Suitum v. Tahoe Regional Planning Agency: The United States Supreme Court Revisits Ripeness in the Regulatory Takings Context

I. OVERVIEW

Bernadine Suitum owned an 18,300 square foot parcel of land in Incline Village, Nevada, near the shore of Lake Tahoe.[1] When she purchased the property in 1972, it was zoned for residential development.[2] By congressional requirement in 1980, the Tahoe Regional Planning Agency (TRPA), which regulates development in the Lake Tahoe Basin,[3] adopted a plan barring any development exceeding "[e]nvironmental threshold carrying capacity."[4] In 1987, the Agency adopted an Individual Parcel Evaluation System (IPES) "to rate the suitability of vacant residential parcels for building and other modification."[5] The IPES also created "Stream Environment Zones (SEZs) which generally convey surface water from upland areas into Lake Tahoe and its tributaries."[6] To qualify for construction, any property had to obtain a minimum score within the IPES system.[7] Undeveloped land located in SEZs, however, received an IPES score of zero, and was therefore unsuitable for construction.[8] The TRPA's plan did not contain provisions for variances and exceptions, but did grant property owners Transferable Development Rights (TDRs).[9] TDR plans presume that

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1. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1662 (1997).
2. *See id*. at 1663.
3. The Tahoe Regional Planning Compact created the Tahoe Regional Planning Agency in 1968. Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969); CAL. GOV'T CODE §§ 66800-801 (West 1977); NEV. REV. STAT. §§ 277.190-.230 (1973). TRPA was a joint agency for the states of California and Nevada to "coordinate and regulate development in the Lake Tahoe Basin and to conserve its natural resources." Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 394 (1978).
4. *Suitum*, 117 S. Ct. at 1662 n.1. "The 1980 Compact define[d] 'environmental threshold carrying capacity' as 'an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region.'" *Id*. The principles included standards for "air quality, water quality, soil conservation, vegetation preservation and noise." *Id*. (citing the 1980 Tahoe Regional Planning Compact, Pub. L. No. 96-551, Art. II(i), 94 Stat. 3234, 3235 (1980)).
5. *Suitum*, 117 S. Ct. at 1662. *See also* Carpenter v. Tahoe Reg'l Planning Agency, 804 F. Supp. 1316, 1320 (D. Nev. 1992) (listing relevant environmental criteria).
6. Suitum v. Tahoe Reg'l Planning Agency, 80 F.3d 359, 361 (9th Cir. 1996).
7. *See Suitum*, 117 S. Ct. at 1662.
8. *See id*.
9. "A TDR program transfers [a parcel's] unused density . . . to a transfer site, which may be nearby or in another area of the community [designated as a 'receiving district']." ROGER

certain property rights are severable from others and are therefore transferable to other parcels.[10] In practice, these plans enable property owners to sell their unused development rights to owners of other parcels.[11]

Seventeen years after acquiring her property, Suitum applied to the TRPA for permission to construct a house.[12] Under the IPES rating system, the TRPA concluded that Suitum's parcel could not be developed because it was located entirely in an SEZ.[13] Accordingly, Suitum was entitled to receive some TDRs.[14] She did not, however, attempt to obtain or transfer any of her TDRs.[15] Rather, she filed a complaint for just compensation under 42 U.S.C. § 1983, claiming that the TRPA's decision comprised a "taking" of her property.[16] Suitum alleged that the Agency's restrictions deprived her of all reasonable and economically viable use of her property[17] and constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments.[18] In response, TRPA contended that Suitum's takings claim was not ripe for adjudication because Suitum lacked a final agency decision regarding the extent of

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A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 9.22, at 644 (2d ed. 1993) (citing D. MANDELKER, LAND USE LAW § 11.26 (1982)).

10. *See* Dennis J. McEleney, *Using Transferable Development Rights to Preserve Vanishing Landscapes and Landmarks*, 83 ILL. B.J. 634, 635 (1995).

11. *See id.*; *Suitum*, 117 S. Ct. at 1663. The TDR program was "'an elaborate system . . . ,' which allow[ed] for transfers of land coverage, residential development rights, and residential allocations. A property owner [could] transfer land coverage to a receiving parcel within the same hydrologic zone allowing for construction of a larger project on the receiving parcel. For property within a SEZ, the property owner [was] allowed to transfer one percent of the total property area." *Suitum*, 80 F.3d at 361 (quoting Carpenter v. Tahoe Reg'l Planning Agency, 804 F. Supp. 1316, 1320 (D. Nev. 1992)).

12. *See Suitum*, 117 S. Ct. at 1663. The 1987 plan outlined four criteria to be met before construction of a single family residence could be approved: (1) an IPES score above that which was established for development in that year, (2) a residential development right, (3) adequate land coverage, and (4) a residential allocation. *See Suitum*, 80 F.3d at 361.

13. *See Suitum*, 117 S. Ct. at 1663.

14. There was no dispute that as an owner of an undeveloped lot, Suitum possessed one automatically receivable Residential Development Right. She also controlled Land Coverage Rights for 183 square feet (1%) of her property. Additionally, Suitum had rights to three additional Residential Development Rights. *See Suitum*, 117 S. Ct. at 1663.

15. *See id.*

16. *See id.*

17. The Supreme Court "has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1980) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (citations omitted)).

18. *See Suitum*, 117 S. Ct. at 1663.

development permissible on her land.[19] Suitum responded that any attempt to transfer her TDRs would be an "idle and futile act" because the TDR program was a "sham."[20] After concluding that Suitum's claim was not ripe, the district court granted summary judgment to the TRPA because a final decision had not been reached regarding the permissible uses of Suitum's property.[21] The Ninth Circuit Court of Appeals affirmed the ripeness ruling for the same reasons.[22] The United States Supreme Court granted certiorari and held that Suitum's claim was ripe, despite her failure to attempt to obtain and sell the TDRs she had or was eligible to receive, and remanded the case to the Ninth Circuit for adjudication of the substantive takings claim.[23] *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997).

II. BACKGROUND

There are two "independent prudential hurdles"[24] that a plaintiff must address when bringing a regulatory taking claim against a state entity in a federal court. First, the plaintiff must demonstrate that she secured a "final decision regarding the application of the [challenged] regulations to the property at issue" from the government entity charged with implementing the regulations.[25] Second, the plaintiff must demonstrate the she sought "compensation through the procedures the state provided for doing so."[26] A plaintiff must meet these two burdens to satisfy the ripeness requirement before a court will consider the

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19. *See id*. The Agency introduced an affidavit from a real estate appraiser stating the fair market value of Suitum's TDRs. The Agency maintained, however, that the actual benefits of Suitum's TDRs could "only be known if she pursue[d] an appropriate . . . application." *Suitum*, 117 S. Ct. at 1664.

20. *Id.* at 1664. Suitum introduced a former TRPA staff member's testimony that the TDR program had produced no sales and that her land had no marketable development rights. This testimony was excluded by the trial court since the individual was not an appraiser qualified to provide valuation of development rights. *See* Suitum v. Tahoe Reg'l Planning Agency, 80 F.3d 359, 363 (9th Cir. 1996).

21. *See* Suitum v. Tahoe Reg'l Planning Agency, No. CV-N-91-040-ECR (D. Nev., Mar. 30, 1994) (order granting summary judgment to TRPA).

22. *Suitum*, 80 F.3d at 359.

23. The Ninth Circuit, in turn, vacated its previous opinion and remanded the case to the district court for further proceedings. *See* Suitum v. Tahoe Reg'l Planning Agency, 123 F.3d 1322 (9th Cir. 1997).

24. *Suitum*, 117 S. Ct. at 1664.

25. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985). This requirement "follows from the principle that only a regulation that 'goes too far,' results in a taking under the Fifth Amendment." *Suitum*, 117 S. Ct. at 1665 (quoting Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922)).

26. *Williamson County*, 473 U.S. at 194. This requirement stems from the Fifth Amendment's stipulation that only takings without just compensation violate the Amendment. *See Suitum*, 117 S. Ct. at 1665.

substantive merits of a regulatory takings claim.[27] Ripeness is considered a jurisdictional issue and may therefore arise at any point in the life of a case.[28]

In general, the ripeness requirement "derives directly from the case-or-controversy requirement of Article III" of the United States Constitution.[29] According to the Supreme Court, "[r]ipeness is peculiarly a question of timing."[30] Findings of nonjusticiability usually arise when a plaintiff prematurely challenges the constitutionality of a regulatory scheme.[31] A pivotal element in a regulatory taking case is a final determination by a zoning commission regarding the exact type and extent of development permitted.[32]

Constitutional scholar Laurence Tribe has commented that the classification of a controversy as unripe for federal adjudication "cannot be reduced to an orderly, much less a highly principled and predictable, process,"[33] because its purpose is to prevent the courts from entangling themselves in abstruse disagreements over governmental schemes.[34] Plaintiffs contending that a government regulation presents an unconstitutional taking without just compensation must usually "exhaust all avenues for obtaining compensation before the issue is deemed ripe."[35]

The United States Supreme Court's application of the ripeness doctrine in land use cases began in 1978 when it decided *Penn Central Transportation Co. v. New York City*.[36] In that case, the owner of the Grand Central Terminal in New York City submitted plans to the New York City Landmark Preservation Commission to construct a large office building atop the Terminal.[37] The Commission rejected the application and the owner filed suit, claiming that the Landmark Preservation Law had "taken" its property without just compensation.[38] The Court held that no taking of the property had occurred, as other permissible uses were

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27. *See Williamson County*, 473 U.S. at 186.

28. *See* Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91, 93 (1994).

29. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-10, at 77 (2d ed. 1988).

30. *Id*. at 78 (citing Regional Rail Reorganization Act Cases, 419 U.S. 102, 140 (1974)).

31. *See id*.

32. *See* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351-53 (1986).

33. TRIBE, *supra* note 29, § 3-10, at 82.

34. *See id.* § 3-10, at 77-78 (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967)).

35. *Id.* § 3-10, at 80.

36. 438 U.S. 104 (1978).

37. *See id*. at 117.

38. *See id*.

available to the owner.[39] Since the owner had not reapplied or submitted alternative plans, the Court could not conclude that the Commission would oppose a smaller building.[40] While the Court did not directly address ripeness in *Penn Central*, commentators have asserted that "[t]his decision paved the way for subsequent requirements that an applicant modify or resubmit a proposal before a case is ripe."[41]

Agins v. City of Tiburon was the first case in which the United States Supreme Court employed the ripeness doctrine to avoid adjudication of the merits of a regulatory takings claim.[42] In that case, landowners challenged zoning ordinances that restricted the number of houses they could build on their property.[43] They filed suit without first seeking approval for any specific development of their land.[44] The Court held that since the owners "ha[d] not submitted a plan for development of their property as the ordinances permit[ted], there [was] as yet no concrete controversy regarding the application of the specific zoning provision."[45]

The following year, the Supreme Court heightened the ripeness hurdle in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*.[46] In *Hodel*, coal producers and landowners challenged the enactment of the Surface Mining Control and Reclamation Act of 1977[47] as a taking of their property.[48] The Court found the claim failed the ripeness test, since it "presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land."[49] The Court held that since there was "no indication in the record that appellees ha[d] availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting . . . a variance," the case was not ripe for adjudication.[50] Accordingly, *Hodel*

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39. *See id.* at 137. The law granted TDRs to the owners who argued their dissatisfaction with the program. Nevertheless, the Court found that the rights were valuable, and could be transferred to at least eight parcels in the vicinity of the Terminal. The Court held that these rights mitigated any taking that might have occurred. *See Penn Central*, 438 U.S. at 137.

40. *See id.*

41. Patrick W. Maraist, *A Statutory Beacon in the Land Use Ripeness Maze: The Florida Private Property Rights Protection Act*, 47 FLA. L. REV. 411, 422 (1995).

42. 447 U.S. 255 (1980).

43. *See id.* at 257.

44. *See id.*

45. *Id.* at 260.

46. 452 U.S. 264 (1981).

47. 30 U.S.C. § 1201 (1994).

48. *See Hodel*, 452 U.S. at 273.

49. *Id.* at 295.

50. *Id.* at 297.

established that, where a regulation provides possible variances from its requirements, a landowner must seek such variances to ripen her claim.[51]

Several years later, the Supreme Court confirmed *Hodel*'s holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[52] In that case, a local planning commission in Tennessee rejected a developer's plan to build a residential complex because it was not consistent with the town's zoning ordinances and subdivision regulations for eight different reasons.[53] The Court held that the claim was not ripe, because the developer had failed to seek variances that "would have allowed it to develop the property according to its proposed plat."[54] By failing to seek variances, the landowner had not yet obtained a final decision regarding the allowable use of his property.[55] Consequently, *Williamson County* tightened the test outlined in *Hodel* and asserted that, in order to ripen a takings claim, a landowner must "resort to the procedure for obtaining variances . . . [and obtain] a conclusive determination by the Commission whether it would allow [the proposed development]. . . ."[56]

In *MacDonald, Sommer & Frates v. County of Yolo*,[57] the Court further refined the elements of the ripeness test established in *Williamson County*.[58] In *MacDonald*, a developer submitted a tentative subdivision map to a local planning commission detailing a plan to subdivide his property into 159 single and multi-family residential lots.[59] The commission rejected the plan because it provided insufficient access to the subdivision by a public street and did not provide for adequate sewer and water service.[60] Additionally, the local Sheriff's Department could not provide sufficient protection for the area.[61] The landowner immediately filed suit for damages and an injunction.[62] Following the test outlined in *Williamson County*, the Court held that the landowner's claim was unripe because the regulation's effect on the value of the developer's property could not be determined until a final decision was made

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51. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1666 (1997).
52. 473 U.S. 172 (1985).
53. The eight reasons included problems of density, grade, "length of two cul-de-sacs, the grade of various roads, the lack of fire protection, the disrepair of the main-access road, and the minimum frontage." *Id.* at 181.
54. *Id*. at 188.
55. *See id.* at 190.
56. *Id.* at 193.
57. 477 U.S. 340 (1986).
58. *See id.*
59. *See id*. at 342.
60. *See id*. at 342-43.
61. *See id.* at 343.
62. *See id.* at 344.

regarding how the regulations applied to his property.[63] Both courts below "[left] open the possibility that some development [would be] permitted."[64] In a frequently quoted passage, the Court explained that "local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other."[65]

Six years later, in *Lucas v. South Carolina Coastal Council*,[66] the Supreme Court again adjusted the ripeness doctrine's employment in land use cases, by applying the futility exception.[67] In *Lucas*, a developer purchased two lots located in a residential beach community in South Carolina, on which he planned to build single family homes.[68] At the time of purchase, the landowner was not required to obtain a permit to develop the lots.[69] Two years after the purchase, however, the South Carolina Beachfront Management Act[70] established a baseline marking the points where beach erosion had occurred during the previous forty years.[71] The Act, in turn, prohibited the building of occupiable improvements seaward of the line and provided no exceptions.[72] Since the developer's land was seaward of the baseline, he filed suit.[73] The Council argued that the landowner's claim was not ripe because he had not applied for a special permit under a "late-created" amendment to the Act.[74] The Supreme Court held that, since the South Carolina court did not rest its judgment on ripeness grounds, "it would not accord with sound process to insist that Lucas pursue the late-created 'special permit' procedure before his takings claim [could] be considered ripe."[75] Consequently, the *Lucas* Court applied the futility exception and held that "such a submission would have been pointless" since the Council had stipulated that even if there had been an application, no building permit would have been issued.[76]

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63. *See id.* at 349, 352-53 (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 & 190 n.11 (1985)).
64. *Id*. at 352.
65. *Id.* at 350.
66. 505 U.S. 1003 (1992).
67. *See id*.
68. *See id.* at 1006-07.
69. *See id*. at 1008.
70. S.C. CODE ANN. § 48-39-10 to –360 (Law Co-op. 1976 & Supp. 1997).
71. *See Lucas*, 505 U.S. at 1008 (quoting S.C. CODE ANN. § 48-39-280(A)(2) (Supp. 1988)).
72. *See id*. at 1009.
73. *See id.*
74. *See id*. at 1011.
75. *Id.* at 1012.
76. *Id.* at 1012 n.3.

III. THE COURT'S DECISION

In the noted case, the United States Supreme Court followed the principles it established in previous opinions to examine the ripeness of Suitum's takings claim. The Court systematically rejected each of TRPA's arguments that Suitum's claim was not ripe for adjudication.

The Court first rejected the lower courts' finding that a final decision regarding Suitum's land was outstanding because she did not obtain or transfer her TDRs.[77] The Court held that this was not the type of "final decision" required by the *Williamson County* line of cases.[78] Those cases involved the inability to determine the development permitted on a parcel when its use was subject to a regulatory agency's discretion that had not yet been exercised.[79] No question of this sort arose in the noted case.[80] The majority emphasized that both parties in the noted case agreed on the TDRs to which Suitum was entitled, and no agency decision was necessary for her to receive or sell them.[81] In this regard, the TDRs in the noted case differed from the variances potentially available to the plaintiffs in *Williamson County*. According to the Court's analysis, the only decision remaining was the TRPA's approval of a particular transfer of TDRs to ensure that a buyer could lawfully use them.[82] The Court summarized this argument by holding that whether a sale of the TDRs could be completed was different from whether the TDRs were saleable.[83]

Next, the Court dismissed the TRPA's argument that values had not been attributed to Suitum's TDRs.[84] Once again, the majority stressed that little or no uncertainty remained regarding the TDRs, and no decision remained unsettled regarding whether Suitum was entitled to receive any TDRs.[85]

Finally, the Court discarded the TRPA's argument that Suitum's claim was unripe under the "fitness for review" test outlined in *Abbott Laboratories v. Gardner*.[86] In *Abbott Laboratories*, a group of drug manufacturers sought review of an FDA labeling regulation that had not yet been enforced against them.[87] The manufacturers claimed that the

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77. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1667 (1997).
78. *Id.*
79. *See id*.
80. *See id.*
81. *See id.* at 1667.
82. *See id.* at 1667-68.
83. *See id*. at 1668.
84. *See id*.
85. According to TRPA, Suitum's probability of getting TDRs was 100%. *See id.* at 1659, 1668.
86. *Id.* at 1669 (citing Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)).
87. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 138-39 (1967).

FDA lacked the statutory authority to impose the new labeling requirement on them.[88] The FDA asserted that the manufacturers' claim was not ripe because the regulation had not yet been enforced.[89] Ultimately, the court created a balancing test, where the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration" were weighed against each other.[90]

The Court in the noted case decided that *Abbott Laboratories* was not relevant and distinguished it from the case at bar.[91] While the drug manufacturers in *Abbott Laboratories* challenged the FDA's authority to enforce a regulation, Suitum never actually challenged the validity of the TRPA's land use regulations.[92] Instead, Suitum assumed that TRPA could validly impede her land development.[93] Similarly, her challenge to the TDRs centered on their value, not their lawfulness.[94] Finally, unlike the manufacturers in *Abbott Laboratories*, Suitum sought payment for a regulation's effects, not freedom from the regulation.[95]

Through its reliance on precedent and its fact specific analysis of the final decision requirement, the Court in the noted case uniformly rejected each of the TRPA's contentions, and held that Suitum's claim was ripe for adjudication.[96] Ultimately, the Court held that Suitum had received a "final decision" compatible with the test outlined in *Williamson County*.[97] As a result, the Court vacated the judgment of the court of appeals.[98] Since Suitum's claim was deemed ripe, she successfully fulfilled the first hurdle to her regulatory takings claim.[99] The second hurdle, which required a demonstration that Suitum sought compensation through the procedures available to her, went unconsidered. The Court relegated analysis of this pivotal issue to the court of appeals on remand.[100]

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88. *See id*. at 139.
89. *See id*.
90. *Id*. at 149.
91. *See Suitum*, 117 S. Ct. at 1669.
92. *See id*. at 1669-70.
93. *See id*. at 1670.
94. *See id*.
95. *See id.* at 1669.
96. *See id.* at 1670.
97. *See id.* at 1670.
98. *See id.*
99. *See id.* at 1659, 1670.
100. *See id*. at 1665 n.8. "In its Opinion, the Supreme Court indicated that upon remand, [the Ninth Circuit] should consider the second prong of the two-part test from Williamson County. . . . Because this issue was not addressed by the district court nor raised before [the Ninth Circuit], it is best considered by the district court in the first instance." Suitum v. Tahoe Reg'l Planning Agency, 123 F.3d 1322, 1322 (9th Cir. 1997) (remanding the case to the district court for further proceedings).

Justice Scalia wrote the concurring opinion in the noted case, and was joined by Justices O'Connor and Thomas.[101] The three concurring justices disagreed with the majority's consideration of whether the TRPA should have reached a final decision on Suitum's ability to sell her TDRs, and whether the value of Suitum's TDRs had to be established at all.[102] According to Scalia, these questions were not relevant to whether or not Suitum's takings claim was ripe under the "final decision" requirement.[103] Scalia criticized the majority opinion for focusing on the vagaries of the final decision test, instead of examining the more precise formulations that were available.[104] Additionally, Justice Scalia questioned the majority's complete failure to discuss *Lucas v. South Carolina Coastal Council*.[105]

Scalia also asserted that TDRs "ha[d] nothing to do with the use or development of the land to which they are . . . 'attached,'" and should be considered new rights conferred upon the landowner in exchange for the taking, rather than a reduction of the taking.[106] He professed that "[p]utting TDRs on the taking rather than the just compensation side of the equation (as the Ninth Circuit did below) [was] a clever, albeit transparent, device that [sought] to take advantage of a peculiarity of [American] takings clause jurisprudence. . . ."[107] He distinguished the noted case from *Agins*, *Williamson County*, and *MacDonald*, because the government in all three of those cases had not determined whether any of the proposed plans would be approved or if variances would be permitted.[108]

In conclusion, Scalia contended that one could easily resolve whether or not there was a "final decision" in the noted case solely by looking to the "fixing of [Suitum's] rights to use and develop her land."[109] TRPA denied Suitum permission to construct a house on her property because the lot was located within a SEZ.[110] Once the TRPA conceded that it "kn[ew] the full extent of the regulation's impact in restricting [Suitum's] development of her own land," Scalia thought the final

101. *Suitum*, 117 S. Ct. at 1670 (Scalia, J., concurring).
102. *See id.*
103. *See id.*
104. *See id.*
105. *See id.* at 1659, 1670.
106. *Id.* at 1671.
107. *Id.*
108. *See id.*
109. *Id.* at 1672.
110. *See id.* at 1673.

decision requirement was fulfilled.[111] Therefore, Justice Scalia concluded that a substantial part of the majority's analysis was unnecessary.[112]

IV. ANALYSIS

While the Court arguably went out of its way to find Suitum's claim ripe, its analysis of the final decision and the ripeness doctrine is in line with its previous decisions. Even though the opinion clarifies some cloudy issues, it leaves pivotal questions open for consideration. Since "[t]he hardest part of [a takings] case is proving to a court that the case is 'ripe' enough to go to trial,"[113] these questions deserve discussion.

The majority's failure to discuss *Lucas* at all in its opinion is noticeable and questionable, especially since *Lucas* is a recent landmark regulatory takings case. *Lucas*' absence from the majority opinion certainly makes the decision incomplete and the state of takings law unclear. Many commentators question how to read or apply the *Lucas* decision.[114] Thus, by failing to utilize and elucidate the *Lucas* opinion in the noted case, the Court declined the opportunity to provide much needed guidance.

Lucas is likely to have supported the Supreme Court's decision. In *Lucas*, the Court held that it was pointless for the developer to apply for a building permit because none would ever be issued.[115] Similarly, Suitum's TDRs would never be sold.[116] "By requiring Suitum to proceed in a TDR program that [had] not been successful, the TRPA [would be] . . . requiring [her] to proceed through 'unfair procedures.'"[117] This would run counter to the Court's previous holdings in *MacDonald* and *Williamson County*.[118]

Similarly, it is surprising that the Court did not discuss *Penn Central* in further detail. In his concurring opinion, Scalia distinguished the noted

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111. *Id.*

112. *Id.* at 1659, 1673.

113. Michael M. Berger, *Eminent Domain and Land Valuation Litigation*, SB48 ALI-ABA 69, 71 (Jan. 1997).

114. "Some commentators claim that *Lucas* put an end to the futility exception, and that *Lucas* makes ripeness discretionary rather than a matter of subject matter jurisdiction." *See* Overstreet, *supra* note 28, at 100. "Another commentator claims that *Lucas* even 'modified existing [ripeness] doctrine significantly.'" *See id.* (quoting R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases From* Hamilton Bank *to* Lucas*,* 9 J. LAND USE & ENVTL. L. 101, 125 (1993)).

115. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1012 n.3 (1992).

116. *See supra* note 20 and accompanying text.

117. Maraist, *supra* note 41, at 435.

118. *See* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 350 n.7 (1986) (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 205-06 (1985) (Stevens, J., concurring)).

case from *Penn Central* by emphasizing that the landowners in *Penn Central* owned at least eight nearby parcels that could benefit from their TDRs whereas Suitum owned no nearby land.[119] Perhaps, however, *Penn Central* is more relevant than either Scalia or the majority suggest. One could certainly argue that the facts of the noted case parallel those of *Penn Central* more closely than those of *Williamson County* or *MacDonald*. The primary ground on which to distinguish the noted case from *Penn Central* might be that the regulation challenged in *Penn Central* was a landmark preservation statute, while the regulation challenged in the noted case was an environmental preservation law. However, in both cases agencies denied the development that landowners requested, and offered TDRs as just compensation. If the Court in the noted case had relied solely upon *Penn Central*, it should have reached its same conclusion regarding ripeness. Since the cases are so similar, however, applying the *Penn Central* decision here was likely to compel the Court to address the merits of Suitum's substantive takings claim. Perhaps the Court simply wanted to avoid analyzing the takings claim.[120]

The Court seemingly utilized a limited portion of the authority available to it in order to reach the conclusion it desired. Its superficial analysis of significant precedent raises uncertainty regarding the application of this decision in future takings cases. Perhaps the decision leaves too much room for speculation. Since ripeness is a threshold issue in takings cases, its test should be comprehensive and uniform. The Court in the noted case failed to outline an appropriate analysis.

V. CONCLUSION

Because regulatory agencies are doubtlessly aware that the final decision requirement serves as an impediment to plaintiffs in takings cases, the agencies can feasibly create schemes that prevent cases from ever becoming ripe. One study indicated that federal courts dismiss cases on ripeness grounds 94.4% of the time.[121] Clearly, the ripeness doctrine is

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119. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1672 (1997) (Scalia, J., concurring).

120. In the introductory paragraph of the majority opinion, Justice Souter indicates that

> [the Court has] no occasion to decide, and [] do[es] not decide, whether or not [Suitum's] 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. . . .

Suitum, 117 S. Ct. at 1662.

121. *See* Brian W. Blaesser, *Closing The Federal Courthouse Door On Property Owners: The Ripeness and Abstention Doctrines In Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J.

a perilous obstacle for landowners who challenge zoning regulations. Consequently, plaintiffs need guidance from the courts in order to effectively litigate their claims.

The Court's opinion in the noted case is a weak attempt at guidance. Nevertheless, the *Suitum* Court did find a questionable case ripe, and its decision is therefore a clear win for landowners. The Court, however, did not provide much explanation as to why Suitum's claim was ripe, or what this decision contributed to the existing test for ripeness and final decision. While the test for final decision is certainly fact sensitive, after the *Suitum* case, it remains analytically cryptic.

On remand, the district court is likely to consider the facts of Suitum's takings claim in light of the *Penn Central* and *Lucas* decisions. The analysis is inclined to be more complete than that of the noted case; however, it will differ greatly since the issue to be addressed is just compensation instead of ripeness.

Private landowners often suffer because of the courts' affinity for the ripeness doctrine. They lose money and time attempting to adjudicate takings claims that the courts might conveniently find unripe. Since landowners face potentially devastating losses when their claims are found unripe, courts should incorporate more equitable considerations into the test for ripeness. The judiciary should also clearly define the futility exception explicated in *Lucas*, and explain more clearly the circumstances under which the exception should apply. Without some clarification, the futility exception itself remains futile.

The lower courts' confusion over ripeness is a product of the Supreme Court's indiscriminate creation and implementation of the doctrine.[122] Unfortunately, in the noted case, the Court seems to have squandered its opportunity to refine and simplify the doctrine.[123] While the noted case elucidates a few aspects of the final decision requirement employed in regulatory takings cases, the opinion seems incomplete and leaves several formerly unsettled issues open to speculation and interpretation.

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73, 91 (1988); *see also* Overstreet, *supra* note 28, at 93 ("[F]ederal courts go to great lengths to find land use cases unripe because, as they openly admit, they simply do not like to hear them.").

122. "Litigation over whether regulatory taking claims are ripe enough to litigate has mushroomed. . . . The resulting proliferation of lower court opinions has resulted in a chaotic basket of case law in which one can generally find a case for whatever proposition one seeks." Berger, *supra* note 113, at 77.

123. Commentators had hoped that the Court would "take this opportunity to clear up the havoc that the lower courts have created in interpreting the [ripeness precedents]." Maraist, *supra* note 41, at 421.