# Cambria's Water War:
# Legal Analysis of the Building Moratorium and Its Implications for Land Owners

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## Executive Summary and Findings

In 1986, after a series of water shortages, the Cambria Community Services District (CCSD) instated a water wait list, whereby property owners could register their parcel for future water service. The list was closed to new applicants in 1990 after approximately 700 properties were added; over 5,000 undeveloped parcels were not added to the list. In 2001, the CCSD declared a water emergency and ceased all residential development in Cambria.

While the CCSD officially instated a building moratorium as a consequence of this emergency declaration, there has existed a *de facto* building moratorium since the water wait list was implemented in 1986. The result: 43% of property owners in Cambria are denied the right to develop their parcels into single-family homes. Those who were able to develop have enjoyed inflated property values due to a restricted market that sees no new growth.

Does this fact pattern give the deprived parties standing to sue the CCSD for suffering a regulatory taking, compensable under the Fifth Amendment of the United States Constitution? The analysis of applicable precedent fails to give us a conclusive answer. While the Supreme Court has recognized that a regulatory taking can occur, it has avoided the establishment of any *per se* rules to determine when this is the case.

The determination appears to hinge on whether the deprived parties have been denied *all economically beneficial uses* of their property. If this is found to be true, then such parties will likely be entitled to compensation, otherwise no compensation will be awarded. In the end, it is impossible to predict any determination, as the Supreme Court has made it abundantly clear that it is preferable to engage in case-by-case analyses.

## Preface

Water is a fundamental element of human existence. Therefore, little development has occurred where areas have lacked sufficient water resources. Only within the last several thousand years has humanity learned to harness the power of water, to build systems to direct its flow, and to bring this essential resource to areas that have historically lied fallow. While we may often look back on ancient engineering techniques as marvels, such projects pale in comparison with today's water management practices. Only recently, with the development of mechanical pumping mechanisms, countless miles of piping, reservoirs, dikes, dams, and intelligent water direction systems, has humanity been able to extend its reach into areas previously considered uninhabitable. Where desert climates reigned for eons, we now enjoy afternoon games of golf on manicured courses, and water is universally available with the turn of a spigot. It is no wonder, then, that humanity has built permanent dwellings in areas that only previously supported seasonal residence. It is in such a region that we find the peculiar case of Cambria, a bucolic town on the Central Coast of California.

Driving through the sleepy town of Cambria, one might be surprised to learn that things are not as calm as appearances suggest. Cambria lacks a reliable source for water, which has resulted in a heated political battle that has raged on for decades between various factions of property owners within the community. In an effort to protect the existing water basins from whence Cambria extracts its water, growth-restricting mechanisms have been enacted, dividing the property owners of Cambria into three distinct categories: those who have access to water, those who will have it eventually, and those who will never have it. These growth measures have resulted in considerable increases in property value for existing developments, while the owners

of vacant land have experienced precipitous declines in their own property values.

Bearing witness to this potentially inequitable situation, I pose the question of whether the deprived property owners have suffered a regulatory taking and are entitled to compensation for their losses. Consequently, this report hopes to couple the facts of Cambria's water predicament with an analysis of current regulatory takings case law. This report also hopes to elucidate the arguments of each side, and reduce the often-heated and biased exchange by providing an objective and fair assessment of the situation.

## Introduction

In 1986, after years of water shortages due to low rainfall, the town of Cambria enacted a water wait list for new water connections in order to stabilize demand until the situation was mitigated. The Cambria Community Services District (CCSD) allowed for the registration of approximately 700 parcels to the list before ultimately closing it to new applicants in 1990. Approximately ten years later, in 2001, the CCSD, sensing no real solutions to the water shortage dilemma, instated a "water emergency" that was to last until the matter was definitively resolved. This emergency condition allowed for the instatement of regulations that the CCSD deemed necessary to manage the availability of water for existing connections. One of these regulations included the now-infamous building moratorium, effectively stalling growth and limiting future development.

Consequently, nearly 43% of Cambria's property owners were—and continue to be—disallowed the highest and best use of their property: development into single-family residences. Furthermore, due to the technicalities of the moratorium, the wait list, and the existing water supply, development has been increasingly considered by these owners to be a dead-end, whereby no means seem to exist that might allow them to develop their properties.

Does such a fact pattern give rise to a claim of a regulatory taking, with the property owners entitled to just compensation? In this report, I hope to explore the answers to this question. I shall begin by discussing the facts of the water situation in Cambria. I will then analyze the relevant regulatory takings rules set by landmark court decisions, and match the precedent of each case with the facts present in Cambria. Finally, I will provide the best answer to this question based on my findings, as well as submit any additional considerations.

## Statement of the Facts[1]

*Current Sources of Water in Cambria*

Cambria's municipal water source, managed by the Cambria Community Services District (CCSD), is supplied exclusively from two wells which draw from the Santa Rosa and San Simeon groundwater basins. Both basins are recharged via the Santa Rosa and San Simeon creeks, respectively. These creeks are entirely dependent on seasonal rainfall.

Currently, Cambria's water system can withdraw a cumulative total of 1,230 acre-feet of water per year (AFY)[2] from both basins. It is important to note here that additional water is available, but extraction is limited to 1,230 AFY by existing California Coastal Commission permits. The 1,230 AFY is drawn entirely from the San Simeon basin; no water is drawn from the Santa Rosa basin during the dry season, as diversion is considered to threaten existing riparian habitat, as well as place several endangered species at potential risk. Only during the wet season can the CCSD supplement its system with water from the Santa Rosa basin—however, the San Simeon basin fulfills all necessary community water requirements during the wet period. Consequently, little water is drawn from the Santa Rosa basin and remains effectively unused, despite its potential to supply an additional 518 AFY. Were the CCSD to extract any water from the Santa Rosa basin, the District would run the risk of violating the limits set by the California Coastal Commission.

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1 It should be noted that the information in this section has been entirely obtained from the Cambria Community Services District's Water Master Plan (WMP), published in 2008. The WMP is available in full online at http://www.cambriacsd.org/cm/water_wastewater/Water%20Master%20Plan.html. See *Works Cited* for more information.

2 An acre-foot is a unit of volume for large-scale water resources. The dimensions of an acre-foot are 66 ft. x 660 ft. x 1 ft. Total volume is approximately 325,851 U.S. liquid gallons.

*Declaration of Water Emergency*

The community of Cambria was created over the course of several decades spanning from the 1920s to the 1940s by the Cambria Pines Development Company. This process subdivided the existing land into 11,923 parcels with an average lot size of 0.25 acres. While development was originally encouraged, residents eventually soured on this notion after a series of water shortages in the 1980s. In 1986, the CCSD, which controls access to water via a permit system, instituted a wait list in which property owners could vie for a position until a permanent solution mitigated the water shortage issue. The list was closed on December 31, 1990, but not before approximately 700 property owners added their parcels to the registry.

In 2001, after several successive years of low rainfall and continuing water shortages, the CCSD declared a California Water Code §350 Emergency. The "350 Emergency," encompassing Water §§350-359, is summarized in part hereafter and codifies the following:

§ 350 : A water authority may declare an emergency should it find that it cannot serve ordinary demands without depleting the water supply to dangerous levels.

§ 353 : Upon declaration, the authority may regulate or restrict water use with *sound discretion*[3] to conserve water for the *greatest public benefit*.[3]

§ 355 : Such regulations or restrictions shall remain in full force and effect until the existing water supply has been *replenished or augmented*.[3]

§ 356 : Such regulations or restrictions may include the right to deny applications for new or additional service connections.

§ 357 : Emergency regulations shall have supremacy in any conflicts with existing laws, or entitlements of individuals to water service.

§ 358 : The statute does not prohibit a court with proper jurisdiction to review the declaration's causes for *fraud, arbitrariness, or capriciousness*.[3]

3 Emphasis added to key elements of the statute.

*Resultant CCSD Policies*

The following is an abbreviated list of resultant regulations from the emergency declaration.

- **Building moratorium.** After the emergency declaration, the CCSD issued a building moratorium that was to last indefinitely, with its cessation contingent only upon the implementation of a permanent solution to the water shortage issue. Therefore, development has officially ceased in Cambria since 2001 when the water emergency was declared. Though, practically speaking, residential development has all but ceased since the water wait list was originally instated in 1986. This has resulted in two moratoria: the official and temporary (though indefinite) building moratorium for properties on the wait list, and a *de facto* and permanent moratorium for properties that never had the opportunity to be added to the list.
- **Water meter transfers.** The CCSD allows for the transfer of existing water meters and wait list positions from parcel-to-parcel (including owner-to-owner), with the condition that the parcel from which the permit or wait list position is being transferred from is permanently stripped of its development rights (known as lot retirement, discussed further in the *Build-out Reduction Program* section).
- **Retrofit program.** All new construction and the resale of existing dwellings require retrofitting with specified water conserving fixtures, including, but not limited to, new water meters and front-loading clothes washers.

*Consequences of CCSD's Policies*

**Building moratorium.** Those who owned property with access to water experienced a dramatic increase in property value as the supply of potential new homes became limited. Even properties that lacked access to water, but held a position on the wait list, saw a precipitous increase in property value. At the same time, however, individuals who owned property with neither a permit nor the hope of securing one saw their property become worth very little. Until a permanent solution to the water shortage issue is implemented, no development of parcels on the wait list shall be allowed.

**Water meter transfers.** Water meters may be sold, as they are a transferable commodity. At present, this is the only means by which a property owner can secure access to water and subsequently develop their parcel. In other words, owners of parcels that lack a wait list position may purchase water meters from existing residents. Single water meters—essentially, access to water and nothing else—have sold for as much as $366,000. Wait list positions may also be sold or transferred. A position on the list can can sell for anywhere from $100,000 to $200,000, depending on the position the parcel enjoys; higher positions on the list command much higher prices as they are anticipated to receive access to water years or even decades before others.

Since the wait list was closed to additional applications on December 31, 1990, the remaining 5,085 vacant properties which did not secure a position between 1986 and 1990 have no possibility of being added to the list. Therefore, for the nearly 43% of the land owners in Cambria who did not have the opportunity to join the wait list, there exists no possibility of development. These owners will simply never receive a connection to water.

*CCSD Limits Ultimate Build-out of Cambria*

During a July 2003 Board of Director's meeting, the CCSD passed a motion to limit the ultimate build-out of Cambria by reducing the allowable number of residential water connections to 4,650. This build-out figure includes 3,828 existing residential connections, 37 connections that were currently being processed at the time, 84 unallocated meters to be eventually distributed by the CCSD, and the 701 wait list properties which would be granted connection at some future but as yet undetermined time.[4]

*Build-out Reduction Program*

There are serious elements of discontent between property owners in Cambria, for a schism exists within the community that divides the "haves" from the "have-nots." In Cambria's case, the "haves" were able, through either current or past owners, to develop their parcels and presently enjoy living in a rural coastal village; the "have-nots" are unable to develop their parcels, and, if they failed to secure a wait list position in the late 1980s, are unlikely to ever have the opportunity for development. The latter group constitutes approximately 43% of the overall property ownership in Cambria, or 5,085 parcels, so the issue is highly contentious.

In an effort to limit the number of residential connections to 4,650, per the CCSD Board's motion in 2003, the 2008 Water Master Plan included a measure titled the Build-out Reduction Program (BRP). By implementing the BRP, the CCSD contends that the program will maintain

4 There exists a discrepancy in the CCSD report regarding these numbers. While the ultimate build-out figure of 4,650 was reportedly calculated based on these figures in the 2008 Water Master Plan, the stable number of wait list registrants is 666 per wait list documents accessed in May of 2014. The status of the additional 35 wait list positions is presently unknown. Furthermore, the CCSD's Build-out Reduction Program cites 65 unallocated meters, rather than 84, that would be eventually distributed to fund the program.

Cambria's way of life, protect open spaces and pine forest, and conserve water. The BRP aims to accomplish these goals by purchasing lots from voluntary private sellers and “retiring” them through conservation easements that would prohibit their development in perpetuity.

The BRP is anticipated to cost the CCSD approximately $38.8 million dollars; of that, $29.3 million has been budgeted for land acquisition alone. The BRP expects to purchase 879 lots from private owners at a calculated average of $33,000 a piece. The primary funding for this program is expected to come from the sale of 65 unallocated water permits by the CCSD at $300,000 a piece. These permits will be released at the rate of three per year as to not distort the existing permit market, spreading the scope of the BRP over 22 years. Further funding is anticipated to come from an additional fee of $10,127 for new water connections—essentially, properties on the water wait list that are granted meters—as well as an approximate $1,000 fee assessed for all residential remodel projects in Cambria. Additionally, there will be a special water rate increase of $8.81 a month for existing residential customers and $39.40 a month for commercial customers.

The mechanism for lot retirement—the removal of all future development rights for a parcel—is as follows: first, the CCSD will transfer three water permits to local land trusts each year. Second, these local land trusts will sell the permits on the open market to private parties seeking to more quickly develop their parcels. The CCSD anticipates that each meter shall sell for around $300,000, which is the expected cost that the market will bear (though, historically, meters have sold for as much as $366,000). The proceeds from these meter sales will then directly finance the land trusts' purchase of vacant lots from voluntary private sellers. These parcels are then retired through deed restrictions or conservation easements, effectively removing

these sites from any future development prospects. In addition to land acquisitions by land trusts, the CCSD expects that 1,728 lots will be voluntarily retired by land owners (with no payment necessary), or merged with neighboring developed parcels.

As an outcome of the BRP, nearly 28% of the total lots in Cambria (3,357 parcels, to be precise) will remain undeveloped via the established build-out limit of 4,650 connections. According to the CCSD's own BRP materials, this means that Cambria will retain those qualities that its residents and visitors find desirable: open spaces, ample pine forests, and a resolution to the long standing water shortage problems through ensuring limited residential development (2008 WMP, BRP Info Pamphlet, 1).

*Future of Cambria's Water Situation*

The future of Cambria's water situation appears to be fairly static. What follows is a short list of ongoing disputes which, depending on the outcomes of each, may change the landscape of Cambria politically, financially, and perhaps even physically.

**Desalination project.** The CCSD's 2008 Water Master Plan (WMP) surveyed several alternatives seeking to mitigate the long-standing water shortage issue. These alternatives included seasonal storage via the construction of a new reservoir, a pipeline from the Nacimiento or Whale Rock reservoirs, additional access to water basins farther north along the coast, or the construction of a water desalination plant. The WMP ultimately concluded that the construction of a desalination plant is the most viable option given the costs, environmental concerns, and potential legal imbroglios of the other alternatives. The CCSD has taken steps to construct the desalination plant, including coordination with the United States Army Corps of Engineers to

identify appropriate building sites for the plant where it might be most effective. To date, nearly six years after the issuance of the report, the project has effectively stalled due to myriad political reasons. Most notably, the California Coastal Commission has disallowed the exploratory drilling necessary to identify appropriate project sites. Furthermore, local citizen groups have hotly debated the idea of desalination. Current owners generally disfavor the project for fear of increased growth, while property owners on the CCSD wait list are in favor, as this is a necessary step in lifting the building moratorium. Were the project to move forward, water would be reliably available to the 4,650 potential connections, which would allow for the lifting of the building moratorium and the development of the parcels registered on the CCSD's wait list.

**Building moratorium.** Concerning the moratorium, there was some discussion by the CCSD during 2012-2013 to temporarily lift the building moratorium and allow for the issuance of water permits to the first ten properties on the CCSD's water wait list. The reason for the temporary lifting appears to be due to a population decline of approximately 200 residents since the moratorium was put in place in 2001, as well as better-than-expected results from the CCSD's ongoing water conservation program. This suggestion appears to have been stymied by the CCSD's counsel who suggested that the District might open itself to potential litigation given that the original water supply has not been "augmented or replenished," per CA Water §350, since the emergency was declared in 2001 (Matt Fountain, 2012).

## State of the Law: Regulatory Takings Jurisprudence

*Constitutional Law: Fifth Amendment*

The Fifth Amendment to the United States Constitution provides that persons shall not be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." In this last sentence of the Fifth Amendment, the Constitution authorizes the use of eminent domain, or a state's power to seize private property for public use, with the requirement that the state must properly compensate the owner of the property being seized. While the Fifth Amendment was not originally thought to apply to states, but rather exclusively to the federal government, the process of incorporation by the courts set forth the precedent that states shall be subject to constitutional law, setting the standard as the Constitution as the supreme law of the land.

The Constitution is relatively silent on the elasticity of the "takings clause," as it is now known. While the Constitution obligates states to compensate owners for the properties seized, we are left wondering whether this clause merely covers physical invasions or something more, and whether or not "property" is merely physical land, or other forms of ownership both tangible and abstract. Only in subsequent Supreme Court decisions do we begin to see a coalescence of opinion on what the takings clause means, and to whom it applies.

*Pennsylvania Coal v. Mahon: Establishing the Concept of Regulatory Takings*

It is of little constitutional doubt that, were a state to physically appropriate the land of a private citizen, that state would be obligated to compensate the owner for the seized property. Eminent domain has long been used to consume property so that public works projects of all

varieties might be constructed. This is certainly an agreeable principle, for even the Framers of the Constitution thought it so necessary as to specifically codify it into their founding document, a document that is known to be deliberately vague. Without a state's power of eminent domain, there is little doubt that we would be unable to enjoy vast highway networks, water treatment plants, libraries, and any number of other public facilities. In essence, an effective government relies on its power to appropriate land in limited cases. Yet, there is a common element among these public goods: physical appropriation of tangible property. What if a state uses its police power to regulate a sector of the economy such that a specific class of individuals are deprived, in some sense, of the right to their lawfully owned property? Furthermore, what if this deprivation isn't physical but economic or otherwise?

Historically, the Court has largely deferred to Congress's power to regulate, and has even more greatly emphasized individual states' police powers in the regulation of property rights. While there have been several cases which seek to better elucidate the limits of legality for a physical taking, none had addressed the issue of whether a regulation can constitute a taking under the Fifth Amendment. While the jurisprudence of physical appropriation was well understood—and, arguably, the most simple—there did not exist any precedent on the subject of regulatory takings for the majority of the Republic's history. The closest applicable precedent for regulatory takings, *Mugler v. Kansas* (1887), held that "the proposition that an exercise of the police power could never be a taking...even if [regulations] deprive property holders of all economic use of their property" (Barros 504). It is not until 1922 with the landmark case *Pennsylvania Coal v. Mahon (1922)* that we see the tide begin to turn towards the disfavor of a state's power to regulate without providing compensation for the resultant damages.

In 1878, Pennsylvania Coal sold the surface rights to a parcel of land to H.J. Mahon. As a stipulation of the sale, Pennsylvania Coal retained all subsurface mining rights to the parcel, and solicited from Mahon an agreement to waive all claims of damage from any future mineral extraction by the company. In 1921, the Commonwealth of Pennsylvania passed the Kohler Act, which effectively barred mining companies from extracting coal where there was a threat of the subsidence of habitable structures. In an effort to prevent Pennsylvania Coal from extracting the property's subsurface coal, Mahon brought suit citing the Kohler Act and concerns about subsidence. If Pennsylvania Coal was to be barred from its right to extract legally-owned resources, did they suffer a regulatory taking?

The Supreme Court ultimately held that the Kohler Act did, in fact, constitute a regulatory taking, and Pennsylvania Coal was entitled to just compensation. In perhaps the most noteworthy quote from the case, the majority states that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change" (Penn. Coal). *Penn. Coal* also establishes the so-called "diminution of value" test, whereby "if a regulation goes too far, it will be considered a taking" (Penn. Coal). Essentially, per *Penn. Coal*, courts must consider the extent of diminution, and if it reaches a certain magnitude, a taking is effected and just compensation is required. The Court, however, is silent in *Penn. Coal* as to what qualifies as an appropriate magnitude of diminution.

*Penn Central Transport v. New York City: Reasonable Rates of Return*

*Penn. Coal* establishes the precedent that regulations can effect a taking and thus obligate a governing agency to compensate for economic losses. Unfortunately, this was perhaps the most lucid result, for the decision left many lingering questions for future courts to decide. While it was established that a regulation could result in a taking of private property, this notion rested on the assumption that there was a certain—but otherwise undefined—diminution of value; a regulation constituted a taking when it went "too far" (Penn. Coal). In *Penn. Coal*, we saw that "too far" could be defined as a total evisceration of value, as the mining company was unable to extract coal it legally owned. Since the value of coal is exclusively bound to its ability to be mined, to prohibit the extraction of it necessarily diminished its value to nothing. In a way, *Penn. Coal* resulted in an easy answer for the Supreme Court, because all value was lost as a consequence of a regulation. How should the Court handle future cases where there is only a partial loss of economic value?

To answer this question, we can turn to the next landmark case in regulatory takings: *Penn Central Transport v. New York City (1978)*. In 1965, New York City signed into law the New York City Landmarks Law, which was a direct consequence of public outcry for the preservation of buildings that exhibited particularly special architectural designs or had some form of cultural value for city residents. Subsequently, several hundred sites throughout the city were deemed to have historic value, and the owners of such parcels were obligated, at their own expense, to maintain these sites in good order so as to preserve their desirable qualities. Essentially, New York City was using land-use regulations to preserve historic sites, rather than the traditional means of appropriation through eminent domain.

During this period, Penn Central Transport owned Grand Central Terminal, which was deemed an historic site by the Landmarks Law. Penn Central, who was experiencing financial difficulties due to a precipitous decline in railroad usage, retained the services of an architect to study any feasible means by which they might construct an office building above the terminal. Penn Central then entered into a 50-year lease with a British company who would construct the building for Penn Central, and thereafter pay rents for its occupation. This deal was expected to result in over $150 million in revenue for Penn Central over the course of the lease. Penn Central and the British company agreed on two plans: one, a 55-story office building would be cantilevered above the existing terminal, which would preserve its facade; or two, a 53-story building would be constructed on the site and necessitated the demolition of the existing station's structure. Both plans were submitted to the NYC Landmarks Preservation Commission, which were summarily rejected, as both designs would fundamentally alter or remove the desirable features deemed by the commission to be of great historic value.

Does this rejection constitute a taking under the Fifth Amendment? The Supreme Court ultimately ruled that it does not, for the historic landmark designation is defensible in two ways. Firstly, the Court notes that "[l]egislation designed to promote the general welfare commonly burdens some more than others" (Penn Central). Secondly, this designation, and the subsequent rejection by the commission to renovate, did not interfere with the current profitable use of the property, as Penn Central Transport was still receiving an admittedly reasonable rate of return on their investment. The Court notes in the majority opinion that a "major theme of law" is to ensure that land owners might receive such reasonable rates of return on their investments, and that the maximum latitude shall be granted to land owners to use their parcels in ways not

inconsistent with the preservation commission's goals (Penn Central).

The Court also notes some points that are germane to our discussion regarding Cambria, and shall hence be further explored. The Court argues that the Fifth Amendment was designed to prevent government "from forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole" (Penn Central; citing *Armstrong v. United States[1960]*). However, the Court has never felt comfortable setting *per se* rules to determine when a regulation becomes too destructive to the economic interests of others. In *Goldblatt v. Hempstead (1962)*, the Court contends that there exists "no set formula to determine where regulation ends and taking begins" (Goldblatt). The Court appears to prefer reviewing cases on an individual, fact-driven basis, rather than set a standard for future courts to follow.

The Court sheds further doubt on the elasticity of the Fifth Amendment regarding regulatory takings:

> A "taking" may be more readily found when the interference with property can be characterized as a physical invasion by government…than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good (Penn Central).

As has already been discussed, physical appropriations are simple and easily adjudicated, but the assessment of regulatory takings quickly becomes difficult. The Court has historically upheld land-use regulations that had significant adverse effects on owners' property rights. In *Village of Euclid v. Ambler Realty Co. (1926)*, we see that a land-use regulation prohibiting the establishment of industrial businesses is a legitimate regulation that does not constitute a taking. Per *Gorieb v. Fox (1927)*, a regulation requiring portions of parcels to remain un-built does not go "too far" and give rise to a takings claim. Height restrictions in *Welch v. Swasey (1909)* are

also acceptable land-use restrictions that significantly infringe on a property owner's right to the full use of their land. In short, the Court argues that there exists many restrictions on property use that are simply not serious enough to obligate a governing agency to compensate the owner, despite tangible reductions in economic value to one or more parties.

It is worth noting, however, that the Court does concede in *Goldblatt* that a restriction on one's usage of their property must serve a vital public interest, for if the restriction is not necessary to achieve such a public interest, then it shall be considered a taking. Justice Stevens, who writes in a concurring opinion to *Moore v. East Cleveland (1977)*, notes that a regulation could rise to a level of a taking if the regulation "has an unduly harsh impact upon the owner's use of the property."

Regardless, *Penn. Coal* sets the baseline where a certain (but otherwise undefined) diminution in value does rise to a level of a taking, with subsequent cases failing to clearly define a numeric value where the diminution of value morphs from acceptable collateral damage into a governmental taking. In *Euclid*, we see a 75% diminution of value that fails to trigger a regulatory taking, while in *Hadacheck v. Sebastian (1915)*, an 87.5% diminution of value also fails to be sufficiently destructive. Therefore, we can only assume that a diminution of value alone is not sufficient to constitute a regulatory taking. Rather, the Court appears to opt for a case-by-case analysis of the facts to determine whether a regulatory taking has occurred.

In a separate but equally compelling point, the dissent in *Penn Central* argues that by way of the preservation scheme, "the property owner is under an affirmative duty to preserve his property as a landmark at his own expense." To the justices joining the dissenting opinion in *Penn Central*, historical preservation does constitute a taking, as it prohibits property owners

found in possession of such landmarks from realizing the highest and best uses of their property. While they are still allowed a modest rate of return, they cannot capitalize on greater investment opportunities because of the prohibitive regulation. Therefore, the cost of maintaining the historic sites should be borne by the public through the traditional means of eminent domain and just compensation. Otherwise, the burden shall fall on a few to the unfair benefit of many.

*Lucas v. South Carolina Coastal Council: Total Diminution of Value*

Before proceeding further, we should briefly summarize the state of the law prior to *Lucas*. In *Penn. Coal*, the Court had established that regulations could constitute a taking, but only upon going "too far." For the Pennsylvania Coal Company, this turned out to be the case, as the Kohler Act had effectively reduced the value of their coal deposits to little, if nothing. Yet, many questions remained as to the exact nature of what constitutes a regulation going "too far." In *Penn Central*, the Court made it clear that the investment opportunities of private parties may be retarded when such parties are already receiving a reasonable rate of return on their investments. Since Penn Central Transport was continuing to receive a reasonable rate of return on their investment in Grand Central Terminal, regulations that prohibited them from realizing over $150 million in profits were still legal, as they served a vital public interest of historical preservation. The Court had preferred to stand by its precedent in *Penn. Coal*, opting to review cases on an individual basis with ad hoc, factual inquiries, and, moreover, eschewing a specific formula by which lower courts might quantitatively identify when a regulatory taking changes from legitimate to unfairly burdensome. The Court reverses the latter policy in *Lucas*, and opts to establish a "total diminution of value" test, whereby private parties can recover for a regulatory

taking when the entirety of their economic interests are destroyed as a consequence of that regulation.

In 1977, the South Carolina Coastal Zone Management Act was signed into law, which required owners of coastal land in “critical areas” to obtain permits from the South Carolina Coastal Council prior to a parcel's development. In 1986, David Lucas purchased two vacant oceanfront parcels for $975,000 that lay in a zone deemed to be “critical” by the Coastal Council. Two years later in 1988, the South Carolina legislature passed the Beachfront Management Act, which further regulated the use and development of properties in such areas. Despite the existence of single-family residences immediately adjacent to the lots that Lucas owned, the Coastal Council rejected Lucas's attempts to obtain residential construction permits. Lucas brought suit contending that he had suffered a regulatory taking, as his properties had become effectively worthless, especially since development into single-family residences was the highest and best use—and, perhaps, the only use—of his parcels. The Supreme Court agreed with Lucas, ultimately concluding that he had suffered a regulatory taking and was entitled to compensation.

Before reaching a conclusion, the majority does note several points of clarification. Perhaps the most noteworthy is that regulations are necessary to the operation of government. As such, regulations may occasionally deprive some property owners of value to the benefit of others. This, the Court finds, is perfectly agreeable. To suggest that the state is required to compensate all property owners for small decreases in value is not only impractical, but impossible. Such are the consequences of living in an organized and legal society, and simply cannot be avoided. Where the Court sours on this notion, however, is in the rare instance where a regulation deprives a land owner of *all* economically beneficial uses:

> Affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—*typically, as here, by requiring land to be left substantially in its natural state*—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm (Lucas; emphasis added).

The Court is alluding to a central tenet of land ownership—the right to develop one's property for economically beneficial purposes—and notes that this right should be protected. This is perhaps the real motivation driving the majority's opinion. The Court develops the notion of protecting property rights further: "[i]f private property was subject to unchecked state police power, then 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]'" (Lucas; quoting Penn. Coal). To the Court, the protection of private property rights from rampant regulation is of paramount importance. In essence, the Court sees the requirement of compensation as an effective check on runaway regulatory power. The Court ultimately concludes the following:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, *to leave his property economically idle*, he has suffered a taking (Lucas; emphasis added).

The Court's reasoning rests on several assertions. First, when a regulation deprives a property owner of all economically beneficial uses of his property, then the land has been, in effect, physically appropriated. Second, when all economically beneficial uses have been prohibited, the state cannot claim to be merely "adjusting the benefits and burdens of economic life to promote the common good," per *Penn Central*. Third, such regulations may be a clever

means to press the property into public service while avoiding the state's burden of compensation for the affected party. Fourth and finally, title to real property is not held subject to a state's power to regulate away all economically beneficial uses of such property.

Nonetheless, the majority's opinion is not without critics. Justice Stevens, writing in dissent, argues that the Court is making a mistake by setting a standard for what constitutes a taking. He notes the potential arbitrariness of the rule, for if Lot Owner A suffers a 100% diminution of value, he is entitled to compensation in the amount of his land's full value. If Lot Owner B suffers a 95% reduction in value, then he is entitled to nothing. Stevens notes that this is a strange qualification, and should not be set as precedent. Rather, Stevens argues, the Court should follow with the prior precedent of *Penn. Coal*, and only engage in ad hoc, factual inquiries on an individual basis.

*Tahoe-Sierra Preservation Council v. Tahoe R.P.A.: Temporary Moratoria*

Thus far we have established that, per *Penn. Coal*, a regulatory taking can occur when it goes “too far” in affecting a private individual's property interests. In *Penn Central*, this precedent was limited when the Court ruled that as long as a property owner is still receiving a reasonable rate of return on their property—or, we might assume, retains the capacity to receive a reasonable rate of return—then regulations that affect the realization of greater profits do not constitute a regulatory taking. The precedent set forth in *Penn. Coal* is buttressed by the Court's ruling in *Lucas*, whereby a landowner is considered to have suffered a regulatory taking when they are deprived of all economically beneficial uses of their property as a consequence of a regulation. The common theme to this set of cases lies in the assessment of the degree to which a

property owner's economic interests have been curtailed. Clearly, the Court is amenable to some degree of deprivation, for if a party is still receiving a reasonable rate of return despite a prohibitive regulation, then that regulation remains legitimate (*Penn Central*). Once the deprivation starts to be debilitating (*Penn. Coal*), or even entirely prohibitive (*Lucas*), then that regulation obligates the regulatory body to compensate the deprived parties for their losses.

The fact pattern of the water situation in Cambria opens up another possibility for a regulatory taking to occur, as we have not yet discussed the significance of the building moratorium. Does such a building moratorium amount to a regulatory taking? The Court addresses this question in another landmark case, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency (2002)*.

The Tahoe Regional Planning Agency (TRPA) is an interstate agency created to oversee the planning and development of the Lake Tahoe basin, which lies in both California and Nevada. In 1981, the TRPA instated a building moratorium for the basin while it developed its comprehensive land-use plan. The first moratorium, issued in 1981, lasted twenty-four months. Upon the expiration of the first moratorium, a second moratorium was instated and lasted an additional eight months. The moratoria were, at the time, open-ended with no express termination date, and property owners within the basin were categorically denied development while the land-use plan was being drafted. A group of property owners, known as the Tahoe-Sierra Preservation Council (TSPC), brought suit against the TRPA claiming that they had suffered a regulatory taking akin to *Lucas*, since they were deprived of all economically beneficial uses of their land. The Supreme Court ultimately ruled against the TSPC, arguing that temporary moratoria do not rise to the level of a regulatory taking, as the depreciation of

property values would rebound once the land-use plan was completed and the moratorium lifted. The Court further noted that there are inherent differences between regulatory appropriations for the purposes of public use, and the regulation of property for private use, of which the moratoria in question concerned the latter.

The Court rested its opinion on several key points. First, the Court argues that there is a practical reason to not rule in the TSPC's favor, for regulations are universal and necessary, and some will undoubtedly have negative and likely unforeseeable effects on property values. To compensate for each adjustment in value would be impractical and make governance impossible. Justice Stevens, writing for the majority, states:

> Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford (Tahoe).

Second, the Court contends that the temporary nature of the moratorium is critical to the assessment of whether it can be considered a taking. Rejecting the TSPC's argument that rested on the precedent of *Lucas*, the Court suggests that the reduction in value by way of their deprivation of all economically beneficial uses is merely temporary in nature. The Court holds that, while there has been a reduction in value to all residential parcels that lie under the authority of the TRPA, such values will inevitably return once the moratoria are lifted. Essentially, the fluctuations in property value incurred as a consequence of regulation cannot be considered a taking, particularly when the fluctuations are temporary in nature. For the Court, the duration of deprivation is a key element to consider when assessing the validity of a regulatory takings claim. The Court, however, makes it expressly clear that they do not wish to adopt any *per se*

rules regarding this, opting instead to support the *Penn. Coal* notion of assessment on a case-by-case basis.

Finally, the Court argues that temporary moratoria are essential to planning purposes, and should be upheld. The majority in *Tahoe* contends that planning agencies will place greater importance on the achievement of arbitrary deadlines than the more beneficial goal of devising a thoughtful and well-developed regional plan:

> The financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or abandon the practice altogether....It may be true that a moratorium lasting more than one year should be viewed with special skepticism, but the District Court found that the instant delay was not unreasonable. The restriction's duration is one factor for a court to consider in appraising regulatory takings claims, but with respect to that factor, the temptation to adopt per se rules in either direction must be resisted (Tahoe).

While the majority's opinion is perhaps sensible in theory, the dissent in *Tahoe* takes practical issue with the conclusion that temporary moratoria do not effect a regulatory taking. For the dissent, the question of takings rests entirely upon the label given to regulations. In other words, if the regulation is deemed temporary, but has no express termination date as was the case in *Tahoe*, then regulatory bodies can simply consider such moratoria perpetually temporary and not be susceptible to a regulatory taking claim, despite having no intention of ever ceasing the moratoria. Chief Justice Rehnquist, writing for the dissent in *Tahoe*, notes that such a designation "does not preclude the government from repeatedly extending the 'temporary' prohibition into a long-term ban on development" (Tahoe). The dissent further notes that, as a consequence of the precedent set by *Tahoe*, "a designation by the government is conclusive even though in fact the moratorium greatly exceeds the time initially specified." The dissent adds: "[a]pparently, the

Court would not view even a 10-year moratorium as a taking under Lucas because the moratorium is not 'permanent'" (Tahoe).

The dissent also argues that the Court has previously accepted the notion that a temporary taking is still compensable. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles (1987)*, the Court expressly rejects the distinction between temporary and permanent takings, at least when a property owner has been deprived of all economically beneficial uses of their property. The majority in *First English* explicitly states as much: "temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation" (First English). Justice Kennedy, who joined the majority for *Tahoe*, concurs with the dissent's sentiments in this regard and concedes that "it is well established that temporary takings are as protected by the Constitution as are permanent ones" (Tahoe).

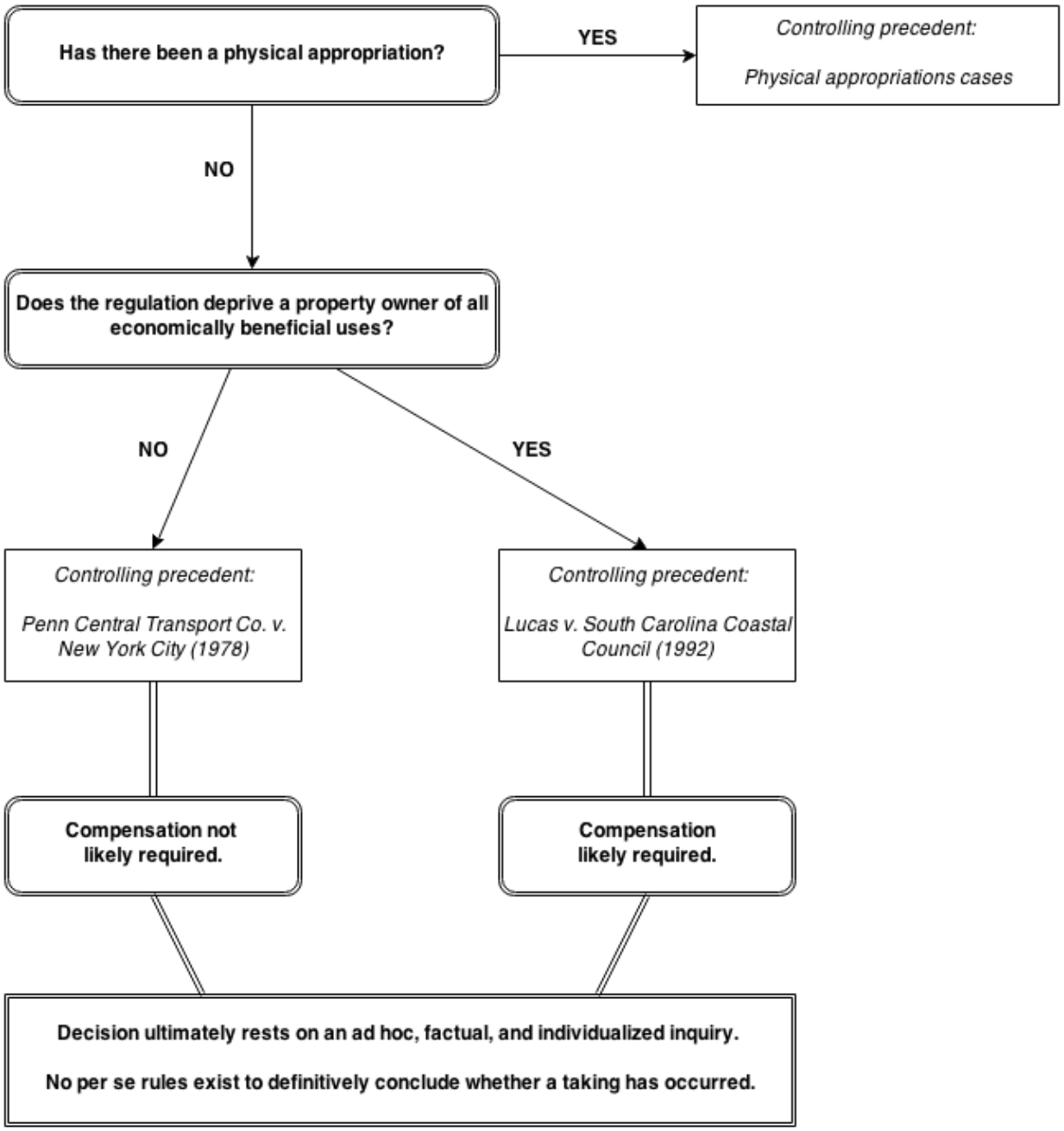
*Taking Stock: Summary of Present Constitutional Case Law on Regulatory Takings*

At the risk of belaboring the subject, let's briefly summarize the current state of regulatory takings jurisprudence. *Penn. Coal* was the first case reviewed by the Supreme Court to legitimize the notion that property owners can suffer a regulatory taking and thus be entitled to just compensation per the Fifth Amendment of the United States Constitution. However, such property owners shall only be entitled to that compensation when a regulation goes "too far," which is a qualification that the Court failed to quantify or better elucidate at the time of the decision. Subsequent courts have wrestled with the idea of what constitutes going "too far," resulting in the *Penn Central* and *Lucas* decisions. In *Penn Central*, the Court denied the claim

that Penn Central Transport suffered a regulatory taking, citing that Penn Central Transport was continuing to receive a reasonable rate of return on their investment in Grand Central Terminal. The Court was not concerned with Penn Central Transport's potential loss of over $150 million in profits as a result of the prohibition to construct an office building above the terminal. In *Lucas*, the Court did find evidence of a regulatory taking when Lucas was prohibited from erecting two single-family residences on his parcels, since he was effectively denied all economically beneficial use of his property. Finally, in *Tahoe*, we see that the Court does not view temporary building moratoria as a regulatory taking, because such moratoria are temporary in nature, and all property values that have been depressed will return after the lifting of the moratoria.

## Figure 1. Precedent Flowchart for Regulatory Takings Cases

In order to determine whether a regulatory taking has been effected, a court must first determine whether a physical appropriation has occurred. If not, the court must then determine whether a property owner has been deprived of all economically beneficial uses of their property. If so, then *Lucas* shall be the controlling precedent, and the owner will likely be compensated. If not, then *Penn Central* shall control, and compensation is unlikely. In either case, the Court still prefers to analyze each claim on an ad hoc, factual basis (Source: Jayson Parsons, 2014).



## Application of Precedent to Fact Pattern

Now that we have discussed the relevant facts of the situation in Cambria, as well as ascertained the applicable precedent, we can ask the question: does the situation in Cambria give rise to a regulatory takings claim? As our discussion of the precedent has already alluded to, we shall first examine whether Cambrian property owners have been deprived of all economically beneficial uses of their parcels, and whether the temporary moratorium instated by the CCSD is a legitimate regulation.

*Have land owners in Cambria been deprived of all economically beneficial uses?*

A noteworthy consequence of the *Tahoe* decision is that it removes any doubt as to the controlling precedent for situations where economically beneficial uses are concerned. *Tahoe* reaffirms the position that when an owner of real property has been deprived of all economically beneficial uses of their property, then a *Lucas* analysis shall be employed. In cases where less than all economically beneficial uses have been deprived, then *Penn Central* shall control the proceedings. Therefore, determining the controlling precedent rests on the distinction of whether these owners have been deprived of all such beneficial uses.

*Lucas* is an interesting case for many reasons, but perhaps the most notable is that Lucas actually managed to recover for being denied a building permit from the Coastal Council. The trial court that first heard Lucas's case determined that Lucas had been deprived of all value and use of his property. This finding of fact had direct implications for the ultimate decision of the Supreme Court. If this is true, then we can assume that the worth of his property was reduced not just to a small amount, but rather reduced entirely to nothing. Yet, practically speaking, is this

even possible? It is of little doubt that there exist individuals who are willing to invest in property that has little value. Maybe a buyer thinks laws will eventually change in their favor, or they are simply desiring to have a claim to land. Removing any notion of regulatory complications from our discussion, it is certainly true that individuals purchase property that is physically unimprovable—for instance, property on hillsides that are prohibitively steep and preclude any form of development. This is not unusual, as there are many acres of unimprovable land that are privately owned for one purpose or another. It can safely be assumed that someone will purchase such properties, regardless of the condition, simply if the price is right.

Furthermore, it is hard to fathom a situation where every single person in society would sooner give away a certain parcel of property rather than enjoy its benefits, even if such benefits are incredibly limited. Perhaps the only imaginable situation is where the parcel is tainted by toxic pollution or contains some other grave danger to human life. Regardless, and excepting such extreme circumstances, it can be assumed as fact that so long as there exists open land possessing no extreme adverse qualities, someone will purchase the property at some price, particularly when that price is especially low. Therefore, it seems incomprehensible that a full 100% diminution of value is possible, and perhaps even moreso when the parcels are beachfront properties, as was the case in *Lucas*. Perhaps even the adjacent home owners would have purchased the parcels from Lucas for a pittance merely to enlarge their own lots. As such, can it truly be claimed that Lucas really did suffer a full diminution of value?

It seems to be no stretch of the imagination that a buyer, with complete knowledge that the parcels were unimprovable, would still pay Lucas a small amount of money for the privilege of owning them. Yet, the majority who crafted the “full diminution of value” test still sided with

Lucas and allowed him to recover. This fact holds similarly true in Cambria, as a market still exists for properties that are not on the water wait list. These buyers know that they are purchasing property that, if current regulation holds, will be unimprovable. Yet, these buyers still purchase such property for one reason or another. Again, the point cannot be stressed enough, that a full diminution of value for property that is not exceptionally flawed is an impossible scenario. Assuming that we take the full diminution of value test at face value, it seems as if the test is setting an impossible standard. Yet, the Court awarded Lucas under the very test that it crafted in the opinion. How does the posited test reconcile with the outcome of the opinion?

Contrary to Justice Stevens's worries that a property owner who suffered a 95% depreciation in value would not recover, and only the individual who suffered a 100% diminution would be successful in recovering for his claim, we can only assume that the majority meant something more by establishing the full diminution of value test. The majority states as much by arguing that a land owner has lost all economically beneficial or productive uses to his land, thus satisfying the test's requirements, when such land has been required "to be left substantially in its natural state" as a consequence of the regulation (Lucas). The Court further adds that an owner of real property is considered to suffer a taking when they are "called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle" (Lucas). Therefore, we might conclude that the majority didn't intend for a true 100% diminution in *property value*, but rather through the more abstract notion that an individual has been deprived of all beneficial uses, the chief use of which is development into the parcel's highest and best use. In Lucas's case, his parcels' highest and best use was the development into single-family residences. Is this not similar to the fact pattern in Cambria? It

certainly seems arguable. Cambria property owners are required to leave their parcels in a natural state and have been denied the opportunity to develop as a consequence of the water wait list and subsequent building moratorium.

Another point of contention for the majority in *Lucas* is the fear that private property will be "pressed into some form of public service under the guise of mitigating serious public harm." The serious public harm from increased residential build-out in Cambria is, simply put, the lack of existing water resources for its residents. Does the situation in Cambria appear to confirm the fears of the majority in *Lucas*, whereby approximately 43% of land owners in Cambria are called on to resign their right to employ their parcels' economically beneficial uses, to serve the public good of the community? Is this not the definition of a regulatory body using its power to press private property into serving the public good? Let's not forget that §353 and §356 of the California Water Code—provisos of the "350 Emergency" adopted by the CCSD in 2001—authorize the Cambria Community Services District to restrict water use by denying new service connections for the "greatest public benefit." Per *Penn. Coal*, is the CCSD responding to a "strong public desire to improve the public condition," thereby desiring to take "a shorter cut than the constitutional way of paying for the change" (Penn. Coal)? This was a key point for the majority in *Lucas*, and led to the conclusion that Lucas was being called upon to sacrifice the highest and best use of his land to mitigate public harm, and therefore entitled to compensation. I can only see stark parallels between the situation in Cambria to the ruling in *Lucas*.

Let us now turn our attention to an analysis of whether *Penn Central* is applicable precedent for the situation in Cambria. Should one argue that property owners in Cambria have not been deprived of all economically beneficial uses, then we might conclude that a *Penn*

*Central* analysis is an appropriate conclusion, and we can assume that the owners are likely not entitled to compensation. Yet, this assertion rests on the assumption that the owners are still capable of receiving a reasonable rate of return on their investment. Is this actually the case?

What economically beneficial uses might a Cambrian lot owner employ to ensure that they receive a reasonable rate of return on their investment? We shall forgo the discussion of what constitutes a "reasonable rate of return," but rather focus merely on what activities can promulgate some modicum of wealth, such that it makes their efforts to acquire and maintain such property worthwhile and nothing more.

Since the lots often lay adjacent to existing dwellings, and all are zoned residential, we can immediately rule out many economic activities that lot owners might engage in to receive a return from their properties. Essentially, any business use is prohibited. We must remember that nearly 43% of property owners must be able to engage in these activities, so niche markets like renting out the lot to campers or recreational vehicles are also out of the question. Renting the lots for the storage of equipment, watercraft, materials, or other storable goods is likely prohibited by county regulations attempting to reduce blight and attractive nuisances, or discourage theft. Where must a property owner turn to realize an economically beneficial use for their property if such avenues are closed to them? The only option appears to be the development of the parcel into a single-family residence. Yet, they are barred from doing so by the inability to receive a water connection.

It is for this reason that I doubt that *Penn Central* applies. In *Penn Central*, Penn Central Transport was still receiving a reasonable rate of return for their ownership of Grand Central Terminal—something Penn Central Transport admitted to in early court proceedings. The Court

decided against Penn Central Transport because they were already engaged in an economically beneficial use of their property. The regulation in question merely precluded them from realizing even greater gains by constructing an office building above the terminal. For property owners in Cambria, no such option exists. There simply is no other economically beneficial use, other than the development of single-family residences. Were this not the case, now twenty-eight years after the water wait list was instated, and thirteen years after the building moratorium was put in place, we would have seen at least a few clever land owners convert their properties into some form of economically beneficial use. This has not happened, as such properties currently lie fallow.

The only argument that could be made that there still exists an economically beneficial use for these properties is the notion that the owners—like all owners of real property—will necessarily experience an appreciation of their property value over extended periods of time. It might be argued that in 1986, unimprovable parcels would sell for a certain amount, and today the same parcels would sell for more. Yet, this is a false assertion. First, currency inflation might lead us to conclude that properties are actually selling for relatively less than they have in the past. This claim shall remain unexplored here, as it requires a statistical evaluation that is beyond the scope of this paper; regardless, the issue remains salient and is worth noting. Second, if property is actually appreciating in value despite an evaporating hope of development, then this appears to be a scheme whereby early property owners paid less for the hope of a situational change in regulation, with later property owners paying more for that same hope despite diminishing prospects of such a change occurring. Logically, this is foolish, and is unlikely to be the case. If anything, the longer the moratorium stays in place, the less confidence the market will have in the situation changing. Consequently, any fluctuations in property values are likely

to be depreciatory. Therefore, current property owners cannot expect any degree of a "reasonable rate of return" on their investment, for their ownership is not an investment at all, but is a disinvestment as a direct consequence of the CCSD's policies.

*Is the building moratorium legitimate per Tahoe?*

The court in *Tahoe* made it abundantly clear that there exist two main considerations by which we might judge the legitimacy of the building moratorium. First, does the moratorium serve an important planning interest that must not be rushed? Second, is the moratorium temporary in nature?

On the first question, and disregarding for a moment the obvious temporal issues, we might assume that the moratorium does in fact serve the important planning interest of developing a stable water source for the community. The CCSD guarantees that the properties currently on the water wait list shall receive water connections at some future date. As such, a moratorium on development is necessary until the CCSD can mitigate the water shortage issue. Per the 2008 Water Master Plan, the CCSD ultimately concluded that a desalination project was the most appropriate means to ensure this access. If this project were to be completed, then enough water would exist within the system to allow the build-out of the remaining parcels on the wait list. Therefore, we might conclude that, at least on this point, the CCSD's moratorium is not in violation of the conditions set forth in *Tahoe*.

The second question of whether the moratorium is temporary in nature is arguable. The building moratorium instated by the CCSD's 2001 "350 Emergency" declaration has now been in effect for thirteen years. However, and more egregiously, a *de facto* moratorium has been in

effect for all property under the CCSD's authority since 1986, or nearly twenty-eight years, as a consequence of establishing the water wait list. Furthermore, even upon the completion of the desalination project, the system will only contain enough water to serve existing connections in addition to those on the wait list, resulting in total build-out of 4,650 connections. The remaining 43% of Cambrian property owners will have no access to water. The majority in *Tahoe* notes that moratoria lasting longer than a year should be reviewed with special skepticism—yet, if an individual can never receive a water connection, is this not, in effect, a permanent moratorium?

The situation that these property owners find themselves in—that is to say, absolutely no hope of receiving a water connection in the future since the CCSD's 2003 motion to limit water connections to 4,650—appears to confirm the fears of the dissent in *Tahoe*, who argued that a moratorium deemed "temporary" in nature could be indefinitely extended, resulting in an effectively permanent building moratorium. So far, little has changed since 1986 for those property owners on the wait list, and the situation only appears more grim for those owners who were unable to secure a wait list position.

## Conclusions and Future Considerations

In 1986, the Cambria Community Services District enacted the water wait list for residential connections, spawning years of controversy and potential legal liability. As a consequence of this wait list, which was closed to new applicants in 1990, nearly 43% of Cambria property owners have no foreseeable access to water. This has denied them the right to develop their properties into their highest and best use—the development of single-family homes. After declaring a "350 Emergency" in 2001, the CCSD also imposed a temporary building moratorium to all new development for properties on the water wait list. Does this fact pattern enable litigant property owners to claim that they have suffered a regulatory taking?

The answer is far from certain. While the facts match quite well to our examination of *Lucas*, it remains to be seen whether the courts will conclude that they have been denied *all economically beneficial uses* of their property. If the courts decide this to be so, then the *Lucas* precedent shall control the proceedings, and there is a real possibility that Cambrian lot owners can recover for a regulatory taking. If the courts decide that there still exists some economically beneficial use to the property, that is, property owners are still capable of receiving a reasonable rate of return on their property, then it is likely that a *Penn Central* analysis will be used, and these property owners will be unable to recover. This is a questionable conclusion, however, since it is arguable that there are no economically beneficial uses for these properties to engage in, other than the development of single-family residences.

Regarding the building moratorium, any anticipated decision by the court is equally difficult to predict. In *Tahoe*, the building moratorium was temporary and would eclipse upon the completion of a comprehensive land-use plan. The Tahoe Regional Planning Agency could not

extend the planning process indefinitely, as it had to produce a plan eventually. In Cambria, the moratorium—which applies, essentially, to only those properties on the water wait list— is much more open-ended in nature as it is contingent upon the development of a reliable water source. While the CCSD concluded in 2008 that a desalination project was the best means to secure a long-term and reliable source of water, this project has yet to come to fruition. The moratorium has been in effect for thirteen years, and no evidence exists to suggest that it will be lifted in the near future.

The discussion regarding the moratorium side-steps the greater issue surrounding the 43% of property owners in Cambria who were unable to join the water wait list between 1986 and 1990. Properties on the wait list are guaranteed access to water, even if the date of acquisition is all but unknown—at the very least, these property owners can find consolation in the fact that they are entitled to a connection at some point in the future. The rest of the property owners, however, have no hope of receiving a water connection. This has, in essence, led to a *de facto* and permanent building moratorium for these owners. It is hard to imagine that the majority in *Tahoe* intended for such moratoria to be legitimized by their opinion. Certainly, the dissent in *Tahoe* realized this threat and argued as much in their dissenting opinion.

Ultimately, the Court still prefers a *Penn. Coal* methodology, whereby cases are analyzed on an ad hoc, individualized, and fact driven basis. Since the Court has repeatedly avoided the establishment of any *per se* rules regarding regulatory takings nor the legitimacy of moratoria, it is nearly impossible to predict how a case might proceed through the courts were the deprived Cambrian property owners to bring suit against the CCSD. There are strong legal arguments in favor of both allowing a build-out of parcels not on the water wait list, as well as disallowing

build-out to serve the public benefit. Morally, the situation is much more dire, as these property owners in Cambria have been called on to resign their economic benefits for the good of those who managed to develop. In the mean time, current home owners enjoy inflated property values, as the ultimate build-out of Cambria has been limited and no new residential properties are capable of increasing the housing supply and thereby reducing existing property values.

*Important issues not examined in this report:*

While the ultimate conclusion of a suit brought against the CCSD remains elusive, there do exist several other seriously contentious issues as a consequence of the CCSD's policies. Below is a short list of these issues which should be further explored for their legality and moral implications.

**Just compensation.** If the courts were to decide in favor of the deprived property owners, then such owners are entitled to "just compensation." But what exactly constitutes just compensation? The CCSD, in its Build-out Reduction Program, plans to pay an average of $33,000 per parcel for properties that they intend to retire. We can safely assume that this is the CCSD's idea of just compensation, as they state in the Water Master Plan that this price is reflective of the fair market value for comparable unimprovable properties. Yet, this "fair market value" is the culmination of twenty-eight years of deflated property values as a result of the prohibition on development. Therefore, simple economics leads us to conclude that the fair market value for improvable parcels would be much higher than unimprovable parcels. The Supreme Court, in the case of *Monongahela Navigation Co. v. United States (1893)* sets the precedent that "[t]he fifth amendment does not allow simply an approximate compensation, but

requires 'a full and perfect equivalent for the property taken'" (Penn Central; quoting Monongahela). What is the "full and perfect equivalent" that Cambrian property owners would be entitled to recover? A proper statistical analysis is necessary to answer this question and is beyond the scope of this report. Instead, we can logically conclude that the amount that they should be entitled to will be greater than a basic assessment of comparable sales, given the historic suppression of property values as a consequence of the prohibition on development.

**Secondary market for water meters.** Upon the instatement of the water wait list, parcels in possession of a water meter saw dramatic increases in value. Once the wait list was closed to new applicants, even a position on the wait list became of great value. Since water meters and wait list positions are transferable, this created a secondary market in which those in possession of water access (or the potential for such possession) could command large sums of money for this privilege. The 2008 Water Master Plan notes that water meters—access to water, and nothing else—can be purchased from private parties for up to $366,000. A wait list position can sell for $100,000 to $200,000, depending on the position. This market is entirely created from the CCSD's policies, and would not exist otherwise.

Furthermore, the CCSD plans to reserve 65 unallocated meters, which they intend to sell as a means to fund their Build-out Reduction Program. The CCSD anticipates that, over twenty-two years, these meters will raise $19.5 million dollars to fund the BRP in part. Can the CCSD create such vast sums of wealth simply by controlling the market and administratively creating the 65 unallocated meters? The answer to these questions is beyond the scope of this research project and shall hence remain unknown, but the notion should certainly cause concern.

**Legal challenge of the "350 Emergency" declaration.** The "350 Emergency" is a term that encompasses California Water Code §§350-359. Water §358 stipulates that courts may review an emergency declaration's causes for fraud, arbitrariness, or capriciousness. Should the CCSD's declaration be challenged in court? While the CCSD makes many questionable claims to further their conclusion of an emergency, perhaps the single most important is that the entire water issue in Cambria rests on the assumption that there is a lack of water. The fact is, a considerable amount of extra water exists in the Santa Rosa basin, but is not extracted. Why? The simple answer is that the cumulative extraction from both the Santa Rosa and San Simeon basins is limited to 1,230 AFY by California Coastal Commission permits. The purpose of this restriction cap remains unknown. Nonetheless, extra water exists, but goes unused. Therefore, all subsequent claims regarding a lack of water resources—compelling the CCSD to create regulations that potentially deprive property owners of the highest and best uses of their property—might rest on arbitrary or capricious grounds.

**NIMBYism.** As a likely consequence of the prohibition on building, a noticeable mentality of "Not In My Backyard" has spread through the community of Cambria. Property owners who own residences in Cambria often charge that they do not want Cambria to turn into a suburban sprawl, ruining Cambria's bucolic and quiet culture (2008 WMP, BRP Info Pamphlet, 1). As such, these residents vehemently oppose any projects creating additional access to water resources. Proposed developments like the state-sponsored San Simeon Creek Dam, calculated to capture and store over 18,500 AFY of seasonal run off from the Santa Simeon Creek, are adamantly opposed on the grounds of protecting riparian habitats. One might wonder whether the real goal is not the protection of wildlife, but rather the preclusion of further development?

By the CCSD's own admission, and assuming that all remaining unimprovable lots were built out, this build-out would result in approximately 6,130 residential dwellings with a total stable population in Cambria of between 10,180 and 13,790 people. While this final figure is approximately twice that of the present population, it would be a stretch to conclude that Cambria would have lost its fundamental charm, which is a claim that is often made in response to those arguing for increased development. The CCSD's own Build-out Reduction Program material alludes, perhaps, to the true motivations at work: “Without careful planning, the things that make Cambria special will be gone forever and it will become like so many other faceless towns...congested with traffic, devoid of open space, and burdened with the high cost of additional infrastructure” (2008 WMP, BRP Info Pamphlet, 1).

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