This installation of Case Law Review focuses on three recent decisions dealing with the validity of land use regulations. The first is the most recent decision from the United States Supreme Court dealing with the concept of "regulatory takings." The second and third are both Pennsylvania Commonwealth Court decisions. One deals with the issues of lot size and protection of environmentally sensitive land, and the other deals with quarrying.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002)

Facts:

The pristine character of the water quality within Lake Tahoe (located partly in California and partly in Nevada) has in recent years been compromised, partially as a result of nutrient loading from increased development around the borders of the lake. Recognizing the potential for further degradation if the pace of development were to continue, particularly in the absence of effective regulation of environmentally sensitive lands (i.e., slopes and stream valleys), California and Nevada adopted the "Tahoe Regional Planning Compact" in 1968 and created the "Tahoe Regional Planning Agency" ("TRPA") "to coordinate and regulate development in the [Lake Tahoe] basin and to conserve its national resources."

Although TRPA adopted ordinances in the early 1970s which sought, among other things, to protect "Stream Environment Zones" ("SEZ Lands"), the ordinances were viewed as time went on as being ineffective in preventing further degradation of the lake's water quality.

In 1981, TRPA enacted a moratorium on all development (including construction of single family residences on individual lots) on all SEZ Lands and as well on other environmentally sensitive lands in the Tahoe basin. Later, the moratorium was extended by resolution, so that the effective duration of the moratorium was 32 months.

Certain landowners combined to form the "Tahoe-Sierra Preservation Council, Inc." and filed suit in Federal Court, alleging that the impact of the moratorium was to impose a "temporary taking" of all development potential - and hence all value - during the period of the moratorium. The Federal District Court agreed with the landowners, concluding that "they have been temporarily deprived of all economically viable use of their land which, therefore, constituted a "categorical" taking under the U.S. Supreme Court's decision in *Lucas v. South Carolina Coastal Council,* 112 S.Ct. 2886 (1992). The District Court recognized that, unlike the case in *Lucas*, the moratorium preventing economic use of the land was not permanent, but nevertheless concluded that a temporary taking had occurred under the authority *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S.Ct. 2378 (1987).

On appeal to the 9th Circuit Court of Appeals, the District Court's decision was reversed, the Court concluding that (i) the "categorical *Lucas* rule" did not apply, and (ii) the "balancing approach" described in the U.S. Supreme Court's decision in *Penn Central Transportation Company v. New York City*, 98 S.Ct. 2646 (1978) had not been cited by the landowners in their appeal, as they relied instead entirely on their position that the "categorical *Lucas* rule" applied to this fact situation.

The U.S. Supreme Court agreed to hear the case, and by a 6 to 3 majority (Chief Justice Rehnquist and Justices Thomas and Scalia dissenting) affirmed the decision of the 9th Circuit that the landowners were not entitled to any compensation for the alleged "temporary taking" of their land.

<u>Decision:</u>

Justice Stevens wrote the opinion for the majority, and throughout the opinion often cited the concurring opinion of Justice O'Connor in the recent decision in *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001). Thus, the court formed a "moderate/liberal" consensus, isolating as dissenters the three justices perceived to be the most conservative.

First, the court noted that the plaintiffs acknowledged that the moratorium was imposed in good faith, for a legitimate public purpose - protection of the water quality of Lake Tahoe. Nevertheless, the plaintiffs argued that the moratorium effected a regulatory taking, albeit a temporary one, of all development value and, therefore, that they were entitled to compensation under the Supreme Court's *Lucas* decision, where two ocean-side lots owned by Mr. Lucas were sterilized from constructing homes thereon by virtue of a law passed by South Carolina prohibiting construction on the "ocean-side" of shoreline sand dunes.

Secondly, a key element in the reasoning of both the 9th Circuit and the U.S. Supreme Court (in affirming the 9th Circuit decision) was its analysis of the "many different dimensions" inherent in property interests. The Court noted with approval the following portion of the 9th Circuit's Opinion:

> "For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question) and a temporal dimension (which describes the duration of the property interests). At base, the plaintiff's argument is that we should conceptually sever each plaintiff's fee interest into discreet segments in at least one of these dimensions - the temporal one - and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this theory, they argue that there was a categorical taking of one of those temporal segments."

Both the 9th Circuit and the U.S. Supreme Court in affirming the Circuit Court's decision rejected this "segmentation" of the attributes of property interests, and focused upon "the impact of a regulation on the parcel as a whole," reasoning that "a regulation that affects only a portion of the parcel - whether limited by time, use, or space - does not deprive the owner of all economically beneficial use.

Thus, the Court by analogy compared the taking of a "temporal slice" of the property (as was here the case) to the "spacial slice" taking which occurs in the context of regulations as simple and common as setback requirements. The Court noted:

> "Land-use regulations are ubiquitous and most of them impact property values in some tangential way - - often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford."

By contrast, the facts in the *Lucas* decision involved a total taking of all three segments of property recognized by the court - i.e., no economically beneficial use was permitted anywhere on the two lots which Mr. Lucas owned, for a permanent (or at least indefinite) period of time.

Conversely, the Court concluded that the lots here at issue in the Lake Tahoe basin were not rendered valueless:

> "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."

Dealing with the fact that the concept of temporary taking had been recognized by the Supreme Court in the *First English* decision, the Court went on to note that the concept of temporary taking cannot be the subject of a "categorical rule", such as was implied in *Lucas*:

> "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision making.
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> ...
>
> We are persuaded that the better approach to claims that a regulation has effected a temporary taking 'requires careful examination and weighing of all the relevant circumstances'."

Comment:

Both the *First English* and *Lucas* decisions constituted "pro private property" exceptions to the "balancing approach" adopted by the U.S. Supreme Court in its landmark *Penn Central* decision in 1978. The *Lake Tahoe* case, by contrast, serves to limit the potential impacts of the concepts of "temporary takings" under *First English* and the "categorical rule" under *Lucas*. By a six to three

majority, the Court now holds that all but the most egregious regulatory takings cases should be examined under the balancing approach adopted in *Penn Central*, where all of the surrounding circumstances are evaluated in determining whether or not a private property owner is entitled to compensation for an alleged regulatory taking.

In the *Lake Tahoe* litigation, the property owners had made a strategic decision not to assert on appeal their entitlement to compensation under this broader “balancing approach” in *Penn Central*. While the Supreme Court thus did not decide the issue, whether these property owners would have been entitled to compensation under the *Penn Central* analysis, the factors which would have been applied are fairly clear.

First, there is no question that the moratorium was designed to serve a legitimate public purpose - i.e., protection of the environment in the context where there was a clear factual connection between development of sensitive lands and degradation of the water quality of Lake Tahoe.

Secondly, as pointed out by the Court, even during the moratorium there was an active market between buying and selling lots subjected to the temporary moratorium, i.e., people (particularly in California evidently) understood that while the process of securing building permits was and would remain extremely complex, they would eventually be able to build at least on the lots not located within very steep slope or flood plain areas. Thus, while the act of development was precluded during the moratorium, the potential development value was not entirely lost.

A second important consideration under the *Penn Central* approach is to evaluate the reasonable “investment-backed expectations” of the property owners. Again, obtaining building permits in the Lake Tahoe basin had never been an easy task and, hence, those who purchased lots in the region did so in the context of an existing regulatory framework that was perhaps aggravated by the moratorium but not imposed out of the blue sky.

A third factor in the moratorium context was that all similarly situated property owners were treated the same - i.e., no one or few landowners were “singled out” to bear a special burden that should be shared by the public as a whole.

In both the *Palazzolo* and the *Tahoe* decisions, the majority of the U.S. Supreme Court has emphasized that the proper approach is to evaluate the impact of regulations “on the parcel as a whole.” This approach bodes well for those advocating the preservation of environmentally sensitive features. For example, unless an entire parcel is sterilized from development by virtue of being 100% wetlands (i.e., similar to the *Lucas* situation), the preclusion of development on substantial portions of a parcel of land will not give rise to a regulatory takings claim, where the remaining portion of the land (even if it is a relatively small proportion of the total land area) can be developed.

Similarly, a reasonable moratorium on development - so long as invoked for a legitimate purpose, such as completing a comprehensive plan - will not constitute a temporary takings (at

least under federal constitutional principles).

A final note - this case does not serve to limit the Pennsylvania Supreme Court's decision in *Naylor v. Hellam Township*, 773 A.2d 770 (Pa. 2001) that a moratorium on development cannot be imposed by Pennsylvania municipalities. *Naylor* was not a constitutional case, but rather was focused on the fact that the legislature, in enacting the Pennsylvania Municipalities Planning Code, did not authorize municipalities to impose development moratoria. Hellam Township's moratorium would be constitution, but was illegal because it was beyond the Township's authority as delegated by the legislature in the MPC.

Fisher v. Viola and Cranberry Township Z.H.B., 789 A.2d 782 (Pa.Cmwlth. 2001).

Facts:

Cranberry Township adopted several land use ordinances to implement a new comprehensive plan. Among the ordinances so adopted were provisions which increased the minimum lot size in a portion of the township to 1.5 acres (for lots with on-site sewage) and 1.25 acres (for lots with public sewage). In addition, the ordinance adopted density regulations which reflected environmentally sensitive land features, such as steep slopes. Certain landowners filed validity challenges to these features of the new ordinance. First, the Zoning Hearing Board, then the Butler County Court of Common Pleas and, finally, the Pennsylvania Commonwealth Court rejected the validity challenges, concluding that these provisions were constitutionally valid.

Decision:

The Commonwealth Court affirmed the validity of the minimum lot area requirements of 1.5 acres for lots with on-site sewage or 1.25 acres if the home could be tied into public sewers. The Court noted that minimum lot areas are not "*per se*" invalid, even if in excess of two acres (invalidated in the *Concord Township Appeal*, 439 Pa. 466, 268 A.2d 765 [1970] because the Township was unable to demonstrate extraordinary justification for the two and three acre lots). The Court noted that "extraordinary justification is required only where the zoning ordinance calls for a minimum lot size exceeding two acres."

The challengers had argued that increasing the minimum lot area requirement would serve to make housing less affordable. The Commonwealth Court also rejected this argument as a basis for a validity challenge, since development was still economically feasible under the minimum lot area requirements so imposed.

Citing *Jones v. McCandless Township Z.H.B.*, 578 A.2d 1369 (Pa.Cmwlth. 1990), the Court also sustained the validity of restrictions against development of environmentally sensitive areas under the new ordinance.

Comment:

Prior to this decision, the reasonableness (and hence the validity) of a minimum lot area requirement falling between one and two acres had not been evaluated by the Pennsylvania appellate courts. Under *Fisher*, any lot size up to two acres appears now to be presumed valid, and municipalities must demonstrate extraordinary justification only for minimum lot area requirements in excess of two acres. (Remember, this is not an exclusionary zoning issue, but rather a reasonableness issue, it being the law that an unreasonable exercise of the police power is a violation of the due process clause of the Constitution.)

With respect to the challenge to the validity of the township's steep slope regulations, unfortunately, the Opinion of the Court does not describe the extent of the regulations as applied to steep slopes or other environmentally sensitive areas.

Centre Lime & Stone Company, Inc. v. Spring Township Board of Supervisors, 787 A.2d 1105 (Pa.Cmwlth. 2001)

Facts:

Centre Lime & Stone Company owned 73 acres of land located near the top of Nittany Mountain, and proposed to commence quarrying of sandstone products (called "SRL-E stone"). The quarrying operation would ultimately produce 50,000 tons of sandstone, and would lower the ridge line of Nittany Mountain by 70 feet. The property was located in the "Forest District" of Spring Township; surface mining and quarrying operations were permitted only in the I-1 Industrial District of the Township. Hence the property owner filed a validity challenge to the township's zoning ordinance, alleging that the impact of allowing quarrying only in the I-1 District was both (i) a *de facto* exclusion of quarrying from the township, and (ii) an unconstitutional taking of the value of the property. The I-1 Zoning District comprised 1,900 acres of land, which was 11% of the total land area of the township.

Decision:

The Commonwealth Court rejected the validity challenge brought by Centre Lime & Stone Company on both the exclusion basis and the takings basis.

First, with respect to the exclusionary argument, the Court concluded that making provision for surface mining and quarrying in 11% of the township constituted more than the township's fair share of quarrying, and was "not disproportionately small in relation to the total amount of undeveloped land in the township."

With respect to the takings claim, the property owner based this argument on the theory that there is a separate "surface mining" estate in the land and that, therefore, the regulations served as a total taking of the quarrying estate. The Commonwealth Court refused to recognize a "quarrying estate" and hence rejected this argument as well.

Comment:

With regard to the allegation of *de facto* exclusionary zoning, the Commonwealth Court applied a "fair share" approach normally associated with residential exclusionary zoning cases. Under either a "fair share" approach or the type of approach previously invoked by the Commonwealth Court in commercial exclusion cases - is the potential demand being met or frustrated under the zoning ordinance - the Court's decision that quarrying was not unreasonably excluded from Spring Township seems well founded.

With respect to the takings claim, the landowner argued that a quarrying or mineral extraction estate should be separately recognized by analogy to prior decisions where the Pennsylvania courts have recognized a separate "coal mining" estate in land. In fact, Pennsylvania is one of the few states that recognizes such a separate estate under any circumstances, be it quarrying or coal mining. In fact, such recognition has no basis under federal constitutional principles, as witnessed by the focus of the U.S. Supreme Court in the *Tahoe* case on "the parcel as a whole," not on the segmentation of the parcel into its separate spacial use and temporal components. Consistent with the U.S. Supreme Court's approach, the Commonwealth Court here refused to extend the doctrine of "separate estate" from coal mining to quarrying of sandstone (or any other type of mineral extraction, for that matter). Since the parcel as a whole retained value for other uses, there was no compensable regulatory taking.