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Laura Hurmence McKaskle

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I. INTRODUCTION

From the time the Supreme Court gave birth to the doctrine of “regulatory takings” in *Pennsylvania Coal Co. v. Mahon*,¹ courts have struggled in defining when a regulation amounts to a taking.² The Supreme Court’s expanded use of regulatory takings has been making a highly controversial and confusing concept more difficult to apply and defend.³ Recently, the Court reentered the regulatory taking ground, and it had an opportunity to clear up the “murky waters” of regulatory taking jurisprudence when it granted certiorari to the landowners in the Lake Tahoe controversy.⁴

Land use moratoria ordinances were at the center of the Lake Tahoe regulatory taking controversy.⁵ Moratorium ordinances have been used as an effective land use planning tool for decades.⁶ While the moratorium doctrine serves as an effective planning tool for land use city planners, its constitutionality has been questioned since its inception.⁷ These ordinances have involved a constant struggle between individual landowners and the rights of the public at large from the time the concept was first created and implemented.⁸ The struggle exists because every year, the country’s population continues to increase; land is not as plentiful as it once was, and natural resources continue to be depleted.⁹ This downward spiral has caused a continuous tension between individual landowners who want to use their land as they see fit and others who want to preserve the land and its resources and prevent its development.¹⁰ The struggle has, in the past, favored property owners.¹¹

[T]he Rehnquist Court has demonstrated an increasing willingness to determine the fairness and legitimacy of regulation and statutes that negatively affect the value and use of real and personal property

1. 260 U.S. 393, 415 (1922) (holding that a government regulation amounts to a violation of the Fifth Amendment Takings Clause when the regulation goes “too far”).

2. Anthony Saul Alperin, *The “Takings” Clause: When Does Regulation “Go Too Far”?*, 31 SW. U. L. REV. 169, 170 (2002).

3. Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2158 (2002).

4. Gideon Kanner, *Temporary Takings*, NAT’L L.J., Nov. 12, 2001, at A21.

5. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 122 S. Ct. 1465 (2002).

6. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 216 F.3d 764, 777 (2000), *reh’g denied*, 228 F.3d 998 (9th Cir. 2000), *aff’d*, 535 U.S. 302 (2002).

7. Thomas E. Roberts, *Moratoria as Categorical Regulatory Takings: What First English and Lucas Say and Don’t Say*, 31 ENVTL. L. REP. 11037, 11037 (2001).

8. Laura M. Rojas, *Interim Ordinances in California: Restoring Balance Between the Rights of Individual Landowners and the Rights of the Public*, 29 MCGEORGE L. REV. 715, 715 (1998).

9. *Id.*

10. *Id.*

11. *Changing Course: U.S. Supreme Court Rules in Takings Case*, 227 N.Y. L.J. 5 (2002).

or that interfere with private property rights. The Court has reconceptualized the Takings Clause, deploying it as a powerful new tool to neutralize a wide range of environmental and land-use regulation and to uphold personal liberty—the right to own and use private property—that some Justices feel has been severely devalued.¹²

This trend took a sharp and sudden turn when the Supreme Court, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, rejected property owners' contentions that a three-year moratorium on development constituted a per se taking of property requiring compensation under the Takings Clause.¹³ The *Tahoe-Sierra* ruling pulls the Court away from the recent trend of embracing a more categorical approach to property rights that has been championed by Justice Scalia.¹⁴ The Court's initiative in determining the constitutionality of temporary land use moratorium ordinances in *Tahoe-Sierra* was thought to reveal the Court's willingness to finally resolve this ongoing dispute about what constitutes a regulatory taking.¹⁵

Unfortunately, the Court's opinion did not offer much insight as to how to apply the confusing concept, nor did it definitively answer what constitutes a temporary regulatory taking.¹⁶ The Court merely held that in answering the "abstract question" as to "whether a temporary moratorium effects a taking," the answer is "neither 'yes, always' nor 'no, never'; [rather,] the answer depends upon the particular circumstances of the case."¹⁷ The Court did, however, conclude that a thirty-two month ban on development—actually turning into a twenty year halt on all development—was not a regulatory taking.¹⁸ According to the Court, it was simply an interruption in property ownership.¹⁹ The Court's decision was a victory for both the regional planning agency in Lake Tahoe and local planning officials

12. Haar & Wolf, *supra* note 3, at 2169.

13. *Id.*

14. *Supreme Court's Reversal of Trend on Property Right Case Noted*, BULLETIN'S FRONTRUNNER, Apr. 26, 2002 [hereinafter *Supreme Court's Reversal*].

15. Roberts, *supra* note 7, at 11037; see also Robert H. Freilich, *Regulatory Takings After Palazzolo: Intermin [sic] Development Controls, Moratoria, and Economic Diminution Cases*, SG021 ALI-ABA 163, 181 (2001).

16. Alperin, *supra* note 2, at 170.

17. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478 (2002).

18. *Id.* at 1489.

19. See *id.*

generally.²⁰ Regrettably, it was a loss for hundreds of people who bought land around the lake on the California-Nevada border and have waited decades to develop their property.²¹

Land use commentators are certainly not all in agreement with the outcome in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,²² but most agree that the decision will have a distinct and profound effect on the future of all land use moratorium ordinances.²³ It “dealt a major setback to the conservative-led property rights movement, ending its string of recent Supreme Court victories elevating the rights of individual property owners over valid planning and community needs.”²⁴

This Comment provides an extensive analysis of land use moratorium, including a historic analysis of its origin, constitutional challenges against its validity, and the Supreme Court’s conclusions as to its constitutionality. Part II of the Comment identifies the reasons city planning boards and local government municipalities impose land use moratorium ordinances; discusses the varying types of moratoria ordinances that are litigated and challenged by landowners and developers, and the types that are frequently used in the course of land use planning that raise no litigious concerns; and addresses where the power to enact moratoria ordinances originates. Part III analyzes the procedural requirements a party challenging the moratorium ordinance must meet to bring a claim against the ordinance, the standard of review courts use to examine moratorium ordinances, and the procedural requirements a city must meet in drafting the moratorium ordinance. Part IV categorizes traditional constitutional challenges that may be available to an aggrieved landowner or developer. Part V addresses the controversial concept in regulatory takings known as “conceptual severance,” which was the center of the *Tahoe-Sierra* decision. Part VI classifies significant Supreme Court decisions prior to *Tahoe-Sierra* that address land use development issues and identify possible concerns that arise when a city places a moratorium on development. Part VII focuses on the backdrop to the *Tahoe-Sierra* controversy, categorizing the relevant district court and appellate court holdings that prompted the Supreme Court to grant certiorari and addressing the Supreme Court’s conclusions to the constitutionality and validity of temporary moratoria, temporary takings, and conceptual severance articulated in *Tahoe-Sierra*. Finally, Part VIII concludes the Comment with an analysis of the implications and ramifications the *Tahoe-*

20. Anne Gearan, *High Court Backs Local Government in Property Rights Clash*, CHATTANOOGA TIMES, Apr. 24, 2002, at A5.

21. *Id.*

22. *Id.*

23. Roberts, *supra* note 7, at 11037.

24. *Supreme Court’s Reversal*, *supra* note 14 (quoting *The Court Reverses Direction*, N.Y. TIMES, Apr. 26, 2002, at A28).

Sierra holding will have on future cases dealing with all types of land use moratorium.

II. BACKGROUND

The concept of land use moratorium has been used by land use planners for decades; however, the term “moratorium” is a fairly recent term in land use planning.²⁵ The term was not used in early cases; it has only surfaced in the last ten or fifteen years.²⁶ More familiar terms related to a moratorium on land use development are the terms “stopgap zoning” and, particularly, “interim zoning.”²⁷ A practitioner is advised to conduct research for terms such as “interim zoning,” “stopgap zoning,” or “moratoria” when investigating the topic.²⁸

A. Moratoria Terminology

The legal principles related to the two terms “stopgap zoning” and “interim zoning” appear interchangeable.²⁹ However, interim zoning is conceptually different from stopgap zoning.³⁰ While the two terms have been used to describe the essential process of moratoriums, a Washington court stated that the terms “stopgap zoning” and “interim zoning” are not interchangeable.³¹ “Interim zoning is no mere stopgap, but rather is a deliberate and purposeful device designed to classify or regulate uses of land and related matters, and is necessary to preserve the zoning scheme as presented to the public in the comprehensive plan and attendant maps and

25. Paul R. Gogleman, Fla. Bar, *Moratoria and Interim Growth Management*, in 2 FLORIDA ENVIRONMENTAL AND LAND USE LAW HANDBOOK 5-1, 4 (1994), WL ELUII FL-CLE 5-1.

26. *Id.*

27. *Id.*

28. *See id.*

29. *Cellular Tel. Co. v. Vill. of Tarrytown*, 624 N.Y.S.2d 170 (N.Y. App. Div. 1995) (stating that a moratorium on the installation of cellular tower antennas was not a valid stopgap or interim zoning ordinance because it was not a valid exercise of the town’s police power); *Noghrey v. Acampora*, 543 N.Y.S.2d 530 (N.Y. App. Div. 1989) (holding stopgap zoning and interim zoning ordinances are valid if they are reasonably designed to temporarily halt development while municipalities consider comprehensive zoning changes); *W. Lane Properties v. Lombardi*, 527 N.Y.S.2d 498 (N.Y. App. Div. 1988) (upholding a 90 day moratorium ordinance as a valid stopgap zoning or interim zoning ordinance because it was a reasonable measure to halt development while the town considered its comprehensive zoning changes).

30. Gogleman, *supra* note 25, at 4.

31. *Smith v. Skagit County*, 453 P.2d 832 (Wash. 1969) (holding that hearings before county planning commission and county board with respect to proposed zoning change did not meet test of fairness).

resolutions or ordinances.”³² Interim zoning describes a process whereby a governmental body, in response to an emergency situation, temporarily establishes an ordinance to classify or regulate uses of land pending either revision of the existing zoning code or adoption of a final, comprehensive zoning plan.³³ “Interim ordinances were initially used as a way to prevent growth while zoning ordinances were being studied, to prevent growth in overburdened cities, and to stop development in environmentally sensitive areas.”³⁴ Unfortunately, they have been used to freeze development altogether and essentially restrain a wide range of activities such as video arcades, mobile homes, fast food restaurants, and adult entertainment businesses.³⁵

Stopgap zoning, on the other hand, seems to be what most people refer to as a zoning moratorium.³⁶ The distinction between the term “stopgap zoning” and the term “moratorium” is unclear; nevertheless, the term “moratorium” was developed because it better describes the process of halting development for a particular period of time.³⁷ The terms “stopgap zoning” and “interim zoning” are misleading since putting a freeze on building permits or otherwise preventing all use of land is not zoning, either interim or stopgap.³⁸ It would be more properly termed a “moratorium” upon the issuance of a building permit.³⁹

B. Purpose for Implementing Moratoria Ordinances

The critical question for understanding the significance of moratoria is determining the purpose for imposing them.⁴⁰ There are several distinct reasons why land use planners issue a moratorium ordinance.⁴¹ In general, moratoria are favored as a means to effectively control land use development and enable the city commission to effectively plan.⁴² Politicians like the idea of being permitted to halt all development when they are faced with a developer who proposes a “distasteful project” or a project which will face

32. *Id.* at 846 (emphasis omitted) (citation omitted).

33. *Mayor Built Homes v. Town of Steilacoom*, 564 P.2d 1170, 1174 (Wash. Ct. App. 1977) (holding that rezoning ordinance was not an interim zoning ordinance since there was no reference to an emergency situation).

34. Rojas, *supra* note 8, at 717.

35. *Id.*

36. Gogleman, *supra* note 25, at 4.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See id.*

41. Linda Bozung & Deborah J. Alessi, *Recent Developments in Environmental Preservation and the Rights of Property Owners*, URB. LAW., Fall 1988, at 969, 1012.

42. *Id.*

significant opposition from the local community.⁴³ The use of a moratorium ordinance to stop a particular project, however, is of “dubious legal validity” and frequently challenged in court.⁴⁴

An additional, possibly less controversial, purpose behind a land use moratorium is the city’s desire to preserve the status quo because of an implementation of a comprehensive plan or a plan revision.⁴⁵ In order to control the increasing urbanization and preserve the environment, most states have adopted a comprehensive plan.⁴⁶ All land use development subsequent to the adoption of the plan must be consistent with the comprehensive plan and ensuing land use regulations.⁴⁷ A comprehensive zoning plan is often very complicated and it usually takes a large amount of effort and time to work out the details.⁴⁸ It would obviously destroy the plan if, during the interim period when the plan was being developed and implemented, parties seeking to evade the operation of the plan were permitted to go through a path of construction which might possibly defeat, in whole or in part, the ultimate execution or purpose of the future plan.⁴⁹

Preserving the status quo during the creation and implementation of a comprehensive plan is one of the most popular reasons given for imposing a land use moratorium ordinance because there is a genuine need to preserve the status quo by curtailing sudden surges in building and rezoning activity.⁵⁰ It is possible that these last minute building permits might undercut a pending or proposed land use plan.⁵¹ A moratorium on development activity protects the planning process by deterring the establishment of uses that might be legal but would be inconsistent with the needs that the city has identified through its studies.⁵²

43. Gogleman, *supra* note 25, at 5.

44. *Id.*

45. Bozung & Alessi, *supra* note 41, at 1013.

46. *Id.* at 969.

47. *Id.*

48. *Miller v. Bd. of Pub. Works*, 234 P. 381, 388 (Cal. 1925); *see also Collura v. Town of Arlington*, 329 N.E.2d 733, 737 (Mass. 1975) (approving a two-year moratorium on apartment construction).

49. *Miller*, 234 P. at 388; *see also Collura*, 329 N.E.2d at 737.

50. Thaddeus R. Ailes, *Not in My Backyard: A Critique of Current Indiana Law on Land Use Moratoria*, 72 IND. L. J. 809, 817 (1997); *see also Shafer v. City of New Orleans*, 743 F.2d 1086 (5th Cir. 1984) (upholding a moratorium ordinance on land use development in order to preserve the status quo while studying the area and its needs); *State ex rel. SCA Chem. Waste Services, Inc. v. Konigsberg*, 636 S.W.2d 430 (Tenn. 1982) (stating that the authority to enact an interim zoning ordinance to preserve the status quo until a new comprehensive zoning ordinance becomes effective is included in the city’s broad legislative power).

51. Ailes, *supra* note 50, at 817.

52. Gogleman, *supra* note 25, at 5.

When developers, or the public in general, learn that the city is about to make a zoning change or conduct studies to determine which changes should be made, development activity is often triggered.⁵³ This triggered development is referred to as the “race for diligence.”⁵⁴ Landowners and developers want to beat the imposition of new restrictions or controls the city is about to impose.⁵⁵ It is true that time will not always allow for the completion of a developer’s or landowner’s project; however, if a developer or landowner can obtain a building permit before the restriction is legalized or made final, a vested right to continue is generally created, assuming the landowner or developer has made substantial expenditures in good faith.⁵⁶ One land use critic noted:

[M]unicipalities should not be handcuffed when dealing with uses of land which they just had not contemplated. In other words, a community should not have to be burdened forever with an undesired land use just because the local government did not have time to go through the lengthy process of enacting a comprehensive plan and zoning ordinance before the developer applied for a building permit. The local government should be able to preserve the status quo while it goes through the procedures which [statutory] law requires for the enactment of a zoning ordinance. Only if municipalities have this ability will they be able to effectively determine just what gets put in their backyards.⁵⁷

The race for developers to acquire building permits and beat the enactment of a new zoning ordinance is not in the best interest of either the community or individual property owners.⁵⁸ Thus, moratoria ordinances are enacted to prevent last minute building permits from being issued which would possibly frustrate the city planners’ efforts and quite possibly be inconsistent with the public needs the city ultimately identified by its planning studies.⁵⁹

Moratoria ordinances also provide an opportunity for increased public participation and public debate.⁶⁰ This is a persuasive reason for permitting land use moratorium ordinances because there are significant benefits from permitting and encouraging a democratic discussion and participation by citizens and developers in drafting long-range land use plans for the

53. *Id.*

54. Ailes, *supra* note 50, at 817.

55. *Id.*

56. *Id.*

57. *Id.* at 810.

58. *Id.* at 817.

59. *Id.*

60. *Id.* at 816.

community.⁶¹ A city planning commission is designed to protect the public health, safety, and welfare of its citizens, and moratoria ordinances allow time for public debate on the issues, goals, and policies of city planning.⁶² Discussion of the impact of impending land use ordinances help city planners design plans that indeed protect the public welfare.⁶³ Putting a freeze on development can allow a community to institute “democratic discussion, which is becoming increasingly essential to public involvement.”⁶⁴ “The planning process can thus be brought out into the open for full democratic debate and citizen participation, thereby assuring a greater relationship between the laws and planning policies and the real goals and needs of the people.”⁶⁵

Another viable purpose behind the issuance of a moratorium is the city’s desire to preserve the status quo because of a public facilities crisis.⁶⁶ There are times when a moratorium needs to be issued to prevent a public facilities crisis from spiraling out of control.⁶⁷ The two primary reasons given for a service facilities moratorium are sewage treatment and water supply facilities crises.⁶⁸ Although there have been a variety of challenges to these moratorium efforts, sewer moratoria have generally been upheld if the city can demonstrate a true lack of capacity such as a lack of ability of the local government to allow sewer hookups.⁶⁹

61. *Almquist v. Town of Marshan*, 245 N.W.2d 819, 825 (Minn. 1976) (upholding a six-month moratorium ordinance and stating that moratorium ordinances are valuable tools in keeping open a municipality’s planning options and permitting the county planning office to seek assistance in preparing a comprehensive plan to meet the needs of the public).

62. *Id.*

63. *Id.*

64. Freilich, *supra* note 15, at 172.

65. Ailes, *supra* note 50, at 816.

66. Gogleman, *supra* note 25, at 5.

67. *Id.*

68. *Id.*

69. *Id.*; *see also* *Triple G. Landfills, Inc. v. Bd. of Commissioners*, 774 F. Supp. 528 (S.D. Ind. 1991) (holding that county ordinance placing limits on sanitary landfill was preempted by state law), *aff’d*, 977 F.2d 287 (7th Cir. 1992); *Pro-Eco, Inc. v. Bd. of Commissioners*, 776 F. Supp. 1368 (S.D. Ind. 1990), *aff’d*, 956 F.2d 635 (7th Cir. 1992), *aff’d*, 57 F.3d 505 (7th Cir. 1995); *Wincamp P’ship v. Anne Arundel County*, 458 F. Supp. 1009 (D. Md. 1978) (holding that in absence of a showing by the landowners of nuisance or menace to health, or any danger of water pollution resulting from failure of county to expand sewage treatment plant, Secretary of Health did not abuse his discretion in not ordering the expansion); *Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976) (upholding a local zoning ordinance which prohibited the issuance of any further residential building permits in the municipality until local sewage disposal complied with specified standards); *Robert T. Foley Co. v. Wash. Suburban Sanitary Comm’n*, 389 A.2d 350 (Md. 1978) (holding that a moratorium on a sewage service charge was not unconstitutional); *Charles v. Diamond*, 360 N.E.2d 1295 (N.Y. 1977) (holding that landowner could develop his own private sewer system, but requiring the landowner to hook up the sewer system

A city may additionally enact a land use moratorium in order to avoid a non-conforming use.⁷⁰ Non-conforming uses are often the thorn in a city planner's side.⁷¹ Depending on the jurisdiction, city planners are often required to treat a non-conforming use as a vested right as long as the landowner does not alter the use.⁷² If a landowner has established a non-conforming use prior to the enactment of a moratorium ordinance, he or she will be permitted to continue with his or her use despite the ordinance.⁷³ While this is beneficial for a landowner who has relied on this use, it is often troubling for planners who have determined that this non-conforming use is no longer beneficial for the public as a whole.⁷⁴ Thus, for jurisdictions that allow amortization for non-conforming uses, a land use moratorium is an appropriate way to prevent non-conforming uses that might prevent the comprehensive zoning plan from continuing.⁷⁵

One final purpose behind the enactment of a land use moratorium is the city's desire to control the community development during comprehensive planning to eliminate the incentive of hasty planning.⁷⁶ This purpose is similar to the first purpose identified, however, moratoria, under this justification, have the effect of allowing a local government to take essentially complete control of land use development within its governing boundaries on a temporary basis pending the construction and adoption of a new plan.⁷⁷ Not only does the moratorium prevent a landowner from creating a use that is incompatible with a future land use plan, but, in this instance, a city is permitted to in fact enact a comprehensive plan which it has determined will benefit the public.⁷⁸ If local governments did not have the power to enact a moratorium ordinance, they may be forced to enact restrictive permanent controls in the shortest time possible in order to limit the number of intervening uses that might not conform to the new plan or

would be unconstitutional).

70. See Gogleman, *supra* note 25, at 5.

71. *Id.* at 6.

72. *City of Sugar Creek v. Reese*, 969 S.W.2d 888, 891 (Mo. Ct. App. 1998) (stating that a non-conforming use means a use of land that lawfully existed prior to the enactment of a zoning ordinance and which is maintained after the effective date of the ordinance even though not in compliance with use restrictions).

73. *Stratos v. Town of Ravenel*, 376 S.E.2d 783, 784 (S.C. Ct. App. 1989) (holding that a landowner could not avoid a moratorium on mobile homes because he merely contemplated that use of the property prior to the enactment of the moratorium ordinance).

74. *Reese*, 969 S.W.2d at 893.

75. *Almquist v. Town of Marshan*, 245 N.W.2d 819, 826 (Minn. 1976) (holding that a property owner who takes steps to develop his land in accordance with a zoning ordinance but is denied a building permit due to a land use moratorium may have a non-conforming use and may be permitted to devote his property to the non-conforming use if the property owner has shown that he suffered undue, unnecessary, and substantial hardship as a result of the municipality's delay).

76. Ailes, *supra* note 50, at 816-17.

77. Gogleman, *supra* note 25, at 6.

78. *Id.*

zoning ordinance enacted.⁷⁹ “This hasty process decreases the chances for a thorough public airing of proposed legislation.”⁸⁰ Moratoria ordinances can eliminate the need or desire for hasty adoption of permanent controls.⁸¹ If the local municipality has the ability to preserve the status quo, there is no incentive to hurry through the planning process.⁸² While this purpose seems a little one-sided and appears to overlook landowners who have a vested right, different jurisdictions have concluded that the local government’s control over development is so complete that it need not be concerned with the establishment of vested rights.⁸³ Courts and land use scholars acknowledge that a need exists for systematic and organized development and for the support of the county planning office in preparing a comprehensive plan to meet the needs of the community in a practical and reasonable manner.⁸⁴ Accordingly, it is not wholly unreasonable for a town to resort to a moratorium that would prevent developers from building and possibly affecting the growth and quality of a community for an indefinite period in the future and give the town a chance to seek the expertise of professional planners to create, adopt, or amend a comprehensive zoning system.⁸⁵ Therefore, the primary purpose for implementing a land use moratorium is to allow comprehensive planning to proceed.⁸⁶

In short, a city is permitted to engage in comprehensive planning through enacting a land use moratorium because it is permitted to adopt a comprehensive plan or a major plan revision, make significant changes to its zoning or land use development regulations, and deal with crisis conditions such as a lack of ability to treat sewage.⁸⁷ The enactment of moratorium ordinances is a recognized, logical tool for the local governmental planning commissions during periods of creation or revision of a comprehensive plan.⁸⁸

79. Ailes, *supra* note 50, at 816.

80. *Id.* at 816-17.

81. *Id.* at 817.

82. *Id.*

83. *Life of the Land, Inc. v. City Council of Honolulu*, 606 P.2d 866 (Haw. 1980) (upholding city’s action in reversing a prior approval of a variance and modifying an interim zoning ordinance, even though the developers spent substantial sums of money for planning and design of housing project in reliance on city council’s actions, and developers acted in good faith with respect to the city’s actions).

84. *Almquist v. Town of Marshan*, 245 N.W.2d 819, 825 (Minn. 1976).

85. *Id.*

86. Gogleman, *supra* note 25, at 6.

87. *Id.*

88. *Id.*; *see also* *Cappture Realty Corp. v. Bd. of Adjustment*, 313 A.2d 624 (N.J. Super. Ct. Law Div. 1973) (holding that a moratorium ordinance prohibiting construction on flood plain areas was

C. Litigious Versus Non-Litigious Moratoria Ordinances

Just as there are diverse purposes behind land use moratoria, there are also different types of moratoria ordinances that are in use today.⁸⁹ There are various types that have been litigated and inherently present constitutional challenges.⁹⁰ There are also types that are not typically challenged and raise little to no concern among developers and landowners.⁹¹

The most frequent type of moratoria ordinances that have been litigated are moratoria on the issuance of building permits in general.⁹² These types are frequently known as temporary moratoria.⁹³ In *State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg*,⁹⁴ the court argued that a “municipality may properly refuse a building permit for a land use in a newly annexed area when such use is repugnant to a pending and later enacted zoning ordinance.”⁹⁵ This court, along with other jurisdictions, has upheld temporary moratorium ordinances as long as they were enacted pursuant to specific standards.⁹⁶ There is significant case law on various types of temporary moratoria issued by legislative bodies and litigated by landowners.⁹⁷

Moratoria ordinances focused on the issuance of building permits for specific uses are another frequently litigated moratoria.⁹⁸ The specific use most popularly targeted is a building permit moratorium ordinance for multifamily residential development.⁹⁹ Building permit moratoriums, however, are not limited to residential development; they may be used to prevent the use of many specific things.¹⁰⁰ Moratoria have been issued to

reasonable in order to complete construction of flood control projects where the health, safety, and welfare of the public was involved), *aff'd*, 336 A.2d 30 (N.J. Super. Ct. App. Div. 1975).

89. Gogleman, *supra* note 25, at 3-4.

90. *Id.* at 3.

91. *Id.*

92. *Id.*

93. *Id.*

94. 636 S.W.2d 430 (Tenn. 1982).

95. *Id.* at 436.

96. *Id.* at 435; *see also* Taylor v. City of Little Rock, 583 S.W.2d 72 (Ark. 1979) (upholding a city zoning ordinance where the city complied with statute requirements); Almquist v. Town of Marshan, 245 N.W.2d 819 (Minn. 1976) (upholding a six-month moratorium ordinance because it was enacted pursuant to proper procedural requirements); Sherman v. Town of Reavis, 257 S.E.2d 735 (S.C. 1979) (holding that an ordinance is legal if the governing body has advertised to the public its intention to hold public hearings on the rezoning matter).

97. Gogleman, *supra* note 25, at 3.

98. *Id.*

99. *Id.*; *see also* Real Estate Dev. Co. v. City of Florence, 327 F. Supp. 513 (E.D. Ky. 1971) (holding that issuing an injunction preventing the city from enforcing a moratorium resolution would enjoin the city's authority to exercise its legislative discretion).

100. Gogleman, *supra* note 25, at 3.

prevent cellular towers,¹⁰¹ adult bookstores,¹⁰² mobile home parks,¹⁰³ nursing homes,¹⁰⁴ video arcades,¹⁰⁵ livestock operations,¹⁰⁶ billboard signs,¹⁰⁷ apartment dwellings,¹⁰⁸ recycling businesses,¹⁰⁹ time-share units,¹¹⁰ and fast food restaurants.¹¹¹

101. *Cellular Tel. Co. v. Vill. of Tarrytown*, 624 N.Y.S.2d 170 (N.Y. App. Div. 1995) (upholding cellular company's motion for summary judgment stating that the local law was not a valid exercise of the village's police or zoning powers and the moratorium was thus invalid); *see also Nat'l Telecomm. Advisors, L.L.C. v. Bd. of Selectmen of W. Stockbridge*, 27 F. Supp. 2d 284 (D. Mass. 1998) (holding that a six-month moratorium on issuance of special use permits for wireless communications facilities was reasonable). *But see Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997) (striking down a moratorium prohibiting the processing of rezoning or zoning applications and issuance of building permits for cellular towers because the commission failed to comply with procedural requirements).

102. *Deighton v. City Council of Colorado Springs*, 902 P.2d 426 (Colo. Ct. App. 1994) (overruling summary judgment in favor of the city council and holding that the moratorium had the effect of amending, suspending and repealing a zoning ordinance which could only be done by enactment of another ordinance); *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 44 (1986) (discussing a moratorium on the licensing of businesses whose primary purpose was showing sexually explicit materials).

103. *Plaza Mobil and Modular Homes, Inc. v. Town of Colchester*, 639 F. Supp. 140, 145 (D. Conn. 1986) (stating that a local municipality was authorized to exercise regulatory power over mobile home parks and was permitted to enact a mobile park moratorium), *aff'd*, 810 F.2d 1160 (2d Cir. 1986).

104. *Jay Alexander Manor, Inc. v. Novello*, 727 N.Y.S.2d 560 (N.Y. App. Div. 2001) (holding that defendant had the authority as the Commissioner of Health of the State of New York to impose a temporary moratorium on a construction company's application to construct a nursing home), *appeal denied*, 767 N.E.2d 151 (N.Y. 2002); *First Baptist Church of Crown Heights Ctr. for Nursing & Rehab., Inc. v. Novello*, 728 N.Y.S.2d 881, 887 (N.Y. App. Div. 2001) (holding that a moratorium violated plaintiff corporation's due process rights), *rev'd*, 747 N.Y.S.2d 775 (N.Y. App. Div. 2002).

105. *Redeb Amusement, Inc. v. Township of Hillside*, 465 A.2d 564, 573 (N.J. Super. Ct. Law Div. 1983) (upholding a temporary moratorium on coin-operated machines as a valid exercise of the municipality's police power).

106. *Matzke v. Block*, 542 F. Supp. 1107 (D. Kan. 1982) (holding that landowner was entitled to preliminary injunctive relief against foreclosure upon her land, chattels, or livestock for delinquency in repayment of loan where record did not reflect that any consideration was ever given to circumstances beyond landowner's control under moratorium provision of Act authorizing Secretary of Agriculture to "forego foreclosure" and to defer principal and interest), *aff'd in part, rev'd in part*, 732 F.2d 799 (10th Cir. 1984); *Schoolcraft Egg, Inc. v. Schoolcraft Township*, 2000 WL 33409627, at *1 (Mich. Ct. App. Aug. 11, 2000) (per curiam) (upholding a building permit moratorium for intensive livestock operations stating that it was a means to protect public welfare).

107. *City of Roswell v. Outdoor Sys., Inc.*, 549 S.E.2d 90 (Ga. 2001) (upholding a one-month moratorium prohibiting billboards exceeding a specific size because it was enacted as an emergency measure to preserve the status quo while city prepared a new sign ordinance).

108. *Collura v. Town of Arlington*, 329 N.E.2d 733 (Mass. 1975) (upholding a two-year moratorium on construction of apartment buildings as a reasonable zoning provision enacted within the scope of a general zoning enabling act).

109. *Q.C. Constr. Co. v. Gallo*, 649 F. Supp. 1331 (D. R.I. 1986) (holding building moratorium on construction was a taking of developer's property without due process of law because it was a constitutionally inappropriate response to problem with inadequate sewer line), *aff'd*, 836 F.2d 1340 (1st Cir. 1987).

Another form of moratorium ordinances on building permits is initiated by the lack of service facilities such as sewage treatment plants.¹¹² At times, moratoria ordinances on new sewer plant authorizations or sewer/waste facility hookups are necessary to prevent the discharge of raw and inadequately treated sewage into local waterways.¹¹³ State statutes generally give environmental enforcement agencies authority to address public health and safety risks caused by sewage treatment and disposal systems and, thus, enact sewer hook-up moratoria.¹¹⁴ The Clean Water Act gives the federal government the ability to impose moratoria as well since wastewater treatment facilities are within the Act's coverage and have been classified as a federal concern.¹¹⁵ Moratorium ordinances are generally created to prevent public harm, alleviate sewage overflow, and protect the natural character of the water in the state.¹¹⁶ Sewage overflow and contaminated waters result from an inability of existing treatment plants to handle all sewage, and moratoria are generally upheld as a valid exercise of municipalities' police power.¹¹⁷ While these moratoria ordinances are established for the health and safety of the public, their adverse effects are a matter of concern since the moratorium ordinances essentially cause a virtual standstill in the construction of sewer facilities.¹¹⁸ Regardless, sewer hook-up moratoria ordinances are usually upheld if the restrictions are determined to be a reasonable means to prevent pollution by sewage overflow and prevent the epidemics of disease that flourish under such conditions.¹¹⁹

Just as there are types of moratoria ordinances that have flooded the legal system, there are types that have not been litigated.¹²⁰ Moratorium ordinances on the consideration of requests for rezoning regulations such as changes in land use designation in a comprehensive plan, special exceptions, and applications for development approval (ADA) or development of regional impact (DRI) are a few examples which have been overlooked by

110. *Jackson Court Condominiums, Inc. v. City of New Orleans*, 665 F. Supp. 1235 (E.D. La. 1987) (upholding a moratorium on time-share plans in certain zoning districts).

111. *Schafer v. City of New Orleans*, 743 F.2d 1086 (5th Cir. 1984) (upholding a moratorium ordinance prohibiting the issuance of building permits for fast-food restaurants until the city completed a study of the area).

112. Gogleman, *supra* note 25, at 5.

113. *Robert T. Foley Co. v. Wash. Suburban Sanitary Comm'n*, 389 A.2d 350, 355 (Md. 1978) (holding that a moratorium on a sewerage service charge was not unconstitutional).

114. Jeffery J. Matthews, *Clean Water Act Citizen Suit Requests for Municipal Moratoria: Anatomy of a Sewer Hookup Moratorium Law Suit*, 14 J. ENVTL. L. & LITIG. 25, 37-38 (1999).

115. *Id.* at 25.

116. *Smoke Rise, Inc. v. Wash. Suburban Sanitary Comm'n*, 400 F. Supp. 1369, 1382 (D. Md. 1975) (upholding a sewer hook-up moratorium ordinance).

117. *Id.*

118. *Id.*

119. *Id.* at 1383-84.

120. Gogleman, *supra* note 25, at 3.

litigants.¹²¹ Other regulations such as site plan approval, plat approval, annexation, and approval of a project having a significant impact on a community have been used by local land use planning commissions but have not raised constitutional challenges from property owners or developers.¹²²

D. State's Power to Enact Moratoria Ordinances

It is unclear where the power to enact a moratorium ordinance originates. Jurisdictions often grant local planning commissions the power to pass the controversial ordinances, but jurisdictions are not in accord as to where the power derives from.¹²³

The Pennsylvania Supreme Court, for instance, stated that the power to impose a moratorium, which suspends land development, is a power distinct from, and not incidental to, any power to regulate land development.¹²⁴ The Tennessee Supreme Court, on the other hand, stated that the power to enact a moratorium ordinance is included within the broad sweep of the state's legislative power.¹²⁵ California has conferred broad police powers on local governments to regulate the use of land within their jurisdictions, and courts have been willing to uphold the moratorium ordinances if they bear a rational relation to the public health, safety, morals, or general welfare.¹²⁶ Other jurisdictions have granted planners the power to create moratorium ordinances absent express language in the municipality's enabling acts.¹²⁷

121. *Id.*

122. *Id.*

123. *Id.* at 18.

124. *Naylor v. Township of Hellam*, 773 A.2d 770 (Pa. 2001) (stating that the power to impose a moratorium on subdivision approvals while the municipality revises its comprehensive zoning plan, if not implicitly granted under the municipality's planning code, must be expressly granted in the municipality's enabling act).

125. *State ex rel. SCA Chem. Waste Services, Inc. v. Konigsberg*, 636 S.W.2d 430 (Tenn. 1982) (upholding the city planning commission's power to construct a moratorium ordinance to preserve the status quo until a new zoning ordinance became effective); *see also Collura v. Town of Arlington*, 329 N.E.2d 733, 737 (Mass. 1975) (upholding the power to enact a "reasonable" land use moratorium ordinance, holding that the ordinance was within the scope of the general zoning enabling act, and stating that the adoption of a two-year moratorium on the construction of apartment buildings in certain areas was within the broad power of the town).

126. *Rojas*, *supra* note 8, at 716.

127. *Arnold Bernhard & Co. v. Planning & Zoning Comm'n of Westport*, 479 A.2d 801 (Conn. 1984) (upholding a nine month moratorium on accepting and granting applications for business development because it was within the power delegated to the planning and zoning commission); *see also Tisei v. Town of Ogunquit*, 491 A.2d 564 (Me. 1985) (stating municipalities had the power to enact moratorium ordinances if they were faced with emergency situations); *Collura*, 329 N.E.2d at 737; *Almquist v. Town of Marshan*, 245 N.W.2d 819 (Minn. 1976); *McDonald's Corp. v. Village of Elmsford*, 549 N.Y.S.2d 448 (N.Y. App. Div. 1989) (holding a moratorium on fast-food restaurants

Each jurisdiction's conclusion generally rests on its individual state's constitution, statutes, and case law.¹²⁸ Regardless of the jurisdiction's justifications, most jurisdictions are reluctant to determine that a moratorium ordinance, permanent or temporary, is beyond the power of the local planning commission.¹²⁹

III. PROCEDURAL REQUIREMENTS

A. Procedural Requirements for Plaintiffs

There are significant constitutional challenges which arise with land use moratorium ordinances facially and as applied to specific landowners.¹³⁰ While the Court has determined that moratoria ordinances are facially valid as long as they are drafted according to state procedural requirements and do not violate constitutional rights, there are still challenges which can be brought as to specific moratorium implementations.¹³¹ There are certain requirements that a city must meet in order for a moratorium ordinance to be legitimate.¹³²

Initially, in order to challenge any zoning ordinance, a plaintiff must demonstrate that he or she has standing.¹³³ Courts decide only cases or controversies they have jurisdiction to hear.¹³⁴ "In order to satisfy the constitutional requirement[,] . . . [a] plaintiff must show that he [or she] has a 'personal stake in the outcome of the controversy,' or that he [or she] has suffered 'some threatened or actual injury resulting from the putatively illegal action.'"¹³⁵ "At the federal level, the 'case or controversy'

was a valid exercise of the village's police power); *Ford v. Bd. of County Commissioners*, 924 P.2d 91 (Wyo. 1996) (holding that counties have broad authority to require compliance with zoning provisions to promote orderly development).

128. *Naylor*, 773 A.2d at 772.

129. *Konigsberg*, 636 S.W.2d at 435-36 (stating that the local government could enact a moratorium ordinance because it was included within the broad sweep of legislative power). *But see* *Schrader v. Guilford Planning & Zoning Comm'n*, 418 A.2d 93 (Conn. 1980) (finding a moratorium ordinance invalid since there was no statutory authority for such a moratorium); *N.J. Shore Builders Ass'n v. Mayor of Middletown*, 561 A.2d 319 (N.J. Super. Ct. Law Div. 1989) (refusing to uphold a six-month moratorium because evidence did not support finding of clear and imminent danger to the health of the municipality's inhabitants); *Naylor*, 773 A.2d at 775.

130. *Gogleman*, *supra* note 25, at 8.

131. *Id.* at 7.

132. *Id.*

133. *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (holding that the question of standing in federal courts is to be considered in the framework of Article III of the United States Constitution, which restricts judicial power to cases and controversies).

134. *Constr. Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897, 903 (9th Cir. 1975).

135. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962) and *Linda R.S. v. Richard D.*, 410 U.S.

requirement of Article III of the United States Constitution translates into satisfaction of the ‘injury in fact’ test,” which asks if the challenged ordinance or regulation causes an injury in fact to the plaintiff.¹³⁶ An injury is determined broadly and is not limited to an economic injury to the plaintiff.¹³⁷

A plaintiff might also be required to satisfy an “additional court-imposed standing requirement that the ‘interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’”¹³⁸ A “plaintiff generally must assert his [or her] own legal rights and interests” as well.¹³⁹ A plaintiff cannot rest his or her claim on the interests or injuries of a third party if the plaintiff does not have a significant interest at stake him or herself.¹⁴⁰

Standing, however, may differ depending on a state statute.¹⁴¹ There is a general trend toward enlarging the class of people who may protest administrative actions.¹⁴² In *Tisei v. Town of Ogunquit*,¹⁴³ the Supreme Court of Maine simplified the standing requirement, stating that a plaintiff may satisfy the standing prerequisite if the challenging party “possess[es] sufficient ‘title, right or interest’ in the land to confer upon him [or her] lawful power to use it or to control its use.”¹⁴⁴

As a general rule, a plaintiff must also exhaust the administrative remedies available to him or her before the plaintiff can challenge a zoning action or regulation in court.¹⁴⁵ This is often a hurdle for many plaintiffs.¹⁴⁶ The vast majority of takings cases, for example, are dismissed on jurisdictional grounds such as ripeness.¹⁴⁷ If a plaintiff does not exhaust all of his or her administrative remedies, a court will not have jurisdiction over

614, 617 (1973)).

136. Gogleman, *supra* note 25, at 21.

137. *Id.*

138. *Constr. Indus. Ass’n of Sonoma County*, 522 F.2d at 903 (quoting *Camp*, 397 U.S. at 153).

139. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

140. *Id.*

141. *Camp*, 397 U.S. at 154.

142. *Id.*

143. 491 A.2d 564 (Me. 1985).

144. *Id.* at 567 (quoting *Walsh v. City of Brewer*, 315 A.2d 200, 207 (Me. 1974)).

145. *City of Gadsden v. Entrekkin*, 387 So. 2d 829, 832 (Ala. 1980) (holding that the application of the exhaustion of remedies doctrine is well established in the law).

146. Stephen J. Eagle, *Development Moratoria, First English Principles, and Regulatory Takings*, ENVTL. L. REP., Oct. 2001, at 11232.

147. *Id.*

the challenge because it is not ripe for review.¹⁴⁸ “The ripeness doctrine serves the purpose of avoiding premature adjudication of administrative actions.”¹⁴⁹ A constitutional challenge to a moratorium ordinance is ripe when a property owner or developer has acquired the planning commission’s “final, definitive position” regarding how the commission will apply the challenged ordinance or regulation to the particular land in question.¹⁵⁰ Typically for a decision to be final, the landowner or developer “must have submitted one formal development plan.”¹⁵¹ Some state statutes will also require that a landowner or developer has sought a variance from the regulation if the formal development plan was denied before the court will assume jurisdiction.¹⁵² In these instances, states will sometimes require the landowner to do more than submit one proposal or one application for variance and receive the planning board’s denial thereto before the claim is ripe for adjudication because “[I]and use planning is not an all-or-nothing proposition.”¹⁵³ The denial of a particular plan does not necessarily equate to a refusal to permit “any” development.¹⁵⁴ An applicant must receive the board’s “final, definitive position regarding how it will apply the regulations at issue to the particular land in question.”¹⁵⁵ A court cannot determine whether a regulation has gone too far unless it knows how far that regulation goes.¹⁵⁶ The court is unable to resolve that issue until it can be certain how the planning board will apply the zoning ordinance to the landowner’s property.¹⁵⁷

There are exceptions to the ripeness doctrine that permit a plaintiff to continue his or her suit without exhausting all administrative remedies.¹⁵⁸

148. *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985) (reversing a jury verdict awarding damages for temporary taking because the verdict was premature, as the plaintiff had not yet obtained a final judgment regarding the application of a zoning ordinance).

149. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir. 1994) (holding that a substantive due process challenge was not ripe inasmuch as owners had never submitted formal development plans nor filed for a specific plan application).

150. *Id.*

151. *Id.*

152. *Williamson County Reg’l Planning Comm’n*, 473 U.S. at 188-89.

153. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 347 (1986) (holding that the Court could not determine whether a taking had occurred in the absence of a final and authoritative determination by the county planning commission because the commission had to determine how it would apply the challenged regulation to the property in question before the claim became ripe).

154. *Id.* at 350.

155. *Id.* at 351.

156. *Id.* at 348-49.

157. *Id.*

158. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990) (stating that the landowners’ failure to seek a variance did not affect the ripeness of their regulatory taking claim challenging the application of the city’s land use regulations to proposed development of ocean-front property because the landowners had submitted a formal development application that the city had rejected, and the city did not dispute that applying for a variance from

One recognized exception is known as the “futility exception,” which states that a development plan does not need to be resubmitted and denied if the action would be “idle or futile.”¹⁵⁹

If the plaintiff establishes standing and the claim is ripe, then the Court has the ability to review the challenged moratorium ordinance.¹⁶⁰

B. Standard of Review

Land use moratorium ordinances are viewed in the same way as other zoning regulation ordinances.¹⁶¹ Moratorium ordinances are given a presumption of validity because they are legislative decisions, and legislative decisions on zoning matters are generally given deference by the court.¹⁶² A local land use restriction lies within the authority of a municipality’s police power if it is reasonably related to the public welfare.¹⁶³ The court’s role is to determine if there was a reasonable basis for the legislative body to enact the moratorium.¹⁶⁴ If the court determines that the moratorium ordinance has no reasonable basis and the legislative body acted “arbitrarily, capriciously, or with unreasonable conduct,” the moratorium will be invalidated as an improper use of the police power.¹⁶⁵ Unfortunately for the landowner, it takes egregious facts to demonstrate that a legislative body acted arbitrarily; thus, moratorium ordinances and other land use regulations are rarely found unconstitutional under the improper use of a municipality’s police power standard.¹⁶⁶

C. Procedural Requirements for Drafting Moratoria Ordinances

Even though there are numerous opinions supporting moratoria ordinances, few legislatures or courts have addressed the criteria for drafting

zoning regulations would have been futile since nature and density of proposed development conflicted with express terms in the city’s zoning ordinances and its general land use plan), *aff’d*, 526 U.S. 687 (1999).

159. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir. 1994).

160. *See Gogleman, supra* note 25, at 21.

161. *Associated Home Builders, Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976) (stating that a moratorium ordinance would be constitutional if it was reasonably related to the welfare of the region affected and moratorium ordinances sustain a presumption of constitutionality under the police powers).

162. *See id.* at 483.

163. *Id.*

164. *Id.*

165. *See id.*

166. *Id.* at 488-89.

a moratorium ordinance.¹⁶⁷ Certain jurisdictions have established specific criteria for drafting a moratorium ordinance, and the ordinance will be invalidated if the criteria are not satisfied.¹⁶⁸ The various jurisdictions that have established certain procedural requirements have done so because moratoria ordinances impose such severe limitations on the uses of the property they affect, and, if there were no guidelines in drafting the ordinances, a local government could easily abuse its power and discretion.¹⁶⁹ Although most moratorium ordinances are temporary in nature, some serve as “permanent, hasty control[s] usually designed to avoid comprehensive planning.”¹⁷⁰ Additionally, jurisdictions have required that the ordinance be drafted carefully due to the ever-increasing concern that the moratorium ordinance may cause an unconstitutional taking if it imposes an unreasonable delay.¹⁷¹

The Minnesota Supreme Court has established a five-factor test for determining the validity of moratorium ordinances, and a plaintiff can have the ordinance nullified if the moratorium ordinance is not enacted pursuant to the requirements.¹⁷² The court stated that the test is to be analyzed on an ad hoc factual basis.¹⁷³ First, in order for the moratorium ordinance to be upheld it must be adopted in good faith.¹⁷⁴ The good faith factor is “a question of fact and hinges on demonstrated facts showing the need for a moratorium.”¹⁷⁵ Public hearings and expert testimony supporting the moratorium should be included in the ordinance and will serve as a demonstration of facts showing the need for the moratorium ordinance.¹⁷⁶ Testimony by the city-planning director is especially important because special weight is given to statements made by the city’s planning executives.¹⁷⁷ The director’s testimony is considered expert testimony because the director is in the position to see what the needs for the public are.¹⁷⁸

The second factor requires that the ordinance must be non-discriminatory.¹⁷⁹ One question before the court in determining whether the ordinance is non-discriminatory is determining whether the effect of the

167. See Gogleman, *supra* note 25, at 7.

168. *Almquist v. Town of Marshan*, 245 N.W.2d 819, 826 (Minn. 1976) (upholding a six-month moratorium ordinance because it was enacted pursuant to state procedural requirements).

169. *Id.*

170. Ailes, *supra* note 50, at 819; see also Bozung & Alessi, *supra* note 41, at 1013.

171. Freilich, *supra* note 15, at 173.

172. *Almquist*, 245 N.W.2d at 820.

173. See *Freilich*, *supra* note 15, at 173.

174. *Id.*

175. Gogleman, *supra* note 25, at 7.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Almquist v. Town of Marshan*, 245 N.W.2d 819, 826 (Minn. 1976).

moratorium ordinance has an unjust consequence as to constitute “substantial prejudice” on the landowner.¹⁸⁰

Third, the ordinance must be of limited duration.¹⁸¹ The Court stated that if the ordinance was not specified as having a limited duration, it would not be invalid *per se*.¹⁸² However, it would be evidence of invalidity, and it would be analyzed with the other factors to determine whether or not the moratorium was enacted properly.¹⁸³ Fourth, the moratorium ordinance must be appropriate to the development of a comprehensive plan.¹⁸⁴ Finally, the city council must act “properly” to adopt the plan.¹⁸⁵

Other jurisdictions have not implemented the factorial analysis that Minnesota has created, but some have said that, at the least, the ordinance “must be a reasonable, necessary, and limited response directed at redressing a genuine crisis or emergency” when the ordinance “interferes with the enjoyment of property.”¹⁸⁶

Even though procedural defects are common, moratoria typically still “achieve the desired goal of delaying development.”¹⁸⁷ For example, even if a court determines that a moratorium ordinance is legally deficient, the moratorium ordinance has still prevented landowners from developing for a specific period of time.¹⁸⁸ A larger obstacle for plaintiffs to overcome is the considerable cost in challenging an ordinance.¹⁸⁹ Regrettably, landowners have traditionally been unable to obtain damage awards for illegal moratorium ordinances, which means that “illegally adopted moratoria have been cost free” since the only remedy is typically invalidation.¹⁹⁰ All of this indicates that the abuse of the moratoria process is rarely corrected.¹⁹¹ Moratoria ordinances may be found to be takings if excessive, and compensation may be available, but “it is difficult to obtain such relief.”¹⁹²

180. *Id.* at 820 (quoting *Hawkinson v. County of Itasca*, 231 N.W.2d 279, 284 (Minn. 1975)).

181. *Id.* at 826.

182. *See id.*

183. *See id.*

184. *Id.* at 827.

185. *Id.* The Court did not give any guidance as to what “properly” means or how the standard would be violated.

186. *Cellular Tel. Co. v. Vill. of Tarrytown*, 624 N.Y.S.2d 170, 175 (N.Y. App. Div. 1995) (holding that a local moratorium ordinance was an invalid exercise of the village’s police power because no emergency existed which would justify the moratorium ordinance).

187. *Bozung & Alessi*, *supra* note 41, at 1013.

188. *Id.*

189. *Eagle*, *supra* note 146, at 11232.

190. *Bozung & Alessi*, *supra* note 41, at 970.

191. *Eagle*, *supra* note 146, at 11232.

192. *Bozung & Alessi*, *supra* note 41, at 970.

Landowners are often left uncompensated, and moratoria ordinances serve their desired purpose whether they are legal or illegal.¹⁹³

D. The Vested Right Doctrine – A Landowner’s Defense

A moratorium ordinance is an “important weapon against the ‘race of diligence’ during the planning periods of a zoning ordinance.”¹⁹⁴ As a result, some jurisdictions permit the retroactive application of a zoning moratorium regulation in which an application was made prior to the effective date of the new ordinance.¹⁹⁵ For jurisdictions that allow this type of action, consideration must be given as to whether the landowner has already substantially relied on the prior ordinance by significantly changing his position.¹⁹⁶

The court must also determine whether the city acted in good faith or whether the city’s actions discriminated against a particular property owner.¹⁹⁷ The question is difficult because a landowner often asserts that, because the moratorium ordinance had not passed at the time he or she applied for a building permit, he or she should have a vested right to go forward with his or her proposed development.¹⁹⁸ The city planners, on the other hand, often contest that the act should, in fact, apply retroactively, otherwise their future plans could be hindered because the landowner may simply be trying to beat the clock of the new, and possibly more restrictive, ordinance.¹⁹⁹

A vested right is an effective weapon for a property owner against the imposition of a moratorium ordinance because a landowner is legally permitted to proceed with his desired development notwithstanding the imposition of the moratorium if a vested right is established.²⁰⁰ Vested rights analysis strikes a balance “in a more substantive way between the interest of [the] government in regulating land use [development] and the interests of private [landowners] in using their land in a particular way.”²⁰¹

The prevailing view is that “no vested right arises merely from the application for a building permit.”²⁰² A minority, countervailing view

193. *Id.*

194. Gogleman, *supra* note 25, at 27.

195. *Almquist v. Town of Marshan*, 245 N.W.2d 819, 826 (Minn. 1976); *see also Collura v. Town of Arlington*, 329 N.E.2d 733 (Mass. 1975) (dealing extensively with the subject of retroactive zoning and upholding a two year moratorium ordinance).

196. *Almquist*, 245 N.W.2d at 826.

197. *Id.* at 825.

198. *See id.* at 826.

199. *Id.* at 826-27.

200. Gogleman, *supra* note 25, at 27.

201. *Santa Fe Trail Ranch II, Inc. v. Bd. of County Commissioners*, 961 P.2d 785, 788 (N.M. Ct. App. 1998) (holding that a landowner had no vested right in a developing subdivision).

202. *Almquist*, 245 N.W.2d at 826.

disagrees and concludes that a property owner should have his application adjudicated according to the ordinance in effect at the time of filing unless a change in ordinance is pending at the time of filing.²⁰³ The majority rule creates a higher bar for the plaintiff but does include a limited exception to alleviate an injured plaintiff.²⁰⁴ The majority rule creates a vested right to a permit “if the permit is unlawfully withheld or unreasonably delayed and the elements of equitable estoppel are otherwise present.”²⁰⁵

To determine if a vested right is ripe, a two-factor test is used by the court.²⁰⁶ First, the court must inquire whether the property owner relied in good faith on some governmental act or omission.²⁰⁷ Second, the court must determine whether the landowner made a substantial change in his or her position or incurred expenses to the extent that it would be inequitable and unjust to terminate the right the property owner has attained.²⁰⁸ Thus, to prevail in a vested rights challenge, a landowner “must show initial approval by the regulatory body,” and he or she must additionally show that he or she “changed [his or her] position in reliance thereon.”²⁰⁹ Only then, when a landowner’s right matures into a vested right, does the landowner earn protection under constitutional provisions prohibiting the government from affecting such a right.²¹⁰

Another widely accepted doctrine that may work against a landowner seeking to avoid a moratorium on the issuance of building permits is known as the “pending ordinance doctrine.”²¹¹ The doctrine maintains that a building permit may be refused if, at the time of application, an amendment to a zoning ordinance is pending that would prohibit the use of the land for which the permit is sought.²¹²

203. *W. Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980) (holding that a city was estopped from enforcing a zoning change prohibiting plaintiff’s proposed use because plaintiff’s building permit conformed to the zoning ordinance in effect at the time the application was filed and there were no pending changes in the zoning ordinance which would prohibit the use plaintiff applied for).

204. Gougleman, *supra* note 25, at 27.

205. *Id.*

206. *Id.* at 28-29.

207. *Id.* at 29.

208. *Id.*

209. *Santa Fe Trail Ranch II, Inc. v. Bd. of County Commissioners*, 961 P.2d 785, 788 (N.M. Ct. App. 1998).

210. *Id.*

211. *Naylor v. Township of Hellam*, 773 A.2d 770, 776 (Pa. 2001) (holding that the pending ordinance doctrine does not apply to applications for subdivisions or land use developments).

212. *Id.*

IV. CONSTITUTIONAL CHALLENGES

There are certain challenges that may be available to an aggrieved plaintiff.²¹³ Specifically, the Fourteenth Amendment protects persons from state governmental deprivations of life, liberty, or property without due process of law.²¹⁴ If a moratorium ordinance deprives a person of a constitutionally protected right or is discriminatory in nature, constitutional issues are triggered.²¹⁵

A. Due Process Challenge

The Supreme Court stated that it is clear that the Due Process Clause does not empower the judiciary “to sit as a ‘superlegislature to weigh the wisdom of legislation.’”²¹⁶ A large amount of discretion is “vested in the legislature to determine what the welfare of the public requires and what measures are necessary to [advance] it.”²¹⁷ When a state acts under its police power, it “may lawfully impose . . . burdens and restraints on private rights” if it is necessary to promote the general welfare.²¹⁸ Thus, the state’s action carries a strong presumption of constitutionality.²¹⁹ Even though the legislature’s action is presumed valid, it may be invalidated if it violates due process limitations.²²⁰ “Because the enactment of a moratorium ordinance is an exercise of the local government’s police power, the ordinance must satisfy substantive due process limitations imposed on all police power regulations.”²²¹

In *Village of Euclid v. Ambler Realty Co.*,²²² the Supreme Court stated that every zoning ordinance, which would by definition include moratoria ordinances, must serve the “public health, safety, morals, or general welfare.”²²³ Furthermore, the ordinance must be reasonably related to the valid governmental purpose.²²⁴ This threshold two-prong test is easily met,

213. Gogleman, *supra* note 25, at 13.

214. U.S. CONST. amend. XIV.

215. Gogleman, *supra* note 25, at 13.

216. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (quoting *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)) (stating that the Kansas Legislature was free to decide what legislation is needed to deal with a specific problem within the state borders).

217. *Robert T. Foiley Co. v. Wash. Suburban Sanitary Comm’n*, 389 A.2d 350, 355 (Md. 1978).

218. *Id.*

219. *Id.*

220. Gogleman, *supra* note 25, at 13.

221. *Id.*

222. 272 U.S. 365 (1926).

223. *Id.* at 395 (conditioning the validity of zoning ordinances on two factors: (1) the zoning ordinance must advance legitimate public interests and (2) the effect of the ordinance must not be unreasonable).

224. *Id.* (holding that if the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control).

though, because moratorium ordinances are “clothed with a presumption of validity” and most are enacted under the “guise of serving the general welfare.”²²⁵ A landowner opposing a moratorium ordinance is unlikely to succeed in a due process challenge.²²⁶

There are two prongs to the Due Process Clause.²²⁷ A litigant may bring a challenge alleging a substantive due process violation or a procedural due process violation.²²⁸ A substantive due process violation occurs when an ordinance arbitrarily, unreasonably, or unduly deprives property owners of a fundamental use, benefit, and control of their property without providing due process in return.²²⁹ In order to succeed, the litigant must prove three elements.²³⁰ He or she must demonstrate (1) that the ordinance has no rational relationship to the public welfare, (2) the ordinance is not reasonably designed to correct an undesirable condition affecting the public good, and (3) the ordinance is not fairly debatable.²³¹ On the other hand, if a municipality can show that the moratorium in question involves a legitimate concern and is fairly debatable, it will be found to have met the threshold requirements of substantive due process.²³² According to *Shelton v. City of College Station*,²³³ the legislative purpose need only be hypothesized, and the city need not prove its legislative purpose as a “historical fact.”²³⁴

Despite the presumptive validity moratoria ordinances have, one New York court determined that one particular moratorium ordinance which had no end date denied the property owners their due process rights “since it [had] the practical effect of imperiling their projects without providing them with any redress or mechanism of appeal.”²³⁵ The court stated that the power to delay without limit was essentially the power to destroy a property owner’s rights.²³⁶

225. Gogleman, *supra* note 25, at 13.

226. *Id.*

227. *Id.*

228. *Id.*

229. Jonathan Brennan Butler, *Insurers Under Fire: Assessing the Constitutionality of Florida’s Residential Property Insurance Moratorium After Hurricane Andrew*, 22 FLA. ST. U. L. REV. 731, 742-43 (1995).

230. Gogleman, *supra* note 25, at 13.

231. *Id.*

232. *Herrington v. City of Pearl*, 908 F. Supp. 418, 426 (S.D. Miss. 1995) (holding that a moratorium against new mobile home sales did not violate litigant’s substantive due process rights).

233. 780 F.2d 475 (5th Cir. 1986).

234. *Id.* at 484.

235. *First Baptist Church of Crown Heights Ctr. for Nursing & Rehab. v. Novello*, 728 N.Y.S.2d 881, 887 (N.Y. App. Div. 2001).

236. *Id.*

“The second prong of a due process challenge is procedural.”²³⁷ Since moratorium “ordinance enactment is a legislative act,” a procedural due process challenge is often unsuccessful because “courts do not usually impose constitutional procedural requirements on the legislative process.”²³⁸ In *Logan v. Zimmerman Brush Co.*,²³⁹ the Court argued that when a state extinguishes property rights through the legislative process, it is said, “the legislative determination provides all the process that is due.”²⁴⁰ The fact that the ordinance “‘applies across the board provides a ‘substitute safeguard.’”²⁴¹

The Seventh Circuit, in *Pro-Eco, Inc. v. Board of Commissioners*, was faced with a moratorium ordinance that was allegedly provoked and enacted because the planning board feared the plaintiff’s forthcoming use.²⁴² The court stated, “where the legislation affects only a tiny class of people,” the procedural process may become more important and more may be required from the legislative process.²⁴³ Despite that statement, the court concluded that it did not believe that “generally applicable prophylactic legislation provoked by the fear of one particular actor converts an elected body’s legislative act into a quasi-judicial or administrative act that would require more process.”²⁴⁴

B. Equal Protection Challenge

The allegation that a zoning moratorium denies equal protection is another frequent litigation challenge.²⁴⁵ The Equal Protection Clause of the Fourteenth Amendment commands that no state may deny any person equal protection of the laws.²⁴⁶ This is, in essence, a command that “all persons similarly situated are to be treated alike.”²⁴⁷ “[T]he threshold inquiry is whether the compelling governmental interest test or rational basis test

237. Gogleman, *supra* note 25, at 14; *see also* *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (holding that a discharged employee’s right to use the Illinois Fair Employment Practices Act’s adjudicatory procedures following his discharge on purported ground that his short left leg made it impossible for him to perform his duties was a species of property protected by the Fourteenth Amendment’s Due Process Clause).

238. Gogleman, *supra* note 25, at 14; *see also* *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); *United States v. LULAC*, 793 F.2d 636, 648 (5th Cir. 1986).

239. 455 U.S. 422 (1982).

240. *Id.* at 433.

241. *Pro-Eco, Inc. v. Bd. of Commissioners*, 57 F.3d 505, 513 (7th Cir. 1995) (quoting *Philly’s v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984)).

242. *Id.*

243. *Id.*

244. *Id.*

245. Gogleman, *supra* note 25, at 8.

246. U.S. CONST. amend. XIV.

247. *Herrington v. City of Pearl*, 908 F. Supp. 418, 427 (S.D. Miss. 1995).

should be used to determine whether” the ordinance is valid.²⁴⁸ “Attempts to invoke the compelling governmental interest test in equal protection challenges to zoning moratoria have been generally unsuccessful.”²⁴⁹ However, the standard is used when the challenge is based on a suspect class such as race or gender.²⁵⁰ If the rational basis test is used, the court is to determine if the ordinance serves permissible governmental objectives, whether the ordinance is rationally related to governmental objectives, and if the ordinance is applied in a nondiscriminatory manner.²⁵¹ Just as in other zoning regulations, a permissible governmental objective with a moratorium ordinance is one that serves the public health, safety, morals, and welfare.²⁵² The Supreme Court of California stated that a temporary moratorium ordinance did not need to be sustained by a compelling state interest, but would be constitutional if it was reasonably related to the welfare of the region it affected.²⁵³ The court further stated that the ordinance had a presumption of validity under the city’s police power test that couldn’t be overcome on the basis of a limited record.²⁵⁴

In *Schafer v. City of New Orleans*,²⁵⁵ the Fifth Circuit determined that a land use moratorium that was aimed solely at fast-food restaurants did not result in a denial of equal protection to the landowners who sought to sell their property to a fast-food chain.²⁵⁶ The court did not state whether it was using the compelling governmental interest test or the rational basis test; it simply stated that the burden of proof was on the landowner to prove that the ordinance was unconstitutional, and the landowner failed to meet the burden.²⁵⁷

C. First Amendment Challenge

A plaintiff may also bring a constitutional challenge against an ordinance imposing a moratorium if the ordinance is a prior restraint on

248. Gogleman, *supra* note 25, at 9.

249. *Id.*; see also *Const. Indus.y Ass’n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

250. Gogleman, *supra* note 25, at 9.

251. *Id.*

252. *Id.*

253. *Associated Home Builders, Inc. v. City of Livermore*, 557 P.2d 473, 476 (Cal. 1976).

254. *Id.* at 483-84.

255. 743 F.2d 1086 (5th Cir. 1984).

256. *Id.* at 1090.

257. *Id.* at 1090-91.

constitutionally protected speech.²⁵⁸ First Amendment challenges typically center on moratorium ordinances that thwart adult entertainment businesses by suspending development or preventing the issuance of entertainment licenses.²⁵⁹ In *Howard v. City of Jacksonville*,²⁶⁰ the court stated that when courts are faced with moratoria ordinances that prevent the development or establishment of adult entertainment businesses, the issue for the court to determine is not what the court thinks about adult entertainment establishments.²⁶¹ Rather, the only issue before the court is whether the ordinance in question “is an unconstitutional restraint on these types of businesses in violation of the free speech provision of the First Amendment” of the Constitution.²⁶² Courts are skeptical of ordinances which place restrictions on individual speech because “[u]nprincipled, heavy-handed government policies have the secondary effect of promoting censorship and sapping the rule of law.”²⁶³

In *Howard*, the city of “Jacksonville require[d] an adult entertainment license before a business [could] offer adult entertainment in the city.”²⁶⁴ The city then imposed a moratorium ordinance on the issuance or granting of any licenses permitting the operation of any adult entertainment facilities in the city.²⁶⁵ The city stated that it imposed the moratorium pursuant to its “police powers to protect the public health, safety, welfare and morals of the community at large.”²⁶⁶ The moratorium in effect barred adult entertainment businesses from getting a license for almost six months.²⁶⁷ The operator of a lounge offering live nude dancing and the owner of a lingerie and gift shop that sold adult media challenged the constitutionality of the ordinance claiming that it was a violation of the First Amendment of the Constitution.²⁶⁸ The court stated that when a city requires a permit to be “obtained before adult entertainment is allowed [it] constitutes a prior restraint on speech.”²⁶⁹ The court emphasized that a prior restraint is not *per*

258. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (holding that petitioners could challenge the validity of an ordinance inhibiting adult entertainment businesses on First Amendment prior restraint grounds); see also *Howard v. City of Jacksonville*, 109 F. Supp. 2d 1360 (M.D. Fla. 2000) (issuing a preliminary injunction against a moratorium ordinance on the issuance of adult entertainment licenses because the ordinance was an invalid restriction on speech).

259. See, e.g., *FW/PBS, Inc.*, 493 U.S. at 220-21; *Howard*, 109 F. Supp. 2d at 1363-64.

260. 109 F. Supp. 2d. 1360 (M.D. Fla. 2000).

261. *Id.* at 1363.

262. *Id.*

263. *Id.*; see also *D’Ambra v. City of Providence*, 21 F. Supp. 2d 106, 111 (D.R.I. 1998) (holding that a city’s license moratorium on adult entertainment establishments violated the First Amendment because the moratorium ordinance was an improper time, place, and manner restriction).

264. *Howard*, 109 F. Supp. 2d at 1362.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at 1363.

se unconstitutional but “bears a heavy presumption against constitutional validity.”²⁷⁰ In order for the ordinance to be constitutional, certain safeguards must be present, including the following:

(i) the restraint cannot place “unbridled discretion” in the hands of a government official or agency; (ii) any restraint prior to judicial review may be imposed only for a brief period of time and only for the purpose of preserving the status quo until the judicial determination is complete; and, (iii) the ordinance must provide for judicial review.²⁷¹

The *Howard* court determined that the ordinance was an unconstitutional prior restraint because it did not provide for judicial review of non-permitting decisions, and it affected all adult entertainment businesses.²⁷² Thus, the ordinance did not exercise any discretion at all.²⁷³ Furthermore, the moratorium failed because it was in effect for an unreasonable time.²⁷⁴

First Amendment challenges are not as prevalent as due process or taking challenges, but they may be effective avenues for landowners to invalidate moratorium ordinances if the ordinances are unconstitutional prior restraints on the freedom of speech.²⁷⁵

D. Takings Challenge

The Fifth Amendment of the Constitution declares that “private property [shall not] be taken for public use, without just compensation.”²⁷⁶ The Constitution implicates a constitutional obligation to pay just compensation when a government action works a taking of a private individual’s property rights.²⁷⁷ The just compensation requirement guarantees that a “few are not

270. *Id.*; see also *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361-63 (11th Cir. 1999) (stating that an ordinance is valid and is not a violation of the First Amendment “if it is narrowly tailored to serve a substantial government interest, and it allows for reasonable alternative avenues of expression”).

271. *Howard*, 109 F. Supp. 2d at 1363-64; see also *FW/PBS, Inc.*, 493 U.S. at 225-227; *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (holding that prior restraint is not necessarily unconstitutional under all circumstances, but a city must provide adequate safeguards against undue inhibition of protected expression).

272. *Howard*, 109 F. Supp. 2d at 1364.

273. *Id.*

274. *Id.*

275. *Id.* at 1363.

276. U.S. CONST. amend. V.

277. *Eagle*, *supra* note 146, at 11232.

forced to bear the cost of [the] uses that benefit” society as a whole.²⁷⁸ A just compensation taking challenge is perhaps the most frequent and troubling challenge moratoria ordinances face.²⁷⁹

“Before 1922 the Supreme Court required that compensation be paid to private property owners *only* when the government engaged in a *permanent physical occupation or invasion* of private property.”²⁸⁰ In 1922, however, the Supreme Court handed down an opinion that significantly altered the future for the takings jurisprudence.²⁸¹ In *Pennsylvania Coal Co. v. Mahon*,²⁸² the Court held a state law was unconstitutional because the law made “it commercially impracticable to mine certain coal [which had] very nearly the same effect for constitutional purposes as appropriating or destroying [the land].”²⁸³ While the Court weighed various factors in assessing the takings claim in *Pennsylvania Coal*, it articulated no specific test for determining when a police power restriction or regulation constitutes a taking.²⁸⁴ In the end, it simply noted that, “while property may be regulated to a certain extent, if [the] regulation goes too far, it will be recognized as a taking.”²⁸⁵ With this observation, the Supreme Court originated the concept of regulatory takings.²⁸⁶

Despite [the Court’s] pronouncement, however, “for the next [fifty-five] years, the Court did [very] little to elaborate on the concept of a regulatory taking.” Not until 1978, in *Penn Central Transportation Co. v. New York City*,²⁸⁷ did the Court articulate a test for regulatory takings. . . . [T]he Court identified three primary factors to be considered while conducting an “ad hoc” evaluation of whether a police power regulation went “too far” Two years following *Penn Central*, and without abandoning the test elaborated in *Penn Central*, the Court articulated a two-part takings test in *Agins v. City of Tiburon*.²⁸⁸ The Court later affirmed the *Agins* test in *Keystone Bituminous Coal Ass’n v. DeBenedictis*.²⁸⁹

278. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 228 F.3d 998, 999 (9th Cir. 2000) (Kozinski, J., dissenting), *aff’d*, 535 U.S. 302 (2002).

279. Butler, *supra* note 229, at 742.

280. Dan Herber, *Surviving the View Through the Lochner Looking Glass: Tahoe-Sierra and the Case for Upholding Development Moratoria*, 86 MINN. L. REV. 913, 922 (2002).

281. *Id.*

282. 260 U.S. 393 (1922).

283. *Id.* at 414.

284. *Id.* at 415.

285. *Id.*

286. *See id.*

287. 438 U.S. 104 (1978).

288. 447 U.S. 255 (1980).

289. Herber, *supra* note 280, at 923-24 (quoting Robert K. Best, *Regulatory Takings: A Brief*

The Constitution allows a state to reasonably regulate private property for the benefit “of the public health, safety or welfare without infringing on the Fifth Amendment.”²⁹⁰ However, these regulations may not rise to the level which unduly deprives a property owner of the fundamental right to use and control property without just compensation in return.²⁹¹ It is often difficult to determine where the line is drawn indicating when the regulation is a valid exercise of the police power, or when the regulation has unduly deprived a landowner from constitutionally using his or her land.²⁹² The line is blurred because the deprivation need not be direct, but may consist of regulations which “arbitrarily, unreasonably, and without sufficient public purpose” rob the owner of the benefits of his or her property.²⁹³ Furthermore, the Court has offered nothing more than ad hoc factual tests that provide little guidance to land owners, developers, city planners, and, most importantly, the courts.

While the Court has a history of providing little more than ad hoc factorial analysis, there have been a few instances where the Court has given some guidance in determining when a government regulation or action works a taking of individual property rights.²⁹⁴ In *Pennsylvania Coal Co. v. Mahon*,²⁹⁵ the Court established a general rule for governmental regulations.²⁹⁶ The Court concluded that the government may regulate property to a certain extent but “if [the] regulation goes too far it will be recognized as a taking.”²⁹⁷ To resolve when a regulation has gone “too far” the Court has created three situations in which a regulatory action may accomplish a taking that requires compensation.²⁹⁸ There are two categories that are “automatically compensable without case-specific examination of ‘the public interest advanced in support of the restraint.’”²⁹⁹ The first type of categorical takings claim involves an actual physical invasion of the property.³⁰⁰ This type of taking is rarely claimed in reference to land use

History, in *Inverse Condemnation and Related Liability* 1, 3-4 (A.L.I.-A.B.A. Course of Study, May 3-5, 2001).

290. Butler, *supra* note 229, at 742.

291. *Id.* at 743.

292. *Id.*

293. *Id.*

294. Eagle, *supra* note 146, at 11232.

295. 260 U.S. 393 (1922).

296. Eagle, *supra* note 146, at 11232.

297. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

298. Gogleman, *supra* note 25, at 29.

299. *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

300. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (finding a taking when a two-inch cable line was affixed to a piece of property and concluding that there is a per se

moratorium ordinances due to the nature of the ordinances.³⁰¹ Moratorium ordinances serve to prevent land use development for a period of time as opposed to physically invading the landowner's property.³⁰²

The second type of categorical taking entails a regulation or ordinance that denies a landowner of "all 'economically viable use' of his property."³⁰³ This is because the Court views a total deprivation of all beneficial use as the equivalent of a physical appropriation of property.³⁰⁴ "This compensation requirement also guarantees that the government does not do by regulation what it cannot do through eminent domain - *i.e.*, take private property without paying for it."³⁰⁵ In *Lucas v. South Carolina Coastal Council*, the property owner bought two residential lots on the coast of South Carolina with the intention of building single-family homes on the lots.³⁰⁶ Before Lucas was able to develop the property, the state legislature enacted the "Beachfront Management Act," which effectively banned permanent construction on Lucas' property.³⁰⁷ Lucas sued the South Carolina Coastal Council for violating the Fifth Amendment Takings Clause.³⁰⁸ The Supreme Court ruled in favor of Lucas, asserting that the Act deprived Lucas of any reasonable use of the lots and made them valueless, thus, denying Lucas of all economically viable use of his property and requiring the state to pay him just compensation for the taking of his property.³⁰⁹

The Court, in *First English Evangelical Lutheran Church v. County of Los Angeles*,³¹⁰ expanded the holding in *Lucas*.³¹¹ The Court announced that a landowner is entitled to just compensation for the taking of his or her property when the owner is deprived of all economically viable use of his or her land, even if the taking is merely temporary.³¹²

The third type of takings claim was created in *Penn Central Transportation Co. v. New York City*.³¹³ This type of analysis asks the court

taking whenever there is an actual physical invasion of property no matter how de minimis).

301. *See id.*

302. *See id.*

303. *Lucas*, 505 U.S. at 1003. This test is often referred to as simply a *Lucas* Taking.

304. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 228 F.3d 998, 999 (9th Cir. 2000) (Kozinski, J., dissenting), *aff'd*, 535 U.S. 302 (2002).

305. *Id.* (Kozinski, J., dissenting) (emphasis added).

306. *Lucas*, 505 U.S. at 1006-07.

307. *Id.* at 1007.

308. *Id.*

309. *Id.* at 1020.

310. 482 U.S. 304 (1987).

311. *See id.* at 318; *see also Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (stating that the government regulation must leave the property owner with more than a token interest in his property).

312. *Id.* at 322.

313. 438 U.S. 104 (1978).

to conduct an ad hoc balancing test which looks at (1) the character of the governmental action, (2) the economic impact of the regulation, and (3) whether the regulation interferes with investment backed expectations.³¹⁴ Most practitioners are familiar with the type of analysis used in *Penn Central*, but its ambiguity causes it to remain a mystery to the members of the bench and bar.³¹⁵ If the moratorium ordinance results in a taking under this analysis, the landowner can obtain compensation for the taking, but the court does not have to invalidate the moratorium ordinance as a whole.³¹⁶ As a practical point, when a plaintiff challenges a city moratorium ordinance, he or she should challenge its constitutionality under the per se taking tests first and, if he or she cannot satisfy either per se test, move to the *Penn Central* test.

V. CONCEPTUAL SEVERANCE

A crucial step in the takings analysis is defining the property interest at stake.³¹⁷ “Defining the ‘property interest’ at stake in a takings claim presents an ongoing challenge for the courts. Judicial outcomes may vary depending on whether a court adopts an expansive or fragmented view of the plaintiff’s holdings.”³¹⁸ Conceptual severance is “an abstract treatment of property that allows any one of the classic property rights to be splintered into fragments, with each segment . . . [being] held up by the owner as . . . [a] distinct property right.”³¹⁹ The term “conceptual severance” has been described as separating the sticks of the bundle that characterize a landowner’s property interests.³²⁰ Since the birth of the Bill of Rights and the inception of takings law, the “bundle of sticks” that characterizes a landowner’s property interest has grown more burdensome and unmanageable.³²¹ At times, courts have permitted plaintiffs to split their property interests into spatial, functional, temporal, or economic units to determine whether a governmental regulation results in a compensable taking of their property.³²² The concept of “conceptual severance” is especially important in a temporary takings

314. *Id.* at 124.

315. Gougleman, *supra* note 25, at 30.

316. *Id.*

317. Tedra Fox, *Lake Tahoe’s Temporary Development Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Taking Claim*, 28 *ECOLOGY L.Q.* 399, 406 (2001).

318. *Id.* at 399.

319. *Id.* at 404.

320. *Id.* at 400-01.

321. *Id.* at 400.

322. *See id.* at 411-12.

analysis because it can make a significant difference in the outcome of the taking analysis.³²³ For example, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Ninth Circuit said there was no taking because all reasonable use had not been denied because substantial future use remained.³²⁴ Had the court accepted the plaintiffs' request to conceptually sever their property interests and agreed that they held distinct, temporal property interests, the thirty-two month development moratorium may have been categorized as a taking.³²⁵

When a court is faced with a *Lucas* taking, that court may categorize conceptual severance as the "denominator dilemma."³²⁶ A one-hundred percent diminution of value is a dispositive taking according to *Lucas*.³²⁷ This requires a court to compare a landowner's property value after the challenged regulation has been in place, the numerator, with the property's value before the regulation was enacted, the denominator.³²⁸ The numerator is generally easy to determine, but the Supreme Court has wrestled with determining how to define a denominator.³²⁹ The definition of the denominator is important because if it is defined broadly enough, a taking may never result, but if it is defined narrowly, it almost always will.³³⁰ The Court has argued that how a court identifies the denominator can "tilt the wheel of takings law toward a particular outcome."³³¹

Federal and state courts have, on occasion, "splintered property interests into spatial, functional, temporal, or economic units to determine whether a government action results in [a] taking."³³² The Ninth Circuit, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,³³³ however, rejected the landowners' request to apply the theory of "conceptual severance" in a taking analysis.³³⁴ The court refused to allow plaintiffs to split their land interests into "slices" of time.³³⁵ The court stated that the "taking jurisprudence does not divide a single parcel into discrete segments" and then attempt to discern whether these detached, segmented rights have

323. See *id.* at 407-09.

324. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 781 (9th Cir. 2000), *reh'g denied*, 228 F.3d 998 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

325. See Fox, *supra* note 317, at 413-15.

326. *Id.* at 405.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 406.

332. *Id.* at 400-01.

333. 216 F.3d 764 (9th Cir. 2000), *reh'g denied*, 228 F.3d 998 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

334. *Id.* at 779.

335. *Id.* at 774-76.

been entirely abrogated.³³⁶ The Ninth Circuit argued that holding otherwise would run contrary to the Supreme Court's assertion that *Lucas* categorical takings are rare.³³⁷ It also stated that engaging in conceptual severance would result in a widespread invalidation of temporary moratorium ordinances and deprive the states and local governments of an "important land-use planning tool with a well-established tradition."³³⁸

For years, the Supreme Court rejected conceptual severance as a legitimate form of analysis in regulatory takings cases.³³⁹ It argued that "property interests should be viewed in their entirety."³⁴⁰ "The Court reasoned that 'where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.'"³⁴¹ Dissenting in *First English Evangelical Lutheran Church v. County of Los Angeles*, Justice Stevens stated that governmental zoning regulations are three dimensional, having characteristics of depth, width, and length, and none of these elements could be analyzed alone to evaluate the impact of a governmental regulation.³⁴²

Likewise, in *Penn Central*, the Court stated that the plaintiff landowners could not "force it to focus on the loss of [their] air rights alone in deciding whether a taking had occurred."³⁴³ The Court maintained that the "whole" parcel of Grand Central Station had to be used to test the validity of the government regulation that prevented the landowners from utilizing their air rights.³⁴⁴ The analysis in *Penn Central* suggests that the present and future values or uses of a property are intrinsically tied together and cannot be viewed separately in a taking analysis.³⁴⁵ Therefore, if there is a loss in present value, there cannot be a valid compensable taking, even if all the value of the present use is denied, because the future value or use rights of the property still exist.³⁴⁶

336. *Id.* at 775.

337. *Id.* at 777.

338. *Id.*

339. *Id.* at 774.

340. Fox, *supra* note 317, at 407.

341. Freilich, *supra* note 15, at 176-77 (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

342. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 330 (1987) (Stevens, J., dissenting).

343. Bozung & Alessi, *supra* note 41, at 1016-17.

344. *Id.* at 1017.

345. *Id.*

346. *Id.*

The conceptual severance question appeared to be settled, but in the late 1980's the Court "breathed new life back into the debate"³⁴⁷ with its decisions in *First English Evangelical Lutheran Church v. County of Los Angeles*³⁴⁸ and *Palazzolo v. Rhode Island*.³⁴⁹ The Court's renewed interest gave promise to the plaintiffs in the *Tahoe-Sierra* case facing the Supreme Court on appeal.³⁵⁰

In *Palazzolo*, the Court carefully stated that the "relevant parcel" issue was still an unsettled matter.³⁵¹ The Court refused to settle the matter, though, stating:

[The plaintiff] ask[ed] us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule Whatever the merits of these criticisms, we will not explore the point here.³⁵²

The Court referenced Justice Scalia's footnote in *Lucas*, wherein Justice Scalia stated: "[r]egrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."³⁵³

In *First English*, the Court affirmed the notion that "a temporal interest could be treated as the relevant unit of ownership."³⁵⁴ The Court accepted the argument that a segment could constitute the "'denominator' of the 'takings fraction' for purposes of takings analysis."³⁵⁵ Some courts and scholars have stated that given the *First English* and *Palazzolo* affirmation of temporal segmentation, "it follows that the deprivation of the economically beneficial use of any temporal segment constitutes a compensable taking."³⁵⁶ The Court, however, did not definitively state that temporal severance was acceptable in a taking analysis.³⁵⁷

347. Fox, *supra* note 317, at 402.

348. 482 U.S. 304 (1987).

349. 533 U.S. 606 (2001).

350. Fox, *supra* note 317, at 402.

351. Eagle, *supra* note 146, at 11232.

352. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (citations omitted).

353. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

354. Eagle, *supra* note 146, at 11232.

355. *Id.*

356. *Id.*

357. Carla Boyd, *Temporal Severance and the Exclusion of Time in Determining the Economic Value of Regulated Property*, 36 U.S.F. L. REV. 793, 805 (2002).

Tahoe-Sierra presented a perfect opportunity for the Court to clarify its position on conceptual severance—more pointedly temporal severance.³⁵⁸ The conceptual severance issue was at the center of the Tahoe decision.³⁵⁹ Unfortunately, the Court's position on the issue is no clearer after Lake Tahoe than before the controversy.³⁶⁰ Nor are the courts any more certain today what the relevant parcel is for purposes of determining whether there has been a "total taking" than they were before the Tahoe controversy.³⁶¹

The *Tahoe-Sierra* majority and dissent did not see eye to eye when it came to the conceptual severance issue. The majority quoted *Penn Central*:

"[The] '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."³⁶²

The Court concluded that it has repeatedly affirmed that "when an owner possesses a full 'bundle' of property rights," the destruction of one stick does not constitute a taking.³⁶³ The Court stated that the district court erred in disaggregating the property owner's property into temporal segments because the court ignored *Penn Central's* admonition that, in takings cases, the court must focus on the parcel as a whole.³⁶⁴ The Court reiterated its rejection of temporal severance, stating "[w]e have consistently rejected such an approach to the 'denominator' question."³⁶⁵

The dissent was troubled by the majority's cursory rejection of conceptual severance considering that it did not even address the Court's prior approval of the concept in *First English*.³⁶⁶ The dissent claimed: "I had thought that *First English* put to rest the notion that the 'relevant denominator' is land's infinite life. Consequently, a regulation effecting a

358. *Id.* at 819.

359. *See id.*

360. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1496 (2002) (Thomas, J., dissenting).

361. *See Tahoe-Sierra*, 122 S. Ct. at 1496 (Thomas, J., dissenting).

362. *Id.* at 1481 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978)).

363. *Id.* (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

364. *Id.* at 1483.

365. *Id.*

366. *Id.* at 1496 (Thomas, J., dissenting).

total deprivation of the use of a so-called ‘temporal slice’ of property is compensable under the Takings Clause”³⁶⁷

Despite the Court’s decision in *Tahoe-Sierra*, the problems presented in defining property under the Fifth Amendment are still complex, and “there is no reason to believe that property can or [ever] will be defined in an all (always aggregate) or nothing (totally sever) manner.”³⁶⁸ “[D]ividing up sticks in the bundle and requiring compensation anytime a single stick is destroyed, is not in accord with Chief Justice Rehnquist’s concession in *First English* that ‘normal delays’ would not constitute periods for which compensation would be due.” Thus, if some normal delay is required in the zoning process, the landowner’s “present use [will not be] a severable, compensable strand, and the mere present inability to use the land” during the delay will not constitute a taking.³⁶⁹

VI. SUPREME COURT GUIDANCE

The Supreme Court has given considerable attention to the constitutional validity of zoning ordinances, but it had not given much guidance as to the constitutionality of moratorium ordinances before its recent decision in *Tahoe-Sierra*.³⁷⁰ “The seminal case concerning temporary takings is the United States Supreme Court’s decision in *First English Evangelical Lutheran Church v. County of Los Angeles*.”³⁷¹ “The case serving as a necessary reference regarding development moratoria is *Lucas v. South Carolina Coastal Council*.”³⁷² *Lucas* held that governmental regulations were compensable takings if they deprived a property owner of all economically viable use of his or her property.³⁷³ Together, *First English* and *Lucas* “state that temporary development regulations that forbid all economically viable use of property are compensable” takings.³⁷⁴

The events leading up to the Court’s *First English* decision were not as complex as the facts in *Tahoe-Sierra*.³⁷⁵ In *First English*, the First English Lutheran Church owned a twenty-one acre parcel of property in Los Angeles County.³⁷⁶ The church constructed recreational facilities on the property,

367. *Id.*

368. Bozung & Alessi, *supra* note 41, at 1017.

369. *Id.* at 1017-18.

370. See Roberts, *supra* note 7, at 11037.

371. Wendie L. Kellington, *Temporary Takings/Moratoria*, SG021 ALI-ABA 105, 107 (2001).

372. *Id.*

373. *Id.*

374. *Id.*

375. See Stephen J. Eagle, *Temporary Regulatory Takings and Development Moratoria: The Murky View from Lake Tahoe*, ENVTL. L. REP., Feb. 2001, at 10224.

376. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 307 (1987).

which it used as a camp for a retreat center and a recreation center for handicapped children.³⁷⁷ The facilities were destroyed by ensuing floods after a severe forest fire denuded the hills upstream from the camp, causing a serious flood hazard.³⁷⁸ In response to the flooding damage, the county prevented the reconstruction or construction of any buildings within that area.³⁷⁹ The temporary moratorium ordinance was enacted to preserve the status quo in order for “the city to study the problem” caused by the fire and flooding and prevent any more deaths and property damage “due to building in the floodplain.”³⁸⁰ After three years, the county converted the moratorium ordinance into a permanent building restriction.³⁸¹ The church sued the county for a violation of the Fifth Amendment Takings Clause.³⁸² The Ninth Circuit refused compensation and determined that there was no *Lucas* or *Penn Central* taking violation.³⁸³

The Supreme Court reversed the Ninth Circuit’s holding and stated that the Ninth Circuit could not refuse compensation simply because the government had invalidated the regulation.³⁸⁴ The Court stated, “[w]e merely hold that where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”³⁸⁵ The Court stated that temporary takings were no different than permanent takings for which the Constitution clearly requires compensation.³⁸⁶ Unfortunately, the opinion had some confusing and arguably contradictory statements about temporary takings, but it did suggest that a moratorium ordinance might be a taking if the delay it caused was unreasonable.³⁸⁷

After *First English* was decided, it was suggested that the case cast a shadow over the constitutionality of moratorium ordinances.³⁸⁸ Shortly after *First English* was decided, the New York Court of Appeals cited it in a case

377. *Id.*

378. *Id.*

379. *Id.*

380. Roberts, *supra* note 7, at 11037.

381. *Id.*

382. *First English*, 482 U.S. at 308.

383. *See id.* at 309.

384. *Id.* at 321.

385. *Id.*

386. *Id.* at 318.

387. Roberts, *supra* note 7, at 11037.

388. Bozung & Alessi, *supra* note 41, at 1014.

involving a takings challenge to a moratorium ordinance.³⁸⁹ The court avoided ruling on the takings claim since the moratorium was invalid on procedural grounds, but its reference to *First English* demonstrated a need for the Supreme Court to clarify its *First English* holding in relation to moratorium ordinances and temporary takings.³⁹⁰

Regrettably, neither *First English* nor the Court's subsequent holdings have comprehensively defined what constitutes a "temporary regulatory taking."³⁹¹ The Court "recently made the rather casual admission, in *City of Monterey v. Del Monte Dunes, Ltd.*, that it has yet 'to define with precision the elements of a temporary regulatory takings claim.'"³⁹² Some critics have assumed that *First English* does not suggest that temporary moratorium ordinances are temporary takings and have stated that there is a difference between a temporary restriction and a temporary taking.³⁹³ Others disagree and read *First English* to presume that moratoria ordinances, which are by definition temporary and which often deny all or most uses, are temporary takings.³⁹⁴ The Supreme Court of Florida took this interpretation and argued that absolutely precluding temporary ordinances from treatment under *Lucas* would "ignore the drastic economic impacts inflicted by such regulations, rendering the protections offered by the categorical rule meaningless."³⁹⁵ The court further stated that it was "unable to discern any meaningful distinction justifying the preclusion of prospectively temporary regulations from categorical treatment under *Lucas*. Moreover, [the court] believe[ed] this to be the only logical outgrowth of *First English*."³⁹⁶

The *First English* Court specifically addressed the temporary nature of the ordinance because the county aborted the moratorium on development when the church brought suit.³⁹⁷ The Court determined that the temporary nature of the taking was irrelevant.³⁹⁸ It stated that there was no difference between a temporary taking which denies a landowner all use of his property and a permanent taking.³⁹⁹ The Court stated that once a taking is found, the government could not retroactively erase what it had done to avoid payment.⁴⁰⁰ This view was one Justice Holmes adopted more than fifty

389. *Id.*

390. *Id.* at 1014-15.

391. Eagle, *supra* note 375, at 10224.

392. *Id.* (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999)).

393. Roberts, *supra* note 7, at 11037.

394. *Id.*

395. *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 873 (Fla. 2001).

396. *Id.* at 874.

397. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 317 (1987).

398. *Id.* at 318.

399. *Id.*

400. Eagle, *supra* note 146, at 11232.

years ago in *Pennsylvania Coal*, stating “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”⁴⁰¹

Subsequently, the Court clarified its holding by stating that when it was discussing temporary takings, it was not speaking to issues which arise in the ordinary course of planning, and the “normal delays” which arise in “obtaining building permits, changes in selling ordinances, variances, and the like,” which were not before the Court in *First English*.⁴⁰² However, the Court did not clarify what it meant by “normal delays,” and whether a temporary moratorium ordinance was included within its definition.⁴⁰³ Nonetheless, there was an implication that the exception for “normal delays” was intended to be a narrow one.⁴⁰⁴

Justice Stevens dissented in *First English* and disputed that the denial of economically beneficial use for a substantial period could constitute a regulatory taking.⁴⁰⁵ The dissent was concerned that the majority’s holding would mitigate the overall effect of the regulation so substantially that the slight diminution in value that the regulation caused would be classified as a compensable taking.⁴⁰⁶

Many lower courts have adopted Justice Stevens’ dissenting opinion and, in turn, ignored and misinterpreted the *First English* majority view.⁴⁰⁷ The dissent in the *Tahoe-Sierra* circuit court opinion accused the majority of turning its back on Supreme Court takings jurisprudence by overruling the *First English* decision.⁴⁰⁸ The majority’s analysis in *First English* was targeted by the dissent in *Tahoe-Sierra*.⁴⁰⁹ The dissent persuasively argued that a temporary moratorium was in fact a taking, and *First English* required just compensation even though the moratorium was temporary.⁴¹⁰ The majority disagreed with the dissent and stated that, while the temporary moratorium did prevent the landowners from utilizing their property for thirty-two months, it was not a significant time in the life of the property.⁴¹¹

401. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

402. *First English*, 482 U.S. at 321.

403. *Eagle*, *supra* note 146, at 11232.

404. *Id.*

405. *Eagle*, *supra* note 375, at 10224.

406. *Id.*

407. *Kellington*, *supra* note 371, at 110.

408. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 228 F.3d 998, 999 (Kozinski, J., dissenting), *aff’d*, 535 U.S. 302 (2002).

409. *Id.*

410. *Id.* at 1000-01.

411. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 216 F.3d 764, 781-82 (9th

The dissent in *Tahoe-Sierra* accused the Ninth Circuit panel of disregarding the majority in *First English* and adopting Justice Stevens' dissent: "The panel does not like the Supreme Court's Taking Clause jurisprudence very much, so it reverse[d] *First English* . . . and adopt[ed] Justice Steves's *First English* dissent."⁴¹² The *Tahoe-Sierra* Court had the opportunity to finally clear up the confusion it left after its holding in *First English*, but it failed to clear up the murky waters it has created.⁴¹³

First English and *Palazzolo* have the most bearing on the interpretation of what constitutes a temporary taking.⁴¹⁴ The *Palazzolo v. Rhode Island*⁴¹⁵ opinion is problematic in determining what constitutes a denial of all "economically viable use" of one's property.⁴¹⁶ In *Palazzolo*, the Court stated that the government's regulation must leave the landowner with more than a token interest.⁴¹⁷ The Court argued that a regulation which leaves the land with some value will still require the government to pay the landowner compensation; however, the Court's holding demonstrates that a token interest is defined very narrowly.⁴¹⁸

In *Palazzolo*, the plaintiff/landowner owned approximately eighteen acres of predominately tidal saltmarsh wetland on the inland side of a barrier beach in Rhode Island.⁴¹⁹ In 1971, the State of Rhode Island created the Coastal Resources Management Council (CRMC) to regulate coastal wetlands under the terms of CRMC Plan.⁴²⁰ Palazzolo attempted to develop the eighteen acre property, and he requested permission from the CRMC to build a wooden bulkhead along the shore of his property and fill the entire marshland area.⁴²¹ The Council rejected the application stating that it was too vague, and the land was inadequate for a project of its size and nature.⁴²² Palazzolo then submitted another application to build a private beach club on the property, but this proposal was denied because it did not serve a compelling public purpose.⁴²³ Palazzolo sued, claiming that the regulation had resulted in a total taking of all economically viable use of his property.⁴²⁴ Palazzolo claimed that since he was unable to build in the

Cir. 2000), *reh'g denied*, 228 F.3d 998 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

412. *Tahoe-Sierra*, 228 F.3d at 999 (Kozinski, J., dissenting) (emphasis omitted) (citation omitted).

413. Roberts, *supra* note 7, at 11037..

414. See Freilich, *supra* note 15, at 163-77.

415. 533 U.S. 606 (2001).

416. See Freilich, *supra* note 15, at 165.

417. *Palazzolo*, 533 U.S. at 629-31.

418. See *id.*

419. *Id.* at 614.

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.* at 615.

424. *Id.*

saltmarsh area, he suffered a \$3,150,000 loss.⁴²⁵ The Supreme Court of Rhode Island rejected the claim.⁴²⁶

The Supreme Court upheld the state's decision and determined that there was no *Lucas* taking.⁴²⁷ The Court noted that while Palazzolo was unable to build in the saltmarsh area, he was still able to build on the upland portion of the property.⁴²⁸ The Court determined that Palazzolo's property retained a \$200,000 value in development.⁴²⁹ Palazzolo argued that the state should not be permitted to sidestep the holding in *Lucas* by simply leaving the landowner a few "crumbs of value."⁴³⁰ The Court agreed that a state could not evade the duty to compensate on the premise that the landowner is left with a "token interest."⁴³¹ But it responded that in the situation at hand, Palazzolo was left with more than a token interest.⁴³² The Court argued that the regulation allowed the landowner to build a substantial residence on his eighteen-acre parcel.⁴³³ The Court concluded that the regulation did not leave the property "economically idle," even though the regulation left the property with a value of \$200,000 when it would have been worth well over three million dollars if Palazzolo had been permitted to build in the marshland area.⁴³⁴

Palazzolo demonstrates the Supreme Court's tendency to resist any attempt to narrowly define attributes of property ownership to show total deprivation of economic use through regulation that proved to be problematic for Lake Tahoe property owners.⁴³⁵

425. *Id.* at 616.

426. *Id.*

427. *Id.*

428. *Id.* at 621-22.

429. *Id.* at 621.

430. *Id.* at 631.

431. *Id.*

432. *Id.* at 631-32.

433. *Id.*

434. *Id.* at 631.

435. Freilich, *supra* note 15, at 174.

VII. TAHOE-SIERRA PRESERVATION COUNCIL, INC. V. TAHOE REGIONAL PLANNING AGENCY

Tahoe-Sierra is a case with a long and complex history.⁴³⁶ Landowners who purchased property on the historically pristine lake have not been able to construct or develop the property for over twenty years.⁴³⁷

Lake Tahoe is a unique lake located in the northern Sierra Nevada Mountains. It is unique because of its size, depth, and the astounding clarity of its water.⁴³⁸ The lake is one of the clearest in the world.⁴³⁹ Since mid-century, however, the lake has undergone “eutrophication,” a process that increases the nutrients entering into the lake, which has caused the lake to lose some of its clarity.⁴⁴⁰ As nutrients wash into the lake from surrounding lands, the growth of algae increases, which causes the lake to become discolored and fish to be threatened.⁴⁴¹ In an effort to halt the increasing rate of environmental damage to Lake Tahoe, the bio-state Tahoe Regional Planning Compact was approved in 1969 by the United States Congress.⁴⁴² The Compact created the Tahoe Regional Planning Agency (TRPA) and set goals for the preservation of the lake and the surrounding basin.⁴⁴³

The Compact directed the Agency to divide the basin into “land capability districts” depending on the susceptibility to environmental damage.⁴⁴⁴ The Agency created a plan and divided the basin into classifications, but the plan was criticized for not being strong enough to remedy the problems causing the decline in the basin environment.⁴⁴⁵ The Compact was amended in 1980; the Compact directed the Tahoe Preservation Agency to (1) adopt environmental threshold carrying capacities within eighteen months of the date on which the Compact became effective, (2) adopt a new regional plan within twelve months of the adoption of the carrying capacities, and (3) review all projects and establish temporary restrictions on development in the basin pending the enactment of the new regional plan.⁴⁴⁶

In order to comply, the Compact enacted a moratorium ordinance that temporarily prohibited most residential and all commercial construction.⁴⁴⁷

436. Eagle, *supra* note 375, at 10224.

437. *Id.*

438. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 766 (9th Cir. 2000), *reh'g denied*, 228 F.3d 998 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

439. *Id.*

440. *Id.*

441. Eagle, *supra* note 375, at 10224.

442. *Tahoe-Sierra*, 216 F.3d at 767.

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.* at 767-68.

447. *Id.* at 768.

The ordinance stated that the provisions setting forth the moratorium would expire upon the adoption of the new regional plan, which was supposed to be within twelve months.⁴⁴⁸ The Agency was unable to adopt a new regional plan within twelve months due to the complexity of the task; thus, a moratorium was reissued which suspended development on all land within the Tahoe basin.⁴⁴⁹ The moratorium was outlined to expire within ninety days but was extended until the new regional plan was adopted in April 1984, which was thirty-two months after the Compact and Planning Agency had initially suspended development.⁴⁵⁰

A. District Court Opinion

Immediately after the plan was adopted, the State of California and the State of Nevada sued and sought a preliminary injunction against the implementation of the plan, stating that it was not stringent enough.⁴⁵¹ A district court judge in the Ninth Circuit issued a temporary restraining order prohibiting TRPA from approving building projects, which remained in force until a completely revised land-use plan was adopted almost three years after the first plan was adopted.⁴⁵²

Conversely, 450 property owners brought suit immediately after the plan was adopted seeking declaratory and injunctive relief, as well as damages for violations of the Takings Clause.⁴⁵³ The court stated that there was no taking under the *Penn Central* analysis but determined that there was a categorical *Lucas* taking.⁴⁵⁴ The court agreed with the landowners' argument that the moratorium ordinance worked a taking of their property, stressing that the regulation completely denied the plaintiffs of all economically viable use of their property.⁴⁵⁵ The court had a difficult time assessing the "total taking" issue. Although it was satisfied that the property owners did retain some value during the moratorium, it found that they had been temporarily deprived of all economically viable use of their land.⁴⁵⁶

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.* at 768-69.

454. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1242 (D. Nev. 1999), *aff'd in part, rev'd in part*, 216 F.3d 764 (9th 2000), *reh'g denied*, 228 F.3d 998 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

455. *Id.* at 1245.

456. *Id.*

The district court noted that the regulation was apparently “intended” to be temporary since it was adopted pending the enactment of a new regional plan, but there was no fixed termination date, which was problematic for the district court.⁴⁵⁷ The court also stated that it was not clear whether development moratorium ordinances “remain[ed] legitimate planning tools after *First English*.”⁴⁵⁸ The court acknowledged that the Supreme Court’s holding in *First English* did not apply to “normal delays,” but distinguished the moratorium ordinance at issue from normal planning delays.⁴⁵⁹ The court reasoned that moratorium ordinances, which are enacted with no deadline, are different than “simply putting a hold on development” for a few weeks or a month in an effort to formulate a plan or zoning ordinance.⁴⁶⁰

B. Ninth Circuit Opinion

The Ninth Circuit reversed the district court’s holding and determined that the temporary moratorium ordinance was not a compensable taking.⁴⁶¹ The Ninth Circuit stated that there could be no *Lucas* taking due to the temporary nature of the moratorium ordinance, which supposedly “preserved the bulk of the future developmental use of the property,” giving the land a “substantial present value.”⁴⁶²

Conceptual severance was at the center of the *Tahoe-Sierra* controversy, and it was the pivotal question facing the Ninth Circuit.⁴⁶³ “Because [the court’s] test for regulatory taking requires [it] to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property ‘whose value is to furnish the denominator of the fraction.’”⁴⁶⁴ The court had to determine whether to view the plaintiffs’ properties as “fee-simple parcels with full lives ahead of them or as limited ‘temporal’ interests divorced from any future years. The answer to this question had the potential to sway the outcome either way by setting the numerator/denominator framework for the court’s takings calculus.”⁴⁶⁵

457. *Id.* at 1250.

458. *Id.* at 1249.

459. *Id.*

460. *Id.*

461. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 216 F.3d 764, 782 (9th Cir. 2000), *reh’g denied*, 228 F.3d 998 (9th Cir. 2000), *aff’d*, 535 U.S. 302 (2002).

462. *Id.* at 781.

463. Fox, *supra* note 317, at 404-05.

464. *Tahoe-Sierra*, 216 F.3d at 774 (quoting *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987)).

465. Fox, *supra* note 317, at 413.

The landowners argued that *First English Evangelical Lutheran Church v. County of Los Angeles*⁴⁶⁶ required the court to view their property interests as temporal segments, but the Ninth Circuit rejected the interpretation.⁴⁶⁷ It stated that the landowners' argument was "flatly incorrect."⁴⁶⁸ The court argued that *First English* was not even a case representing a taking.⁴⁶⁹ According to the Ninth Circuit, the Supreme Court was only resolving what remedy was available once a taking had already been proven.⁴⁷⁰ The court rejected the landowners' argument that *First English* applied to temporary moratorium ordinances and stated that it would work a radical change in the takings jurisprudence if it determined that *First English* required "property interests [to] be carved up into finite temporal segments."⁴⁷¹ The Ninth Circuit also drew guidance from the Supreme Court's general rejection of conceptual severance in prior taking cases such as *Penn Central Transportation Co. v. New York City*⁴⁷² and *Keystone Bituminous Coal Ass'n v. DeBenedictis*.⁴⁷³ The Ninth Circuit argued that these prior Supreme Court taking cases supported the notion that the taking analysis must consider the parcel as a whole.⁴⁷⁴ Similarly, the Ninth Circuit relied on the Supreme Court's holding in *Andrus v. Allard*,⁴⁷⁵ stating that the Court has already rejected conceptual severance in the temporal dimension of property rights.⁴⁷⁶ The *Andrus* Court stated that if a landowner possesses a full bundle of property rights, the destruction of "one 'strand' of the bundle" could not be viewed as a taking because the property must be viewed in its entirety.⁴⁷⁷ The Ninth Circuit stated that if it did not reject the notion of conceptual severance, it "would risk converting every temporary planning

466. 482 U.S. 304 (1987).

467. *Tahoe-Sierra*, 216 F.3d at 777.

468. *Id.*

469. *Id.* at 778.

470. *Id.*

471. *Id.*

472. 438 U.S. 104, 130-31 (1978) (rejecting the landowner's proposal to consider the airspace above the Grand Central Station as a property interest separate and distinct from the rest of the Grand Central Station site).

473. 480 U.S. 470, 497, 500-01 (1987) (refusing to consider the coal that the Act/regulation in question required the plaintiffs to leave in place as a separate property interest, emphasizing that the takings jurisprudence must consider the "parcel as a whole").

474. *Tahoe-Sierra*, 216 F.3d at 774-75.

475. 444 U.S. 51, 65-66 (1979) (holding that the denial of one property right does not always amount to a taking). "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.*

476. *Tahoe-Sierra*, 216 F.3d at 775.

477. *Id.*

moratorium into a categorical taking,” which would run contrary to the Supreme Court’s rationalization that categorical takings are “relatively rare.”⁴⁷⁸

After determining that the landowners’ entire fee-owned interests should serve as the denominator in the takings equation, the Ninth Circuit found that the moratorium ordinance in question did not deprive the plaintiffs of all economic value of their property, even though the landowners were prevented from using their property for thirty-two months.⁴⁷⁹ The court reasoned:

“[e]ven if the appellants’ ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are ‘incidents of ownership. They cannot be considered as a “taking” in the constitutional sense.’”⁴⁸⁰

The Ninth Circuit stated that there could be no *Lucas* taking because the temporary nature of the moratorium ordinance “preserved the bulk of the future developmental use of the property,” which had a “substantial present value.”⁴⁸¹

[There is market value in the property] based on the future use of [the] land since only a fraction of the property’s lifetime is affected. Potential buyers may still be available because they understand the ordinance is temporary, although they may pay less because of the uncertainties raised by the moratorium. . . . Most importantly, the Tahoe property owner may actually benefit from the moratorium if a sustainable land use plan is created that preserves the ecological integrity and aesthetic beauty of her community. In the long run, the enjoyment and market value she derives from her property may increase.⁴⁸²

This idealist view is not shared by the landowners who have not been permitted to build on their land for the last twenty years.⁴⁸³ The majority of landowners who have been fighting the series of moratoria ordinances have

478. *Id.* at 777.

479. *Id.* at 781-82.

480. *Id.* at 776 (emphasis omitted) (quoting *Agins v. Tiburon*, 447 U.S. 255, 263 (1980), in turn quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)).

481. *Id.* at 781.

482. Fox, *supra* note 317, at 418 (emphasis omitted).

483. David G. Savage, *Drawn-Out Tahoe Case May Be a Watershed on Land Use*, L.A. TIMES, Jan. 7, 2002, at A1.

not realized the substantial future value the Ninth Circuit claimed they have.⁴⁸⁴ Instead, the landowners' rights have been reduced to "paying taxes, suffering foreclosure or selling their lots at bargain-basement prices to scavenging organizations acting for the government."⁴⁸⁵ One couple bought their property in the 1970s with the intention of building a place to retire and a place for their children and grandchildren to visit.⁴⁸⁶ Unfortunately, each member of the couple is now eighty-four years old and is no longer able to build a home for retirement or even sell their property.⁴⁸⁷

Facing the Ninth Circuit, the landowners/plaintiffs further relied on *First English* to maintain that temporary moratoria ordinances are takings that deserve compensation. The court agreed that *First English* said that if a taking occurred, compensation was required, even if the taking is temporary.⁴⁸⁸ The Ninth Circuit emphasized that this holding did not imply that temporary moratoria ordinances were thus categorized as temporary takings.⁴⁸⁹ The court said that the Supreme Court was very careful in its definition and stated that temporary takings are those "takings which are ultimately invalidated by the courts."⁴⁹⁰ According to the *First English* Court's definition, what is temporary "is not the regulation; rather, what is temporary is the taking, which is rendered temporary only when an ordinance that affects a taking is struck down by a court."⁴⁹¹ In other words, it is a permanent regulation that ultimately "leads to a temporary taking when a court invalidates the ordinance after the taking."⁴⁹² The Ninth Circuit also expressed a concern with invalidating the temporary moratorium ordinance, stating:

[T]he widespread invalidation of temporary planning moratoria would deprive state and local governments of an important land-use planning tool with a well-established tradition. . . . [T]he breathing room provided by temporary moratoria helps ensure that the

484. *Id.*

485. Kanner, *supra* note 4, at A21.

486. Savage, *supra* note 483, at A1.

487. *Id.*

488. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 778 (9th Cir. 2000), *reh'g denied*, 228 F.3d 998 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002).

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.* (discussing the Supreme Court's holding in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)).

planning process is responsive to the property owners and citizens who will be affected by the resulting land-use regulations.⁴⁹³

The court wanted to preserve local governments' ability to engage in orderly, reasonable land-use planning. It stated that doing otherwise would turn the Takings Clause into a weapon that could be used to penalize local governments for attempting to protect public needs and interests.⁴⁹⁴

The court concluded its holding with an effort to illustrate that there are some moratorium ordinances which may be determined to work a compensable taking.⁴⁹⁵ The court argued that if a temporary moratorium ordinance was "designed to be in force so long as to eliminate all present value of a property's future use," the court "might" be obligated to conclude that a compensable taking occurred.⁴⁹⁶ The court added that it doubted that such an ordinance would ever be designed to last for so long.⁴⁹⁷ It was of no consequence to the court that the moratorium ordinance in question was in effect for eight months longer than expected.⁴⁹⁸ According to the court, the moratorium was still in effect for "only" thirty-two months.⁴⁹⁹ The Ninth Circuit concluded that this was only "a small fraction of the useful life of the Tahoe properties."⁵⁰⁰ "[T]he opinion seems to endorse any ban as long as it is, in fact, 'temporary'—designed to dissolve upon the adoption of a new regional plan."⁵⁰¹

The Ninth Circuit denied the landowners' petition for rehearing; whereupon, "five justices joined in a strongly-worded dissent that accused the panel of turning its back on Supreme Court takings jurisprudence by overruling the *First English* decision."⁵⁰² The dissent argued that the case at hand was no different than *Lucas*, other than that the Lake Tahoe regulation had a finite duration.⁵⁰³ It stated that the only question before the Ninth Circuit was whether there was something special about a finite moratorium ordinance that would relieve the government from its duty to compensate the landowner.⁵⁰⁴ According to the dissent, this issue was resolved in *First*

493. *Id.* at 777.

494. *Id.* at 782

495. *Id.* at 781.

496. *Id.*

497. *Id.*

498. *Id.* at 781-82.

499. *Id.* at 782.

500. *Id.*

501. Douglas W. Kmiec, ZONING AND PLANNING DESKBOOK §§ 7:54, 7-389 (2d ed. 2001); *see also* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 228 F.3d 998, 999 (9th Cir. 2000) (Kozinski, J., dissenting) (stating that, in the court's view, "a temporary regulation can never be a regulatory taking"), *aff'd*, 535 U.S. 302 (2002).

502. Fox, *supra* note 317, at 415.

503. *Tahoe-Sierra*, 228 F.3d at 999 (Kozinski, J., dissenting).

504. *Id.* at 999-1000 (Kozinski, J., dissenting).

English, where the Supreme Court stated that temporary takings are “not different in kind from permanent takings” which require compensation.⁵⁰⁵ The dissent argued that the panel’s holding erroneously adopted Justice Stevens’ dissent in *First English* instead of correctly applying the majority’s holding.⁵⁰⁶ The majority in *First English* specifically held that a taking occurs when a regulation deprives a landowner of all economical use of his or her property, even if the deprivation is only temporary.⁵⁰⁷ The dissent noted that there was a problem with the panel’s holding that the moratorium ordinance at hand did not deprive the landowners of all economic value of their land on the basis that future value remained in the land.⁵⁰⁸ The dissent disagreed with the majority’s reasoning and maintained that the deprivation of value and use are one and the same.⁵⁰⁹ The two are interchangeable because in the case of regulations that lack a sunset provision, “the government [is allowed to] permanently prevent[] the owner from putting his [or her] property to any beneficial use, [and] no potential buyer would offer a dime for it.”⁵¹⁰ Thus, the land has no use or value.⁵¹¹

The panel argued that the landowners retained future value in their property, but the dissent pointed out that “temporary moratoria have a habit of living beyond their purported termination dates.”⁵¹² The dissent used the instant case as an example and indicated that the landowners in *Tahoe-Sierra* have been battling the Tahoe Regional Planning Agency, which has prevented them from building any homes on their lots for the last two decades.⁵¹³ The dissent concluded their opinion with a cautionary warning: “If a local government can evade its constitutional obligations by describing a regulation as ‘temporary,’ we create a sizable loophole to the Takings Clause. . . . Under the theory adopted by the panel, it’s hard to see when a property owner would ever state a takings claim against such a scheme.”⁵¹⁴

505. *Id.* at 1000 (Kozinski, J., dissenting) (emphasis omitted) (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987)).

506. *Id.* (Kozinski, J., dissenting).

507. *Id.* at 1002 (Kozinski, J., dissenting); *see also* Kellington, *supra* note 371, at 123 (“The basis for the 9th Circuit majority opinion seems contrary to *First English* for the reason that the Supreme Court was clear that a total deprivation of all economically beneficial use is compensable and expressly stated that it makes no difference if the regulation is temporary or permanent.”).

508. *Tahoe-Sierra*, 228 F.3d at 1001 (Kozinski, J., dissenting).

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.*

C. Supreme Court's Opinion—Majority Opinion

The Supreme Court granted certiorari to determine “[w]hether 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.”⁵¹⁵ The Court heard the oral arguments on Monday, January 7, 2002.⁵¹⁶ The Justices appeared to be split as to their conclusions on the issue.⁵¹⁷ Justice Kennedy was concerned with the long-term ramifications and practical implications of the landowners’ argument that moratorium ordinances constitute a compensable taking.⁵¹⁸ He asked the landowners’ attorney whether New York City would have to compensate the owners of the World Trade Center if the city froze development for a period of time to create a plan for the devastated area.⁵¹⁹ Justice Antonin Scalia, on the other hand, seemed to favor the property rights and objected to the government’s argument, stating that halting the environmental damage to Lake Tahoe is a “social problem.”⁵²⁰ He then inquired why some individuals should be forced to bear the burden that will be enjoyed by society as a whole.⁵²¹ He declared that this was exactly what the Fifth Amendment protects against, but what the planning agency was attempting to do.⁵²²

In a six-three decision, the Court affirmed the appellate court’s judgment, reversing the finding that an unconstitutional taking occurred.⁵²³ The Court did not spend much effort addressing the property owners’ deprived use of their property; instead, it relied on the detrimental effects that would result from adopting a categorical rule preventing moratorium ordinances.⁵²⁴

The majority began its analysis stating that since the property owners made only a facial attack on the moratorium ordinances, they “[faced] an uphill battle, that [was] made especially steep by their desire for a categorical rule requiring compensation whenever the government imposes such a moratorium on development.”⁵²⁵ The Court stated that if it adopted a

515. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1474 (2002).

516. *Savage*, *supra* note 482.

517. See Linda Greenhouse, *Supreme Court Roundup: A Property Rights Claim Meets Resistance*, N.Y. TIMES, Jan. 8, 2002, at A16.

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.*

522. *Id.*

523. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1470 (2002).

524. See *id.*

525. *Id.* at 1477 (citations omitted).

categorical rule that allowed for compensation with any deprivation of all economic use—no matter how brief—the results would be damaging.⁵²⁶ More specifically, the categorical rule would impose unreasonable financial obligations upon governments for the normal delays involved in processing land use applications and would improperly encourage hasty decision making.⁵²⁷

Because the property owners and the district court relied on *Lucas* to categorize the moratorium ordinance as an unconstitutional taking, the Court began its analysis illustrating the limits set out in *Lucas*.⁵²⁸ The Court articulated that the *Lucas* opinion was only intended to apply in relatively rare situations.⁵²⁹ The Court emphasized:

Lucas carved out a narrow exception to the rules governing regulatory takings for the “extraordinary circumstance” of a permanent deprivation of all beneficial use. . . . It was also justified on the theory that, in the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses,” it is less realistic to assume that the regulation will secure an “average reciprocity of advantage,” or that government could not go on if required to pay for every such restriction.⁵³⁰

The property owners asked the Court to lay down a categorical rule illustrating exactly when a moratorium ordinance affects a “regulatory taking.”⁵³¹ The Court denied the request and stated that, in its view, “the answer to the abstract question” was neither “yes, always’ nor ‘no, never.’”⁵³² The Court reiterated that it would only apply an ad hoc factual inquiry, not create a categorical approach.⁵³³ Thus, the answer to whether a moratorium ordinance is classified as a regulatory taking “depends upon the particular circumstances of [each] case.”⁵³⁴ The Court acknowledged that a simple mathematical precise formula would certainly be easier to apply, but it resisted the temptation to adopt one.⁵³⁵ The Court argued that the “interest

526. *Id.* at 1487.

527. *Id.* at 148-88.

528. *Id.* at 1480.

529. *Id.* at 1480 n.19.

530. *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017-18 (1992)).

531. *Id.* at 1478.

532. *Id.*

533. *Id.* at 1481.

534. *Id.* at 1478.

535. *Id.*

in ‘fairness and justice’ [would] be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.”⁵³⁶ It stated that the most it could do was provide important “guideposts” to the ultimate determination of whether a moratorium ordinance constitutes a taking wherein just compensation would be required.⁵³⁷ The Court resisted creating a categorical approach because, according to the Court, “[t]he Takings Clause requires careful examination and weighing of all relevant circumstances.”⁵³⁸

After the Court recognized its reluctance to adopt a categorical rule, it addressed the argument posed by the property owners regarding *First English*.⁵³⁹ The Court accepted the supposition that *First English* was a significant decision.⁵⁴⁰ Even though the Court was aware that *First English* had left some confusion among the lower courts, the Court stated that nothing it said in *Tahoe-Sierra* would qualify the *First English* holding.⁵⁴¹ The Court aligned itself with the appellate court’s analysis and declared that the *First English* Court did not address whether the temporary regulation at issue had in fact constituted a taking.⁵⁴² Rather, the *First English* Court unambiguously characterized the issue as a remedial question.⁵⁴³ It merely held that “‘where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.’”⁵⁴⁴ According to the Court, the *First English* Court “expressly disavowed any ruling on the merit of the takings issue,” and, “once the California courts concluded that there had not been a taking,” the Supreme Court declined review of that decision.⁵⁴⁵ The Court stated that since the *First English* decision did not center on the “takings” issue, Lake Tahoe property owners could not rely on it to prove that the moratorium ordinances affected a taking.⁵⁴⁶

The Court was willing to admit that it referenced the “antecedent takings question” in *First English*.⁵⁴⁷ But it stated that its decision in *First English* “surely did not approve, and implicitly rejected, the categorical submission

536. *Id.* at 1489.

537. *Id.* at 1481 n.23.

538. *Id.* at 1481.

539. *Id.* at 1482.

540. *Id.*

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.* (emphasis omitted) (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987)).

545. *Id.*

546. *Id.*

547. *Id.*

that [the property owners were] now advocating.”⁵⁴⁸ The Court cited *Lucas* to disprove the property owners’ argument as well.⁵⁴⁹ The Court declared that even though *Lucas* endorsed a categorical rule, it was not the one the property owners were proposing.⁵⁵⁰ The categorical rule espoused in *Lucas*, according to the Court, states that “compensation is required when a regulation deprives an owner of ‘all economically beneficial uses’ of his [or her] land.”⁵⁵¹ The Court recognized that its holding in *Lucas* “was limited to the ‘extraordinary circumstance when no productive or economically beneficial use of land is permitted,’” and if there is anything less than a complete diminution of value, *Lucas* would not apply.⁵⁵²

Despite the Court’s caveat that *Lucas* was inapplicable, the Court still analyzed whether the Lake Tahoe property owners lost all economically beneficial use of their property.⁵⁵³ To answer this question, the Court had to decide if it would engage in conceptual severance.⁵⁵⁴ The Court rejected the notion of conceptual severance, stating that it had “consistently” rejected such an approach.⁵⁵⁵ The Court stated: “[the property owners’] ‘conceptual severance’ argument [was] unavailing because it ignore[d] *Penn Central’s* admonition that in regulatory takings cases we must focus on the ‘parcel as a whole.’”⁵⁵⁶ Unfortunately, the Court merely rejected conceptual severance—as it has done on numerous other occasions—but it did not expressly disavow the line of cases in which the Court adhere[d] to conceptual severance.⁵⁵⁷ The Court had an opportunity to clear up the confusion it had created in the past, but it refused to do so.⁵⁵⁸ Instead, the Court simply rebuked the district court for following its prior case law.⁵⁵⁹ The Court stated:

548. *Id.*

549. *Id.* at 1482.

550. *Id.*

551. *Id.* at 1483 (emphasis omitted) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

552. *Id.* (emphasis omitted) (quoting *Lucas*, 505 U.S. at 1017).

553. *Id.*

554. *Id.*

555. *Id.*

556. *Id.* (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978)).

557. *See id.* at 1483-84.

558. *See Tahoe-Sierra*, 122 S. Ct. at 1496 (Thomas, J., dissenting); *see also* Boyd, *supra* note 357, at 805.

559. *See Tahoe-Sierra*, 122 S. Ct. at 1484. *But see* Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (concluding that the relevant parcel issue was still an unsettled matter); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (stating that a segment could constitute the denominator of the takings fraction for purposes of the takings analysis); Eagle, *supra* note 146, at 11232; Fox, *supra* note 317, at 402.

[T]he District Court erred when it disaggregated [property owners'] property into temporal segments corresponding to the regulations at issue and then analyzed whether [property owners] were deprived of all economically viable use during each period. The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel

An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not.⁵⁶⁰

The Court concluded its *Lucas* analysis by declaring that if the Court could not engage in conceptual severance, the property owners' "total taking" argument had no merit.⁵⁶¹

The Court gave brief consideration to a new emerging taking test known as the "fairness and justice" test.⁵⁶² The Court acknowledged that it had not yet announced a categorical rule that, "in the interest of fairness and justice," the government would be forced to compensate a landowner when it temporarily deprived the owner of "all economic viable use of his or her property."⁵⁶³ The Court refused to take this opportunity to adopt such a test.⁵⁶⁴ The Court presented the test as a possibility, but it then dismissed it abruptly, stating that the Takings Clause would be better served by the ad hoc factual inquiry established in *Penn Central*, as opposed to some categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking.⁵⁶⁵

After dismissing the fairness test, the landowners' argument seeking compensation for a temporary taking that relied on *Penn Central* and *First English* resurfaced, wherein the Court again rejected the landowners' plea and argued that a categorical rule recognizing compensable takings with brief deprivations would "undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police

560. *Tahoe-Sierra*, 122 S. Ct. at 1483-84 (citations omitted).

561. *Id.*

562. *Id.* at 1484.

563. *Id.*

564. *Id.* at 1485.

565. *Id.*

power.”⁵⁶⁶ With that, the Court warned that the government could operate if the Court enacted such a change in the general takings law.⁵⁶⁷ The Court claimed that important changes in the law that would effect the government so profoundly should be the “product of legislative rulemaking rather than adjudication.”⁵⁶⁸

The Court is correct in noting that the legislature is charged with changing public policy, but the Court has long affirmed and undertaken its role in overseeing government action.⁵⁶⁹ In fact, the Court’s role is to protect and enforce the Constitution.⁵⁷⁰ The Constitution, by way of the Fifth Amendment, requires that the government be barred from forcing some people to bear public burdens alone, which, in all fairness and justice, should be borne by the public as a whole.⁵⁷¹ The constitutionality of allowing the government to take a property owner’s lake front property for twenty years without compensation is clearly not an issue for the government to remedy—this is expressly the Court’s domain, but unfortunately for the landowners, the Court refused to do its job.⁵⁷²

The Court’s confusion in *Tahoe-Sierra* culminated when the Court stated that, despite its holding that the moratorium ordinances in Lake Tahoe were not a compensable taking, some moratorium ordinances could be.⁵⁷³ The Court even agreed that “any moratorium that lasts for more than one year should be viewed with special skepticism.”⁵⁷⁴ Nonetheless, the Court decided that it would be unreasonable to create a rule that all delays of over

566. *Id.*

567. *Id.*

568. *Id.*

569. *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000).

When federal judges exercise their federal-question jurisdiction under the “judicial Power” of Article III of the Constitution, it is “emphatically the province and duty” of those judges to “say what the law is.” At the core of this power is the federal courts’ independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law.

Id. (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

570. *See City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997).

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.

Id.

571. U.S. CONST. amend. V.

572. *See id.*

573. *Tahoe-Sierra*, 122 S. Ct. at 1489.

574. *Id.*

one year are constitutionally unacceptable; instead, the courts must always analyze such situations using the *Penn Central* ad hoc balancing test.⁵⁷⁵ To institutionalize the lower courts' uncertainty with temporary takings and moratorium ordinances in general, the Court concluded its opinion, stating:

[t]here may be moratoria that last longer than one year which interfere with reasonable investment-backed expectations, but as the District Court's opinion illustrates, [property owners'] proposed rule is simply "too blunt an instrument," for identifying those cases. We conclude, therefore, that the interest in "fairness and justice" will be best served by relying on the *familiar Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.⁵⁷⁶

Tahoe-Sierra was thought to provide assistance to the lower courts and guide them through the uncertainty the takings jurisprudence has caused over the years.⁵⁷⁷ Regrettably, this opinion only made a highly controversial and confusing concept more difficult to apply and defend.⁵⁷⁸

D. Supreme Court Opinion—Dissenting Opinion

Over the years, Chief Justice Rehnquist has constantly demonstrated an increased willingness to reconceptualize the Takings Clause in an attempt to neutralize a wide range of environmental and land-use regulations in an effort to uphold personal liberty.⁵⁷⁹ With the Chief Justice's desire to rein in government programs and amplify property owners' rights, it is no surprise that he championed the dissenting opinion in *Tahoe-Sierra*.⁵⁸⁰

The Chief Justice began his dissent by noting that the property owners have been prohibited from building on their property for over half a decade.⁵⁸¹ The Chief Justice argued that "[b]ecause the Takings Clause requires the government to pay compensation when it deprives owners of all economically viable use of their land, and because a ban on all development lasting almost six years does not resemble any traditional land-use planning device, I dissent."⁵⁸² The Chief Justice charged the majority with failing to undertake a proper inquiry as to whether the moratorium ordinances went

575. *Id.*

576. *Id.* (emphasis added) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001)).

577. See *Haar & Wolf*, *supra* note 3, at 2169.

578. *Id.* at 2201-02.

579. *Id.* at 2169.

580. See *id.* at 2201; see also *Tahoe-Sierra*, 122 S. Ct. at 1490 (Rehnquist, C.J., dissenting).

581. *Tahoe-Sierra*, 122 S. Ct. at 1490 (Rehnquist, C.J., dissenting).

582. *Id.* (citations omitted).

too far.⁵⁸³ The Chief Justice complained that the majority ignored much of the government planning agency's conduct and relied instead on the "flawed determination" that the moratorium only lasted for three years.⁵⁸⁴

The dissent argued that the Tahoe Regional Planning Agency was certainly responsible for the injunction issued in this case because the first plan did not comply with the compact.⁵⁸⁵ The dissent indicated that since the Agency was responsible for its own regulations, it would logically follow that it was the "moving force" behind the property owners' inability to develop their land until 1987.⁵⁸⁶ Therefore, if the property owners were unable to develop their land for six years because of the Agency's conduct, it should be responsible for compensating them for a regulatory taking.⁵⁸⁷

To support his conclusion, the dissent emphasized that the district court held that the moratorium ordinances "did in fact deny the plaintiffs all economically viable use of their land," [and] [t]he Court of Appeals did not overturn this finding."⁵⁸⁸ The dissent thought that despite the lower courts' holdings, it was apparent that the moratorium ordinances in question affected a taking.⁵⁸⁹ The dissent explained:

because the environmental thresholds issued by [the Agency] did not permit the development of single-family residences, [they] forced [the landowners] to leave their land economically idle for at least another three years. The Court [did] not dispute that [the landowners] were forced to leave their land economically idle during this period. But the Court refuse[d] to apply *Lucas* on the ground that the deprivation was "temporary."⁵⁹⁰

The dissent was appalled at the distinction and argued that it was arbitrary.⁵⁹¹ He stated that it was not supported by logic or case law.⁵⁹² The dissent argued: "[n]either the Takings Clause nor our case law supports such a distinction. For one thing, a distinction between 'temporary' and

583. *Id.*

584. *Id.*

585. *Id.* at 1491 (Rehnquist, C.J., dissenting).

586. *Id.*

587. *Id.* at 1491-92 (Rehnquist, C.J., dissenting).

588. *Id.* (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1245 (D. Nev. 1999), *aff'd in part, rev'd in part*, 216 F.3d 764 (9th Cir. 2000), *reh'g denied*, 228 F.3d 998 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002)).

589. *Id.*

590. *Id.* at 1492 (Rehnquist, C.J., dissenting) (citation omitted).

591. *Id.*

592. *Id.*

'permanent' prohibitions is tenuous. . . . The 'permanent' prohibition in *Lucas* lasted less than two years because the law, as it often does, changed."⁵⁹³ The dissent discussed the long-term ramifications the majority's opinion would have on future government actions and cases implicating a takings violation.⁵⁹⁴ The Chief Justice criticized the majority opinion, stating:

[u]nder the court's decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for [the] government to simply label any prohibition on development "temporary," or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the "temporary" prohibition into a long-term ban on all development. . . . Apparently, the Court would not view even a 10-year moratorium as a taking under *Lucas* because the moratorium is not "permanent."⁵⁹⁵

The dissent simply could not see the distinction between the facts in *Lucas* and the facts presented by the Lake Tahoe property owners.⁵⁹⁶ The dissent claimed that it was unreasonable for the majority to distinguish this case from *Lucas* by suggesting that the Lake Tahoe property owners retained some future value in their property while the property owner in *Lucas* did not.⁵⁹⁷ The dissent acknowledged that "[s]urely, the land at issue in *Lucas* retained some market value based on the contingency, which soon came to fruition, that the development ban would be amended."⁵⁹⁸

Chief Justice Rehnquist acknowledged that there is no question that *Lucas* is implicated when the government deprives a landowner of all economically beneficial use of his or her land—period.⁵⁹⁹ The dissent noted that the district court and majority both agreed that the Lake Tahoe moratorium temporarily deprived the landowners of all economically viable use of their land.⁶⁰⁰ The dissent emphasized that the Court has been clear that the rationale for *Lucas* applies "just as strongly" in the case of a temporary denial of all economically viable use.⁶⁰¹ The dissent cited the opinions in *First English* and *Palazzolo* to support the conclusion that the

593. *Id.*

594. *Id.*

595. *Id.*

596. *Id.* at 1493-94 (Rehnquist, C.J., dissenting).

597. *Id.* at 1494 (Rehnquist, C.J., dissenting).

598. *Id.* (citations omitted).

599. *Id.*

600. *Id.*

601. *Id.*

temporary denial of all viable use of the Lake Tahoe owners' land for six years was in fact a *Lucas* taking.⁶⁰² The dissent warned that the Court was ignoring the constitutional demand that requires that the costs and burdens be borne by the public at large—not by a few targeted citizens.⁶⁰³ The Chief Justice stated that “Justice Holmes’ admonition of 80 years ago again rings true: ‘[W]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.’”⁶⁰⁴

Justice Thomas filed a supplementary dissenting opinion wherein he agreed with the rationale stated by Chief Justice Rehnquist.⁶⁰⁵ He wrote separately to address the majority’s conclusion that the temporary moratorium was not a taking of the parcel as a whole.⁶⁰⁶ The Justice could not comprehend how the majority could come to such a conclusion after *First English*.⁶⁰⁷ The Justice stated that *First English* specifically held that temporary and permanent takings were not different in kind when a landowner was deprived of all economically viable use of his or her land.⁶⁰⁸ The Justice thought that *First English*:

put to rest the notion that the “relevant denominator” is land’s infinite life. Consequently, a regulation affecting a total deprivation of the use of a so-called “temporal slice” of the property is compensable under the Takings Clause unless background principles of state property law prevent it from being deemed a taking⁶⁰⁹

According to Justice Thomas, “[a] taking is exactly what occurred in this case” because no one could seriously doubt that the moratorium ordinance deprived the landowners of all economically beneficial use of their land.⁶¹⁰

602. *Id.*

603. *Id.* at 1496 (Rehnquist, C.J., dissenting).

604. *Id.* (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

605. *Id.* at 1496 (Thomas, J., dissenting).

606. *Id.*

607. *Id.*

608. *Id.*

609. *Id.*

610. *Id.*

VIII. CONCLUSION

In prior decisions, courts have determined that temporary moratoria ordinances are valid as long as they do not cause an unreasonable delay, but the Supreme Court has never determined what constitutes an unreasonable delay.⁶¹¹ The Court had the opportunity to finally resolve this ongoing dispute, but it refused to do so.⁶¹² Instead, the Court reiterated the Court's reliance on an abstract ad hoc factual analysis.⁶¹³ Unfortunately, the Court refused to give additional guidance to the lower courts, Lake Tahoe property owners, and society in general.⁶¹⁴ The Court merely concluded that "[t]here may be moratoria that last longer than one year which interfere with reasonable investment-backed expectations," but the moratorium ordinance in the instant case—affecting a twenty year ban on all development—did not interfere with reasonable investment-backed expectations.⁶¹⁵ As the dissent pointed out, it is difficult to imagine a situation where the Court would find that a moratorium ordinance violated the Fifth Amendment if it declined to do so in the instant case.⁶¹⁶

Lower courts are now no more certain when to strike down a moratorium ordinance because its time frame is considered unreasonable than before *Tahoe-Sierra*.⁶¹⁷ The only guidance the lower courts acquired from the *Tahoe-Sierra* opinion was the basic premise that if the government labels the action as "temporary" it is all but impossible for the court to find the action to be a taking.⁶¹⁸ Some commentators were hoping that the Court would take this opportunity to finally resolve the ongoing dispute between property owners and city planners.⁶¹⁹ A number of land use analysts and scholars were optimistic that the Court would finally hold that moratorium ordinances must in fact be temporary.⁶²⁰ This seemed a logical extension of

611. See *State ex rel. SCA Chem. Waste Services, Inc. v. Konigsberg*, 636 S.W.2d 430, 435 (Tenn. 1982) (stating that courts are to uphold temporary moratorium ordinances as long as they are enacted pursuant to specific standards); see also *Taylor v. City of Little Rock*, 583 S.W.2d 72 (Ark. 1979) (upholding a city zoning ordinance where the city complied with statute requirements); *Almquist v. Marshan*, 245 N.W.2d 819, 829 (Minn. 1976) (upholding a six-month moratorium ordinance because it was enacted pursuant to proper procedural requirements); *Sherman v. Reavis*, 257 S.E.2d 735 (S.C. 1979) (holding that an ordinance is legal if the governing body has advertised to the public its intention to hold public hearings on the rezoning matter).

612. *Tahoe-Sierra*, 122 S. Ct. at 1478 (stating that the answer to the "abstract question" of whether a moratorium ordinance constitutes a taking is neither "'yes, always' nor 'no, never'"; rather, the answer "depends upon the particular circumstances of [each] case").

613. *Id.*

614. See *id.*

615. *Id.* at 1489.

616. *Id.* at 1492 (Rehnquist, C.J., dissenting).

617. See *id.*

618. See *id.*

619. See Roberts, *supra* note 7, at 11037; see also Freilich, *supra* note 15, at 181.

620. See Roberts, *supra* note 7, at 11037; see also Freilich, *supra* note 15, at 181.

its prior holdings.⁶²¹ If this were true, future moratorium ordinances would be required to have a sunset clause, and the ordinance would be required to terminate upon that date or risk a taking challenge.⁶²² Alas, for the 450 property owners who have lost twenty years to this controversy, the Court only perpetuated the dispute between landowners and city planners.⁶²³

The Court did state that moratorium ordinances must, in fact, be temporary.⁶²⁴ However, this opinion did nothing to enforce the decree.⁶²⁵ Not only does it not enforce the theory, it allows the government to avoid ever paying citizens just compensation by simply labeling its action as “temporary.”⁶²⁶ As Chief Justice Rehnquist acknowledged:

Under the Court’s decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for [the] government to simply label any prohibition on development “temporary,” or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the “temporary” prohibition into a long-term ban on all development. . . . Apparently, the Court would not view even a 10-year moratorium as a taking under *Lucas* because the moratorium is not “permanent.”⁶²⁷

Under the rationale espoused by the majority, there will be little incentive for local governments to put sunset clauses in their ordinances or in fact terminate them when they are scheduled to expire because, as the *Tahoe-Sierra* majority explained, it does not matter if the moratorium ordinances expire when they are scheduled to expire, only that they are *intended* to be temporary.⁶²⁸ The Court’s decision thereby allows a government to repeatedly extend its temporary prohibition into a long-term ban on all development.⁶²⁹ The Court’s ruling would seem to allow the government to do by regulation what it obviously cannot do by eminent

621. See Roberts, *supra* note 7, 11037; see also Alperin, *supra* note 2, at 170; Freilich, *supra* note 15, at 181.

622. See Alperin, *supra* note 2, at 170.

623. See *Tahoe-Sierra*, 122 S. Ct. at 1492 (Rehnquist, C.J., dissenting).

624. *Id.* at 1480.

625. *Id.* at 1492 (Rehnquist, C.J., dissenting).

626. See *id.*

627. *Id.*

628. See *id.*

629. *Changing Course: U.S. Supreme Court Rules in Takings Case*, 227 N.Y. L.J. 5 (2002).

domain—freeze the use of private property without paying for it.⁶³⁰ Simply put, this opinion ignores the admonition put forth by Justice Holmes almost eighty years ago that a strong public desire to improve the environment or society as a whole is not enough to warrant achieving the desire in an unconstitutional manner and not paying for the change.⁶³¹

The Court may not have taken the bait to clear the murky waters it left with its decision in *First English*.⁶³² But, in the very least, the Court did emphasize that temporary moratorium ordinances are within the definition of “normal delays” that the Court said were not within the grasp of temporary takings.⁶³³ Unfortunately, state and federal courts will remain perplexed by what the Court means by “temporary,” and the *First English* and *Palazzolo* opinions remain a mystery.⁶³⁴ The bewildering and contradictory language is not any clearer now than when it was enunciated.⁶³⁵ Rather than explain the confusion in the *Tahoe-Sierra* opinion, the Court merely concluded that neither of the opinions were applicable to the Tahoe analysis.⁶³⁶

The final issue the Court had an opportunity to clarify was its position on conceptual severance.⁶³⁷ The Court has passed the buck on this issue for years and, even though the conceptual severance issue was at the center of the Tahoe controversy, the Court simply passed the buck again.⁶³⁸ The Court insisted that it has consistently refused the opportunity to engage in conceptual severance in the past and it refused to do so here as well, but what the Court did not mention was that the Court has, on occasion, accepted conceptual severance.⁶³⁹ Not only did the Court not specifically reject the line of cases that support conceptual severance, the Court did not even acknowledge them.⁶⁴⁰ This has been a reoccurring practice for the Court.⁶⁴¹ The Court either simply refuses to participate in conceptual severance and cite the line of cases which support this conclusion, or the Court partakes in the practice and cites the line of cases which support that assumption.⁶⁴²

The Court’s decision was particularly important in the instant case, because it had the potential of affecting the future of all moratorium

630. *Id.*

631. *Id.*

632. *See Tahoe-Sierra*, 122 S. Ct. at 1482, 1484.

633. *Id.* at 1485.

634. *See Eagle*, *supra* note 146, at 11232; *Fox*, *supra* note 317, at 402-03.

635. *See Eagle*, *supra* note 146, at 11232; *Fox*, *supra* note 317, at 402-03.

636. *Tahoe-Sierra*, 122 S. Ct. at 1484.

637. *Id.* at 1480; *see also Boyd*, *supra* note 357, at 815.

638. *See Tahoe-Sierra*, 122 S. Ct. at 1481.

639. *Id.*

640. *Id.*

641. *See Eagle*, *supra* note 146, at 11232; *Fox*, *supra* note 317, at 402-03.

642. *Tahoe-Sierra*, 122 S. Ct. at 1481.

ordinances.⁶⁴³ If the Court had declared that temporal segregation is permitted, all moratorium ordinances could be categorized as a taking.⁶⁴⁴ The Court's decision will likely have the opposite effect.⁶⁴⁵ Under the existing position, property owners will certainly face an uphill battle any time they facially challenge a moratorium ordinance.⁶⁴⁶ The Court articulated that a regulation must affect an entire parcel—limiting it by time, use, and space—before a court can determine that the owner has been deprived of all economically viable use of his or her property.⁶⁴⁷ Moreover, the Court categorized moratorium ordinances as normal planning delays used to preserve the status quo while formulating a development strategy, and these “normal delays” are “[u]nlike the ‘extraordinary circumstance’ in which the government deprives a property owner of all economic use.”⁶⁴⁸ Thus, despite the Court's inference that determining whether a temporary moratorium effects a taking is never a “‘yes, always,’ nor ‘no, never,’” answer, it is very difficult to identify an instance when a temporary moratorium ordinance would effect a taking under the majority's analysis.⁶⁴⁹ Although the takings law remains muddled, post-*Tahoe-Sierra* regulatory taking analysis contains an “identifiable regimen”—the Court *always* follows an ad-hoc factual analysis of the factual record.⁶⁵⁰

“The right to own property and do with it as one chooses is a cherished right of every United States citizen.”⁶⁵¹ The right, however, is not absolute, and individual liberty must be restricted to protect the environment and society in general – a lesson *Tahoe-Sierra* exemplifies to all property owners.⁶⁵² “The law of regulatory takings sits in the balance of these often conflicting purposes.”⁶⁵³ While the balance has tipped in favor of property owners in the past, the balance is clearly in favor of the government under the current takings analysis.⁶⁵⁴ The Supreme Court's decision in *Tahoe-Sierra* will have a distinct and profound effect on the future of all land use

643. See Boyd, *supra* note 357, at 796.

644. See *id.*

645. See *Tahoe-Sierra*, 122 S. Ct. at 1492 (Rehnquist, C.J., dissenting).

646. See *id.*

647. *Id.* at 1477-79.

648. *Id.* at 1486-87 (emphasis added) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992)).

649. See *id.* at 1478. But see *id.* at 1492 (Rehnquist, C.J., dissenting).

650. Herber, *supra* note 280, at 929.

651. Boyd, *supra* note 357, at 793.

652. *Id.*

653. *Id.*

654. Haar & Wolf, *supra* note 3, at 2169.

planning in general.⁶⁵⁵ It is true that an owner is not entitled to compensation in every delay caused by the government, however, prohibiting all economic and beneficial use for *years* is surely a different scenario, and clearly a circumstance which would seem to require compensation.⁶⁵⁶ After all, this is exactly what the Fifth Amendment claims to prevent.⁶⁵⁷

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655. Roberts, *supra* note 7, at 11037.

656. *Changing Course: U.S. Supreme Court Rules in Takings Case*, 227 N.Y. L.J. 5 (2002).

657. *Id.*