# DEFENSIBLE MORATORIA AND TEMPORARY REGULATORY TAKINGS AFTER *LAKE TAHOE*

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## KEY CASES PRE-DATING *LAKE TAHOE*

*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378 (1987).

*Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

*Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646 (1978).

*Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001).

## ***FIRST ENGLISH*: THE BEGINNING**

The county adopted an interim ordinance prohibiting construction or reconstruction in a floodway after a forest fire destroyed vegetation, creating a flood hazard. The Church sued for monetary damages rather than equitable relief. The trial court held that damages were not a remedy for a temporary regulatory taking. The Supreme Court, assuming but not deciding that the county ordinance constituted a taking, held that mere invalidation of the regulation was not sufficient – monetary damages must be paid for a temporary taking.

***First English* Teaching Point: Damages are an appropriate remedy for temporary regulatory takings.**

## ***LUCAS***

South Carolina adopted a Beachfront Management Act, which had the effect of preventing Mr. Lucas from building any permanent habitable structures on two residential lots that he purchased for $975,000. The South Carolina Supreme Court concluded that there was no taking because the Act was adopted "to prevent serious public harm."

The Supreme Court held that a "categorical" or "per se" taking occurs if a regulation deprives a property owner of "all economically viable use" of the property unless the proscribed use is not part of the "bundle of rights" inherent in the ownership of the property.

***Lucas* Teaching Point: A regulation will constitute a "per se" taking if it deprives a property owner of all economically viable use of the property**

***PENN CENTRAL***

The Court in *Penn Central* established a three-part test to determine whether a regulatory taking has occurred. The test requires a court to examine:

- The economic impact of the regulation;
- The extent to which the regulation interferes with legitimate investment-backed expectations of the property owner; and
- The character of the regulation.

***Penn Central* Teaching Point: Case-by-case determination will normally be needed to determine whether a regulation constitutes a taking**

***PALAZZOLO***

State denied a property owner a permit to fill 18 acres of coastal wetlands. The property owner purchased the land after the state's wetlands regulations had been adopted. The state court concluded that: (1) property owner had not established a *Lucas* taking because the regulations did not deprive the property owner of all economically viable use of the property; and (2) no *Penn Central* taking occurred because the property owner had no reasonable investment backed expectations since the property owner purchased the land after the regulations were adopted. The Supreme Court concluded that the fact that the property was purchased after the regulation was adopted did not bar a *Penn Central* takings claim. In her concurring opinion, Justice O'Connor stated that principles of "fairness and justice" should be considered when evaluating the "reasonable investment backed expectation" factor.

***Palazzolo* teaching point: A regulation can constitute a taking even if it was adopted before the property owner acquired the property.**

## ***LAKE TAHOE* --THE LATEST SUPREME COURT CASE ON TEMPORARY REGULATORY TAKINGS**

*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002). The issue in the case was whether a temporary planning moratorium on land development constituted a taking of property requiring compensation under the Takings Clause of the United States Constitution.

The Tahoe Regional Planning Agency adopted a 32-month moratorium. Four hundred landowners challenged the moratorium as a taking under *Lucas* and *Penn Central*. The trial court ruled that:

- the moratorium was reasonable in scope and duration;
- no *Penn Central* taking occurred because there was no interference with reasonable investment-backed expectations (average land holding period in the Lake Tahoe basin is 25 years);
- the moratorium did not render the plaintiffs' land totally valueless, but it temporarily deprived them of "all economically viable use of their land" and a *Lucas* taking had therefore occurred; and
- the property owners were entitled to monetary damages under *First English.*

Landowners appealed to the Supreme Court and relied on the following arguments:

- if there is a total prohibition of use even "for 10 minutes" there is a taking;
- the rule for temporary regulatory taking should be the same as temporary physical invasion taking;

- the normal delay associated with the ordinary zoning permitting process is different because it is part of "a process working toward the actual development" of the property not a "total blockage" of development; and
- the public ought to be paying for the project, not the individual landowners.

The Planning Agency argued that:

- a three-year moratorium is different from the government acquiring a three-year leasehold interest because there was no physical appropriation;
- the government's good faith and intent are relevant;
- *per se* rules should be avoided in the area of regulatory takings;
- temporary moratoriums are as much a part of general land use principles as the normal zoning permitting process; and
- taken to its logical conclusion, landowners' argument is that "any momentary suspension of the use of property" is a taking.

The Supreme Court (Justice Stevens) ruled that:

- It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a regulatory taking."
- *First English* is not controlling because it addressed only a "remedial question."
- *Lucas* is not dispositive because the taking there "was unconditional and permanent."
- *Lucas* is limited to "the extraordinary circumstance where *no* productive or economically beneficial use of land is permitted."
- The landowners' "temporal severance" claim ignores the *Penn Central* "parcel as a whole" principle.

- The ultimate constitutional question is whether the concepts of "fairness and justice" that underlie the Takings Clause will be best served by a *Penn Central* inquiry into all of the relevant circumstances in particular cases, not by a categorical rule.

The majority opinion relied heavily on Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 (2001) (a temporary taking "requires careful examination and weighing of all the relevant circumstances"). Justice Rehnquist (joined by Justices Scalia and Thomas) dissented, stating that the delay was for six years, not 32 months, and bore no relationship to typical short term moratoriums and that the *Lucas per se* rule should apply. A separate dissent by Justice Thomas (joined by Justice Scalia) rejected the "parcel as a whole" theory and concluded that a total deprivation of use is the equivalent of a physical appropriation.

**Teaching Points from *Lake Tahoe*:**

1. **Parcel-as-a-whole principle is firmly established;**
2. **Physical invasion cases are not controlling in regulatory takings cases;**
3. **No bright line rule for regulatory takings cases – they will be handled on a case-by-case basis, and the *Penn Central* factors will be analyzed with principles of "fairness and justice" in mind;**
4. **Moratoriums adopted in good faith and for a reasonable period of time are alive and well; and**
5. ***Lucas*-type cases will be extremely rare**.

## DECISIONS SINCE *LAKE TAHOE*

### 1. Parcel-As-A-Whole Issue Principle

- *Walcek v. United States*, 303 F.3d 1349 (Fed. Cir. Sept. 11, 2002). Plaintiffs owned approximately 14.5 acres of land, 13.2 of which had been designated as wetlands. The court relied on "parcel as a whole" test to conclude that the plaintiffs could not state a takings claim as to the 13.2 acres separately.
- *Seiber v. United States*, 53 Fed. Cl. 570, (Ct. Cl. 2002). Plaintiffs claimed that the United States government had taken 40 of their 200 acres of land because the 40 acres had been designated as a northern spotted owl nesting habitat and thus was protected from harvesting. The court held that the plaintiffs did not establish a physical occupation of the property despite the fact that the government was essentially allowing the northern spotted owl to exist on their property. The fact that the plaintiffs were denied all economically viable use of their 40 acres while they were attempting to obtain a permit does not constitute a *Penn Central* taking. "The length of the delay is often not the primary factor. For a delay to be extraordinary the delay must be substantial and is usually accompanied by a showing of bad faith."
- *Machipongo Land & Coal Co., Inc. v. Commonwealth of Pennsylvania*, 799 A.2d 751 (Pa. 2002). The state designated a portion of the plaintiff's land as "unsuitable for mining" in order to protect a nearby watershed. Pennsylvania law recognizes separate estates in the same parcel of land including a surface estate, a coal/mineral estate, and a support estate. The trial court found that because the estates could be separated for purposes of ownership, the coal estate should be used as a separate

parcel to determine whether a taking occurred. Relying on *Tahoe*, the Pennsylvania Supreme Court held that for purposes of a *Lucas* takings claim the relevant parcel must include all of the other interests in the land. The court concluded, however, that a trial was necessary to consider the three *Penn Central* factors to determine whether an ad hoc taking had occurred.

**2. *Penn Central* and Case-by-Case Analysis**

- *Grosso v. City of New Bedford*, 774 N.E.2d 1186 (Mass. App. Ct. 2002). The court analyzed the *Penn Central* factors in the context of a denial of a rezoning application. The court concluded that the denial of the rezoning had no economic impact because it did not change the zoning status of the parcel that existed on the property when the plaintiffs purchased it. Plaintiffs had nothing but a unilateral expectation that the city would permit a zoning change; this is not sufficient to interfere with any legitimate investment backed expectations. The character of the governmental action was a zoning law, which is a classic example of land use regulations, and therefore of no help to the plaintiffs. The issue was decided by way of summary judgment.

- *Appolo Fuels, Inc. v. United States*, 54 Fed. Cl. 717 (Fed. Cl. 2002). Owners of multiple coal leases claimed a regulatory taking based on rejection by the Office of Surface Mining ("OSM") of a permit to mine on part of some land encompassed by some of the leases. The court reiterated the "parcel as a whole" and then examined each of the leases to determine if each one should be included. The court went on to analyze the three *Penn Central* factors to grant summary judgment for the federal government. Plaintiff was aware of the OSM's authority when plaintiff purchased

the leases. The character of the government's action was to prevent a nuisance, and even though the economic impact of the restriction was severe, plaintiff did not show that the restriction "makes it impossible for [it] to profitably engage in [its] business."

- *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). The Plaintiffs were the owners of low-income apartments that had received federally subsidized mortgages. The mortgages prevented the apartment owners from prepaying them for 20 years. After that, the owners could prepay the mortgages, thus freeing the property from HUD's regulatory restrictions. In 1987, Congress enacted the Emergency Low Income Housing Preservation Act, which prohibited HUD from temporarily approving any prepayment that did not meet specified criteria. Congress later indefinitely extended the prepayment prohibition. Ultimately, Congress repealed the prepayment prohibition in 1999. The Federal Circuit Court concluded that *Lake Tahoe* did not prevent the plaintiffs from claiming that the regulation constituted a taking of their property interests in the mortgages. The court rejected the government's claim that the property owners could not have a reasonable expectation that the mortgage regulations would not change. The court reinstated a damage award in excess of $3,000,000 to the plaintiffs.
- *Manor III Associates, LLP v. Riesman*, slip op. at 2003 WL 1224248 (R.I. Superior Ct. Feb. 23, 2003). In 1986 the state revoked a wetlands permit and required the developer to apply for a new permit. The permit revocation prevented the developer from proceeding with developing an additional 20 acres of land. The developer applied for a new permit, which was denied. In 1994, the state court enjoined the

state from requiring a new permit, and the developer then proceeded with the project. Applying the *Penn Central* factors, the court concluded that the state's action between 1986 and 1994 constituted a temporary regulatory taking. The court held that the measure of damages was the fair market rental value of the property ($1,472,000) during that period plus the developer's out-of-pocket expenses ($333,952) incurred as a result of applying for a new permit.

- *Santini v. Connecticut Hazardous Waste Management Service*, ___ F.3d ___ (2d Cir. 2003); 2003 WL 22020555. A real estate development claimed, among other things, that an announcement by a state board that the firm's property was under consideration for location of a low-level radioactive waste disposal facility constituted a taking. The court held that although the siting announcement no doubt had an economic impact on the property and interfered with certain investment-backed expectations of the owner, the character of the governmental action was of principal importance. The announcement could not fairly be characterized as a physical invasion and did not lead to the government ultimately acquiring the property. The relatively short duration of the announcement (11 months) was one of the factors that the court considered in evaluating the regulatory takings claim. The court found no temporary regulatory taking.

**3. Physical Invasion Cases as Precedent**

- *Cinema Gardens, supra.* The enactment by Congress of the two Acts preventing prepayment of the mortgages "could fairly be characterized" as a physical taking because it had the effect of allowing HUD to rent apartments beyond the agreed lease term.

**4. "Moratorium" Cases**

- *Denune v. City of Springfield*, 2002 WL 1393687 (Ohio Ct. App. 2002). The city fire marshal temporarily closed a building that had been damaged by fire claiming that it was unsafe. Citing the *Tahoe* decision, the court stated that the temporary deprivation of the property owner's right to use the building did not constitute a taking of property.
- *Currier Builders, Inc. v. Town of York*, 2002 WL 1146773 (D. Me., May 30, 2002). A local ordinance only allowed a certain number of building permits to be issued each year; the ordinance was scheduled to expire within three years. Ordinance did not constitute a facial taking of property because, even though it was not a moratorium, it "prevented" development for less than the moratorium in the *Tahoe* decision. *Penn Central* factors could not be decided by way of summary judgment.
- *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002). The district court had placed an 18-month injunction on logging without a permit. *Tahoe* does not apply to the normal delays associated with obtaining a permit to log. The court rejected the contention that normal delays in the permitting process can give rise to a taking.
- *Cane Tennessee, Inc. v. United States*, 57 Fed. Cl. 115 (Fed. Cl. 2003). Owners of mineral royalty interests claimed that the Secretary of Interior's designation of a portion of their property as unsuitable for mining temporarily took their property without compensation during the unsuitability process. Relying on *Tahoe*, the court

held that it did not need to address the plaintiff's temporary taking claim because there had been no "extraordinary delay" in the regulatory decision-making process.

**5. *Lucas* Cases**

- *Phillip Morris, Inc. v. Reiley*, 312 F.3d 24 (1st Cir. 2002). A Massachusetts statute that required tobacco producers to supply ingredient lists arranged by amount and separated by brand, constituted a regulatory taking of a trade secret. Although ultimately the court centered its analysis on the loss of all value of the trade secrets if ingredient lists and quantities were disclosed publicly, the court refused to apply the per se rule in *Lucas* because *Lucas* concerned real, not personal property.
- *Cooley v. United States*, 324 F.3d 1297 (Fed. Cir. 2003). The property owner was originally denied a Section 404 permit to fill wetlands. The Corps of Engineers later issued a partial permit and then ultimately a full permit. Concluding that the original permit denial effectively precluded any commercial development on the property and resulted in at least a 98.8% loss in the value of the property, the trial court held that a *Lucas* taking had occurred. On appeal, the Federal Circuit held that a 98.8% loss in value is not a *Lucas* taking. The court also held that the taking was a partial one, not a permanent one, and remanded the case to the trial court to analyze whether a *Penn Central* taking occurred.
- *Bass Enterprises Production Co. v. United States*, 54 Fed. Cl. 400 (Fed. Cl. 2002). Court reconsidered its previous ruling that a categorical taking occurred when the federal government denied plaintiffs' permits to drill for oil and gas. Based on *Tahoe*, the court reversed its earlier ruling and analyzed the issue under the *Penn Central* factors. The court found that it was reasonable to place a hold on drilling

until the impact on the stability of a nuclear repository could be determined. Even though plaintiffs leased the land with reasonable investment backed expectations of drilling, the economic impact ($1.1 million) of the taking was only five percent of the value of their property. Therefore, no *Penn Central* taking occurred.

**6. Measure of Damages for Temporary Taking**

- *SDDS, Inc. v. State of South Dakota*, 650 N.W.2d 1 (S.D. 2002). A developer received legislative approval to build a solid waste disposal facility. A referendum reversed the legislation, thus preventing construction of the facility. The Eighth Circuit later determined that the referendum was invalid. The South Dakota Supreme Court held that the plaintiff was entitled to damages for a temporary taking for the 43-month period between the time that the legislation was passed and the date of the Eighth Circuit opinion. The proper measure of damages was the difference between interest on the developer's cash flows as they would have been with and without the 43-month delay.
- *American Pelagic Fishing Co. v. United States*, 55 Fed. Cl. 575 (Fed. Cl. 2003). The plaintiff was issued a federal fisheries permit to fish for mackerel and herring. The plaintiff was about to begin fishing operations pursuant to the permit when Congress adopted the 1997 Appropriations Act in November 1997. The Act effectively revoked the plaintiff's permit for one year. Ultimately, the plaintiff was permanently barred from fishing pursuant to the permit when Congress adopted the 1999 Appropriations Act. The plaintiff's fishing vessel was the only one that was affected by the two Acts. In July 1999, the plaintiff sold its fishing vessel. Applying the *Penn Central* factors, the Court of Claims concluded that there was a regulatory

taking and that the measure of damages was the fair market rental value of the vessel during the 20-month period from November 1997 to July 1999. The plaintiff was awarded damages in excess of $37 million.

## CONCLUSION

The following trends have developed in the sixteen months since *Lake Tahoe*:

1. The “parcel as a whole” principle has taken on a renewed significance.
2. Very few true “moratorium” cases have made it to the appellate court level.
3. *Lucas* cases have been virtually non-existent.
4. With the exception of the Federal Circuit, physical invasion cases have not been relied upon in temporary regulatory taking cases.
5. *Penn Central* factors and measure of damages have been the battlegrounds.
6. Courts seem to be willing to apply the "extraordinary delay" principle in non-moratorium cases.