

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

ORIGINAL

THE SUPREME COURT OF THE UNITED STATES

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

DKT/CASE NO. 84-4

TITLE WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL.,
Petitioners v. HAMILTON BANK OF JOHNSON CITY

PLACE Washington, D. C.

DATE February 19, 1985

PAGES 1 thru 62



ALDERSON REPORTING

(202) 628-9300
20 F STREET, N.W.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

-----x
WILLIAMSON COUNTY REGIONAL :
PLANNING COMMISSION, ET AL., :
Petitioners, :
V. : No. 84-4
HAMILTON BANK OF :
JOHNSON CITY :
-----x

Washington, D. C.
Tuesday, February 19, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:52 o'clock a.m.

APPEARANCES:

ROBERT L. ESTES, ESQ., Nashville, Tennessee; on behalf of the petitioners.

EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae in support of petitioners.

G. T. NEBEL, ESQ., Nashville, Tennessee; on behalf of the respondent.

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
ROBERT L. ESTES, ESQ.,	
on behalf of the petitioners	3
EDWIN S. KNEEDLER, ESQ.,	
on behalf of the United States as	
amicus curiae in support of petitioners	21
G. T. NEBEL, ESQ.,	
on behalf of the respondent	31
ROBERT L. ESTES, ESQ.,	
on behalf of the petitioner -- rebuttal	60

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Estes, I think you may proceed when you are ready.

ORAL ARGUMENT OF ROBERT L. ESTES, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. ESTES: Mr. Chief Justice, and may it please the Court:

This case comes to you after the U.S. Sixth Circuit Court of Appeals reversed the trial court judge's granting of a motion JNOV. Our position is that there is no evidence in this case upon which a reasonable juror could have concluded that the Planning Commission in this case denied the Respondent bank with all economical viable use of its property or any economically viable use that would constitute a taking requiring compensation. To whatever extent the property lacked economic use we say was a function of the property itself, its configuration, and the prior development of that property.

Now, to give you a brief history of this, this entire property consists of 676 acres that was purchased by a prior developer to the Respondent herein to develop into a cluster housing development around a golf course. That was begun in 1973, at which time the developers convinced the Planning Commission to -- or

1 actually, the county commission, to pass a cluster
2 zoning ordinance. This ordinance did now allow greater
3 density than one dwelling unit per acre, but it did
4 allow you to cluster dwelling units closer together
5 provided you preserved enough additional open space area
6 within the same development so that you still ended up
7 with one dwelling unit per acre.

8 Now, this prior developer submitted a plat, a
9 preliminary sketch plat to the Williamson County
10 Planning Commission in 1973 and had it approved. That
11 would be one of the two exhibits that have been passed
12 out to the Court. It's contained in the Joint Appendix
13 at 90 -- at page 422, Exhibit No. 9700.

14 Now, at that time there was a two-step
15 procedure by which a developer could have plats
16 submitted and approved by the Planning Commission.
17 First, an initial or preliminary sketch plat would be
18 presented which contained just generally the outline of
19 the development, did not contain extensive engineering
20 data. That would be looked at and determined whether or
21 not it generally complied with the ordinances and the
22 regulations, and then later, before a building permit
23 was to be issued or the developer start developing, he
24 would have to submit a so-called final plat either of
25 the whole development, if he desired, or a section of it

1 if he desired to develop only a section of the
2 development at a time. In this case, the developer, the
3 prior developer, submitted only sectional final plats
4 for approval. He got about three or four of those, or
5 three or four sections approved through the years.

6 The subdivision regulations in effect in 1973
7 provided that though this preliminary plat was approved
8 in '73, it only lasted one year, that approval did. It
9 had to be renewed yearly. It was not renewed yearly; it
10 was renewed several times. There was a gap from around
11 1976 through 1978. Then there was a gap again in August
12 1980 to November 1980.

13 Nevertheless, the Respondent bank herein had
14 originally loaned approximately \$900,000 to the original
15 developers. Through a rather complicated series of
16 events, this Respondent bank's subsidiaries or some of
17 the banks it was associated with, went into bankruptcy
18 court. This bank then bought out a greater interest
19 through a swapping deal in this subdivision, turned
20 around -- well, it got title to the property, the
21 development at that time, but turned around and sold it
22 back to the original developer.

23 He kept it another three or four years until
24 Noember 1980, at which time he still wasn't able to
25 develop the property out, he went under, and this

1 Respondent bank then bought the remaining interest in
2 this entire development that had not been fully
3 developed. It did not buy the original part of the
4 development.

5 Now, several things occurred over the years
6 that changed the entire situation with respect to this
7 development that the Planning Commission had nothing to
8 do. We say here that the plat that the Respondent bank
9 is relying on in this lawsuit that it filed suit on,
10 that plat it says it's relying on complies with the 1973
11 regulations, and it should be allowed to continue to
12 develop the rest of the property with the '73
13 regulations. Actually, the Planning Commission had
14 amended those regulations from time to time.

15 However, that plat on its face does not even
16 comply with the original '73 regulations that the
17 Respondent bank is claiming it's depending upon.

18 QUESTION: Well, now, was that issue before
19 the Board of Zoning Appeals in that 1980 appeal?

20 MR. ESTES: No, Your Honor.

21 QUESTION: It was not.

22 MR. ESTES: The only issue there was whether
23 or not the Planning Commission could apply the amended,
24 updated regulations or whether it had to apply the '73.

25 QUESTION: And the Commission lost --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. ESTES: Pardon?

QUESTION: The Commission lost --

MR. ESTES: That's right.

QUESTION: The Zoning Appeals decided against the Commission, did it not?

MR. ESTES: That's right, it did.

QUESTION: Is there any issue in this case whether any other state procedures should have been exhausted?

MR. ESTES: Yes, sir, there is. The government plans to argue that portion of it, but there is -- there's inverse condemnation in the State of Tennessee that they could have relied upon. We say they could have sought judicial review.

QUESTION: Well, why didn't that 1980 appeal to the Zoning Commission satisfy any requirement of exhaustion?

MR. ESTES: Because they still have judicial review, Your Honor, in state court in Tennessee. They never sought that. They never sought that. In fact, that appeal to the --

QUESTION: Well, you lost in the Board of Zoning Appeals, the Commission did.

MR. ESTES: That's right, you're right.

QUESTION: Well, then, why didn't you go to a

1 court?

2 MR. ESTES: At that time -- that was at the
3 time when the prior developer submitted the October 1980
4 plat to the Planning Commission and it was rejected.

5 Now, he was immediately foreclosed upon by the
6 bank, so that issue never got anywhere. The Planning
7 Commission thought the bank would come back and submit a
8 plat that did comply with those regulations, those '73
9 regulations, and it would be approved, and they would go
10 on with the development. Instead --

11 QUESTION: Even though the Board of Zoning
12 Appeals had said those regulations were no good?

13 MR. ESTES: No, even though the Zoning -- the
14 amended regulations?

15 QUESTION: Yes.

16 MR. ESTES: Yes, that's right, but the --

17 QUESTION: And you still thought that the --

18 MR. ESTES: No, no, Your Honor has
19 misunderstood what I meant. It is my fault.

20 QUESTION: This is a case one can get easily
21 confused on I might say.

22 MR. ESTES: That's right.

23 The Planning Commission assumed that the new
24 developer, the bank, that foreclosed on the prior
25 developer, would come in and present a new plat that

1 complied with the '73 regulations. It didn't even do
2 that. It submitted another plat that still didn't
3 comply with any of the regulations.

4 Now --

5 CHIEF JUSTICE BURGER: We will resume -- we
6 will resume there at 1:00 o'clock today, Mr. Estes.

7 MR. ESTES: Thank you.

8 (Whereupon, at 12:00 o'clock noon, the oral
9 argument in the above-entitled matter was recessed, to
10 reconvene at 1:00 o'clock p.m., this same day.)

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 AFTERNOON SESSION

2 (12:58 p.m.)

3 CHIEF JUSTICE BURGER: Mr. Estes, you may
4 continue.

5 ORAL ARGUMENT OF ROBERT L. ESTES, ESQ.,
6 ON BEHALF OF THE PETITIONERS -- Resumed

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

9 In further answer to Justice Brennan's
10 question, I would submit that and point out there was an
11 Attorney General of the State of Tennessee's opinion
12 that was rendered shortly after the Board of Zoning
13 appeals made that decision which stated in effect that
14 the Board of Zoning Appeals did not have the
15 jurisdiction and the power to decide that general
16 question of law, and that was relied upon.

17 Furthermore, as Mr. Nebel's letter points out,
18 later on in June of '81 to the Planning Commission, that
19 Hamilton recognized that it needed variances in order
20 for its plat to be approved. That's contained in the
21 record at page 850 of the Court of Appeals appendix in
22 this case.

23 Further --

24 QUESTION: Did it apply for them?

25 MR. ESTES: They never applied for them, Your

1 Honor.

2 QUESTION: What was it you were saying just
3 before lunch, that something had been submitted to the
4 Court?

5 MR. ESTES: I was saying, Your Honor, that I
6 understood you to ask me why the Planning Commission did
7 not appeal the Board of Zoning Appeals decision.

8 QUESTION: Yes, that was the 1980 one.

9 MR. ESTES: That was the 1980 submission.

10 QUESTION: Yes.

11 MR. ESTES: And the --

12 QUESTION: Was there a later submission,
13 that's why I -- by Hamilton, or by anybody?

14 MR. ESTES: Well, that earlier submission was
15 not by Hamilton; it was by the prior developer.

16 QUESTION: Right.

17 MR. ESTES: About a month after that
18 submission and its turn-down, the Hamilton Bank
19 foreclosed and took over the rest of the property.

20 QUESTION: And who made the second
21 submission?

22 MR. ESTES: Hamilton Bank, the Respondent.

23 QUESTION: And it was turned down.

24 MR. ESTES: It was turned down.

25 QUESTION: Now, did Hamilton Bank go to the

1 Planning Board -- or not the Planning Board, I mean
2 the --

3 MR. ESTES: The Board of Zoning Appeals.

4 QUESTION: Yes.

5 MR. ESTES: No, sir, no, sir.

6 QUESTION: Would the Board of Zoning Appeals
7 have had jurisdiction entertained?

8 MR. ESTES: According to the State of
9 Tennessee Attorney General's report, no.

10 QUESTION: No. I see.

11 MR. ESTES: But there are administrative
12 remedies that we say -- state administrative remedies
13 that Hamilton Bank could have followed but did not, and
14 the government is prepared I think to argue that more
15 fully.

16 QUESTION: Yes. All right, thank you.

17 MR. ESTES: The subdivision regulations again
18 in the Court of Appeals Appendix at page 932 and 933
19 provide that in order for a variance to be granted, it
20 must be requested in writing, and that without the
21 application of any conditions shown on the plat which
22 would require a variance, would constitute grounds for
23 disapproval of the plat.

24 So the Planning Commission had every reason to
25 disapprove this plat simply because it was submitted not

1 in accordance with the old '73 regulations and without
2 having applied for a variance.

3 Now, going on to the comparison of the two
4 plats that were submitted to the Court, there are six
5 major differences.

6 QUESTION: Before you get to that --

7 MR. ESTES: All right.

8 QUESTION: Why is it you say that the failure
9 to ask for a variance ends this case for the bank?

10 MR. ESTES: All right, because I think we can
11 look at the plats, all preliminary plats that were
12 submitted earlier as well as the preliminary plat that
13 the bank submitted in June 1981 which was turned down,
14 and on their face they obviously do not comply with the
15 regulations, any of the regulations, without a
16 variance.

17 QUESTION: And they never --

18 MR. ESTES: And the subdivision regulations
19 say that that is grounds alone for turning the plat
20 down.

21 QUESTION: Well, now, what about -- this is a
22 1983 suit, isn't it?

23 MR. ESTES: Yes, sir.

24 QUESTION: What about the principle that the
25 plaintiff in a 1983 suit does not have to exhaust

1 various state remedies?

2 MR. ESTES: Well, sir, we take the position
3 that they do in this case under the Fifth Amendment
4 taking analysis.

5 QUESTION: On the grounds if there is a remedy
6 there can be no taking, is that it?

7 MR. ESTES: Right, right.

8 That gets into the -- that decision that I
9 think you are referring to, the California decisions.

10 Going on to -- if Your Honor is finished with
11 that, going on to a comparison of the plats, the
12 preliminary plat that was submitted in 1973 and renewed
13 several times thereafter but which had expired before
14 the submission in October 1980 by the predecessor
15 developer, and in June of '81 by Hamilton Bank, there
16 are six major differences in those plats. They are just
17 not plats of the same property.

18 First of all, during that interim the State of
19 Tennessee, by condemnation, took a portion of the
20 property in this subdivision, 18 1/2 acres in the bottom
21 right hand corner of the plat. It is referred to on the
22 No. 9702 as the Natchez Trace Parkway. That created
23 tremendous problems for this development to continue in
24 that area. It caused two long prohibited cul-de-sacs,
25 one of 5000 feet in length, the other of 3000 feet in

1 length, in violation of all regulations, even the old
2 '73 lengths. Cul-de-sac lengths were 400 feet maximum.
3 They were amended and actually liberalized by allowing
4 up to 800 feet. Here we have two long cul-de-sacs on
5 the plat submitted by the bank for the first time.

6 Secondly, or thirdly, there had been a survey
7 error by the prior developer which was finally corrected
8 by the bank when it submitted its June 1981 submittal.

9 QUESTION: Well, now, the lower courts now
10 must have rejected all these claims of these.

11 MR. ESTES: I don't think the lower court
12 rejected these claims, Your Honor. The lower court --

13 QUESTION: Well, you lost anyway.

14 MR. ESTES: Well, did, but I won at the end of
15 the lower court proceeding, Your Honor, in that they
16 granted a judgment notwithstanding the verdict.

17 There was a survey error that had occurred
18 that showed up for the first time in October '80, in
19 June '81 which took out on the right hand side of the
20 plat, near the top, took out several lots that had
21 theretofore been plotted as having been a part of this
22 subdivision. That changed the configuration.

23 There were areas in the original plats, five
24 major ones, that were clearly and unequivocally marked,
25 this parcel not to be developed until approved by the

1 Planning Commission.

2 QUESTION: Now, is this a recital of the eight
3 objections of the Commission in '81?

4 MR. ESTES: Ties right into them, six -- it
5 ties into six of them, Your Honor.

6 QUESTION: Six of them?

7 MR. ESTES: Six of the eight.

8 QUESTION: Well, how many were considered by
9 the Board of Zoning Appeals in November of 1980?

10 MR. ESTES: Only one question, as far as I
11 recall --

12 QUESTION: Only one of the eight?

13 MR. ESTES: -- was considered by the Board of
14 Zoning Appeals, and that is whether or not the Planning
15 Commission had the right to apply the amended
16 regulations or whether it had to apply the 1973
17 regulations. That was the only question.

18 QUESTION: And what did they say?

19 MR. ESTES: Well, they said you had to apply
20 the '73 regulations.

21 QUESTION: And you don't agree with that.

22 MR. ESTES: Well, I don't agree with it and
23 the State of Tennessee's Attorney General didn't agree
24 with it. He said it didn't even have the power to
25 decide that.

1 QUESTION: Don't you -- what relief do you ask
2 here?

3 MR. ESTES: All right. We are asking for a
4 recital or an opinion reinstating the trial court's
5 decision that there can be no taking.

6 QUESTION: I thought the trial court also
7 enjoined you from applying the later regulations?

8 MR. ESTES: That is not before this Court.
9 That -- all right, it was --

10 QUESTION: Well, if we reinstate the District
11 Court's judgment, you are subject to an injunction not
12 to apply the later regulation.

13 MR. ESTES: That's right. That was appealed
14 and a cross appeal, if Your Honor please, to the Sixth
15 Circuit, but before the case came before the Sixth
16 Circuit, in a compromise settlement by the bank --

17 QUESTION: Then if you get what you want,
18 there will be an injunction against you in the District
19 Court.

20 MR. ESTES: From applying the seventy --
21 anything, any amended regulation after '73.

22 QUESTION: Exactly.

23 MR. ESTES: That's right.

24 QUESTION: So you are conceding you are not
25 entitled to apply the later regulations, is that it?

1 MR. ESTES: Well, I think we are forbidden
2 from doing so under that injunction.

3 QUESTION: Well, you haven't come up here with
4 a -- you seem to want to live with that injuncton.

5 MR. ESTES: I don't necessarily want to live
6 with it, but we are stuck with it. There was a --

7 QUESTION: Why? Why?

8 MR. ESTES: Well, that court granted that
9 injunction on state law saying that we were estopped to
10 apply any later regulations to Temple Hills
11 subdivision.

12 QUESTION: What you did do, you did apply it
13 in turning down this plat.

14 MR. ESTES: We did, but we say it doesn't
15 matter because as far as this part of the case is
16 concerned, because that plat did not even comply with
17 the '73 regulations.

18 QUESTION: Well, but that's a factual thing.
19 That's something you want us to pass on up here in the
20 first instance, whether this complied with the '73
21 regulations?

22 MR. ESTES: That's right. The taking issue
23 depends on that. The Plaintiffs filed suit depending
24 upon the '73 regulations and the original '73 plat that
25 was preliminarily approved.

1 QUESTION: Well, I know, but you turned them
2 down based on the later regulations.

3 MR. ESTES: That's right, but analysis --

4 QUESTION: Now you are enjoined from doing
5 so.

6 MR. ESTES: That's right. But an analysis --

7 QUESTION: And you want us to say you were
8 right in the first place based on the '72 regulations.

9 MR. ESTES: We were right. They had no -- we
10 are actually saying, Your Honor, that they had no cause
11 of action under Section 1983 and under Fifth Amendment
12 taking theory because they never submitted a plat that
13 even complied with the very regulations that they were
14 depending on in --

15 QUESTION: How do we know that? How do we
16 know that?

17 MR. ESTES: Look on the face of these plats.

18 QUESTION: I know, that's just an initial
19 piece of factfinding by us you are asking us to
20 perform.

21 MR. ESTES: Well, we are saying that as a
22 matter of law the plaintiffs failed to prove a Fifth
23 Amendment taking since they failed to show that they
24 even submitted a plat that complied with the very
25 regulations that they were relying up.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

QUESTION: Did the Court of Appeals rule on that point? Did the Court of Appeals say either that the plat did or did not comply with the 1973 regulations?

MR. ESTES: No, Your Honor. In fact, the trial court wouldn't even rule on that issue. We submitted it so many times to him, in our answer, in our --

QUESTION: Now you are submitting it here?

QUESTION: Now you are submitting it here.

QUESTION: For the first time.

QUESTION: Mr. Estes, the warning light is on. I just want you to know that you are about eating into some other time.

MR. ESTES: I want to reserve about five minutes for rebuttal.

QUESTION: Can I ask just one question, if I may?

MR. ESTES: Yes, sir.

QUESTION: Do you argue that even if there is a taking under these regulations, that nevertheless there should not be monetary damages? Do you make that argument?

MR. ESTES: We are trying to make the argument a little bit differently. We are saying there is not a

1 compensatory taking here, there is just a minor
2 interference with their development.

3 QUESTION: I understand, but do you concede
4 that if there was a taking, that it would not be an
5 adequate remedy just to enjoin enforcement of the
6 regulation?

7 MR. ESTES: No, we maintain that there are
8 adequate remedies under Tennessee law as contrary to
9 California law where there may not be adequate
10 remedies. I am familiar with that. But we have inverse
11 condemnation in Tennessee.

12 CHIEF JUSTICE BURGER: Mr. Kneedler?

13 ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

14 ON BEHALF OF THE UNITED STATES

15 AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

16 MR. KNEEDLER: Thank you, Mr. Chief Justice,
17 and may it please the Court:

18 In a number of respects, affirmance of the
19 judgment of the Court of Appeals in this case would
20 represent a substantial departure from established
21 principles under this Court's Fifth Amendment
22 decisions.

23 As an initial matter, as we point out in our
24 brief, it doesn't appear that Respondents have ever
25 alleged or proven that any taking that occurred in this

1 case was without just compensation, because they haven't
2 shown that a compensation remedy would be unavailable
3 under state law. To ignore this essential element of a
4 Fifth Amendment claim would be in effect to convert the
5 Federal District Courts into claims courts for the
6 states by permitting them to entertain inverse
7 condemnations in any case, even though the state might
8 also provide an inverse condemnation remedy.

9 However, the submission of the United States
10 in this case does not relate to the without just
11 compensation aspect of the cause of action but rather to
12 the question of whether there was a taking at all that
13 required the payment of just compensation.

14 There are four points that are important to
15 us, and I will identify them at the outset: first, that
16 there was no taking in this case because the bank did
17 not pursue procedures before the Petitioner to either
18 obtain a variance or to seek to comply with the
19 applicable regulations; secondly, that the Court of
20 Appeals applied flawed analysis in determining what
21 would be a taking in the zoning context; third, the
22 Court of Appeals ignored the principle that unauthorized
23 conduct by agents of the government such as the
24 application of the wrong regulation here gives rise to a
25 claim for just compensation rather than being in the

1 nature of a tort for wrongful regulation that does not
2 give rise to a claim for just compensation; and fourth,
3 that no compensation was owed for a so-called temporary
4 taking in the circumstances of this case.

5 Now, in answer to several of the questions
6 that have arisen before, looking at the first point, it
7 does seem to us that the failure of the bank to seek to
8 pursue procedures before the Planning Commission does
9 end this case, and I think that the fact that neither
10 the Court of Appeals nor the District Court passed on
11 the question of whether the plat complied with the 1973
12 regulations only reinforces the conclusion that that's a
13 matter for the Planning Commission to decide in the
14 first instance, and in fact, the Planning Commission did
15 decide that the submission did not comply with
16 provisions that were present in both sets of
17 regulations, the steep slope requirements, the length of
18 the cul-de-sacs, the road grades, all matters pertaining
19 to public safety that are quite aside from the density
20 of the residential units on this piece of property.

21 And so the point is that the developer should
22 submit his case to the Planning Commission, and as Mr.
23 Estes pointed out, counsel for the bank conceded that
24 variances would be required in this case to overcome the
25 difficulties with the road grades and with the length of

1 the cul-de-sacs. He simply wanted the Planning
2 Commission to grant approval to the preliminary plat and
3 then he would apply for variances.

4 But in fact, the subdivision regulations
5 applied by the Commission say that the variance has to
6 be applied for before the preliminary plat is approved.
7 And that alone, the absence of a variance request is
8 alone sufficient basis for rejecting the plat.

9 And the idea that the --

10 QUESTION: And also, I gather, Mr. Kneedler,
11 you say that also precludes any finding of a taking.

12 MR. KNEEDLER: That's right. It's not that --
13 it's not a question of --

14 QUESTION: And that's your basic question.

15 MR. KNEEDLER: That's right. It is not a
16 question of exhaustion of remedies for a completed
17 violation, but just that there is no violation at all.

18 And this is the point the Court made in the
19 Hodel decision.

20 QUESTION: Well, what about the argument we
21 just heard that the Attorney General has said it would
22 have done no good to go to the Board of Zoning Appeals?

23 Do you agree with that?

24 MR. KNEEDLER: Well, that's a question of
25 state law with respect to these other issues. The only

1 thing that was before the Board of Zoning Appeals before
2 was the question of whether the sub -- the Planning
3 Commission was required to apply the 1973 regulations.
4 Any question of compliance with those regulation was not
5 before the Board of Zoning Appeals.

6 QUESTION: Well, what do you understand went
7 to the jury?

8 MR. KNEEDLER: On the question of -- there
9 were --

10 QUESTION: How were these \$350,000 arrived
11 at?

12 MR. KNEEDLER: It's quite difficult to
13 determine. I think that what, in effect, the way the
14 jury -- from my reading of the record and what the jury
15 was permitted to infer was really damages on the basis
16 of lost -- on the lost of reuse of money, that whatever
17 amount that the --

18 QUESTION: Well, what were the instructions?
19 Were the instructions --

20 MR. KNEEDLER: The only instructions on the
21 question of taking are whether the landowner had been
22 denied the economical -- the economic viable use of this
23 property. The jury returned a verdict saying yes, and
24 then the question of damages went separately. There
25 were very -- the instructions on the question of

1 compensation were not very detailed, and there is no
2 indication that I can discern as to how those damages
3 were computed.

4 The idea that administrative remedies have to
5 be pursued ties in with the notion of a taking because a
6 taking occurs in the regulatory context only when the
7 government has deprived the owner of all or
8 substantially all of the benefit of the use of his
9 property, and that doesn't occur just because an agency
10 has not approved a particular proposal for development,
11 as was the case in Penn Central. The Court pointed out
12 that yes, the developer may not be able to build a
13 50-story building, but he might be able to build a
14 20-story building, and that only when it is clear that
15 the agency is not going to permit any substantial
16 development is the taking claim right.

17 QUESTION: Well, Mr. Kneedler, does the
18 government take a position on whether the Commission was
19 entitled to apply the later regulations?

20 MR. KNEEDLER: Now, that's a question of state
21 law that I think is not of principal interest to us.

22 It does seem to us, though, that the nature of
23 the jury verdict --

24 QUESTION: I thought part of the claim or a
25 major part of the claim was that they applied later

1 regulations that really affected the taking.

2 MR. KNEEDLER: Well, in that respect -- and it
3 ties in to another one of our points, that the
4 Commission was unauthorized to do that. They were not
5 authorized as a matter of state law to apply the 1981
6 regulations, and that flies in the face of the
7 established principles of this Court in Hooe, in North
8 American Company. It was reflected in Dames & Moore,
9 that unauthorized conduct by agents of of the sovereign
10 is not --

11 QUESTION: When would there ever be a taking
12 if the -- there wouldn't be a taking if the Commission
13 acted properly, and there isn't a taking if they acted
14 improperly.

15 MR. KNEEDLER: No, we are not suggesting
16 that --

17 QUESTION: And there isn't a taking because
18 they acted improperly.

19 MR. KNEEDLER: No, we are not suggesting that
20 there can never be a taking if the agency acts
21 properly. The state legislature could in some states
22 authorized a zoning board or a planning commission to
23 adopt regulations that would go so far as to constitute
24 a taking.

25 QUESTION: So a commission may just completely

1 disobey a state law and deny the landowner any use of
2 his property, and there still isn't a taking?

3 MR. KNEEDLER: There's not -- there's not a
4 taking giving rise to the self-executing --

5 QUESTION: Because the -- because why?

6 MR. KNEEDLER: Because as the --

7 QUESTION: Somebody just booped it.

8 MR. KNEEDLER: That's right. It's something
9 that sounds in tort more than --

10 QUESTION: But if he didn't have his taking
11 claim, would he have a due process?

12 MR. KNEEDLER: He might have a due process
13 claim, and --

14 QUESTION: As one ask, is there a due process
15 claim here?

16 MR. KNEEDLER: No, not before this Court. The
17 jury directed a verdict on the assumption of due process
18 claim, and if a damage remedy were available, it
19 wouldn't be because of the self-executing aspect of the
20 Fifth Amendment but perhaps because of a 1983 remedy
21 where Congress has created a damage remedy where the
22 Fifth Amendment doesn't require it.

23 QUESTION: Well, does the government concede
24 that there could be a taking in the eminent domain
25 sense where there has been no physical occupancy of the

1 land?

2 MR. KNEEDLER: Yes, yes, we are not arguing
3 that regulations can never constitute a taking. Our
4 only point is that compensation isn't due unless the
5 legislature has authorized the agency to do this.

6 We point out that there is a provision of the
7 Strip Mining Act which is construed not to permit a
8 denial of a permit to mine where it would result in a
9 taking. In that instance you couldn't have a taking
10 claim because the agency isn't authorized to apply it,
11 so the appropriate thing to do would be to bring an
12 injunctive action or to seek APA review of the denial of
13 the permit in those circumstances.

14 I also wanted to briefly address what we see
15 as two flaws in the takings analysis. The first is the
16 notion of vested rights that the bank addresses. Vested
17 rights does not mean property rights. It is a term of
18 art in the zoning area which means as a matter of --
19 when as a matter of state law a development has
20 proceeded to a certain extent, state law permits them to
21 complete the development. That is not the same thing as
22 a property right.

23 When the government grants a license or a
24 permit, it is not purporting to confer a property right
25 on someone, and ordinarily the permit could be revoked,

1 and in fact, in the very case that the bank relies on in
2 this case, *Schneider v. Lazarov*, from the Tennessee
3 Supreme Court, the Tennessee Supreme Court said that
4 very thing with respect to building permits in
5 Tennessee. If a building permit is granted, it can be
6 revoked without automatically giving rise to the claim
7 for just compensation.

8 So the mere fact that the bank once had
9 approval, even if it were so, for 736 units, does not
10 forever give it a permanent exemption from the
11 application of changes in the zoning ordinance.

12 QUESTION: Mr. Kneedler, do you take the
13 position that a property owner would have to follow
14 judicial review remedies as well for it to ripen into a
15 taking?

16 MR. KNEEDLER: I think that would depend on
17 the particular statutory scheme. I think under the
18 federal system Congress could prescribe that APA review
19 would have to be sought for the denial of a permit, and
20 that's particularly so where the agency was not
21 authorized to engage in conduct that would constitute a
22 taking.

23 QUESTION: Well, do you think that's true in
24 this case?

25 MR. KNEEDLER: I think that's less clear. I

1 think it tends to blend in with the question of whether
2 there should be abstention on the state law question of
3 whether the commission had properly applied state law.
4 It does seem strange that that should be something for a
5 federal court to decide in the first instance which set
6 of regulations should be applied.

7 Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE BURGER: Mr. Nebel?

9 ORAL ARGUMENT OF G. T. NEBEL, ESQ.,

10 ON BEHALF OF THE PETITIONERS

11 MR. NEBEL: I thank Your Honor. Mr. Chief
12 Justice, and may it please the Court:

13 The issue before this Court is whether the
14 state will be required to pay just compensation when its
15 regulations destroy all practical economic value of
16 private property.

17 To resolve that issue, Hamilton proposes the
18 following two propositions of law:

19 First, zoning regulations can effect a Fifth
20 Amendment taking, at least in those rare cases in which
21 the regulations go too far and destroy all practical
22 economic value.

23 Secondly, when a Fifth Amendment regulatory
24 taking has occurred, the appropriate remedy is
25 compensation.

1 Now, returning to my first proposition which
2 really leads me to respond to several of the questions
3 raised by the Court, after 15 days of trial, 27
4 witnesses, and hundreds of documents, the jury was
5 submitted the following special interrogatory: has
6 Plaintiff been denied economically viable use of its
7 property in violation of the just compensation clause of
8 the Fifth Amendment.

9 QUESTION: Did the instructions that led to
10 that conclusion of the jury, did they define a
11 compensable taking?

12 MR. NEBEL: Yes, Your Honor, and in fact, the
13 jury was specifically instructed that if there was any
14 economically viable use of the property remaining, then
15 no Fifth Amendment taking could occur.

16 QUESTION: Have you any suggestion how the
17 jury arrived at \$350,000?

18 MR. NEBEL: Yes, Your Honor. The \$350,000
19 figure really came from the holding costs associated
20 during the temporary taking.

21 QUESTION: The what costs?

22 MR. NEBEL: The holding costs, the loss of the
23 use of the money.

24 QUESTION: Yes.

25 MR. NEBEL: Not the lost interest, not the

1 lost profit that Hamilton could have made by reinvesting
2 that money and loaning it to someone else and charging a
3 higher rate of interest, but specifically, the record
4 reveals that there were \$393,000 in damages to Hamilton
5 from loss of use of the money, and that formula came
6 from very reasonable calculation, namely, the cost to
7 Hamilton under the Fed Fund discount rate.

8 So really, all the jury found, among othere
9 costs associated, was that Hamilton was entitled to
10 recover a portion of the holding cost of the property
11 when the period was temporarily -- excuse me, when the
12 property was temporarily taken from Hamilton during that
13 sixteen month period.

14 QUESTION: And your client was content with
15 that?

16 MR. NEBEL: Well, Your Honor, we -- in light
17 of the injunction that we got with it, we wouldn't have
18 appealed from the District Court decision if there
19 hand't been a judgment NOV. We didn't receive
20 everything, and under the course of the decisions of
21 this Court, we were entitled to be put in the same
22 monetary position as if the taking had not occurred, and
23 we never did get to that point, but we would have been
24 satisfied, intelligence.

25 QUESTION: Mr. Nebel?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. NEBEL: Yes, Mr. Justice?

QUESTION: What holdings of this Court do you rely on for the proposition that there can be a taking under the eminent domain clause when there has been no physical occupancy of the land and no effort by the government to condemn?

MR. NEBEL: Well, Your Honor, there are, of course, the law in that area is summarized in the San Diego Gas opinion, dissenting opinion by Justice Brennan. Most recently --

QUESTION: What I was asking you, what holdings of our Court do you rely on?

MR. NEBEL: Well, for example, in Ruckelshaus v. Monsanto, last term, this Court found a regulatory taking and found that compensation was the appropriate remedy.

QUESTION: But didn't it find that the property value in those particular formulas had been destroyed?

MR. NEBEL: Well, that's exactly what happened in this case, Your Honor. This is -- this is different from all the cases where there's been a mere denial of the highest and best use or some devaluation of the property. Hamilton has never contended that it was a mere denial of the highest and best use. This is a case

1 where 100 percent of the total practical economic value
2 of the property was wiped out.

3 QUESTION: That's what the jury found, wasn't
4 it?

5 MR. NEBEL: That's exactly what the jury
6 found. That special interrogatory that I read a few
7 moments ago was a quote which of course appears in the
8 Joint Appendix and is part of the record.

9 QUESTION: Well, do you think the damage was
10 done to your client by the application of the later
11 regulations?

12 MR. NEBEL: Absolutely, Your Honor.

13 QUESTION: And what's your answer to the
14 government that says, well, the Zoning Board, whoever it
15 was, just made a mistake and they shouldn't have applied
16 the later regulations. That was contrary to state law,
17 and there can't be a taking just based on an error of an
18 agent.

19 MR. NEBEL: Well, I would agree with Your
20 Honor's question to the extent that you were stating a
21 proposition, and in that case you would never have a
22 taking. This Court held in Euclid, I believe it was,
23 that --

24 QUESTION: Well, they -- Mr. Kneedler seemed
25 to say that if the state law had actually authorized the

1 application of these later regulations, maybe there would
2 have been a taking, or could have been.

3 MR. NEBEL: Well, that really goes, I think,
4 to the question of public use. I think that is how he
5 is trying to tie this up.

6 QUESTION: Well, you do have to answer the
7 claim, though, that there can be a taking that results
8 merely from an error of state law.

9 MR. NEBEL: And Your Honor, the answer --

10 QUESTION: Can there be?

11 MR. NEBEL: Yes, yes.

12 QUESTION: You have to take that position.

13 MR. NEBEL: Yes, Your Honor.

14 QUESTION: Well, supposing that the
15 government, some government agent, say a federal
16 government agent, goes on my land and occupies it. Now,
17 Congress has never authorized him to occupy it at all,
18 but he says I am here to take over this land; it's no
19 longer yours.

20 Now, does the fact that he says that and he is
21 an agent of the government mean that my property has
22 been "taken?"

23 MR. NEBEL: Well, Your Honor, I will respond
24 to your question. Obviously those aren't the facts
25 here

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

QUESTION: Right.

MR. NEBEL: The taking here was authorized by state law, and Your Honor, I didn't mean to imply to your question, Justice White, that we have to find an unauthorized act. I don't think I did state that.

QUESTION: No, no, I don't think you answered that way.

MR. NEBEL: No.

QUESTION: But you do have to claim that if this taking resulted from the application of the later regulations, you have to -- if that's what -- you then have to answer the claim that, well, yes, but the application of the later regulations was contrary to state law.

MR. NEBEL: Well, that's not true, first all, in this instance, Your Honor.

QUESTION: Well --

MR. NEBEL: To the extent, to the extent that those --

QUESTION: In my view, you might have two answers to it: one, it was consistent with state law to apply them, but even if it wasn't, there can still be a taking?

MR. NEBEL: That is correct, and that is our position because cases that hold such, the fact that the

1 state acted under color of state law, or the Planning
2 Commission in this case acted under color of state law I
3 think is sufficient to meet that requirement, and of
4 course, that's not what we have here anyhow. We have a
5 Planning Commission that was acting pursuant to
6 regularly adopted and promulgated state planning laws.
7 But the impact, it is the economic impact of those
8 regulations that was illegal, unconstitutional under the
9 Fifth Amendment. There isn't anything on the face of
10 those regulations that is illegal. It is the
11 application of those regulations to our property, and
12 the economic impact --

13 QUESTION: Was there a holding below by the
14 lower courts that the application of the later
15 regulations was improper under state law?

16 MR. NEBEL: Yes, that's the impact of the
17 estoppel verdict, Your Honor. Under Tennessee State
18 law, the jury also determined, in addition to answering
19 the taking question, the jury also determined that the
20 defendant should be estopped from imposing those new
21 regulations.

22 That doesn't mean again that the regulations
23 are inherently illegal in and of themselves under a
24 facial attack to the regulations. It is just as they
25 were applied to our property.

1 Many of the arguments raised by Mr. Estes
2 during his argument will not be responded to except as
3 the Court requires because, quite frankly, our position
4 is that these issues have already been determined by the
5 jury and have been affirmed by the Sixth Circuit after a
6 full review of the record, and there was --

7 QUESTION: Mr. Nebel, can I ask you to move on
8 to your second point, which is the one that interests me
9 most in the case?

10 Let me give you a hypothetical. Suppose you
11 got a case where nobody really questions the fact that
12 some attempt at zoning regulation or government
13 restrictions would deny the owner of the property all
14 viable use of the property, but there is a good argument
15 for doing it, environmental concerns and all the rest,
16 and it takes five years to litigate the question, with
17 procedural fairness all the way along the line, appeals
18 up to this, and eventually the property owner wins, and
19 then the government says okay, you can get an injunction
20 against further interference with that property.

21 Does it automatically follow under your theory
22 that there are damages for temporary taking?

23 MR. NEBEL: No, Your Honor. If the Court's
24 question goes to the deliberative process of the agency,
25 I think that --

1 QUESTION: Can there be -- what I am asking
2 you is can there be governmental denial of all viable
3 use of a property owner's property for a period of time
4 that it takes to find out whether it is unlawful or not
5 without there being a compensable taking, in your view,
6 and if so, why isn't that what this case is?

7 MR. NEBEL: Well, Your Honor, my response to
8 that would be no, and under the --

9 QUESTION: Because if you always have to pay
10 if you --

11 MR. NEBEL: If you take.

12 QUESTION: If you deny total use of the
13 property.

14 MR. NEBEL: That would be our position, Your
15 Honor.

16 Again, the facts in this case aren't precisely
17 like that, so you don't have to go that far to reach a
18 holding in Hamilton's favor, but to respond directly to
19 the Court's question, yes.

20 QUESTION: So that any time the government
21 wants to take action that extreme, it litigates at the
22 peril of paying damages for the temporary interference
23 with the property.

24 MR. NEBEL: That's precisely our point, Your
25 Honor, and the fact that --

1 QUESTION: Has any case suggested that other
2 than Justice Brennan's decision in the San Diego case?
3 Is there ny precedent for that view?

4 MR. NEBEL: Well, Your Honor, I think that
5 number one, under the concept of equitable loss, yes,
6 Owens v. City of Independence. As in the land use area,
7 I think that a long line of cases of this Court indicate
8 that when there is a denial of all economically viable
9 use of the property, that there is a taking, and the
10 time for measuring that taking --

11 QUESTION: Yes, but then the question is the
12 remedy.

13 Is it an adequate remedy just to enter an
14 injunction say, well, you cannot impose that restriction
15 anymore?

16 MR. NEBEL: No, because number one, the
17 language of the Fifth Amendment is self-executing, where
18 the government takes it, they've got to pay for it.
19 Number two --

20 QUESTION: And if it's only temporarily?

21 MR. NEBEL: That's right.

22 QUESTION: They still have to pay.

23 MR. NEBEL: That's exactly right.

24 QUESTION: The temporary amount.

25 MR. NEBEL: For the temporary period only, and

1 the facts in this case demonstrate how reasonable that
2 rule is. As I have indicated in response to a question
3 from Justice Brennan, Hamilton Bank suffered a number of
4 holding costs in connection with this. The record
5 indicates that it was close to half a million dollars,
6 according to the testimony of one of the officers of the
7 bank, but they only got \$350,000.

8 Our rule of law would simply spread the loss
9 and not put it on a property owner when a regulation has
10 been implemented that destroys all economic value. And
11 that is a very narrow set of cases that are going to --
12 where the property owner is going to be able to come in
13 and prove total destruction of the economic value of his
14 property.

15 In response to the questions that were raised
16 concerning exhaustion of the administrative remedies, we
17 have got several responses to that.

18 First and foremost, keeping in mind -- I will
19 start with just a brief description of the chronological
20 process of the administrative procedure.

21 QUESTION: Could I ask just one other
22 question?

23 MR. NEBEL: Yes, sir.

24 QUESTION: Is part of your claim that the
25 application of later regulations was forbidden by the

1 federal Constitution, or were they just forbidden by
2 state law?

3 MR. NEBEL: Well, they were forbidden both by
4 state law and by the federal Constitution to the extent
5 that they were applied without compensation.

6 Now, they are not illegal --

7 QUESTION: No, that isn't --

8 QUESTION: They are not illegal under the
9 Fifth Amendment, unconstitutional under the Fifth
10 Amendment to the extent that Hamilton has been
11 compensated.

12 As to the question of exhaustion of
13 administrative remedies, on October 2 -- keeping in mind
14 for just a moment a time line -- on October 2 of 1980,
15 for the first time, a plat was denied approval by the
16 Planning Commission. On October 3, in response to a
17 question from the developer as to what do we do next now
18 that our plat has been denied, an officer of the
19 Planning Commission wrote and suggested an appeal to the
20 Board of Zoning Appeals.

21 QUESTION: Forgive me.

22 Will you give me tha date again?

23 MR. NEBEL: Okay, October 2 was the denial of
24 the plat.

25 QUESTION: Right.

1 MR. NEBEL: October 3, a letter from the
2 Planning Commission.

3 QUESTION: This is all 1980.

4 MR. NEBEL: All 1980.

5 QUESTION: Right.

6 MR. NEBEL: And then on November 11, an appeal
7 was taken to the Board of Zoning Appeals. The Planning
8 Commission sent representatives, both the county
9 attorney and the county planner showed up to argue their
10 case. They lost.

11 On November 25, or 26th, Hamilton foreclosed
12 on the property. Prior to that time, the evidence is
13 clear in the record that the Planning Commission abided
14 by the Board of Zoning Appeals decisions. Temple Hills
15 is the only instance that the record reveals where the
16 Planning Commission refused to abide by the Board of
17 Zoning Appeals decision.

18 Moreover, in addition to the fact that the
19 Board of Zoning Appeals route was taken, in 1981, June
20 of 1981, moving forward in chronology, Hamilton
21 submitted two plats. One plat was a plat that had been
22 approved and reapproved on numerous occasions between
23 '73 and '79. The other plat was a plat that was
24 submitted in an attempt to comply with the Planning
25 Commission's request.

1 At that meeting, June 18 of 1981, the Planning
2 Commission turned down both plats submitted by the
3 Planning Commission. The county attorney was asked by
4 the developer's representative what do we do next? Do
5 we go to the Board of Zoning Appeals? The county
6 attorney said we will not listen to any opinion from the
7 Board of Zoning Appeals.

8 Now, in addition there is --

9 QUESTION: I gather the Board of Zoning
10 Appeals has no enforcement authority at all?

11 MR. NEBEL: Well, no, no, it is not
12 self-enforcing, Your Honor. The only way it can enforce
13 would be to pursue a common law writ of certiorari in
14 Tennessee.

15 QUESTION: I see.

16 MR. NEBEL: And of course, it is interesting,
17 as the Court noted, the Board of Zoning Appeals decision
18 in November of 1980 was not appealed by the Planning
19 Commission, and yet they arguing evidently that we
20 should have done more in our case.

21 QUESTION: Mr. Nebel, can I ask you another
22 one?

23 I don't want to interrupt you if you are not
24 finished with your point, but --

25 MR. NEBEL: Go ahead, Your Honor.

1 QUESTION: I had another question following up
2 on the problem that still troubles me somewhat.

3 Can there be a partial taking under your
4 view? Say that the Zoning Board said you can't use the
5 east half of the tract, you must keep it vacant, and
6 then you litigated that for five years, you finally
7 said, no, you can build on the east half as well as the
8 west half, would your theory apply to that?

9 MR. NEBEL: Well, Your Honor, under the
10 traditional principles of eminent domaine, you can't
11 have a partial taking.

12 As to whether or not there would be a partial
13 taking in the hypothetical case presented by Your Honor,
14 that would depend on an economic analysis. There might
15 be some --

16 QUESTION: No, but you would say that the part
17 that you are referring to, the east half of this large
18 tract, must be entirely vacant and cannot be used for
19 any commercial or residential purpose whatsoever because
20 of interest in open areas and all that sort of stuff,
21 and you have litigated that and say no, we are entitled
22 to use that.

23 Wouldn't that be a clear case of a complete
24 denial of economic use of that part of the tract, and
25 therefore wouldn't your theory apply?

1 MR. NEBEL: Well, Your Honor, as to that part
2 of the tract, there would be a denial of economically
3 viable use, but whether or not under those circumstances
4 you would look at the other tract, too, I think it would
5 depend on the facts of the case and whether or not
6 substantial justice required the Court to do that.

7 QUESTION: It seems to me that the principle
8 for which you contend could be applied to almost any
9 aspect of zoning regulation. That's what I'm trying to
10 think through. You say you can't build or can't build
11 above a certain height or can't build on a certain area,
12 you are totally taking to the extent that the
13 restriction applies.

14 MR. NEBEL: Well, not, no -- Your Honor, I
15 disagree with that. As this Court noted in Penn
16 Central, for example, there was a total denial of the
17 air space rights above the building, but that wasn't a
18 taking because the owner had a residual use in the Grand
19 Central Station terminal, an economically viable use.

20 That's not the case here. We've got
21 Hamilton -- the only property that Hamilton owned was
22 the 258 acre tract that it foreclosed on. There were no
23 residual rights, no economically viable use in that
24 tract. One hundred percent of Hamilton's property was
25 subject to these regulations, and the economic impact

1 was the total destruction of value. I think that
2 distinguishes Hamilton from the hypothetical of the
3 Court.

4 QUESTION: When you say the total destruction
5 of value, are you saying that not a single house could
6 have been built on that tract?

7 MR. NEBEL: Well, no, Your Honor. The
8 testimony at trial was that on this 258 acre tract, when
9 you consider all the objections raised by the Planning
10 Commission, you could obtain 67 scattered building
11 sites.

12 QUESTION: Well, that doesn't sound like a
13 total destruction of the use of that tract.

14 MR. NEBEL: Well, that's why I've tried to
15 proceed from a practical standpoint. Of course, any
16 land has some value, but to develop those 67 houses,
17 those lots, Your Honor, under the requirements of the
18 applicable zoning ordinance, you would have to put
19 sewers in, underground utilities, roads that met certain
20 specifications, etc. You can't just go out and build a
21 house out in the middle of that property. You would
22 have to meet the Planning Commission's own
23 requirements.

24 The cost of meeting those requirements would
25 be approximately \$2 1/2 million, according to the

1 record, whereas the maximum that the developer, that
2 Hamilton could have realized by selling those 67
3 scattered building sites would be \$1 1/2 million. So yo
4 would wind up -- any developer who bought that property
5 and wanted to build those 67 houses would have to do so
6 knowing that he would lose a million dollars on the
7 front end. And of course, nobody is going to do that.

8 No alternative uses were availale. The record
9 is clear, it was zoned only for residential. You
10 couldn't put commercial, agricultural or industrial uses
11 on the property.

12 QUESTION: And so you say that because of the
13 requirements they imposed for selling lots would have
14 cost \$2 1/2 million for 67 lots and you could have only
15 sold the lots for \$1 1/2 million, that is a denial of
16 any economic use.

17 MR. NEBEL: That's right, and the testimony at
18 trial, uncontradicted, was that Hamilton because of that
19 was unable to sell the property and because no one was
20 going to pay anything for the right to go in and develop
21 property at a million dollar loss and additionally has
22 pointed out there were no alternative uses for it and --
23 in this particular case.

24 Part of the problem is, Your Honor, you can't
25 just look at it in a vacuum. The property had been used

1 for six and a half years as residential property. A
2 golf course had been put in. All of those committed and
3 locked Hamilton in to a residential use development.

4 In addition to the fact that --

5 QUESTION: Let me ask just one other
6 question.

7 MR. NEBEL: Yes, Your Honor.

8 QUESTION: As I understand, there was a
9 finding of no substantive due process violation.

10 Was there also a question of whether there was
11 any procedural due process violation?

12 MR. NEBEL: Yes, and on a procedural due
13 process violation, the Court directed --

14 QUESTION: A verdict against.

15 MR. NEBEL: A verdict against, that's right,
16 and we of course appealed that.

17 QUESTION: We assume that there were total
18 fair procedures all the way through, then, for purposes
19 of analysis.

20 MR. NEBEL: For purposes of analysis, yes,
21 Your Honor.

22 QUESTION: Well, there's no issue, is there?

23 MR. NEBEL: Pardon, Your Honor?

24 QUESTION: The procedural due process issue is
25 not here now.

1 MR. NEBEL: No, it is not, Your Honor. We of
2 course appealed that to the Sixth Circuit, but the Sixth
3 Circuit said that that issue was predomitted by its
4 holding on the taking issue which gave us all the relief
5 that we sought.

6 On the exhaustion of administrative remedies
7 and state judicial remedies, the Petitioners argue that
8 we should have gone to state court first. Of course,
9 that isn't the law under Section 1983, and we had a
10 right of course to bring our federal claim, a violation
11 of a federal constitutional right, in federal court.
12 And then --

13 QUESTION: What constitutes the rights that
14 you claim were violated?

15 MR. NEBEL: We claim denial of equal
16 protection, substantive and procedural due process and a
17 violation of the Fifth Amendment.

18 Now, we brought both a direct claim under the
19 Fifth Amendment, a --

20 QUESTION: Do we have anything except the
21 Fifth Amendment claim before us now?

22 MR. NEBEL: No, Your Honor.

23 QUESTION: That's the only one, isn't it?

24 MR. NEBEL: That's the only one.

25 QUESTION: Well, what if your client had lost

1 before the Planning and Zoning Commission on the issues
2 you present and never appealed to the Board of Zoning
3 Appeals? Do you think you could have gone right into
4 federal court from the decision of the Planning and
5 Zoning Commission?

6 MR. NEBEL: In this case I think yes, Your
7 Honor. I think as a general abstract proposition you
8 have to exhaust your remedies except from a 1983
9 standpoint, I am aware of a lot of cases that say that
10 rule doesn't apply, but I think from a -- number one,
11 normally yes. In this case, not only did we exhaust our
12 remedies, but it would have been futile to attempt to do
13 anything more.

14 Hamilton went the extra mile simply to avoid
15 going to court. They couldn't make any money going to
16 court. The last thing that they wanted to do in this
17 case -- and the record is replete with references to the
18 fact that they wanted to work with the Planning
19 Commission and avoid the expense of litigation. They
20 can make more money by selling this property than by
21 bringing a claim in federal court.

22 The Petitioners argue the application of the
23 Davis case, which is a Tennessee Court of Appeals
24 decision cited in our brief, and say that that means
25 that there was an adequate state court remedy

1 available. First of all, our position is that under
2 Section 1983, we can bring a claim directly in federal
3 court. Secondly, our position is that even if there is
4 some requirement that you exhaust state judicial
5 remedies, that -- and the Justice Department brief
6 concedes on this point that even that is predicated upon
7 the existence of an adequate state court remedy, and in
8 our case, there is no existence of an adequate state
9 court remedy available.

10 The statute says on its face, and I quote --
11 this is 29-16-123, which is the statute they rely
12 upon -- "If, however, such person or company has
13 actually taken possession of such land, occupying it for
14 the purposes of internal improvement, then the owner can
15 bring a lawsuit."

16 The Davis case specifically refused to apply
17 29-16-123 because it said there was no allegation or
18 evidence -- and I am quoting, "No allegation or evidence
19 that the defendant government actually entered upon,
20 took possession of or used any of the real estate of
21 plaintiff."

22 So the Davis case actually supports our
23 interpretation of 29-16-123.

24 QUESTION: I suppose the existence of the
25 injunction against applying the later regulations but off

1 the running of the damages, is that it?

2 MR. NEBEL: Yes, Your Honor. It converted it
3 to a temporary taking.

4 QUESTION: Damages are not now accruing.

5 MR. NEBEL: That is correct, Your Honor.

6 QUESTION: And so what has happened to the
7 property after all this time?

8 MR. NEBEL: Well, Your Honor, it's not in the
9 record, but to respond to your question, the property --
10 they -- and it is interesting to note that development
11 has gone on under 1973 standards, these same standards
12 which they find --

13 QUESTION: So you filed a plat that has been
14 approved apparently.

15 MR. NEBEL: That is correct, Your Honor.
16 That's correct, under 1973 standards, Your Honor, not
17 under 1979.

18 QUESTION: Yes, I understand. Okay.

19 MR. NEBEL: In Ledbetter v. Beach, the
20 Tennessee Supreme Court in interpreting 29-16-123, found
21 that that statute did not apply -- and I am quoting
22 again -- "in the absence of a physical taking or direct
23 interference amount to a physical taking."

24 Moreover, the issue of whether we should have
25 gone to state court first has been raised too late. In

1 an opinion by Justice Brandeis styled *Twist v. Prairie*
2 *Oil & Gas Company*, 214 U.S. 684, this Court in a similar
3 context found that the petitioners had no right to
4 challenge the choice of forum at the late date of their
5 argument to the Supreme Court.

6 As to the existence of remedy, I think I have
7 made most of my point to this point. Our position is
8 that the Fifth Amendment is self-executing. If the
9 government takes it, they have to pay for it.

10 QUESTION: Let me ask you one other question
11 on this. In thinking back to some of the old rate cases
12 where a commission sets the utility rates at a low
13 level, then they appeal to the state supreme court, and
14 the state supreme court says no, that is a taking
15 without due process of law, the rates are too low, they
16 can't use their property, and they reverse and require
17 that the new rates be put into effect, would the
18 utilities always be able to get damages from the lower
19 commission in those cases?

20 I think they would under your view.

21 MR. NEBEL: Well, Your Honor, if you will run
22 that by me one more time again.

23 QUESTION: Well, there used to be -- there's
24 not too much of this litigation anymore, but you know,
25 public utility commissions regulate utility rates,

1 electric companies, telephone.

2 MR. NEBEL: Yes, I understand that.

3 QUESTION: And supposing the commission sets a
4 rate level that is so low that on appeal the company is
5 able to persuade the state supreme court that there was
6 a taking without due process of law because the rate was
7 so low they couldn't have any economically viable use of
8 their capital, would, in a case like that -- I
9 understand, then of course, the supreme court would say
10 no, you have got to let them charge the higher rate --
11 would the company also be entitled to damages from the
12 commissioners who set the wrong rate?

13 MR. NEBEL: Well, Your Honor, no. And in my
14 mind, the hypothetical that you presented is merely a
15 diminishing of economically viable use. I don't see
16 where there's --

17 QUESTION: Well, the theory of the rate
18 regulation often was that it was a taking without due
19 process.

20 MR. NEBEL: Right. Well, I just -- you know,
21 a total denial of economically viable use in a case like
22 that I think would be very, very difficult to prove.

23 QUESTION: Well, you have to operate at a
24 loss, just as your -- your taking here is not -- you
25 know, you could still sell the 67 houses, but your point

1 is you would lose money if you did. So it is a taking
2 in the sense that it is an unprofitable use of the
3 property, and any time regulation causes a citizen to
4 make unprofitable use of his property, why would it not
5 be a taking that would give rise to this very kind of
6 claim you have here?

7 MR. NEBEL: Well, our position is not just
8 that it was unprofitable. I mean, it wasn't a case of
9 just breaking even or -- and it's more than -- we
10 couldn't sell it. If you analyze the traditional bundle
11 of property rights, which this Court has referred to in
12 a number of its decisions in this area, we had -- the
13 right to alienate that property was from all practical
14 standpoints --

15 QUESTION: But it really wasn't. I mean, you
16 could have sold it. You would have lost money selling
17 it, but you were not disabled from selling it.

18 MR. NEBEL: That -- well, disabled --

19 QUESTION: The test really is whether you can
20 make any money out of what you want to do with your
21 property.

22 MR. NEBEL: The record in this case, Your
23 Honor, is that Hamilton tried to and could not sell it.

24 Now --

25 QUESTION: Well, could not sell it at the

1 price it wanted. You could have sold it at \$10 an acre,
2 I'm sure.

3 MR. NEBEL: Well, it could have sold it
4 probably for some nominal value.

5 QUESTION: Sure.

6 MR. NEBEL: But --

7 QUESTION: Well, is your \$2 1/2 million that
8 you say you would have had to pay to meet the
9 requirements of these lots, is that just in expenses
10 over and above what you had already paid for the land,
11 or does that include the basic price that you had paid
12 for the land?

13 MR. NEBEL: No, that includes additional
14 expenses. The economic analysis of our expert witness
15 was based on the cost of construction as measured
16 against gross sales.

17 QUESTION: Well, but now, does that \$2 1/2
18 million figure include the price you paid for the land
19 as well as the price of putting the requirements on?

20 MR. NEBEL: No, Your Honor. It would have
21 been a cost of constructing sewers and making additional
22 improvements in the property.

23 QUESTION: And it is those additional
24 improvements that account for all of the \$2 1/2
25 million.

1 MR. NEBEL: Yes, Your Honor, that's my
2 understanding of our expert's testimony. Now, it
3 appears in the record.

4 QUESTION: Did you try the case?

5 MR. NEBEL: Yes, Your Honor.

6 Our position is that plaintiffs should not be
7 specially privileged under the Constitution. Affirming
8 the Sixth Circuit would merely bring needed
9 constitutional discipline to this area of the law. The
10 Fifth Amendment addresses takings, not just some
11 takings. Regardless of the mechanics of a taking,
12 whether it be by regulation or eminent domaine, the
13 Fifth Amendment makes takings illegal, at least to the
14 extent they are uncompensated.

15 Liberty and property as so intertwined that
16 one cannot have meaning without the other, and under
17 principles of fundamental fairness, we request that this
18 Court affirm the decision of the Sixth Circuit.

19 QUESTION: Do the complete instructions to the
20 jury appear in the record?

21 MR. NEBEL: Yes, Your Honor.

22 QUESTION: And were there any objections on
23 either side to those instructions as they were
24 delivered?

25 MR. NEBEL: Not as they were delivered. There

1 was an objection by the Planning Commission to some of
2 the special interrogatories submitted to the jury, but
3 not to the instructions on the law.

4 QUESTION: No instructions on the law as to
5 what a taking was or anything?

6 MR. NEBEL: There were instructions on --

7 QUESTION: I know, but no objections?

8 MR. NEBEL: No objections, no, Your Honor.

9 CHIEF JUSTICE BURGER: Very well.

10 You have one minute remaining, Mr. Estes.

11 ORAL ARGUMENT OF ROBERT L. ESTES, ESQ.,

12 ON BEHALF OF THE PETITIONERS -- Rebuttal

13 MR. ESTES: All right.

14 Mr. Chief Justice, and may it please the
15 Court:

16 My recollection of the jury's charge is a
17 little bit different from Mr. Nebel's. I don't recall
18 the judge charging the jury that if there was any
19 economical viable use there was no taking. Instead, I
20 remember him saying if they were denied economically
21 viable use, then there was a taking. He did not define
22 how much economical viable use would have to be --

23 QUESTION: Well, all of the instructions
24 appear in the record, I take it.

25 MR. ESTES: They do, Your Honor.

1 QUESTION: So I guess we can find that out.

2 MR. ESTES: They do.

3 Secondly, we take the position that just
4 because there would be a taking under this conduct if
5 the situation were permanent does not necessarily
6 require a finding of a compensable taking if it is
7 temporary, particularly where the deliberative process
8 is still going on.

9 And I point out to I Appendix page 370,
10 Plaintiff's Exhibit 9035, which is a letter from the
11 Planning Commission here to Mr. Killebrew, who was the
12 representative of the Hamilton Bank, on June 23, 1981
13 with regard to this turndown of this plat whereby he
14 advises them of the problems there and tells them if
15 there is any question, notify my office. Staff will be
16 glad to work with you and your representatives to
17 correct deficiencies so as to comply with the county
18 zoning and subdivision regulations.

19 CHIEF JUSTICE BURGER: Your time has expired.

20 MR. ESTES: Thank you.

21 CHIEF JUSTICE BURGER: Thank you, gentlemen.

22 The case is submitted.

23 We will hear arguments next in Devine v. NAACP
24 Legal Defense Fund.

25 (Whereupon, at 1:49 o'clock p.m., the case in

1 the above-entitled matter was submitted.)

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

erson Reporting Company, Inc., hereby certifies that the
attached pages represents an accurate transcription of
electronic sound recording of the oral argument before the
preme Court of The United States in the Matter of:
-4 - WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL., Petitioners
v. HAMILTON BANK OF JOHNSON CITY

d that these attached pages constitutes the original
manuscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

'85 FEB 26 P 3:32

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE