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NOTE

SUITUM v. TAHOE REGIONAL PLANNING AGENCY: APPLYING THE TAKINGS RIPENESS RULE TO LAND USE REGULATIONS AND TRANSFERABLE DEVELOPMENT RIGHTS

I. INTRODUCTION

In *Suitum v. Tahoe Regional Planning Agency*,[1] the Ninth Circuit held that a regulatory takings claim under the Fifth and Fourteenth Amendments was not ripe in the absence of the landowner's application for a final decision and the failure to demonstrate that such an application would be futile.[2] The court identified the necessary application as a request to the Tahoe Regional Planning Agency ("TRPA") to transfer the Suitum property's development rights to another property.[3] The

1. 80 F.3d 359 (9th Cir. 1996) ("*Suitum II*") (per Panner, O.M., Senior United States District Judge for the District of Oregon sitting by designation, Schroeder, M., and Alarcon, A., Circuit Judges) *rev'd*, 117 S. Ct. 1659 (1997) ("*Suitum IV*").

2. *See Suitum II*, 80 F.3d at 364. The Ninth Circuit evaluated the limited futility exception to the ripeness doctrine. *See id.* at 363. Under this doctrine, the final decision requirement is excused if the plaintiff shows that fulfillment of the requirement would be an idle and futile act or that the application procedures are unfair. *See id.* (citing Del Monte Dunes, Ltd. v. Monterey, 920 F.2d 1496, 1501 (9th Cir. 1990); Kinzli v. Santa Cruz, 818 F.2d 1449, 1454-55 (9th Cir. 1987)).

3. *See Suitum II*, 80 F.3d at 364. The TRPA was created in 1969 by the Tahoe Regional Planning Compact. Pub. L. No. 91-148, 83 Stat. 360 (1969), *amended by* Pub. L. No. 96-551; 94 Stat. 3233 (1980); CAL. GOV'T CODE § 66801 (West 1969), *amended by* CAL. GOV'T CODE § 66801 (1980); NEV. REV. STAT. § 277.200 (1969), *amended by* NEV. REV. STAT. § 277.200 (1980). In 1968, California and Nevada entered into an interstate agreement designed to ensure resource conservation and development

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Ninth Circuit stated that until the property owner requested a transfer of development rights ("TDRs"), it would not be possible to determine the nature and extent of permitted development.[4] As a result, the case was not ripe because the court could not know the full economic impact of TRPA's regulations on the Suitum property or whether those regulations had gone "too far."[5]

On certiorari, the United States Supreme Court reversed the Ninth Circuit and held that the claim was ripe for adjudication.[6] The Supreme Court found that Suitum satisfied the "final decision" ripeness test because no more discretionary TRPA decisions remained.[7] The Court held that the awarding of the TDRs was an administrative function and the valuation of the TDRs was an issue of fact that the trial court could have determined from the evidence presented.[8] The Supreme Court's decision was logical given that the record contained ample evidence to determine the value of the TDRs as either a

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control in the Lake Tahoe Basin. *See* California v. Tahoe Reg'l Planning Agency, 766 F.2d 1308, 1310 (9th Cir. 1985), *amended by* 775 F.2d 998 (9th Cir. 1985). The agreement, known as the Tahoe Regional Planning Compact, became effective when it received the consent of Congress in December 1969. Pub. L. No. 91-148, 83 Stat. 360 (1969). In 1980, California and Nevada extensively amended the Compact with the subsequent approval of Congress. Pub. L. No. 96-551, 94 Stat. 3233 (1980). One of the most significant changes in the 1980 Compact is the requirement that TRPA develop and establish environmental threshold carrying capacities for the Lake Tahoe Basin and amend the regional plan to achieve and maintain these thresholds. *See Tahoe Reg'l Planning Agency*, 766 F.2d at 1310. TRPA incorporated a land capability classification system into the plan that identified sensitive stream environment zones (SEZs) where development would be curtailed. *See Suitum II*, 80 F.3d at 361; Tahoe Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 638 F. Supp. 126, 132 (D. Nev. 1986). The 1987 Plan adopted by the Tahoe Regional Planning Agency allows for transfer of a property's land coverage development rights to another parcel within the same hydrologic zone. *See Suitum II*, 80 F.3d at 361. Residential development rights may be transferred anywhere within the Lake Tahoe Basin. *See id.* This allows an undeveloped property within an environmentally sensitive area, where the 1987 Plan restricts new development, to transfer and sell development rights to other properties outside restricted development areas. *See id.*

4. *See Suitum II*, 80 F.3d at 362.

5. *See id.* (quoting *Kinzli*, 818 F.2d at 1453).

6. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659 (1997) ("*Suitum IV*").

7. *See id.* at 1667, 1670.

8. *See id.* at 1668.

development right of the property or a compensation mechanism.[9]

The Supreme Court's narrow holding, however, did not address the issue of adequate "state procedures" for compensation, which is normally the second hurdle of the ripeness test.[10] Instead, the Court found this test inapplicable.[11] As such, a thorough interpretation and application of the two hurdle, regulatory takings ripeness test was not achieved.[12] In addition, the majority opinion did not address the question of whether TDRs should be considered a property use, to assess whether a taking has occurred, or as compensation, to determine whether full compensation has been supplied for a taking.[13] The pending resolution of this issue will have a significant effect on the design of environmental protection strategies within land use regulations and the ability of TDR programs to withstand legal challenges.

Section II of this note sets forth the facts and procedural history of *Suitum*. The background of ripeness in the context of government regulation of land use and constitutional takings claims is examined in Section III. The major area of inquiry is the evolution and application of the *Williamson County* two hurdle, "final decision" and "state procedures," ripeness test.[14] The analysis of both the Ninth Circuit opinion and the reversing United States Supreme Court opinion are presented in Section IV. Section V evaluates the differing positions of the Ninth Circuit and the Supreme Court regarding the application of the ripeness test to TDRs. The district court's likely approaches to applying the state procedures test in *Suitum* on remand are then discussed, with the conclusion that Suitum will meet the state procedures test for ripeness. *Suitum* will undoubtedly make its way back to the Ninth Circuit and possi-

9. *See id.*
10. *See id.* at 1665 n.8.
11. *See Suitum II*, 80 F.3d at 1665 n.8.
12. *See id.*
13. *See id.* at 1671-72 (Scalia, J., concurring).
14. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 194 (1985).

bly the Supreme Court on the takings issue, and this section also examines the issue of whether TDRs are a property use or merely a compensation for a taking, as raised in Justice Scalia's concurrence.[15] Section VI concludes that there is ample precedent and evidence in *Suitum* to hold that that the TDRs are a property right.

II. FACTS AND PROCEDURAL HISTORY

In 1972, the plaintiff, Bernadine Suitum, purchased a single-family residential lot in Incline Village, Nevada.[16] In 1989, Suitum received a residential allocation from Washoe County for construction of a house.[17] Suitum submitted building plans to TRPA for approval of a single family residence.[18] TRPA staff conducted a field verification of Suitum's property and determined that it was located entirely within a Stream Environment Zone ("SEZ"), according to the criteria of the 1987 Plan.[19]

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15. *Suitum IV*, 117 S. Ct. at 1671-72 (Scalia, J., concurring).

16. *See* Plaintiff's First Amended Complaint, Suitum v. Tahoe Reg'l Planning Agency, No. 91-040 (D. Nev. Apr. 1, 1996) ("*Suitum I*"). The lot was purchased in the Mill Creek Subdivision located in Incline Village. *See id.* The complaint stated that due to a variety of circumstances, including the illness and subsequent death of her husband, Bernadine Suitum was not in a position to undertake construction of a home until recently. *See id.* The subdivision in which the lot is located was substantially built out, and Suitum's lot was surrounded on three sides by existing residences and on the fourth side by an improved street with utilities. *See id.*

17. *See* Suitum v. Tahoe Reg'l Planning Agency, 80 F.3d 359, 361 (9th Cir. 1996) ("*Suitum II*"). Under TRPA's 1987 Plan, a residential allocation is required prior to construction of additional residential units within the Lake Tahoe Basin. *See* Tahoe Regional Planning Agency Code of Ordinances, Chapter 33, Allocation of Development. The allocations are assigned to the counties within TRPA's jurisdiction. *See id.* The counties then assign the residential allocations to property owners. *See id.* Ten percent of the residential allocations in Washoe County are reserved for parcels with Individual Parcel Evaluation System (IPES) scores below the current qualification level, which would include Suitum's parcel. *See id.* Six allocations were reserved for such properties in Washoe County. *See* Defendant's Memorandum Concerning its Transfer of Development Program, Suitum v. Tahoe Reg'l Planning Agency, No. 91-040 (D. Nev. Apr. 1, 1996). The allocations for parcels with low IPES scores were assigned, upon application, to the property owners by random drawing. *See id*

18. *See* Plaintiff's First Amended Complaint, *Suitum I* (No. 91-040).

19. *See* Regional Plan for the Lake Tahoe Basin, Tahoe Regional Planning Agency, September 17, 1986. Stream Environment Zones (SEZ) are areas with surface water, riparian vegetation or alluvial soils. TRPA Code of Ordinances, Chapter 37. Protection of these areas was considered essential to preserve the water quality of Lake Tahoe. *See id.*

As a result, the lot was assigned an Individual Parcel Evaluation System ("IPES") score of zero, precluding development of a house on the property.[20] Suitum appealed the field verification classifying the property as a SEZ with an IPES score of zero.[21] TRPA denied the appeal and upheld the SEZ designation and the resulting IPES score.[22] Suitum did not apply to TPRA to transfer her residential developments right and available land coverage to another property under the TDR program.[23]

Following the TRPA Board's rejection of her appeal, Suitum filed suit in the United States District Court for the District of Nevada.[24] The complaint alleged an unconstitutional taking and violations of substantive due process and equal protection under the Fifth and Fourteenth Amendments, resulting from TRPA's improper exercise of police power when it refused Suitum a permit to build a home on a residential lot.[25] Suitum requested that TRPA's action be declared invalid and that TRPA be ordered to allow construction of a single family residence on her lot.[26] Suitum also requested just compensation

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20. *See Suitum II*, 80 F.3d at 361. The IPES was incorporated into the 1987 Region Plan for the Lake Tahoe Basin. Regional Plan for the Lake Tahoe Basin, Tahoe Regional Planning Agency, pp. VII. 3-4, September 17, 1986. The IPES system is the basis for scoring the environmental sensitivity and developability of a parcel, assessing erosion hazard, runoff potential, accessibility, water influence areas, condition of the watershed, ability to revegetate, and the need for water quality improvements in the vicinity of the parcel. *See id.* A property with an IPES score of zero does not qualify for residential development under the 1987 Plan. Defendant's Memorandum Concerning its Transfer of Development, *Suitum I* (No. 91-040). The 1987 Plan, however, sets up an elaborate system of TDRs that allows for the sale and transfer of residential development rights, residential allocations and land coverage to a receiving parcel. *See id.* TRPA then allows the receiving parcel to construct a larger residential project than normally allowed under the plan. *See id.* Suitum's property was assigned one residential development right and 183 square feet of land coverage, which were available for Suitum to transfer or sell. *See id.*

21. *See Suitum II*, 80 F.3d at 361.

22. *See id.*

23. *See id.*

24. *See Suitum I*, No. 91-040 (order).

25. *See Suitum II*, 80 F.3d at 360; Plaintiff's First Amended Complaint, *Suitum I*, No. CV-N-91-040-ECR. The takings clause of the Fifth Amendment states "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

26. *See* Plaintiff's First Amended Complaint, *Suitum I*, No. 91-040.

for the taking of her property and damages for the violations of her civil rights.[27]

TRPA moved for summary judgment on all claims, and the district court concluded that ripeness was the threshold issue.[28] The specific inquiry was whether Suitum must obtain approval to sell or transfer her TDRs in order to achieve finality and present a ripe claim to the court.[29] The district court stated that the TDRs were a significant part of the calculus in determining the type and intensity of the property's allowed use.[30] The court found that finality, in terms of the property's allowed use, could only be determined after Suitum applied to transfer her development rights to another property.[31] In its analysis, the district court examined previous cases, including a Ninth Circuit decision that indicated pursuit of transfer rights is among the list of items to be completed before a takings claim is ripe.[32] Accordingly, the district court held that Suitum's claim was not ripe for adjudication and granted summary judgment to TRPA.[33]

Suitum then appealed the district court's ruling to the Ninth Circuit.[34] The Ninth Circuit agreed with the district court that Suitum was required to apply for the property's TDRs in order to achieve finality and present the court with a ripe claim.[35] In addition, the court found that Suitum failed to demonstrate that a TDR application would be futile and, thus, the futility exception to the ripeness doctrine did not apply.[36]

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27. *See id.*
28. *See Suitum I*, No. 91-040.
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.* The court looked to *Tahoe Preservation v. Tahoe Reg'l Planning Agency*, 638 F. Supp. 126, 132-33 & n.6 (D. Nev. 1986) *vacated on other grounds*, 911 F. 2d 1331, 1344 n.3 (9th Cir. 1990) (Fletcher, J., concurring), and *Carpenter v. Tahoe Reg'l Planning Agency*, 804 F. Supp. 1316 (D. Nev. 1992).
33. *See Suitum I*, No. 91-040.
34. *See Suitum II*, 80 F.3d at 359.
35. *See id.* at 364.
36. *See id.*

As a result, the Ninth Circuit affirmed the district court's decision.[37]

Subsequently, Suitum filed a petition for a writ of certiorari to the United States Supreme Court.[38] The Supreme Court granted certiorari and held that Suitum's regulatory-takings claim was ripe for adjudication because TRPA's decision denying the development application was a final decision and no further discretionary decisions remained regarding development or transfer of the property's TDRs.[39] The Supreme Court vacated the Ninth Circuit's decision and remanded the case for further proceedings consistent with its opinion.[40] The Ninth Circuit, in turn, remanded the case to the district court.[41]

III. BACKGROUND

A. THE EVOLUTION OF RIPENESS STANDARDS IN TAKINGS CLAIMS

As there is no case or controversy unless a claim is ripe, a takings claim's ripeness governs the power of a federal court to act.[42] The ripeness doctrine functions to avoid premature adjudication of disagreements with administrative policies.[43] Ripeness refers to "conditions that must exist or standards that must be met before a dispute is sufficiently mature to enable a

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37. *See id.*

38. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 293 (1996) ("*Suitum III*").

39. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1669 (1997) ("*Suitum IV*"). TRPA and Suitum agreed on the property's TDRs. *See id.* They also agreed that no more discretionary decisions needed to be made before the TDRs could be obtained and offered for sale. *See id.* The only agency decision remaining regarding any transfer was whether the prospective buyer could lawfully use the TDRs. *See id.* Despite the fact that a particular sale is subject to approval, ultimate salability was presumed because there are many potential lawful buyers and receipt of the TDRs would eventually be approved. *See id.* at 1668.

40. *See id* at 1670.

41. *See* Suitum v. Tahoe Reg'l Planning Agency, 123 F.3d 1322 (9th Cir. 1997) ("*Suitum V*").

42. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §2.4.1, 114 (2d ed. 1994).

43. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1669 (1997) (citing Abbott Lab. v. Gardner, 387 U.S. 136, 148-49 (1967)).

court to decide a case on its merits."[44] The doctrine is also intended to protect public agencies from judicial interference until an administrative decision has been formalized and its effects are felt by the challenging parties in a concrete way.[45] If a court determines that a plaintiff has not met specific conditions with respect to ripeness, then the court must decline review of the case.[46]

1. *Penn Central Transportation Co. v. City of New York*: The Foundation for Ripeness and Regulatory Takings.

In *Abbott Laboratories v. Gardner,*[47] the Supreme Court identified two primary ripeness considerations: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration.[48] The Supreme Court's first significant application of ripeness principles to a land use regulatory case occurred in *Penn Central Transportation Co. v. City of New York.*[49] In *Penn Central*, the owners of Grand Central Station appealed a decision of New York City's Landmarks Preservation Commission, which denied permission to construct an office building in excess of 50 stories over Grand Central Station.[50] The owners claimed that the application of New York City's Landmark Preservation Law to land occupied by Grand Central Station constituted a taking in violation of the Fifth and Fourteenth Amendments.[51] The Supreme Court rejected the takings claim, noting that other possible beneficial uses of the site existed that would be acceptable

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44. 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) (detailing both federal and State of Florida ripeness history and standards).

45. *See Suitum IV*, 117 S. Ct. at 1669 (citing *Abbott Lab.*, 387 U.S. at 148-49).

46. *See* CHEMERINSKY, *supra* note 42, at 115.

47. 387 U.S. 136 (1967).

48. *See id.* at 148-49. The Federal Food and Drug Administration (FDA) rule requiring inclusion of generic names for prescription drugs on all labels and advertising was considered ripe for preenforcement judicial review due to the substantial hardship upon the plaintiffs of denying preenforcement review. *See id.* at 153-54.

49. 438 U.S. 104 (1978).

50. *See id.* at 116-19.

51. *See id.* at 119.

to the Landmarks Preservation Commission.[52] In addition, the owners had not applied for approval of a smaller structure or attempted to transfer their TDRs to other parcels in the vicinity.[53] The decision provided the foundation for subsequent requirements that an applicant, whose development proposal was denied, modify or resubmit the application before a case is ripe.[54]

2. *Agins v. City of Tiburon*: Final Regulatory Decision Required for Ripeness

The next landmark land use regulation case in which the Supreme Court applied the ripeness doctrine was *Agins v. City of Tiburon*.[55] In *Agins*, the City of Tiburon rezoned Agins' property for residential planned development and open space under a newly-adopted ordinance.[56] Agins never sought approval for development of the property under the new zoning ordinance, but filed suit for inverse condemnation damages and requested that the ordinance be declared unconstitutional as a taking without just compensation in violation of the Fifth and Fourteenth Amendments.[57]

The Court framed the question as whether the mere enactment of the zoning ordinances constituted a taking.[58] The Court ruled that the zoning ordinances, on their face, did not take Agins' property without just compensation because the ordinances substantially advanced legitimate government

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52. *See id.* at 137. At oral argument, Penn Central's counsel admitted that the Commission had not suggested that it would not approve a smaller structure, such as a 20 story office tower that was part of the terminal's original plan. *See id.* at 137 n.34.

53. *See id.* at 136-37. The Court found that there were at least eight parcels in the vicinity of the terminal to which the owner could transfer his development rights. *See id.* at 137. One or two of the parcels were found suitable for new office buildings. *See id.* The court stated that the TDRs may not have been just compensation if a taking had occurred, but they would have mitigated any financial burdens the Landmark Preservation Law had imposed on the property owners. *See id.* Therefore, the TDRs were to be taken into account when considering the impact of regulation. *See id.*

54. Maraist, *supra* note 44, at 422.

55. 447 U.S. 255 (1980).

56. *See id.* at 257.

57. *See id.* at 257-58.

58. *See id.* at 260.

goals.[59] In addition, the adoption of the zoning ordinances did not inflict irreparable harm or a taking on the landowner because Agins could still pursue his reasonable investment-backed expectations by submitting a development plan to the City.[60]

The key ripeness issue common to *Penn Central* and *Agins* is that a final regulatory decision applying an ordinance or law to the property at issue had not yet occurred because neither claimant had exhausted the regulatory opportunities available to obtain development approval for their properties.[61] In *Hodel v. Virginia Surface Mining and Reclamation Assn.*,[62] the Supreme Court went one step further and held that a regulatory takings claim is not ripe until the applicant has exhausted any administrative remedies contained in the disputed regulations.[63]

3. *Williamson County Regional Planning Commission v. Hamilton Bank*: The Two-Hurdle Ripeness Test for Regulatory Takings

Subsequently, the Supreme Court combined the final regulatory decision requirement and the administrative relief requirement in *Williamson County Regional Planning Commission v. Hamilton Bank.*[64] In *Williamson County*, the Court applied the two-hurdle test for ripeness to the application of land use regulations on a development proposal.[65] The Court stated that the landowner must first demonstrate that a "final decision regarding the application of the [challenged] regulations to the property at issue" had been reached by the government agency "charged with implementing the regulations[.]"[66] The landowner must then demonstrate that he has sought "com-

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59. *See id.* at 261.
60. *See Agins*, 447 U.S. at 262.
61. *See id.* at 262-63; *Penn Central*, 438 U.S. at 136.
62. 452 U.S. 264 (1981).
63. *See id.* at 297. The Court referenced a variance or waiver from surface mining regulations and restrictions as forms of administrative relief. *See id.*
64. 473 U.S. 172, 190, 194 (1985).
65. *See id.* at 186, 194.
66. *Id.* at 186.

pensation through the procedures the State has provided for doing so."[67]

The Williamson County Regional Planning Commission ("Commission") denied applications to complete the development of a residential subdivision that had been partially constructed when the County amended its zoning ordinance.[68] The Commission modified the method of calculating allowed densities, resulting in a substantial decrease in housing units for the project.[69] The Commission later denied the project proposals for numerous reasons, including reasons related to the zoning ordinance changes.[70] The landowner then filed a claim alleging that the Commission had taken its property without just compensation under the Fifth Amendment and should be estopped from denying approval of the project.[71]

The Supreme Court determined that the landowner had yet to obtain a final decision regarding the application of the zoning ordinance and subdivision regulations to its property and, therefore, failed the first, final-decision, hurdle of the ripeness test.[72] While the landowner submitted development plans that arguably met the previous *Penn Central* and *Agins* requirements, the Court found that the landowner did not seek the variances required to develop the property according to the proposed plan.[73] The Court distinguished the requirement to seek variances from the requirement to exhaust administrative remedies prior to bringing an action.[74] Exhaustion of adminis-

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67. *Id.* at 194.

68. *See id.* at 180-82.

69. *See Williamson County*, 473 U.S. at 178-79.

70. *See id.* at 181. The denial was based, in part, on density problems, road grades, lack of fire protection, length of cul-de-sacs, disrepair of the main access road, and minimum frontage. *See id.*

71. *See id.* at 182.

72. *See id.* at 186.

73. *See id.* at 188-90. The landowner wrote a letter to the Commission stating that it would not request variances from the Commission until after the Commission approved the proposed plat (project plan). *See id.* at 190.

74. *See Williamson County*, 473 U.S. at 192-93.

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to admin-

trative procedures is not required if the procedures are remedial in nature, such as a declaratory judgment.[75]

The landowner also failed the second, state-procedures, hurdle by not using the inverse condemnation procedures that State law provided to obtain just compensation in a taking situation.[76] The Court noted that Tennessee statutes allow a property owner to bring an inverse condemnation action where a taking occurs due to restrictive zoning laws or development regulations.[77] The Court found that the landowner had not shown that the inverse condemnation procedure, available to obtain compensation, was unavailable or inadequate.[78] Until the landowner utilized that compensation procedure, the takings claim was premature under the test's second hurdle.[79]

The ripeness tests set forth in *Williamson County* were further refined in *MacDonald, Sommer & Frates v. Yolo County*.[80] One of the allegations in the *MacDonald* complaint stated that any application for a zone change, variance or other relief would be futile.[81] The Court was unable to determine whether there was a taking because no final decision on the project had occurred.[82] Nonetheless, the Court addressed the concept of futility, noting that denial of a project does not necessarily mean that future applications would be futile, but that a meaningful application may not have been submitted.[83]

> istrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Id at 193.

75. *See id.* at 193.
76. *See id.* at 196-97.
77. *See id.* at 196.
78. *See id.* at 196-97.
79. *See Williamson County*, 473 U.S. at 196-97.
80. 477 U.S. 340 (1986).
81. *See id.* at 344.
82. *See id.* at 351-53.
83. *See id.* at 352-53 n.8. Refusal of a permit for intensive development does not preclude less intensive, but still valuable development. *See id.*

B. RECENT APPLICATIONS OF THE *WILLIAMSON COUNTY* RIPENESS TEST

1. *Lucas v. South Carolina Coastal Council*: Ripeness Clarification Clouded by the Futility Exception

The Court found that futility was a deciding factor in determining the ripeness of the regulatory takings claim in *Lucas v. South Carolina Coastal Council*.[84] Lucas bought two lots on a South Carolina barrier island, intending to build single family homes.[85] Subsequently, the State enacted the Beachfront Management Act, which barred residential development on these parcels due to public resource concerns.[86] Lucas claimed that his property had been taken without just compensation.[87] The Beachfront Management Act was then amended, prior to the issuance of the South Carolina Supreme Court's decision, allowing the Coastal Council to issue "special permits" under certain circumstances.[88] These special permits would allow construction of habitable structures seaward of the baseline.[89] After granting certiorari, the United States Supreme Court rejected the Council's contention that Lucas' claim was not ripe for failure to apply for a special permit.[90] The Court noted that such an application was not available at the time the case was argued in the South Carolina Supreme Court and that the taking, under the Act as read prior to the amendment, was unconditional and permanent.[91] As any application would have

84. 505 U.S. 1003 (1992).

85. *See id.* at 1006-07.

86. *See id.* at 1007. Lucas bought the properties in 1986. *See id.* at 1006. The Beachfront Management Act, enacted in 1988, established a "baseline connecting the landward-most points of erosion during the past forty years[,]" such that "construction of occupiable improvements was flatly prohibited seaward of a line drawn 20 feet landward of and parallel to the baseline[,]" with no exceptions. *See id* at 1008-09.

87. *See id.* at 1009.

88. *See id.* at 1010-11.

89. *See Lucas*, 505 U.S. at 1011.

90. *See id.* at 1010-13.

91. *See id.* at 1012.

been pointless and futile under the 1988 Act, the claim had attained finality and was ripe for review.[92]

2. *Suitum v. Tahoe Regional Planning Agency*: A Pure Regulatory Takings Ripeness Case for the Supreme Court

Despite the tests and precedents provided by the above-mentioned cases, lower courts, landowners and regulatory agencies have had difficulty applying the ripeness rule to regulatory takings cases.[93] The *Suitum* case, where ripeness was the sole issue presented, provided the Supreme Court with an opportunity to clarify the application of the ripeness doctrine in regulatory takings cases.[94]

IV. COURTS' ANALYSIS

The threshold issue in *Suitum* was whether the plaintiff's takings claim under the Fifth and Fourteenth Amendments was ripe for adjudication.[95] The Ninth Circuit based its decision that the claim was not ripe mainly on its conclusion that the TDRs allocated to the property might constitute a valuable use that abated the alleged taking.[96] Suitum, therefore, needed a final government decision, to secure and transfer the TDRs to determine the extent of development allowed the property.[97] The United States Supreme Court approached the TDRs differently and concluded that a final decision had been reached and no further actions were needed to determine the TDRs' value.[98] The concurrence focused on whether TDRs should be considered in a takings ripeness decision and whether they are a

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92. *See id.* at 1012. The Coastal Council had stipulated that a building permit would not have issued under the 1988 Act, application or no application. *See id* at 1012 n.3.

93. Maraist, *supra* note 44, at 421.

94. *See Suitum*, 117 S. Ct. at 1664.

95. *See* Suitum v. Tahoe Reg'l Planning Agency, 80 F.3d 359, 360 (9th Cir. 1996) ("*Suitum II*").

96. *See id.* at 362.

97. *See id.* at 362-63.

98. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1667-68 (1997) ("*Suitum IV*").

property use or merely compensation for a taking.[99] Each of these opinions will likely affect the ultimate outcome of the Suitum case when it is reheard at the district court level.

A. THE NINTH CIRCUIT

Under the court's interpretation of *Williamson County,* a regulatory takings claim is ripe when the "final decision" and "state procedures" prudential hurdles have been met prior to filing the case.[100] In *Suitum*, the Ninth Circuit noted that only the first hurdle, the final-decision requirement, was at issue on appeal.[101]

The court found that no final decision had been reached as to how Suitum would be allowed to use her property because she had not applied to transfer her TDRs.[102] A TDR transfer application was necessary to determine the extent of use of Suitum's property.[103] A regulatory taking in violation of the Fifth Amendment occurs only if the regulation denies an owner all economically viable use of the land.[104]

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99. *See id.* at 1670-72 (Scalia, J., concurring).

100. See *Suitum II,* 80 F.3d at 362 (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985)). The plaintiff must demonstrate that (1) the government entity charged with implementing the regulations alleged to have resulted in a taking has reached a final decision on the regulation's application to the property at issue and (2) the plaintiff has pursued any "reasonable, certain and adequate" provisions that the agency has established for obtaining compensation at the time of the taking. *See Williamson County,* 473 U.S. at 186, 194.

101. *See Suitum II,* 80 F.3d at 362. The district court's decision focused only on the finality test and did not address the compensation test. Suitum v. Tahoe Reg'l Planning Agency, 91-040 (D. Nev. Apr. 1, 1996) ("*Suitum I*"). The district court found that a TDR transfer application was the only meaningful application that could be made once the property was determined to be within the SEZ designation. *See id.* As Suitum had not filed the application, there was no finality. *See id.*

102. *See Suitum II,* 80 F.3d at 362.

103. *See id.*

104. *See id.* at 361 (citing Carson Harbor Village Ltd. v. City of Carson 37 F.3d 468, 473 (9th Cir. 1994)). The *Suitum* court noted that the definition of "economically viable use" had yet to be determined with much precision. *See id.* at 361-62. Relevant factors are the regulation's economic impact and the extent to which it interferes with investment backed expectations. *See id.* at 362 (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

The Ninth Circuit reasoned that without an application for transfer of the TDRs, TRPA was foreclosed from determining the nature and extent of the use and development permitted for Suitum's property.[105] The court viewed the TDRs as "uses" of Suitum's property under TRPA's regulations.[106] As such, the TDRs were an alternative use of a SEZ property that was not materially different from other alternative uses a property owner may seek when denied approval for a proposed development.[107] Without an application for sale or transfer of the TDRs, the court could not determine the extent of the property rights that Suitum possessed and, therefore, could not know the full economic impact of the regulations on Suitum's property.[108]

Suitum claimed that an application to sell or transfer her TDRs would be futile because the TDR program was a "sham" that had produced no sales and, thus, no market value for her TDRs.[109] The Ninth Circuit recognized the limited futility exception to the ripeness doctrine set forth in *Del Monte Dunes at Monterey Ltd. v. City of Monterey*.[110] The court held the futility exception to be inapplicable, however, because Suitum's TDRs had some significant value.[111] Therefore, participation in the TDR program was not a futile endeavor to achieve an economic use of the property.[112]

The Ninth Circuit concluded that Suitum's claims were not ripe because of a failure to apply for TDRs pursuant to TRPA's program and a failure to demonstrate that such an application

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105. *See Suitum II,* 80 F.3d at 362.

106. *See id.* at 363.

107. *See id.* In taking this approach, the court was distinguishing TDRs as a *use* of the property or property right as opposed to *compensation* for regulatory restrictions on the use of the property. *See id.*

108. *See id.* at 362-63.

109. *See id.* at 363.

110. 920 F.2d 1496, 1501 (9th Cir. 1990).

111. *See Suitum II,* 80 F.3d at 363-64. The court held that evidence supported a market value of $10,000 to $21,500 for the development rights with an additional value of $30,000 if accompanied by a development allocation right. *See id.* at 363.

112. *See id.* at 364.

would be futile.[113] Accordingly, the Ninth Circuit affirmed the district court's grant of summary judgment to TRPA.[114]

B. THE U.S. SUPREME COURT

In response to the Ninth Circuit's affirmance of the district court's holding, Suitum filed a petition for writ of certiorari to the United States Supreme Court, which the Court granted.[115] Like the courts below, the Supreme Court applied the *Williamson County* finality rule to the ripeness issue.[116] The majority and concurring opinions differed in their assessment of TDRs.[117]

1. The Majority Opinion

The majority found that the facts in *Suitum* were distinguishable from prior landmark ripeness cases.[118] The Court noted that the prior landmark cases were not ripe because further regulatory steps existed that the plaintiffs could have taken to reach a final decision regarding the properties' allowed uses.[119]

The *Suitum* Court found no further regulatory steps existed because no questions remained regarding how TRPA's development and TDR regulations applied to the property.[120] The

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113. *See id.*

114. *See id.*

115. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659 (1997) ("*Suitum IV*").

116. *See id.* at 1664-65.

117. *See id.* at 1662. (Souter, J. delivered the opinion of the court in which Rehnquist, C.J., and Stevens, Kennedy, Ginsburg and Breyer, JJ., joined, and in which O'Conner, Scalia and Thomas, JJ., joined in part and concurred in part.)

118. *See id.* 1665-67.

119. *See id.* In *Agins v City of Tiburon*, 447 U.S. 255 (1980), the property owner challenged the enactment of a zoning statute without having submitted a development plan for the property. *See Agins*, 447 U.S.257. Ripeness was lacking because there was no concrete controversy regarding the application of the specific zoning provisions. *See id.* at 260. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n. Inc.* 452 U.S. 264 (1981) and *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), takings challenges were unripe because the plaintiff had not yet applied for the variances potentially allowed by the regulations.

120. *See Suitum IV*, 117 S. Ct. at 1667.

Court noted that: 1) the parties had agreed on the particular TDRs to which Suitum was entitled; and 2) no discretionary decision was required of any agency official before Suitum could obtain the TDRs or offer them for sale.[121] Although agency approval was needed to allow a given buyer to lawfully use the TDRs, the Court concluded that enough potential buyers capable of meeting TRPA's approval existed and, thus, the TDRs were salable.[122] As a result, the final decision requirement of the ripeness test was met.[123]

The Supreme Court did not assess the second ripeness requirement, that the landowner seek compensation through the procedures provided by the State prior to filing a regulatory taking claim, because it found that the "state procedures" compensation test was inapplicable.[124] The Court noted that ordinarily a plaintiff must seek compensation if the state provides adequate procedures or remedies for inverse condemnation.[125] In this case, however, TRPA maintained that it did not have provisions for paying just compensation, thus, implying that there were no applicable "state procedures."[126]

The Court then addressed TRPA's argument that the case was not ripe because the value of Suitum's TDRs could not be determined without an actual, prospective sale, subject to TRPA's approval.[127] While Suitum had not yet offered the TDRs for sale, the Court determined that a sale was not necessary to determine their value.[128] The Court found that the class of TDR buyers qualified to receive TRPA approval was broad enough to conclude that the TDRs were salable.[129] Addi-

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121. *See id.*
122. *See id.* at 1667-68.
123. *See id.* at 1668.
124. *See id.* at 1665 n.8.
125. *See Suitum IV*, 117 S. Ct. at 1665 n.8.
126. *See id.* Suitum's counsel stated TRPA's position at oral argument and TRPA's counsel did not object to the implication that the agency was not subject to inverse condemnation proceedings. *See id.*
127. *See id.* at 1668.
128. *See id.*
129. *See id.* TRPA and Suitum agreed on the particular TDRs entitled to the property and that no discretionary decisions remained to be made by any agency official in order to obtain the TDRs or to offer them for sale. *See id* at 1667. The only remaining

tionally, the Court found that the TDRs' market value could be determined by opinion evidence without the benefit of a pending sale.[130] Therefore, the TDRs' valuation was simply an issue of market prices, on which considerable evidence had already been presented to the district court.[131] The Court concluded that the ripeness doctrine did not require Suitum to obtain a prospective buyer for her TDRs or apply for TRPA's approval to determine the level of compensation appropriate for the takings claim.[132]

Accordingly, the Supreme Court held that Suitum's regulatory takings claim was ripe for adjudication because a final decision denying the development application had occurred and no further discretionary decisions remained regarding transfer and valuation of the property's TDRs.[133] The Court vacated the Ninth Circuit's judgment and remanded the case for further proceedings.[134] The Ninth Circuit then remanded the case to the district court with directions to consider the second prong of the *Williamson County* test; state procedures for seeking compensation.[135]

2. The Concurrence

Justice Scalia, joined by Justices O'Connor and Thomas, argued that the majority incorrectly applied the final decision requirement of the ripeness doctrine in *Suitum*.[136] The concurrence declared that the final decision was TRPA's denial of Suitum's development request, for this denial determined the

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agency decision was whether a prospective buyer could lawfully use the TDRs. *See id.* Even if a particular sale was subject to approval, ultimate salability was presumed since there were many lawful potential buyers ensuring that ultimately transfer and receipt of the TDRs would be approved. *See id* at 1668.

130. *See Suitum IV*, 117 S. Ct. at 1669.

131. *See id.* at 1668.

132. *See id.*

133. *See id.* at 1667, 1670. The final decision was TRPA's denial of development and subsequent denial of the appeal of the property's SEZ classification and IPES score. *See id.* at 1663, 1670.

134. *See id.* at 1670.

135. *See* Suitum v. Tahoe Reg'l Planning Agency, 123 F.3d 1322 (9th Cir. 1997) ("*Suitum V*").

136. *See Suitum IV*, 117 S. Ct. at 1670.

permissible use of Suitum's land.[137] The decision on the TDRs was not relevant in the final decision analysis because TDRs were not a "use" of the land.[138] While the majority did not decide whether TDRs should be considered a use of the property in evaluating a takings claim, the concurrence maintained that TDRs are a new right conferred upon a landowner for compensation in exchange for a taking and not a residual right or use.[139]

The concurrence viewed TDRs only as a compensation vehicle to be used in assessing whether the landowner had been adequately compensated for the taking.[140] The opinion further suggested that TDRs are not "undesirable or devious[,]" but serve the purpose of mitigating the economic loss of a restricted-use property.[141] As such, TDRs are not appropriate in offsetting restrictions that would otherwise be sufficient to produce a compensable taking and should not be taken into account when assessing whether a taking has occurred.[142]

V. CRITIQUE

A. *SUITUM*: RIPE FOR TAKINGS UNDER FINAL DECISION AND STATE PROCEDURES HURDLES

The United States Supreme Court held that *Suitum* was ripe for adjudication, but did not decide whether a taking had occurred.[143] The Court correctly found that Suitum met the "final decision" requirement for ripeness because no discretionary decisions remained in allocating the TDRs to Suitum's

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137. *See id.* at 1673.

138. *See id.* at 1671.

139. *See id.* at 1662, 1671. The concurrence stated that the *Penn Central* precedent of recognizing TDRs as a potential property right in considering the impact of a regulation should be distinguished from *Suitum* because the property owners in *Penn Central* owned additional surrounding properties that could directly benefit from the TDRs. *See id* at 1672.

140. *See id.* at 1670-71.

141. *See Suitum IV*, 117 S. Ct. at 1672 (Scalia, J., concurring).

142. *See id.* at 1672.

143. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1670 (1997) ("*Suitum IV*").

property.[144] While it might appear that considerable TRPA involvement was necessary to validate any sale or transfer of the TDRs, ultimately, an acceptable buyer for Suitum's TDRs would be found.[145] With ample evidence that the value of the TDRs could be appraised, it logically follows that the value of the TDRs becomes an issue of their market price, and not an issue dependent upon further administrative decisions by TRPA.[146] Accordingly, the Court concluded that the case was ripe based upon the "final decision" test and remanded it to the Ninth Circuit for further proceedings.[147]

1. Clarification on *Williamson County* State Procedures Ripeness Hurdle Avoided in *Suitum*

The Supreme Court decision ostensibly reverses prior Ninth Circuit decisions requiring finalization of TDRs prior to ripeness.[148] The actual effect of the decision, however, is uncertain because the majority opinion narrowly applied only the first step, "final decision" hurdle, of the *Williamson County* ripeness test.[149] Application of the second step "state procedures" compensation requirement was not before the Court, leaving it open for interpretation.[150]

In contrast, the concurrence strongly argued that TDRs are not relevant to the "final decision" requirement because they

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144. *See id.* at 1667.
145. *See id.* at 1668.
146. *See id.*
147. *See id.* at 1670.
148. *See* Tahoe Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 911 F.2d 1331, 1344 n.3 (9th Cir. 1990) (Fletcher J. concurring); Carpenter v. Tahoe Reg'l Planning Agency, 804 F. Supp. 1316, 1324-25 (D. Nev. 1992): Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 638 F. Supp. 126, 132-33 & n.6 (D. Nev. 1986), *vacated on other grounds*, 911 F.2d 1331 (9th Cir. 1990).
149. *See Suitum IV*, 117 S. Ct. at 1665. This was the only step of the test the Ninth Circuit addressed. *See Suitum II*, 80 F.3d 359.
150. *See Suitum IV*, 117 S. Ct. at 1665. Previous regulatory ripeness cases decided by the Court under the *Williamson County* ripeness test were either found to be unripe due to lack of finality, *see e.g.* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1986); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985), or ripe due to finality, but with no applicable state compensation procedure to examine, *see e.g.* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1012, 1014 n.3 (1992).

are not a use of the land, but are a compensation system for a regulatory taking.[151] The majority did not expressly reject the concurrence's position.[152] The result is a majority opinion that provides no clear direction to the Ninth Circuit regarding application of TDRs to the ripeness, takings, and compensation issues; and a concurrence that is clearly contrary to the Ninth Circuit's current assessment of TDRs in land use regulation takings cases.[153] The Ninth Circuit will now need to determine (1) whether TDRs have a relevant application within the *Williamson County* "state procedures" ripeness hurdle and (2) how to apply the takings and adequate compensation tests to Suitum's TDRs.[154]

2. Application of State Procedures Requirement to *Suitum*

The actions available to the district court in applying the "state procedures" requirement in *Suitum* appear straightforward. Under the state procedures requirement, a property owner claiming a regulatory taking must seek compensation through procedures set up by the state for that purpose.[155] A reasonable, certain and adequate provision for obtaining compensation must have existed at the time of the taking.[156] If the government has provided an adequate process for compensation, then the property owner does not have a takings claim until the process has been used and just compensation has been denied.[157] The district court will likely determine, as TRPA has asserted, that TRPA has no compensation process available to Suitum and that Suitum's TDRs are a property right and not a compensation measure.[158] Accordingly, Sui-

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151. *See Suitum* IV, 117 S. Ct. at 1671 (Scalia, J., concurring).

152. *See id.* at 1670.

153. *See id.* at 1668-71. Suitum v. Tahoe Reg'l Planning Agency, 91-040 (D. Nev. Apr. 1, 1996) ("*Suitum I*"); *Tahoe-Sierra*, 911 F.2d 1331; Carpenter v. Tahoe Reg'l Planning Agency, 804 F. Supp. 1316 (D. Nev. 1992).

154. *See Suitum IV*, 117 S. Ct. at 1670; Suitum v. Tahoe Reg'l Planning Agency, 123 F.3d 1322 (9th Cir. 1997) ("*Suitum V*").

155. *See Williamson County*, 473 U.S. at 194-95.

156. *See id.* at 194. (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974)).

157. *See Williamson County*, 473 U.S. at 195.

158. *Suitum IV*, 117 S. Ct. at 1665 n.8.

tum's complaint will be ripe based upon the "final decision" holding of the Supreme Court.[159]

If the district court reverses its previous position that TDRs are a property right or property use and finds that TDRs are part of some type of compensation program, then it will need to assess the extent to which Suitum has participated in the program.[160] Following the Supreme Court's holding that the amount of Suitum's TDRs has already been determined, such that their value can be appraised, the claim is ripe because Suitum participated in the state procedures sufficiently to determine the level of compensation due to her property.[161]

B. TDRs: A Property Right or Compensation for a Taking?

Finding that the "state procedures" test is either inapplicable or has been met, the district court will need to determine whether a taking has occurred.[162] A key issue will be whether the court finds that Suitum's TDRs are rights and beneficial uses of the property, and whether the TDRs, along with other limited residual uses of the property, constitute sufficient beneficial use to preclude a taking.[163] The final outcome of this analysis will be of enormous significance to the future use of TDRs in the Lake Tahoe Basin and throughout the country. If TDRs are found to be merely a compensation measure for regulatory taking, governments will be required to augment

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159. *See id.* at 1667.

160. *See Williamson County*, 473 U.S. at 194-95.

161. *See Suitum IV*, 117 S. Ct. at 1668-69. The Supreme Court stated that the compensation values attributed to the TDRs could be determined; therefore it was unnecessary for Suitum to finalize the TDR allocation and sales. *See id.*

162. *See Williamson County*, 473 U.S. at 194.

163. *See* Affidavit of Susan E. Scholley in Support of Motion for Summary Judgment, Suitum v. Tahoe Reg'l Planning Agency, No 91-040 (D. Nev. Apr. 1, 1996). Specific allowed uses included vegetation, such as gardening and landscaping, and structures that allowed 75% or more of precipitation to reach the ground, such as chaise lounges and patio tables, jungle gyms, swing sets, pet enclosures, picnic tables, volleyball or badminton sets, and garden trellises. *See id.*

any shortfalls in the value of the TDRs to provide full compensation for the taking.[164]

1. TDRs as a Property Right in the Development of a Regional Planning Area

TDRs are a development right because they represent a fractional share of the cumulative development allowed for the entire region, as determined by TRPA's regional environmental thresholds and cumulative carrying capacity analysis.[165] When the TDRs are allocated to individual parcels, that allocation is conceptually the same as any other zoning or planning process that restricts development potential according to valid police-power purposes and rationally assigns development densities and uses to individual properties, which may then become vested property rights upon development application approval.[166]

Thus, TDRs may be viewed as an extension of basic zoning principles, as in *Barancik v. County of Marin*,[167] where the Ninth Circuit determined that TDRs constituted valid development rights that could be purchased to increase the development potential of a property beyond that normally allowed under the zoning ordinance.[168] California state courts within the Ninth Circuit have also positively identified TDRs as a type of property right, with the characteristics of real property.[169]

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164. *See* Richard J. Lazarus, *Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court*, 12 J. LAND USE & ENVTL L. 179, 201 (Spring 1997). The essay, written after oral arguments and before the opinion, discusses the relevance of the case to property rights issues generally and TDRs specifically. *See id.* at 181.

165. *See* Regional Plan for the Lake Tahoe Basin, Tahoe Regional Planning Agency, September 17, 1986.

166. *See* Communication from Roy Gorman, Associate Professor of Law, Golden Gate University Law School (January 11, 1998), on file with author.

167. 872 F.2d 834 (9th Cir. 1989).

168. *See id.* at 837. The court found that the Marin County TDR program, allowing for accumulation of development rights through purchase from owners in the same area, was rationally related to preservation of agriculture and did not result in an increase in the total amount of development possible in the rural corridor. *See id.*

169. *See* Mitsui Fudosan (U.S.A.) Inc. v. County of Los Angeles, 268 Cal. Rptr. 356, 357 Cal, Ct, apphe one of the fractional interests in the complex bundle of rights aris-

Similarly, TRPA has maintained that its TDR program was based upon TDRs as part of the bundle of rights associated with properties within its jurisdiction and not an inverse condemnation compensation program.[170]

2. TDRs as a Marketable Beneficial Use of a Property

In addition, TDRs can provide economic value to Suitum's property through their market sales value within the Tahoe Basin; thus, it is reasonable that the district court view TDRs as an appurtenant property right conferring a beneficial use to Suitum's property.[171] This position is also consistent with the TDR precedents set forth by the Supreme Court in *Penn Central* and with the public policy and environmental management priorities of the congressionally approved Tahoe Regional Planning Compact.[172]

If the district court finds that TDRs are a property right and hence a beneficial use of the property, then TDRs, along with other residual uses of the land, must be assessed to determine if a taking has occurred.[173] The standard for inverse condemnation is where a regulation denies all economically beneficial or productive use of the land.[174] The TDRs do have economic

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ing from ownership of land and subject to real estate tax assessment upon transfer to a receiving property. *See id* at 528.

170. *See Suitum IV*, 117 S. Ct. at 1663, 1665, n.8.

171. *See id.* at 1663; *Mitsui Fudosan*, 268 Cal. Rptr. At 358. TDRs allowing maximum floor area ratios to be exceeded were subject to hallmarks of real property transfer with agreements that the TDRs be appurtenant to and used for the benefit of the real property owned by the buyer. *See Mitsui Fudosan* , 268 Cal. Rptr. at 528-29.

172. *See* Tahoe Regional Planning Compact, Pub. L. 91-148, 83 Stat. 360; Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

173. *See Lucas*, 505 U.S. at 1014 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

174. *See id.* at 1015. The Court noted that a determination of the "deprivation of all economically feasible use" rule is imprecise, such that a regulation requiring 90% of a rural tract to remain in its natural state may deprive the owner of all economically beneficial use of the burdened portion of the property, or be a mere diminution in the value of the tract as a whole. *See id.* at 1016 n.7. The *Lucas* Court went on to comment that the decision in *Penn Central* was an extreme and insupportable view of economic use, implying that TDRs should not figure heavily in determining the economic use of a property. *See id.* The concurring opinion in *Suitum* presented a similar view of TDRs, and distinguished *Penn Central* from *Suitum* because the landowner in

value, providing an economically-beneficial use of the land; thus, the property has not lost all economic use and a taking has not occurred.[175]

Suitum argued that TDRs are merely administrative creations that do not constitute a use of the land and are not a substitute for a right to build a home.[176] This argument ignores the fact that properties are often regulated to restrict or change the purchaser's anticipated allowable uses, but a taking will not occur as long as some economic or beneficial use remains.[177] The TDRs, in essence, represent new economic, and thus beneficial, uses of the property that replace more intensive uses determined to be environmentally damaging to Lake Tahoe.[178]

The position presented by the concurring opinion, that TDRs have nothing to do with the use of the land and are merely chits redeemable on the market for compensation, did not take into account the real-property nature of the TDRs.[179] TDRs often bear all the hallmarks of real property transfers; such as escrow accounts, escrow instructions, purchase and sale agreements, title reports and title insurance, and restrictive covenants.[180] TDRs are much more than mere chits and can directly affect the development patterns and densities of receiving properties within the planning region.

The substantial market value of the TDRs as property rights and their beneficial use to the holding and receiving

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Penn Central owned nearby property that could benefit from the TDRs. *See Suitum IV*, 117 S. Ct. at 1672 (Scalia, J., concurring).

175. *See Suitum IV*, 117 S. Ct. at 1663. The development rights, together with an allocation right and land coverage, were valued at approximately $35,600 to $44,700, and the land without development rights was valued at $7,125 to $16,750 for a total approximate value of $42,725 to $61,450. *See id.* at 1664. Suitum originally purchased the property for $28,000 in 1972. Deposition of Bernadine Suitum, Suitum v. Tahoe Reg'l Planning Agency, NO. 91-040 (D. Nev. Apr. 1, 1996) ("*Suitum I*").

176. *See* Petitioner's Brief at 19-20, *Suitum IV*, 117 S. Ct. 1659 (No. 96-243).

177. *See Lucas*, 505 U.S. at 1015-16; *Agins*, 447 U.S. at 260-61; *Penn Central*, 438 U.S. at 137-38 n.36.

178. See Tahoe Regional Planning Agency Code of Ordinances, Chapter 34, Transfer of Development.

179. *See Suitum IV*, 117 S. Ct. at 1671 (Scalia, J., concurring).

180. *See Mitsui Fudosan*, 268 Cal. Rptr. 3d at 529.

properties provide ample support for the District Court to find that Suitum retains substantial economic use of her property.[181] Therefore, the court could reasonably determine that TRPA's regulations have not gone too far and no inverse condemnation or taking of Suitum's property had occurred.[182]

VI. CONCLUSION

Given the regulatory and TDR allocation application environment under which this case was brought, the Supreme Court's decision in *Suitum* clarifies that courts must look beyond the mere existence of another structured, regulatory step in testing the "final decision" requirement for ripeness.[183] Courts must fully examine the extent to which that step has a truly discretionary component, which makes finality unpredictable in terms of *Williamson County*.[184] In addition, the ruling implies that the second, state procedures, requirement of the test may be fulfilled without action by the property owner if the level of compensation allowed under state procedures is nondiscretionary and can be determined through testimony.[185]

The concurring opinion goes too far in labeling TDRs a device that only provides for property takings compensation and not a property right to be assessed when evaluating whether a taking has occurred.[186] The nature of TDRs vary from jurisdiction to jurisdiction and may represent transfers of actual property uses and densities through transactions similar to real property sales, making it evident that TDRs are a part of the bundle of property rights within that jurisdiction.[187]

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181. *See Agins*, 447 U.S. at 260.

182. *See Pennsylvania Coal*, 260 U.S. at 415.

183. *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1667-68 (1997) ("*Suitum IV*").

184. *See id.* at 1668-69.

185. *See id.*

186. *See id.* at 1671.

187. *See* Barancik v. Marin, 872 F.2d 834, 837 (9th Cir. 1989); Mitsui Fudosan v. Los Angeles, 268 Cal. Rptr. 356, 527-29 (1990);

The Ninth Circuit may have an opportunity to re-visit *Suitum* if the district court's pending decision is appealed. The Ninth Circuit has adequate precedent and evidence on the record to both accept TRPA's assertion that TDRs are legitimate property rights, and not merely compensation for a taking, and to hold that no taking has occurred because TRPA's regulations have not resulted in the loss of all economic use of Suitum's land.[188] Should the Ninth Circuit find that no taking has occurred, it is likely that *Suitum* will return to the Supreme Court for further deliberation on TDRs as a takings versus compensation, followed possibly by deliberation on the amount of loss in economic use required for a regulatory taking.

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188. *See id.* at 1663, 1668.

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