



Tahoe-Area Development Lawsuits Could Have Far-Reaching Impacts

Four significant lawsuits concerning the Tahoe Regional Planning Agency (TRPA) have either recently been resolved or are proceeding toward resolution. The outcome of these cases could have important consequences for land-use regulation in the Lake Tahoe area. Further, since the cases concern provisions of the U.S. Constitution, they could affect land-use regulation across the country.

Regulation of Tahoe Development

Role of TRPA. The TRPA is a regulatory body established in the late 1960s by a bistate compact between the states of California and Nevada. The compact underwent a major revision—approved by the U.S. Congress—in 1980. The agency is charged with preserving and enhancing the environment and resources of the Lake Tahoe basin through coordinated planning and regulation of development in the basin.

A major component of TRPA's current responsibilities is enforcing a regional development plan for the basin. The plan, which TRPA adopted in 1987, restricts the extent, type, and location of commercial and residential development in order to maintain the lake's water quality, among other goals. In general, TRPA's implementation of the plan seeks

to redirect development away from the most environmentally sensitive areas.

In order to redirect development in this way, TRPA has evaluated every parcel in the Lake Tahoe basin, and has banned development from the most environmentally sensitive lots. However, partly as a matter of equity, TRPA assigns to every vacant parcel in the basin a "transferable development right" (TDR) for one housing unit. While TDRs do not permit construction on *any* parcel, they are necessary for securing permission to construct housing units on property where such development is otherwise appropriate.

Here's how TDRs work: Each property owner receives one TDR from TRPA. If the owner's parcel has been designated as suitable for development, the owner can use the TDR, in conjunction

Cal Update

with other necessary permits, in order to construct a housing unit. If the owner's parcel has been designated by TRPA as *not* suitable for development, the owner may sell the TDR to a property owner elsewhere in the basin whose property would support a second housing unit. This would be necessary, for example, when someone wishes to develop a multiunit apartment complex.

In addition, TRPA has assigned to each vacant parcel "base lot coverage," representing the size of the structure (in square feet) that, if otherwise permitted, could be constructed on the lot. Like TDRs, base lot coverage does not confer an absolute right to build; it is only one of several elements necessary to secure permission to build. Also as with TDRs, base lot coverage is transferable, and thus can be sold to a property owner seeking to build a larger structure.

In summary, property owners can sell their unused TDRs, base lot coverage, or both. According to TRPA, TDRs and transferable base lot coverage permit an owner of undevelopable property to receive financial compensation from owners of developable property. In this way, TRPA can effectively shift development away from environmentally sensitive areas, while providing landowners in those areas compensation for the loss of use of their property, with virtually no cost to TRPA.

Recent Litigation. In carrying out its mission, TRPA occasionally encounters situations where landowners wish to develop or use their property in ways that TRPA will not permit. Such situations can eventually lead to lawsuits by or against TRPA. In recent months, four lawsuits in particular either were resolved or underwent significant developments (see Figure 1). The TRPA has expended considerable legal and financial resources to address this litigation, and the states of California and

Nevada have recently augmented TRPA's budget to accommodate its increased costs.

The outcome of these cases will help to define TRPA's regulatory powers, and will likely help clarify legal issues related to land use regulation by TRPA and other government agencies. In particular, the cases all involve some aspect of the "takings" clause of the Fifth Amendment of the U.S. Constitution, which prohibits the taking of private property for public use without the payment of just compensation to the property owner. Rulings against TRPA could weaken its regulatory authority to carry out its mission, and/or significantly raise its costs by essentially requiring it to pay compensation (beyond the issuance of TDRs) to affected landowners.

Bernadine Suitum v. TRPA

Background. This quintessential "regulatory takings" case has been closely watched by property rights advocates and government regulators throughout the United States. In 1972, Bernadine Suitum and her late husband bought a small parcel of land for \$5,000 in a residential area of Incline Village, Nevada. The Suitums planned to build a home on the property when they retired. However, in 1987 TRPA adopted a regional plan that designated the Suitum's property as existing within a Stream Environment Zone (SEZ). The SEZ designation prohibits any "permanent land disturbance" (such as construction of a new home) within zone boundaries. On the basis of this prohibition, TRPA denied Mrs. Suitum's application for a building permit in 1989.

Issues. Suitum filed suit, claiming that TRPA's denial of a building permit amounted to an unconstitutional taking of her property without just compensation. The TRPA did not dispute that its regula-

Figure 1

Tahoe Regional Planning Agency Selected Recent Litigation

Overview

- Court cases generally upheld Tahoe Regional Planning Agency's (TRPA's) authority to regulate development.
- A couple of cases suggest that TRPA's compensation policy, including use of "transferable development rights" (TDRs), may not provide just compensation.

Suitum v. TRPA

- Landowner claimed prohibition on development constitutes a "taking" deserving of compensation. Owner rejected argument that TDRs constitute a form of compensation.
- Case settled May 1999 before going to trial, with TRPA paying \$600,000 for landowner's attorneys' fees and property.
- Settlement leaves TRPA's regulations, including TDR provisions, intact.

Tahoe Sierra Preservation Council v. TRPA

- Landowners claim TRPA's 1981-84 building moratorium constitutes a "temporary taking." They also claim that the 1987 regional plan (currently in effect) constitutes a "permanent taking."
- District Court ruled in January 1999 that moratorium did constitute a temporary taking that required TRPA to pay compensation. Court has not ruled on amount of compensation due, pending TRPA's appeal of the decision.
- District Court ruled in 1989 that the permanent taking case had been filed after expiration of statute of limitations. However, the Tahoe Sierra Preservation Council has appealed this ruling to the Circuit Court of Appeals.
- If the courts ultimately rule against the state, the TRPA could experience significant increased costs to provide compensation.
- If the courts rule in favor of the state, case law would strengthen TRPA's ability to impose temporary moratoria and other regulatory actions without effecting a taking.

Lake Tahoe Watercraft Association v. TRPA

- Engine manufacturers and others claimed TRPA's ordinance banning certain boat engines from Lake Tahoe is unfair, constitutes a taking, and was improperly developed.
- Case settled March 1999, with TRPA permitting three-year exemptions for certain engines, and manufacturers funding certain enforcement measures. The ordinance went into effect June 1, 1999.
- Settlement essentially leaves intact TRPA's prohibition of watercraft engines that exceed water pollution standards.

TRPA v. Barbieri

- The TRPA claimed that a landowner violated its regulations by constructing a house and other facilities on his parcel without a permit. The TRPA sued for civil fines and the removal of the structures. Landowner counter-sued that regulations violated equal-protection laws and the Fifth Amendment.
- District Court ruled in 1998 that landowner did in fact violate TRPA's regulations. A ruling on the countersuit is expected in 1999.

tions prohibited development of Suitum's parcel, but it contended that it had provided Suitum with a form of compensation. Specifically, TRPA had allocated a TDR to Suitum, which Suitum could sell to owners of developable property in the Tahoe area.

Suitum made no attempt to sell her TDR. Accordingly, TRPA argued that she had no right to claim she had suffered a taking, since the value of her compensation (the TDR) could only be determined by selling it. The federal district and circuit courts concurred with TRPA, holding that Suitum's claim was not "ripe" for adjudication (that is, she must first attempt to sell her TDR).

Suitum appealed this judgment to the U.S. Supreme Court, which in 1997 unanimously ruled that Suitum's taking claim did *not* require an attempt by her to sell the TDR in order to be valid. The Supreme Court therefore held that the case was indeed ripe for judicial review, and sent the case back to the U.S. District Court of Nevada.

In a motion to the District Court for summary judgment, TRPA argued that, even though Suitum had not tried to

Cal Update

sell her TDR, her *ability* to do so annulled her claim that she had suffered a taking. In December 1998 the District Court issued an opinion denying TRPA's motion for summary judgment. In doing this, the court expressed some skepticism about TRPA's reasoning that compensation was provided through the TDR.

Outcome. With summary judgment denied, the case was scheduled to go to trial. However, in May 1999 TRPA and Suitum reached a settlement, thus preempting a "takings" trial by the District Court. While TRPA conceded no liability, the settlement called for TRPA to purchase Suitum's property and pay her legal fees. In accordance with the settlement, TRPA paid \$515,000 to Suitum for her property and attorney's fees, and an additional \$85,000 to the Pacific Legal Foundation, which helped to represent her in court. In return TRPA received ownership of the property and Suitum withdrew her lawsuit.

The settlement leaves TRPA's regulations, including the TDR provisions, intact. The TRPA does not expect the settlement to encourage other lawsuits, given that it took a decade to settle, did not result in a windfall for Suitum, and set no legal precedents.

Tahoe Sierra Preservation Council v. TRPA

Background. Currently, another major takings case remains pending. It results from a three-year building moratorium TRPA adopted in 1981. The moratorium was implemented as a temporary measure while TRPA (1) adopted environmental thresholds (for example, water quality levels) for the lake, and (2) amended its regional plan to achieve those thresholds. The thresholds were established in 1982 and the amended plan was adopted in 1984,

thus permitting TRPA to end its building moratorium.

However, the new regional plan was legally challenged by the California Attorney General's Office and the League to Save Lake Tahoe. They argued that the new plan was invalid because it allegedly failed to incorporate all the elements required by TRPA's 1980 compact. The U.S. District Court for California's eastern district issued a temporary restraining order and enjoined TRPA from issuing building permits until the case could be resolved. The TRPA worked with various stakeholders to develop a new regional plan, which was adopted in 1987 as part of a settlement of the litigation brought by the Attorney General and the League. The regional plan remains in effect (with certain amendments) today.

Issues. Although the moratorium is no longer in effect, several hundred landowners are suing TRPA for what they describe as a "temporary taking" of their property under the moratorium. The landowners, organized as the Tahoe Sierra Preservation Council (TSPC), filed the suit in 1984 and are seeking compensation for the time that the moratorium prevented them from developing their property. The TSPC initially estimated that total damages would amount to about \$30 million.

The TSPC pursued its complaint in various forms through the federal court system. Three times the District Court dismissed TSPC's suits, but each time the Ninth Circuit Court of Appeals reinstated at least a portion of the suits. Finally the case went to trial in the U.S. District Court of Nevada in December 1998. The court ruled in January 1999 that TRPA's 1981-84 moratorium was a reasonable exercise of its regulatory powers. However, the court also ruled that TRPA owed partial compensation to the property owners for its temporary

taking of their land's use. The court is delaying a second trial, which would determine the actual value of the alleged 1981-84 taking, until after TRPA is given an opportunity to appeal the ruling in the first trial. The TRPA's appeal is currently before the federal Ninth Circuit Court of Appeals.

In addition to the above, TSPC also pursued a second lawsuit against the adopted 1987 regional plan. The TSPC argued that the plan amounts to a *permanent* taking of property, in that it prohibits or significantly restricts development on certain privately owned lots. In 1989, the U.S. District Court of Nevada ruled that TSPC's challenge to the 1987 plan was filed after the statute of limitations (of one year) had expired, and thus the claim was invalid. However, the TSPC is appealing this ruling in the Ninth Circuit Court of Appeals.

Outcome. The outcome of the *temporary* takings case has potentially far-reaching implications for TRPA and other regulatory agencies. At issue is the question of whether compensation is due to property owners when a regulatory agency imposes a temporary moratorium pending the development of a regulatory program that permits development. If a decision is issued that finds this is so, then agencies might experience a financial incentive to rush the development of regulations in order to minimize their takings costs. As a result, regulations might be inadequately reviewed and considered, and the regulations might be more susceptible to lawsuits. Alternatively, if agencies choose to continue using moratoria, the state and local agencies would face increased costs to pay takings compensation.

In addition, if TSPC's appeal of the *permanent* takings case is successful, more serious implications could result. Specifically, it could jeopardize major elements of TRPA's regulatory apparatus,

could significantly raise TRPA's takings costs, and could force the state to shift its environmental protection strategies away from land use regulation and toward outright acquisition of land. Similar effects could be experienced by other land-use regulatory agencies.

Lake Tahoe Watercraft Association v. TRPA

Background. In June 1997, TRPA adopted an ordinance that would ban gasoline-powered two-stroke marine engines from operation on Lake Tahoe effective June 1, 1999. The targeted engines are typically used to power personal watercraft such as jet skis. They are also highly polluting, releasing about a quarter of their raw fuel into the water.

Issues. In October 1997, a group including manufacturers and concessionaires of such watercraft filed a lawsuit challenging TRPA's authority to adopt the ordinance. The suit (1) challenged the ordinance as an illegal infringement on their business activities, which involved a regulatory taking of personal property, and (2) charged that TRPA had not conducted adequate studies to determine that two-stroke engines were inherently more damaging than four-stroke engines.

Outcome. In October 1998, the federal District Court of California's eastern district upheld TRPA's authority to adopt the ordinance as a legitimate effort to reduce pollution in Lake Tahoe. However, the ruling allowed the manufacturers to continue pursuing a portion of their suit, focusing on the adequacy of TRPA's environmental studies.

In March 1999 both sides reached a settlement. Under the settlement, the ordinance went into effect June 1, 1999, with TRPA allowing a three-

Cal Update

year exemption for auxiliary sailboat engines and certain fuel-injected and low-power motors. The plaintiffs agreed to drop their suit and to fund several mitigation measures which are intended to compensate for the increased pollution resulting from the exemptions. The mitigation measures include additional watercraft for TRPA's enforcement activities, bilge sponges for absorbing oil, and brochures and signs to promote the restrictions. After the exemptions expire in October 2001, the ordinance will ban all two-stroke engines without direct fuel injection.

The new ordinance represents an expansion of efforts to regulate pollution emissions of engines. Such efforts have traditionally focused on the impact of such emissions on air quality; the new ordinance focuses instead on water quality. At the time this analysis was prepared, local agencies with responsibility for other bodies of water in the region, including Truckee, were considering similar restrictions.

TRPA v. Barbieri

Background. This case was initiated by TRPA in 1995, against a property owner who constructed several facilities in violation of TRPA's regional plan. Previously the property contained only a parking lot, which TRPA agreed could continue to operate. However, TRPA prohibited any new construction on the property, based on its conclusion that the environmental impact of such development on Lake Tahoe's water quality and clarity would exceed acceptable levels.

Issues. Ignoring these restrictions, the property owner (Barbieri) constructed a single-family home, boat shed, and related facilities on the lot. Barbieri did not attempt to secure a permit for this develop-

ment. The TRPA sued for civil penalties and removal of the structures. Barbieri in turn filed a counter-claim alleging that the construction limitations violated equal protection laws (since nearby landowners had been able to construct homes, albeit before TRPA's adoption of the regional plan). In addition, Barbieri claimed that TRPA's proposed enforcement action amounts to an illegal taking.

Outcome. In the fall of 1998, the U.S. District Court of California's eastern district ruled that Barbieri's development did in fact violate TRPA regulations. The TRPA has filed a motion for summary judgment to dismiss the takings and equal protection counter-claims, but the court has not yet ruled on this motion. If summary judgment is granted, then the court will rule on whether TRPA's enforcement action is valid. If summary judgment is *not* granted, then a trial on the takings and equal protection arguments will be scheduled. In any event, a decision by the court is expected by the end of 1999.

Summary

In order to carry out its task of planning and regulating development in the Tahoe Basin, TRPA inevitably encounters controversies about takings of property and just compensation for such takings. Clearly TRPA's regulations impose restrictions on how property owners may use their property. However, the courts have not completely defined the point at which regulations become a taking. Neither have they clarified whether particular compensation programs, such as TRPA's TDRs, qualify as just compensation under the Fifth Amendment.

The four cases discussed above help to illustrate these matters. The decisions and settlements

reached so far generally uphold TRPA's right to enforce its regulations. At the same time, the Suitum and TSPC cases suggest that TRPA's compensation policies, including the use of TDRs, may not provide just compensation for certain takings. This issue would be clarified in future rulings on the TSPC case.

The TRPA is one of the state's primary agencies for protecting and enhancing the public resource that is Lake Tahoe. The cases discussed above will help to define the legal parameters of regulatory

mechanisms that TRPA uses to carry out its mission. If future court decisions require modifications to TRPA's policies and ordinances, the cost of compensation claims could rise considerably. In such a situation, the state would either have to increase its spending on compensation (including the approach of purchasing property outright rather than merely regulating it), or devise different means for maintaining its commitment to the environmental quality of the Lake Tahoe basin.

Contact—Steve Boilard—(916) 445-5291

Economic and Revenue Developments

The California economy continues to grow at a healthy pace in mid-1999, and these gains are being reflected in key revenue sources such as sales taxes and personal income tax withholding.

The Economy. During the first half of 1999, California's economy grew at the fastest pace of the current economic expansion. During this period, personal income and taxable sales rose about 8 percent, while wage and salary jobs through the first seven months were up 3.7 percent from the prior year. Monthly employment data for July indicate that the expansion is continuing into the second half of the year, with most industry sectors expanding during the month.

The growth is being fueled by (1) major gains in real estate sales and construction activity, (2) strong retail spending on cars, appliances, and other durable goods, and (3) continued growth in the software side of the computer industry. The one soft spot has been high-tech manufacturing, where employment in computers, electronics, and

aerospace fell from the prior year. Regionally, growth has shifted from the San Francisco Bay Area to the Central Valley and Southern California.

Rising national interest rates could cause some slowing in California's construction and finance sectors in the months ahead. But for now, the state's economic expansion is firmly on track.

General Fund Revenues. Total General Fund revenues and transfers fell below the budget act estimate by \$111 million (3.2 percent) in July. However, all of the softness was due to cash-flow factors which should be reversed in the months ahead. After adjusting for these temporary factors, underlying receipts appear to be running modestly ahead of the estimate, consistent with the healthy growth in the economy. Specifically:

- *Personal income taxes* were up \$44 million (2.4 percent), reflecting higher-than-expected withholding and lower-than-expected refunds associated with 1998 tax

Cal Update

returns. Withholding payments during the month were up \$26 million from the administration's estimate and are running 11.8 percent ahead of prior-year levels. The continued strength from this source indicates that California wage growth remains strong in mid-1999.

- *Sales and use tax* receipts were down \$61 million during the month. However, the shortfall appears to be entirely due to cash-flow factors. Specifically, because the due date for July collections falls on the last day of the month, it is difficult to determine how much of the payments will be processed in late July and how much in early August. Based on daily cash receipt data, it appears that the July shortfall is more than offset by stronger-than-expected collec-

tions in early August. In fact, based on the preliminary August data, it appears that taxable sales for the full second quarter of 1999 rose by over 8 percent from the prior year. If this is the case, the growth for the first half of this year will have been the strongest since the late 1980s.

- *Bank and corporation tax* receipts were down \$25 million (9.7 percent) during July. The shortfall is largely due to lower-than-expected prepayments toward 1999 liabilities.
- *All other receipts* were down \$69 million during the month. However, all of the shortfall appears to be related to the timing of various payments expected by the state, rather than an underlying shortfall.

Contact—Brad Williams—(916) 324-4942

About the LAO

California Update is published monthly—except January and February—by the Legislative Analyst's Office (LAO). The LAO is a nonpartisan office which provides fiscal and policy information and advice to the legislature. The Legislative Analyst's Office is located at 925 L Street, Suite 1000, Sacramento, CA 95814.

Need an LAO Report?

- Call (916) 445-2375.
- Visit our web site at:

www.lao.ca.gov

Want to Subscribe to LAO Publications?

- Go to www.lao.ca.gov, click on "Subscribe," and fill in your name and e-mail address.
- Once you've subscribed, you'll receive e-mail notification whenever a new LAO publication is released.