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# Defensible Moratoria: The Law before and after the Tahoe-Sierra Decision

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## ABSTRACT

*Governments at all levels have used land use permitting and development moratoria as effective planning tools for decades. The U.S. Supreme Court's* Tahoe-Sierra *decision last year, upholding a 32-month moratorium on all development around portions of Lake Tahoe, has heightened interest in moratoria. The* Tahoe-Sierra *decision elicited comments from all sides, most seeming to believe that the law had changed. Although defensibility remains an issue, a definitive review of the cases before* Tahoe-Sierra*; an analysis of the* Tahoe-Sierra *decision itself; and a look at the cases decided since reveals that there has been little change in the law. The objective of this article is to illustrate how the law has evolved and to serve as a research tool for landowners, governmental officials, advocacy groups, and the courts.*


The U.S. Supreme Court's decision on April 23, 2002, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,[1] galvanized everyone on the property rights continuum, from developers to local planners, on the legality and wisdom of moratoria as a land planning and regulation tool. There followed the usual spate of hyperbolic hand wringing and jubilation, depending upon one's view of the world. The National Association of Home Builders talked of "moratorium mania" fearing that decision would spark widespread adoption of moratoria by


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1. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

local governments.[2] The country's preeminent planning organization, the American Planning Association, predicted a virtual apocalypse in local regulation and issued a press release dubbing the decision "a solid win for planning."[3] In the some-things-never-change category, the press did its usual poor job of accurately reporting what the decision really meant, perhaps because it was simply too arcane for most to comprehend. For example, the *Los Angeles Times* reported that "[t]he Supreme Court upheld the government's power to impose a temporary ban on development Tuesday, ruling in a Lake Tahoe case that property owners are not due compensation whenever they are barred from building on their land."[4]

Reality check—the decision in *Tahoe-Sierra* is actually factually and legally narrow, and like most takings decisions characteristically ad hoc. Justice Stevens, writing for the majority, defined the question under consideration: "The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause of the United States Constitution."[5]

The sound bite description of the holding in the case is that a 32-month moratorium to save a national treasure from certain destruction does *not* effect a facial or per se compensable taking. As Justice Stevens put it, "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."[6] Stevens concluded for the Court "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."[7]

It is important to note that nearly all land use regulatory takings claims are brought as as-applied, not facial, challenges. A property owner sues the government over the application of a land use regulation to a specific piece of property in a particular instance. The claim only has to do with the application of the regulation to the subject property and no others. That said, and for reasons too complex and irrelevant to be

2. *See* Patricia E. Salkin, *U.S. Supreme Court Hands Two Big Wins to Municipal Governments in 2001–2002 Term*, 31 REAL ESTATE L.J. 83, 86-87 (2002), *citing* National Association of Homebuilders, *Supreme Court's Lake Tahoe Decision Could Trigger Moratorium Mania* (Apr. 24, 2002), *at* www.nahb.com.

3. *Id.*

4. David G. Savage, *The Nation: Landowners Dealt Blow by Justices*, L.A. TIMES, Apr. 24, 2002, at A1.

5. *Tahoe-Sierra*, 535 U.S. at 306.

6. *Id.* at 337.

7. *Id.* at 342.

described in this modest effort, petitioner's challenge in *Tahoe-Sierra* made its way through the appellate courts and up to the U.S. Supreme Court as a facial challenge, and therein lies the primary reason that the decision is a narrow one, particularly as it relates to what makes a moratorium defensible.[8]

A facial taking claim challenges the legality of a land use regulation in general, based on the theory that, no matter how the regulation is applied to any property, in every instance it would work a taking of that property without just compensation in violation of the Fifth Amendment. In other words, a facial taking occurs when the mere enactment of the challenged regulation is a taking. A facial taking in the land use context is highly unusual—not totally a matter of fantasy, like a jackalope,[9] but something akin to a nearly extinct species, such as an Asiatic cheetah.[10]

The U.S. Supreme Court supplemented its holding in *Tahoe* with extensive dicta on the subject of "fairness and justice" and in support of land planning as an important activity.[11] The Court specifically noted that moratoria were a widely used and accepted growth management tool, and stated that

> [t]he interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a

8. The main reason it evolved as a facial challenge was that, with more than 700 property owners, individual suits were procedurally and economically impossible and a class action is not available for individual, as-applied takings claims. Also, a facial challenge avoids the need to demonstrate finality.

9. *See, e.g.*, *Obituary Douglas Herrick—Jackalope inventor*, WASH. POST, Jan. 20, 2003, at B05. A jackalope is a cross between an antelope or a deer and a jackrabbit created by taxidermist Douglas Herrick when he stuck antlers on a stuffed jackrabbit. No such creature exists in nature.

10. Asiatic Cheetahs are darker and somewhat larger than typical African cheetahs. *See* http://www.cheetahspot.com/asiatic.php (last visited Sept. 12, 2003). The few remaining Asiatic cheetahs live in Iran on the edge of the Kavir desert. *See* http://www.asiaticcheetah.org/asiatic/index.html (last visited Sept. 12, 2003).

11. *Tahoe-Sierra*, 535 U.S. at 333 (considering seven listed points including alternative approaches the Court might have taken to determine the best approach to ensure that "justice and fairness" were met, weighing the merits of a number of per se rule possibilities and finally pointing out that petitioners might have prevailed in their challenge under *Penn Central* had they brought an as-applied challenge).

> comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.[12]

The Court also pointed out that a good moratorium might enhance property values by providing for better protection of property in the long run.[13]

Though it is not the focus of this article, which is more about the defensibility of moratoria, perhaps the most important holding in *Tahoe-Sierra* is that the Court adopts Justice Stevens' dissent in *First English* as to the composition of the "relevant parcel."[14] The relevant parcel is now comprised of not only a physical dimension and a functional dimension, but a temporal dimension as well, such that the reality of long-term ownership of real property is now a consideration in determining whether or not relatively short-term prohibitions on use work a taking.[15]

Even a shaman poking through the entrails of this decision will find it hard to discern what the Court has told us about moratoria. All that can be said with certainty from the holding alone is that a 32-month moratorium to save Lake Tahoe from the adverse impacts of nonpoint source stormwater runoff is not a facial taking, especially in light of the fact that the average time that people have held lots at Lake Tahoe before developing them is an extraordinary 25 years.[16] Nothing is said about as-applied challenges to moratoria and the Court is careful to point out that the decision is a narrow one.[17]

At a couple of points in the decision, the Court talks about a one-year moratorium, which some might infer suggests an acceptable duration.[18] However, the Court clearly states that it is setting no standard and there is no indication in the cases decided since *Tahoe* that there was meant to be such a standard.[19]

To find out what the *Tahoe-Sierra* decision may mean for moratoria going forward, we must start with a retrospective of the cases before *Tahoe-Sierra* and analyze them on the basis of the criteria they suggest for determining the defensibility of moratoria. A "defensible moratorium" for our purposes is one legally enacted that does not effect a compensable permanent or temporary regulatory taking. Those criteria are:

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12. *Id.* at 339.
13. *Id.* at 339-41.
14. *Id.* at 332. *See* discussion *infra* notes 233-243.
15. *Tahoe-Sierra*, 535 U.S. at 332. See generally Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. (forthcoming 2003).
16. *Tahoe-Sierra*, 535 U.S. at 337.
17. *Id.* at 304-06.
18. *See, e.g., id.* at 341.
19. *Id. See also, e.g.*, Haberman v. City of Long Beach, 298 A.D. 2d 497 (N.Y. App. Div. 2d Dep't 2002).

- Authority to enact moratoria
- Duration of the moratorium
- Public interest intended to be served
- Burden on the private property owner
- Extent of other economic uses of the property during the moratorium
- Availability of local administrative relief

We start first with a brief overview of the pre-*Tahoe-Sierra* takings clause jurisprudence.[20] We then analyze the pre-*Tahoe-Sierra* moratorium cases under the six criteria potentially affecting defensibility.[21] After that, we review the *Tahoe-Sierra* decision in some detail for its guidance on defensibility.[22] Finally, we discuss the post-*Tahoe-Sierra* moratoria cases and what lessons have been learned.[23] A chart with the cases mentioned in this article and other cases of interest is attached as the appendix to this article.

## I. SUMMARY OF RELEVANT U.S. SUPREME COURT TAKINGS JURISPRUDENCE

Some regulatory takings cases are relevant to moratorium cases because moratoria are often challenged as takings. We discuss these takings cases in order of general importance to moratorium cases and in rough chronological order so that we may contrast and compare them with the 1978 *Penn Central* decision.

In the famous, yet virtually moribund, 1992 decision in *Lucas v. South Carolina Coastal Council*,[24] the U.S. Supreme Court found that a categorical or per se regulatory taking occurs in the extraordinary case where a regulation permanently deprives a property owner of all economic value in the property. Since *Lucas* was handed down over a decade ago, it has practically never determined the outcome of a takings case.[25]

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20. *See infra* notes 24-37 and accompanying text.
21. *See infra* notes 38-227 and accompanying text.
22. *See infra* notes 228-249 and accompanying text.
23. *See infra* notes 250-297 and accompanying text.
24. 505 U.S 1003 (1992).
25. There are maybe four cases where *Lucas* has made a difference. *See, e.g.*, State *ex. rel.* R.T.G., Inc. v. State, 780 N.E.2d 998 (Ohio 2002) (holding that property rights constitute a separate and distinct property interest and parcel); Steel v. Cape Corp., 677 A.2d 634 (Md. 1996) (holding failure to upzone from institutional open space zoning classification constituted a total taking); Loveladies Harbor v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (affirming award of compensation); Bowles v. United States, 31 Fed. Cl. 37 (1994) (holding that landowner is entitled to compensation under local "total taking" analysis).

Nearly every regulatory takings case is based on a partial taking, and the decision ruling the roost since 1978, and recently re-ensconced at the head of the pecking order by *Palazzolo*[26] in 2001 and *Tahoe-Sierra* in 2002, is *Penn Central Transportation Co. v. City of New York.*[27]

*Penn Central* established a three-part, fact-specific test for determining whether a regulation worked an invalid, compensable partial taking. The test was largely the result of the balancing of the ideas that "'justice and fairness' require that economic injuries caused by public action [should] be compensated by the government, rather than remain[ing] disproportionately concentrated on a few persons,"[28] but that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the [responsible] general law."[29] Under the *Penn Central* test, the following factors are weighed to determine whether a regulation effects a partial taking: (1) diminution in property value, (2) damage to reasonable investment-backed expectations of the owner, and (3) character of the government action, particularly as compared to the public benefit as against the private burden.[30] *Penn Central* has operated as the default rule in regulatory takings cases, while *Lucas* has existed as a rare exception to that default rule.

In 1980, the Supreme Court decided *Agins v. City of Tiburon,*[31] a precursor to the development moratoria cases, which, for purposes of this article, stands for the proposition that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.' They cannot be considered as a 'taking' in the constitutional sense."[32] In *Agins*, the Court held that an open space ordinance, effectively down-zoning appellants' property but nevertheless permitting the construction of one to five single-family residences on the property, (1) constituted a valid exercise of the City's police power, effectively advancing legitimate governmental purposes of protecting open space and countering the "ill effects" of urbanization, and (2) did not deny the appellants "justice and fairness" under the Fifth and Fourteenth Amendments because the appellants, like the public, benefited from the preservation of open-space, and, though they may have suffered from some diminution in the value of their property, they

26. 533 U.S. 606 (2001).
27. 438 U.S. 104 (1978).
28. *Id.* at 124 (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).
29. *Penn Central*, 438 U.S. at 124 (citing Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
30. *Penn Central*, 438 U.S. at 124-25.
31. 447 U.S. 255 (1980).
32. *Id.* at 263 (quoting Danforth v. United States, 308 U.S. 271, 285 (1939)).

were nevertheless "free to pursue their reasonable investment expectations by submitting a development plan to local officials."[33]

In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*,[34] the Supreme Court held that the temporary nature of a government land use restriction—in that case a moratorium on construction within a flood-prone valley—did not negate the possibility that compensation might be required, and that just compensation necessarily included the remedy of money damages. Despite the fact that *First English* was decided on facts involving a moratorium, and despite the fact that it was sometimes cited early on as a moratorium case, the Supreme Court did not tell us as much about the general defensibility of moratoria as did the Ninth Circuit in *First English* on remand. The result on remand is discussed later in this article.[35]

Finally, *Nollan v. California Coastal Commission*[36] and *Dolan v. City of Tigard*[37] (*Nollan* and *Dolan*) are frequently cited for the respective propositions that (1) there must be an "essential nexus" between the legislative imposition and a legitimate governmental objective and (2) the regulatory means must be "roughly proportional" to the desired regulatory end—not overly invasive for the purpose sought. These cases are particularly relevant to the analysis of purpose in moratorium cases.

These cases are by no means all of the U.S. Supreme Court cases that bear upon our analysis; however, they provide a considerable foundation upon which to interpret takings cases in the general sense. Let us look now at how the lower courts have typically approached taking cases specifically involving moratoria or, as they are sometimes called, "interim zoning" or "interim development" ordinances.

## II. PRE-*TAHOE-SIERRA* MORATORIUM CASES

In general, the moratoria and interim development ordinance cases before *Tahoe-Sierra* were decided on the basis of six factors: authority to enact moratoria, duration of the moratorium, public interest to be served, burden on the private property owner, extent of other economic uses of the property during the moratorium, and availability of local administrative relief.

33. *Agins*, 447 U.S. at 261-62.
34. 482 U.S. 304 (1987).
35. *See infra* notes 140-141, 171-172, and accompanying text.
36. 483 U.S. 825 (1987).
37. 512 U.S. 374 (1994).

### A. Authority to Enact Moratoria

Whether a local government may enact a moratorium is the threshold issue. In the absence of express authority enabling the enactment of local moratorium ordinances,[38] the conventional view is that local governments may generally act under the police power to adopt reasonable temporary moratorium ordinances, so long as they do so in good faith, and so long as the adopted ordinances only limit development for short periods.[39] In other words, courts have generally upheld the enactment of moratoria ordinances based on police power grounds. Courts have also found sufficient authority for moratoria in home rule provisions.[40] General land planning enabling legislation, though not expressly authorizing moratoria, may imply delegation of authority to do so.[41]

Some courts interpret general grants of state power broadly to uphold moratoria. In *State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg*,[42] the Supreme Court of Tennessee upheld the enactment of a resolution placing a temporary hold on the issuance of hazardous waste treatment facility permits. The Court stated that the broad statutory grant of general municipal powers was to be "liberally construed," and the Court therefore held that municipalities were empowered to enact interim zoning ordinances. In a Massachusetts case, the Supreme Judicial Court held that the broadly worded general delegation to cities and towns was sufficient to enable a town to enact a two-year apartment construction moratorium, under its zoning power, while the town did comprehensive planning.[43]

Whether enabling authority is express or implied, the legality of a particular moratorium will sometimes turn on whether or not it was properly enacted in accordance with the procedural requirements in the

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38. For a comprehensive discussion of such state enabling legislation, see EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 11.01[1] (1996) (cited in Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457 (N.D. Ala. 1997); *see also, e.g.*, Ord v. Kitsap, 929 P.2d 1172 (Wash. App.1997) (citing self-executing authority to impose six-month moratorium under Forest Practices Act); Town of Grand Chute v. City of Appleton, 282 N.W.2d 629 (Wis. App. 1979) (interpreting such enabling legislation).

39. *See, e.g., Metro Realty v. El Dorado County*, 222 Cal. App. 2d 508, 516 (Cal. App. 3d Dist. 1963); Almquist v. Town of Marshan, 245 N.W.2d 819 (Minn. 1976).

40. *See, e.g.*, Boulder Builders Group v. City of Boulder, 759 P.2d 752 (Colo. Ct. App. 1988). *See generally* J. JUERGENSMEYER & T. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 3.9 (2003). Home rule powers are a general grant to local governments under a state constitution or state statute to enact local laws.

41. *See, e.g.*, Bernhard v. Planning & Zoning Comm'n of Town of Westport, 619 A.2d 1160 (Conn. App. 1993).

42. 636 S.W.2d 430 (Tenn. 1982).

43. Collura v. Town of Arlington, 329 N.E.2d 733 (Mass. 1975).

base enabling law. The issue of conformity with procedural requirements often arises where moratoria are enacted quickly in response to perceived emergencies.

In *Schoeller v. Board of County Commissioners of Park County*,[44] a county board of commissioners adopted an emergency temporary "land-freeze" to maintain the status quo within the county until a comprehensive plan could be adopted. The board adopted the freeze without notice or hearing. The Wyoming Supreme Court held that the authority to enact such an interim measure could be reasonably implied from the state enabling legislation authorizing the county board to "regulate and restrict the use of buildings and land in unincorporated areas of the county."[45] The court further held that in order to make such power meaningful, the board must have "appurtenant power" to enact the interim freeze resolution without notice or hearing.[46]

In *Jablinske v. Snohomish County*,[47] an appellate court in Washington held that the notice and hearing requirements in the state enabling legislation did not apply in an emergency situation, as was presented when owners of land surrounding an airport raced to pull residential construction permits once it became clear that local planners were studying the possibility of expanding the airport. In *Matson v. Clark County Board of Commissioners*,[48] a different division of the Washington appellate court also interpreted the state enabling legislation as authorizing a local board to adopt an emergency moratorium without public notice and hearing. The *Matson* court stated, "if interim zoning is to serve its purpose in a state with a permissive vested rights doctrine, it must not be subject to time-consuming notice and hearing requirements applicable to ordinary zoning."[49]

Somewhat stricter interpretation of state law can result in invalidation of a moratorium, especially if there is no emergency. In *Sprint Spectrum L.P. v. Jefferson County*,[50] the U.S. District Court for the Northern District of Alabama struck down a moratorium on cell tower permitting, where it was enacted without notice and hearing and in the absence of an emergency. The court made clear that the result would

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44. 568 P.2d 869 (Wyo. 1977).

45. *Id.* at 874. The court acknowledged that there is a split nationwide as to whether or not notice and hearing requirements must be strictly adhered to, particularly where an emergency situation exists. *Id.*

46. *Id.* at 878.

47. 626 P.2d 543 (Wash. App. 1981) (twelve-month moratorium upheld without such qualifying remarks as were stated by the *Schoeller* Court).

48. 904 P.2d 317 (Wash. App. 2d Div. 1995).

49. *Id.* (quoting RICHARD L. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE § 2.13, at 73 (1983)).

50. 968 F. Supp 1457 (N.D. Ala. 1997).

have been different had there been a real emergency.[51] Likewise, a New Jersey court invalidated a timed growth control ordinance where the court did not find that an emergency existed, and where state legislation expressly prohibited the adoption of moratoria except in case of emergency.[52]

In *City of Sanibel v. Buntrock*,[53] a Florida appellate court held that, in the absence of an emergency, a moratorium ordinance was invalid if not enacted in accordance with the procedural requirements in the state zoning enabling act. That said, more than one court has upheld the enactment of a temporary moratorium, where that moratorium was enacted without notice or a hearing and where the court made no express finding that an urgent or emergent situation existed.[54]

Having discussed situations where courts have liberally construed enabling legislation or equated moratoria with zoning in finding grants of local authority, we must now look at the other end of that broad spectrum of judicial interpretation—not all state courts have upheld local moratoria ordinances or regulations in the absence of specific state enabling legislation. The analysis often turns on whether or not the moratorium is an essential part of, or necessarily appurtenant to, the power to zone.

In *Naylor v. Township of Hellam*,[55] the Supreme Court of Pennsylvania recently held that a temporary moratorium on residential subdivision and land development, adopted by the Township of Hellam in the absence of express state enabling legislation, was invalid as an improper exercise of municipal power under Pennsylvania law. The court recognized that "zoning enabling legislation, as opposed to zoning ordinances themselves, must be liberally construed in order to effect its purposes,"[56] and the court expressly acknowledged its awareness that many other states have upheld the enactment of local temporary moratoria legislation in the absence of express enabling legislation.[57]

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51. *Id.* at 1468 (stating that the majority position was to require strict adherence to procedural notice and hearing requirements, except in the case of an emergency).

52. Toll Bros., Inc. v. W. Windsor Twp., 712 A.2d 266 (N.J. Super Ct. App. Div. 1998).

53. 409 So. 2d 1073 (Fla. Dist. Ct. App. 1981).

54. *See* Herrington v. City of Pearl, 908 F. Supp. 418 (S.D. Miss. 1995) (discussed *infra* at notes 134-135 and 162-163 and accompanying text). A moratorium is necessarily temporary, so the use of the term "temporary" to describe a moratorium is redundant and grating; however, the courts continue to use this particular modifier, so it occasionally appears in this article. *See, e.g., Tahoe-Sierra*, 535 U.S. at 302. *See also* CREED v. Cal. Coastal Zone Conservation Comm., 43 Cal. App. 3d 306 (Cal. Ct. App. 4th Dist. 1974) (standing in part for proposition that interim ordinances enacted to protect "priceless coastal resources" may be validly enacted without notice or public hearing).

55. 773 A.2d 770 (Penn. 2001).

56. *Id.* at 774.

57. *Id.* at 777.

Nevertheless, the court interpreted the Pennsylvania municipal land planning enabling statute as delegating to municipalities the power to carry out comprehensive planning and zoning, but not the power to enact moratoria.[58] In an eight-to-one decision, the Pennsylvania Supreme Court held that moratoria ordinances are separate and distinct from zoning ordinances and not necessarily incidental to the effectuation.[59]

Some courts have distinguished moratoria ordinances prohibiting certain uses from those that prohibit or limit the issuance of permits. The Supreme Court of Virginia held that the power to zone under the general police power did not include the power to enact an ordinance imposing a moratorium on the filing of site plans and preliminary subdivision plats.[60] The court held that such a moratorium was more akin to a "ministerial" subdivision regulation than a zoning ordinance.[61] In *Building Industry Legal Defense Foundation v. Superior Court*,[62] a California appellate court invalidated a city ordinance that suspended the formal processing of development applications on the grounds that the zoning power to establish uses did not include the power to suspend processing development applications, particularly where those application procedures were set forth in state statutes.

Municipalities adopting moratoria by resolution, rather than by ordinance, sometimes have had problems in the courts. In *Bittinger v. Corporation of Bolivar*,[63] a town council adopted a resolution placing a 90-day moratorium on the issuance of building permits. The Supreme Court of West Virginia concluded that a moratorium on the issuance of building permits was not a zoning ordinance, stating that "the distinguishing factor between the two types of permits is that a building permit involves how that use is undertaken, while a zoning permit concerns whether a certain area may be used for a particular purpose."[64] The court held that under state law a moratorium resolution cannot amend a building ordinance.[65] The Minnesota Supreme Court employed similar reasoning to strike down a "hold order" on the issuance of building permits in *Alexander v. Minneapolis*.[66] The court held that the

58. *Id.*

59. *Id.* at 777. *See also* L.S. Fletcher, et al. v. Porter, 452 Cal. App. 1962 (Cal. App. 1st Dist. 1962) (holding that an ordinance freezing growth or development is distinguishable from "zoning ordinances," which affect allowable land uses).

60. *See* Bd. of Supervisors v. Horne, 215 S.E.2d 453 (Va. 1975).

61. *Id.* at 459.

62. 85 Cal. Rptr. 2d 828 (Ct. App. 1999).

63. 295 S.E.2d 554 (W.Va. 1990).

64. *Id.* at 558.

65. *Id.* at 558-59.

66. 125 N.W. 2d 583 (Minn. 1963) (acknowledging that municipality had the power to zone but refusing to infer from that power the power to indefinitely suspend application of zoning ordinance).

power to zone did not include the power to suspend the application of a zoning ordinance by operation of a moratorium resolution, where there was no express grant of that power.[67]

In an interesting twist on the "court strikes down the moratorium as not a zoning ordinance" theme, the City of Indianapolis tried to defend a resolution requesting a temporary freeze on the issuance of permits for off-track betting facilities by arguing in part that the resolution was merely a request to its building department, and not a zoning ordinance that needed to be enacted with the formality of such ordinances.[68] The Federal District Court found that there was no enabling authority in any event for the moratorium in question.[69]

It is evident that courts are all over the landscape on the enabling issue. At one end you have the Pennsylvania *Naylor* court refusing to interpret general zoning legislation as allowing local governments to enact moratoria, and for the polar opposite you have a California appellate court stating, in *Metro Realty v. The County of El Dorado*, that reasonableness is the yardstick in determining the validity of a "stop-gap" zoning ordinance, rather than whether or not the local government has been enabled.[70] Most courts interpret the police power broadly, allowing local governments to enact what has been increasingly recognized as a mainstream planning and growth management tool.[71] However, it is important to note that some courts have refused to either find or imply the authority to enact moratoria, because many states do not have express enabling legislation, and many states have general zoning enabling statutes based on the Standard Zoning Enabling Act, which does not directly address growth management regulations or moratoria.[72]

### B. Duration of the Moratorium

How long is too long? This is an enduring but not endearing question in moratorium cases. *Tahoe-Sierra* held that duration was a necessary consideration in moratoria cases, but this was nothing new. Courts interpreting the validity of moratoria have always considered

67. *Id.*

68. Sagamore Park v. City of Indianapolis, 885 F. Supp. 1146 (S.D. Ind. 1994).

69. *Id.*

70. 35 Cal. Rptr. 480, 485 (Ct. App. 1963).

71. *See, e.g.*, Bradfordville Phipps Ltd. v. Leon County, 804 So. 2d 464, 470 (Fla. Dist. Ct. App. 2001) (citing Keshbro, Inc. v. City of Miami, 801 So. 2d 864, 874 (2001) (both cases citing Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000) in dicta regarding the importance of planning and the role of moratoria as a valuable tool).

72. *See generally*, DANIEL R. MANDELKER, LAND USE LAW 79 (2003).

duration, whether under the umbrella of weighing the individual burden and expectations against the public purpose under *Penn Central* or otherwise.

In the frequently-cited case of *Woodbury Place Partners v. Woodbury*,[73] the Minnesota Court of Appeals held there was no facial taking in the adoption, under a state statute, of a two-year moratorium on acceptance or consideration of subdivisions, site plans, or rezonings of undeveloped areas adjacent to a highway. The moratorium was to preserve a potential highway corridor for acquisition following a planning process. Despite the partnership's stipulation that the moratorium would temporarily deny all economically viable use of the property for two years,[74] the court found no *Lucas*-type categorical taking:

> We interpret the phrase "all economically viable use for two years" as significantly different from "all economically viable use" as applied in *Lucas*. The two-year deprivation of economic use is qualified by its defined duration...."All economically viable use from March 23, 1988 to March 23, 1990" [the language from the stipulation] recognizes that economic viability exists at the moratorium's expiration.[75]

This is an important point—courts consistently have held that *Lucas* does not dictate that a moratorium on all use is necessarily a taking because a moratorium is usually for a defined, short period.[76] *Woodbury Place Partners* also foreshadowed the result in *Tahoe-Sierra*.

On remand, a California appellate court held in *First English* that a delay of more than two years was not unreasonable.[77] In *Williams v. City of Central*, the Colorado Court of Appeals analyzed the remands in *First English*, *Agins*, and *Woodbury Place Partners*:

> [A]n interim regulation prohibiting construction or development is not a temporary taking even if such restrictions would be held too onerous to survive scrutiny had they been permanently imposed. Absent extraordinary delay, fluctuations in value that occur during a temporary

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73. 492 N.W.2d 258 (Minn. Ct. App. 1992).

74. *Id.* at 260.

75. *Id.* at 261. *Accord* Williams v. City of Central, 907 P.2d 701 (Colo. Ct. App. 1995) (no taking by 10-month interim gaming moratorium).

76. The pre-*Tahoe-Sierra* cases, with very few exceptions, bear this out. *See, e.g.*, Williams v. City of Central, 907 P. 2d 701 (Colo. Ct. App. 1995) (stating no categorical taking on grounds that moratorium was temporary).

77. First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893 (Ct. App. 1989) (interim ordinance not a taking).

> moratorium enacted to effect the process of governmental decisionmaking are, simply, incidents of ownership.[78]

How long is too long will generally depend upon the reason for the moratorium, as discussed in the following subsection.[79] An emergency moratorium, enacted without the general notice and hearing procedural safeguards, should last only so long as is required to give the notice, have the hearing, and properly enact the permanent fix.[80] At the same time, there are some oddities where long moratoria survived challenge: a Maryland appellate court found that an eight-year sewer moratorium on development in most of the county was not a taking;[81] a Washington state appellate court found that a six-year moratorium on building pursuant to a state forestry statute was valid;[82] and, in one New York county, a moratorium on sewer extensions including main line extension permits remained in effect for approximately ten years, by state order.[83] Again, it appears that a compelling governmental purpose makes a long duration reasonable.

The courts readily approve short moratoria. In *Kawaoka v. City of Arroyo Grande*,[84] a one-year water moratorium on certain development applications was upheld by the Ninth Circuit as not violative of substantive due process and equal protection. That court stressed that, even if it could be argued that the moratorium delayed development of property for a year, such a short-term delay does not rise to constitutional dimensions.[85] In a similar decision, the Maryland Court of Appeals found that a nine-month moratorium to revise a comprehensive plan and a zoning plan was not unreasonable.[86] The court held that "there is nothing in *First English* which alters the established principle

78. *Williams*, 907 P.2d at 704 (citing *First English*, 258 Cal. Rptr. 893; *Agins*, 157 Cal Rptr. 375).

79. *See, e.g.*, Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Com., 486 A.2d 330, 333 (N.J. 1985) (relationship between purpose and duration of moratoria bears heavily upon reasonableness).

80. Schoeller v. Bd. of County Comm'rs of County Park, 568 P.2d 869 (Wyo. 1977).

81. Offen v. County Council of Prince George's County, 625 A.2d 424, 435 (Md. App. 1993) (all economically viable uses are not prohibited), *rev'd on grounds unrelated to the withdrawn constitutional takings claim*, County Council of Prince George's County v. Offen, 639 A.2d 1070 (Md. 1994).

82. Ord v. Kitsap County, 929 P.2d 1172 (Wash. Ct. App. 1997).

83. HBP Assocs. v. Marsh, 893 F. Supp. 271, 278 (S.D.N.Y. 1995) (rejecting a property owner's claim for compensation on ripeness grounds). The moratorium was in effect from 1986 until it was lifted in accordance with a Permit Modification issued by the New York Department of Environmental Conservation on January 18, 1996.

84. 17 F.3d 1227 (9th Cir. 1994) (evidence of irrationality, racial discrimination insufficient).

85. *Id.* at 1237. *See also* Mont Belvieu Square, Ltd. v. City of Mont Belvieu, 27 F. Supp. 2d 935 (S.D. Tex. 1998) (upholding six-month planning moratorium on similar grounds).

86. S.E.W. Friel v. Triangle Oil Co., 543 A.2d 863 (Md. Ct. Spec. App. 1988).

that the interim burden imposed on a landowner during the government's decisionmaking process, absent unreasonable delay, does not constitute a taking...."[87]

In *Meadowland Regional Development Agency v. Hackensack Meadowlands Development Commission*,[88] the New Jersey superior court for the appellate division went so far as to hold that a *26-month* development freeze on the use of ten thousand acres of land in the Hackensack Meadowlands was not unreasonable while the commission prepared and adopted a master plan. In *Metro Realty v. The County of El Dorado*,[89] a California court of appeals held that a one-year ban on residential construction in certain parts of a county, which could be extended for two additional years, was reasonable while the county worked on a water supply conservation plan. That said, the Wyoming Supreme Court held that a five-year moratorium on development in unzoned areas of a town, designed to protect the status quo while the local government engaged in comprehensive planning studies and activities, was too long, particularly where it appeared to the court that the local government had not been "diligent" in creating or adopting such a plan.[90]

In *Santa Fe Village Venture v. City of Albuquerque*,[91] the Albuquerque City Council adopted a property acquisition policy and building moratorium for one year for private properties located within the Petroglyph National Monument. The Council extended the moratorium for six months and then for another year.[92] The time limits were carefully crafted to follow the anticipated periods for Congress to act on legislation creating the Petroglyph National Monument, and during the last year of the moratorium all property owners who applied for building permits were assured of approval within 12 months from the date of application.[93] The court found no taking had occurred.[94]

Courts sometimes uphold open-ended moratoria. In *Metropolitan Dade County v. Rosell Construction Corp.*,[95] a Florida appellate court

87. *Id.* at 867 (citing Guinnane v. County of San Francisco, 241 Cal. Rptr. 787 (Ct. App. 1987).

88. 293 A.2d 192 (N.J. Super. Ct. App. Div. 1972).

89. 35 Cal. Rptr. 480 (Ct. App. 1963).

90. *Schoeller*, 568 P.2d at 879. *See also* STEVEN J. EAGLE, REGULATORY TAKINGS § 4-10(b), at 33 (2d ed. & Supp. 2002) (citing to the Florida trial court decision in Shadek v. Monroe County Bd. of County Comm'ns, No. CAP95-398 (Fl. Cir. Ct. July 17, 2001) as holding that a series of rolling moratoria prohibiting development for eight years violated the takings clause).

91. 914 F. Supp. 478, 480 (D.N.M. 1995).

92. *Id.*

93. *Id.*

94. *Id.*

95. 297 So. 2d 46 (1974). *See also* CREED v. Cal. Coastal Zone Conservation Comm., 43 Cal. App. 3d 306, 320-21 (Cal. Ct. App. 4th Dis 1974) (distinguishing interim development

upheld a temporary freeze on the issuance of all building permits for any construction that would connect into the North Miami Ocean Outfall System. The county pollution control officer determined that there was an inadequate safety margin available within the system to deal with surge pressures in the North Dade sewerage line, and the permitting ban was to be in effect until that deficiency could corrected.[96] Similarly, a Texas appeals court upheld a resolution prohibiting the issuance of building permits within a historic district until such time as the historic district planning process was "resolved."[97]

In *Associated Home Builders of Greater East Bay, Inc. v. City of Livermore*,[98] the city enacted a zoning ordinance prohibiting the issuance of building permits until school overcrowding was relieved. The California Supreme Court upheld the ordinance even though it did not specifically define "overcrowded," where the ordinance could be read as incorporating local school district standards regarding overcrowding.[99] A California appellate court refused to invalidate a moratorium on water service connections that was to remain in effect "until additional water sources [were] developed and/or an adequate supply [was] demonstrated to the satisfaction of the Department."[100]

Not all courts have upheld open-ended moratoria. In *Deal Gardens, Inc. v. Board of Trustees of Village Loch Arbour*,[101] the New Jersey Supreme Court held that an open-ended moratorium had continued beyond the point where the reason for the purpose behind the moratorium supported the restriction. The *Deal Gardens* court stated, "One of the more dangerous aspects of this type of legislation arises from the damage which may result if there is no restriction of the period of time during which a restraint against some land use is permitted to continue. Plainly there must be some terminal point."[102] The court then found that a moratorium, enacted to maintain the status quo during a planning and zoning study period, had exceeded a reasonable duration where two years had elapsed since the adoption of the moratorium. The court held that two years was more than enough time for the town to meet its planning and zoning needs.[103]

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restriction that will terminate upon the formulation of a Coastal Zone Plan from zoning regulations that permanently restrict development, or do so for an "indefinite" period of time).

96. *Metro. Dade County*, 297 So. 2d at 47.

97. Dallas v. Crownrich, 506 S.W.2d 654, 656 (Tex. App. 1974).

98. 557 P.2d 473 (Cal. 1976).

99. *Id.* at 482.

100. Gilbert v. California, 266 Cal Rptr. 891, 893 (Ct. App. 1990).

101. 226 A.2d 607 (1967).

102. *Id.* at 611.

103. *Id.* at 612. *See also* Union Oil Co. v. Morton, 512 F.2d 743, 750-52 (9th Cir. Cal. 1975) (moratorium may be a taking when imposed without specifying when it will end).

The case of *Steel v. Cape Corp.*[104] is not expressly a moratorium case but is of interest because the effect of a town's failure to rezone a landowner's property was to prohibit the landowner from developing that property, at least in the short term. In *Steel*, the Anne Arundel County Commissioners denied a property owner's application to rezone its land from open space to residential, which would make it more valuable.[105] The property was previously rezoned from a residential classification to open space in 1973 on petition from an association that had no legal interest in the property. Five years later the actual owner, Cape Corporation, discovered the downzoning. The county recognized its mistake and said it would rezone it to residential in a 1987 comprehensive rezoning.[106] It did not.[107] Cape Corporation petitioned for the rezoning in 1993, but the county refused to do it because the schools were not adequate to serve the residential use.[108] The most optimistic estimate was that the schools would not be adequate for six years.[109] The court found an as-applied regulatory taking based on the minimum delay of six years.

The short summary of the law as to duration is that there is no set defensible duration—the test is reasonableness.[110] Six months for a general planning "pause" seems acceptable if not followed by more moratoria of the same type. Planning moratoria of up to two or three years may be acceptable, depending upon the complexity of the issues involved, and so long as the local government is diligently pursuing its planning objectives. Still longer moratoria may be defensible to deal with more serious problems, like utility matters, or matters that have been targeted by a state legislature in express enabling legislation. The acceptable duration is going to be in large part a function of the purpose behind the moratorium, to which we now turn.

### C. Public Interest Intended to Be Served

Along the way we have identified several valid public purposes for moratoria, which we will not further review. Here we discuss cases that were decided largely on the question of public interest. Keep in mind that whether or not a public interest will support a particular moratorium cannot be determined in a vacuum, and, even before *Nollan* and *Dollan*, factors affecting the essential nexus between the moratoria

104. 677 A.2d 634 (Md. Ct. Spec. App. 1996).
105. *Id.* at 635-36.
106. *Id.*
107. *Id.*
108. *Id.* at 634.
109. *Id.* at 643, n.19.
110. *See, e.g.*, Metro Realty v. County of El Dorado, 35 Cal Rptr. 480 (Ct. App. 1963).

and the public interest or factors bearing upon the necessary degree of regulation were considerations.

Many courts have upheld the enforcement of moratoria as valid "stop-gap" measures during the land planning process, generally on the grounds that maintaining the status quo and preventing poorly thought out development during the planning and study periods is legitimate.[111] An 18-month moratorium on developing parcels of two or more acres, giving the community time to develop a plan to preserve scarce land for affordable housing, is not a taking.[112] A four-month moratorium on special use applications is permissible when used during development of a new plan and regulations for quarries.[113] A three-month moratorium on the issuance of hazardous waste permits to allow for planning is valid,[114] as is a moratorium on the issuance of fast-food permits within a given district, until a pending historic preservation ordinance is adopted.[115] Note, however, that, in *City of Glenn Heights v. Sheffield Development Co.*,[116] a Texas court struck down a planning moratorium as no longer substantially advancing a legitimate state interest, where the planning and zoning study period had ended and the city council could not get the required votes to adopt the study.

An emergency prohibition or repeal was upheld in *216 Sutter Bay Ass'n v. County of Sutter*[117] on a unique set of facts. In 1989, the Board of Commissioners for rural Sutter County in the Sacramento metropolitan area began studying the possibility of creating four new towns "sprouting from 25,000 acres of farmland" within the county.[118] At the end of 1991, the commissioners voted to adopt their study, the General Plan Amendment (GPA), as part of, or in place of, the existing county plan.[119] Under a referendum procedure, concerned citizens collected enough signatures to put the question of the GPA to a vote of the county residents. Before that vote could take place, interim commissioner elections were held, and some members of the board were replaced.[120] The new board members were to take office in January of

111. *See, e.g.*, Friel v. Triangle Oil Co., 543 A.2d 863 (Md. Ct . Spec. App. 1988).
112. Tocco v. N.J. Council on Affordable Housing, 576 A.2d 328 (N.J. Super. Ct. App. Div. 1990).
113. Nello L. Teer Co. v. Orange County, 1993 U.S. App. LEXIS 12525 (4th Cir. 1993).
114. Tenn. *ex. rel.* SCA Chemical Waste Servs., Inc. v. Konigsberg, 636 S.W.2d 430 (Tenn. 1982).
115. A. Copeland Enterprises, Inc. v. City of New Orleans, 372 So. 2d 764 (La. Ct. App. 1979).
116. 61 S.W.3d 634 (Tex. App. 2001).
117. 68 Cal Rptr. 2d 492 (Ct. App. 1997).
118. *Id.* at 494.
119. *Id.*
120. *Id.* at 495.

1993.[121] During December of 1992, the outgoing majority on the board approved 19 development agreements under the GPA, which were to vest several days after the new board took office.[122] Upon taking office, the new majority immediately instituted a temporary repeal or hold of 45 days on the vesting of the development agreements until the new board could repeal them.[123] This emergency ordinance was upheld on the grounds that the development agreements under the GPA, if they had vested, would have posed an immediate threat to the public health, safety, and welfare, in that they would have altered the community and the way of life in Sutter County in a "radical and fundamental manner."[124]

The need to balance growth can support a moratorium. In *Collura v. Town of Arlington*,[125] the town of Arlington, Massachusetts, enacted a two-year moratorium on the construction of apartment buildings in a certain district, in order to give the town time to amend its comprehensive plan. The evidence in the record showed that in the decade leading up to the moratorium, 68 percent of all construction within the moratorium district had been apartment construction, as compared to 17 percent in the previous decade.[126] The Massachusetts Supreme Judicial Court stated that the test for enforceability was "whether there is 'any substantial relation between the amendment and the furtherance of any of the general objectives in the enabling act.'"[127] The Court found such a substantial relation and held that the purpose was therefore legitimate.[128]

In one of the earliest growth management cases, the Ninth Circuit upheld a five-year ceiling on residential development in the San Francisco suburb of Petaluma, finding that the "exclusion" bore a rational relationship to a legitimate state interest—namely, the City's "desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."[129] Furthermore, in *Sturges v. Chilmark*,[130] a town on Martha's Vineyard enacted an ordinance establishing a de facto moratorium to slow residential growth for a period of ten years to protect the rural character

121. *Id.*
122. *Id.*
123. 216 Sutter Bay Assoc. v. County of Sutter, 68 Cal Rptr. 2d 492, 495 (Ct. App. 1997).
124. *Id.* at 497.
125. 329 N.E.2d 733 (Mass. 1975).
126. *Id.* at 739.
127. *Id.* at 737 (quoting Lanner v. Bd. of Appeal of Tewksbury, 202 N.E.2d 777, 783 (Mass. 1964)).
128. *Collura*, 329 N.E.2d at 780-81.
129. Constr. Indus. Assoc. v. Petaluma, 522 F.2d 897, 909 (9th Cir. 1975).
130. 402 N.E.2d 1346 (Mass. 1980).

of the town. The Massachusetts Supreme Judicial Court noted that the Town of Chilmark was decidedly rural and acknowledged that this type of growth management ordinance was typically used to stem growth and to preserve rural character in expanding metropolitan areas.[131] Nevertheless, the court, relying in part on its earlier decision in *Collura*, upheld the ordinance, citing the "unique and perishable qualities" of Martha's Vineyard.[132]

The amazing expansion of the gaming industry in recent years has created not only political, social, and economic turmoil and some windfalls for both the public and private sectors, but also an interest in moratoria. The city of Central, Colorado, imposed a moratorium on development in the gaming district to study growth induced by the industry. This moratorium was held not to be a temporary taking absent "extraordinary delay."[133]

At least one temporary moratorium aimed at enhancing economic value and encouraging diversity of commerce has been upheld. In *Herrington v. City of Pearl*,[134] a federal court in Mississippi upheld a four-year moratorium on mobile home establishments aimed at overcoming what the city perceived to be a "negative image arising from its unwanted reputation as the 'Home-of-the-Double-Wides' and the 'Mobile Home Sales Capitol.'"[135]

In a unique example of a court upholding a moratorium effectively aimed at a single developer, the Wyoming Supreme Court sustained a building permit freeze placed on a single subdivision to protect downstream residential owners from serious and significant erosion problems.[136] The City of Cheyenne placed a temporary hold on the issuance of building permits within a particular hillside subdivision, after the developer of that subdivision had repeatedly refused to comply with city erosion and runoff regulations.[137] The development of that subdivision had dramatically increased runoff onto the properties of downstream landowners, causing significant flooding.[138] The court agreed that the permitting freeze was necessary, given the developer's failure to comply with erosion and runoff regulations.[139]

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131. *Id.* at 253-54.

132. *Id.* at 255. *See also* W.J.F. Realty Corp. v. Town of Southampton, 261 A.D.2d 609 (N.Y. App. Div 2d Dep't 1999) (New York appellate court upholding a moratorium on development during preparation of a generic environmental impact statement for one of the largest remaining undeveloped tracts in the Pine Barrens).

133. Williams v. City of Central, 907 P.2d 701.

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

135. *Id.* at 421.

136. Sun Ridge Dev. v. Cheyenne, 787 P.2d 583 (Wyo. 1990).

137. *Id.* at 590.

138. *Id.*

139. *Id.*

The protection of the public safety has been held to constitute a "preeminent" state interest and clearly stands as a valid purpose in support of moratoria. On remand in *First English*,[140] a California appellate court held that a permanent or temporary moratorium designed to protect life and property, by prohibiting the construction or reconstruction of any buildings in a flood-prone canyon after a disastrous flood, could not constitute a taking.[141]

Before moving on to discuss the burden on the landowner in the next subsection of this article, it is helpful to take a quick look at a few cases in which courts have examined the nexus between the moratoria adopted and the purposes proffered as justification.

Nexus is essential to a defensible moratorium. Without a supportable connection between the governmental objective and the moratorium, the risk that the moratorium will be invalidated is great. In *Seawall Associates v. City of New York*,[142] the City instituted a five-year moratorium on the conversion, alteration, and demolition of certain affordable residential apartment units, for the stated purpose of alleviating homelessness by increasing, or at least maintaining, the low-income housing stock.[143] The moratorium was struck down for several reasons, one of which was that the nexus between the moratorium and the stated purpose was found to be tenuous, in that maintaining or even increasing the supply of affordable units did not necessarily address the homeless situation.[144]

In a New Jersey case decided prior to *Nollan* and *Dolan*, a trial court struck down a 180-day moratorium that temporarily prohibited the construction of multi-family dwelling units and the conversion of motels into condominiums, while the township studied the adequacy of the public water supply.[145] The court held that there was insufficient evidence on the record to show that the moratorium as enacted had any "real, legitimate and substantial relationship" to the accomplishment of the stated objective.[146] The court also failed to understand why commercial uses such as car washes and laundromats were excluded

140. First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893 (Cal. App. 2d Dist. 1989).

141. *Id.* at 898.

142. 74 N.Y.2d 92 (1989) (the moratorium had several additional restrictions and was struck down for a number of reasons in addition to those set forth herein).

143. *Id.* at 110.

144. *Id.* at 111-12.

145. New Jersey Shore Builders Assoc. v. Township Comm. of Dover, 468 A.2d 742 (N.J. Super. Ct. 1983).

146. *Id.* at 744 (no evidence that expert testimony was ever considered regarding water users and water supply).

from the moratorium if the purpose was to conserve water while studying the local water supply.[147]

Where the nexus is strong, the moratorium will survive. In *Gilbert v. State of California*,[148] a California appellate court relied upon *Nollan* in support of its decision to uphold a moratorium on water service connections. A state agency conditioned the issuance of an operating license to a district water supply plant upon the district's continuation of its moratorium on water service connections.[149] The court held that the moratorium substantially promoted the valid public health purpose of ensuring a continuous supply of potable water.[150]

In *Associated Home Builders of Greater East Bay, Inc. v. City of Livermore*,[151] decided 11 years before *Nollan*, the California Supreme Court found that although a building permit freeze might have a chilling effect on immigration into the City of Livermore, the ordinance did not need to be supported by a compelling state interest.[152] The court held that the ordinance—designed to buy the city time to address school overcrowding problems—was valid as "reasonably related to the welfare of the local region affected by the ordinance."[153]

A court is more likely to uphold a moratorium where there is a direct connection to protecting the public's health and safety.

### D. Burden on the Private Property Owner

The U.S. Supreme Court has long recognized that land use regulations do not effect a taking if they substantially advance legitimate state interests and do not deny property owners all economically viable use of land.[154] Therefore, the initial analysis of the burden on the landowner for our purposes generally focuses on whether or not the moratorium deprives a landowner of all economic use.

For example, as we saw earlier in *Steel v. Cape Corp.*,[155] the rezoning denial, which effectively prohibited all development for at least six years, was an as-applied taking. Similarly, in *Seawall* the court struck down prohibitions on single room occupancy conversion largely because

147. *Id.* at 745.
148. 266 Cal. Rptr. 891 (1990).
149. *Id.* at 894.
150. *Id.* at 903.
151. 557 P.2d 473 (1976).
152. *Id.* at 476.
153. *Id.*
154. *See* Nollan v. California Costal Commission, 483 U.S. 825, 834 (1987).
155. 677 A.2d 634 (Md. Ct. Spec. App.1996).

the "voluntary" buyout provisions virtually proved how onerous the burden was for the property owner.[156]

*Steel* and *Seawall*, however, illustrate the exception rather than the rule, and neither was clearly decided as a moratorium case. In moratorium cases, the temporary nature of the restriction generally leads to the conclusion that the burden on the affected private party is not so great as to cause a taking.

Typical of the moratorium cases is *Metro Realty*, in which a state appellate court found that the burden imposed upon a landowner, as a result of the county's residential construction moratorium during a countywide water resources and conservation study, even if it lasted three years, was temporary, and therefore like hardships imposed by many valid exercises of the police power.[157] The *Metro Realty* court further held that, even if the plaintiff's property were later taken by the county to be part of its new reservoir, the law of eminent domain would require appropriate compensation at that time.[158] Likewise, in *City of Glenn Heights v. Sheffield Development Co.*, the Texas appellate court emphasized that "[d]etermining whether all economically viable use of a property has been denied [by a government regulation] entails a relatively simple analysis of whether the property has any value after the governmental action."[159] In yet another case, a Florida appellate court, having observed that "a truly temporary land use injunction or moratorium looks more like a permitting delay than a compensable regulatory taking,"[160] relied upon the Ninth Circuit decision in *Tahoe-Sierra* to maintain that there is no temporary taking by the enactment of a development moratorium, where the future use of the property has a substantial present value.[161]

Sometimes any burden is offset by benefits or there is no legally cognizable interest. In *Herrington v. City of Pearl*, the ban on mobile home sales establishments in Pearl, Mississippi, was held not to deny a landowner of all economic value in his property, where it was shown the value of the land subject to the moratorium increased significantly during the moratorium.[162] The court in *City of Pearl* also held the

156. Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1068 (N.Y. 1989). Note that in *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291 (N.Y. 1972), the highest court in New York upheld a moratorium with a capital improvement buyout provision where the purpose of the growth management ordinance was to tie the rate of growth to the rate of capital improvements.

157. Metro Realty v. El Dorado County, 35 Cal. Rptr. 480, 486-87 (Cal. Ct. App. 1963).

158. *Id.* at 486.

159. 61 S.W.3d 634, 647 (2001).

160. Bradfordville Phipps Ltd. v. Leon County, 804 So. 2d 464, 471 (Fla. Dist. Ct. App. 2001).

161. *Id.*

162. Herrington v. City of Pearl, 908 F. Supp. 418, 424-25 (S.D. Miss. 1995).

landowner could not have been burdened by the regulation in any event, because the government made no final determination that the moratorium affected the landowner's property.[163] In a case turning on the lack of a protected interest, the Seventh Circuit held that the owner of an option to purchase property could not have been burdened by a moratorium on siting of landfills because an option is not an interest protected by the takings clause.[164]

A final case deserves mention in this subsection because it illustrates how state tests may vary from the federal. In *Nolen v. Newtown Township*,[165] the township of Newtown, Pennsylvania, enacted an ordinance prohibiting the subdivision of land for 18 months, while the township reviewed its subdivision ordinance. An owner of two parcels in the township challenged the ordinance on takings grounds. The Pennsylvania Court of Common Pleas reconsidered several of the Township's objections in light of the Ninth Circuit's decision in *Tahoe-Sierra*, which came down while *Nolen* was pending.[166] The court then concluded that the decision in *Tahoe-Sierra* (holding no taking) did not affect its determination that Newtown's moratorium did cause a taking because the federal standard for the categorical taking under *Lucas* was relaxed under Pennsylvania law to allow finding a taking where a regulation has "substantially deprived the owner of the beneficial use of his property."[167] The court explained that *Tahoe-Sierra* was not dispositive as to whether the moratorium constituted a taking under Pennsylvania law.[168]

### E. Extent of Other Economic Uses of the Property During the Moratorium

The pre-*Tahoe-Sierra* cases generally held that a regulation does not effect a categorical taking if it does not deprive a landowner of all economically viable use and that a temporary moratorium is not a categorical taking because it does not take all use. However, a moratorium may be a partial taking under *Penn Central* when the regulation goes "too far" and the diminution in value is great. On the other hand, if property values rise during a moratorium, or if there are alternative viable uses of the property available during a moratorium,

163. *Id.* at 423 (distinguishing the finality requirement, where there has yet to be a determination inflicting an injury, from the exhaustion requirement, where there has yet to be a final adjudication of such a determination).
164. Pro-Eco, Inc. v. Bd. of Comm'rs, 57 F.3d 505 (7th Cir. Ind. 1995).
165. 55 Pa. D. & C. 4th 548 (2001).
166. *Id.*
167. *Id.* at 550.
168. *Id.*

the burden on a property owner is not excessive when balanced against a legitimate public purpose furthered by the moratorium.

In *Golden Valley Lutheran College v. City of Golden Valley*,[169] a one-year moratorium on all development was held not to cause a taking under either the *Lucas* categorical test—because the property had value at the end of, and could be put to beneficial use during, the moratorium—or the multifactor balancing test for partial takings set forth in *Penn Central*.[170]

Economic use depends upon the character of the property and its intended use. The final decision on remand in *First English*, twice referred to earlier, holding that a delay of more than two years was not unreasonable,[171] is largely unknown because it was not newsworthy. Most people figure that the church won its case in the Supreme Court. It did not—what it won was the right to plead for money damages as compensation. In the end the case never went to trial because the church lost on the pleadings—there was enough residual use in the church camp to avoid even a temporary partial taking claim.[172] The campers could camp, even though the church could not rebuild during the moratorium. Camping is a valuable use at a camp.

Even a limited use can save a moratorium. In *Merriam Gateway Ass'n v. Town of Newton*,[173] a truly hapless developer purchased a former shoe factory in 1983 with the intent of converting it into 100 residential condominium and commercial units. The developer proceeded with the project in 1987 after learning that a sewer moratorium had been lifted.[174] Construction began in March 1988 and final site plan approval was granted in December 1988.[175] Just three months later, when the project was about 80 percent complete, the developer learned that the New Jersey Department of Environmental Protection (NJDEP) had reimposed the sewer moratorium almost two years earlier and, accordingly, no certificates of occupancy could be issued.[176] The developer, in claims against its architects, engineers, and law firms for malpractice and breach of contract and against the town of Newton, alleged more than

169. 1994 Minn. App. LEXIS 92 (Jan. 25, 1994).

170. 438 U.S. 104 (1978).

171. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353 (1989) (interim ordinance not a taking).

172. *Id.* at 1356. *See also* Oaks v. Montague Township, 2001 Mich. App. Lexis 1839 (2001) (upholding moratorium on building permits until such time as adequate drinking water supply could be made available, in part because developer could continue to use or sell the existing single family residence on the site, which was valued at over $700,000).

173. 1992 U.S. Dist. LEXIS 21562 (D.N.J. June 1, 1992), *aff'd*, 91 F.3d 124 (3d Cir. 1996). The hapless developer is of no relation to Dwight H. Merriam.

174. *Id.* at *2.

175. *Id.*

176. *Id.*

$13 million in damages.[177] The federal trial court held that the developer had failed to state a Fifth Amendment takings claim because it did not contend that the property had been rendered useless.[178] The town had received a special concession from the NJDEP during the moratorium and had secured hook-ups for 16 units (with other units served by hauling sewage to another treatment facility), and when the ban was lifted in November 1990, the plaintiff had been free to pursue the project, though he did not.[179]

The importance of reasonable and beneficial economic uses remaining during a moratorium repeatedly arises. In *Collura v. Town of Arlington*, the Massachusetts Supreme Court found it significant that a two-year moratorium on apartment building construction did not prohibit all uses within the moratorium district.[180] Recall also that the city of Pearl, Mississippi, adopted a two-year moratorium on locating new mobile-home sales establishments.[181] The owner of two parcels sued, claiming a taking and seeking injunctive relief to permit him to place mobile-home sales establishments on his parcels.[182] During his deposition, the owner conceded that there were other uses for his properties during the moratorium even though he did not believe they were as profitable as leasing them for mobile-home sales establishments.[183] The plaintiff also acknowledged that he had paid $250,000 for one of the properties that was appraised for $825,000 in 1990.[184] He also testified that although he could not remember what he paid for the other parcel, it was appraised at $750,000 at the time of his deposition, which was taken just after the end of the moratorium.[185] In finding no taking, the court held that, but for the restriction on using his land for a mobile home sales establishment, the landowner had the whole "bundle" of rights available to him, and, "[w]here an owner possesses a full 'bundle' of rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in the entirety."[186]

Lake Tahoe controversies have spawned many lawsuits, not just the one recently decided by the U.S. Supreme Court. In *Kelly v. Tahoe*

177. *Id.* at *3.
178. *Id.* at *10.
179. *Id.* at *9-10.
180. Collura v. Town of Arlington, 329 N.E.2d 733, 737 (Mass. 1975).
181. Herrington v. City of Pearl, 908 F. Supp. 418, 420-21 (S.D. Miss. 1995).
182. *Id.* at 420.
183. *Id.* at n.10.
184. *Id.*
185. *Id.*
186. *Id.* at 425 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496 (1987)).

*Regional Planning Agency*,[187] a property owner at Lake Tahoe was unable to further develop his property for over 13 years. Thereafter, new regulations greatly reduced the property's development potential.[188] The Nevada Supreme Court found no taking and held that the Tahoe Regional Planning Agency (TRPA) could postpone building in critical areas for a "reasonable period of time" so long as the "benefit received by the property from the ordinances is *direct and substantial* and the burden imposed is *proportional*."[189] The court noted that the owner had paid $500,000 for his property, lived in the main house for almost 20 years, and sold the main house alone for $1.1 million.[190] He had also received another $5.6 million from prior sales of parcels in the planned unit development.[191]

Another relevant TRPA takings case is *Carpenter v. Tahoe Regional Planning Agency*.[192] Alice Carpenter purchased a parcel at Lake Tahoe in 1973 for $27,950, recorded the deed in 1980, and decided to build a house in 1981. By then, an ordinance creating a case-by-case review for development in the basin was in place and a 1980 Compact between California and Nevada had replaced an earlier 1969 Compact.[193] The 1980 Compact was intended to establish "environmental carrying capacities" within the Lake Tahoe Basin "while providing for orderly and environmentally safe growth."[194]

On August 26, 1983, "the TRPA governing board temporarily suspended" all project permits.[195] In 1984, the TRPA passed the 1984 Regional Plan, which never took effect because the day it was adopted the attorney general of California filed suit alleging that the plan violated the 1980 Compact.[196] The two parties to the suit agreed to a settlement in 1987 with the adoption of the TRPA's 1987 Regional Plan.[197] It included several new elements, such as an Individual Parcel Evaluation System, a process for transfers of development rights, a system by which property owners could challenge the land capability classification of their parcels, and a provision for amending plans.[198]

Carpenter applied for a building permit in 1982, but she never received it because of the initial ordinance, effective June 25, 1981; a

187. 855 P.2d 1027, 1029-33 (Nev. 1993).
188. *Id.* at 1032.
189. *Id.* at 1035.
190. *Id.*
191. *Id.* at 1035 n.16.
192. 804 F. Supp. 1316 (D. Nev. 1992) (listing other TRPA-related takings cases).
193. *Id.* at 1319.
194. *Id.*
195. *Id.*
196. *Id.* at 1320.
197. Carpenter v. Tahoe Reg'l Planning Agency, 804 F. Supp. 1316, 1320 (D. Nev. 1992).
198. *Id.* at 1320-21.

moratorium on all new building that ran from August 29, 1983, through April 26, 1984; the 1984 Regional Plan; and the injunction brought on by the attorney general's suit (from April 27, 1984, through July 14, 1987).[199] Ultimately, she sold her lot to the state of Nevada in 1990 for $185,000 as part of the state's buyout program of environmentally sensitive Lake Tahoe area properties.[200]

Ruling on the TRPA's motions for summary judgment, the federal trial court ultimately held that Carpenter's taking claims for the period from June 25, 1981, through the end of the subsequent moratorium on April 26, 1984, were ripe because Carpenter had "done everything that she could have done to get a final answer to her building permit request," and she had "engaged in every procedure that might ultimately result in...[the granting of] a building permit."[201]

In the court's reasoning, *First English* required that the government compensate a landowner for a temporary taking if, during the period of land use restriction, the property owner was "deprived of all economically viable use of the land."[202] Carpenter, who had no existing permitted use, suffered such a deprivation.[203] "In other words, even if use of the property is eventually restored to the owner, the owner can still sue for a temporary taking."[204] The temporary prohibition and the temporary loss occurred; it was a taking and it must be compensated.[205] Thus, the fact that plaintiff sold her property should have no impact on any temporary taking claim, although the court allowed in a footnote that "[t]he result would probably differ in the case of a claimed permanent taking."[206]

The *Carpenter* court did not hold that *every* moratorium is a temporary taking; indeed, on the facts of the case no facial taking was found.[207] What the court did say is that if a long period of prohibited use includes a short time during which use is totally precluded by a moratorium, and there is no economically beneficial permitted use, then there is a temporary taking, and the property owner should be compensated—even if the property has value when it is subsequently sold.[208]

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199. *Id.* at 1323-25.
200. *Id.* at 1320.
201. *Id.* at 1323.
202. Carpenter v. Tahoe Reg'l Planning Agency, 804 F. Supp. 1316, 1327 (D. Nev. 1992).
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 1327 n.15.
207. *Id.* at 1325-26.
208. *Id.* at 1325-28.

### F. Availability of Local Administrative Relief

In *City of Pearl*, the Federal District Court in Mississippi distinguished the finality requirement (government must reach a final, determinative position) from the exhaustion requirement (state remedies must be pursued first).[209] A potentially successful challenge to an illegal moratorium is not ripe for judicial consideration where an applicant has not satisfied both the finality and the exhaustion requirements. Many of the reported moratorium cases have considered ripeness but offer little guidance on what is required for finality and exhaustion.

The New York State Legislature imposed a moratorium on development along Beaverdam Creek in the town of Brookhaven so the creek could be studied for possible inclusion in New York State's Wild, Scenic, and Recreational Rivers System.[210] The court dismissed a property owner's claim for just compensation on the ground that he had not exhausted administrative remedies and had, therefore, not established a regulatory taking.[211] The owner had not proven that he had applied for an exemption from the moratorium before filing suit.[212] The New York appeals court affirmed, stating that it could not consider the owner's takings claim without an adequate administrative record.[213] The state had not denied the property owner an exemption from the moratorium, so the owner had not yet been denied "an economically viable use of its land."[214]

Most courts recognize a futility exception to the finality or exhaustion requirements. In *Deal Gardens*, the Supreme Court of New Jersey noted generally it should decline to adjudicate an attack upon an ordinance where the applicant had not sought relief before a board of adjustment.[215] The court, however, held that the applicant's claim was ripe, because the moratorium precluded the issuance of permits and it would have been futile for the applicant to apply for one.[216] Some courts interpret the futility exception much more narrowly than others.[217]

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209. Herrington v. City of Pearl, 908 F. Supp. 418, 423 (S.D. Miss. 1995).
210. Timber Ridge Homes v. State, 637 N.Y.S.2d 179, 179 (N.Y. App. Div. 2d Dep't 1996).
211. *Id.* at 179.
212. *Id.*
213. *Id.*
214. *Id.*
215. Deal Gardens, Inc. v. Board of Trustees of Village Loch Arbour, 226 A.2d 607, 609 (N.J. 1967).
216. *Id.* at 610.
217. *See, e.g.*, Kinzli v. City of Santa Cruz, 818 F.2d 1449 (9th Cir. 1987) (cited in Zilber v. Town of Moraga, 692 F. Supp. 1195 (N.D. Cal. 1988), for the proposition that the futility exception to the finality doctrine was narrowly defined in the Ninth Circuit, in effect, forcing form over substance).

In *Bradfordville Phipps*, the Florida Court of Appeals went out of its way to find that a plaintiff's claim was not ripe.[218] Leon County, Florida, enacted a moratorium on certain development permits, pursuant to a court-ordered injunction.[219] The court dismissed the plaintiff's regulatory taking challenge to the moratorium on the grounds that the plaintiff never sought to have its property exempted from the coverage of the moratorium, and the plaintiff made no effort to intervene in the earlier lawsuit or to challenge the injunction pursuant to which the moratorium was enacted.[220]

Several cases illustrate how local administrative relief procedures might be added to ordinances to facilitate applicants and local governments meeting halfway without resort to the courts. In the landmark case of *Golden v. Planning Board of Ramapo*,[221] the challenged ordinance severely limited the issuance of building permits by conditioning the issuance of such permits upon the existence of requisite capital improvements.[222] The ordinance allowed landowners to expedite permit issuance by constructing improvements themselves.[223] Along the same lines, the ordinance in *Cottle Enterprises, Inc. v. Town of Farmington*[224] temporarily restricted the issuance of sewer hookup permits but expressly allowed for the installation of temporary septic systems in accordance with state guidelines, to be replaced upon the expiration of the moratorium. Likewise, in *Zilber v. Town of Moraga*,[225] the U.S. District Court for the Northern District of California held that an applicant's claim was not ripe where the applicant failed to seek a "status determination" under a moratorium ordinance. That determination would have established whether the applicant's property was subject to a ridge and hillside permitting moratorium.[226] These ordinances were upheld and can be contrasted with ordinances that do not provide exemption or clarification procedures, or ordinances, like that in the *Seawall* case, where the buyout provision itself evidenced the disparate burden placed upon certain landowners.[227]

218. Bradfordville Phipps Ltd. v. Leon County, 804 So. 2d 464 (Fla. Dist. Ct. App. 2001).
219. *Id.* at 466.
220. *Id.* at 467.
221. 285 N.E.2d 291 (N.Y. 1972).
222. *Id.* at 296.
223. *Id.* at 300-01.
224. 693 A.2d 330, 332 (Me. 1997).
225. 692 F. Supp. 1195, 1207 (N.D. Cal. 1988).
226. *Id.* at 1197.
227. See *supra* note 142 and accompanying text.

## III. *TAHOE-SIERRA* IN LIGHT OF PRIOR LAW

In *Tahoe-Sierra*, the Supreme Court affirmed six to three the Ninth Circuit's decision, with Justice Stevens writing for the majority that included Justices O'Connor, Kennedy, Ginsburg, Souter, and Breyer. Chief Justice Rehnquist wrote a dissent, joined by Justices Scalia and Thomas.

The decision is more limited than most government lawyers might wish. The Court held that a 32-month moratorium designed to save an important natural resource was not a facial or per se taking.[228] The Court expressly stated that its decision was intended to be a narrow one: "Although the question we decide relates only to that 32-month period...[we] will clarify the narrow scope of our holding."[229] At the same time, in dictum, the Court enthusiastically and expansively supported planning, recognizing explicitly that good planning was essential and took time and that delays from planning would often benefit property owners by enhancing property values.[230]

*First English*, stated Justice Stevens, was "unambiguously" a remedy case in which the issue of a moratorium was irrelevant to the holding.[231] Thus, the district court was wrong to use *First English* as a basis for holding that a moratorium was a per se taking.[232] The peculiar *Lucas* decision is now probably nothing more than a footnote in the history of takings law, having had no discernable effect on takings jurisprudence. In *Tahoe-Sierra*, the Court has so limited *Lucas* that it is doubtful we will ever see another categorical regulatory taking.[233]

However, the Court gave no guidance on how to develop defensible moratoria. A review of earlier moratoria cases, as we have seen, suggests that defensible moratoria, among other things, must protect significant public interests, be narrowly tailored and of the shortest reasonable duration, and allow for limited uses of property during the moratoriia, if possible.[234] A defensible moratorium might also have an "escape hatch" to allow property owners to buy their way out, as in *Golden v. Planning Board of Ramapo*,[235] the landmark growth management case.

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228. *Tahoe-Sierra*, 535 U.S. at 320-31.
229. *Id.* at 306-07.
230. *Id.* at 337-39 & nn.32, 33, 338-340.
231. *Id.* at 328.
232. *Id.* at 329.
233. *See* Dwight H. Merriam, *Reengineering Regulation to Avoid Takings*, 33 URB. LAW. 1 (2001).
234. ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENAL REGULATION 272-78 (1999).
235. 285 N.E.2d 291 (N.Y. 1972).

Governments are still at risk in using moratoria, as the Court did not hold that a moratorium could never be a facial taking. An indefinite or extremely long moratorium that does little to protect an important public interest, other than stop development, might well be a facial taking. Certainly, there still will be as-applied takings claims for moratoria, and at least one property owner won big before *Tahoe-Sierra*.[236]

The most interesting issue in *Tahoe-Sierra* is that of the "relevant parcel," sometimes called the "denominator question." The polar opposites are the "parcel-as-a-whole" rule at one extreme and "segmentation" at the other.[237] With takings, the first questions are what is the property taken and what is its relationship to the claimant's total holdings.[238] The property taken is the "numerator," and the total property owned is the "denominator," or relevant parcel.

When we look at the totality of the property, we are using the parcel-as-a-whole rule discussed in *Penn Central*. In *Penn Central*, even though the denial of the tower on top of Grand Central Terminal greatly diminished the value of the terminal parcel, the Court considered all of the nearby holdings of the railroad, including its underground system, exclusive railroad franchise, and ownership of abutting and nearby properties.[239] The diminution in value for the Grand Central Terminal, when compared with all of the railroad's holdings, was so small as not to meet the first of the three-part takings test.[240]

In *Tahoe-Sierra*, the Court strongly reinforced the whole parcel rule and rejected segmentation.[241] Segmentation is a way of "slicing and dicing" the relevant parcel to increase the ratio of the property taken to the property held. For example, if a takings claimant has ten acres of wetlands in a 100-acre parcel, and all of the wetlands are prohibited from development, it is either a 10 percent taking of a 100-acre parcel, or a 100 percent taking of a 10-acre segmented parcel. After *Tahoe-Sierra*, a property owner generally will not be able to segment the 10 acres from the 100-acre parcel.[242]

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236. River Oaks Marine, Inc. v. Town of Grand Island, 1993 WL 27486 (W.D.N.Y 1993) ($1,149,149.43 in damages for prohibition against removing earth products during a moratorium).

237. *Tahoe-Sierra*, 535 U.S. at 331.

238. MELTZ ET AL., *supra* note 234, at 144-45.

239. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 129-31, 135-36 (1978).

240. *Id.* at 137-38.

241. *Tahoe-Sierra*, 535 U.S. at 330-31.

242. *See id.* Segmentation is still possible, however, especially in mining cases. Compare two post-*Tahoe-Sierra* mining cases, decided on the same day, showing, at least under state laws, that courts may segment the parcel. *See* Appolo Fuels, Inc. v. United States, 2002 WL 31889325 (Fed. Cl. 2002) (holding that mining rights and real property together are a single parcel); *but see*, State *ex rel.* R.T.G., Inc. v. State, 780 N.E.2d 998 (Ohio 2002) (Supreme Court of Ohio holding that coal rights constitute a separate and distinct property interest and

Justice Stevens finally had his way in *Tahoe-Sierra*. In his *First English* dissent, he identified three measures of the relevant parcel; in *Tahoe-Sierra*, he made them part of the majority opinion.[243] Property is measured physically in its area, subsurface rights, and air rights.[244] That is the relevant parcel we usually think of, as in the *Penn Central* case. Justice Stevens, however, also identified the "functional parcel," which is the development potential in bulk, density, and use.[245]

Finally, and critically important in *Tahoe-Sierra*, property can also be measured over time.[246] A 32-month moratorium, as compared with an average of 25 years that owners held lots at Lake Tahoe before development, as further compared with the much longer physical life of real property, could never meet *Penn Central*'s first prong of diminution in value. The property owners claimed a 32-month complete taking of the 32 months of their period of ownership during which they could do nothing with their property. The Court held that temporally the parcel-as-whole, the relevant parcel, was much longer than 32 months.[247]

Still, there will be tough issues of what is the relevant parcel. Many factors affect the determination of the relevant parcel, including when separate properties were purchased, whether the properties are near or abut each other, whether they are similarly zoned, whether they are held in single ownership, and whether the properties are treated as a single entity for development and use.

Justice Stevens discussed "fairness and justice" in land use regulation and offered seven different ways the claim could be analyzed.[248] "Fairness and justice," even though the Court says it underlies the Takings Clause, is an evolving and still emerging analytic construct that transcends constitutional doctrine. The Court has considered the questions of fairness and justice in takings and other constitutional law cases without necessarily using these terms.[249] It is an

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parcel); *see also* Vellequette v. Town of Woodside, 2002 WL 1614358 (Cal.App.1 Dist.) (discussed at length later herein for proposition that it may still be difficult to determine relevant parcel). For an in depth discussion of the relevant parcel issue, see Merriam, *supra* note 15.

243. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 330-31 (1987) (Stevens, J., dissenting); *Tahoe-Sierra*, 535 U.S. at 330-31.

244. *Tahoe-Sierra*, 535 U.S. at 322-23.

245. *Id.* at 326-27.

246. *Id.* at 331-32.

247. *Id.* at 332.

248. *Id.* at 331-42.

249. *See, e.g.*, Monterey v. Del Monte Dunes, 526 U.S. 687 (1999). During the oral arguments in *Del Monte Dunes*, Justice Scalia said he thought the developer might feel that he was being "jerked around" and that after a while one might begin to "smell a rat." 1998 WL. 721087, at 17 (1998). In *Village of Willowbrook v. Oleck*, 528 U.S. 562 (2000), the Court looked favorably on an elderly widow who had been delayed, allegedly unfairly, in hooking up to municipal water after her well failed.

expression of the Court's desire to have more subjective balancing and greater flexibility in deciding such cases. We likely will see fewer bright-line rules and we are headed toward an even more ad hoc takings analysis.

## IV. POST-*TAHOE* MORATORIUM DECISIONS

There have been many reported regulatory takings cases citing *Tahoe-Sierra* in the year since it was decided, but only a handful involve moratoria or relevant interim development ordinances. Perhaps this is because the approach to moratorium cases has not changed much in the wake of the *Tahoe-Sierra* decision. In any event, the post-*Tahoe-Sierra* moratorium cases are taken up in this section in chronological order. We conclude this section with a brief mention of the recent follow-up case to *Tahoe-Sierra* in the Ninth Circuit.

Shortly after the *Tahoe-Sierra* decision, a federal magistrate issued a recommended decision in a takings challenge to an interim growth ordinance adopted by the town of York, Maine.[250] The ordinance stated that the town would issue no more than seven dwelling unit permits per month and that it would not accept more than two dwelling unit applications for any single subdivision in any one month.[251] The stated purpose for the ordinance was to deal with growth explosion, and the ordinance was to terminate automatically three years after being enacted, unless otherwise extended.[252]

The magistrate recommended that summary judgment be granted in favor of the town on most counts.[253] He found that the ordinance was not a zoning ordinance and did not need to comply with the state planning legislation.[254] The magistrate found that a plaintiff building association had no standing and had sustained no economic injury where none of the association's members had sought to build in the town.[255] He recommended that a facial challenge be dismissed under *Tahoe-Sierra* because the ordinance was temporary.[256] The magistrate opined that a plaintiff who claimed that his business had been destroyed, but who had not applied for a permit in the town, had not suffered injury to a protected interest either under the federal or the Maine constitutions where it appeared that plaintiff could continue to carry on

250. Courier Builders, Inc. v. Town of York, 2002 WL 1146773 (D. Me. May 30, 2002).
251. *Id.* at *2.
252. *Id.* *2-3.
253. *Id.* *16.
254. *Id.* at *11.
255. *Id.* at *8.
256. Courier Builders, Inc. v. Town of York, 2002 WL 1146773, *9 (D. Me. May 30, 2002).

business elsewhere without significant hardship.[257] Finally, the magistrate recommended that the court deny the town's motion for summary judgment with respect to a partial taking claim because *Penn Central* balancing factors were in dispute.[258]

The case of *Vellequette v. Town of Woodside*[259] illustrates that tough facts may continue to make the relevant parcel determination difficult. In 1968, the town of Woodside, California, passed a resolution providing that the three lots in question were "to be 'recombined into one.'"[260] This was done pursuant to a request by the then owner of the lots that the three sewer assessments on the lots be reduced to a single such assessment.[261] Instead of combining the lots into a single one, the town simply spread the single assessment over the three lots—one half of an assessment to one lot and one quarter each to the other two lots.[262] In 1986, the original owner of the lots sold them to Vellequette and in July of 1994 the town adopted a moratorium on sewer hook-ups, prohibiting the issuance of new sewer connection permits to properties that had not fully paid assessments until additional sewer capacity was available in the town.[263] Not one of Vellequette's three lots was eligible for a sewer hookup during the moratorium because of the way the assessment was allocated, and the plaintiff challenged the ordinance as a taking. The California appellate court found no *Lucas* categorical or *Penn Central* partial taking.[264]

The court had some difficulty defining the relevant parcel in this particular case, in large part because the record did not clearly establish whether there were three lots or one. The record showed that in 1992 the town had informed the plaintiff that there was some question as to whether the lots in question constituted a single lot for development purposes or three separate lots, but that he could obtain a certificate of compliance that would clear up the uncertainty.[265] The plaintiff did not seek such a certificate.[266] The court, relying at least in part upon a statement in *Lucas*, effectively collapsed its consideration of the plaintiff's reasonable investment-backed expectations into its definition of the relevant parcel.[267] As a result, the court avoided actually finding a

257. *Id.* at *15.
258. *Id.*
259. 2002 WL 1614358 (Cal. App.1 Dist. 2002).
260. *Id.* at *1.
261. *Id.*
262. *Id.*
263. *Id.* at *2-*5.
264. *Id.* at *9-*12.
265. 2002 WL 1614358, n.5 (Cal. App.1 Dist. 2002).
266. *Id.*
267. *Id.* at *10-*11.

relevant parcel in this instance by concluding that, whether the lots were one or three, the plaintiff could, or had the opportunity to, recoup his investment-backed expectations, even under the moratorium.[268] The court held that (1) the plaintiff had a fully paid sewer assessment if he combined his lots, (2) he never believed he had three separate full sewer assessments, (3) the lots could be developed if combined to construct a house worth almost over $1.5 million, and (4) in determining the economic value of the relevant parcel, it made no sense to ignore the value of the three lots combined into one.[269]

In *Haberman v. City of Long Beach*,[270] a New York appellate court affirmed the denial of plaintiff's summary judgment claim that a city had taken property by imposing, and subsequently extending, a development moratorium for over three years. When the city extended its moratorium, it lifted the moratorium on certain properties, but not the plaintiff's.[271] Consequently, the plaintiff brought an equal protection claim, alleging disparate treatment.[272] The court held that the equal protection claim had no merit, because the differing treatment for properties within the Superblock "furthered a 'legitimate, articulated state purpose,' i.e., the development of the Superblock properties as a single site."[273]

In *Berst v. Snohomish County*,[274] the Washington Court of Appeals reversed a lower court dismissal for failure to state a claim and, in so doing, addressed a landowner's taking claim against Snohomish County for imposing a building moratorium under the state Forest Practices Act. The court of appeals cited *Tahoe-Sierra* for the proposition that *Lucas* and *First English* did not apply in the context of a temporary moratorium.[275] The Court found that it was not clear beyond a reasonable doubt that there were no facts on the record to support recovery under *Penn Central* and *Tahoe-Sierra*.[276] The court declined to adopt plaintiff's "novel" argument that "the imposition of a moratorium in the absence of due process rights constitutes an unconstitutional taking."[277] Rather, the court reiterated that *Penn Central* and *Tahoe-Sierra* were the rule.[278]

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268. *Id.*
269. *Id.* at *9-*12.
270. 298 A.D.2d 497 (N.Y. App. Div. 2d Dep't 2002).
271. *Id.* at 498.
272. *Id.*
273. *Id.* (quoting Doe v. Coughlin, 71 N.Y. 2d 48, 56 (1987).
274. 57 P.3d 273 (2002).
275. *Id.* at 279.
276. *Id.*
277. *Id.* at 280.
278. *Id.*

The Federal Claims Court's decision in *Bass Enterprises Production Co. v. United States*,[279] though a delay rather than a moratorium case, suggests the effect the *Tahoe-Sierra* decision will have upon moratorium cases. In *Bass Enterprises*, the court of claims reversed its prior finding of a compensable regulatory taking upon motion for reconsideration in light of *Tahoe-Sierra*. Prior to reconsideration, the court held that the Bureau of Land Management had taken plaintiff's property (a *Lucas* categorical take) by denying plaintiff's applications to exploit oil and gas leases for almost four years, pending an Environmental Protection Agency determination as to whether activities under the leases would render a proposed nuclear storage facility unstable.[280] The second time around, the Claims Court applied a *Penn Central* partial taking analysis, given the temporary nature of the governmental denial in this case, and held that the public interest in ensuring the stability of a nuclear storage facility negated the taking.[281] In confirming that the *Lucas* categorical taking could not occur where a regulation was temporary, the Claims Court stated,

> It is important to note that the [*Tahoe-Sierra*] Court's consideration included the policy implications of a categorical rule in such cases, and found that it could result in government agencies' [sic] being constrained by financial considerations to the extent that they may be forced to rush through the planning process.[282]

In *W.R. Grace & Co.-Conn. v. Cambridge City Council*,[283] a property owner challenged a 23-month combination zoning change/building moratorium designed to preserve the status quo during a comprehensive planning study period. The Massachusetts Court of Appeals upheld the enactment of the interim restriction, relying upon the *Collura* case to hold that

> [t]he broad authority vested in municipalities to zone for public purposes has been held to justify the imposition of reasonable time limits on development....[and] "reasonable interim zoning provisions may be enacted within the scope of a general zoning enabling act, without reliance on specific statutory authorization for interim ordinances."[284]

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279. 2002 WL 31526504 (Fed. Cl. 2002).
280. *Id.* at *1-*3.
281. *Id.* at *6.
282. *Id.* at *3 (citing *Tahoe-Sierra*, 535 U.S. at 337-39).
283. 779 N.E.2d 141 (2002).
284. *Id.* at 149 (quoting in part Collura v. Town of Arlington, 329 N.E.2d 733, 737 (1975)).

The court of appeals further held that the fact that the planning working group could not agree upon a result after the study period did not alone constitute evidence of bad faith—even where the result of their inability to agree was consistent with the objectives of the "anti-Grace" neighborhood group.[285]

The court of appeals upheld the dismissal of the plaintiff's taking claim on summary judgment, under *Penn Central* and *Tahoe-Sierra*.[286] The court observed that during the period of the moratorium the plaintiff was allowed to continue to make use of existing facilities on the burdened property, so the regulation did not deny the plaintiff all economic use of its property. As to the plaintiff's investment-backed expectations argument, the court said,

> A property owner cannot reasonably rely on an assumption that zoning will forever remain the same, and that government will refrain indefinitely from valid changes in zoning....Simply stated, a developer with designs on improving its property consistent with an existing zoning framework had best get its shovel into the ground.[287]

In a recent Georgia case regarding moratorium enabling issues, the Supreme Court of Georgia struck down a county ordinance setting a three-year moratorium on the construction of high voltage power lines, because the court found that this moratorium violated the Georgia Constitution prohibiting the enactment of a local or special law regulating that which was already regulated by a general state law.[288] Because an electrical co-op was granted exclusive condemning authority under state law to construct power lines, an ordinance interfering with the construction of high voltage lines was held to interfere with the co-op's eminent domain power.[289]

Finally, in the fifth round (*Tahoe-Sierra V*) of *Tahoe-Sierra* litigation, the Ninth Circuit recently affirmed the lower court's dismissal of certain of the Tahoe-Sierra Preservation Council's 1987 TRPA plan takings claims on res judicata grounds, given that the claims were essentially identical to earlier claims brought by the Council in the last two *Tahoe-Sierra* rounds.[290] Judge Reinhardt, writing for the Ninth Circuit, in upholding the dismissal said,

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285. *W.R. Grace*, 779 N.E.2d at 149.

286. *Id.* at 154-57.

287. *Id.* at 156 (citing Daddario v. Cape Cod Comm., 681 N.E.2d 833 (1997)).

288. Rabun County High Voltage Line Constr. Moratorium Ordinance v. Ga. Transm. Corp., 575 S.E.2d 474 (2003).

289. *Id.*

290. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064 (9th Cir. 2003). *See also* http://www.law.Georgetown.edu/gelpi/takings/courts/

> After eighteen years of litigation, ten years of which has been devoted to adjudicating harm allegedly done by the 1987 Plan and its implementation, the final judgments of *Tahoe III* and *Tahoe IV* should finally rest in peace. We steadfastly protect a litigant's right to his day in court. Once a sophisticated party has had a full and fair opportunity to be heard, however, we also recognize the merits of finality....[291]

The court of appeals also found it "telling" that *Tahoe V* had been filed while *Tahoe IV* was pending, and the plaintiff's complaint in *Tahoe V* conveyed the plaintiff's concern that if *Tahoe IV* and *V* went forward together there would be at least some duplicity of claims.[292]

The court dismissed the as-applied takings claims on ripeness, rather than on res judicata grounds.[293] The 1987 Plan allowed landowners, only marginally on the outside of the developable pool of properties, to pay mitigation fees or pursue mitigation projects to make their properties developable.[294] The court held that those landowners' claims were not ripe if they had not appealed them to the TRPA.[295]

*Tahoe-Sierra* is a relevant parcel case and correctly cites *First English* as a remedies case. Also, the *Tahoe-Sierra* Court suggests that a moratorium, because it is temporary, is unlikely to be a *Lucas* categorical taking.[296] These two points, however, were already evident from the pre-*Tahoe-Sierra* cases. The duration of a moratorium is analyzed inter-dependently with other factors and balanced under *Penn Central*.[297]

## V. MORATORIA IN THE POST-*TAHOE-SIERRA* WORLD

The *Tahoe-Sierra* decision is indeed a narrow one, limited to its facts and the limited holding on the facial claim. It is clear that *Tahoe-Sierra* does little to alter prior precedent in moratorium cases. It is unlikely to have any significant impact on as-applied claims, except by extending the relevant parcel from the physical and functional

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snap.htm (excellent regulatory takings case tracker) (last visited Aug. 9, 2003). This was not on remand from the Supreme Court's decision.

291. *Id.* at 1077.

292. *Id.* at 1081.

293. *Id.* at 1077.

294. *Id.* at 1084.

295. *Id.* at 1085-86.

296. *See, e.g.*, Vellequette v. Town of Woodside, 2002 WL 1614358 (Cal. App. 1 Dist. 2002).

297. *See, e.g.*, Haberman v. City of Long Beach, 298 A.D.2d 497 (N.Y. App. Div. 2d Dep't Oct. 21, 2002).

dimensions to include the temporal dimension, which is often the most important dimension in a moratorium case.

**Defensible Moratoria**

Given the precedent before the *Tahoe-Sierra* decision, most of which *Tahoe-Sierra* left undisturbed; the *Tahoe-Sierra* holding; and the few post-*Tahoe-Sierra* decisions; the defensible moratorium will likely take this form:

- *Enabled by statute or common law*—the defensible moratorium must have a firm basis in either state statutes or common law that is consistent with the *Tahoe-Sierra* decision. In a footnote to the *Tahoe-Sierra* decision, the Court lists a number of states that have enacted express legislation authorizing interim development ordinances.[298] Courts are generally more accepting of moratoria directed at freezing uses, rather than those that target permitting processes and procedures, particularly where those processes and procedures are regulated or authorized by state statute.[299] If a government enacts a moratorium in response to a perceived emergency, perhaps without strict adherence to procedural requirements in an enabling statute, it will still follow as completely as it can, even after the enactment, all procedural requirements, including those for notice and hearing.[300] Of course, procedural requirements will depend upon how the enactment is characterized—as a legislative act, a zoning amendment, or some other variant.

- *Protecting health or safety*—the defensible moratorium will further "heavy-weight" objectives of the police power, principally the public's health and safety. Lesser objectives, say the enhancement of tourism or even aesthetics, will not be as defensible.[301] The moratorium ordinance will state its purpose on its face.[302]

298. *See Tahoe-Sierra*, 535 U.S. n.37; *see also* Daniel J. Curtin, Jr., Tahoe and Beyond: Defensible Moratoria—California's Experience, 3 (paper presented at the APA National Planning Conference, Denver, Colorado, Apr. 1, 2003), *available at* http://www.caed.asu.edu/apa/proceedings03/CURTIN2/curtin2.htm (last visited Aug. 9, 2003).

299. *See, e.g., supra* notes 59-60 and accompanying text.

300. *See supra* notes 43-53 and accompanying text.

301. *See supra* notes 111-153 and accompanying text.

302. *Id.*

- *Limited in time*—the defensible moratorium will be for no longer than is necessary to protect the public's interest. Some may see the adoption of a moratorium as a failure of planning; however, the moratorium itself must be planned in its adoption, in the actions taken during its effective period, and in the implementation of new policies and regulations once the moratorium has been terminated.[303] Government actions taken consistent with the stated purpose of the moratorium and during the moratorium period are particularly relevant where the termination of the moratorium will occur upon the occurrence of an event, rather than upon a date certain.[304]

- *Limited in physical dimension*—the defensible moratorium will use the smallest physical area of restriction to limit unintended consequences and adverse impacts beyond those necessary to carry out the objectives of the moratorium.[305]

- *Limited in its functional impact*—the defensible moratorium along the second dimension of the relevant parcel—the functional dimension—will limit the moratorium to those functions or uses of property that must be suspended to carry out the purposes of the moratorium.[306] A moratorium that restricts more than those essential functions will be subject to successful challenge.[307] A defensible moratorium will seek to preserve some functional use of the property so that there is a reasonable, beneficial economic use remaining in the property even during the moratorium.[308]

- *Available local relief*—finally, to the extent possible, a defensible and well-constructed moratorium will expressly provide alternatives or exceptions from coverage that may minimize the impact of the moratorium upon affected landowners. A defensible moratorium will not impose upon private property owners unnecessarily, and when it does, local procedures should provide an effective escape

303. *See supra* notes 73-153 and accompanying text.
304. *See supra* notes 95-110 and accompanying text.
305. *See supra* notes 154-168 and accompanying text.
306. *Id.*
307. *Id.*
308. *Id.*

hatch for a landowner to get out from under the coverage of the moratorium. Maintaining the flexibility to avoid protracted and expensive litigation is in the best interest of regulators and property owners alike.

## APPENDIX

## MORATORIA CASES

| Year | Case | Enable | Duration | Burden | Purpose | Available Uses | Local Relief |
|---|---|---|---|---|---|---|---|
| 2003 | Rabun County v. Ga. Transmission Corp., 276 Ga. 81 | X | | | X | | |
| 2003 | Manor, III Assocs. v. Reisma, 2003 WL 1224248 | | X | | | | |
| 2003 | Eller Media Co. v. City of Houston, 2003 WL 85263 | | X | | | | |
| 2003 | Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F. 3d 1064 (9th Cir. Feb. 28, 2003) | | | | | | |
| 2002 | W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559 | X | X | | X | | |
| 2002 | Bradfordville Phipps Ltd. P'ship v. Leon County Fla., 804 So. 2d 464 | | | X | X | | X |
| 2002 | Vellequette v. Town of Woodside, 2002 WL 1614358 (Cal. App. 1st Dist.) | | X | X | | X | X |
| 2002 | Couriers Builders, Inc. v. Town of York, 2002 WL 1146773 (D. Me.) | X | | | | | |
| 2002 | Tahoe Sierra Preservation Council, Inc., et al. v. Tahoe Reg'l Planning Agency, et al., 535 U.S. 302 | X | X | X | X | X | X |
| 2002 | State *Ex. Rel.* R.T.G., Inc., et al. v. State of Ohio, 98 Ohio St. 3d 1 | | | | | | |
| 2002 | Appolo Fuels, Inc. v. United States, 2002 W.L. 31889325 | | | | | | |
| 2002 | Haberman v. City of Long Beach, 298 A.D. 2d 497 | | X | | X | | |
| 2002 | Bernst v. Snohomish County, 114 Wash. App. 245 | | | | | | |

| Year | Case | Enable | Duration | Burden | Purpose | Available Uses | Local Relief |
|---|---|---|---|---|---|---|---|
| 2002 | Bass Enters. Prod. Co. v. United States, 2002 W.L. 31526504 | | X | | X | | |
| 2001 | Naylor v. Township of Hellam, 656 Pa. 397 | X | | | | | |
| 2001 | City of Glenn Heights v. Sheffield Dev. Co. Inc., 61 S.W. 3d 634 | | | X | X | | |
| 2001 | Loen v. Newtown Township, 55 Pa. D. & C. 4th 548 | | X | X | X | | |
| 2001 | Keshbro v. City of Miami, 801 So. 2d 864 | | X | | X | | |
| 2000 | Village of Willowbrook v. Olech, 528 U.S. 562 | | | | | | |
| 1999 | Bldg. Indus. Legal Defense Found. v. The Superior Court of Orange County, 72 Cal. App. 4th 1410 | X | | | | | |
| 1999 | W.J.F. Realty Corp. v. Town of South Hampton, 261 A.D. 2d 609 | | | | X | | |
| 1999 | Monterey v. Delmonte Dunes at Monterey, Ltd., 526 U.S. 687 | | | | | | |
| 1998 | Toll Brothers, Inc. v. West Windsor Township, 312 N.J. Super. 540 | X | | | | | |
| 1998 | Mont Belvieu Square Ltd. v. City of Mont Belvieu Tex., 27 F. Supp. 2d 935 | | X | | | X | |
| 1997 | ORD v. Kitsap County, 84 Wash. App. 602 | X | X | | | | |
| 1997 | Sprint Spectrum L.P. v. Jefferson County | X | | | X | | |
| 1997 | 216 Sutter Bay Assocs. v. County of Sutter, 58 Cal. App. 4th 860 | | | | X | | |
| 1997 | Cottle Enter. Inc. v. Town of Farmington, 693 A.2d 330 | X | | X | X | | X |

| Year | Case | Enable | Duration | Burden | Purpose | Available Uses | Local Relief |
|---|---|---|---|---|---|---|---|
| 1996 | Steele v. Cape Corp., 111 Md. App. 1 | | | X | X | X | |
| 1996 | Timber Ridge Homes at Brookhaven, Inc. v. State of New York, 223 A.D. 2d 635 | | X | | X | | X |
| 1995 | Matson v. Clark County Board of Comm'rs, 79 Wash. App. 641 | X | | | | | |
| 1995 | Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County Ind., 57 F.3d 505 | | | X | | | |
| 1995 | Williams v. City of Central, 907 P.2d 701 | | X | | | | |
| 1995 | Herrington v. City of Pearl, Miss., 908 F. Supp. 418 | | X | X | | X | X |
| 1995 | HBP Assocs. v. Langdon Marsh, 893 F. Supp. 271 | | X | | | | |
| 1995 | Santa Fe Village Venture v. City of Albuquerque, 914 F. Supp. 498 | | X | | X | | |
| 1994 | Sagamore Park v. City of Indianapolis, 885 F. Supp. 1146 | X | | | X | | |
| 1994 | Dolan v. City of Tigard, 512 U.S. 374 | | | | X | | |
| 1994 | Loveladies Harbor, 28 F.3d 1171 | | | | | | |
| 1994 | Bowles, 31 Fed. Cl. 37 | | | | | | |
| 1994 | Kawaoka v. City of Arroyo Grande, 17 F. 3d 1227 | | X | X | | | |
| 1994 | Golden Valley Lutheran College v. City of Golden Valley, 1994 Minn. App. LEXIS 92 (Minn. Ct. App. Jan. 25, 1994), rev. denied, 1994 Minn. LEXIS 221 (Mar. 15, 1994), cert. denied, 513 U.S. 819 (1994) | | | | | X | |

| Year | Case | Enable | Duration | Burden | Purpose | Available Uses | Local Relief |
|---|---|---|---|---|---|---|---|
| 1994 | Offen v. Prince George's County, 65 Md. 424 (Md. Ct. Spec. App. 1993), reversed Prince George's County v. Offen, 639 A. 2d 1070 (Md. 1994) | | | | | | |
| 1994 | Hunkins v. City of Minneapolis, 508 N.W. 2d 542 | | | | | | |
| 1993 | Town of Riverhead v. New York State Dept. of Envtl. Conservation, 193 A.D. 2d 667 | | | | X | | |
| 1993 | Nello L. Teer Co. v. Orange County, 1993 U.S. App. LEXIS 12525 | | | | X | | |
| 1993 | Kelly v. Tahoe Reg'l Planning Agency, 109 Nev. 638 (Nev. 1993), cert. denied, 510 U.S. 1041 | | | X | | X | |
| 1993 | Dept. of Transp. v. Weisenfeld, 617 So. 2d 1071 | | | | | X | |
| 1992 | Pro-Eco, Inv. v. Bd. of Comm'rs of Jay County Ind., 956 F.2d 635 | X | | | | | |
| 1992 | Lucas v. S.C. Coastal Council, 505 U.S. 1003 | | | X | | | |
| 1992 | Woodbury Place Partners v. Woodbury, 492 N.W. 2d 258 | | X | | | | |
| 1992 | Merriam Gateway Assocs. v. Town of Newton, N.J., 1992 U.S. Dist. LEXIS 21562 (D.N.J. June 1, 1992), *aff'd*, 91 F. 3d 124 (3d Cir. 1996) | | | | | X | |
| 1992 | Carpenter v. Tahoe Reg'l Planning Agency, 804 F. Supp. 1316 | | X | | | X | |
| 1992 | River Oaks Marine, Inc. v. Town of Grand Island, 1992 U.S. Dist. LEXIS 18974 | | | | X | | |

| Year | Case | Enable | Duration | Burden | Purpose | Available Uses | Local Relief |
|---|---|---|---|---|---|---|---|
| 1990 | Bittinger v. Corp. of Bolivar, 183 W. Va. 310 | X | | | | | |
| 1990 | Gilbert v. State of Cal., 218 Cal. App. 3d. | X | X | | X | | |
| 1990 | Sunridge Dev., Inc. v. City of Cheyenne, 787 P.2d 583 | X | X | | X | | |
| 1990 | Tocco v. N.J. Council on Affordable Housing, 242 N.J. Super. 218 | | | | X | | |
| 1990 | Joint Ventures, Inc. v. Dept. of Transp., 563 So. 2d 622 | | X | | X | | |
| 1989 | Seawall Assocs. v. City of New York, 74 N.Y. 2d 92 | | | X | X | | |
| 1989 | First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353 (Cal. Ct. App. 1989), rev. denied, 1989 Cal. LEXIS 4224 (August 25, 1989), cert. denied, 493 U.S. 1056 (1990) | | | X | X | X | X |
| 1988 | S.E.W. Friel v. Triangle Oil Co., 76 Md. App. 96 | | X | | X | | |
| 1988 | Zilber v. Town of Moraga, 692 F. Supp. 1195 | | | | | | X |
| 1988 | Boulder Builders Group v. City of Boulder, 759 P. 2d 752 | X | | | | | |
| 1987 | First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 | | | | | | |
| 1987 | Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 | | | | X | | |
| 1985 | Schiavone v. Hackensack Meadowlands Dev. Comm'n, 98 N.J. 258 | | X | | X | | |

| Year | Case | Enable | Duration | Burden | Purpose | Available Uses | Local Relief |
|---|---|---|---|---|---|---|---|
| 1984 | Arnold Bernhard & Co., Inc. v. Planning & Zoning Comm'n of Town of Westport, 194 Conn. 152 | X | | | | | |
| 1983 | N.J. Shore Bldgs. Ass'n v. Township Comm. of Township of Dover, 191 N.J. Super. 627 | | | | X | | |
| 1982 | State of Tenn., *Ex. Rel.* SCA Chemical Waste Servs., Inc. v. Konigsberg, 636 S.W. 2d 430 | X | | | X | | |
| 1982 | City of Sanabel v. Buntrock, 409 So. 2d 1073 | X | | | | | |
| 1981 | Jablinske v. Snohomish County, 28 Wash. App. 848 | X | | | | | |
| 1980 | Sturges v. Town of Chilmark, 380 Mass. 246 | | | | X | | |
| 1980 | Schrader v. Gilford Planning & Zoning Comm'n, 36 Conn. Supp. 281 | X | | | | | |
| 1980 | Agins v. City of Tiburon, 447 U.S. 255 | | X | X | | | |
| 1979 | Town of Grand Chute v. City of Appleton, 91 Wis. 2d. 293 | X | | | | | |
| 1979 | A. Copeland Enters., Inc. v. The City of New Orleans, 372 So. 2d 746 | X | | | X | | |
| 1978 | Penn Central Transp. Co. v. New York City, 438 U.S. 104 | | | X | X | X | |
| 1977 | Schoeller v. Bd. of County Comm'rs of County Park, 568 P. 2d 869 | X | X | | X | | |
| 1977 | Matthews v. Bd. of Zoning Appeals of Greene County, 218 Va. 270 | | | | X | | |

| Year | Case | Enable | Duration | Burden | Purpose | Available Uses | Local Relief |
|---|---|---|---|---|---|---|---|
| 1976 | Associated Home Builders of Greater East Bay, Inc. v. City of Livermore, 18 Cal. 3d 582 | | X | X | X | | |
| 1976 | Almquist v. Town of Marshan, 308 Minn. 52 | X | | | | | |
| 1975 | Collura v. Town of Arlington, 367 Mass. 881 | X | | | X | X | |
| 1975 | Constr. Indus. Ass'n of Sonoma County v. Petaluma, 522 F.2d 897 | | | | X | | |
| 1975 | Bd. of Supervisors of Fairfax County v. Horne, 216 Va. 113 | X | | X | | X | |
| 1975 | Union Oil Co. of Cal. v. Morton, 512 F. 2d 743 | | X | | | | |
| 1974 | Metro. Dade County v. Rosell Constr. Corp., 297 So. 2d 46 | | X | | X | | |
| 1974 | City of Dallas v. Crownrich, 506 S.W. 2d. 654 | X | X | | X | | |
| 1974 | CEEED v. Cal. Coastal Zone Conservation Comm'n, 33 Cal. App. 3d 306 | X | | | X | | |
| 1974 | CREED v. Cal. Coastal Zone Conservation Comm., 43 Cal.App.3d 306 | X | X | | X | | |
| 1972 | Golden v. Planning Bd. of Ramapo, 30 N.Y. 2d 359 | X | X | X | | | X |
| 1972 | Meadowland Reg'l Dev. Agency v. Hackensack Meadowlands Dev. Comm'n, 119 N.J. Super. 572 | | X | | | | |
| 1967 | Deal Gardens, Inc. v. Bd. of Trustees of the Village of Loch Arbour, 48 N.J. 492 | | X | | X | | X |
| 1967 | Lancaster Dev., Ltd. v. Village of River Forest, 84 Ill. App. 2d 395 | X | | | | | |

| Year | Case | Enable | Duration | Burden | Purpose | Available Uses | Local Relief |
|---|---|---|---|---|---|---|---|
| 1965 | Town of Lebanon v. Woods, 153 Conn. 182 | X | | | | | |
| 1963 | Metro Realty v. The County of Eldorado, 222 Cal. App. 2d 508 | X | X | X | X | | |
| 1963 | Alexander v. City of Minneapolis, 267 Minn. 155 | X | | | | | |
| 1962 | L.S. Fletcher, et al. v. Noel E. Porter, 203 Cal. App. 2d 313 | X | | | | | |
| 1949 | Kline v. Harrisburg, 362 Pa. 438 | X | | | | | |