoria as a local government planning technique in upholding successive moratoria totaling 32 months imposed by the Tahoe Regional Planning Agency ("TRPA") on land surrounding Lake Tahoe.

Facts

The controversy began over 20 years ago with enactment by TRPA of Ordinance 81-5, which prohibited construction of any new residences on land surrounding Lake Tahoe that was located in "Stream Environment Zones" ("SEZ") as well as land on the California side of the lake in "land capability districts 1, 2 and 3." The ordinance became effective on August 24, 1981 and was to remain in effect until a permanent regional land use plan was adopted by TRPA, as required by the 1980 Tahoe Regional Planning Compact. When the deadline for adoption of the new plan was not met, TRPA adopted Resolution 83-21, in effect from August 27, 1983 until April 25, 1984. The resolution suspended all acceptance and review of development proposals on SEZ and other sensitive lands under TRPA's jurisdiction and remained in effect until the new regional plan finally was adopted on April 26, 1984. Taken together, the two actions blocked construction of new residences on affected lands for 32 months.

About two months after the plan was adopted, landowners affected by the moratoria filed suit in federal courts in California and Nevada. These suits were consolidated for trial in the District of Nevada. The District Court first applied the *Penn Central* three-factor test (*Penn Central Transp. Co. v. New York*, 438 U. S. 104 (1978)) and concluded that the moratoria had not affected a "partial taking" of petitioners' property. On the other hand, the court found a temporary "total taking" when it considered the effect of the moratoria under *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003 (1992). As a result, both parties appealed.

The Ninth Circuit reversed the District Court's categorical takings findings under *Lucas*, concluding that the petitioners facial challenge raised only the question whether the enactment of the moratoria constituted a taking. The Court of Appeals concluded that no categorical taking had occurred because the moratoria had only a temporary impact on the ownership interests of the lands in question. The court refused to "conceptually sever" the temporal dimension of fee ownership from its physical and functional dimensions. A regulation

that affects only one of these dimensions is not a compensable taking because it does not deprive the owner of all economically beneficial use, the Court of Appeals concluded.

The court rejected petitioners' argument that *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U. S. 304 (1987) was controlling and held that *Penn Central* provided the correct basis for analysis. But petitioners had not contested the District Court's conclusion that no taking had occurred under *Penn Central* and so had no argument for a *Penn Central* taking claim before the Ninth Circuit.

A petition for rehearing en banc was denied, with five judges dissenting. "Because of the importance of the case," the Supreme Court granted certiorari limited to the question "whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution."

Opinion of Justice Stevens

Justice Stevens began his opinion by emphasizing the "especially steep" hill petitioners must climb in sustaining their facial attack on the challenged moratoria and obtaining their desired "categorical rule requiring compensation whenever the government imposes a moratorium on development." (122 S.Ct. at 1477*)* Speaking for the majority, Justice Stevens stated that the answer to the "abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends on the particular circumstances of the case." (*Id.* at 1478.) Justice Stevens drew heavily on Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island*, 533 U. S. 606, 636, 121 S. Ct. 2448, 150 L. Ed. 592 (2001) advising the Court to resist "'[t]he temptation to adopt what amount to *per se* rules in either direction'" in concluding that "the circumstances in this case are best analyzed within the *Penn Central* framework." (*Id.*)

Using the Fifth Amendment language, Justice Stevens drew a distinction between physical takings, which always require the payment of compensation, "whether the acquisition is the result of a condemnation proceeding or a physical appropriation," and regulatory takings, for which the Constitution "contains no comparable reference" and which require "essentially ad hoc, factual inquiries." *(Id.)* Reviewing Supreme Court cases applying a *per se* compensation rule to "acquisitions of property for public uses" but declining to do so for "regulations prohibiting private uses," Justice Stevens concluded that it was "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." (*Id.* at 1479.*)*

> Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform governmental regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. *(Id.)*

In concluding that *Lucas* is not the answer to the issue posed by the Tahoe moratoria, Justice Stevens reviewed some of the cases leading up to *Lucas,* beginning with *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393 (1922), the case that "gave birth to our regulatory takings jurisprudence." *(Id.* at 1480.*)* Noting that since *Mahon* the Court has "repeatedly and consistently endorsed (Justice) Holmes' observation that 'if regulation goes too far it will be recognized as a taking,'" Justice Stevens observed that "[a]fter *Mahon*, neither a physical appropriation nor a public use has ever been a necessary component of a 'regulatory taking.'" *(Id.* at 1481.*)*

Emphasizing that the Court consistently has chosen a multiple-factor analysis rather than a *per se* rule for partial regulatory takings, Justice Stevens stressed that in applying multiple factors the focus is on "'the parcel as a whole.'" This explains why regulations prohibiting commercial transactions in eagle feathers (*Andrus v. Allard,* 444 U. S. 51, 66 (1979)), development within set-back lines (*Gorieb v. Fox*, 274 U. S. 603 (1927)), or extraction of coal pillars to prevent mine subsidence (*Keystone Bituminous Coal Assn. v. DeBenedictic*were not considered regulatory takings, he asserted. (*Id.*) *First English* is not applicable, he noted, because that case focused on the remedy once a taking was found. In doing so, the *First English* Court limited its decision to the instant facts and observed that "'quite different questions'" would be presented by "'normal delays'" in obtaining traditional land use permits. "Thus, our decision in *First English* surely did not approve, and implicitly rejected, the categorical submission that petitioners are now advocating," he asserted. (*Id.* at 1483.)

In advocating a categorical taking rule for moratoria, petitioners stressed the *Lucas* decision. Justice Stevens disagreed, concluding that the *Lucas* finding of a categorical taking for a "permanent 'obliteration of the value' of a fee simple estate… does not answer the question whether …(a moratorium) has the same legal effect." He stressed that the Court has consistently refused to apply "conceptual severance" analysis because that runs counter to *Penn Central's* "parcel as a whole" analytical focus. "The starting point for the (District) [C]ourt'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." Justice Stevens emphasized that the *Lucas* categorical rule was for the "'extraordinary case'"; the normal regulatory taking case is subject to the "default rule…(requiring) a more fact specific inquiry." (*Id.* at 1483-84.)

Petitioners and the Institute for Justice in an *Amicus* brief argued that *Penn Central* should be overruled in the interests of "'fairness and justice.'" Justice Stevens reviewed briefly and rejected seven theories that could support a conclusion that TRPA's moratoria were compensatory takings.

> A rule that required compensation for every delay in the use of property would render routine government government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication. (*Id.* at 1485.)

Justice Stevens emphasized the majority's belief that the "better approach" is the *Penn Central* multiple factor analysis, with the temporary nature of a land use restriction being one factor in that analysis. He stressed the fact that moratoria are viewed by the "planning community… (as) essential tool(s) of successful development." (*Id.* at 1487.*)* He rejected the idea advanced by petitioners that they should be considered takings "regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values." (*Id.)*

A major reason for avoiding a *per se* rule is the effect it could have on "informed decisionmaking" by governmental bodies, Justice Stevens asserted. Costs of compensating property owners during a moratorium may force communities to "rush through the planning process or abandon the practice altogether." Without moratoria, a rush to develop may occur before planning can be completed, "thereby fostering inefficient and ill-conceived growth." (*Id.* at 1488.) The Court's ripeness rules are driven by the same concerns, he noted.

> We would create a perverse system of incentives were we to hold that landowners must wait for a taking claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those same planners must compensate landowners for the delay. (*Id.)*

Noting that temporary bans on development reduce the risk that individual landowners will be "singled out" for excessive burdens and that all landowners share a "clear 'reciprocity of advantage' against immediate construction that might be inconsistent" with a plan later adopted, Justice Stevens concluded that "fairness and justice" are best served by the "familiar" *Penn Central* approach, rather than "attempting to craft a new categorical rule" focusing solely on the duration of the restriction. (*Id.* at 1489.)

Dissenting opinions

Dissenting opinions were filed by Chief Justice Rehnquist, joined by Justices Scalia and Thomas, and by Justice Thomas, joined by Justice Scalia. Justice Rehnquist focused his dissent on the length of the moratorium, which he interpreted as lasting six years because of injunctions issued by the District Court blocking any construction under the 1984 regional plan. He stressed that nothing in the Takings Clause or the cases supports a distinction between permanent and temporary takings, thus *Lucas* should apply because petitioners could make no use of their land during the six-year period. *(Id.* at 1492.) *First English* made no distinction between permanent and temporary takings, and *Lucas* is based on the notion that, to a landowner, prevention of all use is the "equivalent of a physical appropriation." A "temporary" ban is the equivalent of a "forced leasehold" for which there is ample precedent requiring compensation, he asserted. (*Id.* at 1493.)

Justice Rehnquist disagreed with the majority's characterization of *Lucas* as emphasizing "value" rather than "use," and argued that *Lucas* should apply when all use is denied, even though temporarily. The moratorium at issue should not be considered one of the "background principles of state property law" that would be exempt from the *Lucas* rule because such moratoria "do not have the lineage of permit and zoning requirements." Even if

such moratoria might be viewed as "implied limitations," the one in the instant case "far exceeds" the duration of "ordinary" moratoria," he asserted. (*Id.* at 1495.)

Justice Thomas wrote to emphasize his disagreement with the majority's conclusion that there was no taking of "'the parcel as a whole.'" In his view, *First English* put to rest any "notion that the 'relevant denominator' is land's infinite life." The fact that property may have useful life after a moratorium is lifted "bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place, he asserted. (*Id.* at 1496-97.)

Some preliminary thoughts

The 6-3 split indicates that the Court remains divided on the proper approach to the difficult problem of determining when a land use regulation crosses the line and becomes a compensable taking. Advocates of a categorical rule lost ground as only three members of the Court were willing to apply that approach to development moratoria. The *ad hoc*, multiple factor analytical approach of *Penn Central* gained new life from Justice Stevens's strong endorsement, his refusal to apply the categorical approach of possessory takings law to governmental regulations that do not amount to physical appropriations, and his endorsement of the "parcel as a whole" approach first articulated by Justice Brennan in *Penn Central.*

In emphasizing the effect a broad *per se* rule could have on governmental efforts to implement comprehensive planning goals through diverse land use regulations, Justice Stevens endorsed the communitarian principles that land is a natural resource to be used and enjoyed by present and future generations, and that individual property rights are naturally limited by the fact that human beings are social persons who belong to communities. Decisions regarding the use of privately owned land are subject to reasonable regulations imposed by the government on behalf of the community.

For 80 years, the Court has wrestled with Justice Holmes's admonition that regulation which goes "too far" is a taking. (*Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415 (1922)). Land use regulations have become increasingly sophisticated as growth pressures have reduced the amount of developable land and costs of public infrastructure have escalated. Property owners have pushed repeatedly, in the courts and more recently the legislatures, for a set of categorical rules that would define compensable regulatory takings. Justice Brennan in *Penn Central* established an *ad hoc* multiple factor analysis rather than a categorical rule. Justice Scalia moved the Court in the categorical rule direction with his opinions in *Nollan* and *Lucas*. Justice Stevens has brought the Court back to Justice Brennan's multiple factor analysis applied to an entire parcel of property on a case-by-case basis.

From a landowner's perspective, a major problem with the *Penn Central* multiple factor approach is the emphasis it places on individual impact. To establish such impact, and corresponding ripeness for judicial review, landowners must work their way through the local land use process. This can add considerable time and corresponding expense to the development process, as well as uncertainty regarding the ultimate acceptance of a development proposal. Thus, the landowner prefers categorical rules that reduce the expense and uncertainty of development. Such rules often are sought, as in *Tahoe*-Sierra, through a facial challenge. The

weakness in that strategy was demonstrated in *Tahoe-Sierra.* The regulation is clothed with a presumption of validity and no evidence is produced concerning any particular deleterious impact, leaving the landowner with an almost insurmountable burden of persuasion.

Local governments, on the other hand, face increasing pressure from their constituents to provide costly infrastructure and services, protect the environment, and keep taxes to a minimum. To develop and implement effective plans responding to local concerns and desires, local governments must make use of flexible techniques that allow them to encourage creative and responsive development while restricting excessive and insensitive development. Accomplishing those goals becomes difficult if not impossible if compensation becomes a "normal" price local governments must pay to accomplish public goals.

The *Penn Central* analytical process, reinvigorated by Justice Stevens in *Tahoe-Sierra*, provides a framework for balancing the interests of landowner and local government. *First English, Nollan/Dolan* and *Lucas* provide compensatory protection to landowners who suffer loss of possessory rights (occupation, exclusion, permanent loss of use) through regulation. *Penn Central/Tahoe-Sierra* provides a process for measuring the effect of regulations restricting use but not possession and for determining whether or not a regulation "goes too far." Lest local governments think they now are free from court supervision, Justice Stevens's lengthy review of "fairness and justice" concerns is a reminder that local governments have a serious responsibility to review their regulatory decision-making processes and to make sure that land use regulations not only foster articulated public goals but also permit private landowners to use their property in some reasonable economic manner.