CA # 99-15641
CV-N-84-257-ECR
and
CV-N-92-98-ECR
(D. Nevada)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAHOE REGIONAL PLANNING
AGENCY, *et. al.,*
Appellants-Defendants
v.
TAHOE-SIERRA PRESERVATION
COUNCIL, INC., *et. al.,*

Appellees-Plaintiffs.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEVADA

BRIEF OF AMICI CURIAE AMERICAN PLANNING ASSOCIATION AND LEAGUE TO SAVE LAKE TAHOE

Of Counsel:
John D. Echeverria
Jon T. Zeidler
Environmental Policy Project
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Professor Thomas E. Roberts
Wake Forest University School of Law
Box 7206 Reynolds Station
Winston-Salem, NC 27109

Counsel for *Amici Curiae*
Rochelle Nason
Executive Director
League to Save Lake Tahoe
955 Emerald Bay Road
South Lake Tahoe, CA 96150
(530) 541-5388

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Agins v. City of Tiburon, 447 U.S. 255 (1979)
Andrus v. Allard, 444 U.S. 51 (1979)
City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S.Ct. 1624 (1999)
Downham v. City Council of Alexandria, 58 F.2d 784 (E.D.Va. 1932)
Dufau v. U.S., 22 Cl. Ct. 156 (1990), aff'd, 940 F.2d 677 (Fed. Cir. 1991)
Euclid v. Ambler Realty, 272 U.S. 365 (1926)
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) passim
Kinzli v. City of Santa Cruz, 818 F.2d 1449 (9th Cir. 1987), cert. denied, 484 U.S. 1043 (1988)
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) passim
Midnight Sessions Ltd. v. City of Philadelphia, 945 F.2d 667 (3rd Cir. 1991), cert. denied, 503 U.S. 984 (1992)
Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978)
Q.L. Const. Co. Inc. v. Gallo, 649 F. Supp. 1331 (D.R.I. 1986), aff'd, 836 F.2d 1340 (1st Cir. 1987)
Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), cert. denied, 514 U.S. 1064 (1995)
S. Kawoka v. City of Arroyo, 17 F.3d 1227 (9th Cir.), cert. denied, 573 U.S. 870 (1994)

St. Clair v. City of Chico, 880 F.2d 199 (9th Cir.), cert. denied, 493 U.S. 993 (1989)
Santa Fe Village Venture v. City of Albuquerque, 914 F. Supp. 478 (D.N.M. 1995)
Smoke Rise, Inc. v. Washington Suburban Sanitary Com'n, 400 F. Supp. 1369 (D.Md. 1975)
Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993)
United States v. General Motors Corp., 323 U.S. 373 (1945)
United States v. Petty Motor Co., 327 U.S. 372 (1946)
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)
Zilber v. Town of Maraga, 692 F. Supp. 1195 (N.D. Cal. 1988)

State Cases:
Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979), aff'd, 447 U.S. 255 (1980)
Almquist v. Town of Marshan, 245 N.W.2d 819 (Minn. 1976)
Brazos Land, Inc. v. Board of County Com'rs of Rio Arriba County, 848 P.2d 1095 (N.M. Ct. App. 1993)
Cappture Realty Corp. v. Board of Adjustment, 336 A.2d 30 (N.J. Super. Ct. App. Div. 1975)
City of Dallas v. Crownrich, 506 S.W.2d 654 (Tex. Civ. App. 1974)
Collura v. Town of Arlington, 329 N.E.2d 733 (Mass. 1975)
First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893 (Cal. Ct. App. 1989), cert. denied, 493 U.S. 1056 (1990)
Fowler v. Obier, 7 S.W.2d 219 (Ky. 1928)
Guinnane v. City and County, 241 Cal. Rptr. 787 (Cal. Ct. App.), cert. denied, 488 U.S. 823 (1987)
Hunter v. Adams, 4 Cal. Rptr. 776 (Cal. Ct. App. 1960)
Kelly v. Tahoe Reg'l Planning Agency, 855 P.2d 1027 (Nev. 1993), cert. denied, 510 U.S. 1041 (1994)
Landgate, Inc. v. California Coastal Comm'n, 953 P.2d 1188 (Cal.), cert denied, 119 S.Ct. 179 (1998)
Long Beach Equities v. County of Ventura, 282 Cal. Rptr. 877 (Cal. Ct. App. 1991), cert. denied, 505 U.S. 1219 (1992)
Miller v. Board of Public Works, 234 P. 381 (Cal. 1925)
Mitchell v. Kemp, 575 N.Y.S.2d 337 (N.Y. App. Div. 1991)
Naylor v. Township of Hellam, 717 A.2d 629 (Pa. Commw. Ct. 1998)
Orleans Builders & Developers v. Byrne, 453 A.2d 200 (N.J. 1982)
Peacock v. County of Sacramento, 77 Cal. Rptr. 391 (Cal. Ct. App. 1969)
Walworth County v. Elkhorn, 133 N.W.2d 257 (Wisc. 1965)
Williams v. City of Central, 907 P.2d 701 (Colo. Ct. App. 1995)
Woodbury Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. Ct. App. 1992), cert. denied, 505 U.S. 960 (1993)

State Statues:
Cal. Gov't Code § 65858 (1998)
Mich. Comp. Laws Ann. § 125.285 (1998)
Minn. Stat. Ann § 394.34 (1998)
Mont. Code. Ann § 76-2-306 (1998)
1998 Or. Rev. Stat. Title 19, 197.510

Other Authorities:
American Society of Planning Officials, Planning Advisory Service Report, Nos. 309-10
Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. Urb. Law 65 (1971)

Elizabeth A. Garvin & Martin L. Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan,* 46 Land Use Law and Zoning Digest, No. 6 (1996)
Robert Meltz, Dwight Merriam & Richard Frank, *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* (1998)
Patrick J. Rohan, *ZONING AND LAND USE CONTROLS* (1998)

The American Planning Association (the "APA") and the League to Save Lake Tahoe (the "League") respectfully submit this brief *amicus curiae* in support of the appeal by the Tahoe Regional Planning Agency (the "TRPA") and urge the Court to reverse the decision of the District Court.

STATEMENT OF INTEREST

The APA is a not-for-profit organization incorporated in Washington, D.C., with 46 chapters covering all states and over 30,000 members nationwide. The APA's purposes and objectives include the advancement of community physical, economic and social well-being through planning at the local, state, and national levels. The APA has a stake in this case because the erroneous and unprecedented decision of the District Court, unless reversed, will significantly impair the traditional power of government to develop and implement effective and well-considered community land-use plans.

The League is a California not-for-profit corporation with over 4,000 members dedicated to the restoration and preservation of the best natural features of the Tahoe Basin's waters, forests and landscape for the enjoyment of present and future generations. The League has a stake in this case because the decision of the District Court threatens to undermine the ability of the TRPA to protect and restore the Tahoe Basin, and to drain away taxpayer dollars that would otherwise be available to protect and restore the Tahoe Basin.

As indicated in the motion being filed simultaneously with this brief, the parties have agreed to the filing of this brief *amicus curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court ruled that a moratorium on land development in the Tahoe Basin effected a facial taking of private property under the Fifth Amendment. That conclusion is plainly wrong and therefore the Court should reverse the decision of the District Court.

The *amici's* brief addresses three issues which the *amici* believe are important to the resolution of this case. First, as numerous courts and commentators have recognized, a reasonable moratorium on development serves important public policy purposes. The District Court's decision, unless reversed, will seriously frustrate the achievement of these public purposes.

Second, the District Court's decision conflicts with the virtually unanimous conclusion of other courts across the country which have addressed the constitutionality of development moratoria. Essentially without exception, the courts have ruled that reasonable development moratoria, which simply delay development but do not prohibit it altogether, do not result in a taking under the Fifth Amendment.

Third, the District Court erred in concluding that the U.S. Supreme Court's rulings in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), and Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), support a finding of a taking in this case. Both First English and Lucas, which involved regulatory restrictions which allegedly barred the owners from making any economically viable use of their land, are distinguishable from this case. The reasoning of those decisions does not affect the established rule that a reasonable development moratorium does not result in a taking.

ARGUMENT

I. A Development Moratorium Is a Well Established Land-Use Planning Tool That Serves Useful and Important Public Purposes.

The establishment of a reasonable moratorium on development is widely recognized as a legitimate and useful action by state, regional, and local governments to respond to severe development pressures. See generally Robert Meltz, Dwight Merriam & Richard Frank, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION, 266-279 (1998). Moreover, the recognition that development moratoria are a critical tool for land-use planning and zoning dates back at least to the early part of this century.[1]

Courts and planning professionals have recognized that development moratoria serve to advance at least three important public policy purposes. The District Court's decision threatens to defeat these valuable purposes.

A. Development Moratoria Protect the Integrity of the Planning Process from the Destructive Pressures Created by Ongoing Development Activity.

First, development moratoria facilitate thoughtful and effective land-use planning by preserving the status quo during the planning process and ensuring that ongoing development activity does not defeat the objectives of the planning process.

Land-use planning is necessarily a complex, time-consuming undertaking for a community. The process must address a variety of issues and problems, including projected population growth, anticipated water and sewer service needs, availability of adequate housing for different income groups, transportation problems, hazards associated with development on hillsides and in flood plains and other critical areas, and the protection of various natural resources, including clean water, clean air, and open spaces. See Robert H. Freilich, Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning, 49 J. Urb. Law 65, 68 (1971). Given this complexity, "[p]lanning professionals and elected officials have one overriding need -- time to plan and solve these problems."

Elizabeth A. Garvin & Martin L. Leitner, Drafting Interim Development Ordinances: Creating Time to Plan, 46 Land Use Law and Zoning Digest, No. 6 at 3 (1996).

A development moratorium addresses this need by holding off development that would make the problems the community faces even worse, and by reducing the pressure on land-use planners to adopt poorly conceived plans quickly. As summarized by two planning professionals:

While [planning] is occurring, development applications are often still being submitted and the existing problem(s) may be exacerbated before they are solved. To temporarily stem the tide of applications while creating time for a complete (and useful) planning process, communities are increasingly relying on interim development controls. These controls can be used during the planning process to prevent land development that would conflict in any way with the permanent legal controls that will ultimately be adopted to implement the plan and its policies. With the planning so protected, there is no need for hasty adoption of permanent controls in order to avoid the establishment of nonconforming uses, or to respond in an ad hoc fashion to specific problems.

Garvin & Leitner, 46 Land Use Law and Zoning Digest, No. 6 at 3 (1996). See also American Society of Planning Officials, Planning Advisory Service Report, Nos. 309-10, at 46-7 (1975) (one of the "important functions" of planning moratoria and interim development controls is to "permit planning and ordinance writing to proceed relatively free of development pressures").

The common sense observation that development moratoria provide communities crucial "breathing space" has been widely endorsed by the courts. In one of the earliest moratorium cases, *Fowler v. Obier*, 7 S.W.2d 219 (Ky. 1928), the Court stated:

[I]n undertaking a matter so important as a general zoning ordinance, the city authorities must necessarily, if the best results are to be obtained, move with caution.... The governing authorities of the city must have recognized that the city planning commission could do little good if property owners should be allowed to change conditions after necessary information and data had been obtained, and before a final report had been made to the general council.

Id. at 222. Similarly, in *Hunter v. Adams*, 4 Cal. Rptr. 776 (Cal. Ct. App. 1960), the Court stated, "It is difficult for us to conceive how an intelligent, integrated plan can be formulated if, while it is under study and planning, the area is in a constant state of flux with new building construction and improvements and the resulting change in property values and appraisals." See also *Naylor v. Township of Hellam*, 717 A.2d 629, 633 (Pa. Commw. Ct. 1998) ("Maintaining the status quo serves to protect and promote the health and welfare of the municipality's citizens by

ensuring that proposed development conforms to rather than defeats the revised plans and regulations..., and by preventing further uncoordinated or hazardous development stemming from the regulations in effect prior to the moratorium.").

Indeed, the courts have considered the authority to impose a development moratorium so critical to the integrity of the land-use planning process that they have routinely concluded that the government's authority to enact a moratorium on development is implicit either in state zoning enabling legislation or general police power authority. As the Commonwealth Court of Pennsylvania put it, "implicit in or incidental to the broad powers expressly conferred upon municipalities is the authority to impose moratoria on development while land-use regulations are in the process of being revised." Naylor, 717 A.2d at 633. See also *Almquist v. Town of Marshan*, 245 N.W.2d 819, 825 (Minn. 1976) ("holding development in a state of suspense to permit the town to keep its planning options open and to conduct a study of long range development" is one of the "necessary powers... for adequately conducting and implementing municipal planning"); *Brazos Land, Inc. v. Board of County Com'rs of Rio Arriba County*, 848 P.2d 1095, 1101 (N.M. Ct. App. 1993) (authority to enact development moratoria is implied by broad delegation of authority to regulate subdivisions). At the same time, of course, numerous jurisdictions have explicitly authorized the use of reasonable development moratoria by statute.[2]

B. Development Moratoria Prevent a "Race" by Developers Seeking to Avoid Anticipated Regulation and Circumvent Community Planning Objectives.

A second -- and related -- function of a moratorium on development is to prevent the defeat of planning goals by developers and land owners who might otherwise race to carry out new development before the new plan goes into effect. See American Society of Planning Officials, Planning Advisory Service Report, Nos. 309-10, at 46-7 (1975) (development moratoria "help assure that the effectiveness of the system will not be destroyed before it has been fully implemented").

If a community could not temporarily forestall development, there would be an inevitable tendency for some owners to quickly initiate projects which they believe may be prohibited or more tightly restricted under the new plan. As one of the first courts to address the issue summed up the problem,

[A]ny movement by the governing body of a city to zone would, no doubt, frequently precipitate a race of diligence between property owners, and the adoption later of the zoning ordinance would in many instances be without effect to protect residential communities-like locking the stable after the horse is stolen.

Downham v. City Council of Alexandria, 58 F.2d 784, 788 (E.D.Va. 1932). See also Patrick J. Rohan, ZONING AND LAND

USE CONTROLS, §22.01 (1998) ("Public knowledge that the government has made, or is about to make, studies to alter existing land-use controls frequently triggers development activity that may frustrate planning efforts.").

Courts upholding development moratoria have frequently pointed to the need to prevent a race to circumvent new planning goals. For example, in *City of Dallas v. Crownrich*, 506 S.W.2d 654, 659 (Tex. Civ. App. 1974), the Court upheld the authority of the Dallas City Council to impose a development moratorium pending resolution of the rezoning of a historic district, stating,

We believe it would be inconsistent to allow a city...the power to make zoning regulations, and then deny it the power to keep those impending regulations from being destroyed by an individual or group seeking to circumvent the ultimate result of the rezoning.... The authorization of any other rule would, in our opinion, frequently sanction a race of diligence to the city hall by property owners attempting to place structures upon their land that would be out of accord with the surrounding property under the new zoning laws. This result would be an anathema upon the city's zoning authority.

See Also *Walworth County v. Elkhorn*, 133 N.W.2d 257 (Wisc. 1965) ("The very pendency of the adoption of [a] comprehensive extraterritorial zoning ordinance might precipitate action on the part of property owners in the territory to be affected which would tend to frustrate the objective sought to be attained by the prospective ordinance."); *Miller v. Board of Public Works*, 234 P. 381, 388 (Cal. 1925) ("[W]e may take judicial notice of the fact that it will take much time to work out the details of... a [new] plan and that obviously it would be destructive of the plan if, during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan.").

C. The Use of Development Moratoria Promotes Full and Effective Public Participation in the Planning Process.

Finally, a reasonable development moratorium serves important values at the core of our democratic system of government by providing an opportunity for full and effective public participation in land-use decisions affecting the entire community. Without some means to hold development in abeyance, the pace of ongoing development activity would create enormous pressure on community planners to adopt a plan without full citizen input in the planning process. The use of a development moratorium, on the other hand, allows the "planning and implementation process... to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view." Garvin and Leitner, 46 Land Use Law and Zoning Digest, No. 6 at 3 (1996). As one commentator has explained:

> [One] objective of interim development controls is the promotion of public debate on the issues, goals and policies of planning and of the development controls proposed to implement the plans. The studies, drafting, deliberations, and public airing, with changes and revisions of proposed controls required to prepare and enact comprehensive development controls mean that a considerable period will almost certainly elapse between the time when deficiencies in land use planning are recognized and the effective date of implementation of remedial controls. The failure to institute democratic discussion leads not only to hasty and improvident adoption of plans but also to the failure to utilize planning itself. Essential public involvement will often prevent the kind of planless implementation too often found in our communities when action is precipitated without public participation.

Freilich, 49 J. Urb. L. at 79. A number of courts which have rejected takings challenges to development moratoria have pointed to their value in promoting democratic participation in community land-use planning. As stated by the Supreme Court of Minnesota, one of the "persuasive reasons for permitting moratorium ordinances [is] to derive the benefits of permitting a democratic discussion and participation by citizens and developers in drafting long-range use plans." *Almquist v. Town of Marsham*, 245 N.W.2d at 826. See also *Collura v. Town of Arlington*, 329 N.E.2d 733 (Mass. 1975) (noting that "with the adoption of an interim provision [a developer] is made aware that a new plan is in the offing and is thus able to participate in the debate over what that new plan should contain").

II. Federal and State Courts Across the Country Have Consistently Rejected "Takings" Challenges to Development Moratoria.

Although the U.S. Supreme Court has never ruled on the precise question of the constitutionality of reasonable development moratoria, the Court's decision in*Agins v. City of Tiburon*, 447 U.S. 255 (1979), is virtually dispositive of the issue. Furthermore, the overwhelming weight of other federal and state court decisions supports the conclusion that a reasonable moratorium does not result in a taking.

The rationale for this conclusion is entirely straightforward. A moratorium on development does not deny an owner all use of his property; it simply defers the use. As a practical matter, there is all the difference in the world between a regulation which blocks all development permanently or indefinitely, and a moratorium which by its express terms is designed only to be in effect temporarily. Furthermore, as an economic matter, the financial impact of a moratorium, which simply delays development for a limited period of time, is far different, and less

drastic, than a permanent ban on development. See generally *Woodbury Partners v. City of Woodbury*N.W.2d 258 (Minn. Ct. App. 1992), cert. denied, 505 U.S. 960 (1993).

Agins and its Progeny. In Agins, the defendant city began condemnation proceedings but abandoned the proceedings almost one year later. The owner sued the city, claiming that the aborted proceedings effected a taking by interfering with his ability to sell or develop his land during the period while they were pending. The California Supreme Court rejected the claim, see *Agins v. City of Tiburon*, 598 P.2d 25, 31-2 (Cal. 1979), and the U.S. Supreme Court affirmed, stating,

> Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense. 447 U.S. at 263 n. 9 (citations omitted).

The pendency of the condemnation proceedings in Agins was effectively the same thing as a development moratorium: it prevented the owners from selling or developing their property as they wished until the city determined the appropriate use for the property. Thus, the conclusion that there was no taking in Agins directly supports the conclusion that there is no taking when, as in this case, the government imposes a moratorium on development. In addition, Agins specifically rejected the idea that the public should be held liable for losses caused by delays "during the process of governmental decision making." A development moratorium in support of a comprehensive land-use planning effort is precisely the type of delay associated with the "process of governmental decision making" referred to in Agins.

Consistent with this self-evident reading of Agins, a number of lower courts have relied upon Agins to reject takings challenges to development moratoria. In *Zilber v. Town of Maraga*, 692 F. Supp. 1195, 1206 (N.D. Cal. 1988), the Court rejected the claim that a moratorium pending completion of an open space preservation study resulted in a taking, stating that the claim was "akin to one rejected in Agins." See also *Williams v. City of Central*, 907 P.2d 701, 704 (Colo. Ct. App. 1995) (relying on Agins to reject claim that a development moratorium worked a taking, and observing that "even if the ability to sell or develop... property is restricted during [a] moratorium, the landowner is free to continue with sale or development once the regulation is lifted"). Compare *S. Kawoka v. City of Arroyo*, 17 F.3d 1227, 1237 (9th Cir.), cert. denied, 573 U.S. 870 (1994) (relying on Agins to reject a substantive due process challenge to a development moratorium).

Other Rulings. Apart from Agins and its progeny, the overwhelming weight of decisions by other federal and state courts also supports the conclusion that reasonable moratoria do not result in a taking. See e.g., *Long Beach Equities v. County of Ventura*, 282 Cal. Rptr. 877, 888 (Cal. Ct. App. 1991), cert. denied, 505 U.S. 1219 (1992) (reasonable moratoria are not compensable); *Orleans Builders & Developers v. Byrne*, 453 A.2d 200, 208 (N.J. 1982) (observing that "under decisional law in this state as well as in other jurisdictions" moratoria "leading to formulation of a comprehensive system for the area's development which would safeguard its environment" are not compensable).

Numerous courts have upheld development moratoria which, like the moratorium at issue in this case, lasted a period of several years. See *Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478 (D.N.M. 1995) (30 month moratorium associated with effort to create national monument not a taking); *Smoke Rise, Inc. v. Washington Suburban Sanitary Com'n*, 400 F. Supp. 1369 (D. Md. 1975) (5 year moratorium on sewer hookups "doesn't render land worthless or useless so as to constitute a taking"); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 258 Cal. Rptr. 893, 906 (Cal. Ct. App. 1989), cert. denied, 493 U.S. 1056 (1990) (30 month moratorium on building in a flood plain not a taking); *Woodbury Partners v. City of Woodbury*, supra (2 year moratorium on development pending completion of traffic-flow study not a taking); *Cappture Realty Corp. v. Board of Adjustment*, 336 A.2d 30 (N.J. Super. Ct. App. Div. 1975) (4 year moratorium imposed on construction in flood-prone lands not a taking); *Peacock v. County of Sacramento*, 77 Cal. Rptr. 391 (Cal. Ct. App. 1969) (3½ year interim zoning preventing development not a taking).

A number of courts also have rejected takings challenges to development moratoria which were adopted, like the moratorium in this case, to facilitate the development of a new regional land conservation strategy. See e.g., *Orleans Builders & Developers v. Byrne*, 453 A.2d 200 (N.J. 1982) (18 month moratorium imposed in order to facilitate protection for the New Jersey Pine Barrens not a taking); *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal 1988) (18 month moratorium imposed pending completion of plan for regulating open space not a taking).

In addition, this Court has recognized that land-use regulation is a complex process and that the inevitable time delays in that process do not amount to a taking. In *St. Clair v. City of Chico*, 880 F.2d 199 (9th Cir.), cert. denied, 493 U.S. 993 (1989), a development corporation claimed a taking when, after numerous unsuccessful efforts to obtain a sewer hook-up, it was allegedly forced into bankruptcy. Although the Court decided the case on ripeness grounds, it concluded, "Appellants do not suggest that their takings claim is based on a considerably 'excessive delay' in the application process, and would find it impossible to do so because, as we have stated before, a delay of up to eight years may still be inadequate to satisfy the ripeness requirement." Id.

at 203 n.1, citing *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 n.5 (9th Cir. 1987), cert. denied, 484 U.S. 1043 (1988). Compare *Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188 (Cal.), cert denied, 119 S.Ct. 179 (1998) (delays resulting from erroneous agency assertion of permitting jurisdiction constitute "normal delays" which preclude a finding of a taking). If multi-year delays in administrative processing of development applications are not a taking, as the foregoing authorities establish, then a formal government development moratorium for a comparable period to facilitate comprehensive community planning cannot result in a taking either.

In the few cases in which courts have concluded that moratoria are unconstitutional, they have generally done so on due process, not takings, grounds, and because the moratoria were not enacted in good faith or were otherwise arbitrary or capricious. See e.g., *Mitchell v. Kemp*, 575 N.Y.S.2d 337 (N.Y. App. Div. 1991) (holding moratoria unconstitutional, apparently on due process grounds, where town gave no satisfactory reason for five year delay in enacting zoning ordinance); *Q.L. Const. Co. Inc. v. Gallo*, 649 F. Supp. 1331 (D.R.I. 1986), aff'd, 836 F.2d 1340 (1st Cir. 1987) (finding due process violation where city imposed moratorium on sewer hookups but made no effort to remedy problem giving rise to moratorium).

Measuring the facts of this case against the facts of the numerous other decisions in which similar regulatory takings challenges have been rejected, it is clear there is no taking in this case. The 1980 Tahoe Regional Planning Compact mandated the establishment of environmental threshold carrying capacities within 18 months, and implementation of the amended regional plan within 12 months of establishment of the carrying capacities. In fact, the TRPA implemented the amended regional plan a little less than one year later than scheduled. The TRPA restricted development pending completion of the regional plan from June 25, 1981 until April 26, 1984, a period of less than three years. The District Court found that the TRPA acted in good faith and proceeded with the planning process as expeditiously as possible. ER 21 at 60. Without minimizing the significance of this delay and the burdens it imposed on certain owners, this type of delay does not amount to a taking of private property, much less a facial taking. Under the Supreme Court's Agins decisions, prior decisions of this Court, and the overwhelming weight of decisions from around the country, the decision of the District Court must be reversed.

III. Neither the Supreme Court's Decision in First English, Nor its Decision in Lucas, Undermines, Much Less Contradicts, the Conclusion That Development Moratoria Do Not Effect a Taking.

Finally, the District Court erred in concluding that the U.S. Supreme Court's decisions in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992),

created a new approach to takings claims which supports the conclusion that a moratorium on development effects a taking. To the contrary, a careful reading of these decisions demonstrates that they confirm the constitutionality of the TRPA's moratorium. [3]

First English. In First English, a land owner filed a claim for compensation under the takings clause, alleging that Los Angeles County had denied it "all use" of its property by adopting an interim ordinance barring construction in a flood plain. The California Court of Appeals, without addressing the merits of the case, dismissed the takings claim on the ground that a regulation which allegedly effects a taking may properly be enjoined but never gives rise to a right to financial compensation. The U.S. Supreme Court granted review solely to address the issue of the appropriate remedy in a regulatory takings case. Accepting for the sake of argument plaintiff's allegations that the restrictions effected a taking, 482 U.S. at 313, the Court addressed the question "whether abandonment [of regulations] by the government [after a judicial order finding a taking] requires payment of compensation for the period of time during which [the] regulations" were in effect. Id. at 318. The Court answered this question in the affirmative, holding that, assuming a government regulation works a taking, subsequent rescission of the regulation does not foreclose a claim for compensation.

Thus, First English is a very narrow ruling focusing exclusively on the appropriate remedy in a regulatory taking case. The Court in First English did not establish that a restriction which temporarily deprives a landowner of the use of her property constitutes a taking. Moreover, as the majority made clear, the Court was not addressing "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." Id. at 321.

This reading of First English is confirmed by the California Court of Appeals' resolution of the takings issue on remand. Addressing (for the first time) the actual merits of the takings claim, the Court of Appeals ruled that the County's interim ordinance did not effect a taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 906 (Cal. Ct. App. 1989). Emphasizing the fact that the ordinance was temporary by design, the court concluded: "We do not read the U.S. Supreme Court's decision in First English as converting moratoriums and other interim land-use restrictions into unconstitutional 'temporary takings' requiring compensation unless, perhaps, if these interim measures are unreasonable in purpose, duration or scope." Id. The U.S. Supreme Court denied the petition for certiorari filed by the owner in response to this decision. See 493 U.S. 1056 (1990).

Other courts have read First English in identical fashion, and have refused to find that development moratoria or delays in permit processing effect "temporary takings" under First English.

See e.g., *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1206 (N.D. Cal. 1988) (relying on First English to support conclusion that 1½ year development moratorium is a "normal delay" that does not result in a taking); *Dufau v. U.S.*, 22 Cl. Ct. 156 (1990), aff'd, 940 F.2d 677 (Fed. Cir. 1991) (following First English, and concluding that 16 month delay during Clean Water Act section 404 permitting process not a taking); *Guinnane v. City and County*, 241 Cal. Rptr 787, 790 (Cal. Ct. App.), cert. denied, 488 U.S. 823 (1987) (concluding that "nothing in First English... alters the established principle that the interim burden imposed on a landowner during the government's decision making process, absent unreasonable delay, does not constitute a taking").

In sum, the District Court's belief that First English established a new species of "temporary takings" which would support a finding of a taking based on a "temporary" development moratorium reflects a fundamental misreading of that decision. First English, which involved very different issues than this case, is entirely consistent with the traditional rule that a reasonable development moratorium does not effect a taking.

Lucas. The District Court also was wrong in its belief that the decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), supported a finding of a taking in this case.

In Lucas, the Supreme Court found a taking based on the fact that the South Carolina coastal protection law permanently barred a land owner from developing his property and reduced the market value of the property to zero. The Court applied its longstanding rule that a regulation effects a taking if it "denies [the owner] all economically beneficial or productive use of land." Id. at 1015, citing Agins, 447 U.S. at 260. Nothing in the reasoning in Lucas suggests that the Court's ruling applies to temporary restrictions on development. Indeed, the Court was quite clear in noting that its ruling was likely to apply only in "rare" cases, a statement which contradicts the idea that Lucas could apply to the frequently used moratorium tool. See *Williams v. City of Central*, 907 P.2d at 706 ("Importantly, the Lucas Court specifically noted that categorical temporary takings were expected to be a rare event, occurring only under extraordinary circumstances. 'Stop gap' or interim zoning moratoria, however, play an important role in land-use planning and are commonly employed.").

Moreover, as a logical matter, it is impossible to conclude that a development moratorium, at least one confined to a period of a few years, such as this one, results in a Lucas-type "total taking." In a free market economy like that of the United States the actual market value of property is the best indicator of whether a property retains any economic use. As the Supreme Court asked rhetorically in Lucas, "What is the land but the profits thereof?" 505 U.S. at 1017. Because a moratorium simply defers property use rather than prohibits it, unlike the regulation at issue in Lucas, it does not reduce property value to zero. The mandated deferral of use may lead to a discounting of a property's value,

but it does not eliminate all value. Consistent with this understanding, the TRPA introduced substantial evidence of significant land sales in the Tahoe Basin during the moratorium.[4]

In any event, even if one focuses on actual physical uses of property, there is no total deprivation of use, but merely a postponement of use for the period of the moratorium. Unlike the restriction in Lucas, which prohibited all use of the property on a permanent basis, the moratorium in this case only deferred use for a temporary period. Given this difference, it would be nonsensical to conclude that the TRPA moratorium resulted in a total taking of all use under Lucas.

This conclusion also is supported by the Supreme Court decisions establishing that the impact of a regulation must be measured based on the "parcel as a whole." See Penn Central, 428 U.S. at 130 ("Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."); see also *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (no taking where only one "stick" in the claimant's bundle of rights" were adversely affected by the regulatory action because "the aggregate must be viewed in its entirety"). When a moratorium temporarily restricts use of property, the rights in only one particular temporal segment have been restricted, not all rights. When the effect of a moratorium is viewed in the context of an owner's entire property, it is apparent there has been no Lucas-type taking.

So far as *amici* are aware, no court to address the issue (other than the court below) has ruled that a development moratorium can result in a Lucas-type taking. Indeed, all the decisions are to the contrary. See *Kelly v. Tahoe Reg'l Planning Agency*, 855 P.2d 1027, 1033-4 (Nev. 1993), cert. denied, 510 U.S. 1041 (1994) (rejecting takings challenge to temporary restrictions which, unlike the restrictions in Lucas, "temporarily limit, rather than forever preclude development in environmentally sensitive areas"); *Woodbury Partners v. City of Woodbury*, 492 N.W.2d at 261 (moratorium prohibiting all "economically viable use" of property during two-year period does not result in a taking under Lucas); *Williams v. City of Central*, 907 P.2d at 706 (moratorium on new development in gambling district did not effect a taking under Lucas); *Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. at 483 (citing Lucas and First English, and rejecting claim that 30 month moratorium resulted in taking).

District Court Opinion. The District Court observed that the TRPA made an "excellent case" that development moratoria do not result in a taking, stated that it is "certainly possible" to reach that conclusion, and acknowledged that many other courts have done so. Nonetheless, the Court stated, "we feel that, should the issue be presented to the Supreme Court, it would reach the opposite conclusion." ER 21 at 59. However, none of the arguments the District Court lays out to support this prognostication is persuasive.

First, the Court said the exception the Court recognized in First English for "normal delays in obtaining building permits" appeared to contemplate delays that might occur once the permitting process has begun, but not delays, such as those caused by a development moratorium, which temporarily prevent the permit process from beginning at all. Id. It is not clear what, if any, significance this purported distinction has for the takings issue in this case. In any event, this statement ignores the fact the Court in First English said there likely would be no takings liability "in the case of... changes in zoning ordinances, variances, and the like which are not before us." 482 U.S. at 321. Certainly "changes in zoning ordinances" would temporarily block initiation of permit procedures. And "the like" is obviously a capacious enough term to include a moratorium which has this effect.

Second, the District Court stated that First English does not necessarily exempt regulations which are temporary by design from takings liability, pointing to the citations in *First English to United States v. Petty Motor Co.*, 327 U.S. 372 (1946), and *United States v. General Motors Corp.*, 323 U.S. 373 (1945). ER 21 at 59. However, those two decisions involved actual physical appropriations of private leaseholds by the government, not regulation of the use of private property. The Supreme Court has consistently treated these two categories of government action very differently under the takings clause. While the physical occupation of any portion of a property by the government typically does result in a compensable taking, a restriction on an owner's ability to use a portion of his property typically does not result in a taking. See Penn Central, 428 US. at 130-1. This difference simply recognizes the special, uniquely intrusive quality of government actions which effect an actual physical appropriation of private property, as opposed to a mere restriction on the use of property. See generally, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Finally, the District Court rejected the possible "wisdom" of recognizing that development moratoria do not result in a taking because of the alleged "indefiniteness" of the moratorium in this case. ER 21 at 60. But this ignores the fact that the TRPA was acting under a statutory directive to complete a new regional plan and, as all those concerned were aware, the TRPA only intended to maintain the moratorium in place for so long as it took to complete the plan. To be sure, the TRPA, after it failed to meet the statutory deadline for preparing the plan, twice extended the moratorium, but that hardly altered the fact that the completion of the regional plan provided a clear and identifiable ending point for the moratorium. Contrary to the formalistic approach of the District Court, numerous other courts have rejected takings challenges to development moratoria despite short extensions to complete ongoing planning processes. See, e.g., *Naylor v. Township of Hellam*, 717 A.2d 629 (Penn. Comm. Ct. 1998) (one year moratorium extended two months); *Santa Fe Village Venture v. City of Albuquerque* 914 F. Supp. 478 (D.N.M. 1995) (one year moratorium extended twice, once for six

months, and again for a year). Particularly in light of the District Court's findings that the TRPA acted in good faith and proceeded as expeditiously as possible, the circumstances of this case provide no warrant for creating a hypertechnical exception to the general rule that reasonable moratoria on development do not result in a compensable taking.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the District Court.

Respectfully Submitted,

Rochelle Nason, Esquire
Executive Director,
League to Save Lake Tahoe
Bar # 130979
955 Emerald Bay Road
South Lake Tahoe, CA 96150
(530) 541-5388
Counsel for *Amicus Curiae*

Of Counsel:
John D. Echeverria
Jon T. Zeidler
Environmental Policy Project
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9850

Professor Thomas E. Roberts
Wake Forest University School of Law
Box 7206 Reynolds Station
Winston-Salem, NC 27109
(336) 758-5724

NOTES

[1]The earliest cases affirming the use of development moratoria were almost exactly contemporaneous with the decision in Euclid v. Ambler Realty, 272 U.S. 365 (1926), the landmark U.S. Supreme Court ruling upholding the constitutional validity of zoning. See e.g., Miller v. Board of Public Works, 234 P. 381 (Cal. 1925) (upholding an emergency moratorium on multi-family dwellings); Fowler v. Obier, 7 S.W.2d 219 (Ky. 1928) (upholding a 2 year moratorium on commercial and industrial development).

[2] See e.g., Cal. Gov't Code § 65858 (1998) (authorizing a development moratorium for up to 2 years); Mich. Comp. Laws Ann. § 125.285 (1998) (authorizing a moratorium for up to 3 years); Minn. Stat. Ann. § 394.34 (1998) (authorizing interim zoning for up to 2 years); Mont. Code. Ann. § 76-2-306 (1998) (authorizing interim zoning for up to 2½ years). In many cases,

legislation was adopted in response to repeated court challenges to the authority of municipalities to adpot moratoria under the police power. In Oregon, for example, the moratorium legislation contains a finding that statutory authorization was necessary to prevent "necessary and desirable" moratoria from being "subjected to undue litigation." 1998 Or. Rev. Stat. Title 19, 197.510.

[3] The District Court correctly rejected what it termed the "partial" taking claim in this case. ER 21 at 32. However, amici submit that the District Court was wrong to assume that regulatory takings doctrine actually includes an entirely distinct tier of analysis for so-called "partial" takings. Every takings claimant, in order to prevail, must demonstrate that the regulation eliminated all (or substantially all) of a property's economically beneficial use. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). See also United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (regulatory takings occur only in "extreme circumstances"). The Supreme Court's decision in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), upon which the District Court relied, is consistent with this understanding of regulatory takings doctrine insofar as the Court rejected a takings challenge in that case on the ground that the restrictions at issue "permit reasonable beneficial use of the landmark site." Id. at 138. See also Reahard v. Lee County, 968 F.2d 1131, 1135 (11th Cir. 1992), cert. denied, 514 U.S. 1064 (1995) ("the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property"); Midnight Sessions Ltd. v. City of Philadelphia, 945 F.2d 667, 677 (3rd Cir. 1991), cert. denied, 503 U.S. 984 (1992) (no taking where court could not "conclude[] that the alleged diminution in the value of the properties deprived appellees of all economically viable use of them").

In addition, the District Court pointed to the importance of preserving Lake Tahoe in rejecting the so-called "partial" takings claim. ER 21 at 35. If this fact is pertinent in this takings case, it certainly supports the Court's conclusion. However, it is debatable whether the fact that a regulation does (or does not) advance some public purpose is a relevant factor in takings analysis. See Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed.Cir. 1993) (viability of taking claim presupposes "the validity of the governmental action"). See also City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S.Ct. 1624, 1636 (1999); id. at 1649 n. 2 (Scalia, J., concurring); id. at 1660 n. 12 (Souter, J., dissenting) (expressly raising but deferring resolution of the question whether the ostensible takings test based on government's alleged "failure to substantially advance a legitimate state interest" actually represents a due process issue rather than a takings issue).

[4] As the District Court pointed out, in Del Monte Dunes at Monterey Ltd. v. City of Monterey, 35 F.3rd 1422 (9th Cir. 1996), aff'd, 119 S.Ct. 1624 (1999), the Court expressed the view that an ostensible "market value" based on the government's offer to

purchase a property may not be a reliable indicator that an actual market value exists for the property. In this case, proof of an actual, operating market was not based on sales to or offers to purchase made by the government, but rather on private market transactions.