NO. 02-0033

IN THE
SUPREME COURT OF TEXAS

CITY OF GLENN HEIGHTS, TEXAS,
Petitioner

v.

SHEFFIELD DEVELOPMENT COMPANY, INC.,
Respondent.

On Petition for Review from the
Court of Appeals for the
Tenth District of Texas at Waco

BRIEF OF AMICUS CURIAE AMERICAN PLANNING ASSOCIATION

IN SUPPORT OF PETITIONER CITY OF GLENN HEIGHTS

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Garvin & Leitner, *"Drafting Interim Development Ordinances: Creating Time to Plan"*, 48 Land Use Law and Zoning Digest, No. 6 (1996) 27

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BRIEF OF *AMICUS CURIAE* AMERICAN PLANNING ASSOCIATION

IN SUPPORT OF THE CITY OF GLENN HEIGHTS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

The American Planning Association (APA) respectfully submits this brief *amicus curiae* in support of the City of Glenn Heights in accordance with Texas Rule of Appellate Procedure 11.

STATEMENT OF INTEREST OF *AMICUS CURIAE* AND FEE DISCLOSURE

The American Planning Association is a nonprofit public interest and research organization, founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning -- physical, economic and social -- at the local, regional, state, and national levels. APA's mission is to encourage planning that will contribute to public well-being by developing communities and environments that more

effectively meet the present and future needs of people and society.

APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters and 17 divisions devoted to specialized planning interests. APA represents more than 30,000 practicing planners, officials, and citizens involved with urban and rural planning issues. Sixty-five percent of APA's members work for state and local government agencies. These members are involved, on a day-to-day basis, in formulating planning policies and preparing land-use regulations.

APA regularly files amicus briefs in takings cases to ensure that takings jurisprudence continues to allow for reasonable land-use planning in the public interest. A few of the cases in which APA has participated as amicus curiae include: Agins v. Tiburon, 447 U.S. 255 (1980), Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), Yee v. City of Escondido, 503 U.S. 519 (1992), Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), Dolan v. City of Tigard, 512 U.S. 374 (1994), Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997), City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999), Palazzolo v. Rhode Island, 533 U.S. 606 (2001), Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998); Animas Valley Sand and Gravel, Inc. v. Board of County Comm'rs of the County of La Plata, 38 P.3d 59 (Colo. 2001), and Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002).

APA develops policy guides that represent the collective thinking of our members on both positions of principle and practice. APA policy guides are developed through a thorough

process of research, drafting and review by each of the chapters and divisions within the organization, prior to ratification by the APA Board of Directors. APA's policy guide on takings, available at www.planning.org/policyguides/takings.html, articulates the following basic positions: 1) support for the evolving law in this country that clearly recognizes both the importance of the police power to the protection of the public health, safety and welfare, and the limitations imposed upon that power under the U.S. Constitution to protect property rights; 2) support for regulations that avoid "takings" and other unnecessary and/or unintended hardships for particular landowners, and that offer landowners appropriate relief or, in appropriate cases, modification of regulations to accomplish that purpose; 3) recognition of the need for fairness to all persons and entities; and 4) support for developing appropriate and effective remedies for landowners subject to a regulatory taking under existing Constitutional doctrine, while also considering the impacts of such remedies on government.

This case raises critical issues of national importance for the planning profession, property owners, as well as local, state and regional governments. The Court of Appeals' ruling that the City's revision of its zoning effected a taking based on a 38% diminution in the value of plaintiff's property represents a radical, unprecedented decision which threatens well-established local land use regulatory authority. In addition, the Court of Appeals' conclusion that the City's moratorium effected a taking, on the ground that it failed to "substantially advance a legitimate state interest," represents a serious and unjustified judicial intrusion into a land use policy matter appropriately left to the sound discretion of elected legislators.

No fees have been, or will be, paid for preparing this amicus brief. Tex. R. App. P. 11(c).

ISSUES PRESENTED

APA adopts the issues as set forth by the City in its brief on the merits, but limits its discussion to the issues relating to whether the rezoning was a taking based on the diminution of value and unreasonable interference with investment-backed expectations, and whether the moratorium was a taking under the ostensible substantially advance test.

STATEMENT OF THE FACTS

The American Planning Association adopts the Statement of Facts presented in the City's Brief on the Merits.

SUMMARY OF ARGUMENT

The briefs submitted by the City and its numerous other amici have been thorough and strong. APA does not wish to replow the same ground, but to assist the Court in three ways: (1) by addressing how traditional local government land use planning and regulatory authority would be seriously undermined if the decision below is affirmed; (2) by explaining why the Takings Clause does not support a finding of a taking based on the kind of economic impacts found in this case; and (3) by responding to the briefs recently filed with the Court by developer groups and the Pacific Legal Foundation (PLF).

While APA believes that there was no taking in this case, APA expresses no view on the policy wisdom of the City's decision to promote lower density development in these particular circumstances. APA only contends that a taking cannot be justified based on the facts of this case and, more importantly, that the Court of Appeals' decision represents a misguided and dangerous legal precedent which should not be permitted to stand.

APA agrees with the City that the conclusion that a 38% reduction in the value of an

individual property can establish a taking is out of sync with existing precedent and should be reversed. APA is concerned that this decision, unless reversed, would effectively destroy the ability of local communities to engage in traditional land use regulation, in Texas and elsewhere across the country. This result would be inconsistent with longstanding U.S. Supreme Court precedent endorsing land use regulation, even when it imposed far more significant economic burdens on individual owners than occurred in this case.

The rule that a taking can be established only in extreme circumstances not only is supported by precedent, it makes eminent good sense. While land use regulations, and zoning rules in particular, impose some economic burdens on individual property owners, they also create a "reciprocity of advantage" which provides significant economic benefits to all landowners. In addition, the expansive theory of regulatory takings adopted by the Court of Appeals would have a severe chilling effect on the exercise of important municipal land use authorities, and promote judicial intrusion into policy matters more appropriately left to the executive and legislative branches. Furthermore, the opinion is not supported by the language and the original understanding of the Takings Clause.

Finally, APA agrees with the City and other amici that the Court of Appeals erred in concluding that the continuation of the moratorium beyond April 1997 effected a taking on the theory that it failed to substantially advance a legitimate public interest. First, this ostensible takings test does not involve a takings issue at all, but instead raises a potential claim under the Due Process Clause. Second, assuming this type of claim can be brought under the Takings Clause, the standard of review should be the same as rational basis review under the Due Process Clause. Lastly, again assuming plaintiff has raised a viable takings claim, and regardless of what

standard of review applies, the continuation of the moratorium did not effect a taking on the facts of this case.

ARGUMENT

I. The Court of Appeals' Unprecedented Reading of the Takings Clause Would Have Serious Adverse Effects on the Ability of Local Governments to Engage in Traditional Planning and Zoning.

A. The Court of Appeals' Decision Represents a Radical Departure From Settled Law

The Court of Appeals' ruling that the City's rezoning resulted in a taking rests on the radical view that essentially any unanticipated change in land use regulation which produces more than a nominal adverse impact on property value can result in a taking. See City's Brief on the Merits, at 22-24. See also Brief Amicus Curiae of National Association of Homebuilders (NAHB), at 4, 10 (a change in zoning supports a finding of a taking when it produces a "calculable economic injury").

This extreme view is untenable. A regulatory taking occurs only in "extreme circumstances," United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985), and when the regulation "imposes restrictions so severe that they are tantamount to a condemnation or appropriation." Tahoe-Sierra, 122 S.Ct. at 1478 n. 17. Indeed, the Court of Appeals' decision is so inconsistent with established precedent that plaintiff itself admits that the decision below "may be unprecedented." See Response Brief, at 23.

Economic Impact. PLF (PLF Brief at 14-15) and the NAHB (NAHB Brief at 5-6) cite various decisions which, they contend, support the conclusion that an adverse impact on property values in the range of 38% can support a finding of a taking. But these decisions do not in fact support their position.

First, PLF incorrectly contends that City of Monterey v. Del Monte Dunes at Monterey Ltd, 526 U.S. 687 (1999), demonstrates that a "drastic loss of property value" is not required to establish a taking, because "the owner clearly did not suffer such a loss" in that case. While the issue was not disputed and, therefore, not discussed at the Supreme Court level, plaintiff in that case presented extensive evidence that the city's actions eliminated "all economically viable use of the property," and the Ninth Circuit specifically ruled that there was sufficient evidence to support the jury verdict based on that allegation. See 95 F.3d 1422, 1430-34 (9th Cir. 1996).

Second, Wheeler v. City of Pleasant Grove, 746 F.2d 1437 (11th Cir. 1984), is distinguishable because it involved an owner who had been issued a building permit and had actually begun construction, see id. at. 1438, and therefore had acquired vested rights under the prior zoning regime. By contrast, plaintiff in this case never acquired vested rights.

Nor does Corrigan v. City of Scottsdale, 720 P.2d 528 (Ariz.Ct.App. 1984), aff'd in part, rev'd in part, 720 P.2d 513 (Ariz), cert. denied, 479 U.S. 986 (1986), provide convincing support for plaintiff's position. (PLF cites the decision of the Arizona Supreme Court, but only the Arizona Court of Appeals addressed the merits of the takings issue in that case; the Arizona Supreme Court addressed the question of the appropriate remedy for a taking, *on the unchallenged assumption* that a taking had been established). Examining the Court of Appeals' decision in Corrigan, the court's ruling on the takings issue is problematic for several different reasons. The court failed to consider the effect of the regulation on plaintiff's entire contiguous land holding, in violation of the "parcel as a whole rule" recently reaffirmed by the U.S. Supreme Court in Tahoe-Sierra, supra. The court also concluded that the regulation "prevent[ed] any development whatsoever" of the land, see 720 P.2d. at 539, even though the court indicated

elsewhere in its opinion that the regulation permitted plaintiff to develop up to 25% of the property. Id. at 532.

Finally, the analysis employed in the Court of Federal Claims in Florida Rock Industries v. United States, 45 Fed Cl. 21 (1999) (which, in any event, did not go so far as to indicate that a 38% reduction in value could constitute a taking), has been superseded by the U.S. Supreme Court's decision in Tahoe-Sierra. The relatively expansive theory of "partial" regulatory takings in Florida Rock was based on the view that regulatory restrictions on the use of property are logically indistinguishable from physical occupation of property. See Florida Rock Industries v. United States, 18 F.3d 1560, 1569 (1994). But in Tahoe-Sierra, the Supreme Court rejected this equation, flatly stating: "[W]e do not apply precedent from the physical takings context to regulatory takings claims." 122 S.Ct. at 1479.

Investment-Backed Expectations. The proposition that a property owner can "establish a 'taking' simply by a showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130 (1978).

APA recognizes that, as a general matter, an investor's purchase of property under a particular regulatory regime which later changes, may provide some evidence of an owner's investment expectations and some evidence of a frustration of those expectations. However, such evidence cannot, without a good deal more, demonstrate an unreasonable interference with investment-backed expectations sufficient to support a taking. Plaintiff's view of takings "would effectively compel the government to regulate by purchase." Andrus v. Allard, 444 U.S. 51, 65 (1979). That clearly is not the law.

There are three important considerations in this case which contradict the conclusion that plaintiff suffered the kind of unreasonable frustration of investment-backed expectations necessary to demonstrate a taking. First, the legal change at issue in this case is completely ordinary and unremarkable, given that cities and towns commonly adjust their zoning restrictions as a normal part of the process of administering their zoning programs. Moreover, in this particular case, the City of Glenn Heights, shortly before plaintiff purchased its property, changed the zoning affecting approximately 80% of the City's geographical area. See City's Brief on the Merits, at 24. Under these circumstances, plaintiff's protestations of shock that the City proceeded with the rezoning after its purchase of the property ring hollow.

It is also significant in this case that plaintiff's president is "an experienced developer" and is "the former president of the Texas Association of Builders". See Response Brief, at 32-33. In general, "'[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.'" Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993), quoting FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958). This principle is fully applicable to the heavily regulated field of real estate development. See District Intown Properties Limited Partnership v. District of Columbia,198 F.3d 874, 884 (D.C. Cir. 1999), cert. denied, 531 U.S. 812 (2000) (affirming rejection of taking claim brought by a firm in "the real estate business, with a history of restriction of development for the purpose of preserving historic sites"); Good v. United States, 39 Fed Cl. 81, 109-110 (1997), aff'd, Good v. United States, 189 F.3d 1355, 1361-63 (Fed.Cir.1999), cert. denied, 529 U.S. 1053 (2002) (land developers cannot claim "a reasonable expectation that government regulation would not be altered to their detriment").

Finally, in assessing the effect of a regulation, 'the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored', thereby requiring the court to compare 'the relationship of the owner's basis or investment' in the property before the alleged taking to the fair market value of the property after the alleged taking. Walcek v. United States, 49 Fed. Cl. 248, 266 (2001), aff'd, 2002 WL 31027444 (Fed. Cir. Sept. 11, 2002), quoting Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 905 (Fed.Cir.1986), cert. denied, 479 U.S. 1053 (1987). The fact that plaintiff in this case stands to gain four times its original investment in the property under the new zoning restrictions argues strongly against the taking claim. Cf. Forest Properties, Inc v. United States, 177 F.3d 1360 , 1367 (Fed.Cir.), cert. denied, 528 U.S. 951 (1999) (three-fold increase in value of property undermines [claimant's] contention that its property was taken").

B. The Court of Appeals' Decision Represents a Serious Threat to Well-Established Local Government Land Use Authority

As a national organization which encourages sound planning and reasonable land use regulation, APA is especially concerned about the potential chilling effect that the Court of Appeals' ruling would have on communities attempting to implement conventional land use regulations as well as other, more innovative approaches. Planning for and regulating development and growth are two of the most important responsibilities exercised by local government. Virtually every community in the United States which is urbanized, or in the process of becoming urbanized, has adopted some type of land use regulation, such as zoning. Today, faced with enormous population growth and more complicated land uses, communities have adopted new, more innovative approaches, including public facility ordinances and transit-supportive land-use regulations. See Mark S. White, "Adequate Public Facilities Ordinances and

Transportation Management," APA: Planning Advisory Service Report No. 465 (1996); APA, "Creating Transit-Supportive Land-Use Regulations," APA Planning Advisory Service Report No. 468 (1996). If a 38% reduction in value based on adoption of quarter-acre zoning (hardly an uncommon density standard) were sufficient to establish a taking, traditional zoning regulations (as well as other types of land use regulations) would routinely be subject to attack under the Takings Clause. The Court of Appeals' decision, unless reversed, will effectively discourage, if not prohibit, many types of effective land use regulations.

The Court of Appeals' ruling contradicts a century of U.S. Supreme Court jurisprudence upholding far more stringent restrictions than the kind at issue in this case. For example, in Hadacheck v. City of Los Angeles, 239 U.S. 394 (1915), the Court rejected a takings challenge to a city's ban on brick making that reduced the value of the claimant's property by 92.5%. More recently, in Agins v. City of Tiburon, 447 U.S. 255 (1980), the Court unanimously rejected a taking claim based on the city's adoption of zoning restrictions which permitted a maximum of five houses on a five-acre tract. See also Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993) (discussing, with approval, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), which rejected a constitutional challenge to a zoning ordinance which reduced the value of the claimant's land by 75%).

The Court of Appeals' ruling also conflicts with the Supreme Court's frequent declarations that the Takings Clause is not an obstacle to reasonable land use regulation. In Palazzolo v. Rhode Island, 533 U.S. 606 (2001), the Court said, "The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions." See also Dolan v. City of Tigard, 512 U.S. 374, 396

(1994) ("[c]ities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization"); Tahoe-Sierra, 122 S. Ct. at 1488 (upholding the Tahoe Regional Planning Agency's efforts to prevent "inefficient and ill-conceived growth").

The amici developer groups contend that, if the Court of Appeals' ruling were reversed, a parade of horribles would follow, including "devastation" and "chaos" in the residential development industry. See Brief Amicus Curiae of Texas Association of Builders, et al. at 4. These contentions are absurd. The Court of Appeals' ruling is a radical departure from established law, and even plaintiff effectively acknowledges that it is unprecedented. Thus, it is nonsensical to suggest that a decision by this Court overturning this aberrant ruling would undermine the past, ongoing or future success of the development industry. The real issue in this case is how a radical new departure in takings law would affect the ability of local governments to engage in sensible land use planning and regulation. APA believes that the Court of Appeal's decision, unless reversed, will severely undermine reasonable local land use authority.

Furthermore, the premise of the developers' argument, that reasonable zoning and other similar regulation of the development industry necessarily harms the industry and property owners, is simply incorrect. Sound planning and reasonable regulation help create a stable environment for investment which protects property values and encourages families to invest in residential property. In the long-term, the development industry and its customers benefit from effective land use regulation.

C. No Special Factors in the Case Justify the Court of Appeals' Ruling

The APA recognizes that the Court of Appeals rested its conclusion in this case, in part, on two additional considerations: (1) that the rezoning allegedly interfered with plaintiff's ability

to earn a substantial profit on this project; and (2) that the City adopted the moratorium which preceded the adoption of the zoning amendment without providing advance public notice to plaintiff and others. Upon analysis, neither of these considerations provides support for the Court of Appeals' ruling.

The Court of Appeals cited no authority whatsoever for the proposition that a diminution in projected profits can support a finding of taking. In fact, this idea is contradicted by the U.S. Supreme Court's repeated statements that merely because a regulation prevents "the most profitable use of a property cannot establish a taking." See Andrus v. Allard, 444 U.S. 51, 66 (1979). See also Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) ("the fact that [a regulation] deprives the property of its most beneficial use does not render it unconstitutional"). Cf. Unity Real Estate Co. v. Hudson, 178 F.3d 649, 675-677 (3rd Cir.), cert. denied, 528 U.S. 963 (1999) (fact that government regulation might force a firm into bankruptcy is not sufficient to establish a taking). Interpreting the Takings Clause as a guarantee of an investment's profitability would place too tight a straitjacket on the police power. In addition, "[p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." Andrus, supra.

While the Court of Appeals focused on alleged lost profits, it completely ignored "the owner's opportunity to recoup its investment or better, subject to the regulation." Walcek, supra, 49 Fed. Cl. at 266. Because the value of plaintiff's property, under the new zoning, is more than four times greater than the purchase price, plaintiff cannot demonstrate the kind of unreasonable interference with investment-backed expectations necessary to establish a taking.

Given that the investor's cost basis in property is highly pertinent in takings analysis, the

speculative estimates of lost profits should be irrelevant. If, as in this case, an investor pays only a small amount for a tract of land, but subsequently seeks compensation based on a much higher value under the Takings Clause, the investor is in a poor position to complain that his expectations have been unreasonably frustrated. After all, the expectations factor focuses on "investment-backed expectations," and what the investor actually paid for the property is generally the best possible indication of whether plaintiff's expectations are "investment-backed."

Under the Court of Appeals' theory, the smaller the size of the owner's original investment, and the greater the likelihood that the investor could show a lost opportunity to reap a large speculative profit, the greater the owner's chances of recovery under the Takings Clause. This turns logic on its head. If the original cost basis is properly considered in takings analysis (and it is), then, logically, arguments based on speculative lost profits have to be disregarded.

The argument that the finding of a taking is supported by the City's unwillingness to provide advance public notice of the moratorium reflects a misunderstanding of the purpose of a development moratorium, which is to preserve the status quo so that a public debate can be held on regulatory policies and government officials can then put appropriate changes in place. As the U.S. Court of Appeals for the Ninth Circuit explained in the recent Tahoe-Sierra litigation, "temporary development moratoria prevent developers and landowners from racing to carry out development that is destructive of the community's interests before a new plan goes into effect." Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency, 216 F.3d 764, 777, aff'd. 122 S. Ct. 1465 (2002). The Texas Court of Appeals adopted the same rationale in City of Dallas v. Crownrich, 506 S.W.2d 654, 659 (Tex. App. 1974, writ refused n.r.e.), stating that the

basic purpose of a moratorium is to keep "impending regulations from being destroyed by an individual or group seeking to circumvent the ultimate result of the rezoning." Given that the purpose of a moratorium is to preserve the status quo, the government's decision whether or not to impose a moratorium obviously cannot be the subject of extensive public debate. See Patrick J. Rohan, ZONING AND LAND USE CONTROLS, §22.01 (1998) ("Public knowledge that the government has made, or is about to make, studies to alter existing land-use controls frequently triggers development activity that may frustrate planning efforts."). See also City of Dallas v. Crownrich, 61 S.W.3d at 222 (the announcement of potential regulatory changes, without the benefit of a moratorium, would "frequently sanction a race of diligence to the city hall by property owners attempting to place structures upon their land that would be out of accord with the surrounding property under the new zoning laws").

The weakness of plaintiff's legal argument is underscored by plaintiff's own actions in this case. In March 1997, during a period of several days when plaintiff believed the City's moratorium might have lapsed, plaintiff quickly filed a site plan/preliminary plat in an attempt to obtain vested development rights before the new zoning was put in place. It is reasonable to suppose that plaintiff might have attempted a similar preemptive strike earlier if the City had issued a public notice stating that it was considering adoption of a moratorium.

II. The Courts Have Given the Takings Clause a Relatively Narrow Reading For Numerous, Sound Reasons

Property owners who may have suffered little or no actual economic injury could reap windfalls at the expense of the public fisc if takings, such as in the present case, were upheld. In

the typical takings case, as in this case, the economic impact of the regulation is measured, in the first instance, by comparing the estimated value of the claimant's property subject to the challenged regulations with the estimated value the property would have if the restriction were lifted. While this calculation can be performed with relative ease, it does not provide a true measure of a regulation's actual economic impact on an individual property owner. The reason is that it ignores the fact that a regulation which applies to all or a substantial portion of a community not only restricts what the takings claimant can do with her land, but also confers significant economic benefits on her. Regulatory restrictions enhance property values by preventing owners from engaging in activities which reduce neighbors' property values, creating what the Supreme Court has described as "reciprocity of advantage" among different landowners." Tahoe-Sierra, 122 S.Ct. at 1489, citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). While the net effect of a regulation on any particular owner is extremely difficult to quantify in practice, both sides of the ledger have to be considered to fairly assess how regulations affect property values.

The U.S. Supreme Court's takings jurisprudence, in effect, solves this computational problem by confining takings recovery to extreme circumstances. As the Supreme Court stated in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), when an owner is denied all economically viable use of a property, a finding of a taking will generally result, because "it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life in a manner that secures an 'average reciprocity of advantage' to everyone concerned." Id. at 1017-18 (emphasis added). Implicit in this statement, of course, is a recognition that a finding of taking generally is not warranted when there is less than a total

destruction of property use or value, because it can properly be assumed, in that circumstance, that the government is simply adjusting the benefits and burdens of economic life. The Supreme Court relied on this reasoning, for example, in rejecting the takings claim in Agins v. City of Tiburon, supra, observing that the zoning ordinances

> "benefit the appellant as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open spaces.... Appellants will therefore share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer." 447 U.S. at 262-63.[1]

Furthermore, confining regulatory takings to extreme circumstances is necessary to avoid an interpretation of the Takings Clause which would severely "chill" the ability of local communities to protect the public interest. As a result of the U.S. Supreme Court's decision in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), a finding of a taking necessarily imposes an obligation on local governments to pay financial compensation, at least for the temporary period that the restriction remains in place. Therefore, an expansive theory of takings liability would impose the risk of enormous financial burden on local governments. See Eastern Enterprises v. Apfel, 524 U.S. 498, 542 (1998) (Kennedy, J, concurring in part and dissenting in part) (observing that an expansive reading of the Takings Clause would "subject[] States and municipalities to the potential of new and unforeseen claims

[1] See also Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 491 (1987) ("Under our system of government, one of the States' primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.").

in vast amounts").

The risk created for Texas communities by these potential liabilities is made all the more burdensome by the fact that the Texas Municipal League Risk Pool (like municipal insurance programs in most other states) does not treat inverse-condemnation liability as an insurable risk. As a result, a good faith but erroneous prediction by a municipal attorney about whether a particular land use regulation or regulatory action is a taking would have severe adverse effects on municipal finances. Local officials would be tempted to sacrifice the public interest by erring heavily in the direction of avoiding the slightest risk of a taking whenever possible.

An expansive reading of the Takings Clause threatens to produce improper judicial intrusion into policy matters properly handled by the legislative and executive branches. The Court of Appeals repeated the familiar admonition that "courts should not assume the role of a super zoning board." 61 S.W.2d at 643, citing Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 933 (Tex. 1998). Yet the Court of Appeals' expansive takings ruling would have precisely this result. Unless reversed, the Court of Appeals' decision would transfer primary responsibility for local land use issues from the city council to the courtroom. Practically speaking, the resulting litigation burden would mean that small communities, such as Glenn Heights, would have to abandon their land use regulations.

Finally, respectful attention to the language and original understanding of the Takings Clause supports the conclusion that regulations should be held to be takings only in extreme cases. The Takings Clause of the U.S. Constitution was originally adopted to address direct,

physical appropriations of private property.[2] In the words of Justice Antonin Scalia, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." Lucas v. South Carolina Coastal Council, 505 U.S. 1003,1028 n.15 (1992). See also Tahoe, 122 S.Ct. at 1478 (the "plain language [of the Takings Clause] requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation[,] ... [b]ut the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.")

While it is now well established that regulations can result in takings, the regulatory takings doctrine, out of respect for the original language and original understanding, cannot be given an overly broad scope. As the Court stated in Tahoe-Sierra, the ultimate test for a regulatory taking is whether a regulation "imposes restrictions so severe that they are tantamount to a condemnation or appropriation." Tahoe, 122 S. Ct. 1478 n. 17.

A theory of regulatory takings which would permit recovery based on a 38% reduction in the value of an individual parcel cannot be squared with the language and original understanding of the Takings Clause. It would permit takings recoveries based on relatively minor regulatory restrictions which cannot properly be analogized to the kinds of direct appropriations or physical appropriations which are at the core of the Takings Clause.

III. The Court of Appeals' Use of, and Application of, the Substantially Advance

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[2] This Court has generally assumed, without definitively deciding the issue, that for all relevant purposes federal and state takings clauses should be interpreted in the same fashion. See Mayhew v. Town of Sunnyvale, supra.

Test Was Deeply Flawed

APA agrees with the position of the City and its other amici that the Court of Appeals erred when it concluded that the continuation of the moratorium beyond April 1997 effected a taking because it did not "substantially advance a legitimate state interest."

A. The Ostensible Substantially Advance Test Is Not a Valid Takings Test

The "substantially advance" test is not a taking test at all, it is a due process test. As the City and its amici have explained, the opinions of the five-justice majority in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), if not a square holding on this issue, provide a direct and authoritative indication of how the U.S. Supreme Court will eventually resolve this issue.

Three additional points support the City's position. First, the U.S. Court of Appeals for the Fifth Circuit has recently embraced precisely the reading of Eastern Enterprises which the City now urges this Court to adopt. In Simi Investment Co. Inc v. Harris County, 256 F.3d 323 (5th Cir.), cert. denied, 122 S.Ct. 550 (2001), on application of rehearing en banc, the Fifth Circuit concluded that the plaintiff had properly challenged an allegedly arbitrary interference with its property rights under the Due Process Clause rather than the Takings Clause. Pointing to its earlier decision in John Corp. v. City of Houston, 214 F.3d 573 (5th Cir. 2002), the Fifth Circuit stated that, in general, it views the Takings Clause as providing more "particularized" constitutional protection for property rights than the Due Process Clause. Therefore, the court said, takings analysis should generally "control constitutional violations involving property rights that have been infringed by government action." Most importantly for present purposes, however, the Fifth Circuit said that there were several exceptions to this general rule, including cases involving alleged "deprivations of property based on... illegitimate and arbitrary

government abuse." Cases based on allegedly "illegitimate and arbitrary government abuse," the Fifth Circuit said, have to be brought under the Due Process Clause, and cannot be brought under the Takings Clause.

To support the conclusion that an allegedly arbitrary or illegitimate government action raises a due process issue, not a takings issue, the Fifth Circuit relied explicitly on the reasoning of the five-justice majority in Eastern Enterprises. See 256 F.3d at 323 n. 3. The Fifth Circuit observed that the Supreme Court "split 4-1-4, with five Justices concluding that a substantive due process analysis, and not a Takings Clause analysis, should be used to determine the constitutionality of the statute." The Fifth Circuit then went on to quote Justice Kennedy's statement that a case challenging government action as arbitrary or illegitimate "is controlled not by the Takings Clause but by well-settled due process principles." The Fifth Circuit also quoted Justice Breyer's statement, for himself and three other justices, "agreeing with Justice Kennedy and stating 'at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the public good."

Second, the Pacific Legal Foundation asserts (PLF Brief, at 6) that the U.S. Supreme Court's most recent takings decision, Tahoe-Sierra, supra, "confirmed" the validity of the substantially advance takings test. This assertion is incorrect. The Supreme Court in Tahoe, after explaining at great length why plaintiffs could not establish a taking under conventional takings analysis, briefly discussed "seven different [alternative] theories" which it said "arguably" might have been advanced to support the takings claim. Addressing one of these "arguable" legal theories, the Court said, in one sentence, that the plaintiffs might have argued

"that the TRPA moratorium did not substantially advance a legitimate state interest." The Court disposed of this hypothetical claim (which the plaintiffs never in fact raised), by observing, again in a single sentence, that it was "foreclosed by the District Court's unchallenged findings of fact." In short, Tahoe contains no discussion, much less any actual holding, that lends genuine support to the substantially advance test.

Finally, plaintiff and its amici read far too much into the result in City of Monterey v, Del Monte Dunes Limited, 526 U.S. 687 (1999). It is correct that the Supreme Court in that case affirmed a jury verdict finding a taking based on instructions which included the substantially advance test. But the decision does not undermine the precedent established in Eastern Enterprises. The defendant city in Del Monte Dunes waived its right to object to the jury instructions incorporating the substantially advance test, and therefore the Supreme Court ruled that the city had no standing to challenge the substantially advance test. Thus, the fact that the Supreme Court upheld the finding of a taking in Del Monte Dunes case has no precedential significance and does not undermine Eastern Enterprises.

Furthermore, a careful reading of the different opinions in Del Monte Dunes demonstrates that the decision actually reinforces Eastern Enterprises, First, no member of the Court spoke in defense of the substantially advance takings test. In addition, five of the justices either wrote opinions, or joined in opinions, expressly reserving the question of the validity of the substantially advance test, indicating that the result in the case should not be taken as an endorsement of the test. See 526 U.S. 687, 732 n. 2 (Scalia, J., concurring in part and concurring in the judgment); see id. at 753 n.12 (Souter, J., dissenting , joined by Justices O'Connor, Breyer, and Ginsburg). Notably, these justices included Justice Antonin Scalia, who, based on his earlier

decision in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), had generally been viewed as the leading champion on the Court of the substantially advance test. In sum, Del Monte Dunes supports (and certainly does not undermine) the conclusion that the substantially advance test is not a legitimate takings test..[3]

B. In Any Event, the Substantially Advance Test Should Not Be Interpreted As Going Beyond Conventional Rational Basis Review

Assuming, for the sake of argument, that there is some type of means-ends test under the Takings Clause, this test cannot properly be interpreted as being more demanding than traditional rational basis review under the Due Process Clause.

First, in substance, it is apparent that the substantially advance takings test and the due process rational basis test involve the same constitutional inquiry. In both cases, the courts are required to examine whether the government is pursuing permissible ends and whether it has selected permissible means to advance those ends. Because the legal inquiry is, at bottom, the same, it would be nonsensical to conclude that the courts should apply one standard in conducting the inquiry under the banner of takings, but apply a different standard in conducting the same inquiry under the banner of due process.

Second, as matter of historical fact, it is clear that the substantially advance takings test has simply been lifted out of due process cases and dropped into takings law. See Kenneth Bley,

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[3] Putting together the various different opinions in Eastern Enterprises and Del Monte Dunes, seven of the nine justices on the U.S. Supreme Court have now either explicitly repudiated or openly questioned the validity of the ostensible substantially advance test.

"Substantive Due Process and Land Use: The Alternative to a Takings Claim," in Takings: Land Development Conditions and Regulatory Takings After Dolan and Lucas, 289, 291 (1996). It would make no sense to conclude that the standard of review should change because what is, in reality, a due process inquiry has been transplanted into takings law.

Finally, there is no basis in U.S. Supreme Court precedent for applying a higher standard of review, at least outside the special context of development "exactions," when conducting means-ends analysis under the Takings Clause rather than the Due Process Clause. APA recognizes that this Court, in Mayhew v. Town of Sunnyvale, supra, expressed the view that the substantially advance test "is not equivalent to the 'rational basis' standard applied to the due process and equal protection claims," citing Justice Scalia's opinion for the Court in Nollan v. California Coastal Commission, supra. However, especially in light of the Supreme Court's subsequent decision in City of Monterey v. Del Monte Dunes at Monterey Ltd., supra, the APA respectfully submits that this no longer represents the best reading of U.S. Supreme Court precedent.

Nollan and the Court's companion decision in Dolan v. City of Tigard, 512 U.S. 374 (1994), both involved takings challenges to conditions requiring permittees to grant the public access to their property. Standing alone, these requirements indisputably would have effected per se takings. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("a permanent physical occupation... is... perhaps the most serious form of invasion of an owner's property interests"). The issue the Court addressed in both cases was whether a finding of a taking could be avoided because these requirements, rather than being imposed directly, were imposed as conditions attached to permits which the owners could refuse to accept. In Nollan

the Court said that a taking could be avoided by a showing that there was an "essential nexus" between the condition and legitimate regulatory objectives, and in Dolan the Court imposed the additional requirement that the condition be "roughly proportional" to the projected impacts of development. In Dolan, in response to the dissent's objection that the majority had placed too heavy a legal burden on the city, Justice Rehnquist justified a standard of heightened scrutiny on the ground that the case involved an ad hoc "adjudicative decision," and observed that the dissent was correct "in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights."

Following Nollan and Dolan, it was clear that the Court had established a higher standard of review, more stringent than that required under the due process rational basis test, for some category of cases. But the question was what was the scope of this category. The Court effectively answered this question in City of Monterey v. Del Monte Dunes at Monterey Ltd, supra. In a decision handed down approximately one year after this Court's decision in Mayhew, the Supreme Court ruled that the heightened Nollan/Dolan standards could not be extended "beyond the special context of exactions--land-use decisions conditioning approval of development on the dedication of property to public use." Id. at 602. While the exact definition of "exaction" is subject to some debate (does it refer only to physical-occupation conditions, or does it also include monetary conditions?), it is clear, at a minimum, that this ruling precludes application of the Nollan/Dolan standard to ordinary restrictions on the use of property, such as those at issue in Del Monte Dunes, or in this case.

In light of the foregoing, there are two independent reasons for the Court to reject the

conclusion that application of a means-ends takings test in this case (assuming a means-ends takings test exists at all) should involve a higher standard of review than ordinary rational basis review. First, this case is not subject to Nollan/Dolan heightened scrutiny because the case involves a taking claim based on a use restriction, not an "exaction." Under the holding in Del Monte Dunes, Nollan and Dolan simply do not apply. Second, this case involves a taking claim based on a "generally applicable zoning regulation" and, therefore, under the reasoning of Dolan, the City's zoning is not subject to heightened scrutiny for this independent reason. The City's rezoning clearly meets the definition of a generally applicable zoning regulation because it was adopted by the city's legislative body as part of a comprehensive rezoning of a significant portion of the community.

C. Under Any Standard, the Moratorium was Entirely Reasonable and Did Not Result in a Taking

Assuming again that regulatory takings law includes a means-ends analysis, and regardless of what standard of review applies, the Court should reverse the conclusion that the continuation of the moratorium beyond April 1997 resulted in a taking.

First, the finding of a taking is flawed because the moratorium was the necessary first step toward adoption of the City's zoning amendment. The Court of Appeals concluded that the rezoning reasonably advanced a legitimate public purpose. Given that conclusion, it necessarily follows that the moratorium also served a sufficiently legitimate public purpose to avoid a finding of a taking. After all, the sole purpose of the moratorium was to prevent plaintiff and other owners from developing their properties in accordance with the prior zoning which, the Court of Appeals acknowledges, the City was entitled to change.

Second, the Court of Appeals was wrong in its conclusion that the City acted unreasonably by extending the moratorium because it had assembled all the information it needed to make a decision by that date and, therefore, had no excuse for not making its decision by that date. The Court ignored one of the basic functions of a moratorium, which is to create an opportunity for vigorous democratic debate to proceed. A development moratorium creates the possibility for full and effective public participation in land-use decisions affecting the entire community. Without some means to hold development in abeyance, the pace of ongoing development activity would create enormous pressure on community planners to adopt a plan or land use regulation without full citizen input in the process. The use of a development moratorium allows "the planning and implementation process... to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view." Garvin & Leitner, *"Drafting Interim Development Ordinances: Creating Time to Plan"*, 48 Land Use Law and Zoning Digest, No. 6 (1996). See also Robert H. Freilich, *"Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning",* 49 J. Urb. Law 65, 79 (1971) ("One objective of interim development controls is the promotion of public debate on the issues, goals and policies of planning and of the development controls proposed to implement the plans.")

In the recent Tahoe case, the U.S. Supreme Court endorsed the idea that a moratorium facilitates democratic debate. The Court said that the Tahoe Regional Planning Agency's moratorium, which lasted nearly three years, "enabled [the agency] to obtain the benefit of comments and criticisms from interested parties." The Court also observed, in rejecting the proposal that it impose an arbitrary one-year cap on moratoria, that such a rule "would only serve

to disadvantage those landowners and interest groups who are not as organized or as familiar with the planning process."

In this case, it is reasonable to conclude that the moratorium served to facilitate a healthy, if somewhat contentious, public debate. At the beginning of the moratorium there was a political gridlock within the community on the rezoning issue. The availability of the results of technical studies, while a necessary precondition for a thoughtful decision, did not resolve the debate. After an additional year of debate, the gridlock was broken and the City made the decision to proceed with the rezoning. Absent the power to impose a moratorium which allowed this process to unfold, the question whether to rezone or not would have been made by default by plaintiff and other developers acting in their own financial self interest. The City's decision to allow the democratic process to operate past April 1997 cannot support a finding of taking.

CONCLUSION

For the foregoing reasons, and for the reasons stated by the City and the City's other amici, APA respectfully requests that this Court reverse the judgment of the Court of Appeals.

Respectfully submitted,

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