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IN THE SUPREME COURT OF THE UNITED STATES

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SAN DIEGO GAS & ELECTRIC COMPANY, :
:
Appellant, :
:
v. : No. 79-678
:
CITY OF SAN DIEGO, ET AL., :
:
Appellees. :
:
- - - - - :

Washington, D. C.,
Monday, December 1, 1980

The above-entitled matter came on for oral argu-
ment before the Supreme Court of the United States at
10:56 o'clock a.m.

APPEARANCES:

LOUIS E. GOEBEL, ESQ., Goebel and Monaghan, Security
Pacific Plaza, 1200 Third Avenue, Suite 1700, San
Diego, California 92101; on behalf of the Appellant.

C. ALAN SUMPTION, ESQ., Deputy City Attorney, City of
San Diego, 233 A Street, Suite 300, San Diego,
California 92101; on behalf of the Appellees.

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1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We will hear arguments in
3 San Diego Gas & Electric Company v. City of San Diego.

4 Mr. Goebel, you may proceed when you're ready.

5 ORAL ARGUMENT OF LOUIS E. GOEBEL, ESQ.,

6 ON BEHALF OF THE APPELLANT

7 MR. GOEBEL: Mr. Chief Justice, and may it please
8 the Court:

9 Our case this morning deals with the availability of
10 a money damage remedy for just compensation when the oppressive
11 governmental conduct of a municipality denies a property owner
12 of all practical beneficial or economic use of his property.
13 In particular, this case presents a question which was left
14 open by the decision of this Court last term in Agins v. City of
15 Tiburon, namely, whether a state may limit a property owner
16 under such circumstances to solely nonmonetary or so-called
17 equitable remedies.

18 QUESTION: But your premise is that there was a tak-
19 ing in this case?

20 MR. GOEBEL: That's correct, Your Honor. We believe
21 there was a taking.

22 QUESTION: But that's disputed, I suppose?

23 MR. GOEBEL: It is disputed. We --

24 QUESTION: And if we agreed with your opposition we
25 wouldn't reach the question again. Is that it?

1 MR. GOEBEL: That's possible, Your Honor. In this
2 case we had a fully developed trial record as opposed to the
3 Agins case. The trial court found a taking and that taking
4 was affirmed by the California Court of Appeals.

5 QUESTION: Well, am I wrong that the latest order of
6 the intermediate appellate court leaves open the question whe-
7 there there was a taking?

8 MR. GOEBEL: I don't believe --

9 QUESTION: Initially, there was a finding, you know,
10 that there was a taking, both by the initial court and by the
11 appellate division, was there not?

12 MR. GOEBEL: That's correct, Your Honor.

13 QUESTION: But then I thought, when -- what's this
14 strange practice of a transfer by your Supreme Court to the
15 appellate court? That's not a remand, or is it?

16 MR. GOEBEL: It's a -- it is, in effect, a remand of
17 the same case, Your Honor.

18 QUESTION: Well, does it vacate the judgment clause?
19 Did the transfer vacate the affirmance of the finding of
20 taking?

21 MR. GOEBEL: That's correct, Your Honor, but under
22 California practice it would have been vacated anyway. In this
23 case, after the California Court of Appeal, the intermediate
24 appellate court, affirmed the trial court judgment, the Supreme
25 Court granted a hearing, which has the effect of vacating the

1 intermediate appellate court's opinion anyway.

2 QUESTION: Well, and then, doesn't the appellate
3 court send it back leaving still open the question of taking?

4 MR. GOEBEL: They sent it back for reconsideration
5 in light of their Agins decision. Now, it's our position that
6 there was no question at that point in time what the basis for
7 the second California Court of Appeal decision was. The
8 California Court of --

9 QUESTION: See, what I'm reaching at, is there a
10 final judgment here? That's -- do we have jurisdiction at all?

11 MR. GOEBEL: Well, I think you do, Your Honor.

12 QUESTION: On the taking question?

13 MR. GOEBEL: In regard to this taking away this
14 judgment, the California Court of Appeal specifically stated
15 that a local agency's arbitrary, unconstitutional exercise of
16 the police power does not require compensation. It was that
17 premise which caused the California Court of Appeal to do a
18 180 and suddenly take away the judgment which only months be-
19 fore they had affirmed.

20 QUESTION: Well, this is an appeal from the Court of
21 Appeal's judgment?

22 MR. GOEBEL: That's correct, Your Honor.

23 QUESTION: Because any further appeal was refused?

24 MR. GOEBEL: The second time around, so to speak, the
25 California Supreme Court denied hearing, and therefore we

1 brought this appeal to this Court.

2 QUESTION: Mr. Goebel, your client, as I understand
3 it, wants to build a power plant on this land. Is that right?

4 MR. GOEBEL: Your Honor, that was the original in-
5 tention at the time of acquisition of this property in 1966.
6 However --

7 QUESTION: The taking, the theory of the taking, is
8 that you're denied the right to build the plant you planned on
9 building?

10 MR. GOEBEL: Build the plant or some other indus-
11 trial use. the property was acquired --

12 QUESTION: Well, supposing, when the case goes back
13 to the trial court, the trial court enters an order that says,
14 let them build either a power plant or some other industrial
15 use. Would you be complaining about that?

16 MR. GOEBEL: As it happens -- I'll answer that on two
17 levels, Your Honor. As it happens, the plans of my client
18 have changed in the intervening years and there's no longer a
19 desire to build a power plant.

20 QUESTION: What do you want to use the land for?

21 MR. GOEBEL: To devote the property to a use that was
22 perfectly consistent with the zoning and planning at the time
23 they acquired it, some industrial use.

24 QUESTION: Give me an example of what you'd like to
25 use the land for?

1 MR. GOEBEL: A well-planned, designed industrial
2 park.

3 QUESTION: All right. Supposing, when you go back,
4 the trial judge enters an order and says that this would be
5 an unconstitutional taking unless the property owner is permit-
6 ted to build precisely that, and you will argue for the right
7 to do that? You do have the right to do that on remand, don't
8 you?

9 MR. GOEBEL: That's not the California practice as I
10 understand it, Your Honor. The California practice for these
11 so-called equitable remedies is that if the court, the judicial
12 system finds the action previously taken by the municipality
13 to be improper, the case is simply remanded to the municipality
14 for, to be dealt with entirely anew.

15 QUESTION: You don't think you get any relief at all
16 on remand?

17 MR. GOEBEL: We'd have an opportunity --

18 QUESTION: Would you have an opportunity on remand
19 to ask the judge to say, please enter an order that will allow
20 us to develop this as an industrial park?

21 MR. GOEBEL: That is not the practice under adminis-
22 trative relief.

23 QUESTION: I know it's not the practice, but you've
24 claimed your constitutional rights have been denied you. And
25 in order to remedy the constitutional rights, you say the only

1 thing that will protect us is to let us build this industrial
2 park. Would he have power to grant you that relief?

3 MR. GOEBEL: I assume there is power and jurisdiction
4 to grant that relief, Your Honor. It's not the --

5 QUESTION: How do we know he's not going to do it?

6 MR. GOEBEL: I think that in light of the decision
7 in the Agins case and in our case when it was previously before
8 the courts, that that's not likely to happen.

9 QUESTION: Well, Mr. Goebel, what's the significance
10 of that sentence in the second opinion of the appellate court,
11 "The City has not made application to use or improve the pro-
12 perty, nor has it asked the City what development might be
13 permitted." What's that all about?

14 MR. GOEBEL: Well --

15 QUESTION: It sounds like you didn't exhaust your
16 administrative remedies.

17 MR. GOEBEL: Your Honor, it is correct that the
18 property owner has not submitted a specific development propo-
19 sal to the City and been denied. It is our position on this
20 record, on the factual record developed in the trial court,
21 that to have done so was totally impractical and futile. That
22 was so found by the trial court, and affirmed by the Court of
23 Appeal in the first instance.

24 QUESTION: Well, why does the Court of Appeal throw
25 this in in the second opinion?

1 MR. GOEBEL: I'm not certain, Your Honor. I think
2 in the context of this remand and the statement that I read to
3 Your Honor previously, that it is clear that the action of the
4 Court of Appeal, what caused the Court of Appeal on the same
5 record to take a 180 difference in view was the fact that the
6 California Supreme Court had said, even an arbitrary, unconsti-
7 tutional exercise of the police power does not require compen-
8 sation.

9 QUESTION: Let me be a little more specific. When
10 did your client, the utility, reach the decision not to build
11 these nuclear plants?

12 MR. GOEBEL: It would have been in the early '70s,
13 Your Honor, prior to the --

14 QUESTION: Do you know what the basis of that deci-
15 sion was?

16 MR. GOEBEL: A number of changing concerns by the
17 Company, and also the changing regulatory climate in California
18 in terms of environmental constraints, building power plants
19 near the ocean, and so forth.

20 QUESTION: Have you ever tried to sell any of the
21 property in question?

22 MR. GOEBEL: Not prior to the trial of this action,
23 Your Honor. However, there was a finding of fact in the trial
24 court that after the culmination of the several aspects of the
25 City's conduct, the property was unmarketable and had only a

1 nominal fair market value.

2 QUESTION: Have you had any offers to purchase?

3 MR. GOEBEL: No, Your Honor.

4 QUESTION: But, in any event, the appellant never
5 sought approval for a nuclear plant?

6 MR. GOEBEL: That is correct, Your Honor. And it is
7 our position that in effect, as a matter of law, beyond dis-
8 pute, at the conclusion of the totality of the City's conduct
9 in June of 1973, would have been totally impractical and fu-
10 tile to do so by reason of the consistency policy which the
11 City had followed. And that is that when they enacted an open
12 space designation on a particular property, they required any
13 building permit and any subdivision map on that property to be
14 consistent with the open space designation. We say, how can
15 any industrial use be consistent with open space?

16 QUESTION: And yet they purported to bring within
17 the possibility a nuclear power plant.

18 MR. GOEBEL: We believe that was a cynical --

19 QUESTION: Well, tell me, Mr. Goebel, could the City,
20 I take it, repeal this ordinance? It could now, couldn't it?

21 MR. GOEBEL: It could repeal it and modify it; yes,
22 Your Honor.

23 QUESTION: Well, suppose it repealed it. Then I take
24 it you'd be free or your client would be free to go ahead
25 and build its nuclear power with no inhibition in this

1 ordinance. Now, if that were to happen, would the holding as
2 to compensation mean you could not have compensation for the
3 period that you've been denied the use of the property to
4 build a nuclear plant, whatever that period is, a year or two,
5 something?

6 MR. GOEBEL: Since that was not the case before the
7 Court, we can't say for sure, Your Honor. There is not any
8 significant precedent in California for interim damages in
9 this kind of a situation. The typical situation where there's
10 a remand and an invalidation is no interim damages.

11 QUESTION: Isn't Agins itself a precedent? It says
12 you don't collect damages, you seek a writ of mandate.

13 MR. GOEBEL: Agins is the controlling precedent, and
14 in our view that's the precedent that caused the Court of
15 Appeal to do a 180 and --

16 QUESTION: But Agins is not before us, is it?

17 MR. GOEBEL: Pardon me?

18 QUESTION: Agins is not before us, is it?

19 MR. GOEBEL: No, Your Honor, you disposed --

20 QUESTION: Don't you really want us to reverse Agins?

21 MR. GOEBEL: I want you to declare --

22 QUESTION: We can't do it, I don't think.

23 MR. GOEBEL: No, Your Honor, I don't think that's
24 true. But you --

25 QUESTION: Well, isn't that really what you want?

1 MR. GOEBEL: In Agins, this Court, as I understand
2 the opinion, found that there was no taking, and therefore did
3 not reach the question of whether a state could limit a pro-
4 perty owner whose property has been taken by regulatory con-
5 duct to equitable remedies only. We don't ask that you re-
6 verse Agins. We simply ask that you confirm that the Fifth
7 Amendment means what it says, that when there's a taking of
8 property, that just compensation is required, and just compen-
9 sation means money damages.

10 QUESTION: Well, you want us to write an essay?

11 MR. GOEBEL: No, Your Honor, we'd simply like to
12 have the money judgment affirmed on the basis of the Fifth
13 Amendment and settle precedent of this Court from Pennsylvania
14 Coal to Penn Central.

15 QUESTION: Suppose you agreed with me that -- or
16 agreed with the suggestion that there is no final decision on
17 taking in the California courts. Wouldn't Agins suggest that
18 perhaps we shouldn't decide the inverse condemnation question,
19 that we should just say, there is no taking? Or remand until
20 -- or just don't decide the case until there is a decision on
21 the taking issue?

22 MR. GOEBEL: Well, that's a possibility, Your Honor.

23 QUESTION: Well, then, where do you -- where do you
24 put your finger on a final decision that there is a taking, in
25 the California courts?

1 MR. GOEBEL: I can't put my finger on the fact that
2 there is a final decision of the California courts that there
3 is a taking. My position is that there was a taking in
4 California established in the trial court and affirmed on the
5 Court of Appeal until the California Supreme Court changed
6 things. It was that part of the judgment --

7 QUESTION: Well, that finding was never disavowed
8 or reversed, was it?

9 MR. GOEBEL: In effect it was, because the conse-
10 quence of that taking, that is, the flowing of money damages
11 under the Fifth Amendment, was taken away by the Court of
12 Appeal.

13 QUESTION: Well, your California court has held that
14 when a taking is the result of the unconstitutional and arbi-
15 trary use of the exercise of the police power, there is no
16 condemnation, although I expect that it would hold that when
17 the taking is the result of the wholly legitimate use of the
18 taking power, there is. It's rather odd.

19 MR. GOEBEL: That's correct, Your Honor, and we
20 think it is totally in violation with the Fifth Amendment and
21 the settled precedents of this Court --

22 QUESTION: In other words, you don't have to claim,
23 it seems to me, under the Just Compensation Clause that this
24 taking was wrongful in any way. Because the Just Compensation
25 Clause assumes that it was a rightful taking. You take --

1 the government takes private property for the use of building
2 a post office or a city hall, or a public park. And it can be
3 quite legitimate. You're still constitutionally entitled to
4 compensation, even if the taking is wholly rightful.

5 MR. GOEBEL: That's right, Your Honor.

6 QUESTION: But your California court has held,
7 presumably, that while you are entitled to compensation when
8 the taking is wholly rightful, you're not entitled to it when
9 the taking is wrongful.

10 MR. GOEBEL: We view that as a very bizarre --

11 QUESTION: It is bizarre, if that's the --

12 MR. GOEBEL: -- position, Your Honor, and further-
13 more, I want to --

14 QUESTION: Does that correctly characterize it?

15 MR. GOEBEL: I think so. I want to make it clear in
16 this case that we're not dealing solely with a state claim.
17 We're dealing here with a claim which was also found to be a
18 federal constitutional tort.

19 QUESTION: Mr. Goebel, will you give me in the record
20 exactly what you're appealing from?

21 MR. GOEBEL: We're appealing from the --

22 QUESTION: I'm speaking of an order or -- or some-
23 thing that looks like an order. Because I don't know what
24 we've got here yet.

25 MR. GOEBEL: Judgment of the Court of Appeal on the

1 second occasion, Your Honor, which is found in the Joint Appen-
2 dix.

3 QUESTION: G1 of your jurisdictional statement.

4 MR. GOEBEL: Of the jurisdictional statement. It is
5 also found in the Joint Appendix at page 63. But it's our
6 position that this cause of action that was litigated, found
7 by the trial court and affirmed by the Court of Appeal, was
8 not only a state cause of action but a federal constitutional
9 tort, whether we call it common law inverse condemnation, a
10 Bivens tort, or in effect a 1983 civil rights cause of action.

11 QUESTION: Well, it seems to me that you're mixing
12 up two things. The Just Compensation Clause of the Constitu-
13 tion, of the Fifth Amendment, as incorporated in the Four-
14 teenth for the purposes of this case, presumes a perfectly
15 lawful taking, not a tort at all. It is simply an exercise of
16 the power of government, of its eminent domain power, to take
17 up private property for public purposes. Why do you have to
18 also assume that this was an improper taking?

19 MR. GOEBEL: Well, I won't -- if I was not faced
20 with the bizarre position of the California Supreme Court, I
21 wouldn't have to take that position. I'm only taking that posi-
22 tion because I think that it's inconsistent with this Court's
23 position in Owen v. the City of Independence to have an uncon-
24 stitutional act of government not be -- utilize money damages.

25 QUESTION: Well, you're suggesting its wrongful only

1 in the sense they didn't give you any money?

2 MR. GOEBEL: That's correct, Your Honor.

3 QUESTION: Well, that's all right.

4 QUESTION: And that's your claim.

5 MR. GOEBEL: That's the essence of it, Your Honor,
6 whatever label we put on it, it --

7 QUESTION: But assume that it was perfectly clear in
8 the California courts that the courts had decided, (a) there is
9 a taking; (b) that you're not entitled to any money, however;
10 you're entitled only to an injunction. Now, let's just assume
11 that. Wouldn't both issues be open here, whether there is a
12 taking for federal constitutional purposes, and then only if
13 there were, would we reach the other question?

14 MR. GOEBEL: I don't believe so, Your Honor, because
15 the sole question that's open in California courts as I under-
16 stand it is the question of whether declaratory or equitable
17 relief might be available.

18 QUESTION: Yes, but we don't need to accept the
19 California court's holding that there is a taking for Fifth
20 Amendment purposes, Fifth and Fourteenth Amendment purposes?

21 MR. GOEBEL: No.

22 QUESTION: And so, isn't the other side entitled to
23 insist on an affirmance based on the ground that there is not
24 a taking?

25 MR. GOEBEL: If you don't accept the California

1 court's position on taking, it's my position that we proved in
2 the trial court -- and you can examine the record and affirm
3 -- that there was a taking. It's a mixed question of fact and
4 law. You can look at the trial record.

5 QUESTION: But you lost below?

6 MR. GOEBEL: No, we won below. We proved --

7 QUESTION: No, but you lost -- you're an appellant
8 here.

9 MR. GOEBEL: Yes.

10 QUESTION: No matter how far below you go.

11 QUESTION: The last judgment was against you?

12 MR. GOEBEL: That's correct.

13 QUESTION: So you were a loser.

14 MR. GOEBEL: Only in that court, Your Honor.

15 QUESTION: Yes, where you were a loser. But the --
16 but isn't the other side entitled to say that you should con-
17 tinue to lose and that the last judgment that's being appealed
18 should be affirmed on the ground that there was not a taking?

19 MR. GOEBEL: I don't understand that to be the pro-
20 per result, Your Honor. If the facts in the record establish
21 that there was such conduct by the government and compensation
22 ought to be paid.

23 QUESTION: Yes, but isn't that question open here?

24 QUESTION: For us to decide?

25 MR. GOEBEL: The only question that remains for the

1 California courts to decide is whether or not they will choose
2 on the basis of these facts to grant equitable relief. We say
3 that even if they decide to grant equitable relief, that's not
4 constitutionally adequate, because the Fifth Amendment re-
5 quires more.

6 QUESTION: You need more money?

7 MR. GOEBEL: We want money, Your Honor.

8 QUESTION: That's what you want, money.

9 QUESTION: Mr. Goebel, your second and third cause
10 of action in your complaint were petitions for mandate and the
11 relief prayed in paragraph 3 of your complaint was that the
12 Court order the City of San Diego to set aside the rezoning
13 and to set aside the adoption of the open space element of
14 its general plan. As I understand it, on remand, the trial
15 court may grant that relief, theoretically.

16 MR. GOEBEL: That's correct, Your Honor.

17 QUESTION: Now, if they grant that relief, how could
18 there then have been a taking? Aren't the things that are set
19 aside the things on which you rely to establish the taking?

20 MR. GOEBEL: Yes, Your Honor, but it's our position
21 that the first cause of action established that a taking
22 occurred and that we were entitled to litigate that --

23 QUESTION: You're making sort of a law of the case,
24 are you?

25 MR. GOEBEL: In state court, even -- well, regardless

1 of state law, we're entitled to litigate the federal constitu-
2 tional tort aspect of those facts in state court.

3 QUESTION: Let me put it more simply. If you get
4 the relief you prayed for in paragraph 3 of your complaint,
5 would you still contend there had been a taking?

6 MR. GOEBEL: Yes.

7 QUESTION: Of what? You have a total right to use
8 your property any way you want to.

9 MR. GOEBEL: But we have seven years after that --

10 QUESTION: Well, you might have a damage action for
11 the loss of the use of the property in the seven years, but
12 you have not alleged any intent to use the property in this
13 period of time. All you describe here is some long-range plan
14 in the future that you say was denied you. Maybe you could
15 amend your complaint to get damages, but I don't understand
16 how there's a taking if you set aside that which constituted
17 the taking?

18 MR. GOEBEL: Well, Your Honor, it's our position that
19 the so-called set-aside, those equitable remedies are consti-
20 tutionally inadequate to remedy the nexus of combination of
21 facts which result in what we allege to be a taking. That
22 remedy is simply inadequate.

23 QUESTION: But if, when this case goes back, if it
24 goes back, the trial court can find that you can build what-
25 ever you could have built initially, before the zoning change,

1 haven't you got all the relief that you are entitled to?

2 MR. GOEBEL: I don't believe so, Your Honor. I think
3 we're entitled to --

4 QUESTION: The interim damages too?

5 MR. GOEBEL: Interim damages. And I don't think that
6 really puts us back in our position, because we're now, by
7 that time we'd be --

8 QUESTION: Yes, but are you entitled to the interim
9 damages as the consequence of a taking, or just of deprivation
10 of use for the seven or eight years?

11 MR. GOEBEL: If we are to accept the California
12 Supreme Court's dichotomy between these two concepts, I think
13 we're left with the interim damages as a result of the interim
14 deprivation of use.

15 QUESTION: It's not consequent upon a taking if the
16 ordinance that caused all the trouble, the difficulty for you.
17 If that's invalidated, then there's no taking, is there?
18 You'll be free to go ahead and erect your nuclear plant.

19 MR. GOEBEL: When that finally becomes a fact, it'll
20 be ten to fifteen years after the fact of the events that --

21 QUESTION: You may have a claim for damages in ten
22 or fifteen years.

23 MR. GOEBEL: But, as possible, I would hope that
24 the Fifth Amendment --

25 QUESTION: I thought a taking usually meant, as my

1 brother Stewart suggested earlier, the government, whatever
2 the unit may be, ends up with the property and you end up with
3 money.

4 QUESTION: Right.

5 QUESTION: And if the government doesn't end up with
6 the property, because the ordinance is invalidated, then you
7 keep the property. You can build your plant, and if you have
8 any claim, why is it anything more than damages?

9 MR. GOEBEL: Your Honor, if you get a chance to go
10 through the facts of this case, it's our position that we're
11 not dealing with a single ordinance or even two or three ordi-
12 nances. We're dealing with the synergistic effect of a course
13 of conduct which resulted in a taking, much along the formula-
14 tion that was very well discussed in the Penn Central case,
15 that these cases are to be decided on an ad hoc case-by-case
16 determination. And when you take into consideration all the
17 aspects and elements of the course of conduct of the City of
18 San Diego in this instance, it constitutes a taking. That in-
19 cludes not just one ordinance, not just two ordinances, it in-
20 cludes the fact that they passed a resolution of public con-
21 venience and necessity to acquire this property for public use;
22 it includes the fact that the trial court found, as a matter
23 of fact, that the property is now being devoted to public use,
24 because in fact the public use originally sought was open space
25 and a person now driving along the interstate freeway next to

1 this property uses the property for the very purpose that it
2 was originally sought by resolution of public convenience and
3 necessity. It's that synergistic effect of this course of
4 conduct that we claim entitles us to compensation and it's
5 that synergistic effect which we also assert renders the
6 equitable remedies, or the so-called equitable remedies, inade-
7 quate.

8 There has been a great deal of discussion of these
9 so-called equitable remedies, and again, we believe that they
10 are inadequate.

11 QUESTION: Mr. Goebel, let me ask you one question
12 about the last paragraph of the opinion of the supreme court
13 of California, F14 in the blue brief, where it says, "Recog-
14 nizing that constitutionally protected property interest is
15 here involved, we also accept the reasonable latitude which
16 must be afforded public officials on planning for implementa-
17 tion of legitimate land use goals. These twin purposes will
18 be served by preserving to the landowner in appropriate cases
19 declaratory relief or mandamus remedies. However, the use of
20 inverse condemnation with its imposition of money damages upon
21 the public entity would in our view unwisely inhibit the
22 proper and necessary exercise of a valid police power."

23 Now, do you read that to say that money damages are
24 simply not recoverable regardless of how arbitrary the zoning
25 of the city was?

1 MR. GOEBEL: That's my understanding, Your Honor,
2 and that certainly was the understanding of the California
3 Court of Appeal. They said it in so many words, at page 13
4 of the reply brief, or page 66 of the Joint Appendix:
5 "A local entity's arbitrary, unconstitutional exercise of the
6 police power which deprives the owner of the beneficial use
7 of his land does not require compensation." They said it
8 point-blank. That's the rule in California as we understand
9 it. And it's that rule that violates the federal Constitution
10 in our view, and that's why we're asking this Court to act.

11 But, further on the question of the adequacy of --

12 QUESTION: But it -- to be complete, it should have
13 said, but of course he can get his property back. Or, the
14 restrictions may be invalidated.

15 MR. GOEBEL: That's true. It goes on to say that.

16 QUESTION: Yes.

17 MR. GOEBEL: It offers the property owners --

18 QUESTION: But it doesn't leave the property owner
19 without any remedy whatsoever. He can get the restrictions
20 invalidated.

21 MR. GOEBEL: That's correct. We view that offer to
22 be an illusory offer not adequate and not --

23 QUESTION: Well, it isn't illusory. It's just that
24 meanwhile you can't use your property.

25 MR. GOEBEL: It's not fully --

1 QUESTION: Which is a substantial matter, but it
2 doesn't mean you can't use it forever.

3 MR. GOEBEL: It's not the full equivalent of the
4 property taken, that this Court has repeatedly held is required
5 under the Fifth Amendment from the Monongahela case on down.

6 QUESTION: Well, did the Court of Appeal just right
7 out, as you say, indicate that there are no interim damages
8 either?

9 MR. GOEBEL: They didn't deal with that question.

10 QUESTION: Well, that's -- so your answer
11 is, no, they did not say that?

12 MR. GOEBEL: They did not say one way or the other.

13 QUESTION: So that, let's assume that the California
14 courts would say, you can't get -- make us buy the property at
15 the fair market value, but we'll give you an injunction against
16 further enforcement of the restrictions and we'll give you
17 interim damages. And would you still say, well, we have the
18 right to have you buy the property from us?

19 MR. GOEBEL: On the basis of an ad hoc case-by-case
20 determination we think there is still a category of cases
21 where the only satisfactory remedy is money damages. We're
22 not saying that --

23 QUESTION: But you mean, for the whole property?
24 For the entire property?

25 MR. GOEBEL: For the property.

1 QUESTION: They would have to take title to the pro-
2 perty and pay you for it?

3 MR. GOEBEL: When you have, as in this case, a com-
4 bination of four or five factors which through their own
5 synergy come together and have the impact that we claim was
6 present in this case.

7 QUESTION: Well, I gather, Mr. Goebel, your client's
8 no longer interested in building the plant; let the City keep
9 the property; it wants the money.

10 MR. GOEBEL: That's correct. But again, as the trial
11 court found and as we assert --

12 QUESTION: Well, can't the City back out if it wants
13 to?

14 MR. GOEBEL: That question really hasn't been dealt
15 with in California.

16 QUESTION: Well, I know, but can't it?

17 MR. GOEBEL: I would think that --

18 QUESTION: It would be compelled to, I take it, if
19 the courts were to invalidate this synergistic combination
20 that you have.

21 MR. GOEBEL: If you could do such a thing, Your
22 Honor; if such a thing were possible. And that's part of the
23 reason why we say, at least in a certain category of cases the
24 money damage remedy is the only appropriate one. Again I
25 refer to the Owen v. City of Independence case where it was

1 stated that a decisionmaker would be derelict in his duties if
2 he didn't at some point consider whether his decision comports
3 with constitutional mandates and didn't weigh the risk that
4 a violation might have an effect upon the public treasure.
5 It's this cost-benefit --

6 QUESTION: It's not clear to me, and maybe I'm re-
7 peating myself, but it's not clear to me whether you argue
8 that your client's entitled to money damages for a wrongful
9 act of San Diego, or whether you're simply entitled to compen-
10 sation because San Diego has taken your real property. Now,
11 there is a difference.

12 MR. GOEBEL: Let me try to address that without get-
13 ting bound up in semantics, Your Honor. It is our view that
14 the Fifth Amendment requires compensation.

15 QUESTION: Yes.

16 MR. GOEBEL: Whether it's by reason of constitutional
17 or unconstitutional acts.

18 QUESTION: There is a difference, but compensation
19 results from a perfectly rightful taking of property.

20 MR. GOEBEL: In our view, the combination of the
21 facts and circumstances of this case led to in June of 1973 a
22 taking of this property.

23 QUESTION: So if it had been a perfectly valid exer-
24 cise of the police power that would have taken your property,
25 you would not have questioned the exercise of the police power.

1 you would have simply said, please pay me for the property
2 you've taken.

3 MR. GOEBEL: That's correct.

4 QUESTION: Not for any wrongful action on the part
5 of San Diego, except insofar as it was wrong to not pay you.

6 MR. GOEBEL: Wrong to not pay. That's right.

7 QUESTION: Right.

8 QUESTION: Mr. Goebel, it's of course perfectly clear
9 that if a sovereign takes and keeps property, he's got to
10 pay for it.

11 MR. GOEBEL: Right.

12 QUESTION: If he takes it rightfully. But is there
13 any precedent at all that you've cited where the government has
14 impaired the use of private property in attempting to serve
15 some governmental purpose, and its action has later been held
16 unconstitutional, and it's been required to pay money to the
17 property owner?

18 MR. GOEBEL: Owen.--

19 QUESTION: Owen isn't such a case. Owen is an indi-
20 vidual discharge.

21 MR. GOEBEL: That's right. There are a number of
22 cases at the lower federal level.

23 QUESTION: But this Court has never held there's any
24 such obligation?

25 MR. GOEBEL: It's stated the principle in a number of

1 cases from Pennsylvania Coal to --

2 QUESTION: No, no, those are all rightful -- those
3 are all cases where it's held that the sovereign had the power
4 to do what it sought to do. Now, you rely on a "wrongful"
5 -- as Mr. Justice Stewart points out -- theory. Is there any
6 case where the government has acted wrongfully and the conse-
7 quence of its wrong has been to impair the use of property and
8 the government's had to pay the property owner money for its
9 wrong?

10 MR. GOEBEL: Well, I think that's implicit in the
11 Fifth Amendment.

12 QUESTION: Well, the Fifth Amendment deals with
13 rightful taking, for the moment. If this -- have you got any
14 case at all for your position, involving a wrongful inter-
15 ference with the use of property, where the government was re-
16 quired to pay the property owner even a dime?

17 MR. GOEBEL: Well, I think that's implicit in the
18 Kaiser Aetna decision.

19 QUESTION: We used to have cases like that quite
20 frequently in the Court of Appeals for the 6th Circuit, where
21 the claim was made that the government exceeded its authorized
22 power in exercising its power of eminent domain for the purpose
23 of taking something, not for a post office but for some margi-
24 nal purpose. And the issue was, had the government rightfully
25 exercised its power of eminent domain? And sometimes it was

1 decided that it had, sometimes it was decided that it hadn't.
2 When it was decided that it hadn't, then the property owner
3 was always entitled to damages for the tying up of his proper-
4 ty during the period that the case was between the government
5 decided to take it and the time the case was decided.

6 MR. GOEBEL: Well, the U.S. v. Causby is a similar
7 case, except, of course, the appellants would say that involved
8 aspects of physical invasion. But that's the type of case.
9 There are a number of cases. Each case is different, though.
10 That's why we've led to the standard that it's an ad hoc case
11 by case determination.

12 QUESTION: No, in Causby it was held that the
13 government was within its rights in flying the airplanes over
14 the property, and that what it did was rightful but it caused
15 harm, and therefore was a taking and it had to pay for it.

16 MR. GOEBEL: Well, I don't want to be led into the
17 position that we're asserting by reason of your interpretation,
18 the interpretation we're leading to here on the Fifth Amend-
19 ment, that we're asserting this is a wrongful taking. Perhaps
20 if we approach it salami style and slice it up a piece at a
21 time --

22 QUESTION: Well, in the second and third counts of
23 your complaint you do, you allege -- in your petition for man-
24 date you allege it was wrongful.

25 MR. GOEBEL: Wrongful in the sense that they did it

1 and they didn't pay for it. In effect, our position is, this
2 property has been devoted to public use since 1973, has served
3 its purpose, the same purpose they wanted to condemn it for in
4 the first place. It's open space.

5 QUESTION: You have an action for rent.

6 MR. GOEBEL: I'd like to reserve the rest of my time.

7 MR. CHIEF JUSTICE BURGER: Your time is entirely
8 used up, counsel. Mr. Sumption.

9 ORAL ARGUMENT OF C. ALAN SUMPTION, ESQ.,

10 ON BEHALF OF THE APPELLEES

11 MR. SUMPTION: Mr. Chief Justice and may it please
12 the Court:

13 Briefly, I'd like to go over some of what I consider
14 to be the important relevant facts in this case, because --

15 QUESTION: At some point will you tell us what is
16 the scope of the authority of the trial court, assuming this
17 case went back? What can it do? Do it in your own time, but
18 tell us about it sometime.

19 MR. SUMPTION: All right, Your Honor. Thank you.
20 And if I neglect to answer your question, would you please re-
21 mind me?

22 QUESTION: We'll bring it up again.

23 MR. SUMPTION: I think the facts are crucial to get a
24 grasp of what this case is all about, because we've got a num-
25 ber of confusing facts and a number of shifting and conflicting

1 theories of liability and seeking of relief against the City
2 of San Diego. We're talking about land use regulation by way
3 of zoning on approximately half of the 214 acres of the proper-
4 ty that the trial court said we had taken. We're talking about
5 land use activity by way of planning, as opposed to zoning, by
6 the adoption of an open space plan, mandated by the State of
7 California, required by all local governments, to attempt to
8 plan for the preservation, whether it be through regulation or
9 acquisition, of open space lands that are currently being
10 diminished in the State of California.

11 QUESTION: Does the plan forbid the owner to make
12 anything of an open space without the approval of the municipal
13 plan?

14 MR. SUMPTION: That's one of the issues that's in
15 contention, Your Honor. It's our position it does not. The
16 definitions cited in the open space plan, there's really no
17 one single definition, but the plan recites that for most pur-
18 poses the definition is something to the effect that the pro-
19 perty shown as open space should remain in its essential,
20 natural, or in an open, condition.

21 The City of San Diego interprets that to mean, not
22 that no development is reasonable or inconsistent with open
23 space. In fact, the City of San Diego has allowed developments
24 notwithstanding an open space designation, where we did not
25 have the resources to purchase the property. And that's one

1 of the major issues, I think, in this case.

2 QUESTION: Well, that's a factual issue, and this
3 Court isn't here to decide factual issues.

4 MR. SUMPTION: Yes, Your Honor, except in the circum-
5 stance of this case and the way it's come up, the City of San
6 Diego appealed the trial court's findings of fact in the Court
7 of Appeal and on up on the basis that there was no substantial
8 evidence to support them, and the question, the findings on a
9 taking, and the question of whether or not the Gas & Electric
10 Company was excused from applying for some relief to avoid the
11 problem that this Court saw in the Agins case, are really so
12 intertwined and mixed with legal questions that I don't think
13 you can completely separate them out from factual findings.

14 QUESTION: Well, it's certainly not a factual question
15 to say that if the City says that the 214 acres of the San
16 Diego power company land that's presently open is hereafter a
17 park with access to everybody, and no compensation is to be
18 paid.

19 MR. SUMPTION: The plan does not say that, and no-
20 thing the City of San Diego did or said contemplated that pub-
21 lic use could be made of this property designated for open
22 space. There is --

23 QUESTION: Isn't that the definition of open space,
24 isn't that a public --

25 MR. SUMPTION: It's to preserve land from being

1 developed or overdeveloped and lost forever. It might be
2 used for X -- excuse me.

3 QUESTION: What's the difference if they declared it
4 a park and put a lot of park benches in it and let the public
5 use it?

6 MR. SUMPTION: The difference would be that the
7 public is then actually using the property. And that's one
8 of the bases for the distinction between the power of eminent
9 domain and the police power used to regulate land use by pro-
10 hibiting certain natural excuses.

11 QUESTION: But are you telling us now that the pub-
12 lic is not using it by --

13 MR. SUMPTION: The public is not using it in any
14 physical sense. The property was vacant before the City of
15 San Diego designated it for potential acquisition in its open
16 space plan. It was unused and the public was enjoying it by
17 driving by the freeway and looking out to the ocean then just
18 as much as in the --

19 QUESTION: Are you saying that any members of the
20 public who came on this land after it had been declared open
21 land would have been trespassers?

22 MR. SUMPTION: That's right, Your Honor.

23 QUESTION: Against whom the electric company should
24 proceed?

25 MR. SUMPTION: Absolutely right. The public had no

1 right to go on that property. We did not require there be
2 any paths, pedestrian hikers' trails, bicycle paths, anything
3 of that sort. It was merely to preserve and protect land
4 that otherwise would have been developed.

5 QUESTION: What would the City have done had the
6 utility attempted to develop the 214 acres in a way you would
7 normally expect a utility to normally develop such acreage?

8 MR. SUMPTION: Your Honor, that's something that
9 from this record we don't know and we will never know until
10 the Gas & Electric Company comes to the City and gives it the
11 opportunity to interpret its own actions, its own open space
12 plan, to weigh and balance the important public interest ver-
13 sus the private property interest of this landowner to deter-
14 mine what is a reasonable use of the property, whether or not
15 we want to preclude all use of it by purchasing it so that it's
16 now in the public domain and we can do with it what we want,
17 or whether we will allow some use that we consider to be con-
18 sistent with open spaces.

19 QUESTION: Including construction of a nuclear plant?

20 MR. SUMPTION: Including -- especially including the
21 construction of a nuclear plant. The open space plan itself
22 specifically says that there shall not be any per se incom-
23 patibility between properly building and siting a nuclear
24 power plant on this property. And to that extent the Gas &
25 Electric Company simply cannot start switching its expectations

1 and claiming that we had somehow deceived them because we knew
2 they had bought the property for construction of a power plant
3 and that we somehow pulled the rug out from under them.

4 The first time we ever heard that the Gas & Electric Company
5 was thinking of other industrial uses for this property was at
6 trial when they paraded out an industrial park development
7 plan. They had never gone to the city planners, the staff, or
8 the City Council and said, what do you think about the possi-
9 bility of us doing this? We can no longer use the property
10 for a power plant site.

11 Furthermore, our zoning regulations allowed by condi-
12 tional use permit, they could have built -- they could make
13 any use that a public utility can do by way of structures,
14 buildings, or uses, by conditional use permit. Even on the
15 agricultural zoned portions of the property, which were zoned
16 agricultural when they bought the property, half of it was
17 zoned industrial when they bought it, half of it was zoned
18 for agricultural purposes. They could have come in and made
19 use by way of conditional use permit if they had applied for
20 scientific and other --

21 QUESTION: Well, your brother is shaking his head,
22 and these are factual controversies that it's no business of
23 this Court to try to resolve. We're simply not equipped to
24 do it.

25 QUESTION: Mr. Sumption?

1 MR. SUMPTION: Yes, Your Honor?

2 QUESTION: You commenced your brief, as I recall, by
3 saying that the findings of fact made by the trial court had
4 been rejected. Where in any opinion is that made clear?

5 MR. SUMPTION: The only place, Your Honor, where --
6 well, first of all, from a procedural standpoint in California
7 law, when the case -- the first opinion was decided by the
8 California Court of Appeal, we sought further appeal by way
9 of a hearing in the California Supreme Court. When the
10 California Supreme Court granted that hearing under California
11 procedure, that vacates and renders null and void without any
12 force and effect the Court of Appeal opinion which had affirmed
13 the trial court's findings.

14 QUESTION: But not the Superior Court opinion?

15 MR. SUMPTION: Yes, Your Honor, that is gone.

16 QUESTION: I thought the Supreme Court of California
17 in ordinary proceedings vacated the intermediate appellate court
18 opinion, but left standing, reversed, or affirmed the Superior
19 Court opinion?

20 MR. SUMPTION: I don't believe that's so.

21 QUESTION: Well, just a granting of a hearing doesn't
22 vacate the findings of the Superior Court. Is that what
23 you're suggesting?

24 MR. SUMPTION: Well, it vacates the Court of
25 Appeal opinion. From that --

1 QUESTION: Yes, that's -- suppose that it had set
2 aside the findings?

3 MR. SUMPTION: I'm sorry. I didn't follow that
4 question.

5 QUESTION: Suppose the intermediate court had set
6 aside the findings of the trial court?

7 MR. SUMPTION: Yes; which we had asked them to do.

8 QUESTION: And suppose it had -- and then there's a
9 grant of a hearing by the California Supreme Court, which
10 vacates the judgment of the intermediate appellate court,
11 doesn't that reinstate the findings of the trial court?

12 MR. SUMPTION: Perhaps there's a semantical differ-
13 ence, but it doesn't -- my understanding is it does not rein-
14 state them, the court is still open to determine from the
15 record whether there is evidence to support those findings of
16 fact. And we contended that there was no --

17 QUESTION: Well, they aren't vacated until and unless
18 they reinstate them, are they?

19 MR. SUMPTION: Well, that could be, Your Honor. But
20 then the next thing that happened, that leads to my conclusion
21 that they have in fact been vacated, is this paragraph that
22 we've been dealing with by the Court of Appeal's second opinion
23 after the case was retransferred back to the Court of Appeal
24 after the California Supreme --

25 QUESTION: Now, is transfer a peculiar procedure

1 in California?

2 MR. SUMPTION: Your Honor, I think transfer and
3 remand, as far as I can tell, are one and the same.

4 QUESTION: Same thing?

5 MR. SUMPTION: I don't know why they use the differ-
6 ent terminology, because the California Supreme Court, I think,
7 does use "remand" as well. But when the case went back, it's
8 not a -- obviously, from reading it, it's not a model of
9 clarity, but I can see no other interpretation from the lan-
10 guage, especially when we were contending that the Gas &
11 Electric Company had never applied for any relief, that this
12 zoning had never been applied to them, and in light of the
13 California Supreme Court's decision in the Agins case, then it
14 goes back to the Court of Appeal and they expressly state that
15 they have not applied for any relief. Why would they make
16 this --

17 QUESTION: Was that the sentence quoted earlier?

18 MR. SUMPTION: Yes. Why would the court make that
19 statement if they didn't feel that there was merit to our con-
20 tention that they had not been legally excused from seeking
21 application? There was no concrete controversy before the
22 court. Then it, to reinforce that argument, it goes on a
23 little bit further in that same paragraph and it said, its
24 remedy if any for alleged overzealous use of the police power
25 would be equitable relief other than money damages. And the

1 Company did in its complaint seek these remedies, asserting
2 that the City had arbitrarily exercised its police power by
3 enacting an unconstitutional zoning law and general plan ele-
4 ments. And then it says, "or by applying the zoning." How-
5 ever, on the present record, these are disputed fact issues not
6 covered, so I read that as the Court of Appeal saying there is
7 no sufficient evidence on this record from which the gas
8 company's argument that we had applied these regulations arbi-
9 trarily is supported.

10 QUESTION: And what then do you understand the Court
11 of Appeal required the Superior Court now to do?

12 MR. SUMPTION: They go on to say that if the Gas &
13 Electric Company wants to pursue its equitable remedies, to
14 set aside these land use and planning decisions, that they --
15 because there's not sufficient evidence in the existing record
16 -- they can retry that issue.

17 QUESTION: Retry the taking issue?

18 MR. SUMPTION: Retry the taking issue.

19 QUESTION: In court, or do they have to dismiss the
20 case and start with the City?

21 MR. SUMPTION: I don't know that they have to dismiss
22 the case. I think they're back to the trial court and they can
23 pursue their case on the existing complaint on --

24 QUESTION: So they have exhausted their administra-
25 tive remedies, so to speak?

1 MR. SUMPTION: They had not. That would be one of
2 the issues as to whether or not there was a taking.

3 QUESTION: Well, I would think you would have dis-
4 missed the case until they had.

5 MR. SUMPTION: Yes, Your Honor. You're right. In
6 other words, they should not be able to pursue their judicial
7 remedies until they have exhausted their administrative reme-
8 dies, which means finding out from the City of San Diego what
9 they might or might not be able to do with this property.
10 Then, if the conclusion results that there's no reasonable use
11 that the city's going to allow them, because we want to buy
12 this property for open space, they can -- you know, they've
13 exhausted their relief, and the court will not have to sit as
14 a planning board or body, the trial court, as it did in the
15 first trial of this case, and it can determine whether or not
16 there was a taking and if there was a taking, what follows?
17 What's the remedy?

18 QUESTION: Mr. Sumption, let's come back to the facts
19 that were found by the trial court and affirmed by the Court
20 of Appeal, one of which was that it would be perfectly futile
21 to do what you call exhaust administrative remedies. Now, was
22 there ever any finding by an appellate court anywhere that
23 there was no substantial evidence to support that finding by
24 the trial court?

25 MR. SUMPTION: Not in those specific words,

1 Your Honor. And that's why it's --

2 QUESTION: Well, aren't you relying on an inference
3 when there were originally two findings, or rather finding by
4 the trial court and acceptance of that finding by the Cali-
5 fornia intermediate appellate court, that it would have been
6 futile? The California Supreme Court didn't say anything to
7 the contrary.

8 MR. SUMPTION: Well, the California Supreme Court
9 never really answered any question. They simply sent the case
10 back after they decided Agins by saying, take another look at
11 it now after we've told you what the law is.

12 QUESTION: Are you saying that all findings have been
13 vacated in this case?

14 MR. SUMPTION: As far as the taking question which
15 in -- a subsidiary question of whether there was a taking and
16 the failure to exhaust administrative remedies, and the
17 futility --

18 QUESTION: Could you identify by number the findings
19 that have been vacated?

20 MR. SUMPTION: It would take me a few minutes to
21 flip through the pages to find the specific --

22 QUESTION: Everything relevant to this case has been
23 vacated, is that your position?

24 MR. SUMPTION: It would be the finding that there
25 was a denial of all reasonable use of the property, and that

1 it would have been futile for the Gas & Electric Company to
2 have applied for any development. Those are the --

3 QUESTION: The only basis for your argument, I judge
4 from what you have said, is the final paragraph in the four-
5 page opinion of the Court of Appeal on its second considera-
6 tion of this case?

7 MR. SUMPTION: Yes, Your Honor, I can see no reason
8 why the court would have said that they have not applied for
9 any relief or found out what they could do with the property,
10 unless they meant --

11 QUESTION: There's nothing in that paragraph as I
12 read it that rejects Finding No. 29, which in substance says
13 that the owner already has been deprived of all practical use
14 of his property. What language in that paragraph states -- ?

15 MR. SUMPTION: No, there's nothing specific that
16 says that. They don't refer to any findings either generally
17 -- either by the word "findings" or by the number, specifi-
18 cally.

19 QUESTION: I thought, Mr. -- in reading these briefs,
20 under California law, everything that the trial court says is
21 wiped out, as though it hadn't been said at all, and every-
22 thing that the Court of Appeal said in its first opinion is
23 wiped out. Is that correct as a matter of California law?

24 MR. SUMPTION: Everything that the Court of Appeal
25 said is wiped out, in its first opinion. That is gone. Now --

1 QUESTION: It's gone as though it had never been
2 written.

3 MR. SUMPTION: That's right. And so, you eliminate
4 that and then you take what the Court of Appeal is saying on
5 its second opinion that's being appealed from, and they are
6 mentioning the fact that they have not applied for any relief.

7 QUESTION: What I don't understand is that the
8 California Supreme Court decision in Agins didn't deal at all
9 with these factual findings. Did -- and I say this from
10 principles of law, that it would appear caused it to remand
11 this case to the Court of Appeal. There was no rejection by
12 the California Supreme Court of the findings, and no review,
13 again, of findings by your intermediate appellate court.

14 If there's any authority in your brief that says
15 that all facts are wiped out in those circumstances, that may
16 be another thing. We took the case because we thought it was
17 different from Agins.

18 MR. SUMPTION: I realize that, Your Honor.

19 QUESTION: But you are now arguing that inferentially
20 this is entirely a new ball game?

21 MR. SUMPTION: I think Agins applies and is con-
22 trolling precedent in this case.

23 QUESTION: Well, here's what your Court of Appeal
24 said in the opinion supporting the judgment that is appealed
25 from here, at the end of its penultimate paragraph:

1 "A local entity's arbitrary unconstitutional exer-
2 cise of the police power which deprives the owner of
3 the beneficial use of his land does not require compen-
4 sation. . ."

5 That's the way they understand the law of California,
6 and isn't that the issue before us? Whether or not that's
7 correct, as a matter of federal constitutional law?

8 MR. SUMPTION: I don't think the Court can get to
9 that issue without finding that there was a taking, and --

10 QUESTION: Well, the Court of Appeal certainly got
11 to it, and disposed of it.

12 QUESTION: They also got to the taking question.
13 You took the same position in the lower courts and you lost.
14 They didn't -- they said, whatever the Company should or
15 shouldn't have done, we nevertheless -- there is no barrier to
16 our reaching the taking question. They reached it.

17 MR. SUMPTION: I realize that.

18 QUESTION: They said there was a taking.

19 MR. SUMPTION: I realize that, Your Honor.

20 QUESTION: Or at least a full deprivation of the use
21 of the property.

22 MR. SUMPTION: And I think they were dead wrong --

23 QUESTION: I know you do.

24 MR. SUMPTION: -- on that, and there's no evidence to
25 support that finding.

1 QUESTION: I know you do, but you lost that in the
2 state courts.

3 MR. SUMPTION: But now, with the Court of Appeal's
4 second opinion, they seem to be retracting from that posi-
5 tion --

6 QUESTION: Well, it doesn't sound like it from what
7 Justice Stewart read. It sounds like they stuck right to
8 their guns.

9 QUESTION: Well, but, don't you have to read the
10 opinion in the light of the allegations of the complaint?
11 Didn't the appellate courts as a matter of law in effect hold
12 that Count One of the complaint does not state a cause of
13 action. That's the only count on which they ask for damages
14 and that was the taking theory, compensation for the taking.
15 There was no allegation in the complaint asking for interim
16 damages, so there was no occasion for the courts of appeals
17 to rule on whether not damages for loss of interim use would
18 be recoverable. Isn't that true?

19 MR. SUMPTION: Interim damages were not raised at
20 all.

21 QUESTION: Nobody ever raised or argued about it at
22 all, and so all of the language is broad. As Justice Stewart
23 says, it's not directed to the complaint.

24 QUESTION: Well, but if there were a taking, a per-
25 fectly valid taking under California law, interim damages

1 would follow with general damages under the taking clause, it
2 would it not?

3 MR. SUMPTION: No, I don't believe that interim
4 damages would necessarily be awarded under the taking clause
5 if --

6 QUESTION: You mean, you think the City could an-
7 nounce that as of January 1, 1973, this particular 215 acres
8 is a park to which all of the citizens of California shall have
9 access, and then on January 1, 1978, five years later, pay the
10 company the fair value of the park?

11 MR. SUMPTION: That's my understanding of the law in
12 California, plus seven percent interest per annum from the
13 date of the taking, plus attorneys' fees and expert witness
14 fees, if they have to go to court to prove that there was a
15 taking. But I would caution Your Honor that that's not the
16 facts in this case, as far as us declaring that that was a
17 park.

18 QUESTION: Well, then don't you have to disavow part
19 of the Court of Appeal's opinion?

20 MR. SUMPTION: On what issue or aspect?

21 QUESTION: Well, because the Court of Appeals had no
22 hesitation reaching the takings question.

23 MR. SUMPTION: I don't think --

24 QUESTION: Well, wouldn't you have a reason to
25 disavow the finding that an effort to exhaust administrative

1 remedies would be futile? You have to rely on that one sen-
2 tence in which they make reference to the fact that actually
3 the property owner never did apply for any administrative
4 relief.

5 MR. SUMPTION: That's right.

6 QUESTION: But surely, earlier they said, didn't
7 have to because it'd be futile to do it.

8 MR. SUMPTION: Well, they said earlier in a decision
9 that it's wiped off the books and no longer exists.

10 QUESTION: But you have to -- you really have to
11 build everything on that one sentence, don't you?

12 MR. SUMPTION: As far as interpreting what the Court
13 of Appeal, was the basis of its ruling, that's all we have,
14 and it's not entirely clear.

15 QUESTION: Now, you think that the complaint in this
16 case challenged the constitutionality of a local ordinance?

17 MR. SUMPTION: Of a local ordinance? It did.

18 QUESTION: So that you think this is a proper appeal
19 here? Aside from finality questions it's a proper appeal in
20 the sense that the state court rejected a claim that a local
21 ordinance was unconstitutional in the Federal Constitution.

22 MR. SUMPTION: I don't think it's a proper appeal
23 from the standpoint that I think the taking question can't be
24 answered until there is an --

25 QUESTION: I understand, I understand your view on

1 that, but that's just that there isn't any final judgment on
2 the taking issue.

3 MR. SUMPTION: Yes, Your Honor.

4 QUESTION: But there was a straightforward challenge
5 to a local ordinance on the constitutional grounds?

6 MR. SUMPTION: Yes, there was.

7 QUESTION: Are you suggesting that they can do --

8 QUESTION: Does the complaint even mention the
9 Federal Constitution?

10 MR. SUMPTION: I don't recall specifically if the
11 complaint mentions --

12 QUESTION: I don't think it does.

13 MR. SUMPTION: -- mentions the Federal Constitution.
14 It may just say constitutional deprivation.

15 QUESTION: It doesn't even say that.

16 QUESTION: Are you suggesting the power company can
17 do now in the trial court everything it could have done back
18 in 1973 or '74?

19 MR. SUMPTION: It could have -- could do in a trial
20 court?

21 QUESTION: No, can get whatever relief it could have
22 gotten initially?

23 MR. SUMPTION: Certainly, I think they could. Oh,
24 is what you're driving at is the business about whether money
25 damages are appropriate?

1 QUESTION: Broad. Can they get whatever they could
2 get in the beginning? Have any of these interim decisions
3 foreclosed them of any right they had in 1973?

4 MR. SUMPTION: On the question of damages, let me
5 answer it this way, Your Honor. And I think that's the only
6 particular question where that statement would be -- . No,
7 there is probably some difference as a result of the Court of
8 Appeal and the California Supreme Court's decision in Agins.

9 QUESTION: May I ask another question before you
10 take up another point? If we should conclude that Findings
11 29 and 32 are still before us, would you agree that there has
12 been a taking?

13 MR. SUMPTION: No, I would not agree that there has
14 been a taking.

15 QUESTION: Would you develop that a little bit?
16 One finding states that no practical use can be made of the
17 property. The other states that it would be futile to make any
18 application for further administrative relief. At that point
19 you have a property owner with property that is apparently
20 worthless. Why hasn't there been a taking?

21 MR. SUMPTION: Well, we have to be careful in the
22 sense of how we're using the phrase, "taking." And I think
23 that gets back to the confusion from this Court's early deci-
24 sion in the Penn Coal case. There may very well be a taking
25 from a due process standpoint under the Fourteenth Amendment,

1 a denial of property without due process of law. But if you're
2 meaning a taking from the eminent domain sense, that's where
3 our position is that there is a distinction. And I think there
4 seems to me to be a lot of confusion by decisions on the ten-
5 dency to blur the two distinct powers, the police power and
6 the power of eminent domain. They are not, it's not a differ-
7 ence in degree. -- Excuse me.

8 QUESTION: Just so I can understand you, you think
9 that if a state or one of its subdivisions characterizes its
10 action as an exercise of a police power, then the compensation
11 clause is inapplicable?

12 MR. SUMPTION: Your Honor, it's not how we charac-
13 terize, it's not how we characterize it. It's whether or not
14 we are regulating through land use means and telling the land-
15 owner what uses may not occur or may be prohibited as -- and
16 that's the police power, as opposed to the power of eminent
17 domain, which is, we are taking your property for public use.

18 QUESTION: But what if you, in doing so, you denomi-
19 nate what we are doing is simply exercising the police power,
20 the control of safety, health, and morals of the populace?

21 MR. SUMPTION: Well if it's not exercising the
22 police power, then it doesn't matter what we call it.

23 QUESTION: Which leaves you --

24 QUESTION: Well, what about Pennsylvania Coal v.
25 Mahon, where there was very stringent regulations. The Court

1 said, this crosses the line, this is a taking, in spite of the
2 fact that the State has called it a regulation.

3 MR. SUMPTION: Yes, Your Honor, but the Court did not
4 award money damages and title to the property. They said that
5 the police power regulation could not stand up or it would con-
6 stitute a taking. And the Constitution is satisfied if the re-
7 striction is not enforced or wiped off the books. And so --

8 QUESTION: Well, then, is it your view, Mr. Sumption,
9 that this sentence which seems to me the dispositive holding
10 of the Court of Appeal, that "A local entity's arbitrary un-
11 constitutional exercise of the police power which deprives the
12 owner of the beneficial use of his land does not require com-
13 pensation," that that language contains a negative pregnant,
14 so to speak, a negative implication that a local entity's
15 rational and constitutional exercise of the police power, which
16 deprives the owner of the beneficial use of his land, does re-
17 quire compensation?

18 MR. SUMPTION: I don't think it does, Your Honor,
19 not at all. Not under -- this Court has never found that a
20 regulation can be transmuted into --

21 QUESTION: Well, what if it is, in fact?

22 MR. SUMPTION: The only way it could be is if there
23 is some physical occupation or use of the property, because --

24 QUESTION: That's not true.

25 MR. SUMPTION: Well, there's no taking in an eminent

1 domain sense, only in the due process sense.

2 QUESTION: Well, in an eminent domain sense,
3 government could take property and then leave it undeveloped
4 for years.

5 MR. SUMPTION: Well, we're speaking of taking in
6 two complete different senses.

7 QUESTION: Mr. Sumption, let me put Mr. Justice
8 Stewart's question somewhat differently. Suppose you owned,
9 say, 50 acres of quite scenic property and the City had simply
10 adopted an ordinance saying that, we would zone that property
11 as a natural habitat for animals and fauna and the flora;
12 never put anything on it, we're just going to zone it for that
13 purpose. But the public may wander through it, may fish
14 in the ponds, may make such use as it wishes. Are you saying
15 there would be no taking?

16 MR. SUMPTION: No. I think that's what I'm trying to
17 say is the distinguishing factor. If we somehow give the public
18 the right to go on private property, then I think you've --

19 QUESTION: You just give the public a right to look
20 at it.

21 MR. SUMPTION: I'm sorry?

22 QUESTION: Just to look at it, as they drive by it
23 on the freeway.

24 MR. SUMPTION: Yes. As long as the landowner can
25 make a use of his property, we have not taken it for public

1 land.

2 QUESTION: No, you say he can't make any use of it.
3 He can't develop it at all.

4 MR. SUMPTION: But he can. We're not physically
5 taking the property away from him. If you mean, by no use,
6 that he can't go on his own property, that's one thing.

7 QUESTION: Mr. Sumption, I wonder why you weren't
8 satisfied with just defending the judgment of the Court of
9 Appeal? Don't you consider you've won the case?

10 MR. SUMPTION: Yes, Your Honor. I am satisfied.

11 QUESTION: Well, would you be satisfied if we
12 affirmed on the grounds that the California courts have held
13 that the landowner was wholly deprived of the use of his
14 property and we accept those findings, but that in a sense
15 that we agree with the Agins decision of the Supreme Court of
16 California?

17 MR. SUMPTION: I would be satisfied if this Court
18 affirmed the ruling of the Court of Appeal below.

19 QUESTION: But the California Court of Appeal has
20 not held that there was no taking. It says that remains open
21 for the utility if it desires to retry the case and produce
22 new evidence, doesn't it?

23 MR. SUMPTION: Right. Yes, Your Honor. May I make
24 one comment, because I know my time is running out? The other
25 misleading thing is that the appellants are trying to say that

1 scope of the California Supreme Court's decision in Agins,
2 which is relied on and cited in this Court of Appeal opinion,
3 that the remedy is equitable relief, not money damages, where
4 a taking through governmental regulation has occurred. The
5 case is not absolute. Counsel for appellant portrays it in
6 his brief as though the California Supreme Court has created
7 some sort of immunity. The California Supreme Court has still
8 left the door open for money damages in land use cases in cer-
9 tain circumstances. One would be unreasonable precondemnation
10 conduct. That is, a public entity wants to buy the property
11 and they start, you know, doing things with an illicit motive
12 in order to reduce the value so when we do get around to buy-
13 ing it we pay much less than what the property would otherwise
14 be worth.

15 The other situation, the California Supreme Court
16 has said, where there is a denial of access to the property,
17 they have still left open the door to money damages on that
18 theory and where there is special and direct interference
19 with the landowner's use of the property. And there is no
20 evidence or facts on the record, even the findings of fact,
21 there are no findings to that effect, that we have frustrated
22 any use of -- or refused a use to develop the property.

23 QUESTION: Well, suppose the California Supreme
24 Court or all the courts in California declare the zoning
25 statute unconstitutional as applied to this piece of property,

1 that the City has unconstitutionally interfered with the use
2 of this property.

3 MR. SUMPTION: Yes, Your Honor.

4 QUESTION: Now, has the California Supreme Court or
5 the Court of Appeal precluded damages in that situation?

6 MR. SUMPTION: Under those facts, without any actual
7 use, without the other factors, denial of access or any direct
8 and special interference with the landowner's attempt to use
9 the property, I think that's a correct assessment, that the
10 California Supreme Court would say, no, your remedy is to set
11 aside the regulations.

12 QUESTION: Well, they get set aside but meanwhile
13 the landowner has not been able to use it for the purpose he
14 wanted. The zoning ordinance has effectively precluded his use
15 of the property and the Supreme Court has said so. No damages?

16 MR. SUMPTION: No damages, Your Honor.

17 QUESTION: You say that's police power, not Fifth
18 Amendment taking?

19 MR. SUMPTION: In California, that's the rule --

20 QUESTION: Well, California is a part of the United
21 States, isn't it?

22 MR. SUMPTION: I understand that, Your Honor.

23 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

24 MR. SUMPTION: Thank you, sir.

25 MR. CHIEF JUSTICE BURGER: The case is submitted.

1 (Whereupon, at 11:57 a.m., the case in the above-
2 entitled matter was submitted.)
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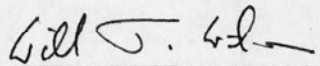
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