

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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(10:12 a.m.)

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

ORAL ARGUMENT OF SCOTT G. BULLOCK  
ON BEHALF OF PETITIONERS

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

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

JUSTICE GINSBURG: Mr. Bullock, you are leaving out that New London was in a depressed economic condition, so this is distinguished from the case where the state has no particular reason for wanting this, but the critical fact on the city side, at least, is that this was a depressed community and

1 they wanted to build it up, get more jobs.

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

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

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

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

24 JUSTICE SCALIA: You don't concede, or do  
25 you, that elevating the city from a depressed to

1 prosperous is a better justification than elevating a  
2 city from prosperous to more prosperous?

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

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

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

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

24 MR. BULLOCK: Your Honor, it is clear that  
25 eminent domain power is broad, but there has to be

1 limits, and that's what we are really talking about  
2 here.

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

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

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

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

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

1 That's a fact of the world.

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

7 MR. BULLOCK: Your Honor, we think that  
8 that cuts way too broadly.

9 JUSTICE BREYER: Because?

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

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

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

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

24 MR. BULLOCK: Well, Your Honor, I think  
25 with public -- with just having a simple public

1 benefit, then there really is no distinction between  
2 public and private uses. And that is what we call  
3 upon this Court to state, for instance, in the Berman  
4 case and in the Midkiff case, which we think are  
5 really the outer limits of government's eminent  
6 domain --

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

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

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

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

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



1 them to an industrial developer to raise the tax base  
2 and hence ultimately to raise taxes.

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

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

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

23 MR. BULLOCK: No, Your Honor. We do not  
24 believe that that would be -- 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 that.

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 is appropriate, though --

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.

23 JUSTICE KENNEDY: As I understand, you're  
24 testing -- you want me to make a distinction between  
25 blight which is a permissible governmental use,

1 governmental objective and economic revival, which  
2 isn't?

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

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

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

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

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

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

24 MR. BULLOCK: Well, Your Honor, because, I  
25 think -- to get back to the decisions in Berman and

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

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

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

14 MR. BULLOCK: But --

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

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

22 JUSTICE KENNEDY: And this seems to be  
23 really essential for the purpose of developing  
24 industrial property to increase the tax base. The  
25 argument is, and I don't know of any reason to doubt

1 it, that doing it seriatim by voluntary acquisition  
2 and sale doesn't work.

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

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

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

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

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

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

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

13 JUSTICE O'CONNOR: Yes.

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

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

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

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

25 MR. BULLOCK: Well, the test, Your Honor,



1 for --

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

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

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

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

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

1 could be such things as a commencement date for the  
2 project, a construction schedule, financial  
3 eligibility for the developers, there's a number of  
4 different things.

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

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

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

17 MR. BULLOCK: No. Your Honor.

18 JUSTICE SCALIA: Do you want us to sit  
19 here and evaluate the prospects of each condemnation  
20 one by one?

21 MR. BULLOCK: No, Your Honor, what we are  
22 advocating for, and utilities of course are  
23 justified, have long been justified under a separate  
24 line of cases, common carrier regulations.

25 But what we are talking about are certain

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

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

13 MR. BULLOCK: A question of whether or not  
14 the procedure --

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

24 So I can understand the need for some  
25 distinction between that case and what we've got

1 here. The question is when you say there have to be  
2 minimum standards, I guess, is do we have a problem  
3 historically or in this case about the good faith of  
4 the taking so that we need the minimum standards to  
5 make sure that we are not getting into the first  
6 example?

7 MR. BULLOCK: Yes, Your Honor. And there  
8 is a number of reasons why there has to be reasonably  
9 foreseeable uses --

10 JUSTICE SOUTER: Is there a reason in this  
11 case? Is there some doubt here?

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

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

24 MR. BULLOCK: Your Honor, our test is  
25 limited really to the condemnations that are

1 completely dependent upon the private businesses  
2 actually being successful, and that those benefits  
3 coming about so it would not affect utilities or  
4 anything like that. But at a minimum, this Court  
5 should require that the government actually name a  
6 use.

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

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

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

21 JUSTICE KENNEDY: In all of those cases, I  
22 think the economic feasibility or economic success  
23 test would have been easily met. I mean, what you're  
24 doing is trying to protect some economic value/ But  
25 I think it's pretty clear that most economists would

1 say this development wouldn't happen unless there is  
2 a foreseeable chance of success.

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

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

17 JUSTICE KENNEDY: And you have to prescind  
18 the project when you fix the value.

19 MR. BULLOCK: I'm sorry?

20 JUSTICE KENNEDY: You have to prescind the  
21 project -- you have to -- you have to ignore the  
22 project when you determine the value. The value is a  
23 willing buyer and a willing seller, without reference  
24 to the project.

25 MR. BULLOCK: Yes, that is right. And so

1 they simply get the --

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

7 MR. BULLOCK: I believe there has been  
8 some scholarship about it, but we think it's vital  
9 that there be a public use requirement.

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

12 MR. BULLOCK: Yes.

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

18 MR. BULLOCK: It's similar to our  
19 reasonable foreseeability test that we set forth in  
20 our brief that this Court actually talked about in  
21 the Vester case as well, and a number of the other  
22 state cases that are cited in our brief that  
23 establish that there has to be a use for the property  
24 and that that use has to be reasonably perceived.

25 JUSTICE BREYER: Is there a lot of

1 disagreement about this?

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

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

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

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

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

17 JUSTICE BREYER: There needs to be a  
18 reasonable assurance.

19 MR. BULLOCK: Exactly. Or at the very  
20 least, a reasonable foreseeability as well, which is  
21 at a minimum that is not even in place in this  
22 particular case. And the majority of state courts  
23 that have looked at this, that is a --

24 JUSTICE BREYER: Well, they might well  
25 need it here.



1 MR. BULLOCK: Not in this case, Your  
2 Honor.

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

6 MR. BULLOCK: Right.

7 JUSTICE O'CONNOR: And there's some -- to  
8 be developed first, you say that your clients lived  
9 in parcels that are not likely to be developed soon,  
10 if at all. So when making this determination, is  
11 development reasonably likely, do you have to do it  
12 parcel by parcel or can it be with the whole --

13 MR. BULLOCK: No, Your Honor. We believe  
14 it should be done where the property is actually  
15 being conveyed. And we think that that is the  
16 proper --

17 JUSTICE GINSBURG: So it's not the area  
18 development but this house, will there be -- is it  
19 reasonably likely that there will be development in  
20 that particular plot.

21 MR. BULLOCK: In this particular parcel,  
22 that is correct, Your Honor, and that has been  
23 supported by ruling in just about every  
24 condemnation --

25 JUSTICE SOUTER: Let me ask you, I'm

1 sorry, I'll make this a quick question. Why do you  
2 think it is necessary, given your position, why do  
3 you think it's necessary to adopt the test you've  
4 just articulated as distinct simply from a good faith  
5 requirement. So that if somebody objected and  
6 offered to prove bad faith, that would be in effect a  
7 defense for the taking?

8 MR. BULLOCK: Your Honor, because that  
9 does not really provide any protection to property  
10 owners. The intent to benefit a private party, and  
11 the intent to benefit the public are really one and  
12 the same in these types of condemnations.

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

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

21 ORAL ARGUMENT OF MR. HORTON

22 ON BEHALF OF THE RESPONDENTS

23 MR. HORTON: Justice O'Connor, and may it  
24 please the Court:

25 The principal purpose of the takings

1 clause is to provide for just compensation. Now, I  
2 want to very briefly state two reasons why you do not  
3 want to make a --

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

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

7 JUSTICE O'CONNOR: Okay.

8 MR. HORTON: I completely agree with that,  
9 but if the primary purpose of the takings clause is  
10 not to regulate legislative determinations of that,  
11 but it seems to me that what the opposition is asking  
12 for is two tests.

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

19 JUSTICE BREYER: But he doesn't -- he  
20 doesn't, his second test does not adopt that. The  
21 second test which he was arguing at the end is just  
22 that there has to be a reasonable assurance that the  
23 public use, and it could include all those things,  
24 will in fact take place.

25 MR. HORTON: Yes, Justice Breyer. And I

1 noted his remark because that's actually in  
2 concession because that's the test the Connecticut  
3 Supreme Court imposed. And they have --

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

6 MR. HORTON: I don't, I don't agree. I  
7 don't think it's necessary to do that, because if you  
8 have that test, you have to say, well, what do I do  
9 about, about other areas than this.

10 Berman is an excellent example of that,  
11 because as Justice Ginsburg said, Mr. Berman's  
12 property was not blighted. You needed to take  
13 Mr. Berman's property in order for the economic  
14 development that was going to occur later on.

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

21 JUSTICE SCALIA: Mr. Horton, what, what  
22 difference does it make that, that New London was in  
23 an economic depression? Would it not be fully as  
24 much, under your theory of a public use, for a city  
25 to say, yes, we are not doing badly, but we could do

1 better. Let's attract some high-tech industry here.  
2 You can't possibly draw a line between depressed  
3 cities and undepressed cities, can you?

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

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

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

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

18 MR. HORTON: Yes, Your Honor. But I have  
19 a caveat on that. If you're talking about one  
20 property, you're very likely to have a Willowbrook  
21 versus Oleck problem about discrimination, you know,  
22 intentional discrimination against somebody else's  
23 property.

24 JUSTICE SCALIA: No. I just want to take  
25 property from people who are paying less taxes and

1 give it to people who are paying more taxes. That  
2 would be a public use, wouldn't it?

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

6 MR. HORTON: Yes, Your Honor. That would  
7 be okay. I -- because otherwise you're in the  
8 position of drawing the line. I mean, there is,  
9 there is a limit. I mean --

10 JUSTICE KENNEDY: Well, if that, if that's  
11 so then the occasional statements that we see in the  
12 writing that you can't take from A to give to B is  
13 just wrong?

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

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

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

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

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

25 JUSTICE SCALIA: I'll accept that. You

1 can take from A and give to B if B pays significantly  
2 more taxes.

3 MR. HORTON: With that --

4 JUSTICE SCALIA: You accept that as a  
5 proposition?

6 MR. HORTON: I do, Your Honor.

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

9 MR. HORTON: I'm sorry.

10 JUSTICE KENNEDY: There are statements in  
11 our cases that say you cannot take from A just to  
12 give to B.

13 MR. HORTON: Yes.

14 JUSTICE KENNEDY: Do you agree that there  
15 is substance to that proposition and that that  
16 proposition is correct?

17 MR. HORTON: Yes, Your Honor. I do. And  
18 to --

19 JUSTICE KENNEDY: But isn't that exactly  
20 what happened in Berman?

21 MR. HORTON: Your Honor, in Berman, the --  
22 what has --

23 JUSTICE KENNEDY: Isn't that exactly what  
24 always happens unless it's for a firehouse or a  
25 school?

1           MR. HORTON: Your Honor, my position is  
2 that purely taking from one person to give to another  
3 that shows no public benefit other than just giving  
4 from -- taking from one person to another would not  
5 be a public use.

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

10           I would also point out that there are a  
11 few cases around the country where it does not  
12 include Justice Scalia's hypothetical about  
13 additional taxes.

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

21           It -- the trial judge there didn't say it  
22 was just for a public purpose -- a private purpose,  
23 but he said it was overwhelmingly just for the Trump  
24 organization's -- so, I mean, if you include Justice  
25 Scalia's hypothetical about more taxes, then I say



1 that's sufficient, as long as you get over --

2 JUSTICE GINSBURG: Is that what the  
3 Connecticut Supreme Court that we are reviewing said,  
4 you -- you are arguing, it seems to me, for something  
5 that goes beyond what was adjudicated in this case.  
6 I mean --

7 MR. HORTON: Yes.

8 JUSTICE GINSBURG: It was a finding, a  
9 finding before to be a fact in the trial court that  
10 this development was going to be primarily for the  
11 benefit of the citizens of New London, and not for  
12 the benefit of Pfizer or the private developer.

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

18 JUSTICE SCALIA: Is that a factual  
19 finding? You consider that a factual finding?

20 MR. HORTON: I think it's a mixed question  
21 of fact and law --

22 JUSTICE SCALIA: Well, that this is  
23 primarily for the benefit of the city of New London,  
24 not for the benefit of a --

25 MR. HORTON: I consider that --

1 JUSTICE SCALIA: In the eye of the  
2 beholder, to whom do you think this does greater  
3 benefit to, not a factual finding.

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

13 MR. HORTON: Well, for one thing we have  
14 in this case, and this comes back to the point about  
15 this particular case, is a severe assembly problem.  
16 We have 115 properties we are talking about on this  
17 90-acre plot, and there is 32 acres that come from  
18 one place, from --

19 JUSTICE O'CONNOR: Well, let's look at the  
20 specifics here. Pfizer is already in place. That's  
21 happened.

22 MR. HORTON: Yes, Your Honor.

23 JUSTICE O'CONNOR: So what are these  
24 parcels of the people now before us going to be used  
25 for?

1 MR. HORTON: Yes, Your Honor. First of  
2 all, it's a long-range plan. If I could have, if I  
3 could have the chart, please, if I may show you Your  
4 Honor.

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

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

14 JUSTICE O'CONNOR: Let's talk about the  
15 litigants.

16 MR. HORTON: Yes.

17 JUSTICE O'CONNOR: Before us today.

18 MR. HORTON: Yes. That's right. They are  
19 in parcel 3 and they are in parcel 4-A. Now, the --  
20 it's to be developed in phases. The first phase is  
21 one and two. The next phase is then three and four,  
22 A, and there is also a marina --

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

25 MR. HORTON: What's planned for 3 is that

1 it's going to be office space. And the expectation  
2 is there is going to be a demand for class A office  
3 space, which is the best quality office space in this  
4 area by 2010. And the expectation is that it will  
5 attract the sorts of offices that will feed on the  
6 Pfizer. They spent \$300 million on a site here.

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

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

18 It's not like we are talking, as in  
19 Berman, you're talking about something that's in the  
20 parcel. And in Berman, they said it's not for the  
21 court to decide where the boundary lines ought to be.  
22 It seems to me that's another point, Justice  
23 O'Connor. It's not like parcel 3 is already --

24 JUSTICE BREYER: Well, can't the courts at  
25 least -- can't the courts, could the courts -- do you

1 object to this, and I'm not advocating it, I want  
2 your reaction.

3 MR. HORTON: Yes, Your Honor.

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

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

20 MR. HORTON: No, Your Honor, if what  
21 you're defining as reasonableness is being higher  
22 than rational basis. Because in that situation,  
23 you're applying a higher standard for a taking where  
24 we are paying for it than you would be for --

25 JUSTICE BREYER: Well, the reason that you

1 would apply a somewhat higher standard is because the  
2 rational basis, with tremendous deference, applies to  
3 the power of Congress to act in an economic area in  
4 the absence of a particular constitutional provision  
5 designed to protect a minority from the actions of  
6 the majority.

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

13           MR. HORTON: Your Honor, that same type of  
14 remark could be made about rational basis equal  
15 protection review.

16           JUSTICE BREYER: Oh, and indeed with equal  
17 protection, we very often do have a somewhat higher  
18 standard of review.

19           MR. HORTON: Ah, yes, Your Honor, but the  
20 point here is that you should not have a higher  
21 standard of review because we are paying for it. It  
22 would be ironic to have a higher test than for  
23 example in a regulatory taking or even the same test.  
24 You have a test in Nollan and Dolan, for example,  
25 which is an exactions case. So that's to say --

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

8 MR. HORTON: No, of course not, Your  
9 Honor.

10 JUSTICE SCALIA: Well, then, let me ask --  
11 would, would the reasonableness standard, if the  
12 project is indeed reasonable, and there is genuine  
13 prospect that all of these good things that you're  
14 talking about will happen, why wouldn't private money  
15 come in to further the project? Why is it necessary  
16 to condemn it if it's so reasonable. Why couldn't  
17 you, you -- now, you say there is a holdout for one  
18 part, parcel. Couldn't the city fund a private  
19 purchase of that parcel? Say, you know, we'll make  
20 funds available out of our general tax revenue to  
21 somebody who wants to come in and put together this  
22 system? Of course, that person has to buy out  
23 property owners, but we'll, we'll give you money to  
24 buy them out at high prices.

25 MR. HORTON: Your Honor, there are some

1 plaintiffs who are not going to sell at any price.  
2 They want to stay there. You've got a severe  
3 assembly problem in this case and it's not as though  
4 you can say, well, go somewhere else.

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

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

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

21           JUSTICE BREYER: That may be. Now, that's  
22 why I'm back to reasonableness. You see, we are told  
23 in the briefs that the people who often might hold  
24 out, might be doing so to get more money, but it  
25 might also be because they are poor, they are not



1 well connected politically, and their only hope is to  
2 go to a court and stop this thing.

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

11           MR. HORTON: I have two responses to that,  
12 Your Honor. First of all, that applies to all sorts  
13 of takings. If I'm building a road, let me give you  
14 an example of the Rindge case that Your Honors  
15 decided in the 1920s.

16           That was the road to nowhere. It was a  
17 road that went through a farm to the county line.  
18 And the other county had no intention at that point  
19 of building a road, but Your Honors said, well, they  
20 might get around to it at sometime so it's a good  
21 idea to build it now.

22           We had a similar situation in Hartford.  
23 There is supposed to be a ring road around Hartford,  
24 and the state condemned all this land for a ring road  
25 around Hartford. Well, one little bit of it was done

1 and then just this, this year, in very low print in  
2 the last page of the newspaper, we see about the  
3 state getting around to selling the land because they  
4 didn't, they didn't do it.

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

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

19 MR. HORTON: Well, I would like to point  
20 out that the -- there is a difference, the whole  
21 point is about having a test about reasonable  
22 assurances about whether something is going to happen  
23 and that's where the railroad case makes a  
24 difference.

25 QUESTION: I agree with you on that.

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

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

16                   The other thing is if you stick to blight,  
17 this is the problem you're going to have. You're  
18 going to end up making a blight jurisprudence  
19 because -- because what's going to happen is the  
20 cities are going to say, we can only do this by  
21 blight, so they are going to have marginal  
22 definitions of blight.

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

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

7 MR. HORTON: Yes. But I mean, the other  
8 thing is, are you going to make -- would the Court  
9 make a distinction between a case where the city is  
10 doing the developing itself, and another case where  
11 the city gives it to a private person.

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

18 JUSTICE KENNEDY: It does seem ironic that  
19 100 percent of the premium for the new development  
20 goes to the, goes to the developer and to the  
21 taxpayers and not to the property owner.

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

25 JUSTICE KENNEDY: The compensation

1 measures.

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

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

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

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

21 JUSTICE KENNEDY: Under Connecticut law,  
22 if the property owner is offered \$100 but goes to the  
23 jury and gets \$200, does the property owner have to  
24 pay the attorneys' fees or does the state pay the  
25 attorneys' fees?

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

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

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

22           So you are not going to do things -- yes,  
23 as a practical matter, to take Justice Scalia's  
24 earlier example, for one piece of property because of  
25 the transaction costs involved. I mean, you're never

1 going to make up -- unless it's to, you know, to  
2 favor the governor's friend or something like that,  
3 as you say.

4 JUSTICE SOUTER: In which case we have a  
5 different --

6 MR. HORTON: In which case you have a  
7 different problem. The Willowbrook versus Oleck  
8 test.

9 QUESTION: Okay. So we have transaction  
10 costs.

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

18 It seems to me democracy can make good  
19 decisions and -- or bad decisions under the  
20 Constitution, but the important thing is that when  
21 it's paid for, it's not like regulatory takings which  
22 are, you know, the taxpayers don't see that until  
23 it's too late. You know, in this type of taking, the  
24 taxpayers are seeing up front what's going on.

25 JUSTICE BREYER: That's true. But now,

1 put yourself in the position of the homeowner. I  
2 take it, if it's a forced sale, it's at the market  
3 value, the individual, let's say it's someone who has  
4 lived in his house his whole life. He bought the  
5 house for \$50,000. It's worth half a million. He  
6 has 450,000 profit.

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

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

20 MR. HORTON: Well, I mean, first of all,  
21 the -- in Connecticut, fortunately, we have  
22 relocation loans which are involved here. And they  
23 are available in this case.

24 There was, it wasn't clear from our brief  
25 whether they were loans or not, and it is correct



1 that they are loans. The other side pointed out that  
2 that was for all projects in the state. That's not  
3 true, you know, I mean, there is \$10 million involved  
4 in relocation funds.

5 JUSTICE SOUTER: But the loans don't make  
6 him whole. Isn't --

7 MR. HORTON: That's true.

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

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

19 JUSTICE SCALIA: And that would really  
20 overrule a bunch of prior cases and really throw  
21 condemnation law into chaos.

22 MR. HORTON: Yes. And Justice Scalia, a  
23 question you -- or actually it was a comment you had  
24 made about public use versus public purpose. And  
25 that would not only overrule -- and my opposing

1 counsel said there is a difference between the two.  
2 And when pressed by Justice Souter -- and I would  
3 point out, that's just overruling cases going back to  
4 Berman. That's overruling two decisions by --

5 JUSTICE BREYER: What is the remedy?  
6 Let's repose the problem to which I want to remedy  
7 then. And maybe this isn't the right remedy.

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

15 MR. HORTON: Well, the right case is in  
16 the just compensation concept, but going to your,  
17 your point, if this were here as just compensation, I  
18 would say in terms of just compensation, in deciding  
19 what the fair market value is today, you can  
20 certainly take into account the economic plan that's  
21 going into effect. You know --

22 JUSTICE KENNEDY: Really? I thought that  
23 that was a fundamental of condemnation law that you  
24 can not value the property being taken based on what  
25 it's going to be worth after the project. That's

1 just --

2 MR. HORTON: Well --

3 JUSTICE KENNEDY: Unless Connecticut law  
4 is much different from any other state.

5 MR. HORTON: I may have misspoken on that  
6 subject, Your Honor.

7 JUSTICE SCALIA: But you know, in any case  
8 --

9 MR. HORTON: I --

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

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

25 JUSTICE SCALIA: It wouldn't the first of

1 Holmes' decisions to be overruled.

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

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

12 But the -- I guess the best answer I have,  
13 Justice Breyer, to your question, after I, after I  
14 misspoke is simply to go back to the point that the  
15 time at which you consider what just compensation is,  
16 is in the just compensation proceedings.

17 And while I misspoke about what the test  
18 was, and I apologize for that, certainly this Court  
19 can consider if social costs should be taken into  
20 account at that time. I'm not saying they should. I  
21 haven't thought that through as can you obviously see  
22 by my misanswering the question, but it seems to me  
23 because my primary answer is that you don't look at  
24 that now.

25 JUSTICE KENNEDY: Well, of course, the tax

1 code does have special provisions for involuntary  
2 sales and reinvestments.

3 MR. HORTON: Yes, it does.

4 JUSTICE KENNEDY: The tax hypothetical is  
5 not accurate.

6 MR. HORTON: Yes.

7 JUSTICE SCALIA: Mr. Horton, I'm not  
8 proposing that the state has to use the property  
9 itself. I'm simply proposing that its use not be a  
10 private use which has incidental benefits to the  
11 state. That is not enough to justify use of the  
12 condemnation power.

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

14 JUSTICE SCALIA: You can give it to a  
15 private entity, you can give it to a railroad, to  
16 some public utility. But the use that it's put to by  
17 that railroad and public utility is a public use.  
18 That's why it's a public utility.

19 It's quite different to say you can give  
20 it to a private individual simply because that  
21 private individual is going to hire more people and  
22 pay more taxes. That, it seems to me, just washes  
23 out entirely the distinction between private use and  
24 public use.

25 MR. HORTON: Well, I don't agree, Your

1 Honor, because I think, you know, I think if a person  
2 is without a job and if a person is not able to get  
3 basic services that they need from the town because  
4 the town can't afford it, that's just as important as  
5 a trains running on time or eliminating blight.

6 And Justice Breyer, I thought of another  
7 answer to your question that has to do with this  
8 case. And that is even on a higher test, we win  
9 because the Connecticut Supreme Court applied a  
10 higher test in this case.

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

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

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

3 REBUTTAL ARGUMENT BY SCOTT G. BULLOCK

4 ON BEHALF OF THE PETITIONERS

5 JUSTICE KENNEDY: Mr. Bullock, do you know  
6 those four words?

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

15 I think the key to understanding their  
16 argument is the answer to the question of, can you  
17 take a Motel 6 and give it to a fancier hotel? Their  
18 answer is yes. And that's what's really at stake  
19 here.

20 These condemnations are taking place  
21 throughout the country. A city in California  
22 condemns the 99 cents store in order to give it to  
23 Costco. Now, were they giving enormous benefits to  
24 Costco? Of course they were. But they did so  
25 because they wanted to get the tax revenue, and

1 that's the problem with these types of condemnations,  
2 the desire to help a private party and the desire to  
3 help the public are really one and the same. The  
4 public only benefits if the private party is  
5 successful.

6 All right, the NLDC is a private body. It  
7 has a private board of directors, and it is leasing  
8 land to a private developer for 99 years at \$1 a  
9 year. That is private ownership of land.

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

19 Also, Your Honor, the Rindge case that was  
20 cited by the Respondents, they actually knew what was  
21 going to go on in that, in that case. They knew what  
22 the use was going to be.

23 And finally, Your Honors, the Respondents  
24 talk about the effect that this may have upon poor  
25 people. Not all neighborhoods, not all poor



1 neighborhoods are blighted. But the one thing that  
2 all poor neighborhoods share in common is that they  
3 don't produce much in the way of tax revenue, so  
4 you're going to put poor neighborhoods and working  
5 class neighborhoods like the ones that exist in Fort  
6 Trumbull in jeopardy if the Court affirms the  
7 decision below.

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

15           JUSTICE O'CONNOR: The case is submitted.

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

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