ORIGINAL

In the

Supreme Court of the United States

UNITED STATES OF AMERICA, Petitioner,	)	
v.	)	No. 78-488
564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, PENNSYLVANIA, ET AL., Respondent.	)	

Washington, D. C.
March 27, 1979

Pages 1 thru 42

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Washington, D. C.
Tuesday, March 27, 1979

The above-entitled matter came on for argument at 11:27 o'clock, a.m.

BEFORE:

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

APPEARANCES:

STEPHEN R. BARNETT, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530, on behalf of the Petitioner.

H. OBER HESS, ESQ., 30 South 17th Street, 20th Floor, Philadelphia, Pennsylvania 19103, on behalf of the Respondent Southeastern Pennsylvania Synod of the Lutheran Church in America.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-488, United States against 564.54 Acres of Land, etcetera.

Mr. Barnett, you may proceed.

ORAL ARGUMENT OF STEPHEN R. BARNETT, ESQ.,

ON BEHALF OF THE PETITIONER

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

The question in this case is whether, when the Government condemns facilities that are operated on a not-for-profit basis, like a church or another private entity, the measure of just compensation that the Fifth Amendment requires is the fair market value of the facilities taken, or whether, on the other hand, it is the cost of constructing substitute facilities.

The Respondent Southeastern Pennsylvania Synod of the Lutheran Church in America owns three separate parcels of land totaling about 300 acres on the Delaware River in Northeastern Pennsylvania, which it used as three summer camps for young people.

QUESTION: What's happened to the original 564?

MR. BARNETT: The 564 acres, Mr. Justice Blackmun, included a number of tracts besides the three owned by the Synod. At the beginning of the Appendix, you will find the Declarations of Taking applicable to all the tracts, and the Synod's tracts are three of them.

In June of 1970, the United States condemned these three parcels for a river project. Six years before, in 1964, anticipating that the land would be condemned, Respondent had purchased some 3,800 acres of land in the nearby Pocono's, as a replacement site for its camps.

When the land on the river was taken, the Government offered to pay $485,000 as the fair market value of the camps taken. Respondent, however, rejected the offer, claiming that the cost of developing equivalent camps at the new site would be something in excess of $5 million.

Respondent, accordingly, asked the court to rule that the appropriate standard was the cost of constructing the new facilities, not the fair market value of the old facilities.

The District Court ruled against that contention and Respondent took an interlocutory appeal and the Third Circuit ruled that the substitute facilities measure of compensation is available to private owners of non-profit community facilities in certain cases, as well as to public owners -- that is, governmental entities -- as had been recognized previously to be available.

QUESTION: Am I right, General Barnett, in thinking that this Court has never even applied that doctrine to public?

MR. BARNETT: That is true. This Court has never endorsed the substitute facilities doctrine, even for public entities. The Brown case, which is cited in the briefs, was a case

In which Congress, after one town was flooded by a public project, appropriated money to condemn another area as a substitute site, and the question was the constitutional validity of that subsequen taking, whether that was a public use under the Fifth Amendment.

The Court held that it was and the Court's language talked about how it is a reasonable thing to substitute a new town for the old town. But the question was not the scope of compensation for a taking.

So, this Court has never approved the substitute facilities doctrine.

In any event, the Third Circuit here, in its first opinion, said that the doctrine can be applicable to a private, non-profit entity, in certain circumstances. It described the key circumstance as one in which the facilities taken are reasonably necessary to public welfare.

On remand, the trial was divided into two phases. The issue in the first phase was whether the substitute facilities measure of compensation applied to the taking of these camps. After a 10-day trial, the jury returned a verdict, by special interrogatory, finding that the doctrine did not apply here.

The second phase of the trial was devoted to the issue of the fair market value of the condemned camps. Respondents sought to establish the fair market value by what is called the "cost approach," that is, the reproduction cost of the camps

minus depreciation -- that is, the reproduction cost of the buildings, minus the depreciation on the buildings, plus the value of the underlying land.

The Government used two evidentiary approaches to show the fair market value. One was, again, the cost approach, and the other was the so-called "market data approach," that is comparable sales.

The jury returned a verdict -- an award of $740,000 as the fair market value of the camps, which was a compromise between the position taken by the opposing side, which of course often happens in these cases.

Respondent then took a second appeal and the Court of Appeals reversed again. In addition to finding error in comments to the jury in closing, the court held that the District Court's instructions on application of the substitute facilities measure of compensation had been erroneous.

As the Court of Appeals restated the doctrine, it has three requirements. The property must be operated on a not-for-profit basis, there must be no ready market for the particular type of property and the facilities must be reasonably necessary to the public welfare. That is -- I should have made clear -- the Court of Appeals' restatement of what it held the first time. The Court of Appeals then went on to elucidate further what it meant, and with respect to the no ready market test, for example, the court held that even if Respondent could have sold its camps

and even if they had a fair market value, as the jury had found that they did, this condition of the substitute facilities test was met if Respondent could not have replaced the camps in the market place for a cost roughly equal to their fair market value.

With respect to the third condition that the facility be reasonably necessary to the public welfare, the majority explained that what it meant by this was not really necessity, but simply that the condemned facility must, quote, "provide a benefit to the community that will not be as fully provided after the facility is taken."

Thus, the court gave as an example if the camps here did, as Respondent contended, help to reduce juvenile crime by taking some youngsters from inner-city Philiadelphia and, thus, helping to alleviate the gang problem in inner-city Philadelphia, then the court said, "These camps would provide a benefit to the entire community of Eastern Pennsylvania not just to the campers."

Judge Stern concurred in the opinion, under compulsion of the court's earlier opinion, but his opinion is essentially a dissent on the merits. Judge Rosen dissented, but from the court's reinterpretation of the earlier opinion.

The Court of Appeals remanded the case for a new trial pursuant to its newly articulated standards, and at that point this Court intervened by granting certiorari.

Well, the substitute facilities doctrine with which we deal here and which, as Mr. Justice Rehnquist has pointed out,

this Court has never approved, is in any event an exception to what this Court has made clear is the standard method of computing just compensation under the Fifth Amendment. And that method, of course, is fair market value.

The Court has defined 'just compensation" as the full monetary equivalent of the property taken, in the Reynolds case, and, as stated in Almota, the Court early established the concept of market value. The owner is entitled to the fair market value of his property at the time of taking.

Now, the Court has also made clear that where the property is so special that market data, such as comparable sales, may be few, resort must be had to other data to ascertain its value. This is the Miller case. And those other approaches are, for one, the income approach, capitalization of net income, which can be used for business properties, or the cost approach, reproduction coast minus depreciation, which, in fact, was used here in the fair market value aspect of the trial.

QUESTION: It wouldn't be very helpful to use a capitalization approach on a boys' camp, would it?

MR. BARNETT: No, it would not be, and nobody has suggested that that approach be used here, Mr. Chief Justice.

But the Court has indicated that these approaches, quote, "may have relevance but only, of course, as bearing on what a prospective purchaser would have paid." They are all approaches that are designed to determine fair market value.

Now, the difference with the substantive facilities doctrine is that it concededly is not a method of determining values at all. It is -- Or at least certainly not fair market value -- It is a completely different avenue.

As Respondent here says in his brief at page 23, "The doctrine is not used in conjunction with the market value approach to valuation, but as an alternative to it." And, thus, the difference which is indicated by the facts of this case, where the fair market value was found to be $740,000, and yet Respondent claims that the cost of substitute facilities would be $4 or $5 million.

Now, Respondent has attempted to justify the use of the substitute facilities doctrine here, on the basis that this case is unique, or at least very, very special, that it is a situation that arises infrequently.

What is rare about it?

Well, Respondent says that this is a case in which the property's chief value is in its use and not its status in the market place. And this theme that the true value of this property is in its use, and that that makes this case very rare and different, recurs throughout Respondent's brief.

In the first place, we are not sure what this means, that the true value is in its use. It may mean simply that the property is adapted for a particular use, in this case camps, and that makes it particularly valuable. If that is all it means,

we have no quarrel with it whatever. It is what this Court has said, for example, in the Mitchell case. But if it means more than that, we see nothing so rare about this case and no justification here for deviating from the principles of fair market value that this Court has laid down. If it simply means that there is a disparity here, as Respondent emphasizes, between what the property-owner would receive by way of fair market value and what the property owner needs in order to preserve the use to which the property was devoted, well, that happens very commonly.

It often happens that a property may suffice for its owner's use, even be uniquely well adapted for that use, and yet when it's condemned the fair market value falls short of what the owner would have to pay to acquire a property equally suitable for carrying on that use.

It may happen, for example, in the case of an old factory, specially adapted to the owner's use. For example, in the Certain Property in Manhattan case, 306 F.2d 439, one of the issues involved the printing plant of a newspaper, EL PROGRESSO in Manhattan, which was an old printing plant but very well adapted to putting out this particular newspaper. However, the evidence was that if anybody bought the property they would tear the building down and use it for something else. That is, the fair market value of the structure, as a printing plant, was nil. And the court held that there would be no compensation for that structure. That is one example.

Another example would be an old and ramshackle house, very comodious for the family living in it, but if the house were condemned, its age -- and I suppose we are not talking about a house in Washington, D.C., but elsewhere -- might bring it a reduced price on the market, which would not suffice to buy a new house or any house of equal size and convenience.

QUESTION: I suppose, Mr. Barnett, that you take the same position with regard to an old church, too. Say this had been a church instead of a camp.

MR. BARNETT: Well, yes, that would be true. Similarly, with an old church, the fair market value might be insufficient to purchase a new church equally suitable to the needs of the congregation. On the other hand, it might not be the case. The reproduction cost of the old church, if it is not a worn down old church, but a well-preserved old church, the reproduction cost conceivably could be higher than the cost of building a new plastic church.

QUESTION: Well, that was the case, too, in Cors, wasn't it, where the ships condemned had risen in value and it was perfectly clear that the court said the just compensation award need not be sufficient to enable the owner to buy ships at an inflated value because the inflated value had been created by the Government.

MR. BARNETT: Indeed, this follows almost necessarily from the considerations of depreciation and new regulatory

requirements. The old building is going to have depreciated and it is going to follow almost necessarily that a new building will cost more. Also if there are new regulatory requirements --

QUESTION: Yes, but as I understand their test, it is the substitution cost, less depreciation. They would allow for --

MR. BARNETT: We are not sure they would do that at all, Mr. Justice Stevens. They have said in their brief that if there are what they call maintenance and capital savings on the new camp, they should be deducted from the award. We are not sure what they mean by maintenance and capital savings. If they meant depreciation costs, one would have thought they would say so. But that certainly was not their position below.

In the trial court, as we explained in our reply brief, they argued precisely for the entire cost of constructing these camps, as testified to by their experts, without any depreciation.

QUESTION: But you would still object to the alternative approach, even if they did allow a factor for depreciation or betterment, as the insurance company --

MR. BARNETT: Yes, we still would object to it.

But it is noteworthy that the substitute facilities doctrine, as applied to public entities, more often than not has been applied without the deduction for depreciation. And the trial court here so ruled. At page 650 of the transcript, the court, after stating, "The synod argues that depreciation cannot

be considered in a substitute facilities evaluation," at page 627; the court went on to rule at page 650, "I think that the depreciation is not a proper deduction for taking the public property, and therefore it should not be permitted when it is private."

And, indeed, if the purpose of the substitute facilities doctrine is to allow substitution replacement of the facility, it is certainly arguable that that purpose is frustrated.

QUESTION: Well, your ultimate purpose is to provide just compensation, as required by the Constitution. And one could say that means you have to have full compensation in order to replace it, but you are not entitled to a profit on the transaction.

MR. BARNETT: One certainly could say that. We would say that you are entitled only to the fair market value of what you have, and you are not entitled to replacement at all. One reason for that is the tremendous -- and a point, I believe, that has not really been emphasized so far in this case -- tremendous flexibility and leeway that comes in by way of the substitute facilities doctrine. It is supposed to be a functionally equivalent substitute facility. And this case well illustrates how much flexibility can come in there. For example, here Respondent had 300 acres of flat land along the river where his camps were located and went out and bought 3800 acres of wooded hilly land on which the only water was a creek. Thus, in order to have functionally equivalent aquatic facilities, it is necessary to

dam the creek to create a small lake, for which Respondent would have $1 to build the dam. Respondent wants three beaches to put in on the small lake. Respondent has to build a bridge to get over the new lake. The old camp was on a public road. Respondent has to build a new access road of 1.6 miles to get to the new camp, plus substantial interior road facilities.

The trial court charged that this was all all right, so long as the jury found that the new camp was adequate, that the new site was adequate to Respondent's needs. The costs resulting from new conditions at the site should be taken into account in computing the cost of substitute facilities. And that is one of the huge reasons for the difference between reproduction cost of the old facilities and the cost of substitute facilities.

Respondent argues that the doctrine should be extended to private facilities and asks, to put a hard case, why should it be when the United States Government takes a city school, a public school, the city is compensated with the cost of constructing a new school. But if the city were to take a parochial school, right across the street, the non-profit church that owns the parochial school would not be entitled to such compensation, only to the fair market value.

We think there are a number of explanations, even assuming that the doctrine should be applied to public facilities in the first place, or even assuming that it should be applied

in particular to public facilities like schools, for which fair market values can be established, as distinguished from where the doctrine started, streets and highways, which have no fair market value.

For one thing, the public entity is often under -- The assumption in the case of the public entity, for the doctrine to be applied, is that it is under a requirement to replace the facility. Now, this requirement can be legally enforced in various ways in the case of the public entity.

It is true that a private entity, such as a church, may say that it, too, is required to replace its school. It needs its school for its purposes. It has children who are attending the condemned school, and so forth.

One answer is that in the -- One difference is that in the case of the public entity the requirement is legally enforceable. A further answer is that if simple need to replace is the test why stop at private non-profit entities? A business firm which has its only establishment taken, its only manufacturing establishment, its only sales establishment, is surely under as much factual need to replace it, as a non-profit entity would be or as a government would be. And yet no one has suggested that all this Court's prior rulings should be thrown out and substitute facilities be substituted across the board for the fair market value test.

A third difference is that if the facility is not, in

fact, constructed with the substitute facilities award, or if it is constructed and subsequently sold or diverted to another purpose, in the case of the public facility, there is assurance that only the public will benefit from the money in any event. Whereas, in the case of the non-profit private facility, one cannot have that assurance.

A further difference is the need for, and the very difficult task of divising standards that arises once one goes beyond public facilities. And that difficulty is well illustrated by this case, where the Court of Appeals first said the standard was whether the non-profit facility was reasonably necessary. Then, after the jury's negative verdict, the court relaxed the standard and said the test is whether the facility provides a community benefit. And when we pointed out some of the difficulties in determining what's the community and what's the benefit, Respondent now does not defend the Court of Appeals' latest opinion either. Respondent simply contends that all non-profit entities are entitled, so long as their facility is devoted to any religious, public, charitable or educational purpose.

The problem with that is it would cost a lot of money, for one thing. And we find it hard to find in the Constitution, anything that says all non-profit entities are entitled by constitutional command to the substitute facilities measure of compensation. Whereas, profit entities are not.

So those are the reasons why we think that if the doctrine is to be recognized at all there is very good reason for limiting it to public governmental entities.

Finally, there are in this case the First Amendment problems that we have noted where a church is concerned.

QUESTION: Before you get to that, Mr. Barnett, where lies the authority to define what is just compensation? Exclusively with the Congress, with the courts or where?

MR. BARNETT: I think it is in the courts, Mr. Chief Justice. It's a constitutional requirement which I think the courts have the authority to -- That is, the constitutional requirement for just compensation, I think, is in the province of the courts.

QUESTION: Then this Court could say, in your view, that just compensation means to do justice, presumably; and that when you take something away from a person you ought to give him the equivalent.

MR. BARNETT: The Court could say that, but it would be inconsistent with what the Court has said. In the recent Bodcaw case, for example, the Court of Appeals said something very much like that, that our duty in eminent domain cases is to do justice. This Court reversed, saying, among other things, the one principle to which it has always adhered is that compensation is for the property and not for the use.

MR. CHIEF JUSTICE BURGER: I was only addressing myself

to the ultimate authority.

In your view then, I take it, that if a principle of such longstanding in our jurisprudence were to change, it should be changed not by the Court but by Congress?

MR. BARNETT: Well, Congress can add to the compensation that is being provided. Congress has done so in the Uniform Relocation Act, for example. But I think Congress could not take away from what this Court decided was required by the Constitution as just compensation.

MR. CHIEF JUSTICE BURGER: I am just talking about enlargement.

MR. BARNETT: Enlargement certainly should be done by Congress or by state legislatures.

QUESTION: Couldn't they set the guidelines? That's where I get into trouble.

MR. BARNETT: That's a difficult question. In a federal taking, I would suggest perhaps not. In a state taking where the Fourteenth Amendment is the vehicle, perhaps it would have more leeway.

QUESTION: There is no such thing as a state condemnation of a federal property, is there? I suppose because of the supremacy issue.

MR. BARNETT: Not that I know of. I meant the state taking of private property.

QUESTION: Certainly, when a taking demolishes, let us

say, a small college in an isolated place, nondenomination, so you keep away from the First Amendment problem that you are about to address, there is no market for small colleges in isolated areas, is there?

MR. BARNETT: Well, there may be a market for college-type facilities with campuses in isolated areas. Businesses use them, all sorts of schools, other than colleges --

QUESTION: But it isn't the kind of market you have for real estate in Washington.

MR. BARNETT: No. In such a case, you have to look further. The Newton Girl Scouts case, which is cited by the District Court in its opinion in the Appendix, makes clear that when you have a fairly special kind of facility you may have to look across the country rather than just in the neighborhood, and you may have to wait longer to get a purchaser. But it doesn't follow that there is no market at all for the facility.

QUESTION: Well, when I said no market -- there is not a very good market for college campuses and things of that kind, is there?

MR. BARNETT: Well, it may not be terribly active, but certainly the land is marketable and the buildings, depending on how many other things they are suitable for. There are all sorts of conference centers and retreats these days that thrive on being in isolated places. So, I wouldn't --

QUESTION: This case illustrates something about the

marketability, how much market there is for boys' camps, doesn't it?

MR. BARNETT: Well, we put in testimony showing that, indeed, there were, that there have been eleven comparable sales within a seven-year period in this very county, of camps. Of course, that evidence was disputed.

QUESTION: That's because it's up in the Pocono's and you do have a large area there, don't you?

MR. BARNETT: I think so.

If I may, I'd like to reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Hess.

ORAL ARGUMENT OF H. OBER HESS, ESQ.,

ON BEHALF OF THE RESPONDENT SOUTHEASTERN PENNSYLVANIA SYNOD OF THE LUTHERN CHURCH IN AMERICA

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

The essence of this case, I think, is best presented by supposing three identical camps, the first, a non-profit camp owned by a governmental body, the second, a non-profit camp owned by a non-governmental body, and the third, of which there are a significant number in this country, a private, commercial camp operated for the profit of the owner.

I would take it that Petitioner has conceded that a camp owned by a governmental body is entitled to just compensation

determined according to the substitute facilities doctrine.

QUESTION: I didn't understand them to concede that.

MR. HESS: Then, if I may rephrase my sentence, not to dispute it at this time.

QUESTION: But that would just be the Government's opinion as to what the constitutional law might be. It certainly doesn't concede -- his concession might not control this Court. And this Court has never so held.

MR. HESS: Certainly, it is open to this Court, despite that very nice dictum of Chief Justice Taft in the Brown case. It is open to this Court to demolish the substitute facilities doctrine.

QUESTION: You mean not to embrace it?

MR. HESS: To demolish it to the extent that it has been followed, if the Court please, in ten circuits and rejected in none, and in some state courts as well.

QUESTION: Well, surely we are not bound by the holdings of the Courts of Appeals.

MR. HESS: Indeed, not.

My point merely is that it has had a universal acceptance in the circuits.

Whether it concedes it or not is not altogether the point. The point is that, as the decided cases in the circuits now stand, a camp owned by a governmental body would certainly be entitled to the substitute facilities doctrine.

QUESTION: Mr. Hess, is it perfectly clear that the doctrine would apply to a government-owned piece of property, such as a camp? As I understand it, there is some argument about that in the lower courts.

MR. HESS: I base my statement that it would upon the comprable cases involving bath houses, recreation centers, playgrounds and public parks. I would put them in an indistinguishable category with camps.

QUESTION: And there is the same uniformity of that category of cases?

MR. HESS: Yes.

Now, as to the commercial, non-profit camp, it clearly is not entitled to have its award determined under the substitute facilities doctrine.

The question here, as we see it, is whether just compensation for a non-profit camp owned by a non-governmental body is to be determined as it is for a governmental camp or as it is for the commercial camp.

The governmentally owned camp receives an award based on the substitute facilities doctrine when three conditions are met, first, that the fair market value is insufficient to obtain a functionally equivalent camp. It is not a question of whether there is some kind of market for the disposition of the condemned camp, but whether there is a replacement market in which a substitute could be purchased for the equivalent of the award.

That's the first test.

The second is that the camp was fully used before the taking and, third, that the taking itself did not eliminate the use for the camp. There would be no qualitative evaluation of the benefit of the camp, or for that matter of a bathhouse or school or a playground or park.

The benefit in the case of a governmentally owned -- operated and owned facility -- the benefit is presumed from the fact that the governmental entity decided to have a camp and that the camp was fully used. There is no requirement that the governmental unit be legally obligated to replace the condemned facility. And that is all spelled out very clearly in a note in the Yale Law Journal which is cited in our brief.

Now, the Synod, the Respondent, seeks the same treatment here, nothing more or less. It, too, must demonstrate that the fair market value will not be sufficient to obtain a functionally equivalent camp in the replacement market.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Hess.

(Whereupon, at 12:00 o'clock, noon, the Court recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Hess, you may resume.

ORAL ARGUMENT OF H. OBER HESS, ESQ., (Resumed)

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

Immediately prior to our noon recess, I was pointing out that under existing decisions a non-profit camp operated by a governmental body would have to show, in order to bring into play the substitute facilities doctrine, three things.

The Synod, that is Respondent, just seeks precisely the same treatment here. It, too, must demonstrate the fair market value will not be sufficient to obtain a functionally equivalent camp. The replacement market must be taken into account, and secondly that its camp was fully used prior to the taking, and thirdly that the taking itself did not eliminate or destroy the use.

The benefit of the camp, as in the case of the governmentally owned camp, is presumed from the fact that it is run on a non-profit basis and is devoted to public, charitable, educational or religious purposes.

QUESTION: I am not quite sure I understand the third of those criteria.

MR. HESS: The third is included because this is the familiar category in which non-profit activities which are

classified in the quasi-public corporation category, are expressed. This is the way the category is expressed and so expressed in many places in the law, a non-profit corporation operated for charitable, educational or religious purposes -- public charitable, educational or religious purposes.

QUESTION: You say it is expressed in many places -- like the Internal Revenue Code?

MR. HESS: Yes, a number of times in the Code and elsewhere in our jurisprudence.

Now, in this case, we are not talking about the tennis club or the swimming club or the country club.

QUESTION: Excuse me. Where, other than the Internal Revenue Code?

MR. HESS: Well, in the Constitution of Pennsylvania, for example, and in real estate tax exemption cases, such as existed in New York which came under inspection in Walz v. Tax Commission, to which I will presently refer in another context.

As I say, we are not talking about our country clubs. They certainly would not qualify. In a sense, they are non-profit, but they are not devoted to public charitable, educational purposes and have no proper claim to be included with non-profit organizations which operate and which are encouraged, I submit, by our public policy to operate.

QUESTION: What if a country club gave a free golf clinic once a week?

MR. HESS: Well, I would not think, Your Honor, that that would put it in the category of a non-profit corporation operated -- organized and operated for public charitable, educational or religious purposes. I would not think so.

These non-profit corporations, I refer to, which do operate and are encouraged by a public policy to operate non-profit facilities for public charitable, educational and, yes, to religious purposes. We are talking about that category alone, such as the Synod in this case. And we are talking about non-profit camps and schools and hospitals and homes for the aged and similar eleemosynary institutions.

For Fifth Amendment purposes, we submit, they are clearly distinguishable from the commercial condemnee. They stand, rather, in a position identical with the governmental condemnee.

Now, the commercial camp owner -- and this is an important point -- the commercial camp owner, having decided to use his capital in the commercial market place, must also have his just compensation determined in the commercial market place. Now, that's no hardship. The value of his facility takes into account its profitability and its earning power, and he is made whole by an award that provides him with an opportunity, through investment or otherwise, to receive a comparable return on his capital investment.

QUESTION: What if a non-profit company paid its

director a salary that the Government claimed was three times what a comparable director would receive? Would that be a litigable issue in this sort of condemnation, that it called itself a non-profit company, but was really a way to give a very fancy salary to the chief executive?

MR. HESS: That would contradict the non-profit -- It might go to contradict it. It would depend on many other things. You know, one swallow doesn't make a summer, but it would certainly go a long way to contradict the non-profit status, if it were just a way to siphon off a huge salary for some person's private benefit.

That's not this case. It is not contended that that is this case.

Now, as I've just said -- and I mean to emphasize this point -- that non-profit corporations are encouraged by public policy in this land to operate these non-profit facilities for public charitable and educational purposes, and religious, too -- I include that. This policy just lies so deep in the American tradition, which leaves large measures of public good to be provided in whole or part by non-profit organizations. Countless voluntary hospitals, homes for the aged, schools and colleges --

QUESTION: What words -- Mr. Hess, I agree on tax exemption and all those things. But here you are asking the Government to give you some money.

MR. HESS: I am not asking the Government, Your Honor,

to give us any money. I am asking the Government to give us just compensation.

QUESTION: You are asking the Government to give you the difference between $740,000 and $3 million. That's what you are asking for.

MR. HESS: I am asking for just compensation.

QUESTION: Is that in dollars and cents, what you are asking?

MR. HESS: In dollars and cents --

QUESTION: You are asking for money.

MR. HESS: Our evidence was to the effect -- and it wasn't contradicted because we didn't get into that phase at the trial. The Government had a witness there on substitute facilities values. He was not called because we didn't get into that phase of the case. Our testimony was to the effect that a substitute facility would cost around $4.3 million. And that shouldn't be a shocking figure because this was a big operation. This had a capacity of 600 children at the time, these three camps combined, and out of that three -- I don't remember off-hand, although it is in the record, what went to make up that total of $4.3 million, but two items come to my mind. Replacing the sewage facilities, alone, was $400,000, plus. Replacing the water system was $400,000, plus, which makes ridiculous the $740,000 fair-market figure, if we come to consider the question of what is just compensation.

What is just?

According to the cases, it is what's equitable, what's fair.

And we submit that that's not fair and we say that the public policy of this country, which I was referring to, entitles us to be treated the same as a governmental condemnee, because we are in that category, and in a very real sense the Government does not and need not and probably should not provide all these facilities. There should be some range left for the type of facility we are talking about here. And to a large extent, these non-profit corporations, in this category, are really surogate to Government. And when their facilities are condemned, our position is that they should not be treated differently from the governmental owner of similar facilities.

It is this very policy of encouraging volunteerism which makes non-profit corporations of this category quasi-public corporations, in the language which was used in Walz v. Tax Commission.

QUESTION: Mr. Hess, in your emphasis on the justice, which of course is the bottom line in a case like this, is it really just, if your view is correct, to treat a profit corporation -- they give it $700,000 when it is going to cost them $5 million to stay in business?

MR. HESS: Now, Your Honor, that's a different category, as I endeavored to point out. The commercial corporation, when

its facility is condemned -- take the commercial camps -- a very important item of evidence on value for condemnation purposes would be the profitability of the facility. And the commercial camp would and should get an award that would be sufficient to protect that profitability. It may not be enough to buy another camp, because the price of facilities may have gone up so greatly that it would be folly to take that money and put it into another camp. But it ought to be enough to produce a deal comparable to what the commercial camp produced. And that --

QUESTION: Let's take this example. Supposing the fair market value of the property is $700,000, but the earnings of this camp are enough to justify a $5 million investment, but it just doesn't have it. What should be paid in that case? Just the $700 wouldn't it?

MR. HESS: You mean to us, a non-profit --

QUESTION: No, no. I want to try and think it through in terms of a profit-making corporation. Assume that it is a very, very profitable camp, but the real estate only has a fair market value of $700,000.

MR. HESS: If Your Honor please, in a condemnation case, the value of the real estate would take very largely into account its profitability. That's a common type of evidence where a commercial facility is condemned. The jury takes into account whether that was a profitable facility.

QUESTION: Even if all the comparable sales were at

$700,000?

MR. HESS: Yes.

I think I've said enough about the public policy involved here, the public policy which leads us to the conclusion that we should have treatment comparable --

QUESTION: Does the non-profit facility have to be in existence and operating to invoke your rule?

MR. HESS: Yes, it has to be. The three tests are that the --

QUESTION: Suppose that the Government condemns the day after the organization passed a resolution saying, "We've been doing a great job, but our facilities are worn out and we can't afford to replace them, so we are closing down at the end of the year."

MR. HESS: That would be another case.

QUESTION: It would still be the same valuable function.

MR. HESS: If the Court please, let me repeat the three tests. The operation must be conducted on a non-profit basis; it must be conducted for charitable, educational, etcetera, purposes; it must be fully used at the time of the taking and the taking must not have destroyed its use.

QUESTION: But in my example, the only reason this very valuable function doesn't go on is that the organization doesn't have the money.

MR. HESS: That would have a bearing upon full --

QUESTION: Similarly, in the actual case, if there is a condemnation and they pay only the fair market value, the only reason the organization won't continue is it doesn't have the money.

MR. HESS: The case Your Honor supposes is different from the case here. If the camp were in its death throes when the condemnation --

QUESTION: Death throes only because they didn't have the money to replace the sewer plant or the water facility.

MR. HESS: That would bear on the full use at the time of the taking. You've got one of those, as I say, a rare coincidence cases, but it would be a different case than this. This case is, we were in full swing, there was full use before the taking and the taking did not, itself, destroy the use, as in the case of a country road leading through a condemned dam site, to nowhere.

QUESTION: You could also make your argument in the case where an organization was about to -- had great plans to build a camp, and they got right up to it and they suddenly announced that, "We are abandoning our plans because we haven't got the money to build it," and then the Government condemns. And they said, "Gee, it would be nice if you paid us enough money for this land to build a camp."

MR. HESS: That would not be this case, or anything

closely resembling it.

QUESTION: Mr. Hess, does "charitable" mean something more than non-profit, in your definition?

MR. HESS: Well, yes, it is a broader word than "non-profit."

QUESTION: Assuming it is non-profit, what more does "charitable" mean?

MR. HESS: Charitable raises a whole dictionary of considerations.

QUESTION: What if, instead of Lutherans, these had been very wealthy Episcopalians that had gone to this camp?

MR. HESS: If it's operated on a non-profit basis for wealthy people who could pay and don't, I suppose that puts it in the category of a country club.

QUESTION: Even a Lutheran country club?

MR. HESS: The Episcopalians have the money and have the good intentions.

(laughter)

QUESTION: Mr. Hess, I suppose your approach here would be the same if this were a non-profit denominational hospital?

MR. HESS: Precisely.

We submit that whether the condemnee is a municipal corporation or a non-profit, charitable, educational corporation, just compensation should be the same, and I think the Third Circuit put it very well in its opinion. On the first appeal,"

says the First Circuit, "We are not dealing with congressional largess."

It comes back to Your Honor's question. We are not dealing with congressional largess which might justify a distinction between governmental and non-governmental community facilities. Rather, says the Third Circuit, "We are dealing with judicial interpretation of the Taking Clause. Accepting the interpretation that it protects the value of community uses, there is no basis distinguishing between governmental and private community uses." That's the Third Circuit.

I might just add that it is further indicative of this approach that the Commissioners on Uniform State Laws have promulgated and recommended for the adoption by the states a code of condemnation containing -- in which they have adopted the substitution doctrine for non-profit corporations, on a basis similar to what we are contending for here.

The Government does not dispute -- I think they don't dispute -- and it has been uniformly decided, in every case where it has come up to date, that subordinate state governmental units get their condemnation awards under, and only under, the same Fifth Amendment Clause which applies to us.

For this purpose, cities, school districts, townships and towns are treated the same as private condemnees. The Fifth Amendment Clause refers to the taking of private property for public purposes. And for this purpose, these state units are

treated the same as we.

QUESTION: Why shouldn't the Government give you the right of eminent domain, while they are at it?

MR. HESS: I am sorry I didn't understand Your Honor.

QUESTION: You say it's just like a county or a city, or anything else,but you don't have eminent domain. You don't have anything close to it.

MR. HESS: Of course, many subordinate governmental units also lack eminent domain. That's a statutory matter in each state. It's a state statutory matter.

QUESTION: But you still want money.

MR. HESS: We want an award of just compensation.

QUESTION: And the just compensation is in dollars and cents?

MR. HESS: Yes, it is.

QUESTION: And that's the Government giving the money to a church? Does that mean that the Government will be giving the church that money; the Lutheran Church that money?

MR. HESS: The Southeastern Pennsylvania Synod of the Lutheran Church of America is the Respondent here.

QUESTION: And that's who would be getting the money?

MR. HESS: That's right. They are the owner of the property.

QUESTION: Well, that would be true whenever their property was condemned.

QUESTION: No, but the difference is -- I am not talking about the $740 -- I am talking about the difference between $740 and $5 million.

MR. HESS: That is the cost of the substitute facilities. $4.3 million, I think, is the testimony.

QUESTION: Well, when it gets to the millions, that's millions.

MR. HESS: And the same thing was true of the bathhouse case in New York. The award that was given, before the substitute facilities applied -- or at least the testimony was -- it was about $5 million and about $1.5 million was what was determined under the substitute facilities application.

I would like to make this further point. The Government tries to make a distinction by saying the governmental unit is under some kind of legal necessity and we are not. Now, that distinction, I think, fails on two counts, first, the legal necessity has been ruled out, at least in the Second and Eighth Circuits, and a different test applied that makes it discretionary with the governmental unit. But secondly, in this case, it can be guaranteed that we will use the -- if there is any doubt about it -- that we will use the award for creation of a substitute facility and it can be done so under Section 285 of the Federal Condemnation Statute, by making the award in trust for release as the facility is built.

This treatment is available, in our opinion, under the

general language of Section 285(a), and the Yale Law Journal Note, cited in our brief, thinks so, too.

One final point. The Government charges that to apply the substitute facilities rule to us is to give us a windfall. I think this may be in Mr. Justice Marshall's mind.

The Government says that we would get new buildings for what may have been dilapitated buildings, with no adjustment for depreciation.

Now, this assertion is without foundation, first, on a factual basis, because the fact is -- the evidence shows it -- that our structures were not dilapitated, but were well maintained.

The further fact is that we --

QUESTION: They weren't new, though?

MR. HESS: They weren't new.

The further fact is, that we have stated in our brief, that an adjustment should be made in the substitute facilities award for the economies which new structures would afford. Now, we do not concede that depreciation should be deducted. That's a technical term, and one that, I think, has been used too loosely in some of the cases. We do not concede the depreciation should be deducted. Depreciation is an arbitrary, commercial accounting technique, whereby cost is recovered out of current profits.

In substitute facilities cases, there is a projection

of the cost of the equivalent, with a discount. In the language that was used by the Second Circuit, "That discount by reason of the benefit which accrues to the condemnee, when a new building replaces one with expired useful years."

Now, the Second Circuit was very careful not to refer to depreciation, but instead did carefully refer to a "discount by reason of the benefit which accrues."

And the Second Circuit also reassured the Government with these further words, "Even when substitution is required, sumptuous awards need not be feared. Exact duplication is not essential. The substitute need only be functionally equivalent. The equivalence is one of utility."

My friend raises the further point, which I think is purely spectral, that we may take the award and apply it for totally unrelated uses. The same could be said for the award to a city for bathouses and recreation centers. But again, the condemnation statute will protect this situation perfectly, be the condemnee a municipal corporation or a non-profit corporation.

As to the future, the specter is projected, and the Government says we may rebuild the camp and later discontinue its use as such.

Again, we say that the same comment applies equally to the governmental condemnee.

Short of a sale of the camp, it is hard to see how the

use of such a single-purpose facility could be greatly altered. And if it is sold for other purposes, the price realized will contain its own penalty, in that the proceeds will in all likelihood be deficient, as is the market value award already entered in this case.

In closing, may it please the Court, the question in human terms, in this case, is whether the non-profit condemnees can, with constitutional impunity, be expropriated and its full use, purpose and function forever destroyed. That's the result the Government seeks sanction for here.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Barnett, do you have anything further?

REBUTTAL ORAL ARGUMENT OF STEPHEN R. BARNETT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BARNETT: Just a couple of points, Mr. Chief Justice, if I may.

My brother's key argument for the applicability of the substitute facilities doctrine here is to an entity like the Synod for these camps is that, as he says, public benefits are presumed from the fact that the facility is run on a non-profit basis, and devoted to a charitable, educational or religious purpose.

Now, I am not clear, from his position, whether the reliance is on the public benefit that these camps are said to

provide or whether it is simply on the fact that this is a religious institution, and anything done by this religious institution would qualify.

Some of his language would cut either way.

But if it's the public benefit, then we see these problems under the First Amendment.

QUESTION: I thought he cleared that up somewhat when he analogized it to a charitable hospital.

MR. BARNETT: Well, that's it. If he is then relying on the good works, the public benefit that these camps provide --

QUESTION: The "public served" is the term he --

MR. BARNETT: Yes, all right. To that extent it is similar to the benefit to the community test of the Court of Appeals. And we see those problems with that, under the First Amendment. It has the court involved in determining whether what a religious entity does provides a community benefit or not.

In the Walz case, 397 U.S. 664, this Court said something very apropos to that, quote, "We find it unnecessary to justify the tax exemption on the social welfare services or good works that some churches perform for parishioners and others. To give emphasis to so variable an aspect of the work of religious bodies, would introduce an element of governmental evaluation and standards to the worth of particular social welfare programs."

If, on the other hand, my brother's position is -- and that's what the language in their reply brief would imply -- that any religious purpose qualifies, then they are saying that simply because it's a church doing something religious it qualifies. And it wouldn't matter then whether these camps were converted into purely religious facilities or not.

Now, on that basis, we have the constitutional problem that the award here on a substitute facilities basis of much more than the fair market value of the camps --

QUESTION: How is that different from allowing the National Cathedral, which I assume is tax exempt, or the Shrine --

MR. BARNETT: The difference between a tax exemption created by a legislature and this Court saying that is what the Fifth Amendment requires, and that the Fifth Amendment draws that line between non-profit entity and profit-making entities. The analogy is not the Walz case, but Tilton v. Richardson or the Niquis case. In both of those cases, this Court struck down -- in Tilton, it struck down unanimously the Federal aid grant for the construction of facilities to the extent --

QUESTION: That was a giving of public money, as distinguished from a recompense for a taking.

MR. BARNETT: Well, we would suggest that here when the award would be so much more than the fair market value of the property, that it would amount to more than compensation.

It would amount to a giving. And that on that basis it would have constitutional problems when the recipient is a religious institution and the facility could be engaged, on the second theory, entirely in a religious function.

QUESTION: Do I understand your argument, that they might not stay in the same business? If they get the $740,000, they could stop the business, couldn't they?

MR. BARNETT: Yes, but their theory for getting the $4 or $5 million is that they would stay in the same business. That is, at least under the Court of Appeals approach -- that is a premise on which they would be given --

QUESTION: How are you going to hold them to that?

MR. BARNETT: That's precisely our point, that we could not hold them to that.

QUESTION: Why did you have a right to?

MR. BARNETT: Well, because, under the Court of Appeals' theory, that would be the basis for giving them that amount of money, so that the camps could continue to function.

We do not espouse that. We say the Government should not be involved in trying to monitor what a church does with its money.

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

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:31 o'clock, p.m., the case was submitted.)