

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITY OF MONTEREY, Petitioner v. DEL MONTE
DUNES AT MONTEREY, LTD., AND MONTEREY-
DEL MONTE DUNES CORPORATION

CASE NO: 97-1235 C-2

PLACE: Washington, D.C.

DATE: Wednesday, October 7, 1998

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Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITY OF MONTEREY, :

4 Petitioner :

5 v. : No. 97-1235

6 DEL MONTE DUNES AT MONTEREY, :

7 LTD., AND MONTEREY-DEL MONTE :

8 DUNES CORPORATION :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, October 7, 1998

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:03 a.m.

15 APPEARANCES:

16 GEORGE A. YUHAS, ESQ., San Francisco, California; on
17 behalf of the Petitioner.

18 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the United States, as amicus curiae, supporting the
21 Petitioner

22 MICHAEL M. BERGER, ESQ., Santa Monica, California; on
23 behalf of the Respondents.

24

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1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 97-1235, the City of Monterey
5 v. Del Monte Dunes, et cetera.

6 Mr. Yuhas. Is that the correct pronunciation of
7 your name?

8 MR. YUHAS: Yes.

9 ORAL ARGUMENT OF GEORGE A. YUHAS

10 ON BEHALF OF THE PETITIONER

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

13 We are asking this Court to decide three issues
14 in this inverse condemnation case. First and most
15 important the constitutional standard for review of a
16 city's land use decision does not allow the imposition of
17 takings liability based upon a de novo second guessing of
18 the city's policy and factual determinations.

19 Second, courts, not juries, are the appropriate
20 decisionmakers for all inverse condemnation liability
21 issues and, finally, the concept of rough proportionality
22 does not apply to this case, where the city denied the
23 proposed development.

24 What ties these issues together are the concepts
25 of deference and the concepts of the limited role of the

1 Constitution and the Federal courts in the local land use
2 planning process.

3 This case is not atypical in some respects. The
4 city was faced with a complex decision it had to reconcile
5 competing interests, sift through facts, and exercise its
6 discretion and judgment, and it did so.

7 QUESTION: Five times.

8 MR. YUHAS: It did so, Your Honor. It was a
9 complicated project. In this particular case it only
10 exercised discretion once, that is directly relevant, and
11 that is, its consideration of the restoration plan
12 presented by the respondents.

13 QUESTION: This was the fifth plan presented,
14 right? Each one was successively rejected for a different
15 reason each time?

16 MR. YUHAS: The initial rejections were for
17 density, and the fifth one was rejected down for two
18 reasons only. There was access, and there was the
19 restoration plan, and that was the first time that -- in
20 fact, the city council had faced the question as to
21 whether there was an adequate recommended plan.

22 QUESTION: And this is typical, you say?

23 MR. YUHAS: It is typical in this kind of
24 complex. It was a complicated project.

25 QUESTION: Well, in asking whether the decision

1 in question was reasonable, the history of the zoning and
2 the previous attempts are relevant, are they not, in
3 determining the reasonableness of the city's action?

4 MR. YUHAS: I submit that the issue is not the
5 reasonableness of the city's action, but rather the issue
6 is whether, in fact, the city's action in the first
7 instance bears a reasonable relationship to a legitimate
8 goal.

9 QUESTION: Well, could you -- suppose you told
10 the jury, the issue for you to decide is, was the decision
11 based on reason? Did it substantially advance a
12 legitimate public goal? Could the jury answer that
13 question?

14 MR. YUHAS: I believe that that is two different
15 questions.

16 QUESTION: Well, that was your argument to the
17 jury. I've read the record.

18 MR. YUHAS: I submit that the question presented
19 to the jury in the instructions was, does the city's
20 action bear a reasonable relationship to a legitimate
21 goal. Here --

22 QUESTION: You said, did it substantially
23 advance a legitimate goal? You said that's the issue for
24 the jury, and you said the issue for you to decide was the
25 decision based on reason. Those are two questions, and

1 you said those are presented here, and it seems to me that
2 the past history of what the developer was required to do
3 is relevant to that.

4 MR. YUHAS: And we didn't argue that the jury
5 could not consider that past history, but on the specific
6 issue that the jury was asked to address, over our
7 objection, because we continue to believe that that is an
8 issue for the court, on the first prong, the substantially
9 advance a legitimate public interest, that prong, which
10 derives essentially from substantive due proc language,
11 that is a deferential test.

12 QUESTION: Well, are you saying that the jury
13 was not entitled to consider the length of time that these
14 proceedings were underway at all?

15 MR. YUHAS: I'm not suggesting that, Your Honor.

16 QUESTION: How long were they underway, from
17 beginning to end?

18 MR. YUHAS: The first time that the city was
19 presented with this development application was 1983. The
20 final consideration was 1986. There was some additional
21 planning for 1983, because the local coastal plan was
22 being implemented or developed at that time.

23 QUESTION: What happened between 1986 and now?

24 MR. YUHAS: After 1986, the testimony is that
25 the developer made no further effort to develop the

1 property or contact the city. The property was sold in
2 1991 for \$4.5 million, approximately \$800,000 more than
3 the developer paid, and something less than --

4 QUESTION: We have a lawsuit here. Surely the
5 lawsuit must have begun sometime after 1986, one hopes.

6 MR. YUHAS: Well, one hopes. Believe it not,
7 the lawsuit began in 1986. In 1986 the lawsuit was filed,
8 there was a ripeness challenge, that went up to the Ninth
9 Circuit, it was reversed, it came back, and that resulted
10 in the trial that brings it to today.

11 QUESTION: May I ask about that ripeness
12 challenge, and it relates to how significant this jury
13 trial issue is because, as I understand it, the Ninth
14 Circuit said it was ripe because at the time California
15 had no proceeding which the developer could bring, but now
16 California does and, as I understand our case law, a
17 developer in the situation that this one is in would be
18 obliged to go to the State court, not Federal court, is
19 that correct?

20 MR. YUHAS: That is correct, Your Honor.

21 QUESTION: And under the California procedure
22 the liability issue would not go to a jury.

23 MR. YUHAS: That is also correct, Your Honor.

24 QUESTION: So is there, now that the States have
25 been told that they must have these proceedings, is this

1 question of jury trial or not just a question for these
2 cases hanging over from the eighties?

3 MR. YUHAS: Your Honor, I certainly submit that
4 the issue of the jury trial is very significant to my
5 client in this case. It is not -- it does not have, I
6 think, great significance directly in cases litigated in
7 the State courts.

8 QUESTION: Does it have any continuing
9 significance at all? That's my question, because if
10 there's no ripe challenge until we've gone to the State,
11 the State would decide those questions. The State would
12 decide the liability questions, and then you might have
13 some constitutional question about it.

14 MR. YUHAS: There are two issues that were
15 raised, one which was raised by the amicus filed on behalf
16 of some of the States is there might be, under some
17 circumstances, a question as to whether, in fact, the
18 State determination would be fully collaterally estopped
19 in a subsequent case, or whether it would give rise to
20 collateral litigation.

21 But I think of more importance is that,
22 depending upon the nature and the reason why it's
23 determined that there is a right to jury trial, the
24 character of the issue is important.

25 If, in fact, the issue is one that requires a

1 deferential standard, because one that is akin to
2 substantive due process, that is an issue that cuts across
3 simply the procedural issue as to who decides, and goes to
4 what standard should be used.

5 The Ninth Circuit standard, the reasonableness
6 standard, is one that says, when a Government agency makes
7 a decision -- it could be establishing seismic standards.
8 It could be anything, and all a developer, a property
9 owner needs to do, is to say, you know, we have an expert,
10 and our expert says that we can build safely, we can
11 essentially dispute the fact that you need these
12 standards, or we can say that those standards are
13 excessive.

14 QUESTION: Well, let's talk about -- we're
15 dealing with inverse condemnation here, and it's a two-
16 part inquiry if we follow Agins. I don't know what the
17 inquiry is. What do you think it is?

18 MR. YUHAS: I believe --

19 QUESTION: Agins says two things, that the
20 city's action has to substantially advance a legitimate
21 purpose, and deny the subject property all economically
22 viable use.

23 MR. YUHAS: Yes, that is what Agins says.
24 That's what the jury was instructed here.

25 QUESTION: And they found on both those points

1 in favor of the respondents.

2 MR. YUHAS: We don't know that, Your Honor.

3 QUESTION: Well, they gave a general verdict.

4 MR. YUHAS: They gave a general verdict. They
5 found on one or the other, or both.

6 QUESTION: Well, was it an and or an or
7 instruction? Were they told to find that --

8 MR. YUHAS: Or.

9 QUESTION: -- it takes both, or were they told
10 either one?

11 MR. YUHAS: Either one. Either one, and that --

12 QUESTION: It was a general verdict.

13 MR. YUHAS: It was a general verdict on that
14 claim.

15 QUESTION: And you didn't object to those
16 instructions?

17 QUESTION: Even if we were to conclude that
18 there were one or more issues in here that were legal
19 issues for the court, it wouldn't require a new trial
20 because the court could look at the evidence and resolve
21 it anyway. It's not like we're having to send it back for
22 a new trial, regardless of the answer.

23 MR. YUHAS: That's correct, and I believe the
24 Ninth Circuit in fact indicated that in its opinion.

25 QUESTION: And there are certainly some factual

1 issues here, like economically viable use, that
2 traditionally would go to a jury, it seems to me.

3 MR. YUHAS: Those are certainly ad hoc factual
4 inquiries.

5 QUESTION: Absolutely.

6 MR. YUHAS: However, they are not inquiries that
7 I believe are properly decided by the jury, because the
8 decision of economically viable use is not simply a
9 question of valuation. That is certainly a component, but
10 going with that is the question of what is the reasonable
11 investment-back expectations of the property?

12 QUESTION: But surely a jury could be charged on
13 that. Juries decide all sorts of questions where they get
14 legal instructions from the judge and they decide the
15 factual component of the question.

16 MR. YUHAS: Juries are very adept at resolving
17 historical issues of fact. Juries are not adept at
18 employing balancing tests or multifactor analysis.

19 QUESTION: Well, but juries decide questions of
20 land value all the time in the State courts in
21 condemnation actions. California, Arizona --

22 MR. YUHAS: Mr. Chief Justice that is absolutely
23 correct, and if the only issue on a denial of all
24 economically viable use was a valuation question, I would
25 say the jury had the competence, but it goes far beyond

1 that.

2 For example, even where it does deprive the
3 property of all economically viable use, there is also the
4 issue of simply, is the intended use akin to a nuisance,
5 the Lucas issue. That is an issue which is akin to a
6 public nuisance determination, which is historically made
7 by courts.

8 QUESTION: Well, you cast the case as if the
9 jury is going to be assessing the reasonableness of the
10 zoning ordinance, but that's not what the jury was
11 instructed. That's not what you argued to the jury.
12 That's not what Mr. Jacobson argued. They said, was this
13 decision a reasonable implementation of that ordinance,
14 and that's different, and juries talk about reasonableness
15 all the time. That's the whole law of torts.

16 MR. YUHAS: Juries do decide reasonable
17 questions. They decide reasonable conduct because that is
18 underlying the legal standard of liability.

19 Where the standard of liability, I submit, is,
20 in fact, one, does an action substantially advance the
21 public purpose, and where that standard derives from
22 substantive due process principles which carries with it a
23 level of deference, carries with it the idea that we don't
24 want juries coming in in every case and saying, I don't
25 think that the State's action reasonably implemented

1 zoning, that will depend upon invariably complicated facts
2 and subsidiary policy decisions as well.

3 QUESTION: Well, you instruct the jury that the
4 city is entitled to the greatest of deference and leeway,
5 but that if they have been unreasonable or, say in bad --
6 suppose the jury's -- the planning commissioner is in bad
7 faith in implementing the ordinance, could that question
8 go to the jury?

9 MR. YUHAS: That question did not go to the
10 jury. In fact --

11 QUESTION: Could that question --

12 MR. YUHAS: Oh --

13 QUESTION: -- in a proper case go to the jury?

14 MR. YUHAS: -- in a proper case, that question
15 could go to the jury. In this case, the jury was
16 instructed that they were to disregard motive, because
17 there was no evidence of bad faith and, in fact, the trial
18 court, considering this same record, concluded that the
19 city acted reasonably. They were not attempting to
20 forestall all reasonable development.

21 QUESTION: Could the jury do this. This is --
22 am I right -- help me with this. Am I right in thinking
23 that we're reviewing a judgment that awarded your opponent
24 \$1.45 million for a temporary taking, which I take it was
25 for the period of time from, like maybe when they bought

1 the land or something, until California paid the \$4.5
2 million, or 4.8. That was the judgment we're reviewing.
3 I may not have it precisely right, but roughly.

4 MR. YUHAS: The taking damages went all the way
5 to trial. They went 4 years beyond when they actually
6 sold the property, but --

7 QUESTION: But it's a temporary taking.

8 MR. YUHAS: It is, Your Honor.

9 QUESTION: All right. Now, if that's so, and if
10 I believe the jury could assess this question, had it
11 during that time been deprived of all value, I suppose
12 that's a jury question in my mind, supposedly. They can
13 decide that question, whether or not all value disappears
14 from the property, therefore it warrants -- and, moreover,
15 the jury could assess the amount.

16 All right. If I believe those two things, is
17 there any reason for me to go further in this case?

18 MR. YUHAS: I believe there is, Your Honor.

19 QUESTION: Why?

20 MR. YUHAS: First, in this case the evidence was
21 undisputed and, in fact, the jury was instructed that if
22 they found insubstantial value --

23 QUESTION: Could anyone have found -- could
24 anyone, any reasonable person have doubted that the
25 property lost all its value during that temporary time?

1 Is there some evidence here? Is there some dispute?

2 I mean, I know there is a dispute as to whether
3 or not, when they got paid the money later -- I mean, you
4 had 4.8 million. I understand that dispute. But during
5 the temporary time, is there any dispute that it had no
6 value?

7 MR. YUHAS: Oh, very much so.

8 QUESTION: There was.

9 MR. YUHAS: In fact, the plaintiff's expert
10 opined that immediately after the city's action the
11 property retained \$2.9 million in value, and he opined
12 that that value from that point in time went up, so that
13 when the property was sold to the State in its regulated
14 State it was worth \$4.5 million.

15 Now, that was, to be fair, according to that
16 expert, a diminution value. In fact, the diminution I
17 believe was in the ball park of about 50 -- about 55
18 percent, but, in fact, there was substantial value the
19 entire time and that's why, when the jury was instructed,
20 if this property has substantial value, you should
21 conclude that there has been no denial of economically
22 viable use.

23 QUESTION: Is there any value, other than the
24 value that would come about by selling it to the State for
25 the use as a seashore?

1 MR. YUHAS: Oh, I believe so. I mean, this
2 project was turned down for two reasons, and two reasons
3 only.

4 QUESTION: Okay.

5 MR. YUHAS: And all that had to be done was to
6 resubmit the site plan that had a better restoration plan,
7 or, in fact, buy the property needed for the access.

8 QUESTION: But I thought they did that five
9 times to try to get a better restoration plan.

10 MR. YUHAS: The very first time that the
11 restoration plan was ever even put together in draft form
12 was in 1984, shortly before the city council overruled the
13 planning commission and approved conditionally the 190-
14 unit development, and the conditions were, you need to
15 show that you can do this development consistent with
16 habitat protection and, in fact, they went through a
17 year's process.

18 The city council expressly said, we can't assess
19 the adequacy of this habitat plan because we don't know
20 enough. You need to talk to Fish & Wildlife and Fish &
21 Game.

22 Finally, in 1986, they for the first time said,
23 we have the information, you have not shown us this is
24 good enough.

25 QUESTION: The landowner here essentially thinks

1 that it was getting jerked around, that basically the city
2 didn't want this land used for anything and wanted to
3 retain it empty so it could be used as a seashore. That's
4 what this thing is about.

5 Now, let's talk about deference to the city's
6 judgment. I can understand -- our normal rule is that we do
7 defer and, if there's a rational basis, that's all we look
8 to.

9 But where you have a consistent process, as is
10 alleged here, of turning down one plan, the next plan, the
11 next plan, okay, I'll do this to satisfy you, isn't there
12 some point at which, although there's a rational basis for
13 the fifth decision, a rational basis for the fourth and
14 the third and the second and the first, you begin to smell
15 a rat, and at that point can't we say, despite our normal
16 rational basis review, there's some other factor that
17 begins to come in here, and that is, at some point you can
18 say, this is simply unreasonable.

19 MR. YUHAS: I submit, Justice Scalia, that that
20 inquiry does not occur in the first prong of Agins as to
21 whether the decision substantially advances illegitimate
22 use. That comes into the second prong as to whether, in
23 fact, there are economically viable uses available.

24 If, in fact, the evidence demonstrates the city
25 intended never to approve any development, the trier of

1 fact could conclude, well, I guess this thing doesn't have
2 any economically viable use, and presumably it would have
3 no value.

4 But on the first prong, the first prong simply
5 says, is there, in fact, the city's action denying this
6 development, leaving the property as it is, does that have
7 a substantial relationship to a legitimate goal, whether
8 that goal be open space, whether that goal be habitat
9 protection.

10 QUESTION: What if the commission, instead of
11 saying no, you can't -- we'll reject your plan five times,
12 says, we're going to reject it for 100 units but we'll
13 approve it for 10 units?

14 Now, there the owner can't say it was denied all
15 economic value, but isn't it possible that an element of
16 bad faith would come in somewhere along the lines of
17 Justice Scalia -- I'm not saying it happened here, but if
18 a jury or a finder of fact was convinced that the city
19 council was simply going through motions here, that it was
20 determined not to really appraise the situation in the
21 light of the ordinance, couldn't a finder of fact, either
22 a jury or a judge, say that an element of bad faith plays
23 a part in the decision?

24 MR. YUHAS: Again, I submit that the element of
25 bad faith goes into whether in fact the property has been

1 deprived of all economically viable use.

2 QUESTION: But what the Chief Justice is asking,
3 and I think it was prompted by Justice Scalia's question
4 in my mind as well, let's assume that the city is
5 unreasonable in the implementation of its planning
6 ordinances, and that it's in bad faith in the
7 implementation of its planning ordinance. The property
8 still has an economically -- an economic viability.

9 Is there -- the city still liable in damages for
10 that unreasonable treatment of the landowner?

11 MR. YUHAS: Not under the Fifth Amendment.
12 There may be a remedy under State law and if, in fact, the
13 city participates in an effort to deliberately deflate the
14 value of the property for purposes of condemnation there's
15 a remedy for oppressive and unreasonable precondemnation
16 conduct, certainly under State law.

17 QUESTION: Well, may I try --

18 QUESTION: Why doesn't it come under the
19 other -- the other of the two criteria? Why do you insist
20 that we force this under the economically viable use
21 criteria rather than under whether it substantially
22 furthers any valid purpose?

23 MR. YUHAS: Because, looking at the -- what the
24 jury was instructed in this case as to a valid purpose,
25 which was habitat protection, health and safety, the

1 denial of this development, you know, did unquestionably
2 have a relationship --

3 QUESTION: Not if there was bad faith. If there
4 was bad faith it rationally could further that purpose but
5 it wasn't being used for that purpose.

6 MR. YUHAS: No. In this case there was no
7 finding of that. The Court was -- directed the jury to
8 disregard questions of motive and certainly I understand
9 that the respondent felt that in fact they were being
10 jerked around.

11 The respondent acquired this property and only
12 pursued two applications. The one that got approved -- I
13 correct myself, one application. The only application
14 that this respondent pursued was the one in 1986.

15 QUESTION: Okay --

16 MR. YUHAS: They bought the property --

17 QUESTION: Thank you, Mr. Yuhas.

18 Mr. Kneedler, we'll hear from you.

19 ORAL ARGUMENT OF EDWIN S. KNEEDLER

20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

21 SUPPORTING THE PETITIONER

22 MR. KNEEDLER: Mr. Chief Justice, and may it
23 please the Court:

24 Before discussing the substantially advanced
25 legitimate Government purpose aspect of this case I would

1 like to briefly address another point which the Ninth
2 Circuit addressed and that is that the Ninth Circuit,
3 without any prompting by the parties, brought this Court's
4 decisions in Nollan and Dolan into this case and said that
5 the overall denial of the plan in this case had to be
6 assessed under the rough proportionality formulation that
7 this Court announced in the Dolan case.

8 QUESTION: Well, of course, the jury wasn't
9 instructed on that theory. The oral arguments weren't on
10 that theory. I'm not sure why that issue is in the case
11 if the verdict can be sustained on another basis.

12 MR. KNEEDLER: Well, I -- but -- that seemed to
13 be an important aspect to the court of appeals affirmance
14 of the judgment.

15 On both page 16 and page 20 of the appendix to
16 the petition the Court relies upon the rough
17 proportionality standard as the basis for finding that the
18 jury could have found that there was no sufficient
19 evidence to support the city council's verdict, and it may
20 be sufficient for this Court simply to vacate the judgment
21 and eliminate that discussion from the Ninth Circuit's
22 decision.

23 But we do want to make clear our position on
24 that question, that this Court's decisions in Nollan and
25 Dolan imposed that special rule for a special situation,

1 where the concern was that the city might actually be
2 extorting a right of physical access, essentially an
3 interest in property on the land, and using the occasion
4 of a permit approval in order to extort that.

5 It was a special rule for that situation. In
6 fact, in the Dolan case the Court specifically
7 distinguished that situation from one in which the -- you
8 simply had regulations that controlled the landowner's use
9 of her own property as opposed to having someone come onto
10 the property.

11 QUESTION: Well, suppose we agree with you that
12 the court of appeals got it wrong on the Dolan point, what
13 is -- how would reversing that, or vacating it, affect the
14 balance of the decision, if at all?

15 MR. KNEEDLER: Well, the question then would be
16 whether the court of appeals was correct in affirming the
17 judgment on the ground that there was sufficient evidence
18 from which the jury could have concluded that there was
19 not a reasonable basis for the action in this case, and
20 that really goes to the substantial relationship prong,
21 and we have -- we have two basic problems with that.

22 One is, we believe that the Court's formulation
23 of that aspect of finding a compensable taking in Agins
24 was erroneous, and that the question of whether a land use
25 regulation substantially advances a legitimate

1 governmental purpose should not be --

2 QUESTION: Was that challenged by the
3 petitioner, the Agins rule?

4 MR. KNEEDLER: It was not, Mr. Chief Justice.

5 QUESTION: Ordinarily we don't accept any new
6 questions or positions from an amicus.

7 MR. KNEEDLER: I understand that. The reason
8 that I do think it's relevant to the Court's
9 consideration, however, is the Court is being asked to lay
10 down a rule for the lower courts in terms of how a jury
11 or -- if it's a jury issue, or how a trial court should
12 address that question. Specifically, the petitioner is
13 arguing, and we think quite correctly, that if this is a
14 proper standard in a takings analysis.

15 QUESTION: Well, but that's not any particular
16 justification for taking a new point from an amicus.
17 You're simply saying you think it's wrong.

18 MR. KNEEDLER: No --

19 QUESTION: Presumably all new points from amicus
20 are based on that.

21 MR. KNEEDLER: My point was that in order to
22 decide the question of whether deference to the agency is
23 appropriate and whether the question should be whether
24 there was sufficient evidence before the city council from
25 which it could conclude that there was a rational basis

1 for this action, there is the antecedent question as to
2 whether that is a proper inquiry at all, and we think that
3 where you have an antecedent question upon which the
4 standard of review depends --

5 QUESTION: Well, do you --

6 MR. KNEEDLER: -- it would be proper for the
7 Court --

8 QUESTION: Do you take the position that the
9 legitimacy of the Government purpose is irrelevant to the
10 inverse condemnation question?

11 MR. KNEEDLER: We believe that it is irrelevant
12 to the question of whether a compensable taking has
13 occurred. That's quite -- that is a --

14 QUESTION: That's hard to derive from Agins,
15 certainly.

16 MR. KNEEDLER: No, but if -- if you look at
17 Agins, what the court recited for that proposition was
18 this Court's decision in Nectow, which was a due process
19 case, and what the Court said there was that the action
20 did not substantially advance a legitimate governmental
21 purpose because it was arbitrary and irrational. It was
22 language that spoke in due process terms.

23 And I think this goes to Justice Kennedy's
24 point, too, in focusing on the reasonableness of the past
25 history of the consideration of this project proposal.

1 That is essentially an objection I think that sounds in
2 procedural due process terms. Unreasonable delay, and
3 that sort of thing, are procedural due process or, in the
4 first instance governed by State APA standards, or --

5 QUESTION: Would this be a -- Mr. Kneedler,
6 would this be a possible different way of looking at it in
7 nonprocedural terms? We -- the discussion up to this
8 point has been largely in terms of the language that was
9 used in Agins, but if you look at the Penn Central
10 multifactor formulation, one of the sort of broad subjects
11 to be addressed is the nature of the governmental action,
12 and if we take that into consideration properly, isn't the
13 issue of bad faith something that may be considered right
14 up front under that particular heading?

15 MR. KNEEDLER: I think not. The purpose of the
16 just compensation clause is to address the situation where
17 the Government has taken lawful action, but lawful action
18 that benefits the entire community in a way that it's
19 unfair to visit that cost of a lawful action on a
20 particular individual.

21 Bad faith, arbitrary action, those are not
22 aspects of lawful governmental action. Those are aspects
23 of unlawful governmental action, and as this Court said
24 way back in the Pennsylvania Coal Company case the basis
25 for the award of compensation under the Fifth Amendment

1 presupposes that the action is being taken for a public
2 purpose. It presupposes lawful, proper governmental
3 action. It is a question of who must pay for it.

4 And we think this is reinforced by the structure
5 of the Fifth Amendment, which separately addresses the
6 question of the propriety of the governmental purpose.

7 QUESTION: When you get -- is it relevant here?
8 It keeps coming into my mind that the damages here were
9 awarded for a temporary taking, and the conditions of
10 obtaining damages for a temporary taking are?

11 MR. KNEEDLER: Well, it would -- the way the
12 jury was instructed here, either that the property --

13 QUESTION: What is the fact? What do the
14 Court's cases say? You get money for a temporary taking,
15 you get -- does the total value have to be destroyed?

16 MR. KNEEDLER: The Court has said if there was
17 all economic -- that is the test.

18 QUESTION: All right. For a temporary taking --
19 for a temporary taking, total value destroyed, plus --
20 anything?

21 MR. KNEEDLER: The Court has not really spelled
22 out what the standards are, but it has typically come up
23 in terms of saying that the property has been deprived of
24 all economic -- all economically beneficial --

25 QUESTION: And if it has?

1 MR. KNEEDLER: Pardon?

2 QUESTION: See, that's what keeps bothering me.
3 This is a temporary takings case, I take it, and
4 everybody's arguing as if it's not, so I must be wrong,
5 but why?

6 MR. KNEEDLER: Well, first of all we think if
7 you focus on the deprivation of all economic value in this
8 case that would simply be impossible to find, because
9 the -- as petitioner's counsel pointed out, the
10 respondent's own expert said this land was worth \$3
11 million after the permit was denied. That's \$80,000 an
12 acre.

13 So it would be I think impossible to say that
14 this land was deprived of all economic value, and
15 therefore we think it would be inconsistent with the
16 purposes of the Just Compensation Clause, where you don't
17 have anything approaching the sort of physical
18 appropriation --

19 QUESTION: What about a case --

20 QUESTION: Mr. Kneedler, if this is -- granting,
21 for the sake of argument, the correctness of your
22 proposition that this good faith factor is a due process
23 concern ordinarily, does it not become a proper concern in
24 a temporary takings case, even though it may not be in a
25 permanent takings case?

1 MR. KNEEDLER: I -- I --

2 QUESTION: Because the argument here is you've
3 effectively taken it during this interim period by jerking
4 me around, by using an essentially unfair procedure for me
5 to get my rights under the existing ordinance.

6 MR. KNEEDLER: As you've said, an essentially
7 unfair procedure. That objection sounds in due process
8 objections precisely --

9 QUESTION: Maybe, but that's what -- that's why
10 there has been a taking, because you have not used a fair
11 procedure, and so at least in the temporary takings cases,
12 if you believe in temporary takings -- maybe you don't
13 believe in temporary takings at all, but once you
14 acknowledge there's such a thing as a temporary taking,
15 what else produces it except -- except an unfair
16 procedure?

17 MR. KNEEDLER: A temporary taking occurs, as I
18 understand this Court's decision in First English, not
19 from unlawful governmental conduct, unlawful procedure,
20 but where there's a substantive limitation on development
21 that is imposed for a temporary period of time.

22 Again, the purpose of the Just compensation
23 Clause was not to protect the people against arbitrary or
24 unlawful action. It presupposes lawful action. And in
25 the land use area there are both questions of procedure

1 and questions of substance.

2 QUESTION: So you're saying this is not a
3 temporary taking case. That isn't what --

4 MR. KNEEDLER: I believe it was not properly a
5 temporary -- I mean, it was tried on alternative theories,
6 and one theory being that the property was deprived of all
7 economic value, but that simply can't be, given
8 respondent's own expert saying it was worth \$3 million.

9 QUESTION: Did the jury instructions advert to
10 the issue that the action was brought by the buyer,
11 whereas I guess chronologically most of the temporary
12 taking, if that's what there was, occurred during the
13 ownership of the previous owner, the prior buyer shows
14 inaction.

15 MR. KNEEDLER: The premise of the temporary
16 taking award, it began after the period in which the buyer
17 purchased --

18 QUESTION: I see.

19 MR. KNEEDLER: -- purchased the property.

20 QUESTION: Thank you, Mr. Kneedler.

21 Mr. Berger, we'll hear from you.

22 ORAL ARGUMENT OF MICHAEL M. BERGER

23 ON BEHALF OF THE RESPONDENTS

24 MR. BERGER: Mr. Chief Justice, and may it
25 please the Court:

1 I suppose I ought to start out by referring to
2 Justice Breyer's question and answer it. This is a
3 temporary takings case. This property was taken for a
4 finite period of time which the jury found under
5 instructions that were, by the way, drafted by the city.

6 The city got the jury instructed with everything
7 that it wanted and presumably could have offered more if
8 it didn't like the instructions it had.

9 QUESTION: Mr. Berger, I'd like to -- this jury
10 trial issue, which has been posed as a discrete issue, I
11 have it in my mind, and I may be wrong about this, that as
12 a result of our two decisions, Williamson the last one,
13 there won't be any ripe claim to be brought in the Federal
14 court as a court of first view any more, because the
15 inverse condemnation proceeding will take place -- must
16 take place in the California State courts, is that right?

17 MR. BERGER: That's my reading of this Court's
18 cases as well, Justice Ginsburg.

19 QUESTION: And do I also understand that these
20 two questions, the economic justification or deprivation,
21 that under the California law the liability question,
22 that is, whether there has been a taking, is done by the
23 judge?

24 MR. BERGER: I would have to say that's not as
25 clear as counsel for the city represented.

1 QUESTION: Well, what cases are you referring
2 to, Mr. Berger? You said the last two cases from our
3 Court in response to Justice Ginsburg.

4 MR. BERGER: Oh, actually I thought that that
5 was Justice Ginsburg's reference. I think she was
6 referring --

7 QUESTION: Williamson was the second one.

8 MR. BERGER: Williamson and probably First
9 English --

10 QUESTION: Yes, and First English -- yes.

11 MR. BERGER: -- that mandated compensation as a
12 remedy for a regulatory taking.

13 QUESTION: And Judge Wallace, as I recall, said
14 the reason this case is ripe, he said at the time all this
15 happened California did not have those procedures --

16 MR. BERGER: That is correct. The --

17 QUESTION: -- in place. Now it does.

18 MR. BERGER: This case arose in 1986, 1 year
19 before First English, at a time when California recognized
20 no compensatory remedy.

21 QUESTION: So that's why this whole 1983 jury
22 trial or not seems to me largely academic, not having any
23 continuing importance.

24 MR. BERGER: It could have little continuing
25 importance, I would --

1 QUESTION: It's certainly not academic in your
2 case, though, is it?

3 MR. BERGER: In this case it was the heart of
4 the case.

5 QUESTION: Well, and in California juries do, in
6 precondemnation delay cases, for instance, decide whether
7 the State was unreasonable in delaying condemnation
8 activity under Coppin, I take it. That's a jury question,
9 isn't it?

10 MR. BERGER: Your Honor, there are many of those
11 kinds of cases in California, and I would have to say I
12 cannot put my finger on a citation to an appellate
13 decision that deals with the issue. I can assure the
14 Court we've tried cases like that in California that have
15 gone to juries --

16 QUESTION: Well, in --

17 MR. BERGER: -- and without objection. That's
18 why it doesn't go up.

19 QUESTION: In California, State condemnation is
20 a jury trial, is it not, because Arizona it is, and we
21 patterned ours after California, unlike the Federal system
22 where it is not.

23 MR. BERGER: Yes, Your Honor, but of course the
24 only issue in a direct condemnation case would be the
25 valuation of the property, a major distinction between the

1 kind of case we have here and a condemnation case, but in
2 California those issues, the only issues that are left,
3 the valuation issues, are decided by juries.

4 QUESTION: And in the inverse condemnation case,
5 which is new in California, how is that division?

6 MR. BERGER: I'm hesitating, Justice Ginsburg,
7 only because there have been so few of them that have
8 reached --

9 QUESTION: Well, I don't want to detract you on
10 that, but at least it's my understanding that these cases
11 are not going to come up under 1983 now the way they did.

12 MR. BERGER: They're very unlikely to make an
13 appearance in the way that this case did, because this
14 Court has ordered California to recognize compensation as
15 a remedy. To the extent that California complies with
16 that, and some of us think that it pays only lip service,
17 these cases will not be filed at least in the first
18 instance in Federal district court.

19 But getting back to the reasonableness issue
20 that counsel spent so much time on, this is not something
21 that I think was invented for this case. It was not
22 something that was even invented in Agins. This Court's
23 jurisprudence on regulatory takings is based on a
24 determination by a court, whether it be a judge or a jury,
25 of the reasonableness of the conduct of the

1 governmental --

2 QUESTION: Does that derive, do you agree, from
3 due process concerns? I mean, it's basically whether it's
4 sufficiently arbitrary to violate due process.

5 MR. BERGER: Well, Your Honor, there are
6 certainly some due process aspects that could be raised in
7 such a case. They can't, by the way, be raised in the
8 Ninth Circuit any longer. We briefed this in our brief
9 pointing out to the Court that in an en banc decision in a
10 case called Armendariz v. Penman the Ninth Circuit has
11 decided that all property owner claims related to
12 constitutional infirmities have to be brought as takings
13 claims and cannot be brought as due process claims.
14 There's an Eleventh Circuit opinion in a case called
15 Villas of Lake Jackson v. Leon County that reaches that
16 same conclusion.

17 So there are some due process-sounding concerns
18 in these cases, but at least in the part of the country
19 where we live we can't raise those on behalf of property
20 owners.

21 QUESTION: It seems a little odd to me, perhaps
22 to you, too, given your representation in the case in your
23 client's position, that the judge would find as a matter
24 of law that the planning action was substantively
25 reasonable under due process but then submit the takings

1 issue to a jury. That does seem to me somewhat
2 inconsistent.

3 MR. BERGER: Well, let me say at least I was
4 disappointed in that result, Your Honor, but I don't think
5 that -- I don't think it's terribly inconsistent. It
6 depends on the standard of review that one uses in these
7 two different questions, and when you look at the standard
8 of review for a due process violation it's a very low
9 threshold that the city has to climb.

10 It's a determination that the city did not act
11 arbitrarily, and once the Court makes that determination,
12 as I think it could make legitimately in this case, which
13 is why we did not appeal that finding, the city did not
14 act arbitrarily.

15 That doesn't mean that the impact of what it did
16 to this property owner in applying its general planning
17 and zoning laws did not result in a taking.

18 QUESTION: It was not arbitrary, but it was
19 unreasonable?

20 MR. BERGER: It was not a reasonable way for the
21 city to effectuate --

22 QUESTION: Well, if it's not a reasonable way,
23 then it was unreasonable, wasn't it?

24 MR. BERGER: I think in that sense, yes, but I
25 think that it could also pass an arbitrary standard under

1 a due process examination, and I think that's what
2 happened here.

3 QUESTION: If this is basically a temporary
4 takings case, and if -- and here I'm not certain -- the
5 point of the temporary takings doctrine is to stop, say,
6 cities from giving people what one might call the extreme
7 run-around, all right, suppose that's the point of it, and
8 if that's so, we could answer the first question, I guess.

9 We could answer the first question and say, some
10 issues anyway -- maybe we'd answer it in your favor, I
11 don't know. Assume that for the sake of argument.

12 But the second and third questions, how would we
13 even get to them? I mean, that's what I'm having trouble
14 with. This question of proportionality has nothing to do
15 with the temporary takings case, I would think, as -- at
16 least if it's the extreme run-around. I don't see the
17 relationship.

18 Nor do I see the relationship of the reweighing.
19 I mean, I don't -- in other words, I don't know what to do
20 with this case if I see it as a temporary takings case. I
21 got question 1. I guess we could answer that. But how do
22 you see the 2 and 3 relating to this case?

23 MR. BERGER: I -- Justice Breyer, I have to
24 confess that I have trouble understanding some of this
25 case as well. I believe that what the city is trying to

1 do is to get this Court to review the standards by which
2 takings, either permanent or temporary, are evaluated, but
3 I -- it feels to me as though a temporary taking, where
4 the jury looks at what's going on and looks at the period
5 of time, as it was instructed to do.

6 Whether the action was reasonable or
7 unreasonable, whether it was proportional or not
8 proportional, if they determine that there was a period of
9 time during which there was a complete taking of this
10 property, which it appears that they did, then I would
11 agree that those other questions on the substantive merits
12 of the case become irrelevant.

13 QUESTION: Well, we don't know that they did.
14 The thing was put to them in the alternative.

15 MR. BERGER: Yes.

16 QUESTION: Either there was a total taking, or.

17 MR. BERGER: That's correct, Justice Scalia.
18 They were told, in the words of this Court's decision in
19 Agins, that they could find a taking either if it -- the
20 city's actions failed to substantially advance a
21 legitimate State interest, or if it denied the property
22 owner economically viable use.

23 QUESTION: Mr. Berger, if the -- what was
24 submerged in this general word is not clear to me, because
25 even before we get to the split on the takings there was

1 also an equal protection claim.

2 As I understand it, the jury was told you could
3 find a violation of equal protection or unconstitutional
4 taking, one or the other, and how can we just uphold this
5 verdict without saying that the award would be
6 independently sustainable on either basis, equal
7 protection and takings, because unless there was a special
8 verdict, we could be talking about takings when in fact
9 the jury went off on equal protection.

10 MR. BERGER: Justice Ginsburg, the -- as I read
11 the record in this case the equal protection issue is not
12 before the Court. The Ninth Circuit --

13 QUESTION: But we don't know what the jury told
14 you could find on either basis?

15 MR. BERGER: I believe that it was, Your Honor.

16 QUESTION: Do we know which one the jury did
17 find on?

18 MR. BERGER: We got a general verdict from the
19 jury.

20 QUESTION: So that's -- even before you get to
21 the which part of the takings analysis was it, we don't
22 even know whether the jury ever got to a taking question.

23 MR. BERGER: I believe that they examined each
24 of those things independently. They were instructed --

25 QUESTION: But we can't tell. If it's a general

1 verdict they could have gone on equal protection or
2 taking. If they went on taking, then these two parts they
3 could have gone on, either-or there.

4 But if -- I don't understand -- unless we agree
5 that this verdict was independently sustainable as an
6 equal protection claim or a takings claim, then I don't
7 understand how we can do anything with it.

8 QUESTION: There's been no claim of inadequacy
9 of the equal protection ground, has there been?

10 MR. BERGER: The --

11 QUESTION: I didn't realize that question was
12 here.

13 MR. BERGER: It was -- it has not been briefed
14 in this Court. It was the Ninth Circuit expressly did not
15 deal with the equal protection issue.

16 QUESTION: Then it's not one of the questions
17 presented in the petition, certainly.

18 MR. BERGER: That's certainly true, as the -- I
19 believe in the -- either in the petition or in the
20 petitioner's --

21 QUESTION: I mean, it may be true, but I didn't
22 know we were going to have to grapple with it.

23 QUESTION: Well, my only point is, we don't --
24 we are making an assumption that the jury went on the
25 takings claim when there's no basis for that. I mean, how

1 much can we make up?

2 QUESTION: Well, the petitioner framed the
3 question he chose to put it in terms of regulatory takings
4 and not to challenge the equal protection.

5 MR. BERGER: Your Honor, I believe that the
6 verdict form did distinguish between the equal protection
7 and the takings, and that the jury found that there was a
8 violation --

9 QUESTION: Then I could understand this case,
10 but if it was just a general verdict, so we don't know --

11 MR. BERGER: It was general within the takings
12 realm, so that we have these unanswered questions of which
13 prong of the Agins formulation the jury may or may not
14 have ruled on, and how they determined what the amount of
15 compensation was.

16 QUESTION: As long as they found both, the jury
17 found both, then I have no problem with it.

18 MR. BERGER: The jury found both, Your Honor.

19 QUESTION: Well, it found both equal protection
20 and takings.

21 QUESTION: Yes.

22 QUESTION: But within the takings --

23 MR. BERGER: That's right.

24 QUESTION: This is the concern I have. I hope
25 you'll address it a little. The first prong within the

1 taking is not substantially advance legitimate State
2 interest and I gather, given the judge's finding that
3 there was no substantive due process violation, it was
4 nonarbitrary, we're saying that something can be
5 nonarbitrary that does not substantially advance
6 legitimate State interests.

7 MR. BERGER: Yes, Your Honor, that's the way it
8 looks here.

9 QUESTION: And I frankly had not -- I was here
10 during -- I had thought that that former prong meant
11 totally irrational, but I guess it's -- I guess there's
12 some intermediate area between being nonarbitrary and not
13 substantially advancing.

14 MR. BERGER: Well, it seems to me, Justice
15 Stevens, that this case may be an excellent example of
16 that kind of a determination, as I think that the court of
17 appeals properly analyzed.

18 What we had here was a jury examining whether it
19 was a reasonable way to achieve the city's environmental
20 goals to completely frustrate the development of this
21 property, and the jury decided that that was such an
22 extreme misconnection between ends and means that it
23 failed to substantially advance legitimate State
24 interests.

25 QUESTION: Even though it was not arbitrary.

1 MR. BERGER: Even though you could say that
2 there was a reason --

3 QUESTION: Yes.

4 MR. BERGER: -- why they did it.

5 QUESTION: Of course, I suppose we could sustain
6 your verdict by saying the judge was wrong and the jury
7 was right.

8 MR. BERGER: If the Court wanted to do that we'd
9 certainly --

10 QUESTION: But you --

11 QUESTION: Even if the two standards are the
12 same.

13 QUESTION: Is it in that --

14 QUESTION: But I don't think we could say that,
15 because you did not appeal from the judge's holding. I
16 think we have to accept -- assume that for purposes of
17 this case the judge was right.

18 MR. BERGER: That's correct.

19 QUESTION: Maybe he wasn't, but it seems to me
20 that's the way it comes to us.

21 MR. BERGER: Justice Stevens, you're correct
22 that we did not appeal from the due process holding. As
23 it turns out in hindsight, if we had appealed the Ninth
24 Circuit's intervening decision in Armendariz would have
25 resulted in a conclusion that we had no due process claim

1 in any event, but that's --

2 QUESTION: On the jury trial issue there's been
3 some mention in the brief that the judge would have
4 discretion to submit this to the jury anyway, and so maybe
5 that issue isn't before us, either.

6 But assuming the question is before us whether
7 or not there is a right to jury trial, what is the best
8 case you have for the proposition that there is, that
9 there is a right to jury trial on this issue under 1983?

10 MR. BERGER: The -- well, there are no cases
11 from this Court, I believe, that has directly dealt with
12 a -- the right to a jury trial in a 1983 case.

13 QUESTION: Ah -- excuse me. Go ahead.

14 MR. BERGER: There are two cases that this Court
15 has decided.

16 QUESTION: Chauffeurs and Terry and Tull, are
17 those the two you have?

18 MR. BERGER: Chauffeurs is a good discussion of
19 the jury trial analysis. The cases that I was thinking of
20 were Jett v. Dallas Independent School District and Hetzel
21 v. Prince William County, both of them 1983 cases.

22 In Jett this Court determined that after the
23 district court decided a question of law as to who the
24 appropriate decisionmaker was in a municipality then the
25 remainder of the determination of liability, whether that

1 decisionmaker's actions resulted in section 1983 liability
2 would be decided by the jury.

3 In the Hetzel case, decided I think this last
4 term, this Court reversed a determination by the Seventh
5 Circuit when the Seventh Circuit attempted to reduce a
6 jury verdict and this Court said you can't do that. They
7 had a right to have a jury determine this issue, and the
8 court of appeals cannot arbitrarily --

9 QUESTION: Well, I would have thought we'd look
10 to the Seventh Amendment in a Federal court case to decide
11 whether a jury should decide a particular issue or case,
12 and not to section 1983. I mean, there's no indication,
13 is there, that the drafters of section 1983 were trying to
14 tinker with what the Seventh Amendment required and say
15 every case could go to a jury at plaintiff's option?

16 MR. BERGER: Well, they certainly wouldn't have
17 had any inclination to tinker with the Seventh Amendment,
18 Justice O'Connor, if that's your --

19 QUESTION: No. I mean, it just -- I don't know,
20 I thought your argument on that was very strange, and that
21 we should look to the Seventh Amendment for what goes to a
22 jury.

23 MR. BERGER: Your Honor, I'm sorry that it
24 struck the Court as strange, but I was doing that because
25 of this Court's earlier decisions, which said that the

1 first thing to examine in determining whether there's a
2 jury trial right is the statute, and only after having
3 exhausted the statute do we turn to the Seventh Amendment
4 itself.

5 That's why in our brief we analyzed it both ways
6 as did, I believe, the court of appeals here, and
7 concluded that the drafters of section 1983, when they
8 said that a plaintiff at his or her option could file an
9 action at law or a suit in equity or some other
10 appropriate proceeding, was giving the plaintiff the right
11 to choose --

12 QUESTION: Oh, but I would think you'd --

13 MR. BERGER: -- the kind of action he wanted.

14 QUESTION: Yes, but you'd have to look at this
15 temporary takings claim and try to analogize it to
16 something to figure out whether there's a right to a jury
17 trial or not. I don't think you'd derive that from the
18 face of 1983.

19 MR. BERGER: Not from the face of 1983.

20 QUESTION: No.

21 QUESTION: In the Jett case that you referred to
22 and the other -- did the court look at it, the jury trial
23 right, as a statutory thing, or did they analyze it in
24 terms of the Seventh Amendment?

25 MR. BERGER: The Hetzel case was clearly a

1 Seventh Amendment analysis. The Jett case I believe was a
2 1983 analysis.

3 QUESTION: The -- 1983 required a jury trial.

4 MR. BERGER: I can't push it that far, Your
5 Honor. The court didn't directly deal with the question
6 of whether the statute required a jury trial.

7 What the Court dealt with was how to divide the
8 issues in the case to determine whether a judge decided
9 the issues or a jury decided the issues, and what the
10 Court decided was that the jury would decide liability
11 once the judge had determined as a matter of law which
12 municipal official was the actual decision-making body.

13 QUESTION: Is it the case at the trial that when
14 the second half, that the city's decision to reject the
15 plaintiff's unit did not substantially advance a
16 legitimate public purpose -- that was the second half of
17 the basic instruction. Did your opponents say, judge, we
18 don't want to submit that to the jury?

19 MR. BERGER: Your Honor, all of the jury
20 instructions were drafted by the city.

21 QUESTION: Well then --

22 MR. BERGER: Everything the city wanted they
23 got.

24 QUESTION: How are they saying now that the
25 error is that it was submitted to the jury, if they didn't

1 object?

2 QUESTION: Didn't they object to a jury trial in
3 the beginning?

4 MR. BERGER: They did object to the trial, yes.

5 QUESTION: To the whole thing?

6 MR. BERGER: Yes.

7 QUESTION: To the whole thing, okay.

8 MR. BERGER: That's correct.

9 QUESTION: Now, was there an element in this
10 case, when you get back to the details of the case, which
11 had to do not with whether or not as a matter of law the
12 city's decision was reasonable or not, but as to what
13 factually happened?

14 That is, was there bad faith? Was an official
15 saying, I don't -- I want to protect the butterfly, or was
16 saying I don't want to protect the butterfly, but reality,
17 that was his motive, or -- was there a factual element to
18 this, or was it simply a matter of the lawfulness of a
19 city's, or the reasonableness of a set of facts that were
20 not in dispute?

21 MR. BERGER: Justice Breyer, let me try
22 answering it this way, because bad faith per se was not an
23 issue that was raised directly in the trial.

24 What the jury got was the entire history of this
25 case from the time that the first application was filed in

1 1981, the entire 5-year history of administrative
2 proceedings from 1981 through 1986, all of the trips that
3 were made to the planning commission, all of the revisions
4 that were requested, all of the revisions that were made,
5 and they heard the biologist who was processing the
6 reclamation plan on behalf of the developer testify about
7 what he did, how he worked with the city staff, with the
8 coastal commission staff, how they accepted and
9 incorporated all of the suggestions that were made by any
10 of the expert agencies, unless they, for example,
11 conflicted with one of the other city's requirements.

12 I remember one place in the --

13 QUESTION: Mr. Yuhas -- may I just interrupt to
14 clarify what Mr. Yuhas said, and if this is wrong please
15 tell me, that the motive, bad faith and motive were not
16 made issues in this case?

17 MR. BERGER: That is correct, Justice Ginsburg.
18 Motive was not an issue that was submitted to the jury.

19 QUESTION: And what was submitted to the jury
20 was either-or, and can you explain to me now why it
21 doesn't make any difference that we don't know whether it
22 was the substantially justified or the no economic value
23 that the jury in fact determined?

24 MR. BERGER: Well, I believe, Justice Ginsburg,
25 it doesn't make any difference, because, as the court of

1 appeals explained, the evidence amply supports both prongs
2 of that Agins test, and therefore whichever way the jury
3 went, and they may well have gone both ways, it's
4 supported by the evidence in the record.

5 QUESTION: Mr. Berger --

6 QUESTION: Well, how is it amply supported if
7 the Ninth Circuit says that there's no arbitrariness
8 within the meaning of the Due Process Clause? That's
9 where we get tangled up.

10 MR. BERGER: I think, Justice O'Connor, it has
11 to do with the level of examination that goes on in a due
12 process case as opposed to a takings case.

13 QUESTION: What if we assumed --

14 QUESTION: How is it different in your view, the
15 inquiry of the substantial relationship to a legitimate
16 city purpose? How does that really differ from the
17 essential due process inquiry?

18 MR. BERGER: I believe that the essential due
19 process inquiry simply looks on its face at what the city
20 said it was doing, and if the city said we are basing this
21 determination on our conclusion that we need to protect
22 this habitat for a butterfly that nobody's ever seen
23 there, then that is sufficient to get the city past the
24 extremely low threshold of review that happens in a due
25 process case.

1 I think when the matter gets submitted to a
2 determination of whether there's a substantial advancement
3 of legitimate State interest, the jury in this case or a
4 judge if it didn't go to a jury would be entitled to look
5 at what the city is trying to accomplish -- that is, to
6 set up a butterfly preserve -- and look at the means that
7 it adopted to get there, essentially total frustration of
8 the use of this 36-1/2 acre parcel of property, and say,
9 is this an appropriate way to achieve that end as a matter
10 of fact, and I think that that's a different level of
11 examination than you'd get when you just look at, what is
12 the city's rationalization for what it was doing.

13 QUESTION: But if we read Agins the way Justice
14 Stevens said he remembered, or he thought was intended,
15 then we really would have a conflict, wouldn't we, because
16 Justice Stevens -- I hope I don't misstate him, but he
17 said that he thought of the Agins test, or had at one
18 point thought of the Agins test as being essentially an
19 absolute irrationality kind of test, and if that's the
20 case, then we really would have a conflict between what
21 the court found and what the jury was -- would have
22 apparently found here.

23 MR. BERGER: It would appear that way, Justice
24 Souter, although I have to say that the trial judge at the
25 time that he made that ruling expressly said that he

1 didn't find it to be in conflict.

2 QUESTION: No, certainly one can draw -- I mean,
3 the language is different, and maybe I just -- you know, I
4 didn't understand what was going on at the time.

5 (Laughter.)

6 QUESTION: But the other question, I'd like to
7 have you comment just to be sure I don't -- you have a
8 full opportunity.

9 Your opponent has said it's perfectly clear that
10 they could not have relied on the denying economically
11 viable use of the land because he sold it for several
12 million dollars. What is your response to that?

13 MR. BERGER: My response is that this is a
14 temporary taking case, and that there was a period of time
15 that the jury found that this property had no use and no
16 particular value to a private property owner.

17 The fact that they actually sold the property at
18 some later date --

19 QUESTION: But wouldn't that always be true in
20 any case in which time is required to make a zoning
21 decision? There's always going to be a period where you
22 can't start construction while they make up their mind and
23 there's a total denial -- is that the same? Is there a
24 difference between that and what happened here?

25 MR. BERGER: Sure. The difference, and I agree

1 with you, Justice Stevens, because that's what the Court
2 said in First English, that there is this period of delay
3 during normal planning, although I think that the
4 developer here in 5 years went sort of overboard in the
5 normal planning process trying to find something that
6 would satisfy the city.

7 But what we have here, as the trial court
8 instructed the jury, that they should focus their
9 attention in awarding damages for a temporary taking from
10 the time in 1986 when the permit was finally denied, the
11 fifth permit application was denied, until sometime
12 between then and the date of trial, so that it wasn't that
13 normal period of planning and waiting and trying to get
14 permits that was compensated in this case. The developer
15 was essentially told, that's your problem. You're going
16 to -- you went through all that process. You'll have to
17 take the heat for that one.

18 But from the time the city denied the permit in
19 1986, from there forward the jury was instructed to
20 determine what the period of delay was in allowing these
21 people to make some productive use of either their
22 property or its monetary equivalent, and to find a
23 monetary equivalent and award it.

24 QUESTION: Mr. Berger --

25 MR. BERGER: That's what they did.

1 QUESTION: Could I ask about the -- coming back
2 to the jury question, the objection to the jury request,
3 did that go to use of the jury for any of the issues in
4 the case?

5 MR. BERGER: I believe it did, Your Honor.

6 QUESTION: Including the equal protection?

7 MR. BERGER: I believe so, although, like Your
8 Honor, I --

9 QUESTION: Well, if that were the case the
10 objection wouldn't be sufficient if a jury would be
11 appropriate for the equal protection claim, even though it
12 was not appropriate for the taking claim, I suppose.

13 MR. BERGER: If it was not appropriate across
14 the board --

15 QUESTION: Yes.

16 MR. BERGER: -- it certainly would not have
17 been.

18 QUESTION: Yes.

19 QUESTION: But you don't remember -- as I
20 remember, the position was, this action is not triable to
21 a jury. This action, equal protection, due process
22 taking, goes to a judge. I think that was --

23 MR. BERGER: I believe it was across the board
24 that the objection was raised.

25 QUESTION: That was my recollection.

1 MR. BERGER: The Fifth Amendment is a critically
2 important part of the Constitution. It was applied in
3 this case. It was enforced in this case. As this Court
4 said very recently in the Dolan case the Fifth Amendment
5 is not to be considered as some sort of poor relation in
6 the Bill of Rights. It is just as important as the First
7 Amendment or the Fourth Amendment.

8 The reason that it's important is that people
9 like this developer need to know that when they are
10 dealing with their regulating local government agencies
11 that their rights are protected, that they can't be simply
12 strung along and abused at the city's whim.

13 I think, looking at the record in this case as
14 the court of appeals laid it out, what you have here is a
15 pattern of abuse, if you will, and I think the jury was
16 entitled to look at that pattern that existed from 1981
17 when the first application for use of this land was made.

18 The judiciary in general and this Court in
19 particular remains the only hope of these kind of people.

20 CHIEF JUSTICE REHNQUIST: Thank you. Thank you,
21 Mr. Berger. The case is submitted.

22 (Whereupon, at 11:03 a.m., the case in the
23 above-entitled matter was submitted.)
24
25