

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   SUSETTE KELO, ET AL.                   :

4                               Petitioners :

5               v.                               : No. 04-108

6   CITY OF NEW LONDON,                   :

7   CONNECTICUT, ET AL.                   :

8   -----x

9   Washington, D.C.

10    Tuesday, February 22, 2005

11               The above-entitled matter came on for oral

12   argument before the Supreme Court of the United

13   States at 10:12 a.m.

14   APPEARANCES:

15   SCOTT G. BULLOCK, ESQ., Washinton, D.C.; on behalf of

16               the Petitioners.

17   WESLEY W. HORTON, ESQ., Hartford, Conn.; on behalf of

18               The Respondents.

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2 JUSTICE O'CONNOR: We will now hear  
3 argument in the case of Kelo vs. City of New London.  
4 Mr. Bullock.

5 ORAL ARGUMENT OF SCOTT G. BULLOCK

6 ON BEHALF OF PETITIONERS

7 MR. BULLOCK: Justice O'Connor, and may it  
8 please the Court:

9 This case is about whether there are any  
10 limits on government's eminent domain power under the  
11 public use requirement of the Fifth Amendment. Every  
12 home, church or corner store would produce more tax  
13 revenue and jobs if it were a Costco, a shopping mall  
14 or a private office building. But if that's the  
15 justification for the use of eminent domain, then any  
16 city can take property anywhere within its borders  
17 for any private use that might make more money than  
18 what is there now.

19 JUSTICE GINSBURG: Mr. Bullock, you are  
20 leaving out that New London was in a depressed  
21 economic condition, so this is distinguished from the  
22 case where the State has no particular reason for  
23 wanting this, but the critical fact on the city side,  
24 at least, is that this was a depressed community and  
25 they wanted to build it up, get more jobs.

1                   MR. BULLOCK: Well, Your Honor, it's  
2     important to point out it -- in first place that  
3     chapter 132 of the statutory section at issue here  
4     applies to every city within the State of  
5     Connecticut, not those that are simply depressed.

6                   And there is a fundamental difference  
7     between an area like what was at issue in Berman, an  
8     area that actually had problems and a city that has  
9     certain problems. Every city has problems. Every  
10    city would like to have more tax revenue, but that  
11    cannot be a justification for taking the property --

12                  JUSTICE GINSBURG: But you concede that on  
13    the facts, more than tax revenue was at stake. The  
14    community had gone down and down and the town wanted  
15    to build it up.

16                  MR. BULLOCK: It is a desire to try to  
17    improve the economy through tax revenue and jobs.  
18    That is certainly the case. But that cannot be a  
19    justification for the use of eminent domain because  
20    if the trickle down effects of economic development  
21    are a justification, then there really is no limit on  
22    the --

23                  JUSTICE SCALIA: You don't concede, or do  
24    you, that elevating the city from a depressed to  
25    prosperous is a better justification than elevating a

1 city from prosperous to more prosperous?

2 MR. BULLOCK: That is not -- that is  
3 correct, Your Honor. We do not. And chapter 132  
4 again applies to not so prosperous cities and  
5 prosperous cities.

6 JUSTICE GINSBURG: The line you draw is  
7 between blight, which Berman says was in the public  
8 use, lighted conditions okay, but depressed  
9 conditions, not the best in line with the --

10 MR. BULLOCK: Yes, Your Honor. We think  
11 that that is a line that this Court has drawn that is  
12 area specific that focuses on the conditions in a  
13 particular area. And the condemnations in Berman  
14 removed the problematic areas. It removed the  
15 blight.

16 JUSTICE O'CONNOR: Oh, but Berman spoke,  
17 in the opinion, said that the determination of the  
18 legislature about these things is virtually  
19 conclusive, that there is only the narrowest,  
20 narrowest role for the judiciary. What kind of  
21 standard are you proposing we should get into here to  
22 second-guess the public use aspect?

23 MR. BULLOCK: Your Honor, it is clear that  
24 eminent domain power is broad, but there has to be  
25 limits, and that's what we are really talking about

1     here.

2                   JUSTICE O'CONNOR:  Well, have we ever in  
3     any case from this Court said that the limit has been  
4     exceeded?

5                   MR. BULLOCK:  In a few cases from earlier  
6     in this century, Your Honor, the Missouri Pacific  
7     case, the Thompson versus Consolidated Gas case, but  
8     this Court has recognized for over 200 years that  
9     there are limits on eminent domain power, that they  
10    cannot be used for private cases.  And that has been  
11    a consistent strain throughout this Court's --

12                  JUSTICE BREYER:  Justice Douglas says  
13    there that as long as it's an objective within  
14    Congress and legislature's legitimate grant of power,  
15    they can do it, I mean, as long as there's a -- so  
16    why does there have to be a limit within that broad  
17    limit?

18                  MR. BULLOCK:  Well, Your Honor, the limit  
19    is that there cannot be takings for private use.

20                  JUSTICE BREYER:  Of course, there can't,  
21    purely.  But there is no taking for private use that  
22    you could imagine in reality that wouldn't also have  
23    a public benefit of some kind, whether it's  
24    increasing jobs or increasing taxes, et cetera.  
25    That's a fact of the world.

1           And so given that fact of the world, that  
2    is law, why shouldn't the law say, okay, virtually  
3    every taking is all right, as long as there is some  
4    public benefit which there always is and it's up to  
5    the legislature.

6           MR. BULLOCK: Your Honor, we think that  
7    that cuts way too broadly. And it puts --

8           JUSTICE BREYER: Because?

9           MR. BULLOCK: Because then every property,  
10   every home, every business can then be taken for any  
11   private use. For any private development project.

12          JUSTICE BREYER: No. It could only be  
13   taken if there is a public use and there almost  
14   always is. Now, do you agree with that, or do you  
15   not agree with my last empirical statement?

16          MR. BULLOCK: Well, again, the eminent  
17   domain power is broad, but there has to be limits.

18          JUSTICE BREYER: Now, that's, of course,  
19   my question. The question is, if you agree with the  
20   empirical statement that there almost always is some  
21   public benefit attached, then my question is, why  
22   must there be a limit within that broad framework?

23          MR. BULLOCK: Well, Your Honor, I think  
24   with public -- with just having a simple public  
25   benefit, then there really is no distinction between

1 public and private uses. And that is what we call  
2 upon this Court to state, for instance, in the Berman  
3 case and in the Midkiff case, which we think are  
4 really at the outer limits of government's eminent  
5 domain --

6 JUSTICE O'CONNOR: But do you think those  
7 were correctly decided or do you take issue with the  
8 decision in those two cases?

9 MR. BULLOCK: We think that those  
10 decisions can be consistent with ruling in favor of  
11 Petitioners in this particular case, Your Honor,  
12 because --

13 JUSTICE O'CONNOR: But you take the  
14 position that a city that is suffering from enormous  
15 lack of jobs and depression, economic depression,  
16 that there is no public use purpose for taking land  
17 to enable the creation of jobs?

18 MR. BULLOCK: That is correct, Your Honor.  
19 We do not --

20 JUSTICE SOUTER: Well, let's assume that  
21 the city instead of taking the property by eminent  
22 domain simply used its, its own -- some of its own  
23 regular tax income to buy up the property, and  
24 assembled parcels of land with the purpose of selling  
25 them to an industrial developer to raise the tax base



1       and hence ultimately to raise taxes.

2                       Would you say just within the meaning of  
3       general understanding of proper governmental purposes  
4       that the city was acting in a way that had no  
5       legitimate public purpose?

6                       MR. BULLOCK:   Well, Your Honor, I think  
7       the question goes to whether or not the government  
8       could use its police power to acquire property and  
9       then sell it to a private developer.

10                      JUSTICE SOUTER:   Well, I'm not interested  
11       in the label.   I'm just saying if the government says  
12       we need to increase the tax base because we have a  
13       depressed city, so we are going to take some of our  
14       tax money now, and we are just going to buy up  
15       property that people are willing to sell to us, and  
16       we are going to assemble parcels.   And when we get a  
17       big enough one, we are going to sell it to a  
18       developer for industrial purposes.   And that will,  
19       that will raise the tax base.   Is there anything  
20       illegitimate as a purpose for governmental spending  
21       in doing that?

22                      MR. BULLOCK:   No, Your Honor.   We do not  
23       believe that that would be some legitimate because  
24       it's not a public use.

25                      JUSTICE SOUTER:   Why isn't there a public

1 purpose here?

2 MR. BULLOCK: Well, Your Honor, because  
3 this case affects the eminent domain power, which is  
4 regulated by the Fifth Amendment --

5 JUSTICE SOUTER: No, but we are talking  
6 about -- I mean, I realize that, but I mean, I  
7 thought your point was that it was use of eminent  
8 domain power for an improper purpose. And you  
9 characterize that purpose as conveying property to  
10 private owners.

11 Well, in my example, the same thing is  
12 going on except that it's not using the eminent  
13 domain power. If the purpose in my example is a  
14 proper public purpose, why isn't it a proper public  
15 purpose when the government does it by eminent  
16 domain? What changes about the purpose?

17 MR. BULLOCK: Your Honor, because of the  
18 public use restriction of the Amendment. That's what  
19 we really --

20 JUSTICE SCALIA: Mr. Bullock, do you  
21 equate purpose with use? Are the two terms the same?  
22 Does the public use requirement mean nothing more  
23 than that it have a public purpose?

24 MR. BULLOCK: No, Your Honor.

25 JUSTICE SCALIA: That's your answer to

1 Justice Souter.

2 JUSTICE SOUTER: But if that is your  
3 answer then the slum clearance cases have got to go  
4 the other way.

5 MR. BULLOCK: I'm sorry --

6 JUSTICE SOUTER: If that is your answer,  
7 then I suppose the slum clearance cases were wrongly  
8 decided.

9 MR. BULLOCK: Well, your Honor, this Court  
10 did hold in Berman and Midkiff that the police power  
11 and eminent domain power are coterminous. That was a  
12 holding especially of this Court's opinion in  
13 Midkiff. And there are certain amici that have been  
14 filed in this case, amicus briefs filed in this case  
15 that have called upon this Court to re-examine that.  
16 And of course, this Court is free to do so.

17 JUSTICE SOUTER: But you are saying we  
18 don't have to re-examine it, but I think your  
19 adoption of Justice Scalia's approach puts you in a  
20 difficult -- I think you're moving in the direction  
21 of saying we really have got to overrule the prior  
22 cases.

23 MR. BULLOCK: Your Honor, I think under  
24 a -- perhaps an original understanding of the takings  
25 clause, there was a difference between public use and

1 public domain.

2 JUSTICE SOUTER: Just for the moment, what  
3 about my question? And you can get into history, if  
4 you want to, and I tend to be interested in that, but  
5 my immediate concern is, if you give the answer that  
6 you have just given, doesn't it jeopardize the  
7 precedent of the slum clearance cases?

8 MR. BULLOCK: Your Honor, I don't think  
9 so, because of the caveat in Berman and Midkiff that  
10 eminent domain cannot be used for private uses. And  
11 that is what is really at issue here. What I think  
12 was the focus of --

13 JUSTICE KENNEDY: But that's what they  
14 were being used for in Berman and -- everybody knows  
15 that private developers were the beneficiaries in  
16 Berman.

17 MR. BULLOCK: Your Honor, I believe the  
18 justifications focused upon the removal of the  
19 offensive conditions in Berman, that the public  
20 purpose, if you want to call it that, was served once  
21 the blight was removed, the public purpose was served  
22 once the oligopoly was broken up. Here the focus is  
23 that --

24 JUSTICE KENNEDY: As I understand, you're  
25 test then -- you want me to make a distinction between

1     blight which is a permissible governmental use,  
2     governmental objective and economic revival, which  
3     isn't?

4                 MR. BULLOCK: Under the eminent domain  
5     authority, Your Honor, we think that --

6                 JUSTICE KENNEDY: Is that the line you  
7     want me to draw.

8                 MR. BULLOCK: Yes. And we think that that  
9     is a line --

10                JUSTICE KENNEDY: Well, suppose an  
11     economist or even a judge might say, well, it's  
12     very clear that if this economic depression continues  
13     for another five years we are going to have blight.  
14     Blight is in the eye of the beholder, I know that.

15                MR. BULLOCK: Exactly. And I think that  
16     that is really one of the dangers of the majority  
17     opinion here is that it puts any property up for  
18     grabs. Under the blight statutes, they actually have  
19     to -- governments have to meet a certain objective  
20     criteria to satisfy that this is actually a blighted  
21     area.

22                JUSTICE KENNEDY: Why isn't it an  
23     objective criteria to say that we are going to have  
24     economic revival, avoid economic downturns?

25                MR. BULLOCK: Well, Your Honor, because, I

1 think -- to get back to the decisions in Berman and  
2 Midkiff, what this Court I think focused on there is  
3 that the public use or the public purpose was direct  
4 and immediate. It was served directly by the  
5 condemnations and it was immediately served by the  
6 removal of the blight and the breaking up of the  
7 oligopoly.

8 In economic development condemnations, the  
9 only public benefits that come about, if they come  
10 about at all, are completely dependent upon private  
11 parties actually making a profit. And that those  
12 profits then somehow --

13 JUSTICE KENNEDY: That's the same thing  
14 that is true in the railroads in the west.

15 MR. BULLOCK: But --

16 JUSTICE KENNEDY: Precisely the  
17 description you gave applied to the railroads in the  
18 west.

19 MR. BULLOCK: Well, Your Honor, those were  
20 justified under I think the line of cases that held  
21 that those were really essential for land assembly  
22 for instrumentalities of commerce. They were --

23 JUSTICE KENNEDY: And this seems to be  
24 really essential for the purpose of developing  
25 industrial property to increase the tax base. The

1 argument is, and I don't know of any reason to doubt  
2 it, that doing it seriatim by voluntary acquisition  
3 and sale doesn't work.

4 So the rationale for this is essentially  
5 the rationale for the railroads, for the public  
6 utility line condemnations and so on. There isn't  
7 another practical way to do it. And there is a  
8 public benefit at the end, and that ought to qualify  
9 it as a public use.

10 MR. BULLOCK: Your Honor, there are many  
11 ways to do economic development without condemnation.  
12 It happens every single day in this country. And in  
13 the states that prohibit the use of eminent domain  
14 simply for private business development, those states  
15 do make the distinction between blighted areas and  
16 simply their communities wanting to take advantage of  
17 more tax revenue. And those states are doing fine.

18 JUSTICE GINSBURG: Even though in Berman,  
19 there was a department store that was not blighted,  
20 and it was permissible because the whole area was to  
21 be improved to raze that department store, even  
22 though it wasn't contributing in any way to blight.

23 MR. BULLOCK: Yes, Your Honor. But the  
24 Court in Berman held that there were certain  
25 properties that even though they might have been

1 nonblighted, it was essential to have those  
2 properties in order to remove the blight from the  
3 area that was at issue. So there was the ability of  
4 government to get certain properties even though they  
5 might have been nonblighted. Here --

6 JUSTICE O'CONNOR: Mr. Bullock, would you  
7 articulate the test that you would propose the Court  
8 adopt. Some amici and others have argued that we  
9 should use the substantially advances test, so-called  
10 test from regulatory takings. What tests do you  
11 articulate?

12 MR. BULLOCK: Well, for our bright line  
13 rule, Your Honor.

14 JUSTICE O'CONNOR: Yes.

15 MR. BULLOCK: The test should be that the  
16 government cannot take property simply so that the  
17 new owners can put it to ordinary private uses of  
18 land. That's really the test. And the --

19 JUSTICE O'CONNOR: Well, that's not what's  
20 asserted here, of course. Here the city says, we are  
21 doing this for purposes of enhancing economic  
22 development of a very poor city.

23 MR. BULLOCK: True, Your Honor, but --

24 JUSTICE O'CONNOR: So what do we do with  
25 that alleged purpose? What is your test?



1                   MR. BULLOCK: Well, the test, Your Honor,  
2     for --

3                   JUSTICE O'CONNOR: Is it no economic  
4     development purpose?

5                   MR. BULLOCK: Yes. Yes. When it's only  
6     justified in order to gain the secondary benefits  
7     from ordinary private uses of land, and the way that  
8     businesses always make use of their land to try to  
9     make money or to try to make a profit. That's our  
10    bright line rule.

11                  But for our second test, if this Court  
12    accepts that economic development can be a public  
13    use, then we advocate a test of reasonably  
14    foreseeable uses and minimum standards in order to  
15    counter the dangers posed by such private involvement  
16    in the use of eminent domain power.

17                  JUSTICE BREYER: What's the latter. I  
18    mean, I understand the former. That's a big retreat  
19    and it comes to me now you're getting to what I  
20    think is a possible realm of reason here. But the  
21    second part now you said and minimum standards.  
22    What minimum standards?

23                  MR. BULLOCK: Well, the dissent in the  
24    Connecticut Supreme Court talked a lot about minimum  
25    standards that should be in place in order to ensure

1     that public benefits actually come about.  Those  
2     could be such things as a commencement date for the  
3     project, a construction schedule, financial  
4     eligibility for the developers, there's a number of  
5     different things.

6                 JUSTICE BREYER:  No, I mean, are you  
7     advocating particular ones?

8                 MR. BULLOCK:  Not particular ones, just  
9     the standard actually be in place and we think that  
10    the dissent provides some good guideposts for  
11    establishing --

12                JUSTICE BREYER:  The remaining test is the  
13    --

14                JUSTICE SCALIA:  Isn't that approaching --  
15    Isn't that in effect changing the test from public  
16    use to efficient public use?  I mean, what's -- you  
17    know, if I condemn land for a public utility and the  
18    public utility turns out to be very inefficient, has  
19    the condemnation been invalid?

20                MR. BULLOCK:  No.  Your Honor.

21                JUSTICE SCALIA:  Do you want us to sit  
22    here and evaluate the prospects of each condemnation  
23    one by one?

24                MR. BULLOCK:  No, Your Honor, what we are  
25    advocating for, and utilities of course are

1 justified, have long been justified under a separate  
2 line of cases, common carrier regulations.

3 But what we are talking about are certain  
4 minimum standards in place at the time of  
5 condemnation to try to have some type of reasonable  
6 certainty that the public benefits are to come about  
7 so we are not talking about ongoing oversight. We  
8 are simply talking about minimum standards at the  
9 time of the, at the time of the condemnation.

10 JUSTICE SOUTER: I take it there isn't,  
11 but maybe there is, there isn't any question in this  
12 case that the city was acting in good faith and  
13 did -- and I presume still does -- intend to convey  
14 it to developers who will, will actually proceed to  
15 develop a project. Is there a question about that?

16 MR. BULLOCK: A question of whether or not  
17 the procedure --

18 JUSTICE SOUTER: Yeah, in other words, I  
19 can understand perfectly well, why we would want to  
20 draw a distinction between the use of the eminent  
21 domain power that takes a parcel of property from  
22 private person A and simply then reconveys it to  
23 private person B without any particular object in  
24 mind except that the city likes B, you know, the  
25 mayor is the Democrat and B is the Democrat. That

1 kind of thing.

2 So I can understand the need for some  
3 distinction between that case and what we've got  
4 here. The question is when you say there have to be  
5 minimum standards, I guess, is do we have a problem  
6 historically or in this case about the good faith of  
7 the taking so that we need the minimum standards to  
8 make sure that we are not getting into the first  
9 example?

10 MR. BULLOCK: Yes, Your Honor. And there  
11 is a number of reasons why there has to be reasonably  
12 foreseeable uses --

13 JUSTICE SOUTER: Is there a reason in this  
14 case? Is there some doubt here?

15 MR. BULLOCK: Well, it goes to the doubt  
16 about whether or not the public benefits will  
17 actually come about in this case. The takings here  
18 are really for speculative purposes, pure speculative  
19 purposes. And that's where the minimum standards  
20 come into play to ensure --

21 JUSTICE O'CONNOR: But do you really want  
22 courts to be in the business of trying to weigh the  
23 evidence to see if the utility will be successful or  
24 the hospital will be successful or the road will be  
25 well constructed? I mean, what kind of a test are

1     you proposing?

2                   MR. BULLOCK: Your Honor, our test is  
3     limited really to the condemnations that are  
4     completely dependent upon the private businesses  
5     actually being successful, and that those benefits  
6     coming about so it would not affect utilities or  
7     anything like that. But at a minimum, this Court  
8     should require that the government actually name a  
9     use.

10                  JUSTICE O'CONNOR: Does the record tell us  
11     anything about how often takings by eminent domain  
12     for economic development occur in this country? Is  
13     it frequent? What are we dealing with?

14                  MR. BULLOCK: It is, it is frequent, Your  
15     Honor. There's no -- we do not know of any study  
16     that looks specifically at condemnations for economic  
17     development, but after the Michigan court's decision  
18     in Poletown, they became commonplace.

19                  And you had properties -- business that  
20     were being condemned for casinos, other homes that  
21     were taken for automobile manufacturers. And the  
22     Michigan Supreme Court saw that as a disaster. And  
23     overturned that.

24                  JUSTICE KENNEDY: In all of those cases, I  
25     think the economic feasibility or economic success

1 test would have been easily met. I mean, what you're  
2 doing is trying to protect some economic value/ But  
3 I think it's pretty clear that most economists would  
4 say this development wouldn't happen unless there is  
5 a foreseeable chance of success.

6 Let me ask you this, and it's a little  
7 opposite of the particular question presented. Are  
8 there any writings or scholarship that indicates that  
9 when you have property being taken from one private  
10 person ultimately to go to another private person,  
11 that what we ought to do is to adjust the measure of  
12 compensation, so that the owner -- the condemnee --  
13 can receive some sort of a premium for the  
14 development?

15 MR. BULLOCK: There may be some  
16 scholarship about that. This Court has consistently  
17 held that the property owner is simply entitled to  
18 just compensation of the appraised value of the  
19 property. Of course, the property owner --

20 JUSTICE KENNEDY: And you have to prescind  
21 the project when you fix the value.

22 MR. BULLOCK: I'm sorry?

23 JUSTICE KENNEDY: You have to prescind the  
24 project -- you have to -- you have to ignore the  
25 project when you determine the value. The value is a

1 willing buyer and a willing seller, without reference  
2 to the project.

3 MR. BULLOCK: Yes, that is right. And so  
4 they simply get the --

5 JUSTICE KENNEDY: But what I am asking is  
6 if there has been any scholarship to indicate that  
7 maybe that compensation measure ought to be adjusted  
8 when A is losing property for the economic benefit of  
9 B.

10 MR. BULLOCK: I believe there has been  
11 some scholarship about it, but we think it's vital  
12 that there be a public use requirement in those  
13 takings as well.

14 JUSTICE BREYER: Can I ask you about the  
15 standard. Go back for a second.

16 MR. BULLOCK: Yes.

17 JUSTICE BREYER: I gather that the Iowa  
18 courts have a standard that includes whether there is  
19 a reasonable likelihood that the intended public use  
20 will take place. Now, is that the standard you're  
21 advocating?

22 MR. BULLOCK: It's similar to our  
23 reasonable foreseeability test that we set forth in  
24 our brief that this Court actually talked about in  
25 the Vester case as well, and a number of the other

1 state cases that are cited in our brief that  
2 establish that there has to be a use for the property  
3 and that that use has to be reasonably perceived.

4 JUSTICE BREYER: Is there a lot of  
5 disagreement about this?

6 MR. BULLOCK: No, there's not.

7 JUSTICE BREYER: I mean, it seems to me  
8 you might -- whether there is a reasonable assurance  
9 that there will in fact be the public use which the  
10 state uses as the justification for taking the  
11 property. Is that going to help you that much?

12 MR. BULLOCK: I think it will provide  
13 important minimal standards of protection for --

14 JUSTICE BREYER: Well, I mean, I don't see  
15 how this Court could get into the business of saying  
16 you have to have this by a particular day or you have  
17 to have 14 witnesses. I mean, we couldn't impose  
18 that sort of thing, could we?

19 MR. BULLOCK: Your Honor, I think just the  
20 standard needs to be in place.

21 JUSTICE BREYER: There needs to be a  
22 reasonable assurance.

23 MR. BULLOCK: Exactly. Or at the very  
24 least, a reasonable foreseeability as well, which is  
25 at a minimum that is not even in place in this



1 particular case. And the majority of state courts  
2 that have looked at this, that is a well established  
3 doctrine.

4 JUSTICE BREYER: Well, they might well  
5 need it here.

6 MR. BULLOCK: Not in this case, Your  
7 Honor.

8 JUSTICE GINSBURG: But do you do that area  
9 by area? I mean, one of the points you made, this is  
10 divided into what, seven areas?

11 MR. BULLOCK: Right.

12 JUSTICE GINSBURG: And there's some -- to  
13 be developed first, you say that your clients lived  
14 in parcels that are not likely to be developed soon,  
15 if at all. So when making this determination, is  
16 development reasonably likely, do you have to do it  
17 parcel by parcel or can it be with the whole --

18 MR. BULLOCK: No, Your Honor. We believe  
19 it should be done where the property is actually  
20 being conveyed. And we think that that is the  
21 proper -- that is the proper test.

22 JUSTICE GINSBURG: So it's not the area  
23 development but this house, will there be -- is it  
24 reasonably likely that there will be development in  
25 that particular plot.

1                   MR. BULLOCK: In this particular parcel,  
2     that is correct, Your Honor, and that has been  
3     supported by ruling in just about every  
4     condemnation --

5                   JUSTICE SOUTER: Let me ask you, I'm  
6     sorry, I'll make this a quick question. Why do you  
7     think it is necessary, given your position, why do  
8     you think it's necessary to adopt the test you've  
9     just articulated as distinct simply from a good faith  
10    requirement. So that if somebody objected and  
11    offered to prove bad faith, that would be in effect a  
12    defense for the taking?

13                  MR. BULLOCK: Your Honor, because that  
14    does not really provide any protection to property  
15    owners. The intent to benefit a private party, and  
16    the intent to benefit the public are really one and  
17    the same in these types of condemnations.

18                  And we believe it is imperative at a  
19    minimum because the condemnations are dependent upon  
20    private parties even being successful that there has  
21    to be reasonable foreseeable uses. And also, if this  
22    Court so chooses, minimum standards in place to  
23    ensure that those benefits actually go to the public.  
24    I would like to reserve the remainder of my time.

25                  JUSTICE O'CONNOR: Very well. Mr. Horton.

1 ORAL ARGUMENT OF MR. HORTON

2 ON BEHALF OF THE RESPONDENTS

3 MR. HORTON: Justice O'Connor, and may it  
4 please the Court:

5 The principal purpose of the takings  
6 clause is to provide for just compensation. Now, I  
7 want to very briefly state two reasons why you do not  
8 want to make a --

9 JUSTICE O'CONNOR: Well, but it has to be  
10 for a valid public use.

11 MR. HORTON: Yes, it does, Your Honor.

12 JUSTICE O'CONNOR: Okay.

13 MR. HORTON: I completely agree with that,  
14 but if the primary purpose of the takings clause is  
15 not to regulate legislative determinations of that,  
16 but it seems to me that what the opposition is asking  
17 for is two tests.

18 One for Berman and Midkiff and National  
19 Railroad, and another test for Kelo. There is no  
20 principle basis for a court to make what is really a  
21 value judgment about whether a long-term plan to  
22 revive an economically depressed city is a public use  
23 of a higher or lower rank constitutionally --

24 JUSTICE BREYER: But he doesn't -- he  
25 doesn't, his second test does not adopt that. The

1 second test which he was arguing at the end is just  
2 that there has to be a reasonable assurance that the  
3 public use, and it could include all those things,  
4 will in fact take place.

5 MR. HORTON: Yes, Justice Breyer. And I  
6 noted his remark because that's actually in  
7 concession because that's the test the Connecticut  
8 Supreme Court imposed. And they have --

9 JUSTICE BREYER: That may be, but what do  
10 you think of that test?

11 MR. HORTON: I don't, I don't agree. I  
12 don't think it's necessary to do that, because if you  
13 have that test, you have to say, well, what do I do  
14 about, about other areas than this.

15 Berman is an excellent example of that,  
16 because as Justice Ginsburg said, Mr. Berman's  
17 property was not blighted. You needed to take  
18 Mr. Berman's property in order for the economic  
19 development that was going to occur later on.

20 And the question is, was it reasonably  
21 assured that the economic development -- in fact,  
22 some of the other side's amicus briefs say that that  
23 worked out terribly down there, and all it was was  
24 discriminating against the poor and, and poverty  
25 stricken people and it didn't accomplish any goal --

1 JUSTICE SCALIA: Mr. Horton, what, what  
2 difference does it make that, that New London was in  
3 an economic depression? Would it not be fully as  
4 much, under your theory of a public use, for a city  
5 to say, yes, we are not doing badly, but we could do  
6 better. Let's attract some high-tech industry here.  
7 You can't possibly draw a line between depressed  
8 cities and undepressed cities, can you?

9 MR. HORTON: I would not draw a line.

10 JUSTICE SCALIA: You wouldn't. And you  
11 wouldn't ask us to do it either.

12 MR. HORTON: I would not ask -- I have a  
13 back-up argument that you do not need to reach that  
14 issue here in light of the facts of this case. But  
15 I -- to be candid with you, my view is that the test  
16 you have is -- there is no principle --

17 JUSTICE SCALIA: Any city can do it. And  
18 in the hypothetical that Justice Souter gave earlier  
19 where, you know, you couldn't take it from A and give  
20 it to B, because B is a good Democrat, you could take  
21 it from A and give it to B if B is richer, and would  
22 pay higher municipal taxes, couldn't you?

23 MR. HORTON: Yes, Your Honor. But I have  
24 a caveat on that. If you're talking about one  
25 property, you're very likely to have a Willowbrook

1       versus Oleck problem about discrimination, you know,  
2       intentional discrimination against somebody else's  
3       property.

4               JUSTICE SCALIA:  No.  I just want to take  
5       property from people who are paying less taxes and  
6       give it to people who are paying more taxes.  That  
7       would be a public use, wouldn't it?

8               JUSTICE O'CONNOR:  For example, Motel 6  
9       and the city thinks, well, if we had a Ritz-Carlton,  
10       we would have higher taxes.  Now, is that okay?

11              MR. HORTON:  Yes, Your Honor.  That would  
12       be okay.  I -- because otherwise you're in the  
13       position of drawing the line.  I mean, there is,  
14       there is a limit.  I mean --

15              JUSTICE KENNEDY:  Well, if that, if that's  
16       so then the occasional statements that we see in the  
17       writing that you can't take from A to give to B is  
18       just wrong?

19              MR. HORTON:  No.  I don't agree with that.  
20       A good example is -- well, there is Missouri Pacific.

21              JUSTICE KENNEDY:  You think you can't take  
22       from A to give to B, that there is some substance and  
23       force to that proposition?

24              MR. HORTON:  There is some force to it.  I  
25       certainly wouldn't --

1 JUSTICE SCALIA: Let me qualify it. You  
2 can take from A to give to B if B pays more taxes?

3 MR. HORTON: If it's a significant amount.  
4 Obviously, there is a cost --

5 JUSTICE SCALIA: I'll accept that. You  
6 can take from A and give to B if B pays significantly  
7 more taxes.

8 MR. HORTON: With that --

9 JUSTICE SCALIA: You accept that as a  
10 proposition?

11 MR. HORTON: I do, Your Honor.

12 JUSTICE KENNEDY: But without the  
13 addition, I'd please like an answer to your question.

14 MR. HORTON: I'm sorry.

15 JUSTICE KENNEDY: There are statements in  
16 our cases that say you cannot take from A just to  
17 give to B.

18 MR. HORTON: Yes.

19 JUSTICE KENNEDY: Do you agree that there  
20 is substance to that proposition and that that  
21 proposition is correct?

22 MR. HORTON: Yes, Your Honor. I do. And  
23 to --

24 JUSTICE KENNEDY: But isn't that exactly  
25 what happened in Berman?

1                   MR. HORTON: Your Honor, in Berman, the --  
2    what has --

3                   JUSTICE KENNEDY: Isn't that exactly what  
4    always happens unless it's for a firehouse or a  
5    school?

6                   MR. HORTON: Your Honor, my position is  
7    that purely taking from one person to give to another  
8    that shows no public benefit other than just giving  
9    from -- taking from one person to another would not  
10   be a public use.

11                  A good example is the Missouri Pacific  
12   case. The one case in 200 years of this Court's  
13   jurisprudence where you have, in fact, struck such a  
14   taking that was not a regulatory taking.

15                  I would also point out that there are a  
16   few cases around the country where it does not  
17   include Justice Scalia's hypothetical about  
18   additional taxes.

19                  An excellent example of that is the case  
20   the other side has cited from New Jersey. Casino  
21   Properties versus Bannon, where the Trump Association  
22   just wanted a parking lot that was next door. There  
23   was no assembly problem. No problem putting small  
24   parcels together. There was no talk in the case  
25   about taxes or more taxes or more jobs or anything.



1           It -- the trial judge there didn't say it  
2   was just for a public purpose -- a private purpose,  
3   but he said it was overwhelmingly just for the Trump  
4   organization's -- so, I mean, if you include Justice  
5   Scalia's hypothetical about more taxes, then I say  
6   that's sufficient, as long as you get over --

7           JUSTICE GINSBURG: Is that what the  
8   Connecticut Supreme Court that we are reviewing said,  
9   you -- you are arguing, it seems to me, for something  
10   that goes beyond what was adjudicated in this case.  
11   I mean --

12          MR. HORTON: Yes.

13          JUSTICE GINSBURG: It was a finding, a  
14   finding before to be a fact in the trial court that  
15   this development was going to be primarily for the  
16   benefit of the citizens of New London, and not for  
17   the benefit of Pfizer or the private developer.

18          MR. HORTON: Yes, Your Honor. I agree  
19   with that and that is why I say my back-up position  
20   is you don't need to determine whether you go beyond  
21   economic depression of a city in this particular  
22   case.

23          JUSTICE SCALIA: Is that a factual  
24   finding? You consider that a factual finding?

25          MR. HORTON: I think it's a mixed question

1 of fact and law --

2 JUSTICE SCALIA: Well, that this is  
3 primarily for the benefit of the city of New London,  
4 not for the benefit of a --

5 MR. HORTON: I consider that --

6 JUSTICE SCALIA: In the eye of the  
7 beholder, to whom do you think this does greater  
8 benefit to, not a factual finding.

9 JUSTICE O'CONNOR: When, when there is no  
10 condemnation to acquire property for the direct use  
11 of the public, as for a public right-of-way, or a  
12 utility path or something, where it's purely economic  
13 development, is there any reason why we shouldn't  
14 draw a clear line and say that isn't a public  
15 purpose. Let them go out and deal with -- buy it on  
16 the market, on the open market. What's the matter  
17 with that?

18 MR. HORTON: Well, for one thing we have  
19 in this case, and this comes back to the point about  
20 this particular case, is a severe assembly problem.  
21 We have 115 properties we are talking about on this  
22 90-acre plot, and there is 32 acres that come from  
23 one place, from --

24 JUSTICE O'CONNOR: Well, let's look at the  
25 specifics here. Pfizer is already in place. That's

1       happened.

2                   MR. HORTON:   Yes, Your Honor.

3                   JUSTICE O'CONNOR:   So what are these  
4       parcels of the people now before us going to be used  
5       for?

6                   MR. HORTON:   Yes, Your Honor.   First of  
7       all, it's a long-range plan.   If I could have, if I  
8       could have the chart, please, if I may show you Your  
9       Honor.

10                   The -- we are out on a peninsula here, and  
11       here is Pfizer down here, which at the time of the  
12       taking was almost completed.   They moved in a month  
13       afterwards.   Up here is an old state -- old fort from  
14       the 19th century that the state agreed to turn into a  
15       state park as part of an overall plan.   The overall  
16       plan is this whole thing.

17                   Now, parcel one is going to be a hotel, is  
18       planned for a hotel.   Parcel two was planned --

19                   JUSTICE O'CONNOR:   Let's talk about the  
20       litigants.

21                   MR. HORTON:   Yes.

22                   JUSTICE O'CONNOR:   Before us today.

23                   MR. HORTON:   Yes.   That's right.   They are  
24       in parcel 3 and they are in parcel 4-A.   Now, the --  
25       it's to be developed in phases.   The first phase is

1 one and two. The next phase is then three and four,  
2 A, and there is also a marina --

3 JUSTICE O'CONNOR: What's planned for 3  
4 and 4-A?

5 MR. HORTON: What's planned for 3 is that  
6 it's going to be office space. And the expectation  
7 is there is going to be a demand for class A office  
8 space, which is the best quality office space in this  
9 area by 2010. And the expectation is that it will  
10 attract the sorts of offices that will feed on the  
11 Pfizer. They spent \$300 million on a site here.

12 In addition, I may point out, this is the  
13 Amtrak line going along here. The only way you can  
14 get to parcels 1 and 2 is to go right by parcel 3 or  
15 go right by parcel 4-A.

16 This is a waste water treatment facility.  
17 Parcel 4-A is for park support or marina support.  
18 Now, it isn't more definitive, but obviously, one  
19 possible use is for parking here because you've got a  
20 waste water treatment facility here. You've got the  
21 park here. You've got the marina here and you've got  
22 the other parcels here.

23 It's not like we are talking, as in  
24 Berman, you're talking about something that's in the  
25 parcel. And in Berman, they said it's not for the

1 court to decide where the boundary lines ought to be.  
2 It seems to me that's another point, Justice  
3 O'Connor. It's not like parcel 3 --

4 JUSTICE BREYER: Well, can't the courts at  
5 least -- can't the courts, could the courts -- do you  
6 object to this, and I'm not advocating it, I want  
7 your reaction.

8 MR. HORTON: Yes, Your Honor.

9 JUSTICE BREYER: Could the courts, under  
10 this clause, at least review what you've just said  
11 for reasonableness? I mean, look at the  
12 reasonableness of a claim that this is for --  
13 basically for a public use. Look at the  
14 reasonableness of the claim that we should do it this  
15 way, rather than excusing the people who don't want  
16 to sell their houses no matter what and doing it a  
17 little bit differently.

18 Reasonableness is a concept that's already  
19 in the Constitution in terms of what the legislature  
20 can do, but I'm thinking of the stronger kind of  
21 reasonableness review that you might have in an  
22 administrative action. Now, is, Overton Park, if you  
23 want a case. Is that a possible kind of review that  
24 you might find appropriate here?

25 MR. HORTON: No, Your Honor, if what

1     you're defining as reasonableness is being higher  
2     than rational basis. Because in that situation,  
3     you're applying a higher standard for a taking where  
4     we are paying for it than you would be for --

5             JUSTICE BREYER: Well, the reason that you  
6     would apply a somewhat higher standard is because the  
7     rational basis, with tremendous deference, applies to  
8     the power of Congress to act in an economic area in  
9     the absence of a particular constitutional provision  
10    designed to protect a minority from the actions of  
11    the majority.

12            And if you read that public purpose  
13    doctrine, a section here as having that in mind, you  
14    might want a somewhat higher level of review. Now,  
15    that's the whole thing spelled out. I'm not  
16    advocating it. But I am putting it forward to get --  
17    to get your reaction.

18            MR. HORTON: Your Honor, that same type of  
19    remark could be made about rational basis equal  
20    protection review.

21            JUSTICE BREYER: Oh, and indeed with equal  
22    protection, we very often do have a somewhat higher  
23    standard of review.

24            MR. HORTON: Ah, yes, Your Honor, but the  
25    point here is that you should not have a higher

1 standard of review because we are paying for it. It  
2 would be ironic to have a higher test than for  
3 example in a regulatory taking or even the same test.  
4 You have a test in Nollan and Dolan, for example,  
5 which is an exactions case. So that's to say --

6 JUSTICE SCALIA: Mr. Horton, you're paying  
7 for it, but you're also taking property from somebody  
8 who doesn't want to sell it. Does that count for  
9 nothing? Yes, you're paying for it, but you're  
10 giving the money to somebody who doesn't want the  
11 money, who wants to live in the house that she's  
12 lived in her whole life. That counts for nothing?

13 MR. HORTON: No, of course not, Your  
14 Honor.

15 JUSTICE SCALIA: Well, then, let me ask --  
16 would, would the reasonableness standard, if the  
17 project is indeed reasonable, and there is genuine  
18 prospect that all of these good things that you're  
19 talking about will happen, why wouldn't private money  
20 come in to further the project? Why is it necessary  
21 to condemn it if it's so reasonable. Why couldn't  
22 you, you -- now, you say there is a holdout for one  
23 part, parcel. Couldn't the city fund a private  
24 purchase of that parcel? Say, you know, we'll make  
25 funds available out of our general tax revenue to

1     somebody who wants to come in and put together this  
2     system? Of course, that person has to buy out  
3     property owners, but we'll, we'll give you money to  
4     buy them out at high prices.

5             MR. HORTON: Your Honor, there are some  
6     plaintiffs who are not going to sell at any price.  
7     They want to stay there. You've got a severe  
8     assembly problem in this case and it's not as though  
9     you can say, well, go somewhere else.

10            You have a situation where you've got the  
11   Pfizer plant that is being built there. You've got  
12   the state park that's there. You've got this Naval  
13   underseas facility that just came on the market.  
14   That's the only place anything is going to work and  
15   it's -- and it's five to six square miles of town. I  
16   mean, there is no other place to go.

17            JUSTICE GINSBURG: How much, how much of  
18   this was voluntarily sold, is that correct?

19            MR. HORTON: The large share of it was,  
20   but of course, that's because there is always in the  
21   background the possibility of being able to condemn  
22   it. I mean, that obviously facilitates a lot of  
23   voluntary sales. And if, if this is not -- if this  
24   is not -- let me put it this way. I mean, there is  
25   going to be a more severe holdout problem.



1 JUSTICE BREYER: That may be. Now, that's  
2 why I'm back to reasonableness. You see, we are told  
3 in the briefs that the people who often might hold  
4 out, might be doing so to get more money, but it  
5 might also be because they are poor, they are not  
6 well connected politically, and their only hope is to  
7 go to a court and stop this thing.

8 So you'd give them two weapons. Weapon  
9 one is you have to pay them. That's correct.  
10 Compensation. And weapon two is they can put you to  
11 a test of being reasonable. That might be quite a  
12 deferential test, so you might have every leg up.  
13 But they at least could catch the instances where  
14 this is really not reasonable to do to them what  
15 you're doing to them that they don't want.

16 MR. HORTON: I have two responses to that,  
17 Your Honor. First of all, that applies to all sorts  
18 of takings. If I'm building a road, let me give you  
19 an example of the Rindge case that Your Honors  
20 decided in the 1920s.

21 That was the road to nowhere. It was a  
22 road that went through a farm to the county line.  
23 And the other county had no intention at that point  
24 of building a road, but Your Honors said, well, they  
25 might get around to it at sometime so it's a good

1     idea to build it now.

2                 We had a similar situation in Hartford.  
3     There is supposed to be a ring road around Hartford,  
4     and the State condemned all this land for a ring road  
5     around Hartford. Well, one little bit of it was done  
6     and then just this, this year, in very low print in  
7     the last page of the newspaper, we see about the  
8     state getting around to selling the land because they  
9     didn't, they didn't do it.

10                I mean, this can happen in the railroad  
11     case is a good example. The railroad case. The one  
12     Your Honors decided. If it's -- being a common  
13     carrier makes all the difference, then how come the  
14     ICC just didn't order the Boston & Maine to fix the  
15     railroad? You know. Why? You know, you didn't look  
16     to make a --

17                JUSTICE SCALIA: Common carriers are  
18     subject to state regulation to a degree that private  
19     companies are not. They must, they must treat all  
20     comers alike. I mean, I don't think the public  
21     utility cases are at all comparable to condemning  
22     land in order to get a new company to move in and pay  
23     more taxes. I just don't think it's similar.

24                MR. HORTON: Well, I would like to point  
25     out that the -- there is a difference, the whole

1 point is about having a test about reasonable  
2 assurances about whether something is going to happen  
3 and that's where the railroad case makes a  
4 difference.

5 QUESTION: I agree with you on that.

6 MR. HORTON: That's the only point I was  
7 making, Your Honor. I didn't mean to go further than  
8 that. But coming back to Justice Breyer's point, you  
9 made a point about poor people. And I'd like to  
10 point out, unless you're going to overrule Berman,  
11 you know, poor people and minorities are more likely  
12 to be vulnerable in the blight cases than in this  
13 case.

14 I mean, this is a good example. Economic  
15 development can take place anywhere in town. Blight  
16 happens in one area of town where the poor and the  
17 minorities are likely to live, and in fact, this very  
18 case, we have got middle class people. There is no  
19 blight that's been alleged in the condemnation  
20 papers.

21 The other thing is if you stick to blight,  
22 this is the problem you're going to have. You're  
23 going to end up making a blight jurisprudence  
24 because -- because what's going to happen is the  
25 cities are going to say, we can only do this by

1 blight, so they are going to have marginal  
2 definitions of blight.

3 Florida, for example, says property is  
4 blighted if it's vacant. Is that blight? I mean,  
5 you're going to have a big headache in that --

6 JUSTICE BREYER: No, I'm accepting that  
7 you can't make that kind of a distinction. That's  
8 where I'm focusing on a test that would possibly  
9 apply only where you transfer property from one  
10 private person to another, but still wouldn't make  
11 those distinctions of blight or not blight.

12 MR. HORTON: Yes. But I mean, the other  
13 thing is, are you going to make -- would the Court  
14 make a distinction between a case where the city is  
15 doing the developing itself, and another case where  
16 the city gives it to a private person.

17 I'd like to point out, my client is going  
18 to keep the property. It's -- it's going to be  
19 leased to a developer. It's not going to be sold to  
20 the developer. So I mean, if this developer builds a  
21 building on this property, and then doesn't comply,  
22 they are in big trouble.

23 JUSTICE KENNEDY: It does seem ironic that  
24 100 percent of the premium for the new development  
25 goes to the, goes to the developer and to the

1 taxpayers and not to the property owner.

2 MR. HORTON: Well, that's an interesting  
3 point. A question was raised earlier about the other  
4 side about whether there should be --

5 JUSTICE KENNEDY: The compensation  
6 measures.

7 MR. HORTON: The compensation measures.  
8 Exactly. By the way, the answer to your question is  
9 if there is some -- if there is some scholarly  
10 articles on that, I'm not aware of it either.

11 But I would point out that's something,  
12 you know, in terms of social costs and things like  
13 that, that is something that this Court might or  
14 might not wish to consider in a just compensation  
15 case, but I don't think it should affect whether you  
16 take the property or not. It seems to me that is --  
17 I'm not taking a position on that one way or another,  
18 but it seems to me that's -- you have to assume in  
19 this case that there is going to be just  
20 compensation.

21 JUSTICE KENNEDY: On that point, just in  
22 Connecticut, if the property owner goes to the jury  
23 and receives more than the state offered, does the  
24 state also have to pay those attorneys' fees?

25 MR. HORTON: Under -- under state law?

1 JUSTICE KENNEDY: Under Connecticut law,  
2 if the property owner is offered \$100 but goes to the  
3 jury and gets \$200, does the property owner have to  
4 pay the attorneys' fees or does the state pay the  
5 attorneys' fees?

6 MR. HORTON: The state does not pay  
7 attorneys' fees, Your Honor. Everybody pays his own  
8 attorneys' -- and likewise, the other way, if it's  
9 lower amount than what was put in than, you know,  
10 it's not as though the state gets attorneys' fees  
11 back. It works both ways.

12 JUSTICE SOUTER: Mr. Horton, what do you  
13 think is the reason that there are not a lot of  
14 examples of the sort that I think one of Justice  
15 O'Connor's hypotheticals raised, in which the, I  
16 don't know, the Econoline Motel gets condemned so  
17 that the Ritz can be built, thereby increasing tax  
18 revenue and so on, kind of parcel by parcel  
19 augmentations to the tax base and so on. Why aren't  
20 there a lot of examples like that?

21 MR. HORTON: I think there is two good  
22 reasons for it, and that it's a theoretical more than  
23 a practical problem. First of all, you've got all  
24 sorts of transaction costs when you, when you go  
25 through eminent domain, as opposed to doing things

1 voluntarily.

2           So you are not going to do things -- as a  
3 as a practical matter, to take Justice Scalia's  
4 earlier example, for one piece of property because of  
5 the transaction costs involved. I mean, you're never  
6 going to make up -- unless it's to, you know, to  
7 favor the governor's friend or something like that,  
8 as you say.

9           JUSTICE SOUTER: In which case we have a  
10 different --

11           MR. HORTON: In which case you have a  
12 different problem. The Willowbrook versus Oleck  
13 test.

14           QUESTION: Okay. So we have transaction  
15 costs.

16           MR. HORTON: Transaction costs, but that  
17 is a serious problem. And the other thing, there is  
18 the democratic process, Your Honor. I mean,  
19 especially if the taxpayers are paying for something  
20 and you know, they are getting a bad reason or run  
21 around about the reason, you know, that's subject to  
22 review.

23           It seems to me democracy can make good  
24 decisions and -- or bad decisions under the  
25 Constitution, but the important thing is that when

1     it's paid for, it's not like regulatory takings which  
2     are, you know, the taxpayers don't see that until  
3     it's too late. You know, in this type of taking, the  
4     taxpayers are seeing up front what's going on.

5                 JUSTICE BREYER: That's true. But now,  
6     put yourself in the position of the homeowner. I  
7     take it, if it's a forced sale, it's at the market  
8     value, the individual, let's say it's someone who has  
9     lived in his house his whole life. He bought the  
10    house for \$50,000. It's worth half a million. He  
11    has 450,000 profit.

12                He pays 30 percent to the Government and  
13    the state in taxes, and then he has to live  
14    somewhere. Well, I mean, what's he supposed to do?  
15    He now has probably 350,000 to pay for a house. He  
16    gets half a house because that's all he is going to  
17    do, all he is going to get for that money after he  
18    paid the taxes, or whatever.

19                And I mean, there are a lot of -- and he  
20    has to move and so forth. So going back to Justice  
21    Kennedy's point, is there some way of assuring that  
22    the just compensation actually puts the person in the  
23    position he would be in if he didn't have to sell his  
24    house? Or is he inevitably worse off?

25                MR. HORTON: Well, I mean, first of all,



1 the -- in Connecticut, fortunately, we have  
2 relocation loans which are involved here. And they  
3 are available in this case.

4 There was, it wasn't clear from our brief  
5 whether they were loans or not, and it is correct  
6 that they are loans. The other side pointed out that  
7 that was for all projects in the state. That's not  
8 true, you know, I mean, there is \$10 million involved  
9 in relocation funds.

10 JUSTICE SOUTER: But the loans don't make  
11 him whole. Isn't --

12 MR. HORTON: That's true.

13 JUSTICE SOUTER: I mean, what bothered  
14 Justice Breyer I guess bothers a lot of us. And that  
15 is, is there a problem of making the homeowner or the  
16 property owner whole? But I suppose the answer to  
17 that is that goes to the measure of compensation  
18 which is not the issue here.

19 MR. HORTON: Yes. And that's, and I had  
20 said that earlier. But another point when I was  
21 talking about roads is that applies to -- that could  
22 apply to any type of case. It doesn't just apply to  
23 a case like this.

24 JUSTICE SCALIA: And that would really  
25 overrule a bunch of prior cases and really throw

1 condemnation law into chaos.

2 MR. HORTON: Yes. And Justice Scalia, a  
3 question you -- or actually it was a comment you had  
4 made about public use versus public purpose. And  
5 that would not only overrule -- and my opposing  
6 counsel said there is a difference between the two.  
7 And when pressed by Justice Souter -- and I would  
8 point out, that's just overruling cases going back to  
9 Berman. That's overruling two decisions by --

10 JUSTICE BREYER: What is the remedy?

11 Let's repose the problem to which I want to remedy  
12 then. And maybe this isn't the right remedy.

13 But the remedy that they are saying, and  
14 I'm really repeating it, is an individual has a house  
15 and they want to be really not made a lot worse off,  
16 at least not made a lot worse off just so some other  
17 people can get a lot more money. Now what, what is  
18 the right -- is there no constitutional protection?  
19 If this isn't the right case, what is?

20 MR. HORTON: Well, the right case is in  
21 the just compensation concept, but going to your,  
22 your point, if this were here as just compensation, I  
23 would say in terms of just compensation, in deciding  
24 what the fair market value is today, you can  
25 certainly take into account the economic plan that's

1       going into effect.  You know --

2                   JUSTICE KENNEDY:  Really?  I thought that  
3       that was a fundamental of condemnation law that you  
4       can not value the property being taken based on what  
5       it's going to be worth after the project.  That's  
6       just --

7                   MR. HORTON:  Well --

8                   JUSTICE KENNEDY:  Unless Connecticut law  
9       is much different from any other state.

10                  MR. HORTON:  I may have misspoken on that  
11       subject, Your Honor.

12                  JUSTICE SCALIA:  You didn't misspeak.  But  
13       you know, in any case --

14                  MR. HORTON:  I apologize, I --

15                  JUSTICE SCALIA:  What this lady wants is  
16       not more money.  No amount of money is going to  
17       satisfy her.  She is living in this house, you know,  
18       her whole life and she does not want to move.  She  
19       said I'll move if it's being taken for a public use,  
20       but by God, you're just giving it to some other  
21       private individual because that individual is going  
22       to pay more taxes.  I -- it seems to me that's,  
23       that's an objection in principle, and an objection in  
24       principle that the public use requirement of the  
25       Constitution seems to be addressed to.

1                   MR. HORTON: But as I say, Your Honor, if  
2 public use and public purpose are the same thing,  
3 which they are unless you're going to overrule  
4 Holmes' decisions from 1905 and 1906.

5                   JUSTICE SCALIA: It wouldn't be the first of  
6 Holmes' decisions to be overruled.

7                   JUSTICE GINSBURG: Well, I think you'd  
8 have to take some substantial chunks of language out  
9 of Berman as well, because Justice Douglas spoke very  
10 expansively in that case.

11                  MR. HORTON: Plus I think Holmes was right  
12 when he said that to say that the public actually has  
13 to use the property is not an appropriate meaning of  
14 the phrase, so I would not think you'd want to  
15 revisit that case, even if you want to revisit some  
16 other of Holmes' decisions.

17                  But the -- I guess the best answer I have,  
18 Justice Breyer, to your question, after I, after I  
19 misspoke is simply to go back to the point that the  
20 time at which you consider what just compensation is,  
21 is in the just compensation proceedings.

22                  And while I misspoke about what the test  
23 was, and I apologize for that, certainly this Court  
24 can consider if social costs should be taken into  
25 account at that time. I'm not saying they should. I

1 haven't thought that through as can you obviously see  
2 by my misanswering the question, but it seems to me  
3 because my primary answer is that you don't look at  
4 that now.

5 JUSTICE KENNEDY: Well, of course, the tax  
6 code does have special provisions for involuntary  
7 sales and reinvestments.

8 MR. HORTON: Yes, it does.

9 JUSTICE KENNEDY: The tax hypothetical is  
10 not accurate.

11 MR. HORTON: Yes.

12 JUSTICE SCALIA: Mr. Horton, I'm not  
13 proposing that the state has to use the property  
14 itself. I'm simply proposing that its use not be a  
15 private use which has incidental benefits to the  
16 state. That is not enough to justify use of the  
17 condemnation power.

18 MR. HORTON: Well, I don't think --

19 JUSTICE SCALIA: You can give it to a  
20 private entity, you can give it to a railroad, to  
21 some public utility. But the use that it's put to by  
22 that railroad and public utility is a public use.  
23 That's why it's a public utility.

24 It's quite different to say you can give  
25 it to a private individual simply because that

1 private individual is going to hire more people and  
2 pay more taxes. That, it seems to me, just washes  
3 out entirely the distinction between private use and  
4 public use.

5 MR. HORTON: Well, I don't agree, Your  
6 Honor, because I think, you know, I think if a person  
7 is without a job and if a person is not able to get  
8 basic services that they need from the town because  
9 the town can't afford it, that's just as important as  
10 a trains running on time or eliminating blight.

11 And Justice Breyer, I thought of another  
12 answer to your question that has to do with this  
13 case. And that is even on a higher test, we win  
14 because the Connecticut Supreme Court applied a  
15 higher test in this case.

16 And just -- I would say that in this case,  
17 the essence of federalism is to let various courts  
18 make various decisions about what they consider an  
19 important public purpose. It may be different in  
20 Utah from the way it is in Connecticut, and it's  
21 different in Florida, and I don't think this Court  
22 should be having a new jurisprudence for this area  
23 and having two separate tests, and maybe having a  
24 test that even approaches the Nollan Dolan test where  
25 you certainly want to discourage people from taking

1       these actions.

2                   And so it seems to me the four words I  
3       think that this Court should consider -- and I'm not  
4       going to tell you the four words since my red light  
5       is on. Thank you, Your Honor.

6                   JUSTICE O'CONNOR: Mr. Bullock, you have  
7       three and a half minutes.

8                   REBUTTAL ARGUMENT BY SCOTT G. BULLOCK  
9                   ON BEHALF OF THE PETITIONERS

10                  JUSTICE KENNEDY: Mr. Bullock, do you know  
11       those four words?

12                  MR. BULLOCK: I wish I did. I could  
13       respond to it if I -- if I actually did. Your  
14       Honors, first of all, just a couple of matters  
15       regarding the Connecticut Supreme Court's decision.  
16       The Connecticut Supreme Court did not apply the test  
17       that we suggest in our case, they explicitly, the  
18       majority explicitly declined to apply heightened  
19       scrutiny in this, in this instance.

20                  I think the key to understanding their  
21       argument is the answer to the question of, can you  
22       take a Motel 6 and give it to a fancier hotel? Their  
23       answer is yes. And that's what's really at stake  
24       here.

25                  These condemnations are taking place

1 throughout the country. A city in California  
2 condemns the 99 cents store in order to give it to  
3 Costco. Now, were they giving enormous benefits to  
4 Costco? Of course they were. But they did so  
5 because they wanted to get the tax revenue, and  
6 that's the problem with these types of condemnations,  
7 the desire to help a private party and the desire to  
8 help the public are really one and the same. The  
9 public only benefits if the private party is  
10 successful.

11 The NLDC is a private body. It has a  
12 private board of directors, and it is leasing land to  
13 a private developer for 99 years at \$1 a year. That  
14 is private ownership of land.

15 Also, Your Honors, there is no severe  
16 assembly problem in this particular case, and in many  
17 other development situations. The NLDC and the city  
18 have 32 acres that was given to them by the Federal  
19 Government for them to do as they wish. And our  
20 homeowners who have lived there a long time and wish  
21 to hold on to their properties do not object to that  
22 development going on. It is within the rights of the  
23 city and the NLDC to do so.

24 Also, Your Honor, the Rindge case that was  
25 cited by the Respondents, they actually knew what was



1 going to go on in that, in that case. They knew what  
2 the use was going to be.

3 And finally, Your Honors, the Respondents  
4 talk about the effect that this may have upon poor  
5 people. Not all neighborhoods, not all poor  
6 neighborhoods are blighted. But the one thing that  
7 all poor neighborhoods share in common is that they  
8 don't produce much in the way of tax revenue, so  
9 you're going to put poor neighborhoods and working  
10 class neighborhoods like the ones that exist in Fort  
11 Trumbull in jeopardy if the Court affirms the  
12 decision below.

13 And that's why so many organizations that  
14 are concerned about the rights of senior citizens and  
15 the rights of minorities and poor folks like legal  
16 services corporations have joined in our side to  
17 support the property owners in this case. If there  
18 is no further questions, Your Honors, I will close.  
19 Thank you.

20 JUSTICE O'CONNOR: Thank you Mr. Bollock.  
21 The case is submitted.

22 (Whereupon, at 11:12 a.m., the case in the  
23 above-entitled matter was submitted.)

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