

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1199

TITLE FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GELNDALE,
Appellant V. COUNTY OF LOS ANGELES, CALIFORNIA

PLACE Washington, D. C.

DATE January 14, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FIRST ENGLISH EVANGELICAL :
4 LUTHERAN CHURCH OF GLENDALE, :
5 Appellant :
6 v. : No. 85-1199
7 COUNTY OF LOS ANGELES, :
8 CALIFORNIA :
9 - - - - -x

10
11 Washington, D.C.

12 Wednesday, January 14, 1987
13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 1:58 o'clock p.m.
17

18 APPEARANCES:

19 MICHAEL M. BERGER, ESQ., Santa Monica, Calif.;

20 on behalf of Appellant

21 JACK R. WHITE, ESQ., Los Angeles, Calif...;

22 on behalf of Appellee
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1 Court of Appeals dealt with only one issue, and it
2 reached its conclusion for only one reason. And since
3 that takes only one sentence, I'd like to reread it to
4 the Court:

5 "We conclude that because the United States
6 Supreme Court has not yet ruled on the question of
7 whether a state may constitutionally limit the remedy
8 for a taking to non-monetary relief, this court is
9 obligated to follow Agins."

10 Of course, the Agins opinion which the Court
11 of Appeals was referring to was the 1979 decision of the
12 California Supreme Court which concluded that monetary
13 damages in the form of just compensation are not
14 available for a regulation which takes the use of
15 property.

16 Thus, adhering to the respect which this Court
17 in MacDonald said must be paid to the decisions of the
18 California Court of Appeals on matter of local law and
19 local pleading, we would submit that the compensation
20 issue which the Court was unable to reach in MacDonald
21 is squarely before the Court in this case, because it's
22 the only question of a federal nature that the
23 California Court of Appeals dealt with and it's the only
24 issue that was litigated on this question in the
25 California courts.

1 QUESTION: And you say you raised a federal
2 constitutional claim of this sort in the California
3 Court of Appeals?

4 MR. BERGER: Yes, sir. And that's the issue
5 that the California Court of Appeals dealt with. They
6 clearly analyzed the decision of the California Supreme
7 Court in Agins in light of what had happened in this
8 Court in its decisions since Agins, primarily the San
9 Diego Gas & Electric opinions, and concluded that this
10 Court had not yet clearly enough indicated what its
11 feelings were for California to reach a different
12 conclusion, and therefore it found itself bound by the
13 California --

14 QUESTION: For it, at any rate, to reach a
15 different conclusion than the Supreme Court of
16 California had reached.

17 MR. BERGER: Well, that's true, and for any
18 California court to reach a different conclusion. In
19 the reply brief, for example, we've collected all of
20 post-Agins California decisions. The California Supreme
21 Court twice since Agins has reiterated the rule that
22 regulations cannot lead to just compensation.

23 The California Court of Appeals in a dozen or
24 more cases in varying contexts has held that damages
25 under just compensation cannot be awarded for a

1 regulatory taking of property, and they've held that
2 even in cases which were expressly brought as federal
3 civil rights cases under 42 U.S.C. Section 1983 in state
4 courts.

5 QUESTION: In California, I take it they say
6 that you can get a declaration of invalidity and an
7 injunction?

8 MR. BERGER: That is what the California
9 courts say.

10 QUESTION: And an injunction?

11 MR. BERGER: Well, that I suppose would go
12 along with the declaration of invalidity.

13 QUESTION: Well, in any event, what's really
14 left over is whether you can get damages for a temporary
15 taking.

16 MR. BERGER: If you get a declaration of
17 invalidity, what's left is compensation for the other
18 period of time, that's correct, Your Honor.

19 QUESTION: And saying that you can't get
20 damages for a temporary taking is a federal
21 constitutional issue?

22 MR. BERGER: Yes, sir.

23 QUESTION: And just like whether there was a
24 taking in the first place.

25 MR. BERGER: It's a question of degree and of

1 degree only.

2 QUESTION: Well, you don't reach the remedy
3 until you find there's a taking.

4 MR. BERGER: In this case the complaint
5 alleged there was a taking.

6 QUESTION: Well, I know.

7 MR. BERGER: Nobody challenged that.

8 QUESTION: I know, I know.

9 MR. BERGER: And the courts only dealt with
10 the question of whether the remedy --

11 QUESTION: That's right.

12 MR. BERGER: -- was just compensation.

13 QUESTION: But there were two constitutional
14 questions and they just, they decided one of them.

15 MR. BERGER: No, they assumed one of them.

16 QUESTION: Well, all right. They decided one
17 of them, if there was a taking you had no remedy for
18 damages.

19 MR. BERGER: But they assumed that the
20 pleading under local law --

21 QUESTION: Well, I know.

22 MR. BERGER: -- adequately alleged a taking.
23 And having adequately alleged a taking, what the County
24 said was, those allegations are immaterial.

25 QUESTION: All I'm trying to get at is that we

1 needn't worry that there was no decision below that
2 there was a taking.

3 MR. BERGER: I agree with Your Honor that --

4 QUESTION: That's all I'm trying --

5 MR. BERGER: -- you need not be concerned
6 because the court below held it to be immaterial.

7 QUESTION: May I ask, Mr. Berger --

8 MR. BERGER: Yes, sir.

9 QUESTION: -- it seems to me there might be
10 two different sorts of taking, and I'm just curious as
11 to what your allegation. One, you might allege that if
12 this regulation remains in place and it prevents us from
13 building again in this area, that would constitute a
14 taking for which we're entitled.

15 You might additionally allege that, even if
16 the regulation is voided by a declaratory judgment after
17 three and a half years of litigation, that the three and
18 a half years of litigation, inability to build for three
19 and a half years, is a separate taking, for which in all
20 events we're entitled to compensation.

21 Do you make the second allegation in your
22 complaint?

23 MR. BERGER: I believe we do, Your Honor. We
24 make the allegation that --

25 QUESTION: That even if the regulation is

1 voided, that the temporary deprivation of use would have
2 been so serious that it amounts to a taking of your
3 property?

4 MR. BERGER: The detailed allegations are not
5 that express in the complaint. What the complaint
6 alleges is that the ordinance which was adopted --

7 QUESTION: I understand, that that's the
8 taking and if it remains in place it's a taking. But is
9 it perfectly clear that you've alleged that the period
10 of time that it takes to get your rights vindicated in
11 court is also sufficient to amount to a taking?

12 MR. BERGER: It seems to me that's implicit in
13 the complaint, Your Honor.

14 QUESTION: You think it's implicit in all
15 allegations of taking?

16 MR. BERGER: It was never questioned in the
17 courts below.

18 QUESTION: All allegations of taking?

19 MR. BERGER: I believe it is, and as nobody
20 ever questioned it --

21 QUESTION: It certainly is at least
22 theoretically possible that the temporary deprivation
23 would not be serious enough to cross the constitutional
24 threshold? Or do you think that that's impossible? If
25 it's a taking when it's permanent, a fortiori it's also

1 a taking even if it's a temporary taking?

2 MR. BERGER: Well, in the colorful language of
3 this Court in Loretto, taking doesn't depend on whether
4 it's bigger than a breadbox.

5 QUESTION: That's a physical occupation.
6 We're talking about regulatory takings here.

7 MR. BERGER: I understand that that was a
8 physical occupation rather than a regulatory taking.
9 And you know, whether we're in fact able to prove that
10 this was a taking, that it crossed the threshold, is an
11 issue that we haven't reached in this case yet, because
12 the California court dismissed the case.

13 And it may be that when we go back to trial
14 the evidence won't show a taking, or the evidence
15 wouldn't have shown a significant diminution in the
16 value of the property.

17 QUESTION: But you're out of court now, you're
18 out of court now.

19 MR. BERGER: But that's a matter of fact.

20 QUESTION: You're out of court.

21 MR. BERGER: The allegations are that the
22 regulation did in fact take the use of property.

23 QUESTION: And you had no chance to prove it
24 because you're out of court for another reason.

25 MR. BERGER: At this point, yes.

1 QUESTION: And do California rules allow
2 notice pleading, the way the federal rules do?

3 MR. BERGER: Technically, it's called fact
4 pleading, but the facts that are required to be pled in
5 the complaint are equivalent to federal notice
6 pleading. They are very -- only the basic fundamental
7 facts are required to be pled in the complaint, ultimate
8 facts the California court calls them, rather than
9 evidentiary facts.

10 And it's clear as a matter of the record in
11 this case that the County certainly understood what
12 those minimal allegations meant, because they immediately
13 responded by moving to strike them on the ground that
14 under the Agins case there could be no recovery of
15 compensation for a taking by a regulation.

16 QUESTION: May I ask you about the discussion
17 of temporary taking. As long as the ordinance is on the
18 books, you have a taking, don't you?

19 MR. BERGER: Yes, Your Honor. As long as the
20 ordinance is there, it takes the use of property.

21 QUESTION: So as of today, the argument in
22 this case, are we to consider it as a temporary or a
23 permanent taking?

24 MR. BERGER: Well, this temporary taking is
25 now nine years old, and I strongly suspect from an

1 economist's standpoint that if you have taken something
2 for that long you've taken it permanently.

3 QUESTION: If we leave the ordinance in
4 effect, it'll be a permanent taking so far as we know,
5 is that correct?

6 MR. BERGER: Yes, that's correct.

7 QUESTION: Well now, the case was litigated,
8 though, was it not, under some temporary ordinance, as
9 opposed to the one now in effect?

10 MR. BERGER: The case was originally filed
11 under what they called a temporary ordinance, yes,
12 ma'am.

13 QUESTION: And you assert for our purposes
14 here that that admittedly temporary ordinance is a
15 permanent taking?

16 MR. BERGER: That temporary ordinance was in
17 effect for three years, of course, before they replaced
18 it. The general effect of the permanent ordinance,
19 so-called, is the same as the temporary ordinance, if
20 allowed --

21 QUESTION: But we are looking at it from the
22 standpoint of that original temporary ordinance.

23 MR. BERGER: I think-what this case involves
24 is not the so-called temporary ordinance or the
25 so-called permanent ordinance, but the County's pattern

1 of regulation of this particular piece of land. It
2 started out with their moratorium, their temporary
3 ordinance so that they could study what use they wanted
4 made on this land, and they consistently followed it
5 through.

6 QUESTION: Well, that's the record we have in
7 front of us. The things that have happened since are
8 not part of that original trial record.

9 MR. BERGER: That's correct. If remanded,
10 that of course would become of interest to both parties,
11 what has happened since, because the temporary
12 ordinance, the original ordinance, of course, flatly
13 prohibits any use on the property and doesn't allow the
14 County to make the arguments that it does --

15 QUESTION: Well, under your theory would a
16 municipality or county that made it temporarily
17 impossible to build on something because of road repair
18 or something of that kind have made a taking then that
19 requires compensation for that interim period?

20 MR. BERGER: No, not necessarily, Your Honor.

21 QUESTION: But possibly?

22 MR. BERGER: It would depend on what the facts
23 showed. In this case we're not, for example, talking
24 about a temporary road repair that requires a minor
25 detour that may have disrupted the use for a short

1 period of time.

2 QUESTION: Well, some of these things take a
3 while. A major bridge or a freeway construction or
4 something could deprive a property owner of access for a
5 good while.

6 MR. BERGER: Yes, they can. And under --

7 QUESTION: And in your view that would require
8 compensation.

9 MR. BERGER: Under settled law, Your Honor, if
10 access is totally deprived to property, that is the
11 taking of the property interest and requires
12 compensation.

13 QUESTION: Even though it is admittedly for a
14 temporary duration?

15 MR. BERGER: Yes, ma'am. The highway people
16 routinely condemn temporary easements so that they can
17 perform just that kind of construction without having to
18 litigate with people over inverse compensation cases.
19 They acknowledge that they are taking their access and
20 interfering with their use, and they directly go ahead
21 and buy that interest.

22 What we have in this case is a County effort
23 to turn what had for 20 years been a usable --

24 QUESTION: May I inquire, do they do this in
25 California, what you've been saying in response to

1 Justice O'Connor, that they routinely pay just
2 compensation in dollars on these road repair
3 situations?

4 MR. BERGER: Not on minor road repairs, Your
5 Honor.

6 QUESTION: I thought in California the rule
7 was they don't pay dollars for taking. You're just
8 telling us they do.

9 MR. BERGER: I'm talking there about direct
10 condemnation.

11 QUESTION: But supposing they didn't -- I
12 think Justice O'Connor's question was supposing they
13 didn't go through the compensation procedure, they just
14 built a road in a way that denied access, all the use of
15 an adjacent parcel of land, for 90 days. Is the owner
16 of that parcel of land entitled in California to
17 compensation? I think not.

18 MR. BERGER: 90 days, I suspect --

19 QUESTION: Well, say six months. Let me put
20 it, the period of time it would take you to litigate
21 this case and have this regulation set aside.

22 MR. BERGER: Yes.

23 QUESTION: Would he be entitled to
24 compensation in California --

25 MR. BERGER: Yes.

1 QUESTION: -- for the same interference caused
2 by road repair?

3 MR. BERGER: I think if you looked at a case
4 that the California Supreme Court decided called Jones
5 versus People, which is precisely that case, where a
6 parcel of vacant land was rendered inaccessible because
7 of a freeway --

8 QUESTION: I'm talking about temporarily, not
9 permanently. We're talking about temporary
10 interference. I think that was Justice O'Connor's
11 question.

12 MR. BERGER: Well, eventually they did get
13 access, eventually. But they were deprived of access.

14 QUESTION: For a temporary period?

15 MR. BERGER: And the Supreme Court said that
16 damages had to be paid, just compensation had to be
17 paid.

18 QUESTION: Well, how does that square with
19 Agins? Why won't they give just compensation here,
20 then?

21 MR. BERGER: They view regulations very
22 differently from the way that they view anything else.
23 And the only way that I can explain it to Your Honor is
24 in that fashion. I can't make sense of it personally.

25 QUESTION: So that if the state built a wall

1 around this place because they thought it was too
2 dangerous, the flood and all the rest, then you would
3 have gotten compensation?

4 MR. BERGER: I believe if they'd have done
5 that --

6 QUESTION: But not if they said, we'll post
7 signs that say nobody can enter? Then you don't.

8 MR. BERGER: I believe if they had done that
9 the courts would have viewed it differently. But having
10 done it only by regulation, they find that it doesn't
11 require compensation. And it's exactly that kind of a
12 hypothetical, Your Honor, that concerns us.

13 QUESTION: Mr. Berger, did you argue to the
14 Court of Appeals specifically in California that Agins
15 was contrary to federal law, that Agins was
16 unconstitutional under federal law? Was that argument
17 made?

18 MR. BERGER: Yes, we did. That argument was
19 expressly made, Your Honor. You'll find in the briefs a
20 separate response that we did to the County's second
21 motion to dismiss the complaint, and as appendices to
22 that we have included pieces of the briefs that we filed
23 in the California courts.

24 And in there we expressly directed the
25 California court's attention to everything that this

1 Court and the federal Courts of Appeals had done since
2 Agins and concluded that Agins had no federal
3 underpinning, that it was totally contrary to what was
4 going on in this Court and in the Ninth Circuit
5 particularly.

6 The Ninth Circuit three, I think now four,
7 times has said that Agins at best is suspect and at
8 worst doesn't represent the views of a majority of the
9 U.S. Supreme Court.

10 The problem we face in California with the
11 Ninth Circuit is in getting them not to abstain, to take
12 these cases, because they keep wanting the California
13 court to clean up its own act. But the California
14 Supreme Court and the California Courts of Appeals
15 continue to follow this line, to hew to the Agins line,
16 and say that if it's a regulation, as opposed to
17 building a wall around it, then you don't get
18 compensation.

19 You know, this is the same argument that was
20 made far more eloquently than I can make by Justice
21 Brennan in his San Diego Gas dissent and Justice White
22 in MacDonald.

23 QUESTION: May I ask you --

24 MR. BERGER: That it doesn't matter how you
25 interfere with the owner's rights from the owner's

1 standpoint. It's the same thing if you bulk the wall
2 or if you passed the regulation.

3 QUESTION: I understand, but you have a kind
4 of a double-barreled claim. One, you claim that the
5 regulation is a taking if it remained in place; and
6 secondly, you claim that even if it were rescinded
7 today, you suffered damage during the temporary period
8 it took to litigate.

9 MR. BERGER: That's correct.

10 QUESTION: And that's a separate form of
11 taking.

12 What is the measure of -- assume the court --
13 you win on the taking claim, the court says, well, we'll
14 cancel the regulation. What is the measure of damages
15 that you contend you're entitled to?

16 MR. BERGER: Well, obviously we haven't gotten
17 that far.

18 QUESTION: But you don't contend that in that
19 situation you'd get the full value of the property, do
20 you?

21 MR. BERGER: I sincerely doubt it. It would
22 be subject to appraisal testimony and, as in any other
23 inverse compensation case, I suspect what would happen
24 is that the appraiser would use some form of rental
25 value or return on investment value.

1 QUESTION: Supposing the appraiser found that
2 at the date of cancellation of the regulation the
3 property was even more valuable than it had been when
4 you originally wanted to build. Would you still be
5 entitled to compensation?

6 MR. BERGER: That it was even more valuable?
7 Yes, I think we would still be entitled to compensation
8 for the lost use of the property. How the appraisers
9 would decide to value it is a whole different question,
10 and I don't think this Court needs to get tied up in the
11 nuances of valuation.

12 What we need in California particularly is for
13 this Court to tell California that the compensation
14 question needs to be faced. As the Arizona Supreme
15 Court said most recently -- that's the most recent case
16 which adopted the compensation resolution to this issue
17 -- we don't need to instruct the trial courts at this
18 point on how to value the issue; we can let them
19 experiment. That's what trial courts are for.

20 QUESTION: May I ask just one other question.
21 Do you contend you're entitled to compensation in every
22 case in which the regulation is invalidated and it took
23 three years to do it? Or is there some special
24 additional burden you have to show about the harm during
25 the interval?

1 MR. BERGER: If the property in fact -- if the
2 use of the property was taken during that interim, I
3 believe that is a taking, and the taking would require a
4 trial on what just compensation is due for that period
5 of time.

6 QUESTION: So every time you invalidate a land
7 use regulation, you'd be entitled to some compensation
8 for the loss of use during the period it took to
9 litigate it?

10 MR. BERGER: I think it's potential, it's
11 possible that there may be some cases where there in
12 fact was no value lost. Or there may be cases where
13 there was no use being made or going to be made during
14 that time.

15 QUESTION: Mr. Berger, the Solicitor General
16 has suggested that, rather than implying a damage remedy
17 directly from the Constitution or inferring one directly
18 from the Constitution, you would have the remedy of
19 using Section 1983.

20 What's wrong with that, apart from the fact
21 that you haven't used it here, I mean. If you knew
22 about it, why wouldn't that give you as satisfactory --
23 why wouldn't that give everybody as satisfactory a
24 remedy as implying a direct monetary cause of action as
25 the Constitution would?

1 MR. BERGER: Let me answer that in several
2 ways, Your Honor. First, although it's never been
3 mentioned in this case, the allegations of the facts in
4 this case would support an action under 1983. 1983, as
5 this Court knows, creates no substantive rights. It's
6 just a remedial vehicle.

7 And what we've been arguing about in this case
8 is the substantive right to just compensation. So the
9 issue of what remedial vehicles get used hasn't been
10 brought up.

11 I think that the allegations in this complaint
12 are adequate to state a 1983 cause of action if that
13 were true.

14 QUESTION: Supposing it had been a federal
15 regulatory taking. Would 1983 --

16 MR. BERGER: 1983 only works against state
17 governments.

18 QUESTION: Maybe that's why the Solicitor
19 General thinks that that's better than applying it
20 directly.

21 MR. BERGER: It's something that he's totally
22 uninvolved in, Your Honor.

23 But secondly, in the California courts --

24 QUESTION: Well, it doesn't work against the
25 state either, does it?

1 MR. BERGER: You have Eleventh Amendment
2 problems against the state.

3 QUESTION: Just municipalities, right,
4 precisely.

5 MR. BERGER: Yes, we're talking here only
6 about local government agencies.

7 QUESTION: But you haven't commented on the
8 underlying theory of the SG's suggestion in his brief.

9 MR. BERGER: No.

10 QUESTION: That the Fifth Amendment is not
11 self-executing at all.

12 MR. BERGER: The underlying theory of the
13 Solicitor General, Your Honor, I candidly found
14 insulting to this Court because it was based on
15 expressly stating that a whole raft of opinions of this
16 Court, including most recently U.S. versus Clarke, in
17 which this Court said the Fifth Amendment just
18 compensation guarantee is self-executing, are simply
19 wrong.

20 For example -- and I think this Court said it
21 very clearly in Jacobs versus United States --

22 QUESTION: Well, we just said, but we didn't
23 hold it, because --

24 MR. BERGER: That's true, you did say it. In
25 Jacobs --

1 QUESTION: Where have we held that it's
2 self-executing?

3 MR. BERGER: Let me show you in Jacobs.

4 QUESTION: Against government.

5 MR. BERGER: In Jacobs versus United States,
6 290 U.S., this Court said in the holding the right to
7 recover just compensation was guaranteed by the
8 Constitution. It rested upon the Fifth Amendment.
9 Statutory recognition was not necessary. A promise to
10 pay was not necessary. Such a promise was implied
11 because of the duty to pay imposed by the Amendment.
12 The right to compensation arose from the Constitution,
13 not from the statute.

14 QUESTION: Where there's a taking.

15 MR. BERGER: Also --

16 QUESTION: But if the court stops the taking,
17 then there's no compensation.

18 MR. BERGER: Of course. If there's no taking,
19 then the question will never be reached. But in this
20 case it's the only question we have: What is the remedy
21 once we have a taking?

22 QUESTION: No, California says: We're not
23 going to allow the taking. That's what the California
24 court's are saying.

25 MR. BERGER: I don't think they're saying that

1 at all.

2 QUESTION: Your remedy is we will stop that
3 taking.

4 MR. BERGER: That's a matter of fact. That's
5 like saying we're not going to allow the sun to rise
6 tomorrow. What the county does is to take the
7 property. If California wants to call that lettuce
8 instead of calling it a taking, it doesn't change what
9 happened.

10 QUESTION: What California says, if you take
11 it without just compensation you've got to give it back,
12 just as if you take --

13 MR. BERGER: But you can't give back what's
14 been taken in the past.

15 QUESTION: You cancel the regulation. Suppose
16 the regulation was enacted without following appropriate
17 procedures, taking without due process of law. The
18 remedy is you've got to give it back. You don't have to
19 pay anybody anything for that.

20 MR. BERGER: That can be, yes, that's right.
21 But what happens, Your Honor, is it provides no remedy
22 for the taking that's already occurred, and it in fact
23 guarantees nothing about the future.

24 QUESTION: But they're two separate
25 questions: what already occurred; when you give it

1 back, has there still been a taking?

2 MR. BERGER: I don't know that we've given it
3 back, because what it does is it returns the regulation
4 to the entity and tells the entity, draft a new
5 regulation. Now, that guarantees nothing. As Justice
6 Brennan's dissent in San Diego pointed out and as
7 virtually every commentary on this issue has pointed
8 out, there are an awful lot of government agencies that
9 will take those regulations back, dicker with them a
10 little bit, make minor changes, and then re-enact them
11 and force the property owner to litigate all over
12 again.

13 QUESTION: But meanwhile you haven't had the
14 use of your property in any event.

15 MR. BERGER: Exactly, and that's entirely the
16 problem. You have not had the use of your property
17 while they've been playing this game with you.

18 QUESTION: Well, Mr. Berger, do you think that
19 local governments don't have authority to engage in
20 flood control regulation?

21 MR. BERGER: Oh, not for a minute do I make
22 that assertion, Justice O'Connor. I believe that they
23 do.

24 QUESTION: And does the church plan to rebuild
25 on a flood plain where people have been killed? Is that

1 the church's plan?

2 MR. BERGER: The church can't plan to rebuild,
3 because the ordinance won't allow it.

4 QUESTION: If you get it struck down, that's
5 the church's plan?

6 MR. BERGER: If the ordinance were struck
7 down, the church would like to be able to use the
8 property the way it had used the property. And it's not
9 building in a flood plain where people had drowned. No
10 question there was a tragic flood that occurred in that
11 area. It was a freak of weather conditions, as the
12 record shows.

13 But the point is that what the County has done
14 is to engage in the valid purpose of flood control,
15 something which we acknowledge. We never challenged
16 that flood control was not a valid purpose. But once
17 they've decided to engage in a valid purpose, when that
18 valid exercise of power takes property of private people
19 for public use in the process, then the just
20 compensation clause comes into use.

21 QUESTION: Well, do you think that any time a
22 local government says, in this particular location it's
23 subject to flooding and no one may build there, that
24 that is a taking?

25 MR. BERGER: It could be. I don't think that

1 every time. It would depend on the property. You know,
2 the market is what it is. The fact is this property has
3 been used for 20 years in this fashion. It may be that
4 there is other property which is at the bottom of a
5 river and which isn't usable.

6 QUESTION: Mr. Berger, suppose -- is there
7 anything that stands between your position and the
8 Federal Government having to pay innumerable people
9 nationwide some to be determined amount of compensation
10 every time a regulation of the FCC or the FTC or any
11 other federal agency is stricken down?

12 MR. BERGER: Is there anything that --

13 QUESTION: That stands between the position
14 you're arguing here and that.

15 MR. BERGER: Sure, because in my situation
16 what we are talking about is a regulation which totally
17 deprives the owner of property of its rightful use. The
18 regulations that come up with the Federal Government, I
19 have not seen any that come that totally as prohibitions
20 of use.

21 And what we've got here is a regulation which
22 as a matter of conceded pleading fully takes the use of
23 property.

24 QUESTION: Well, how about a patented item or
25 a designer drug of some kind, and you apply for federal

1 approval and the regulatory process takes a long time.

2 MR. BERGER: That hasn't deprived you of the
3 use of that.

4 QUESTION: Oh, yes. You can't market it until
5 you have approval.

6 MR. BERGER: I don't believe that's
7 technically true, Your Honor. I believe that you can
8 market --

9 QUESTION: Make that assumption, because I
10 think there are some examples.

11 MR. BERGER: Drugs is a different stories.
12 Patented items was a wholly different one. And as the
13 Court discussed in Ruckelshaus versus Monsanto, when you
14 go into a business of that sort, which is a regulated
15 industry, knowing what it is and knowing what its
16 confines are, that's an assumption of risk, if you will,
17 that a business is allowed to take, and there is no
18 constitutional problem that arises when there is some
19 delay in the process.

20 But where we have --

21 QUESTION: It's a little hard to distinguish
22 that from your theory, frankly.

23 MR. BERGER: Well, I'm sorry that Your Honor
24 is having that trouble. What I see in our case is a
25 piece of property that has been open and usable for at

1 least two decades and which the County comes in now and
2 says: That property is now a part of the County-owned
3 flood control channel; we're just not going to change
4 the title; we're going to let you keep the title, but
5 we're going to wash the water through it.

6 QUESTION: But wouldn't your argument be
7 exactly the same if your client had bought it ten days
8 before the regulation went in effect?

9 MR. BERGER: I don't think my argument would
10 be quite as strong as if we owned it for 20 years.

11 QUESTION: You'd be making the same argument,
12 wouldn't you?

13 MR. BERGER: If we bought it ten days before
14 the regulation went into effect?

15 QUESTION: Sure, if you hadn't used it for 20
16 years, you bought the property ten days before and then
17 the temporary regulation took effect.

18 MR. BERGER: Maybe, and we may end up arguing
19 over the amount of damages, because if we had bought
20 that property ten days before the regulation went into
21 effect, after the devastating flood, I strongly suspect
22 that the market price would have been virtually nil.

23 QUESTION: But you would be arguing there had
24 been a temporary taking.

25 MR. BERGER: There still may have been a

1 taking. What its value is is something wholly
2 different, and I think that's the question we're getting
3 into.

4 QUESTION: Not worth the attorney's fees.

5 MR. BERGER: Probably not, Your Honor.

6 If I have any time left, I'd like to reserve
7 it.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
9 Berger.

10 We'll hear now from you, Mr. White.

11 ORAL ARGUMENT OF

12 JACK R. WHITE, ESQ.

13 ON BEHALF OF APPELLEE

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

16 Before this Court can reach the remedy
17 question that Mr. Berger so strongly urges upon the
18 Court, it must first decide that it has jurisdiction and
19 it must decide that the issue of ripeness, that the
20 issue of remedy is ripe in this action.

21 In Agins, MacDonald, and Williamson County,
22 the three more recent cases involving this kind of
23 question, the Court made it clear that it's not going to
24 reach questions of what the appropriate remedy is for an
25 alleged regulatory taking arising out of a zoning

1 ordinance unless and until it has a ripe and valid
2 taking claim.

3 I take strong issue with Mr. Berger's
4 contention in this case that the taking claim is both
5 ripe and valid and must be assumed by this Court. it's
6 neither ripe nor valid, for all of the same reasons in
7 Agins and MacDonald and Williamson County.

8 In addition to that, however, we believe that
9 on the face of the record before this Court the loss of
10 use that we're talking about in this case cannot be
11 regarded as a taking under the rule announced in Mugler
12 versus Kansas by this Court 100 years ago, where the
13 Court drew a very clear distinction, which I think is
14 still valid today, between an exercise of police power
15 to prevent a dangerous use of one's property --

16 QUESTION: But doesn't that go beyond the
17 ruling of the Court of Appeal, Mr. White? I thought
18 that they had assumed for purposes of decision that
19 there was a taking and they said under California law,
20 even if there was a taking here, you're not entitled to
21 damages by reason of temporary deprivation.

22 I don't think they really decided the question
23 of whether there was a taking. They assumed there was
24 one. Now, do you want us to look into that and say,
25 well, no matter what California law is, we don't think

1 there was a taking here?

2 MR. WHITE: Yes, Your Honor, I do. Let me
3 explain why.

4 QUESTION: That's a very strange procedure.

5 MR. WHITE: Let me explain --

6 QUESTION: We have to decide, do we want to
7 avoid one constitutional question in order to get to
8 another.

9 MR. WHITE: Well, first of all, the
10 constitutional question that I'm talking about has to
11 have been raised as a prerequisite to reaching the
12 remedy issue. And when I discuss jurisdiction, I'm
13 going to point out that it wasn't.

14 QUESTION: Well, that's a different argument.

15 MR. WHITE: It is. The point right now,
16 however, is in this case the court in California did not
17 assume a taking. It didn't decide the issue one way or
18 another, because a motion to strike does not call into
19 question or it does not even raise an issue about the
20 sufficiency of the pleadings.

21 QUESTION: Well, it disposee the case on the
22 basis that damages were not available.

23 MR. WHITE: It did, Your Honor, based on
24 Agins.

25 QUESTION: So the case was over then.

1 MR. WHITE: It was over, that's correct.

2 QUESTION: Well, they're out of court. How
3 can they ever get back in by just saying there's a
4 taking? Give us the damages because there's a taking,
5 and they'll be laughed out of court.

6 MR. WHITE: Justice White, there was a way in
7 which they could very easily have gotten into court in
8 this action and preserved the issue for this Court. All
9 they had to do was add a cause of action for declaratory
10 relief challenging the validity of the ordinance.
11 That's what the plaintiff did in Agins.

12 Indeed, it was the cause of action for
13 declaratory relief that provided appeal jurisdiction to
14 this Court. That's how this Court got to review Agins.

15 QUESTION: But that isn't what the California
16 Court of Appeals said here. If they had said that,
17 perhaps it would have been an entirely permissible
18 disposition to say, you didn't bring a declaratory
19 judgment action so you don't get a ruling.

20 But the California Court of Appeals didn't go
21 on that basis.

22 MR. WHITE: That's correct. The Court of
23 Appeal didn't. The court could have.

24 QUESTION: Perhaps they could have, but it
25 didn't.

1 MR. WHITE: It never passed on the question of
2 whether there was a taking. But I don't think it makes
3 any difference whether the court below passed on the
4 taking question, because this Court has said it regards
5 the question of taking as an antecedent to the remedy
6 issue.

7 In the final analysis, it's up to this Court
8 to decide whether a cause of action for a taking has
9 been adequately alleged.

10 QUESTION: But that's not part of the case,
11 Mr. White. I really don't understand this argument.
12 Suppose the issue in the case -- there are two issues in
13 another case, whether any holder of a leasehold interest
14 can have his property taken, and it comes before a
15 California court and the court says its ruling is you're
16 out of court because no owners of leasehold interest can
17 have any cause of action.

18 Now, would you come up here and say that we
19 couldn't dispose of that case and we couldn't determine
20 whether that's a valid federal constitutional law,
21 because the issue of taking has never yet been
22 determined?

23 MR. WHITE: Your Honor, I think that's
24 correct. If the court -- let me explain. If the court
25 looked at the pleading and saw that the pleading did not

1 adequately allege a federal claim, then the remedy
2 question should not be reached.

3 It doesn't matter whether the court below
4 decided one way or the other on the sufficiency of
5 stating the federal claim. It's up to this Court to
6 decide if a federal claim has not been properly alleged,
7 and if a federal claim has not been properly alleged --

8 QUESTION: Not just colorably, but fully? Not
9 just colorably alleged.

10 MR. WHITE: That's right.

11 QUESTION: It has to be valid.

12 MR. WHITE: In order to reach the remedy
13 question. It doesn't have to be -- it only needs to be
14 colorably alleged for jurisdictional purposes. But for
15 this Court to reach the remedy question, unless it's
16 going to back away from what it said in Agins and in
17 MacDonald and in Williamson County, it's going to have
18 to be satisfied that a cause of action was alleged, not
19 that a cause of action that clearly on its face wasn't
20 alleged, that the court below didn't decide that.

21 Because if it's clear to this Court looking at
22 those allegations that there is not and could not as a
23 matter of law be a regulatory taking in this case, then
24 any decision it gives on the remedy question is purely
25 an advisory opinion. It's not going to apply to this

1 case.

2 And the point I am making is, on the face of
3 the allegations in this complaint no cause of action was
4 stated as a matter of law.

5 QUESTION: You want us to review the federal
6 issue that was not decided below in order not to review
7 the federal issue that was decided below.

8 MR. WHITE: That's correct, because it is
9 antecedent to reviewing the federal issue that is before
10 the Court now. If there's no federal claim asserted,
11 then the question of whether there might be a remedy if
12 a federal claim had been asserted is not properly before
13 this Court.

14 QUESTION: May I ask, though, the first cause
15 of action, last allegation, is "Ordinance No. 11855
16 denies First Church all use of Lutherglen."

17 MR. WHITE: That's correct.

18 QUESTION: Why doesn't that allege a taking?

19 MR. WHITE: No, that does not, Your Honor.
20 First of all, it's a bare conclusion. In Agins and
21 MacDonald, the same kind of allegations were treated as
22 conclusions, but the reason for that --

23 QUESTION: Well, I understand. They could say
24 as a matter of California law you've got to allege the
25 value and you've got to allege, and so forth and so on.

1 MR. WHITE: That's correct.

2 QUESTION: But they didn't do that.

3 MR. WHITE: And in addition to that -- no,
4 they didn't allege anything but that it denies all use,
5 which is the barest of conclusions. Beyond that,
6 however, as the Court recognized in Agins and in
7 MacDonald, the Court can take judicial notice of the
8 actual provisions of the ordinance.

9 And it has -- in those cases what it did is it
10 compared the actual provisions of the ordinance with the
11 bare conclusory allegation that it denies all use. If
12 the Court looks at these ordinances -- and by "these
13 ordinances" I mean the temporary ordinance, which is the
14 only ordinance that is the basis of the complaint in
15 this case -- and if it looks at the permanent ordinance,
16 it'll see that it doesn't deny all use at all.

17 QUESTION: Don't we also have to look at the
18 survey?

19 MR. WHITE: The survey?

20 QUESTION: Or whatever the property looks
21 like? How can we say just on the face of the ordinance
22 it doesn't have the practical consequence that they say
23 it has?

24 MR. WHITE: Well, the question is who has the
25 burden of presenting the facts --

1 QUESTION: It's very hard for an appellate
2 court to try a case that hasn't been -- to try an issue
3 that hasn't been tried below.

4 MR. WHITE: That's correct, Your Honor. But
5 the real question is who has the burden of presenting it
6 to the court in a fashion that raises the issue and
7 preserves it for appeal. And if they allege nothing but
8 a single bare conclusion which this Court would have to
9 say without more doesn't state a taking, then they
10 didn't state a taking.

11 That's not our fault; it's their fault.

12 QUESTION: Why would we have to say without
13 more that this didn't state a taking? I mean, I'm not
14 at all sure that that sort of an allegation might not be
15 sufficient under the federal rules, and I'm not at all
16 clear as to what California requires.

17 But from the California Court of Appeals
18 decision, I gather it didn't require much more.

19 QUESTION: Why would they go to the trouble of
20 deciding the remedy issue?

21 MR. WHITE: Why would who go to the trouble of
22 deciding the remedy issue?

23 QUESTION: The Court of Appeals.

24 MR. WHITE: Because that was the only issue in
25 front of them. The motion to strike --

1 QUESTION: Well, it wasn't even in front of
2 them on your theory, because there was absolutely no
3 reason to even get to it. There was not a sufficient
4 allegation of a taking.

5 MR. WHITE: No. The County filed a motion to
6 strike based on the grounds that the allegations were
7 irrelevant. They were irrelevant based on the Agins
8 decision, which had been decided just a matter of months
9 before the motion was filed.

10 The Agins decision said in essence, if you
11 have a regulatory taking claim, the proper remedy is
12 declaratory relief, not inverse compensation.

13 QUESTION: You led the Court of Appeals into
14 it?

15 MR. WHITE: We led the Court of Appeals into
16 it, but the plaintiff has --

17 QUESTION: Dispose of this case on a remedy
18 issue, forget all this business about taking.

19 MR. WHITE: No, Your Honor, I don't think
20 that's correct.

21 QUESTION: Well, that's what your motion was
22 apparently.

23 MR. WHITE: Well, but --

24 QUESTION: Agins.

25 MR. WHITE: But why was it the County's burden

1 to do something beyond what was necessary --

2 QUESTION: I don't know whether it was your
3 burden or not, but you wanted to get rid of the case on
4 this particular federal issue, namely Agins. And we
5 succeeded.

6 MR. WHITE: I'm sorry. We wanted to get rid
7 of it based on the California Supreme Court decision
8 that said this is not a proper remedy --

9 QUESTION: Right.

10 MR. WHITE: -- for a taking. As I started to
11 say before, the remedy could have been preserved for
12 this Court very simply, by adding a declaratory relief
13 action.

14 The complaint was amended twice. It was
15 amended once a couple of years after the motion to
16 strike had been granted. They did not add the cause of
17 action for declaratory relief. Had they done so, then
18 the issue would have been preserved for this Court. It
19 would have been a perfect issue.

20 The Court would then -- the California court
21 would have had to pass on the taking issue, because now
22 there's a declaratory relief cause of action in front of
23 them. They have to judge the validity of the
24 ordinance.

25 So there was a very simple technique for the

1 church to get the issue before this Court. It didn't.
2 The County elected to do something that the California
3 Supreme Court said it could do, and it's true that that
4 -- that by doing that they didn't get a review of their
5 taking issue.

6 But they could have done it. They could have
7 done it even after the motion had been granted, by
8 asking to amend to add a cause of action for declaratory
9 relief. So it's not just the County's fault that the
10 issue isn't here before this Court. It's every bit as
11 much the fault of the plaintiff, and it's the
12 plaintiff's burden to present the federal issue and
13 preserve it.

14 And I submit that if anybody is to bear the
15 burden of this fault, it should be the plaintiff and not
16 the County.

17 QUESTION: Mr. White, did not the Court of
18 Appeals, the California Court of Appeals, assume the
19 correctness of the allegations in the complaint?

20 MR. WHITE: No, Your Honor.

21 QUESTION: You made a motion to strike.

22 MR. WHITE: But a motion to strike does not
23 test the validity of the allegations. A motion to
24 strike, as distinguished from a demurrer, simply says
25 they're irrelevant; whether they're true or not, it

1 doesn't matter.

2 QUESTION: Why did the Court of Appeals quote
3 from Agins, the California Supreme Court case to the
4 effect that there was a total taking of use?

5 MR. WHITE: What it said was --

6 QUESTION: Referring to the ordinance that was
7 in the complaint.

8 MR. WHITE: No, my recollection of what the
9 Court of Appeals said was that if there is a total
10 taking.

11 QUESTION: I don't think that's right, but you
12 may be. I don't have the opinion here.

13 MR. WHITE: But there is only a total taking
14 or a total denial of use that amounts to a taking if the
15 County does not have the right to prevent that use. Let
16 me move to the point that I was trying to make before,
17 which is why a mere allegation of denial of all use,
18 even if it's accepted as a fact, not treated as a
19 conclusion of law, even if it's accepted as a statement
20 of fact by this Court, that doesn't state a taking
21 claim.

22 And the reason it doesn't is from the very
23 facts in this record some of which are in the trial
24 transcript that's before the Court, some of which can be
25 judicially noticed, we have a safety regulation. The

1 rule of Mugler versus Kansas applies here.

2 Under Mugler versus Kansas, a government has
3 the right to prohibit a dangerous use of land. And what
4 the Court said 100 years ago in that case is that that
5 is not a taking, it's not the kind of regulation for
6 which the government must pay compensation.

7 Mugler versus Kansas has been reiterated in
8 other cases, in Goldblatt versus Town of Hempstead, and
9 a recently as this Court's opinion in the Penn. Central
10 case and in Chief Justice Rehnquist's dissent in that
11 case, where both the Court and the dissent agreed on one
12 key point, and that is that when you're dealing with a
13 regulation aimed at protecting the health and safety of
14 the citizens you're dealing with a different animal.

15 What you have there is an exception to the
16 normal rule that a regulation which destroys property
17 values can be regarded as a taking, because if all the
18 government entity is doing is protecting the citizens
19 from a dangerous use of land then it has not only the
20 right to do that without paying compensation, but I
21 submit the obligation to do it.

22 Suppose we accept the proposition --

23 QUESTION: Has the obligation to do it without
24 condemnation? I don't think that follows. Has the
25 obligation to do it.

1 MR. WHITE: Well, the bottom line is this.
2 The bottom line is suppose -- and I think that is what
3 we can assume is the case here -- suppose a regulation
4 in fact denies all use. Now, we don't concede that, but
5 if the Court wants to accept that as a general
6 proposition, that it's bound by that conclusory
7 allegation and this one in fact denies all use.

8 The County's position is that use is
9 dangerous, and the fact that a Mugler type regulation
10 which prevents a dangerous use of land happens to
11 deprive the property owner of all of his use does not
12 provide an exception to the Mugler rule that
13 compensation doesn't have to be paid.

14 The bottom line question is does the County
15 have to make a choice between allowing a dangerous use
16 of land to be resumed or buy the land by paying
17 compensation, because the only way to prevent a
18 dangerous use of this land would be to put a permanent
19 restriction.

20 Then we've got a total taking, a permanent
21 taking. Does the County have to do that? Is that the
22 County's choice, allow them to make a dangerous use of
23 the land or buy them out, particularly in a situation
24 like this, where this is a flood-prone area? When they
25 bought into that property in a flood-prone canyone, they

1 had to know that there was flood danger.

2 Indeed, this is not a freak situation, as Mr.
3 Berger suggested. There's evidence in the record that
4 there were prior floods. Indeed, there was a 1969 flood
5 that did damage to this property. The 1978 flood was
6 more severe, but it was devastating. It obliterated
7 everything in the canyon.

8 And we're talking about a very narrow mountain
9 canyon. That canyon is approximately 250 feet wide, or
10 at least the flood protection area is 250 feet wide.

11 QUESTION: Counsel, do we have to do that to
12 decide this case?

13 MR. WHITE: I think the --

14 QUESTION: Do I have to find out how wide that
15 canyon is?

16 MR. WHITE: The Court does have to decide
17 whether the bare statement of a denial of all use states
18 a cause of action in the face of the record that I am
19 discussing now, the facts that are in the record.

20 What I'm suggesting is that to state a claim
21 of taking you have to state more than a mere denial of
22 all use.

23 QUESTION: Well, Mr. White, supposing the
24 California Court of Appeals had expressly said: The
25 plaintiff's complaint in this case states only that the

1 regulation denies them all use of their property; the
2 Appellee says this is not enough to state a claim for
3 taking; but under our pleading law we hold that it is.

4 Would you still say that we should require
5 more than the California courts do to state a claim of
6 taking?

7 MR. WHITE: Yes, I do, Your Honor, because I
8 think that the ultimate question of whether an adequate
9 federal claim has been stated lies with this Court, not
10 with the Court of Appeals in California.

11 But of course that didn't happen here anyway.
12 They didn't decide one way or another. Had they done
13 so, it's quite clear they would have decided there was
14 no taking, because under California law flood plain
15 management regulations are not a taking.

16 Turner versus County of Del Norte, cited in
17 our brief, is a case based on the flood plain regulation
18 adopted under the California Colby-Alquist Act, which
19 has provisions exactly like this.

20 QUESTION: May I ask you a hypothetical.

21 MR. WHITE: Yes.

22 QUESTION: You're talking about flood
23 control. The Mississippi River floods with some
24 frequency large areas of particularly Louisiana. Let's
25 assume, for example, that the state of Louisiana,

1 because of the cost that the state incurred whenever
2 there was a serious flood, that no one could build on
3 property within ten miles of the Mississippi River.

4 Would there be any taking under your
5 analysis?

6 MR. WHITE: I think the question -- I think,
7 Justice Powell, the question would be whether the
8 restriction was reasonably necessary to --

9 QUESTION: Let's assume it was reasonably
10 necessary; so that if you owned property within that
11 area you get zero compensation, is that your
12 construction of the Fifth Amendment?

13 MR. WHITE: Your Honor, I do believe that's
14 correct. I think if the public entity is protecting
15 health and safety and it prohibits a dangerous use of
16 land while allowing other uses -- and there were other
17 uses available on this property -- then it's not a
18 taking.

19 But even if it denies all use because the only
20 possible use is dangerous, then yes, I would say that's
21 not a taking under the Fifth Amendment.

22 QUESTION: Let me give you another one.
23 There's a great deal of liberality with respect to
24 zoning ordinances, going back to our decision, or this
25 Court's decision in Euclid. But let's assume a zoning

1 ordinance that said with respect to someone's property
2 that it not only cannot be built on, but the state wants
3 to make a part there.

4 Would there be any taking?

5 MR. WHITE: Oh, of course.

6 QUESTION: Of course there would be?

7 MR. WHITE: Yes..

8 QUESTION: Why?

9 MR. WHITE: If the state wanted to make a
10 park?

11 QUESTION: A zoning ordinance, a zoning
12 ordinance that zones a property for park use only. You
13 bought it because you were going to build a --

14 MR. WHITE: I think I may have misunderstood
15 your question. They zone it, they downzone it, is that
16 what you're saying?

17 QUESTION: And you bought the property when it
18 was zoned, say, for residential. And 20 years later or
19 ten years later or the next day, without your having any
20 knowledge of the zoning ordinance being pending, the
21 city zones your property so that you could not use it
22 for any purpose. It's going to make a public park.

23 Is the zoning ordinance valid?

24 MR. WHITE: Do we have the safety element
25 involved here?

1 QUESTION: No safety element.

2 MR. WHITE: No safety? Oh, well then that's
3 different, because what they've done --

4 QUESTION: Wait a minute. Would you be
5 entitled to compensation?

6 MR. WHITE: Yes. Well, under the California
7 rule what you would have to do is challenge it. If it
8 was declared invalid, then the public agency would have
9 to decide whether it wanted to keep the regulation or
10 not.

11 If it wanted to keep the regulation, then it
12 would have to pay compensation. That fact situation, by
13 the way, would then present the temporary taking remedy
14 issue that the Court has been talking about.

15 But the difference why that's a taking, at
16 least if the regulation is allowed to be permanent --
17 and there's a question about whether it's a taking if
18 it's only permanent. But if it was permanently
19 down-zoned to be a park, then the public is getting the
20 benefit of that property.

21 In this case the public is not getting the
22 benefit of the church's property. It is doing nothing
23 more than saying you can't put buildings in the middle
24 of a flood channel that's going to cause an increase in
25 the level of flood waters downstream, endangering other

1 people.

2 The County in this case did --

3 QUESTION: Would there be a taking, for which
4 compensation would be allowed?

5 MR. WHITE: In your zoning case, where they
6 had zoned it into a park, yes, Your Honor.

7 QUESTION: There would be compensation?

8 MR. WHITE: Well, it would be a taking for
9 which compensation would be required if the zoning
10 regulation remained permanent. Now, if the property
11 owner challenged the zoning ordinance under the
12 California rule and it was declared to be invalid
13 because it goes too far under Pennsylvania Coal versus
14 McMahon -- or Mahon -- then you'd have the question
15 whether it was a taking during the temporary period.

16 My position on that is no, it's not a
17 temporary taking.

18 QUESTION: Well, coming back to this case,
19 let's assume that there had never been a flood, no
20 threat of flood. The County just decided this would
21 make a lovely public park and so it said to, whatever it
22 is, to the Appellant in this case: We are taking your
23 property for the purpose of a public park; it's
24 beautiful for that purpose.

25 Would that be a taking?

1 MR. WHITE: If permitted to stand, yes, I
2 believe that would be a taking.

3 QUESTION: It would?

4 MR. WHITE: Yes.

5 QUESTION: But because of the flood, that's
6 the difference?

7 MR. WHITE: Yes. The difference again is what
8 the County would be doing in your hypothetical, Justice
9 Powell, is it would be saying: You can't use your
10 property, so the public can come on and use it, or at
11 least enjoy the open space, enjoy the benefits of it.
12 That is a restriction on property that benefits the
13 public as a whole. It doesn't protect them from
14 anything.

15 Mugler versus Kansas' rationale, which
16 distinguishes between police power regulation for safety
17 purposes and taking unoffending --

18 QUESTION: Yours is limited to safety?

19 MR. WHITE: Absolutely, absolutely.

20 Justice Marshall, this regulation was adopted
21 by the County -- and this is in the record -- in an
22 effort to comply with the national flood insurance
23 program, which requires regulations like this. The
24 national flood insurance program provides federally
25 assisted flood insurance to flood-prone areas only if

1 the local government agencies adopt flood plain
2 management regulations that restrict construction in
3 natural flood channels.

4 That's exactly what the County did here. If
5 the Court holds that that's a taking, then there are
6 going to be a lot of compensation paid throughout the
7 United States in all these flood plains where local
8 government entities are trying to comply with the
9 federal regulations to restrict construction in flood
10 plains.

11 The reason construction in flood plains is
12 being restricted is that it's dangerous. It's dangerous
13 because it raises the flood level. It's dangerous
14 because it causes a surge of water downstream, and when
15 the building breaks up, as these buildings did -- what
16 more proof do we need than the actual events of this
17 case -- you've got tons of debris, in addition to all
18 the backed up water, going downstream, damaging
19 downstream property owners and taking lives.

20 The Federal Government has said that's
21 dangerous and we've got to stop that, and so if you want
22 federal assistance in getting flood insurance, you local
23 governments have got to adopt regulations that restrict
24 new construction in flood plains.

25 QUESTION: Mr. White, just in case we reach

1 the merits, do you want to say a few words about why we
2 shouldn't imply a monetary cause of action?

3 MR. WHITE: Yes, Justice Scalia, I will. I
4 think what you have under the California rule is a
5 situation where the California Supreme Court said that
6 it interferes with the legislative prerogative for the
7 court to order it in essence to exercise its power of
8 eminent domain.

9 And declaring that the regulation is invalid
10 satisfies the requirements of the Fifth Amendment
11 because it removes the offending regulation. In
12 essence, the permanence has been lifted.

13 QUESTION: It sure does, except for the
14 interim period.

15 MR. WHITE: Except for the interim period,
16 that's correct.

17 QUESTION: Now, why shouldn't we imply --

18 MR. WHITE: Because the interim period is
19 nothing more than a delay inherent in the regulatory
20 process. It's no different than delays on trying to get
21 permits. It's no different than a whole host of delays
22 that are caused by various kinds of building and safety
23 regulations.

24 QUESTION: That may be, but during that delay
25 the person has been deprived of the use of the land.

1 MR. WHITE: But they do in all the other
2 cases. Is it a constitutional taking of use in all
3 those cases? If that's so, then when there's delay --

4 QUESTION: What other cases? What other cases
5 are you talking about? Maybe it is.

6 MR. WHITE: A delay in issuing a building
7 permit perhaps. You can't build on the property until
8 you get a permit, and you have to go through a number of
9 attempts to get a permit. Perhaps along the way there
10 is an arbitrary denial of one of them, and then five
11 months later it's finally granted.

12 Has there been a taking for five months? I
13 don't think so. I don't think that that kind of
14 temporary harm, if you will, rises to the level of an
15 appropriation of property, because that's what the Court
16 has said you have to have for a regulatory taking that
17 doesn't involve any kind of physical invasion, a mere
18 loss of use of property.

19 QUESTION: Well, Mr. White, there are some
20 horror stories out there of local governments
21 intentionally running these things through the mill
22 indefinitely in a jurisdiction like California, with
23 full recognition that if they lose on one they can make
24 a minor modification of the requirement and go again and
25 effectively deprive people forever of any use.

1 Now, what's an owner to do?

2 MR. WHITE: Well, Justice O'Connor, I don't
3 know of any horror stories. I've seen references to
4 horror stories in law review articles, but I don't know
5 of any actual case involving --

6 QUESTION: Well, the Agins come pretty close,
7 don't they?

8 MR. WHITE: Well, the Agins, I don't know what
9 happened after the Agins decision was decided. But this
10 Court held that there was no taking in the Agins case.

11 But my point is I don't think a rule of
12 general application should be adopted on the assumption
13 that some regulatory agencies may be acting in bad faith
14 when other regulatory agencies, like the County of Los
15 Angeles, which adopted a regulation that it thought was
16 in compliance with the national flood insurance program
17 -- why should the County be penalized with a rule that's
18 based in part on a policy that assumes there's going to
19 be gamesmanship when it didn't engage in any
20 gamesmanship?

21 So if there's going to be compensation for a
22 temporary harm because a regulation has gone too far, I
23 would draw a line at the situation where there is some
24 kind of showing of bad faith or intentional conduct on
25 the part of the zoning authorities to go beyond what is

1 permissible.

2 Here we have a situation where there was no
3 way on God's earth that the County of Los Angeles could
4 have known when it adopted what it thought was a badly
5 needed safety regulation in accordance with the federal
6 regulations that it was going to have to pay some
7 compensation for it because it had crossed over that
8 line.

9 So I would draw the line for compensation for
10 temporary harms where there is some kind of intent or
11 bad faith. And if there isn't any, then I don't think
12 that there should be any compensation.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
14 White.

15 Mr. Berger, you have one minute remaining.

16 REBUTTAL ARGUMENT OF
17 MICHAEL M. BERGER, ESQ.
18 ON BEHALF OF APPELLANT

19 MR. BERGER: Thank you, Your Honor.

20 I'm a little confused by counsel's conclusion
21 there about making this some sort of an intentional
22 tort. We're talking about the Constitution and the
23 vindication of rights under the Constitution. There has
24 never been any such intent element in inverse
25 compensation cases.

1 The question, as this Court has held on many
2 occasions, is what is the impact of the governmental
3 action on the private property owner? If the impact is
4 to take the property, then compensation is payable. It
5 has nothing to do with whether the government was well
6 intentioned or ill intentioned, and I would urge this
7 Court not to import that difficulty into these cases.

8 I was also a bit surprised to hear counsel say
9 he doesn't know what happened to the Agins' since the
10 decision by this Court in 1980, since they filed an
11 amicus curiae brief in this case and explained exactly
12 what's happened to them since 1980.

13 They're still without the use of their
14 property. They're still without compensation, and the
15 City of Tiburon has put another temporary moratorium on
16 their property after they got building permits. Now,
17 they're six years down the road from this Court; they
18 still don't know what they're going to do.

19 That's the kind of horror story, Justice
20 O'Connor, that does go on in California, and it goes on
21 all the time.

22 The people of this country need an answer to
23 this question. We urge the Court to reach the question
24 and decide that just compensation is mandated for a
25 regulatory taking of property.

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CHIEF JUSTICE REHNQUIST: Thank you, Mr.
Berger.

The case is submitted.

(Whereupon, at 2:58 p.m., oral argument in the
above-entitled case was submitted.)

CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1199 - FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE,

Appellant V. COUNTY OF LOS ANGELES, CALIFORNIA

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

BY Paul A. Richardson

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