What the Supreme Court Didn't Decide in *Tahoe-Sierra*

By Dwight H. Merriam, FAICP

In these pages, you'll read plenty of opinions about what the Court decided. Sometimes you'll wonder if the authors are even talking about the same case. It all depends on your perspective. Why, just a year ago Rhode Island Attorney General Whitehead had his head handed to him by the Court in *Palazzolo* when the Court found a takings

Reprinted with the permission of the publisher, American Planning Association. This material originally appeared in Land Use Law & Zoning Digest, Vol. 54, No. 6, June 2002.

claim ripe and told the AG to go back to court and try the case instead of hiding behind the gossamer bunting of the ripeness doctrine. So what did the General Whitehead do? He simply declared victory—at least you would think so from the local legal newspaper article with the headline: "U.S. Supreme Court Rules Against Palazzolo in Land Dispute," *The Rhode Island Law Tribune*, Week of July 4-10, 2001 at p. 6. He was quoted: "We're happy with it. The important point is under the theory Mr. Palazzolo pursued, he lost and he lost flat out."

I decided to do the really hard thing in this case—a Houdini-esque escape trick attempted by no one else—and wiggle out of the "he said, she said" mentality of these usual commentaries to explain what I think the Court *didn't* decide. And our fine editor, Lora Lucero (that's her real name, not a stage name; it has a great film noir sound to it, don't you think?) said I could have a shot at it, so here goes.

One last point. We represent both property owners and governments in takings cases (no, not in the same case . . .). These are my ideas and not those of our past, present, or future clients. I try to be objective, and of this motley crew, pretty much the Gilligan's Navy of land-use law, I am the only one with no dog in the fight. Objectively, I tell you I'm objective.

Question #1

Could a 32-month moratorium be a Penn Central as-applied taking? The Court doesn't say it would be, but I think it can be. Remember, the decision was only that a 32-month moratorium was not a facial taking; that is, it caused a taking in every instance from the moment it was adopted. Justice Stevens asked Michael Berger during oral argument if a 10-minute moratorium was a taking and our counselor to the downtrodden was forced to respond cheerily that, of course, it was. The facial claim was all that was left by the time Michael Berger got the case. A 32-month moratorium is not necessarily safe from a takings claim. Neither is a one-year moratorium, even though, in at least a couple of places in the decision, it sounds like a one-year period is somehow not subject to challenge. Moratoria of any length can still be attacked on *Penn Central* grounds. The Court said as much in footnote 16:

> Despite our clear refusal to hold that a moratorium never effects a taking, THE CHIEF JUSTICE accuses us of "allowing the government to . . . take private property without paying for it," (citation omitted). It may be true that under a *Penn Central* analysis petitioners' land was taken and compensation would be due. But petitioners failed to challenge the District Court's conclusion that there was no taking under *Penn Central*. (citation omitted).

The Court also said, "In rejecting petitioners' *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other." Several times the Court noted the narrow and limited scope of the question presented and its decision.

If I were a property owner subject to some off-the-wall moratorium with no rational basis, I would sue in a New York minute, looking for a preliminary injunction and money damages. I would do the *Penn Central* shuffle—diminution in value, investment-backed expectations, and character of the government's action. *Tahoe-Sierra* doesn't reverse well-reasoned prior decisions invalidating some moratoria. *See, e.g. River Oaks Marine, Inc. v. Town of Grand Island*, 1992 U.S. Dist. LEXIS 18974 (W.D.N.Y. Nov. 24, 1992) ($1,149,149.43 in damages for prohibition against removing earth products during a moratorium).

Question #2

How do you enact a defensible moratorium? The Tahoe moratorium was a "planning pause" moratorium designed to give government some breathing room while it planned for and adopted regulations to protect Lake Tahoe. Governments have imposed moratoria to prevent sewer hookups where the capacity was inadequate, to suspend issuance of new offshore drilling leases, to prevent destruction of single-room occupancy units, to stop development along a transportation corridor while the state figured out what land to acquire for future roads, and to stop, temporarily, the development of new landfills in a county.

Are moratoria to prevent problems with inadequate public facilities the same as the Tahoe planning-pause moratoria to protect a treasured natural resource from certain destruction? Will the panoply of growth management techniques—tiered growth, growth management boundaries, concurrency, and holding zones—be carried on the coat tails of *Tahoe-Sierra?* The Court seems to equate interim development ordinances with moratoria. Functionally and legally they may not be the same.

Does the subject matter of the moratorium matter? Does a moratorium on development to save a sole-source aquifer from potential pollution while groundwater flows are studied stand a better chance of being successfully defended than a moratorium imposed on retail development while there is a study of parking ratios?

How long is too long? What would happen to a 25-year moratorium on all use? Wouldn't that be a taking, even a facial taking?

How important is it that some beneficial use remains during the moratorium? The existence of limited use during the moratorium was essential in finding no taking in *First English.*

Should a moratorium have an "escape hatch" built in to save the odd property from being accidentally taken by overregulation? Is there any way for property owners to get relief administratively—something like a variance—so that they are not forced to go to court?

Do we factor in the rate at which property is developed? In *Tahoe-Sierra* it was apparently important that lot purchasers kept their lots for an average of 25 years before building on them. There isn't much in the decision on investment-backed expectations, but suppose a homeowner sold her house, rented an apartment for a single six-month term, immediately purchased a new lot, engaged an architect and contracted with a builder to build a new home on the lot, to be completed in six months? What if, the day the contract was signed with the builder but before a building permit was issued, the local government imposed a one-year planning pause moratorium on all new residential developments because it was concerned about the increased use of portable

classrooms for public school students? Well, you get the point. These cases are fact-driven and we must read *Tahoe-Sierra* in the context of many prior decisions on moratoria, vested rights, and zoning estoppel.

Question #3

Does the whole-parcel rule forever trump the relevant parcel debate? This sounds too arcane to be interesting to even the geekiest of takings geeks, but it's a big deal. Hear me out. *Tahoe-Sierra* implanted a pacemaker in the whole-parcel rule, giving it new strength. In a miracle of modern takings jurisprudence, Justice Stevens performed a triple bypass to incorporate his definition of what is the relevant parcel from his *First English* dissent 15 years ago into the *Tahoe-Sierra* majority opinion. The relevant parcel now definitely includes the extent of the physical property, the functionality of use, and time. However, the decision didn't pull the plug on something called "segmentation." Segmentation is the division of some larger property in terms of the area, functionality, or temporal dimension; it can dramatically shift the advantage to the takings claimant.

It's like this. Suppose you have 100 acres, 10 of which are wetlands, and the government won't let you fill them. If the relevant parcel (the denominator) is 100 acres, then the most you have lost is 10 of 100 acres or 10 percent. No taking. If the relevant parcel is 10 acres and the numerator (the land where the fill permit was denied) is 10 acres, then it's a complete wipe out, and you are probably the only person left in the world with a *Lucas*-style categorical taking.

The whole-parcel cult thinks the Court ended that debate forever. It didn't. If you bought the 10 acres of wetlands in 1950 before any regulation and the 90 additional acres last year, you will have your day in court on the question of what is the relevant parcel.

Question #4

Where is the Court going with the "fairness and justice" analysis? "Fairness and justice" are at the base of the Takings Clause, says the Court. Justice O'Connor noted that in her opinion in *Palazzolo*, but the somewhat freeform use of the analysis in *Tahoe-Sierra* transcends the consideration of investment-backed expectations. Sure, takings analysis is essentially ad hoc, but attempting to develop a rule of law with the bungee cord terms "fairness and justice" will be problematic for both sides of the debate.

In Summary

Contrary to what my shipmates say in their head-shaking, hand-wringing, chest-beating, fist-pounding acclamations and protestations, the debate has only begun. Planning and public regulation get a boost of undefined dimension. The *Lucas* categorical regulatory taking is now virtually a footnote in the history of takings law. *Penn Central* rules. *First English* was unsatisfying in telling us the obvious—when government takes property, it has to pay for it. Similarly, all *Tahoe-Sierra* says is that moratoria are not automatically takings, and that good planning and regulation takes time. No one should read too much into it, one way or the other.