The Supreme Court's Evolving Takings Jurisprudence:

A First Look at *Tahoe-Sierra*

By Steven J. Eagle

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (Apr. 23, 2002), the Supreme Court held that temporary moratoria on development imposed for purposes of comprehensive land-use planning were not per se, or categorical, takings. Although narrow, the holding was accompanied by expansive dicta and was the first Supreme Court victory for land-use regulators in 15 years.

Robert Freilich, who filed an amicus brief for the American Planning Association, hailed the decision as "a constitutional acceptance of the need for planning in our society." Bob Egelko, *Property Owners Lose Key Tahoe Case*, S.F. CHRON., Apr. 24, 2002, at A1.

Michael Berger, who argued for the landowners, conceded that the ruling was "backpedaling from where the court seemed to be headed." David G. Savage, *Hitting the Brakes—A Pro-Property Rights Juggernaut Stalls on the Shores of Lake Tahoe*, A.B.A.J. (June 2002), at 32. Berger also expressed concern about the individual owners "who've been hung out to dry for 20 years—left with no ability to enjoy their land and no compensation for it—so the rest of us can enjoy Lake Tahoe." Jan Crawford Greenburg, *Court Rejects Blanket Compensation for Halted Building*, CHI. TRIB., Apr. 24, 2002, at 8.

Preserving Lake Tahoe

Lake Tahoe is a pristine alpine lake nestled in the mountains between Northern California and Nevada. By the late 1950s, development had led to increased runoff and nutrient loading, causing erosion and a proliferation of algae that threatened the lake's clarity. The inadequacy of local efforts to deal with these problems led to a bi-state compact creating the Tahoe Regional Planning Agency (TRPA) "to coordinate and regulate development in the Basin and to conserve its natural resources." *Tahoe-Sierra*, 122 S. Ct. at 1471.

In 1980, the TRPA was directed to develop regional air, water quality, soil conservation, and vegetation preservation standards within 18 months. The agency had a year thereafter to adopt an amended regional plan to achieve those standards. To prevent inconsistent development, the regional planning compact also provided for a moratorium on development until the earlier of adoption of the final plan or May 1, 1983. TRPA, however, did not adopt a new regional plan until April 26, 1984, and bridged the gap with a second moratorium. Together, the two moratoria prohibited all development for a total of 32 months.

On the day the 1984 plan went into effect, California challenged it as insufficiently restricting residential construction. An injunction against implementation was issued by the district court and remained in effect until a new plan was adopted in 1987. The revised 1987 plan remains in effect.

The Affected Landowners

The petitioners included the Tahoe-Sierra Preservation Council, an association of about 2,000 owners of improved and unimproved lots in the Lake Tahoe Basin, and a class of about 400 individual owners who had purchased vacant lots before 1980 but who did not build or obtain vested rights before the effective date of the 1980 compact. These undeveloped lots were not along the lake shore but were scattered within the Tahoe Basin in residential subdivisions that already had been largely developed. From the imposition of the first moratorium in 1981 until the present day, many owners of vacant lots have not been permitted to build. Some owners have died, and others have sold to TRPA for low prices set by that agency.

The Developing Litigation

The *Tahoe-Sierra* litigation has been protracted, with four published court of appeals decisions and a number of published trial court decisions. The Supreme Court's opinion focused on one of these district court opinions, 34 F. Supp. 2d 1226 (D. Nev. 1999), its reversal by the Ninth Circuit, 216 F.3d 764 (9th Cir. 2000), and the circuit's denial of review en banc, 228 F.3d 998 (9th Cir. 2000).

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Andrew O. Alcala/Lake Tahoe image by Corbis

The district court first considered whether the moratoria would constitute a taking under the traditional analysis set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The *Penn Central* approach requires the court to consider "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Weighing these factors, the district court concluded that no taking occurred. 34 F. Supp. 2d at 1240-42.

The court noted, however, that the moratoria temporarily denied the plaintiffs all economically viable use of their properties. As a result, the court concluded that the government's actions constituted a "categorical" taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which established the bright-line rule that compensation is required whenever a regulation deprives an owner of "all economically beneficial uses" of the land. 34 F. Supp. 2d at 1242-45.

The district court further found that although the prohibition on development "was clearly intended to be temporary," there was no fixed date for when it would terminate. Id. at 1250. Therefore, compensation was required under *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), which held that a regulatory taking is compensable even if the taking proves to be only temporary because the regulation is later rescinded or invalidated.

The Ninth Circuit reversed, concluding that the district court had misinterpreted *First English* and incorrectly applied *Lucas*. Judge Reinhardt observed that the plaintiff in *First English* had sought "damages for the uncompensated taking of all use" of its property. The state court dismissed the compensation claim, concluding that an injunction was the appropriate remedy in an inverse condemnation action of this type. Thus, "regardless of whether a taking occurred, the claimants could not recover damages during the period running from the time of enactment of the ordinance to the time when it was finally declared unconstitutional." 216 F.3d at 778. The U.S. Supreme Court in *First English* disagreed, holding that subsequent invalidation of the regulation, "though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." 482 U.S. at 319. Thus, the plaintiffs were entitled to compensation for the period of time that the regulation remained in effect.

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Judge Reinhardt emphasized that the question presented to the Supreme Court in *First English* "related only to the remedy available *once a taking had been proven*." 216 F.3d at 778 (emphasis in original). Although *First English* held that compensation is required even when a taking is temporary, he wrote, "the Court stated explicitly that it was not addressing whether the ordinance constituted a taking." Id.

Turning to this latter question, the Ninth Circuit reversed the district court's conclusion that a categorical taking had occurred under *Lucas*. Contrary to the district court's findings, Judge Reinhardt stated that the temporary moratorium did not render the plaintiffs' property valueless. "Given that the ordinance and resolution banned development for only a limited period, these regulations preserved the bulk of future developmental use of the property. This future use had a substantial present value." Id. at 781. Because the moratoria did not deprive the property of all economically beneficial use, *Lucas* was inapplicable.

The Ninth Circuit denied review en banc. But a stinging dissent by Judge Alex Kozinski, joined by four others, observed that the panel "does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English Evangelical Lutheran Church v. County of Los Angeles* . . . , and adopts Justice Stevens's *First English* dissent." 228 F.3d at 999. Justice Stevens had argued that no taking had occurred in *First English* because the regulation merely postponed development of the property for a fraction of its useful life. In Justice Stevens's view, the economic impact of postponed development was no greater than the economic impact of a regulation permanently restricting the use of only part of the property. 482 U.S. at 332. Judge Kozinski noted that although the Ninth Circuit did not cite Justice Stevens's *First English* dissent, "the reasoning—and even the wording—bear an uncanny resemblance." Id. at 1000. "By adopting Justice Stevens's dissent, the panel places itself in square conflict with the majority's opinion in *First English*." Id. at 1002.

The Supreme Court's opinion recounted that "[i]n the dissenters' opinion, the panel's holding was not faithful" to *First English* and *Lucas*, and that certiorari was granted because of "the importance of the case." 122 S. Ct. at 1477. Using his prerogative as senior justice in the majority, Stevens assigned himself to write the opinion.

The Supreme Court's Holding and Dicta

As Justice Stevens repeatedly emphasized, the Court's 6-3 holding was "narrow." It simply refused to adopt a bright-line rule that a temporary moratorium on development—even one depriving the owner of all economic value of the land while it is in

effect—is a per se taking requiring payment of just compensation. Although the opinion contained broad dicta commending the virtues of planning and the role of fairness in takings adjudication, Justice Stevens made it clear the Court was merely rejecting the application of *Lucas*'s per se rule and reiterating the primacy of the "ad hoc" test adopted in *Penn Central*. "[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking[,]" Justice Stevens wrote, but "we simply recognize that it should not be given exclusive significance one way or the other." 122 S. Ct. at 1486.

Although the decision is a victory for regulators, it does not signal a return to the Court's pre-1987 policy of almost unlimited deference to land-use regulation. Justice Stevens twice emphasized the narrowness of the opinion, adding that "nothing that we say today qualifies [our *First English*] holding." 122 S. Ct. at 1482. Perhaps these reassurances played a role in the absence of concurring opinions from Justices Kennedy and O'Connor, who often write separately and who are the swing votes on takings issues.

Factors Shaping the Court's Decision

Two primary factors shaped *Tahoe-Sierra*'s narrow ruling. The first is the limited question upon which the Court granted certiorari. The second factor consists of several strategic decisions made by trial counsel many years earlier.

Petitioners sought certiorari on the question of "is it permissible for the Ninth Circuit Court of Appeals to hold—as a matter of law—that a temporary moratorium can *never* require constitutional compensation?" (Emphasis in original.) The Supreme Court, however, limited its analysis to "whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property." 122 S. Ct. at 1470. Framing the issue this way allowed the Court to focus solely on whether the 32-month moratoria fell within *Lucas*'s categorical test or the *Penn Central* analysis and to sidestep several other potential taking issues. The Court noted, for example, that the district court had issued an injunction pending California's challenge of TRPA's 1984 plan. Although the injunction prohibited development from 1984 to 1987, the lower courts held that the delays were attributable to the court and not to the 1984 plan itself. In his dissent, Chief Justice Rehnquist argued that the proximate cause of the development prohibition during this period was not the judicial injunction, but rather TRPA's failure to conform its 1984 plan to the 1980 compact. Id. at 1491. Justice Stevens declined to address this argument, however, because the petitioners had not challenged the lower courts' holding on this issue. Thus, Chief Justice Rehnquist's "novel theory of causation was not briefed, nor was it discussed during oral argument." Id. at 1474 n.8.

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The Court's decision also did not address the constitutionality of TRPA's 1987 plan. The plaintiffs had attempted to amend their complaint to allege that adoption of the 1987 plan also constituted a taking, but the district court held that the claim was barred by both California's and Nevada's statutes of limitations. Accordingly, even though TRPA regulations have precluded development of some of the landowners' small parcels from 1981 to the present day, the Court limited its review to the moratoria in effect for a total of 32 months.

These and other tactical decisions greatly limited petitioners' case. As discussed below, of the seven theories that "arguably" could have supported a takings claim, the Supreme Court noted that four were unavailable because of the procedural posture of the case. Id. at 1485.

Penn Central as "Polestar"

Central to *Tahoe-Sierra* was *Penn Central*'s "essentially ad hoc" test for regulatory takings, which was "designed to allow 'careful examination and weighing of all the relevant circumstances.'" Id. at 1478 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001)).

Before *Tahoe-Sierra*, the Court recognized categorical exceptions to *Penn Central* review in only a handful of circumstances: permanent physical occupations, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); regulatory deprivations of all economic value, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and the imposition of severe retroactive liability on a limited class of parties that could not have anticipated it, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

Justice Stevens stressed that a categorical rule is appropriate when the government physically takes possession of an interest in property for some public purpose—even if the government takes only part of the property or its use is only temporary. 122 S. Ct. at 1478-79. Those cases are to be distinguished, he stated, from cases involving government regulations restricting property's use. "The first category of cases [physical occupations] requires courts to apply a clear rule; the second [regulatory actions] necessarily entails complex factual assessments of the purposes and economic effects of government actions." Id. at 1479. Stevens stressed that "we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, prefer-

ring to examine 'a number of factors' rather than a simple 'mathematically precise' formula." Id. at 1481. This point, he added, had been affirmed by Justice O'Connor's concurring opinion in *Palazzolo*: " 'Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings.' " Id. at 1481 n.23 (quoting *Palazzolo*, 533 U.S. at 633). O'Connor had joined in Stevens' dissent in *First English*.

Although *Lucas* endorsed a categorical rule in a regulatory takings scenario, Justice Stevens said that rule applied only in " 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.' " Id. at 1483 (quoting *Lucas*, 505 U.S. at 1017)(emphasis in original). "Anything less than a 'complete elimination of value,' or a 'total loss,' . . . would require the kind of analysis applied in *Penn Central*." Id. (quoting *Lucas*, 505 U.S. at 1019-20 n.8).

The plaintiffs attempted to bring their case within the rule by arguing that the moratoria deprived them of all economically beneficial use of their property for a 32-month period. Justice Stevens found this argument unavailing, however, because it "ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.' " 122 S. Ct. 1483 (quoting *Penn Central*, 438 U.S. at 130-31). To view property in its entirety, Justice Stevens said, courts must consider not only the geographic dimensions of the parcel, but also the temporal aspect of the property owner's interest. "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." Id.

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Justice Thomas's dissent focused on the majority's analysis of the "parcel as a whole," citing the Court's discomfort with that concept in *Palazzolo* and *Lucas*. 122 S. Ct. at 1496 n.*. Thomas noted that he "had thought that *First English* put to rest the notion that the 'relevant denominator' is land's infinite life." Id. From a landowner's standpoint, he wrote, "total deprivation of use is . . . the equivalent of a physical appropriation." Id. (quoting *Lucas*, 505 U.S. at 1017). Thus, "a regulation effecting a total deprivation of the use of a so-called 'temporal slice' of property is compensable under the Takings Clause unless background principles of state property law prevent it from being deemed a taking." Id.

Justice Stevens rejected this interpretation of *First English*. Echoing Judge Reinhardt's opinion in the court below, Justice Stevens emphasized that *First English* addressed the "remedial question of how compensation is measured once a regulatory taking is established" but did not address "the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking." Id. at 1482. "In fact, *First English* expressly disavowed any ruling on the merits of the takings issue because the California courts had decided the remedial question on the assumption that a taking had been alleged." Id. He noted that upon remand, the California courts concluded that there had not been a taking and the U.S. Supreme Court had declined review of that decision.

Seven Theories of "Fairness and Justice": A Roadmap for Future Litigation

Although neither *Lucas* nor *First English* compelled the use of a categorical takings test, Justice Stevens went on to consider whether the circumstances justified the creation of a new per se rule. He observed that "any of seven different theories" was "arguably" a basis for finding the moratoria to be takings. 122 S. Ct. at 1484. Regarding each, "the ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases." Id. at 1485.

Equating Temporary Moratoria to Temporary Physical Takings

The first theory considered by the Court was whether to extend *Lucas*'s categorical rule to government regulations that temporarily deprive an owner of all economically viable use of the property. Conceptually, this rule would put regulatory takings on the same ground as physical appropriations of land, which have long been held compensable, regardless of whether the appropriations are permanent or temporary. See, e.g., *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871) (permanent flooding of land upstream from dam); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (temporary occupancy of office building by government employees).

Justice Stevens cited several policy

reasons militating against adoption of a categorical rule for temporary deprivations in the regulatory arena. First, he suggested that the rule "would render routine government processes prohibitively expensive or encourage hasty decisionmaking." 122 S. Ct. at 1485. He said the rule would apply not only to normal delays in obtaining building permits and changes in zoning ordinances but also to orders temporarily denying access to crime scenes or to buildings in violation of health or safety codes.

Second, and more importantly, Justice Stevens said the majority was "persuaded that the better approach" to regulatory taking claims is to make a "careful examination and weighing of all the relevant circumstances." Id. at 1486. In support of this conclusion, Stevens looked to Justice O'Connor's concurring opinion in *Palazzolo*, where she observed:

> The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . . ." The outcome instead "depends largely 'upon the particular circumstances [in that] case.'"

Palazzolo, 533 U.S. at 633 (O'Connor, J., concurring).

First English declared, however, that temporary takings are "not different in kind from permanent takings." 482 U.S. at 318. The Fifth Amendment does not on its face distinguish physical, regulatory, permanent, temporary, complete, or partial takings. Accordingly, future litigants might suggest, in appropriate cases, that the segmentation of takings jurisprudence into physical and regulatory tracks leads to unjust results. Counsel may also argue that per se rules contain some flexibility that would offset the public policy concerns listed by Justice Stevens. Physical occupations, for instance, may be transient or tortuous, and permanent regulatory deprivations of all value are subject to a "background principles" exception. See *Lucas*, 505 U.S. at 1029.

Moratoria in Excess of "Normal Delays" or Specified Periods

The second and third theories discussed by Justice Stevens are modified versions of the first theory. One would be to "craft a narrower rule that would cover all temporary land-use restrictions except those 'normal delays in obtaining building permits, changes in zoning ordinances, variances and the like'"; the other would "allow a short fixed period for deliberations to take place without compensation" but find a taking after that period. 122 S. Ct. at 1484. Justice Stevens acknowledged that a categorical rule using these standards "would certainly have a less severe impact on prevailing practices." Id. at 1486. But "even the weak version of petitioner's categorical rule would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values." Id. at 1487. Also, a moratorium is not apt to result in individual owners being singled out unfairly, and the benefits of planning present a "clear 'reciprocity of advantage'" to all owners. Id. at 1488-89 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

"The ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases."

One of the problems with this argument is that "good faith" does not preclude a taking. Proper planning for the extensive Tahoe Basin, with its unique environmental problems, takes much longer than review of a subdivision development application. Moreover, the benefits of the moratoria extend to the regional economy, to the national interest in the environment, and, most intensely, to owners who built before the 1980 compact, especially on expensive lakefront lots. It is not clear how those owners of scattered lots, in mostly developed subdivisions, who are excluded from building their vacation or retirement homes enjoy a reciprocity of advantage.

"Rolling Moratoria"

As a fourth theory, Justice Stevens noted that the Court could have characterized "the successive actions of TRPA as a 'series of rolling moratoria' that were the functional equivalent of a permanent taking." Id. at 1485. Petitioner had presented the issue, but the Court's grant of certiorari did not encompass it because the case was tried in the district court and reviewed by the court of appeals

on the theory that each of the two moratoria was a separate taking.

Given that a permanent prohibition on development was an obvious way of preserving Lake Tahoe from the outset, the "rolling moratorium" theory seems plausible. The Court's lack of interest diverges sharply from its *Penn Central* analysis, which warns of "conceptual severance" of property rights and treats the "parcel as a whole." Future litigators might be expected to look for the imposition of sequential or extended moratoria without justification in events that could not have been foreseen earlier.

Bad Faith Moratoria as Takings

Tahoe-Sierra noted that, as a fifth theory, "we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact." Id. at 1485. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999), the Court upheld the award of regulatory takings damages based on a pretextual refusal to accept one development plan after another, when each plan complied with the city's previous demands. Application of this theory was precluded in *Tahoe-Sierra* by the district court's findings that TRPA had acted diligently and in good faith, which were not challenged by the plaintiffs on appeal. But future litigants undoubtedly will explore whether new or extended moratoria result from conditions unforeseen at the outset.

Moratoria Not Substantially Advancing a Legitimate State Interest

The sixth theory—"that the state interests were insubstantial"—also was foreclosed by the district court's unchallenged findings of fact. 122 S. Ct. at 1485. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court said that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." Id. at 260 (internal references omitted). The Court declined to explain "substantial advancement" in *Del Monte Dunes*. Litigators undoubtedly will continue to question it in cases in which the state interest is less clear than in *Tahoe-Sierra*.

Moratoria "as Applied"

As a final theory, Justice Stevens suggested that the plaintiffs might have attempted to challenge the application of the moratoria to their individual parcels, rather than making a facial challenge. In doing so, some of the landowners might have prevailed under a *Penn Central* analysis. But he noted that the plaintiffs had "expressly disavowed" a *Penn Central* analysis and did not appeal from the district court's conclusion that the evidence would not support recovery under a *Penn Central* theory. 122 S. Ct. at 1485.

The Court's recent emphasis on balancing tests gives judges great power but gives no one much predictability.

Mounting an "as applied" challenge in a complex takings case is formidable. Moreover, in state cases, "ripening" an action for federal judicial review is very difficult. See *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) (holding that landowner's claim was not ripe because it had not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to the property). When it is not clear whether a moratorium will be extended, as presented in *Tahoe-Sierra*, the "ripeness" problem is exacerbated. As a result, counsel's decision not to pursue this theory in *Tahoe-Sierra* is understandable, given the then-undeveloped state of regulatory takings law and the daunting logistical problems in mounting fact-intensive litigation on behalf of many small landowners against a powerful agency. Nevertheless, the result was to limit Supreme Court review to a narrowly tailored facial challenge, precluding review of the moratoria as applied to individual parcels.

Conclusion

In last year's *Palazzolo* decision, the narrow victory went to the landowner. The acquisition of title after the effective date of a regulation did not bar a regulatory takings claim. In *Tahoe-Sierra*, the narrow victory went to the regulator. In neither case did the Court make major changes in regulatory takings principles. In *Palazzolo*, Justice O'Connor's crucial swing concurrence insisted that "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [the owner's] expectations." 533 U.S. at 633. In *Tahoe-Sierra*, the Court declined to extend the list of categorical exceptions to *Penn Central*'s ad hoc balancing test for regulatory takings.

Both Justice O'Connor in her *Palazzolo* concurrence, 533 U.S. at 633, and Justice Stevens in *Tahoe-Sierra*, 122 S. Ct. at 1485, emphasized "the concepts of 'fairness and justice' that underlie the Takings Clause." Reliance on "fairness," or "reasonable expectations," however, is apt to give little certainty to the regulator or security to the landowner. Thus, the Court's recent emphasis on balancing tests gives judges great power but gives no one much predictability. As Judge Kozinski stated in his dissent from denial of en banc review in *Tahoe-Sierra*: "Governmental policy is inherently temporary while land is timeless." 228 F.3d at 1001 n.1. ■