

## U.S. SUPREME COURT NARROWS APPLICATION OF REGULATORY TAKING DOCTRINE

In a 6-3 decision, the United States Supreme Court issued a ruling that narrowed the application of the “regulatory takings” doctrine established by the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 2002 WL 654431 (U.S. April 23, 2002). The decision is significant for municipalities because it indicates that the Court is making it more difficult for a landowner to win a claim that a zoning bylaw has deprived the person of the right to use his or her property.

Before summarizing the decision it is important to briefly draw a distinction between the two categories of takings: physical takings and regulatory takings. Physical takings occur when the government physically takes away a private landowner's fee simple ownership in land for public purposes. The most obvious example of this is condemning land for use in creating a public highway. When that occurs the government must compensate the landowner. Regulatory takings occur when a government regulation, for example a zoning bylaw, is so restrictive that it deprives a landowner of “all economically beneficial uses” of his or her land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, the Supreme Court applied what it called a categorical rule. The rule basically provides that a taking exists and compensation is required if, as a result of a regulation, “no productive or economically beneficial use of land is permitted.”

If the categorical rule does not apply, to win a takings claim a landowner must establish that a regulatory taking has occurred based on a test that was set forth by the Supreme Court in *Penn Central Trans Co. v. New York City*, 438 U.S. 104 (1978). The Penn Central analysis involves a complex set of factors including the economic effect of the regulation, the extent to which the regulation interferes with investment-backed expectations, and the character of the regulation.

In the *Tahoe* case, the Tahoe Regional Planning Agency (TRPA) imposed a 32-month moratorium on development in the Lake Tahoe Basin. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 2002 WL 654431 (U.S. April 23, 2002). The purpose of the moratorium was to allow the TRPA to develop a comprehensive land use plan for the area.

The Tahoe-Sierra Preservation Council (TSPC), an organization that represents about 2,000 landowners in the Lake Tahoe Basin, challenged the 32-month moratorium by claiming it constituted a regulatory taking that invoked the categorical rule established in *Lucas* and that the TSPC members should be compensated by the TRPA. The dispute ultimately reached the U.S. Supreme Court.

The Supreme Court's decision is lengthy and complex. However, in our opinion, the bottom line of the decision is that in the Court's view, a temporary moratorium on use of property imposed by the government does not trigger the categorical rule established in *Lucas*. Rather, unless a government regulation creates a permanent taking that results in no productive or economically beneficial use of land, the landowner must meet the requirements of the *Penn Central* analysis in order to establish a takings claim.

Based on this case it appears very likely that if your municipality adopts a reasonable moratorium on land use, a takings challenge will not be successful unless a

landowner can meet the complex *Penn Central* analysis. This certainly makes it more difficult for landowners to challenge a moratorium.

With regard to adopting a moratorium, because Vermont is not a home-rule state, municipalities must consider the authority to adopt a moratorium prior to implementing one. This question of authority can and will be the subject of an entire article. For now, our advice is to check with the VLCT Law Center or your municipal attorney prior to implementing any type of moratorium.

While this decision involves a moratorium, it has broader implications than that. The decision indicates that this U.S. Supreme Court is inclined to narrowly apply the *Lucas* categorical rule to all regulatory taking issues. It is not clear how far the Court will go in narrowing the application of the *Lucas* decision. However, as far as municipalities are concerned, the Court is heading in the right direction.

- Jon Groveman, Director, VLCT Municipal Law Center

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