

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-2015

TITLE MacDONALD, SOMMER & FRATES, Appellant V.
COUNTY OF YOLO, ET AL.

PLACE Washington, D. C.

DATE March 26, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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MacDONALD, SOMMER & FRATES, :

Appellant, :

V. : No. 84-2015

COUNTY OF YOLO, ET AL. :

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Washington, D.C.

Wednesday, March 26, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 12:58 o'clock p.m.

APPEARANCES:

HOWARD N. ELLMAN, ESQ., San Francisco, California; on
behalf of the appellant.

WILLIAM L. OWEN, ESQ., Sacramento, California; on
behalf of the appellees.

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P R C C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in MacDonald, Sommer, and Frates against the County of Yolo.

Mr. Ellman, you may proceed whenever you are ready.

ORAL ARGUMENT OF HOWARD N. ELLMAN, ESQ.,
ON BEHALF OF THE APPELLANT

MR. ELLMAN: Thank you, Your Honor.

Mr. Chief Justice, and may it please the Court, this is a land use regulatory taking case that comes from the State of California.

The California state courts dismissed appellant's complaint in this case for legal insufficiency, finding it insufficient to state a claim for relief under the Fifth and Fourteenth Amendments to the United States Constitution and under Title 42, Section 1983 of the United States Code.

Now, as a result of that procedural situation, we stand before you asking for a remand of this case to the California courts for trial of the issues of fact, and the issues of fact will address the three key elements of a regulatory taking case, and I would like to frame those issues, because I would like to discuss each of them or at least aspects of each of them in the

1 argument today within the framework of our claim.

2 The first is the question of rightness. What
3 if we can prove, as we have alleged in the complaint,
4 that what occurred in this case was not simply the
5 denial of a subdivision map but the imposition of
6 regulations which preclude the County of Yolo and the
7 City of Davis from allowing any use of the property of
8 any kind whatsoever except uses for agricultural and
9 open space.

10 It is our contention that under the rightness
11 theory articulated by this Court in the Hamilton Bank
12 case and the other cases which have dealt with that
13 issue that such a result would be a definitive result,
14 definitively applying the regulations to the property in
15 question, and that those determinations are essentially
16 issues of fact for a trial.

17 Now, assuming that we overcome that hurdle,
18 what if we can prove, as we have alleged in our
19 complaint, that the restrictions applied to the property
20 of MacDonald, Sommer, and Frates deprived that property
21 of all of its economic use and deprive the property
22 owner of their reasonable investment-backed
23 expectations.

24 It is our contention that if we succeed in
25 doing that, that we will have established a taking, a

1 regulatory taking within the precedents which this Court
2 has articulated, some of them as recently as the
3 Connelly case, which I guess is just about a month old
4 today.

5 And finally, if we prove the restriction as I
6 have described it, and if we approve its impact as we
7 have pleaded it, what is the remedy, and here, as you, I
8 am sure, are aware, the California courts have
9 categorically denied that there is any possibility to
10 recover compensation in a regulatory taking context.

11 Indeed, if you will look at Footnote 57 at
12 Page 27 of our reply brief, we have given you some
13 history on the Gilliland litigation where the
14 California Supreme Court has gone to great lengths to
15 cause depublication of an opinion of the Court of
16 Appeals that suggested that its position on the issue of
17 compensation might be somewhat different than that which
18 was held by this Court here.

19 QUESTION: What is the significance, counsel,
20 of depublication from the Supreme Court of California to
21 the Court of Appeals?

22 MR. ELLMAN: The opinion when it is
23 depublished under the rules can no longer be cited as
24 authoritative in California courts, so for all practical
25 purposes the opinion ceases to exist for everybody

1 except the litigants who are the subject of the
2 decision.

3 QUESTION: It is res judicata, and that's it.

4 MR. ELLMAN: As between the parties, yes.
5 Collateral estops any other issue that they may raise.

6 QUESTION: And I take it that that position of
7 the California courts means that you would not have an
8 opportunity to prove what you say you could prove in
9 this case.

10 MR. ELLMAN: Well, yes, that's true, Your
11 Honor, and actually the court has decided against us in
12 California, so the California issues, I think, have been
13 resolved, and I think it is Joint Appendix 132 or right
14 thereabouts --

15 QUESTION: Well, why are you precluded now
16 from proving what you say you can prove at trial?

17 MR. ELLMAN: As far as -- well, because the
18 California court has said we failed to state a cause of
19 action.

20 QUESTION: And for what reason?

21 MR. ELLMAN: First, because we are seeking
22 compensation.

23 QUESTION: Now, is that an independent
24 ground?

25 MR. ELLMAN: Yes, I think it is.

1 QUESTION: Well, is there another independent
2 ground?

3 MR. ELLMAN: Well, the court also said because
4 we failed to plead a taking by the taking standard which
5 it applies, and you see, that is an issue which we
6 believe implicates federal constitutional principles.
7 The California court has from time to time said that a
8 regulation which is excessively burdensome as to a
9 property owner, notwithstanding the fact that it is a
10 legitimate exercise of the police power --

11 QUESTION: What is wrong with it saying on
12 what was before it that you didn't plead a taking?
13 Because they just misunderstood what the law was?

14 MR. ELLMAN: I think so, Your Honor, yes.

15 QUESTION: In terms of your well pleaded
16 complaint?

17 MR. ELLMAN: Yes, sir. And it is a confusing
18 opinion. If you will look at Page 129 of the Joint
19 Appendix, you will see where the court agrees that we
20 have well pleaded the issue of futility, and yet later
21 on in the opinion at Joint Appendix 134, I believe, the
22 court says, nonetheless, having pleaded futility, we
23 should have made another application. I mean, it
24 doesn't really make much sense. The basic --

25 QUESTION: Didn't the Court of Appeals

1 specifically find that a less intensive development
2 proposal might be approved?

3 MR. ELLMAN: The Court of Appeals said that in
4 the second half of its opinion.

5 QUESTION: And aren't we bound by that?

6 MR. ELLMAN: I do not think so, Your Honor.

7 QUESTION: Why not?

8 MR. ELLMAN: Because I think that we have
9 stated a case for relief under the Fifth and Fourteenth
10 Amendment of which this Court is the final arbiter when
11 we plead in our complaint. Bear in mind what occurred
12 here. We plead that any application would be futile.
13 The court --

14 QUESTION: Yes, but the Court of Appeals says
15 not so.

16 MR. ELLMAN: Well, the Court of Appeals said
17 not so on a case dispositive pleading motion. I mean,
18 that -- I don't think that -- if it is possible for a
19 state court to find against a complaint on a case
20 dispositive pleading motion relying on the findings of
21 the defendant in the case, the County Board of
22 Supervisors, if you will, you are in a situation where a
23 plaintiff who accuses a local governing body of having
24 violated your constitutional rights can insulate itself
25 from any liability by making a finding that it hasn't

1 done so, which the court will then rely upon to prevent
2 a trial.

3 See, we were denied a trial in this case on
4 that issue. Essentially the record was, we plead no
5 use. Then the county comes back and says, yes, you have
6 a use, and the Court of Appeals found their finding
7 conclusive, not even allowing us to go to trial. I
8 submit and it is our theory here that if that is what
9 the California courts have decided, it does not meet
10 constitutional standards because it effectively deprives
11 us of a constitutional right.

12 QUESTION: But the observation of the
13 California Supreme Court, rather, the California Court
14 of Appeals was that if you had asked for a less
15 intensive residential use, and you were asking for some
16 -- more than four homes to the acre, as I recall,
17 perhaps the zoning board would have gone along.

18 MR. ELLMAN: Your Honor --

19 QUESTION: Is that just flatly wrong?

20 MR. ELLMAN: It is flatly wrong, and I would
21 be happy to --

22 QUESTION: Well, it is certainly contrary to
23 your allegations in the complaint.

24 MR. ELLMAN: It is contrary to the allegations
25 of our -- you mean, that it was wrong, it is contrary --

1 QUESTION: No, no.

2 MR. ELLMAN: I am sorry.

3 QUESTION: You have said it would have been
4 futile.

5 MR. ELLMAN: Right.

6 QUESTION: And that is one if the issues that
7 you would want to try out.

8 MR. ELLMAN: That's correct. And our
9 complaint frames the issue. We have the burden of
10 proving it, and I submit to you if we can't prove that,
11 we lose. It is just that simple. But it is not an
12 issue which can be determined conclusively by the other
13 side putting its submittal in and having that submittal
14 found as conclusive.

15 QUESTION: It sounds like what you are
16 complaining about is that the California courts didn't
17 give you your day in court. They didn't let you have a
18 hearing. And that would be, what, some kind of a due
19 process claim? It isn't a takings claim.

20 MR. ELLMAN: Well, Your Honor, what they did
21 is, they established -- they reached a decision in
22 effect which deprived of us our right to pursue our
23 takings claim. They decided in effect that the findings
24 of the defendant, the defendant county of Yolo were
25 going to be conclusive and prevent us from having a

1 trial, but more importantly than that, it is a forum
2 which absolutely denies what we claim is a
3 constitutionally mandated remedy.

4 We claim that we are entitled to compensation.
5 The California courts say --

6 QUESTION: You are not entitled to
7 compensation unless there is a taking, and it sounds
8 like you are saying we can't prove a taking because they
9 won't let us go to trial.

10 MR. ELLMAN: That's correct.

11 QUESTION: And that isn't a question here then
12 of taking. It is a question of whether California
13 furnished you due process of law, I guess.

14 MR. ELLMAN: Well, Your Honor, it is our
15 position that it becomes a question of a taking because
16 we claim that under our complaint, that we pleaded the
17 issue of futility and rightness, and the Court of Appeal
18 agreed, and by the standard -- and the Court of Appeal
19 of California agreed, and by the standard of what we
20 ought to be entitled to do in order to vindicate our
21 constitutional rights, that that should be enough. It
22 is not enough for the Court to then go on and say, well,
23 they pleaded futility but it wasn't futile because they
24 could have made another application.

25 This Court sits in judgment to review what the

1 courts below have done on constitutional issues, and
2 that is essentially our position. I am as puzzled, I
3 must confess, by what the Court of Appeal did as between
4 those parts of the opinion as you appear to be. I mean,
5 I can't reconcile them.

6 QUESTION: Mr. Ellman, may I ask you one
7 question?

8 MR. ELLMAN: Yes, sir.

9 QUESTION: Under your view of the case, when
10 did the taking occur?

11 MR. ELLMAN: The taking occurred when we were
12 denied our subdivision approval in the process by which
13 that denial occurred.

14 QUESTION: That would be in June of 1977?

15 MR. ELLMAN: Well, the findings of fact were
16 actually made in February, I believe, in '77, became
17 final in June of '77, and that would be about right,
18 yes.

19 QUESTION: And when did you file this
20 complaint?

21 MR. ELLMAN: October of 1977. Well, the
22 fourth amended complaint was filed in 1981.

23 QUESTION: I see, and when did you file your
24 case in which you sought mandamus or equitable relief?

25 MR. ELLMAN: The mandamus case was originally

1 filed concurrently with the filing of the case seeking
2 damages.

3 QUESTION: Does California procedure provide
4 for those to go forward jointly? Why would they go
5 separately?

6 MR. ELLMAN: Well, the mandate case is a case
7 which is in the nature of appellate review. It is
8 initiated by a petition, and it is tried on an
9 administrative record, and typically you file it with a
10 memorandum of points and authorities, and an alternative
11 writ is issued which directs the administrative body to
12 set aside what it has done subject to review of the
13 administrative record. It is not like a case initiated
14 with a claim followed by an answer and with discovery.

15 QUESTION: Why wouldn't that case in the
16 normal course of events have gone forward before this
17 one? That is one thing that puzzles me.

18 MR. ELLMAN: I can give you some history on
19 the mandate case. At the time this lawsuit was
20 initiated, this Court had not yet decided Penn Central,
21 and there was tremendous uncertainty in the law as it
22 developed. In addition to that, it was our perception
23 that you could not comfortably join a mandate action as
24 part of an action, a normal civil action which might
25 proceed on the basis of discovery and with an answer and

1 proceed in the ordinary course.

2 As the litigation developed, though, when it
3 became clear that the California courts were only going
4 to allow the remedy of invalidation as a result of the
5 mandate petition, we took the position that that is a
6 constitutionally inadequate remedy, and so that --

7 QUESTION: How could you take that position
8 without finding out first what kind of relief you might
9 have gotten?

10 MR. ELLMAN: Well, because the California
11 courts had told us that all you are entitled to in a
12 mandate case is to set aside the decision below, and you
13 go back and they reapply a different set of
14 restrictions.

15 QUESTION: Is it not conceivable that in that
16 case you would have gotten precisely what the court said
17 at the end of its opinion in this case, that you would
18 have a right to file an application for a less intensive
19 use?

20 MR. ELLMAN: No, sir, and I would like to
21 explain to you why, if I may. And unfortunately this
22 requires you to get into a little bit into the quagmire
23 of the California land planning law, but you don't have
24 to decide the issue, because it is just a question that
25 can be referred back for trial.

1 California requires that all approvals be
2 found consistent with a valid and internally consistent
3 general plan. Now, the general plan consists of several
4 elements. There is a land use element which designated
5 this property as residential, but there are also
6 development policies, and the development policy which
7 was applied to us and found controlling in this case we
8 have set out in pertinent part in Footnote 3 on Page 3
9 of our reply brief.

10 And it is a development policy that says
11 notwithstanding the fact that we have designated this
12 land residential, it cannot be developed until it is
13 annexed to the City of Davis, because we, the County of
14 Yolo, even though we are the planning jurisdiction, and
15 even though we have determined with our planner's hat on
16 that residential is the most appropriate use of the
17 property, you can't develop or make any use of the
18 property that requires urban service until you take the
19 property into Davis.

20 And Davis came to our hearing, to the hearing
21 on our findings, and said, our law controls, our
22 ordinances control. We have this zoned agricultural and
23 open space, and furthermore, Yolo County, you lack the
24 authority to grant any approval.

25 Now, we can prove at trial -- this is

1 essentially as the party whose complaint was dismissed,
2 I suppose. I make this in the nature of an offer of
3 proof, but I think it is well within the terms of our
4 pleadings, we can prove at trial that Yolo County under
5 the authorities I have cited in Footnote 4 of our reply
6 brief lacks the legal authority to grant us the right to
7 do anything.

8 The California Court of Appeals did not
9 recognize that, but if you read the Friends of B Street
10 case, or the Save El Toro case, or the other cases I
11 have cited, you will see that with the county having
12 applied that development policy to us --

13 QUESTION: That is very difficult, Mr.
14 Ellman. You know, when we have a Court of Appeals
15 opinion in your case that doesn't say that at all, for
16 you to tell us that other California cases say
17 something, we are not authorities on California law,
18 because only the judges of the California Court of
19 Appeal are.

20 MR. ELLMAN: Well, Your Honor, I understand
21 that, and I appreciate the difficulty, and I think that
22 the area of the law is peculiar to California. There is
23 no question about that. All we are asking for -- we are
24 not asking you to resolve those issues. We are -- what
25 I am saying to you is, we have pleaded that

1 notwithstanding what the Court of Appeal said, that it
2 would be futile for us to make any other application,
3 and that Yolo County could not grant us any approval,
4 and we can prove that at trial, and that we are
5 entitled, having --

6 QUESTION: Then for you to win, we have to
7 disagree with the California Court of Appeals on an
8 issue of California state law, as I understand you.

9 MR. ELLMAN: I don't believe that is true,
10 Justice O'Connor, with all due respect. I think that
11 you need only say that if we can plead, if we can prove
12 what we have pleaded, the very simple, straightforward
13 question, that we have stated a case, a takings case
14 cognizable under the Fifth and Fourteenth Amendment and
15 42 USC Section 1983.

16 QUESTION: That sounds like an advisory
17 opinion or something in the face of a holding by the
18 California court to the effect that you can't do that,
19 that you could seek application for a less intensive
20 development with a chance of success.

21 MR. ELLMAN: Well, I disagree with that, but
22 obviously -- but I would like to suggest one thing to
23 you. If you look at the California Court of Appeal
24 opinion, you will see the last part of the opinion talks
25 about the Civil Rights Act, the 42 USC Section 1983, and

1 it says that, well, we didn't plead a due process case,
2 so we are not entitled to a remedy.

3 I mean the California Court of Appeal no
4 disrespect, but I mean that is a proposition so plainly
5 erroneous that it ought to suggest some at least
6 question about the internal integrity of that opinion.
7 It is our position, and if it isn't sufficient here,
8 then that will be the decision of the Court, that we are
9 asking you to remand to the California trial court
10 advising that court that if we can prove what we have
11 alleged, that there is no other application available to
12 us, and that we can prove that those restrictions
13 deprived us of all economic beneficial use of our
14 property, then we have met the test of rightness and we
15 have established a taking.

16 QUESTION: What was your property zoned in the
17 County of Yolo when you made the application?

18 MR. ELLMAN: Residential. We were in
19 accordance with all the applicable zoning and general
20 plan designations.

21 QUESTION: And your submission was in
22 accordance with the setback and minimum lot area and all
23 those --

24 MR. ELLMAN: Yes, sir. It complied in all
25 those respects. The only problem was, it did not comply

1 with this development policy.

2 QUESTION: And the development policy was not
3 to allow any residential building in Yolo County until
4 the part was annexed to the City of Davis?

5 MR. ELLMAN: That's correct, and a lot of
6 California counties have somewhat similar policies.
7 Now, the County Board of Supervisors found a number of
8 deficiencies --

9 QUESTION: Other reasons.

10 MR. ELLMAN: Right, but our pleading is, and
11 as I say, we are prepared to prove at trial that the
12 application complied in all respects with every land use
13 regulation ordinance of the County of Yolo applicable to
14 that property at the time except this development
15 policy.

16 QUESTION: Then what is the California law
17 when you submit your subdivision map, which I presume
18 asks approval for the subdivision. If everything
19 complies with every existing zoning regulation, what
20 discretion does the Board of Supervisors have?

21 MR. ELLMAN: Well, they have the discretion to
22 deny it on several grounds. First, in this case, they
23 applied a development policy to override the land use
24 element, which is fairly common.

25 QUESTION: And that is consistent with

1 California law.

2 MR. ELLMAN: Correct, that was -- and, see, we
3 are not arguing -- we pleaded in our complaint a number
4 of aspects where we thought that what they did to us was
5 wrong, to use a generic, imprecise term. But the fact
6 is that I think those are California issues in that we
7 stand here having to admit what has occurred is a
8 legitimate exercise of the police power as the
9 California court views it, but as I think you, sir,
10 wrote for the Court in Kaiser Aetna, the question of
11 whether or not there is a taking is a wholly separate
12 question, and that is the wholly separate question that
13 we are attempting to present here.

14 QUESTION: Mr. Ellman, was this development
15 policy adopted by the county after your client bought
16 the property?

17 MR. ELLMAN: Yes, I believe so.

18 QUESTION: I see, but you don't contend that
19 was the taking, adopting the policy.

20 MR. ELLMAN: No, because it wasn't applied --
21 you see, if we had come to this Court -- if we had filed
22 a case without having made an application, and I was
23 standing here trying to tell you that that was going to
24 be applied to override the land use element, you would
25 say don't tell me that until you have made an

1 application, as I read Agins, and we have no quarrel
2 with that.

3 QUESTION: Yes, but the Court of Appeals has
4 now told us you can make another application, so I am
5 not really sure it is all that different. If it is the
6 development policy, it totally frustrates your use of
7 the property.

8 MR. ELLMAN: Well, our problem -- and I
9 understand that problem. Our problem is that that is a
10 neverending process. I mean, I hope you can understand
11 some of the concern when you get an opinion from the
12 Court of Appeal, and I practice in the state, I have
13 been doing it for 26 years, and here is an opinion that
14 says in the beginning the complaint has got to be taken
15 as true for purposes of demur. Here are the facts that
16 have been pleaded. None of this stuff about conclusory
17 pleading or anything like that that we have in the FLE's
18 brief, and one of the facts that has been pleaded is
19 that it would be futile, and this is recited in the --

20 QUESTION: Yes, but you could have filed
21 precisely that complaint before you filed this
22 application. You could have made the same general
23 allegation, then gone ahead and proved, as you can now,
24 that the development policy makes any development
25 absolutely impossible.

1 MR. ELLMAN: Well, Your Honor --

2 QUESTION: It may have been a little harder
3 but you could have done it.

4 MR. ELLMAN: -- I believe, though, that this
5 Court's opinion in the Agins case prevents me from doing
6 that. I think that what the Court said in Agins is that
7 I cannot come to court and state a Fifth or Fourteenth
8 Amendment claim by virtue of land use regulations until
9 I have first made an application to demonstrate how
10 those regulations have been applied.

11 We have done that. We have done that, and all
12 we ask now is a day in court to prove exactly how they
13 have been applied.

14 One other point before it escapes me, and it
15 is a point I would really like to make. As far as the
16 point when the taking occurs, we are -- I am very
17 mindful of the position that you took in the opinion you
18 wrote, Mr. Justice Stevens, in the Hamilton Bank case
19 about the fact that the friction of the regulatory
20 process is something to which all property owners hold
21 their property.

22 We don't disagree with that, but we want you
23 to understand the California context. In California, we
24 have something that is euphemistically referred to as a
25 Permit Streamlining Act, which allows one year to

1 consider applications. The application procedure
2 requires a substantial period of time before the
3 application is deemed complete, so there is more than
4 one year within which to consider and act on
5 applications.

6 We have a very, very tough issue exhaustion
7 doctrine, which means that I cannot stand in front of a
8 local planning body and fust over my arguments and then
9 go to court and challenge them on something I didn't
10 fully and fairly raise in front of them, so the local
11 governing bodies that impose these restrictions, and
12 these are very restrictive things -- they can be based
13 entirely on aesthetics, entirely on how people feel
14 about their community and where they live and so forth
15 -- they have a year plus some additional time to
16 consider them and to consider all the issues and
17 arguments that can be raised, and our position is that
18 when they make a decision that is excessively
19 burdensome, exceeds constitutional bounds, that they
20 ought to be responsible for that and responsible in
21 money damages, that to impose liability in such a case
22 is just like what this Court said in Mailey versus
23 Briggs very recently, that it creates a necessary
24 restraint, a valuable restraint.

25 QUESTION: But in order for us to reverse the

1 Court of Appeals, we don't have to find that there are
2 interim damages available for a taking. All we have to
3 do is say that you have pleaded a taking.

4 MR. ELLMAN: That's correct, and tell the
5 court that the damages we prove, that we are entitled to
6 be compensated, we are entitled to just compensation for
7 the damages we prove.

8 QUESTION: No, we don't have to say that, it
9 doesn't seem to me. Your Court of Appeals has said, A,
10 there is no taking, and B, if there were, there are no
11 interim damages available. All you can do is get the
12 taking set aside. We don't have to decide both those
13 questions to adjudicate this case. We could simply
14 decide you have alleged sufficient facts to show a
15 taking.

16 MR. ELLMAN: Well, we have asked you also to
17 direct the California courts on what the remedy is. I
18 am mindful of the argument that has been made in the
19 Solicitor General's brief that that is an open question,
20 but the question of whether compensation is required
21 once you find a taking, as was stated in the San Diego
22 dissent, or whether the compensation claim is just
23 conditional is still an open question here.

24 So I suppose I have to agree with you,
25 although we obviously are arguing, and I hope

1 persuasively, that compensation is the only meaningful
2 remedy.

3 QUESTION: Mr. Ellman, do you think ultimately
4 it is possible that ripeness is an element of a taking,
5 that there can't be a taking until it is ripe for
6 consideration?

7 MR. ELLMAN: Yes, I really do. I mean, it is
8 the same concept that I was trying to explain in
9 connection with our Permit Streamlining Act. We are
10 prepared to accept the notion that until you make an
11 application and go through the process and lay all your
12 issues and arguments in front of the regulating body,
13 assuming that they have a process by which you can do
14 that, which is very easy, by the way. If I hadn't run
15 out of space, I have drafted an amendment, a proposed
16 ordinance to include in my reply brief. It was very
17 short. That that should be required.

18 We have no problem with that. We claim we did
19 that, and we are prepared to prove it. We just need the
20 chance.

21 I would like to reserve the balance of my time
22 for rebuttal, if I may. Thank you.

23 CHIEF JUSTICE BURGER: Mr. Owen.

24 CRAL ARGUMENT OF WILLIAM L. OWEN, ESQ.,

25 ON BEHALF OF THE APPELLEES

1 MR. OWEN: Thank you.

2 Mr. Chief Justice, and may it please the
3 Court, the appellant's complaint here alleges that the
4 county denied one relatively intensive subdivision
5 proposal based upon specific planning, public service,
6 and safety reasons.

7 We advance two basic propositions. First,
8 denial of one specific subdivision proposal is not a
9 final determination as to how the appellant's land may
10 be used, and thus no ripe taking claim has been alleged
11 by the complaint.

12 Second, even if ripeness is found to exist
13 under these allegations, the allegations of this
14 complaint do not state a taking whether analyzed under
15 either the just compensation clause or the due process
16 clause.

17 I would like to address some of the remarks
18 that were made in counsel's prior argument in regard to
19 the urban development policy of the county. Here we
20 have a decision of the Court of Appeal that rules as a
21 matter of California law that the denial of one specific
22 map does not preclude other valuable uses under the
23 county's judicially noticed zoning regulations.

24 Oddly, the property owner wants to go to trial
25 as a matter of proof to prove that the Court of Appeals

1 was incorrect in interpreting the county's zoning
2 regulations.

3 QUESTION: Mr. Owen, I take it then you don't
4 agree with Footnote 3 in the petitioner's reply brief --

5 MR. OWEN: No, we do not.

6 QUESTION: -- where it says about the Yolo
7 County.

8 MR. OWEN: No, we do not, Your Honor.

9 QUESTION: Well, has it been your position in
10 this case that the petitioner was entitled to some
11 residential use of this land?

12 MR. OWEN: Yes, as long as the property is
13 zoned residential and planned residential in the county,
14 which it is, the land use regulations of the county
15 prescribe that that is a permitted use, and there is no
16 prohibition against that use.

17 QUESTION: Has the county ever approved a use
18 contrary to the City of Davis's recommendation or
19 desire?

20 MR. OWEN: I am not sure, but they are right
21 now embroiled in a fight over one, and the outcome is
22 unclear.

23 QUESTION: It appears that as a practical
24 matter the county has not and will not approve any such
25 plan if the City of Davis doesn't say, fine, go ahead.

1 MR. OWEN: Well, I don't know that that
2 conclusion -- I honestly couldn't reach that conclusion,
3 and I know the communities. The fact is that Yolo
4 County is a very agricultural community, and they have
5 had a policy for many years that "urban" developments
6 occur within cities simply because cities are best able
7 to provide the services that people demand when an urban
8 type development occurs.

9 That is a matter of public fiscal policy and
10 planning policy that has been long in existence. And --

11 QUESTION: Well, but now here the petitioner
12 was asking for 160 houses on 44 acres. Would that be
13 regarded as an urban development?

14 MR. OWEN: I believe it would, Your Honor, and
15 that is precisely the point with regard to this argument
16 in Footnote 3. The term "urban development" is not
17 defined at all, and in fact if you -- we didn't include
18 these zoning classifications because this new argument
19 has just been raised.

20 But in the clerk's supplemental transcript you
21 will find the county zoning ordinance, and if you look
22 at the agricultural zone for general agriculture, or if
23 you look at the residential suburban zone, which is a
24 low density residential zone, residences may be
25 constructed up to one per half-acre in residential

1 suburban, and it is my position that you can't have a
2 ripe taking claim by fiat.

3 QUESTION: Okay, so what was this zoned at the
4 time of the application?

5 MR. OWEN: The property was zoned R-1, R-2,
6 R-3, and R-4 as to precise areas.

7 QUESTION: What does that mean?

8 MR. CWEN: Well, each area, each geographic
9 area has a specific set of standards which outline the
10 maximum densities that are permitted within that zone.

11 QUESTION: Well, did this subdivision plan
12 that was submitted with 159 lots, did that comply with
13 those existing zoning classifications, or would it have
14 required rezoning?

15 MR. CWEN: No, the rezoning would not have
16 been required. They were within the maximum densities
17 permitted in those zoning classifications. But as is
18 pointed out in appellant's opening brief, the fact that
19 you have zoning on property only outlines the use and
20 the maximum densities. The actual division for purposes
21 of sale, lease, or financing, or for the development of
22 public streets depends upon being within those maximums
23 and also demonstrating that the plan and design will
24 work under the applicable county policies, development
25 policies.

1 QUESTION: Why did the Zoning Board turn this
2 down?

3 MR. OWEN: The Planning Commission or the
4 Board of Supervisors?

5 QUESTION: The Planning Commission in the
6 first instance.

7 MR. OWEN: The Planning Commission, I do not
8 recall whether they made formal findings or not.

9 QUESTION: Did the supervisor make formal
10 findings?

11 MR. OWEN: Yes, and those are Exhibit C to the
12 complaint, and they are included in the Joint Appendix,
13 and they go into great detail, and in fact on Page 75,
14 Finding Number 12 of the board specifically refers to
15 this urban development type concept, and yet you can see
16 if you read the board's evaluation that that was not a
17 precluding factor.

18 In other words, the board didn't say because
19 of this policy we have to deny this project. They went
20 through the entire list of public services that would be
21 required to be provided to this subdivision, and they
22 determined that the application was inadequate because
23 it made no provision as to how the services would be
24 maintained and operated.

25 QUESTION: Okay. You have got some 18 reasons

1 here for turning the thing down, and supposing I am in
2 the petitioner's spot and I see these reasons, and it
3 says the City of Davis has officially opposed the
4 subdivision because it is inconsistent with the general
5 plan.

6 MR. OWEN: Yes.

7 QUESTION: Does that mean to me that until the
8 City of Davis approves what I want to do, the Board of
9 Supervisors of Yolo County is going to say no?

10 MR. OWEN: Absolutely not.

11 QUESTION: Then why do they give this as a
12 reason?

13 MR. OWEN: Because the subdivision proposed
14 the extension of a city street through city territory
15 which the city would have had to --

16 QUESTION: That is given as a separate reason
17 under 6, the failure to extend Cowi Boulevard.

18 MR. OWEN: That's right.

19 QUESTION: So Reason 10, it just seems to me
20 if the City of Davis has officially opposed the
21 subdivision, that is a reason for denying it.

22 MR. OWEN: No, you have to read 9, 10, and 11
23 together. They run in sequence. Nine says, the board
24 finds the tentative map does not provide for service by
25 any governmental entity. The agreement between the

1 county and the city is that development in areas that
2 are outside the city and outside the existing county
3 service area must annex to one or the other.

4 The next finding says the City of Davis has
5 opposed because it is inconsistent with its general
6 plan, and then 11 says, therefore, essentially, the only
7 means of providing sewer service is to annex to the CSA,
8 the County Service Area, which the appellant has not
9 done, has not taken any proceedings to do.

10 That was not a finding that because of the
11 city's opposition this proposal couldn't be approved,
12 and that would clearly be contrary to California law.
13 Cities do not have the ability to control land use
14 outside their boundaries. They can plan and they can
15 object like any other citizen could, but they cannot
16 control that extraterritorial land use power.

17 Again, it is our position that the attempt
18 here to in effect prove, to claim that the appellant can
19 prove that the uses which the Court of Appeals said are
20 available to it is not a matter of proof. It is a
21 matter of law based upon the regulations of the county,
22 which under California law the Court of Appeal has
23 determined does permit the lesser residential or
24 non-agricultural uses.

25 Our ripeness position essentially is that

1 there were four routes to achieve a final determination
2 from the county as to how the property might be
3 utilized. The first of these was to submit a redesign
4 that addressed the objections of the county to the first
5 submittal.

6 The Court in Penn Central recognized this, and
7 the Court of Appeal here states specifically that the
8 denial of that particular plan cannot be equated with a
9 denial or with a refusal to permit any development.

10 The second route of achieving relief and the
11 one that we believe is critical here is the variance
12 procedure. The variance procedure is well recognized in
13 planning law as the basis for relieving hardship upon
14 the basis of special conditions conditions. And
15 essentially this taking claim, this as applied
16 contention of the appellant, is a hardship claim that
17 falls directly within the purpose of the variance
18 procedure.

19 The appellant has attempted to get --

20 QUESTION: Mr. Owen, what does your typical
21 developer do when he is turned down by the Planning
22 Commission? He can appeal to the Board of Supervisors,
23 or could he also at that time let the denial stand and
24 go to the, what, Board of Adjustments for a variance?

25 MR. OWEN: Yes.

1 QUESTION: He doesn't have to go all the way
2 to the Board of Supervisors?

3 MR. CWEN: I don't believe he does, no. In
4 fact, you could apply for a variance without ever even
5 applying in the first case for the subdivision. The
6 variance procedure is an independent type of permit
7 asking for relief from some identified portion of the
8 county's zoning regulations.

9 Here the county's basis for denial, although
10 they are articulated in separate sections, essentially
11 fall under their zoning policy to promote sound and
12 orderly development and to require that intensive urban
13 subdivisions be served by public streets.

14 The reason that the variance procedure is
15 absolutely critical here is that it provides two
16 essential elements. First it provides full disclosure
17 to the governmental agency as to the nature and the
18 basis for the hardship claim. The hardship claim is not
19 relevant nor even a part of the subdivision map review
20 process.

21 The map review process is one that under state
22 law requires a determination of conformity with the
23 general plan policies of the county, and an evaluation
24 of other specific criteria, none of which have to do
25 with the hardship or claim of special circumstance of

1 the property owner.

2 The second critical factor in the variance
3 process is that even if it is denied, even if the
4 variance is denied, it has attained -- the property
5 owner has attained a final determination on its hardship
6 claim. Thus we believe at that point the hardship claim
7 upon the plan for which the variance is sought would be
8 final and ripe.

9 In addition to the variance relief, the Court
10 of Appeal specifically found that without regard to the
11 contentions of the appellant, the judicially noticed
12 zoning ordinance specifically on its face authorizes
13 less intensive but still valuable development. None of
14 these uses have been pursued.

15 And finally, a fourth form of relief that
16 would have relieved the property owner from economic
17 hardship or at least could have as it has specifically
18 been articulated in the complaint was the special
19 assessment relief provisions of the California statutes
20 that would have allowed the property owner to apply for
21 relief from the sewer assessments to which it has
22 alluded in its complaint, but we would like to note that
23 the original complaint, which actually sought in a
24 portion of the causes of action a refund of those sewer
25 assessments, those causes of action have been abandoned

1 by the appellant, and they have acknowledged that they
2 have failed to pursue the administrative relief that
3 would have enabled them to claim refund of those
4 benefits or those payments.

5 Our second basic proposition here is that no
6 taking claim has been alleged. First, no property right
7 has been taken. In this regard, no property right is
8 identified and nothing is identified as having been
9 taken. The complaint does not identify a state
10 protected property right.

11 QUESTION: Are you talking about the
12 allegations in the complaint?

13 MR. OWEN: Yes.

14 QUESTION: I thought the petition alleged that
15 he was deprived of all economically beneficial uses of
16 his property there in Yolo County.

17 MR. OWEN: Yes, and as this Court has stated,
18 an economic impact standing alone without some
19 supporting legal basis either in property rights or
20 clear understandings is not sufficient to state a taking
21 claim.

22 QUESTION: Are you saying that if the zoning
23 on the property is what he bought it with and they don't
24 try to downgrade or upgrade the zoning, that he is stuck
25 with whatever the Zoning Board decides?

1 MR. OWEN: No. No. What I am saying is that
2 under California law, and I think it is the law in most
3 states -- here there is no rezoning. There is no change
4 in the land use regulations. But even if there had
5 been, the cases to date, and it is clearly California
6 law, is that you don't have a property right in existing
7 or prospective zoning, so zone changes can be made.

8 QUESTION: Okay, but I think his contention is
9 -- perhaps he can't prove it -- is that in effect he was
10 required to use this 44 acres just for agricultural
11 use --

12 MR. OWEN: Yes.

13 QUESTION: -- when it had a much higher use as
14 a residential use.

15 MR. OWEN: That's right.

16 QUESTION: If that is true, do you say that
17 wouldn't be a taking?

18 MR. OWEN: It is our position that -- let's
19 just talk about taking -- that nothing has been taken.
20 That is correct. That what he is asking --

21 QUESTION: He has still got the 44 acres?

22 MR. OWEN: I am sorry?

23 QUESTION: He has still got the 44 acres?

24 MR. OWEN: He has got the 44 acres. He has
25 got the existing use, the very use that was in existence

1 when he purchased the property. His dominion over the
2 property is uninterrupted.

3 QUESTION: What if when he purchased it he
4 zoned for four lots to the acre residential, and then
5 after he purchases it the county rezones it and says you
6 can only use this for agricultural land?

7 MR. OWEN: The California decisions would say
8 that there is no vested right in that prior zoning.
9 Now, on the other hand, under California law, you would
10 be able to go to court on a mandate or declaratory
11 relief action to show that the zoning was arbitrary and
12 capricious and unreasonable as applied to specific
13 property on an invalidation type proceeding.

14 QUESTION: Then it really is your position,
15 isn't it, that no sort of land use regulation, however
16 it may deprive a person of the best use of their land or
17 really any economic use of their land ever amounts to a
18 taking.

19 MR. OWEN: No, that is not our position. I
20 think there are California decisions that clearly state
21 that a harsh zoning regulation which is accompanied --
22 maybe I ought to quote the Supreme Court. "One example
23 of a direct legal restraint," referring now to de facto
24 takings, "is a particularly harsh zoning restriction,
25 often calculatingly designed to decrease any future

1 condemnation award." And I believe if the Court will
2 review the Jones case, Jones versus Department of
3 Transportation, there was a case where a property owner
4 was deprived of subdivision approval because there was a
5 -- by the county when there was a state freeway route
6 that would have cut off his existing frontage.

7 QUESTION: That is kind of malice aforethought
8 type --

9 MR. OWEN: Well, except that the state
10 contended that they didn't have any part in it, it was
11 really the county, and the connection that the court
12 found was, well, yes, but there was a freeway agreement
13 between the state and the county which in effect
14 precluded any at grade access under this freeway route,
15 and the court there found that there was a taking by
16 virtue of the denial of these subdivision maps, and that
17 interim damages in this case was awarded because the
18 state in the meantime had abandoned the route, the
19 freeway route.

20 Peacock versus County of Sacramento is another
21 case where the county was thinking about acquiring an
22 airport to be a county airport, and they started
23 imposing height restrictions and other land use
24 restrictions on a neighbor's property. They ultimately
25 decided not to buy the airport, but the court found that

1 because of their actions and the fact that the zoning
2 was imposed as part of the public domain's, the public
3 acquisition process, that there was a taking there, in
4 fact, a permanent taking.

5 QUESTION: If we thought --

6 MR. OWEN: So we don't contend that at all.

7 QUESTION: If we thought that the complaint
8 taken on its face stated a cause of action under the
9 federal constitutional requirements for a taking by way
10 of inverse condemnation, then what should we do, vacate
11 the opinion below and send it back so that the plaintiff
12 below could have an opportunity to establish the
13 allegations?

14 MR. OWEN: If the Court agrees that the
15 allegations state a taking claim under the Fifth
16 Amendment, I would assume it would have to be reversed
17 and remanded for trial.

18 QUESTION: Under the opinion below, assuming
19 he proved up what he alleged in his complaint, the only
20 remedy available under California law would be
21 invalidation of the restraints?

22 MR. OWEN: Yes, because --

23 QUESTION: That is what -- and the court ruled
24 that in this case.

25 MR. OWEN: That is right, because the -- as

1 this Court found in Connelly, there was no actual
2 displacement of domain and no precondemnation facts
3 alleged.

4 QUESTION: If we thought that -- if there is a
5 taking, and if we think that a taking requires
6 compensation, I would think -- you would think we would
7 say so.

8 MR. OWEN: Do I think you would say so?

9 QUESTION: Can we avoid saying that
10 compensation is required?

11 MR. OWEN: Oh --

12 QUESTION: If we say there is a taking.

13 MR. OWEN: Surely.

14 QUESTION: How can we --

15 MR. OWEN: Well, I think the --

16 QUESTION: Part of the taking is -- part of
17 the issue about a taking is whether there is some money
18 due.

19 MR. OWEN: Tying it into the remedy issue?
20 Well, it is our position that a Fifth Amendment just
21 compensation clause taking for public use is not
22 demonstrated where there is an absence of factual
23 allegations regarding either physical invasion --

24 QUESTION: I know, but suppose we disagree
25 with you. Suppose that the allegations of the complaint

1 we think state a cause of action.

2 MR. OWEN: For a taking.

3 QUESTION: For a taking.

4 MR. OWEN: Under the just compensation
5 clause. Then you would reverse, and we would try the
6 taking issue.

7 QUESTION: Would we say a thing about
8 compensation?

9 MR. OWEN: Well, I would hope you would say
10 under which theory of invalidation you are going,
11 because I think there are significant consequences of
12 which clause you rely on in determining that there is a
13 taking, and our position is that in the absence of those
14 kinds of invasive activities or precondemnation
15 activities, the analysis is under the Fourteenth
16 Amendment, and that compensation is not the appropriate
17 remedy.

18 With regard to the property right question, we
19 do realize that there has been an allegation that the
20 use which is being made of the property, the
21 agricultural use is unprofitable to this plaintiff, and
22 what we believe this is is a contention essentially that
23 there is a constitutional right to governmental permits
24 that would assure a profit.

25 And we do not believe that there is any such

1 property right, that otherwise government would be the
2 insurer of a developer's risk, especially as here, where
3 nothing has changed. The existing use is the same. The
4 zoning regulations are the same. And all that has
5 happened is one permit for one --

6 QUESTION: Your position, is it that here is a
7 person who buys a piece of property, 44 acres, that is
8 zoned for residential, but let's just assume, which is
9 alleged here, that it is absolutely useless because of
10 the soil conditions for agriculture, and if a person
11 buys a piece of property like that, he is just stuck
12 with it, I guess. Is that it?

13 MR. OWEN: Well, we would think that
14 government is not responsible to bail him out of that
15 poor investment. It is no different than purchasing --

16 QUESTION: If it had been zoned for
17 agriculture only when he bought it, then he certainly is
18 stuck with it.

19 MR. OWEN: Well, yes, I would think that would
20 be a stronger --

21 QUESTION: Even if there is a rezoning for
22 residential use.

23 MR. OWEN: I am sorry, he bought it as
24 agricultural --

25 QUESTION: He bought it as agriculture, then

1 it is rezoned for residential use, and you just say that
2 we are just not going to appoint, we are just not going
3 to allow you to develop it at all, regardless of the
4 zoning. Would that be a taking, in your view? Or would
5 you say, well, look, you are stuck with your bargain.
6 You bought it as agricultural land. It certainly isn't
7 a taking.

8 MR. OWEN: That would be a more difficult case
9 to establish a taking simply because the one factor of
10 reasonable expectations might be less favorable to the
11 property owner than if he had purchased a piece of
12 property that was residential, and is in the position
13 that these people are, where they say, we need to take
14 advantage of that zoning in order to --

15 QUESTION: You seem to say under California
16 law even if you take his allegations, the allegations of
17 his complaint as true, that he just hasn't been deprived
18 of any property right under California law.

19 MR. OWEN: That's correct.

20 QUESTION: May I ask one question on the
21 zoning?

22 MR. OWEN: Yes.

23 QUESTION: As I understand, the property is
24 currently in an agricultural use rather than any kind of
25 residential use.

1 MR. OWEN: Yes.

2 QUESTION: And I gather that is permitted
3 under a -- notwithstanding the fact it is zoned
4 residential.

5 MR. OWEN: Yes.

6 QUESTION: When it is zoned residential, it
7 can be that or anything less intensive. Is that it?

8 MR. OWEN: Correct.

9 QUESTION: I see.

10 MR. OWEN: A second basis for our taking
11 contention is that the allegations of the complaint only
12 address a discrete 44-acre portion of the total 167-acre
13 land holding, and makes no reference at all as to the
14 overall economic usability or viability of the parcel,
15 and it is our contention that it is no different really
16 than the setback type of case or height limitation case
17 where a discrete portion is alleged to be economically
18 not viable, but no allegation is made as to the economic
19 viability of the property as a total land holding.

20 And finally, on the taking issue, we believe
21 that the Court of Appeal has specifically held that
22 there are valuable development uses available here under
23 the city's zoning regulations -- or the county's zoning
24 regulations, and that the developer is not precluded
25 from applying to take advantage of --

1 QUESTION: Would the city have absolute right
2 on a reapplication for a less intensive plan to decline
3 to extend any of its utilities?

4 MR. OWEN: I believe it has the ability to
5 decline to extend utilities, yes.

6 QUESTION: Would that apply to property within
7 the city as well as the county?

8 MR. OWEN: The city actually cannot -- it does
9 not provide utility services outside its limits except
10 in a cooperative basis with the county or the county
11 service area, but the city does have the ability, I
12 think, within its own city limits to say we are not
13 going to extend services because it is inconsistent with
14 our general plan, and there never has been a general
15 plan request made to the city.

16 QUESTION: So that the city could decline to
17 extend any of its services to the 15-acre tract?

18 MR. OWEN: Oh, no, the portion that is in the
19 city -- that is another thing I ought to point out.
20 There is a portion of this 167 acres that is in the
21 city, zoned residential, and there was an application
22 which came within a whisker of being approved in what --
23 the city has an annual development review process
24 balancing different project proposals, and it was
25 proposed for development and was approved through the

1 Planning Commission essentially, and at the last minute
2 the City Council turned it down because the street was
3 proposed to be extended, contrary to the general plan.

4 QUESTION: Is that 15-acre question before
5 us?

6 MR. OWEN: I think it is, Your Honor, because
7 the complaint and the facts judicially noticed is that
8 this is all one contiguous land holding.

9 If there are no further questions, that will
10 conclude my remarks. Thank you.

11 CHIEF JUSTICE BURGER: You have three minutes
12 remaining, Mr. Eelman.

13 ORAL ARGUMENT OF HOWARD N. ELLMAN, ESQ.,

14 ON BEHALF OF THE APPELLANT - REBUTTAL

15 MR. ELLMAN: Thank you very much, Your Honor.
16 I have just three points.

17 First of all, I want to make it absolutely
18 clear that we are not asking to be guaranteed a profit.
19 What has happened in this case is that our land has been
20 relegated to open space use for the benefit of the
21 citizens of Davis, and as a result we have been
22 relegated to activities from which we can derive return
23 equal to a minor fraction of the property taxes assessed
24 for holding this land.

25 We have pleaded in our complaint that all

1 services, all urban services are available to that
2 property on prosaic physical and legal conditions but
3 for the decision of the City of Davis to withhold them.
4 That is what we are prepared to prove. That is the
5 burden we are prepared to carry at trial.

6 Now, it suggested that variances are
7 available. Well, we say not, and that is what our
8 complaint says, and they say they are, and on a case
9 dispositive pleading motion I think I am entitled -- we
10 should be entitled to put that case in issue. It is
11 suggested --

12 QUESTION: Well, perhaps well pleaded facts
13 must be admitted, but propositions of law certainly
14 don't need to be, do they?

15 MR. ELLMAN: Well, that is correct, Your
16 Honor, but I think that if you look at the complaint,
17 that what we have here is more than a proposition of
18 law, and more than that, under California law a variance
19 cannot be granted unless it is found consistent with the
20 applicable general plan, and we have been told that the
21 general plan that applies here is this development
22 policy.

23 I have one question. If we gave all of these
24 administrative procedures that are available and we are
25 being invited to pursue them, obviously there ought to

1 be no concern. Why the great fear of trial? We are in
2 a situation here where when you strip away all the
3 rhetoric, what you get down to is, the county has made
4 some findings, and they want those findings to be
5 conclusive as against our complaint, and we are prepared
6 to attempt to prove that what we say is correct.

7 QUESTION: What is your -- what federal cause
8 of action do you think you have stated?

9 MR. ELLMAN: I think that we have stated a
10 case for taking and compensation under both the Fifth
11 Amendment and 42 USC Section 1983. That is what we
12 claim we have done.

13 QUESTION: And what is your -- you have been
14 denied a constitutional right?

15 MR. ELLMAN: Yes.

16 QUESTION: What is that?

17 MR. ELLMAN: We have been deprived of our
18 property without just compensation, and the deprivation
19 is the deprivation of all economic beneficial use and
20 reasonable investment-backed expectations.

21 QUESTION: So you trace your constitutional
22 deprivation to the just compensation?

23 MR. ELLMAN: Yes, correct. That is the basis
24 for our claim, and I am afraid the case presents that
25 tough question, the regulatory taking question, because

1 it is true, there has been no physical invasion here.
2 We have been reduced to a use which condemns us to hold
3 the property at a loss so that the citizens of Davis can
4 look at our land in an open condition.

5 Thank you.

6 CHIEF JUSTICE BURGER: Thank you, gentlemen.
7 The case is submitted.

8 (Whereupon, at 1:57 o'clock p.m., the case in
9 the above-entitled matter was submitted.)
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CERTIFICATION

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reme Court of The United States in the Matter of:

#84-2015 - MacDONALD, SOMMER & FRATES, Appellant V. COUNTY OF YOLO, ET AL.

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

BY Paul A. Richardson

(REPORTER)

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