TEMPORARY MORATORIA AND REGULATORY TAKINGS JURISPRUDENCE AFTER *TAHOE-SIERRA PRESERVATION COUNCIL, INC. V. TAHOE REGIONAL PLANNING AGENCY*

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I. INTRODUCTION

When the Fifth Amendment of the United States Constitution was adopted, regulations did not constitute takings. Restrictions on when, how, and what land could be developed abounded.[1] It was not until 1922 that the Supreme Court recognized regulatory actions as compensable under the Takings Clause of the Fifth Amendment.[2] In a landmark case that year, Justice Holmes declared that some regulations might go "too far" so as to be tantamount to a physical appropriation.[3]

As the regulatory takings jurisprudence developed, two distinct approaches emerged. One line of cases emphasized that regulatory takings are different in kind from traditional physical appropriations, and therefore should be subject to a distinct analysis consisting of "essentially ad hoc" inquiries.[4] *Penn Central Transportation Co. v. New York City*[5] and Justice O'Connor's concurrence in *Palazzolo v. Rhode Island* embody this ad hoc approach, calling for a "careful examination and weighing of all the relevant circumstances."[6] Specifically, *Penn Central* identified three principal factors a court should balance to determine if a taking has occurred: (1) the character of the governmental action, (2) the claimant's reasonable investment-backed expectations, and (3) the economic impact of the regulation on the claimant.[7]

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[1] *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1257 (1996).

[2] The "Takings Clause" or "Just Compensation Clause" states, "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

[3] "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding that a statute prohibiting mining beneath surface structures constituted a taking).

[4] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[5] *Penn Central* involved the classification of New York's Grand Central Terminal as a historic monument, which prevented the owners from constructing a fifty-story office building over the train station. The Court found that no taking had occurred, emphasizing that the property interest must be evaluated as a whole, and therefore, the air rights of a property could not be evaluated independently. *See id.* at 115, 130–31.

[6] Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001).

[7] *Penn Central*, 438 U.S. at 124.

In contrast, several opinions have suggested that certain types of regulations are equivalent to physical appropriations.[8] This approach holds that certain categories of restrictions or deprivations of property rights should be considered per se takings, which is a taking in all cases regardless of the factors considered in an ad hoc analysis.[9] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* supported this treatment of regulatory takings, holding that remedies should be the same whether the case involves a regulatory or physical taking.[10]

Lucas v. South Carolina Coastal Council, the most recent per se takings case, signaled a turn towards strong protection of property rights within regulatory takings jurisprudence. The Court in *Lucas* declared that restrictions depriving a parcel of all economically beneficial use are per se takings, unless justified by nuisance or other background common law rules.[11] Justice Scalia's opinion additionally voiced uncertainty as to what the relevant denominator should be when assessing a regulation's impact on a "property interest," a question sometimes referred to as "conceptual severance."[12]

Prior to *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* ("*Tahoe III*"),[13] it was unclear how broadly the Court

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[8] *See Mahon*, 260 U.S. at 414 (finding the challenged regulation to have "very nearly the same effect for constitutional purposes as appropriating"); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992) (finding that the regulation "is from the landowner's point of view the equivalent of a physical appropriation"); *see also* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199 (1985) (describing regulatory takings analysis as trying "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession").

[9] Per se takings categories may include: permanent physical occupation, *see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (finding that an ordinance requiring landlords to allow cable box installation on apartment buildings was a physical taking); deprivation of all economically beneficial use, *see Lucas*, 505 U.S. 1003 (1992) (finding that barring development of any permanent structure on beachfront property constituted a taking); and the possible deprivation of certain core property rights, *see* Hodel v. Irving, 481 U.S. 704 (1987) (finding that a law restricting members of a tribe's ability to devise or control the descent of their land constituted a taking). *See generally* JOSEPH WILLIAM SINGER, PROPERTY LAW, RULES, POLICIES, AND PRACTICE 1252–53 n.4 (1997).

[10] 482 U.S. 303, 321 (1987) (holding that an ordinance restricting reconstruction within a floodplain, constituted a taking and required the government to compensate the landowner despite eventual withdrawal of the regulation).

[11] *Lucas*, 505 U.S. at 1027–31.

[12] *Id.* at 1016 n.7. Conceptual severance involves separating a property interest into discrete interests in order to evaluate the diminution in the value of a parcel. If a regulation completely destroys one part of a property interest, the result could be characterized either as a diminution in the value of the total property interest (and thus not a per se taking), or as a total elimination of economic use of that distinct property interest (and thus a per se taking). *See id.* at 1003, 1016, 1054 (1992); *see also* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1614 (1988); Frank Michelman, *Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192–93 (1967); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 60 (1964).

[13] 122 S. Ct. 1465 (2002) (Stevens, J., for majority; Rehnquist, CJ., dissenting, joined by Scalia and Thomas, JJ.; Thomas, J., dissenting, joined by Scalia, J.).

would apply *Lucas*'s per se rule. Since its decision in *Lucas*, the Court seemed reluctant to apply per se rules; instead it appeared to prefer the ad hoc approach in *Penn Central*.[14] *Tahoe III* presented an opportunity for the Court to apply takings jurisprudence to temporary moratoria, a class of land use restrictions presenting a case of first impression before the Court. The decision therefore marked an important battle for dominance between the ad hoc and per se approaches to regulatory takings analysis.

Much was at stake in this decision for local and regional government action. Temporary moratoria are commonly used in local and regional planning. If such temporary restrictions were ruled per se takings, then local governments would be unable to restrict construction for a specific period of time without compensating landowners. As a result, planners likely would have to refrain from conducting studies, requesting public comment, and designing complex regional development plans whenever possible.

The Supreme Court in *Tahoe III* held that the local governments in California and Nevada could temporarily prohibit construction in the Lake Tahoe Basin, without compensating affected landowners, while the regional planning agency evaluated the basin's environmental carrying capacity and formulated a regional plan for development. The Court ruled that so long as some future interest remained, the per se rule under *Lucas* did not apply to temporary building restrictions; instead, courts must apply an ad hoc analysis under the *Penn Central* test to decide whether a taking has occurred. Some called this the "the best victory for planning in more than a decade."[15]

Tahoe III significantly refined takings jurisprudence by upholding the use of development moratoria for planning purposes. In writing for the majority, Justice Stevens emphasized the dichotomy between "regulatory takings" and "physical takings,"[16] rejected the concept of conceptual severance for non-physical regulatory takings,[17] and continued the

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[14] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001).

[15] American Planning Association, *U.S. Supreme Court Decision: A Solid Win for Planning* (Apr. 23, 2002), *at* http://www.planning.org/newsreleases/2002/ftp0424.htm (on file with the Harvard Environmental Law Review).

[16] *Tahoe III*, 122 S. Ct. at 1478. Physical takings traditionally include government appropriations of property through the use of eminent domain. This concept was expanded to refer to any governmental action that results in the permanent physical occupation of property by a third party. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982). While Justice Stevens refers to *Loretto* as a physical takings case, it lies at the border between traditional physical appropriations and regulatory takings and is considered by some to be a per se regulatory taking. *See* SINGER, *supra* note 9, at 1252–53 n.4. As discussed, *see supra* notes 4–10 and accompanying text, regulatory takings are traditionally government-issued restrictions on use that either constitute one of a number of pre-defined per se takings, or "go too far" as determined on an ad hoc basis. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[17] *See supra* note 12 for an explanation of conceptual severance. Non-physical regulatory takings refer to regulations that do not result in the permanent physical occupation by a third party. *See Loretto*, 458 U.S. at 434 (1982).

Court's general reluctance to create additional per se takings categories.[18] The Court's reasoning focused on the necessity for full public disclosure and participation in the planning process. The Court suggested that, in some cases, temporary moratoria might be the only means to achieve such ends.

II. FACTS

Lake Tahoe is a renowned vacation spot, famous for its "noble sheet of blue water"[19] and hailed by President Clinton as a national treasure.[20] The lake is unique not only in the beauty and clarity of its waters, but also for its accessibility from major metropolitan areas.[21] In the 1950s, increased development corresponded with sharp decreases in the water's acclaimed clarity and transparent blue color.[22] As Justice Stevens explained, "[t]he lake's unsurpassed beauty, it seems, is the wellspring of its undoing."[23]

To address the deterioration of the lake, in 1968 the California and Nevada legislatures created the Tahoe Regional Planning Agency ("TRPA") to "coordinate and regulate development in the Basin and to conserve its natural resources."[24] In 1972, TRPA classified the Lake Tahoe basin into seven "land capability districts" based on their contribution to runoff and proximity to the lake, nearby streams, and wetlands.[25] Depending on the category of the land, local zoning limited construction of impervious surfaces, a major cause of increased runoff.[26]

However, the administration of those zoning restrictions proved ineffective.[27] In frustration, the California and Nevada legislatures adopted the Tahoe Regional Planning Compact ("Compact") in 1980.[28] The Compact directed TRPA to develop regional "environmental threshold carrying capacities."[29] Specifically, TRPA had eighteen months to determine "standards for air quality, water quality, soil conservation, vegetation

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[18] *See Palazzolo*, 533 U.S. at 636.

[19] MARK TWAIN, ROUGHING IT 174–75 (1872).

[20] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1230 (D. Nev. 1999) ("*Tahoe I*").

[21] *Tahoe III*, 122 S. Ct. at 1471 n.2 (citing S. REP. No. 91-510, at 3–4 (1969)).

[22] *Tahoe I*, 34 F. Supp. 2d at 1231.

[23] *Tahoe III*, 122 S. Ct. at 1471.

[24] Pub. L. No. 91-148, 83 Stat. 360 (1969); Lake Country Estate, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 394 (1979).

[25] *Tahoe I*, 34 F. Supp. 2d at 1232.

[26] *Id.*

[27] TRPA allowed many exceptions and failed to significantly limit the construction of new residential housing. *Tahoe III*, 122 S. Ct. at 1472.

[28] Act of Dec. 19, 1980, Pub. L. No. 96-551, 94 Stat. 3233 (granting Congressional consent to TRPA as interstate compact); CAL GOV'T CODE ANN. § 66801 (West Supp. 2002); NEV. REV. STAT. § 227.200 (1980).

[29] 94 Stat. 3235, 3239 (1980).

preservation and noise,"[30] and it had one year after the adoption of those standards to devise a regional plan to achieve and maintain those "carrying capacities."[31] The Compact prohibited development until the final plan was adopted, stating that "in order to make effective the regional plan as revised by [TRPA], it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan."[32] This initial moratorium was not challenged before the Supreme Court.

A few months after the 1980 Compact's effective date, TRPA recognized that it would not meet the Compact's deadline[33] and enacted the first of two ordinances imposing moratoria on development until a permanent regional plan could be adopted.[34] The second moratorium was passed two years later. Together, these two ordinances temporarily prohibited "any construction or other activity that involved the removal of vegetation or the creation of land coverage."[35] The moratoria applied to lands classified as "high hazard" or "sensitive" for a period of thirty-two months in California and eight months in Nevada, and to lands classified as Stream Environmental Zones ("SEZ") for a period of thirty-two months in both states.[36]

A final plan was adopted on April 26, 1984, but was immediately challenged by the State of California as insufficient to protect the basin.[37] The district court entered an injunction, halting the implementation of the plan until 1987 when a revised plan was adopted.[38] Both the injunction and the 1987 plan continued the prohibition on new construction on "sensitive" lands in the Lake Tahoe Basin.[39]

The Tahoe-Sierra Preservation Council ("Council"), a nonprofit membership corporation, composed of Lake Tahoe area landowners, challenged the restrictions on development.[40] The Council alleged that

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[30] *Id.*

[31] *Id.* at 3240.

[32] *Id.* at 3243.

[33] The district court found that TRPA had performed in good faith in attempting to comply with the 1980 Compact, concluding it was reasonable that standards were not set until two months after the original deadline and that a plan was not adopted until eight months after the deadline in the 1980 Compact. *Tahoe I*, 34 F. Supp. 2d 1226, 1233 (D. Nev. 1999).

[34] *Id.* The first moratorium was Ordinance 81-5, which was enacted on June 25, 1981 and lasted two years. The second was Resolution 83-21, which was enacted in 1983 and lasted eight months. *Tahoe III*, 122 S. Ct. 1465, 1472–73 (2002).

[35] *Tahoe III*, 122 S. Ct. at 1473; *see also Tahoe I*, 34 F. Supp. 2d at 1233–35.

[36] *Tahoe III*, 122 S. Ct. at 1473.

[37] *Tahoe I*, 34 F. Supp. 2d at 1236.

[38] *Tahoe III*, 122 S. Ct. at 1473.

[39] *Id.*

[40] *See id.* at 1473–74. The Council represents approximately 2000 owners of real estate in the Lake Tahoe Basin, and some 400 owners of vacant lots on either SEZ lands or other "sensitive" areas. *Id.* at 1473.

Ordinance 81-5, Resolution 83-21, and the 1984 regional plan, on their face, constituted takings of its members' properties and demanded compensation.[41] TRPA argued that these restrictions did not constitute takings, in part because the temporary nature of the moratoria distinguished them from the per se takings defined in *Lucas*.[42]

In *Tahoe I*, the district court initially applied the *Penn Central* ad hoc analysis. It found that the Council's facial claim would not constitute a taking under the three-factor balancing test of *Penn Central*.[43] Specifically, the district court found a lack of evidence of diminution in value of any individual property, a lack of reasonable investment-backed expectations because of heavy zoning restrictions prior to 1981, and found the temporary moratoria to be proportional responses to prevent significant additional damage to the lake.[44]

Despite these findings, the district court concluded that the ordinances constituted per se, regulatory takings under *Lucas* because the owners were temporarily deprived of "all economically viable use of their land."[45] Although the district court hesitated to hold that all temporary moratoria on development constitute per se takings, it found that the lack of any expressed termination date distinguished the moratoria in this case from truly temporary moratoria.[46]

TRPA appealed the district court's holding that the moratoria constitutes a categorical per se taking to the Court of Appeals for the Ninth Circuit. TRPA argues that the restrictions were temporary in nature and that *Lucas* should not apply to temporary moratoria.[47] The Council did

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[41] *See id.* at 1473–74. The case before the Supreme Court involved only the two ordinances. Both the district court and the court of appeals found that the 1984 plan was not the cause of the alleged injuries and challenges to those findings were not granted certiorari. *Id.* at 1490–91. Nonetheless, in dissent, Chief Justice Rehnquist addressed this issue, stating that the 1984 plan was the proximate cause of the resulting prohibition on development, *id.* at 1474 n.8, as TRPA was the "'moving force' behind the petitioners' inability to build on their land." *Id.* Both California and Nevada's statutes of limitation barred the Council's attempts to amend their complaint to include the 1984 plan. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 785–89 (9th Cir. 2000) ("*Tahoe II*").

[42] *Tahoe I*, 34 F. Supp. 2d at 1248.

[43] *See id.* at 1240. The Supreme Court noted that "if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis." *Tahoe III*, 122 S. Ct. at 1485.

[44] *Tahoe I*, 34 Supp. 2d at 1240–41.

[45] *Id.* at 1245; *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (adopting a per se rule that permanent deprivation of all economic use of a parcel constituted a taking).

[46] *Tahoe I*, 34 F. Supp. 2d. at 1250–51. Ordinance 81-5 expressed termination upon finalization of a regional plan. Resolution 83-21 originally terminated after ninety days but was renewed after the first term and continued for a total of eight months. *Id.*

[47] *See Tahoe II*, 216 F.3d 764, 771, 773 (9th Cir. 2000).

not appeal the district court's finding that under the Penn Central ad hoc analysis the restrictions would not constitute a taking.[48]

The Ninth Circuit, reversing the district court, held that the regulations did not constitute per se takings because "only a temporary impact on petitioners' fee interest in the properties" had occurred.[49] The court of appeals reasoned that, in regulatory takings claims, the analysis should focus on the parcel as a whole. Thus, like other regulations, temporary moratoria may impact the parcel's value; however, so long as a moratorium is temporary, it is merely regulating "when the 'use' may occur" and does not deprive the owner of all economically beneficial use.[50] The Ninth Circuit denied the Council's petition for rehearing en banc.[51]

The Supreme Court granted certiorari on the narrow question of "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."[52] Justice Stevens delivered the majority opinion, affirming the Ninth Circuit's ruling.[53]

III. REGULATORY TAKINGS ANALYSIS

The majority's decision clarified four principal issues in takings jurisprudence. First, it highlighted the distinction between physical and regulatory takings[54] and reinforced the difference in the proper analysis of each. Second, the Court distinguished formal temporary moratoria from other temporary total restrictions on land, holding that the *Lucas* per se rule does not apply when some future interest remains. Third, the Court refused to announce a new per se rule for temporary total deprivation of all economically beneficial use. The Court notes both the necessity of reasonable delays in government decision-making and the "numerous practices that have long been considered permissible exercises of the police power."[55] Fourth, the Court highlighted factors that may be

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[48] The Council also did not "'dispute that the restrictions imposed on their properties are appropriate means of securing the purpose set forth in the Compact.'" *Tahoe III*, 122 S. Ct. at 1476 (citing *Tahoe II*, 216 F.3d at 773).

[49] *Id.*

[50] *See Tahoe II*, 216 F.3d at 776, 781.

[51] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998, 999 (9th Cir. 2000).

[52] *Tahoe III*, 122 S. Ct. at 1470.

[53] *Id.* at 1477.

[54] *See supra* note 16.

[55] *Tahoe III*, 122 S. Ct. at 1485. Specifically, the Court referred to "'normal delays in obtaining building permits, changes in zoning ordinance, variance, and the like,' as well as . . . orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damage buildings, or other areas that we cannot not foresee." *Id.* (quoting First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 303, 321 (1987)).

particularly relevant in an ad hoc analysis of temporary total restrictions on land.

A. Distinction Between Physical and Regulatory Takings

The decision in *Tahoe III* highlighted the dichotomy between regulatory takings and traditional physical takings (i.e., government appropriations of property through eminent domain and permanent physical occupations).[56] The difference in the origins of regulatory and physical takings, the majority opinion argued,[57] is significant. Justice Stevens wrote:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it 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.[58]

By separating regulatory takings jurisprudence from physical takings, Justice Stevens discussed two different analyses. While physical occupations and appropriations are per se takings,[59] regulatory takings are generally subject to an ad hoc analysis.[60] Justice Stevens argued that a per se treatment of regulatory takings could turn all regulatory restrictions into "a luxury few governments could afford."[61] Instead, as the Court stated in *Loretto v. Teleprompter Manhattan CATV Corp.*, "[s]o long as . . . regulations do not require the landlord to suffer the physical occupation of a portion of his building [or property] by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity."[62]

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[56] *Id.* at 1478; *see supra* note 16.

[57] It was only after Justice Holmes declared that some regulations might go "too far," that regulatory takings became compensable under the Takings Clause. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[58] *Tahoe III*, 122 S. Ct. at 1479.

[59] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that permanent physical occupation of property is a taking, no matter how minimal the invasion and no matter how small the effect on market value).

[60] *See also Penn Central*, 438 U.S. at 124; *supra* notes 4–7 and accompanying text.

[61] *Tahoe III*, 122 S. Ct. at 1479. This "functional reasoning" for distinguishing regulatory takings is best expressed in *Lucas*: "[T]he *functional* basis for permitting the government, by regulation, to affect property values without compensation [is] that 'Government 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.'" 505 U.S. 1003, 1018 (1992) (citing *Mahon*, 260 U.S. at 415).

[62] *Loretto*, 458 U.S. at 440.

The majority opinion also emphasized the difference in the relative distribution of rights resulting from the two types of government actions. Unlike physical appropriations, regulatory takings do not give the government any right to admit, exclude, or use the property. Nor do regulatory takings inherently "dispossess the owner or affect her right to exclude others."[63] In the case of temporary restrictions, the owner retains future interests and other core property rights. The Court argued that because of these retained property interests, takings analysis of temporary moratoria should follow an ad hoc balancing test, rather than employ strong per se rules.

B. Temporary Restrictions, Future Interests, and Rejection of Conceptual Severance

1. Defining a "Temporary" Restriction

Within takings jurisprudence, several kinds of temporary total restrictions on land have emerged. The form that has been before the Court most often is a permanent zoning ordinance restricting all economically beneficial use, which is later repealed by the state. In *Lucas* and *First English*, the Court held that the temporary nature (due to the state's subsequent repeal) was irrelevant in determining whether a taking occurred and compensation is due.[64] Thus, this first type is not treated as a "temporary" restriction, but rather a repealed permanent restriction.[65]

Prior to *Tahoe III*, no precedents governed two other types of temporary total restrictions: administrative delay and formal temporary moratoria. The Court had referred to normal administrative delay in government decision-making in the dicta of *First English*.[66] In that case, the Court suggested that such delays should not constitute per se takings because reasonable delays are often necessary to government administration.[67]

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[63] *Tahoe III*, 122 S. Ct. at 1480 n.19. *But see* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (holding that restricting a shopping center's right to exclude did not constitute a taking).

[64] *See Lucas*, 505 U.S. at 1011–12; First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 303, 321 (1987).

[65] *See* Thomas E. Roberts, *Moratoria as Categorical Regulatory Takings: What First English and* Lucas *Say and Don't Say*, 31 ENVTL. L. REP. 11,037 (2001). *But see First English*, 482 U.S. at 329–34 (Stevens, J., dissenting) (arguing that the time period of the restriction should be part of the analysis of whether a regulation constitutes a taking). In many ways, *Tahoe III* is a triumph of this dissenting approach.

[66] *First English* explicitly stated that its holding does not pertain to "the quite different question that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." 482 U.S. at 321.

[67] The majority opinion in *First English* referred to Agins v. Tiburon, 447 U.S. 255, 263 n.9 (1980) (asserting that the public should not be held liable for losses caused by delays "during the process of governmental decision-making"). Other courts have similarly interpreted *Agins* as holding that "[d]elaying the sale or development of property during the governmental decision-making process may cause fluctuations in value that, absent

Formal temporary moratoria, which last a finite period of time per explicit statutory mandate, were the type of temporary total restrictions at issue in *Tahoe III*. This type of restriction had not been addressed directly in prior Supreme Court takings cases.[68] While the TRPA, the American Planning Association, and the National Trust for Historic Preservation argued that there is no real difference between administrative delays and formal temporary moratoria,[69] the Court explicitly addressed each type separately,[70] indicating that it did perceive a significant distinction. In both cases, however, the Court refused to recognize a per se rule.[71]

2. *Dismissing of Conceptual Severance and Emphasizing Landowners' Remaining Future Interests*

Perhaps the most significant part of the majority's opinion for takings jurisprudence was its dismissal of conceptual severance and its emphasis on remaining future interests. In *Lucas*, Justice Scalia explicitly voiced uncertainty as to what the relevant denominator should be when assessing a "property interest."[72] This statement opened a window of ambiguity, suggesting that conceptual severance might be used to broaden the application of *Lucas*.[73] *Tahoe III* rejected the use of conceptual severance to define a taking under *Lucas*, reaffirming that the relevant property interest is in the parcel as a whole. It also emphasized the importance of future interests in regulatory takings analysis.[74]

The majority in *Tahoe III* held that *Lucas*'s per se rule does not apply to cases of formal temporary moratoria where some future interest remains. The Court refused to separate a parcel's value into temporal slices in order to measure whether it had been deprived of all economic

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extraordinary delay, are incidents of ownership rather than compensable takings." Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 262 (Minn. Ct. App. 1992) (holding that a two-year building moratorium is not a taking under the *Lucas* per se rule) (citing *Agins*, 447 U.S. at 263 n.9).

[68] However, Justice Stevens's dissent in *First English* seemed to address this type of restriction: "[W]hile I agree with the Chief Justice's view that the permanent restriction on building involved in *Penn Central* constituted a taking, I assume that no one would have suggested that a temporary freeze on building would have also constituted a taking." 482 U.S. at 331.

[69] *See* 2002 WL 43288 (U.S. Oral Arg.); *see also* Brief of Amici Curiae American Planning Association and the National Trust for Historic Preservation at *14–*17, *Tahoe III*, 122 S. Ct. 1465 (2002) (No. 00-1176), *available at* LEXIS 2000 U.S. Briefs 1167.

[70] *See infra* notes 89–92 and accompanying text.

[71] *Tahoe III*, 122 S. Ct. 1465, 1483, 1484–89 (2002).

[72] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992); *see also supra* note 12.

[73] In other words, after *Lucas*, a litigant may seek to isolate a restriction on part of a property interest (be it a present interest, a particular use, or one physical part of the property) in order to argue that a per se taking of that part of the total property interest had occurred. *See Tahoe III*, 122 S. Ct. at 1483–84.

[74] *Id.* at 1483.

use for that period of time.[75] Therefore, even if the two ordinances enacted by TRPA caused a total prohibition on economic use for thirty-two months, this did not constitute a per se taking under *Lucas* because the moratoria did not deprive each parcel as a whole from all economically beneficial use, given that the restrictions were temporary in nature.

Moreover, the Court emphasized that while a parcel may be divided into discrete segments in determining whether a physical taking has occurred,[76] conceptual severance should not be applied to regulatory takings.[77] As defined in *Penn Central*, courts should analyze the "parcel as a whole" in regulatory takings claims.[78] In *Tahoe III*, the Court defined "parcel as a whole" as encompassing both the "geographic dimensions" and the "temporal aspects of the owner's interests."[79] Hence, "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[80]

Tahoe III, therefore, explicitly precludes application of conceptual severance to find a per se taking under *Lucas* and seems to reject conceptual severance in all regulatory takings. However, it is unclear how broadly this rejection of conceptual severance will be applied within other subsets of regulatory takings. Other precedents applied some limited form of conceptual severance to regulatory takings when core property rights were restricted.[81] Remaining silent regarding these precedents, *Tahoe III* may not have eliminated conceptual severance from regulatory takings jurisprudence altogether.

C. Refusal to Adopt a Per Se Takings Rule for Temporary Moratoria

Tahoe III also strengthened the ad hoc approach to regulatory takings jurisprudence by refusing to adopt a new per se rule for temporary moratoria. The Court conducted a detailed inquiry into "whether the interest in protecting individual property owners from bearing public burdens 'which in all fairness and justice, should be borne by the public as a

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[75] In *Tahoe III*, Justice Thomas's dissent, however, argues that *First English* "put to rest the notion that the 'relevant denominator' is land's infinite life." *Id.* at 1496. He argues that "potential future value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place." *Id.* at 1497.

[76] For an example of severing property interests in physical takings, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[77] *Tahoe III*, 122 S. Ct. at 1483–84.

[78] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978).

[79] *Tahoe III*, 122 S. Ct. at 1484.

[80] *Id.*

[81] *See* Hodel v. Irving, 481 U.S. 704 (1987) (finding that the restriction of a tribe's right to devise its land deprived it of a core property right and constituted a taking). ***But see*** Andrus v. Allard, 444 U.S. 51 (1979) (finding that a law restricting the owners of eagle feathers from selling that property was not a taking). *See generally* SINGER, *supra* note 9, at 1252–53 n.4.

whole'" is better served by either a new per se rule or by the *Penn Central* analysis.[82] It concluded that in the case of any kind of temporary restriction, an ad hoc approach best serves the interests of fairness and justice.[83] The Court's resistance to a new per se rule was consistent with its most recent regulatory takings decision.[84]

The majority declined to adopt a broad per se rule that would treat all temporary total restrictions as equivalent to permanent total restrictions. "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision-making."[85] Additionally, the Court noted that it would be anomalous for a landowner permanently deprived of ninety-five percent of the value of her property to be subject to an ad hoc analysis, while a landowner deprived of all use for only five days had the benefit of a per se rule.[86]

In addition to rejecting the broad per se rule argued for by the petitioners, the majority opinion also rejected the adoption of a narrower per se rule "that [would exclude] the normal delays associated with processing permits, or that covered only delays of more than a year."[87] The Court acknowledged that such a rule "would still impose serious financial constraints on the planning process" and that "the consensus in the planning community . . . appears to be that moratoria, or 'interim development controls' . . . are an essential tool of successful development."[88]

The Court also found no reason to treat formal moratoria differently from ordinary delays in government decision-making. Rather, the majority opinion stated that full disclosure of delays, as is the case with moratoria, is preferable to informal delays that might occur if TRPA had "simply delayed action on all permits pending a regional plan."[89] Justice Stevens specifically cited the benefits of allowing "the planning and implementation process [to] be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view."[90] Thus, the decision highlighted the importance of temporary moratoria as a means to encourage

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[82] *Tahoe III*, 122 S. Ct. at 1484 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[83] *See id.* at 1484–90.

[84] Palazzolo v. Rhode Island, 533 U.S. 606, 634, 636 (2001) ("The temptation to adopt what amount to per se rules in either direction must be resisted.").

[85] *Tahoe III*, 122 S. Ct. at 1485.

[86] *Id.* at 1485–86 n.30.

[87] *Id.* at 1486.

[88] *Id.* at 1486–87. The Ninth Circuit also found that, "[g]iven the importance and longstanding use [of temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism." *Tahoe II*, 216 F.3d 764, 777 (9th Cir. 2000).

[89] *Tahoe III*, 122 S. Ct. at 1487 n.31.

[90] *Id.* at 1487 n.33 (citing Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URB. L. 65 (1971)).

deliberate decision-making regarding community development[91] and allow for full public participation.[92]

The Court also emphasized that the *Penn Central* analysis directs "the inquiry to the proper considerations."[93] Particularly, the Court observed that "there is reason to believe property values often will continue to increase despite a moratorium."[94] Thus, "[s]ince in some cases a one-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."[95] Therefore, the Court concluded, any per se rule would be over-inclusive, particularly in cases where a property owner has benefited from temporary restrictions and the burden is insignificant.

D. Implications for Ad Hoc Analyses of Temporary Moratoria

Although the district court's finding that there was not a taking under an ad hoc analysis was not before the Court in *Tahoe III*, Justice Stevens suggested that some petitioners might have succeeded in an as applied challenge. Indeed, the Court noted that "if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis."[96] As described in *Palazzolo*, the *Penn Central* ad hoc analysis specifically weighs "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 ac-

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[91] The Court stated, "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." *Id.* at 1488. The lower court also noted that such a rush to develop had occurred in this case prior to the adoption of the 1980 Compact. *Tahoe II*, 216 F.3d at 777 n.15.

[92] The Court wrote that because "a categorical rule tied to the length of deliberation would likely create added pressure on decisionmakers to reach a quick resolution of land-use questions, it would only serve to disadvantage those landowners and interest groups who are not as organized or familiar with the planning process." *Tahoe III*, 122 S. Ct. at 1488.

The Court further emphasized its interest in promoting informed decision-making through its strict ripeness requirement for claiming a regulatory taking. Adopting the reasoning employed in *Palazzolo*, the Court required that the landowner attempt to follow all "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property." *Id.* (citing Palazzolo v. Rhode Island, 533 U.S. 606, 620–21 (2001)). The adoption of a per se rule in this case would conflict with the reasoning behind the ripeness requirement for bringing the claim in the first place and would result in "a perverse system of incentives." *Id.*

[93] *Id.* at 1487 n.34.

[94] *Id.* at 1489 (citing Growth Props., Inc. v. Klingbeil Holding Co., 419 F. Supp. 212, 218 (D. Md. 1976) and Forest Props., Inc. v. United States, 177 F.3d 1360, 1367 (Fed. Cir. 1999) as cases in which increases in market value were anticipated or realized despite a restriction on development).

[95] *Id.*

[96] *Id.* at 1485.

tion."[97] The majority in *Tahoe III* indirectly addressed each of these issues and emphasized particularly relevant factors for temporary moratoria that might influence the outcome of future ad hoc takings analyses.

Regarding the economic effect on landowners, the Court emphasized the importance in showing some loss in value of the property during the moratorium.[98] In this case, the record lacked evidence regarding the devaluation of any of the petitioners' properties.[99]

Analyzing the effect on reasonable investment-backed expectations, the Court specifically emphasized that the Tahoe basin was subject to a "heavily regulated zoning scheme" leading up to the moratoria.[100] The property owners were on notice and had ample opportunity to develop before 1980. Thus, such restrictions should have formed part of the property owner's reasonable expectations.[101]

With respect to the character of the governmental action of temporary moratoria generally, the majority suggested that "with a temporary ban on development there is a lesser risk that individual landowners will be 'singled out' to bear a special burden that should be shared by the public as a whole."[102] Moreover, the Court observed that "with a moratorium there is a clear 'reciprocity of advantage,' . . . because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted."[103]

In its discussion of the character of the governmental actions specific to this case, the Court emphasized the importance of the good faith interest of the planners. The Court pointed to three legislative bodies, which stressed the importance of "'halt[ing] temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan.'"[104] Thus, these restrictions had widespread support and seemed necessary to prevent individuals from imposing large, irreversible costs on the lake and surrounding community and from undermining the

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[97] Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

[98] *See Tahoe III*, 122 S. Ct. at 1487.

[99] *Tahoe I*, 34 F. Supp. 2d 1226, 1241 (D. Nev. 1999).

[100] *Tahoe III*, 122 S. Ct. at 1473 n.5.

[101] The Court recognized that the property owners "purchased their properties prior to the effective date of the 1980 Compact, . . . primarily for the purpose of constructing at a time of their choosing a single-family home to serve as a permanent, retirement or vacation residence." *Id.* at 1473 (internal quotation marks omitted). But the Court also emphasized that "[w]hen [the property owners] made those purchases, they did so with the understanding that such construction was authorized provided that they complied with all reasonable requirements for building." *Id.* (internal quotation marks omitted); *see also Tahoe I*, 34 F. Supp. 2d at 1241.

[102] *Tahoe III*, 122 S. Ct. at 1488.

[103] *Id.* at 1489 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

[104] *See id.* at 1488 (quoting the 1980 interstate compact, which summarized the conclusions of the California and Nevada legislatures).

planning process. The Supreme Court also emphasized the district court's finding that TRPA had made good faith efforts to develop a final plan and had performed to the best of its ability.[105]

Another factor relevant to the character of the governmental action, which seemed especially important to the Supreme Court in this case, was the necessity of a temporary restriction in order to allow full and transparent public participation in the planning process. The Court stressed the interest in promoting deliberate decision-making with public participation, suggesting that this delay is less likely to constitute a taking.[106] In particular, Justice Stevens emphasized the importance of a deliberate, accessible decision-making process when an agency is contemplating a regional development plan, as compared to assessing a permit application for an individual property.[107]

The duration of the moratorium is also a factor relevant to the *Penn Central* test.[108] The Court admitted that "[i]t may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism."[109] However, it reiterated that duration is but "one of the important factors."[110] For example, the temporary restriction in *First English*, which lasted for more than six years, was ultimately found not to constitute a taking.[111]

Future courts, in conducting a *Penn Central* analysis, should consider the relevant future interests attached to the parcel and the effect of the moratorium on the life of a particular property interest. The Ninth Circuit speculated that "were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use, [it] might be compelled to conclude that a categorical taking had occurred."[112] The Supreme Court declined to address this hypothetical, but

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[105] *Id.* at 1488–89.

[106] *Id.* at 1488.

[107] *Tahoe III*, 122 S. Ct. at 1488.

[108] Chief Justice Rehnquist's dissent proposed that courts should determine the duration of a moratorium from the standpoint of the landowner. *See id.* at 1490. This interpretation would expand the time of a restriction to the total duration that a landowner is denied use of her land, regardless of whether the direct cause was a court-issued injunction or a legislative ordinance. *Id.* at 1490–91. The Chief Justice's position may be consistent with the holding in *First English* that the time the land was restricted due to litigation should be included in the calculation of damages. *See* First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 303, 319 (1987).

The majority's opinion did not address the Ninth Circuit's holding that excluded the period the restriction was imposed due to injunction. That issue was not within the narrow question granted certiorari, was not briefed, or argued before the Court. *Tahoe III*, 122 S. Ct. at 1474 n.8.

Whatever the proper analysis, the majority consistently refrained from suggesting a range or cut-off period after which a restriction would become a per se taking.

[109] *Tahoe III*, 122 S. Ct. at 1489.

[110] *Id.*

[111] *See id.* at 1489 n.36 and accompanying text.

[112] *Tahoe II*, 216 F.3d 764, 781 (9th Cir. 2000); *see also* Roberts, *supra* note 65, at 11,037.

emphasized that a property interest is in part defined by "the term of years that describes the temporal aspect of the owner's interest[s]."[113] Thus, a court should consider the impact of the restriction on the temporal life of a property interest, particularly when evaluating the economic impact on a property owner.

Under an ad hoc analysis, none of these factors are in themselves determinative. However, the Court's opinion in *Tahoe III* suggested that the factors discussed above are all particularly relevant when analyzing temporary restrictions on development.

IV. Conclusion

Tahoe III had immense implications for both takings jurisprudence and land use planning. Within regulatory takings jurisprudence, this decision signaled a retreat from the per se treatment of regulatory takings applied in *Lucas*. Additionally, *Tahoe III* reaffirmed the Court's interest in protecting local government's ability to deliberate, plan, and elicit open public participation in land development.

Significantly, the Court rejected conceptual severance for regulatory takings was especially significant. While *Lucas* and *First English* equated regulatory and physical takings, the Court in *Tahoe III* distinguished the two. Physical takings, even of a small fraction of the parcel, are always per se takings. Regulatory takings, on the other hand, outside a few limited per se exceptions, must be determined through an ad hoc analysis looking at the parcel as a whole and not at the part or period being restricted.

This decision also had strong implications for the future of smart growth. Communities must have the authority to restrict development temporarily in order to prevent undermining community zoning plans during the processes of implementation.[114] *Tahoe III* reaffirmed the power of communities to make reasonable, deliberate choices on how, when, and where to grow, without having to compensate every landowner affected. While some would advocate limiting government land use regulation to nuisance law and background property law,[115] the historical

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[113] *Tahoe III*, 122 S. Ct. at 1484.

[114] *See* Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 Univ. Pa. L. Rev. 873, 874 (Jan. 2000) (arguing that "dysfunctional growth" threatens "quality of life (particularly in our poorest neighborhoods), prime farmland, the environment, our historic and cultural heritage, and our sense of community"). Additionally, the article cites a report sponsored by The Bank of America, which stated that "'unchecked sprawl has shifted from an engine of California's growth to a force that now threatens to inhibit growth and degrade the quality of our life.'" *Id.* at 876. "The report concludes that sprawl contributes to, among other ills, decreased employee productivity, higher business costs and taxes, and a decreased urban tax base." *Id.*

[115] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992); *see also* Richard Epstein, Takings: Private Property and the Power of Eminent Domain (1985).

precedent for government regulation of development dates back to colonial times,[116] and continues to be applied in numerous lower court decisions and affirmed by the Supreme Court.[117] *Tahoe III* acknowledges the importance of government land use planning and is an important victory for advocates of smart growth.

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[116] *See* Dowling, *supra* note 114, at 881–82 (citing Hart, *supra* note 1).

[117] *See Tahoe III*, 122 S. Ct. at 1487 n.32 (listing lower court decisions finding that moratoria do not constitute per se takings); *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 490 (1987) (rejecting the notion that determination of a taking turns on whether there is a common law nuisance); Miller v. Schoene, 276 U.S. 272, 279–80 (1928).