ORIGINAL

In the

Supreme Court of the United States

DONALD W. AGINS ET UX.,	)	
	)	
APPELLANTS,	)	
	)	
V.	)	
	)	
CITY OF TIBURON,	)	No. 79-602
	)	
APPELLEES.	)	
	)	

Washington, D. C.
April 15, 1980

Pages 1 thru 55

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

DONALD W. AGINS ET UX., Appellants, v. CITY OF TIBURON, Appellees.	No. 79-602

Washington, D. C.,

Tuesday, April 15, 1980.

The above-entitled matter came on for oral argument at 10:13 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GIDEON KANNER, ESQ., 1440 West Ninth Street, Los Angeles, California 90015; on behalf of the Appellants

E. CLEMENT SHUTE, JR., ESQ., Shute, Mihaly and Weinberger, 396 Hayes Street, San Francisco, California 94102; on behalf of the Appellee

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 79-602, Agins v. City of Tiburon.

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

ORAL ARGUMENT OF GIDEON KANNER, ESQ.,

ON BEHALF OF THE APPELLANTS

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

Particularly in view of the controversy that erupted in the briefing, it seems appropriate to emphasize some of the facts in this case. In this case --

QUESTION: It is more the volume of the briefing than the controversy, Mr. Kanner.

MR. KANNER: The amici have indeed been prolific, Your Honor. We have here a combination of factors. There is an impact of -- a two-fold impact on the subject property. We have first of all the regulatory impact, the intrusive regulation which in fact appellants contend deprives the subject property of all use and value in the marketplace. The second factor which has not in our view received the proper amount of attention from the appellees side, is that we have here a fairly extensive, longstanding and overt acquisatory activities by the city, that is, longstanding official announcements and commitments

to acquisition of this property and long-standing studies by experts indicating that this property was to be an indispensable part of the city's open space.

QUESTION: Mr. Kanner, let me ask you a question about the procedural posture of the case, because of my lack of familiarity with California law.

As I understand it, your clients brought an action in the Superior Court of Marin County and demurrer to one count was sustained and demurrer to another was overruled?

MR. KANNER: Not quite, Your Honor. The second count was also sustained, but with leave to amend.

QUESTION: With --

MR. KANNER: Yes, that was the declaratory relief count and the plaintiffs then declined to amend and stood on that part of the plea.

QUESTION: Well, what I'm puzzled about is, do we have any way of knowing whether ultimately your client would be allowed to build one house per acre on this five acre tract, or only one house on the entire five acre tract?

MR. KANNER: There is no way of knowing that, and that is precisely --

QUESTION: There was a way, wasn't there?

MR. KANNER: I beg your pardon?

QUESTION: There was a way, wasn't there? The administrative remedy?

MR. KANNER: Well, there was no administrative remedy on this ordinance, Your Honor. There was, would have been, had Mr. Agins gone ahead and decided to build. The point is that one owns property not necessarily to build. He may wish to sell it; he may wish to do something else with it. The point is that the property, the allegation goes, has now been rendered unusable and worthless in the marketplace.

QUESTION: Unusable for any purpose?

MR. KANNER: For any purpose.

QUESTION: Can't you build one house on it?

MR. KANNER: Well, we suggest, Your Honor, that we cannot because, again, Your Honor has me at a disadvantage precisely because of the procedural posture mentioned by Mr. Justice Rehnquist, and that is, we have before Your Honors a complaint that has never been even amended once. The demurrer was sustained without leave to amend even once, so we only have the bare language of the pleading, under California practice the so-called pleading of ultimate facts, which heaven forbid, must not be evidentiary facts. That is forbidden.

So we cannot on this record point to any facts that would present the court with the evidence that we

could put on had we been permitted to go to trial.

QUESTION: Does the City of Tiburon have a zoning commission before whom you could have gone and asked leave to build one house per acre?

MR. KANNER: I presume they do. The point, our point here is, Your Honor, however, that we're dealing with a legislative enactment. We're dealing here with an extensive zoning ordinance that covers a wide area, and after this court's ruling in the Forest City Enterprises case and parallel California cases which are cited in the briefs, that is a purely legislative act so that there were no administrative remedies to exhaust this ordinance. The legislation itself does not set up any administrative review procedure so that one could do it only in the same sense that if the legislature of the State of California were to adopt an unconstitutional statute, one could say, "Well, why don't you go to Sacramento and ask them to change it before you challenge it in court?"

Now, as I understand this court's precedents, that is Euclid v. Ambler, which was quite explicit on the point, that is not required to be done.

QUESTION: Would you know at this point then whether if you had followed some sort of zoning board or adjustment board procedure, you might or might not have been allowed to build one house per acre?

MR. KANNER: That is correct. This court does not know it on this record --

QUESTION: Could I just ask you, what do you do about the statement by your supreme court in California that says, "According to the wording of the ordinance of which we may take note, the RPD-1 zoning allows plaintiff to build between one and five residences on their property"?

MR. KANNER: That --

QUESTION: This belies plaintiff's claim that development of their land is forever prevented. Now, that's what the supreme court of California said.

MR. KANNER: That was directed, Your Honor, into the second count, the declaratory relief count, and under California law remedies --

QUESTION: -- directed to, it says that under the zoning ordinance you can build one to five houses.

MR. KANNER: Well, this court in Nectow v. Cambridge said quite the contrary. In that case, that is precisely what the Massachusetts supreme court said, and this court disagreed and said that the owner was, had to be permitted as he was there permitted, which we were not, to put on evidence and satisfy a trier of fact that notwithstanding such language in the ordinance, he in fact was not able to put the property to uses which would be

economically viable that would give him a reasonable ---

QUESTION: So you say that we should just, that we just shouldn't accept this statement as to what the zoning ordinance does to you?

MR. KANNER: That's not quite our position. The answer to that is twofold:

Number one, there are two causes of action involved there. This was, this one was directed only to the facial constitutionality of the ordinance, so that the California supreme court said since the ordinance on its face allows something, it is not amenable to challenge by the declaratory relief under California law. Period.

However, that leaves unanswered the first cause of action, which is the Nectow v. Cambridge approach, in which we say notwithstanding the face of the ordinance, let us look at the facts. Suppose the legislature or the local city were to make some -- let's hypothesize a bad faith situation in which they zone swamp land for highrise office buildings. Now, would not the owner then be permitted to come into court and put on evidence and say, "Look, it's impossible to build office buildings on that land."

We make the same argument except our argument goes to the economics and the value of the property.

QUESTION: Well, that's not zoned there traditionally in para value of property for --

MR. KANNER: That's a point of some importance, allegation of this complaint not that the value has been diminished, which incidentally ought to be enough, as a matter of degree under this court's opinion in Central Eureka Mining, but we are alleging that it went beyond that: That the property has been deprived of all value and utility.

QUESTION: Well, are you telling the court now that there was anything to prevent you from making an application to build five houses, one on each acre?

MR. KANNER: Yes, Your Honor, the practicalities of the matter.

QUESTION: How do you know unless you did it?

MR. KANNER: Well, there is a fairly well-settled body of state law and Federal law that is to the extent the Federal courts have considered it, and we've cited some of it in the brief, the most recent one in California being Dahl v. City of Palo Alto, which discusses California law on that point, and there is a well-recognized doctrine of futility, and that is that if the position of the public body is such that it is manifest that they have no intention of allowing it, one is not required to perform an idle act.

The same thing happened in the Dahl case. The facts are virtually identical. There the City of Palo Alto

pretty much said, "We want those foothills left open; that is going to be open space; that will be a viewshed for our city park, and that's that."

QUESTION: You see this as almost, then, as if the legislature had said your five acres is zoned as a park, and nothing, nothing should be built on it?

MR. KANNER: Just about. May I invite Your Honor's attention to page 32 of the appendix in the jurisdictional statement, which contains some of these standards as the ordinance puts it.

Take a look at this, for example: "Land to be preserved as open space shall be maintained as permanent open space by dedication to the city of fee title or of scenic easements by deed restriction approved by the city attorney or by other methods acceptable to the city."

Now, we have here a piece of property, if it's going to be one house per five acres, we're talking here about an estate of unimaginable grandeur on that part of the country, and even one house per acre would be quite lavish. Now we have to sell this land to some person who is going to have to spend a fortune, and then he discovers that he has to dedicate it in fee to the city, if the city so requires.

QUESTION: Economic reality will just mean that you cannot develop it, even if you could build one house

per acre? That just won't work?

MR. KANNER: What we're saying, Your Honor, is that there is no way in which there is going to be one house per acre. Again, I am again at a disadvantage being bound to the complaint.

QUESTION: In a legal sense, then, what your complaint boils down to is that on the allegations in your complaint, instead of having the demurrer sustained, it should have been overruled and a trial on the facts should have been held.

MR. KANNER: That is precisely our position. If all these arguments from the other side on that point are correct, then obviously my client would have lost very quickly, possibly by summary judgment, if it's all that cut and dried. And as an advocate, I certainly ascribe a great deal of significance to the determined effort to keep my clients from going to trial and to put on their evidence. Why? If the evidence is all that bad, they're going to lose like that, aren't they? But the evidence isn't all that bad, and I'm prevented from going into it here on this record.

QUESTION: You want us to change the procedures of California courts?

MR. KANNER: No, sir, Your Honor. We are dealing here with Fifth Amendment --

QUESTION: I thought you said they wouldn't let you put on evidence and that is your complaint.

MR. KANNER: We are --

QUESTION: Isn't that your complaint?

MR. KANNER: Our complaint is that --

QUESTION: So you want us to change that?

MR. KANNER: No, Your Honor. Our complaint is that they wouldn't let us put on evidence of Federal constitutional violation.

QUESTION: Like what?

MR. KANNER: Deprivation of property without due process; taking of property without just compensation.

QUESTION: I just don't understand how you get to that, how you would get that before us if it's not in the record.

MR. KANNER: I beg your pardon, Your Honor?

QUESTION: I don't see how you get anything before us that is not on the record.

MR. KANNER: We were denied the opportunity to have a day in court to put on this evidence.

QUESTION: You did have some day; you're in court. I mean, with summary judgment you have the same thing, don't you?

MR. KANNER: Well, it wasn't a summary judgment, it was a dismissal here on the pleading --

QUESTION: -- summary judgment you don't get to put your evidence in, either, do you?

MR. KANNER: Well, of course, but had the latter gone as far as to summary judgment, there at least would have been evidentiary facts before the --

QUESTION: (Inaudible) -- complaining then? I think you're complaining about procedure.

MR. KANNER: Oh, no, Your Honor. I wouldn't have been complaining then if there had been no tryable issue of facts and only an issue of law. Lawyers know that there is always a winner and a loser in every case.

QUESTION: Did you make a tender of proof?

MR. KANNER: There was no opportunity ever to make one, because this was on a general demurrer.

QUESTION: Well, were you handcuffed?

MR. KANNER: Your Honor, under California law --

QUESTION: I said, did you offer to make an offer of proof?

MR. KANNER: Your Honor, that is not --

QUESTION: Did you --

MR. KANNER: -- California law. That is ageneral demurrer --

QUESTION: Then you complain about California procedure.

MR. KANNER: Well, may I make -- may I use a

hypothesis, Your Honor?

Suppose we had a criminal prosecution in which a defendant wants to offer evidence that he was in fact coerced into confessing, and he is met by some state statute which says that the existence of a written confession is presumptive, is conclusive. And he is not then permitted to offer any evidence.

Now, surely we wouldn't have any difficulty with that, would we?

QUESTION: That's a rock, and this case is an orange.

MR. KANNER: Well, may I point out that there is nevertheless a similarity, Your Honor. We were never permitted --

QUESTION: -- (inaudible) --

MR. KANNER: -- we were never -- perhaps only that. We were never permitted to put on evidence or even to plead in amended form any additional facts that show that in fact this ordinance deprives the owner of all reasonable use and value.

QUESTION: You would have tried to prove that under this ordinance you would -- that the land was unusable?

MR. KANNER: Yes. We not only would have tried, we --

QUESTION: Just as an economic matter, you just couldn't --

MR. KANNER: Yes, Your Honor.

QUESTION: And so in effect, this was a device, and an effective device, to maintain open spaces?

MR. KANNER: Precisely.

QUESTION: Without paying for it?

MR. KANNER: That is precisely what happened. It's exactly like Nectow v. Cambridge. We have an ordinance which on its face permits the use, but once the tryer of fact heard it, he realized that that ostensibly permitted use was in fact economically impossible. The owner would be locked into a perpetually money-losing position.

QUESTION: Did you make this argument before the California court?

MR. KANNER: Yes, Your Honor. Those are the allegations of the complaint --

QUESTION: No, I know, but did you say that you were being denied due process by not being able to put on your proof?

MR. KANNER: Oh, yes, Your Honor. That was the argument.

QUESTION: What did the court say about that?

MR. KANNER: The court simply said that it --

QUESTION: Ignore it, or what?

MR. KANNER: -- didn't care to deal with that, that even if there had been a taking without just compensation the court said that my clients could not recover any just compensation because their only remedy was invalidation, and then in a rather surprising turn of events, the California supreme court, without saying so, revived the commonlaw form of action approach, and then because my client asked for the wrong remedy, affirmed a dismissal, which was a startling development, but that is a matter of state law.

QUESTION: Maybe I am missing something here, but if I understand correctly, the first cause of action was the action for damages?

MR. KANNER: Inverse condemnation.

QUESTION: And they held there is no such remedy in --

MR. KANNER: That is correct.

QUESTION: So they didn't grant you leave -- then your second action is one where you attacked the declaratory judgment as to the validity of the ordinance.

MR. KANNER: On its face.

QUESTION: Now, where in this -- and you were given leave to amend as to that, but you declined?

MR. KANNER: Yes, sir.

QUESTION: What allegation in the second cause of

action do you principally rely on as indicating that you could prove that you couldn't even build five houses?

MR. KANNER: The second cause of action was not amended for that very reason, Your Honor. There isn't really much to be said.

QUESTION: -- said you could build five houses?

MR. KANNER: No, Your Honor.

QUESTION: -- you couldn't. I don't understand it.

MR. KANNER: Well, that's what I'm trying to respond to, Your Honor. Under California law, when you go in declaratory relief, you may only challenge what is on the face of the ordinance. So that is, candidly, that was a secondary consideration to our side of the case because the face of the ordinance did say all those things that you could build, back to Nectow v. Cambridge. That was a formidable barrier to us. We have to have an opportunity to put on in evidence, and to show that de facto, those ostensibly permitted uses were economically and in one instance, physically, unachievable. And in order to --

QUESTION: But you never pleaded that.

MR. KANNER: Well, that was --

QUESTION: You say -- California law, they would not allow you to plead that theory?

MR. KANNER: We were not allowed to plead any

evidentiary facts, of course. Even if there had been a --

QUESTION: You don't even plead the conclusion?

MR. KANNER: I beg your pardon?

QUESTION: You don't even plead the conclusion, as I read the second cause of action.

MR. KANNER: Well, the second cause of action, Your Honor, is only directed to the face of the ordinance. That is where we may not, we simply may not, it is forbidden under California law, to deal with the constitutionality as applied. For that, until the California supreme court spoke in this case, the sole remedy was to go in inverse condemnation or mandamus. And in this case they eliminated the inverse condemnation remedy. So that under the second cause of action, it was simply, it was the wrong tool for the job, so to speak, in California.

One cannot go behind the face of the ordinance on declaratory relief. It is only a facial --

QUESTION: No way in California that you could have, other than asking for money damages, there is no way as a matter of California law in which you could have filed some kind of a complaint in which you said, "There's an ordinance here that says I can build five houses, but I really can't build the five houses." No way you could tender that issue?

MR. KANNER: There was a way to tender it, the

way we did, in fact: by inverse condemnation. Indeed, Your Honor, we alleged the ultimate facts, the fact of the ordinance and the other activities, and I do ask the court to keep in mind the other activities, the property was rendered worthless and useless. Those were the ultimate facts.

QUESTION: Mr. Kanner, supposing that this court were to hold that California under the Federal Constitution has a perfect right to withhold the remedy of inverse condemnation so long as it grants you the right to establish the unconstitutionality of the particular ordinance. Nonetheless you would have to prove a taking, I suppose.

MR. KANNER: Yes, sir.

QUESTION: Where in the record, may I ask, or in the jurisdictional statement or appendix, is your complaint?

MR. KANNER: The complaint is contained in the joint appendix. It begins at page 3.

QUESTION: Oh, thank you.

QUESTION: Suppose, Mr. Kanner, that your friends on the other side had come in in their brief and tendered on behalf of the city assurance that you could build one house on each of the five acres. Would you still be here making these arguments?

MR. KANNER: No, Your Honor. I have been driven to respond in a way which I'm not sure is proper, but I

think the court should know that when this case was being argued before the California supreme court, Mr. Hearn, who was arguing the case, offered to dismiss the action right then and there on a stipulation that one house per acre could be built, and no such stipulation was proffered.

QUESTION: How about one house for the entire five acres?

MR. KANNER: That is a matter of physical impossibility. The outside improvements necessary for the construction of one house on that parcel of land would make it so expensive that no one could afford it. That's what it boils down to.

Now, again, I apologize if I've transgressed the boundary of the record, but that's the sort of evidentiary matters that we would have had to go into to persuade a trier of fact, as was done in Nectow v. Cambridge, that in fact that just can't be done, no matter what that ordinance says.

I did want to emphasize the other activities that took place here. That is something which this court has never considered and that is the impact of the pre-condemnation activities of the government which is not content just to go ahead and condemn land when they want to, but on the contrary, they go ahead and they make announcement and they get studies and they get planners and it's

all widely reported in the press, this property is being acquired by the city: This went on for a period of years here. Who in the market is going to be foolish enough to spend good money to buy land which the city has announced repeatedly, definitively, this is an indispensable part of open space city resources, we are going to acquire it, and in fact they went ahead, adopted condemnation resolution, brought a condemnation action, and it was then only when confronting the value of this land -- because it is a very desirable part of the country -- they abandoned the condemnation and chose to stand on this ordinance, which accomplishes the very same thing, the passive use.

Now, if the government wants to go in and build a road on somebody's property, obviously they have to enter it at some point and do it. But if the use that is desired by the government is a passive one, such as open space, they don't have to cross the clothes, they don't have to set a toe on the property.

QUESTION: Did I understand you to say a while ago that if it were stipulated that you could build five houses, one house per acre, that you wouldn't be here?

MR. KANNER: That is correct, Your Honor.

QUESTION: Because then you would say it would be economically feasible to develop the property?

MR. KANNER: That's my understanding.

QUESTION: And there would be no taking?

MR. KANNER: That is correct, Your Honor.

QUESTION: But you never applied for that, you never sought to get --

MR. KANNER: Well, Your Honor, again we get back to the point that we have here an extensive record of city commitments to just the exact position, and there is again a very clear matter of the doctrine of futility.

This had never arisen in the briefing here, and I think if the court deems it appropriate, I would request leave to file a supplemental brief on the question of the lack of need to pursue administrative remedies even if they're available, which they are not here, by the way. But if, even if they're available, they need not be exhausted when there is a clear cut case of futility, which we suggest we have here, in view of the city's --

QUESTION: What's the clear cut case of futility? Suppose you applied for a -- what do you do, apply for a building permit, or you file a plat, or you file a -- you do something --

MR. KANNER: In California, that's quite a major undertaking which in this case --

QUESTION: Well, whatever it is, let's assume you -- why do you say it would be futile?

MR. KANNER: Because we have here longstanding

city announcement of commitment to the acquisition of this property for its open space.

QUESTION: So you think they would just turn you down to build five houses?

MR. KANNER: Yes, Your Honor. I again call Your Honor's attention to the language of the ordinance, pages 32 and 33 of the appendix of jurisdictional statement, and the city has a, has some four subparagraphs under each of them. Any construction can be turned down under the most vague and subjective criteria imaginable. To minimize visual impact, for example.

In any event, I would urge the court to consider the other mode of the city activity. That is quite critical and I see that it did not capture the court's mind as much as the first issue. Nevertheless, that is the kind of pragmatic issue which the market reacts to very strongly because nobody wants to buy land that has a lawsuit attached to it, and nobody wants to buy land that is under a cloud of condemnation; nobody wants to buy land that the city has shown a definite interest in and has committed itself as clear as can be on this record even, without going into the evidentiary facts, which incidentally go even further than this record.

So we have here two studies by two consultants. We have the appropriation of funds. We have the issuance

of bonds. We have a condemnation resolution. We have an actual on-again, off-again condemnation which in these cases is often a very common device, bring the condemnation; then abandon it; then bring it later, at a later date, and so on.

QUESTION: Your client was reimbursed for his expenses?

MR. KANNER: He was reimbursed for his, for the attorneys' fees and litigation expenses. He was not reimbursed, of course, for any loss of value to property or any constitutional loss. That's just attorneys' fees and expert fees.

So that side of the case, particularly when combined -- I think I'd better reserve my five minutes for rebuttal, with the court's permission.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Kanner.

Mr. Shute.

ORAL ARGUMENT OF E. CLEMENT SHUTE, JR., ESQ.,

ON BEHALF OF THE APPELLEE

MR. SHUTE: Mr. Chief Justice, and may it please the court:

I also would like to review the significant allegations of the complaint.

It is alleged that the appellants bought the property for residential use, and as the court has observed,

the California supreme court that it be made available for residential use by the construction it placed upon the zoning ordinance, that is, at least one home must be allowed by the city, and up to five may be allowed by the city under the terms of the zoning ordinance.

It must be recalled that the complaint alleges that the City of Tiburon has the highest values of land for residential purposes of any place in California, and that this land of appellants' has the highest values within the city. So we are talking --

QUESTION: Mr. Shute, let me refer you to part of page 13 of the joint appendix, where the allegation is that, No. 7, that the ordinance in question is an arbitrary, capricious and unreasonable, and therefore constitutes taking their property without payment of just compensation in violation of the Fifth and Fourteenth Amendments prohibiting such.

Now, as I say, I'm not familiar with California rules of procedure, but I would have thought that under ordinary rules of notice pleading an allegation such as that, the sustaining of a demurrer would have -- even if the ordinance does that, it's perfectly all right, which strikes me as a somewhat odd result.

MR. SHUTE: Well, Your Honor, I think the answer lies in the fact that the California supreme court took

judicial notice of the zoning ordinance, and under California law, and several cases have done the same, in effect considered the terms of the zoning ordinance to be a part of the complaint, or a part of the record before the court, construe those ordinances as requiring the city to allow residential use; then determine under the substantive test for encroachment upon private rights that the remaining available reasonable use rendered negatory that allegation.

As a matter of law, the ordinances are not arbitrary or capricious.

QUESTION: What do you have to say about Mr. Kanner's suggestion that an application to build five houses, one per acre, would have been utterly futile?

MR. SHUTE: I think, Your Honor, that's an incorrect intention. The city -- there's no indication that the city would not consider such an application on its merits, and perhaps grant up to five residential units. One of the key parts of the city's position is that it should be able to preserve its process. It calls for the submission of a master plan, and then it would act on the master plan.

QUESTION: Master plan for how many --

MR. SHUTE: For up to five units.

QUESTION: Just for the five acres?

MR. SHUTE: Because the zoning ordinance calls for maximum density of the one home per acre which, if the land values are such as have been alleged, would certainly yield very substantial values. I think that would be a matter of common knowledge. So what we say is, the city can't very well indicate in advance how many units it would approve because the necessary environmental review hasn't occurred, there's no way to know the physical circumstances in enough detail to indicate how many units might be approved.

But the supreme court of our state has said, residential use must be approved.

QUESTION: Did the city in its response make any defense that you haven't even taken this before the zoning board or the land development, or whatever you have, rather than simply demurring? Because -- which is, as I understand, is the same thing as saying a motion to the complaint fails to state the claim on which relief may be granted?

MR. SHUTE: Actually, an alternative ground of the demurrer was lack of jurisdiction, which under California law, the doctrine of exhaustion of administrative remedies, is jurisdictional. And one of the grounds of the city's demurrer was the court lacked jurisdiction precisely because of the failure to exhaust administrative remedies.

QUESTION: And is it your contention that it was

-- the demurrer was sustained because of that reason, or that the supreme court of California upheld the superior court's ruling because of that reason?

MR. SHUTE: I think, Your Honor, that it implicitly did in the sense that it also refused to speculate as to how many units might be appropriate by court action prior to administrative action, and by construing the ordinance on its face, that is what is before us, the facial validity of the ordinance, not what might be applied in certain circumstances that would call on this ordinance for the submission of a master plan.

QUESTION: Until there has been some attempt to get a plan approved, you couldn't really tell how the ordinance was going to be applied?

MR. SHUTE: That's correct, Your Honor.

QUESTION: The only issue that was left was the facial validity?

MR. SHUTE: That is correct, Your Honor.

QUESTION: Well, how much -- is it your position that the city could have waited five or ten years for, to get a master plan approved, and meanwhile these owners could have kind of been held in suspense until the master plan was finally approved?

MR. SHUTE: Absolutely not, Your Honor. The choice to submit a master plan is that of the owner, and

could have been undertaken at any time.

QUESTION: So the owner can simply submit a master plan for his five acres to the zoning board?

MR. SHUTE: That's correct. And a further point I would make, Your Honor, is that under the California government code, I may have the numbers transversed, 65950, there is a time limit established under California law. An agency can take no more than one year for any kind of action such as this, and is encouraged to take less time. So had the application been submitted, it could not have just been suspended indefinitely. And the penalty for an agency's failure to act is that the application is deemed approved by operation of law.

QUESTION: After what period of time?

MR. SHUTE: After a one year period. But that's on a state-wide basis any kind of project, and there's a legislative finding which encourages agencies to take an even shorter period of time.

QUESTION: Mr. Shute, I wonder if you'd comment on Mr. Kanner's reference to subparagraph (e) on page 32 of the jurisdictional statement: The permanance of open space, the part about land to be preserved as open space shall be maintained as permanent open space by dedication to the city of fee title or of scenic easements?

MR. SHUTE: Well, Your Honor, I would respond to

that in two ways:

First of all, it seems to me that if there were any improprieties that occurred in the amount of dedication or the form of dedication which the city asked for during the process, then the court would be aware of the issues and the legal questions that would be presented, and it could be litigated following the completion of the administrative process.

In other words, if owner's dedication requirements that were unreasonable under any standard were imposed, the owner could litigate that by following the city's action.

So that really ties into the exhaustion point and becomes kind of an element of --

QUESTION: Well, if the city can --

MR. SHUTE: -- due process.

QUESTION: -- dedication pursuant to that paragraph, would there be compensation paid for that which was dedicated?

MR. SHUTE: Well, ordinarily there would not be, because this would be an aspect of the approval for the -- of the activity --

QUESTION: I see.

MR. SHUTE: And park dedications, dedications for roadways and such as that have been, have generally been held to be non-compensable. But you see, in all candor, I

don't see how that issue can be considered before the court at this point, because we can't presume that the city would require an extraordinary or unfair or illegal amount of dedication. That would have to wait and see what occurs.

And also, the open space process as contemplated by California law in this circumstance calls for a balance between preservation of open space resources, whatever they may be. In California that would include vast amounts of agricultural land, lands which are subject to landslide or earthquake, and it might be very appropriate to require dedications under some circumstances to preserve the very open space features which the law identifies, and I think that --

QUESTION: Mr. Shute, you are simply answering questions posed to you by members of the court, but really, aren't all these things matters for a trial court? And doesn't that show why a demurrer was improper?

Here you have a complaint that in paragraph 9 says: "The natural and proximate result of the ordinance was to prevent any sale, use, transfer, or development thereof, or any part thereof" -- and then you filed a demurrer which I assume is what appears on page 25 of the jurisdictional statement, and the demurrer was sustained, and yet the allegations of that complaint sound like the

property was taken without any compensation whatsoever.

Now, maybe there is all sorts of factual evidence that can show that it wasn't. But why does this make a demurrer proper?

MR. SHUTE: Because, Your Honor, the California supreme court took that demurrer together with the city zoning ordinances and pointed out --

QUESTION: Yes, but not all --

MR. SHUTE: -- use.

QUESTION: But you weren't referring to the zoning ordinances. You were referring to all sorts of other permutations and combinations and possibilities. All of those things are matters for evidence in a trial court, aren't they?

MR. SHUTE: Well, it --

QUESTION: The allegation, the complaint is that it is factually mistaken?

MR. SHUTE: I think there's a very strong policy here of protecting zoning and land use regulation from --

QUESTION: Well, the Constitution imposes a very strong policy of not taking anybody's property without paying for it.

MR. SHUTE: That's quite correct, Your Honor.

QUESTION: They allege if -- if the owner alleges that it has been taken, a demurrer is not a satisfactory

response, it would seem to me. It would seem to me that you have to come in and deny that it has been taken and that necessitates factual proof.

QUESTION: Is that issue somewhat removed from the case by your friend's concession, which I at least understood him to make, that he understands he can build one house on the five acres?

MR. SHUTE: I think that's correct in terms of the --

QUESTION: Five houses on the five acres.

QUESTION: No, his response was that he knew that he could build one house on the five acres, but he has never tried the one house --

MR. SHUTE: And his further response, as I recall, was that if they were allowed to build five, they would -- that would satisfy their expectations. And our contention is, the owner has every right to litigate all constitutional issues. There's no question about that. It's a matter of timing, and when. Should an owner be allowed to come in and allege that a complaint constitutes a taking on conclusory facts where the zoning that's apparently allowed would be about one unit per acre, frustrate the normal planning processes and carry that matter to trial.

QUESTION: Mr. Shute, as of right now, can the appellants apply for master plan, submit --

MR. SHUTE: Yes, Your Honor.

QUESTION: They didn't --

MR. SHUTE: As they have throughout this proceeding.

QUESTION: And regardless of what happens in this case?

MR. SHUTE: Yes, Your Honor.

QUESTION: Then what are we here for?

MR. SHUTE: I believe the court may be interested in some of the issues raised by the complaint, but we respectfully submit that most of those issues really are not raised in this case.

QUESTION: Is it correct that the only action that the city has taken with respect to the appellants' property is that they've passed this ordinance?

MR. SHUTE: They passed the ordinance and also, Your Honor, there was the eminent domaine action which was filed and terminated.

QUESTION: But that's all over. That's something that's aborted completely.

MR. SHUTE: That's correct.

QUESTION: So the only legal, the only significant, the only step that has any legal effect that's outstanding now on their property is the ordinance itself, and so the question really is whether the ordinance on its

face constitutes a taking, is that it?

MR. SHUTE: That's correct.

QUESTION: And that's what the supreme court said, if you read the ordinance the way we read it, the California supreme court, they're still free to build some houses if they file appropriate plans.

MR. SHUTE: That's correct, Your Honor. The facial validity of the ordinance is an issue, and the ruling of the California court was that the zoning ordinance satisfied substantive due process test, did not encroach on private property rights because of the available use. And further observed that it --

QUESTION: Well, I suppose you would concede that if the zoning ordinance said you could build one house on five acres of real estate in the center of Manhattan Island, that would basically be a taking, because everybody knows that that's economically impossible.

MR. SHUTE: I think that's correct, Your Honor.

QUESTION: And the allegation in this complaint is that this zoning ordinance is the equivalent of that, as I understand it.

MR. SHUTE: With the exception that the character of the --

QUESTION: Doesn't that require evidence to find out if it is or isn't?

MR. SHUTE: I respectfully submit no, Your Honor, because the allegations of the complaint themselves indicate the nature of this land, the high values of the land for residential use. One acre zoning is not uncommon. This really constitutes an attempt to thwart the normal process and litigate right at the front of the process, rather than going through the planning process --

QUESTION: You would concede, I suppose, if the City of Tiburon had taken this property, just moved in and turned it into a public park, that there would have been action for its so-called inverse condemnation.

MR. SHUTE: That would have been your classic case of physical invasion and that requires compensation. But there's a world of difference between that kind of --

QUESTION: But the complaint in this case says there isn't any difference.

MR. SHUTE: But those are --

QUESTION: Isn't that a matter, then, for evidence?

MR. SHUTE: To the extent the complaint equates this zoning with the physical use, it's really making a legal argument and not a factual argument, and that's why it is --

QUESTION: Well, what if a zoning ordinance of the City of New York said to an owner of five acres of

unimproved land, you can build exactly one residence on there, in the middle of New York, and he filed a complaint saying that this zoning ordinance, while it purports to simply be a five acre residential zoning, actually has the effect of taking my property, because I can't use it for that purpose, and I can't sell it for that purpose. Now, would that be a complaint to which a demurrer should be sustained?

MR. SHUTE: I think in a circumstance such as that it might be appropriate to go beyond the demurrer stage, and that is why I have concentrated on the facts, because I don't believe that that can be fairly said of the facts of this case.

QUESTION: Mr. Kanner, a while ago Mr. Justice White put a question to your friend and summarized what the highest court of California has said, namely that it is clear, said the supreme court of California, that they can build from one to five houses on this property. I believe Mr. Kanner agreed that that's what the court had held.

Do you have any comment on that?

MR. SHUTE: That is what the court held, and its our position that that establishes the facial validity of the ordinance by indicating a substantial use and the potential for up to five homes. The city zoning ordinance

contemplates a planning review process which has never been invoked.

QUESTION: Under California law, if there had been no appeal taken here, could the owners have applied then for five buildings on five acres?

MR. SHUTE: Yes, Your Honor.

QUESTION: And if the decision was thought to be arbitrary in the sense that it was done for a subsurface purpose of keeping this property completely open, destroying its value, as he said, would that be within the reach of litigation in California courts?

MR. SHUTE: Yes, it would, Your Honor, because following the exhaustive administrative remedies, all issues tendered in that proceeding would be before a court for review.

Now, we might have a quarrel over the remedy, but the issues could be litigated.

QUESTION: So basically the validity of the supreme court of California's judgment can be sustained on the exhaustion of administrative -- failure to exhaust administrative remedies, regardless of whether or not the complaint could have been demurred to on themerits, so to speak, saying if there was no taking --

MR. SHUTE: That's correct, Your Honor. The case could have been resolved on the doctrine of exhaustion

of administrative remedies.

QUESTION: Do you think it was?

MR. SHUTE: I think it implicitly was, because the court construed the facial validity of the ordinance which under California law can be attacked by declaratory relief, and did not reach the "as applied" issue, which is an aspect of exhaustion, if California courts saying we will not do that, until there has been exhaustion, if we do it we are missing th e sifting and refinement, elimination of issues which --

QUESTION: If the owner applies, files his plan and says, "I'm going to build five houses," and the city says, "Awfully sorry, but you can only build one." He could then say, "Well, this ordinance as being applied is unconstitutional, because this is economically impossible."

MR. SHUTE: That's correct.

So a large part of our position, as I have indicated before, is to try to protect the sanctity of the city's planning and zoning process. And I would point out that the facts of the case also indicate that a significant portion of the City of Tiburon was zoned in this manner, with the same RPD-1 zoning, so we are not talking about a circumstance where appellant's property was the sole property put into this zoning district.

And in terms of the substantive validity of the

ordinance in addition to the notion of reasonable use remaining to the property owner, there is a classic, we submit, instance of reciprocity here. The appellants' properties would benefit by the grading controls and the density restrictions and all this. They would be applied to neighboring property, so the --

QUESTION: Was the ordinance passed before or after the appellants acquired their property?

MR. SHUTE: It was passed after they acquired their property.

QUESTION: And what was the nature of the zoning prior to that time?

MR. SHUTE: Your Honor, the zoning prior to that time was not alleged in the complaint, and the best I can do is to go somewhat outside the record and point out that in one of the amici briefs of the conservation foundation they included as an appendix the prior zoning which was one-acre zoning, RO-1.

QUESTION: Which would have automatically entitled them to build one house per acre or five houses on this five-acres?

MR. SHUTE: Well, yes, Your Honor, except even at that time in California there was the subdivision map act which requires going through an approval process. Certain findings have to be made in order to allow the

maximum density, and there is the California environmental quality act, which was in effect at that time. So it would not have been automatic even then that they would have received five. But their expectations certainly cannot have been much damaged by the change in the zoning ordinance.

QUESTION: The California supreme court has held in this opinion that this ordinance is valid even if the city will permit only one house on this land?

MR. SHUTE: Following completion of the administrative process? I don't think the California court had an opinion on that question, because --

QUESTION: Well, it seemed to say that the ordinance is valid because it will allow one to five, which seems to include that it's valid even if the city allows only one house.

MR. SHUTE: Well, I think, more it includes the idea that it might allow up to five, and looking at it that way it would be valid, and we don't know until the process is completed. And what evidence would come forward in the administrative process would dictate the court's response to subsequent litigation.

QUESTION: Well, I take it the city's position is, however, since it passed this ordinance, that the ordinance would be valid even if it permitted only one house on this land.

MR. SHUTE: Your Honor, I would think that the city would be astute and fair enough to realize that if a good case was made in the planning process, that one home was totally uneconomic, that they would allow additional homes. I think that's part of the reason and the benefit of letting this process go forward.

QUESTION: Either that, or decide maybe to take the land and pay for it.

MR. SHUTE: I think we are through with that, but possibly yes.

I would just like to mention briefly this remedy question which has been much briefed. If the court agrees with our position that this ordinance is valid on its face, or that this case could be considered one where administrative remedy should be exhausted, and of course the question of what remedy to invoke following an unconstitutional action or an encroachment on private property rights would not be presented.

But the concept of the remedy to be applied to regulation is really based on the need to accommodate two very strong powers; one is the power to regulate, which this court has observed to be one of the least limitable powers of government. In fact, local zoning authority has been observed to be about the most essential power held by the local government, and where that power comes into

conflict with protected property rights, then there are no absolutes involved. What is necessary is to engage in a balancing, and we submit that the proper balance to be struck in that circumstance is to invalidate the offending measure. That preserves that police power is an essential power and it provides fairness to the property owner in the sense that a property owner normally does not commence development procedure or process with the idea of having the city end up buying its property. He commences that process with the idea of commencing some development, and validation allows them to go forward with some form of development.

Also under California law, declaratory relief and mandate have priority on the court calendar, so it's much faster to receive a judicial resolution of these kinds of conflicts through declaratory relief and mandamus than it is to go inverse condemnation, which can stick around on the trial calendar for a good long time.

So we think it's an appropriate constitutional balance between these two strong interests. And we submit that this court has recognized that essentially the payment of compensation or money damages is a legislative choice, and that is an aspect of the separation of powers since legislatures under our structure of government are the ones that appropriate and expend public funds.

And in cases which don't have to do with the police power, U.S. Trust v. New Jersey, involving the impairment of bondholders' rights, perhaps somewhat akin to interference with investment-backed expectations, as discussed in Penn Central, the court was careful to note that while invalidating New Jersey's repeal, the State of New Jersey was not frustrated in trying to carry out its new public policy. It would invoke its power of eminent domain and compensate effective property interests and proceed with its new policy.

The critical point there is that it was a matter of legislative choice, not court decree, that compensation would be paid. So it was reserved to the legislature as a legislative matter.

And finally I would note, as has been noted in cases involving Civil Rights Act, the prospectively chilling effect that monetary damages would have in circumstances where they cannot be easily anticipated, where there would be inadvertent --

QUESTION: Would that mean that any claim, any cause of action for monetary damages is suspect because it has a, quote, "chilling effect," close quote?

MR. SHUTE: I think, Your Honor, in a circumstance such as these zoning ordinances where you are dealing with a regulatory act, that --

QUESTION: Well, all state actions in effect are regulatory actions, aren't they?

MR. SHUTE: I think that where a state moves, or a local agency moves by eminent domain, it's not a regulatory act. That is the exercise of sort of proprietary direct governmental powers, not adjusting the public good but moving to the benefit of government. I don't think a physical invasion of property by government is necessarily a regulatory act.

So our point is that in the area of pure regulation, which is intending to adjust the public good, whether it be an environmental law or some other area, that the approach should be that if it goes too far under certain circumstances, it would be an invalid act, precisely because it's unaccompanied by the just compensation that would be necessary to sustain an invasion of guaranteed property rights.

QUESTION: I have trouble with your eminent domain being legislative and not judicial. I thought it was judicial.

MR. SHUTE: Well, I think that the decision to proceed in eminent domain is a legislative decision, and then the process of --

QUESTION: -- file a piece of paper.

MR. SHUTE: That's correct.

QUESTION: Then that's the end of the legislative.

MR. SHUTE: But the key aspect is that the choice to expend public funds by beginning proceedings starts with the legislative body.

If the court has no questions, I --

QUESTION: Well, let me: You say there was a, the question was reduced to a facial attack here. Actually, no one claimed that this ordinance was really invalid on its face, in the sense that it couldn't ever be applied to any piece of property. The question was whether the ordinance was unconstitutional as applied to this piece of property.

MR. SHUTE: That's correct, but still, the ordinance --

QUESTION: I know, but let's assume the supreme court had ruled in the plaintiff's favor. It certainly would have invalidated the ordinance, it wouldn't have meant that the ordinance was invalid as applied to a lot of other properties, would it?

MR. SHUTE: That's correct.

QUESTION: Just about this piece of property? And as it stands now, as it stands now, the supreme court has said that this ordinance is not invalid even though or because the plaintiff can build one to five houses on his property, and so who's going to -- it could be

anybody who reads this would think that the ordinance would be valid even if the city allows only one house.

MR. SHUTE: Well, Your Honor, I respectfully disagree. I think that what the court was saying is a guaranteed minimum of one, and anything above that the city might grant, and taking that as a totality, we think this ordinance is not invalid. Why don't you folks go to the planning department?

QUESTION: Did the court say that -- that is what troubled me -- did the court say that in so many words? I had the same impression as my brother Stewart that the plaintiffs alleged that this was a taking because, as applied to their land, because very possibly they could only build one house, and that was simply destroying the value. A demurrer was sustained. And then the supreme court of California said, "Well, the ordinance will allow one to five houses," but it didn't seem to me it relied on exhaustion of administrative remedies.

MR. SHUTE: I don't think that the -- in fact I know that the court's opinion does not discuss administrative remedies, but I think implicit in the court's ruling was the notion of, "We will take today the facial validity of this ordinance, and we will not anticipate how many units might be approved, because that is something which would require the completion of the planning process."

QUESTION: But if you were a prospective buyer and read -- if somebody came around and asked you to buy this piece of property and you said, "Well, what can I use it for?" Well, you can either put one to five -- you can either have one house or five houses, up to five houses, but maybe only one, and you say, "Well, how am I going to find out?" "Well, somebody's going to have to go through this procedure."

So only a developer, on the one who wants to develop it can find out whether -- it certainly isn't a very marketable piece of property in its present condition, is it?

MR. SHUTE: Well, I --

QUESTION: Under this zoning ordinance, unless somebody goes through this operation and finds out whether you can build five or four or three?

MR. SHUTE: That's why I think the allegations of the complaint are so important. They allege that this land has the highest residential land of virtually any land in the state. The prospective purchaser looks at that and sees the possibility of up to one unit per acre. I would think that looks fairly attractive.

QUESTION: Up to one unit, yes, except he may only have one. He may have one house on five acres.

QUESTION: Well, as I read the California supreme

court's opinion, again, the very point that Mr. Justice White called attention to before: They review the statements of the appellant here as claiming it deprived the landowner of all reasonable use of his property, and then the court said this:

"The ordinance before us had no such effect. According to the wording of the ordinance, the zoning allows plaintiffs to build between one and five residences on the property."

So the prospective purchaser would know that he could build one, the supreme court of California having said so, and that he has an administrative process for a modification of the zoning with possibly more.

MR. SHUTE: That's correct, Your Honor. In fact, not only this planning process but a modification of the zoning would always be possible, too, and I think that given the facts of the complaint, the allegation --

QUESTION: Let me ask you this: Suppose this property were put on the market under this decree, and let's assume that you get an offer X, the highest offer you get is X. Now, let's suppose that the property was subject not to this one to five restriction, but that it was perfectly clear you could build five, and then you put it on the market. Do you think you could get a higher price for it?

MR. SHUTE: Oh, I don't dispute that, Your Honor, but I think --

QUESTION: It would be how many X?

MR. SHUTE: I'm not an appraiser of land --

QUESTION: Well, that's really what the complaint is all about here, isn't it?

MR. SHUTE: That's true, but I think the regulatory authority is entitled to say, "Here's a piece of land with many variables. There are hazard conditions there, there are possible off-site impacts, and we can't know in advance precisely how much density should be allowed, so a range is provided."

QUESTION: So what they're expected to do is apply for the five before they complain, is that it?

MR. SHUTE: That is correct.

QUESTION: In the 29 or 30 briefs filed in this case, how many of them do you think I have to read to understand the issues?

(Laughter.)

MR. SHUTE: Of course, just my brief, Your Honor.

(Laughter.)

MR. SHUTE: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Kanner.

ORAL ARGUMENT BY GIDEON KANNER, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. KANNER: Mr. Chief Justice, and may it please the court:

A most remarkable argument. This is a case in which a demurrer was sustained, thereby giving rise to the traditional Anglo-American issue of pure law. Yet virtually all we have been arguing about is facts.

QUESTION: Well, that's perhaps because of the way you undertook to set this litigation in motion, instead of asking for what is provided under the city's ordinance, an opportunity to get five sites, and you passed that opportunity and plunged right into the total litigation.

MR. KANNER: Well, may I respectfully point out and call to the court's attention the basic American seminal case, Euclid v. Ambler, 272 US at page 386, that very issue was presented and the court said, "A motion was made in the court below to dismiss the bill on the grounds that because the complainant had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the cert was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance on its own force operates

greatly to reduce the value of appellees' land and destroy their marketability for investor or commercial and residential uses."

I won't go on with the quotation. We were and still are relying on that, and it seems to us that the court would have to overrule not only Nectow v. Cambridge but Euclid as well to deprive us of an opportunity to rely on what was until now a clear principle of law.

May I touch on just a couple of facts.

Mr. Chief Justice, I wanted to make very clear that in responding to your question, sir, I intended to indicate that even one house cannot be built because of the prohibitive cost of on-site improvements. That is a large five-acre parcel on a ridge, and in order to prepare it and provide access to it, utilities and so on, it would be prohibitive.

Now, as to the question also, Mr. Chief Justice, you commented on the California supreme court's opinion as to what they did decide. May I respectfully call your attention to page 9 in the appendix of the jurisdictional statement where they tell us, as to that first part of the opinion.

In HFH, Limited, we specifically noted that, quote, "This case does not present and we therefore do not decide the question of entitlement to compensation

in the event the zoning regulation forbade substantially all" -- that is emphasized -- "substantially all use of the land in question. We leave that question for another day," unquote. That was the HFH quotation.

They now go on and say, "We now reach that issue." They did reach that issue, "as to what happens when substially all use of the zoned land is destroyed."

So I respectfully disagree with my colleague, and I urge the court to consider that passage, because there the California supreme court tells us expressly what they did reach and what they did decide.

QUESTION: They were there talking about whether you could get damages, and as I read that, the opinion, it's on the assumption there was a taking. Can you get damages, or are you limited to an injunction? And they reached that issue, and we don't -- and if we agree there isn't a taking here, I suppose we don't even reach this part of the case.

MR. KANNER: Well, yet, that is what made Agins v. Tiburon the landmark California case. So we now wind up in an --

QUESTION: It may be, but you can't -- we don't --

MR. KANNER: We wind up, Your Honor, in an --

QUESTION: You can't cram issues down our throat --

(Laughter.)

QUESTION: (Continuing) -- that we don't need to decide.

MR. KANNER: That would be beyond my meager powers.

But may I point out, Your Honor, that that leads us, however, into a very anomalous position whereby as counsel says the California supreme court had no jurisdiction to even reach all this stuff, and yet they did, and yet they decided -- can you imagine a California lawyer walking into a trial court and saying, "Pay no attention to what our supreme court said. They have no jurisdiction to do it."

And manifestly the court intended to decide this; did decide it, and told us in so many words that they did decide it.

QUESTION: Do you think you can still apply, if we affirm, here, hypothetically, that you can go back and apply for five sites?

MR. KANNER: I don't know, Your Honor, I am an appellate lawyer and I don't deal with that -- I suppose so, I see no reason why not.

QUESTION: You could apply?

MR. KANNER: Oh, I am sure you could. Whether it would be granted is another story.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER. Thank you, gentlemen.

The case is submitted.

- - -