

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

ORIGINAL

CAPTION: BERNADINE SUITUM, Petitioner v. TAHOE REGIONAL
PLANNING AGENCY

CASE NO: 96-243

PLACE: Washington, D.C.

DATE: Wednesday, February 26, 1997

PAGES: 1-49

REVISED

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

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SUPREME COURT, U.S.
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C O N T E N T S

| | | |
|----|---|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | R. S. RADFORD, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | ORAL ARGUMENT OF | |
| 6 | RICHARD J. LAZARUS, ESQ. | |
| 7 | On behalf of the Respondent | 24 |
| 8 | ORAL ARGUMENT OF | |
| 9 | LAWRENCE G. WALLACE, ESQ. | |
| 10 | On behalf of the United States, as amicus curiae, | |
| 11 | supporting the Respondent. | 42 |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

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

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-243, Bernadine Suitum v. Tahoe Regional
5 Planning Agency.

6 Mr. Radford.

7 ORAL ARGUMENT OF R. S. RADFORD

8 ON BEHALF OF THE PETITIONER

9 MR. RADFORD: Mr. Chief Justice, and may it
10 please the Court:

11 This case is about an ordinary property owner
12 who's been denied all beneficial use of her land and then,
13 in addition, has been denied access to the courts to seek
14 relief for that categorical taking of her property.

15 QUESTION: Well, at the outset, I -- and maybe
16 you can answer this question very easily. I don't know
17 why you didn't bring an inverse suit here, number 1, as a
18 matter of choice. I don't know why you're not required to
19 do so under Williamson as a matter of law, unless it's
20 peculiar to TRPA. There's no inverse action available to
21 you against the bi-State agency?

22 MR. RADFORD: Well, the Tahoe Regional Planning
23 Agency, of course, is a bi-State body operating under an
24 act of Congress, and the type of proceeding that was
25 initiated here in district court would appear to be

1 specifically authorized under the TRPA compact.

2 QUESTION: Can you bring an inverse suit against
3 the Tahoe Regional Planning Agency?

4 MR. RADFORD: Well, I'm afraid that I can't
5 answer that question, Justice Kennedy.

6 QUESTION: But don't you have to answer it under
7 Williamson? Williamson says that that's what you must do.
8 Maybe -- is it because the agency has no treasury, I
9 guess, to pay the judgment, or --

10 MR. RADFORD: Does your -- is the thrust of your
11 question going to the second prong of Williamson County
12 regarding the need to pursue State remedies?

13 QUESTION: Yes, and these aren't State remedies
14 because it's a bi-State agency, but it still seems to me
15 that to put the case into focus you should go to inverse
16 condemnation first and then 1983 if there's no inverse
17 available.

18 MR. RADFORD: Well, the position of the Tahoe
19 Regional Planning Agency is that they do not have the
20 power of eminent domain, they do not have provisions for
21 paying just compensation, and this entered into the
22 decision that was made at the initial level of this
23 litigation to proceed by way of Federal --

24 QUESTION: Thank you. And so we might say that
25 generally we do not know that there are routinely inverse

1 suits filed against the agency and defendant against the
2 agency as they would be against, say, the State of
3 California or the State of Nevada?

4 MR. RADFORD: I'm not aware of such a practice,
5 certainly not routinely, Justice Kennedy.

6 QUESTION: Thank you.

7 QUESTION: Does the charter of the agency give
8 them eminent domain power?

9 MR. RADFORD: No, it does not, Justice Scalia.

10 I'd like to make two points here this morning,
11 if I could. First, the opportunity to sell development
12 credits for the Tahoe Regional Planning Agency is not a
13 remaining use of Mrs. Suitum's land that could constitute
14 a ripeness bar to her regulatory takings claim.

15 Second, the monetary value of those credits,
16 which was the sole issue in dispute in the proceedings
17 below, has no relevance to the ripeness of her claim, and
18 in any case is eminently fit for adjudication using
19 ordinary appraisal methods.

20 QUESTION: But it might have relevance as to
21 whether there's a taking, conceivably.

22 MR. RADFORD: I don't believe that would be
23 true, Justice O'Connor. The monetary value --

24 QUESTION: Well, but it was true in Penn
25 Central, I guess.

1 MR. RADFORD: Justice O'Connor, I think that the
2 Solicitor General made a -- an extremely important
3 distinction in the brief that was filed with this Court.
4 I believe on page 17 the distinction was between value and
5 rights that were retained in Mrs. Suitum's property
6 following the application of these regulations and value
7 or rights that were obtained from the agency after the
8 complete deprivation of her ownership rights.

9 The value of the TDR's -- and we're going to use
10 shorthand here. When we talk about TDR's, transferable
11 development rights, we're talking about these credits that
12 the agency has created.

13 Their value, if any, is something that has been
14 injected from the outside after all of Mrs. Suitum's
15 development rights have been destroyed. Those are values
16 that she has obtained from the agency, not values that
17 were retained by her property and, of course, when you
18 look at it that way, and the reason that distinction I
19 think is valuable is it illustrates that what TRPA is
20 really doing here --

21 QUESTION: Well, how were the TDR's obtained in
22 Penn Central? I mean, we at least dealt in that case with
23 transferable development rights.

24 MR. RADFORD: The TDR's at issue in Penn
25 Central, Justice O'Connor, of course were not considered

1 relevant to the ripeness issue. The Court went directly
2 to the merits.

3 QUESTION: But apparently they were considered
4 of relevance in deciding whether there was a taking.

5 MR. RADFORD: That -- that would appear to be
6 correct. The direct answer to your prior question is, the
7 TDR's that were at issue in Penn Central were preexisting.
8 They were not created by the landmarks law that was being
9 challenged in Penn Central.

10 QUESTION: They existed when the owner bought
11 the property in question and later sued on it?

12 MR. RADFORD: I could not tell you exactly when
13 Penn Central purchased the property involved and when the
14 New York City zoning ordinance went into effect, but the
15 TDR's were part of the general zoning ordinance.

16 QUESTION: But in any event, when Mrs. Suitum
17 bought her property the Tahoe Regional Planning Agency was
18 not yet in existence and hadn't developed the TDR?

19 MR. RADFORD: The agency was in existence at the
20 time Mrs. Suitum acquired this property in 1972. However,
21 the credits that are at issue here were only created under
22 the 1987 plan that came along, of course, considerably
23 after Mrs. Suitum and her husband had acquired this lot
24 with the expectation of being able to build a home.

25 QUESTION: Now, there is some residual value to

1 the extent the property might want to be acquired by a
2 neighbor or someone else to have a larger yard or
3 additional property, I assume.

4 MR. RADFORD: Justice --

5 QUESTION: There is some value, apparently,
6 remaining for that purpose. We don't know how much.

7 MR. RADFORD: I would disagree with that,
8 respectfully, Justice --

9 QUESTION: Volleyball and things like that?

10 MR. RADFORD: Well, I know --

11 QUESTION: A picnic table?

12 MR. RADFORD: The situation that we have here is
13 an ordinary street with ordinary homes and one vacant lot
14 in the middle of it. It might be a suburb of Milwaukee or
15 Sacramento. It happens to be Incline Village.

16 Now, you have two houses, obviously, on each
17 side of that vacant lot, and the Ninth Circuit actually
18 says this. That consists -- that comprises a market for
19 her property, because either of those two neighbors might
20 want to buy that as an extension of their own land.

21 QUESTION: But there was an affidavit backing
22 that up, wasn't there, the Johnson affidavit that said
23 this property has some residual value?

24 MR. RADFORD: That's true, Justice Ginsburg.

25 QUESTION: So the Ninth Circuit had something to

1 go on.

2 MR. RADFORD: Well -- however, if you look at
3 the evidentiary basis for that affidavit, there were no
4 comparable sales. There has never been a sale of SEZ
5 property -- that is, property that the agency has
6 designated a stream environment zone -- to an adjacent
7 landowner.

8 Mr. Johnson's affidavit cited to six sales which
9 were an attachment to that affidavit, every one of which
10 was a sale by the State of Nevada. There has never been
11 an arm's length private transaction between the owner of
12 SEZ property and an adjacent property owner, and there's
13 no reason to believe there ever would be one.

14 QUESTION: Well, suppose we think in fact there
15 is some residual value in what's left for sale for some
16 purpose, obviously less than it would be if a house could
17 be built upon it. If there is such a value, does it go to
18 the determination of whether there's a taking in the first
19 instance, and then possibly later, if there is a taking,
20 to the amount of money that should be paid?

21 MR. RADFORD: It would presumably go to the
22 issue of viability for a taking, Justice O'Connor. It
23 certainly would not go to the ripeness question.

24 QUESTION: The Ninth Circuit didn't reach any
25 takings question, did they?

1 MR. RADFORD: No.

2 QUESTION: They said that under Hamilton County
3 this was simply -- you had to pursue further remedies
4 before they would even confront the question.

5 MR. RADFORD: That's correct, Mr. Chief Justice.

6 QUESTION: I thought it was your position that
7 it doesn't go to the taking either.

8 MR. RADFORD: Well --

9 QUESTION: That the criterion is not residual
10 value, but whether there is any economically beneficial
11 use of the land.

12 MR. RADFORD: That, indeed, is our position,
13 Justice Scalia.

14 In response to Justice O'Connor's hypothetical,
15 what I was saying is, if this Court decides that there's
16 residual value in the property and decides that that has
17 some relevance to the takings question --

18 QUESTION: Or decides that there may be. We
19 don't need to make the factual determination.

20 MR. RADFORD: That's correct. I'm sorry if I
21 misrepresented your question, Justice O'Connor, but the
22 thrust of my answer was, if the Court winds up in the
23 position of saying this is not a complete wipe-out, this
24 isn't a Lucas-type deprivation of all beneficial use but
25 in fact is a Penn Central type analysis where we look at

1 the economic impact and balance various factors, then that
2 would become relevant.

3 I think this is a Lucas case. I think if we
4 were to get to the merits -- and, of course, all the Ninth
5 Circuit actually arrived at was the ripeness issue -- if
6 we were to get to the merits, I think this is a Lucas
7 case.

8 QUESTION: Do we have to say whether it's a
9 Lucas case or a Penn Central case in order for you to
10 prevail on the ripeness claim?

11 MR. RADFORD: No. That's not necessary, Justice
12 Kennedy. What we need to prevail in this case to reverse
13 the decision of the Ninth Circuit is simply a ruling that
14 Mrs. Suitum has, in fact, received a final decision within
15 the meaning of Williamson County, and --

16 QUESTION: Is the TRPA subject to the
17 Administrative Procedure Act? Has any court ever decided
18 that question?

19 MR. RADFORD: I know of no ruling to that
20 effect, Your -- Mr. Chief Justice, and my assumption would
21 be they are not subject to the Administrative Procedure
22 Act which, of course, applied in the Abbott Laboratories
23 case that TRPA now seems to rest its ripeness claims on.

24 QUESTION: Do I understand the reasoning of the
25 courts below that the lack of ripeness depended not only

1 on the fact that there had not been a final ruling from
2 the county in this -- with respect to one of these rights
3 that -- the lottery issue, I guess -- but that in fact
4 with respect to all of the TDR's collectively there was
5 simply too little known about their actual functioning to
6 assign a market value, and because a market value could
7 not be supplied, that was one of the reasons for saying
8 that the claim was not ripe. Is that correct?

9 MR. RADFORD: Justice Souter, that is the
10 interpretation that TRPA places on the decisions below. I
11 don't read that myself.

12 In the proceedings below we had, of course, a
13 request -- or, actually an order from the district court
14 for a supplementary briefing on how the TDR process
15 worked. The supplemental briefs and affidavits were
16 submitted, and among the material that was submitted in
17 that process were affidavits valuing these very credits
18 that are at issue.

19 Mrs. Suitum presented valuation evidence. The
20 TRPA presented valuation evidence. This was a factual
21 issue that was presented to the trial court to determine
22 in response to its order for supplemental briefing, and
23 yet presented with this evidence that both sides were
24 prepared to testify and present experts as to the
25 valuation of the credits, the court simultaneously held

1 that the credits have value, but there's no way of knowing
2 what that value is.

3 QUESTION: I take it it's your position that
4 even if the value of the credits cannot be determined, you
5 are prepared to proceed in this suit and take whatever
6 consequences that fact might produce for you.

7 MR. RADFORD: Justice Souter, the answer to that
8 would be yes. Mrs. Suitum wants to build her house. She
9 believes that she's entitled to realize her reasonable
10 expectations to proceed with the development of her
11 subdivision lot just as everyone else in the subdivision
12 has.

13 QUESTION: And I take it you would say -- or
14 maybe you don't say. I take it you would say that if
15 these credits have no market value, or have no value that
16 can be established, that that in a sense aggravates the
17 taking that has occurred in your view.

18 MR. RADFORD: That would be correct, Justice
19 Kennedy.

20 Now, there seems to be a strange dilemma that's
21 presented by the rulings below, and that is clearly either
22 there is a market for the TDR's as the agency has
23 contended and many of its amici contend in their briefs to
24 this Court -- either there is a market for the TDR's in
25 which they are commonly bought and sold, in which case the

1 court could easily determine the value by appraisal, or
2 there is not a market for them, as the agency has
3 contended in other cases, and nobody knows what they're
4 worth. It's a total mystery. In which case, it would
5 obviously be completely unfair to force Mrs. Suitum to go
6 out and try to test a market that doesn't exist.

7 Significantly, I think, if we look at footnote
8 18 in the respondent's brief, the bottom line to all of
9 this is, regardless of whether Mrs. Suitum goes out and
10 goes through this process, tests the market, gets an
11 offer, comes back to the agency and applies for a sale of
12 these credits, it's the agency's position that the court
13 should still make up its own determination of what the
14 credits are worth.

15 So there's clear -- more than an implication.
16 The TRPA has clearly expressed its position that the
17 courts can determine the valuation issue completely
18 independently of anything Mrs. Suitum is required to do.

19 QUESTION: If you're right, you have a very
20 strong argument that's final and definite. So then we'd
21 say it's ripe, go decide the merits.

22 But when they get to the merits, what is the
23 situation? That is, my impression is that they've been
24 through the merits in the court, that there's one
25 affidavit in there that says that these things are worth

1 something -- I don't know if it's \$30,000 -- several
2 thousand dollars, and then there's another affidavit that
3 says no, they're not worth anything. That was struck out
4 of the case, and the Ninth Circuit affirmed.

5 So if we send it back, what is there left to do?

6 MR. RADFORD: Our basic position, Justice
7 Breyer, is that although the value of the credits can
8 easily be determined by the trial court, that in fact is
9 irrelevant to the taking issue, because what these
10 regulations have done --

11 QUESTION: So in other words you're going to
12 send it back and make a legal argument.

13 MR. RADFORD: That's --

14 QUESTION: And the legal argument will be on the
15 basis of the record this constitutes a taking, and the
16 other side will say on the basis of the record it doesn't.

17 MR. RADFORD: That's correct --

18 QUESTION: Okay.

19 MR. RADFORD: -- Your Honor.

20 QUESTION: But so far as this particular
21 proceeding this morning is concerned, I take it your
22 position is, even if you lose on the question whether the
23 TDR's are relevant to the taking, you are ready to
24 litigate them for whatever they are worth, and you just
25 want to proceed.

1 MR. RADFORD: That's correct, Justice Souter.

2 QUESTION: Yes.

3 MR. RADFORD: Now, I would have to add that this
4 is an extremely unusual case in that the substantive issue
5 of whether there has been a Lucas-type taking seems almost
6 to be contained within the procedural issue of whether the
7 case is ripe for adjudication.

8 This came up on ripeness. The question
9 presented was ripeness, and by the normal procedures of
10 this Court, a ruling would be limited to ripeness.

11 QUESTION: Well, the one is included in the
12 other only if the way that you resolve the first is by
13 resolving that these things have no value. If you resolve
14 it that way, then indeed the Lucas question is answered,
15 but if you resolve it the other way, that they have some
16 value, then it's not the same question, is it?

17 MR. RADFORD: Well, there's another way of
18 looking at it, Justice Scalia, and that is, the Ninth
19 Circuit held the case was not ripe because the opportunity
20 to sell these TDR's was a use of Mrs. Suitum's property.

21 If we're going to reverse the Ninth Circuit's
22 decision, then the conclusion could only be that the
23 opportunity to sell the TDR's is not a use of her
24 property --

25 QUESTION: Why? Why? It is what it is. I

1 mean, that is to say, they have said this is the
2 situation. You have these three things, the 180 feet, the
3 allocation, the 5-4 residential rights -- that's it. You
4 got it.

5 Okay. Now we go back and decide whether taking
6 a person's property is at issue, or it is a taking under
7 those circumstances or it isn't. What is there any need
8 for us to go beyond that?

9 MR. RADFORD: There --

10 QUESTION: That is, why should we overrule a
11 holding, what looks like a holding in the Penn Central
12 case in order to decide a ripeness issue?

13 MR. RADFORD: Oh, no, Justice Breyer. I want to
14 make it perfectly clear that we are not suggesting this
15 Court should overrule Penn Central or, indeed, should
16 overrule any previous precedent.

17 Our position is the existing precedents of this
18 Court in Williamson County and the MacDonald case are
19 clearly consistent with a ruling that this case is ripe.

20 There's been a final adjudication not just
21 regarding the ability to utilize her land which was
22 involved in Williamson County and MacDonald, there's also
23 been a final determination, as you just said, regarding
24 what credits are available -- indeed, what credits she is
25 required to go out and market.

1 So there's been a final decision, the case is
2 ripe, that's as far as this case needs to go -- the Court
3 needs to go.

4 However, the Court could, without in any way
5 overruling Penn Central or any other case, take the
6 additional step of saying, since the ability to sell these
7 credits is not a use of her property, she has no
8 beneficial use of her property. The regulations have
9 deprived her of all beneficial use.

10 Because everyone agrees -- the parties, and the
11 courts below -- everyone agrees that she has no remaining
12 use of her property except the ability to sell the TDR's.

13 QUESTION: Suppose an agency said that you can't
14 use this lot, but we will give you your choice of one of
15 four other residential lots which appraisers would testify
16 are comparable. Would that be a taking in your view?

17 MR. RADFORD: I think that would be a taking,
18 Justice Kennedy, under the basic standard that all land is
19 unique, and to say we're going to take away the land that
20 you own in which your expectations are wrapped up and give
21 you another piece of land would in fact be a taking with
22 an offer of compensation.

23 Now, the property owner might accept that offer,
24 but they might also claim no, that doesn't comply with the
25 just compensation requirement.

1 QUESTION: Mr. Radford, do I understand you
2 correctly that you recognize that the only thing before us
3 is that threshold ripeness?

4 I think at least the United States has said you
5 have a final order, you have a final decision, and the
6 only question is this prudential ripeness coming out of
7 Abbott Laboratories. That was the United States'
8 position.

9 MR. RADFORD: Well, I would agree, Justice
10 Ginsburg, that actually in my opinion both the Solicitor
11 General and the agency in their briefs to this Court have
12 conceded that there's been a final decision within the
13 meaning of Williamson County.

14 Now, the fallback to Abbott Laboratories I think
15 is completely inappropriate and something this Court
16 should avoid. Abbott Laboratories was not a land use
17 case. It wasn't a takings case. It wasn't even a
18 constitutional law issue.

19 However, if we were to look at the Abbott
20 Laboratories standards we'd see that the basic issue in
21 Abbott Laboratories, determining the ripeness of a
22 preenforcement challenge to Federal regulations, is
23 whether there had been a final agency action that imposed
24 a distinct injury upon the plaintiff. There clearly has
25 been in this case.

1 In fact, that would seem to be virtually the
2 same as the final decision requirement in the specific
3 land use context of Williamson County.

4 What the agency is trying to do with Abbott
5 Laboratories is shoe-horn its argument in through the
6 second subsidiary issue of hardship on the parties and
7 yet, of course, the hardship inquiry in Abbott
8 Laboratories was not a balancing test, where we looked at
9 the hardship on the plaintiffs of having adjudication
10 delayed versus the hardship on the Government, whatever
11 that would mean, of having a prompt determination of the
12 legality of its regulations.

13 The hardship inquiry applied only to the
14 petitioners. What the Court looked at is, will there be
15 an injury, a further injury to the petitioner of having
16 adjudication delayed, and clearly that also holds in this
17 case.

18 Mrs. Suitum stands to suffer not only the
19 additional losses of time and expense of continually
20 litigating her basic constitutional rights, but her
21 constitutional claims could, in fact, be mooted out if she
22 complies with the procedural requirements that the Ninth
23 Circuit has set forth.

24 So frankly we think that this Court should
25 simply reject TRPA's proposal to proceed with an Abbott

1 Labs type analysis, look at Williamson County, look at
2 MacDonald -- those are land use cases involving regulatory
3 takings challenges.

4 The point of the Takings Clause is fairness.
5 The point of requiring just compensation when there has
6 been a complete wipe-out of all beneficial use of land is
7 fairness.

8 The point of the ripeness doctrine is certainty.
9 We want to know that we have a certain claim. We want to
10 know that the regulations have been applied with certainty
11 so that we can proceed with the adjudication. We have
12 certainty.

13 QUESTION: Mr. Radford, could I take you back to
14 the line of questioning that Justice O'Connor began with?
15 You said that none of these TDR's preexisted the asserted
16 taking here. That is, the denial of the building
17 authorization.

18 Is that so? I thought that -- is it not the
19 case that any lot owner in this area could, if he or she
20 wished, sell that lot-owner's right to build to somebody
21 else?

22 MR. RADFORD: Within the many restrictions that
23 are placed on the transactions that's correct, Justice
24 Scalia.

25 QUESTION: Right. Well, so then some of these

1 TDR's did preexist the asserted taking here.

2 MR. RADFORD: Perhaps my answer to Justice
3 O'Connor was misspoken. My point was that the TDR's were
4 created at the same time as this regulatory scheme that
5 TRPA has placed.

6 QUESTION: Well, the regulatory scheme is not
7 the taking. I --

8 MR. RADFORD: No. No.

9 QUESTION: I thought your point was that if
10 something is given to you at the same time as the taking,
11 it can be regarded as compensation, but it in no way
12 reduces the amount of the taking, and their response is,
13 yes, but you had more than just your ability to use the
14 land at the time of the taking. You also had your ability
15 to trade off your land rights to somebody else.

16 MR. RADFORD: Well, we have, of course --

17 QUESTION: And for some of them that's true.
18 I'm not sure all of them. I think some of them you only
19 acquire after you've been designated a --

20 MR. RADFORD: That's -- that's true. Of course,
21 you have to go through the lottery to obtain the
22 allocation. You get the bonus residential development
23 rights but only if you sell your initial right and
24 greenbelt your property and so forth.

25 But the sole point I was making was that the

1 TDR's at issue in Penn Central existed prior to the whole
2 regulatory scheme of the landmarks regulation. It was
3 part of the comprehensive zoning plan of the entire City
4 of New York.

5 Here, by contrast, the TDR's were created at the
6 same time as the regulatory plan under which it was
7 finally applied to Mrs. Suitum, giving rise to this
8 taking.

9 The point being, the TDR's at issue here were
10 created specifically for situations where these
11 regulations will deprive an owner of all beneficial use of
12 their land and then go through an ersatz compensation
13 procedure of saying, in effect, here, you have some paper.

14 We've taken away all of your property rights but
15 you have some paper. We haven't taken that away, so you
16 not only have no taking, but your claim isn't even ripe.

17 I'd like to reserve the rest of my time, Mr.
18 Chief Justice.

19 QUESTION: Very well, Mr. Radford.

20 Mr. Lazarus, we'll hear from you.

21 I hope sometime during your argument you will
22 comment on the observation I am about to make, that the
23 Ninth Circuit seemed to rely very heavily on the
24 Williamson v. Hamilton County.

25 Your brief here kind of shifts and goes to

1 Abbott Laboratories. Is that really a shift in your
2 position, or a change in emphasis?

3 ORAL ARGUMENT OF RICHARD J. LAZARUS

4 ON BEHALF OF THE RESPONDENT

5 MR. LAZARUS: It's exactly that, Your Honor. It
6 is a change in emphasis. It's not a change in the bottom
7 line reasoning or the ultimate result.

8 We -- as this case has progressed our thinking
9 has evolved somewhat on that issue, and we don't think
10 that the best way to view the ripeness issue, which is a
11 prudential ripeness issue here, the best way to view it is
12 in strict terms of finality in Williamson County but
13 instead in terms of more of a flexible approach a
14 prudential ripeness as reflected in this Court's decision
15 in Abbott Labs. Williamson County --

16 QUESTION: Do you think the Administrative
17 Procedure Act applies to the TRPA?

18 MR. LAZARUS: No. The Administrative Procedure
19 Act does not apply, and our basic position is that the
20 Abbott Labs principles, the prudential ripeness principles
21 announced in Abbott Labs, which, of course, was a case
22 involving the Administrative Procedure Act, should apply
23 more broadly than just cases, and there's no reason --

24 QUESTION: So you would apply, say, Abbott
25 Laboratories to an entirely uni-State proceeding if this

1 were just California?

2 MR. LAZARUS: Yes, Your Honor. I mean,
3 basically our position is that prudential ripeness is
4 described in very flexible terms in Abbott Labs, and at
5 those --

6 QUESTION: What if the State of California were
7 to take a different position in its administrative
8 procedure rulings?

9 MR. LAZARUS: Well, we're just claiming in terms
10 of Federal jurisdiction, and --

11 QUESTION: So you say the Tahoe Regional
12 Planning Agency is governed by Federal law in this
13 respect?

14 MR. LAZARUS: No. It's just a question of, it's
15 a jurisdictional issue to the extent a case is brought in
16 Federal court, and cases to be brought against the Tahoe
17 Regional Planning Agency under the compact either in State
18 court or in Federal court.

19 To the extent that they're brought in Federal
20 court, though, standing requirements would apply, both
21 prudential and constitutional, and ripeness considerations
22 would apply, both prudential and constitutional.

23 Petitioner's position in this litigation is
24 decidedly at odds in our view with the interests of
25 property owners concerned about governmental regulation.

1 They are challenging a ripeness ruling that will likely
2 help them, and they attack a TDR program that furthers
3 rather than undermines private property rights.

4 Petitioner offers two reasons why the lower
5 courts were wrong in concluding that her takings claim
6 lacks ripeness, a very narrow reason and a broad reason.
7 I would like to begin my argument by addressing first
8 petitioner's narrow argument, because I believe at least
9 that argument presents a close question.

10 Petitioner's narrow argument is that her takings
11 claim is ripe because the value of her TDR's can be
12 determined by a court based on appraisals without any
13 effort necessary by her to market them or to seek any
14 possible approval of the transfer.

15 QUESTION: Well, and that sounds eminently
16 reasonable in light of the evidence that we do have in
17 front of us. Experts have given their opinion of the
18 value.

19 MR. LAZARUS: And we do agree, Your Honor, that
20 the appraisals that are in evidence are very good evidence
21 and they're weighty evidence, but the value of an actual
22 marketing effort for a TDR remains great, and let me
23 explain why.

24 QUESTION: Well, but I don't see why that's a
25 requirement for ripeness.

1 MR. LAZARUS: Well --

2 QUESTION: Maybe the best value of a property is
3 if it's sold, but we have many claims for takings where
4 the property isn't sold, and no court requires it to be
5 sold in order to determine the value.

6 MR. LAZARUS: That's right.

7 QUESTION: So it's a strange argument.

8 MR. LAZARUS: Well, Your Honor, this is a unique
9 case, because TDR's -- most real property, the value can
10 be readily determined based on appraisals. TDR's are
11 fairly unique in this regard, which is what makes the
12 value for the fitness of the issue so important to
13 actually have a marketing effort. Let me try to explain
14 just for a moment.

15 The single most dispositive factor in valuing
16 real property, as we all know, is location. Well, TDR's
17 arise in the first instance out of ownership at one
18 location, but their efficiency and their effectiveness is
19 that they can ultimately be applied to many locations.
20 Until one starts to begin to identify where the market
21 exists for the TDR, it's very hard to know its value.

22 A TDR, for instance in Placer County if
23 ultimately applied there is worth far less than in Washoe
24 County.

25 But the irony here is if you look back to the

1 old TDR cases in the 1960's, the early litigation in Penn
2 Central, it was the property owners who made this
3 complaint about TDR's, that until you --

4 QUESTION: Well, but the TDR's in Penn Central
5 were different in that they went to property already owned
6 by the claimant.

7 MR. LAZARUS: They didn't have to. These could
8 go to properties that were owned by Mrs. Suitum if she
9 owned them. These TDR's are actually far more flexible
10 than the TDR's in Penn Central because they can go to
11 adjacent property, property she owns, or they can go to
12 lots of people in the --

13 QUESTION: Well, you say they're more flexible,
14 but they also strike me as less usable, since at least the
15 person who owned the property that the TDR applied to
16 could make the judgment do I want to use it, rather than
17 just having to sell it to somebody.

18 It seems to me your argument is -- if the TRPA
19 says you can't use your lot but here's some scrip, you go
20 over to Harrah's and you can play roulette with it.

21 (Laughter.)

22 QUESTION: Then you say no, we don't value the
23 scrip. We have -- we require the owner to stand outside
24 the door of Harrah's and see what she can get for it,
25 though.

1 MR. LAZARUS: The fact that the Court considers
2 the TDR's in the Penn Central case relevant both to the
3 economic impact and considered to be use of the property
4 did not turn on the happenstance that they actually owned
5 some other property nearby. If Mrs. Suitum owned some
6 other property nearby, the TDR's could be applied there.

7 The TDR's here, though, are far more flexible.

8 QUESTION: What -- there's a 60-day claims
9 period against TRPA?

10 MR. LAZARUS: The 60-day claims period would not
11 apply in this case. This is a section 1983 case, and
12 under section 1983 the general limitations period
13 applicable in Nevada for personal injuries pursuant to
14 this Court's decisions in Wilson --

15 QUESTION: How does Mrs. Suitum know when the --
16 even under 1983 the statute runs?

17 MR. LAZARUS: The statute would run in our view,
18 the way we approach the case, that if she identified an
19 interested and eligible buyer, and they had obtained TRPA
20 approval of the transfer, at that point limitations would
21 run.

22 If, instead, she found out that it was futile --
23 it was -- with a good faith effort there was no market,
24 and we don't think that's going to happen, then it would
25 begin running at the date of the reasonable discovery of

1 the cause of action.

2 QUESTION: Your rules adopted by the association
3 say that you have to bring suit within 60 days, don't
4 they?

5 MR. LAZARUS: Yes, but those rules -- and this
6 has actually been litigated and settled, at least in the
7 Ninth Circuit, that for a 1983 action it's quite
8 consistent, and mandated by this Court's decision in
9 Wilson v. Garcia, that there is a uniform limitations
10 period for all 1983 actions, and you look to the
11 applicable State law, and in this case it would be Nevada.
12 It would be 2 years.

13 So it's not as though some 1983 actions are
14 governed by the 60-day in Article VI and others are
15 governed by Nevada law. Instead, 1983 actions would all
16 be governed --

17 QUESTION: But I didn't see anywhere in these --
18 I haven't read yet everything, but I didn't see in most of
19 these things any ground that the authority would have to
20 deny approval, assuming that she transferred the rights to
21 a person who was qualified, which any other -- so what's
22 left to do? I mean, why isn't it ripe under any theory?

23 MR. LAZARUS: Well --

24 QUESTION: That she's been told at a certain
25 date at that moment you cannot build on this property, and

1 instead, here are some pieces of paper, and they have
2 definite rights in them, and there's nothing more for the
3 agency to do? There's nothing for the agency to do? The
4 legal issue's clear?

5 What remains under Abbott Laboratories to
6 happen?

7 MR. LAZARUS: Well, one of the factors that
8 would apply in a case like this is the Penn Central factor
9 and the economic impact of the regulation, and until the
10 court has the record fleshed out to make the proper
11 determination of the economic impact, which includes the
12 value of the TDR's, the court -- it's just a matter of
13 prudential ripeness considering on the one hand the
14 relative fitness of the issue, and the issue simply is not
15 fit.

16 As counsel themselves said, they viewed this
17 whole thing as a mystery, how much these things were
18 worth.

19 QUESTION: Mr. Lazarus, suppose there's a
20 regular inverse condemnation case, and the plaintiff is
21 saying, you took my land, and I want just compensation.

22 Do you think that the State that took the land,
23 or the State agency, would be able to come in and say, you
24 know, this land is way off in the mountains. There hasn't
25 been a sale in that area in 50 years. Figuring out the

1 value of that land for just compensation purposes is very
2 difficult. This suit is not ripe. The owner of the land
3 has to go out and find a potential buyer at some cost.

4 Why is that any different from -- you know the
5 answer to that is, of course, the suit is ripe. Why is
6 that any different from the present case?

7 (Laughter.)

8 MR. LAZARUS: It's different from the present
9 case because of the uniqueness of TDR's. In a case like
10 that --

11 QUESTION: No, but you are creating the
12 uniqueness. I mean, you are supplying the ingredient
13 which Justice Scalia referred to as being up in the
14 mountains without any comparable sales, and the only thing
15 that is unique is that, in creating the TDR scheme, you
16 have created the problem. Why should the landowner have
17 to wait because you created something which is difficult
18 to value?

19 MR. LAZARUS: Well, the landowner shouldn't have
20 to wait if there would be any undue hardship, but what you
21 have here is a question for the court.

22 QUESTION: We don't inquire into hardship in
23 that case. I've never heard of a court inquiring into
24 hardship. The court might say to the plaintiff, look, if
25 you can't prove the value, you're the one who's going to

1 be the loser, but if you want to go ahead, go ahead.

2 MR. LAZARUS: Well, the --

3 QUESTION: They don't look into hardship.

4 MR. LAZARUS: There are other things at stake
5 here. One of the most important things of prudential
6 ripeness is the fitness of the issue for the court to
7 decide, and the court here simply wanted to decide this
8 very important as-applied takings case based on the better
9 evidence possible. The court --

10 QUESTION: I can't think of any ripeness case
11 I've ever read, and maybe you can cite one, but I can't
12 think of any ripeness case I've ever read in which a
13 factor like this made a difference. I mean, because of
14 what Justice Scalia said.

15 The agency isn't likely to change. They're not
16 going to change anything, and of course it would be a
17 little easier if we had better evidence about what these
18 TDR's are worth, but is there any case which said because
19 you can get better valuation evidence later --

20 MR. LAZARUS: Well --

21 QUESTION: -- this matter isn't ripe?

22 MR. LAZARUS: There are not cases involving
23 valuation.

24 QUESTION: No, but anything like that.

25 MR. LAZARUS: There are --

1 QUESTION: Which case?

2 MR. LAZARUS: Well, there are cases involving
3 the fact the court wants better facts before it to decide,
4 like the Whren v. Geary case, the First Amendment case I
5 believe written by Justice Kennedy involving a First
6 Amendment challenge, and one of the questions -- it was a
7 California constitutional provision which made it unlawful
8 for a political party to endorse any candidate for non --
9 a nonpartisan office.

10 And if one reads the Court's opinion there, one
11 of the things the Court is concerned about there is that
12 until they have an actual application -- they can see what
13 the pamphlets are. They can see what the actual hardship
14 would be on the political party in that case -- it simply
15 really wasn't ripe for --

16 QUESTION: Mr. Lazarus, on a question of
17 evidence, what these TDR's are worth, it's something that
18 you created. The landowner really wants nothing to do
19 with it, and one of the considerations when we're dealing
20 with evidence is which side is better equipped to present
21 the information.

22 Now, as I understand it, Ms. Suitum had somebody
23 testify and that person was rejected as not a proper
24 expert. You had someone who did qualify as an expert, so
25 even if the record needs fleshing out, why should it be

1 Suitum rather than the agency that does the fleshing out?

2 MR. LAZARUS: Well, because she is the plaintiff
3 in this case, and she in effect created the factual
4 uncertainty about these TDR's which prompted the lower
5 court to decide that it needed a better record to decide
6 the case than it had before.

7 QUESTION: Why should we characterize her as
8 creating the uncertainty when it was your agency that
9 created the rights?

10 MR. LAZARUS: Well, we created the --

11 QUESTION: Why blame her rather than your
12 client?

13 MR. LAZARUS: Well, the rights that we created,
14 though, were rights which were very consistent with
15 fairness and justice, and that is in this case we were
16 striving --

17 QUESTION: Well, that's kind of the issue here,
18 isn't it?

19 (Laughter.)

20 QUESTION: May I -- let me make a proposal, and
21 you tell me if I'm wrong, and why.

22 It seems to me that the agency's interest here
23 in raising the ripeness claim and in defending what has
24 happened below is simply this, that if the valuation does
25 proceed right now, without the development of a market and

1 without the -- any further action by the petitioner, an
2 appraiser is likely to come in and say, there is so little
3 reason for me to ascribe value to these rights that I'm
4 going to ascribe a very low value to them. I'm going to
5 say, perhaps not that they're worth less -- worth nothing,
6 but that they are worth very little.

7 And it seems to me that that's the only interest
8 which the agency has in delaying this. They don't want a
9 low valuation. Is there something more involved in that?

10 MR. LAZARUS: Well, certainly the agency has an
11 interest in a ruling which promotes the creation of this
12 market, but the real, more concrete interest of the agency
13 in this case -- because, of course, the only record
14 evidence in this case, the only appraisals are all on our
15 side. Our interest is a far broader interest, and that is
16 to have these applied takings challenges based on the best
17 record possible.

18 QUESTION: But it seems to me quite manipulative
19 for you to say we want to use the courts to create our
20 market. You want the ruling to create a market?

21 MR. LAZARUS: It would have -- it could have
22 that incidental effect.

23 QUESTION: If your position is that these are
24 worth something, then that ought to be a market that
25 you've created when you gave her the coupons.

1 MR. LAZARUS: Well, Your Honor, that is an
2 incidental, I think positive effect of our position, but I
3 think the main impetus of our position remains the fact
4 that it is in the Government's interest always to have the
5 constitutionality determined based on a fully fleshed-out
6 record.

7 Now, in this case, perhaps the trial court,
8 contrary to our recommendation, should have, relying on
9 our appraisals, ruled against the petitioner on the
10 merits. The irony is what she is challenging is a ruling
11 that is far more generous than that which is in effect.

12 QUESTION: But then she could have been able to
13 appeal here on the merits question, which your opposing
14 counsel is urging us to reach but acknowledges we need not
15 reach, and this 6 years of litigation would have been
16 ended that much sooner.

17 MR. LAZARUS: Well --

18 QUESTION: This just adds another layer of
19 litigation.

20 How elderly is this plaintiff, if we're talking
21 about hardship? Do we know how old the lady is?

22 MR. LAZARUS: I believe she's 82 years old.

23 QUESTION: And she's been litigating this for 6
24 years already.

25 MR. LAZARUS: Well, Your Honor --

1 QUESTION: Do you want to talk about hardship?

2 MR. LAZARUS: Well --

3 (Laughter.)

4 MR. LAZARUS: To the extent, Your Honor, that
5 there's been hardship here, under our view she could have
6 very easily made this case ripe consistent with the
7 district court's opinion in a very short time. The delay
8 that has resulted over the years is a result of the
9 litigation.

10 Now, she is of course well within her rights to
11 appeal, but having chosen to appeal, you can't claim
12 hardship on the valuation based on the time that it took
13 for the appeal when the case could have been very easily
14 made ripe for other times.

15 I can't speculate as to why, given the age of
16 the petitioner, one chose one technique rather than
17 another technique, but in terms of hardship, I don't think
18 one could put the litigation, particularly the lengthy
19 appeal, as evidence of the hardship --

20 QUESTION: How could she -- does she have to
21 wait till she wins the lottery? What if she doesn't win
22 the lottery? How is that one to be evaluated?

23 MR. LAZARUS: Under our view, she basically
24 would have to make a good faith effort.

25 QUESTION: To win the lottery?

1 MR. LAZARUS: Well, it's a lottery that we'd all
2 like to apply to, Your Honor. Based on the record
3 evidence --

4 QUESTION: She can only sell that particular
5 right if she wins the lottery, so I guess she would have
6 to keep applying until she wins, and then try to sell it
7 and see how much it's worth, and then maybe you discount
8 it by the chances of winning.

9 MR. LAZARUS: Well --

10 QUESTION: I don't know.

11 MR. LAZARUS: Yes, well, the record evidence is
12 in 1993 there is --

13 QUESTION: The point is, it's certainly not an
14 easy thing for her to come up with the kind of
15 evaluation --

16 MR. LAZARUS: Well -- well --

17 QUESTION: -- that you're talking about, and she
18 had no reason to believe you were going to be generous
19 in --

20 MR. LAZARUS: Your Honor --

21 QUESTION: -- saying never mind the lottery.

22 MR. LAZARUS: Because everything is outside the
23 record, there were fewer applicants than allocations.

24 QUESTION: Yes, but it's the case that everybody
25 wins this lottery after 4 or 5 years. I got that

1 impression from reading --

2 MR. LAZARUS: Well, at this point there were
3 few -- in Washoe County there were fewer applicants than
4 there are allocations, so at this point it's really not --

5 QUESTION: There's 100 percent chance of winning
6 the lottery?

7 MR. LAZARUS: Yes, and even if there wasn't,
8 Your Honor, because obviously this could vary depending on
9 the county, all we're asking -- all we're basically urging
10 the Court to adopt here is a prudential approach which
11 would be looking at --

12 QUESTION: Mr. Lazarus, I understand the Ninth
13 Circuit didn't, and the Abbott Laboratories is a new
14 creation, and you're talking about balance of hardships.
15 That's -- the Ninth Circuit thought it was dealing with a
16 Williamson-type case. It was just like, could I get a
17 variance.

18 MR. LAZARUS: We think the better way to view
19 the case is in more flexible terms. Williamson County and
20 Yolo County are, after all, really just case-specific
21 applications of the broader principles of Abbott Labs,
22 basically concerns with --

23 QUESTION: But there's also one -- I'm sorry. I
24 think there's one difference between the Williamson
25 situation and this, and that is, if I understand it

1 correctly, in the Williamson situation the rights which
2 the property owner wanted to exercise were rights which
3 came to the property owner with the purchase of the
4 property, but they were simply subject to a Government
5 limitation. You can't do this unless you get a variance.

6 The rights that we're concerned with here,
7 however, are at least in part new rights. She, for
8 example, did not when she purchased her lot get a right to
9 have somebody else build so many square feet on somebody
10 else's lot. That's a brand new creation, and so that, it
11 seems to me, is why the -- even if we were to say well,
12 this is a Williamson case, you might still be in trouble
13 under Williamson.

14 MR. LAZARUS: Well, and that's maybe one reason
15 why we think the better way to view the case is in more
16 flexible terms.

17 If I've got a little time, I'd like to spend
18 just a moment, though, on petitioner's broader ripeness
19 argument, which is simultaneously less persuasive and far
20 more troublesome, and that's petitioner's argument that
21 the value of her TDR's is irrelevant as a matter of law as
22 to the question whether this property has been taken.

23 We really think that that argument is directly
24 contrary to this Court's holding in the Penn Central case,
25 where the Court directly faced -- the only case in which

1 this Court has directly faced the question of the
2 relevance of TDR's to the question whether the property
3 has been taken, and the Court squarely held that the value
4 of TDR's is relevant to the economic impact.

5 Thank you.

6 QUESTION: Thank you, Mr. Lazarus.

7 Mr. Wallace, we'll hear from you.

8 ORAL ARGUMENT OF LAWRENCE G. WALLACE

9 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING THE RESPONDENT

11 MR. WALLACE: Thank you, Mr. Chief Justice, and
12 may it please the Court:

13 It's important to bear in mind that the TDR's
14 under this plan become part of the owner's bundle of
15 rights that are connected with the property. The
16 market --

17 QUESTION: But they're new sticks in the bundle,
18 at least some of them.

19 MR. WALLACE: They're new sticks in the bundle
20 which --

21 QUESTION: Is an easement part of the bundle of
22 rights?

23 MR. WALLACE: It could be if it were
24 transferable. The point I'm trying to make is that if she
25 were to sell her lot to a new purchaser and had not used

1 the TDR's, the purchaser would get the right to use the
2 TDR's and market them, and therefore the market value of
3 the lot that she owns reflects the value of the TDR's.

4 This is not some separate compensation that's
5 been given to her personally. It's a part of the bundle
6 of rights that goes with ownership of this parcel. This
7 was an effort made --

8 QUESTION: If you had two parcels, one with this
9 restriction and one without, which person has the bigger
10 bundle of rights? It seems to me very strange to call
11 this part of the bundle of rights.

12 MR. WALLACE: Well, it is part -- in takings
13 analysis, in regulatory takings cases we look to see what
14 economic value has been retained and what economic value
15 has been taken, as well as the purpose of the regulation,
16 interference with reasonable investment-back expectations
17 and the rest of it.

18 What she retains under this plan, which was
19 designed to mitigate, in accordance with this Court's
20 analysis in Penn Central, the economic burden that would
21 be placed on these environmentally sensitive properties
22 where no further development on the property itself, no
23 further impermeable surfacing could be permitted, what she
24 has been given is something that this record says is of
25 value and is marketable along with the land if she wants

1 to sell the lot.

2 QUESTION: Well, Mr. Wallace, what if the
3 Government had imposed this same restriction on her, and
4 instead of giving her TDR's had said, we have another
5 piece of property over here that we think is equal to the
6 value we're taking away from you, so here it is.

7 Now, that may or may not be ripe, but surely
8 there's not a ripeness problem there, is there?

9 MR. WALLACE: Well, ripeness is not what I was
10 speaking of at the moment. There would not be --

11 QUESTION: Well, I thought that's what this case
12 involved.

13 MR. WALLACE: Of course it does, and I wanted to
14 get to that, but first we are quite concerned with the per
15 se takings theory under which they are arguing that it's
16 ripe, because it seems to us contrary to this Court's
17 jurisprudence, not only directly contrary to the holding
18 in Penn Central that TDR's count in the takings calculus
19 and are not just to be considered part of compensation,
20 but there's a reason for that holding that has to do with
21 the fact that the TDR's are part of the bundle of rights
22 that an owner of this parcel would get.

23 QUESTION: But the Court didn't treat Penn
24 Central as a ripeness case at all. It treated it as a
25 takings case --

1 MR. WALLACE: Of course.

2 QUESTION: -- and said there was no taking.

3 MR. WALLACE: Of course, and that is my point,
4 that the Court held there was no taking, and part of the
5 calculus was that the value of the TDR's was retained by
6 the owner, and was something that contributed to market
7 value remaining in that parcel of property.

8 Now, in approaching the ripeness question
9 itself, we have no enthusiasm generally for the
10 proposition that a plaintiff in a takings case who fails
11 to prove her case should get a second bite of the apple
12 and be able to bring a case later making essentially the
13 same claim if better evidence can be produced, so it was
14 with some hesitancy that we supported the ripeness
15 argument here on the respondent's side, and I think
16 that --

17 QUESTION: Mr. Wallace, let me understand what
18 you're just saying. I don't know that any judge in this
19 case said that she didn't have a claim on the merits. I
20 thought it was ripeness at both stages.

21 MR. WALLACE: That is true. The courts below
22 did not reach the merits, but the only evidence of value
23 that she offered was excluded, and so it seems to us that
24 the likely outcome if this case is held to be ripe is that
25 the respondent has introduced sufficient evidence of value

1 that it can't be said that she has shown that there's a
2 taking.

3 The model --

4 QUESTION: Goodness, no court decided that.

5 MR. WALLACE: Well --

6 QUESTION: Even taking the evidence introduced
7 by the respondent --

8 MR. WALLACE: No court has decided --

9 QUESTION: -- her land was worth more than
10 \$100,000 many years ago as a location to build a house,
11 and the evidence introduced by respondent shows that the
12 rights given by the TDR's and the other rights attaching
13 to the property at most would amount to what, \$30,000 or
14 something?

15 MR. WALLACE: \$35,000, but --

16 QUESTION: So we're not going to decide here
17 that that couldn't be a taking. My goodness.

18 MR. WALLACE: Well, there's --

19 QUESTION: I mean, why not give this poor,
20 elderly woman the right to go to court and have her
21 takings claim heard?

22 MR. WALLACE: That could be done. What --

23 QUESTION: You rely on Abbott Labs.

24 (Laughter.)

25 QUESTION: Abbott Labs is your answer, right?

1 MR. WALLACE: Well, what --

2 QUESTION: Abbott Labs is an APA case. It's
3 also, being an APA case it's a case -- and a case seeking
4 an injunction. It's a case bringing one of the
5 prerogative writs so that the court is sitting with all
6 sorts of equitable powers, and can, indeed, decide to
7 weigh the equities and so forth.

8 This is not an equitable case here, is it?

9 MR. WALLACE: She is seeking very similar relief
10 in some of her claims.

11 QUESTION: 198 --

12 MR. WALLACE: She's seeking a permit to build on
13 this lot. She is seeking equitable relief.

14 QUESTION: But you -- could you answer Justice
15 O'Connor's question, because I have a distinct feeling
16 perhaps the answer is neither the Government nor the
17 respondent mind if this Court were to say, it's ripe.
18 We're not expressing any view on the merits -- none -- and
19 all she is arguing is that in fact under these
20 circumstances she gets definite rights of TDR's and her
21 property can't be built on.

22 She says that constitutes a taking. The other
23 side says it doesn't. Now, suppose the opinion said just
24 that, would the Government object?

25 MR. WALLACE: This would not be harmful to our

1 interests in any way.

2 QUESTION: Maybe this case is moot. I don't
3 know why all these people have come up here, then.

4 MR. WALLACE: What I --

5 (Laughter.)

6 QUESTION: I thought that's what the whole
7 dispute was about, Mr. Wallace.

8 MR. WALLACE: Well, we have said that we think
9 there has been a final decision in this case within the
10 meaning of Williamson, and perhaps the role that we see
11 for Abbott Laboratories can best be hypothesized if at the
12 outset of this plan, when the TDR's were brand new and no
13 one had marketed any of them, every owner of one of these
14 properties went directly to court and there would be
15 nothing in the way of comparable sales, nothing but
16 speculation about what the value of the TDR's would be.

17 QUESTION: But that's because of the nature of
18 the right the agency itself created. You're saying that
19 agencies can diminish ownership rights and diminish value
20 and then claim as a defense the fact that this can't be
21 appraised in court. This is a very strange doctrine.

22 MR. WALLACE: Well, this was an effort to
23 transform part of the bundle of rights in a way that would
24 retain a substantial measure of value in it.

25 Those responsible for governing at three levels

1 here, the States that entered into the compact, Congress,
2 and the planning agency, recognized that because of the
3 basin's peculiar ecological fragilities, further
4 development on these parcels located in these sensitive
5 areas could not be permitted, that this would threaten the
6 interrelated environmental and economic well-being of the
7 entire basin.

8 And so they tried to create a program that would
9 retain a substantial measure of value for the owners of
10 these parcels, and mitigate any loss that they would
11 suffer as a result of what was not an extraneous
12 restriction being placed on them but something very much
13 related to the danger that their development would pose
14 within Dolan v. Tigard.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
16 Wallace.

17 Mr. Radford, you have 5 minutes remaining.

18 MR. RADFORD: Mr. Chief Justice, unless there
19 are further questions from the Court I have nothing to
20 add.

21 CHIEF JUSTICE REHNQUIST: Very well. The case
22 is submitted.

23 (Whereupon, at 10:59 a.m., the case in the
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson 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:

BERNADINE SUITUM, Petitioner v. TAHOE REGIONAL PLANNING AGENCY
CASE NO: 96-243

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

BY *Donna Marie Federico*-----

(REPORTER)