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In a 2002 Supreme Court Decision, Which Shifted Landowner and Government Expectations Regarding Temporary Regulatory Takings, the Court Held That Temporary Construction Moratoria During the Preparation of a Comprehensive Land-Use Plan Do Not Constitute Takings Requiring Compensation. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)

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IN A 2002 SUPREME COURT DECISION, WHICH SHIFTED LANDOWNER AND GOVERNMENT EXPECTATIONS REGARDING TEMPORARY REGULATORY TAKINGS, THE COURT HELD THAT TEMPORARY CONSTRUCTION MORATORIA DURING THE PREPARATION OF A COMPREHENSIVE LAND-USE PLAN DO NOT CONSTITUTE TAKINGS REQUIRING COMPENSATION. *TAHOE-SIERRA PRESERVATION COUNCIL V. TAHOE REGIONAL PLANNING AGENCY*, 535 U.S. 302 (2002).

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INTRODUCTION

A nearly twenty five-year push-pull between the federal government's right to regulate land use and the rights and expectations of landowners reached a tenuous resting place in 2002. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Supreme Court held that temporary construction moratoria are not government takings requiring compensation.[1] Specifically, when a moratorium is placed on development while an agency devises a comprehensive land use plan, there is no compensation owed to those who are prevented from building while the plan is being developed.[2]

In the nine years since the Supreme Court's decision in *Tahoe-Sierra*, District Courts have rarely recognized a moratorium as a regulatory taking or due process violation despite the Court's recognition that moratoria lasting more than one year could raise suspicions.[3] *Tahoe-Sierra* reaffirmed a commitment to the framework of *Penn Central*

1. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 304 (2002).
2. *Id.* at 342.
3. "It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the thirty-two months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable." *Id.* at 341-42.

   See also Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 850 (2005) (upholding a district court's dismissal of a claim that a twenty-one-month moratorium constituted a taking). Ecogen, LLC v. Town of Italy, 438 F. Supp. 2d 149, 162 (W.D.N.Y., 2006) (holding that a two-year moratorium on construction of wind turbines and substations was not unconstitutional despite stymying the plaintiff's business plans and endangering contracts).

Transportation v. City of New York.[4] The factors to be considered in determining a regulatory taking are the economic impact of the regulation and the extent to which it interferes with investment-backed expectations as well as the character of the invasion.[5] Decisions prior to *Tahoe-Sierra* held that when a regulation is invalidated by a court, the government must compensate affected parties for the time when they were deprived of their property rights and that a deprivation which is permanent and then amended later to allow development can be a taking.[6]

In the years since *Tahoe-Sierra,* lower courts have relied on the Supreme Court view that a moratorium is not a *per se* taking and have emphasized the procedural steps that complaining parties take before bringing a takings claim.[7] These courts have also struggled with the correct application of the *Penn Central* analysis, including how to approach the factors Justice Brennan lays out and how to weigh the relevant facts once they are distilled.[8] The courts are also recognizing the potential for government planning agencies under the *Tahoe-Sierra* ruling to use temporary development restrictions, such as moratoria to control who can build in their region, a power which has opened the door to complaints alleging not only regulatory takings but due process and prior restraint violations as well.[9]

I. HISTORICAL DEVELOPMENT

In 1922, Justice Holmes recognized that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[10] Over the past several decades, courts frequently cited Holmes' language and sought to determine when a regulation went "too far."[11] In 1978, the Court handed down *Penn Central,* which

4. Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
5. *Id.* at 124.
6. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
7. *See First English Evangelical Lutheran Church of Glendale,* 428 U.S. at 304; *see also Lucas,* 505 U.S. at 1003.
8. *See First English Evangelical Lutheran Church of Glendale,* 428 U.S. at 304; *see also Lucas,* 505 U.S. at 1003.
9. See ASF, Inc. v. City of Seattle, 408 F. Supp. 2d 1102, 1107 (D. Wash, 2005) (holding that a 17-year moratorium on issuing adult entertainment licenses was unconstitutional prior restraint). . 30 Am. Jur. Proof of Facts 3d 503 (2011) (exploring the relationship between Section 1983 of the Civil Rights Act and claims of unconstitutional land use regulations which violate substantive or procedural due process).
10. Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding that a regulation forbidding a landowner from mining under their property and threatening other structures was not a valid exercise of the police power and cause such a diminution in value as to become a taking requiring compensation).
11. Barefoot v. City of Wilmington, 306 F.3d 113 (4th Cir. 2002).

held that a regulation forbidding the drastic alteration of historic landmarks may be upheld as a use of police power.[12] The Court also stated that the taking does not require compensation despite undercutting a potential avenue for profit the owners sought to explore.[13] Part of the legacy of the decision came from the factors established by Justice Brennan that are used to determine a regulatory taking through ad hoc factual inquiries including: the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the invasion, whether it is physical or regulatory.[14]

Using the *Penn Central* factors, the Court found two temporary regulatory takings where property owners were virtually deprived of all use of their land.[15] In *First English Evangelical Lutheran Church of Glendale*, the landowner claimed that an ordinance denied all use of it's property and sought compensation for the time it was prohibited from construction on it's land when the ordinance was later invalidated.[16] Chief Justice Rehnquist, writing for the majority, determined that temporary deprivations "are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[17] The Court was careful to limit its holding to the issue presented, and to state that the decision did not encompass "normal delays" in building such as obtaining permits and seeking variances.[18] In his dissent, Justice Stevens argued that there should be a strong presumption of constitutionality in favor of the state and that the appellant did not actually allege wrongdoing on the government's behalf before seeking compensation.[19] Furthermore, Justice Stevens claimed that the majority misread takings clause precedent by finding that a regulation, which would constitute a taking if it remained in effect permanently, requires compensation for the time it is in place even if it is later invalidated or removed.[20]

Five years later, the Court addressed the question of duration of the taking again in *Lucas v. South Carolina Coastal Council*.[21] The peti-

12. *Penn Central*, 438 U.S. at 130.
13. *Id.* ("the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable . . . ").
14. *Id.* at 124.
15. *First English Evangelical Lutheran Church of Glendale*, 428 U.S. at 304.
16. *Id.* at 304-05. A Los Angeles County ordinance prohibited construction or reconstruction on a flood protection area where appellant owned land and had a building destroyed by a flood. *Id.*
17. *Id.* at 318 (holding that when a private party is so burdened by a governmental action that it amounts to a taking, the Just Compensation Clause requires payment for the use of the land).
18. *Id.* at 321.
19. *Id.* at 327.
20. *Id.* at 329.
21. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

tioner was denied the ability to build when the Beachfront Management Act was enacted in 1988 and the Act included two residential lots he purchased as "critical areas" where further development was prohibited.[22] Lucas did not challenge the Act's validity, but sought compensation as it rendered his land devoid of "all economically beneficial use."[23] Though an amendment after the trial court decision created an exception for Lucas' purpose, Justice Scalia's majority opinion held that the case should not be dismissed on ripeness grounds and that at the time of the trial the taking was "unconditional and permanent."[24] Lucas was entitled to compensation for the permanent taking of his property because he was deprived of all economic use and value.[25] In a concurring opinion, Justice Kennedy affirmed that if the regulation were a taking, "its limited duration will not bar constitutional relief."[26] Justice Blackmun's dissent criticized the majority for finding that the land had lost all of its value when Lucas could still enjoy the right to exclude and alienate and he also was able to camp or picnic on his land.[27] Justice Stevens objected to announcing a *per se* rule that could too easily burden the government's ability to regulate for health and safety and seemed to ignore the ad hoc, factual inquiries of *Penn Central*.[28]

When it granted certiorari for *Tahoe-Sierra* in 2002, the Court addressed the unique question of whether a moratorium on development imposed during the creating of a comprehensive land-use plan is a *per se* taking requiring compensation.[29] The case arose when the Tahoe Regional Planning Agency (TRPA) was created to harmonize efforts between multiple states to preserve the beauty of the Lake Tahoe area, which was suffering from the rapid development in the

22. *Id.* at 1008. Lucas and others began residential development in the late 1970s and Lucas purchased two lots for $975,000 on the Isle of Palms. *Id.* at 1006-07. No portion of the lots were "critical areas" under the 1977 Coastal Zone Management Act at the time of purchase, but the 1988 act established a baseline inland behind which construction was permitted and Lucas' lots were between the baseline and the shore. *Id.* at 1007-08.
23. *Id.* at 1017.
24. *Id.* at 1012.
25. *Lucas*, 505 U.S. at 1035.
26. *Id.* at 1033.
27. *Id.* at 1044. Blackmun chastised the majority for confusing "less value" with "valueless" and for rooting its decision that all economic value has lost on an appraiser's valuation based on the highest value use of the land. *Id.* Justice Stevens also dissented and argued that the court's decision was too arbitrary when a landowner whose property loses 95% of its value cannot recover compensation but one whose land is found to have lost 100% of its value is fully compensated. *Id.* at 1065.
28. Stevens disagreed with the emphasis on the economic impact of the regulation and its effect on investment-backed expectations and apparent lack of regard for the character of the invasion. *Id.* at 1070-71.
29. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 302 (2002).

region.[30] The TRPA enacted two ordinances halting construction and development to remain in effect until a comprehensive plan was passed.[31] The petitioners, developers, and individual landowners, who were prohibited from developing their land for nearly three years as a result of the moratoria, claimed a regulatory taking without just compensation.[32] Citing *Lucas*, the District Court found a total taking and temporary deprivation of all economically viable use and rejected the TRPA argument that the ordinances were reasonable temporary actions while the government devised a comprehensive plan.[33] The Ninth Circuit Court of Appeals distinguished *Lucas* by claiming that it applies to the rare case when a regulation denies all productive use of a parcel while the moratoria are only a "temporal slice" of the fee interest and are a well-established form of regulation.[34]

Echoing his dissent in *Lucas*, Justice Stevens wrote for the majority and criticized the proposed *per se* rule for its overbreadth, where "it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a *per se* rule that a taking has occurred."[35] A temporary restriction does not remove all economic value from a parcel because the property's value will return when the restriction is lifted.[36] The time period of a deprivation should not be given exclusive significance in the *Penn Central* analysis, especially when a satisfactory deliberation period is vital to good decision making when devising a comprehensive plan.[37] Chief Justice Rehnquist wrote the dissent and argued that the actual time of deprivation was nearly six years because after the thirty-two-month moratoria and later injunction, development was prohibited from 1981 until 1987.[38] The driving force behind the majority's decision seemed to be that the moratoria were, by definition, temporary, and in *Lucas* the restriction was labeled as permanent at the time of its enactment and this allowed Lucas to recover compensation for the time he could not use his land.

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30. *Id.* at 309.
31. *Id.* at 306-12. The agency enacted Ordinance 81-5 imposing a moratorium to be in effect from August 24, 1981 until the adoption of a permanent plan, but when the deadline for a plan passed a second ordinance (Ordinance 83-21) was enacted extending the moratorium which remained in effect until the new regional plan was adopted on April 26, 1984. *Id.* at 305. The moratoria amounted to a thirty-two-month ban on all construction. *Id.* at 302. A challenge to the plan led to the District Court injunction continuing to prohibit construction until a new plan was adopted in 1987. *Id.*
32. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 313.
33. *Id.* at 316.
34. *Id.* at 319.
35. *Id.* at 320. Land-use regulations can easily impact property values tangentially and to treat them all "as *per se* takings would transform government regulation into a luxury few governments could afford." *Id.* at 324.
36. *Id.* at 332.
37. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 337-39.
38. *Id.* at 344.

II. ANALYSIS

A. *The Supreme Court Is Reluctant to Announce a New Per se Taking Rule that Could Be Overbroad and Lower Courts Apply the Decision Strictly.*

Only two *per se* rules exist in takings law: a permanent physical invasion and a deprivation of all economically beneficial use via regulation.[39] The *Tahoe-Sierra* majority explicitly declined to extend this short list to include moratoria that temporarily halt development.[40] Justice Stevens repeated his concern that if the court continued to announce categories of *per se* takings, it would add to a litany of regulations the government could not attempt without paying compensation, including "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[41]

In this practical manner, the *Tahoe-Sierra* majority dismisses possible unfairness to landowners and faces the reality that if moratoria are considered regulatory takings requiring compensation, then some governments will not be able to afford to put them in place.[42] In subsequent lower court decisions, few landowners have been able to mount a successful case to fight a moratorium despite the Supreme Court's suggestion that one lasting more than one year may be suspect.[43] In *Wild Rice River Estates, Inc. v. City of Fargo,* the Supreme Court of North Dakota affirmed judgment for the city and denied a claim that a twenty-one-month moratorium on building permits constituted a regulatory taking.[44] In *Ecogen, LLC v. Town of Italy,* a New York District Court found that a two-year moratorium on the building of structures related to wind energy was not a taking, and the court cited the *Tahoe-Sierra* decision and held that there is "no bright-line rule as to how long a moratorium can remain in effect without treading upon constitutional rights."[45]

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39. Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 854 (2005).
40. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 304.
41. *Id.* at 303 (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987)). "The interest in facilitating informed decisionmaking [sic] by regulatory agencies counsels against adopting a per se rule that would impose such severe costs on their deliberations." *Id.* at 339.
42. *See id.*
43. *See id.* at 341-42.
44. *Wild Rice,* 705 N.W.2d at 852-53. Wild Rice purchased farmland in anticipation of it becoming a part of the city and planned a subdivision. *Id.* at 852. The land was subject to severe flooding and the city placed a moratorium on building permits for new construction in the floodway which included several Wild Rice lots. *Id.*
45. Ecogen, LLC v. Town of Italy, 438 F. Supp. 2d 149, 162 (W.D.N.Y., 2006). Ecogen sought to construct wind energy projects between Prattsburgh and Italy, NY. *Id.* at 152. Italy passed a moratorium on all wind turbine towers and support facilities while the town adopted comprehensive zoning. *Id.* The original period was six months but was extended to be in effect for two years. *Id.* at 162.

The ramification the Supreme Court envisioned in *Tahoe-Sierra* was that "landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted," leading to ill-conceived growth.[46] The dissent, on the other hand, faced the other harsh reality: that a thirty-two-month moratorium on development was only a part of the big picture of a six-year halt to construction while property was held in limbo.[47] In *Wild Rice* and *Ecogen*, trial courts adhered to the announcement that moratoria would not be *per se* takings while merely acknowledging the *Tahoe-Sierra* majority's notion that their duration – both of these were approximately two years – could subject them to takings status.

B. *Lower Courts Struggle with How to Approach a Potential Regulatory Taking, Including the Procedures and Administrative "Hoops" that Must Be Completed Prior to a Claim.*

The Supreme Court placed an emphasis on semantics in the takings clause cases – *First English*, *Lucas*, and *Tahoe-Sierra* – and sometimes the majority's logic turned on the language used in a regulation and the order in which a petitioner challenged the constitutionality of the law and its implementation without compensation.[48] A driving force behind the decision in *Lucas* was the fact that when the Beachfront Management Act was passed, it affected a permanent ban on construction on Lucas' lot.[49] The majority found that at the time "the taking was unconditional and permanent," and therefore Lucas should have been compensated.[50] The *Lucas* application was rejected as to moratoria because they are by nature temporary and land value will return when the restriction ends.[51] Justice Thomas' dissent criticized the argument that the property will recover value once the prohibition is lifted as "cold comfort to the property owners in this case or any other."[52]

A major point of contention in *Lucas* was the ripeness of the suit because the amended Beachfront Management Act allowed for special permits for habitable structures after the briefing and argument before the South Carolina Supreme Court.[53] The dissent in *Lucas* opined that the landowner must pursue this option and be denied

46. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 339.
47. *Id.* at 343.
48. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 339.
49. *Lucas*, 505 U.S. at 1009.
50. *Id.* at 1012.
51. *See* Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L. Q. 307, 333 (2007).
52. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 356.
53. *Lucas*, 505 U.S. at 1011.

before he could move forward with his claim for relief.[54] Lucas also never challenged the original setback line.[55] The dissent argued that the taking cannot be terribly egregious if Lucas did not contend that the regulation was invalid to begin with.[56]

Subsequent applications of the decision have also paid attention to semantics and procedure – not just by the label of the regulation but also by strictly construing the two requirements for a ripe takings claim: finality and exhaustion.[57] In *Ecogen*, the plaintiff wind energy company did not seek a hardship exception available during the moratorium period that could have allowed the company to build.[58] Ecogen argued that this should not impact its takings claim because the company repeatedly appealed to the board to reconsider the moratorium and that the application for an exception would be futile "given the Board's overt hostility to the Italy Project."[59] Similarly, the plaintiff in *Watson Construction Co. Inc. v. City of Gainesville* did not seek a hardship exception to construct an asphalt plant "because of its belief that an exemption would never be approved."[60] When the company did pursue a hardship exemption Watson's counsel did not include a thorough account of the facts and repeatedly called the hearing "an exercise in futility," which the court did not give credence to in finding that all avenues had not been exhausted.[61] The *Ecogen* decision acknowledged that the ripeness requirement does not require a lengthy procedure to be followed, the foreseeable end of which is a "brick wall."[62] However, trial courts seem to be requiring just that. Both decisions acknowledged legislative hostility toward the

54. *Id.* at 1041-42. The majority chose to proceed on a "temporary takings" theory based on the period when Lucas had no option to build. *Id.* at 1011-12.

55. *Id.* at 1042-43.

56. *Id.* at 1043.

57. *See* Watson Construction Co. Inc. v. City of Gainesville, 433 F. Supp. 2d 1269, 1282-83 (2006) (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193). Finality refers to whether the initial decision maker has arrived at a definitive position and exhaustion refers to the administrative and judicial procedures to seek review of the decision. *Id.*

58. Ecogen, LLC v. Town of Italy, 438 F. Supp. 2d 149, 153-55 (2006). To apply for a hardship exemption, the applicant must pay $500 with relevant facts and documentation. *Id.* A public hearing is held within forty-five days and the town board acts based on their findings. *Id.*

59. *Id.* at 153-55.

60. *Watson*, 433 F. Supp. 2d at 1283. In a "first-step" meeting with the city, the company was told that the government would not pass a moratorium on construction of asphalt and concrete plants unless citizens initiated the action, which they did soon after. *Id.* at 1271. This led to the adoption of a six-month moratorium. *Id.* at 1272.

61. *Id.* at 1283-84.

62. *Ecogen*, 438 F. Supp. 2d at 160 (citing Triple G Landfills v. Bd. of Comm'rs of Fountain Cnty, Ind., 977 F.2d 287, 291 (7th Cir. 1992)).

projects in question but did not view seeking hardship exemptions as certain "brick walls."[63]

C. *The Economic Impact and Duration of a Regulation Do Not Carry Greater Weight than Other Factors in a Takings Analysis.*

In both *First English* and *Lucas*, the majority opinion focused on the loss of all economically viable use for the properties in question because government regulations forbid construction.[64] Though two of the factors in *Penn Central* revolve around the economic prospects of the landowners (economic impact of the regulation and the extent to which it interferes with investment-backed expectations), the *Tahoe-Sierra* court stressed that they carry no more weight than other factors: the character of the invasion and the government interest.[65] Nor does the duration of a temporary deprivation carry extra weight when determining a taking.[66] The opinion cited Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island* in finding that, ". . .we do not hold that the temporary nature of a land-use restriction precludes finding that it effects [sic] a taking; we simply recognize that it should not be given exclusive significance one way or the other."[67] This reference to *Palazzolo* aided in clarifying " . . .such vexing and long-standing issues as the relevance (if any) of a property owner's expectations when a regulation destroys all economically beneficial use of her land, and what criteria courts may consult to gauge whether an owner's expectations are reasonable."[68]

Armed with the knowledge that investment-backed expectations of landowners and the length of moratoria do not carry substantial weight in a *Penn Central* ad hoc factual inquiry, lower courts have ac-

63. *Ecogen*, 438 F. Supp. 2d at 161("Here, it may be unlikely that defendants would grant Ecogen a hardship exception from the Moratorium . . . . There is obviously some hostility toward the project among some of the town. That the availability of such an exception is doubtful is not enough, however."); *Watson*, 433 F. Supp. 2d at 1286 ("[T]here certainly does seem to be some hostility on the City's part toward the Watson project.").

64. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

65. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 320 (2002).

66. *Id.* at 335.

67. *Id.* at 337 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001)). In *Palazzolo*, the petitioner owned waterfront property which was designated as coastal wetlands by law. *Palazzolo*, 533 U.S. at 611. His development proposals were rejected and he sued, claiming the application of wetlands regulations took the property without compensation. *Id.* The majority ruled that not all of the petitioner's land was a part of the protected wetlands and therefore he did not experience a total deprivation of all economic value. *Id.* at 631.

68. J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo And The Lower Courts' Distrubing Insistence On Wallowing In The Pre-Palazzolo Muck*, 34 SW. U. L. REV. 352, 354 (2005).

knowledged the plight of plaintiffs while still upholding moratoria. In *Wild Rice*, the landowners incorporated to develop a subdivision, constructed a connection to the sewer system, and entered an agreement with the city for sewage treatment, all to comply with county and township regulations.[69] The company invested $500,000 in developing and promoting the subdivision only to have the moratorium passed while city officials conferred with Federal Emergency Management Agency (FEMA) representatives to plan for flooding emergencies.[70] No lots were sold during the moratorium on building permits, but five were sold after the moratorium was lifted.[71] Wild Rice claimed the moratorium denied it all economically-viable use of its property after investing $500,000, "most of which was mandated by government entities," and sought more than one million dollars in damages.[72] The trial court found the damages claim to be vastly higher than what was reasonable based on the pre-moratorium and post-moratorium sales and cited *Tahoe-Sierra* in holding that that "[a] mere delay" was not a taking.[73]

In *Ecogen*, when the government in Italy, New York, passed the moratorium on wind energy facility construction, it did so intentionally to impact the plaintiff's company, which needed to construct a substation in Italy to fulfill its contract with the neighboring town of Prattsburgh, which welcomed the project.[74] Though Ecogen showed financial harm through the continued extension of the moratorium, it was not found to be a taking because it was not shown to be unreasonable in duration.[75] The court did acknowledge, however, that "it does seem curious and suspicious that a two-year period is needed to adopt a zoning plan for wind turbines" and ordered the town to enact a plan within ninety days or render a decision on a hardship exception for the plaintiff.[76]

Like *Wild Rice*, the government in *Watson* also passed a moratorium after a company had taken steps to begin their enterprise.[77] Watson contracted to purchase the land and spent more than $200,000 to

69. Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 852 (N.D. 2005).
70. *Id.* at 852-53.
71. *Id.* The moratorium was lifted in May 2000, after which lots were sold for $39,200 in that month, $39,000 in March and November 2002, $55,900 in July 2003, and $59,000 in April 2004. *Id.*
72. *Id.* at 857.
73. *Id.* at 858.
74. Ecogen, LLC v. Town of Italy, 438 F. Supp. 2d 149, 152 (2006).
75. *See id.* at 153, 161.
76. *Id.* at 162.
77. *See* Watson Construction Co. Inc. v. City of Gainesville, 433 F. Supp. 2d 1269 (2006). In a "first-step" meeting with the city, the company was told that the government would not pass a moratorium on construction of asphalt and concrete plants unless citizens initiated the action, which they did soon after. *See id.* at 1271. This led to the adoption of a six-month moratorium. *See id.*

purchase and move an asphalt plant to the new site and more than $100,000 in preparing plans for the project and "anticipated no problems with the construction."[78] The purchase agreement expired during the moratorium, and after the moratorium ended, a competitor built an asphalt plant on the site in question.[79] The court held that the takings claim revolving around Watson's investment-backed expectations was not ripe based on finality and exhaustion and did not reach a *Penn Central* analysis.[80]

The effect of the regulation on investment-backed expectations of the landowner is not the paramount concern when determining a regulatory taking according to *Tahoe-Sierra*.[81] Lower courts have abided by this part of the decision.[82] Investment-backed expectations must be balanced with the character of the invasion and the government's interest in health and safety; however, all three factors are devoid of "bright lines" to limit confusion.[83] In future cases, those claiming a regulatory taking cannot rely solely on a diminution in value or frustration of development plans to request compensation but must place weight on the other factors the court considers in its ad hoc, factual inquiries.[84]

D. Constitutional Safeguards Are Inadequate to Protect Governments from Manipulating the Planning Process to Control New Businesses.

The decision in *Tahoe-Sierra* was a victory for government planning agencies. They would not be required to pay compensation to landowners who are located in areas in need of a comprehensive land use plans in order to enact a moratorium on development while a plan is devised.[85] However, this decision also gives the government room to manipulate what kind of people and businesses can build in their area, a power that the court may not have intended or wished.[86] When a government can use innocent tools of planning such as construction moratoria to halt building in certain regions, the results can be less than desirable if a government acts in bad faith or with an unsavory motive.

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78. *Id.* at 1275.
79. *Id.*
80. *Id.* at 1282.
81. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 319 (2002).
82. *See* Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 857 (N.D. 2005).
83. *See* J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo And The Lower Courts' Distrubing Insistence On Wallowing In The Pre-Palazzolo Muck*, 34 SW. U. L. REV. 352, 399 (2005).
84. "[L]andowners cannot expect to be compensated if frustration of their development plans is the only factor supporting their claim." *Id* at 401.
85. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 302.
86. *See id.*

Both the *Ecogen* decision in New York and the *Watson* decision in Florida recognize aversion, if not outright hostility, to the projects in question.[87] In these cases, the takings claims were accompanied by due process claims, where the courts were asked to determine if the moratoria, both facially and as-applied, violated the due process rights of the companies.[88] A procedural due process claim challenges the procedures used in adopting the regulation, and a substantive due process claim challenges "arbitrary and capricious action" in adopting the regulation.[89] Ecogen asserted a substantive due process claim that, on its face, the moratorium bore "no rational relationship to any legitimate government purpose," and supported it by contending that there was no reason to prohibit the construction of only wind power substations and not all types of power stations, but this was deemed insufficient.[90] The court, however, found that the moratorium was not arbitrary or irrational enough to be a violation.[91] Similarly, Watson contended that the denial of their building permits was irrational because other developers' plans were approved during that time.[92] Likewise, the court found that the moratorium bore a rational relationship to a legitimate government purpose.[93] Both cases saw challenges to the as-applied constitutionality of the moratoria dismissed for lack of ripeness (finality and exhaustion).[94] In both *Ecogen* and *Watson*, despite admitted hostility and moratoria, which were clearly passed to halt the projects in question alone, plaintiffs could not recover based on due process violations.

CONCLUSION

The Supreme Court's ruling in *Tahoe-Sierra* seemed on its surface to be giving the government a fighting chance to devise comprehensive land-use plans. The alternatives resulting from a *per se* rule, which announced that temporary construction moratoria are takings that require compensation, appeared to be devised based on the options to either deal with nonconforming construction occurring during the planning or paying owners for the time it takes to devise a plan. The

87. Ecogen, LLC v. Town of Italy, 438 F. Supp. 2d 149, 161 (2006); *see Watson*, 433 F. Supp. 2d at 1286.
88. *See Ecogen*, 438 F. Supp. 2d at 154; *Watson*, 433 F. Supp. 2d at 1272.
89. *Watson*, 433 F. Supp. 2d at 1278 (citing Villas of Lake Jackson, Ltd. V. Leon County, 121 F.3d 610, 612 (11th Cir. 1997)).
90. *Ecogen*, 438 F. Supp. 2d at 156-58.
91. *Id.* at 155.
92. *Watson*, 433 F. Supp. 2d at 1279-80.
93. *See id.* Reasons cited by the city included enabling the government to "review, study, hold public hearings, and prepare and adopt an amendment or amendments to the City of Gainesville Code of Ordinances," and protecting and preserving the environment and safety of citizens. *Id.* at 1280.
94. *See Ecogen*, 438 F. Supp. 2d at 160; *Watson*, 433 F. Supp. 2d at 1284.

government can either be rushed or pay for the privilege of being thoughtful.

However, the reality for landowners is that in cases such as the Lake Tahoe region, subdivisions in Fargo, North Dakota, wind energy companies in Italy, New York, and asphalt plants in Gainesville, Florida, is that they can be deprived of the ability to build on their land for years and receive nothing for it. The Supreme Court believed that land would regain value when moratoria were lifted, but in the interim the realities of the construction industry can force development companies to abandon their plans and be seriously harmed financially by having stagnant properties that they could no longer turn into revenue.

Wild Rice River Estates could not sell lots in a subdivision for nearly two years after investing to connect to the Fargo sewer system and promote and develop its land.[95] Ecogen risked losing a contract with a neighboring town when Italy forbade construction of a substation.[96] Watson Construction Company lost money that it invested in an asphalt plant and then lost the project itself when its contract to purchase the property expired during the moratorium.[97] Investment-backed expectations may not be the only considerations when determining a taking, but they certainly bear more relevance than the *Tahoe-Sierra* majority casually touches on and dismisses.

Even other constitutional safeguards can fail to protect businesses from being targeted by moratoria as a result of the announcement by the Supreme Court that such measures will not be deemed takings.[98] There appear to be extremely limited options available to businesses that are singled out for construction moratoria, even when the moratoria are obvious and hostile. *Tahoe-Sierra*'s majority may have alleviated the fears of planning agencies that wish to halt construction while they enact comprehensive zoning, but the Supreme Court also gave governments another tool to abuse at the local level.

95. *See* Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 852 (N.D. 2005).
96. *Ecogen*, 438 F. Supp. 2d at 152.
97. *Watson*, 433 F. Supp. 2d at 1271.
98. *See Ecogen*, 438 F. Supp. 2d at 154; *Watson*, 433 F. Supp. 2d at 1272. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 304 (2002).