rescinded a regulation after a court determined that it was a taking.[4] Inverse condemnation damages were only available where, after a court determined that the regulation was excessive, the government nevertheless decided to maintain the regulation.[5]

First English, however, brought about a sea change by holding that compensation is the appropriate remedy for temporary regulatory takings. As the Court explained, "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."[6]

The practical impact of *First English* has been profound. Following *First English*, planners operate under the fear that a court may find that their decision constituted a taking requiring the payment of compensation, even if the decision is withdrawn.[7]

Although *First English* held that compensation is required even where government reverses an action that was held to be a taking, the Court left open the question of how to determine whether there was a taking in the first place. The Court faced that question in *Tahoe-Sierra.* To best understand the *Tahoe-Sierra* decision, and its impact on temporary takings law, it will be helpful to briefly explore the various types of temporary takings, as well as key takings tests.

III.

TYPES OF TEMPORARY REGULATORY TAKINGS

Temporary regulatory takings can be separated into several categories, each of which tends to receive a different treatment by the courts. We will note the categories here; in the last section of this paper, we will explore the different treatments given to these various types of temporary takings in light of *Tahoe-Sierra.*

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4. *See Agins v. City of Tiburon*, 598 P.2d 25, 32 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980); *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 384-85 (N.Y. 1976), *appeal dismissed and cert. denied*, 429 U.S. 990 (1976); *De Botton v. Marple Township*, 689 F. Supp. 477, 480 n.1 (E.D. Pa. 1988).

5. *See First English*, 482 U.S. at 312.

6. *Id.* at 321.

7. *See* Ann E. Carlson and Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103, 113 (2001); *but see id.* at 156, indicating the need for empirical studies specifically testing this question.

1. *Physical Takings*

Government usually physically takes property by either formally acquiring the property through an eminent domain process, or by informally taking property through a physical action (such as building a damn that floods private property). As indicated in *Loretto v. Teleprompter Manhattan CATV Corp.*,[8] however, government can also use the regulatory process to physically take property. In *Loretto,* for example, the State of New York adopted a statute that permitted cable companies to install cables and switch boxes in apartment buildings without the building owner's permission. Other examples of physical appropriations through the use of the regulatory process are seen in *Nollan v. California Coastal Commission*,[9] and *Dolan v. City of Tigard,*[10] where public entities issued building permits conditioned on the owners dedicating property to public uses.

2. *Regulations of Use*

a. Prospectively temporary

Certain land use restrictions are from the outset intended to be temporary. These regulations, such as moratoria, are designed to put development activities on hold pending triggering events — for example, the drafting of a plan to control development in a region,[11] the availability of sufficient water to allow new water hookups,[12] or a determination that it would be safe to allow oil and gas drilling under public lands that were slated for use as a nuclear waste disposal.[13] *Tahoe-Sierra* concerned a building moratorium, although as we will review later, its reach probably goes well beyond prospectively temporary takings.

b. Retrospectively temporary

Other regulations are intended to be permanent but are subsequently rescinded. The rescission is often in response to an adverse judicial decision, or a defensive reaction to a threatened or

8. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
9. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).
10. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
11. *See Tahoe-Sierra*, 535 U.S. 302.
12. *See Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990).
13. *See Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004).

actual lawsuit. Courts have used the term "retrospectively temporary" to describe this type of temporary restriction.[14]

c. Permitting Delays

Finally, some courts have given special treatment to two related categories of permitting delays: (1) cases where the delay is excessive, and (2) situations in which government erroneously denies a use due to its misinterpretation of governing law. We will review in detail these delays, and other temporary takings categories, following an analysis of *Tahoe-Sierra.*

IV.
SETTING THE STAGE FOR *TAHOE-SIERRA*: KEY TAKINGS TESTS

To better understand the *Tahoe-Sierra* decision, and its impact on temporary takings law, it will be useful to review three key takings tests: the general test outlined in *Penn Central Transportation Co. v. City of New York*,[15] and the subsequent per se tests established in *Loretto v. Teleprompter Manhattan CATV Corp.*[16] and in *Lucas v. South Carolina Coastal Council.*[17]

Penn Central: *Taking Determined by Weighing Various Factors on a Case by Case Basis*

In *Penn Central Transportation Co. v. City of New York*,[18] the Court gave some form to its prior broad pronouncements about what constitutes a regulatory taking. *Penn Central* started out by reiterating the generalized principle that courts are to decide whether "'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[19] It added some specificity to that, however, by explaining that while the determination "depends largely 'upon the particular circumstances [in that] case,'" three factors are particularly significant: (1) The economic impact of the regulation on the

14. *See, e.g., Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 262 (Minn. Ct. App. 1992) and *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 873 (Fla. 2001).

15. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

16. *Loretto*, 458 U.S. 419.

17. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

18. *Penn Central*, 438 U.S. 104.

19. *Id.* at 124.

claimant; (2) The extent to which the regulation interferes with "distinct investment-backed expectations"; and (3) The character of the governmental action.[20] Expanding on the last factor, the Court explained that the probability of a taking is increased where the regulation can be categorized as a "physical invasion by government."[21]

Loretto: *Regulations Requiring Permanent Physical Occupations Are Per Se Takings*

The Court carved out an exception to the *Penn Central* weighing of factors approach in *Loretto v. Teleprompter Manhattan CATV Corp.*[22] As previously noted, *Loretto* involved a state statute that required apartment owners to allow cable companies to install cables and switch boxes in apartment buildings. Following up on *Penn Central*'s statement that regulations akin to physical invasions are more likely to be deemed takings,[23] the *Loretto* Court held that where a regulation requires the permanent physical occupation of property, it is a taking per se.[24] There is no need to engage in a *Penn Central* review of the case's particular circumstances. On the other hand, of special significance to the topic of this paper, the Court expressly held that a temporary physical invasion is not a per se taking.[25]

Lucas: *Regulations Denying "All Economically Viable Use" Are Per Se Takings*

Finally, a decade after *Loretto*, the Court created a second category of "categorical takings" in *Lucas v. South Carolina Coastal Council.*[26] The *Lucas* Court accepted the trial court's determination that regulations prohibiting any development on the landowner's two ocean front lots made those lots "valueless."[27] The Court went on to hold that, with certain exceptions, where regulations deny "all economically beneficial use" of property, there

20. *Id.*
21. *Id.*
22. *Loretto*, 458 U.S. 419.
23. *Penn Central*, 438 U.S. at 124.
24. *Loretto*, 458 U.S. at 426.
25. *Id.* at 434.
26. *Lucas*, 505 U.S. 1003.
27. *Id.* at 1020. *See also id.* at 1020 n.9, ruling that the government waived any argument that the lots retained value.

is no need to engage in a *Penn Central* weighing of various factors; there is a per se taking.[28]

V.

THE DECISION IN *TAHOE-SIERRA*

In *Tahoe-Sierra*, the United States Supreme Court issued a 6-3 decision holding that a 32-month development moratorium, adopted by the Tahoe Regional Planning Agency (TRPA) while it crafted a regional plan in the 1980s, was not a "categorical taking" under the Fifth Amendment of the U.S. Constitution.[29] Rather, the Court explained that moratoria should be reviewed on a case-by-case basis under the principles articulated in *Penn Central* — something that the property owners in *Tahoe-Sierra* chose not to pursue for strategic reasons.[30]

Tahoe-Sierra stems from efforts to protect a spectacular lake — Lake Tahoe. As the Supreme Court noted there was no dispute that Lake Tahoe is "uniquely beautiful . . . a national treasure that must be protected and preserved."[31] There was also no dispute that, as the result of unwise development — especially on environmentally fragile lands — Lake Tahoe's stunningly transparent waters have "deteriorated rapidly over the past 40 years."[32] Absent a turnaround, the trial court thus found that "the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity."[33]

In 1968, in an effort to curb this disturbing trend, the States of Nevada and California created, and Congress approved, the Tahoe Regional Planning Compact, which established an entity to regulate development in the Tahoe Basin — the Tahoe Regional Planning Agency.[34] TRPA, however, proved ineffective.[35] In 1980, the States therefore amended their compact (again with Congress's approval) to enhance TRPA's powers and responsibilities.[36] In particular, TRPA was required to (1) develop "environmental threshold carrying capacities," including "standards for air quality, water quality, soil conservation, vegetation preser-

28. *Id.* at 1015, 1027.
29. *Tahoe-Sierra*, 535 U.S. at 342.
30. *Id.* at 317, 342.
31. *Id.* at 307 (citations and internal quotations omitted).
32. *Id.*
33. *Id.* at 308.
34. *Id.* at 309.
35. *Id.*
36. *Id.* at 309-10.

vation and noise"; and then (2) adopt a regional plan that "achieves and maintains" those thresholds.[37]

The *Tahoe-Sierra* litigation challenged TRPA's efforts to comply with these requirements. In 1984, approximately 400 owners of residential lots in the Lake Tahoe Basin sued TRPA, plus the States of California and Nevada, in U.S. District Courts in Sacramento and Reno.[38] The lot owners asserted that various TRPA regulatory restrictions on development of sensitive lands in the Tahoe Basin, on their face, prevented them from building homes on their land — at least for a temporary period of time — thereby unconstitutionally "taking" their property in violation of the Fifth Amendment.[39] The litigation eventually involved three regulatory periods:

1. *Moratorium Pending Adoption of Regional Plan (August 1981 - April 1984).*

When TRPA began its process of developing thresholds, and a subsequent regional plan that would achieve and maintain those thresholds, it was concerned that absent interim protections, there would be a rush to develop environmentally sensitive lands, which would undermine the plan's ultimate effectiveness. TRPA therefore adopted a moratorium (technically, two moratoria — the first was extended by 8 months after a bi-state compact deadline passed) prohibiting most development of fragile lands, which remained in effect for the 32-month period it took TRPA to develop, hold public hearings on, and enact — in 1984 — its complex Regional Plan.[40]

2. *1984 Regional Plan (April 1984 - July 1987).*

Immediately after TRPA adopted the 1984 plan, the State of California and the League to Save Lake Tahoe filed suit against TRPA in the U.S. District Court in Sacramento, essentially asserting that the plan was too weak.[41] That court issued a Temporary Restraining Order, and then a Preliminary Injunction, each of which prohibited TRPA from issuing any permits.[42] Although

37. *Id.* at 310.
38. *Id.* at 311-12.
39. *Id.* at 318.
40. *Id.* at 311-12.
41. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 216 F.3d 764, 768 (9th Cir. 2000), *aff'd.* 535 U.S. 302 (2002).
42. *Id.*

initially TRPA vigorously opposed those orders, TRPA eventually decided to engage in a broad "consensus" effort to develop a new regional plan.[43] That plan was adopted in 1987, and the preliminary injunction was lifted.[44]

3. *1987 Regional Plan (July 1987 to Present).*

The 1987 Regional Plan, which is still in effect, established a new, sophisticated approach for permitting residential development, focusing not on broad land capability classifications but instead on the development potential of each individual lot in the Tahoe Basin. Under this Individual Parcel Evaluation System, residential lots were individually surveyed by a team of scientists and assigned a number based on their suitability for development.[45] Some parcels not immediately eligible for development could become eligible over time.[46] The 1987 Plan also established a unique system of transferable development rights that created a strong market for their sale.[47] The effect was to direct development to areas that would not further harm Lake Tahoe, while allowing owners of environmentally fragile parcels to sell their development rights, sell the parcel itself to public and private entities,[48] or, in some cases, build on the parcel.

DISTRICT COURT DECISIONS

Tahoe-Sierra had a complex procedural history, during which damage claims against the States were dismissed on Eleventh Amendment grounds;[49] the California and Nevada lawsuits were consolidated in U.S. District Court in Reno;[50] the action was narrowed by three separate rulings by the Ninth Circuit Court of

43. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 808 F. Supp. 1474, 1483 (D. Nev. 1992).

44. *Tahoe-Sierra*, 535 U.S. at 312.

45. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1071 (9th Cir. 2003).

46. *Id.* at 1072.

47. *See generally Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997).

48. *Tahoe-Sierra*, 535 U.S. at 316 n.12.

49. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 938 F.2d 153, 155 n.5 (9th Cir. 1991); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1336 (9th Cir. 1990) (plaintiffs conceded that California and Nevada district courts properly dismissed damage claims).

50. *See Tahoe-Sierra*, 535 U.S. 302.

Appeals[51] and then bifurcated into liability and damages phases.[52] Nevada District Court Judge Reed then issued a key pre-trial decision regarding the 1987 Plan challenge and conducted a three-week bench trial concerning the moratorium and 1984 Plan challenges.

Pre-Trial Ruling Concerning 1987 Plan (Statute of Limitations): In its pre-trial published ruling, the court held that plaintiffs' challenges to the 1987 plan, asserted in amended complaints, were brought long after California's then-one year and Nevada's two-year statute of limitations had run.[53] The court therefore dismissed those challenges.[54]

Trial Rulings Concerning Moratorium and 1984 Plan: Following the three-week bench trial, the court issued a second published decision, which concluded that the moratorium violated the Takings Clause, but that the 1984 Plan did not.[55]

1. *Moratorium:*

The court first reviewed the moratorium utilizing the case-by-case approach articulated in *Penn Central.*[56] The district court found that all three *Penn Central* factors — "economic impact," interference with "distinct, investment-backed expectations," and the "character of the governmental action" — weighed against a taking.[57] Of particular interest, it concluded that "[s]ince the *Penn Central* test is essentially a balancing test . . . and since the interest in protecting Lake Tahoe is so strong, any test that takes that interest into account would result in victory for the defendants."[58] That decision was based, in part, on the court's conclusions that "what is at stake, at least in part, is the survival of Lake Tahoe, one of the wonders of the natural world,"[59] that there was a "direct connection" between the development of plaintiffs' lots

51. *See Tahoe-Sierra*, 911 F.2d 1331; *Tahoe-Sierra*, 938 F.2d 153; and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 34 F.3d 753 (9th Cir. 1994).

52. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 34 F. Supp.2d 1226, 1238 (D. Nev. 1999).

53. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 992 F. Supp. 1218, 1229 (D. Nev. 1998).

54. *Id.*

55. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1248 (D. Nev. 1999).

56. *Id.* at 1251 (construing *Penn Central*, 438 U.S. 104 (1978)).

57. *Id.* at 1240-42.

58. *Id.* at 1242.

59. *Id.* at 1229.

and harm to Lake Tahoe,[60] that "it is difficult to see how a more proportional response could have been adopted [by TRPA],"[61] and that TRPA met its obligations under the Compact "with good faith and to the best of its ability."[62]

The court went on, however, to hold that the moratorium nevertheless imposed a taking. This was based upon its conclusion that the development restrictions deprived plaintiffs of "all economically viable use of their land" during the moratorium period, and therefore amounted to a "categorical taking" under *Lucas v. South Carolina Coastal Council*[63] and First *English Evangelical Lutheran Church v. County of Los Angeles*.[64]

2. 1984 Plan: Regarding the period between TRPA's adoption of a regional plan in 1984, and its adoption of the current plan in 1987, the court found no liability based upon a lack of "causation."[65] As explained above, immediately after TRPA adopted the 1984 plan, the State of California and the League to Save Lake Tahoe filed suit against TRPA in the U.S. District Court in Sacramento. That court issued a Temporary Restraining Order, and then a Preliminary Injunction, each of which prohibited TRPA from issuing any permits. In the subsequent takings lawsuit, the court found that, given the injunctions, TRPA's 1984 plan could not have "caused" any harm to plaintiffs since the plan never went into effect.[66]

NINTH CIRCUIT COURT OF APPEALS DECISION

In an opinion authored by Judge Stephen Reinhardt, the Ninth Circuit reversed the district court's moratorium finding, and ruled that no taking had occurred during any period.[67] Of particular interest, the court found that this was not a "*Lucas*" categorical taking because, by definition, land subject to a moratorium can potentially be used in the future, after the moratorium is lifted.[68] Property owners were not, therefore, deprived of "all economically viable use" of their land — the land still had a potential future use. The court also held that plaintiffs failed to ap-

60. *Id.* at 1240.
61. *Id.*
62. *Id.* at 1233.
63. *Lucas*, 505 U.S. 1003.
64. *First English*, 482 U.S. 304; *Tahoe-Sierra*, 34 F. Supp. 2d at 1240, 1242-46, 1250.
65. *Tahoe-Sierra*, 34 F. Supp. 2d at 1247-48.
66. *Id.*
67. *Tahoe-Sierra*, 216 F.3d 764.
68. *Id.* at 782.

peal the District Court's *Penn Central* holding, and that even if they had, they would have lost for the reasons outlined in the district court's opinion.[69] Finally, the Ninth Circuit agreed with the district court's 1984 Plan "causation" analysis and its 1987 Plan statute of limitations reasoning, and affirmed the district court's dismissals of challenges to those plans.[70]

The property owners then filed a petition for en banc review of the panel's decision, which the Ninth Circuit denied. Judge Alex Kozinski, however, joined by four other judges, wrote a blistering dissent. Judge Kozinski, for example, first charged that the panel "adopts Justice Stevens's *First English*[71] dissent," and later asserted that "the panel plagiarizes Justice Stevens's dissent."[72]

THE SUPREME COURT DECISION

The property owners then sought Supreme Court review. The Court granted that review, but limited to a question that was drafted by the Court itself: "Whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause of the United States Constitution."[73] The Court went on to issue a 6-3 decision, authored by Justice Stevens, affirming the Ninth Circuit's decision. The Court's opinion only addressed TRPA's moratoria because, as the Court explained, its "limited grant of certiorari" did not embrace petitioners' challenge to the 1984 and 1987 Plans.[74]

The majority held that, by its nature, a development moratorium does not deprive a landowner of "all economically benefi-

69. *Id.* at 773.

70. *Id.* at 782-89.

71. *First English*, 482 U.S. 304.

72. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 228 F.3d 998, 999, 1001(9th Cir. 2000). In *First English*, the majority did not address the question of whether the moratorium at issue in that case in fact constituted a taking — it only held that if a taking occurred, then there could be a damages remedy. Justice Stevens, in a dissent joined by Justices O'Conner and Blackmun, wrote that the taking claim should have been rejected on its merits. *First English*, *Id.* at 329 (Stevens, J., dissenting). In one portion of his dissent that was not joined by other justices — and that is similar to the *Tahoe-Sierra* panel's reasoning — Justice Stevens wrote that to require compensation, a temporary regulation would have to both involve a "substantial" use restriction and "remain in effect for a significant percentage of the property's useful life." *Id.* at 331.

73. *Tahoe-Sierra*, *supra* note 2, at 306.

74. *Id.* at 313, 334. In his dissent, Chief Justice Rehnquist argued that the question presented should at least include review of the 1984 Plan. *Id.* at 343 n.1 (Rehnquist, C.J., dissenting).

cial uses" of his land — which is required to find a categorical taking under *Lucas* — because the land retains value due to the potential that it can be developed in the future.[75] The Court also declined to create a new categorical rule for moratoria.[76] Rather, moratoria need to be reviewed under "the familiar *Penn Central* approach."[77] The Court found that the property owners failed to establish a taking, since they solely relied upon their assertion that a temporary prohibition of uses is a per se taking (having expressly declined to appeal the district court's finding that under *Penn Central* no taking occurred).[78] As we will see, in reaching its conclusions, the Court clarified a number of contentious issues that affect temporary takings challenges.

Distinguished physical takings from use restrictions. In *Lucas*, the Court took a step towards merging physical and regulatory takings law. Most notably, it suggested that a "total deprivation of feasible use is, from the landowner's point of view, the equivalent of a physical appropriation."[79] That movement was apparently[80] aborted, however, in *Tahoe-Sierra*, when the Court went to great lengths to distinguish physical and regulatory takings. In reviewing cases dealing with the two types of takings, *Tahoe-Sierra* concluded that:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," [footnote omitted] and vice versa.[81]

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75. *Id.* at 332.

76. *Id.* at 342.

77. *Id.*

78. *Id.* at 334, 342.

79. *Lucas*, 505 U.S. at 1017.

80. *See* note 81.

81. *Tahoe-Sierra*, 535 U.S. at 323. Three years later, the Court did recognize an analytical connection between physical and regulatory takings. Specifically, in *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074 (2005), the Court emphasized that while the "paradigmatic taking" is "a direct government appropriation or physical invasion of private property," a regulation can amount to a taking where it is "so onerous" that its effect is "tantamount to a direct appropriation or ouster." *Id.* at 2081. Courts reviewing regulatory takings challenges therefore look at whether the regulations' "effects are functionally comparable to government appropriation or invasion of private property." *Id.* at 2084. Lingle did not, however, alter the Tahoe-Sierra determination that physical and regulatory takings cases are distinct; they are not controlling precedents for each other.

Moreover, although *Tahoe-Sierra* did not focus on the difference between regulations, such as the *Loretto* ordinance, [82] that require property owners to submit to a physical invasion by a third party, and situations in which the government itself directly invades property, the Court implicitly considered both as physical takings. Thus, for example, in describing *Loretto*, the Court referred to "the physical taking at issue in the case."[83]

Affirmed "parcel as a whole" rule. The Court affirmed that, in determining the impact of a challenged regulation, courts must not just look at the part of an owner's property that is restricted by a challenged regulation, but rather they must look at the "parcel as a whole."[84] Moreover, the Court explained that real property interests have both a "geographic" and a "temporal" dimension.[85] The geographic dimension refers to the metes and bounds description of the property; the temporal dimension refers to the period of time covered by the ownership interest in property, such as a fee simple estate or a one year leasehold.[86] Courts must look to the entirety of those interests in evaluating the impact of a challenged regulation.[87] This at least partially resolved what the *Lucas* Court had described as the "uncertainty regarding the composition of" the relevant parcel.[88] Justice Thomas, joined by Justice Scalia (but, curiously, not the Chief Justice), wrote a dissenting opinion objecting to the majority's reliance on the "questionable" parcel as a whole rule.[89]

Held that *Lucas* turns on value, not use. In *Lucas*, the Court had held that a categorical taking occurs when a land use restriction deprives a property owner of "all economically viable use" of the land. A debate followed over whether the decision was referring to the inability to physically develop a parcel, or the

82. *Loretto*, 458 U.S. 419.
83. *Tahoe-Sierra*, 535 U.S. at 324 n.18.
84. *Id.* at 331.
85. *Id.* at 331-32.
86. *Id.*
87. *Id* at 332.
88. *Lucas*, 505 U.S. at 1016 n.7. Even with *Tahoe-Sierra*'s affirmation of the "parcel as a whole" rule, in some cases courts may still need to determine whether particular lands or interests should be considered together for takings purposes. In the case of physical lands, the Court of Federal Claims, which sees a significant number of takings cases, generally looks at factors such as "'the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the [regulated] lands enhance the value of remaining lands, and no doubt many others.'" *Cane Tenn., Inc. v. United States* (2004) 60 Fed. Cl. 694, 700 (quoting *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991).).
89. *Tahoe-Sierra*, 535 U.S. at 355 (Thomas, J., dissenting).

total loss of a property's value.[90] The *Lucas* facts did not help resolve that debate because in *Lucas* the trial court had determined that the regulations prohibiting development on Mr. Lucas' lots rendered them "valueless," and the Supreme Court declined to question that holding since it was not raised by the government in opposing the petition for certiorari.[91]

In *Tahoe-Sierra*, the Court made it clear that the sole question is whether land retains value. Unless the challenged restriction "permanently deprives property of all value," Lucas does not apply.[92] Combining this element of its holding with its parcel as a whole determination, the Court found that since moratoria hold out the possibility of future development, by their nature they do not render property "valueless," and therefore cannot be categorical takings under *Lucas*.[93] The Chief Justice's dissent underscores this aspect of the decision; the Chief Justice criticized "the Court's position that value is the *sine qua non* of the *Lucas* rule."[94]

Expressed respect for thoughtful government land use decision-making. A number of Supreme Court regulatory takings decisions issued during the past fifteen years have expressed considerable skepticism about governmental planning activities. In contrast, *Tahoe-Sierra* repeatedly signaled respect for thoughtful, balanced governmental planning efforts. For example, in declining to adopt a new categorical rule for moratoria, the Court expressed concern about any rule that would "impose serious financial constraints on the planning process."[95] It also favorably noted the "consensus in the planning community" that deems moratoria "an essential tool of successful development."[96] The Court likewise explained that "[t]he interest in facilitating informed decision-making by regulatory agencies counsels against adopting a per se rule," since the costs of finding moratoria to be per se takings would virtually eliminate their use.[97] The Court went on to note that the per se rule would therefore "foster inef-

90. *See generally Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1995), *aff'd* 526 U.S. 687 (1999), noting the lack of precision in the phrase "all economically viable use."

91. *Lucas*, 505 U.S. at 1020 n.9.

92. *Tahoe-Sierra*, 535 U.S. at 332.

93. *Id.*

94. *Id.* at 350 (Rehnquist, C. J., dissenting).

95. *Id.* at 337.

96. *Id.* at 338.

97. *Id.* at 339.

ficient and ill-conceived growth."[98] This positive attitude was probably facilitated by the very strong factual record, which led the district court to make unequivocal findings — repeatedly cited by the Supreme Court — that TRPA addressed a pressing, complex problem in good faith and most reasonably.[99]

Protected property owners from excessive governmental regulation. *Tahoe-Sierra* is by no means a carte blanche for governments to adopt moratoria regardless of their reasonableness. To the contrary, the Court emphasized that under a *Penn Central* analysis, moratoria can be found to take property.[100] Moreover, the Court indicated that in engaging in such an analysis, the length of a moratorium is an important factor for courts to consider, and that moratoria lasting more than one year may "be viewed with special skepticism."[101] The Court did, however, point out that given the district court's finding that TRPA's 32-month moratorium was reasonable, a blanket one-year rule would be inappropriate.[102] In rejecting such a blanket rule, the Court also noted that the moratorium ultimately upheld by a California appellate court in *First English* lasted for six years.[103]

Having reviewed the *Tahoe-Sierra* decision, we will now turn to its impact on temporary takings law.

VI.

THE STATUS OF TEMPORARY TAKINGS LAW AFTER *TAHOE-SIERRA*

Commentators have varied — even those on the same "side" of the takings debate — in their characterization of *Tahoe-Sierra*'s effect on temporary takings law. For example, a senior attorney with the Pacific Legal Foundation, a strong advocate of property rights in takings cases, states that "[t]he *Tahoe-Sierra* Court did not dispute that damages must be paid for temporary takings, but it did cast doubt on whether a temporary regulation could effect a taking."[104] On the other hand, a prominent academician who is generally supportive of property rights theories in takings cases, sees repeated references to "fairness" in *Tahoe-Si-*

98. *Id.*
99. *See, e.g., id.* at 310-11.
100. *See, e.g., id.* at 314 and 342.
101. *Id.* at 341.
102. *Id.* at 341-42.
103. *Id.* at 342 n.36.
104. James S. Burling, *Private Property Rights and the Environment after Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1 n.75 (2002).

erra as providing "a vehicle for vindication of landowner rights threatened with unreasonable planning moratoria."[105]

Cases decided after *Tahoe-Sierra* indicate that, in fact, the jury is still out. On the one hand, the *Tahoe-Sierra* determination that *Lucas* turns on value not use, and its strong affirmation of the parcel as a whole rule, significantly reduce the chances that any temporary land use restriction will be found to be a taking — or indeed that even an apparently permanent restriction will constitute a taking. On the other hand, there are signs that, in particular where there is significant evidence of bad faith, unreasonable temporary governmental restrictions are likely to be found to be takings, especially if the other *Penn Central* factors (economic impact and expectations) point to a taking. In terms of *Tahoe-Sierra*'s impact on different categories of temporary takings, it has had the least impact on physical takings, the most on moratoria and similar prospectively temporary restrictions, and some impact on retrospectively temporary takings.

1. *Physical Takings*

The law concerning regulatory physical takings has not been significantly altered by *Tahoe-Sierra.* As we have seen, the *Tahoe-Sierra* court stressed that physical takings — presumably including regulatory physical takings such as that involved in *Loretto*[106] — are governed by different principles than regulations of use. Moreover, one year after *Tahoe-Sierra*, the Court reinforced that distinction in *Brown v. Legal Foundation of Washington.*[107] At least one commentator has criticized the Court's distinction between physical and regulatory takings.[108] The distinction, however, makes sense. As Justice Scalia has explained, prior to 1922, the Court viewed the Takings Clause as limited to direct appropriations of property.[109] Although it is now well settled that the clause also applies to regulations of use,

105. Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners,* 31 Fla. St. U. L. Rev. 429, 507 (2004).

106. *Loretto*, 458 U.S. 419.

107. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 233-34 (2003) (explaining that "we made [this distinction] clear just last term," and going on to quote the key portion of *Tahoe-Sierra* on this point).

108. *See* Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 Fl. At. U. L. Rev. 429, 453-55 (2004).

109. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014 (1992).

the fact that that application stems from an expansive reading of the clause counsels caution before adopting any further expansions. The Supreme Court has, in fact, been cautious. For example, although a government appropriation of the lawn in front of a building would no doubt be a physical taking, regulations requiring buildings to be set back from lot lines are not takings.[110] Likewise, while the government's physical use of airspace for military flights can constitute a physical taking, as in *United States v Causby*,[111] regulations limiting a building's height are "not remotely like [the situation] in *Causby*."[112]

That said, all is not crystal clear when it comes to the line between temporary and permanent physical takings. This line is important because, as previously noted, physical invasions are takings per se, but temporary invasions require "a more complex balancing process to determine whether they are a taking."[113]

In *Loretto*, the Court downplayed as "overblown" the dissent's concern that the distinction between "a permanent physical occupation and a temporary invasion will not always be clear."[114] Nine years later, however, the Federal Circuit sowed significant confusion about that dividing line. In *Hendler v. United States*,[115] a case involving the federal government's installation and maintenance of wells on private property, the court took what appeared to be an expansive view of the term "permanent":

> in this context, 'permanent' does not mean forever, or anything like it. A taking can be for a limited term—what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute.[116]

Subsequent decisions, however, put the genie back in the bottle. Most notably, in *Boise Cascade Corp. v. United States*,[117] the Federal Circuit clarified that the *Hendler* language "has been widely misunderstood and criticized as abrogating the [*Loretto*] permanency requirement."[118] *Boise* explained that *Hendler*

110. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987).
111. 328 US 256 (1946).
112. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 135 (1978).
113. *Loretto*, 458 U.S. at 436 (1982) (quote from 436 n.12).
114. *Id.* (The Court also dismissed the concern as "irrelevant.")
115. *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).
116. *Id.* at 1376.
117. *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002).
118. *Id.* at 1356.

"must be read in context. And in context, it is clear that the court merely meant to focus attention on the character of the government intrusion necessary to find a permanent occupation, rather than solely focusing on temporal duration."[119]

Boise Cascade went on to further limit the apparently expansive *Hendler* decision, stating that:

> [p]utting its dicta to one side, *Hendler's* holding was unremarkable and quite narrow: it merely held that when the government enters private land, sinks 100-foot deep steel reinforced wells surrounded by gravel and concrete, and thereafter proceeds to regularly enter the land to maintain and monitor the wells over a period of years, a per se taking under *Loretto* has occurred.[120]

Bosie Cascade contrasted that with the "transient invasion by owl surveyors" involved in the case before it.[121]

Thus, although the exact line between a "permanent" and "temporary" physical invasion may still be subject to debate, the distinction is very important, and it has not been eviscerated even within the Federal Circuit.

2. *Regulations of Use*

In contrast to temporary regulatory physical takings, *Tahoe-Sierra* unquestionably affects temporary use restrictions. Overall, *Tahoe-Sierra* probably maintains the status quo, under which prospectively temporary restrictions have rarely been found to be takings. Its greatest significance is to thwart the effort of some property rights advocates to expand takings law by deeming any governmental prohibition on using property for any period of time a per se taking. But it has also had other impacts. The probability that a temporary restriction will be held to be a taking is reduced by *Tahoe-Sierra*'s affirmation of the parcel as a whole rule, and its confinement of *Lucas* to regulations that eliminate all value from property. To some extent, however, those impacts may be countered by the Court's recognition of partial regulatory takings — the taking of property even where the parcel retains some value.[122] A number of post-*Tahoe-Sierra* lower court decisions reflect these various impacts.

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119. *Id.*

120. *Id.* at 1357.

121. *Id.*

122. Although the Court repeatedly refers to partial regulatory takings (see, e.g., *Tahoe-Sierra*, 535 U.S. at 326, 326 n.23, and 336), it does not define them. That is significant, given the Court's more recent decision in *Lingle v. Chevron U.S.A., Inc.*,

a. Prospectively temporary

The most direct impact of *Tahoe-Sierra* has been on moratoria and other prospectively temporary development restrictions. With the possible exception of a restriction that prohibits development during the entire period of a leasehold,[123] courts can no longer hold that prospectively temporary development bans are per se takings under *Lucas*.

This change was starkly apparent in *Bass Enters. Prod. Co. v. United States*.[124] That temporary taking challenge was brought by the owner of oil and gas rights, who sought permission from the government to drill under public lands that were slated for use as a nuclear waste disposal. The government took forty-five months to determine whether the drilling was safe. The Court of Federal Claims initially held that the delay constituted a taking. Specifically, citing *Lucas*, the court had held that there was a categorical taking because "[p]laintiffs have not been permitted to use their leases for a substantial period of time. Their loss during that period was absolute."[125]

Following the *Tahoe-Sierra* decision, however, the government moved for reconsideration, on the ground that the delay should not have been considered a *Lucas* categorical taking, but instead should have been analyzed utilizing the *Penn Central* factors.[126] The court agreed.[127] The court then went on to apply those factors, and rejected the takings claim. It explained that while the owners had a reasonable investment backed expectation that they could drill, that was outweighed by the government's impor-

125 S. Ct. 2074 (2005). The Lingle Court emphasized that for a regulation to amount to a taking, its impact must be "so onerous" that it is "tantamount to a direct appropriation or ouster." *Id.* at 2081. Lingle's "so onerous" reference indicates that a claimant asserting a taking based upon a regulation's economic impact may need to show that the impact comes close to a total loss of value, although the decision's reference to "how any regulatory burden is *distributed* among property owners" (*id.* at 2084, emphasis in original) implies that some lesser impact, combined with the singling out of a property owner, could combine to make a regulation "so onerous" as to amount to a taking.

123. *See* Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners,* 31 FLA. ST. U. L. REV. 429, 472-73 (2004) (suggesting that "[a] lesser term than a fee simple might be rendered valueless because it might terminate before the planning moratorium is set to expire. This might result in a complete deprivation of value and a per se taking under *Lucas*.").

124. 54 Fed. Cl. 400 (2002), *aff'd*, 381 F.3d 1360 (Fed. Cir. 2004).

125. *Bass Enters. Prod. Co. v. United States*, 45 Fed. Cl. 120, 123 (1999).

126. *Bass Enters. Prod. Co. v. United States*, 54 Fed. Cl. 400, 401 (2002).

127. *Id.*

tant health and safety interest in delaying the drilling, as well as the minimal economic impact of the delay when looking at the property as a whole (since, as the government explained, "the property was still there at the end of the delay period").[128] On appeal, the Federal Circuit affirmed.[129]

Tahoe-Sierra had a similar impact in a Florida case, *Leon County v. Gluesenkamp*.[130] *Leon County* is a temporary takings action in which property owners were denied a building permit due to an injunction that had been issued in a separate lawsuit. That injunction prevented the County from issuing any building permits in a certain area until the County complied with various requirements of its comprehensive plan. After the County rejected the property owners' permit application, the owners sued the County, alleging a taking. While the takings action was pending, the injunction was dissolved. The trial court then held that the property owners suffered a categorical taking under *Lucas* because they "had suffered a loss of all or substantially all economically viable uses of" their property during the injunction period.[131]

Based upon *Tahoe-Sierra*, however, the Court of Appeal reversed. The court stated in general terms that *Tahoe-Sierra* "implicitly rejected a categorical rule in the [temporary] regulatory taking context."[132] The court went on to reject the trial court's application of *Lucas* to this case, explaining that "under the Court's holding in *Tahoe-Sierra*, the development moratorium could not constitute a per se taking of property under *Lucas* . . . "[133] The court then weighed the *Penn Central* factors, and concluded that no taking occurred.[134] Notably, the analysis included a de facto parcel as a whole evaluation, since the court looked at

128. *Id.* at 403-04.

129. *Bass Enters. Prod. Co. v. United States*, 2004 U.S. App. LEXIS 18388, at *30 (2004). Of special note, on appeal Bass argued that in considering the *Penn Central* "character" factor, the lower court should have limited its review to whether the government was seeking to prevent a nuisance. Citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra*, however, the Federal Circuit rejected that narrow reading of character, holding that the term is much broader, encompassing "the purpose of the regulation and its desired effects." *Bass Enters. Prod. Co.*, 2004 U.S. App. LEXIS 18388, at *28 (2004).

130. *Leon County v. Gluesenkamp*, 873 So. 2d 460 (Fla. Dist. Ct. App. 2004).

131. *Id.* at 462-63.

132. *Id.* at 466.

133. *Id.* at 466-67.

134. *Id.* at 467-68.

the value of the property after the development prohibition was lifted, and found that the property's value increased.[135]

Although *Bass Enters.* and *Leon County* are examples of how *Tahoe-Sierra* can reduce the chances that a moratorium will be found to be a taking, property rights advocates can point to *Tahoe-Sierra*'s embrace of partial takings, which arguably can lead to takings findings where they were less likely prior to *Tahoe-Sierra*.[136] A good example is seen in *W.J.F. Realty Corp. v. Town of Southampton*.[137] In that federal court action, involving an alleged eight year subdivision moratorium, a key question was whether a state court's rejection of a state taking claim collaterally estopped the property owners' subsequent assertion of a federal taking claim in federal court. The federal court rejected the estoppel defense, in part on the ground that the state court applied too harsh a standard. The state court had found that the owners "failed to demonstrate that the challenged restriction, in fact, deprived them of absolutely any economically beneficial use of their property . . . "[138] The federal court, however, indicated that *Tahoe-Sierra* requires federal courts to apply *Penn Central*'s factors for analyzing alleged partial takings.[139]

b. Retrospectively temporary

Determining the precise impact of *Tahoe-Sierra* on retrospectively temporary cases is more difficult, in part because the cases applying *Tahoe-Sierra* either do not neatly fit into this category, or because the decisions do not necessarily turn on the temporary aspect of the alleged taking. Nevertheless, it has had an impact, as indicated by the following examples.

In *Cooley v. United States*,[140] we see the effect of *Tahoe-Sierra*'s requirement that a regulatory action must deprive property of all value for *Lucas* to apply. In *Cooley*, the Army Corps of Engineers initially rejected a developer's request for a permit. Over three years later, on the eve of trial, the Corps issued a provisional permit subject to the developer creating a mitigation plan capable of being approved by the Corps. The lower court

135. *Id.* 467.
136. *But see* note 117.
137. *W.J.F. Realty Corp. v. Town of Southampton*, 220 F. Supp. 2d 140 (E.D.N.Y. 2002).
138. *Id.* at 143.
139. *Id.* at 149.
140. 324 F.3d 1297 (Fed. Cir. 2003).

found that the initial denial reduced the property's value by 98.8%, and held that it constituted a categorical taking under *Lucas*.[141] On appeal, the Federal Circuit, citing *Tahoe-Sierra*, held (1) that the issuance of a provisional permit may have converted any permanent taking into a temporary taking, and (2) that since value remained in the property, the lower court should have analyzed the taking claim under *Penn Central*, not *Lucas*.[142] It appears that the Federal Circuit's decision stemmed from the *Tahoe-Sierra* holding — applicable to both temporary and permanent takings cases — that all value must be eliminated for *Lucas* to apply; the Federal Circuit did not base its holding on the fact that the taking in this particular case may have been temporary.

Another Federal Circuit case, *Maritrans Inc. v. United States*,[143] illustrates the application of *Tahoe-Sierra*'s parcel as a whole concept beyond the prospectively temporary category. *Maritrans* involved a federal law, adopted in response to the Exxon Valdez oil spill that essentially required ship owners to stop using single hull ships by a specified retirement date. Maritrans claimed that this law imposed a categorical *Lucas* taking of a number of its ships because the ships could not be used after the retirement date.[144] The court rejected the *Lucas* argument, however, in part based upon its rejection of Maritrans' temporal argument. The court explained that the prohibition could not be carved up into two temporal periods: the pre-restriction period in which the ships could be used, and the post-restriction period in which their use was prohibited. Rather, the value Maritrans received in the pre-restriction period must be included, and doing so defeats the *Lucas* claim.[145]

More generally, in *Denune v. City of Springfield*,[146] an Ohio court interpreted *Tahoe-Sierra* as standing for the broad proposition that "a temporary regulatory deprivation ordinarily does not constitute a 'taking' of property for Fifth Amendment purposes."[147] The statement, however, was made in the context of an arguably prospectively temporary regulatory taking: plaintiffs

141. *Id.* at 1304.
142. *Id.* at 1304-05.
143. *Maritrans Inc. v. United States*, 342 F.3d 1344 (Fed. Cir. 2003).
144. *Id.* at 1355.
145. *Id.* at 1355.
146. *Denune v. City of Springfield*, No. 01CA0097, 2002 WL 1393687 (Ohio Ct. App. June 28, 2002).
147. *Id.* at *5.

were denied access to their building from the time that a fire marshal padlocked the fire-damaged building to the time that a court issued limited injunctive relief allowing the landowners to re-enter their building.[148]

Finally, in *Seiber v. United States*,[149] the Federal Circuit opined that whether or not *Tahoe-Sierra*'s rejection of *Lucas*'s per se rule extends to all temporary takings is an open question. In *Seiber*, the government initially denied a permit to log a portion of the landowner's property that had been designated as protected spotted-owl nesting habitat.[150] Two years later, the government lifted the restriction, finding that the spotted owls had left the area and that the area no longer needed protection.[151] Seiber asserted various takings theories, including an argument that the government's actions constituted a temporary taking that should be deemed per se under *Lucas*.[152] In response, the government argued that the case did not fall under *Lucas* because, among other things, after *Tahoe-Sierra* "there is no such legal category as a temporary categorical taking because by its very nature a temporary taking allows a property owner to recoup some measure of its property's value."[153] Although the court declined to address that question, holding that there was no categorical taking because the landowners could have logged other portions of their parcel, it did question the government's argument:

> In *Boise Cascade* [*Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002)] we explained that the Supreme Court may have only "rejected [the] application of the per se rule articulated in *Lucas* to temporary development moratoria," 296 F.3d at 1350, and not to temporary takings that result from the rescission of a permit requirement or denial, *id.* at 1351-52.[154]

148. *Id.* at *1.

149. *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004), *cert. denied*, 125 S.Ct. 113 (2004).

150. *Id.* at 1360.

151. *Id.* at 1362.

152. *Id.* at 1368.

153. *Id.*

154. *Id.* Looking at the same facts, the Oregon Court of Appeals interpreted *Tahoe-Sierra* more broadly. In a footnote, it explained that the "legal landscape for 'temporary' takings has changed significantly," because under *Tahoe-Sierra*, "a temporary restriction that merely causes a diminution in value of property is not a taking of the parcel as a whole; property is not rendered valueless by a temporary prohibition on economic use because the property will recover value as soon as the prohibition is lifted." *Boise Cascade Corp. v. Board of Forestry*, 63 P.3d 598, 600 n.1 (Or. Ct. App. 2003), *cert. denied*, 540 U.S. 1075 (2003).

We will next review *Tahoe-Sierra*'s impact on two related categories of potential temporary takings that have received distinctive treatments by lower courts: permitting delays that are "extraordinary" and delays that are erroneous.

c. Permitting Delays

The notion that "normal delays" in governmental decisionmaking are not takings, while "extraordinary delays" might be, was first articulated in *Agins v. City of Tiburon*.[155] The *Agins* Court rejected the property owners' claim that the City's precondemnation activities constituted a taking, explaining in a footnote that "mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered a "taking" in the constitutional sense.'"[156] The Court reinforced that distinction between normal and extraordinary delays in *First English Evangelical Lutheran Church v. County of Los Angeles*,[157] where it went out of its way to distinguish the facts before it from "the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[158]

Tahoe-Sierra has had a notable impact on the likelihood that a delay will be considered unconstitutionally extraordinary. It has had less of an impact, however, on related but arguably distinct delays — those caused by erroneous permit denials that are subsequently reversed by courts.

(a) Extraordinary Delays

Starting at least with *Tabb Lakes, Ltd. v. United States*,[159] courts — especially within the Federal Circuit — have been reviewing whether delays before them are "extraordinary," and therefore amount to takings. *Tahoe-Sierra* has influenced these decisions by making it clear that delay is *a* factor, rather than the factor, in determining whether there is a temporary taking.[160] The *Penn Central* factors — economic impact, interference with

155. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).
156. *Id.* at 263 n.9 (quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)).
157. *First English*, 482 U.S. 302.
158. *Id.* at 304.
159. *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993).
160. *Tahoe-Sierra*, 535 U.S. at 341-42.

reasonable expectations, and character of the governmental action — must also be considered.[161]

This was most recently seen in the Federal Circuit's decision in *Appolo Fuels, Inc. v. United States*.[162] In *Appolo*, the owner of surface mining leases asserted that the government's eventual prohibition of mining on a portion of property covered by its leases constituted a permanent taking. In addition, Appolo raised a temporary taking claim based upon the government's failure to reach a final decision within a twelve-month period established by the applicable mining statute. Applying *Penn Central*, the court rejected the permanent taking claim. It found that, even assuming (without deciding) that the economic impact of the government's action was very substantial, Appolo's lack of reasonable expectations, plus the government's need to protect health and safety, outweighed any economic impact.[163] The court went on to explain that the *Penn Central* factors also apply to extraordinary delay challenges:

> Delay in the regulatory process cannot give rise to takings liability unless the delay is extraordinary. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1352 (Fed. Cir. 2002) ("[A]bsent denial of a permit, only extraordinary delays in the permitting process ripen into a compensable taking."). If the delay is extraordinary, the question of temporary regulatory takings liability is to be determined using the *Penn Central* factors.[164]

The court then rejected Appolo's temporary takings claim, stating that given its finding that there was no permanent taking under *Penn Central*, "it would be strange to hold that a temporary restriction imposed pending the outcome of the regulatory decisionmaking process requires compensation."[165]

(b) Erroneous Delays

A significant number of state courts have reviewed the somewhat related question of whether delays due to governmental errors are normal, and therefore not temporary takings. They have tended to find that, absent indicia of bad faith, these delays are not takings. Except to the extent that *Tahoe-Sierra*'s endorse-

161. *Id.* at 315 n.10, 320, 342.

162. *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004), *cert. denied*, 125 S.Ct. 1406 (2005).

163. *Id.* at 1351.

164. *Id.*

165. *Id.* at 35.

ment of thoughtful decisionmaking supports justifiable but erroneous permit denials,[166] it will probably not have a significant impact on these decisions. As outlined at the end of this discussion, however, the Court's more recent decision in *Lingle v Chevron U.S.A., Inc.* raises doubts about whether any erroneous delay can ever be a compensable taking.[167]

The leading state court case comes out of California, where the State Supreme Court held that a two year delay caused by a commission's "mistaken assertion of jurisdiction" that was corrected on appeal, is "in the nature of a 'normal delay' that does not constitute a taking."[168] The court indicated, however, that a different case would be presented if the commission's "position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it."[169] Subsequently, relying on *Landgate*, the appellate court in *Loewenstein v. City of Lafayette*[170] held that a city's mistaken denial of a landowner's lot line adjustment request, which resulted in a two-year delay, was not a taking. The court explained that "the City's action was not objectively unreasonable because it was not taken solely to delay the proposed project."[171]

On the other hand, in *Ali v. City of Los Angeles*,[172] the court found that a city's denial of a permit to demolish a damaged hotel, where the city was seeking to preserve single occupancy units, imposed a temporary taking. The court explained that the denial was "arbitrary and unreasonable" in light of a state statute and existing case law that required the issuance of the permit.[173]

California's approach has been endorsed by at least one federal court. Citing *Landgate* and *Lowenstein*, the district court in *N. Pacifica, LLC v. City of Pacifica*[174] held that California provides an adequate remedy for temporary takings based upon allegedly improper delays in processing development applications,

166. *See Tahoe-Sierra*, 535 U.S. at 339.

167. 125 S Ct 2074 (2005).

168. *Landgate, Inc. v. Cal. Coastal Comm'n*, 953 P.2d 1188, 1190 (Cal. 1998).

169. *Id.* at 1199.

170. *Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79 (Cal. Ct. App. 2002), *cert. denied*, 540 U.S. 938 (2003).

171. *Id.* at 87.

172. *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999).

173. *Id.* at 464.

174. *N. Pacifica, LLC v. City of Pacifica*, 234 F. Supp. 2d 1053 (N.D. Cal. 2002).

and consequently that remedy must be pursued prior to bringing a federal court action.[175]

The Wisconsin Supreme Court, however, has rejected the *Landgate* approach. In *Eberle v. Dane County Bd. of Adjustment*,[176] property owners alleged that they were improperly denied a permit for a driveway needed to access their property.[177] A trial court subsequently ordered the county to issue the permit.[178] The State Supreme Court held that these facts stated a temporary taking claim under the Wisconsin constitution.[179] In doing so, the majority expressly rejected *Landgate's* reasoning.[180] The Chief Justice issued a strong dissent, however, asserting that where an administrative body refuses to allow a particular land use, and a court subsequently overturns the denial and allows the use, there is no temporary taking. In support, she cited, in addition to the California *Landgate* opinion, decisions from Vermont, New Hampshire, Pennsylvania, and New York.[181]

The holding in *Eberle*, and the dicta concerning bad faith in *Landgate*, are in tension with *Tahoe-Sierra*. These state court cases in essence create a categorical taking for governmental errors. *Elerle* holds that an erroneous delay is a per se taking, at least under the Wisconsin constitution. *Landgate* calls for a per se taking where a delay is due to bad faith. In *Tahoe-Sierra*, however, the Court expressly refused to carve out a new category for

175. *Id.* at 1064-66. Under *Williamson County Reg'l. Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985), "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195, superceded by statute as stated in Sprint Spectrum L.P. v. City of Carmel, 361 F.3d 998 (7th Cir. Ind. 2004).

176. *Eberle v. Dane County Bd. of Adjustment*, 595 N.W. 2d 730 (1999).

177. *Id.* at 733-35.

178. *Id.* at 735.

179. *Id.* at 739-40.

180. *Id.* at 742 n.25.

181. *Id.* at 748 (Abrahamson, C.J., dissenting). The citations read as follows: *Chioffi v. City of Winooski*, 165 Vt. 37, 676 A.2d 786, 788 (1996) (board's improper denial of permit not a temporary taking); *Smith v. Town of Wolfeboro*, 136 N.H. 337, 615 A.2d 1252, 1257 (1992) (board improperly applying ordinance is not a taking); *Stoner v. Township of Lower Merion*, 138 Pa. Cmwlth. 257, 587 A.2d 879, 886 (1991), *appeal denied*, 529 Pa. 660, 604 A.2d 252 (1992) (compensation for temporary taking available only for taking effected by legislation or rule of continuing effect, not for withholding approval under ordinance allowing reasonable use of land); *Lujan Home Builders, Inc. v. Town of Orangetown*, 150 Misc. 2d 547, 568 N.Y.S.2d 850, 851 (Sup. Ct. 1991) (board's refusal to approve plat not a taking in substantive constitutional sense).

per se takings.[182] To be consistent with *Tahoe-Sierra,* even a delay based on bad faith should only be a taking if that delay, in combination with the other *Penn Central* factors, point to a takings.

More fundamentally, the *Landgate/Ali* approach, that delay due to a public entity's erroneous but good faith acts should not be a taking, while clearly illegitimate acts should be a taking, has been criticized as doctrinally unsound for reasons unrelated to *Tahoe-Sierra.* A number of commentators, pointing both to the "public purpose" phrase in the Takings Clause[183] as well as United States Supreme Court Justices' statements in recent takings decisions,[184] assert that a clearly illegitimate act is by definition *not* for a public purpose, and therefore cannot be a taking.[185]

That argument finds some support in Federal Circuit case law, and has been bolstered by the United States Supreme Court's recent decision in Lingle v. *Chevron U.S.A., Inc.*[186] Decisions out of the Federal Circuit state that an unauthorized act, by definition, cannot constitute a taking. They limit the notion of "unauthorized," however, by deeming even illegal acts as authorized for takings purposes where the acts fall within an individual's or entity's general charge. This approach was recently summarized in *PI Elec. Corp. v. United States*,[187] where the court first explained that an act must be "authorized" to be a taking:

> It is well settled that a "compensable taking arises only if the government action in question is authorized." *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998); *see also Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001). An unauthorized action cannot predicate liability for a compensable taking, given that it does not "vest some kind of title

182. *Tahoe-Sierra*, 535 U.S. at 342.

183. The Fifth Amendment provides in relevant part as follows: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V, cl. 4.

184. *See, e.g., E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part.) ("The Clause presupposes what the government intends to do is otherwise constitutional . . ."); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 511 (1987) (Rehnquist, C.J., dissenting.) ("[T]he existence of . . . a public purpose is . . . a necessary prerequisite to the government's exercise of its taking power.").

185. *See, e.g.*, Thomas E. Roberts, *An Analysis of Tahoe-Sierra and Its Help and Hindrance in Understanding the Concept of a Temporary Regulatory Taking*, 25 U. HAW. L. REV. 417, 440-47 (2003); John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1068 (2000).

186. 125 S. Ct. 2074 (2005).

187. *PI Elec. Corp. v. United States*, 55 Fed. Cl. 279 (2003).

> in the government and entitlement to just compensation in the owner or former owner." *Armijo v. United States*, 229 Ct. Cl. 34, 40, 663 F.2d 90, 95 (1981) (cited with approval in *Del-Rio*, 146 F.3d at 1362). Therefore, a "claimant must concede the [authorization] of the government action which is the basis of the taking[s] claim to bring suit under the Tucker Act . . . ." *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993).[188]

The court went on, however, to note that acts within an entity's or individual's responsibilities may be authorized even if they are illegal:

> [T]he Federal Circuit has "drawn an important distinction between conduct that is 'unauthorized' and conduct that is authorized but nonetheless unlawful." *Del-Rio,* 146 F.3d at 1362. The "'mere fact that a government officer has acted illegally does not mean he has exceeded his authority for Tucker Act purposes, even though he is not "authorized" to break the law.'" *Id.* at 1362 (internal citation omitted.)[189]

The United States Supreme Court's recent decision in *Lingle v Chevron U.S.A., Inc.*[190] supports the view that unauthorized actions, and probably even authorized but "illegal" actions, cannot be compensable takings. In *Lingle*, the Court explained:

> if a government action is found to be impermissible — for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process — that is the end of the inquiry. No amount of compensation can authorize such action.[191]

Lingle therefore enhances the argument that no erroneous permit denial – whether made in good faith, arbitrarily, or even in bad faith — gives rise to a claim for compensation under the Takings Clause.

VII.
CONCLUSION

Following *Tahoe-Sierra*, the analytical approach used to review temporary takings challenges is clear for most types of restrictions, but less clear for others. The current situation can be summarized in a chart as follows:

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188. *Id.* at 288.
189. *Id.* at 289.
190. 125 S Ct 2074 (2005).
191. Id. at 2084.

The Impact of *Tahoe-Sierra* on Temporary Regulatory Takings Law

Daniel L. Siegel[1]

I.
INTRODUCTION

This paper explores the development of temporary regulatory takings law, the Supreme Court's latest temporary takings opinion — *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*[2] — and the impact of *Tahoe-Sierra* on subsequent lower court temporary takings decisions. As will be seen, since *Tahoe-Sierra* rejected the argument that building moratoria are per se takings, its greatest impact has been on cases challenging moratoria. Its impact on temporary takings challenges, however, has extended far beyond moratoria because essential elements of the *Tahoe-Sierra* holding — such as its affirmation of the "parcel as a whole" rule — apply to other types of temporary restrictions on the use of property.

II.
FIRST ENGLISH: TEMPORARY TAKINGS COME OF AGE

The concept of "temporary takings" hit the big time with the United States Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*.[3] Prior to that opinion, some state courts, such as those in California, New York and Pennsylvania, interpreted the federal and their own state constitutions as not requiring compensation where government

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2. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

3. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

TYPE OF REGULATION	PER SE LIABILITY?	REVIEW USING *PENN CENTRAL*?
Physical: Permanent (*Loretto*)	YES	NO
Physical: Temporary (*Loretto*)	NO	YES
Use: Prospectively Permanent, but Becomes Temporary (*Lucas; Tahoe-Sierra*)	YES (if valueless)	YES (if not valueless)
Use: Prospectively Temporary (*Tahoe-Sierra*)	NO	YES
Use: Extraordinary Delay (*Appolo Fuels*)	NO	YES
Use: Erroneous Delay (*Lingle*)	NO?	NO?

As can be seen from this chart, temporary takings claims remain viable after *Tahoe-Sierra*. Claims challenging temporary restrictions on property use, however, will almost always be subject to review using the *Penn Central* factors as opposed to a per se analysis.