New England Estates, L.L.C. v. Town of Branford: What Not To Do With Eminent Domain

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I. NARRATIVE SUMMARY OF *NEW ENGLAND ESTATES, L.L.C. v. TOWN OF BRANFORD*

New England Estates LLC ("NEE") is a Connecticut limited liability company whose principals are a long-time builder, a mortgage broker, and a realtor. In May 2001, NEE entered into an option contract with Messrs. Santa Barbara and Perrotti to purchase, for $4.7 million, 77 acres in Branford, Connecticut (10 miles east of New Haven, adjacent to Long Island Sound). The property is currently vacant. It has been used in the past for mining of topsoil and gravel, but is otherwise unoccupied and undeveloped. It is served by public water and sewer. The property is less than one mile from Long Island Sound and the Town of Branford's commercial and retail center.

The southeast corner of the property abuts a Town-owned landfill that since 1991 has been restricted to "bulky waste" such as construction debris. The landfill is licensed by the state and has at all times been operated in compliance with its environmental permits, which require periodic testing for off-site impacts.

In 2002, NEE applied for development approvals for a 268 unit market-rate condominium development. NEE obtained a local wetlands permit and a § 404 permit from the U.S. Army Corps of Engineers, but in November 2002, the Branford Planning and Zoning Commission denied NEE's zoning permit application. In response, NEE turned to Connecticut's affordable housing statute, Conn. Gen. Stat. § 8-30g, which is a builder's remedy statute. Section 8-30g provides that if a local planning and zoning commission denies zoning approval for a development in which at least 30 percent of the units will be set aside for low- and moderate-income households and the applicant appeals to the Superior Court, the burden of proof on appeal shifts to the zoning commission to demonstrate that its denial was based on public health or safety. Thus, where a property has public sewer and water and safe traffic access, it is difficult for a zoning commission to deny an application.

In 2003, in response to the denial of its 268 unit market-rate application, NEE developed a 354 unit residential condominium application with a 30 percent affordable housing component in compliance with Connecticut's affordable housing statute. NEE informed the Town in late April 2003 that it intended to file this application. **Three weeks later, the Branford Board of Selectmen announced that the Town was going to take the property by eminent domain, stating three reasons: (1) the Town needed to gain access to the property in order to test its environmental condition; (2) the Town needed to take the land in order to remediate contamination on the 77 acres emanating from the Town's adjoining landfill; and (3) "possible" recreational fields**. The Town's legislative body on July 9, 2003, voted to take the land by eminent domain. On July 18, 2003, NEE filed an action under 42 U.S.C. § 1983 for a bad faith use of eminent domain, seeking an injunction and damages. The Town opposed the injunction, in part, by arguing that if its use of eminent domain violated the federal Takings Clause, NEE had a compensatory damages remedy.

In late August 2003, NEE obtained a temporary restraining order against the use of eminent domain pending a hearing on its application for a temporary injunction. This delay in

the eminent domain forced the Branford Planning and Zoning Commission to process NEE's affordable housing application, which it did at public hearings held September through November 2003. In December 2003, a Superior Court judge denied NEE's application for a temporary injunction (noting in part the Town's argument that NEE had a potential damages remedy), and the Planning and Zoning Commission denied the affordable housing application. The Connecticut Supreme Court denied an emergency application for a stay. On January 5, 2004, the Town took title to the land by eminent domain, valuing the land at $1.1 million. The taking terminated the fee ownership of Santa Barbara and Perrotti, NEE's option contract, its wetlands and Army Corps permits, and its rights to pursue an appeal of the Planning and Zoning Commission's denial of its affordable housing application.

Thereafter, NEE pursued two lawsuits, an appeal of the Town's $1.1 million valuation of the subject property, and an action for consequential damages under 42 U.S.C. § 1983 action for eminent domain abuse. The fee owners filed their action contesting the valuation, and joined NEE's § 1983 action for damages.

The three reasons given by the Town of Branford for the use of eminent domain were demonstrably baseless. The first reason, a claimed need to use eminent domain to gain access to the property to conduct environmental testing, was inaccurate because two Connecticut statutes give municipalities and licensed environmental professionals retained by them access to property to conduct environmental testing *prior* to the exercise of eminent domain. In addition, by applying for development permits, NEE and the property owners had granted the Town, in writing, access to the site.

With respect to the Town's claim of needing to use eminent domain to remediate contamination from its own landfill, the Town was in possession of 16 years of quarterly environmental reports from its own environmental consultants saying that there was no environmental impact from the landfill on the 77 acres.

As to the potential for playing fields, the Town had no plan whatsoever for that type of use of the property. Also, the claim of potential playing fields was obviously inconsistent with the first two reasons.

It may also be noted that the Town's claim that it needed to use eminent domain to gain access to *determine* the environmental condition of the property, and the claim that it needed to remediate existing contamination, were contradictory.

In June and July of 2007, a Superior Court judge reviewed the Town's valuation of the property and raised the value from $1.1 to $4.6 million, which was just below the option price of $4.75 million.

The 1983 bad faith eminent domain case was then tried to a jury over six weeks in August and September of 2007. NEE proved that the Town's stated reasons for using eminent domain were factually and legally baseless, and that the real reason for the use of eminent domain was to stop residential development of the property. (NEE did not claim discrimination

against affordable housing, but that the reasons given for the eminent domain were false.) The Court instructed the jury, among other things, that it was reasonably probable that but for the use of eminent domain, NEE would have succeeded in appealing the denial of its 354 unit affordable housing development within approximately one year and would have obtained its final permits by January 2005 (thus setting the legal and factual basis for NEE's lost profits claim).

The trial court instructed the jury that the Fifth Amendment to the U.S. Constitution prohibits the use of eminent domain in bad faith. **Defining the standards for bad faith, the Court instructed the jury as follows**:

> Every government, including a town government, has the power to "take" land from private individuals, even if they do not want to sell their land. This power is called "eminent domain." Eminent domain is a necessary and inherent power of government. For example, eminent domain is used when a government needs to lay out a street or a highway, build a new public facility such as a school or a fire station, or lay a sewer pipe or water line. If the owner does not agree to sell the land that the government needs, the government may take it over the owner's objection, subject to limitations and protections that I will discuss. This is sometimes referred to as "condemning the property" or "condemnation." The terms "eminent domain" and "condemnation" mean the same thing.
>
> A town's use of eminent domain must follow a plan in which the land is taken for public use, public purpose, or public benefit.
>
> The Bill of Rights in our federal Constitution protects individuals from a government abusing its powers. The Fifth Amendment to the Constitution is part of the Bill of Rights, and it contains what is called the "Takings Clause." The Takings Clause states that private property may be taken for a public use or purpose so long as the government pays just compensation. The term public use is synonymous with public benefit or advantage. Just compensation is measured by the fair market value of the subject property at the time of the taking.
>
> When a town uses eminent domain, it "takes" the property from its owner, so we refer to this as a "taking."
>
> As I just explained, § 1983 provides a remedy for violations of a federal constitutional right. The particular constitutional rights that the plaintiffs claim were violated are their rights under the Takings Clause of the Fifth Amendment to the United States Constitution.
>
> The alleged constitutional violation before you is the plaintiffs' claim that the town's use of eminent domain to take the 77 acres was a pretextual, bad faith exercise of the power of eminent domain and not for a public use or purpose. The plaintiffs allege that the Town took the 77 acre property not for a public use or purpose, but to block development of housing. I will define what constitutes a "bad faith" taking in a moment.

REASON FOR CONDEMNATION INVALID IF TOWN ACTED BY PRETEXT/INVALID REASON, OR ACTED UNREASONABLY, OR ABUSED ITS POWER

To prove that the town acted in bad faith and violated their rights under the Takings Clause of the Fifth Amendment, the plaintiffs must prove by a preponderance of the evidence that as to each of the three reasons that the town of Branford has asserted for its use of eminent domain that either (1) the town's stated reason was pretextual and its actual reason was invalid; or (2) the town acted unreasonably; or (3) the town abused its power. Thus, if the plaintiffs prove that each one of the three reasons that the town identified for its use of eminent domain was pretextual and the actual reason was invalid; or was unreasonable; or was an abuse of power, then the town has violated the plaintiffs' Fifth Amendment Takings Clause rights.

REASONS FOR CONDEMNATION INVALID IF TOWN ACTED BY PRETEXT/INVALID REASON

I will now instruct you further as to the standards of liability for a bad faith use of eminent domain. The first basis on which the plaintiffs may prove a violation is that each of the town's stated reasons for the taking was pretextual, and the actual reasons were invalid. "Pretextual" means that the stated reason was not the real or actual reason. Next, the plaintiffs must prove that the actual reasons stated for the taking were invalid, illegal, false or improper. Accordingly, if you find that each of the reasons stated by the town for the taking was not the actual reason for the taking, and the actual reasons were invalid, illegal, false or improper, then the town acted in violation of the plaintiffs' rights with respect to those stated reasons.

REASONS FOR CONDEMNATION INVALID IF TOWN ACTED UNREASONABLY IN USE OF EMINENT DOMAIN

A second way in which the plaintiffs may prove each of the town's stated reasons to be unconstitutional is by showing that that stated reasons were unreasonable. "Unreasonable" means not justified by the facts and circumstances existing at the time of the taking. "Unreasonable" action does not mean simply action about which people might disagree, or action that was debatable; in this context it means without justification, or having no basis. Whether a town's use of eminent domain is unreasonable includes whether the use of eminent domain was "necessary" or "excessive" in the sense that the town took significantly more acreage than was needed to accomplish its stated purpose.

ABUSE OF POWER

A third way in which the plaintiffs may prove each of the town's stated reasons to be unconstitutional is to prove that the taking of land resulted from an abuse of

> government power. I instruct you that abuse of government power means action by the town that is arbitrary, deceptive, fraudulent or dishonest. Thus, the plaintiffs must prove that the taking was for an arbitrary, deceptive, fraudulent or dishonest purpose. Thus, this standard is a third way that the plaintiffs may prove an unconstitutional use of eminent domain.

The jury returned a verdict in favor of NEE of $1.2 million for development expenses and $11.2 million for lost profits. The jury also awarded the fee owners $340,000, reflecting the option contract payments they would have received when NEE exercised its option and closed, had the Town not taken the land. The jury answered affirmatively an interrogatory asking whether the Town's conduct constituted bad faith. The trial court later awarded NEE $1.4 million in attorneys' fees under 42 U.S.C. § 1988, but awarded the fee owners far less than their claim, holding that their fees in the valuation appeal were not proper.

On appeal, the Town's arguments included that (1) the Public Use Clause of the federal Fifth Amendment does not allow a compensatory damages remedy, but only injunctive relief; (2) awarding the co-plaintiffs just compensation for the land taken and lost profits and expenses from the terminated development venture would constitute a double recovery; (3) plaintiffs' claim was barred by the ripeness requirements of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); (4) claims in the § 1983 case were barred by *res judicata* or collateral estoppel due to claims that could have been raised or issues that could have been decided in the valuation appeal; (5) the trial court's instructions regarding the standards for bad faith use of eminent domain were erroneous, and at most presented a state rather than a federal constitutional standard; and (6) NEE, as holder of an option to purchase the property that had not been exercised as of the taking date, did not have a property interest entitled to protection under the Takings Clause of the federal Fifth Amendment. The fee owners cross-appealed the reduction of their attorneys' fees.

In February 2010, the Connecticut Supreme Court issued two decisions. The first affirmed the trial court's $4,600,000 valuation of the real property taken, *Town of Branford v. Thomas Santa Barbara, Jr., et al.*, 988 A.2d 209 (Conn. 2010) ***[COPY ATTACHED]***. In this opinion, the Court affirmed that its valuation was based on the probability that NEE would have obtained all permits necessary for its 354 unit development plan, and thus the trial court's use of land with approvals for multi-family residential construction were comparables in establishing value.

In the companion case, *New England Estates, L.L.C. v. Town of Branford*, 988 A.2d 229 (Conn. 2010) ***[COPY ATTACHED]***, NEE's and the fee owners' claim for compensatory damages under 42 U.S.C. § 1983 for a bad faith use of eminent domain in violation of the Public Use Clause of the federal Fifth Amendment, the Court: (1) rejected the Town's *Williamson County* argument as inapplicable to eminent domain (as opposed to inverse condemnation / regulatory takings); (2) rejected, on the basis of Connecticut case law, the Town's claim that an award of just compensation and lost profits would overlap and constitute a double recovery; (3) rejected procedural defenses of *res judicata* and collateral estoppel; (4) affirmed that bad faith use of eminent domain violates the federal Public Use Clause; (5) affirmed the standards for bad faith

articulated by the trial court; and (6) awarded the fee owners of the property – the two individuals who had granted NEE its option to purchase the property – compensatory damages in the amount of $340,000, representing the option contract payments that the fee owners would have received when NEE exercised its option to purchase the property. The Court found error in the trial court's reduction of attorneys' fees to the fee owners.

On the other hand, the Court reversed the jury's award to NEE, holding that under Connecticut law, an unexercised option to purchase is not substantial enough to be entitled to constitutional protection of real property interests under the federal Takings Clause.

Four aspects of the Connecticut Supreme Court's decision regarding bad faith eminent domain are most significant. First, after noting that the Town did not dispute that its conduct was dishonest, the Court rejected the argument that dishonest use of eminent domain is not a violation of the federal Public Use Clause, and the Town's alternative argument that the only remedy is an injunction, not damages. Second, the Court affirmed the bad faith standards articulated by the trial court. Third, the Court upheld a compensatory damages remedy *over and above* the fair market value of the land. Finally, in holding that, under Connecticut law, NEE's option contract did not qualify as a constitutionally-protected property interest, the Court did not discuss, and effectively overruled, 80 years of Connecticut precedent holding that all interests taken by eminent domain that have compensable value are entitled to constitutional protection when eminent domain is used.

The Connecticut Supreme Court denied NEE's motion for reargument of the protected property interest issue in May 2010. In June 2010, the U.S. Supreme Court issued its decision in *Stop the Beach Nourishment, Inc. v. Florida Department of Environmental Protection*, ___ U.S. ___, 130 S. Ct. 2592 (2010). In that case, a four-justice plurality endorsed the principle that when a state court "declares that what was once an established right of private property no longer exists," the court has effected a "judicial taking." Justices Breyer and Sotomayor did not disagree with this principle, but concurring in the holding that the Florida case did not present a taking or a change in state law, wrote that the judicial takings issue was left "for another day."

In July 2010, NEE announced its intention to file a petition for a writ of certiorari, arguing to the U.S. Supreme Court that the NEE decision, by overruling 80 years of judicial recognition of options to purchase real property as protected interests in eminent domain cases, had committed the type of judicial taking discussed in *Stop the Beach*.

On October 19, 2010, three days before NEE's cert petition was to be filed in the U.S. Supreme Court, the parties entered into a global settlement of $3.4 million, which included attorneys' fees payable to the fee owners under 42 U.S.C. § 1988, and a payment to NEE.

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SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. NO. 18132

NEW ENGLAND ESTATES, L.L.C.,
PLAINTIFF / APPELLEE

V.

TOWN OF BRANFORD,
DEFENDANT / APPELLANT, AND
THOMAS SANTA BARBARA, JR. AND FRANK PERROTTI, JR.,
DEFENDANTS/CROSS-COMPLAINANTS/APPELLEES

JOINT BRIEF OF PLAINTIFF / APPELLEE NEW ENGLAND ESTATES, L.L.C., AND DEFENDANTS / CROSS-COMPLAINANTS / APPELLEES THOMAS SANTA BARBARA, JR., AND FRANK PERROTTI, JR.

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INTRODUCTION

On June 26, 2003, plaintiff New England Estates, L.L.C. ("NEE") filed an application with the Branford Planning and Zoning Commission ("PZC") to develop a 77-acre property into a mixed-income, multi-family residential development. Less than two weeks later, for reasons that were pretextual, factually and legally baseless, and an abuse of power, the Town's legislative body used eminent domain to block that development. By doing so, the Town violated the Public Use Clause of the Fifth Amendment to the United States Constitution.

When Branford's Representative Town Meeting ("RTM") voted on July 9, 2003 to condemn the 77-acre site, NEE was on the cusp of a profitable business venture. It had an option to purchase the land, which had previously been approved for 298 residential condominiums. The land was zoned for multi-residential use by special permit, identified on the Town's Future Land Use Map as suitable for "High to Moderate Density" housing, and surrounded by single-family homes or permanent open space. All utilities were available to the property, and a sewer line ran through the site. NEE had spent $1.2 million and countless hours to prepare a fully-engineered site plan and to procure permits from the Branford Wetlands Commission, the Connecticut Department of Environmental Protection, and the U.S. Army Corps of Engineers; the only permit still to be obtained was site plan approval. NEE's principals had decades of experience, recent success with the same type of residential development in an adjacent town, and construction cost calculations that showed a substantial profit. Sales prices of condominiums in the area were increasing, and market demand for new, modestly-priced, two-bedroom units located between Long Island Sound and Branford's retail center was unquestionable.

The RTM gave three reasons for the taking: (1) to "investigate" the property's environmental condition; (2) to "remediate" environmental contamination allegedly caused by the Town's own landfill, which adjoins a small part of the 77 acres; and (3) "possible playing fields." During a five-week trial, the plaintiffs proved to a jury that: (1) the Town did

not need to permanently condemn the property to temporarily investigate its environmental condition because (a) it had written consent from the plaintiffs to inspect and test the site, (b) two state statutes expressly grant towns the right to conduct environmental testing *before* using eminent domain, and (c) the Town owns an easement across the property; (2) the Town had 16 years of test results from its own environmental consultant and an April 2003 Phase II study (that is, an on-site study) from a Licensed Environmental Professional demonstrating that the landfill had not contaminated the 77 acres; and (3) the Town had no plan whatsoever for playing fields at this site. The plaintiffs also proved that the RTM voted to condemn at a six-minute meeting at which there were no questions or discussion, and without holding a single public hearing. In front of the jury, Town officials conceded that their three reasons were baseless and that the actual reason was to terminate NEE's contract and permits before it could use the State's remedial affordable housing statute, General Statutes § 8-30g, to obtain site plan approval. The jury found that the Town had used eminent domain in bad faith and awarded NEE and the fee owners $12.7 million in lost profits, development expenses, and lost option payments.

The Town has not tried to defend its conduct. Rather, it argues that the plaintiffs' bad faith and lost profits claims are barred because they could have been raised in the plaintiffs' valuation appeals; the only remedy for a Public Use Clause violation is an injunction; by appealing the Town's valuation, the plaintiffs elected to forgo their consequential damages claims; the plaintiffs' bad faith claim is barred by the "ripeness" requirements of the U.S. Supreme Court's 1985 *Williamson County* decision; the Public Use Clause only forbids condemnation to promote a private use; as to NEE, the Town did not condemn an interest protected by the federal Takings Clause; and NEE did not prove its lost profits to a reasonable certainty and did not calculate them correctly.

In this Brief, the plaintiffs demonstrate: (1) the Town violated two separate provisions of the federal Constitution, which had to be raised in separate actions; (2) the plaintiffs are not limited to injunctive relief because 42 U.S.C. § 1983 allows consequential

damages as a remedy, the Town gained title by arguing below that the plaintiffs had such a damages remedy, and when the Town took the property, it made restoring the plaintiffs to their original position impossible; (3) the election of remedies doctrine was inapplicable because the Town had already taken title to the property; (4) *Williamson County* applies only to regulatory/inverse takings, not eminent domain; (5) the Public Use Clause not only prohibits eminent domain to promote a private use, but also use of that power that is pretextual, baseless, or abusive; (6) the federal Takings Clause protects not just real estate, but vested rights in property that are taken by eminent domain, and NEE's option contract and environmental permits were protected; and (7) NEE documented its lost profits meticulously through a highly-qualified accountant who correctly calculated the amount in the manner prescribed by federal law. Under Practice Book § 63-4(a)(1)(B), NEE also challenges the trial court's ruling that precluded its damages expert from testifying about an update to his calculation that he prepared and NEE produced prior to his deposition.

COUNTER STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

A. The Plaintiffs And 48-86 Tabor Drive, Branford.

Plaintiff NEE's three principals are Don Stanziale, Jr., Andrew Forte, and Al Pizzolorusso. Forte and Pizzolorusso, principals of a mortgage brokerage firm, have spent their careers dealing with real estate pricing, appraisals, financing, and marketing. Stanziale has worked for Midland Construction, his family's construction business, since 1977. He has built a spectrum of residential developments, from modest capes to custom-built mansions to multi-family condominiums. He has decades of experience in framing, roofing, excavation, road construction, plumbing, excavation, landscaping, and construction cost estimating, and has evaluated hundreds of properties and built homes in about 250 locations in Connecticut. 10T 5-21, 46-47, 61, 113.[1]

[1] *See* Index to Transcripts, *supra*. 10T 5-21, for example, refers to Transcript 10, pp. 5-21. The Appendix contains excerpts from the trial testimony of Don Stanziale (8T,

Defendant and cross-complainant Thomas Santa Barbara, Jr. is a life-long resident of Branford. Defendant and cross-complainant Frank Perrotti, Jr., of New Haven, is an independent business owner. 8T 2.[2]

The 77 acres at issue in this case, 48-86 Tabor Drive ("Tabor parcel"), is three-fourths of a mile north of Long Island Sound and about the same distance south of the Town's retail and commercial center. It is surrounded on three sides by residential neighborhoods and permanent open space. Plaintiffs' Exhibit ("PE") 2, 3, Appendix ("A") A1-A2. In 1988, the Branford PZC approved the construction of 298 condominiums and a nine-hole executive golf course on the Tabor parcel. PE 7, 8, 9, 10, A8-A9; 8T 40. For reasons unrelated to the land and site plan, the development did not proceed. 8T 40. In 1991, Santa Barbara and Perrotti (the "Owners") bought the Tabor parcel at a foreclosure auction. PE 13.

At the southwest corner, the Tabor parcel shares a boundary of about 300 feet (out of its 2,700-foot perimeter) with a Town-owned landfill. PE 2, 3, A1-A2; PE 6. The Town opened this area to landfilling in the 1950s. The DEP first issued a permit governing its operation in 1986. PE 5; 8T 21. Santa Barbara's company, Superior Landfill, operated the landfill for the Town from the late 1980s through the late 1990s. 8T 7. In 1991, the landfill stopped receiving municipal solid waste and began to operate under a closure plan[3] that allowed only periodic deliveries of bulky waste, which in general does not impact groundwater or produce landfill gases such as methane. 8T 10-13.

_____ (continued)
10T, 11T); Daniel Baughman (20T and 21T); Dennis Flanigan (23T and 24T); and Conrad Kappel (28T-31T).

[2] After this action began in July 2003, Santa Barbara and Perrotti, as indispensable parties, were joined as defendants in September 2003. They filed a cross-complaint against the Town in 2004. Due to their joint position with respect to the Town, NEE and the cross-complainants are collectively referred to as "plaintiffs" throughout this Brief.

[3] *See generally* Conn. State Agency Regs. § 22a-209-13.

The DEP landfill permit required the Town to conduct quarterly environmental testing to ensure that the landfill was not contaminating adjacent properties. PE 5 at 2-4, A5-A7. The Town's environmental consultant, Fuss & O'Neill, began such testing in the late 1980s and thereafter filed quarterly reports and an annual summary with the DEP and the Town. PE 6, 27, 28; 8T 24-25.[4] In every report, Fuss & O'Neill informed the State and the Town that the landfill was in full regulatory compliance. 8T 27-28, 33; 9T 21; 13T 20-21.

In 1992-93, Santa Barbara asked Fuss & O'Neill to evaluate the Tabor parcel for expansion of the Town landfill's bulky waste disposal capacity. That evaluation concluded that the groundwater was too clean for DEP to issue a permit. 8T 50; PE 15, A10.

In 1997, the Town designated the Tabor parcel for "High to Moderate Density" residential use. PE 18 at 31, A16; 9T 25-28. ***[MAP ATTACHED]***

B. <u>Owners' Contract With NEE; NEE's Development Efforts</u>.

In 2000-01, the Owners put the Tabor parcel on the market. Through a broker, they were introduced to Stanziale, Forte, and Pizzolorusso, who after due diligence formed New England Estates as an LLC to hold an option to purchase the property. 10T 30-38, 46-60; PE 22, A19. The option price, negotiated at arm's length, was $4.75 million. The contract gave NEE rights to conduct environmental testing and to apply for permits for multi-family residential use, and the Owners represented that the parcel was not environmentally contaminated. PE 22, ¶ 8H, A25. NEE was obligated to insure its option. *Id.*, ¶ 5, A21.

NEE's initial plan was to revive the 298-unit condominium approval, but at a reduced density. By November 2001, NEE had a 268-unit plan that was fully engineered for stormwater management, road construction, building construction, grading, erosion controls, landscaping, and utilities. PE 26, 5T 93; 10T 35. The Branford Inland Wetlands Commission granted a wetlands permit for the plan in May 2002. PE 29, A67. The

[4] Fuss & O'Neill's reviews of monitoring wells indicated that groundwater beneath the landfill flowed offsite to the east and west, not north toward the Tabor parcel. PE 27, A66; PE 28; 8T 52.

Wetlands Commission specifically reviewed reports regarding the Town landfill and its relationship to the Tabor parcel. *Id.* at 4-5, A72-A73. In early 2003, based on the same plans, the Army Corps of Engineers issued a § 404 federal Clean Water Act permit and the Connecticut DEP issued a Water Quality Certification. PE 41, A79.

NEE filed its application with the PZC in June 2002. PE 26, A49. The PZC denied the application in November 2002, stating concerns about density and impact on the school system. PE 39. The denial raised no environmental concerns. *Id.*

NEE appealed this denial to Superior Court, while also initiating settlement discussions and considering converting its market-rate plan to one that would comply with General Statutes § 8-30g, the affordable housing statute. In March 2003, as § 8-30g was first being discussed, Town Attorney Penny Bellamy asserted for the first time that the Tabor parcel might be unfit for residential use because of contamination from the Town's landfill. 11T 12. In April, Attorney Bellamy asked Fuss & O'Neill to prepare a letter describing the potential health hazards of landfills, and then spent almost four hours revising Fuss & O'Neill's draft five-page letter. 33T 66-67; PE 40A, A77-A78. The letter, issued April 16 (PE 43), contains a general discussion of how landfills may expose humans to volatile organic compounds, toxic concentrations of metals, and methane explosions. The letter was an attempt to raise a public health issue to ward off NEE's § 8-30g application. 26T 52, 64; 33T 39, 43.

In response to Fuss & O'Neill's letter, NEE commissioned a Phase II environmental study by IES, Inc., whose environmental professionals had done a Phase I in 2001. 10T 64; 11T 18-20. IES reported in late April 2003 that the site contained no contamination above state Remediation Standard Regulations ("RSRs"), General Statutes § 22a-133k; Conn. State Agency Regs. §§ 22a-133k-1, *et seq.*

When it became clear that settlement of NEE's zoning appeal was unlikely, NEE directed its engineering firm to convert its 268-unit site plan to one that could be filed under § 8-30g. 5T 64; 10T 111. ***[MAP ATTACHED]*** Because NEE had already received

wetlands, DEP, and Army Corps permits, it directed Codespoti & Associates, Inc. to convert to the higher density necessary to sell 30 percent of the units at below-market prices,[5] without making any change to the approved regulated activities, roads, buildings, stormwater system, landscaping, or utilities. 5T 67-79; 10T 111. This was achieved by changing the interior of each building from four 1,900 square foot, three-bedroom units to six 1,200 square foot, two bedroom units. *Id.* This change actually decreased the total number of bedrooms in the plan from 800 to 700. 5T 76; 11T 9.

On April 28, 2003, NEE's attorney visited Town Planner Rasmussen to present part of a draft § 8-30g application. 10T 119. The next day, Rasmussen sent a fax to Attorney Alice Bruno, the PZC's attorney in the pending zoning appeal, warning her that NEE expected to file its § 8-30g application in May. PE 45. On May 8, First Selectman Anthony DaRos discussed eminent domain with the Town Attorney and Town staff. PE 40A, A77-A78; 25T 25, 36; 33T 75; 36T 119-121.

C. Town's Use of Eminent Domain.

On May 21, 2003, the three-member Board of Selectmen voted to recommend that the Town condemn the entire 77 acres. PE 47, A112. ***[COPY ATTACHED]*** This was the first time that any Town official had publicly discussed eminent domain. 11T 29-30; 36T 33.

NEE filed its § 8-30g application on May 30, 2003. PE 48. During the next 12 weeks, the PZC, the Wetlands Commission, and Town staff worked to force NEE to withdraw its § 8-30g application while the PZC tried to eliminate from its regulations the residential uses applicable to the Tabor parcel, to bring it under the "industrial land exemption" set forth in § 8-30g(g)(2)(A). These events are recounted in NEE's Brief in S.C. Nos. 18089 /18091 at 8-9. During this procedural shuffle, NEE refiled its § 8-30g application on June 26, 2003. PE 60.

[5] Fifteen percent of the units in the § 8-30g plan would be reserved for households earning up to $60,000 annually, and 15 percent for households earning up to $35,000. 11T 28.

Branford's 30-member RTM conducts its work through several standing committees. 20T 29. The proposed taking was discussed at two meetings of the Administrative Services Committee, attended by four RTM members, on June 18 (PE 54) and July 2, 2003 (PE 63). Though open to the public, these meetings were not public hearings. 20T 49-50; 23T 34.

On July 9, 2003, the RTM voted unanimously to take the land by eminent domain for $1,167,800, stating as its reasons: "investigation, elimination of environmental contamination, and possible development of playing fields." PE 65, A140.

On July 18, 2003, NEE filed this § 1983 action, seeking a temporary restraining order ("TRO"), a temporary injunction, a permanent injunction, and damages. R111. In August 2003, NEE obtained a TRO pending a hearing on its temporary injunction application. This delay in the taking required the PZC to commence hearings on NEE's § 8-30g application.

At the PZC hearings, Licensed Environmental Professionals ("LEPs")[6] David Bramley and Carver Glezen of Triton Environmental, retained by NEE, testified that they had conducted an additional on-site investigation and reviewed Fuss & O'Neill's 16 years of environmental data, and concluded that the site was safe for residential use, now and in the future. 13T 40, 58-60. Glezen noted that Fuss & O'Neill had not investigated the site or prepared an LEP opinion. 13T 52.

NEE's temporary injunction application was heard intermittently from September 9 through early December 2003. Opposing it, the Town argued that the holder of an option to

[6] An "LEP" is certified by the State after satisfying rigorous educational and professional experience qualifications and passing a licensing examination. *See* General Statutes § 22a-133v. When an LEP provides an opinion on a matter within his experience and certification, anyone may rely on that opinion. *See* § 22a-133v(a)(1); 13T 19-20. This statute avoids the need for multiple parties to retain separate LEPs at duplicative expense. The Town could thus have relied on Glezen's on-site testing, report, and conclusions that the Tabor parcel was safe for residential use.

purchase real property that is taken by eminent domain "can be compensated by money damages and therefore cannot satisfy the lack of an adequate remedy prong of [the four-part test for a temporary injunction]." Town's Mem. in Opp. 9/9/03 at 3, A212, A215; *see also* Town's Supp. Mem. 12/2/03, A224. When it referred in these memoranda to "monetary damages," the Town specifically cited consequential damages, not just compensation for the land:

> Here, it is undisputed that NEE holds an unexercised option to purchase a 77 acre parcel of land located on Tabor Drive. . . . Thus, any damages ultimately proven by NEE can be reduced to monetary compensation. Indeed, the only harm allegedly suffered by NEE is the potential loss of approximately $500,000 that it has spent in connection with the development of the parcel. . . . Therefore, NEE has an adequate remedy at law and is not entitled to injunctive relief.

A225.

The trial court (DeMayo, J.T.R.) denied the temporary injunction, accepting the Town's argument that NEE had a damages remedy. R165, 167, 175. Thereafter, the Town filed its Notice of Condemnation, Town Exhibit ("TE") DDDDD, and deposited $1,167,800 with the trial court. The Town did not deduct any environmental remediation costs from its deposit.

NEE moved for a continuation of the August 2003 TRO or a stay pending an appeal, citing *Northeast Gas Transmission Co. v. Brush*, 138 Conn. 370, 373-75 (1951), for the proposition that a trial court order that allows immediate possession of real estate is immediately appealable. NEE noted that the trial court had not decided several of NEE's legal claims. The court denied NEE's motion. NEE then moved for review and for articulation. The Appellate Court granted review, denied continuation of the TRO, and ordered articulation. R102. On December 29, the Chief Justice denied an emergency § 52-265a petition. A285.

In January 2004, the PZC denied NEE's § 8-30g application, and the Town filed a Certificate of Taking (R7), vesting in itself title to the Tabor parcel. The taking terminated

the Owners' title, NEE's contract, NEE's local wetlands, DEP, and Army Corps permits, and NEE's standing to appeal the PZC's § 8-30g denial. 11T 35; 20T 42; 33T 77, 91-92 (Bellamy); 36T 122-23.

The day after the Town took title, it moved to dismiss NEE's appeal and to vacate the articulation order, arguing that the trial court's decision "did not make any final determination regarding the rights of the parties." Town's Mot. to Dismiss, 1/6/04 at 5, A235. The Town added:

> [NEE] seeks in this case only to prevent the loss of a business opportunity . . . . [It] can be compensated by monetary relief if after a full trial on the merits, the trial court determines that it is entitled to such relief.

Id. The Appellate Court dismissed the appeal. Order, 3/25/04, A239. Thus, the Town secured its title to the property by successfully arguing that NEE had a remedy at law for consequential damages if the taking was in bad faith, and by terminating NEE's effort to preserve its claim for injunctive relief.

This case and the companion valuation cases were transferred to the Complex Litigation Docket for trial. The trial court (Cremins, J.), without objection, bifurcated the cases and heard the valuation appeals in June and July 2007. On August 3, the court ruled (R67) that the value of the land was $4.6 million.[7] In its decision, the trial court stated that there was no credible evidence that the land was contaminated. MOD at 24, R85.

D. Trial Evidence Regarding Bad Faith; Jury Verdict.

In this case, the jury heard 16 days of testimony focused on two subjects, the Town's conduct and the plaintiffs' claims for consequential damages.[8] The plaintiffs reviewed the RTM's three stated reasons for the taking and the chronology and timing of its actions:

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[7] Because the option price was $4.75 million, the valuation increase ordered by the trial court, from $1.1 to $4.6 million, is payable to only the Owners.

[8] Evidence regarding lost profits is set forth in § V.B, infra, and incorporated herein by reference.

1. "Investigation" of environmental condition.

The RTM's first reason was to "investigate" the parcel's environmental condition. The jury heard these facts: (a) as required by Town regulations (PE 24, A43), when applying for development permits, the plaintiffs, in writing, had expressly granted the Town access to inspect and test the site (PE 59, A123) ***[COPY ATTACHED]***; (b) two state statutes, § 22a-133dd (A283) and § 48-13 (A284) allow municipalities to conduct environmental testing before proceeding with eminent domain ***[COPY ATTACHED]***; (c) the Town did not need to take permanent title to conduct temporary testing; (d) Fuss & O'Neill, as the Town's LEP, had filed 16 years of reports stating that the landfill was not contaminating any adjoining parcel (13T 20-21); (e) before it voted to take the property in July 2003, the Town had received the Phase II report from IES; and (f) before it took title in January 2004, the Town had a second LEP opinion, based on on-site testing, that the site was not contaminated. At trial, RTM members Baughman and Flanigan conceded that the Town did not need to use eminent domain to investigate the parcel's environmental condition. 20T 86-90; 21T 28-29 (Baughman); 23T 44-45; 24T 27, 31 (Flanigan). DaRos agreed. 35T 128.

2. "Remediation" of environmental contamination.

Carver Glezen of Triton Environmental testified that the Tabor parcel was safe for residential use, based on Fuss & O'Neill's 16 years of testing, the April 2003 IES Phase II, and his own firm's August 2003 confirmatory testing. 12T 101, 13T 19-60. David Hurley of Fuss & O'Neill conceded that his firm's quarterly and annual reports documented consistent compliance with the DEP landfill permit and the absence of contamination of adjacent properties. He testified that if the Town had asked him in 2003, based on his own firm's reports, to write an opinion letter as an LEP stating that the Tabor parcel was safe for residential use, he could have done so. 26T 94-101. Flanigan agreed that the RTM had no basis to condemn in order to remediate and that the environmental evidence was

speculative. 24T 38. So did DaRos, 36T 40-42. Bellamy conceded that Fuss & O'Neill's April 16 letter did not support the taking. 33T 72, 110.

3. "Possible playing fields."

RTM member Dennis Flanigan testified that playing fields were not even one of the RTM's actual reasons for the taking, even though the RTM's resolution cited "possible" playing fields as a reason for the condemnation. 23T 47; 24T 39. Town Parks and Recreation Director Palluzzi, Town Engineer Steven Dudley, and Town Attorney Bellamy each admitted that the Town had no plan, report, or study for use of this property for playing fields, and in fact had identified other parcels for acquisition for public recreation. 19T 119-20; 20T 6-9; 18T 24; 33T 110-12. So did DaRos, 36T 42. *See* PE 18 at 34, 37. DaRos, three weeks *after* the Selectmen's May 21 initial vote, had asked Dudley – who admitted that he had no experience designing playing fields, 18T 19-21 – to quickly "sketch" fields (and, as another "public use," a cemetery – located in a flood plain) onto a topographic base map. 18T 16-18. Moreover, Dudley's sketch, PE 55, A116, contained several errors, 5T 96-99, and proposed to use only 15 of the 77 acres. 18T 46.

4. The real reason: "to block housing."

Town officials admitted that the actual and unstated reason for the RTM's vote was to prevent NEE from proceeding with its § 8-30g housing application. 24T 23-26 (Flanigan); 34T 104-05 (Walsh); 35T 122-23 (DaRos). They conceded that they were aware that a § 8-30g site plan could only be denied if it adversely impacts a substantial public health or safety interest, and in this case, the plan presented no such concern. 34T 95, 119-23 (DaRos); 24T 23-25 (Flanigan).[9]

[9] NEE did not allege or try to prove racial bigotry or economic prejudice, despite the Town's efforts to have the jury believe that these were elements of plaintiffs' proof. The "bad faith" in this case is the pretextual, baseless, or dishonest reasons given and the illegality of using eminent domain to interfere with a remedial state statute.

5. The Town's rush to condemn.

Finally, the jury heard a recounting of the Town's precipitous action and disregard of fundamental fairness. As of July 2003, NEE was not ready to start construction and in fact had just filed its zoning application. The Town's environmental concerns, if valid, would be aired before the PZC at the upcoming public hearings. But the Town acted to avoid that process.

The jury heard about how the Town Attorney co-authored Fuss & O'Neill's scare tactic letter, how the Town ignored the IES April 2003 report, and how NEE's April 28, 2003 notice of its imminent § 8-30g application prompted immediate discussion of eminent domain by Town officials.

The Administrative Services Committee met on June 18 and July 2, 2003. It did not conduct any public hearing, and only invited Town officials and staff to speak. 20T 49-50, 68; 23T 34. Committee Chair Baughman and RTM member Flanigan conceded that the Committee did not review the available environmental information regarding the Tabor parcel or even try to do so. 20T 49-90; 21T 30-32; 23T 26, 47. Moreover, this Committee received incomplete information that it did not question or pursue. Hurley told the Committee that the environmental issues stated in Fuss & O'Neill's April 16 letter were "just possibilities" as to the Tabor parcel, but then no one asked him about the actual conditions. Hall, the landfill administrator, stated that residential development of the Tabor parcel could cost the Town "millions," but no one questioned her qualifications or the basis for her assertion. 19T 49, 79.

The Town also deliberately avoided obtaining relevant information. On June 23, 2003, Fuss & O'Neill submitted to the Town a proposal to conduct on-site testing of the Tabor parcel, at a cost of $30,000. The First Selectman declined it. 36T 12; PE 57, A117.

At the July 9, 2003 RTM meeting (PE 65, 66) – which also was not a public hearing – 18 of the 22 members present had not attended either of the Committee meetings and thus were relying completely on Baughman for a recommendation and the basis for

eminent domain. 20T 72-73; 21T 19-20; 23T 37-39. In remarks lasting less than six minutes, Baughman reported erroneously that eminent domain was necessary because the site was possibly contaminated and the Owners had denied the Town access to the site to conduct testing. PE 65 at 6, A145; 21T 25-28. He distributed the Fuss & O'Neill letter and displayed the Dudley sketch of playing fields; this was the only information provided to the RTM members. 23T 25. Baughman did not mention Fuss & O'Neill's 16 years of environmental reports, 21T 36-37; the 2003 IES report, 21T 25-36; or the Wetlands Commission's 2002 approval of NEE's plan after reviewing extensive landfill data (21T 30). No one suggested that the RTM conduct a public hearing or investigate the site, and no one asked about any intended public use. PE 65. There were no questions. *Id.*; 22T 64. Finally, the RTM proceeded without an opinion from the Town Attorney regarding the constitutionality of using eminent domain. 21T 14; 33T 24, 39, 43, 108-09.

6. Verdict and award.

The jury returned a verdict in favor of NEE in the amount of $1,192,038.78 for development expenses and $11,243,876 for lost profits. It awarded the Owners $340,000 in option and closing payments. R245-46.

The Town's October 9, 2007 post-verdict motions (R247) were denied by the trial court on November 20, 2007, and judgment was entered as of that date. Plaintiffs' motions under 42 U.S.C. § 1988 for attorneys' fees and costs are pending in the trial court.

ARGUMENT

I. THE PLAINTIFFS' SEPARATE ACTION TO RECOVER DAMAGES UNDER § 1983 FOR THE TOWN'S VIOLATION OF THEIR CONSTITUTIONAL RIGHTS DOES NOT SEEK A DOUBLE RECOVERY AND WAS NOT BARRED BY THE VALUATION APPEALS.[10]

A. The Plaintiffs Properly Sued The Town In Separate Actions For Two Constitutional Violations.

The Town's Brief, at 3-4, correctly states that a plaintiff may be compensated only once for an injury, and may not recover for constitutional harms that are compensated by statutory or common law remedies. These principles, however, do not apply to this case. The Town violated distinct provisions of the federal Constitution that not only have different purposes, elements of liability, and procedures, but mutually exclusive financial recoveries.

Interpretation of constitutions, like statutes, begin with the text. The Fifth Amendment contains *two* limitations on government's use of eminent domain: "[Nor] shall private property be taken *for public use,* without *just compensation.*" Separate phrases must be given separate meanings, and a construction that would render one provision superfluous is improper. *See, e.g., Marbury v. Madison,* 5 U.S. 137 (1803); *Sheff v. O'Neill,* 238 Conn. 1, 28 (1996). The Town first argues, contrary to this principle, and with no textual or historical support or precedent, that a Public Use Clause claim must be raised in a just compensation appeal, where the court's sole task (*see* § B, *infra*) is to review the

[10] In addition to not discussing the facts of the Town's conduct, the Town makes several arguments about interpreting the Takings Clause without discussing the dozens of reported decisions on bad faith use of eminent domain, summarized in §§ IIIA and B of this brief. For example, on p. 10, the Town refers to the "structure" of the Takings Clause in a single sentence, with no citation or analysis. On pp. 17-22, the Town argues for substantial limitations on the scope of the Public Use Clause without even mentioning the relevant cases. It asserts that *Gohld Realty Co. v. Hartford*, 141 Conn. 135 (1954) and similar cases involve state constitutional standards, but without using the analysis set forth in *State v. Geisler*, 222 Conn. 672, 684-85 (1992). The Town's failure to discuss the relevant national case law warrants this Court declining to review the Town's constitutional arguments. *See Glezen v. Dress Barn*, 274 Conn. 33, 87-88 (2005); *Comm'r v. Youth Challenge*, 206 Conn. 316, 317 (1988) (constitutional issue).

government's valuation of the property taken. This construction would strip the Public Use Clause of any citizen protection separate from the Just Compensation Clause.

The Takings Clause necessarily contains two limitations because government can misuse eminent domain in two ways: by abusing the power itself, and by failing to pay for what it takes. Valuation appeals and bad faith claims, therefore, arise from different facts. When an owner contests valuation, the trier's sole focus is assessing the constitutional sufficiency of the compensation already deposited. A bad faith claim, on the other hand, challenges the government's decision to use eminent domain. *See generally* 1 Lewis Orgel on Valuation Under Eminent Domain (2d ed. 1953) § 51-3, pp. 1-18, A264.

Except in the limited instance (not applicable here) of a state constitutional provision or statute that expressly allows a claim for "damage" in addition to the value of the condemned property, the sole issue in a just compensation appeal is the value of the property taken; damages to persons or business entities resulting from eminent domain must be pursued in a separate action. This Court has drawn a clear distinction between property valuation and consequential damages. *See Comm'r of Transp. v. Rocky Mountain, LLC,* 277 Conn. 696, 711-12, 730 (2006); *Wronowski v. Redevelopment Agency*, 180 Conn. 579, 584-85 (1980).[11] Federal cases and other jurisdictions recognize the same limitation. *See Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 6 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946); 2-5 Nichols on Eminent Domain § 5.03(1)(h)(ii) ("[t]he

[11] This is not to say that lost profits do not play a role in valuation of land. All characteristics of real property that add to its value must be considered in valuation. *See, e.g., Wronowski*, 180 Conn. 579 (1980). In *Laurel, Inc. v. Comm'r of Transp.*, 180 Conn. 11 (1980), the proposed development was so far along in construction that its profit potential was readily identifiable and calculable, and thus the Court considered profitability (not profits, but potential) as an element of valuation. *Id.* at 19-20. However, nowhere in *Laurel, Inc.* did the Court say that it was awarding lost profits from the operation of a business separate from or in addition to land value. *See Rocky Mountain*, 277 Conn. at 732 (discussing *Laurel).*

taking of the land terminates all contracts in respect to its use . . ., but it is well settled that they are not entitled to compensation for the loss of their contracts").

In contrast, § 1983 (A868) provides a damages remedy for government's violation of a federal civil right. *See Kalina v. Fletcher*, 522 U.S. 118, 123 (1997); *Farrar v. Hobby*, 506 U.S. 103, 112 (1992); S. Nahmod, Civil Rights and Civil Liberties Litigation (4th ed. 2007) § 4.1 at 4-3. In *Carey v. Piphus*, 435 U.S. 247, 253-55 (1978), the Court held that "[t]he legislative history of § 1983 . . . demonstrates that it was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution and thus, are designed to compensate for injuries caused by a defendant's breach of duty." *See also Virgo v. Lyons*, 209 Conn. 497, 502 (1988) (recognizing § 1983 as basis for damages for constitutional torts).

Valuation appeals and § 1983 actions also differ procedurally. Just compensation appeals are *in rem* proceedings, and just compensation is an equitable decision for the court; *see, e.g., Kelo v. New London*, 268 Conn. 1, 28 (2004), *aff'd*, 545 U.S. 469 (2005); *Cumberland Farms, Inc. v. Groton*, 262 Conn. 45, 76 (2002); *State v. McCook*, 109 Conn. 621 (1929). Moreover, in Connecticut there is no right to a jury trial in a valuation appeal, *see Cumberland Farms*, 262 Conn. at 70-84; *Antman v. CL&P*, 117 Conn. 230, 237 (1933), but a § 1983 litigant has a right to a jury. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 721-22 (1999).

"Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County,* 506 U.S. 56, 70 (1992). The numerous, substantial differences between valuation appeals and § 1983 claims warranted the plaintiffs here bringing one action to appeal the Town's substantial

undervaluation of the land and a separate action for damages caused by the Town's deceptive use of eminent domain.[12]

B. The Plaintiffs Could Not Have Litigated Their Public Use And Lost Profits Claims In Their Valuation Appeals.

The Town's *res judicata* and collateral estoppel arguments rest on its contention that the plaintiffs could have raised their bad faith and lost profits claims in their compensation appeals. Town's Br. at 6.[13] Neither doctrine applies, of course, if a party could not have litigated its claim in a prior, separate proceeding. *See, e.g., Linden Condo. Ass'n, Inc. v. McKenna*, 247 Conn. 575, 595 (1999); *Connecticut Nat'l Bank v. Rytman*, 241 Conn. 24, 43-44 (1997); Restatement of the Law (Second), Judgments § 26 (1)(c) & cmt. C (1982). As prefaced above, under Connecticut statutes and case law, valuation appeals are strictly limited to judicial reassessment of whether the compensation paid was just, and thus the plaintiffs' valuation claims do not have preclusive effect on this § 1983 federal civil rights case.

An appeal from a municipality's statement of compensation is limited to reassessment of the compensation. *See, e.g., St. John v. Comm'r of Transp.*, 172 Conn. 234, 240 (1977). A judge or panel reviewing compensation does not have jurisdiction to review whether the taking was valid. *See Comm'r of Transp. v. Larobina*, 92 Conn. App. 15, 29, *cert. denied*, 276 Conn. 931 (2005). *See also Vegliante v. East Haven*, 2007 Conn. Super. LEXIS 847, at *14 (Mar. 29, 2007), A862; *Crump v. CRRA*, 1997 Conn.

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[12] This Court may take judicial notice of the fact that the Town, in a June 2008 action brought against its insurance carriers for failure to provide a defense on coverage in this federal civil rights case, contends that the misconduct alleged to violate § 1983 in this case does not arise out of eminent domain, and therefore is not subject to the policy's inverse condemnation exclusion. *See* Complaint, A246, at ¶¶ 23-24, A254.

[13] These claims of error were not properly preserved as to the Owners. The citation provided by the Town to its Appendix at pages 49 and 66 is to a motion in limine directed to the claims raised by NEE, not the Owners. *See* Town Br. at 4, 7. Thus, even if these claims had any merit, the Town has not established that it perfected its appellate record with respect to the Owners' § 1983 claims. Practice Book § 60-5.

Super. LEXIS 316 (Feb. 7, 1997), A857; 1 Dupont, Connecticut Civil Practice (2007) § 10-20.8 (discussing limited jurisdiction of valuation judge). In a valuation appeal, the trial court's sole task is to make "an independent determination of value and fair compensation" for the property taken. *E.g., Northeast Ct. Economic Alliance v. ATC Partnership*, 272 Conn. 14, 26 (2004). If a party wishes to raise issues separate from just compensation, it must file an independent action. *See Russo v. East Hartford*, 4 Conn. App. 271, 274 n.2 (1985).

The Town cites *Transportation Plaza Assoc. v. Powers*, 203 Conn. 364, 370 (1987) and *Water Commissioners v. Manchester*, 87 Conn. 193 (1913) for its claim that the plaintiffs could have challenged the Town's Public Use Clause violation in their valuation appeals. Town's Br. at 7. *Powers* only states that the court may "review . . . the entire statement *of compensation*" (emphasis added). *Water Commissioners* concerned a statute, the Flowage Act, now codified at General Statutes §§ 52-446 *et seq.* In contrast to General Statutes §§ 8-129 *et seq.*, this Act has its own procedural provisions for assessment of compensation, including a statutory process for challenging the propriety of a taking by challenging the appointment of appraisers. In *Water Commissioners*, the petition thus presented the threshold question of "whether the maintenance and regulation of the flow of the Farmington River is or is not a public use." 87 Conn. at 203. This Court validated the public agency's plan as a public use and, reversing the trial court, approved the taking. But this case turned on a unique statute, and the opinion does not address whether a federal Public Use Clause claim may or must be raised in a just compensation appeal.

Albahary v. Bristol, 276 Conn. 426 (2005), does not support the Town's claim that plaintiffs here seek double recovery for a single harm; in fact, the decision supports the separate actions filed here. In *Albahary*, the plaintiffs alleged that Bristol's landfill had contaminated their property. They asserted federal environmental violations, and pendent trespass, nuisance, and inverse condemnation claims. While this federal action was

pending, Bristol took the groundwater under the plaintiffs' property by eminent domain and deposited compensation. Bristol appealed the compensation and also sought damages for pre-condemnation contamination. While the compensation appeal was pending, the federal court granted the plaintiffs injunctive relief (installation of potable water, and indemnification) in the contamination action, but rejected their inverse condemnation claim. A state court then decided the compensation appeal, rejecting plaintiffs' pre-condemnation damages claim because that issue had been decided in the federal action. *See Albahary*, 84 Conn. App. 329, 331 (2004). This Court's *Albahary* collateral estoppel holding is thus unremarkable; it simply affirmed that plaintiffs' pre-condemnation damages claim had already been decided in the federal action. On the other hand, *Albahary* supports the plaintiffs' argument here: they were entitled – indeed, required – to pursue two separate actions, one for their consequential damage claims, and one for inadequate compensation. The plaintiffs in *Albahary* obtained relief in *both cases*, as did the plaintiffs here. Moreover, the trial court in the *Albahary* compensation appeal did not consider the wrongfulness of the taking or consequential damages.

A "cause of action" is "that single group of facts that is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief." *Wagner v. Clark Equipment Co., Inc.*, 259 Conn. 114, 129 (2002). In this case, plaintiffs' valuation claims arose from the Town's December 2003 Statement of Compensation and deposit. In contrast, the plaintiffs' § 1983 claim arose from the pretextual, baseless, and abusive RTM July 2003 resolution and the January 2004 vesting of title that carried out that resolution. These are separate causes of action. The word game in the Town's brief about the plaintiffs' claims arising "under the Takings Clause" and their being "recompensed" and

"remunerated" in their valuation appeals cannot undermine these distinctions.[14] The valuation claims do not bar the § 1983 claim.

C. Under § 1983, Damages Are Recoverable For A Public Use Clause Violation.

The Town claims (at 10-11) that if a landowner proves bad faith use of eminent domain under the Public Use Clause, the only available remedy is an injunction. The Town's argument fails for two reasons. First, neither the text of the Public Use Clause nor § 1983 contains or suggests any such limitation. To the contrary, as discussed above, § 1983's remedies include compensatory damages (subject to the usual limitations on when injunctions or damages are appropriate). The Town's argument about the text of the Public Use Clause improperly conflates the underlying right with the statutory remedy for a violation. As with most provisions of the Bill of Rights, the Public Use Clause states a substantive limitation on government conduct, but it is § 1983 – enacted decades after the ratification of the Constitution – that specifies the remedies available to an individual if government transgresses a federal civil right. Indeed, the "central purpose" of § 1983 was to supply a damages remedy where the Constitution did not. *See Felder v. Casey*, 487 U.S. 131, 141 (1988). Thus, the Town's argument that the Public Use Clause itself does not provide for damages looks to the wrong source.

Second, the Town disregards that the plaintiffs pursued an injunction to block the taking, and the Town defeated that effort by arguing that the plaintiffs could obtain money

[14] As a factual matter, the plaintiffs did not recover lost profits in the valuation appeals. The trial court's August 2007 valuation decision (R62) does not mention lost profits (and the Town has not sought articulation). The plaintiffs' experts segregated their analyses to ensure that there was no double recovery. NEE's appraiser in the valuation appeal calculated land value only; his "land residual" approach calculated profits on the sale of units, but he *subtracted* them as a development cost, arriving at the "residual" – land value only. *See* NEE's Brief, S.C. Nos. 18089, 18091 at 13. Plaintiffs' damages expert in this case then utilized land cost as an expense, deducting it from sales revenue. PE 138, A173 (lower right table).

damages for their lost business opportunities.[15] *See* pp. 8-9, *supra*. The trial court expressly adopted the Town's argument that "the sole harm that the condemnation could cause the plaintiff is financial loss, *recoverable in the case in chief*." R169 (emphasis added). Having argued successfully that injunctive relief was unavailable because money damages were recoverable, the Town cannot now reverse itself and argue that money damages are unavailable because injunctive relief should have been sought. *McNamara v. New Britain*, 137 Conn. 616, 618 (1951) ("A plaintiff cannot try his case on one theory and appeal on another").[16]

D. The Election Between Challenging Unlawful Occupation And Accepting Compensation Is Inapplicable To This Case.

The Town (at 11-12) argues that if government occupies privately-owned land without authority and without a formal condemnation process, the owner must choose between challenging that occupation through an injunction or ejectment action, and accepting the government's presence as a condemnation and seeking just compensation. If the owner accepts compensation, it waives its right to challenge the occupation.

The cases cited by the Town, however, do not support the principle that one who invokes the just compensation appeal process waives all other claims. These cases only stand for the rule that where the property owner has the ability to decide between ejecting the government from a *current*, wrongful occupation and accepting compensation for that

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[15] In fn. 5 at 15, the Town recognizes that if property is destroyed physically, no court can fashion an injunctive order returning it to its former owner. But the same is true for the impact of eminent domain on an option contract and already-issued permits, which depend on a fee or contractual interest in the subject property.

[16] Judicial estoppel also applies. The doctrine requires that (1) the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding, and (2) the prior inconsistent position must have been adopted by the court in the same manner. *Hijeck v. United Tech. Corp.*, 24 F. Supp. 2d. 243 (D. Conn. 1998); *Media Group, Inc. v. Tuppatsch*, 298 F. Supp. 2d 235 (2003); *see LaSalla v. Doctor's Associates*, 278 Conn. 578 (2006). Here, the Town represented that the plaintiffs had a damages remedy if they could prove bad faith use of eminent domain, and the Superior and Appellate Courts accepted the Town's argument.

occupation, it may not do both. If this Court accepted the Town's broader argument, government could insulate itself from civil rights liability simply by setting the compensation for a taking at such a low level that the condemnee would be compelled to appeal.[17]

The election discussed in the case law arises from inverse condemnation. When government uses eminent domain, it takes formal action to acquire title, thus evincing its intent to pay just compensation. Inverse condemnation, on the other hand, involves government acting through physical presence or regulation of use, effectively taking ownership but not acknowledging that it is legally or effectively asserting title. This case is a direct condemnation, and thus an election to force the acknowledgment is irrelevant.

Moreover, election of remedies only applies when ejecting the government or enjoining its occupation is currently possible. Here, obviously, when the Town took title in January 2004, it terminated the plaintiffs' option contract, NEE's permits, NEE's $1.2 million investment, and NEE's standing to pursue an administrative appeal under § 8-30g. Those rights were irretrievably lost on the date of the taking; after that, ejectment or similar relief was illusory, because no injunctive order could have restored NEE to its January 2004 position as option and permit holder. An election was not possible because the Town's own action made one of the remedies unavailable.

The election argument is also inapplicable "unless the remedies are inconsistent and the other party materially changes his position in reliance on the manifestation." *Hill v. Raffone*, 103 Conn. App. 737, 743 (2007). Here, the Town does not claim inconsistent remedies or that it materially changed its legal position in reliance on the plaintiffs' valuation appeals.

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[17] For example, if property were valued at $1 million and occupied by a church, and the government gained title to the land by eminent domain, depositing $10,000 as market value and giving as its reason for the taking that the practice of religion is barred in the town, does Branford suggest that the church would be limited to *either* appealing just compensation *or* instituting a damages action?

There is no merit to the Town's contention that the plaintiffs have been awarded a double recovery as a result of their successful claims in the valuation appeals and this case. This Court recently held that "separate but related actions against multiple tortfeasors, even when both actions are successful, will not necessarily result in duplicate recoveries, particularly if the respective recoveries are intended to redress distinct losses." *Chapman Lumber, Inc. v. Tager,* 288 Conn. 69, 112 (2008). This holding is equally true where, as here, two recoveries against the same tortfeasor redressed district losses and were required to be brought in separate actions.

II. *WILLIAMSON COUNTY*'S RIPENESS REQUIREMENTS APPLY ONLY TO INVERSE CONDEMNATION, NOT EMINENT DOMAIN.

The "ripeness requirements" of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) do not apply to this case. *Williamson County* and its progeny apply only to claims under the Just Compensation Clause for inverse condemnation/regulatory takings cases, not to direct condemnation.

Williamson County holds that a property owner's regulatory taking claim is not justiciable until the governmental defendant, through its land use regulatory agencies, has arrived at a final decision as to what uses it will allow. *Id.* at 186-87. In general, a property owner must make one "meaningful" application and if denied, pursue administrative avenues to obtain relief from the restrictions that he asserts constitute the taking. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (clarifying *Williamson County* "finality"). Second, the putative takings plaintiff must bring a regulatory takings claim in state court, not federal court. *Williamson County*, 473 US.195; *San Remo Hotel v. City & County of San Francisco*, 545 U. S. 323 (2005).

Williamson County's "finality" requirement is inapplicable when the plaintiff claims an unconstitutional direct condemnation, as opposed to a regulatory taking by inverse condemnation. The principle that a landowner may not claim that government has denied all economically viable use of land until he has obtained a "final decision regarding the

application of the [challenged] regulations to the property at issue" has no bearing in a case where the government has already taken ownership of the land and deposited compensation. Moreover, *Williamson County's* "state court first" requirement is obviously irrelevant if, as here, the case is in state court.

The U.S. Supreme Court has drawn a bright line between inverse and direct condemnation: "For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically viable use, we do not apply our precedent from the physical takings context to regulatory taking claims." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002). The *Williamson County* ripeness rule was created to deal with cases in which the government denies that it has done anything to take private property. Thus, to ripen a regulatory taking claim, it is necessary to confront whether regulatory action has effected a taking. In a direct condemnation case, however, there is no question about the government's intent: it intends to take the property. When the Town here consummated the taking, there was nothing left to ripen.

The cases cited by the Town are inverse condemnation cases. The differences between the two types of takings case are determinative. *Melillo v. New Haven*, which the Town cites repeatedly, was a regulatory taking case seeking compensation for land. *See* 249 Conn. 138, 142 n.7 (1999).

Federal appellate courts have held that where eminent domain has been exercised, *Williamson County*'s ripeness requirements are inapplicable. *See, e.g., Rumber v. Dist. of Col.*, 487 F.3d 941, 944 (D.C. Cir. 2007); *Montgomery v. Carter County*, 226 F.3d 758, 766 (6th Cir. 2000); *see also Deepwells Estates Inc. v. Incorporated Village of Head of the Harbor*, 973 F. Supp. 338, 347-48 (E.D.N.Y. 1997), *appeal dismissed*, 162 F.3d 1147 (2d Cir. 1998).

Federal appellate courts also have held that a plaintiff bringing a claim under the Public Use Clause need not challenge just compensation award as a prerequisite to a

§ 1983 federal civil rights claim. *See, e.g., Montgomery*, 226 F.3d at 766-67; *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997) (landowners "need not pursue state procedures for a claim that the City took the [land] without a justifying public purpose . . . because this is a Constitutional violation even if compensation is paid."); *Samaad v. City of Dallas*, 940 F.2d 925, 936 (5th Cir. 1991).

The Town asks this Court to interpret *Williamson County* in a way that no court ever has, by requiring a property owner to seek a mandatory injunction in state court for the return of the taken property before pursuing a damages remedy for eminent domain abuse. The Town asserts that "an attempt to secure a mandatory injunction against an allegedly wrongful taking clarifies the state's position and allows the taking to be assessed under the federal constitution." Town's Br. at 15. This argument, however, ignores the fact that *Williamson County* requires clarity and finality of the government's *regulatory* position. When government uses eminent domain, the effect of its actions or regulations on the *condemnee's* proposed use becomes irrelevant. Moreover, *Williamson County* only requires regulatory taking claimants to pursue administrative remedies that will clarify the relevant government's application of its regulations; *Williamson County* finality does not require resort to "remedial" actions such as an administrative appeal challenging the legality under state law of a land use restriction, and it certainly does not require an exhaustion of judicial remedies. 473 U.S. at 194-95 n.13.[18]

Finally, the Town erroneously relies on *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999).[19] *Del Monte Dunes* is a regulatory taking case and the opinion does not require takings claimants to seek an injunction.

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[18] And, of course, § 1983 does not require exhaustion of administrative remedies. *Patsy v. Fla. Bd. of Regents*, 457 U.S. 496 (1982).

[19] *Del Monte Dunes* was procedurally unique in that, at the time the plaintiff property owner first sued for inverse condemnation in the 1980s, California did not recognize a damages remedy for a regulatory taking, and thus *Williamson County*'s "state court first"

III. SECTION 1983 PROVIDES FOR RECOVERY OF CONSEQUENTIAL DAMAGES FOR A MUNICIPALITY'S BAD FAITH USE OF EMINENT DOMAIN IN VIOLATION OF THE PUBLIC USE CLAUSE.

The Town's Brief (at 18) makes the startling argument that government transgresses the Public Use Clause only when it takes property in good faith to benefit a private person, but not when it uses eminent domain in bad faith, that is, pretextually, without a factual or legal basis, or through deception, dishonesty, or fraud.

Response to the Town's argument requires two preliminary observations. First, the term "bad faith" in case law is an umbrella term that refers to a variety of ways in which government's use of eminent domain *per se* may be improper, separate from promoting a private use. Second, the Town does not challenge the specific instructions given to the jury,[20] which explained these three categories; rather, it argues (at 17-21) that pretext *per se,* and baseless action or abusive conduct, are simply not standards under the Public Use Clause.

A. The Public Use Clause Prohibits Pretextual Takings That Conceal An Invalid Or Improper Purpose, Not Just A Private Purpose.

The Town claims (at 18) that "[w]here, as here, a plaintiff makes no allegation of private use, an assertion of 'pretext' does not allege a violation of the takings clause." In other words, the Town claims that under the Public Use Clause, the plaintiffs may only claim that the Town's stated reason was false and its real reason was to benefit a private individual or entity;[21] no other conduct is covered. Thus, the Town makes the extraordinary

_____ (continued)
requirement was inapplicable. *See Cumberland Farms*, 262 Conn. at 77-83 (discussing *Del Monte's* procedural anomalies).

[20] The trial court's instructions on § 1983 liability are reprinted in the Town's Appendix, A164-A172.

[21] The Court need not and should not review this claim. In seeking plain error or *Golding* review (at 17), the Town concedes that it did not raise the claim below. In fact, in the trial court, it affirmatively acknowledged that there is a cause of action for bad faith takings. *See, e.g.,* Memo in Opp. to Prelim. Inj. 9/9/03 at 9-10, A220-A221; Preliminary Req. to Charge 8/14/07, at 12, A244. A party is not entitled to litigate a case under one

argument that the Bill of Rights does not apply when government uses eminent domain for an improper purpose such as to block an unwanted but lawful use, or when the process was carried out dishonestly, deceptively, fraudulently, or without any factual or legal basis.

The Town asserts (at 18) that *Kelo v. New London*, 545 U.S. 469 (2005), dictates this limitation, holding that the only purpose for the Public Use Clause "is to prevent the government from taking the property of any private person for the sole purpose of transferring it to another private person." *Id.* at 19. But *Kelo* contains no such holding. In that case, the city agencies engaged in numerous lengthy public meetings and hearings, reviewed numerous planning alternatives, and acted deliberately and fairly at each step of the way. No subterfuge, bad faith, pretext, or abuse was alleged; the plaintiffs conceded that city leaders had pursued eminent domain in good faith. *See Kelo,* 268 Conn. at 6, 54; *Kelo*, 545 U.S. at 478. The Supreme Court was called on to decide only whether the City's promotion of private economic development constituted a public use. The Court's assumption that the City was acting in good faith distinguishes it from this case and contradicts the Town's assertion that *Kelo* addressed and circumscribed the bad faith component of the Public Use Clause. *Kelo* and its predecessors such as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Berman v. Parker*, 348 U.S. 26 (1954), stand in sharp contrast to the cases that have recognized pretextual use of eminent domain as a Public Use Clause violation even where there was no claim of promoting a private use. In fact, as set forth below, courts across the country have recognized that the Public Use Clause prohibits use of eminent domain where the government's stated reason is false and its actual reason is invalid or improper. These decisions display a bright line between good faith exercise of eminent domain where the existence of a public use is a judicial question that is resolved with substantial deference to legislative prerogative, and bad faith claims in

_____ (continued)
theory and appeal it on another. *See, e.g.*, *Januskauskus v. Fichman*, 264 Conn. 796, 807 (2003) (plain error review only available in exceptional circumstances).

which the plaintiff has the burden to prove egregious conduct to the trier, but deference to legislative prerogative is not relevant.

Not surprisingly, most of these cases are state court decisions. Eminent domain is used far more frequently by local, regional, and state governments than the federal government, and eminent domain is carried out procedurally through state statutes. In addition, it is important to note that when state courts adjudicate challenges to eminent domain, they are necessarily interpreting the federal Public Use Clause, because for state and local governments, the federal Bill of Rights is a minimum, national standard for protection of individual citizens from governmental action. *See, e.g., Mills v. Rogers*, 457 U.S. 291 (1982); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *State v. Geisler*, 222 Conn. 672, 684 (1992). While states may afford more protection to individuals through their own constitutions, they may not provide less. *See Geisler*, 222 Conn. at 684-85 (1992); *see also Kelo*, 545 U.S. at 489-90. The federal Takings Clause is less often acknowledged as a minimum, national standard because many state supreme courts, including this Court, have treated their state takings clauses as providing the same protections as the federal Takings Clause. *See Santini v. Conn. Hazardous Waste Mgt. Serv*, 251 Conn. 121, 136 n.20 (1999); *Melillo v. New Haven*, 249 Conn. 138, 143, 154 n.28 (1999); *Kelo*, 268 Conn. at 28-40. But because of the federal standard is the minimum, absent a state court's express application of a state law standard more protective of individual rights, state cases on bad faith use of eminent domain should be regarded as interpretations of the federal Public Use Clause.

The Town's argument, then, about Public Use Clause limitations is contradicted by many reported cases, such as *Pheasant Ridge Assocs. v. Burlington*, 506 N.E. 2d 1152 (Mass. 1987). The court affirmed that a pretextual use of eminent domain for an improper, concealed purpose was void. There was no claim of a private use. *Pheasant Ridge* is very similar to this case; the town had taken property for the stated purposes of "parks, recreation, and the construction of moderate income housing," but the evidence showed

that its real purpose was to prevent the development of low and moderate income housing under Massachusetts' "Anti-Snob Zoning Act" (which is similar to § 8-30g), for which a zoning application was pending at the time of the taking. *Id.* at 772-73. The Massachusetts court observed:

> Bad faith in the use of the power of eminent domain *is not limited* to action taken solely to benefit private interests. It includes the use of the power of eminent domain solely for a reason that is not proper, although the stated public purpose or purposes for the taking are plainly valid ones.

Id. at 776 (emphasis added). *See also Carroll County v. Bremen*, 347 S.E.2d 598 (Ga. 1986) (affirming dismissal of petition to condemn because even though the county set forth a public purpose, "there is evidence that the actual purpose was to stop another use, also public, but one which the county officers oppose").[22]

This Court itself invalidated a pretextual taking,[23] without a claim of private use, more than a hundred years ago. In *Farist Steel Co. v. City of Bridgeport*, 60 Conn. 278 (1891), the city constructed an ornamental bridge. After it was built, the city learned that there were plans to erect buildings adjacent to the bridge. Concerned that the "expensive and sightly" bridge would be "marred by placing buildings on either side" of it, the city

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[22] Numerous other courts have invalidated takings where the condemning authority offered a pretextual reason for the condemnation, and the actual reason was improper. *See, e.g., Rhode Island Econ. Devel. Corp. v. The Parking Co.*, 892 A.2d 87, 102-08 (R.I. 2006) (condemnation of a "temporary easement" over airport parking garage was impermissible subterfuge to increase governmental revenues in abrogation of contract rights); *Earth Mgmt. Inc. v. Heard County*, 283 S.E.2d 455 (Ga. 1981) (pretextual taking was invalid where county condemned land ostensibly for a public park, but the true reason was to prevent use of the property as a hazardous waste facility); *City of Miami v. Wolfe*, 150 So. 2d 489, 490 (Fla. App. 1963) (taking was invalid where city condemned land ostensibly for road extension, but real reason was to obtain valuable riparian rights); *Essex Fells v. Kessler Inst.*, 673 A.2d 856 (N.J. Super., Law Div. 1995) (taking was invalid because reason given – need for a municipal storage facility – was pretext, and real reason was to prevent development of rehabilitation facility).

[23] Contrary to the Town's Brief at 19, the trial court in this case did not instruct the jury that pretext refers only to the "real reason" not being the "given reason." The jury was charged that the stated reason must be false and the actual reason must be illegal or improper. *See* Town Appendix at A171.

condemned abutting properties. The city, however, falsely represented that the condemnation was necessary to extend harbor lines to improve navigation. *Id.* at 280. This Court held that the taking was invalid because protecting views of a bridge was not a "legitimate public use," *id.* at 291, and it would not countenance undisclosed, improper reasons:

> The taking of private property in the legal establishment of harbor lines is *prima facie* a taking for public use. But the right to establish harbor lines, and to take private property for that purpose, *must be exercised in good faith and for a public use naturally connected with their establishment.* Private property cannot be taken for other than public uses under the guise of taking it for public use. . . . [W]here, as in the present case, all the proceedings declare the purpose to be an ulterior one, which no one would claim to be a public one within the meaning of the constitution, when this purpose is spread upon the very records which are laid before us as containing the authority on which the assessment committee acted, we should be shutting our eyes to the real state of affairs, and permitting property to be taken under the excuse of the right of eminent domain in a case where no public use was contemplated . . . .

Id. at 291-92 (emphasis added).[24]

Federal courts have also recognized bad faith claims unrelated to private use. *See, e.g., United States v. 101.88 Acres of Land*, 616 F.2d 762, 767 (5th Cir. 1980) (in assessing the validity of a taking, "[t]he court may ask in this inquiry whether the authorized officials were acting in bad faith or arbitrarily or capriciously by condemning land"); *United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1058 (7th Cir. 1973) (citing cases) ("[the] determination of whether the taking of private property is for a public use may appropriately

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[24] In *AvalonBay Communities, Inc. v. Town of Orange*, 256 Conn. 557 (2001), this Court affirmed an injunction against an economic development plan that called for the taking of the plaintiff's property. The project plan had been hastily adopted in bad faith to prevent development of affordable housing. Although the claim for an injunction against the taking was moot in light of the invalidation of the project plan, this Court affirmed the underlying principle that a municipality does not have the power to take property on a pretext to prevent an undesired but lawful use of the property. *See also Middletown Twp. v. Stone*, 939 A.2d 331, 337-38 (Pa. 2007); *Norwood v. Horney*, 853 N.E.2d 1115, 1133-35 (Ohio 2006); *Rapid City v. Finn*, 668 N.W.2d 324, 327-28 (S.D. 2003); *Evansville Dept. of Redev. v. Reising*, 547 N.E.2d 1106, 1111-12 (Ind. Ct. App. 1989); *City of Atlanta v. First Nat'l Bank*, 271 S.E.2d 821, 822-23 (Ga. 1980).

and materially be aided by exploring the good faith and rationality of the governmental body in exercising its power of eminent domain"); *Tahoe-Sierra*, 535 U.S. at 333-34 (recognizing invalidity of taking not accomplished in good faith); *United States v. Carmack*, 329 U.S. 230, 243 (1946) (a taking "may be set aside if government officials acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principles or was unreasoned"). *See also Kelo*, 545 U.S. at 493 (Kennedy, J., concurring, recognizing a separate category of cases involving suspicious transfers and procedural abuses).

Though terminology has varied, this Court and others have been consistent in identifying pretext, unreasonable basis, and abuse of power as among the variations of the overarching term "bad faith." *See Board of Water Comm'rs,* 86 Conn. at 158 ("the decision of a condemnor that a necessity exists for the taking of particular property is one open to judicial review to discover if it was unreasonable, or in bad faith, or an abuse of power conferred "). *See also Gohld Realty Co. v. Hartford*, 141 Conn. 135, 146 (1954); *Hall v. Weston*, 167 Conn. 49, 66 (1974); *Kelo*, 268 Conn. at 88. *Carmack, supra,* essentially mirrors these three categories, as do such cases as *City of Freeman v. Salis*, 630 N.W.2d 699 (S.D. 2001) (defining bad faith to include dishonest purpose, wrongdoing, or ill will); and *City of Atlanta*, 271 S.E. 2d at 822 (describing bad faith as "sharply distinguished from negligence or bad judgment" and equated with conscious wrongdoing, ill will, improper interest, fraud, dishonest purpose, or moral obliquity).

B. The Public Use Clause Also Prohibits Use Of Eminent Domain Without Any Factual Or Legal Basis, Or As An Abuse Of Power.

The Town also argues (at 21-22) that the Public Use Clause does not apply to eminent domain undertaken without any factual or legal basis, or in a deceptive, fraudulent, or dishonest manner.[25] In addition to the cases cited above, the U.S. Supreme Court has

[25] In the trial court, the Town argued: "NEE must demonstrate that it is likely to succeed on its claim that Branford acted with a dishonest purpose, in utter disregard of the

recognized abuse of power as a Public Use Clause violation. In *Carmack*, the Court noted that "[t]he Fifth Amendment . . . provides [an owner of land] with important protection against *abuse of power* of eminent domain by the Federal Government." 329 U.S. at 236-37 (emphasis added). In *Kelo,* 545 U.S. at 496, Justice O'Connor, dissenting, noted that the Public Use Clause ensures "stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power." The Court also has stated unequivocally that "there is no place in our constitutional system for the exercise of arbitrary power." *Garfield v. United States*, 211 U.S. 249, 262 (1908). *Accord Simmonds v. United States*, 199 F.2d 305, 306-07 (9th Cir. 1952) (recognizing judicial review of taking for "plain abuse" of the official's discretion, for "fraudulent actions," and for "bad faith"); *United States v. 101.88 Acres*, 616 F.2d 762, 767 (5th Cir. 1980) ("The court may ask in this inquiry whether the authorized officials were acting in bad faith or arbitrarily or capriciously"). The Town cannot successfully argue that a deceptive, dishonest, or fraudulent use of eminent domain by a government official is not covered by the Public Use Clause.

The Town concludes its assertion of the limited reach of the Public Use Clause by arguing that the jury's award is unsupported by the Clause itself and case law such as *Kelo* and *Midkiff*. Town's Br. at 21. But interpreting the Public Use Clause to prohibit the type of government conduct exhibited in this case has been recognized unequivocally in dozens of state and federal court decisions. Moreover, if the Town were to persuade this Court that the eminent domain abuse that occurred here is not a Public Use Clause violation, the "awesome power of eminent domain" would be unrestrained.[26] Put another way, simply

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possible necessity of the parcel's use, or to cloak some sinister purpose." Supp. Mem. 9/9/03 at 10, A221.

[26] The Town's reliance (at 21) on pre-Civil War sources and James Madison's belief that the problems associated with abusive legislative takings would be resolved through the political process is misplaced. The passage of § 1983 in 1871 significantly altered the role of the courts in the enforcement of constitutional rights: "The very purpose of the Bill of

because the Town's conduct in this case was so egregious that few reported decisions present substantially similar facts is no reason to hold that what the Town did is not actionable under the Public Use Clause and § 1983.

C. The Trial Court Did Not Instruct The Jury That Lack Of A "Plan" Is A Separate Public Use Clause Violation.

The Town's final argument is that the trial court erroneously instructed the jury, separate and apart from the three bad faith standards, that it could find a Public Use Clause violation if the Town, using eminent domain, did not follow a "plan," when it condemned the subject property. Town's Br. at 22.

The trial court did not so instruct the jury. The word "plan" was only used in the introductory section of the jury instructions, describing eminent domain in general. *See* Town Appendix at A166. After the trial court gave the jury a primer on eminent domain, it expressly instructed the jury that it could find a takings clause violation only if the Town's actions were: (1) pretextual; (2) without factual or legal basis; or (3) an abuse of power. *See* Town Appendix at A170. There was no separate instruction of a fourth basis. *Id.* at A168-A172. *See also* Jury Interrogatories, R241.

IV. NEE'S OPTION CONTRACT AND ENVIRONMENTAL PERMITS ARE PROPERTY INTERESTS PROTECTED BY THE TAKINGS CLAUSE.

The Town argues (at 22-27) that in Connecticut, an option to purchase land is not an interest in real estate, and therefore the Town did not deprive NEE of a property interest protected by the federal Takings Clause.

This argument is incorrect. First, the federal Takings Clause protects citizens from government abuse of eminent domain, which may be used to condemn not just real estate,

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Rights was to withdraw subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

but many forms of property, including tangible and intangible property and contracts. Takings Clause protection thus does not turn on what constitutes "real estate" under state law, but a broader concept of whether the condemnee had a vested right to what was taken. Second, in any event, NEE had a protected interest in the environmental permits it had obtained in 2002-03. Third, in Connecticut, it is settled law that an option to purchase real property is a protected interest in eminent domain proceedings. Finally, in this case, NEE had much more than an "unrecorded and unexercised option"; in fact, it had a contract that granted substantial rights, which it had exercised. Thus, the Town deprived NEE of interests cognizable under the Takings Clause.

A. Scope of the Takings Clause.

The Town argues that contract rights to purchase real property, as opposed to fee ownership, are excluded from the Takings Clause's protections. This argument directly contradicts U.S. Supreme Court takings jurisprudence. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (property protected by the Fifth Amendment "extends beyond land and tangible goods").[27] The Town ignores precedent regarding contract rights in particular. *See Lynch v. U.S.*, 292 U.S. 571, 579 (1934) (term insurance policies); *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose . . ."); *Contributors to Pa. Hosp. v. Philadelphia*, 245 U.S. 20, 22-24 (1917) (contract taken by eminent domain).[28]

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[27] Intangible property protected by the Takings Clause has included employee and retirement benefits, *Eastern Enters. v. Apfel*, 524 U.S. 498, 522-38 (1998); interest earned on bank accounts, *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998); trade secrets, *Ruckelshaus*, 467 U.S. at 1003-04; interest on monies deposited in state court registry, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); a materialmen's lien, *Armstrong v. U.S.*, 364 U.S. 40, 44 (1960); and a real estate lien, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935).

[28] Other federal courts have found contracts to be property rights. *See Buffalo Teachers Fed'n v. Tobe*, 446 F. Supp. 2d 134, 152 (W.D.N.Y. 2005) (contractual rights to salary increases), *aff'd*, 464 F.3d 362 (2d Cir. 2006); *Cienega Gardens v. U.S.*, 503 F.3d 1266, 1275 (Fed. Cir. 2007) (upholding the ruling in "*Cienega VIII*," *Cienega Gardens v.*

The Town cites the principle that "[s]tate law defines what constitutes property for the purposes of the takings clause of the Fifth Amendment." Town Br. at 23. While state law is a primary source, it is not the only one, and it is important to note that a state, by an overly-restrictive definition of property, cannot restrict the scope of a provision of the federal Bill of Rights. In any event, the issue is not whether state law defines a particular interest as one in real estate. Rather, courts apply the basic axiom that property interests "are not created by the Constitution [but] by existing rules or understandings that stem from an independent source *such as* state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (emphasis added). As part of this analysis, courts consider if the interest is usable, transferable, and exclusive. *See, e.g., Ruckelshaus*, 467 U.S. at 1002; *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945). Thus, the Town's argument that the federal Takings Clause only protects real estate is incorrect.

B. NEE's Environmental Permits Are Protected Interests.

NEE obtained three environmental permits in 2002-03. Federal courts that have addressed the issue have found that vested permits are cognizable property interests under the Takings Clause. *See A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987); *Wheeler v. City of Pleasant Grove,* 664 F.2d 99 (5th Cir. 1981) (same); *see also Scott v. Greenville County*, 716 F.2d 1409, 1421 (4th Cir. 1983) ("Where a previously valid permit has issued and construction begun, a subsequent rezoning that effectively revokes permission to build is a confiscatory taking of the permit itself").

Significantly, NEE's permits had vested by the time of the condemnation. The Branford wetlands permit was protected by General Statutes § 22a-42e, and under local regulations it was assignable and transferable. PE 29 at 1, A67.

_____ (continued)
U.S., 331 F.3d 1319, 1329-30 (Fed. Cir. 2003), that contractual rights to prepay mortgages are property rights); *Tamerlane, Ltd. v. U.S.*, 80 Fed. Cl. 724, 738 (2008).

C. NEE's Option Contract Is A Protected Interest.

Under well-established Connecticut law, "all kinds of property, and every kind of right or interest in property which has a market value cannot be taken *in invitum*, without making just compensation therefor."[29] *Campbell v. City of New Haven*, 101 Conn. 173, 178 (1924); *see Canterbury Realty Co. v. Ives*, 153 Conn. 377, 384-85 (1966) (lessee with an option to renew); *Slavitt v. Ives*, 163 Conn. 198 (1972) (lessee); *Stamford v. Vuono*, 108 Conn. 359 (1928) (holder of an appurtenant easement); *Newington v. Estate of Young*, 47 Conn. Supp. 65, 90-93 (2000) (option to purchase real property must be compensated in eminent domain proceedings); *Texaco, Inc. v. Comm'r of Transp.*, 34 Conn. Supp. 194 (1977) (lessee with an option to renew). Moreover, under Connecticut law only an "aggrieved" person has appeal rights in land use appeals, *see* General Statutes §§ 8-8 and 22a-43, and, significantly, an "aggrieved" person includes an option holder. *E.g., Goldfeld v. Planning & Zoning Comm'n*, 3 Conn. App. 172, 176 (1985). Thus, in Connecticut, an option to purchase real estate is a property interest that, if taken by eminent domain, enjoys the protections of the federal Takings Clause.

There are several jurisdictions where an option is not considered a property right in eminent domain,[30] but Connecticut is not one of them. Courts in several states have clearly held that options are cognizable property interests in eminent domain proceedings. *See*

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[29] In its August 2003 Mot. to Dismiss, the Town conceded that Connecticut "[allows] holders of an unexercised option to participate in a condemnation award." A210.

[30] The Town misstates the law in other jurisdictions. Of the cases cited by the Town, only 14 of 20 involved options that were not compensable in eminent domain proceedings. In one of those states, a different court actually held that options are compensable in eminent domain. *See Cullen & Vaughn Co. v. Bender Co.*, 170 N.E. 633, 636 (Ohio 1930). Thus, the split between the states is closer to 8 to 13, rather than 2 to 20.

Otherwise, the Town relies on cases that do not involve eminent domain – where the court states, often in *dictum*, that options are not "interests" or "estates" in real property for purposes of, for example, bankruptcy law, *see In re Continental Properties, Inc.*, 15 B.R. 732, 736 (Bankr. D. Haw. 1981); breach of contract, *see Kramer v. Schmidt*, 206 P. 620, 621 (Mont. 1922); and the rule against perpetuities. *See Anderson v. Blixt*, 72 N.W.2d 799, 807-08 (N.D. 1955).

United States v. 3,035.73 Acres of Land, 514 F. Supp. 640, 644 (E.D. Ark. 1979); *County of San Diego v. Miller*, 532 P.2d 139 (Cal. 1975); *Sholom, Inc. v. State Roads Comm'n*, 229 A.2d 576 (Md. Ct. App. 1967); *City of Peerless Park v. Dennis,* 42 S.W.3d 814 (Mo. Ct. App. 2001); *State v. Las Vegas Bldg. Materials, Inc.*, 761 P.2d 843 (Nev. 1988); *Nicholson v. Weaver*, 194 F.2d 804 (9th Cir. 1952) (Nevada law); *In re Petition of Governor Mifflin Joint Sch. Auth. (Synes Appeal),* 164 A.2d 221 (Pa. 1960); *Spokane Sch. Dist. No. 81 v. Parzybok*, 633 P.2d 1324 (Wash. 1981); *see also* Nichols on Eminent Domain § 5.02[3][a] ("Recent legal trends support the conclusion that the owner of an unexercised option to purchase land possesses a property right that is compensable in eminent domain").

The Town relies on *Pro-Eco, Inc. v. Board of Commissioners of Jay County*, 57 F.3d 505, 511 (7th Cir. 1995), where the court held that the Takings Clause did not apply to an option contract. *Pro-Eco*, however, wrongly determined that the U.S. Supreme Court's 1934 *Lynch* decision, recognizing contracts as property under the Takings Clause, had been overruled. *Id. Lynch* was reaffirmed in *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 54 (1986) and since 1995 has been affirmed again. *See Cherokee Nation v. Leavitt*, 543 U.S. 631, 646 (2005). As discussed above, other federal courts (including the Second Circuit) have relied on *Lynch* since 1995 to find that contracts are cognizable under the Takings Clause.

The only Connecticut case cited by the Town for its argument about options not being real estate is *Patterson v. Farmington Street Ry. Co.*, 76 Conn. 628 (1904), which was an *in rem* proceeding brought to compel a nonresident defendant to perform a contract for the sale of corporate bonds. That case did not involve eminent domain and held only that an option to buy bonds did not give the option holder a property interest in the bonds. This holding is plainly at odds with the Connecticut cases cited above. *Patterson* most likely has never been expressly addressed by later eminent domain cases because the issue was the court's jurisdiction over a non-resident, which depended on whether the contract was for real property or personalty. *Patterson*'s comment on the nature of an

option, 76 Conn. at 642, is *dictum*, and the case is certainly not a root case in Connecticut eminent domain law.

Finally, NEE's particular option had the characteristics recognized by courts as evincing a protected interest. The option was assignable, PE 22, A27 at ¶ 12(A),[31] and granted NEE the exclusive right to purchase the property. *Id.* ¶ 12(A); *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982). The agreement also granted NEE the rights to prepare a development plan for the property and to obtain the necessary land use permits, which it did. PE 22, ¶ 4. It provided access "for all purposes of surveying, conducting engineering studies, inspection and testing for the presence of hazardous wastes, making soil tests and borings, and other similar uses and purposes." *Id.*, ¶ 8(J). And as a condition to accessing the property, it required NEE to obtain insurance.[32] *Id.*

The Town urges this Court (at 25) to alter substantive Connecticut law by overruling the line of decisions cited above, dating back to *Campbell* in 1924, recognizing in eminent domain "all interests that have value." *Stare decisis* counsels against this, especially where the principle has been established for decades and was relied on by the plaintiffs in this case and their real estate counsel in negotiating the option in 2001.

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[31] Paragraph 12(A) provides that the option contract "shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns," and it also allows NEE to transfer it with the owners' consent, although it is freely assignable to an entity involving the principals of NEE.

[32] Contrary to the Town's Brief at 26, options are insurable. *See* Lee R. Russ & Thomas F. Segalla, *3* Couch on Insurance 3d (1997) § 42:64, at 42-80 ("The holder of an option to purchase has an insurable interest in the property to which the option extends").

294 Conn. 785, *; 988 A.2d 209, **;
2010 Conn. LEXIS 41, ***

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TOWN OF BRANFORD v. THOMAS SANTA BARBARA, JR., ET AL.; NEW ENGLAND ESTATES, LLC v. TOWN OF BRANFORD

SC 18089; SC 18091

SUPREME COURT OF CONNECTICUT

294 Conn. 785; 988 A.2d 209; 2010 Conn. LEXIS 41

May 26, 2009, Argued
February 16, 2010, Officially Released

SUBSEQUENT HISTORY: Companion case at New Eng. Estates v. Town of Branford, 294 Conn. 817, 988 A.2d 229, 2010 Conn. LEXIS 42 (2010)

PRIOR HISTORY: [***1]

Appeal, in two cases, by Thomas Santa Barbara, Jr., et al. and New England Estates, LLC, from the statement of compensation filed by the town of Branford in connection with its taking of certain real property by eminent domain, brought to the Superior Court in the judicial district of New Haven, where the cases were consolidated and transferred to the judicial district of Waterbury, Complex Litigation Docket; thereafter, the cases were tried to the court, Cremins, J.; judgments sustaining the appeals and increasing the amount of compensation, from which the town of Branford filed separate appeals.

New Eng. Estates, LLC v. Town of Branford, 2007 Conn. Super. LEXIS 2127 (Conn. Super. Ct., Aug. 3, 2007)

DISPOSITION: Affirmed.

COUNSEL: Wesley W. Horton, with whom were William H. Clendenen, Jr., Kimberly A. Knox and, on the brief, Kevin C. Shea, Kenneth J. Bartschi, David A. Reif, Matthew A. Weiner and Jonathan M. Freiman, for the appellant (defendant town of Branford).

Timothy S. Hollister, with whom were Sheila A. Huddleston and, on the brief, Jill O'Toole, for the appellee (plaintiff New England Estates, LLC).

Linda L. Morkan, with whom, on the brief, were Steven R. Humphrey, Brian R. Smith and Jeffrey J. White, for the appellees (plaintiffs Thomas Santa Barbara, Jr., et al.).

JUDGES: Norcott, Katz, Palmer, Zarella and McLachlan, [***2] Js. * McLACHLAN, J. In this opinion the other justices concurred.

* This case was argued prior to the implementation of the policy of this court to hear all cases en banc.

OPINION BY: McLACHLAN

OPINION

[**211] [*787] McLACHLAN, J. These two consolidated appeals, [1] as well as the two companion cases also decided today; see *Branford v. Santa Barbara*, 294 Conn. 803, 988 A.2d 221 (2010); *New England Estates, LLC v. Branford*, 294 Conn. 817, 988 A.2d 229 (2010); arise from the exercise of eminent domain by the defendant town of Branford (town), with respect to an approximately seventy-seven acre parcel of land, known as 48-86 Tabor Drive, in the south central area of town. The town appeals from the judgments of the trial court in favor of the plaintiffs, [*788] Thomas Santa Barbara, Jr., and Frank Perrotti, Jr., the owners of the subject property at the time of the taking (owners), and the plaintiff, New England Estates, LLC (New England Estates), a developer that had entered into an option contract with the owners to purchase the property. [2] The town claims that the trial [**212] court improperly concluded that the highest and best use of the property was for residential development. The town bases this claim primarily on the contention that, in order for [***3] the trial court to so conclude, it first must have concluded that New England Estates would have prevailed in an appeal pursuant

to General Statutes § 8-30g from the decision of the town planning and zoning commission (zoning commission) denying its application for site plan approval, and that such a conclusion would have been improper. [3] Additionally, the town [*789] claims that the trial court improperly allowed New England Estates' expert witness to testify regarding his opinion that on appeal the trial court would have reversed the denial of New England Estates' affordable housing application. We affirm the judgments of the trial court.

1 On August 16, 2007, the town of Branford filed two separate appeals from the judgments of the trial court to the Appellate Court. Subsequently, we transferred the appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1, and granted a motion by Thomas Santa Barbara, Jr., Frank Perrotti, Jr., and New England Estates, LLC, to consolidate the appeals.

2 In the first case, the town filed a certificate of taking and the owners subsequently sought review of the statement of compensation. In addition to the owners, the first case [***4] also included the following parties: National Railroad Passenger Corporation, Adelbert Mautte, Dorothy Mautte, Dennis Butler, Barbara Butler, Barbara Kennedy, the town sewer authority, Edward Parzyck and Mary Brown.

In the second case, New England Estates sought review of the statement of compensation filed by the town. Thereafter, the trial court consolidated the appeals challenging the statement of compensation. Although the first case is captioned *Town of Branford v. Thomas Santa Barbara, Jr., et al.*, because the town filed the certificate of taking, "[t]his court has recognized that the filing of a statement of compensation does not originate a civil action. *Simmons v. State*, 160 Conn. 492, 494 n.1, 280 A.2d 351 (1971)." *Branford v. Santa Barbara*, supra, 294 Conn. 811 n.10. Consequently, we recognize the town as the defendant and New England Estates and the owners as the plaintiffs in these appeals. We refer to these parties by name, however, rather than by party status, in order to avoid any confusion that may result from any contrary identification by the parties in certain pleadings at the trial level.

3 The town also argues that, because neither the owners nor New England Estates [***5] appealed from the zoning commission's denial of the application for site plan approval to develop the property as affordable housing, each of them waived their right to argue that they would have prevailed in such an appeal. Because we conclude that the question of whether New England Estates would have prevailed in an appeal pursuant to § 8-30g is not necessary to the resolution of the present appeals, it is unnecessary for us to resolve whether either of them waived their right to argue that they would have prevailed in an appeal from the denial of the application for site plan approval. Moreover, the town's taking of the land rendered any such appeals moot.

The trial court found the following relevant facts. The property consists of 76.91 acres, and residential development is the predominant use of the land surrounding the property. The property is bordered on the west by Tabor Drive, along which are residences, a church, a cemetery, salt marshes and small industrial sites. The property is bordered on the north by an active railroad line, which separates the property from residential neighborhoods to the north. The northeastern corner of the property abuts Pine Orchard Road. A landfill [***6] borders the property on the southwest, and land owned by the Branford Land Trust makes up the remainder of the southern border of the property. To the east are a dog kennel, a veterinary clinic and more residential neighborhoods. The property is about one mile southeast of the town center and is southeast of the Branford River. Long Island Sound is about three quarters of a mile to the south of the property.

Because the site formerly had been mined for sand and gravel, much of the topsoil has been removed. Wetlands comprise 7.35 acres of the property, including a 4.7 acre pond. Although the northwest portion of the site is within a flood plain, according to a flood insurance rate map dated June 16, 1992, and November 18, [**213] 1983, a majority of that portion of the property is located in an area of minimal flooding. Dirt and gravel roads run through the site, and sewer, water, electricity and [*790] telephone service are available to the property. At the time of the taking in January, 2004, most of the site was zoned IG-2 industrial, and a small portion was zoned R-3 residential. [4] There also was a special development area [5] overlay zone over the entire site. The property previously had been designated [***7] a planned development district, but the town had eliminated that designation for the property in 2002 pursuant to § 35.11 of the town zoning regulations. [6]

4 Chapter II, § 23.12, of the Branford zoning regulations defines IG-2, or "[g]eneral [i]ndustrial [d]istrict # 2" as follows: "These districts consist of areas intended to be used for heavy commercial and industrial development on a less intensive basis than the [general industrial district # 1] [d]istricts. They are designed for occupancy on somewhat larger sites with more spacious set-

backs, in order to assure a high quality of development within the [d]istrict and an agreeable relationship to adjacent districts. Further development of retail, business and residential uses in these districts will be inconsistent with their purpose and the purpose of the districts. Any residential construction would occur under conditions unfavorable for residential occupancy."

Chapter II, § 23.4, of the Branford zoning regulations defines a "[r]esidence R-3 [d]istrict" as follows: "These districts are designed to consist of single family houses on lots of sufficient size to support private sewage disposal systems pending extension of sewers. Institutions [***8] and similar uses will be necessary and appropriate in these districts but only as special uses upon a finding that development will be compatible with the character of the district."

5 Chapter II, § 23.15, of the Branford zoning regulations defines "[s]pecial [d]evelopment [a]rea" as an overlay zoning district that is "in addition to and overlap[ping] one or more other districts for the purpose of defining that area of [t]own in which other districts, including [p]lanned [d]evelopment [d]istricts, may be established and coordinated in accordance with overall plans for development of the area."

6 Chapter III, § 35, of the Branford zoning regulations governs planned development districts, which may be established only within the special development area designated on the town zoning map. Once a planned development district is authorized by the zoning commission, "[t]he development authorized by the [c]ommission shall be completed within five . . . years from the effective date of the [d]istrict, except that the [c]ommission may extend the time for completion for one . . . year periods after public hearing for good cause demonstrated to the satisfaction of the [c]ommission; otherwise the [c]ommission [***9] shall be deemed authorized by the owner or owners of land within the [d]istrict to amend these [r]egulations and the [z]oning [m]ap, deleting the [p]lanned [d]evelopment [d]istrict and establishing for such land the provisions of another zoning district." Branford Zoning Regs., c. III, § 35.11.

[*791] In 1988, notwithstanding the zoning classification of the property as IG-2 industrial, the town had approved a site plan application for the construction of a development on the property consisting of 298 residential condominiums, a community building and a nine hole golf course. In the early 1990's, the owners purchased the property at a foreclosure auction for $ 2.11 million, and in 2001, entered into an option agreement with New England Estates for a purchase price of $ 4.75 million. New England Estates, which had been formed for the purpose of purchasing and developing the property, agreed to pay $ 10,000 per month for the option to purchase, as well as the costs of testing, engineering, site designs, and town approvals for the proposed residential development, including legal fees associated with the approval process. The contract allowed for renewal periods at higher monthly rates, and [***10] subsequent amendments allowed New England Estates to extend the term of the [**214] option agreement. The contract provided for an additional payment at closing of $ 100,000, plus $ 45,000 per revised renewal period.

After entering into the option agreement, New England Estates began its efforts to secure site plan approval for a residential development on the property. Initially intending to resurrect the 1988 plan, it hired the same engineering, planning and landscaping firm that had prepared that plan. Ultimately, New England Estates submitted a plan for a 268 unit development with a golf course. The town's inland wetlands commission and the United States Army Corps of Engineers both granted permits for the site plan, in May, 2002, and March, 2003, respectively. The zoning commission, however, denied New England Estates' application [*792] seeking a new planned development district designation for the property. [7]

7 New England Estates appealed the denial to the Superior Court, but later withdrew the appeal.

In May, 2003, New England Estates submitted a new plan, this time under the affordable housing statute. See General Statutes § 8-30g. The plan called for 354 units, but did not include a golf [***11] course. At the same time, New England Estates sought a modification to the permit it had received from the inland wetlands commission in 2002, for the 268 unit proposed development. In June, 2003, New England Estates once again submitted a site plan application for a 354 unit affordable housing development, this time including a golf course. In August, 2003, the inland wetlands commission informed New England Estates that it would not consider a modification of the 2002 inland wetlands permit, and that an application for a new permit was required. [8]

8 New England Estates appealed the decision of the inland wetlands commission, but later withdrew the appeal.

In July, 2003, the representative town meeting, the town's legislative body, voted to take the property by eminent domain, and on December 18, 2003, the town filed a notice of condemnation and statement of compensation in the amount of $ 1,167,800. That sum was de-

posited with the clerk of the court. In the meantime, the zoning commission conducted public hearings on New England Estates' June, 2003 proposed site plan and § 8-30g application. The town acquired the site by eminent domain on January 5, 2004, and subsequently denied New [***12] England Estates' § 8-30g application. In separate actions, the owners and New England Estates each filed appeals and applications for review of the statement of compensation. The two actions were consolidated and transferred to the complex litigation docket in the judicial district of Waterbury, where they [*793] were tried together before the court. [9] The judgments in those cases give rise to these appeals.

9 Prior to trial, the owners filed an offer of judgment pursuant to General Statutes § 52-192a, for the amount of $ 3,967,800. The town objected to the offer of judgment, contending that § 52-192a is inapplicable to condemnation cases. In a memorandum of decision issued on September 20, 2005, the trial court, *Blue, J.*, agreed with the town and sustained the objection. The owners have appealed that decision in *Branford v. Santa Barbara*, supra, 294 Conn. 806, which was released on the same date as this opinion.

The trial court heard the testimony of two appraisers on behalf of the owners and New England Estates, R. Bruce Hunter and Richard A. Michaud, and one appraiser on behalf of the town, Albert W. Franke III. Hunter and Michaud, both of whom testified that it was reasonably probable that [***13] New England Estates' would obtain [**215] approval for residential development of the property, began with the premise that the highest and best use of the land was residential, while Franke, who concluded that such approval was "highly speculative at best," began with the assumption that the highest and best use was for the land to remain vacant and undeveloped. [10] Hunter, relying on the sales comparison approach, [11] determined that the market value of the land was $ 6.1 million based on the 354 unit affordable housing development proposal, and $ 6.2 million based on the 268 unit market rate housing development proposal. Michaud relied on both the sales comparison approach and the development approach, [12] and arrived [*794] at a valuation of $ 6.9 million under the sales comparison approach and a valuation of approximately $ 6.4 million under the development approach. Giving slightly greater weight to the development approach, Michaud arrived at a final valuation of $ 6.5 million. Franke relied on the sales comparison approach to arrive at a valuation of $ 770,000.

10 Franke agreed with the other experts that the property was not suited, despite its IG-2 zoning classification, for industrial use, [***14] stating that there is a weak market for industrial development of parcels of this size, and that the property had poor accessibility for truck traffic.

11 The sales comparison approach, also known as the market data approach or the comparable sales approach, "is a process of analyzing sales of similar recently sold properties in order to derive an indication of the most probable sales price of the property being appraised. . . . After identifying comparable sales, the appraiser makes adjustments to the sales prices based on elements of comparison." (Internal quotation marks omitted.) *Abington, LLC v. Avon*, 101 Conn. App. 709, 711-12 n.4, 922 A.2d 1148 (2007).

12 The development approach is a type of income capitalization approach for appraising property, specifically adapted to the valuation of "multiple unimproved lots in a subdivision or potential subdivision as a unit." *Lehigh-Northampton Airport Authority v. Fuller*, 862 A.2d 159, 167 (Pa. Commw. 2004), cert. denied, 2005 Pa. LEXIS 3158 (December 29, 2005). "The income capitalization approach consists of the following seven steps: (1) estimate gross income; (2) estimate vacancy and collection loss; (3) calculate effective gross income [***15] (i.e., deduct vacancy and collection loss from estimated gross income); (4) estimate fixed and operating expenses and reserves for replacement of short-lived items; (5) estimate net income (i.e., deduct expenses from effective gross income); (6) select an applicable capitalization rate; and (7) apply the capitalization rate to net income to arrive at an indication of the market value of the property being appraised. . . . The process is based on the principle that the amount of net income a property can produce is related to its market value." (Internal quotation marks omitted.) *Housing Authority v. CB Alexander Real Estate, LLC*, 107 Conn. App. 167, 170 n.6, 944 A.2d 1010 (2008).

The trial court found that the highest and best use of the land was residential, and, accordingly, rejected Franke's opinion. The court relied on the appraisals of Hunter and Michaud, as well as all of the testimony presented during the trial and the court's visual inspection of the property, to arrive at a valuation of $ 4.6 million. [13] In [***16] arriving at its conclusion, the court specifically found that the town had presented no credible evidence of environmental contamination of the site. These appeals followed.

13 The court also awarded the owners and New England Estates interest of 4 percent per annum on $ 3,432,200, the amount by which the award

exceeded the amount that the town had deposited with the clerk of the court when it filed its statement of compensation.

I

The town first claims that the trial court improperly determined that the highest and best use of the property [*795] was for residential development. The town argues that because the property was zoned industrial [**216] at the time of the taking, New England Estates could not have secured approval for a residential development without a zone change. Because it was not reasonably probable that New England Estates would have been successful in obtaining a zone change, the town argues, the trial court's conclusion that the highest and best use of the property was residential was improper. We disagree that the appeal turns on whether New England Estates successfully would have obtained a zone change. Instead, because there were sufficient facts in the record independent of that [***17] issue to support the trial court's finding that the highest and best use of the land is residential, we conclude that the court's determination was not clearly erroneous.

"The owner of land taken by condemnation is entitled to be paid just compensation. Conn. Const., art. I, § 11." *Lynch v. West Hartford*, 167 Conn. 67, 73, 355 A.2d 42 (1974). "[T]he amount that constitutes just compensation is the market value of the condemned property when put to its highest and best use at the time of the taking." (Internal quotation marks omitted.) *Northeast Ct. Economic Alliance, Inc. v. ATC Partnership*, 256 Conn. 813, 828, 776 A.2d 1068 (2001). "Generally speaking, market value is the price that would in all probability -the probability being based upon the evidence in the case-result from fair negotiations, where the seller is willing to sell and the buyer desires to buy." (Internal quotation marks omitted.) *Budney v. Ives*, 156 Conn. 83, 88, 239 A.2d 482 (1968). "The highest and best use concept, chiefly employed as a starting point in estimating the value of real estate by appraisers, has to do with the use which will most likely produce the highest market value, greatest financial return, or [***18] the most profit from the use of a particular piece of real estate. . . . In determining its highest and best use, the [trier] [*796] must consider whether there was a reasonable probability that the subject property would be put to that use in the reasonably near future, and what effect such a prospective use may have had on the property's market value at the time of the taking." (Citations omitted; internal quotation marks omitted.) *Northeast Ct. Economic Alliance, Inc. v. ATC Partnership*, supra, 829.

"Because a change in zoning restrictions obviously could affect the price of real property, where such a change is reasonably probable and not merely a remote or speculative possibility, the probability may properly be considered in the determination of the fair value of the property." (Internal quotation marks omitted.) *Greene v. Burns*, 221 Conn. 736, 745, 607 A.2d 402 (1992). In determining the market value of a property in light of a reasonably probable zone change, "the true issue is . . . the value of the property as zoned at the time of the taking as it is affected by the probability of a change." *Budney v. Ives*, supra, 156 Conn. 89. The questions of the highest and best use of the property [***19] and the reasonable probability of a zone change are questions of fact, and a trial court's determination of these issues will not be disturbed unless clearly erroneous. *Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 65, 931 A.2d 237 (2007); *Transportation Plaza Associates v. Powers*, 203 Conn. 364, 375, 525 A.2d 68 (1987).

In reviewing the factual findings of the trial court under the highly deferential, clearly erroneous standard of review, "[w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, [**217] to determine whether it is legally correct and factually supported. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence in the record to support it, the [*797] reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *St. Joseph's Living Center, Inc. v. Windham*, 290 Conn. 695, 706-707, 966 A.2d 188 (2009).

Implicit in the [***20] trial court's finding that the highest and best use of the land is residential is the finding that it was reasonably probable that New England Estates would succeed in obtaining approval to use the land for residential development under at least one of the proposed development plans-either the 354 unit affordable housing development or the 268 unit market rate development-and that it was also reasonably probable that New England Estates successfully would obtain any necessary zone changes. [14] The trial court had more than sufficient evidence before it to support [*798] those implicit factual findings. The court's memorandum of decision recognizes that at the time of the taking, the property was zoned as IG-2 industrial under the town's zoning regulations. The court noted, however, that in 1988, when the property also was zoned as IG-2 industrial, the town approved a proposal for a 298 unit condominium development that would have included a community building and a nine hole golf course. [15] The court considered the following additional facts: [**218] The property was located within a special development area, and previously had been designated a planned de-

velopment district. As part of the town's [***21] plan of conservation and development, adopted in 1997, the town's future land use map designated most of the property for use as moderate to high density residential development. In May, 2002, New England Estates received a permit from the town's inland wetlands commission for its proposal for a 268 unit condominium development [*799] with a nine hole golf course. In March, 2003, in connection with the same proposed development, New England Estates received a permit under 33 U.S.C. § 1344 from the United States Army Corps of Engineers. [16]

14 New England Estates contends that a zone change would not be necessary in order for the property to be approved for use as a residential development because: (1) the town's zoning regulations allow some residential uses in an IG-2 industrial zone; see footnote 4 of this opinion; (2) the special development area overlay applicable to the property would permit the designation of a planned development district pursuant to chapter III, § 35.1, of the Branford zoning regulations, which in turn would allow the land to be used for residential development without any zone change; and (3) the prior, 1988 approval was accomplished without a zone change. The town [***22] contends that the town's zoning regulations prohibit residential development in an IG-2 industrial zone. The town also points to the fact that New England Estates' site plan application sought the creation of a new "[h]ousing [o]pportunity [d]istrict," in the town's zoning regulations, and the designation of the property as a housing opportunity district. Lastly, in response to New England Estates' contention that the creation of a planned development district would not require a zone change, the town points out that the creation of a planned development district results in the modification of the zoning regulations. See Branford Zoning Regs., c. III, § 35.6 (upon establishment of planned development district, "these [z]oning [r]egulations and the [z]oning [m]ap shall be considered to be modified to permit the establishment of the development as approved").

We need not decide whether a zone change was required to develop the land residentially. Instead, we read the trial court's memorandum of decision to include an implicit determination that, if a zone change was required, it was reasonably probable that New England Estates would have obtained one.

15 We recognize that on July 24, 2003, [***23] the zoning commission voted to amend the town zoning regulations, amending the town's plan of conservation and development to remove from the future land use map the designation of the property as intended for moderate/high density residential use to office/industrial use and amending the IG-2 classification by changing the letting of rooms within that classification from a permitted use to a prohibited use. New England Estates' application, however, was filed in June, 2003. Accordingly, the zoning regulations that were in effect at the date of the application apply. See General Statutes § 8-2h (a) ("[a]n application filed with a zoning commission, planning and zoning commission, zoning board of appeals or agency exercising zoning authority of a town, city or borough which is in conformance with the applicable zoning regulations as of the time of filing shall not be required to comply with, nor shall it be disapproved for the reason that it does not comply with, any change in the zoning regulations or the boundaries of zoning districts of such town, city or borough taking effect after the filing of such application").

Although the as it is zoned at the time of the taking; see *Budney v. Ives*, supra, 156 Conn. 89; [***24] the factual circumstances of the present case-particularly the timing of the changes to the zoning regulations in relation to New England Estates' June, 2003 site plan application for an affordable housing development and in relation to the date of the taking-persuade us that the property should be valued as it was zoned at the time of the June, 2003 application. See *New England Estates, LLC v. Branford*, supra, 294 Conn. 824-28.

16 Section 1344 (a) of title 33 of the United States Code, known as the Clean Water Act, authorizes the secretary of the army, acting through the army chief of engineers, to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites. . . ."

The court also found that the property's location is an "ideal setting for residential use," located close to both Long Island Sound and the town center, with considerable frontage on the existing streets of Tabor Drive and Pine Orchard Road. There are residential neighborhoods to the north, east and west of the property. The property has easy access to utilities, including a sanitary sewer line and a municipal water line. Two of the three experts who testified at trial [***25] stated their opinion that it was reasonably probable that New England Estates would be successful in obtaining approval for a residential development on the property. [17] New England [*800] Estates had entered into an option [**219] agreement with the owners, which the trial court recounted in great

detail. That agreement established a purchase price of $ 4.75 million, required New England Estates to pay tens of thousands of dollars monthly for the option, and also required that New England Estates pay the costs of obtaining the necessary approvals for the development. New England Estates diligently sought such approval, filing three separate site plan applications for residential l development of the property. The court also relied on its own visual inspection of the property. Finally, the court found that there was no credible evidence to support the primary reason proffered by the town-that the property was environmentally contaminated-for rejecting the development plan submitted by New England Estates. [18]

17 The town contends that the testimony of the two experts-Hunter and Michaud-is not probative, and instead constitutes mere conjecture. The town cites to *Tandet v. Urban Redevelopment Commission*, 179 Conn. 293, 299, 426 A.2d 280 (1979), [***26] for the proposition that: "Where in the opinion of the appraiser the property is not, on the date of taking, being put to its highest and best use, it is incumbent upon the appraiser to provide the trier with sufficient evidence from which it could conclude that it is reasonably probable that the land to be taken would, but for the taking, be devoted to the proposed use by a prudent investor in the near future." First, we note that we did not state in *Tandet* that the evidence testified to by the experts must in isolation support a trial court's determination that there is a reasonable probability that a property would be put to its highest and best use. On the contrary, the court was entitled to consider the testimony of Hunter and Michaud in the context of *all* the evidence presented at trial relevant to the proposed use of the property, and, as we have explained in this opinion, there was sufficient evidence in the record to support the conclusion that there was a reasonable probability that the property would have been put to residential use but for the taking. Second, we note that both experts testified as to the basis for their conclusion that it was reasonably probable that New [***27] England Estates would obtain the necessary approvals. Specifically, Hunter testified that it was a reasonable assumption that either of the proposed developments-both the 268 unit market rate development and the 354 unit affordable housing development-would have been approved. He based his opinion primarily on the 1988 approval of the 298 unit development proposal, which, he observed, went through with no change in the zoning regulations. Michaud had based his appraisal only on the 354 unit affordable housing development proposal, and testified that, based on his general knowledge of affordable housing applications, it was a reasonable assumption that the development ultimately would be approved. The trial court properly could consider the testimony of the experts as to the probability that the property would be put to use as residential, and evaluate the credibility of that testimony in light of the basis for those opinions, in the context of all of the relevant evidence.

18 In making this finding, the court noted that it had precluded the testimony of the town's expert on the issue of environmental contamination on the basis of the town's failure to disclose the expert within a reasonable [***28] time prior to trial. See Practice Book § 13-4. The town does not challenge in these appeals the court's decision to preclude the expert testimony.

The evidence amply supports the trial court's express determination that the highest and best use of the property was residential, and its implicit determination that it was reasonably probable that New England Estates would obtain the necessary approvals for a residential development, including any necessary zoning changes. We find particularly significant the prior approvals by [*801] both the town inland wetlands commission and the zoning commission of a similar development plan in 1988, prepared by the same engineering, planning and landscaping firm, under the same applicable zoning restrictions. Those prior, 1988 approvals, coupled with the designation of the property on the future land use map as intended for moderate to high density residential use, the 2002 inland wetlands commission approval, the 2003 approval by the United States Army Corps of Engineers, the opinions of the two experts relied upon by the court, the fact that the property's location is ideally suited for residential development, and the fact that the trial court did not [***29] find credible the town's proffered reason for denial of approval for the June, 2003 development plan-that the property was environmentally contaminated-all combine to provide more than enough support for the trial court's findings. We conclude, therefore, that the court's determination that the highest and best use of the land was for residential development, and its underlying, implicit determination that New England Estates would have obtained the necessary approvals and any necessary zoning changes were not clearly erroneous.

The town argues that, in order to affirm the trial court, we must conclude that New England Estates would have prevailed in an appeal pursuant to § 8-30g of the zoning commission's denial of New England Estates' site plan application for the affordable housing development. We disagree. Put most simply, the trial court did not address this issue, and, because there was sufficient,

other evidence to support the trial court's finding, it did not need to resolve the question in order to decide the case.

As we have stated, in reviewing the court's findings for clear error, "we focus [**220] on the conclusion of the trial court, as well as *the method by which it arrived at* [***30] *that conclusion*, to determine whether it is legally correct [*802] and factually supported." (Emphasis added; internal quotation marks omitted.) *St. Joseph's Living Center, Inc. v. Windham*, supra, 290 Conn. 707. It is unnecessary to consider whether a method *not* relied upon by the trial court-namely, a determination of whether New England Estates would have prevailed in an appeal pursuant to § 8-30g-would have had merit. In concluding that it was reasonably probable that New England Estates would have obtained approval for residential development of the property, the court relied on the testimony of experts, evidence of a previous similar approval, the characteristics of the property that render it suitable for residential development, the town's development plan and its own visual inspection of the land. In resolving these appeals, we are required to decide whether the trial court's determination was clearly erroneous based on the record presented. The trial court did *not* rely, in arriving at its determination of highest and best use, on a conclusion that New England Estates would have been required to prevail in an appeal pursuant to § 8-30g, and would have so prevailed. Moreover, the court [***31] did not base its valuation on a specific finding that the property would be developed as an affordable housing development. Rather, it based its valuation at least in part on the testimony of Hunter, who appraised the property based both on the 268 unit market rate development and the 354 unit affordable housing development. Because the record is devoid of evidence that the court based its decision on an evaluation of the merits of an appeal by New England Estates pursuant to § 8-30g, and because there is ample evidence to support the court's determination, it is unnecessary for us to determine whether New England Estates would have prevailed in a § 8-30g appeal.

II

The town next claims that the trial court improperly allowed Mark K. Branse, an attorney who testified as [*803] New England Estates' zoning law expert witness, to offer his opinion that the trial court would have reversed the denial of New England Estates' affordable housing application. We disagree.

Branse testified that it was his opinion that the reasons offered by the zoning commission in denying New England Estates' application would have been insufficient to withstand a challenge in the Superior Court pursuant to § 8-30g. [***32] The town objected that the testimony was inappropriate because it constituted an interpretation of the law, and was testimony as to the ultimate issue in the case. The court overruled the objection. Because we already have concluded in this opinion that the question of whether New England Estates would have prevailed in an appeal of the decision of the zoning commission pursuant to § 8-30g is irrelevant to the resolution of this appeal, it hardly can be said that Branse offered testimony as to the ultimate issue in the case. Similarly, even if the testimony was improperly admitted on the basis that it constituted impermissible legal opinion because the record is devoid of evidence that the court grounded its decision on the likelihood of a successful appeal pursuant to § 8-30g, any error was harmless.

The judgments are affirmed.

In this opinion the other justices concurred.

294 Conn. 817, *; 988 A.2d 229, **;
2010 Conn. LEXIS 42, ***

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NEW ENGLAND ESTATES, LLC v. TOWN OF BRANFORD ET AL.

SC 18132

SUPREME COURT OF CONNECTICUT

294 Conn. 817; 988 A.2d 229; 2010 Conn. LEXIS 42

May 26, 2009, Argued
February 16, 2010, Officially Released

SUBSEQUENT HISTORY: Companion case at Town of Branford v. Santa Barbara, 294 Conn. 803, 988 A.2d 221, 2010 Conn. LEXIS 43 (2010)

PRIOR HISTORY: [***1]

Action pursuant to 42 U.S.C. § 1983 to recover damages from the named defendant et al. for the unconstitutional taking by eminent domain of certain real property, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Waterbury, Complex Litigation Docket; thereafter, the matter was tried to the jury before Cremins, J.; verdict and judgment for the plaintiff, New England Estates, LLC, and the cited in defendants, Thomas Santa Barbara, Jr., et al., from which the named defendant appealed; subsequently, the court, Cremins, J., issued a memorandum of decision awarding attorney's fees to New England Estates, LLC, and Thomas Santa Barbara, Jr., et al., and the named defendant amended its appeal and Thomas Santa Barbara, Jr., et al. filed a cross appeal.

New Eng. Estates, L.L.C. v. Town of Branford, 2008 Conn. Super. LEXIS 2353 (Conn. Super. Ct., Sept. 9, 2008)

Town of Branford v. Santa Barbara, 294 Conn. 785, 988 A.2d 209, 2010 Conn. LEXIS 41 (2010)

DISPOSITION: Affirmed in part; reversed in part; further proceedings.

COUNSEL: Wesley W. Horton and William H. Clendenen, Jr., with whom, were Kimberly A. Knox and, on the brief, Kevin C. Shea, Kenneth J. Bartschi, David A. Reif, Matthew A. Weiner, Jonathan M. Freiman, Kerry R. Callahan and Daniel R. Canavan, for the appellant (named defendant).

Timothy S. Hollister, with whom was Sheila A. Huddleston, for [***2] the appellee (plaintiff).

Linda L. Morkan, with whom, on the brief, were Stephen R. Humphrey, Brian R. Smith and Jeffrey J. White, for the cross appellants (defendants Thomas Santa Barbara, Jr., et al.).

William H. Ethier, Mary Lynn Huett, Kristy M. Rogan and Thomas F. Geselbracht, filed a brief for the National Association of Home Builders et al. as amici curiae.

JUDGES: Norcott, Katz, Palmer, Zarella and McLachlan, Js. * McLACHLAN, J. In this opinion the other justices concurred.

* This case was argued prior to the implementation of the policy of this court to hear all cases en banc.

OPINION BY: McLACHLAN

OPINION

[**234] [*820] McLACHLAN, J. This appeal and cross appeal, along with the companion cases decided today, *Branford v. Santa Barbara*, 294 Conn. 785, 988 A.2d 209 (2010), and *Branford v. Santa Barbara*, 294 Conn. 803, 988 A.2d 221 (2010), arise from the named defendant town of Branford's (town) [1] exercise of eminent domain with respect to an approximately seventy-seven acre parcel of land, known as 48-86 Tabor Drive. In this action [*821] brought pursuant to 42 U.S.C. § 1983 (§ 1983 action), [2] the town appeals [3] from the judgment rendered, following a jury trial, in favor of the cited in defendants, Thomas Santa Barbara, Jr., and Frank Perrotti, [***3] [**235] Jr., the owners of the subject property at the time of the taking (owners), and

the plaintiff, New England Estates, LLC (New England Estates) a developer that had entered into an option contract with the owners to purchase the property. [4] The town claims that: (1) the trial court lacked subject matter jurisdiction because New England Estates and the owners failed to seek first a mandatory injunction for the return of the property, thus rendering their § 1983 action unripe; (2) the judgment in favor of New England Estates was improper because it did not have a compensable interest under the takings clause of the fifth amendment of the federal constitution; (3) because New England Estates and the owners already had recovered just compensation for the taking in their appeal challenging the statement of compensation filed by the town (valuation appeal); see *Branford v. Santa Barbara*, supra, 294 Conn. 785; the § 1983 action was barred by the doctrine prohibiting double recovery in general, and, more specifically, barred by the doctrines of res judicata and collateral estoppel, as well as the takings clause itself; (4) the takings clause protects only against takings that are not [*822] for a public [***4] use and provides no protection against takings that are based on pretext or constitute abuses of power; and (5) the trial court improperly awarded attorney's fees to New England Estates and the owners. [5] In their cross appeal, the owners claim that the trial court improperly denied them attorney's fees and costs in connection with the valuation appeal. We reverse the judgment in favor of New England Estates, and reverse the award of attorney's fees to New England Estates. We affirm the judgment in favor of the owners and affirm the award of attorney's fees to the owners for work performed in the § 1983 action. We reverse the denial of attorney's fees to the owners for work performed in connection with the valuation appeal, and remand the matter to the trial court for a determination of reasonable attorney's fees in connection with that case.

1 The complaint originally named Anthony DaRos, Francis Walsh, Robert Denhardt, Jr., and Georgette Laske as defendants, but claims against those parties subsequently were withdrawn. In addition, Thomas Santa Barbara, Jr., and Frank Perrotti, Jr., were cited in as defendants and later filed a cross complaint against the town. For convenience, we refer [***5] to the parties by name rather than by party status.

2 Title 42 of the United States Code, § 1983, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any [s]tate . . . subjects, or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the [c]onstitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

3 The town appealed from the judgment of the trial court to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

4 The trial court granted the motion by New England Estates to cite in the owners as necessary and indispensable parties. See General Statutes §§ 52-102 and 52-108; Practice Book § 9-6.

5 The town also claims that New England Estates failed to present sufficient evidence of lost profits. Because we conclude that New England Estates, as the holder of an unrecorded, unexercised option to purchase the property, does not hold a property interest protected by the takings clause, we [***6] need not address the town's claim that the award of lost profits to New England Estates was improper.

Additionally, because the town did not prevail in the valuation appeal; see *Branford v. Santa Barbara*, supra, 294 Conn. 789; we need not address its claim that if it had prevailed in the valuation appeal, the judgment in the § 1983 action should also be reversed.

The jury reasonably could have found the following relevant facts. The owners purchased the subject property in 1991 at a foreclosure sale. The property was zoned as IG-2 industrial, with a small area designated as R-3 residential. The property also had an overlay zone designation as a special development area. In such an area, special development is allowed consistent with the unique characteristics of the land, when it is established that another zoning district could not be established to accomplish the proposed purpose of the development, and that the proposed use is consistent [*823] with any comprehensive plan of development adopted by the planning and zoning commission (zoning commission) for the special development area. In 1988, the property previously also had been designated as a planned development [**236] district at the time [***7] of an approval of a plan for residential development of the land. The town's future land use plan designated the property for use as moderate to high-density residential.

From approximately 1985 through 1998, the owners operated the town's landfill, which abuts a portion of the property. Since 1991, the landfill has accepted only bulky waste; prior to that point, the landfill had also accepted solid waste. The owners contracted with Fuss and O'Neill, Inc. (Fuss & O'Neill), a consulting engineering company that specializes in, among other things, solid waste management, industrial and hazardous waste management, site plan engineering, environmental engineering, water resources engineering and environmental field

services, to ensure that the landfill complied with the regulations and standards established by the state department of environmental protection (department). Fuss & O'Neill performed all required testing of the landfill on a quarterly basis, and prepared annual reports in connection with those assessments. During the fourteen years that the owners operated the landfill, Fuss & O'Neill reported no violations of the department's standards.

In 1988, Codespoti and Associates, P.C. [***8] (Codespoti), a landscape design firm, was retained by a prior owner of the property to prepare a site plan application for the residential development of the property. The plan, comprising 298 units and a golf course, was approved by the zoning commission that year. At that time, the town expressed no concerns regarding any potential environmental contamination of the property based on its proximity to the landfill, nor did the town indicate [*824] that it had any interest in developing playing fields on the property. The plan was never developed.

In 2001, the owners entered into an option agreement with New England Estates, by which New England Estates agreed to make monthly payments to the owners for the exclusive option to purchase the property for $ 4.75 million which subsequently was increased by agreement to $ 4.85 million. Pursuant to the option agreement, New England Estates was responsible for obtaining all necessary permits for the development of the land. New England Estates retained Codespoti to prepare the site plan application for its planned development of the property. Codespoti worked from the plan he had developedin 1988, and made some modifications to it, including reducing [***9] the number of units per building from six to four, for a total of 268 units in the development, with a golf course as part of the development. In May, 2002, the town inland wetlands commission granted a five year permit to New England Estates for the proposed development on the property. In March, 2003, New England Estates obtained a permit from the United States Army Corps of Engineers, which was required due to the property's location near a tidal wetlands area. Those two permits represented the limit of New England Estates' success in obtaining approval for the development.

In November, 2002, the zoning commission denied approval for New England Estates' site plan application. In its notice of decision denying the permit, the zoning commission found that the proposed development did not satisfy the requisite standards for creating a new planned development district because the high density of the proposed development was inconsistent with surrounding neighborhoods, which are low and moderate density residential. The zoning commission also found that a multifamily zoning district could have accomplished the same proposed purpose, and further [*825] expressed concerns regarding [**237] road access [***10] and flood control. The notice of decision expressed no concerns and made no findings regarding potential environmental contamination of the property from the landfill, nor did it indicate that the town had any interest in developing playing fields or establishing any other use on the property.

On June 18, 2003, New England Estates submitted a second site plan application, this time proposing an affordable housing development of 354 units. [6] In connection with the proposal, New England Estates requested a modification of its inland wetlands permit. Jeffrey Gordon, the president of Codespoti, testified that, with respect to wetlands impact, the only significant difference between the proposal that had received inland wetlands approval in May, 2002, and the June, 2003 proposal was that the June, 2003 proposal was designed in such a way that drainage from the development would have lesser impact on wetlands. Otherwise, the two plans had similar "footprints"; that is, the roadway, the number of buildings and bedrooms, the drainage, soil amendments, the utilities, and the phasing of construction would involve only minor changes, resulting in a slightly smaller "footprint" for the June, 2003 [***11] proposed development. The inland wetlands commission declined to grant the modification of the existing permit, and instructed New England Estates that it was required to submit an application for a new inland wetlands permit in connection with the development.

6 The application originally was submitted in May, 2003, but was modified and resubmitted in order to comply with requested changes by the inland wetlands commission.

Intemal communications among various town actors viewed in conjunction with the timing of the town's actions in response to New England Estate's proposals [*826] revealed that the town was not receptive to an affordable housing development. In a memorandum dated October 22, 2002, Shirley Rasmussen, the town planner, informed the first selectman, Anthony DaRos, and Ellsworth McGuigan, of the zoning commission, of the possibility that New England Estates might submit an affordable housing proposal. The memorandum detailed relevant affordable housing statutes, discussed various strategies that had been implemented by the town with the purpose of "protecting the [t]own against affordable housing appeals" and suggested updating some town regulations to comply with state standards. [***12] On April 28, 2003, the owners informed Rasmussen that they soon would submit a site plan proposal for an affordable housing development. Rasmussen conveyed that information to DaRos. On May 21, 2003, the town board of selectmen voted unanimously to refer to the represen-

tative town meeting [7] a proposal to acquire the property-by eminent domain if necessary-in order to investigate and remediate environmental contamination and possibly to develop the property as playing fields. Shortly after the board of selectmen voted to refer the proposal to acquire the property to the representative town meeting, DaRos asked Stephen Dudley, the town engineer, to prepare a "sketch" of the property that depicted playing fields on the property.

7 The representative town meeting is the legislative body of the town and has the authority to take property by eminent domain. Any vote by the board of selectmen to seize land must be approved by the representative town meeting in order to have effect.

On June 18, 2003, the administrative services committee of the town [8] (committee) [**238] met to consider whether to authorize the taking of the property. During that meeting, members of the committee represented that the [***13] town had a significant need for playing fields. Dudley's [*827] sketch depicting playing fields on the land was displayed during the meeting and relied upon in discussion. In considering the second reason for the proposed acquisition of the land-environmental concerns due to the property's proximity to the landfill-the committee relied on a five page letter from Fuss & O'Neill to Rasmussen, dated April 16, 2003. [9] The committee did not rely on or refer to the fourteen years worth of annual reports that had been prepared by Fuss & O'Neill documenting their quarterly testing of the landfill and reporting no evidence of environmental contamination by department standards. The committee voted to recess and reconvene on the issue on July 2, 2003. In the meantime, the town board of finance met and recommended that the town appropriate $ 2.5 million for all associated costs related to the acquisition of the land, including legal fees.

8 The administrative services committee is a subcommittee of the representative town meeting. One of the functions of the administrative services committee is to gather information, and report back, regarding matters that have been delegated from the representative town [***14] meeting.

9 At that time, Fuss &O'Neill had been retained by the town for engineering consulting services. David Hurley, a vice president of the company, testified that initial drafts of the letter had been submitted to the town's attomey for comment.

Although both the June 18 and July 2, 2003 meetings of the administrative services committee were public hearings, neither New England Estates nor the owners were notified of the hearings. At the July 2, 2003 meeting, the committee heard testimony from David Hurley, a vice president of Fuss & O'Neill, who is also an environmental engineer and hydrogeologist. Hurley testified regarding the contents of the April 16 letter to Rasmussen, and stated that the information in the letter identified "generic" and "typical" concerns involved in building a residential development near a landfill. He stated before the committee that the information conveyed in the letter attested merely to "possibilities." He was not asked about a much more detailed and technical analysis of the landfill's environmental impact that Fuss & O'Neill had prepared in April, 2002, nor did [*828] the committee members question him regarding the previous environmental testing that [***15] Fuss & O'Neill had performed on the landfill. At trial, Hurley testified that the town never had requested that he inspect or test the property prior to preparing his April 16 letter, or prior to his testimony before the committee on July 2, 2003. [10] At the end of the meeting, the committee unanimously voted to acquire the property and to present its recommendation to the representative town meeting. On July 9, 2003, relying on the recommendation of the committee and in light of the appropriation of funds by the board of finance, the representative town meeting convened and voted to take the land, either by way of negotiation or by eminent domain.

10 In fact, at the subsequent July 9, 2003 meeting, Daniel Baughman, the chairman of the representative town meeting, represented that the town had been denied access to the property, despite the fact that New England Estates expressly had given the town permission to inspect it, and that permission never had been revoked.

New England Estates subsequently initiated the § 1983 action by filing an application for a temporary injunction pursuant to 42 U.S.C. § 1983, alleging that the proposed condemnation by the town was undertaken in bad faith, [***16] and, accordingly, violated the takings clause of the fifth amendment of the constitution of the United States, [11] [**239] article first, § 11, of the constitution of Connecticut, [12] as well as provisions of the state and federal fair housing acts. [13] The owners were cited in as defendants [*829] in the action and filed a cross complaint against the town. On December 15, 2003, the court, *Hon. Anthony V. DeMayo*, judge trial referee, denied the application for a temporary injunction, concluding that New England Estates had failed to establish that: (1) it had no adequate legal remedy; (2) it would suffer irreparable injury; (3) it would likely succeed on the merits; and (4) the balancing of equities favored New England Estates. On December 18, 2003, the town filed a statement of compensation in the Superior Court, and on January 5, 2004, the town filed a certificate of taking.

Both the owners and New England Estates appealed from the statement of compensation in separate actions, which subsequently were consolidated and tried together before the court in the valuation appeal. See *Branford v. Santa Barbara*, supra, 294 Conn. 803. Following the taking, New England Estates amended its complaint in the [***17] § 1983 action to seek only compensatory damages, removing the counts seeking injunctive relief. The valuation appeal and the § 1983 action subsequently were consolidated in the complex litigation docket in the judicial district of Waterbury, and then bifurcated into two separate phases. [14] After the court trial in the valuation appeal concluded, the § 1983 action went to trial before a jury, which found in favor of New England Estates and the owners, and awarded New England Estates $ 12,435,914, and the owners $ 340,000. [15] [*830] The trial court denied the town's subsequent motions to set aside the verdicts and for judgment notwithstanding the verdicts, and for a new trial and remittitur. This appeal followed. Subsequent to the judgment rendered in accordance with the jury's verdict, and subsequent to [**240] the filing of this appeal, the trial court awarded attorney's fees pursuant to 42 U.S.C. § 1988. [16] In accordance with their separate submissions to the court in support of attorney's fees, the court awarded $ 1,488,587 in fees and costs to New England Estates and $ 275,979 in fees and costs to the owners. The town amended its appeal to challenge the award of attorney's fees, and the owners [***18] cross appealed.

11 The fifth amendment to the United States constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

12 Article first, § 11, of the constitution of Connecticut provides: "The property of no person shall be taken for public use, without just compensation therefor."

13 In the third amended complaint, which is the operative complaint, and in the third amended cross complaint, New England Estates and the owners, respectively, do not allege violations of the state constitution or provisions of the state and federal fair housing acts. The only cause of action brought to trial was the claim raised under 42 U.S.C. § 1983 that the condemnation constituted a wrongful taking in violation of the takings clause of the fifth amendment to the United States constitution.

14 Although there are no written orders in the record reflecting either the consolidation or the subsequent bifurcation of the valuation appeal and the § 1983 action, in its memorandum of decision on the motions for attorney's fees, the trial court stated that it ordered both the consolidation and later bifurcation. The owners assert that the cases had been [***19] consolidated and the town does not challenge this assertion.

15 Specifically, in special interrogatories, the jury found that New England Estates and the owners had proven by a preponderance of the evidence that the town's proffered reasons for taking the property were pretextual or invalid, unreasonable or an abuse of power, and, therefore that the condemnation violated the takings clause of the fifth amendment of the United States constitution. The jury also found that New England Estates had proven by a preponderance of the evidence that it suffered lost profits as a result of the taking in the amount of $ 11,243,876, and lost investment expenses in the amount of $ 1,192,038. With respect to the owners, the jury found that they had proven by a preponderance of the evidence that as a result of the taking, they had suffered lost option payments under the option agreement with New England Estates in the amount of $ 90,000 and that they had suffered the loss of the full option contract price, in the amount of $ 250,000.

16 Title 42 of the United States Code, § 1988 (b), provides in relevant part: "In any action or proceeding to enforce a provision of [section] . . . 1983 . . . the court, [***20] in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ."

I

We first address the town's claim that the court lacked subject matter jurisdiction over the § 1983 action because New England Estates and the owners failed to seek first a mandatory injunction for the return of the property, thus rendering the § 1983 action unripe for review. We conclude that the action was ripe for review.

In *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 192, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) (*Williamson*), the United States Supreme Court established a two part "finality requirement" for § 1983 actions that are premised on a claim that government regulations effect a taking of private property, entitling the property owner to just compensation under [*831] the takings clause. [17] Such a claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue"; id., 186; and "the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the [s]tate for obtaining [***21] such compensation . . . ." Id., 195. The United States Court of Appeals for the Seventh Circuit succinctly has summarized *Wil-*

liamson as standing "for the proposition that there is no uncompensated taking-that is, nothing to litigate under 42 U.S.C. § 1983-until the state has established (a) what it has taken, and (b) its refusal to pay 'just compensation.' " *SGB Financial Services, Inc. v. Indianapolis-Marion County*, 235 F.3d 1036, 1038 (7th Cir. 2000).

17 In setting forth the finality requirement, the court was careful to distinguish it from the requirement that a litigant exhaust state administrative remedies, which is not a prerequisite to bringing an action pursuant to § 1983. *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982); see also *Fetterman v. University of Connecticut*, 192 Conn. 539, 549, 473 A.2d 1176 (1984) (*Patsy* rule finding no exhaustion requirement applies with equal force when § 1983 action brought in state court).

The first prong of the test applies solely in the context of cases such as *Williamson* itself, in which the primary issue presented was whether there was a taking at all. *Williamson Planning Commission v. Hamilton Bank*, supra, 473 U.S. 185. [***22] This first portion of the *Williamson* inquiry "is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." Id., 193. As Judge Easterbrook explained in *SGB Financial Services, Inc. v. Indianapolis-Marion* [*832] *County*, supra, 235 F.3d 1038, the first prong of *Williamson* [**241] requires that a property owner establish what the government has taken. Although that inquiry is often the primary issue in a regulatory takings case, in a case such as the present one, in which the town has physically taken the land, there is no question as to the extent of the taking. See *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 93 (2d Cir. 1992) (contrasting physical and regulatory takings). It is very clear what the town has taken; therefore, the first prong of *Williamson* is not applicable to the § 1983 action. See, e.g., *Montgomery v. Carter County*, 226 F.3d 758, 766 (6th Cir. 2000) ("[w]hen [***23] the state has physically occupied or invaded the plaintiff's property, there is generally no need to ask the relevant state decisionmaker to clarify its final position in order to determine whether a taking has occurred").

Moreover, the town's claim that New England Estates and the owners were required to seek a mandatory injunction ordering the return of the property so that the exact scope of the taking could be clarified is based on a misunderstanding of the first *Williamson* prong. A mandatory injunction, if granted, would constitute a judicial remedy for a violative action, not a final decision on the part of the town clarifying the scope of the taking. As we have stated, the extent of the taking is not in doubt. New England Estates and the owners were not required to seek such relief prior to bringing this § 1983 action.

Although the town did not rely on the second prong of the *Williamson* ripeness inquiry, we address it because it implicates subject matter jurisdiction. *Soracco v. Williams Scotsman, Inc.*, 292 Conn. 86, 91, 971 A.2d 1 (2009) ("concerns regarding subject matter jurisdiction implicate the court's fundamental authority and may properly be raised and decided by the court [***24] sua sponte"). Unlike the first prong of *Williamson*, the [*833] requirement that a property owner seeking to bring an action pursuant to 42 U.S.C. § 1983 challenging a taking must first *unsuccessfully* seek just compensation through state proceedings does apply to physical takings. *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003). As we explain in part III C of this opinion, however, the present case involves the highly unusual circumstance in which just compensation is not at issue. Instead, the issue is whether the town's condemnation of the land violated the constitutional rights of the owners and New England Estates because it did not comply with the public use requirement of the takings clause. Because the second prong of *Williamson* does not apply to a claim that a government actor's taking of private property violated the public use requirement, there is no jurisdictional bar to our consideration of the issue on appeal. See *Montgomery v. Carter County*, supra, 226 F.3d 766-67.

II

We next address the town's claim that New England Estates' unrecorded, unexercised option to purchase the property is not an interest that is compensable under the takings clause of the fifth amendment. [***25] We conclude that, because such an interest is not considered a property interest under Connecticut state law, New England Estates' contractual right is not a property right protected by the federal takings clause.

The option contract between the owners and New England Estates granted to New England Estates the exclusive right to purchase the property. The initial term of the agreement was for six months, and New England Estates had the right to seek extensions of the agreement. The contract set a purchase price for the premises [**242] of $ 4.75 million. [18] The contract further required New England Estates to make monthly option [*834] payments to secure the option, initially at $ 10,000 per month, and increasing during renewal periods to $ 15,000 per month. One half of all the option pay-

ments was to be applied to the purchase price of the property. As part of the agreement, New England Estates was obligated to obtain the necessary permits and approvals to proceed with the planned development of the property. The contract granted to New England Estates the right to enter upon the premises for the purposes of inspecting and testing the property for any contamination, and as necessary in the pursuit [***26] of any permits and approvals for the development of the land. New England Estates agreed to purchase insurance to cover any risks associated with such entry upon the land. New England Estates did not record its option in the land records.

18 The initial price of $ 4.75 million was later increased to $ 4.85 million.

"The [f]ifth [a]mendment, made applicable to the [s]tates through the [f]ourteenth [a]mendment . . . provides that private property shall not be taken for public use, without just compensation. Because the [c]onstitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." (Citation omitted; internal quotation marks omitted.) *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 163-64, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998); see also *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) ("Property interests, of course, are not created by the [c]onstitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such [***27] as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."). Accordingly, we look to the laws of our state to determine whether New England Estates' right under the [*835] option contract was a protected property interest under the takings clause.

This court already has concluded that an option contract conveys no property interest to an optionee. In *Patterson v. Farmington Street Railway Co.*, 76 Conn. 628, 634, 57 A. 853 (1904), the plaintiff entered into an option contract with the defendant, Coykendall, to purchase 135 out of a total of 315 mortgage bonds of the Hartford and West Hartford Horse Railroad Company. When the plaintiff tendered the agreed upon price for the bonds, Coykendall refused to convey them to him. Id., 633. Instead, Coykendall and two others, Soop and Greeley, purchased all the rights, property and franchises of the company, and formed the Farmington Street Railway Company to take over the property. Id. Upon the transfer, Coykendall, Soop and Greeley divided the stock of the new company among themselves. Id. The plaintiff brought an action seeking delivery of the original 135 bonds to him, or the transfer [***28] to him of a comparable share of the stock in the new company. Id. The court reasoned that the plaintiff's alleged equitable right to the stock depended on the legal effect of the option contract. The court then examined the nature of an option contract, which "affects for a limited time one right incident to absolute ownership, namely, the right to sell at pleasure, but does not otherwise affect the ownership." Id., 642. The limited rights conveyed under an option contract compelled the court's conclusion that "[s]uch a contract gives no property interest in its subject-matter." [19] [**243] Id. In Connecticut, therefore, under *Patterson*, an option contract does not [*836] create a property interest. [20] Applying that principle in the context of federal takings jurisprudence; see *Board of Regents v. Roth*, supra, 408 U.S. 577; New England Estates' unexercised option to purchase the land does not create a property interest that is protected under the taking clause.

19 New England Estates' rights under the option contract were further limited by a clause prohibiting it from assigning its rights under the agreement without the express written consent of the owners, unless the assignment were to an entity [***29] having the same principals as New England Estates itself.

20 New England Estates has not argued that we should overrule *Patterson*, and we decline to do so.

New England Estates also contends that the permits that it had obtained created a property interest that was protected under the takings clause. [21] Any rights that New England Estates had pursuant to the permits, however, were tied to its rights under the option contract, which we already have concluded did not give rise to a property interest for purposes of the takings clause. New England Estates cites to federal authority for the proposition that a permit may give rise to a property interest protected under the takings clause, but all of those cases involved permits that had been obtained by the *owners* of the property in question. See, e.g., *A.A. Profiles, Inc. v. Fort Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988) (building permits obtained by [*837] property owner created compensable property interest), cert. denied, 490 U.S. 1020, 109 S. Ct. 1743, 104 L. Ed. 2d 180 (1989); *Wheeler v. Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981) (same), cert. denied, 456 U.S. 973, 102 S. Ct. 2236, 72 L. Ed. 2d 847 (1982). New England Estates has [***30] not cited to a single case in which a court concluded that an optionee, prior to exercising its rights under the option, held a compensable interest in permits that had issued in connection with the subject property. [22] We conclude, therefore, that New England Estates did not have a compensable property interest [**244] in the permits. Because our conclusion that New England Es-

tates lacked a property interest protected under the takings clause renders the remaining issues irrelevant with respect to New England Estates, we address those claims only with respect to the owners.

21 The town suggests that, because the court did not instruct the jury that New England Estates had a protected property interest that arose from the permits that it had obtained, and because New England Estates does not now challenge the court's failure to so charge, New England Estates' claim that it had a protected property interest in the permits is not properly before this court. We disagree.

The question of whether New England Estates had a protected property interest is a question of law, not an issue decided by the jury. The court instructed the jury as follows: "I instruct you that as of January, 2004, when the town [***31] . . . took the seventy-seven acres by eminent domain, New England Estates had a constitutionally protected interest under the takings clause of the fifth amendment to the United States constitution in the property. That interest arose from the option agreement that it had with [the owners] to purchase the seventy-seven acre property." New England Estates took an exception to the charge, arguing that its property interest arose from the option contract and the permits, taken together. New England Estates' exception to the charge preserved its claim that, as a matter of law, the permits constituted a protected property interest.

22 New England Estates cites to one case that involved a nonproperty owner's claim that he had a compensable interest in a permit. See *Scott v. Greenville County*, 716 F.2d 1409, 1421 (4th Cir. 1983). In *Scott*, however, the United States Court of Appeals for the Fourth Circuit concluded that the plaintiff, who held only an option to purchase the subject property, did not have a property interest in permits that he sought in connection with a proposed development of the land protected by the takings clause because the permits had not yet been issued to the plaintiff. [***32] Id., 1421-22. Accordingly, the court did not reach the issue of whether permits that had been issued to an optionee would constitute a protected property interest.

III

We next address the town's claims that the owners' recovery in the § 1983 action violated the rule of double recovery in general, and, more specifically, that the action was barred by the doctrines of collateral estoppel, res judicata and the takings clause itself, which the town contends prohibits separate recovery for the same taking under the just compensation and public use clauses. [23] We disagree.

23 Because the owners do not argue, in response to the town's claim that the § 1983 action is barred by the doctrines of collateral estoppel and res judicata, that the doctrines do not apply to bar the second phase of a bifurcated proceeding on the basis of a final judgment arrived at in the first phase, we do not address that issue.

[*838] The following additional procedural facts are necessary to the resolution of these claims. The jury awarded the owners $ 340,000 in damages based on the rights that the owners had pursuant to the option contract with New England Estates. Specifically, but for the condemnation of the property on [***33] January 5, 2004, the owners would have been entitled under the contract to receive $ 90,000 in option payments over the course of the next year. In addition, the full option contract price for the purchase of the property was $ 4.85 million. [24] During trial, one of the owners testified that the full option contract price would have entitled them to $ 250,000 more than they ultimately received for the condemnation of the property. The owners had been awarded $ 4.6 million as just compensation in the valuation appeal. See *Branford v. Santa Barbara*, supra, 294 Conn. 794. Thus, the jury awarded the owners the difference between the full option contract price and the amount recovered as just compensation, and $ 90,000 in additional option payments.

24 Although the original purchase price had been $ 4.75 million, that price later had been increased to $ 4.85 million by agreement of the parties.

A

We first address the town's claim that the § 1983 action was barred by the doctrine of collateral estoppel. Under Connecticut law, "[c]ollateral estoppel, or issue preclusion, prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action. [***34] . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . . The doctrine of collateral estoppel is based on the public policy that a party should not be ableto relitigate a matter which it already has had an opportunity to litigate." (Citations omitted; intemal [*839] quotation marks omitted.) *Aetna Casualty & Surety Co. v. Jones*, 220 Conn. 285, 296, 596 A.2d 414 (1991). "An issue is actually litigated if it is properly raised in the

pleadings or otherwise, submitted for determination, and in fact determined. . . . 1 Restatement (Second), Judgments § 27, comment (d) (1982). An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered." (Internal quotation marks omitted.) *Carol Management Corp. v. Board of Tax Review*, 228 Conn. 23, 32-33, [**245] 633 A.2d 1368 (1993). "In order for collateral estoppel to bar the relitigation of an issue in a later proceeding, the issue concerning which relitigation is sought to be estopped must be identical to the issue decided [***35] in the prior proceeding. . . . [T]he court must determine what facts were necessarily determined in the first trial, and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding." (Internal quotation marks omitted.) *Aetna Casualty & Surety Co. v. Jones*, supra, 297. We must determine, therefore, whether the issues litigated in the § 1983 action are identical to any of the issues litigated and necessarily decided in the valuation appeal.

The valuation appeal arose from the separate appeals by New England Estates and the owners challenging the statement of compensation filed by the town in connection with the taking. *Branford v. Santa Barbara*, supra, 294 Conn. 792. Those appeals were consolidated and tried together in the complex litigation docket in the judicial district of Waterbury. The sole issue before the court was whether the town had paid just compensation for the property, and with respect to that issue, the primary dispute concerned whether the highest and best use of the land was residential, as New England Estates and the owners claimed, or, as the town contended, as undeveloped and vacant land. Id., 793. In [*840] arguing that the highest [***36] and best use of the land could not be residential, the town relied primarily on the fact that the land was zoned as IG-2 industrial. Accordingly, both sides presented considerable testimony and evidence regarding New England Estates' attempts to obtain permits for residential development of the land, and the prior approval of the land for residential development. Id., 791-93. New England Estates and the owners presented testimony of two appraisers who took as their starting point that the highest and best use of the land was residential and testified as to the value of the property based on relevant comparable sales of residential developments. Id., 793. The town's appraiser testified as to comparable sales on the basis of a starting assumption that the highest and best use for the property was as vacant and undeveloped land. Id., 793-94. On the basis of its finding that the highest and best use of the land was residential, the trial court relied on the testimony of the appraisers retained by New England Estates and the owners to arrive at its independent valuation of the property as $ 4.6 million. Id., 794.

Notably, the question of whether the taking was in any way wrongful or in violation [***37] of the public use requirement of the fifth amendment to the United States constitution was not at issue in the valuation appeal. The only issue litigated was the question of whether the town had offered just compensation for the land. By contrast, in the § 1983 action, the "value" of the property was not litigated in the trial court, nor is it at issue on appeal. Instead, the issue litigated in the § 1983 action is whether the town, by acting in bad faith in exercising its eminent domain power, violated the public use requirement of the taking clause. Although the finding of the trial court in the valuation appeal that the highest and best use of the land was residential was given preclusive effect in the § 1983 action; see footnote 30 of this opinion; that finding was relevant only insofar [*841] as it pertained to whether the town acted in bad faith in denying approval for the residential development of the land. No appraisers testified in the § 1983 action as to the highest and best use of the land; no evidence of comparable [**246] sales was offered. It is true that testimony was offered regarding the efforts of New England Estates to obtain permits for the residential development of the land [***38] and that similar testimony was offered in the valuation appeal. In the valuation appeal, however, that testimony was offered as relevant to the claim of New England Estates and the owners that the highest and best use of the land was residential and, thus, that the fair market value of the land should be measured accordingly. See *Branford v. Santa Barbara*, supra, 294 Conn. 795-96. In the § 1983 action, by contrast, that testimony was elicited by New England Estates and the owners in order to establish that the town had acted in bad faith in taking the property by claiming that its reasons for the taking were to investigate and to remediate any environmental contamination on the property, and for the possible development of playing fields, when in fact the town's real purpose was to prevent the proposed residential development of the property.

Moreover, the damages recovered in the § 1983 action and the valuation appeal are not identical. The damages recovered in the valuation appeal were limited to the fair market value of the land, defined as "the price that would in all probability-the probability being based upon the evidence in the case-result from fair negotiations, where the seller [***39] is willing to sell and the buyer desires to buy." (Internal quotation marks omitted.) *Budney v. Ives*, 156 Conn. 83, 88, 239 A.2d 482 (1968); *Branford v. Santa Barbara*, supra, 294 Conn. 796. The damages sought and recovered in the § 1983 action essentially constituted consequential damages. New England Estates was awarded its lost profits; but see [*842] part V A of this opinion; and the owners recovered their contract damages. These damages were not litigated or decided in the valuation appeal. The only

element shared by the two issues is that both claims arose from the same set of events-namely, the town's taking of the land. That fact alone, however, is not sufficient to render these two issues identical. Although there was some overlap in evidence presented at both trials, the essential proof in each case was starkly different. Put simply, the valuation appeal required a showing that the compensation was inadequate; the § 1983 action required a showing that the town had been dishonest about its reasons for taking the land and had used a pretext to deprive the owners of the value of their bargain. The two issues are not even remotely identical. Accordingly, the § 1983 action is not barred [***40] by the doctrine of collateral estoppel.

B

The town next claims that the § 1983 action is barred by the doctrine of res judicata. "The doctrine of res judicata holds that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. . . . If the same cause of action is again sued on, the judgment is a bar with respect to any claims relating to the cause of action which were actually made or *which might have been made.*" (Emphasis added; internal quotation marks omitted.) *Powell v. Infinity Ins. Co.*, 282 Conn. 594, 600, 922 A.2d 1073 (2007). "The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." *Fink v. Golenbock*, 238 Conn. 183, 191, 680 A.2d 1243 (1996).

[**247] [*843] "We have adopted a transactional test as a guide to determining whether an action involves the same claim as an earlier action so as to trigger operation of the doctrine [***41] of res judicata. [T]he claim [that is] extinguished [by the judgment in the first action] includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. . . . In applying the transactional test, we compare the complaint in the second action with the pleadings and the judgment in the earlier action." (Citations omitted; internal quotation marks omitted.)*DeMilo & Co. v. Commissioner of Motor Vehicles*, 233 Conn. 281, 294, 659 A.2d 162 (1995).

"Finally, we recognize that a decision whether to apply the doctrine of res judicata to claims that have not actually been litigated should be made based upon a consideration of the doctrine's underlying policies, namely, the interests of the [***42] defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim. We have stated that res judicata should be applied as necessary to promote its underlying purposes. These purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation. . . . The judicial [doctrine] of res judicata . . . [is] based on the public policy [*844] that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest. . . . We review the doctrine of res judicata to emphasize that its purposes must inform the decision to foreclose future litigation. The conservation of judicial resources is of paramount importance as our trial dockets are deluged with new cases daily. We further emphasize that where a party [***43] has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding." (Citation omitted; internal quotation marks omitted.) *Fink v. Golenbock*, supra, 238 Conn. 192-93.

Application of these principles to the present facts is not a simple matter. On the one hand, the valuation appeal and the § 1983 action are readily distinguishable. As we already have explained in our discussion of the town's collateral estoppel claim, these two actions raise different issues and seek different damages. See part III A of this opinion.

On the other hand, both actions arise from a single transaction: the taking of the property. The town's actions in denying the permits despite prior approval of a similar development, offering pretextual reasons for the taking in response to the affordable housing development proposal, bolstering the "evidence" supporting those pretextual reasons so shortly prior to the final vote to take the land, and in filing a statement of compensation consistent with its position that the highest and best use of the land was as vacant and undeveloped land, are very closely related [**248] in time, space, origin, and motivation. A straightforward [***44] application of the transactional test could yield the conclusion that res judicata bars the § 1983 action.

[*845] We cannot lose sight, however, of the fact that the doctrine of res judicata is driven by the principle of judicial economy, and not by the mechanistic applica-

tion of the transactional test. That principle must be balanced with the policy of allowing a party to vindicate a just claim. We must therefore confine the application of res judicata to matters that the parties had an opportunity to litigate in the valuation appeal. The question remains whether the owners could have raised their § 1983 claim that the town wrongfully took the land in violation of the public use requirement of the fifth amendment, or sought the recovery of their contract damages in the valuation appeal.

General Statutes § 8-132 (b) (1) specifies the procedure to be followed in reviewing the statement of compensation as follows: "[T]he judge trial referee, after giving at least ten days' notice to the parties interested of the time and place of hearing, shall hear the applicant and the redevelopment agency, shall view the property and take such testimony as the judge trial referee deems material and *shall thereupon* [***45] *revise such statement of compensation* in such manner as the judge trial referee deems proper and promptly report to the court. Such report shall contain a detailed statement of findings by the judge trial referee sufficient to enable the court to determine the considerations upon which the judge trial referee's conclusions are based. The report of the judge trial referee shall take into account any evidence relevant to the fair market value of the property, including evidence of environmental condition and required environmental remediation. . . ." (Emphasis added.) The scope of an appeal pursuant to § 8-132, as stated in the statute, is whether, based on evidence relevant to fair market value, the statement of compensation should be revised. This reading of the statute is consistent with our case law. In interpreting the closely related statutory scheme governing the commissioner of transportation's [*846] exercise of eminent domain in connection with the condemnation of land for state highway purposes, we repeatedly have articulated the limited scope of an appeal taken pursuant to General Statutes § 13a-76. [25] See, e.g., *St.* [**249] *John v. Commissioner of Transportation*, 172 Conn. 234, 240, 374 A.2d 190 (1977); [***46] *Plunske v. Wood*, 171 Conn. 280, 284, 370 A.2d 920 (1976). In *Plunske*, for example, we explained that the measure of damages for a partial taking for the purposes of highway construction is "the difference between the market value of the whole tract as it lay before the taking and the market value of what remained of it thereafter." (Internal quotation marks omitted.) *Plunske v. Wood*, supra, 283. Accordingly, we concluded that, although a court assessing damages for a partial taking must consider "any damage to the remainder [that] is a necessary, natural and proximate result of the taking," [*847] evidence of those damages is admissible only insofar as it is "evidence of elements in the decrease in market value," and any damages resulting from the negligence of a contractor working on the related highway improvements would not be recoverable in the condemnation proceeding, but must be sought in an independent action. (Internal quotation marks omitted.) Id., 284.

> 25 General Statutes § 13a-76 provides in relevant part: "Any person claiming to be aggrieved by the assessment of such special damages or such special benefits by the commissioner may, at any time within six months after the same has [***47] been so filed, apply to the superior court for the judicial district within which such land is situated for a reassessment of such damages or such benefits so far as the same affect such applicant. The court, after causing notice of the pendency of such application to be given to the commissioner, may appoint a judge trial referee to make such reassessment of such damages or such benefits. The court or such judge trial referee, after giving at least ten days' notice to the parties interested of the time and place of hearing, shall hear the applicant and the commissioner, may view the land, and shall take such testimony as the court or such judge trial referee deems material and shall thereupon reassess such damages and benefits so far as they affect such applicant. The reassessment by the court or such judge trial referee shall take into account *any evidence relevant to the fair market value of the property*, including evidence of required environmental remediation by the Department of Transportation. The court or such judge trial referee shall make a separate finding for remediation costs, and the property owner shall be entitled to a set-off of such costs in any pending or subsequent [***48] legal action to recover remediation costs for the property. If the amount of the reassessment of such damages awarded to any such property owner exceeds the amount of the assessment of such damages by the commissioner for such land, the court or such judge trial referee shall award to such property owner such appraisal fees as the court or such judge trial referee determines to be reasonable. . . ." (Emphasis added.)

We relied on this line of cases to conclude, in *Albahary v. Bristol*, 276 Conn. 426, 436, 442, 886 A.2d 802 (2005), that a claim for inverse condemnation arising out of pretaking property damage caused by a condemnor may be raised in the context of an appeal seeking review of a statement of compensation pursuant to § 8-132. We reasoned that "[r]equiring separate proceedings would be both unnecessarily duplicative and inconsistent with our case law." Id., 442, citing *Plunske v. Wood*, supra, 171 Conn. 284-85. We distinguished a claim for inverse condemnation, which involves a determination of the compensation to which property owners are entitled, based

on the value of property that is "taken" by virtue of government regulations or acts; *Albahary v. Bristol*, supra, 437 n.9; [***49] from actions that are grounded in personal liability, such as those sounding in tort. Id., 438-39. Damages sought as a result of the latter, we stated, would not be "recoverable in a condemnation proceeding, but must be sought in an independent action." Id., 438. This distinction is consistent with the language of § 8-132, setting forth the scope of review of a condemnation proceeding as limited to the court's review of the statement of compensation, on the basis of any evidence relevant to fair market value. General Statutes § 8-132 (b) (1); see also *Commissioner of Transportation v. Larobina*, 92 Conn. App. 15, 29, 882 A.2d 1265 (concluding that property owner may not, in context of valuation appeal taken pursuant to § 13a-76, challenge validity of condemnation), cert. denied, 276 Conn. 931, 889 A.2d 816 (2005).

[*848] Applying these principles to the present case, we conclude that, in the valuation appeal, the owners could not have raised their claim that the town wrongfully took the property in violation of the public use requirement of the takings clause. The owners' § 1983 action does not seek damages that are measurable with reference to the fair market value of the land, and they do [***50] not seek, by way of 42 U.S.C. § 1983, a review of the statement of compensation. Rather, as we previously have recognized, "the interests protected in a § 1983 action are similar to those protected in common law tort actions. In *Memphis Community School District v. Stachura*, 477 U.S. 299, 305, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986), [**250] the United States Supreme Court stated that 42 U.S.C. § 1983 creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the [c]onstitution. . . . [T]he purpose of § 1983 damages is to compensate persons for actual injuries and the amount of compensation is ordinarily determined by the rules applicable to common law torts." (Citations omitted; internal quotation marks omitted.) *Virgo v. Lyons*, 209 Conn. 497, 502, 551 A.2d 1243 (1988). A claim alleging a civil rights violation pursuant to 42 U.S.C. § 1983 simply cannot be encompassed within the limited scope of review in a condemnation proceeding pursuant to § 8-132. In the valuation appeal, the owners could not have raised their claim that the town violated the public use requirement of the takings clause. Accordingly, we conclude that [***51] the § 1983 action is not barred by the doctrine of res judicata.

C

The town claims that the takings clause itself prohibits the § 1983 action and advances two closely related arguments in support of this claim. First, it contends that just compensation is the only monetary remedy available for a violation of the takings clause and that [*849] the sole remedy for a wrongful taking is injunctive relief barring the taking or ordering the return of the property. Put another way, the town claims that money damages are not recoverable under 42 U.S.C. § 1983 for a wrongful taking unless those damages constitute just compensation. Second, the town claims that, by pursuing the just compensation claim, the owners elected their remedy and waived any claim they may have had challenging the lawfulness of the taking. We disagree with both contentions.

We first address the town's claim that a property owner may not, pursuant to 42 U.S.C. § 1983, recover money damages for a wrongful taking when those money damages are not a part of just compensation. Because the United States Supreme Court has "declined . . . to classify § 1983 actions based on the nature of the underlying right asserted"; *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 711, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999); [***52] we look to the nature of an action brought pursuant to 42 U.S.C. § 1983 in resolving this question. Title 42 of the United States Code, § 1983, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any [s]tate . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the [c]onstitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." With regard to the general purpose of 42 U.S.C. § 1983, the United States Supreme Court has stated that it "was intended not only to 'override' discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights 'where state law was inadequate,' but also to provide a federal remedy 'where the state remedy, though adequate in theory, was not available in practice.' " *Zinermon v. Burch*, 494 U.S. 113, 124, [*850] 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990). Additionally, the court has stated that the remedy available pursuant to 42 U.S.C. § 1983 is "supplementary to any remedy any [s]tate [***53] might have . . . ." (Internal quotation marks omitted.) *Owens v. Okure*, 488 U.S. 235, 248, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989). Compensatory damages are allowable pursuant to 42 U.S.C. § 1983 upon proof of actual injury. [**251] *Carey v. Piphus*, 435 U.S. 247, 264, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978).

As we stated in part III B of this opinion, "the interests protected in a § 1983 action are similar to those protected in common law tort actions." *Virgo v. Lyons*, supra, 209 Conn. 502. The Supreme Court explained in *Monterey v. Del Monte Dunes at Monterey, Ltd.*, supra, 526 U.S. 709, that "there can be no doubt that claims

brought pursuant to [42 U.S.C.] § 1983 sound in tort. Just as common-law tort actions provide redress for interference with protected personal or property interests, [42 U.S.C.] § 1983 provides relief for invasions of rights protected under federal law." "Like other tort causes of action, it is designed to provide compensation for injuries arising from the violation of legal duties . . . and thereby, of course, to deter future violations." (Citation omitted.) Id., 727 (*Scalia, J.*, concurring); see also *Riverside v. Rivera*, 477 U.S. 561, 575, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986) [***54] (recognizing that deterrence of future civil rights violations is proper purpose served by allowing recovery of money damages pursuant to 42 U.S.C. § 1983).

Applying these principles to the present case, it is evident that money damages are recoverable under 42 U.S.C. § 1983 for a violation of rights guaranteed by the constitution, and that the owners' recovery of damages in the present case serves the dual purpose of 42 U.S.C. § 1983 to provide redress for an invasion of a right protected under federal constitutional law, and to deter future violations of constitutional rights. The jury concluded [*851] that the town violated the constitutional right of the owners to have their property taken only for a valid public purpose. The jury's finding satisfies the requirement of 42 U.S.C. § 1983 that there be an actual injury in order to justify an award of compensation. The money awarded in the § 1983 action was not a part of the just compensation due to the owners for the taking of the property. As we already have explained in this opinion, the award consisted of $ 90,000 in option payments that would have been due to the owners pursuant to their contract with New England Estates, and an additional [***55] $ 250,000, beyond the award of just compensation of $ 4.6 million in the valuation appeal, to which the owners would have been entitled under the contract had the taking never occurred. We acknowledge that the owners' recovery of what amounts to contract damages, above and beyond the fair market value of the land, is unusual. Ordinarily, as we already have stated in this opinion, the limit of a property owner's recovery is the fair market value of the land. *Northeast Ct. Economic Alliance, Inc. v. ATC Partnership*, 256 Conn. 813, 828, 776 A.2d 1068 (2001). The circumstances in the present case, however, justify a departure from the ordinary rule. As we explain more fully in part IV of this opinion, the town not only failed to provide just compensation, it also was dishonest about its reasons for taking the land. It is upon that second violation of the takings clause that the owners based their § 1983 action.

Additionally, allowing the recovery of damages under 42 U.S.C. § 1983 is consistent with the general principle that the focus in evaluating the measure of compensation due to a property owner under the takings clause is on "what has the owner lost, not what has the taker gained." [***56] *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S. Ct. 459, 54 L. Ed. 725 (1910). [26] Therefore, [*852] the owner "is entitled to be put in as good a position [**252] pecuniarily as if his property had not been taken." (Internal quotation marks omitted.) *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 236, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003). The owners and New England Estates had sought, and were denied, injunctive relief barring the town from taking the land. The town makes much of the fact that, once the town had taken the land, the owners and New England Estates did not seek injunctive relief ordering its return, and instead sought money damages. Once the town took the land, however, the owners' rights under the contract were extinguished, and the return of the land could not restore those contract rights, and, thus, could not have placed the owners in as good a position pecuniarily as if their property had not been taken. Id.

26 But see part III B of this opinion discussing the limited scope of a valuation appeal.

We next address the town's contention that the owners waived their right to challenge the wrongfulness of the taking by pursuing their claim for just compensation. [***57] The town appears to rely on the basic principle that a property owner may not both receive just compensation for a taking and pursue injunctive relief seeking to bar the taking or, if the taking already has been accomplished, seeking the return of the land. Put simply, the town claims that a property owner may not have its just compensation and its property too. Obviously, the granting of injunctive relief would obviate the need for just compensation, and an award of just compensation followed by a return of the property would constitute a particularly striking example of double recovery. That is not, however, what occurred in the present case. The owners did not seek the return of the land after they had recovered just compensation-they sought damages for the town's bad faith actions in taking the land. Additionally, as we already have explained, the damages recovered in the § 1983 action were not a part of just compensation. Therefore, [*853] the strong disjunction relied upon by the town-either just compensation or injunctive relief, but not both-is inapplicable to these facts. The damages recovered by the owners in the § 1983 action simply are not duplicative of the just compensation [***58] awarded in the valuation appeal. They are additional damages recovered on the basis of the town's bad faith actions in accomplishing the taking.

IV

The town next argues that the public use clause prohibits only a taking of private property for a use that is not a public use and does not provide a remedy for a tak-

ing that is undertaken in bad faith, or one that constitutes an abuse of power. The town does not challenge the jury's finding that in taking the land, the town either acted in bad faith, taking the land for pretextual reasons, acted unreasonably, or in an abuse of its power-instead, it argues that it did not violate the public use requirement by being dishonest about the reasons for which it took the land. It is well established, however, that a government actor's bad faith exercise of the power of eminent domain is a violation of the takings clause. *Essex Fells v. Kessler Institute for Rehabilitation, Inc.*, 289 N.J. Super. 329, 337, 673 A.2d 856 (1995), and cases cited therein. Thus, there is no merit to the town's claim that a violation of the public use requirement is limited to situations in which the government takes private property for a use that is not a public use. [***59] Although the United States Supreme Court has not yet addressed this issue directly, we agree with those jurisdictions concluding that the public use clause should not be interpreted so narrowly. Indeed, many state courts have found a violation of the takings clause on the basis of a bad faith exercise of the power of eminent domain. See, e.g., *Carroll* [**253] *County v. Bremen*, 256 Ga. 281, 282-83, 347 S.E.2d 598 (1986) (bad faith taking to prevent construction of water waste facility [*854] exceeded county's eminent domain power); *Pheasant Ridge Associates Ltd. Partnership v. Burlington*, 399 Mass. 771, 774-75, 506 N.E.2d 1152 (1987) (town's bad faith taking of private property to prevent affordable housing development unlawful and void); *Essex Fells v. Kessler Institute for Rehabilitation, Inc.*, supra, 339 (dismissing borough's complaint in condemnation because state public use was pretext); *In re Hewlett Bay Park*, 48 Misc. 2d 833, 837, 265 N.Y.S.2d 1006 (1966) (dismissing condemnation proceeding based on finding that village offered pretextual, bad faith reason for taking). [27]

27 The town's reliance on *Kelo v. New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), for the proposition [***60] that only a taking for the purpose of conferring a benefit on a private party constitutes a violation of the public use requirement, interprets that decision overbroadly. *Kelo* did not involve any allegations that the city of New London acted in bad faith in taking private property. Id., 478. Therefore, the issue of whether a bad faith taking would violate the public use requirement was not before the court.

V

Finally, we address the town's challenge to the award of attorney's fees, and the owners' claim in their cross appeal that the trial court improperly declined to award them attorney's fees pursuant to 42 U.S.C. § 1988 in connection with work performed in the valuation appeal. See footnote 16 of this opinion. The following additional procedural facts are relevant to the resolution of these claims. Following the judgment rendered in favor of New England Estates and the owners in accordance with the verdict, the trial court awarded attorney's fees to both of those parties. The trial court awarded New England Estates $ 1,488,587, which included an award for attorney's fees for work performed in connection with the valuation appeal. The court's award of $ 275,979 to the owners did not [***61] include an award for fees in connection with the valuation appeal.

[*855] A

We first address the town's claim that, because only a prevailing party may recover attorney's fees pursuant to 42 U.S.C. § 1988, if the town prevails on the merits in this appeal, the attorney's fees fail as well. [28] We agree, but because the town prevailed only against New England Estates, the award of attorney's fees is reversed only with respect to those fees awarded to New England Estates; the award of attorney's fees to the owners does not fail.

28 The town also appears to argue in its brief that even if it prevails only against New England Estates, and not with respect to the owners, that result not only means that New England Estates is not a "prevailing party" for purposes of 42 U.S.C. § 1988, but the *owners* also are no longer prevailing parties, and the town is entitled either to judgment or to a new trial. The town has offered no support for this extraordinary claim, and we do not address it.

Section 1988 of title 42 of the United States Code clearly authorizes the award of attorney's fees only to a "prevailing party . . . ." See footnote 16 of this opinion. The relevant question, therefore, is whether New England [***62] Estates and the owners are prevailing parties for purposes of 42 U.S.C. § 1988. The United States Supreme Court has explained that "[u]nder our generous formulation of the term, plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the [**254] parties sought in bringing suit." (Internal quotation marks omitted.) *Farrar v. Hobby*, 506 U.S. 103, 109, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). Under that rule, we conclude that New England Estates has not prevailed on a significant issue. We have concluded in this opinion that, pursuant to Connecticut law, New England Estates did not have a compensable property interest protected by the takings clause. See part II of this opinion. That conclusion yields the result that New England Estates has recovered no [*856] damages in this action. New England Estates clearly is not a prevailing party. The owners, on the other

hand, have prevailed. We have affirmed the judgment rendered following the jury verdict in favor of the owners, and upheld that judgment in face of all of the arguments of the town advanced against it. See parts III and IV of this [***63] opinion. Accordingly, the award of attorney's fees to New England Estates is reversed, and the order of attorney's fees to the owners is affirmed.

B

In their cross appeal, the owners claim that the trial court improperly declined to award them fees in connection with work performed in the valuation appeal. The owners appear to advance two separate theories in support of this claim. The first theory upon which they apparently rely is that the fees expended for the valuation appeal are recoverable pursuant to 42 U.S.C. § 1988 because that action was a prior proceeding that involved work that was both necessary and useful for its success in its § 1983 action. The second theory takes as its starting point the fact that the valuation appeal and the § 1983 actions had been consolidated and later were bifurcated. See footnote 14 of this opinion. Under that theory, the owners contend, they should have been awarded fees for the work done on the valuation appeal, which was merely the first phase of these consolidated actions, because the work done on those claims was sufficiently related to their successful § 1983 claims. We conclude that the owners are entitled to reasonable attorney's fees under [***64] their second theory. Because a prevailing plaintiff in an action brought pursuant to 42 U.S.C. § 1983 "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," our review of the trial court's decision not to award attorney's fees to the owners is plenary. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968).

[*857] To illustrate why the second theory more appropriately applies under these procedural facts, it is helpful first to set forth the two theories in greater detail. Under the first theory, the owners contend that the valuation appeal constituted a related prior proceeding under *Webb v. County Bd. of Educ.*, 471 U.S. 234, 242, 105 S. Ct. 1923, 85 L. Ed. 2d 233 (1985). *Webb* involved a § 1983 plaintiff who sought recovery for attorney's fees in prior administrative proceedings. Both the administrative proceedings and the § 1983 action challenged the plaintiff's termination of employment as a public school teacher. Id., 236. The court concluded that fees for the administrative proceeding were not recoverable; id., 243; and articulated the following rule for determining when fees are recoverable [***65] for a prior proceeding. First, "[t]he time that is compensable under § 1988 is that reasonably expended *on the litigation*." (Emphasis in original; internal quotation marks omitted.) Id., 242. Some services rendered during the course of a prior proceeding, however, "are performed 'on the litigation.' " Id., 243. In order for work performed during a [**255] prior proceeding to be considered " 'on the litigation' " for purposes of § 1988, it must be "work that was both useful and of a type ordinarily necessary to advance the civil rights litigation" to the final result. Id.

The second theory relied upon by the owners views the valuation appeal not as an underlying, prior proceeding, but as the first part of a single litigation. There are several lines of cases dealing with this question, and the most relevant are those that address the question of whether a plaintiff may recover fees in an action brought pursuant to 42 U.S.C. § 1983 for work performed on a claim for which a fee is not independently recoverable-a non-fee claim. Ordinarily, this question arises when a litigant prevails in an action brought pursuant to 42 U.S.C. § 1983, but does so on the non-fee claim, and the claim brought pursuant [***66] to 42 U.S.C. § 1983 [*858] is left unaddressed by the court. See, e.g., *Smith v. Robinson*, 468 U.S. 992, 1006-1007, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984), superseded by statute as stated in *Pazik v. Gateway Regional School District*, 130 F. Supp. 2d 217 (D. Mass. 2001). In *Maher v. Gagne*, 448 U.S. 122, 132 n.15, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980), the court explained that the legislative history of 42 U.S.C. § 1988 "makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded . . . ." "In some instances . . . the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the nonconstitutional claim is dispositive. . . . In such cases, if the claim for which fees may be awarded meets the substantiality test . . . attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a common nucleus of operative fact." (Citations omitted; internal quotation marks omitted.) Id., 133 n.15. The [***67] court earlier had stated, in *Smith v. Robinson*, supra, 1007, the additional requirement that "a claim for which fees are awarded [must] be reasonably related to the plaintiff's ultimate success." The United States District Court for the Northern District of New York summarized the two holdings: "When a plaintiff prevails upon a non- § 1983 claim which is accompanied by an undecided § 1983 claim, a fee award pursuant to § 1988 is appropriate where (1) the § 1983 claim is sufficiently substantial to support the invocation of federal jurisdiction; (2) it arises from the same nucleus of operative facts as the claim on which the plaintiff prevailed; and (3) it is reasonably related to the plaintiff's ultimate success." (Internal quotation marks omitted.) *American Automobile Manufacturers Assn. v. Cahill*, 53 F. Sup. 2d 174, 179-80 [*859] (N.D.N.Y. 1999). Recovery for a

successful, non-fee claim also has been held to be allowable where the reasonably related, substantial, § 1983 claim has been "reached and upheld . . . ." *Raley v. Fraser*, 747 F.2d 287, 292 (5th Cir. 1984).

Because the valuation appeal and the § 1983 action were consolidated and then bifurcated for purposes of trial, the present case [***68] is more appropriately understood, for purposes of this issue, as a single action, in which the owners have prevailed both on a non-fee claim, seeking just compensation for the taking, and their § 1983 claim, seeking damages for the bad faith actions of the town in accomplishing the taking. Accordingly, the rule set forth in *Smith* and *Maher* applies.

Applying that rule, we first turn to the question of substantiality. The Supreme [**256] Court set forth the "substantiality" test in *Hagans v. Lavine*, 415 U.S. 528, 554, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974). The test requires a plaintiff to allege constitutional violations sufficiently substantial to support federal jurisdiction. *Maher v. Gagne*, supra, 448 U.S. 130-31. Because we have concluded that the town violated the takings clause of the fifth amendment by acting in bad faith in taking the owners' property, the § 1983 claim is sufficiently substantial to support federal jurisdiction.

We also conclude that the owners' just compensation claim and their bad faith claim arose from a common nucleus of operative facts. Although the cases involved separate issues, both required discovery and proof regarding environmental contamination, which was [***69] relevant to the trial court's determination of whether to offset the fair market value of the land by any costs for remediation, and relevant in the § 1983 action to support the owners' claim that the town had been dishonest when it asserted that one of its reasons for the taking was to investigate and remediate environmental [*860] contamination. Similarly, the history of the various permitting approvals and denials was relevant in the valuation appeal to demonstrate that the highest and best use of the property was residential, and it was relevant in the § 1983 action as evidence of the town's bad faith in denying approval of the affordable housing proposal. [29] Finally, the fair market value of the land itself, the ultimate factual determination of the trial court in the valuation appeal, was highly relevant to the § 1983 action. In the § 1983 action, the owners sought contract damages above and beyond what they had recovered in the valuation appeal. Accordingly, without the determination of the fair market value of the property in the valuation appeal, the jury could not have arrived at an amount of contract damages to award to the owners in the § 1983 action. [30]

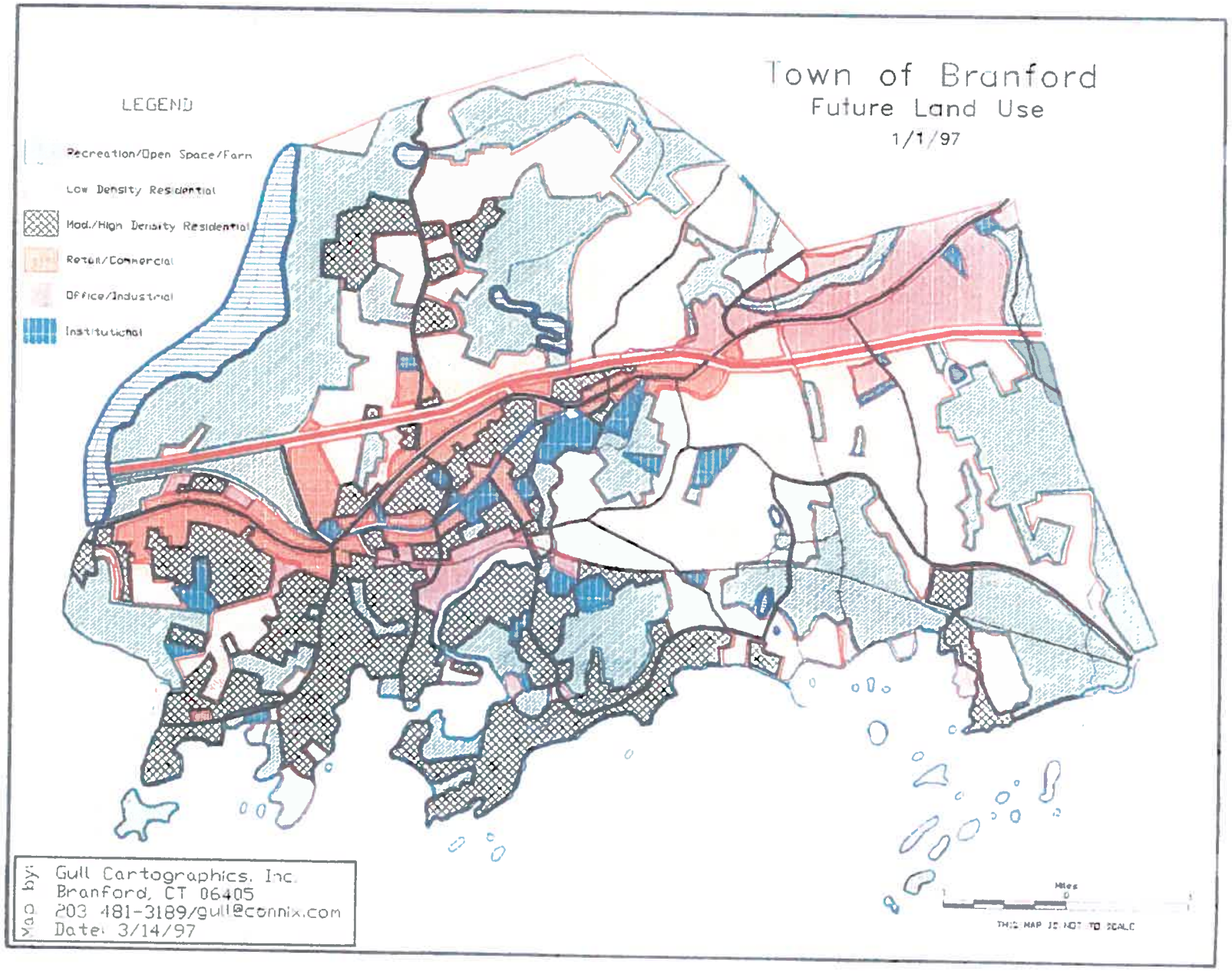
29 The court instructed [***70] the jury that the court's determination in the valuation appeal that the highest and best use of the property was for residential development was to be given preclusive effect in the present case, and further instructed the jury that it was reasonably probable that, but for the taking, New England Estates would have obtained the required approvals to develop the land according to its proposed, 354 unit affordable housing development. These facts were relevant to the jury's determination that the town acted in bad faith in blocking the development.

30 The town contends that the conclusion that these two cases arise out of a common nucleus of operative facts is inconsistent with the conclusion that the action is not barred by the doctrine of res judicata. As we already have explained in this particular case, the transactional test is not helpful. Rather, in our analysis of the doctrine of res judicata as it applies to the present case, we have focused on the fact that the § 1983 claim could not have been raised in the valuation appeal. See part III C of this opinion. Moreover, although there is no written record of the trial court's reasons for bifurcating these two actions, it is likely [***71] that the court bifurcated them precisely because it had determined that the limited scope of a valuation appeal precluded the two actions from being tried together.

Finally, the § 1983 action is reasonably related to the owners' success. It is undisputed that the contract damages recovered in the § 1983 action would not have been recoverable in the valuation appeal. Therefore, to the extent that, at the end of this litigation, the owners [*861] were placed in as good a position as they would have been had the taking never occurred, the § 1983 action was essential to achieving that end. Accordingly, we conclude that the owners are entitled to attorney's fees for work reasonably expended in the valuation appeal. The case is remanded to the trial court for a determination of what fees are reasonable for that claim.

[**257] The judgment in favor of New England Estates and the award of attorney's fees to New England Estates are reversed. The judgment in favor of the owners and the award of attorney's fees to the owners for work performed in the § 1983 action are affirmed. The denial of attorney's fees to the owners for work performed in the valuation appeal is reversed and the case is remanded to the trial [***72] court for a determination of reasonable attorney's fees in connection with that case.

In this opinion the other justices concurred.


Town of Branford
Future Land Use
1/1/97
LEGEND
Recreation/Open Space/Farm
Low Density Residential
Mod./High Density Residential
Retail/Commercial
Office/Industrial
Institutional
Map by:
Gull Cartographics, Inc.
Branford, CT 06405
203 481-3189/gull@connix.com
Date: 3/14/97
Miles
0
THIS MAP IS NOT TO SCALE

EX018-036

FAIRWAYS VILLAGE ESTATES
SP4

Branford Board of Selectmen Resolution, May 2, 2003

To consider and if appropriate approve the Board of Finance funding for a proposal to acquire by negotiation, and if necessary, by eminent domain, a 77 acre parcel located at 48-86 Tabor Drive in order to investigate and remediate environmental contamination and possibly develop the property as playing fields. RESOLVED: That the Board of Finance recommends that the Town of Branford appropriate, &2,500,000 for costs related to the acquisition, through negotiated purchase or through the exercise of the Town's power of eminent domain, of the 77 acre parcel of land known as 48-86 Tabor Drive, now or formerly owned by Frank perotti, jr. and Thomas Santa Barbara et. Al, for municipal purposed including but not limited to investigation and remediation of environmental contamination, and possible development of playing fields.

_____ Date of Receipt per CGS 22a-42a.c _____ File Number
_____ Fee _____ Date Paid _____ Approval Date

TOWN OF BRANFORD
INLAND WETLANDS AGENCY
APPLICATION FOR PERMIT

Tabor Drive and Pine Orchard Road (ADDRESS OF PARCEL)
Map F08/Block 08/Parcels 4, 5, 6, (MAP/BLOCK/LOT)

THIS APPLICATION IS FOR:

____ Permit to conduct regulated activity ____ Significant Impact
____ Site Plan Referral (Per Section 8-3 CT State Statutes)
____ Special Permits/Exceptions/Exemptions (Per Section 8-3c CT State Statutes)
____ Subdivision Referral ____ No Regulated Activity Proposed
(Per Section 8-26 CT State Statutes)
____ Amend regulations ____ Section to be amended
____ Amend wetland boundary
____ Renewal of Permit # _____ ____ Section to be amended
_X_ Minor Modification of Permit # 01-10.2
____ Permitted Use As of Right (Must comply with Sections 4.1 and 4.4-Branford IW Regs.)
____ Non Regulated Use (Must comply with Sections 4.2 and 4.4-Branford IW Regs.)

TITLE OF PLAN: Fairways Village Estates Latest Revision: 6/18/03
Plan Certified by: Jeffrey N. Gordon Soil Scientist: Otto R. Theall
Engineer: Robert J. Wheway Phone: (203) 375-3661
Address: Codespoti & Associates, P.C., 3060 Main St., Suite 205, Fax: (203) 377-0664
Stratford, CT 06614

This application gives the Commission and its agent authority to inspect the property at reasonable times, both before and after a final decision has been issued. The applicant warrants the truth of all statements contained herein and in all supporting documents according to the best of his/her knowledge and belief.
Date of Submission: June , 2003

Don Stanziale, Jr.
Print Applicant's Name

New England Estates, LLC
c/o P.O. Box 2250
Shelton, CT 06484
Address
(203) 929-2295 (203) 925-0316
Phone Fax

Home Address: 42 Lazy Brook Road
Shelton, CT 06484

Applicant's Signature

Frank Perrotti, Jr.
Print Owner's Name

105 Sanford Street
Hamden, CT 06518
Address
Phone Fax

(See attached sheet for additional owner)

Owner's Signature
(See letter of authorization)

Please attach a sheet listing any and all additional owners and letters of authorization from each.

Contact person/Agent if other than applicant: Robert J. Wheway, P.E. or Jeffrey N. Gordon, L.A.
Phone: (203) 375-3661 Address: 3060 Main Street, Suite 205, Stratford, CT 06614

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§ 48-13. Inspection and testing prior to condemnation.

Upon filing a notice of condemnation of a condemning authority, either before or after the institution of a condemnation proceeding and after reasonable notice to the property owner or owners affected, the Superior Court or any judge thereof may authorize such condemning authority to enter upon and into land and buildings sought or proposed for public uses for the purpose of inspection, survey, borings and other tests. Such condemning authority shall be responsible to the owner or owners of such property for any damage or injury caused by such entrance and use, and such court or judge may require the filing of a bond or deposit of surety to indemnify the owner or owners of property for such damage. This section shall not limit or modify rights of entry upon private property otherwise provided for by law.

§ 22a-133dd. Entry of licensed environmental professional onto certain property.

Any licensed environmental professional employed or retained by a municipality may enter, without liability, upon any property within such municipality for the purpose of performing an environmental site assessment or investigation if: (1) The owner of such property cannot be located; or (2) such property is encumbered by a lien for taxes due such municipality; or (3) upon a filing of a notice of eminent domain.

[NOTE: This Petition was ready to be filed when the case settled three days before the deadline]

IN THE

Supreme Court of the United States

NEW ENGLAND ESTATES, L.L.C.,
Petitioner,

v.

TOWN OF BRANFORD, CONNECTICUT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After a trial on the merits, a jury found that Respondent Town of Branford had abused its power of eminent domain in violation of the Public Use restriction of the 5th Amendment by invoking the Takings Clause in a way that was "pretextual," had "no basis in fact or law," or constituted an "abuse of power," and awarded Petitioner more than $12,400,000 in compensatory damages for that violation. The Connecticut Supreme Court affirmed the Fifth Amendment violation but reversed the damages award in an opinion that changed long-standing Connecticut law. It abruptly held — contrary to preexisting, unremarkable and settled Connecticut law holding that an option to purchase land is a protected property interest when government uses eminent domain to terminate the contract — that Petitioner's option to purchase the subject property was *not* "property" and that therefore the violation of Petitioner's Takings Clause rights was non-compensable.

Question: Did the Connecticut Supreme Court commit a "judicial taking" (as described, but not decided, in last Term's *Stop the Beach Renourishment* case) when it did so?

PARTIES TO THE PROCEEDING

Plaintiff/Petitioner is New England Estates, L.L.C., a Connecticut limited liability corporation, whose principals are Don Stanziale, Jr., Alan Pizzolorusso, and Andrew Forte, all resident in Connecticut.

Defendant/Respondent is the Town of Branford, Connecticut.

Other parties (involved below, but not named in this Petition) are Thomas Santa Barbara, Jr. and Frank Perrotti, Jr.

RULE 26.9 DISCLOSURE STATEMENT

New England Estates, L.L.C. is a Connecticut limited liability corporation, of which Andrew Forte of North Haven, Connecticut, is managing member. This L.L.C. has no subsidiaries, parents or affiliates.

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PETITION FOR WRIT OF CERTIORARI

New England Estates, L.L.C., a Connecticut limited liability corporation, respectfully petitions this Court for a writ of certiorari to review a final judgment of the Connecticut Supreme Court.

OPINIONS BELOW

The Town's use of eminent domain triggered two actions, one challenging the amount of just compensation and the other seeking compensatory damages under 42 U.S.C. § 1983 for a bad faith taking in violation of the Public Use restriction in the Fifth Amendment.

The cases were first consolidated but later bifurcated, as the valuation was decided by the court and the civil rights claim by a jury. In the valuation proceeding, the Superior Court awarded the property's fee simple title holders $4,600,000 as just compensation. (App. ---.)

In the damages action, the Superior Court entered judgment awarding Petitioner, as the owner of an option to purchase the subject property, $12,435,914 in lost profits and development expenses, and $1,488,587 in fees and costs pursuant to 42 U.S.C. § 1988. The trial court also awarded the fee owners $340,000 representing the option contract payments they would have received from New

England Estates at closing, and $275,979 in fees and costs for that abuse. (App. C is the judgment, which includes the jury's responses to special interrogatories and the jury's verdict.)

The Connecticut Supreme Court transferred the Town's appeals of both judgments directly to itself (rather than allow intermediate appellate review), and simultaneously rendered two related decisions: It affirmed the trial court's increase in valuation and just compensation, which amount was payable to the fee owners in *Town of Branford v. Santa Barbara*, 294 Conn. 785, 988 A.2d 209 (2010) (App. B) and, in the companion Civil Rights Act (42 U.S.C. § 1983) case that is the subject of this Petition (*New England Estates, L.L.C. v. Town of Branford*, 294 Conn. 817, 988 A.2d 229 [2010]), affirmed the award of option contract payments to the fee owners, but eliminated the compensatory award to New England Estates (App. A). New England Estates' timely motion for reconsideration was denied. (App. D.)

JURISDICTION

The Connecticut Supreme Court entered judgment on Feb. 16, 2010. (App. --.) Final action on timely-filed motions for reconsideration was issued May 21, 2010.

(App. --.) The time to file this Petition was extended to Oct. 21, 2010. (No. 10A28.)

This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

U.S. Const., Fifth Amendment: "[N]or shall private property be taken for public use without just compensation."

INTRODUCTION

At the end of the last Term, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, __ U.S. __, 130 S.Ct. 2592 (2010), this Court declined to decide whether the 5th Amendment's Takings Clause encompassed a "judicial taking," although no Justice said "no." The four-Justice plurality opinion was clear that the 5th Amendment included such takings:

> "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." (130 S.Ct. at 2602; emphasis, the plurality's.)

The other Justices did not disagree. Justices Kennedy and Sotomayor concluded:

> "State courts generally operate under a common-law tradition that allows for incremental modifications to property law, but 'this tradition cannot justify a *carte blanche* judicial authority to change property definitions wholly free of constitutional limitations.' [Citation.]" (130 S.Ct. at 2615.)
>
> "[However, t]o announce that courts too can effect a taking when they decide cases affecting property rights, would raise certain difficult questions....[T]his case does not require those questions to be addressed...." (*Id.*)

Justices Breyer and Ginsburg simply noted that the issue involved "questions of constitutional law that are better left for another day." (130 S.Ct. at 2618.)

This is that day.

As shown by this Petition and the *amici curiae* supporting it, until the decision below was handed down, Connecticut law had consistently held for the better part of a century that an option to purchase real

property was itself an interest entitled to constitutional protections when government employs eminent domain. New England Estates and the fee owners relied on this settled law when negotiating the option.

The underlying facts are not in question. The jury found a 5th Amendment violation because the Town invoked its eminent domain power for reasons that were "pretextual," "invalid," had no basis in fact or law, or were an "abuse of power." (App. --.) The Connecticut Supreme Court described the Town's actions as both "bad faith" (App. --) and "dishonest" (App. --, --).

The only reason that the Connecticut Supreme Court reversed the jury's award of more than $12 million in compensatory damages to New England Estates was its out-of-the-blueconclusion that an option to purchase real property is not itself an interest in the optioned real property that is protected from eminent domain abuse. (App. --.)

In reaching that conclusion, the Connecticut Supreme Court overturned nearly a century of settled state law holding that such options, like many other interests in condemned property, *are* protected in eminent domain.

This case therefore presents the appropriate vehicle to address the "judicial taking"

questions left in limbo at the end of the last Term.

STATEMENT OF THE CASE

Seventy-seven vacant acres of prime land, largely surrounded by residential development, less than a mile from Long Island Sound, walking distance to the Town's retail and commercial center, with sewer, water, electricity and telephone service available. That is what New England Estates sought to convert into a residential community. There was every reason to believe that such a development would be welcomed by the Town of Branford. In 1988, the Town had approved a 298-unit condominium complex on the site and, in 1997, designated most of the property for moderate and high density residential development.

New England Estates, a partnership among long-time builder Don Stanziale, Jr., a mortgage broker, and a real estate sales person, obtained an option to purchase the property in 2001. This was no speculative venture. That option gave New England Estates substantive rights of access and inspection, environmental testing, securing necessary development permits and zoning approval in its own name, and purchasing fee title. The option also imposed on New England Estates the obligations to pursue development

and seek the necessary approvals, as well as the obligation to obtain insurance covering its exercise of these rights. New England Estates did those things at a cost of $1.2 million.

Matters appeared to proceed smoothly. New England Estates obtained permits from the Town's Wetlands Commission (because excavation of topsoil by a prior owner had left several small wetland pockets), the Connecticut Department of Environmental Protection, and the U.S. Army Corps of Engineers. The initial application sought to resurrect the expired 1988 approval, but scaled down to 268 units and improved with an executive golf course. When the Town Zoning Commission denied this plan, New England Estates turned to a Connecticut statute that provides favorable presumptions to applicants who agree to preserve 30 percent of the units for moderate and low income households. Using the identical building footprints of the prior plan, New England Estates proposed 354 smaller units under this state program.

What New England Estates did not realize was that the Town did not want housing on this property at all. Evidence showed internal Town memoranda strategizing about "protecting the [t]own against affordable housing appeals" (App. ---), and Town officials conceded at trial that their actions sought to

prevent residential development in any form. Thus, when it became apparent that New England Estates was on a path to obtain its final zoning approval for its multi-family plan, the Ttown voted in July 2003, at a six-minute meeting and without holding a public hearing, to acquire the property by eminent domain in order to prevent such development, offering three reasons — *none* of which could be supported by evidence, as the trial judge (App. ---) and jury (App. ---) would independently find.[1]

The Town totok title in 2004. Two suits were filed in state court and then consolidated. The first was the fee owners' and New England Estates' suit challenging the Town's valuation and deposit with the court of just compensation. The second was New England Estates' civil rights suit under 42 U.S.C. § 1983 (later joined by the underlying fee owners) for abuse of the eminent domain power. The eminent domain suit was tried to the court, the civil rights suit was tried to a jury.

---

[1] The Town's asserted reasons were to investigate possible environmental contamination, to remediate contamination if found, and a "possible" need of the property for playing fields.

Although there was some overlapping evidence, the eminent domain suit dealt with the value of the property. There, the court decided the issue of the highest and best use of the property, agreeing with New England Estates and the fee owners that the answer was the very kind of residential development New England Estates proposed. Moreover, the trial court found (as affirmed on appeal) that it was reasonably probable that New England Estates, in addition to all environmental permits already in hand, would have succeeded in obtaining final zoning approval needed to develop its project. (App. ---.) The courts expressly rejected the Town's prime (stated) reason for using eminent domain, i.e., possible contamination. *There was none.* (App. ---.) The court affirmed that the land should be valued based on the imminence of final approvals, and the $4,600,000 value and award to the fee owners was affirmed.

The Section 1983 case then went to trial. There, the jury dealt with claims that the Town had abused its eminent domain power, violating the restriction that property be taken only for a "public use" by intoning those words pretextually but, instead, acting *sub rosa* to preclude unwanted housing. After hearing all the evidence, the jury concluded that the Town's stated reasons for the condemnation

were "pretextual," had no factual or legal basis, or were an "abuse of power." (App. --.)

For the Town's abuse of what Justice Kennedy recently called the "vast governmental power" of eminent domain (*Stop the Beach Renourishment*, 130 S.Ct. at 2613; concurring opinion), the jury awarded New England Estates $12,435,914 for its lost profits and development expenses, and the fee owners $340,000 for contract payments they would have received from New England Estates when its option was exercised by closing on the land, which the court thus affirmed would have occurred but for the taking. In addition, the court awarded New England Estates $1,488,587 and the fee owners $275,979 to compensate for their fees and costs in the action. (App. ---.)

It is noteworthy that, on appeal, *the Town did not question any of the findings that its actions were abusive and dishonest*, as the Connecticut Supreme Court confirmed:

> "The town does not challenge the jury's finding that in taking the land, the town either acted in bad faith, taking the land for pretextual reasons, acted unreasonably, or in an abuse of its power—*instead it argues that it did not violate the*

> *public use requirement by being dishonest* about the reasons for which it took the land." (App. ----; emphasis added.)

The Connecticut Supreme Court transferred to itself the Town's appeals of both judgments, that would ordinarily have gone to the state intermediate appellate court. The eminent domain valuation judgment was affirmed. (App. ----.) The Section 1983 judgment was affirmed as to the fee owners, but reversed as to New England Estates, based on the court's wholesale change in the law as to the status of an option to purchase real property as an interest in the real property that is protected under the 5th Amendment. (App. ---.) This Petition follows denial of New England Estates' timely motion for reconsideration. (App. ---.)

REASONS FOR GRANTING THE WRIT

CERTIORARI IS WARRANTED IN ORDER TO RESOLVE THE ISSUE LEFT UNANSWERED AT THE END OF THE LAST TERM: WHETHER JUDICIAL ACTION THAT REVERSES SETTLED REAL PROPERTY LAW CAN BE A TAKING UNDER THE 5TH AMENDMENT

Last Term, the Court granted Certiorari and heard argument in *Stop the Beach Renourishment*, thus acknowledging the need to examine the question whether acts of the judiciary suddenly extinguishing private property rights previously settled under state law could be a taking within the context of the 5th Amendment. In the context of that case, however, the Court could not achieve a majority to answer the question.

The question is as important this year as it was last, and this case presents the appropriate opportunity to decide it. The reasons for addressing the issue are the same as in *Stop the Beach Renourishment*. The Court's three opinions in that case explain them in depth, so they will not be reiterated here.

As the focal point of the judicial takings issue is whether the Connecticut Supreme

Court changed settled law in a way that upended private property rights in Connecticut, this Petition must begin with an examination of Connecticut property law.

A.

Until This Case, Connecticut Property Law Had Been Settled And Clear That An Option To Purchase Real Property Was An Interest In The Optioned Property Entitled To Takings Clause Protections When Government Uses Eminent Domain

One of the standard building blocks of Connecticut eminent domain law is the oft-cited decision in *Campbell v. City of New Haven*, 125 Atl. 650 (Conn. 1924). There, the Supreme Court explained the breadth of interests protected by the Takings Clause:

> "[A]ll kinds of property, and every kind of right or interest in property which has a market value cannot be taken *in invitum*, without making just compensation therefor." (*Id.* at 651; underscore added.)

The outward boundary of such compensable interests was that the asserted interest not be "too speculative and too uncertain and remote a

probability." (*Id.* at 652.) In *Campbell*, the asserted interest (*i.e.*, the possibility that the claimant might obtain title by adverse possession to neighboring land, thus making the condemned parcel more valuable) was held to fail this test.

Campbell has been cited repeatedly as authority for requiring constitutional protection against use of eminent domain for a wide variety of interests asserted in property being condemned, *including specifically options to obtain or retain interests in real property* — even if the option had not been exercised. (E.g., *Canterbury Realty Co. v. Ives*, 216 A.2d 426, 429 [Conn. 1966] [citing *Campbell*]; *Texaco, Inc. v. Commissioner*, 383 A.2d 1060, 1060 [Conn. Super. 1977] [citing *Canterbury*]; *Town of Newington v. Estate of Young*, 777 A.2d 219, 236-237 [Conn. Super. 2000] [citing *Canterbury*].)

Demonstrating the breadth of its holding, *Campbell* has been cited as authority for requiring eminent domain compensation for such inchoate interests as restrictive covenants (*Town of Stamford v. Vuono*, 143 Atl. 245, 249 [Conn. 1928]), access to property (*Slavitt v. Ives*, 303 A.2d 13, 18 [Conn. 1972]), and a license to use property (*Connecticut Comm'r of Transp. v. City of Hartford*, 1992 Conn. Super. LEXIS 2207.)

That *Campbell*'s summary was intended to be applied broadly was demonstrated less than two years later, in *McGowan v. Town of Milford*, 133 Atl. 570, 572 (Conn. 1926), where the Connecticut Supreme Court quoted from the national eminent domain encyclopedia, Nichols on Eminent Domain as follows:

> "[I]t is not merely the owner of the fee who is entitled to compensation, but every person holding an estate or interest in the subject-matter of the taking *which will be recognized by the courts as valid against the owner of the fee*, is equally protected by the constitution." (*Id.* at 572; emphasis added.)[2]

Here, the record showed that New England Estates' option had substantial value and was neither speculative, uncertain, nor remote. Indeed, both lower courts agreed that the option was so solid that — absent the Town's

[2] This view tracks precisely this Court's explanation in *U.S. v. Willow River Power Co.*, 324 U.S. 499, 503 (1945) that constitutionally protected property consists of economic advantages that receive protection from the law. There can be no dispute that, until the Connecticut Supreme Court spoke at bench, options to purchase land were legally protected under Connecticut law.

illegal actions — New England Estates would have successfully completed the permit process and purchased the land. On that basis, the Connecticut Supreme Court affirmed damages *to the fee owners* under 42 U.S.C. § 1983 based on profit *they* would have made *when New England Estates exercised its option*. But on top of the value that accrued to the fee owners, New England Estates — by obtaining vested wetlands permits from local, state, and federal agencies, and preparing a development plan that was a virtual certainty for approval under Connecticut's affordable housing law — created a significant value in its option, a value found by the jury to exceed $12,400,000. Thus New England Estates had, in *Campbell*'s words, created through its efforts something that had a "market value" far above the land value of $4,600,000.

There is also no question that New England Estates held an interest that was valid *vis-a-vis* the fee owners. The Connecticut Supreme Court plainly treated the option contract as valid and binding. That was the basis on which it upheld the jury award to the fee owners of damages calculated *as though the option contract between New England Estates and the fee owners had actually been fully performed.* (App. --.)

The Connecticut Supreme Court thus got it half right. Its constitutional error was in recognizing the option agreement's force in only one direction. In eminent domain cases, equity forms the anchor, and completes the cycle. As this Court put it:

> "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, [citation] as it does from technical concepts of property law." (*U.S. v. Fuller* [1973] 409 U.S. 488, 490.)

The Connecticut Supreme Court had itself concluded even before *Fuller* that "the question of what is just compensation is an equitable one...." (*Colaluca v. Ives*, 191 A.2d 340, 344 [1963]).

In 1977, a three-judge committee of the Connecticut Superior Court relied on a combination of the *Campbell* line of cases and this Court's decision in *Fuller* to provide eminent domain compensation to the holder of an unexercised option to purchase land, saying:

> "[T]he right to compensation is to be determined by whether the condemnation has deprived the claimant of a valuable right rather

> than by whether his right can technically be called an 'estate' or 'interest' in the land." (*Texaco, Inc. v. Commissioner of Transp.*, 383 A.2d 1060, 1062 [Conn. Super. 1977].)

Recently, in a scholarly exegesis of the law of eminent domain, another Superior Court surveyed Connecticut law and concluded that the holder of an unexecuted contract to purchase land was entitled to compensation. Quoting the Nichols treatise (as its Supreme Court had done earlier), the court concluded:

> "Where the option is not subsequently exercised, it has been held that the optionee is entitled to compensation for the loss of his right to elect to purchase." (*Estate of Young*, 777 A.2d at 236.)

Nor was this treatment of options limited to eminent domain. Because such options are interests in real property, Connecticut requires them to comply with the Statute of Frauds. (*Montanaro Bros. Builders, Inc. v. Snow*, 460 A.2d 1297, 1300 [Conn. 1983]; *Hayman v. CBS, Inc.*, 423 A.2d 887, 890 [Conn. 1979]; *Pigeon v. Hatheway*, 239 A.2d 523, 526 [Conn. 1968].)

As the Connecticut Supreme Court put it:

> "The statute of frauds applies, of course, to contracts concerning real property *and a fortiori to options to purchase* real property." (*Hayman*, 423 A.2d 887, 890 [1979]; emphasis added.)

Moreover, the holder of an option has a sufficient right in the property to grant the holder standing to appear as an "aggrieved" party in land use proceedings involving the property. (*Richards v. Planning & Zoning Comm'n*, 365 A.2d 1130, 1135 [Conn. 1976].)

That was the law in Connecticut *before* the decision in this case.

Thus, in the lower court proceedings, the Town's attorney conceded not once, but twice, that options to purchase real estate were compensable in eminent domain under settled Connecticut law. *First*, in an unsuccessful motion to dismiss, the Town said that Connecticut law allows "holders of an unexercised option to participate in a condemnation award." (----------) *Second*, the Town later conceded that, "[u]nder Connecticut law, the holder of an unexercised option to purchase real property subject to an eminent domain proceeding can be compensated...." (----------)

B.

When The Connecticut Supreme Court Declared That The Town's Infliction of More Than $12.4 Million Worth Of Damage Could Not Be Redressed Because New England Estates' Option To Purchase Was Not A Protected Interest In The Optioned Property, It Committed A Judicial Taking

There is no question that New England Estates was severely damaged by Town actions that even the Connecticut Supreme Court had to describe repeatedly as "dishonest." (App. --, -- .) The trial court implicitly found that New England Estates would have obtained final project approval, after which it would have exercised its option. (App. ---.) That is why the jury awarded New England Estates more than $12.4 million, and the fee owners $340,000, in damages as compensation for the Town's "bad faith" (App. --) actions that prevented fruition of the project.

Such a damages award is the appropriate outcome in a Section 1983 action, which this Court has described as a "constitutional tort,"[3] intended to provide "a uniquely federal

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[3] *Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992).

remedy"[4] with "broad and sweeping protection"[5] "to provide compensatory relief to those deprived of their federal rights by state actors"[6] whose "[m]issue of power...[is] possible only because the wrongdoer is clothed with the authority of state law...."[7] Moreover, "the Taking Clause of the Fifth Amendment...stands as a shield against the arbitrary use of governmental power" (*Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 [1980]), the very thing which the jury found the Town had done.

The trial court findings were confirmed when the judgments in favor of the underlying fee owners were affirmed. The fee owners were awarded damages *on the premise that New England Estates would have exercised its option after obtaining development approval.* Thus, the fee owners recovered from the Town the total of the periodic payments New England Estates would have made to maintain its option, and also the compensation agreed to be paid at the close of escrow, in addition to the

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4 *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

5 *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972).

6 *Felder v. Casey*, 487 U.S. 131, 141 (1988).

7 *Monroe v. Pape*, 365 U.S. 167, 184 (1961).

fair market value of the property *as if fully permitted for residential development.*

Thus, the trial judge, the jury, and the Connecticut Supreme Court all agreed that the efforts of New England Estates would have borne fruit, but for the illegal actions of the Town. The only question was whether New England Estates would be compensated for its loss, or whether the Town would be allowed to retain the profit from its abuse of the eminent domain power.[8]

Inexplicably, the Connecticut Supreme Court ignored *all* of the cases cited above. Although these cases were briefed by New England Estates, the Supreme Court's opinion holding that an option is not a property right is

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[8] The bulk of the award to the fee owners was as direct compensation for the fair market value of the property. That was an even exchange on the Town's balance sheet. $4,600,000 in cash was replaced by property judicially determined to be worth the same amount. Thus, the Town now owns the property, and it also has New England Estates' plans for how to develop it. That package is readily saleable in the market. As a result of its abuse of eminent domain, the Town is in a position to reap a tidy profit by selling the land with its approvals, which the jury would result in a profit of $11,200,000).

bereft of a citation to *Campbell* or any of its progeny or any other case dealing with options to purchase real property (see App. __-__).

Instead, the Connecticut Supreme Court held that an "option contract conveys no property interest" by relying on a single, century-old case having no connection to real estate: *Patterson v. Farmington Street Railway Co.*, 57 Atl. 853 (1904), a case dealing with a contract to purchase bonds. (App. ---.)

Patterson had never before been cited as governing options to purchase real property. Rather, *Campbell* and its progeny governed real property and, specifically, compensability of options involving real property in eminent domain. (Cases cited *ante*, pp. 14-15.)

Thus when, in the context of this complex litigation resulting in two substantial opinions from the Connecticut Supreme Court, that court simply brushed aside the focal point of a $12.4 million judgment with the comment that it had "already concluded" that there was no property right involved (App. --), the result was jaw-dropping. Any such conclusion was not simply a well-kept secret, it was directly contrary to the law as it had been understood by Connecticut judges and practitionersfor years.

If the Connecticut Supreme Court had "already concluded" that an option holder had no interest in the optioned property, then it would not have held the option compensable in *Canterbury*. That case involved an option to renew a lease, but the option had not been exercised before the eminent domain taking. The trial court found the unexercised option non-compensable, but the Supreme Court reversed. Citing *Campbell*'s broad definition of compensable rights, the court held that the multiple (albeit unexercised) options to renew had to be considered in the valuation. The importance of *Canterbury* is that the tenant was held entitled to compensation not because of its status as a tenant (as that had been eliminated by the eminent domain action) but for its status as the holder of unexercised options in the property.

The 1966 decision in *Canterbury* then served as the basis for the decisions in *Texaco* and *Estate of Young* (holding compensable in eminent domain unexercised options to purchase property).

None of those decisions cited *Patterson*'s discussion of options to purchase bonds as having any relevance. All of them dealt with options to acquire real property. They formed the basis for the trial court's decision here and, absent the Supreme Court's abrupt about-face,

would have made New England Estates whole after the Town's years of dishonest actions designed solely to keep out the low and moderate income families that would have occupied some of the homes in this development.

CONCLUSION

We are unable to improve on this Court's admonition in *Phillips*, 524 U.S. at 167, that "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."

When the Connecticut Supreme Court changed settled Connecticut law that formed the basis for the option contract at the heart of this case, it committed a judicial taking.

New England Estates prays that certiorari be granted.

Respectfully submitted,

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