No. 00-1167

IN THE

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *ET AL.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMERICAN PLANNING ASSOCIATION AND THE NATIONAL TRUST FOR HISTORIC PRESERVATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?

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INTEREST OF *AMICI CURIAE*[1]

Amicus American Planning Association ("APA") represents the nation's land use planning professionals - those charged with addressing the public's interest in how land is used and with drafting regulations to ensure that the impacts of adverse land use are minimized. As a nonprofit, educational research organization with more than 30,000 members nationwide, the APA is the oldest and largest organization devoted to advancing state and local land use planning.

The APA has forty-six chapters representing all fifty states, including chapters in California and Nevada. Members of the APA are routinely involved in comprehensive land use planning and its implementation through land use regulation. An overriding concern of the APA is that in order for comprehensive land use planning to foster orderly and beneficial development, communities must have the tools and legal authority to deal effectively with a variety of types of land uses.

The APA has participated as amicus in a number of cases before this Court; most recently in *City of Los Angeles v. Alameda Books, Inc. and Highland Books, Inc*. (No. 00-799) in support of the City of Los Angeles; in *Lorillard Tobacco Co., et al., v. Thomas F. Reilly, Attorney General of Massachusetts* (No. 00-596, 00-597) in support of Massachusetts; and in *Anthony Palazzolo v. Rhode Island* (No. 99-2047) in support of Rhode Island.

Amicus National Trust for Historic Preservation ("National Trust") was chartered by Congress in 1949 as a private charitable, educational, and nonprofit organization to "facilitate public participation in

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

the preservation of sites, buildings, and objects significant in American history and culture." 16 U.S.C. §461, 468. The National Trust's mission is to foster an appreciation of the diverse character and meaning of our American cultural heritage and to preserve and revitalize the livability of our communities by leading the nation in saving America's historic environments. The National Trust has more than 250,000 members nationwide.

The National Trust's expertise on historic preservation law is nationally recognized. The National Trust has participated as amicus curiae in many cases involving the enforcement and interpretation of state and local historic preservation laws, including cases raising constitutional takings challenges to land use regulation and preservation ordinances. *See, e.g., Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001); *City of Monterey. v Del Monte Dunes, Ltd.*, 119 S. Ct. 1624 (1999); *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

STATEMENT OF THE CASE

Amici adopt the statement of the case as set forth by Respondents. However, the following points are of particular significance to the matters set forth in this brief.

The Tahoe Regional Planning Agency (TRPA) adopted Ordinance 81-5, prohibiting development in environmentally sensitive areas from August 1981 through August 1983, in order to carry out studies, adopt carrying capacities, and adopt the regional plan required by the Amended Tahoe Regional Compact, Pub. L. No. 96-551, 94 Stat. 233 (1988) (authorizing a thirty-month moratorium). When it became apparent that final adoption of the new plan required additional time, TRPA adopted Resolution 83-21, extending the two-year moratorium for an additional eight months to April 1984, or a total of thirty-two months – only two months longer than the statutory authorization.

On appeal to the Ninth Circuit, the principal question was "whether a temporary planning moratorium, enacted by TRPA to halt development while a new regional land use plan was being devised, effected [*a facial*] taking of each plaintiff=s property under the standard set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 766 (9th Cir. 2000). Recognizing its critical importance to their taking claim, the Preservation Council petitioned the Ninth Circuit to accept the "conceptual severance" argument when determining the relevant property interest allegedly taken. The Council argued that the property interest to be considered is not the entire fee simple in the

property, but rather the "temporal 'slice' of each fee that covers the time span during which Ordinance 81-5 and Resolution 83-21 were in effect." *Id*. at 774.

Recognizing the inconsistency of Petitioners= argument with this Court=s well-established precedent, the Ninth Circuit explained:

> Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest).

Id. Citing *Penn Central*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (rejecting "airspace" as spatial severance); and *Keystone Bituminous Coal Ass=n v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (rejection of "spatial" conceptual severance); *Andrus v. Allard*, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979) (rejection of "functional" severance); *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) (rejection of "temporal" severance), the Ninth Circuit held: "It would make little sense to accept temporal severance and reject spatial or functional severance." *Tahoe-Sierra*, 216 F.3d at 772-74.

> To not reject the concept of temporal severance, we would risk converting every temporary planning moratorium into a categorical taking. Such a result would run contrary to the Court=s explanation that it is >relatively rare= that government >regulation denies all economically beneficial or productive use of land.= *Lucas*, 505 U.S. at 1015....[T]he relevant property interests in the present case are the whole parcels of property that the plaintiffs own.

Id. at 777. The court also held that "given the importance and long-standing use of temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism." *Id*. The court concluded that the temporary moratorium adopted by TRPA did not deny all

use or value of the property. "Given that the ordinance and resolution banned development for only a limited period, these regulations preserved the bulk of the future developmental use of the property. This future use had a substantial present value." *Id.* at 781. "This economic reality is precisely what differentiates a permanent ban on development, even if subsequently invalidated, from a temporary one." *Id.* at 781 n.26.

Finally, this case comes to the Court in a posture of a facial taking. As the Court held in *Keystone*, 480 U.S. 470:

> Because appellees' taking claim arose in the context of a facial challenge … the only issue properly before … this Court, is whether the 'mere enactment' of the Surface Mining Act effected a taking … petitioners thus face a uphill battle … because petitioners have not claimed, at this stage, that the Act makes it commercially impracticable for them to [make a profit].

Id. at 494-95.

See also, Yee v. City of Escondido, 503 U.S. 519, 533-34, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (citing *Keystone*). In sum, the Ninth Circuit found that even apart from the Petitioners' assertion of a "temporal severance" theory, the "facial" taking argument of Petitioners must fail because sufficient evidence was presented to show that the property had use and value during the moratorium so as to require an as-applied, *ad hoc* factual determination under *Penn Central*, and Petitioners had waived all as-applied takings claims. [2]

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[2] The Ninth Circuit did not consider whether the development moratorium effected a compensable taking under *Penn Central*, 438 U.S. 104 (1978). The court explained: A[T]he only question before us is whether the rule set forth in *Lucas* applies B that is, whether a categorical taking occurred because Ordinance 81-5 and Resolution 83-21 denied the plaintiffs >all economically beneficial or productive use of land.=@ *Tahoe-Sierra*, 216 F.3d at 773. The TRPA only appealed the District Court=s finding of a categorical taking under *Lucas* and the Tahoe-Sierra Preservation Council did not appeal the court=s finding of no compensable taking under *Penn Central*. "And even if arguments regarding the *Penn Central* test were fairly encompassed by the defendants= appeal, the Petitioners have stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*." *Id.*

SUMMARY OF ARGUMENT

1. Temporary moratoria are fundamental to the planning process and have been traditionally recognized by the courts and authorized by state statutes as background principles of state law. Petitioners concede in their opening brief that "planning" or "time out" moratoria are validly used by planning agencies to provide "breathing space" and contend only that the "dubbed" temporary moratorium in this case was, in fact, a permanent substantive change in the regulations. (Petitioners' Brief at 4-5.) Petitioners' facial taking claim must fail because it expressly recognizes that temporary moratoria do not constitute a taking, the very question certified by this Court; or in the alternative, the grant of *certiorari* should be dismissed as "improvidently granted."

2. Temporary moratoria constitute a "normal delay" in the planning process, and cannot constitute a facial partial or temporary taking.

3. Both *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) and *Lucas* support the Ninth Circuit's holding that temporary moratoria do not effect a taking. *First English* limited temporary takings to invalidated permanent restrictions lasting for a temporary period of time – specifically, that once a taking has been found, the period between the time of the taking and the eventual invalidation and rescission of the offending

regulation would be a temporary taking. *First English*, 482 U.S. at 321. *Lucas* is clearly limited to those relatively rare circumstances where all economically viable use and all value is *permanently* removed due to the regulatory impact of the challenged regulation. *Lucas*, 505 U.S. at 1015, *see also Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).

4. Apart from "normal delays," takings analysis requires consideration of the entirety of the property, including temporal, as well as spatial and use elements, *Penn Central*, 438 U.S. at 130, *Keystone*, 480 U.S. 470 (1987). The Ninth Circuit properly found that, contrary to the arguments asserted by Petitioners, the takings analysis looks at all components of the fee, *Tahoe-Sierra*, 216 F.3d at 774-79. Furthermore, reviewing courts should not conceptually sever these interests "into small temporal pieces" any more than they would sever spatial interests (*e.g.*, setbacks) or allowable uses (*e.g.*, traditional zoning restrictions). *Id.* Rather, courts in a facial taking claim should look at all elements to determine whether, in totality, "all economically viable use" has been permanently removed from the property. *Id.*, *see also Lucas*, 505 U.S. at 1012.

ARGUMENT

I. MORATORIA, REASONABLE IN DURATION, MEANS, AND ENDS, ARE FUNDAMENTAL TO ACHIEVING PROPER PLANNING AND LAND USE REGULATION IN THE UNITED STATES

Interim development controls and moratoria are fundamental to a rational, defensible planning process. Prior to *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), courts had recognized the necessity of temporary moratoria of building permit issuance pending planning

studies as a prerequisite to a valid planning and regulatory process. *Miller v. Bd. of Public Works*, 234 P. 381, 195 Cal. 477 (Cal. 1925), *cert. den.*, 273 U.S. 781 (1926).[3] Courts since that time have recognized that a temporary halt on development activity during a period of study is not only reasonable, but also ensures that government acts in a manner that is thoughtful and deliberate, not arbitrary and capricious. *Williams v. City of Central*, 907 P.2d 701, 706 (Colo. Ct. App. 1995). Regulatory agencies across the country have used temporary moratoria and interim development controls as a legitimate means of creating breathing space while necessary background data could be gathered, analyses conducted, and policies assessed. Patrick J. Rohan, ZONING AND LAND USE CONTROLS, §22.01[1] (1998).

The reasonableness of a moratorium is measured by both the length of its duration and its relation to the underlying studies supporting change in the regulations. Thus, an enacting authority must diligently pursue completion of the planning process, including studies, analyses, public participation, and the drafting of legislation. *Id.* at §22.02[2]. The need for the moratorium is justified by the need to pursue further study of the matter at hand. *Williams*, 907 P.2d at 705. If, however, having established a legitimate need, the government fails to pursue the necessary studies or to work diligently toward resolution of the matter, the

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[3] The significance of planning to zoning regulation was fully recognized when the U.S. Department of Commerce issued the Standard State Zoning and Planning Enabling Acts in 1926 and 1928, respectively, including the requirement that "Zoning be in accordance with a comprehensive plan." Professor Charles Haar has stated that one of the important aspects of planning was to assure that property owners be protected by meaningful standards. "With the heavy presumption of constitutional validity that attaches to legislation … and the difficulty in judicially applying a
'reasonableness standard,' there is danger that zoning [would] tyrannize individual property owners." Charles Haar, *In Accordance With a Comprehensive Plan*, 68 Harv. L. Rev. 1154-58 (1955).

As the New York Court of Appeals stated in *Udell v. Haas*, 235 N.E.2d 897, 901, 21 N.Y.2d 463, 288 N.Y.S.2d 888 (1968): "… the comprehensive plan is the essence of zoning. Without it there can be no rational allocation of land use. It is the insurance that the public welfare is served and that zoning does not become nothing more than a Gallup poll." *See also* Daniel Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 799 (1976); and *Geo-Tech Reclamation Indus. v. Hamrick*, 886 F.2d 662 (4th Cir. 1989) (land use regulation requires comprehensive planning to avoid "mob rule").

substantive validity of the moratorium can be called into question. *Id. c.f. Almquist v. Town of Marshan*, 245 N.W.2d 819, 826, 308 Minn. 52 (Minn. 1976); and *State ex rel. SCA Chemical Waste Serv., Inc. v. Konigsberg*, 636 S.W.2d 430, 434 (Tenn. 1982).

Moratoria have been set aside when the restraint has been determined to be accompanied by studies unreasonable in scope, adopted in bad faith, or otherwise arbitrary or capricious. *Mitchell v. Kemp*, 575 N.Y.S.2d 337, 176 A.D. 2d 859 (N.Y. App. 1991) (moratoria unconstitutional on due process grounds, where town gave no satisfactory reason for five-year delay in enacting permanent zoning ordinance); *Q.C. Const. Co. Inc. v. Gallo*, 649 F. Supp. 1331 (D.R.I. 1986), *aff'd*, 836 F.2d 1340 (1st Cir. 1987) (due process violation where city imposed moratorium on sewer hookups but made no effort to study or remedy problem giving rise to moratorium). Where the government enacts a moratorium with the intent of blocking a specific development, with no legitimate, good faith interest in addressing a larger planning or environmental concern, unlawful discrimination may be found. *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999); *see also Williams*, 907 P.2d at 705.

In this case, the studies undertaken by TRPA during the thirty-two-month moratorium were specifically tied to the development of standards to slow the eutrophication of Lake Tahoe and to meet the charge given TRPA under the Tahoe Regional Planning Compact to address this problem within a thirty-month period. *Tahoe-Sierra Preservation Council*, 216 F.3d at 781-82 (accepting the district court's finding of fact that "TRPA worked diligently to complete the regional plan as quickly as possible"). Thus, even under an as-applied analysis, the taking claim should fail.

Three important principles underlie the need for temporary moratoria. Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URBAN

L. 65, 77-80 (1971) (cited by the Ninth Circuit below, *Tahoe-Sierra*, 216 F.3d at 777). First, reasonable moratoria allow the regulating body the necessary time to study and formulate solutions to significant land use and environmental problems affecting society. Elizabeth A. Garvin & Martin L. Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, LAND USE LAW AND ZONING DIG., June 1996, at 3.

The range of planning and public policy objectives that may necessitate a moratorium on development include the timing and phasing of development to the provision of adequate public facilities and infrastructure. *See Golden v. Ramapo Planning Bd.*, 285 N.E.2d 291, 334 N.Y.S.2d 138, 30 N.Y.2d 359 (N.Y. 1972), *app. dismissed*, 409 U.S. 1003 (1972) (upholding timed and phased multi-year development controls to assure that adequate public services will be provided in accordance with a long-term capital improvement plan); *Schenck v. City of Hudson Village*, 114 F.3d 590 (6th Cir. 1997); *Construction Industry Ass'n v. City of Petaluma*, 522 F.2d 897, 909 (9th Cir. 1975) (both upholding City numerical allocation of development permits over multi-year phasing programs based on comprehensive and intensive growth studies and capital improvement analysis); *see also* Robert H. Freilich, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS (1999); *see generally*, Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth and the Fifth Amendment*, 148 U. PA. L. REV. 873 (2000).

Petitioners themselves concede the validity of "a planning or time out moratorium of the kind sometimes used by planning agencies to provide needed breathing space." Petitioners' Brief at 4-5. By this extraordinary admission, Petitioners concede that if this case involved a temporary moratorium, the moratorium would have been valid. Furthermore, Petitioners assert that: "although dubbed temporary it was

actually a substantive regulation rather than a procedural planning device and it made a dramatic change in TRPA's land use plan." *See id.* at 5.

This Court, however, did not accept this case on a challenge to a permanent regulation. The question presented asks, "whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property.…" *Tahoe-Sierra*, 2001 WL 69237 (U.S.). The case should be dismissed on the basis that *certiorari* was improvidently granted, or alternatively, the order of the Court of Appeals should be affirmed, since Petitioners concede that a temporary moratorium would be valid and hence not a taking.

Temporary moratoria also constitute a valid response to imminent public health and safety threats. Indeed, it was such a concern for the immediate safety of the public that prompted Los Angeles County to enact an interim ordinance prohibiting development within a flood protection area to protect from loss of life, a temporary moratorium that was eventually upheld on remand from this Court even though all use was prohibited during the thirty-month period. *First English*, 482 U.S. 304 (1987), *on remand*, 210 Cal. App. 3d 1353, 258 Cal.Rptr. 893 (Cal. App. 1989), *cert. denied*, 493 U.S. 1056 (1990); *see also Cappture Realty Corp. v. Bd. of Adjustment*, 133 N.J. Super. 216, 336 A.2d 30 (N.J. Super. App. Div. 1975) (upholding a temporary moratorium on construction within designated flood prone areas while flood control studies were completed); *Orleans Builders & Developers v. Byrne*, 186 N.J. Super. 432, 453 A.2d 200 (N.J. Super. App. Div. 1982) (upheld eighteen-month moratorium to facilitate environmental protection for the vast area of the New Jersey Pine Barrens). In the case *sub judice*, the TRPA's thirty-two-month moratorium was for a duration directly tied to the task before it, specifically, to adopt environmental carrying capacities and to develop a new regional plan, *Tahoe-Sierra*, 216 F.3d at 767-68.

In each of these circumstances, government was confronted with a planning, environmental, or public safety threat of considerable magnitude and immediacy. In each case, the government found that a temporary halt on development was necessary to accomplish legitimate planning purposes precedent to the eventual regulation. David Heeter, *Interim Zoning Controls: Some Thoughts on Their Uses and Abuses*, 2 MGMT. & CONTROL OF GROWTH 409, 411 (S. Scott Ed. 1975).

The second principle underlying the need for temporary planning moratoria is the prevention of nonconforming uses or development inconsistent with the purposes and policies of the planning legislation being formulated. When developers expect that a regulating body is studying a particular planning or environmental issue, and, in fact, may adopt regulations to address that issue, there inevitably will be a rush to secure building permits under current regulations. Rohan at §22.01[1]. *See also SCA Chemical*, 636 S.W.2d at 436-37 ("SCA Chemical … was engaged in a race to avoid the more stringent zoning and permit requirements … contained in the new ordinance"). One of the first courts to address temporary moratoria summed up the problem as follows:

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

Downham v. City Council of Alexandria, 58 F.2d 784, 788 (E.D. Va. 1932).[4]

Courts have recognized the illogical result that would accrue were regulatory bodies simultaneously authorized to control and limit the private use of land, but prohibited from imposing temporary prohibitions on

[4] In fact, as the Ninth Circuit opinion points out, a race of diligence occurred prior to the adoption of the Tahoe Regional Planning Compact of 1980. *Tahoe-Sierra*, 216 F.3d at 777, n.15.

use during the development of those controls and limitations. As stated in *Chicago Title and Trust Co. v. Village of Palatine*, 22 Ill. App. 2d 264, 160 N.E.2d 697, 700 (Ill. App. 1959):

> It would be utterly illogical to hold that, after a zoning commission had prepared a comprehensive zoning ordinance or an amendment thereto, which was on file and open to public inspection and upon which public hearings had been held, and while the ordinance was under consideration, any person could by merely filing an application compel the municipality to issue a permit which would allow him to establish a use which he either knew or could have known would be forbidden by the proposed ordinance, and by so doing nullify the entire work of the municipality in endeavoring to carry out the purpose for which the zoning law was enacted.

See Walworth County v. Elkhorn, 27 Wis. 2d 30, 133 N.W.2d 257 (Wis. 1965); *Miller*, 234 P. at 388 (Cal. 1925).

The third principle underlying temporary planning moratoria is the facilitation of public debate and input into the legislative process. Unless the development industry, landowners impacted by development activity, and public interest groups have participated in the planning process, regulations likely will fail to protect the full range of community values and to accomplish the intended goals of the governing body. As stated by the Supreme Court of Minnesota, one of the "persuasive reasons for permitting moratorium ordinances [is] to derive the benefits of permitting a democratic discussion and participation by citizens and *developers* in drafting long-range use plans." *Almquist*, 245 N.W.2d at 826 (emphasis added). *See also Collura v. Town of Arlington*, 367 Mass. 881, 329 N.E.2d 733 (Mass. 1975) (noting that "with the adoption of an interim [moratorium a developer] is made aware that a new plan is in the offing and is thus able to participate in the debate over what that new plan should contain").

II. TEMPORARY MORATORIA CONSTITUTE NORMAL DELAYS IN THE DEVELOPMENT APPROVAL PROCESS

In *First English*, this Court expressly recognized the validity of "normal delays" in the development approval process. *First English*, 482 U.S. at 321. Professor Frank Michelman of Harvard Law School, in his review of *First English*, states: "the *First English* decision [does] not reach regulatory enactments, even totally restrictive ones, that are expressly designed by their enactors to be temporary…." Frank Michelman, *Takings*, 88 COLUM. L. REV. 1600, 1621 (1988). The subsequent history of *First English* confirms Michelman's reasoning. Upon remand of *First English*, the California Court of Appeals found that the thirty-month moratorium to prevent flooding was not a temporary taking, 258 Cal. Rptr. 893 (1989), and this Court denied *certiorari*, 493 U.S. 1056 (1990). Numerous courts have relied on *First English* to hold that temporary development moratoria do not amount to a taking of property. *Sun Ridge Dev. v. City of Cheyenne*, 787 P.2d 583 (Wyo. 1990); *Estate of Scott v. Victoria County*, 778 S.W.2d 585 (Tex. App. 1989); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. Ct. App. 1993).

The *First English* "normal delays" holding stems directly from *Agins*, 447 U.S. 255, where it was argued that aborted condemnation proceedings that lasted for a year effected a taking by interfering with the owner's ability to sell or develop the land during the period. The pendency of the condemnation proceedings in *Agins* had a greater restrictive effect than a temporary moratorium: it prevented the owners from selling as well as developing the property until the city determined the appropriate use for the property. The conclusion that there was no taking in *Agins* directly supports the finding that there is no taking when the government imposes a temporary moratorium on development. *Agins* specifically rejected the notion that the public should be held liable for losses caused by delays "during the process of governmental decision making." *Id.* at

263 n.9. A development moratorium in support of a comprehensive land use planning effort is precisely the type of delay associated with the "process of governmental decision making" referred to in *Agins* and was the progenitor of the phrase used in *First English*: "normal delays in the development approval process" are not takings. *First English*, 482 U.S. at 321.

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

It is incumbent upon the governing body of any agency imposing a moratorium to limit its duration to an amount of time that is reasonable and necessary. Rohan at §22.02[2]. As long as the delay is not "extraordinary" in light of the severity and complexity of the problem, the duration of the otherwise valid moratorium will constitute a "normal delay in the development approval process." *First English*, 482 U.S. at 321. The overwhelming weight of decisions by other federal and state courts supports the conclusion that temporary moratoria in effect for reasonable periods of time similar to the duration of the TRPA restriction do not result in a taking. *See Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478 (D. N.M. 1995) (thirty-month moratorium associated with effort to create national monument not a taking);

Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D. Md. 1975) (five-year moratorium on sewer hookups does not render land "worthless or useless so as to constitute a taking"); *Woodbury Place Partners*, 492 N.W.2d 258 (Minn. Ct. App. 1992) (two-year moratorium on development pending completion on interstate intersectional location study not a taking); *Cappture*, 336 A.2d 30 (N.J. Super. App. Div. 1975) (four-year moratorium imposed on construction in flood-prone lands not a taking); *Friel v. Triangle Oil* Co., 76 Md. App. 96, 543 A.2d 863 (Md. App. 1988) (twenty-four-month interim ordinance not a take); *Estate of Scott*, 778 S.W.2d 585 (Tex. App. 1989) (two-year interim ordinance not a taking); *Matter of Rubin v. McAlvey*, 29 App. Div. 2d 874, 288 N.Y.S.2d 519 (1968) (two-year interim development ordinance valid); *First English*, 258 Cal. Rptr. 893 (delay of thirty months not unreasonable).[5]

III. NEITHER THE SUPREME COURT'S REMEDIAL DECISION IN *FIRST ENGLISH*, NOR ITS DECISION IN *LUCAS*, INVOLVING PERMANENT CATEGORICAL TAKINGS, UNDERMINES, MUCH LESS CONTRADICTS, THE CONCLUSION THAT A TEMPORARY MORATORIUM ON LAND DEVELOPMENT DOES NOT EFFECT A TAKING

The U.S. Supreme Court's decisions in *First English*, 482 U.S. 304 (1987) and *Lucas*, 505 U.S. 1003 (1992), did not create a new approach that would support the conclusion that a temporary moratorium on development effects a taking. To the contrary, a careful reading of these decisions demonstrates that they confirm the constitutionality of TRPA's moratorium.

[5] *See Orleans Builders*, 453 A.2d at 208 (observing that "under decisional law in this state as well as in other jurisdictions" moratoria "leading to formulation of a comprehensive system for the area's development which would safeguard its environment" are not compensable), *McCutchan Estates Corp. v. Evansville Vanderburgh County Airport Auth. Dist*., 580 N.E.2d 339 (Ind. Ct. App. 1991) (nine-month delay not extraordinary as a matter of law), *Dufau v. United States*, 22 Cl. Ct. 156 (Fed. Cl. 1990) (sixteen-month delay not extraordinary as a matter of law).

A. *First English*

In *First English*, this Court granted review solely to address the issue of the appropriate *remedy* in a regulatory takings case.[6] Accepting for the sake of argument plaintiff's allegations that the restrictions effected a taking, 482 U.S. at 313, the Court addressed the question "whether abandonment [of regulations] by the government [after a judicial order finding a taking] requires payment of compensation for the period of time during which [the] regulations" were in effect. *Id.* at 318. The Court answered this question in the affirmative, holding that, assuming a government regulation works a taking in the first place, subsequent rescission of the regulation does not foreclose a claim for compensation. "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321.[7]

Temporary takings apply to the period of time between application of a permanent restriction and subsequent invalidation,[8] not the period during which a temporary measure is applied and is not a taking in the first place. The obvious reach of *First English* is to compensate for permanent takings that last a

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[6] The fact that *First English* involved a temporary moratorium was irrelevant to the holding in the case. The Petitioners' Petition for Certiorari is quite misleading in this regard. *First English*'s only relevance to this case is the dicta regarding "normal delays". The decision in *First English* as to the remedy could easily have been made in any of the cases where the court declined to accept jurisdiction by reason of ripeness. (*San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621, 101 S. Ct. 1287, 67 L. Ed. 2d 551 (1981); *Agins*, 447 U.S. 255 (1980); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986)). *See* Thomas E. Roberts, *Moratorium And Categorical Regulatory Takings: What* First English *and* Lucas *Say and Don't Say*, 31 ENVT'L L. REP. 11037 (Sept. 2001).

[7] *See Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 n.4 (11th Cir. 1996), holding that *First English* is not applicable to moratoria or other temporary actions; rather, *First English* is applicable only where the ordinance is indefinite in duration and would expire only if declared unconstitutional or repealed.

temporary period of time, *i.e.*, regulations subsequently rescinded or declared invalid, but not to compensate commonplace temporal regulations such as the TRPA=s thirty-two-month temporary moratorium, which have not been held to be a taking in the first place. Bozung & Alessi, *Recent Developments in Environmental Preservation and the Rights of Property Owners, "Moratoria as Regulatory Takings After* First English," 20 URB. LAW. 969, 1014-1030 (1988).

Thus, the *First English* ruling focuses exclusively on the appropriate remedy in a regulatory taking case. The Court in *First English* did not establish that a restriction temporarily depriving a landowner of the use of property constitutes a taking. Moreover, as the majority made clear, the Court was not addressing "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *Id.* at 321. This reading of *First English* is confirmed by the California Court of Appeals' resolution of the takings issue on remand. Addressing for the first time the actual merits of the takings claim, the Court of Appeals ruled that the County's interim ordinance did not effect a taking. *First English*, 258 Cal. Rptr. at 906. Emphasizing the fact that the ordinance was temporary by design, the court concluded:

> As an independent and sufficient grounds for our decision, we further hold [that] the interim ordinance did not constitute a "temporary unconstitutional taking even if we were to assume its restrictions were too broad if permanently imposed on First English. This interim ordinance was by design a temporary measure**B**in effect a total moratorium on any construction on First English=s property while the County conducted a study to determine what uses and what structures, if any, could be permitted on this property consistent with considerations of safety." "We do not read the U.S. Supreme Court's decision in *First English* as converting moratoriums and other interim land use restrictions into unconstitutional 'temporary

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[8] The opinion presupposes that "temporary regulatory takings" means "regulatory takings which are ultimately invalidated by the courts." *First English*, 482 U.S. at 310.

> takings' requiring compensation unless, perhaps, if these interim measures are unreasonable in purpose, duration or scope."

Id.

This Court denied the petition for *certiorari* filed by the owner in response to this decision. *First English*, 493 U.S. 1056 (1990). Although the Court=s denial of *certiorari* is not precedential, it clearly affected the ultimate result in *First English*.

Other courts have read *First English* similarly, and refused to hold that temporary moratoria effect a temporary taking. *Corn*, 95 F.3d 1066, 1073 (*First English* not applicable to temporary moratoria); *Dufau*, 22 Cl. Ct. 156 (1990) (following *First English*, and concluding that sixteen-month delay during Clean Water Act section 404 processing is not a taking); *Zilber*, 692 F. Supp. at 1206 (relying on *First English* to support conclusion that eighteen-month development moratorium is a "normal delay" that does not result in a taking).

For Petitioners to read *First English* as establishing a new species of "temporary takings" that would support a finding of a taking based on a "temporary" moratorium reflects a fundamental misreading of that decision.

B. *Lucas*

In *Lucas*, this Court found a *per se* taking where a South Carolina coastal protection law permanently barred a landowner from developing the property and reduced the market value of the property to zero. *Lucas*, 505 U.S. 1003. Nothing in the reasoning in *Lucas* suggests that the Court's ruling applies to temporary restrictions on development. Indeed, the Court was quite clear in noting that its ruling was likely to apply only in "rare" cases, a statement which contradicts the idea that *Lucas* could apply to the frequently

used moratorium tool. *See Williams*, 907 P.2d at 706 ("Importantly, the *Lucas* court specifically noted that categorical temporary takings were expected to be a rare event, occurring only under extraordinary circumstances. 'Stop gap' or interim zoning moratoria, however, play an important role in land use planning and are commonly employed."). *See also Palazzolo*, 121 S. Ct. 2448 (confirming that *Lucas* is only applicable in "relatively rare" circumstances).

The *Lucas per se* rule was held to be applicable only where property is permanently rendered without use and thus valueless in perpetuity.[9] *Lucas*, 505 U.S. at 1012 ("taking was unconditional and permanent"); and 505 U.S. at 1018 ("the relatively rare situation where the government has deprived the owner of all economically beneficial use"). *See* R. Meltz, D. Merriam and R. Frank, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION, pp. 139-141 (Island Press 1999); D. Mandelker, LAND USE LAW 2.18 (4th ed. 1997); R. Freilich, E. Garvin & D. Martin, *Regulatory Takings: Factoring Partial Deprivation into the Taking Equation*, Ch. 8 in TAKINGS (ABA, David Callies, ed. 1996). Justice Scalia, in *Lucas*, emphasized that the *certiorari* petition squarely raised the question of whether regulatory prohibitions had rendered Lucas' beachfront land permanently valueless. *Lucas*, 505 U.S. at 1007; and 505 U.S. at 1020 n.9. *See K&K Const., Inc. v.*

[9] Treating use and value as synonymous for takings analysis is common sense, for if property retains value as determined by the market, by definition it retains economically viable use through sale for market value. *See Lucas*, 505 U.S. at 1017 ("What is land but the profits thereof?" (citation omitted)).

Dept. of Nat. Resources, 456 Mich. 570, 575 N.W.2d 531 (1998) (*Lucas* applies only where the property owner is permanently deprived of all use and value looking at the property as a whole).[10]

The draconian prohibitions of the South Carolina Act were described as the "*complete extinguishment* of his property's value" and a "*permanent* ban on construction insofar as Lucas' lots were concerned," *Lucas*, 505 U.S. at 1009 (emphasis added), and government has deprived a landowner of all economically beneficial uses. *Lucas*, 505 U.S. at 1017-1018 (emphasis added), and that "all" means "all." *Lucas*, 505 U.S. at 1016 n.7; 505 U.S. at 1019 n.8. Justice Scalia refused to entertain the argument (raised by the dissent) that "valueless" meant something less than a complete and total destruction of all use and value or for a period of time less than permanent. *Lucas*, 505 U.S. at 1020 n.9; 505 U.S. at 1016 n.7; 505 U.S. at 1019 n.8. A similar rule applies in physical appropriation takings cases, *Loretto v. Manhattan Teleprompter CATV Corp.*: "Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking ….We do not, however, question the equally substantial authority upholding a state's broad power to impose appropriate restrictions upon an owner's *use* of his property." 458 U.S. 419, 441 (1982) (emphasis in original).

"All value" as used in *Lucas* means that the regulation has permanently destroyed all value, both in a physical and temporal sense. *Lucas*, 505 U.S. at 1016 n.7, 1019 n.8. *See Woodbury Place Partners*, 492 N.W.2d at 260-61 (two-year building moratorium not a *Lucas per se* take despite stipulated lack of all economically viable use for two years). The *Woodbury* trial court had applied the *Lucas per se* test. The Court of Appeals reversed, relying on both *Lucas* and *Agins*:

[10] In *Concrete Pipe*, this Court, looking at the property as a whole, determined that where only a 59% deprivation occurred, the plaintiff's attempt to "shoehorn" the challenge into the *Lucas per se* claim would be rejected. *Concrete*

> *We interpret the phrase "all economically viable use for two years" as significantly different from "all economically viable use" as applied in Lucas. The two-year deprivation of economic use is qualified by its defined duration*. That the Woodbury property's economic viability was delayed, rather than destroyed, is implicitly recognized in the language of the stipulation. "[A]ll economically viable use from March 23, 1988 to March 23, 1990" recognizes that economic viability exists at the moratorium's expiration.
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> * * *
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> Delaying the sale or development of property during the governmental decision-making process may cause fluctuations in value that, absent extraordinary delay, are incidents of ownership rather than compensable takings. *Agins v. Tiburon*, 447 U.S. 255, 263 n.9, 100 S. Ct. 2138, 2143 n.9, 65 L.Ed.2d 106 (1980). (emphasis supplied).

Woodbury Place Partners, 492 N.W. 2d at 261-62.

If the regulation is temporary or if any use or any value remains, the *Lucas per se* rule does not apply. *See Palazzolo,* 121 S. Ct. 2448 (rejecting a *Lucas* claim where small residual value has been left in the property, remanding the case for a *Penn Central* review). In *Penn Central*, this Court identified three factors to guide *ad hoc* factual inquiries: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the character of the government regulation. *Penn Central,* 438 U.S. at 124; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225, 106 S. Ct. 1018, 89 L.Ed.2d 166 (1986). In the present case, Petitioners do not argue, and on a facial attack cannot argue, that the moratorium constituted a *Penn Central* take. Nor could they have succeeded in doing so because the economic impact was minimal due to the temporary nature of the moratorium; Petitioners could have had no investment-backed expectation that it could develop land in an environmentally sensitive area free from reasonable, temporary delays; and the exercise of the TRPA police power to prevent

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Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602,

environmental harm to Lake Tahoe caused by immediate development in sensitive areas is the highest form of governmental action to protect health and safety. *Keystone*, 480 U.S. at 489-491; *Lucas*, 505 U.S. at 1023-1024; *Trobough v. City of Martinsburg*, 120 F.3d 262 (4th Cir. 1997).

So far as *amici* are aware, no court yet to address the issue has ruled that a temporary moratorium can result in a *Lucas*-type taking. Indeed, all the decisions are to the contrary. *See Kelly v. Tahoe Reg'l Planning Agency*, 855 P.2d 1027, 1033-34 (Nev. 1993), *cert. denied*, 510 U.S. 1041 (1994) (rejecting takings challenge to temporary restrictions which, unlike the restrictions in *Lucas*, "temporarily limit, rather than forever preclude development in environmentally sensitive areas"); *Williams*, 907 P.2d at 706 (moratorium on new development in gambling district did not effect a taking under *Lucas*); *Santa Fe Village Venture*, 914 F. Supp. at 483 (citing *Lucas* and *First English*, and rejecting claim that thirty-month moratorium resulted in taking). Just four months ago, the Florida Supreme Court in *Keshbro v. City of Miami*, 2001 WL 776555, (Fla. 2001) held that temporary moratorium in the land use and planning arena does not constitute a *Lucas* take, citing the Ninth Circuit Court of Appeals opinion.[11]

643-644 (1993).

[11] *Keshbro* did find that a nuisance abatement board order closing a multi-rental facility for illegal drug operation constituted a *Lucas* taking for the one-year period of the closure, citing *State ex rel. Pizza v. Rezcallah*, 702 N.E.2d 81, 89 (Ohio 1998) (finding such closure orders to be in the same footing as "seizures" of property). *Keshbro* distinguished such closures from temporary moratoria in the "land use and planning arena, where an entirely different set of considerations are implicated from those in the context of nuisance abatement where a landowner is being deprived of a property's dedicated use". *Keshbro, Inc. v. City of Miami*, 2001 WL 776555, 6 (Fla. 2001). These two cases and one Washington intermediate court of appeals case differ from temporary moratoria because they find a taking from the interference with the property owner's ability to lease his existing property, to gain physical access to the land and buildings. Nevertheless these cases are also wrongly decided because they fail to properly analyze *Lucas*' holding. *See Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. banc 1996) where the court held that a temporary revocation of an apartment license to abate nuisances was not subject to the *Lucas per se* rule because the apartment license was taken, if at all, only temporarily. 552 N.W.2d at 553 n.4. The court held that temporary nuisance closures should be analyzed using *Penn Central* and concluded that since the ordinance furthered a legitimate state interest in deterring criminal activity, it prevented a public harm and no taking resulted. 552 N.W.2d at 553-555.

IV. TAKINGS ANALYSIS REQUIRES CONSIDERATION OF THE PROPERTY IN ITS ENTIRETY, INCLUDING TIME AS WELL AS SPATIAL AND USE ELEMENTS, AND TRPA'S ACTIONS DID NOT CONSTITUTE EITHER A FACIAL *LUCAS PER SE* TAKE OR A FACIAL *PENN CENTRAL* TAKE

In *Penn Central* the Supreme Court explained that:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and then attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses both the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Penn Central, 438 U.S. at 130-31.[12] Consistent with *Penn Central*, the Supreme Court declined to find a categorical take in *Andrus*, 444 U.S. 51 (1979). The Court reasoned that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id*. at 65-66.[13] When a moratorium temporarily restricts use of property, the rights in only one particular temporal segment have been restricted, not all rights. When the effect of a moratorium is viewed in the context of an owner's entire property, it is apparent there has been no *Lucas*-type taking.

Petitioners assert that viewing the parcel as a whole was rejected by this Court in *First English*. They cite to the vigorous dissent of Judge Kozinski on the denial of the motion to rehear the case *en banc*, where he accuses the majority of having adopted the statement made by Justice Stevens in dissent:

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[12] The *Penn Central* formalization for takings analysis has recently been strongly reaffirmed by this Court in *Palazzolo*, just this past term, 121 S. Ct. 2448 (U.S. June 28, 2001).

[13] It is remarkable that at the beginning of the Twenty-First Century the fundamental scientific principle of our time, Einstein's recognition that space and time are the third and fourth dimensions of physical matter, would not be regarded as a reality by the courts.

"Regulations are three dimensional; they have depth, width and length. . . . Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions." *First English*, 482 U.S. at 331 (Stevens, J., dissenting). Petitioners assert that the majority in *First English* rejected Justice Stevens' reasoning: "In *First English,* this Court directly faced the question of whether the length of time made any constitutional difference. The dissent thought it did (482 U.S. at 318). The majority, however, decided it did not (482 U.S. at 321)." Petitioner's Brief at 21.

In fact, the *First English* majority did not reject Justice Stevens' dissent on this point at all – it did not rule on this point or on the "parcel as a whole" theory. It rejected merely the dissent's proposition that the remedy for takings was invalidation, not compensation. On the issue of temporary takings, the Court could not have been more explicit. Relying heavily on *United States v. Dow*, 357 U.S. 17, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958) (abandonment of condemnation proceedings already constituting a taking) and three cases involving direct condemnation of leasehold interests for shorter periods of time, the Court held: "Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause requires that the government pay the landowner for the value of the use of the land during this period, *C.f. United States v. Causby*, 328 U.S. at 261." *First English*, 482 U.S. at 319. It was not time that was critical to *First* English but whether the governmental action had already amounted to a taking. The property at issue in the case *sub judice* retained value and there were a range of uses available, as well as all future

uses available after the thirty-two-month moratorium period. If a regulation is temporary, all reasonable use has *not* been denied because all future uses remain.[14]

Finally, there are practical planning and administrative reasons for considering the entire property when determining whether regulatory impact amounts to a taking. Reasonable regulation in pursuit of the public interest will necessarily burden *certain pieces* of the owner's physical property. However, for courts to base their taking analysis on just the affected pieces would result in the irrational circumstance of government having to compensate the property owner for the incremental impact of the regulation, regardless of the overall remaining usefulness of the entire parcel. *See Keystone*, 480 U.S. 470. The unworkable application of this reasoning became apparent in Washington, when the state supreme court first held that a greenbelt set-aside that limited the use of only a portion of certain properties amounted to an unconstitutional taking. *Allingham v. City of Seattle*, 109 Wash.2d 947, 948, 749 P.2d 160 (Wash. 1988), *amended by*, 757 P.2d 533 (Wash. 1988). Just two years later, recognizing the catastrophic nature of its prior holding, the court reversed itself, recognizing that:

> [N]either state nor federal law has divided property into smaller segments of an undivided parcel of regulated property to inquire whether *pieces* of it has been taken …. Rather, we have consistently viewed a parcel of regulated property in its entirety. Federal case law has also specifically refused to focus its inquiry upon a given portion of a regulated property. . . . To the extent *Allingham* is inconsistent with the foregoing analysis, it is hereby overruled.

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14 Property interests under the common law explicitly deal with the length of time that an interest lasts. One of the geniuses of the common law system distinguishing it from its European civil law counterparts was the early recognition that estates in land have present and future interests. *See Lewis Simes, Future Interests, Introduction 2-3* (1951) "In Anglo-American law there are two devices by which the owner of property projects his will into the future. They are the trust and the future interest." The latter, for the most part, are alienable, assignable and inheritable, and support standing for actions in executory interests and reversions following life estates and terms of years. Ashbel G. Gulliver, LAW OF FUTURE INTERESTS, at 73 (1959).

Presbytery of Seattle v. King County, 114 Wash.2d 320, 334-35, 787 P.2d 907 (1990) (emphasis in original) (citations omitted).

Similarly, the temporal element of property ownership must also be viewed in the entirety. *See Agins*, 447 U.S. at 258; *Andrus*, 444 U.S. at 65-66. Unless the *entire* term of ownership is recognized as the appropriate temporal denominator over which to measure the relative impact of the challenged regulation, results as irrational as those recently recognized by the Washington Supreme Court will characterize takings jurisprudence, and accordingly will diminish the traditional rights of state and local governments to regulate land in a reasonable manner. *Euclid*, 272 U.S. 365 (1926).

CONCLUSION

The grant of *certiorari* should be dismissed as improvidently granted, or in the alternative, the Ninth Circuit opinion holding that no categorical taking occurred under the Fifth Amendment should be affirmed.

Respectfully submitted,

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