LAKE TAHOE DEVELOPMENT MORATORIUM PASSES CONSTITUTIONAL TEST

James C. Kozlowski, J.D., Ph.D.
© 2003 James C. Kozlowski

The Takings Clause of the Fifth Amendment forbids the taking of private property for public use without just compensation. As characterized by the Supreme Court of the United States, this constitutional guarantee is designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Rather than applying a set mathematical formula, the Supreme Court has considered the particular circumstances in a given case to determine whether “justice and fairness” requires that “economic injuries caused by public action be compensated by the government.”

In the case of Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, No. 00-1167 (U.S. 04/23/2002), the Supreme Court of the United States considered whether a moratorium on development while a comprehensive land use plan was being developed was, in and of itself, an unconstitutional taking of private property. In this instance, the Tahoe Regional Planning Authority (TPRA) imposed two moratoria on development “to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth.” The net effect was to prohibit virtually all development on substantial portion of property subject to TPRA’s jurisdiction for a period of 32 months.

SAVING THE LAKE

As noted by the Supreme Court, Lake Tahoe has been characterized as “uniquely beautiful” due to the “exceptional clarity” of its waters. This feature is attributable to the absence of algae that obscures the waters of most lakes. In particular, the lack of nitrogen and phosphorus in Lake Tahoe, which nourishes the growth of algae, was historically lacking, thus ensuring the transparency of its waters.

In the last 40 years, however, the pristine state of the lake had deteriorated rapidly due to increased land development in the Lake Tahoe Basin (Basin). In 1968, problems associated with burgeoning development around the lake, prompted California and Nevada to create the TPRA as the agency assigned "to coordinate and regulate development in the Basin and to conserve its natural resources." In 1972, TPRA adopted a land use ordinance, but numerous exceptions failed to sufficiently limit development and preserve the environmental integrity of the lake.

In 1980, TPRA was directed to develop regional "environmental threshold carrying capacities" and adopt an amended regional plan that achieved and maintained those carrying capacities. As a result, prior to May 1983, TPRA prohibited the development of new subdivisions, condominiums, and apartment buildings. Moreover, building permits were limited to the number granted in 1978.

Despite its good faith efforts, TPRA concluded that it was unable to adopt a permanent plan by the May 1983 deadline. TPRA, therefore, enacted an ordinance and a resolution "which completely suspended all project reviews and approvals, including the acceptance of new proposals," and which remained in effect until a new regional plan was adopted on April 26, 1984. In combination,
these land use measures effectively prohibited all construction on areas near streams and wetlands in the Basin for 32 months.

Private landowners in the Basin contended that the mere enactment of these temporary land use regulations denied them of all economic use of their property for the period these measures were in effect. As a result, the landowners claimed TPRA had an “unqualified constitutional obligation” to provide compensation for the value of a parcel’s use during the period development was prohibited.

As characterized by the Supreme Court, the private landowners were desirous of “a categorical rule requiring compensation whenever the government imposes such a moratorium on development.” Under such a proposed rule, the Court noted that there would be “no need to evaluate the landowners’ investment-backed expectations, the actual impact of the regulation on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction.” On the contrary, according to the private landowners in this case, it was sufficient that a regulation imposes a temporary deprivation -- no matter how brief -- of all economically viable use to trigger a per se rule that a taking has occurred.”

PROPERTY VALUES

In this particular instance, the Court characterized the challenged governmental action as an “interference with property rights” arising from a land use scheme which adjusted “the benefits and burdens of economic life to promote the common good.” In determining whether a particular governmental regulation has effected an unconstitutional taking of private property, the Court focused on “the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.” Moreover, in such cases, the Court stated that it would “examine a number of factors, rather than a simple mathematically precise formula.”

In so doing, the Court acknowledged that a regulation temporarily denying an owner all use of the property might constitute a taking. Under such circumstances, the Court stated that “compensation is required when a regulation deprives an owner of all economically beneficial uses of his land.” On the other hand, the Court recognized that a quite different situation “would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.”

In this particular situation, the issue before the Court was “whether a regulation prohibiting any economic use of land for a 32-month period has the same legal effect,” i.e., deprives an owner of all economically beneficial uses of his land. In the opinion of the Court, “a temporary restriction that merely causes a diminution in value” is not necessarily an unconstitutional taking of private property. According to the Court, private property is not “rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.” Moreover, in the opinion of the Court, “[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership which cannot be considered as a ‘taking’ in the constitutional sense.”

[T]he extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained… [Such a
broad rule] would apply to numerous "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like, as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee.

Such a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power [i.e., inherent governmental power to preserve public health and safety]… [G]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking.

Accordingly, in the interest of “informed decisionmaking,” the Court reiterated the following “important principle”:

[A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation…

[A] takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

INTERIM DEVELOPMENT CONTROLS

Given the scope and complexity of these particular land use regulations, the Court accepted the finding by the federal district court that “the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable.” In light of this finding, the Supreme Court rejected the notion that “every delay of over one year is constitutionally unacceptable.” On the contrary, the Court noted “the consensus in the planning community appears to be that moratoria, or ‘interim development controls’ as they are often called, are an essential tool of successful development.”

To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth… The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a per se rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether…
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 planners must compensate landowners for the delay.

Applying this reasoning to “the proceedings involving the Lake Tahoe Basin,” the Court found “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.” In particular, the Court noted that “the moratoria enabled TRPA to obtain the benefit of comments and criticisms from interested parties” during its deliberations, including the private landowners who brought the lawsuit. Moreover, in the case of the Lake Tahoe Basin, the Court found “reason to believe property values often will continue to increase despite a moratorium.”

Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state. Since in some cases a 1-year moratorium may not impose a burden at all, we should not adopt a rule that assumes moratoria always force individuals to bear a special burden that should be shared by the public as a whole.

Formulating a general rule of this kind is a suitable task for state legislatures. In our view, the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the temptation to adopt what amount to per se rules in either direction must be resisted.

Accordingly, the Supreme Court affirmed the judgment of the lower federal court which had upheld the constitutionality of the TRPA’s 32 month moratorium on development in the Lake Tahoe Basin.

NOTE: In addition to the “Tahoe” decision described herein, the NRPA Law review has dedicated several columns to earlier opinions by the U.S. Supreme Court involving private property rights and the constitutionality of governmental regulations under the Fifth Amendment. In particular, the October 1992 column entitled “Constitutional Dire Straits for Public Ban on Private Beach Building” reviewed Lucas v. South Carolina Coastal Council. In addition, the September 1994 column entitled “Constitutional Greenway Dedication Requires ‘Rough Proportionality’ to Development’s Impact” reviewed the opinion of the Supreme Court in Dolan v. City of Tigard. Both of these articles are available on my class webpage at George Mason University:

Lucas v. South Carolina Coastal Council.

http://classweb.gmu.edu/jkozlows/lucas.html

Dolan v. City of Tigard
http://classweb.gmu.edu/jkozlows/dolan.htm