

TAHOE-SIERRA PRESERVATION  
COUNCIL, INC. v. TAHOE REGIONAL  
PLANNING AGENCY  
122 S. CT. 1465 (2002)

INTRODUCTION

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (“*Tahoe III*”),<sup>1</sup> the Supreme Court declined to adopt a per se rule stating that whenever government adopts a moratorium prohibiting all economically viable development, regardless of its duration, then that moratorium automatically works a compensable taking of private property.<sup>2</sup> The Court reaffirmed its position that whether a moratorium on development is a compensable taking under the Fifth Amendment depends on the particular circumstances of each case.<sup>3</sup>

I. BACKGROUND

A. *The Takings Clause*

There is a distinct difference between physical takings, which unquestionably require compensation under the Fifth Amendment,<sup>4</sup> and regulatory takings, a category of takings jurisprudence that developed through common law and generally requires weighing the

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1. 122 S. Ct. 1465 (2002) (“*Tahoe III*”).

2. See *id.* at 1477 (stating plaintiffs’ position that a temporary prohibition of all economic use of land constituted a compensable taking); see generally LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE 67-71 (Brian W. Blaesser & Alan C. Weinstein eds., 1989) (noting that when the government “takes” land, either physically or through regulation, it must pay the property owner just compensation or fair market value).

3. See *Tahoe III*, 122 S. Ct. at 1478 (finding that neither precedent nor “fairness and justice” demands the adoption of a per se rule).

4. U.S. CONST. amend. V (stating “. . . nor shall private property be taken for public use, without just compensation”); see U.S. CONST. amend. XIV (forbidding States from infringing on the federal rights guaranteed to American citizens by the United States Constitution and thereby making the Takings Clause of the Fifth Amendment applicable to state action).

facts and circumstances of each particular case.<sup>5</sup> The concept of regulatory takings was first introduced in 1922 by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.<sup>6</sup> Justice Holmes stated, “if regulation goes too far it will be recognized as a taking.”<sup>7</sup> Regardless of the legal category of taking at bar, the over-arching theme in this area of the law is to protect private landowners from bearing the brunt of providing a public benefit, “which, in all fairness and justice, should be borne by the public as a whole.”<sup>8</sup>

Since the legal recognition of regulatory takings, the Court has attempted to avoid establishing a bright-line test to determine “how far is too far.”<sup>9</sup> Instead, the Court developed the current framework for deciding whether a government regulation constitutes a taking in the landmark case, *Penn Central Transportation Co. v. New York City*,<sup>10</sup> where a New York City law was applied to declare the Grand Central Terminal and the city block that it occupied, both owned by Penn Central, as landmarks.<sup>11</sup> The framework is an “essentially ad hoc, factual inquir[y].”<sup>12</sup> The Court in *Penn Central* stated three factors that should be considered: (1) the economic impact of the regulation, (2) the interference of the regulation with the investment expectations of the property owners, and (3) the character of the government regulation.<sup>13</sup>

In *Lucas v. South Carolina Coastal Council*,<sup>14</sup> the Supreme Court established a rare *per se* rule in the area of regulatory takings

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5. See *Tahoe III*, 122 S. Ct. at 1478 (stating that there is no constitutional basis for declaring that a government regulation prohibiting private uses has effectively taken private property requiring compensation for the landowner).

6. 260 U.S. 393 (1922).

7. *Id.* at 415.

8. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

9. See *Tahoe III*, 122 S. Ct. at 1481 (discussing that the Court prefers to consider a broad range of factors when deciding if a particular regulation has worked a taking rather than relying on a precise formula).

10. 438 U.S. 104 (1978) (holding that application of New York City's Landmarks Preservation Law to a designation of Grand Central Terminal as a landmark did not constitute a taking of Penn Central's property under the Fifth Amendment).

11. See *id.* at 115-16. Penn Central had entered into an agreement to construct an office building above the Terminal. This plan was rejected by a Commission established under the New York City law, which concluded that the development would destroy the Terminal's historic and aesthetic features that made it a landmark. *Id.* at 116-18.

12. *Id.* at 124.

13. See *id.* at 138 (finding that the challenged New York City Landmarks Law, which was designed to preserve structures of historic or aesthetic interest, promoted a permissible government goal and did not infringe on the property owners' present use or prevent a reasonable rate of return on their investment).

14. 505 U.S. 1003 (1992).

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jurisprudence. Petitioner Lucas purchased two residential lots in a subdivision with the intent to build single-family homes on the sites.<sup>15</sup> A statute enacted two years after Lucas purchased the lots permanently forbade any economically viable use of the land.<sup>16</sup> Because the development restriction resulted in a total diminution in the value of the real property, the Supreme Court found that a taking had occurred.<sup>17</sup> *Lucas*, in effect, established a new categorical rule for regulatory takings that requires a complete and permanent elimination of value to apply, not merely a decrease in value.<sup>18</sup>

B. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency

This case is part of a long-running dispute between Lake Tahoe property owners and the Tahoe Regional Planning Agency's ("TRPA") efforts to control the environmental degradation that has plagued the lake for more than forty years. Since Lake Tahoe straddles the California-Nevada border, TRPA's responsibilities include coordinating land use and environmental policies in both states.<sup>19</sup> The 1980 Tahoe Regional Planning Compact ("Compact") directed TRPA to formulate a plan to prevent and reverse damage to Lake Tahoe's clarity and distinctive blue coloration.<sup>20</sup> In August 1981, TRPA enacted a moratorium on the development of environmentally sensitive lands in order to give itself the time necessary to develop an effective plan.<sup>21</sup> This moratorium was to last until a permanent plan was adopted.<sup>22</sup> Formulation of the plan took longer than expected and TRPA enacted a second moratorium in August 1983, which remained in effect until April 1984, when a new

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15. See *id.* at 1006 (describing Lucas' plans for his property).

16. See S.C. CODE ANN. § 48-39-290(A) (Law. Co-op. 1988) (barring the petitioner from erecting any permanent habitable structures on his two parcels); see also *Lucas*, 505 U.S. at 1007 (noting that the trial court found that the regulation rendered Lucas' land "valueless").

17. See *Lucas*, 505 U.S. at 1019.

18. See *id.* at 1015 (requiring elimination of "all economically beneficial or productive use of land" for a taking).

19. See *Tahoe III*, 122 S. Ct. at 1472.

20. See *id.* (stating that the 1980 compact directed TRPA to develop a plan addressing air and water quality, soil conservation, vegetation preservation, and noise).

21. See *id.* (finding that Ordinance 81-5, issued by TRPA, effectively banned development on a majority of the sensitive lands and greatly limited development on the remainder).

22. See *id.* (explaining that the Compact required TRPA to adopt a permanent plan).

regional plan was finally adopted.<sup>23</sup> California judicially challenged the new plan on the day of its adoption, after determining the new plan did not adequately protect the Lake Tahoe Basin.<sup>24</sup> The federal district court issued an injunction preventing development in certain areas within the basin that lasted until a completely revised regional plan was adopted in 1987.<sup>25</sup>

Two months after the adoption of the new regional plan in April 1984, a group of approximately 400 individual landowners and the Tahoe Sierra Preservation Council, a nonprofit corporation that represents owners of real estate in the Lake Tahoe Basin, sued TRPA claiming that the two moratoria and the 1984 final plan took their property under the Fifth Amendment Takings Clause, entitling them to monetary compensation.<sup>26</sup>

Finding *Lucas* controlling on the issue, the United States District Court for the District of Nevada determined that the moratoria were facially invalid because they constituted a compensable categorical taking of private property by denying the landowners all economically viable use of their land for a thirty-two month period.<sup>27</sup> The district court further determined that any injury to the plaintiffs following the enactment of the final plan in 1984 was the result of the court ordered injunction and not the actions of the TRPA.<sup>28</sup>

The Ninth Circuit Court of Appeals reversed the district court's ruling, finding that a temporal severance of the fee simple property interests held by the property owners was not mandated by precedent.<sup>29</sup> It further held that the two ordinances at issue did not

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23. See *id.* at 1473 (stating that the complexity of the task required TRPA to adopt Resolution 83-21, which banned development on all sensitive lands until a new regional plan was adopted eight months later).

24. See *id.* (indicating that California sought to enjoin implementation of the resolution because it was not sufficiently stringent).

25. See *id.* (noting that the injunction prohibited new construction on sensitive lands in the Basin).

26. See *id.* at 1474 n.7 (stating that the challenge to the 1984 plan was not before the court because it was the federal injunction against implementing the plan that caused the post-1984 injuries).

27. See *id.* at 1475 (discussing the district court's application of *Lucas* to the moratoria). The district court found no taking had occurred under the *Penn Central* factors. *Id.*

28. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1245-48 (D. Nev. 1999) ("*Tahoe I*") (finding that the TRPA could not be liable to the property owners for compensation, because its actions were not both the cause in fact and the proximate cause of the injury the property owners sustained).

29. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 775-79 (9th Cir. 2000) ("*Tahoe II*") (engaging in an in-depth analysis of Supreme Court precedent and concluding that the district court misinterpreted these cases to support conceptual severance—the notion that a separate property

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deprive the property holders of all the use or value in their land<sup>30</sup> and, therefore, did not work a categorical taking of property.<sup>31</sup> The court of appeals upheld the district court's determination regarding the 1984 final regional plan.<sup>32</sup>

The Supreme Court granted certiorari to consider the narrow issue of whether temporary moratoria on land development are a regulatory taking of land that requires compensation under the Takings Clause of the Fifth Amendment.<sup>33</sup>

## II. MAJORITY OPINION

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* the Supreme Court systematically analyzed the applicable takings jurisprudence and rejected the categorical rule the plaintiffs advocated.<sup>34</sup> The Court also rejected less severe or modified versions of the rule.<sup>35</sup> Instead, the Court reaffirmed the applicability of a case-by-case analysis to determine if a government regulation has worked a taking.<sup>36</sup> The decision was 6-3 with Justices O'Connor, Kennedy,

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interest could be identified instead of considering the "parcel as a whole"—in the present case).

30. *See id.* at 780-81 (basing this finding on the "general scope and dominant features" of the two moratoria).

31. *See id.* (noting that moratoria, by their very nature, are temporary and that the temporary prohibition on development did not render the fee simple interest in the land valueless). Rather, the court found that the future development possibilities of the land had a "substantial present value." *Id.* at 781. Similarly, the moratorium did not deny the property owners "use" of the property since this property interest also exists on a continuum and plaintiffs had future "use" possibilities once the moratoria expired. *Id.* at 782.

32. *See id.* at 785 (explaining that the TRPA adopted a plan that would comply with the Compact and had been advised by Counsel that its legislative discretion would be given great deference). Therefore, the court of appeals reasoned, the TRPA could not foresee that the 1984 plan would be enjoined or that it would lose a lawsuit. *Id.* In addition, TRPA may not be held liable for the effects of the injunction because of a lack of causal connection between the alleged wrongdoing and the purported harm. *Id.*

33. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764 (9th Cir. 2000), *cert. granted*, 533 U.S. 948 (June 29, 2001) (No. 00-1167) (granting certiorari to examine "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?").

34. *See Tahoe III*, 122 S. Ct. at 1478 (stating, "... our cases do not support their proposed categorical rule—indeed fairly read, they implicitly reject it," in regards to the proposed rule requiring governmental compensation for any restriction on all economic use of land, no matter how short in duration).

35. *See id.* (finding that considerations of fairness and justice do not require the Court to adopt modified versions of the categorical rule).

36. *See id.* (reaffirming the need to evaluate the circumstances of each particular case).

Souter, Ginsburg, and Breyer joining in the opinion of the Court written by Justice Stevens.<sup>37</sup>

A. *Precedent Does Not Support a Categorical Rule*

The first issue the Supreme Court addressed in *TRPA III* was the validity of the categorical rule advocated by the plaintiffs when evaluated against applicable precedent.<sup>38</sup> The plaintiffs' primary claim was that precedent provides for the division of fee simple estates into finite temporal segments and that if all economically feasible use of the land was denied in one of those segments, then governmental compensation was required.<sup>39</sup>

The Court denied the validity of a temporal segmentation of the fee estate, arguing that a fee estate is necessarily infinite in duration, because allowing the disaggregation of temporal slices of the fee simple estate would render any delay of all economically viable use of the land, no matter how short in duration, a taking that required compensation.<sup>40</sup>

In rejecting the plaintiffs' contention that *Lucas* was controlling for the question presented, the Court reaffirmed the utility of the *Penn Central* weighing factor analysis discussed earlier.<sup>41</sup> *Lucas*, the Court pointed out, only applies to the "‘extraordinary case’" in which a property owner is denied all economically feasible use of his land.<sup>42</sup> Accordingly, the Court asserted that "a fee simple estate cannot be

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37. *Id.* at 1470.

38. *See id.* at 1477-78 (describing the analytical framework the Supreme Court applied to reject the proposed categorical rule that compensation was required whenever a moratorium was imposed).

39. *See id.* at 1483 (describing plaintiffs' efforts to bring their case under the *Lucas* umbrella by arguing that *Lucas*' categorical rule could apply to both temporary and permanent takings, provided all economically beneficial use of the land was denied during the challenged period); *see id.* (discussing the circular reasoning employed by plaintiffs when defining the property interest that was allegedly taken by the government in terms of the challenged regulation).

40. *See id.* at 1481 (reiterating the Court's support of the *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978), "parcel as a whole" doctrine where the effect of the challenged regulation is analyzed in terms of its impact on the whole parcel, not a just a portion of it); *see also* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987) (rejecting a "spatial" conceptual severance); *Andrus v. Allard*, 444 U.S. 51, 67-68 (1979) (rejecting a "functional" severance).

41. *See Tahoe III*, 122 S. Ct. at 1478 n.16 (noting that the moratorium may have constituted a taking under a *Penn Central* analysis but the plaintiffs failed to challenge the district court's determination that a taking had not occurred under the *Penn Central* factors); *see also* discussion *supra* notes 10-13 and accompanying text.

42. *See Tahoe III*, 122 S. Ct. at 1484 (stating that absent the rare circumstance where a government regulation effects a complete and permanent elimination in value, as in *Lucas*, the fact finder must engage in a fact specific inquiry to determine whether the regulation has worked a taking).

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rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.”<sup>43</sup>

*B. The Armstrong Principle of “Fairness and Justice” Does Not Support the Adoption of a New Categorical Rule*

Next, the Court analyzed whether it was necessary, under considerations of “fairness and justice,” to adopt any of three *per se* theories to find that the moratoria had worked a taking.<sup>44</sup> The first theory the Petitioner urged the Court to adopt was a new categorical rule requiring compensation whenever the government temporarily denies a property owner economically viable use of her land.<sup>45</sup> Due to the broader public policy implications of denying state and local governments traditional land use tools that this option would eliminate, the Court found that “the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained.”<sup>46</sup> The Court pointed out that while the length of time a temporary development restriction is in effect is not dispositive of whether the regulation has worked a taking, time remains an important factor that should be considered.<sup>47</sup> Consequently, the Court recognized that the analytical framework established in *Penn Central* gives the judicial system the necessary tools to effectively weigh the unique circumstances of each case to ensure that the “fairness and justice” concerns of the Fifth Amendment are not offended.<sup>48</sup>

The Court considered the second and third options under the same rubric.<sup>49</sup> The second option qualified an across-the-board rule

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43. *Id.*

44. *See id.* (adopting language from *Armstrong v. United States*, 364 U.S. 40, 49 (1960), demonstrating the Court’s concern that private property owners should not be forced to bear the costs of a public benefit).

45. *See id.* (considering that the notions of fairness and justice could be applied based on several different theories to support a conclusion that the moratoria constituted a taking).

46. *See id.* at 1485 (determining that such a rule could encourage premature government decision making or make routine government functions too expensive).

47. *See id.* at 1486 (stating the importance of the length of time the regulation was in effect in evaluating its impact on the investment-backed expectations of the property owner, without giving this factor undue weight).

48. *See id.* (asserting the importance of Justice O’Connor’s concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001), in which she enumerated the more thorough examination afforded by weighing “all relevant circumstances” rather than applying a bright-line test).

49. *See id.* at 1484 (establishing that the Court’s adoption in any form of a categorical rule would only be made out of considerations of “fairness and justice”).

requiring compensation whenever the government deprives a property owner “economically viable use” of her land with an exception for typical planning tools such as building permits or changes in zoning.<sup>50</sup> The Court rejected this option primarily because it provided no exception for planning moratoria, which the Court determined to be “an essential tool of successful development.”<sup>51</sup> The third option would have allowed temporary restrictions on land use, but would fix a time period that, once crossed, would require the government to compensate landowners.<sup>52</sup> The Court also discarded this third option based on the district court’s finding that the thirty-two month delay in formulating the 1984 Regional Plan was not unreasonable.<sup>53</sup> Since the delay was not unreasonable, the Court was unwilling to declare that all delays in development over one year are constitutionally invalid and instead reiterated the requirement for a case-by-case evaluation of reasonableness.<sup>54</sup>

### III. DISSENTING OPINIONS<sup>55</sup>

Chief Justice Rehnquist’s dissent criticized three main points of the majority opinion.<sup>56</sup> First, Rehnquist argued that the Court’s grant of certiorari fairly encompassed not only the two moratoria the majority considered but also the time period between the enactment of the 1984 Regional Plan and the adoption of the revised plan in 1987.<sup>57</sup>

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50. *See id.* at 1487 (noting this version of the per se rule would not take into account the good faith of the government, the reasonable expectations of the property owners, or the actual effect of the moratoria on property values).

51. *See id.* (showing that the Court specifically considered the probability of ill-conceived planning under this version of the per se rule, the property owners’ rush to develop, and the need to protect the decision-making process during the formulation of a regional plan).

52. *See id.* at 1486-87 (stating that an amicus brief submitted by the Institute for Justice suggested a version of the categorical rule requiring a one year time limit).

53. *See id.* at 1489 (finding that moratoria greater than one year do not necessarily place a special burden on property owners and determining that establishment of a specific duration for development moratoria is better left to state legislatures).

54. *See id.* (reaffirming that the length of time the moratorium is in effect is an important, but not a determinative, factor in assessing its constitutionality).

55. *See id.* at 1496-98 (Thomas, J., dissenting) (arguing that a conceptual severance of the fee simple interest is allowed and, accordingly, that a taking occurred in this case). Justice Scalia joined Justice Thomas’s dissenting opinion. *Id.* at 1496.

56. *See id.* at 1490 (Rehnquist, C.J., dissenting) (indicating Justices Scalia and Thomas joined the Chief Justice’s dissent).

57. *See id.* at 1491 (Rehnquist, C.J., dissenting) (asserting that the proper time frame for the Court’s inquiry should have been 1981-1987, which includes both moratoria and the time period covered by the 1984 injunction).

The dissent reasoned that TRPA was responsible for the Compact and the pursuant regulations, and that TRPA's failure to comply with its own directives resulted in the court ordered injunction against the implementation of the final regional plan.<sup>58</sup> Therefore, the dissent argued that the majority should have addressed the entire six-year time period the property owners challenged.<sup>59</sup>

The dissent next argued that a six-year ban on development was a taking under *Lucas* because the property owners were denied all economic use of their land during the time period.<sup>60</sup> It attacked the majority's contention that the deprivation in this case was "temporary" by relying on the "permanent" two-year prohibition on development that the Court in *Lucas* found was a taking.<sup>61</sup> The dissent criticized the majority for placing too much emphasis on the label given by government to the regulation.<sup>62</sup> Instead, the dissent argued, courts should take into account the perception of the property owner when assessing the temporary or permanent nature of a government action that denies all economically beneficial use of the land.<sup>63</sup> Accordingly, the dissent found that the six-year

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58. See *id.* (Rehnquist, C.J., dissenting) (describing TRPA as the "moving force" behind the property owners' inability to construct single family homes on their land).

59. See *id.* at 1491-92 (Rehnquist, C.J., dissenting) (commenting that the "temporary prohibition" was in effect for six years and comparing this case, where a moratoria was found to be a temporary taking, with *Lucas*, where the taking was found to be permanent despite the passage of only two years).

60. See *id.* at 1491-92 (Rehnquist, C.J., dissenting) (relying on the district court's determination that the property owners were denied all economically viable use of their land during the two moratoria, that the court of appeals did not overturn this finding and that the majority opinion does not dispute the contention that the property owners were forced to leave their land idle following the 1984 injunction).

61. See *id.* at 1492 (Rehnquist, C.J., dissenting) (finding support for its position in the fact that the "permanent" deprivation of use at issue in *Lucas* was later rendered "temporary" by subsequent statutory amendment and that compensation for "temporary" takings was explicitly authorized by *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987)). *First English Evangelical* held that temporary and permanent takings are not different when all beneficial use of the land is denied to the landowner. *Id.* at 1496 (Thomas, J., dissenting).

62. See *id.* (Rehnquist, C.J., dissenting) (arguing that government now has the incentive to label land use regulations "temporary" or to establish a set number of years in an effort to avoid constitutional challenges to their validity).

63. See *id.* at 1492-94 (Rehnquist, C.J., dissenting) (finding that a temporary moratorium on development is comparable to a forced leasehold, from the property owner's point of view, and this perception entitles the property owner to compensation under the Fifth Amendment). The dissent cites a series of World War II era cases in which the government conceded it had to give compensation for condemned leasehold interests that were used to support the war effort. *Id.* at 1493. The dissent cited these cases in order to emphasize the "practical equivalence," from the point of view of the property owner, between the forced leasehold and the ban on development for the property owner, which was at issue in this case. *Id.*

“temporary” ban on development was a taking.

Lastly, the dissent attempted to calm the fears of the majority that the use of traditional land-use planning devices would be threatened if a taking were found in this case.<sup>64</sup> The dissent recognized that the use of these devices by government is generally an incident of property ownership.<sup>65</sup> Regulations that delay a final land use decision are grounded in state property law, thereby insulating them from takings claims.<sup>66</sup> These regulations include building permits, changes in zoning schemes, and variances.<sup>67</sup> However, the dissent argued, moratoria prohibiting all economic use lasting for six years cannot be classified as short-term planning devices and cannot be categorized as an implied limitation of state property law because these moratoria evolved separately from zoning and permit requirements.<sup>68</sup> Thus, it is possible that they should not be viewed as an implied incident of ownership, though these issues were not before the Court.<sup>69</sup> The dissent found that the extended nature of the moratoria alone was enough to disqualify the moratoria as an implied limitation of property ownership and establish a taking.<sup>70</sup>

#### IV. IMPLICATIONS AND CONCLUSION

*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* does not preclude property owners from challenging the constitutionality of land-use regulations.<sup>71</sup> Rather, it established the

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64. See *id.* at 1494 (Rehnquist, C.J., dissenting).

65. See *id.* (Rehnquist, C.J., dissenting) (finding that the right to enjoy one's property is limited by a reasonable exercise of governmental power).

66. See *id.* at 1494 (Rehnquist, C.J., dissenting) (determining that the state has the ability to delay final land-use decisions on a short-term basis).

67. *Id.* (Rehnquist, C.J., dissenting) (“The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.” (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001))).

68. See *id.* at 1495 (Rehnquist, C.J., dissenting) (drawing a distinction between moratoria that prohibit certain uses, such as construction of fast food restaurants, from moratoria that ban all development).

69. See *id.* (Rehnquist, C.J., dissenting) (stating that these moratoria also differ from permit requirements in that a permit system implies that a permit will be granted if certain conditions are met whereas a temporary ban on development suggests that all uses could be prohibited permanently).

70. See *id.* at 1496 (Rehnquist, C.J., dissenting) (emphasizing that the original moratorium in this case was only to last ninety days, signifying TRPA's understanding that moratoria are to be of limited duration).

71. See *id.* at 1478 n.16 (2002) (stating the moratoria may have constituted a taking under a *Penn Central* analysis and that this issue was not properly before the Court, as the property owners had failed to challenge the district court's determination that the average property owner did not have a reasonable investment-backed expectation that he could build a single-family home during the

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manner in which that challenge must be made.<sup>72</sup> Specifically, property owners must argue an as-applied takings claim, addressing the factors enumerated in *Penn Central*.<sup>73</sup> Rather than make the duration of a development restriction the sole factor in a takings analysis, as the dissent would advocate, the majority emphasized the wisdom of evaluating several important factors on a case-by-case basis.<sup>74</sup> While a per se rule would have simplified a takings analysis for challenged moratoria, this rule gives courts the flexibility to apply the *Penn Central* factors to the specific circumstances of each case to maintain the delicate balance between property owners' rights and the public good as determined by government.

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six years covered by the suit).

72. *See id.* at 1486 (concluding that the better approach to claims that a regulation has effected a temporary taking requires careful examination and weighing of all the relevant circumstances).

73. *See id.* at 1481 (finding that interests of "fairness and justice" are best served by the *Penn Central* analysis of "essentially ad hoc factual inquiries").

74. *See id.* at 1489 (refusing to give the duration element too much or too little weight in the takings analysis).