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Just a Little Longer Mrs. Suitum, Your Case Is Just about Ripe for Review: Suitum v. Tahoe Regional Planning Agency

Kevin J. Cross

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JUST A LITTLE LONGER MRS. SUITUM,
YOUR CASE IS JUST ABOUT RIPE FOR REVIEW:
SUITEM v. TAHOE REGIONAL PLANNING AGENCY

I. INTRODUCTION

A Supreme Court Justice sat on a riverbank, fishing. A traveler wandered by and asked: "Is that your boat, sir? I'd like to use it to cross the river." "Yes," said the Justice. "It's mine. You may use it." But the boat was unfit and it sank in the middle of the river, drowning the traveler. Before going under, the traveler cried out to the Justice: "Why did you do this to me?" The Justice replied: "The question of the boat's condition was not before me." 1

This type of absurd situation seems quite improbable, but it is a fitting analogy to what happened in Suitum v. Tahoe Regional Planning Agency. 2 Suitum involved petitioner Bernadine Suitum, the owner of a plot of undeveloped land near Lake Tahoe, and the Tahoe Regional Planning Agency (TRPA). 3 Individuals familiar

1. Gideon Kanner, Beating Up On A Little Ol' Landowning Lady, NAT'L L.J., July 14, 1997, at A21. This short anecdote helps explain the thesis of this Note and elucidates the types of problems that impact the ripeness doctrine and land use takings claims. For a description of the ripeness doctrine, see infra notes 17-21 and accompanying text.


Private property expectations and environmental protection concerns are usually heightened at the borders of land and water, where land values tend to be high. See Richard J. Lazarus, Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court, 12 J. LAND USE & Envtl. L. 179, 192 (1997) (describing Suitum as classic regulatory takings case that emphasizes conflicts between environmental protection and private property rights on borders of land and water). Many people choose to live in those border areas "because of
with regulatory taking cases, cases in which landowners claim that governmental statutes, ordinances, or regulatory actions have effectively taken some or all of their property rights, know that one of the most difficult components of these disputes is not proving that a taking has occurred nor the amount of damage, but instead proving the case’s “ripeness” for adjudication. To demonstrate ripeness, courts have generally required a showing that the government has reached some type of “final” determination regarding the permissible uses of a piece of land. In Suitum, TRPA, which regulates their close proximity to water bodies.” Id. Additionally, waterfront land attracts a significant number of corporations engaging in manufacturing and commercial activities because of its transportation and industrial potential. See id. Restrictions on the development of waterfront land are likely to affect investment-backed expectations. See id. at 192-93. Lazarus comments that “[i]t is therefore no coincidence that virtually every regulatory takings case to reach the Supreme Court in recent years has arisen in those land/water border areas.” Id. at 193. See, e.g., Dolan v. City of Tigard, 512 U.S. 374 (1994) (involving hardware store’s proximity to waterway prone to flooding); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (involving property bordering Pacific and Atlantic Oceans); Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) (same); First English Evangelical Church v. County of Los Angeles, 482 U.S. 304 (1987) (reviewing case related to construction of camp in flood plain region); Agins v. City of Tiburon, 447 U.S. 255 (1980) (deciding dispute over large lot zoning in city overlooking San Francisco Bay).

4. A considerable number of scholarly journals recently have published articles on regulatory takings, demonstrating how hotly-debated the issue has become in the past decade. See Lazarus, supra note 3, at 180 (citing James H. Freis, Jr. & Stefan V. Reyniak, Putting Takings Back Into the Fifth Amendment: Land Use Planning After Dolan v. City of Tigard, 21 COLUM. J. ENVTL. L. 103 (1996) (explaining that with growth in environmental law, comes increases in legislation and curtailment of traditional property notions of freedom of use); Thomas G. Douglass, Jr., Have They Gone “Too Far”? An Evaluation and Comparison of 1995 State Takings Legislation, 30 GA. L. Rev. 1061 (1996) (noting that when regulations do not prohibit all economically feasible use of property, Court traditionally resorts to ad hoc balancing test under which even property owners suffering ninety-five percent loss in value sometimes may be denied compensation); Daniel A. Crane, Comment, A Poor Relation? Regulatory Takings After Dolan v. City of Tigard, 63 U. CHI. L. Rev. 199 (1996) (commenting on litigation focusing particularly on attempts by municipalities to condition approval of real estate development permits on landowners’ dedicating portions of property to public use); Danielle M. Stager, Takings in the Court of Federal Claims: Does the Court Make Takings Policy in Hage?, 30 U. RICH. L. Rev. 1183 (1996) (noting that takings policy will continue to evolve with input from both judiciary and legislature in future years); Jerold S. Kayden, Hunting for Quarks: Constitutional Takings, Property Rights, and Government Regulation, 50 WASH. U. J. Urb. & Contemp. L. 125 (1996) (exploring constitutional framework for property rights-regulation conflict with special attention paid to recent Supreme Court opinions); Jeremy Walker, Property Rights After Dolan: The Search for the Madisonian Solution to the Regulatory Takings Conundrum, 20 WM. & MARY ENVTL. L. & Pol’y Rev. 263 (1996) (discussing individual freedoms impact on tensions between property concerns and civil liberties).


One commentator has stated:
land use throughout the Lake Tahoe region, determined that
Suitum's land was ineligible for development because it is located
in a specially designated environmental zone. \(^6\) In an attempt to re-
lieve the economic loss Suitum suffered as a result of its ruling,
TRPA granted her Transferable Development Rights (TDRs), rights
which TRPA alleged to be of value. \(^7\) Suitum could potentially have
sold the TDRs to nearby landowners, which would have allowed
both those landowners to build on their lots and Suitum to recover

The ripeness doctrine of the Taking Clause is the most important legal
principle in federal land use litigation. If a taking claim arising from a
land use agency's decision does not meet the rigid standards of the ripe-
ness doctrine, and almost every one does not, a federal court will not hear
the case. The effect of the ripeness doctrine is to "close the federal court
house door" on almost all land use taking cases.

Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases, 10 J.
LAND USE & ENVTL. L. 91, 91-92 (1994) (footnotes omitted); see also Brian W.
Blaesser, Closing the Federal Courthouse Door on Property Owners: The Ripeness and Ab-
(demonstrating between 1983 and 1988, courts deemed ripe, and permitted final
adjudication in, only 5.6% of land use cases).

There are primarily "two reasons why federal courts should not hear unripe
claims." Gregory M. Stein, Regulatory Takings and Ripeness in the Federal Courts, 48
VAND. L. REV 1, 4 n.3 (1995). Stein notes that "Article III courts are constitution-
ally limited to deciding cases or controversies . . . [and] prudent courts do not wish
to reach speculative decisions based upon incomplete records." Id. (citing U.S.
CONST. art. III, § 2). For a further description of the prudential side of the ripe-
ness doctrine, see infra notes 18-21 and accompanying text.

Over the last 14 years, the United States Supreme Court has outlined a ripe-
ness test for land use cases in a series of decisions that have developed a broad,
costly and difficult application process. See id. at 4 n.3. See generally Lucas, 505 U.S.
at 1005-08 (holding landowner's case ripe for development despite South Carolina
Supreme Court erroneously applying noxious uses principle to decide case); First
English Evangelical Church v. County of Los Angeles, 482 U.S. 304 (1987) (asserting
California Supreme Court improperly interpreted Just Compensation Clause
in not requiring compensation as remedy for temporary regulatory taking); Mac-
Donald v. County of Yolo, 477 U.S. 340 (1986) (noting no decision could be made
in absence of final determination by county planning commission regarding how
challenged regulation would be applied to property in question); Williamson,
473 U.S. at 175-76 (holding jury verdict awarding damages for temporary taking of
property was premature despite Fifth Amendment requirements); San Diego Gas
& Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (deciding monetary compensa-
tion inappropriate remedy, but not providing what would constitute appropriate
remedy); Agins, 447 U.S. at 259 (noting confusion over whether municipality's
good faith planning did not so diminish landowners' enjoyment of their property
to constitute taking); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104
(1978) (reasoning railroad owners' establishment of taking having occurred based
on consideration of several factors). Although the Court has addressed ripeness in
these cases, it has left many related questions unresolved. See Stein, supra at 4 n.3.

7. See id. For a further discussion of TDRs, see infra note 66.
some of her loss.\textsuperscript{8} Suitum, however, refused to participate in the program.\textsuperscript{9} She claimed that the TDRs were worthless and that TRPA's ruling therefore constituted a regulatory taking of her property and violated 42 U.S.C. § 1983.\textsuperscript{10} The United States Supreme Court, while noting that Suitum's case raised important issues regarding just compensation and land takings, limited its efforts to resolving the question of whether her claim was ripe for review.\textsuperscript{11} The Court declined to address the larger and more deli-
cate issue of the appropriate balance between environmental concerns and personal property rights, and ultimately remanded *Suitum* for further review.\(^{12}\)

Section II of this Note begins by examining both the roots of the ripeness doctrine in land use cases as it has developed through the Court’s adjudication as well as the Court’s establishment of a two-prong test to determine whether a land use case is ripe for review.\(^{13}\) Section II also considers TRPA’s history, which supported the Court’s application of the ripeness doctrine in *Suitum*.\(^ {14}\) Sections III and IV of this Note discuss the facts of *Suitum* and the Court’s reasoning in determining whether *Suitum* was ripe for review.\(^ {15}\) Finally, Section V critically analyzes *Suitum* by discussing its effect on land use ripeness claims, and Section VI concludes that although the Court’s decision was correct, it was too narrow and ambiguous.\(^ {16}\)

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5, at 91 n.2 (quoting Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 194 n.13 (1985)). Also, the *Williamson* Court noted that “because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied.” *Williamson*, 473 U.S. at 194 n.13 (emphasis added). A taking will therefore not be found to exist until a final decision has been reached and state compensation has been deemed inadequate. *See id.*

12. *See Suitum*, 117 S. Ct. at 1662. *Suitum* has generated so much controversy that over 20 different amici curiae have been filed by special leave of the Court. *See id.* Seven states, including California and Nevada, have supported *Suitum’s* position. *See id.* Also the American Planning Association, National League of Cities and the National Governors’ Association all wrote briefs in support of *Suitum*. *See id.* *See also Eric Brazil, High Court Rules Tahoe Zoning Case Can Go to Trial: Landowner was Denied Permit to Build by Stream*, S.F. EXAMINER, May 28, 1997, at A7. The American Farm Bureau Federation, the National Association of Homebuilders and the American Land Rights Association all championed TRPA’s cause. *See id.*


14. For an in-depth examination of the history of TRPA, see *infra* notes 58-70 and accompanying text.

15. For a discussion of the facts of *Suitum*, see *infra* notes 71-91 and accompanying text. For a description of the Court’s reasoning in deciding *Suitum*, see *infra* notes 92-149 and accompanying text.

16. This Note proposes that because Justice Souter employed a narrow rationale in writing for the *Suitum* majority, that rationale was therefore applicable only to the specific facts of *Suitum*. For a discussion of both the Court’s holding in *Suitum* as well as the consequences of its decision, see *infra* notes 150-80 and accompanying text. This Note also suggests that Justice Scalia’s concurring opinion offered a firm rationale for analyzing ripeness problems that involve government compensation systems such as TRPA’s TDR framework. For a discussion of Justice Scalia’s concurring opinion, see *infra* notes 139-49 and accompanying text.
II. BACKGROUND

A. The Roots of the Ripeness Doctrine in Land Use Cases

Ripeness refers to certain conditions that must be present in a controversy before a court will adjudicate a case on its merits. Although much conflict exists regarding the ripeness doctrine, "the relevance of the doctrine can be supported under both constitutional and prudential principles." Article III of the United States Constitution limits federal courts' review to true cases or controversies, and not mere hypothetical situations. This limitation supports the principle of separation of powers by precluding judicial review in situations in which the courts should not be present and there exists no significant burden to postponing review. On the prudential side, a court cannot properly adjudicate a case in which the record is incomplete because the facts have not yet fully materialized.

17. See Patrick W. Maraist, A Statutory Beacon in the Land Use Ripeness Maze: The Florida Private Property Rights Protection Act, 47 FLA. L. REV. 411, 416 (1995); see also Bruce I. Weiner, Obstacles and Pitfalls for Landowners: Applying the Ripeness Doctrine to Section 1983 Land Use Litigation, 7 J. LAND USE & ENVTL. L. 387, 391 (1992). Although there exists no precise definition of the ripeness doctrine, a court's ripeness analysis often involves determining whether a particular agency's decision suffices to allow for judicial resolution of a claim. See JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 48.01, at 48-3 (1996). Additionally, "[t]he ripeness concept should not be confused with exhaustion of administrative remedies which, while related, focus on procedures rather than substance." Id. at 48-4 to 48-6.

One commentator has stated, "[r]ipeness . . . is best understood as the determination of whether a federal court can grant pre-enforcement review; for example, when may a court hear a request for a declaratory judgement, or when must it decline review?" ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.4, at 115 (2d ed. 1994). Stein has interpreted the ripeness doctrine as "a tool designed to determine when judicial review is appropriate." Stein, supra note 5, at 11. Black's Law Dictionary provides that "[a] case is ripe for decision by an appellate court if the legal issues involved are clear enough and well enough evolved and presented so that a clear decision can come out of the case." BLACK'S LAW DICTIONARY 1327 (6th ed. 1990).

18. Maraist, supra note 17, at 417 (footnotes omitted).

19. See U.S. CONST. art. III, § 2. Under Article III, "[t]he judicial Power shall extend to all Cases, in law and Equity, arising under this Constitution, the Laws of the United States . . . [and] to Controversies to which the United States shall be a party . . . ." U.S. CONST. art. III, § 2 (emphasis added); see also Maraist, supra note 17, at 417 (discussing federal courts' obligation to "dismiss merely hypothetical cases").

20. See Maraist, supra note 17, at 417 (citing CHEMERINSKY, supra note 17, § 2.4.1, at 116).

21. See Maraist, supra note 17, at 418. The purpose of the ripeness doctrine is to improve the quality of judicial decisions by requiring adequate records and statements of facts as prerequisites of review. See CHEMERINSKY, supra note 17, § 2.4.1, at 116. Many courts impose prudential restrictions because they prefer to "avoid speculative cases, defer to finders of fact with greater subject matter expertise, decide cases with fully-developed records, and avoid overly broad opinions,
In 1978, the Court formulated its land use ripeness rationale in *Penn Central Transportation Co. v. City of New York.*\(^{22}\) In *Penn Central,* the owners of Penn Central Railroad Station sought to build a fifty-five story office building on top of the existing station.\(^{23}\) Although the New York City Landmarks Preservation Commission, which had designated the Station a historical landmark only one year earlier, rejected the construction plans in the interest of preserving the site, it did grant the plaintiff several TDRs.\(^{24}\) The plaintiff filed suit as a result of the defendant's findings, alleging that the City of New York had taken its property in violation of the Fifth and Fourteenth

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23. See id. at 116. In *Penn Central,* the Court considered the application of New York City's Landmarks Preservation Law (Preservation Law) to Penn Terminal. See id. at 115. The existing terminal is an eight-story building which Penn Central uses primarily as a railroad station. See id. Penn Central rents out the remaining space for commercial interests. See id. Penn Terminal was only one of several mid-town Manhattan properties Penn Central owned. See id. New York City designated Penn Terminal as a historic "landmark" under the Preservation Law on August 2, 1967. See id.

On January 22, 1968, Penn Central sought to increase its income by entering into a "renewable 50-year lease and sublease agreement." Id. at 116. Penn Central hoped to build a large multi-story office building above Penn Terminal. See id. It subsequently applied to the New York City Landmarks Preservation Commission (Commission) for approval to build. See id. Penn Central originally designed a 20-story office tower to be added to Penn Terminal, but it never sought approval for its construction of that addition. See id.

24. See id. at 116-18. In its application to the Commission, Penn Central proposed two alternative construction plans. See id. at 116. The first plan provided for the new building to be cantilevered on top of the roof of the existing station. See id. The second plan required the destruction of a large portion of the station by stripping several of the Terminal's facade features and constructing the building through the remaining structure. See id. at 117. The Commission denied both applications, stating that "[t]o protect a Landmark, one does not tear it down," and that the new facade would be, "nothing more than an aesthetic joke." Id. 117-18.
Amendments. Specifically, the plaintiff averred that despite its having been granted TDRs as compensation for its loss, it effectively had been denied just compensation for the taking of its property. Finding other permissible uses for the land, the Court rejected the plaintiff’s assertion and ruled that the defendant’s actions were constitutional.

In reaching its determination, the Court identified three factors relevant to the resolution of regulatory takings claims: (1) the “character of the governmental action;” (2) the extent of any “interference with distinct, investment-backed expectations;” and (3) the regulations’ “economic impact.” The Court concluded

25. See id. at 119. Penn Central filed suit in the New York Supreme Court seeking a declaratory judgment, injunctive relief and damages for the period between the dates of the designation and the point at which the Commission’s ruling would be lifted. See id. The trial court found for the plaintiff, but the Appellate Division of the New York Supreme Court reversed, holding that the restrictions were necessary to promote the public purpose of protecting landmarks. See id. at 119-21. The New York Court of Appeals later affirmed, and the plaintiffs then appealed to the United States Supreme Court. See id. at 121-22.

26. See Penn Central, 438 U.S. at 119.

27. See id. at 136-37. The Penn Central Court stated:

[1] It simply cannot be maintained, on this record, that appellants have been prohibited from occupying any portion of the airspace above the Terminal. While the Commission’s actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. The Commission’s report emphasized that whether any construction would be allowed depended on whether the proposed addition “would harmonize in scale, material, or character with [the Terminal].” Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

Id. 136-37 (internal citation omitted).

28. Id. at 124. These factors have provided much of the rationale supporting the Fifth Amendment’s prohibition on private property being taken for public use without just compensation. See id. Determination of what constitutes a “taking” under the Fifth Amendment requires complicated analysis. See id. The Court has established that the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Id. at 123-24 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). The Court concluded that the question of “whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case.” Id. at 124 (quoting
that the defendant might have approved a smaller-scaled version of
the structure, had the plaintiff made such an application. 29 Penn Central therefore illustrated the Court's requirement that an appli-
cant resubmit a proposal before his case can be deemed ripe for
adjudication. 30

Two years later, the Court had the opportunity to expand
upon its Penn Central ruling in Agins v. City of Tiburon. 31 In Agins,
the Court considered whether certain municipal zoning ordinances
violated the Fifth and Fourteenth Amendments and thereby took
the plaintiff's property without just compensation. 32 The plaintiff
had planned to build several units on his prime lot location, but was
prevented from doing so by city ordinances that limited zoning in
the area to single-family dwellings, accessory buildings and open-
space uses. 33 The Court held that because the plaintiff never actu-
ally submitted a specific development plan for his property, there
existed no concrete controversy regarding the defendant's zoning
ordinances. 34 Hence, although it never used the term "ripe" in its
opinion, the Court dismissed the plaintiff's initial challenge to the
ordinances because he failed to apply for a specific permit for his
land development. 35 The plaintiff also asserted that the ordinances
were facially unconstitutional, but the Court again ruled in the de-

29. See id. at 136-37. Counsel for New York City suggested that the Commis-
sion might approve a 20-story building similar to the one the plaintiffs had origi-
nally planned. See id. at 137 n.34.

30. See Maraist, supra note 17, at 422. Maraist notes that "[t]he decision paved
the way for subsequent requirements that an applicant modify or resubmit a pro-
posal before a case is ripe, with some courts applying the rationale that an agency
should be given the 'opportunity to change its mind.'" Id. (footnote omitted).


32. See id. at 257. Lyman argues that the "analytical framework" for the ripe-
ness doctrine first emerged in the City of Tiburon's land use regulation system. See
Lyman, supra note 2, at 110. However, it was not until Williamson County Regional
Planning Commission v. Hamilton Bank that the Court provided a detailed explana-

33. See Agins, 447 U.S. at 262. The plaintiff sought $2 million in damages
from the defendant and a declaratory judgment that its ordinances were unconsti-
tutional. See id. at 258. The plaintiff alleged that his lot was located in a prime area
in Tiburon and had "greater value than any other suburban property in Califor-
nia." Id. The plaintiff also stated that the defendant's re-zoning efforts had pre-
vented him from developing his land and had therefore completely destroyed its
value. See id.

34. See id. at 260 (citing Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell,
J., concurring); Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972)).

35. See Suitum, 117 S. Ct. at 1666.
fendant's favor, finding that the ordinances substantially advanced a legitimate governmental goal and were therefore valid. 36

Several years later, the Court formulated a two-prong ripeness test for land use claims in Williamson County Regional Planning Commission v. Hamilton Bank. 37 In Williamson, the Williamson County Regional Planning Commission rejected a developer's plan to build a residential subdivision by deeming the plan inconsistent with zoning and subdivision regulations. 38 The Court noted that the respondent did apply to the commission for a permit to undertake construction work, and thus passed the "Agins threshold." 39 It fur-

36. See Agins, 447 U.S. at 261. Challenges of regulations are generally ripe for adjudication as soon as the regulations are made into law, but those challenges "face an 'uphill battle' to prove that mere enactment" resulted in the taking of one's land. Suitum, 117 S. Ct. at 1666 n.10 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987)).

Only one term after Agins, the Court again reviewed a landowner's challenge of the enactment of a law which the landowner argued resulted in a taking. See Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc., 452 U.S. 264 (1981). In Hodel, the Virginia Surface Mining and Reclamation Association, a group of coal producers involved in mining operations in Virginia, sought a declaratory judgment that the Surface Mining Control and Reclamation Act of 1977 (SMCRA) did not apply to them. See id. at 273. Plaintiffs sought relief from the performance standards of SMCRA, which they alleged resulted in a taking of their property. See id. Similar to the Agins case, the Court concluded that the challenge was not ripe for review, stating that "[t]here is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting a variance from the [appropriate provision of the Act]." Id. at 297. Therefore, as the Suitum Court later noted, "Hodel... held that where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim." Suitum, 117 S. Ct. at 1666.


38. See id. at 177-81. In 1973 a developer submitted a plan to the Williamson County Regional Planning Commission (Planning Commission) for a permit to begin construction on a cluster development of an area designated the "Temple Hills Country Club Estates." See id. at 177. The Planning Commission initially reviewed and approved the developer's building plans in 1973. See id. Subsequently, the developer spent approximately $3 million to build a golf course, convey an open air easement to the county and install utility and road improvements. See id. at 178. In 1977, the county changed its zoning ordinances, and three years later, it requested that the developer resubmit his building proposal. See id. at 178-79. Due to financial difficulties, the defendant, Hamilton Bank, foreclosed on the developer and acquired the remaining property. See id. at 181 (citation omitted).

The Planning Commission denied the developer's application for development, providing eight specific reasons for its denial. See id. at 182. Further, the Planning Commission stated it would permit "respondent to build only 67 units, 409 fewer than respondent claims it is entitled to build, and that the development... would result in a net loss of over $1 million." Id. (citations omitted). This action by the Planning Commission led the developer to file suit under 42 U.S.C. § 1983, claiming he had been deprived of his property without just compensation. See id. at 182.

39. Id. at 187. For a discussion of how the "Agins threshold" principle applies to Suitum, see infra notes 166-69 and accompanying text.
ther stated, however, that "[b]ecause respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe." In this, the Court established an important two-prong test to determine whether a land use case is ripe for review.

The ripeness test's first prong, the finality prong, requires both that a final decision be reached regarding the application of the ordinance, regulation or law to the property in question, and that the landowner seek a variance for the land's development. The test's second prong requires that the landowner seek compensation through any available state procedures. Therefore, until a landowner has failed to receive just compensation through available state procedures, no violation has occurred and his case is not ripe for adjudication.

40. Id. at 186. The Court arrived at this conclusion after examining the appellant's cause of action under the Fifth Amendment's Just Compensation Clause. See id; see also U.S. Const. amend. V.

41. See Marais, supra note 17, at 425 (analyzing rationale Court employed in applying Williamson two-prong test).

42. See Williamson, 473 U.S. at 191 (reasoning case cannot be considered ripe until specific factual factors are evaluated and "administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question").


44. See Williamson, 473 U.S. at 194. The Williamson Court reasoned that the Fifth Amendment does not prohibit the taking of private property, but instead prohibits the taking of property without just compensation. See id. (citing Hodel, 452 U.S. at 297 n.40). The Court also explained that the Fifth Amendment requires neither that the compensation be "paid in advance" nor "contemporaneously with . . . the taking." Id. at 194. Further, if the government employs a legitimate process in acquiring land, such as paying just compensation, then the owner has "no claim against the Government." See id. 194-95 (quoting Ruckelshaus v. Monsanto, 467 U.S. 986, at 1018 n.21 (1984)). The Court continued by stating:

Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Id. at 195 (citation omitted).

45. See Williamson, 473 U.S. at 195. A landowner does not suffer harm under the Just Compensation Clause until he has failed to obtain compensation through available state procedures. See id. However, state action is not "complete" in the sense of causing a constitutional injury "unless or until the State fails to provide an adequate post-deprivation remedy for the property loss." Id. at 195 (quoting Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984)).
The Court’s holding in *MacDonald v. County of Yolo* affirmed *Williamson* and offered the Court an opportunity to apply the two-prong test. In *MacDonald*, Yolo County Planning Commission declared the plaintiff’s beachfront development plan ineligible for approval because it failed to conform with zoning regulations. In response to the defendant’s ruling, the plaintiff filed suit, seeking both monetary and declaratory relief. The Court asserted that success in a regulatory takings claim requires a showing that: (1) the regulation “goes too far;” and (2) that any proposed compensation is not just. According to the Court, the plaintiff failed to meet these two conditions and the case was therefore not ripe be-


47. See id. at 348-53. *MacDonald* was brought only one year after the *Williamson* decision, offering the Court a chance to clarify its newly enacted ripeness rationale.

48. See id. at 342. The plaintiff, MacDonald, brought an action against the defendant, Yolo City Planning Commission, after it denied his application to develop and divide beachfront land into 159 single family and multifamily homes. See id. Defendant denied the subdivision plan for several reasons, including the plan’s failure to provide sufficient street access, improper water and sewer service and the county’s inability to provide adequate police protection. See id. at 343. Plaintiff claimed that defendant’s ruling, which limited the permissible use of the land to “open-space agricultural use,” made it essentially worthless. Id. at 344. Plaintiff contended that the sole purpose of defendant’s decision was to provide an “open-space buffer” for the county. Id.

49. See id. at 344.

50. See id. at 348 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). The Court in *Mahon* was the first to consider whether a regulation had “gone too far,” and since then it has continually undertaken that consideration. See id. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1017-19 (1984) (involving applicant who brought suit seeking injunctive and declaratory relief from provisions of Federal Insecticide, Fungicide, and Rodenticide Act, alleging they effected taking of property without just compensation); Agins v. Tiburon, 447 U.S. 255, 260 (1980) (concerning landowner who filed complaint seeking damages for inverse condemnation and declaration that zoning ordinances were facially unconstitutional); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979) (relating to suit United States brought against owners of marina seeking to settle dispute whether owners were required to obtain authorization from government agency before making improvements in marina); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (involving validity of regulations prohibiting trade of birds legally killed before protected by Eagle Protection Act and Migratory Bird Treaty Act); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (concerning complaint that refusal of New York City Landmarks Preservation Commission to approve plans for construction of 50-story office building over Grand Central Terminal constituted taking of property without just compensation and arbitrarily deprived owners of property without due process); Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) (relating to action to enjoin defendants from operating sand and gravel pit until they had obtained required ordinance, which defendants contended was unconstitutional); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (involving action gold mine owners brought against United States to recover damages for alleged taking of property resulting from War Production Board order directing mine closings). The Court has reasoned that “[a] court cannot determine whether a regulation had gone ‘too far’ unless it knows
cause "no answer is possible until a court knows what use, if any, may be made of the affected property."\textsuperscript{51} The \textit{MacDonald} Court also outlined a "futility exception" to these requirements, stating that "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination," and not all situations may require multiple applications.\textsuperscript{52}

The Court subsequently applied the "futility exception" in \textit{Lucas v. South Carolina Coastal Council}, a 1992 land use case in which it held that a case was ripe for review despite the absence of special permit applications.\textsuperscript{53} In \textit{Lucas}, a developer brought suit after the South Carolina Coastal Council denied him permanent habitable structure zoning for his waterfront residential lots under the Beachfront Management Act (BMA).\textsuperscript{54} The Council argued that the case

\begin{quote}
how far the regulation goes." \textit{MacDonald}, 477 U.S. at 348. The Court explained this principle in \textit{Williamson} when it stated:

\begin{quote}
[T]he difficult problem [is] how to define "too far," that is, how to distinguish the point at which [a] regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. . . . [R]esolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property.
\end{quote}

\textit{Williamson}, 473 U.S. at 199-200 (footnote omitted).
\end{quote}

\textsuperscript{51.} \textit{MacDonald}, 477 U.S. at 350.
\textsuperscript{52.} \textit{Id.} at 350 n.7 (citing \textit{Williamson}, 473 U.S. at 205-06 (Stevens, J., concurring); \textit{United States v. Dickinson}, 331 U.S. 745 (1947)). In \textit{Williamson}, Justice Stevens stated:

\begin{quote}
The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations. It does not, however, impose the utopian requirement that enforcement action may not impose any cost upon the citizen unless the government's position is completely vindicated. We must presume that regulatory bodies such as zoning boards, school boards, and health boards, generally make a good-faith effort to advance the public interest when they are performing their official duties, but we must also recognize that they will often become involved in controversies that they will ultimately lose. Even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute as a "taking" of private property.
\end{quote}

\textit{Williamson}, 473 U.S. at 205 (Stevens, J., concurring).
\textsuperscript{53.} See \textit{505 U.S. 1003, 1059-61 (1992)}.
\textsuperscript{54.} See \textit{id. at 1006-09; see also Beachfront Management Act, S.C. CODE ANN. \S 48-39-290(A) (1988)}. The plaintiff, David H. Lucas, paid nearly $1 million for two prime beach lots in Charleston County in 1986, on which he hoped to build several single family homes. \textit{See Lucas}, 505 U.S. at 1008. Before the plaintiff was able to begin construction, however, the South Carolina legislature enacted the
should have been dismissed as not ripe for review because of a “special permit” exception that was amended to BMA after plaintiffs filed suit. The Court reasoned that “[i]n these circumstances, we think that it would not accord with sound process to insist that Lucas pursue the late-created ‘special permit’ procedure before his takings claim can be considered ripe.” The Court continued by explaining that unless state nuisance law would already have forbidden restrictive regulation, denial of all of a landowner’s beneficial use of his land violates the Constitution’s Takings Clause and requires just compensation.

B. Tahoe Regional Planning Agency History

In 1969, Congress approved the Tahoe Regional Planning Compact (1969 Compact), which created an interstate agency between California and Nevada responsible for regulating development in the Lake Tahoe region. This joint venture was named Beachfront Management Act (BMA) in 1988 to protect critical environmental areas on South Carolina’s beaches. See id. at 1007-08. Because the plaintiff’s lots fell within the protected environmental areas, BMA prohibited him from building any homes. See id. at 1008. The plaintiff brought suit alleging, inter alia, that “[BMA’s] construction bar effected a taking of his property without just compensation.” Id. at 1009.

55. See id. at 1010-11. The South Carolina legislature modified BMA to provide for “special permits” that would provide certain exceptions to the BMA’s requirements. See id.; see also S.C. CODE ANN. § 48-39-290(D)(1) (Supp. 1991). The modification rendered the plaintiff’s claim not ripe because he had failed to obtain a final decision regarding the status of his property. See id. at 1011 (citing Williamson, 473 U.S. at 190).

56. Lucas, 505 U.S. at 1012.

57. See id. at 1029-30. The Lucas Court reasoned that confiscatory regulations that restrict all economical use of an owner’s land without appropriate compensation constitute a taking and therefore should be abolished. See id. at 1029. To warrant abolition, however, a restriction must be more limiting than a state’s existing common law nuisance requirements. The Court provided two examples: [T]he owner of a lake bed . . . would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.

Id.

The Court stated that restrictions similar to those BMA imposes might very well deny an owner all economic benefit of this land. See id. However, these restrictions are almost always unlawful and the State could enforce them when it so desired. See id. at 1030 (citing Frank I. Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of “Just Compensation” Law, 80 HARV. L. REV. 1165, 1289-41 (1967)).

the Tahoe Regional Planning Agency (TRPA).\textsuperscript{59} After finding that the 1969 Compact inadequately protected the Lake Tahoe area from environmental harm, in 1980 Congress amended the 1969 Compact to correct its deficiencies.\textsuperscript{60} Although the 1980 Compact sought to more effectively protect Lake Tahoe’s environment through the establishment of “environmental threshold carrying capacities,” it similarly proved to be substantially inadequate.\textsuperscript{61}

\textsuperscript{59}See \textit{Suitum}, 117 S. Ct. at 1662 (citing \textit{Lake Country Estates}, 440 U.S. at 394).


\begin{quote}
[\textit{f}or the first time, state and federal governments [had] agreed to set up funding mechanisms to purchase sensitive lands. Concurrently, they agreed to amend the Tahoe regional compact. The new version required TRPA to adopt comprehensive environmental standards, or thresholds, for Tahoe, and to prepare a plan to achieve them.]
\end{quote}

\textit{Id.} The group also noted that officials had prepared another plan in 1983, “but the [Lake Tahoe] League and the Attorney General of California both believed [the plan] was incapable of meeting TRPA’s environmental thresholds, and filed suit to protect the lake.” \textit{Id.} Consequently, a federal court, after reviewing the facts, “issued an injunction saying that nothing could be built until the suit was resolved. At this time, parties concerned decided to settle the suit out of court. The assorted factions agreed to reach a consensus by working with representatives of every interest at the lake.” \textit{Id.}

\textsuperscript{61}\textit{Carpenter}, 804 F. Supp. at 1319; see also \textit{Suitum}, 117 S. Ct. at 1662. The 1980 Compact identifies an environmental threshold carrying capacity as “an envi-
Consequently, in 1987 Congress drafted a new plan under the 1980 Compact's authority which established an Individual Parcel Evaluation System (IPES). In assigning lots individualized numerical scores, IPES identified the regions in which construction would be least damaging to the environment, and therefore best-suited for development. The 1987 plan designated certain areas as Stream Environmental Zones (SEZs) to protect watersheds that contained runoff water from Lake Tahoe. Lots located within SEZs were automatically assigned IPES scores of zero and their owners were denied the right to either disturb or build on those lots.

TRPA tried to curtail the harshness of this system through the use of TDRs. Under the 1987 plan, TRPA was authorized to grant TDRs to restricted landowners, who could in turn sell the TDRs to unrestricted landowners and gain at least partial compensation for their losses. Attainment of a building permit under the 1987 plan required that a property owner meet the following four criteria: “(1) an IPES score above the numerical level established for development in that calendar year; (2) a residential development right; environmental standard necessary to maintain a significant scenic, recreational, scientific, or natural value of the region or to maintain public health and safety within the region. Such standards shall include . . . air quality, water quality, soil conservation, vegetation preservation and noise.” NEV. REV. STAT. ANN. § 277-200 art. II(i) (1980).


63. See Carpenter, 804 F. Supp. at 1320. The Individual Parcel Evaluation System (IPES) ranked lots in accordance with the 1980 Compact’s environmental threshold carrying capacities. See id. Criteria such as “erosion hazard, run-off potential and degree of difficulty of access to the construction site, etc.” all affected a lot’s score. Id. The lots with the highest numerical scores would have first priority for receiving building permits, while the lowest scores had lowest priority. See id.

64. See Suitum, 80 F.3d at 361; see also Suitum, 117 S. Ct. at 1662. Stream Environmental Zones (SEZs) are zones that “comprise only a small portion of the Basin but . . . perform a variety of natural functions critical to the needs of wildlife, the maintenance of water quality, and others. The role of SEZs [sic] in the cleansing of runoff is integral to the achievement of regional water quality goals and standards.” Affidavit of Susan E. Scholley at 22a, Suitum v. Tahoe Reg’l Planning Agency, 80 F.3d 359 (9th Cir. 1995).

65. See Suitum, 117 S. Ct. at 1663 (stating “the agency permits no ‘additional land coverage or other permanent land disturbance’ on such a parcel” (citing TRPA Code of Ordinance ch. 37 § 20.4.) [hereinafter TRPA Code]).

66. See Suitum, 80 F. Supp. at 361. TRPA uses Transferable Development Rights (TDRs) to curb the permitting scheme’s harsh effects because the 1980 Compact permits no other system, such as variances or exceptions. See Suitum, 117 S. Ct. at 1663. TRPA’s TDR program is an elaborate system designed to allow a landowner “to receive density credits for development proposals in redirection areas or areas designated for transferring development potential from sensitive lands.” Carpenter, 804 F. Supp. 1320; see also Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency, 638 F. Supp. 126, 132-33 n.6 (D. Nev. 1986).

67. See Suitum, 117 S. Ct. at 1663.
(3) adequate land coverage; and (4) a residential allocation.”

Each of the above, except the non-transferable IPES rating, is a type of TDR. Under this system, “[a]ll three kinds of TDRs [could] be transferred for the benefit of any eligible property in the Lake Tahoe Region, subject to approval by TRPA based on the eligibility [IPES score] of the receiving parcel for development.”

III. Suitum v. Tahoe Regional Planning Agency

In 1972, Bernadine Suitum purchased a vacant lot near Lake Tahoe in Washoe County, Nevada. Homes have subsequently been built on three sides of Suitum’s property, and an improved

68. Suitum, 80 F.3d at 361. The 1987 Plan was drafted pursuant to the 1980 Compact and controls the development of Suitum’s property. See id. at 360-61. The 1987 plan includes the Individual Parcels Evaluation System (IPES) under which TRPA assigns a numeric value to a residential lot on the basis of its being environmentally suited for development. See id. TRPA established the minimum IPES score annually and permitted owners of parcels with scores above that level to seek building permits. See id.

The 1987 plan also established “Stream Environmental Zones (SEZs) which generally convey surface water from upland areas into Lake Tahoe and its tributaries.” Id. No new land coverage is permitted within SEZs, except development for certain limited public uses. See id.

69. See Suitum, 117 S. Ct. at 1663. Although each of the TDRs is different, they are all applied in substantially the same manner. See id. In addition to a development right, one must possess a residential allocation, which the County issues through an annual drawing, and permits construction for a specified calendar year. See id. at 1663 n.2. To determine a landowner’s coverage rights, the total area a building may occupy on a given piece of property is calculated. See id. at 1659 (citing TRPA Code ch. 20. §§ 20.3.A, 37.11). These rights are limited to 1% of the lot’s total area. See id.

70. Suitum, 117 S. Ct. at 1663 (citing TRPA Code ch. 20 §§ 20.3.C, 34.1-34.3). The Suitum Court noted that all transfers of development rights are “subject to county approval and the use and density eligibility of the receiving parcel.” Suitum, 80 F.3d at 361. Development rights may be transferred to the entire Lake Tahoe Basin, as long as the receiving parcel has an IPES score greater than the annual IPES level required for development. See id.

71. See Suitum, 117 S. Ct. at 1663. Lake Tahoe is located “in the Sierra Mountains over 6,000 feet above sea level. The lake straddles the state line between California and Nevada.” Lake Tahoe Real Estate (visited Oct. 24, 1997) <http://www.highsierra.com/hauerman/guide.htm>. Suitum’s lot is located in the Mill Creek Estates subdivision of Incline Village. See Petitioner’s Brief at 2, Suitum v. Tahoe Reg’l Planning Agency, 117 S. Ct. 1659 (1997) (No. 96-243) [hereinafter Petitioner’s Brief]. Suitum purchased the lot with her husband, hoping to build a retirement home on it. See id. The lot is set on a steep slope that abuts the water’s edge. See Frank Clifford, Woman’s Suit Over Tahoe Land Tests Law on Environmental Protection, L.A. TIMES, Feb. 19, 1997, at A20. Incline Village is described as one of the wealthiest and trendiest neighborhoods located near Lake Tahoe. See id. It has grown into “a wealthy mountain community intended as a recreational paradise.” Lake Tahoe Real Estate (visited Oct. 24, 1997) <http://www.highsierra.com/hauerman/guide.htm>. Local realtors boast of its celebrity residents, noting that “[n]ames such as Hobart, Whittell and Harrah have long been associated with the Incline Village area.” Id.
road lines the fourth side.\textsuperscript{72} In 1989, Suitum sought and received a Residential Allocation through the annual county drawing which allowed her to begin construction on her property.\textsuperscript{73} Suitum then requested TRPA's permission to begin residential construction on the lot, but TRPA denied Suitum's request after it determined that her property was situated in a SEZ, and therefore had an IPES score of zero.\textsuperscript{74} Following her appeal of its initial decision, TRPA again denied Suitum's request for permission to build on her lot.\textsuperscript{75}

Suitum subsequently brought suit in the United States District Court for the District of Nevada, alleging that "in denying her the right to construct a house on her land, [TRPA's] restrictions deprived her of 'all reasonable and economically viable use' of her property, and so amounted to a taking of her property without just compensation in violation of the Fifth and Fourteenth Amendments."\textsuperscript{76} TRPA responded by asserting that Suitum's takings claim was not ripe for review due to her "failure to obtain a final decision by TRPA as to the amount of development ... that may be allowed ... ."\textsuperscript{77} TRPA maintained that a "final decision" could not be determined until Suitum tried to sell the TDRs entitled to her under the

\textsuperscript{72} See Petitioner's Brief, \textit{supra} note 71, at 14a. Since the purchase date, Suitum has paid all taxes, assessments and utility fees related to ownership of her lot. \textit{See id.}

\textsuperscript{73} See \textit{Suitum}, 117 S. Ct. at 1663.

\textsuperscript{74} See \textit{id.} The delay between purchase and construction on the lot resulted from several personal and financial losses Suitum suffered, including the death of her husband. \textit{See Petitioner's Brief, \textit{supra} note 71, at 2.} Suitum submitted plans for a single family detached dwelling unit to the TRPA with her building permit application. \textit{See Petitioner's Brief, \textit{supra} note 71, at 14a-15a} 5. For a discussion of SEZs, see \textit{supra} note 64 and accompanying text.

\textsuperscript{75} See \textit{id.} In her complaint, Suitum also: [A]ppealed . . . the IPES score of 0 to the TRPA . . . . This appeal was heard by the TRPA initially on August 22, 1990, and subsequently on November 27, 1990. At that time, the TRPA acted to deny the Plaintiff's appeal and upheld the IPES score on the grounds that the Subject Lot was located in a Stream Environment Zone. The effect of the determination of the TRPA was to deny the Plaintiff the right to construct a home on the Subject Lot . . . .

\textit{Petitioner's Brief, \textit{supra} note 71, at 15a.}

\textsuperscript{76} \textit{Suitum}, 117 S. Ct. at 1663. Suitum brought suit under 42 U.S.C. \textsection 1983. \textit{See id.} at 1662. The Court noted that although Suitum could have raised substantive due process or equal protection claims, it did not consider those issues because she failed to assert them. \textit{See id.} at 1663 & n.3. For a description of the Fifth and Fourteenth Amendments, see \textit{supra} notes 10, 25, 28, 44, 52 and accompanying text.

\textsuperscript{77} \textit{Id.} For a discussion of Suitum's response to these claims, see \textit{infra} notes 78-79 and accompanying text. For an analysis of the district court's ruling that supplemental briefing should be in order, see \textit{infra} notes 80-84 and accompanying text.
1987 plan. After TRPA rejected her building request, however, Suitum declined participation in the TDR program and rejected the several different transferable rights to which she was entitled.

Following its request for a supplemental briefing to determine the value of Suitum's TDRs, the court estimated their worth at between $40,000 and $60,000. Suitum contested this finding, stating that the system was a "sham" and any attempt to transfer her TDRs would be an "idle and futile act." In support of her claim, Suitum produced an affidavit of a former TRPA employee who attested that because of a poor market possessing complicated transfer procedures, Suitum's TDRs were not very valuable.

TRPA countered Suitum's claim by alleging that because there were fewer applicants than allocations in the county area where Suitum would be eligible to participate in the drawing, she had a "100 percent chance of winning [the drawing]." Additionally, because property owners within SEZs could transfer 1% of their total property area, Suitum would be entitled to 183 square feet in Land Coverage Rights for her 18,300 square foot lot. Suitum argued that if she could gain rights only through participation in a lottery, she did not possess them at that time. For further explanation of TDR types, see supra note 68 and accompanying text.

80. See Suitum, 117 S. Ct. at 1663-64. Following each party's filing of cross-motions for summary judgment, the district court requested supplemental briefing on the TDRs' value, procedure and status. See id; see also Petitioner's Brief, supra note 71, at 89a. TRPA hired a real estate appraiser to appraise Suitum's rights. See id. (citing Petitioner's Brief, supra note 71, at 130a-32a). The appraiser determined that: (1) each of Suitum's Residential Development Rights would have a market value of between $1,500 and $2,500; (2) her 183 square foot Land Coverage Rights were worth approximately $2,000; and (3) the vacant lot was worth between $7,000 and $16,000. See id. Additionally, a Residential Development Right sold with a Residential Allocation Right could be worth between $30,000 and $35,000. See id.

81. Id. at 1664; see also Petitioner's Brief, supra note 71, at 161a-62a. (detailing Suitum's response to defendant's memorandum concerning its transfer of development rights program).

82. See Suitum, 117 S. Ct. at 1664. Paul Kaleta, a Senior Planner with TRPA's Project Review Division from 1984 to 1990, made the affidavit. See Petitioner's Brief, supra note 71, at 134a. Kaleta stated that all six allocations issued to Washoe
countered by asserting that Suitum's witness was not an expert and that only through Suitum's actual attempt to sell her TDRs could their true value be ascertained. The court agreed with TRPA and concluded that Suitum's claim was not ripe because "[a]s things now stand, there is no final decision as to how Suitum will be allowed to use her property."

The Court of Appeals for the Ninth Circuit affirmed the district court's ruling that Suitum's failure to attempt a transfer of her development rights fatally affected her claim. Only through her attempt to transfer these rights, the Ninth Circuit reasoned, could it "know the regulation's full economic impact or the degree of their interference with her reasonable investment-backed expectations . . . ." Although it recognized that a limited futility exception to the ripeness doctrine exists, the Ninth Circuit declined to invoke the exception. It instead focused on the meaningful nature of the transfer of development rights program and the economic value of Suitum's rights.

County property owners to be transferred were returned to the county because there was no market for them. See id. at 135a-36a. Kaleta noted that therefore "[t]he market value for allocations could . . . be considered to be zero . . . ." Id. Kaleta further stated:

TRPA submits that its transfer of development rights program is a meaningful and realistic course of relief for the plaintiff. This is not true. Additionally, the land does not retain significant residual value as an adjunct to the transfer remedies. If one could sell this land to an adjacent property owner . . . I suspect they [sic] could sell ice to Eskimos.


84. Suitum, 117 S. Ct. at 1664 (citing Suitum, No. CV-N-91-040-ECR) (App. to Pet. for Cert. C-3)). The Court found that there was value in the allotment of the TDRs from TRPA to Suitum. See id. at 1664 (citing Suitum, No. CV-N-91-040-ECR) (App. to Pet. for Cert. C-3 to C-4)). Until specific prices could be discerned, however, the district court refused to rule on whether a taking had taken place. See id.

85. See Suitum v. Tahoe Reg'l Planning Agency, 80 F.3d 359, 362-63 (9th Cir. 1995).

86. Id. The Ninth Circuit analogized TRPA's TDR program to requests for special exceptions or variances in other cases in that the TDR program "effect[ed] the same purpose: facilitating alternative uses of property." Id. at 363. Although it recognized that TRPA's system of TDRs was unique, the Ninth Circuit found that TRPA's system of TDRs constituted a "use" of the property. See id. It further stated, "[t]he key inquiry is whether the property retains 'any reasonable beneficial use.'" Id. (quoting MacDonald v. County of Yolo, 477 U.S. 340, 349 (1986)).

87. See Suitum, 80 F.3d at 362-63 (citing Del Monte Dunes at Monterey Ltd. v. City of Monterey, 920 F.2d 1496, 1501 (9th Cir. 1990)).

88. See Suitum, 80 F.3d at 362-63.
Suitum's next appeal was to the United States Supreme Court, which granted certiorari.\(^8\) The Court concluded that the sole question presented was the ripeness of Suitum's claim; not whether TDRs may be considered when deciding a takings claim or whether Suitum had been justly compensated for the taking of her property.\(^9\) Ultimately, the Court vacated the Ninth Circuit's ruling, finding *Suitum* ripe for review and remanded the case to the district court.\(^1\)

### IV. NARRATIVE ANALYSIS

#### A. The Plaintiff's Claim is Ripe

After analyzing the facts and procedural history of Suitum's appeal, the Supreme Court found that the only relevant issue presented was whether TRPA's alleged regulatory taking of Suitum's property constituted a claim which was ripe for adjudication.\(^2\) The Court applied the *Williamson* two-prong test to resolve


The Pacific Legal Foundation (PLF) took over the Suitum case after it reached the Court. See *Lazarus*, supra note 3, at 196. Lazarus describes PLF as "a conservative public interest litigation organization" that "is no novice in Supreme Court regulatory takings litigation." *Id.* Lazarus further notes that "PLF has represented the interests of property owners as amicus curiae or as parties in virtually every land use takings case before the Court during the past two decades." *Id.* Finally, Lazarus opines that "PLF lawyers saw in the sympathetic facts of Mrs. Suitum's personal circumstances an opportunity for favorable Supreme Court precedent that furthers PLF's broad property rights agenda." *Id.*

\(^{9}\) See *Suitum*, 117 S. Ct. at 1662. The *Suitum* Court concluded:

> While the pleadings raise issues about the significance of the TDRs both to the claim that a taking has occurred and to the constitutional requirement of just compensation, we have no occasion to decide... whether or not these TDRs may be considered in deciding the issue of whether there has been a taking in this case, as opposed to the issue of whether just compensation has been afforded for such a taking. The sole question here is whether the claim is ripe for adjudication, even though Suitum has not attempted to sell the development rights she has or is eligible to receive. We hold that it is.

*Id.* (emphasis added).

\(^{10}\) See *id.* The Court remanded *Suitum* to the district court for a determination of the approximate value of Suitum's TDRs to determine whether there has been an unconstitutional regulatory taking of her property without "just compensation." See *Suitum v. Tahoe Reg'l Planning Agency*, 123 F.3d 1322 (9th Cir. 1997) (No. 94-15768).

\(^{11}\) See *id.* The Court remanded *Suitum* to the district court for a determination of the approximate value of Suitum's TDRs to determine whether there has been an unconstitutional regulatory taking of her property without "just compensation." See *Suitum v. Tahoe Reg'l Planning Agency*, 123 F.3d 1322 (9th Cir. 1997) (No. 94-15768).
Suitum's claim. Satisfaction of the first prong, the Court stated, required that Suitum show she had received a “final decision regarding the application of the [challenged] regulations to the property at issue” from the appropriate government subdivision whose function it is to implement these regulations; here, TRPA. This prong requires that the regulation “goes too far” and thereby results in a taking under the Fifth Amendment. An example of a

Election Campaign Act); Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972) (relating to political party, officers and members who joined as plaintiffs in requesting invalidation of various sections of Ohio election laws as unconstitutional). In Suitum, TRPA did not question whether Suitum's claim met Article III justiciability requirements; instead, it maintained that Suitum's claim failed to satisfy the prudential ripeness test. See Suitum, 117 S. Ct. at 1664 n.8. Only a court itself may assert the need for its consideration of a claim's ripeness. See Reno, 509 U.S. at 57; see also Blanchette v. Connecticut Gen. Ins. Corp., 419 U.S. 102, 138 (1974) (concerning multiple parties with interests in Penn Central Transportation Company who brought suits challenging Regional Rail Reorganization Act as violating Fifth Amendment's Just Compensation Clause).

Justice Souter delivered the majority opinion in Suitum, in which Chief Justice Rehnquist, Justice Stevens, Justice Kennedy, Justice Ginsburg and Justice Breyer joined. See id. at 1662.

93. See id. at 1664-65 (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)). For a discussion of the Williamson two-prong ripeness test used in land use cases, see supra notes 41-45 and accompanying text.

94. Suitum, 117 S. Ct. at 1665 (quoting Williamson, 473 U.S. at 186); see also Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc., 452 U.S. 264 (1981) (concerning association of coal producers who brought pre-enforcement challenge of constitutionality of Surface Mining Control and Reclamation Act); Agins v. City of Tiburon, 447 U.S. 255 (1980) (relating to landowners who brought suit against city seeking both declaration that zoning ordinances controlling lot overlooking San Francisco Bay were unconstitutional as well as damages for inverse condemnation).

95. See Suitum, 117 S. Ct. at 1665. See also MacDonald v. County of Yolo, 477 U.S. 340, 348 (1986) (noting regulatory claims have two components: (1) regulation must "take" plaintiff's property by "going too far;" and (2) plaintiff must demonstrate that any available compensation is not just). The Court, in its early takings jurisprudence, recognized that the government may take private property for public use. See Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922) (stating protection of private property under constitutional guarantees provides land is taken for public purpose, but not without just compensation). The Mahon Court qualified the government's right as "not absolute" and observed that "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id. (emphasis added). The Court addressed the question of how far is "too far" in First English Lutheran Church v. Los Angeles County. 482 U.S. 304 (1986).

In First English, the First English Lutheran Church owned several acres of land in an area that flooded following a forest fire. See id. at 307. Because the flood had significantly damaged property in that area, the County of Los Angeles passed a temporary regulation prohibiting construction. See id. The plaintiff alleged that the regulation constituted a taking of its property and that the defendant should be required to pay it for its loss. See id. at 308. The Superior Court of California ruled in favor of the defendant, the Court of Appeals affirmed, and the California Supreme Court denied review of the Church's claim. See id.
regulation that "goes too far" is one that inhibits all productive use of land and leaves it economically worthless.96

The test’s second prong, the Court stated, requires a landowner’s employment of appropriate state procedures for obtaining just compensation for his taking claim.97 The Court observed that this requirement was rooted in the Fifth Amendment’s Just Compensation Clause, under which “only takings without ‘just compensation’ infringe” upon rights that the Amendment grants.98 Furthermore, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation . . . until he has used the procedure and been denied just compensation."99 The Court reasoned that Suitum addressed only the “final

Stein summarizes First English by stating:
The Supreme Court could not determine whether a regulatory taking had actually occurred, given the absence of a trial. But the Court nonetheless held that “where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” In other words, if a municipality takes some action that a court determines years later to have worked a regulatory taking, then the municipality must provide compensation accruing from the point when the interference first effected the taking. Although First English resolved the uncertainty surrounding the appropriate remedy for an inverse regulatory taking, it left to the lower courts the challenging details of how to calculate compensation. Significantly, the Court offered no suggestion as to how to determine when a temporary regulatory taking begins and ends.

96. See Suitum, 117 S. Ct. at 1665. For a description of the "goes too far" rationale the Mahon Court developed, see supra note 95 and infra note 141.

97. See id. (citing Williamson, 473 U.S. at 194).

98. Id. See U.S. CONST. amend. V. The Fifth Amendment authorizes governmental condemnation of one’s property. See Suitum, 117 S. Ct. at 1665; see also United States v. Carmack, 329 U.S. 230, 241-42 (1946) (describing Takings Clause as exact and specific delegation of "pre-existing authority"). Because the public purpose requirement is construed broadly, condemnation is permitted for various reasons. See Stein, supra note 5 at 8 n.14.

The courts have resolved most issues relating to direct condemnation, in which the government takes land through its eminent domain authority or a similar procedure. See id. In an inverse condemnation dispute, however, “a municipality will take some action short of a direct condemnation that restricts a private landowner’s use of her property, often substantially, without explicitly taking it.” Id. Although the government’s action in Williamson did not constitute a direct condemnation, the landowner argued that it essentially had the same effect. See id. Stein notes that “[z]oning laws, environmental protection laws, historic preservation laws, and public health and safety laws [are types of ] . . . inverse condemnation claims.” Id. at 8-9.

99. Suitum, 117 S. Ct. at 1665 (citing Williamson, 473 U.S. at 195). Similarly, in Parratt v. Taylor, 451 U.S. 527 (1981), the Court recognized that a property owner suffers no harm under the Just Compensation Clause until he has attempted and has failed to obtain compensation under appropriate state procedures. See Williamson, 473 U.S. at 195. In Parratt, the Court found that when a state deprives a person of property “through a random and unauthorized act by a state
decision" prong of Williamson, and dismissed both Williamson's second prong and the "state procedures" requirement. As neither the State nor TRPA offered any remedy to provide just compensation, the Court limited its discussion to whether a final decision regarding application of TRPA's regulations to Suitum's land had been reached.

1. The Demand for Finality is Satisfied

The Court criticized the rationale the Ninth Circuit used to support TRPA's assertion that Suitum had failed to receive a decision to satisfy Williamson's "finality prong." In its brief to the Court, however, TRPA later conceded that the full extent of the regulations' impact is ascertainable. To clarify the ripeness princi-

employee" a Due Process claim does not arise merely by alleging the loss. Id. The Constitution does not require pre-deprivation process because it is too impracticable to grant a meaningful hearing prior to the loss. See id. State action, observed the Court, is incomplete "until the state fails to provide an adequate postdeprivation remedy for the property loss." Id. (citing Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984)). Similarly, the Court reasoned that the U.S. Constitution fails to require pre-taking compensation, "and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, [hence] the state's action here is not 'complete' until the state fails to provide adequate compensation for the taking." Id.

100. Suitum, 117 S. Ct. at 1665 n.8.
101. See id. The Suitum Court stated:
We therefore do not decide whether [Williamson's] "state procedures" requirement has been satisfied in this case. Ordinarily, a plaintiff must seek compensation through state inverse condemnation proceedings before initiating a taking suit in federal court, unless the State does not provide adequate remedies for obtaining compensation. Suitum's counsel stated at oral argument that "the position of the Tahoe Regional Planning Agency is that they do not . . . have provisions for paying just compensa-


The Court concluded that resolution of this issue would therefore be left to the Ninth Circuit's discretion. See id. Suitum's sole remedy seems to be compensation under a Section 1983 suit for damages based on a wrongful taking by TRPA. See id.

102. Id. at 1665; see also Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).
In this case, of course, we do know how far the regulation has "gone" in one respect. We know the full extent of the regulation's impact in restricting petitioner's development of her own land. The TRPA has finally determined that petitioner's land lies entirely within a SEZ; therefore, she cannot build a permanent structure on her parcel.

Id.

TRPA, however, believed that Suitum erred in concluding that reaching a final decision regarding whether a taking has occurred ripens a claim. See id. TRPA
ciple, the Court emphasized that because TRPA’s claim had not satisfied the ripeness prong, this case is inconsistent with its earlier holdings.104

The Court inferred that a final decision had been reached in Suitum because there remained no question of how Suitum might use her land.105 Therefore, “[b]ecause [TRPA] has no discretion to exercise over Suitum’s right to use her land,” the Court concluded that “no occasion exists for applying Williamson’s requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel.”106 Recognizing the parties’ continued disagreement regarding the role of the TDR system in determining whether a taking has occurred, the Court stated that further reference to the Williamson two-prong test would be unnecessary because it was clear that finality had been achieved.107

2. Obtaining the Value of TDRs Is Not the Type of Final Decision Required

Both TRPA and the lower courts maintained that before a case could be deemed ripe for adjudication, a “final decision” had to be reached; namely, that Suitum could apply to either transfer or sell her TDRs to another eligible party.108 Disagreeing with this view, the Court held that “[t]his is not, however, the type of ‘final decision’ required by our Williamson precedents.”109 While many of the Court’s earlier holdings addressed the difficulty of ascertaining what development would be allowed on land requiring a regulatory agency’s approval, Suitum did not warrant this consideration.110 As

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104. See Suitum, 117 S. Ct. at 1665. For a comprehensive discussion of the Court’s earlier decisions regarding the ripeness of land use cases, see supra notes 22-57 and accompanying text.

105. See id. at 1667. The Court recognized that neither party disputed TRPA’s finding that Suitum’s property lies entirely within a SEZ and was therefore subject to the total ban on building. See Respondent’s Brief, supra note 103, at 21. See TRPA Code § 20.4. For further discussion regarding the settled nature of this issue, see supra note 103 and accompanying text.

106. Suitum, 117 S. Ct. at 1667.

107. See id.


109. Suitum, 117 S. Ct. at 1667. In the land use cases that preceded Williamson, courts focused on determining how a regulatory agency’s decision regarding the permissible uses of a piece of land would affect a landowner. See id.

110. See id.; see, e.g., Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (noting no concrete controversy regarding application of specific zoning provisions existed
the Court stated, "no discretionary decision must be made by any agency official for her to obtain [the TDRs] or to offer them for sale." Although the final determination regarding whether a particular sale may be completed is subject to agency approval, such is not the case regarding the marketability of TDRs. The Court concluded that as long as there is more than one available purchaser, sellers’ rights are marketable.

3. The Value of the TDRs Is Irrelevant

The Court next addressed TRPA’s argument that Suitum’s case was not ripe for review because no “values” were “attributable” to her TDRs. Although the Court believed this argument to be a mere variation on a continuing theme, it methodically rejected the argument’s merits and concluded that there remained no uncertainty regarding Suitum’s rights to receive TDRs which she may later sell. Even if uncertainty regarding whether Suitum would be entitled to certain TDRs did remain, the Court found that “it would be unreasonable to require Suitum to enter the drawing in order to ripen her suit.” The Court suggested that it would be more prudent in such a case to simply discount Suitum’s claim “to reflect the mathematical likelihood of her obtaining one.” The Court also reasoned that Suitum was able to transfer her develop-

because of challenged ordinances allowing plaintiffs to construct between one and five residences on their land); Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1997) (discussing decisions of this type as generally ad hoc, factual inquiries courts evaluate on basis of several significant factors).

111. Suitum, 117 S. Ct. at 1667. The Suitum Court noted that the only remaining obstacle was obtaining TRPA’s approval of an application to transfer TDRs from an unqualified seller to a qualified buyer. See id. at 1667-68.

112. See id. The abundance of potential uses and parcels of land for the application of TDRs makes the determination of whether there exist enough buyers unnecessary. See id. The only question is to whom an agency will grant approval for the use of TDRs. See id.

113. See id. at 1668. There existed a particularly diverse group of potential buyers for Suitum’s TDRs. See id.


115. See Suitum, 117 S. Ct. at 1668.

116. See id. The Court found there to be no need for a “discretionary decision” in determining whether Suitum would receive TDRs. See id.

117. Id. The Court suggested that it would be illogical to hold Suitum’s takings suit at bay until she received TDR allocation through the lottery. See id.

118. Id. The Court stated that if the odds of success in the Allocation lottery were low, “Suitum’s taking claim could be kept at bay for year to year until she actually won the drawing.” Such a rule, the Court reasoned, would permit any local authority to nullify the Fifth Amendment’s guarantee. See id. The Court instead asserted that in such a situation, “the value attributable to the allocation...
ment rights to anyone willing to purchase them. The only existing restriction was TRPA's ability to deny a particular transfer, but this would not render the TDRs' value unascertainable. In support of this, the Court noted that "[w]hile a particular sale is subject to approval, salability is not . . . ."

Observing that the value of Suitum's development rights was simply a matter of "possible market prices," the Court asserted that the district court could study the evidence before it to determine an appropriate value for those rights. The Court then noted that although the potential difficulty in evaluating a new standard, such as TDRs, might negatively affect the market for a short period, such effect would be "simply one of the risks of regulatory pioneering, and the pioneer here is the agency, not Suitum."

4. Abbott Laboratories Is Not on Point

TRPA stressed another argument when Suitum brought her case before the Court; specifically, that Suitum's claim was not ripe under the "fitness for review" requirement established in Abbott Laboratories v. Gardner. In Abbott Laboratories, manufacturers of prescription drugs brought suit against the Food and Drug Administration's (FDA) commissioner, claiming that he lacked statutory authority to create special labeling regulations. In the interest of

Suitum might or might not receive in the drawing" should simply be appraised mathematically. Id.

119. See id. For a description of the obstacles to transferring TDRs a buyer might encounter, see supra notes 66-70 and accompanying text.

120. See Suitum, 117 S. Ct. at 1668.

121. See id.

122. Id. The Court reasoned that the valuation of Suitum's TDRs is simply an issue of possible market prices. Additionally, this valuation is one in which the district court had considerable evidence and could have come to a reasonable conclusion. See id.

123. Id. at 1668. Courts often make market price determinations without referring to similar past transactions. See id. at 1668-69; see also United States v. 819.98 Acres of Land, 78 F.3d 1468 (10th Cir. 1996) (using evaluations of expert testimony to determine value of condemned land); United States v. L.E. Cooke Co., 991 F.2d 336 (6th Cir. 1993) (permitting expert witnesses' valuation of mineral rights).

124. Suitum, 117 S. Ct. at 1669. The Suitum Court also noted that, to determine the value of a piece of land, a court may use both expert witnesses and request that parties submit additional briefs. See id. at n.13.

125. See id. at 1669.


127. See id. at 137-39. After Congress passed this legislation, 37 drug manufacturers and the Pharmaceutical Manufacturers Association, which is composed of more than 90% of the United States' prescription drug manufacturers, brought suit. See id. at 138-39. Congress amended the Federal Food, Drug, and Cosmetic Act (FFDCA) to require prescription drug manufacturers to "print the 'established
preventing confusion in the drug market, these regulations required manufacturers to include on labels the common names of drugs, which doctors and patients could recognize easily.\textsuperscript{128} FDA countered the manufacturers' challenge by arguing that as it had not yet initiated proceedings against the manufacturers to enforce the new labeling regulations, their claim was not ripe for review.\textsuperscript{129}

The Court dealt with the problem in a twofold manner, first analyzing the issues' fitness for adjudication, and second evaluating the hardship parties suffer when courts refuse to consider their claims.\textsuperscript{130} Applying the "fitness for review" prong, the Court found that the FDA's new labeling regulations constituted final agency action.\textsuperscript{131} The Court came to this conclusion after determining that the regulations directly and immediately affected the manufacturers,\textsuperscript{132} This determination was based on the manufacturers' having to decide whether to obey the new regulations and change their current labels at great expense or ignore the regulations and face prosecution.\textsuperscript{133} The "hardship prong" is satisfied by requiring the

\textsuperscript{128} See id. at 139. The purpose of FFDCA is to inform doctors and patients that many name brand drugs are available in lower-priced generic forms. See id.

\textsuperscript{129} See id. at 148-49.

\textsuperscript{130} See id. The Court outlined its evaluation of the problem by stating: Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

\textsuperscript{131} See Abbott Lab. v. Gardner, 387 U.S. 136, 149-52 (1967). The Court described the labeling regulations as "final agency action" within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 704 . . . . " Id.

\textsuperscript{132} See id. at 152.

\textsuperscript{133} See id. The Abbott Laboratories Court reasoned: "[i]f petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies." Id. If they chose not to comply, the Court noted that petitioners could continue to use "material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation of the Commissioner . . . . " Id. at 153. The second option might have potentially been more costly to petitioners because of the "serious criminal and civil penalties for the unlawful distribution of 'misbranded' drugs." Id.
manufacturers to either significantly change their business operations or face considerable penalties for non-compliance.\textsuperscript{134}

In applying the "fitness for review" prong to \textit{Suitum}, the Court came to a direct conclusion: "\textit{Abbott Laboratories} is not on point."\textsuperscript{135} In \textit{Abbott Laboratories}, the manufacturers challenged the validity of the FDA's regulations, believing it had overstepped its bounds in creating them.\textsuperscript{136} \textit{Suitum}, however, did not challenge TRPA's regulations.\textsuperscript{137} She instead accepted TRPA's authority to bar her from building and proceeded to pursue full compensation for the regulations' adverse consequences.\textsuperscript{138}

B. Justice Scalia's Concurring Opinion

In his concurrence, Justice Scalia agreed with the majority's opinion, but objected to the discussion of whether TRPA was obliged to reach a final decision regarding \textit{Suitum}'s ability to sell or evaluate her TDRs.\textsuperscript{139} Justice Scalia stated that the majority only superficially examined the language of the Court's previous holdings.\textsuperscript{140} More careful examination, Justice Scalia proposed, would

\begin{itemize}
  \item \textsuperscript{134} See \textit{id.} at 153. The Court recognized that the drug manufacturing business is a sensitive industry, warranting considerable public confidence. See \textit{id.} The Court reasoned that mandating manufacturers' defiance of a regulation promulgated under the Administrative Procedure Act might adversely affect consumer confidence. See \textit{id.} The Court therefore determined that no violation need have occurred for a challenge to be brought. See \textit{id.}
  \item The Government also held that to allow this suit to proceed would not hinder the future creation of similar legislation by allowing a multiplicity of suits. See \textit{id.} at 154. The Court dismissed this argument as unlikely, adding that even if true, "the courts are well equipped to deal with such eventualities." \textit{Id.} at 154-55.
  \item \textsuperscript{135} \textit{Suitum}, 117 S. Ct. at 1669.
  \item \textsuperscript{136} For a complete discussion of the FDA regulations at issue in \textit{Abbott Laboratories}, see supra notes 125-38 and accompanying text.
  \item \textsuperscript{137} See \textit{id.} at 1669-70. The Court noted that \textit{Suitum} could have opted to challenge the regulations by simply ignoring TRPA's ruling and proceeding to build on her parcel. See \textit{id.} at 1670.
  \item \textsuperscript{138} See \textit{id.} at 1670. The Court noted that even if \textit{Abbott Laboratories} did apply to \textit{Suitum}, it would not support TRPA's position. See \textit{id.} The Court commented: "\textit{Suitum} is just as definitively barred from taking any affirmative step to develop her land as the drug companies were bound to take affirmative steps to change their labels." \textit{Id.}
  \item \textsuperscript{139} See \textit{id.} (Scalia, J., concurring). Justice Scalia described discussion regarding TRPA's determination of \textit{Suitum}'s ability to sell her TDRs as "beside the point." \textit{Id.}
  \item \textsuperscript{140} See \textit{Suitum}, 117 S. Ct. at 1670 (Scalia, J., concurring). Justice Scalia stated that the \textit{Suitum} majority quoted only vaguely from the language of \textit{Williamson County Regional Planning Commission v. Hamilton Bank}, when describing the nature of a "final decision" inquiry. See \textit{id.} (citing 473 U.S. 172 (1985)). For example, the majority noted that there must be a "‘final decision regarding the application of the [challenged] regulations to the property at issue . . . .’" \textit{Id.} (quoting \textit{Williamson}, 473 U.S. at 186). The majority also commented that "‘[a] court cannot deter-
reveal that the main purpose of a "final decision" inquiry should be to ascertain the extent of governmental restriction on an individual's land rather than what he has received in exchange for that restriction.141

According to Justice Scalia, the important question was whether the government had made a final decision on the permissible use of the land.142 Finding TDRs to have no bearing on either land use or development, Justice Scalia concluded they are irrelevant in determining whether a "final decision" has been made regarding the extent of governmental land restrictions.143 Justice mine whether a regulation has gone 'too far' unless it knows how far the regulation goes." Id. (quoting MacDonald v. County of Yolo, 477 U.S. 340, 348 (1986) (alteration in original)).

In Williamson, for example, the Court explained that consideration of the "final decision" issue should focus on assisting the Court in ascertaining "how [the takings plaintiff] will be allowed to develop its property." Williamson, 475 U.S. at 190 (emphasis added). The MacDonald Court similarly stated that the "final decision" requirement's purpose is to guarantee that there has been a "determination of the type and intensity of development legally permitted on the subject property . . . [and that] our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." Id. (quoting MacDonald, 477 U.S. at 348-351 (second alteration in original). Justice Scalia also noted the majority's failure to mention Lucas v. South Carolina Coastal Council, a case in which the Court used precise wording to elucidate the "final decision" requirement. See Suitum, 117 S. Ct. at 1670 (citing 505 U.S. 1003 (1992)).

141. See Suitum, 117 S. Ct. 1671 (Scalia, J., concurring). Justice Scalia interpreted the majority's assertion that without a "final decision" it is impossible to know whether a regulation "goes too far" to mean that it "goes too far in restricting the profitable use of the land," not that it does not go "far enough in providing compensation for restricting the profitable use of the land." Id. at 1671 (citing id. at 1665); see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

142. See Suitum, 117 S. Ct. at 1671 (Scalia, J., concurring). The "final decision" question normally hinges on whether a government agency has made a determination regarding an owner's permissible use of his land; not whether the landowner has employed a reimbursement scheme. See id. Each of the four cases the majority relied on focused on whether a governmental agency had determined the amount and type of land use permitted. See id.; see also, e.g., MacDonald, 477 U.S. 340 (1986); Williamson, 473 U.S. 172 (1985); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

143. See Suitum, 117 S. Ct. 1671 (Scalia, J., concurring). Justice Scalia attempted to differentiate between TDRs and their equivalents and actual land use by stating:

TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory decree) "attached." The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop his land. The latter is valuable, to be sure, but it is a new right conferred upon the landowner in exchange for the taking, rather than a reduction of the taking. In essence, the TDR permits the landowner whose right to use and develop his property has been restricted or extinguished to extract money from others. Just as a cash payment from the government would

http://digitalcommons.law.villanova.edu/elj/vol9/iss2/3
Scalia noted that when TDRs are placed on the taking side rather than on the just compensation side, "a clever, albeit transparent, device" emerges which seeks to exploit a "peculiarity of our takings clause jurisprudence" by denying property owners just compensation and permitting the government to pay much less for property.144 In causing the government rather than a third party to provide compensation, this type of TDR scheme appears to place the value in the land as opposed to in the compensation system.145 Justice Scalia concluded that TDRs, although somewhat useful,146 must be limited to the compensation side of takings analysis not relate to whether the regulation "goes too far" (i.e., restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking; and just as a chit or coupon from the government, redeemable by and hence marketable to third parties, would relate not to the question of taking but to the question of compensation; so also the marketable TDR, a peculiar type of chit which enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, relates not to taking but to compensation. It has no bearing upon whether there has been a "final decision" concerning the extent to which the plaintiff's land use has been constrained.

Id. (emphasis added).

144. Id. The Constitution requires that a deprived landowner, through just compensation, be placed in the same pecuniary position as he would be if his land not been taken. See United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979) (involving suit government brought for condemnation of recreational camps nonprofit organization owned and managed for public use). The compensation provided must both fully compensate the property owners, as well as precisely equal the value of the taken property. See Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893) (relating to proceedings United States undertook to acquire lock and dam of company situated in river).

A court generally will not find a regulatory taking to have occurred if the value of the property affected retains a substantial amount of its original value. See, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). If compensation provided through TDRs, or another system, is permitted to be counted in the taking analysis rather than on the compensation side, the government can pay much less for the land simply by implementing these systems. See Suitum, 117 S. Ct. at 1671-72.

145. See id. at 1672. Justice Scalia provided an example of this practice: It would be too obvious, of course, for the government simply to say "although your land is regulated, our land-use scheme entitles you to a government payment of $1,000." That is patently compensation and not retention of land value. It would be a little better to say "under our land-use scheme, TDRs are attached to every parcel, and if the parcel is regulated its TDR can be cashed in with the government for $1,000." But that still looks too much like compensation. The cleverness of the scheme before us here is that it causes the payment to come, not from the government but from third parties—whom the government reimburses for their outlay by granting them (as the TDRs promise) a variance from otherwise applicable land-use restrictions.

Id. (emphasis added).

146. See id. Justice Scalia commented that the TDR system is not in itself "undesirable or useless." Id. TDRs can serve the necessary purpose of mitigating eco-
to maintain the current system of regulatory takings jurisprudence.147 The fixing of Suitum’s rights to develop her land was the only necessary consideration, Justice Scalia reasoned, in determining whether a final decision had been reached.148 Because there had been no dispute regarding Suitum’s total denial to either develop or build on her property, Justice Scalia concluded that the final decision requirement had been satisfied.149

V. CRITICAL ANALYSIS

While the Court’s conclusions in Suitum may have produced the correct result, the Court missed an opportunity to establish important clarifying precedent. The Suitum majority held that there existed no Court precedent to support the Ninth Circuit’s conclusion that a “final decision” had not been reached.150 The Court reasoned that because Suitum’s land lies entirely within a development-free zone and transfer of her TDRs was unnecessary to resolve the ripeness question, her claim was both ripe and final.151

147. See Suitum, 117 S. Ct. 1672 (Scalia, J., concurring); see also Steven R. Levine, Environmental Interest Groups and Land Regulation: Avoiding the Clutches of Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). For a further explanation of TDRs, see supra note 66-70 and accompanying text.

148. See Suitum, 117 S. Ct. 1672 (Scalia, J., concurring).

149. See id. at 1673-83. The “final decision” issue regarding Suitum’s land had never been disputed, as TRPA rejected her application for a building permit. See id. Because Suitum’s property lies within a SEZ, and TRPA Code § 20.4 states that “[n]o additional land coverage or other permanent land disturbance shall be permitted” in such a zone, there is no chance for her parcel’s development. Id. (citing TRPA Code § 20.4). Therefore, as TRPA conceded, “[w]e know the full extent of the regulation’s impact in restricting petitioner’s development of her own land.” Respondent’s Brief, supra note 103, at 21. For a more thorough discussion of the location of Suitum’s property within the SEZ and its IPES score, see supra note 74 and accompanying text.

150. See Suitum, 117 S. Ct. at 1664-66. The Suitum majority relied on several cases to demonstrate that the Ninth Circuit strayed from earlier Court ripeness rationale. See id. (citing MacDonald v. County of Yolo, 477 U.S. 340 (1986); Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172 (1985); Agins v. City of Tiburon, 447 U.S. 255 (1980)). For a discussion of these cases, see supra notes 31-52 and accompanying text. For a thorough description of the approach the Ninth Circuit took in Suitum, see supra notes 85-88 and accompanying text.

151. See Suitum, 117 S. Ct. at 1663-66. For a description of the SEZ area surrounding Lake Tahoe, which TRPA identified as an area in which development is prohibited, see supra note 64 and accompanying text.
A. The Court's Four Options in Adjudicating Suitum

To understand the Court's decision in Suitum, it is important to delineate the four primary options it could have used in deciding the case.152 First, the Court could have decided that a landowner has an inherent right to develop his property in any manner he sees fit, and that Suitum's takings claim was therefore ripe.153 This decision would severely threaten the government's ability to protect environmental resources by triggering the application of the Lucas per se takings test, which requires full compensation when an owner is deprived of all economical use of his land.154 If the Suitum Court had employed this rationale, the application of TRPA's restrictions would have forced the agency to pay just compensation to Suitum, as a restricted landowner, for infringing on her inherent right to develop.155

Second, the Court could have viewed TDRs as inconsequential to the determination of whether property has been taken.156 Under this view, the TDR system would only be used to determine whether a deprived landowner has been justly compensated; not whether "there has been a taking in the first instance."157 This ap-

152. See Lazarus, supra note 3, at 199-204.
153. See id. at 200.
154. See id. An attempt to either remove or prevent the existence of one's right to develop his land, regardless of its physical condition, would automatically trigger an application of Lucas. See id; see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Lucas requires that a landowner be compensated in the event that he is deprived of all "economically viable use" of his property. Lucas, 505 U.S. at 1029. For a discussion of the Court's holding in Lucas, see supra notes 53-57 and accompanying text. For a discussion of the Fifth Amendment's Takings Clause, see supra note 25 and accompanying text.

Notably, under this approach the Lucas holding would be extended in favor of the landowner, nullifying any possible environmental protection programs that restrict, however slightly, a landowner's absolute right to develop, unless the governmental agency provides full compensation. See Lazarus, supra note 3, at 200. The author noted, for example, "[w]etlands protection programs, restrictions on mining, and land use restrictions for the protection of endangered species would all be imperiled." Id.

155. See Lazarus, supra note 3, at 200.
156. See id. at 200-01. Justice Scalia favored this approach to resolving the issue in Suitum. See Suitum, 117 S. Ct. at 1670-73 (Scalia, J., concurring). For a discussion of the rationale Justice Scalia employed in his concurring opinion, see supra notes 139-49 and accompanying text.

157. Lazarus, supra note 3, at 200-01. The applicability of TDRs' worth to the "taking" or "just compensation" requirements is determinative of the economic deprivation a landowner may potentially suffer. See id. at 201. When land use regulation schemes use TDR programs, and thereby affect the "taking" issue, landowners almost always retain some of the value of their land through the TDRs. See id. Those landowners therefore do not suffer complete economic deprivations. See id.
proach would hamper governmental efforts to protect environmental resources by causing regulations to increasingly be viewed as takings and result in regulating agencies having to pay the difference between compensation systems remuneration and actual just compensation.\(^\text{158}\)

Third, the Court could have deemed the TDR system valid, but not required that landowners gain approval to transfer their rights to ripen their takings claims.\(^\text{159}\) The approximate value of a landowner’s TDRs could be estimated, and that estimation could be used to determine whether a taking has occurred.\(^\text{160}\)

Fourth, the Court could have affirmed the Ninth Circuit’s rationale and ruled that Suitum’s claim could not be deemed ripe until she attributed actual value to her TDRs.\(^\text{161}\) This approach would be inconsistent with, and therefore difficult to support under the Court’s holdings in *Williamson* and *MacDonald*.\(^\text{162}\)

As long as the property retains some of its value, landowners are not entitled to compensation under *Lucas*. See id. TDRs’ economic value also would affect the result of cases in which *Lucas* did not otherwise apply. See id. For example, courts often will apply the three-factor analysis *Penn Central* established in such cases. See id; see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) The three factors include the “character of the governmental action . . . interference[nce] with distinct, investment-backed expectations . . . [and] economic impact” of the regulations. *Penn Central*, 438 U.S. at 124. For a further discussion of the holding in *Penn Central*, see *supra* notes 22-30 and accompanying text.

On the other hand, if the value of TDRs would apply only to the “just compensation” issue, courts likely would find a taking. See *Lazarus*, *supra* note 3, at 201. This result precipitates from the extent that courts measure “just compensation” by fair market value of land, absent restrictions and TDRs. See id.

\(^\text{158}\) See *Lazarus*, *supra* note 3, at 201. Lazarus proposes that reliance on federal, state and local governments’ compensation of deprived landowners might prove threatening to programs such as the TDR scheme were they to become unable to pay. See id.

\(^\text{159}\) See id. at 201-02. The *Suitum* Court employed this approach in reversing the Ninth Circuit’s ruling. See *Suitum*, 117 S. Ct. at 1662-70.

\(^\text{160}\) See *Suitum*, 117 S. Ct. at 1668-69. The Court noted that in estimating the value of Suitum’s land, TRPA’s valuation of Suitum’s TDRs should be weighed against any conflicting information *Suitum* provided regarding the current marketability of the TDRs. See id. at 1663-64. For a further discussion of the valuation of Suitum’s property in the interest of determining whether a taking had occurred, see *supra* note 80 and accompanying text. For the Court’s breakdown of each TDR’s individual value, and Suitum’s responses to those valuations, see *supra* notes 81-83 and accompanying text.

\(^\text{161}\) See *Lazarus*, *supra* note 3, at 202; see also *Suitum*, 80 F.3d 359 (1995). For a discussion of the rationale the Ninth Circuit employed in adjudicating *Suitum*, see *supra* notes 85-91 and accompanying text.
B. The Court’s Reasonable, Yet Conservative, Ruling

The Court in *Suitum* ultimately overruled the Ninth Circuit’s decision, choosing the third, which was the most reasonable and conservative, of its four primary options. By not requiring landowners to seek final agency approval to ripen takings claims, the Court simultaneously left the TDR system intact and continued to permit landowners to approximate the value of their development rights to determine whether a taking has occurred. While previous decisions might create an incoherent picture of ripeness analysis when analyzed individually, they provide a sound and rational basis for the Court’s decision in *Suitum* when they are assessed collectively.

To illustrate, the Court correctly interpreted *Agins*, which requires an actual submitted plan for the finding of a concrete controversy. In applying for a permit to develop her lot, *Suitum* William

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*Williamson* test is irrelevant in *Suitum*, as Nevada has no procedures through which a deprived landowner may be compensated. Under *MacDonald*, to prevail on a regulatory takings claim, one must show that a land regulation “goes too far” and that any proposed compensation is not just. See id. at 348-50. To make those determinations, a court must know what use one may make of the affected land. In *Suitum*, the Court was able to determine exactly how far the regulation went, as absolutely no development could have been made on the land, and the question of permissible land use was thus finalized. See id. at 1667.

For a further description of the *Williamson* two-prong ripeness test, see supra notes 41-45 and accompanying text. For a further description of the facts and holding of *MacDonald*, see supra notes 46-52 and accompanying text.

163. *See Suitum*, 117 S. Ct. 1664-70. For a detailed discussion of the majority’s opinion in *Suitum*, see supra notes 92-138 and accompanying text.

164. See id. at 1662-70.

165. See Stein, supra note 5, at 24-26. In the ripeness cases that preceded *Suitum*, the Court did not directly address the regulatory takings issue. See id. at 25. Courts often added steps to the ripeness rationale and confused many observers. See id. In *Hoehne v. County of San Benito*, the Ninth Circuit noted that cases must, however, be decided on the basis of their particular facts. See 870 F.2d 529, 533 (9th Cir. 1989). The *Hoehne* court stated:

> [T]he solution to [the ripeness] problem is not achieved by color-matching putative precedents and comparing snippets from stated rationales contained in past cases. As in many types of litigation, resolution of this issue turns on the recorded facts. Relevant cases in the Supreme Court and this court are extremely fact-specific.

*Id.* at 533.

166. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). As no specific plan ever was submitted for approval to the local agency in *Agins*, no concrete controversy existed regarding defendant’s zoning ordinances. See id. *Suitum*, however, did submit a development plan to TRPA, but it was summarily rejected because *Suitum’s* property fell within a SEZ’s borders. See *Suitum*, 117 S. Ct. at 1663.

The second assertion in *Agins*, that is, challenging the city ordinance as facially unconstitutional, did not apply to *Suitum* either. *See Agins*, 447 U.S. at 261. The majority properly refused to address any facial attack by *Suitum* on TRPA’s SEZ or development regulations. *See generally Suitum*, 117 S. Ct. at 1663-70. *Suitum*...
passed the "Agins threshold."\textsuperscript{167} \textit{Penn Central} expanded on the Agins rule, requiring the re-submission of a development proposal before a case will be deemed ripe for adjudication.\textsuperscript{168} The Court properly found this step to be inapplicable to Suitum's situation, as her lot's location in a SEZ renders it unfit for any development.\textsuperscript{169}

The Court also relied on the two-prong test it developed in \textit{Williamson}.\textsuperscript{170} The \textit{Williamson} prongs respectively require that a final decision be reached regarding the application of an ordinance, regulation or law to the property at issue and that the complaining party seek available state procedures to obtain just compensation.\textsuperscript{171} The Court decided that both prongs had been satisfied, as TRPA could make no further decision regarding the application of its regulation and Nevada offered no appeal procedure.\textsuperscript{172}

The \textit{Suitum} Court's decision also complied with \textit{MacDonald}, which requires that there be full understanding of a regulation's impact before a case can be deemed ripe.\textsuperscript{173} Under this rationale,
the Court resolved Suitum's claim properly, as her property possessed no value other than that which she could attain through the sale of her TDRs.174 In addition, MacDonald's "futility exception" prohibits a landowner from being either subjected to unfair procedures or required to make multiple application attempts before obtaining a final decision from a regulating agency.175 The Lucas Court's application of this test prohibited a late-created special permit opportunity from depriving the plaintiff of ripeness standing.176 The Court's finding in Suitum regarding ripeness is consistent with these principles and logically would not require Suitum to make futile application attempts to TRPA.177

C. A Broader Approach to the Court's Rationale in Suitum

While there is little doubt that the Court adhered to ripeness precedent and came to a correct conclusion in Suitum, it could have chosen to rule in closer alignment with the second of the four options, as Justice Scalia suggested in his concurring opinion, and

In some cases, landowners will submit numerous development plans. In Del Monte Dunes at Monterey, Ltd. v. City of Monterey, for example, the Ninth Circuit deemed a case ripe following a landowner's fifth development application. See 920 F.2d 1496, 1506 (9th Cir. 1990). It is unclear how many application attempts are necessary under Del Monte to deem a claim ripe, as the landowner in that case did not attempt to litigate his claim earlier than his fifth rejection. See Stein, supra note 5, at 23 n.89. Each of these variance and development application requirements, however, is inapplicable to Suitum, as her lot location automatically assessed her an IPES score of zero, and thereby restricted all development. See id.

174. See Suitum, 117 S. Ct. at 1666. Because Suitum's land may not be developed, she has met the MacDonald requirement that a plaintiff show how far an applied regulation affects her property. See MacDonald, 447 U.S. at 348-50.


Like Lucas, the facts in Suitum make clear that this was not a case of total economic wipe-out, as even with the restriction, Suitum's land possessed significant residual value. See Lazarus, supra note 3, at 193-94. Because TDRs possessing some market value are available to Suitum, a land-use restriction on development does not constitute a total economic loss under the Lucas rationale. See id. For this reason, the issue of whether TDR value is relevant to the threshold "taking" question, rather than merely to the subsequent "just compensation" question, is therefore quite important. See id. For a further discussion of this significance, see supra notes 150-69 and accompanying text.

177. See Suitum, 117 S. Ct. at 1666.
thereby settled many takings issues.\textsuperscript{178} Under this approach, TDRs would be viewed as irrelevant to determining whether property has been taken, and the TDR system’s sole purpose would be to determine whether just compensation has been provided.\textsuperscript{179} The TDR system could continue to be helpful to government agencies by defraying the cost of takings in the interest of protecting the environment, but landowners would be guaranteed that if TDRs fail to adequately compensate them for their losses, regulating agencies would pay the difference to provide just compensation.\textsuperscript{180} This approach would allow for the most ideal outcome because it would protect both the landowners and the environment, while at the same time require the government to accord with its constitutional obligation to provide just compensation.

\section*{VI. Impact}

Although its analysis in \textit{Suitum} was proper, the Court failed to seize an opportunity to clear up confusion regarding ripeness in land use cases.\textsuperscript{181} The majority focused too narrowly on Suitum’s specific problem and declined to comment on the larger issues her case highlighted.\textsuperscript{182} In contrast, Justice Scalia more appropriately advocated considering TDRs solely in the context of compensation rather than when deciding either the ripeness issue or whether a taking has occurred in a particular situation.\textsuperscript{183} Many government

\begin{itemize}
\item \textsuperscript{178} See \textit{id.} at 1670-72. (Scalia, J., concurring). For a complete description of the rationale Justice Scalia employed in his concurring opinion, see \textit{supra} notes 139-49 and accompanying text.
\item \textsuperscript{179} See \textit{id.}
\item \textsuperscript{180} See \textit{id.} It is also relevant that Suitum’s presentation of the facts in her case may have significantly downplayed the monetary value of her TDRs. See Petitioner’s Brief, \textit{supra} note 71, at 17-20. Suitum’s strategic “low-balling” suggests that TDRs fail to sufficiently supplement an individual’s inherent rights to develop his land. See \textit{id.} at 12-29. This supports Suitum’s argument that a taking requiring “just compensation” has occurred. See \textit{id.}
\item \textsuperscript{181} For the critical points of the \textit{Suitum} Court’s analysis, see \textit{Suitum}, 117 S. Ct. at 1662-64.
\item \textsuperscript{182} See \textit{id.} at 1662-70. An important underlying issue in \textit{Suitum} is a landowner’s right to choose his property’s destiny, a point to which Suitum’s brief alluded when it cited Friedrich A. Hayek’s \textit{The Road to Serfdom}, stating “[p]roperty ownership without the right of use would be an empty formalism, incapable of performing its crucial social function of providing a bulwark of personal autonomy against the encroachment of an aggressive, overreaching state.” Petitioner’s Brief, \textit{supra} note 71, at 21 (citing FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM, 103-04 (1944)). For a discussion of the majority’s view in \textit{Suitum}, see \textit{supra} notes 92-138 and accompanying text.
\item \textsuperscript{183} See \textit{Suitum}, 117 S. Ct. at 1662-64. For a discussion of Justice Scalia’s rationale, see \textit{supra} notes 139-49 and accompanying text.
\end{itemize}
agencies have argued that if TDR systems are not permitted on the takings side, efforts to protect the environment will be thwarted because the government simply lacks the funds to compensate landowners. An appropriate compromise would be to maintain compensation systems similar to the Lake Tahoe area’s TDR program, thereby protecting the environment and other legitimate government concerns, while at the same time establishing a simpler system for landowners to receive just compensation for property loss.

Although Suitum fought her ten year battle all the way to the Supreme Court, and prevailed, her sole victory was winning the right to return to the lower courts to seek just compensation for the taking of her property. At the age of eighty-two, even if she someday wins that compensation, she might never be able to enjoy it. With facts like those involved in Suitum, some might question whether the Court’s ripeness rationale is a legitimate necessity or just a leaky judicial boat.

Kevin J. Cross


185. Interestingly, one source has recently reported that Lake Tahoe’s present environmental condition is improving:

Tahoe’s air quality is improving slightly, the loss of the lake’s clarity has slowed, and limits on new development and efforts to restore wetlands have combined to curb soil erosion. And the bad news? There’s still much work to be done to restore and improve air and water quality, protect habitat for plants and animals, preserve scenic value and recreational opportunities for people, and keep noise levels down. And though the past five years have seen a decline in the rate at which the lake is losing clarity, algae growth still claims roughly a foot of clarity each year.

Such are the findings of the Tahoe Regional Planning Agency staff, which recently presented a five-year review of the lake’s environmental condition to the TRPA governing board. The report, called a threshold review, shows how well or poorly the lake is doing on nine fronts: air, water, and scenic quality; soil conservation; vegetation; wildlife; fisheries; recreation; and noise.


186. The Justices recognized the long wait imposed by the filing of this lawsuit. See Oral Argument, supra note 101, at 46. For example, Justice O’Connor stated: “[m]y goodness . . . why not give this poor, elderly woman the right to go to court . . . ?” Id. at 46. Justice Scalia added, if one “[w]ant[s] to talk about hardship,” then he need only look to Suitum’s six-year wait to be heard before the Court. Id. at 38.

187. See Kanner, supra note 1, at 1.