

FOR IMMEDIATE RELEASE

September 13, 2001

COURT ASKED TO REQUIRE COMPENSATION FOR TEMPORARY TAKING OF PROPERTY

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

The Washington Legal Foundation (WLF) this week asked the U.S. Supreme Court to require governments that prohibit all use of property to compensate the owners of the property, even if the prohibition is only temporary.

In a brief filed in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, WLF argued that the Fifth Amendment's Takings Clause requires government to provide just compensation *whenever* it takes private property, and it does not contain an exception for takings that are only temporary. WLF asked the High Court to overturn a decision from the U.S. Court of Appeals for the Ninth Circuit that denied compensation to Lake Tahoe property owners who were at least temporarily blocked from making any use of their property.

"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 filing WLF's brief. "Thus, the lower 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 involves 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 involves 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 appeals court held 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 appeals courts decision was based on a

misreading of prior case law. WLF argued that the Supreme Court clearly 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.

WLF noted that governments need not provide compensation when they adopt land-use regulations designed to prevent property owners from maintaining a public nuisance. WLF argued that there is no plausible claim that the Lake Tahoe plaintiffs are seeking to engage in nuisance-type activities, because the plaintiffs are only seeking to build the same types of structures that continue to be permitted throughout the Lake Tahoe area.

WLF also 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.

WLF also stressed that it is not seeking to interfere with government efforts to protect the environment. "Any government that seeks to preserve open space through the imposition of development bans is free to do so; however, basic fairness requires that the cost of those bans be borne by the citizenry as a whole rather than by individual property owners," Samp said.

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.

* * *

For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302.