

A Victory for Land-Use Planning

By John D. Echeverria

The U.S. Supreme Court's latest decision on a controversial "takings" issue struck an important – and unexpected -- blow in favor of sensible community land-use planning and regulation. In the process, the Court handed the property rights movement a major setback.

The case involves Lake Tahoe, the famously clear mountain lake that sits astride the California-Nevada border. Unfortunately, the lake's clarity has been degrading at an accelerating pace, largely as a result of polluted runoff from development, especially in or adjacent to wetlands that naturally purify the water flowing into the lake. Once degraded, the lake's clarity cannot be recovered for hundreds or thousands of years, if ever.

In the early 1980s, the Tahoe Regional Planning Agency, created through a bi-state compact, placed a moratorium on building on a substantial portion of the land around the lake. The goal was to put the rampant development threatening the lake on hold and to give the agency the breathing space it needed to prepare a comprehensive program to protect the lake. Given the complexity of the task, the moratorium lasted nearly three years.

Several hundred land owners in the basin filed a lawsuit, contending that the moratorium constituted a "taking" in violation of the Fifth Amendment to the U.S. Constitution. They contended that the agency could impose the moratorium only if it were willing, in effect, to pay rent to the land owners while the moratorium was in place.

Faced with this kind of staggering financial obstacle, no local or regional agency could use a moratorium as part of its comprehensive planning efforts.

When the case finally wended its way to the U.S. Supreme Court last year, many believers in the value of local land-use controls were concerned. The U.S. Supreme Court had never embraced the extreme constitutional arguments of libertarian property-rights advocates. But, over the last 15 years, the high court has handed public regulators a long string of defeats in takings cases, seemingly signaling a more expansive reading of the Takings Clause.

Fortunately, in the 6-3 decision issued last month, authored by Justice John Paul Stevens, the Supreme Court looked over the property-rights cliff and drew back. The court rejected the argument that the Tahoe moratorium effected a taking and, by implication, barred takings challenges to moratoria that other communities may adopt in the future, at least so long as they are reasonable in duration.

The court's reasoning also provides a powerful defense to takings challenges to land use and environmental measures other than moratoria. The court rejected the land owners' argument that in evaluating the economic impact of the moratorium it should look only at the three-year slice of time during which the moratorium was in place.

Instead, the court stated that it had to consider the owners' entire period of ownership, a perspective which reduces the apparent adverse economic effect of the restriction and reduces the likelihood of a taking.

The court made clear that this reasoning applies broadly. Thus, an owner of a 10-acre parcel subject, say, to a restriction on steep slope development affecting two acres, could not bring a taking claim focusing only on the two restricted acres. Similarly, an owner of valuable

timberland or farm land subject to rural zoning restrictions could not assert a taking claim focusing solely on the owner's inability to develop the property for residential or commercial purposes.

The decision also expressly affirmed the validity of the principle that owners subject to regulatory restrictions enjoy a "reciprocity of advantage" with their neighbors. While any particular owner may feel burdened by restrictions, she or he also receives implicit compensation from the neighbors' compliance with the same or similar restrictions.

In the Tahoe case, the court questioned whether land owners had suffered any actual economic loss; after all, the court reasoned, the moratorium provided the opportunity to prepare a comprehensive plan to protect the natural resources that made the basin a desirable place to invest in the first place, increasing property values for all.

Finally, the decision is remarkable, especially in comparison with some other recent Supreme Court decisions, because of the importance the court assigned to the goals of land use planning and regulation. The court deferred to the "consensus of the planning community," supporting moratoria as a valuable land management tool, and expressed its support for the objective of reining in "inefficient and ill-conceived growth."

Lake Tahoe has always been one the nation's natural "crown jewels," but now Lake Tahoe also represents a crown jewel of sensible -- and -- successful land use regulation.