

When governments temporarily take private property



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Delays in the development approval process may or may not be subject to a claim for damages by property owners and developers depending upon the specific circumstances involved.

As every builder and developer of commercial and residential developments knows, local governmental approvals of projects often take lengthy periods of time as the permitting and approval process winds its way through various administrative levels, boards and commissions at the local government level. Oftentimes, property needs to be rezoned to accommodate a certain type of development or a local government may impose a moratorium on development for a period of time within which to promulgate regulations which will affect development of the property. Delays in the development approval process may or may not be subject to a claim for damages by property owners and developers depending upon the specific circumstances involved.

Last year, both the United States Supreme Court and the Ohio Supreme Court handed down significant land use decisions which evidence this struggle over the issue of whether compensation is due when the government temporarily takes private property for the asserted public benefit of land use regulation. Although the United States Supreme Court decision is widely considered a setback for individual property rights and the Ohio Supreme Court decision considered a victory for land owners,

Three recent court decisions weigh in



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that's a simplistic analysis. These cases provide some new guidance but nothing clear cut in an area that is certain to be a continuous source of dispute between property owners and governmental bodies attempting to regulate the use of their property.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency

In the *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* case, the United States Supreme Court addressed the issue of a moratorium that was, in effect, a government regulatory taking of private property. The Lake Tahoe Regional Planning Agency had im-

posed a moratorium totaling 32 months on development around Lake Tahoe while it studied the impacts of growth on the lake and created environmental regulations for the future. A group of 449 landowners alleged that they should be compensated under the "takings" clause of the U.S. Constitution's Fifth Amendment for the time of the moratorium when they were deprived of all economic use of the property.

Although the *Tahoe* case involved a regulatory takings claim and not a direct challenge to the legality of a moratorium on development, the U.S. Supreme Court reinforced the use of moratoria as a planning tool. But the real question in *Tahoe* was not

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whether moratoria are legal but whether the government owes compensation to the landowner. The court held a temporary moratorium or the local government's delay in a permit process cannot be categorically determined to be a taking, and it reinforced that a case-by-case analysis of the facts must be performed to determine whether a taking has occurred.

This approach, known as the *Penn Central* test after the 1978 U.S. Supreme Court case in which it was first announced, is based on an analysis of numerous factors. Unless the regulatory taking "denies all economically beneficial or productive use of the property," the court has instructed lower courts to decide regulatory takings, both permanent and temporary, using a fact-specific inquiry under *Penn Central*. With *Tahoe*, the court applied the test and found in favor of the government because it proved that the moratorium advanced legitimate state interests and did not deny the economic viability of the land.

Shemo v. Mayfield Heights

The *Penn Central* analysis is a crucial factor in takings disputes both on a federal and local level. Even before the federal *Tahoe* case, state courts have used *Penn Central* to decide cases. However, the recent, highly publicized case of *Shemo v. Mayfield Heights* is not necessarily one of those cases. Although *Shemo* was reviewed five times by the Ohio Supreme Court, the court specifically distinguished *Penn Central* in making its decision.

The first *Shemo* case involved an appeal of Mayfield Heights' initial decision not to rezone the property. The city, however, stipulated at the trial that the single-family residential zoning classification of the property was invalid but refused to adopt the property owner's request for commercial retail zoning. Over the property owner's objection, the city rezoned the property to a higher density residential planned unit development zoning classification. The trial court found that the new zoning classification was unconstitutional as applied to the property. After an appeal of that decision by the city, which it

lost, the trial court ordered the property owners to make improvements to a roadway as specified in the site plan and for the city to facilitate the improvements. This decision was eventually appealed to the Ohio Supreme Court, which reinstated the decision of the trial court.

In the second and third *Shemo* cases, the property owners filed a petition asking the Ohio Supreme Court to compel the city to grant final approval of the road improvements including access and to grant all other approvals and permits necessary for the retail development per the trial court's order. The action also asked the court to require the city to commence state court appropriation proceedings to determine the value of the taking of the property for the period of time that it was improperly zoned. The court granted the property owner's petition to compel the city to approve all plans, but it did not rule on the request to compel state appropriation proceedings.

In the fourth *Shemo* case, the property owners again sought to compel the city to commence appropriation proceedings for the city's temporary taking of its property between 1992 and 2001—i.e., from the date that the original lawsuit was filed to the date the city finally rezoned the property. The court found that the zoning classifications on the property were unconstitutional because the application of the classifications did not substantially advance legitimate state interests. This was not the case in *Penn Central* where New York City's ordinance limiting development above Penn Central Station was not unreasonable. Because the zoning classifications were unconstitutional, the court found that a taking had occurred and the landowner was due compensation. Thirteen days later, the United States Supreme Court decided *Tahoe*.

Mayfield Hts. filed a motion for reconsideration in the Ohio Supreme Court immediately after *Tahoe* based at least in part on the *Tahoe* decision and, in part, to shorten the period of the taking, and thus its damages. In its fifth *Shemo* decision, the court rejected all of the city's arguments but it did shorten the period of time of the taking from 1995 to 2001. The reduction of the period for which damages could

be sought was based upon the fact that the property owner amended its complaint to request a rezoning to commercial retail zoning in 1995 after it had originally requested multi-family apartment zoning in its original complaint filed in 1992.

The lesson in *Shemo* is that although the burden on a property owner to prove a zoning ordinance unconstitutional remains extremely high, once that burden is met, the municipality will face a claim for damages for the temporary period of the taking of the property.

State ex rel. R.T.G., Inc. v. State

In January 2003, the Ohio Supreme Court published its decision in *State ex rel. R.T.G., Inc. v. State* that a property owner's intent in purchasing a certain property interest is paramount in determining whether there has been a regulatory taking of that interest. Although the case involved coal mining rights, the *Penn Central* test was applied, and the case can be used to find a taking even where less than 100% of a property's economically beneficial use is deprived by the government's regulation.

As you can see from these three cases, the issue of when property owners are due compensation from a temporary regulatory taking will not be decided on one factor or one test alone. The courts will continue to use a case-by-case analysis of several criteria. As these cases also demonstrate, these types of lawsuits often take many years to resolve. Therefore, neither a landowner/developer nor a governmental body can afford to be too recalcitrant in its position. Both should remain flexible and have factual support for why a temporary moratorium or a zoning classification or regulation is or is not reasonable. **BXM**

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