June 2003

Property Owners Cannot Repeatedly Challenge Regional Planning Process Every Time That Development Permits Are Denied

Liwen Mah

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38FG0T

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
Property Owners Cannot Repeatedly Challenge Regional Planning Process Every Time that Development Permits Are Denied

How many times can an association of property owners challenge a regional process for limiting development in ecologically sensitive areas? After five lawsuits spanning nearly two decades arose from the same set of facts, the Ninth Circuit decided in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* that once is enough.

The situation involves one of the world's most pristine bodies of water, Lake Tahoe. The nation's largest mountain lake, Lake Tahoe is a two-million year old lake nestled in the Sierra Nevada and straddling the border of California and Nevada. The water is unusually clear because of the paucity of dissolved nutrients in the lake, but the conditions are worsening due to development around the lake. Property development around Lake Tahoe in the last sixty years has increased watershed erosion and runoff into the lake. This disturbance increases the amount of dissolved nutrients, which in turn promotes the growth of algae. The algae further reduce the water's clarity and also deplete the oxygen available to support natural fauna. In response to this threat, California,
Nevada, and Congress created the Tahoe Regional Planning Agency ("the Agency") in 1969 to regulate regional development. The resulting tension between the public interest in preservation and the private interest in freedom to develop property has led to extensive litigation including this action, which the Ninth Circuit barred under the doctrine of res judicata.

The Tahoe-Sierra Preservation Council (TSPC) represented numerous private property owners in the Lake Tahoe vicinity in two similar suits filed in 1991 and 2000. In both of those cases, the plaintiffs challenged a 1987 plan that the Agency had developed to restrict development in various Tahoe residential parcels, depending on the ecological risk. The plan requires the Agency to assign a score to each parcel based on this risk, and annually determine for each county what minimum score will qualify for development permits that year. If enough owners agree to permanently refrain from developing a predefined proportion of the environmentally sensitive parcels within a county, the Agency must lower the minimum score that a parcel must have to qualify for permits. Owners of parcels that scored no more than ten percent below the minimum criterion may still receive a permit by undertaking mitigation efforts. The Agency initially predicted that it would be able to lower the California threshold score for permits, but it has not yet done so because too few parcels have been retired from development.

Disappointed, TSPC in both cases challenged the plan’s prohibition of certain uses on parcels that scored below the minimum criterion and the Agency’s refusals (in 1990 and in 1999) to reduce the minimum criterion in a timely manner. TSPC alleged that the Agency’s refusals constituted an uncompensated taking of property rights, in violation of the Fifth Amendment. To support its claim of a taking, TSPC argued that the Agency’s actions would effectively bar owners from developing the most environmentally sensitive parcels on the California side of Tahoe.

7. Id.
8. Id. at 1069 (noting that litigation between the same two parties had resulted in ten previous published opinions).
9. Id.
10. Id. at 1070 (describing how the Agency's Individual Parcel Evaluation System scores the environmental appropriateness of various parcels for development).
11. Id. Any owner of a parcel with a score below the minimum set for the county thus cannot develop the parcel that year.
12. Id. at 1072 (these proportions must reach 80% in California counties and 66.7% in Nevada counties before the Agency can lower the permit criteria).
13. Id. at 1072.
14. Id. at 1073.
15. Id. at 1078-79.
The Ninth Circuit avoided resolving the substantive issues raised by the lawsuit, relying instead on the doctrine of *res judicata*.

In finding the lawsuit barred, the court explained that *res judicata* promotes the societal value of finality in a dispute. Finality conserves judicial resources and ensures that litigants can rely on judgments by the courts. Finality also protects winning parties from the costly burden of having to revisit settled matters. With respect to an earlier judgment, "*res judicata* is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." Identity of claims arises if two suits originate from the same "transactional nucleus of facts." Identity of claims does not require that the claims in the present case were actually litigated previously, only that the claims could have been litigated. This prevents an imaginative plaintiff from renewing a dispute just by suing under a different theory. A judgment may be considered final and on the merits even when the resolution was by dismissal, as when the statute of limitations has run.

Privity is a measure of the relationships between the parties. The concept of privity includes at least those parties who are the same as the parties in an earlier suit arising from the same transactional nucleus, but may also include other parties that have a sufficiently common interest with the primary parties.

Considering identity of claims, the court held that TSPC did assert or could have asserted its claims in its 1991 action. The claims in the later action in 2000 arose from the same nucleus of facts, because the Agency's plan and its manner of application were established and known before 1991 and had not changed since. The rules of the 1987 plan dictated the Agency's 1990 and 1999 refusals to lower the threshold score for development, so the 1999 refusal did not constitute a different transaction or occurrence from the earlier refusal. Also, although the Agency initially predicted that it would be able to allow more development in

---

16. *Id.* at 1075-76.
17. *Id.* at 1077.
18. *Id.* (quoting *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997)).
19. *Id.*
21. *Id.* at 1143
22. *Tahoe VI, supra* note 4, at 1078.
23. See *Id.*
24. *Id.* at 1081.
25. *Id.* at 1081-82.
26. *Id.*
27. *Id.* at 1078.
28. *Id.*
29. *Id.*
California by 2000, the court found that the Agency had reset that expectation prior to the 1991 suit. By that time, the owners knew the scores of their parcels, knew what would be required for the threshold score to drop, and knew how the plan would be applied in the future, so identity of claims existed.

The court further found that the 1991 action resulted in a final judgment on the merits, because TSPC’s claims were dismissed because of the statute of limitations. Finally, the court found privity under the doctrine of res judicata because TSPC and most of the joined individual plaintiffs were all litigants in prior actions against the Agency. Even the individual plaintiffs who were not explicitly parties in the earlier suits were adequately represented by the TSPC, so the court found that they were also in privity. The court stated that only plaintiffs who might have a possible claim are the owners of parcels that scored no more than ten percent below the minimum criterion and who thus qualify for permits by carrying out mitigation as determined by the Agency. If any of the plaintiffs applied for this mitigation program, the Agency would determine the mitigation requirements for each parcel uniquely, so this application of the plan would not be part of the same transaction as the 1987 plan itself. However, none of the plaintiffs had ever applied for the mitigation program or learned what mitigation would be required, so these plaintiffs had no ripe claim regarding the constitutionality of those requirements.

In this latest of judgments about development restrictions in the Tahoe Basin, the court emphasized two points by affirming the dismissal of TSPC’s claim under the doctrine of res judicata. First, if the rules of a development plan rigidly constrain the discretion of the administering agency, plaintiffs have only one opportunity to challenge those rules and their application. Second, if an association represents a group of

30. Id. at 1078-79 (the court found that even the facts in TSPC’s 2000 complaint admitted as much).
31. Id. at 1080.
32. Id. at 1081. The earlier suit was Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 992 F. Supp. 1218, 1221 (D. Nev. 1998).
33. Id. at 1081.
34. Id. at 1082-83 (none of the plaintiffs alleged that the Agency had applied the plan differently to them than to any other property owners, so the court found all the plaintiffs to be similarly situated). But cf. Perez-Guzman v. Gracia, 2003 U.S. App. LEXIS 20617 (1st Cir. 2003) (finding that privity depended on whether plaintiff association was formed for the avowed purpose of actively representing the interests of its individual members before various regulatory agencies and had the authority to bring claims on behalf of its members).
35. Id. at 1085.
36. Id. at 1086.
37. Id.
38. Id. at 1080.
property owners, privity may exist even with owners outside that association, because the court is wary of groups of individual plaintiffs evading res judicata.\textsuperscript{39}

\textit{Liwen Mah}

\textsuperscript{39} \textit{Id.} at 1084.