

April 25, 2002

COURT DECLINES TO REQUIRE PAYMENT FOR TEMPORARY TAKING OF PROPERTY

(Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency)

The U.S. Supreme Court this week ruled that a government is not *automatically* required to provide compensation to property owners when it prohibits all use of property, so long as the prohibition is only temporary.

The decision was a setback for the Washington Legal Foundation (WLF), which had filed a brief in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, urging adoption of a *per se* rule requiring compensation in all such cases. WLF argued that the Fifth Amendment's Takings Clause requires government to provide just compensation *whenever* it takes private property, and the Constitution does not contain an exception for takings that are only temporary.

Declining to adopt WLF's position, the Court ruled that compensation claims filed in response to temporary moratoria on land use should be judged on a case-by-case basis, taking into account a wide variety of factors. The Court ruled that temporary moratoria are an important tool for land-use regulators and should not give rise to a compensation claim so long as they are no longer than is necessary to achieve a valid land-use goal. The Court indicated that any moratorium lasting longer than one year should be viewed with suspicion, but it declined to establish a *per se* rule requiring compensation in all cases involving moratoria of that length.

WLF attorneys expressed disappointment with the decision but noted that the Court did not foreclose any Takings Clause claims; the decision simply makes it harder to establish such claims. "Any land use regulation can be characterized as temporary, in the sense that there is always the possibility that the regulation will be lifted at some future date," WLF Chief Counsel Richard Samp after reviewing the Court's decision. "Thus, the Court's approach -- whereby a land use regulation labeled 'temporary' cannot give rise to categorical takings analysis -- is a recipe for emasculating the Takings Clause," Samp said.

The case involved a development moratorium imposed on much of the land surrounding Lake Tahoe. Designed to prevent further deterioration of the lake's clarity, the moratorium has been in effect, in one form or another, since 1981. The result is that the plaintiffs' property has been rendered virtually worthless, while the value of previously developed land (which is ecologically indistinguishable from the plaintiffs) has skyrocketed in value.

The case before the Supreme Court involved the initial development moratorium, which lasted from 1981 to 1984. Prior Takings Clause cases have established that property owners are *always* entitled to compensation when regulations deprive them of all or substantially all of the value of their property. The Supreme Court distinguished those cases, holding that a temporary regulation can never be said to deprive the property owner of *all* value, because a present value can always be placed on the right to future development.

In its brief, WLF argued that the defendant's position was based on a misreading of prior case law. WLF argued that the Supreme Court established the right to compensation for even temporary takings in its 1987 *First English* decision. WLF argued that were the law otherwise, governments could avoid the duty to compensate by stringing together an indefinite series of "temporary" development moratoria -- which is precisely what happened here. The Supreme Court avoided that argument by limiting its review to the 1981-84 period (thus, the Lake Tahoe landowners are free to file new Takings Clause claims with respect to more recent years of the moratorium), and by significantly cutting back on the scope of its *First English* decision.

WLF's brief noted that a victory for the plaintiffs would not require governments to pay compensation for every delay in development attributable to the normal development permit process. WLF stated that courts have made clear that no compensation is due based on delays attributable to the day-to-day, good-faith activities of zoning boards and planning agencies. The Court agreed with WLF that unreasonable delay in granting development rights can give rise to a valid Takings Clause claim; but the Court held that lengthy delays should not *automatically* give rise to compensation, but rather should be one factor among many in determining whether compensation is due.

WLF is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to promoting tort reform and protecting individuals and businesses from excessive government regulation. WLF filed its brief with the *pro bono* assistance of Connecticut attorney Douglas B. Levene.

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