PLS 521 – Legal Foundations of Coastal and Environmental Management
Development in Lake Tahoe Exercise

Background:

Lake Tahoe is renowned for its crystal clear water, which has declined in clarity from about 100 feet to 70 feet. These declines are due primarily to NPS pollution associated with residential and commercial development. In 1969, Congress approved the Tahoe Regional Planning Compact between the States of California and Nevada, creating respondent as an interstate agency to regulate development in the Lake Tahoe basin. After the 1969 compact had proven inadequate for protection of the lake and its environment, the States proposed and Congress approved an amendment in 1980, requiring the agency to adopt a plan barring any development exceeding such specific "environmental threshold carrying capacities" as the agency might find appropriate. In 1987, the agency adopted a new Regional Plan providing for an "Individual Parcel Evaluation System" (IPES) to rate the suitability of vacant residential parcels for building and other modification.

The IPES applies to undeveloped residential parcels. Non-residential and developed parcels are subject to the original Bailey Land Capability System (A land capability rating of 1 or 2 allowed only 1 percent impervious coverage to be constructed on the site while the other extreme, 7, allows the construction of 30 percent impervious coverage). The IPES is intended to be a more objective and accurate classification of the suitability of a residential parcel's development potential. By 1988, all 17,000 undeveloped residential parcels were assigned a numerical score based on eight site characteristics. Scoring ranges from 0 to 1140. Those with the highest scores can be developed after receiving a building permit from a local government. The IPES sets a total development cap of 300 parcels per year, which is divided among the counties and incorporated areas. These allocations are intended to regulate both the location and pace of development.

In order to try and prevent takings claims, two programs were adopted. First, various land acquisition programs have focused on acquiring parcels with low IPES scores. The USFS also acquired more than $100 million in ecologically sensitive private parcels through the Santini-Burton Act, many of which had low IPES scores. The California Tahoe Conservancy (CTC) has acquired more than 5,450 undeveloped and environmentally sensitive private parcels covering more than 6,000 acres on the California side of the basin. The agency's goal is to acquire as many sites as possible on a willing-seller basis.

Second, a transferable development rights (TDR) program was established. In order to build a residential unit you need a development allocation, a development right, and an appropriate coverage. Local governments are each allocated a specific number of development allocations and decide how to distribute their allocations among single and multi-family dwellings. Local governments often fail to use their total allocations. Every residential parcel was also assigned a development right. This was intended to create additional opportunities for residential property owners to transfer the value of their land and help the TRPA avoid "takings" claims. The rights can only be transferred within its hydrological area (there are nine). Finally, an owner must have an appropriate amount of coverage. Coverage refers to the amount of impermeable surface on a

parcel. Coverage rights can also be transferred. Landowners wishing to acquire more coverage can also exceed their coverage limitation by providing mitigation funds or can transfer coverage from another parcel. It is possible to purchase coverage, however, the price is often prohibitive. According to one planner about 1,800 square feet is needed to build a single-family residence and the current market price is around $35 per square foot.

The initial interest in the TDR program stemmed from the development restrictions imposed by the IPES. As one TRPA official stated, "Our building community is based upon scarcity. Here, we are like an island because of federal land." The amount of coverage that may be transferred varies. The rules are more stringent for commercial and tourist accommodations than for residential units. For commercial development, coverage transfers from one parcel to a second at a ratio up to 2:1, reducing the total coverage in the basin. These limits also encourage the rehabilitation of dilapidated structures and the re-development of entire parcels. Other projects transfer coverage at a ratio of 1:1 for existing or potential coverage. In all cases, coverage transfers must be from a parcel that is equally or more sensitive than the receiving parcel and always in the same hydrological area.

Cases:

Suitum v. Tahoe Regional Planning Agency (96-243), 520 U.S. 725 (1997)

Bernadine Suitum owns land near the Nevada shore of Lake Tahoe. She and her late husband acquired the land in 1972 and intended to build a retirement home on the small lot. The lot consists mostly of what is known as a Stream Environment Zone (SEZ) pursuant to the regulations promulgated by the Tahoe Regional Planning Agency. Stream environment zones are a categorization that includes any wetland, floodplain or riparian zone and have low IPES scores due to the vital importance of undisturbed streams in filtering nutrients that are otherwise deposited into the lake. Parcels located entirely within a SEZ's setback area receive an IPES score of zero. With limited exceptions not relevant here, the agency permits no "additional land coverage or other permanent land disturbance" on such a parcel.

In 1989, Suitum obtained a Residential Allocation through Washoe County's annual drawing. When she then applied to the agency for permission to construct a house on her lot, the agency determined that her property was located within a SEZ, assigned it an IPES score of zero, and denied permission to build. Suitum appealed the denial to the agency's Governing Board, which itself denied relief. After the agency turned down the request for a building permit, Suitum made no effort to transfer any of the TDRs that were hers under the 1987 plan, and there is no dispute that she still has the one Residential Development Right that owners of undeveloped lots automatically received, plus the Land Coverage Rights for 183 square feet that she got as the owner of 18,300 square feet of SEZ land. It is also common ground that Suitum has the right to receive three "bonus" Residential Development Rights. Although Suitum has questioned the certainty that she would obtain a new Residential Allocation if she sought one, the agency has said that she undoubtably would.
Instead, Suitum brought this action alleging that in denying her the right to construct a house on her lot, the agency's restrictions deprived her of "all reasonable and economically viable use" of her property, and so amounted to a taking of her property without just compensation in violation

of the Fifth and fourteenth amendments. The agency responded by objecting, among other things, that Suitum's taking claim was not ripe due to her "failure to obtain a final decision by TRPA as to the amount of development . . . that may be allowed by" the agency. Moreover, while Suitum argued that she had been deprived of her constitutional rights because she had lost all use of her land, the TRPA argued that just compensation had been offered because she was allowed to sell development rights (TDR). At trial, the TRPA The agency introduced an affidavit from a real estate appraiser, whose opinion was that the Residential Development Right that Suitum already has, and the three more to which she is entitled, have a market value between $1,500 and $2,500 each; that her Land Coverage Rights can be sold for $6 to $12 per square foot ($1,098%$2,196 total); and that her lot devoid of all TDRs would sell for $7,125 to $16,750. The appraiser also said that if Suitum were to obtain a Residential Allocation and sell it with a Development Right, together they would bring between $30,000 and $35,000. *Ibid.* As if in spite of the figures supplied by its own affidavit, however, the agency maintained that the "*actual* benefits of the [TDR] program for [Suitum] . . . can only be known if she pursues an appropriate [transfer] application," with the result that Suitum's claim was not ripe for adjudication. For her part, Suitum insisted that trying to transfer her TDRs would be an " `idle and futile act' " because the TDR program is a "sham," and she supplied the affidavit of one of the agency's former employees whose view was that "there is little to no value to [Suitum's TDRs] at the present time as . . . either [there is] no market for them or the procedure for transferring one particular right would restrict the opportunity to transfer a remaining right."

The District Court decided that Suitum's claim was not ripe for consideration because "[a]s things now stand, there is no final decision as to how [Suitum] will be allowed to use her property." Although the Court found that "there is significant value in the transfer of [Suitum's TDRs], ... until [specific] values attributable to the transfer program are known, the court cannot realistically assess whether and to what extent [the agency's] regulations have frustrated [Suitum's] reasonable expectations." The Court of Appeals for the Ninth Circuit affirmed this ripeness ruling for the like reason that "[w]ithout an application for the transfer of development rights" there would be no way to "know the regulations' full economic impact or the degree of their interference with [Suitum's] reasonable investment backed expectations[,]" and without action on a transfer application there would be no "final decision from [the agency] regarding the application of the regulation[s] to the property at issue." The only issue before the Supreme Court is whether Suitum's claim of a regulatory taking of her land pursuant to the fifth and fourteenth amendments is ready for judicial review under prudential ripeness principles.

The sole question here is whether the claim is ripe for adjudication, even though Suitum has not attempted to sell the development rights she has or is eligible to receive. The Supreme Court held that it is and ordered the case remanded. The case was then settled for $515,000 as it was about to go to trial in the U.S. District Court in Nevada.

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 00-1167

The Supreme Court heard oral arguments on January 7, 2002 in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 00-1167. When the TRPA promulgated its new regulations, there was a prohibition on new residential construction from 1981 to 1984. The first plan was rejected and a second was finally approved in 1987, which in effect extended the

probation for several more years. Under the new rules (described above and at issue in Suitum) many of the land owners in the basin were prohibited from building. In 1984, about 700 families sued because their lots received low IPES scores and were viewed as being too susceptible to erosion and they were barred from building in order to protect the Lake from declining water clarity. The current case argues that the land owners are due compensation for the temporary takings that occurred during the moratorium. The Tahoe-Sierra Preservation Council recently filed another lawsuit challenging the Individual Parcel Evaluation System (IPES) that is the heart of the *1987 Regional Plan* claiming that it resulted in an unconstitutional takings.

The Supreme Court's decision should come in the near future and is of great interest to developers, environmentalists, and local officials. Theodore B. Olson argued on behalf of the federal government in favor of the TRPA, which suggests that Bush administration officials are worried about how damaging to local land use planning a ruling in favor of the owners would be.

During oral arguments, Justice Antonin Scalia noted "This was a general social problem for which the entire society should pay." Why he asked, "should some individuals bear the burden?"

Justice Anthony Kennedy wondered whether the city of New York would have to compensate the owners of the World Trade Center site if the city stopped any building there for a year while it prepared an overall plan for the site.

Justice Stephen Breyer noted the potential unfairness of the moratorium. "The justification here is excellent – saving Lake Tahoe." But the method is questionable. "we're saying, 'you won't be able to build on your land.'"

Justice Sandra Day O'Connor, among others, worried about forcing agencies to pay compensation whenever they deny building permits, even temporarily. "What about your basic zoning laws?" "Isn't that an immediate taking?" To this the attorney defending the TRPA argued that a moratorium does not strip owners of their property "Because the regulation is temporary, the land retains value." To this O'Connor said that the supposed temporary moratorium has been in place for 22 years for some of them. And there's no end in sight.

Questions:

1) Was there a takings in Suitum? Is every land owner with a low IPES score a potential victim of regulatory takings?

2) Does a moratorium amount to a temporary takings? How would you decide the Tahoe-Sierra Preservation Council case?

3) From a policy standpoint, what do you think of the TRPA's regulatory program and its design? From a legal standpoint, do you think it will be able to weather the storm of takings lawsuits? What advice would you give the current TRPA director and the Governing Board?