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# Takings Watch

*CRC's Monthly Update on Regulatory Takings*

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## FEATURE CASE

### *Happy Earth Day, Lake Tahoe!*

On April 23, the U.S. Supreme Court gave a wonderful Earth Day present to Lake Tahoe and local officials across the nation in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*. The ruling rejects a regulatory takings challenge to a 32-month planning moratorium imposed to allow for the preparation of a regional plan to protect Lake Tahoe from pollution caused by uncontrolled development.

**QUOTE OF THE MONTH**

The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule * * *. 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. 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.

Justice Stevens's 6-3 Majority Opinion in *Tahoe-Sierra*

At long last, *Tahoe* breaks a string of government losses in regulatory takings rulings by the Supreme Court, and it does so in dramatic fashion. Although the opinion is narrow on the surface -- addressing only whether the moratorium worked a *per se* taking under *Lucas v. South Carolina Coastal Council* (U.S. 1992) -- it addresses key issues in a way that will be very useful to municipal lawyers in future cases. It's the best news from the Court on takings in 20 years.

Authored by Justice Stevens, the comprehensive and elegant majority opinion emphatically reaffirms the parcel-as-a-whole rule (rejecting both conceptual and physical segmentation), notwithstanding confusing dicta in *Lucas* and *Palazzolo v. Rhode Island* (U.S. 2001) suggesting that the Court might revisit the rule. *Tahoe* declares that both "the metes and bounds" and "the term of years" of the owner's interest must be considered under the parcel-as-a-whole rule. *Tahoe* should be submitted as supplemental authority in every pending appeal that involves a relevant-parcel issue.

The opinion also preserves the important analytical divide between physical and regulatory takings, rejecting strenuous efforts by the *Tahoe* claimants and their amici to blur the distinction. It limits the reach of the *Lucas per se* rule to regulations that completely eliminate all value, rejecting the oft-heard argument that *Lucas* recognizes a constitutional right to build and that regulations can deny all economically viable use even where land retains value. It construes *First English* narrowly as a remedies case. It defers to the "consensus of the planning community" regarding the importance of moratoria. It weighs concerns about "inefficient and ill-conceived growth" in its consideration of fairness. It recognizes that land-use restrictions, even severe restrictions, may enhance property values and generate a reciprocity of advantage. And unlike several prior takings opinions, which drip with skepticism about government regulation, *Tahoe* acknowledges the importance of thoughtful, careful planning in protecting our communities from harmful land use.

To be sure, the ruling recognizes that unreasonable moratoria are subject to challenge under the multifactor test set forth in *Penn Central Transp. Co. v. New York City* (U.S. 1978). It also states that, absent special circumstances, moratoria extending beyond one year might warrant careful scrutiny. At the same time, however, the Court acknowledges that several state legislatures have authorized moratoria for up to two years, and it concludes that time limits are best left to legislative bodies, not the judiciary.

The two swing Justices, Kennedy and O'Connor, fully embrace the majority's analysis without the confusing concurrences generated by earlier rulings. Indeed, one observer aptly described *Tahoe* as a Declaration of Independence by the Court's center on takings issues. Their separate opinions in cases including *Lucas* and *Palazzolo* were signals that they were unwilling to follow the property rights movement over the cliff, and *Tahoe* serves as the exclamation point on their break from the ideologues.

Kudos to John Marshall at the Tahoe Regional Planning Agency, John Roberts (who presented the Agency's case at oral argument), and the Agency's entire legal team. CRC filed an amicus brief on behalf of a large coalition of state and local officials. The opinion, briefs, argument transcript, and other information on *Tahoe* are available at Community Rights Counsel's newly designed web site at www.communityrights.org.

## OUTRAGE OF THE MONTH
## Is Private Property "Extinct" in California?

Pop quiz! Who recently wrote the following? "Private property, already an endangered species in California, is now entirely extinct in San Francisco. * * * [T]he property right is now -- in California, at least -- a hollow one."

Given the over-the-top tone, one might guess that the author was Gideon Kanner, one of the shrillest pro-developer voices in the takings debate, or perhaps Richard Epstein, who candidly acknowledges that his vision of the Takings Clause casts into doubt the constitutionality of zoning, progressive taxation, and many other reforms of the 20th Century.

But this jarring pronouncement comes not from an overcharged advocate or detached academic, but from a jurist, Justice Janice Brown of the California Supreme Court, who is reputed to be on the short list of potential nominees to the U.S. Supreme Court. Justice Brown reached this startling conclusion in her lone dissent in *San Remo v. San Francisco* (2002), a case in which the Court upheld San Francisco's efforts to address its affordable housing crisis by limiting the ability of residential hotels to convert to tourist use (see Feature Case in the March 2002 *Takings Watch*). This result was too much for Justice Brown, who seems prepared to deem many community protections to be takings. After accusing San Francisco of being a "kleptocracy," she stressed that in her view the "[r]estriction of any one of the several rights that constitute private property in effect takes that property." This radical view of takings would call into question myriad land use controls. The *San Remo* majority flatly rebuffed Justice Brown's activism: "However strongly and sincerely the dissenting justice may believe that government should regulate property only through rules that the affected owners would agree indirectly enhance the value of their properties, nothing in the law of takings would justify an appointed judiciary in imposing that, or any other, personal theory of political economy on the people of a democratic state."

One hopes that the President will think hard about her radical views on property — and the turmoil that her nomination would cause — before nominating her to the highest court in the land.

## EYE ON WASHINGTON:
## A Friend Indeed

Those of us who file friend-of-the-court briefs might wonder whether they have any real impact. In March 14 remarks at Georgetown University, Justice Sandra Day O'Connor reaffirmed the value of amicus briefs, observing that "they are read" and play an important role.

Justice O'Connor offered two bits of advice for brief writers. First, she encouraged *amici* to avoid "me too" briefs that parrot the arguments of the parties, and instead to "have a different take" on the case. Her observations echo Supreme Court Rule 37, which explains that an *amicus curiae* brief that offers a fresh perspective or new information "may be of considerable help to the Court," whereas a brief that does not do so "burdens the Court, and its filing is not favored."

Second, she cautioned brief writers against circumventing the Court's rules on page limits by including lengthy footnotes in an attempt to shoehorn additional material into the brief. "Don't play that game, please!," she exclaimed. Her remarks track those of other appellate jurists, some of whom have eliminated all footnotes from their opinions in an effort to make them more readable.

In a nutshell, potential friends of the Court should determine whether they have something new to add and, if so, offer it concisely. That's sage advice no matter which court you are seeking to befriend.

## ON THE HORIZON:
### Peeking at Pending Cert. Petitions

With the U.S. Supreme Court cranking out five reg-take rulings in 1987 (*First English, Nollan, Keystone, Hodel v. Irving, Florida Power*) and one almost every Term since then (*Pennell, Sperry, Preseault, Lucas, Yee, Concrete Pipe, Dolan, Suitum, Phillips, Eastern Enterprises, Del Monte Dunes, Palazzolo,* and *Tahoe*), it's natural to speculate as to what might be next from the high court. CRC's web site makes such speculation easier by listing pending petitions for certiorari in reg-take cases and identifying the issues they raise. We also list more than 40 recent petitions that have been denied so that Court watchers can get a sense of the kinds of takings issues being presented to the Court on a regular basis. To see what may be on the horizon at the Supreme Court, go to www.communityrights.org/legalresources/legalmain.asp