

NO. CV-03-0183606 : SUPERIOR COURT
NEW ENGLAND ESTATES LLC : JUDICIAL DISTRICT
VERSUS OF WATERBURY
TOWN OF BRANFORD, ET AL : AUGUST 14, 2007
----- X

OPENING STATEMENTS

BEFORE: THE HONORABLE WILLIAM C. CREMINS, JUDGE

APPEARANCES:

JAMES W. BERGENN, ESQUIRE
TIMOTHY S. HOLLISTER, ESQUIRE
ATTORNEY FOR NEW ENGLAND ESTATES

STEVEN R. HUMPHREY, ESQUIRE
BRIAN R. SMITH, ESQUIRE
ATTORNEYS FOR THOMAS SANTA BARBARA & FRANK
PERROTTI, JR.

KERRY CALLAHAN, ESQUIRE
DANIEL CANAVAN, ESQUIRE
ATTORNEYS FOR THE TOWN OF BRANFORD

JACQUELINE SAGLIANO
COURT RECORDING MONITOR

MR. BERGENN: New England Estates has waited a long time for this moment.

When a town uses the power of eminent domain to take privately owned land and it claims it's doing it for the benefit of the public, but its reasons are false or a pretext, they're hiding the actual reason that is improper or illegal, or its reasons have no factual or legal basis, or it takes much more land than its stated reason makes sense to do, or the taking is an abuse of power, then our Constitution requires the town to pay for the harm its action causes.

In our country and in our state, the Constitution State, towns are forbidden from taking private property when the reasons are false. It's called bad faith or a pretext or it hides the actual reason, or it's unreasonable, that there's no legal or factual basis, it's not necessary for the public use or it's an abuse of power. And why is that forbidden? Because it's the ultimate abuse of the awesome power of eminent domain.

Now, this case is unlike any case you've ever heard of in your lives. Fortunately, what you're going to hear about in this trial never happens. You have a very honored

position in this case. You're essentially going to be sitting in the position of the Constitution. You're going to consider justice in this case based directly on our Constitution.

The case is about playing by the rules, and specifically, and you'll notice already, it's about the Town of Branford using eminent domain to take 77 acres of private property. That makes sense first just to show you what's at stake, where it is. This is the big picture of part of the Town of Branford. Most of us know the Long Island Sound. We can see there's a lot of residences, residential development here, of course, all along the sound and all round the area. You happen to see right here there's a little space that's not developed. Now, it's only little because this is a big view, but it's actually big. Its 77 acres.

And what you can see is this 77-acre parcel. It's less than a mile from the beach. It's just a walk from the town. You cross here. This is actually a railroad line. You can barely see it because they have buffers that grow up vegetation so you don't look at a railroad track. But when we come right

through here, this is just a walk to the center of Branford. That's essentially the area that is in question.

I want to blow up for you -- This is just the same picture, we've just blown it up a little. Now you can see a little bit better the 77 acres. The first things you're going to notice, residence on the left side, residence on the right side. Up here is the Branford landfill. It just touches the bottom part of this 77-acre piece of property. All we've done there is just blow up so you can see the residence -- residential area to the left and the residential area to the right. This is the church that's right next to it. This again is the landfill. We're showing now the corner of the 77 acres. This is the landfill. These are homes that have been there for a long, long time right next to the landfill. And again, this is just the church and the parking lot. Now, this is the north side. You can see the top; again, it's all residential.

Now, this I've brought out because it gives you a little bit more attention on the landfill itself, but before going to that, can we can back to the large one. When you look

at this the first thing you might think of is, well, how come there's no residence on that 77 acres. It seems like there's residence everywhere else. Well, there's a reason. Actually, they almost put it up there. Back in 1988 the Town of Branford unanimously approved a 298 unit development and a 9 hole golf course right on this parcel. They made the judgment that it fit. They already knew they had other residences all around the landfill and they approved it, 298 units and a little golf course. The golf course was going to wrap around this part and the 298 units were going to be here. It was called the Fairways. That happened in 1998, and when you get an approval of the town, it lasts for 5 years.

The entity that was going to do this ran into financial trouble. It had nothing to do with this, but lost it. The bank took over. It got sold out of auction. Who bought it? In 1991, there was a guy who, for the Town of Branford, actually ran the landfill. His name was Thomas Santa Barbara. He's going to testify. And he ran the landfill, that was his job, and he knew the landfill. And so in 1991, three years after the 298 approval and

the golf course, he said this is a good thing to buy. He's a smart guy. But if you look, everything else is developed. It's already approved right off the water. This is pretty choice, so he buys it in 1991.

What's the first thing that happens to him after he buys it? He runs to the town, well, you know, you've already approved this and we got a sewer assessment and you got 298 units in there, so he gets assessed. He ultimately agrees, okay, I'll pay you some money as the units are built. He decides, however, he doesn't want to build it. He just wants to hold it for investment. He had just sold another business, he'd had some money, he decided this is just a real good long-term investment.

Now you can go to the landfill itself. I want to tell you a little bit of a story about the landfill. That landfill, which right now just looks like a green field, it actually -- that's how they run it. This landfill had been operating from back in the 70s. And in the 70s and 80s this was operated and it used to carry -- get municipal waste, you know, regular garbage, and then every day when you do that, you've got to cover it with earth,

and that went on for years. In 1991, the town basically closed that part, the municipal solid waste. It was open from 91 to now to just take what they call bulky waste, which is like construction debris, stumps and things of that sort. And a couple of trucks two mornings a week for the town residents, from the transfer station, they bring over and they use what's left of this landfill. Just this last little piece is the only part that's left. All the rest of it has been covered up.

And the other interesting thing about the history of this landfill is that they're very heavily regulated by the Department of Environmental Protection. They have very strict standards. Of course, they'd have strict standards, there's houses right here. And you saw from the other maps, it's surrounded by houses. So in 1986 the town has to apply for what they call a closure permit, which allows them to shut it down, but assures everybody that it's going to be shut down safely. So what does the state require? Every quarter, every three months from 1986 until right now, there has to be reports on the landfill. Those reports punch out test results to be sure that there's no risk or

safety to anybody within or around the landfill. From 1986 through today, they've got a 4.0 average, straight A's. Some of you I know have gone to school; we'd all like to have straight A's. They have already been in compliance. They were in compliance in 1988, because remember that's when they approved the 298 and the golf course. They already had a perfect record. There was no violation of any environmental standard, and those are strict standards.

There was never a violation when, in 1991, Mr. Santa Barbara bought it. There was never a violation in the entire time he owned it right up until what brought this suit on, which was January of 04 when they took it. So from the very beginning until January of 04 this landfill has been tested, so that we know that the surface water that flows off and the ground water that goes underneath isn't presenting danger to these people who are already living there. And that's why the town knew back in 1998 when they approved the 298, they could feel secure, there was no problem. That's why when they told Mr. Santa Barbara when he bought it, you've got to pay for the sewer assessment, they knew there were no

problems. That's the landfill.

Can we get to the other aerial. This is just another view. I show you this view. It's a pretty picture. Here you can see the little pond that's on that same parcel. I'm going to reorient you. This is that same triangle. Here's the landfill over here. Up here is tidal waters. You know what those are, when the tides comes and goes out, that's salt water. Here's that church area. Here's the residence right next to the landfill. Residence all around the property. You see.

This is just the very top of the landfill, you can barely see it here, but I call this up just to show you, again, there's residence above the landfill from this picture. Even have a few ball fields nearby. And this is the last aerial I want to focus on. This is a close-up shot essentially of the landfill. You can see just the very bottom portion of the 77 acres, which are this from way out here. These couple of acres here go up against this property. And if you look you can see this grassy thing that we saw from afar, and you can also see they're just finishing up here, they're almost done using this landfill. But they're pursuing a closure

plan that was initiated back in 1986. So closure takes a long time and you've got to keep doing these quarterly reports to give people assurances there's total safety for years and years and years. And what's left is just something that just looks like a field.

You can kind of tell here how it slopes off, and the idea is for the water to slope off. Go back to the general area. You can see -- Water always goes downhill and generally speaking, this is the flow of the water. It goes down towards the tidal basin and over here is where the sound is, so it flows basically down towards the sounds. That's the general area.

Now that you've see this, what's this doing in the lawsuit? Most of know that the Constitution does not allow the town to just take private property just because it wants to. In other countries, they allow this, but not here. Usually towns take private property when they've got to build a school, build a road, something like that. And even if it wants to condemn and take property, it can only do it if the reasons it uses are the truth, the real actual reason, and they have a factual and legal basis and the town needs it

for public use, not because they want it for something else, it's got to be necessary public use.

A town cannot act on whim; just decide we're going to take something without having a specific plan for a specific public use. And they can't take much more land than it publically needed. That Constitution is what protects them from taking the whole town.

This case is about what the Town of Branford did with these 77 acres. The question is did they play by the rules? You're going to be focusing ultimately just on 7 weeks for their conduct. The Town of Branford never raised a word about eminent domain on this property. Remember, they approved 298 units, a golf course, no complaints when Santa Barbara bought it. And then for the first time eminent domain comes up May 21, 2003 at a Board of Selectman meeting. Seven weeks later, there was still no plans for anything in place what they're going to do with this land. They vote to take it.

Now, what I want to do is to go back and tell you the story, what led up to and why did they do this in those seven weeks. I have a

chronology just so you can follow it along. You'll remember we talked about this 1988 approval, and when they approved that 298 they had had no environmental concerns. Already I think you'll remember that. And in 1991, remember -- So this is all before January 1. The real action starts in early 01, because New England Estates, Don Stanziale and the other owners, they came along in 2001, at the beginning of 2001. But just before then they had the full approval, then in 91 Santa Barbara bought it. And by the way, why did he buy it? Well, he had been running the landfill. He ran the landfill from, I think it's 84 to 98. He knew, he saw these quarter reports, so there's no environmental problems. This is really a good opportunity, so he buys it in 91.

This is just to remind you that for 15 years they had 60 quarterly reports, F and O, that's the name of the engineering company, Fuss and O'Neil. And they had by the beginning of 01 all those reports, no contamination for the land and they had fully required with all the requirements.

Could I have the next? What happens is beginning in January, Santa Barbara decides,

I've held out long enough, it's time to sell. What had happened in the interim? Well, there weren't any more big properties around. By 2001, there was a lot of demand and less supply. Most of us understand high demand, low supply; it's a good time to sell. They decided to sell. Within a couple months New England Estates, they see this. They had worked together, the three of them, and they had done other housing and they were successful. They're good at it. They're builders and they had made a lot of people happy and they had been successful. So they said this is unbelievable, look where it's sitting. It's already been approved. We can just pick up and run from there.

So they start looking -- They find out about it in February, and what's the first thing they do as smart guys do, a lot of smart people here, they go to the landscape architect who worked on the original approval, the one that got voted in unanimously, 298 units and a golf course. They go to him and say, geeze, we see this thing's for sale. It would save us a lot of money if you'd let us use your plans. He said, well, I'll let you use them, but you have to pay me something for

them, so they do. They look at the plans. They walk around. This is crazy, all we've got to do is make it even better, make the town happy and all those people would be able to live there who are needing housing.

So in May they sign what's called an option contract. That gives them the right to buy it from Santa Barbara and Perrotti at the time that they get all their developments. The price, 4.75 million dollars. And as soon as they do that there were -- they're walking the site. They get permission to do whatever they want to do so that they can develop this site. They're meeting with the town regularly. The town -- Everything is positive, no problems, no concerns. The town itself saw that this thing had already been approved and it had something the town really did like. Right in the old approval there was a road that went right through here, and you're going to hear a little bit about the roads down here aren't so good. They flood a little bit. Not real bad, but that happens. So the town engineer actually loved the old proposal. He was sad it didn't get up there, because you want a road that gets the emergency access and all that.

In any event, so these guys are deciding, we can do this. We've built roads before. We built housing before. Now we got the guy on board with us who did it before. So they start and they apply for a wetlands permit. There's a whole lot of things you've got to do before you do something like this. Basically you're doing the same thing that happened before; they're just doing it all over again. They take the same footprint that is exactly what was done before and they just try to make the housing a little better, make the golf course a little better. They actually reduced the number of units from 298 to 268 thinking the town would like that.

Wetlands says okay, and they don't have any environmental issues. Then they have to apply after that for the planning and zoning commission. They have to give approval when you want to do something like this on this property. And by the way, they started for 272, that's down from 298, wetlands says we'll let you do 268, okay, they apply with 268 to zoning.

Then I'm going to stop here to start on a separate story. What you've seen so far is Plan A. Plan A, let's just go right to the

market, the same thing they did before, now we've got 268 units. They've been doing it now from the beginning of 01 until October of 02, a year and a half, and then they're thinking, you know what, I may want to do a Plan B. What if they don't vote for this even though they voted for it before, we put a lot of money in this thing. They're not getting paid. They've worked a year and a half, they've paid hundreds of thousands of dollars to engineers, lawyers, people like that, but after all this work they realize, wait a second, we've got to be sure, so they know there's another way to build, market 268, whatever anybody's willing to pay you can charge.

The State of Connecticut passed a law, its called 8-30(g). We all know in the State of Connecticut it's hard to afford to buy homes. So the State says if you got a developer who is willing to set aside 30 percent of what the developer is building so that people who make less money can buy it, then the town can't stop you. If you just want to build 268 at the market, the town can just say, ah, we don't like it for lots of different reasons. But if you're willing to

set aside 30 percent of them to make it more affordable for some people in Connecticut, like the people who work in the town so they can afford to buy, if you're willing to do that, then we're going to give you a substantial advantage developer, Mr. Builder, if the town tries to stop you they can only do it if they've got a real health or safety reason. Now, if you can't get fire trucks in there, if there's some kind of danger. Well, no, the State doesn't say town you've got to put this housing up, but if you don't have a real environmental problem, you don't have a real safety problem, then if the town shoots down a builder, the builder just goes to court, the court says, well, do you have any health or safety reason, Judge says, I don't see one, you may proceed.

So October 02 New England Estates had hired a lawyer who knew how to do what I call Plan B. They couldn't get Plan A. They'd have Plan B. And the town knew this. We were open about it. Rasmussen is the name of the town planner. He writes a memo to the First Selectman and says, hey, 8-30(g) gives a substantial advantage to the builders, lays this out, because this doesn't happen that

often. Most builder just want to make all the money, they don't want to set aside 30 percent. Our builders were willing to set aside 30 percent to make less money, and she explains to the town officials, hey, you know what, if they do that, they have a substantial advantage.

Now we proceed. Plan A gets denied. They're a little surprised, this is November, because, wait, this is the same thing, we just made less units, a nice golf course, what's going on. Well, we don't want to have that many houses here, density, a few other reasons they cite. No environmental problems at all. Why not? Because there never were. We've already covered that. All right. This landfill had been tested quarterly, all right.

Next. Then what happens is naturally New England Estates appeals it. We're thinking, what's wrong. This is better than we had before. Next. While this is being appealed, Plan A is being appealed, now we've got Plan B, from January through May New England Estates got a lawyer working with the town planner and they're meeting and talking about an alternative plan, Plan B to go 8-30(g). If we can't work this thing out, I guess we'll

suck it up, set aside 30 percent and we'll build under that.

Along this time, while it's being appealed, the process continues. It's a little complicated, that's why they have to hire lawyers. Army Corp of Engineers grants the permit for the 268 for the Plan A. So now we've already got wetlands and the Army Corp both saying, okay, you may go.

Then this is where it gets interesting, in April when they see this is happening, and they already know about they've got to have a health or safety reason, they get Fuss and O'Neil, the same ones who do this quarter report, everything okay, everything okay, they work with them. They actually help Fuss and O'Neil write a letter to themselves, and in that letter it talks about, well, you know, if you're going to build next to a landfill there can be lots of problems. They don't talk about this landfill that they've been monitoring for 16 years. They don't talk about the fact that the landfill has been here surrounded by residences and some right next to it and we don't have any problems. They just say, you know, sometimes when you build near a landfill it can be a pretty big

problem.

Next. Right at that same time we're doing environmental studies. IES, they do a Phase II, that means they actually test. And when they test, surprise, surprise, no environmental problems.

Next. Now, this is coming towards the end of that period and an attorney for New England Estates gives the town planner the draft Plan B, 8-30(g), set aside. They give the plan to the town attorney and they say, by the way, our formal applications -- They've got to do the whole thing all over again, a whole big plan, everything that they did back in 98 -- excuse me, in 88, that they did in 02, they've now got to do the whole thing, all these plans, all over again. So it's taken a few months, so they it's coming, we're almost ready with our Plan B. You can expect it somewhere between, you know, in May, early May.

What's the next thing that happens? May 21. Suddenly the selectman vote to take the property by eminent domain. They got three reasons. They can only act, they're a town, they can only act by vote, to investigate, to remediate environmental conditions and

possibly to develop playing fields.

Meanwhile, our formal submission like we promised comes in at the end of May, a couple weeks later than it was originally hoped to get done, so Plan B is now before them.

Next. This is the formal vote that was taken on May 21 and it just breaks down the three reasons that I summarized, to investigate and remediate and possibly to develop as playing fields. The Board of Selectman, they all vote. Then it goes to committees. June 8, the first committee meeting -- June 18. Excuse me. And at that time, after they say investigate, remediate and maybe ball fields, the town engineer comes up with a map about possibly using this land for playing fields. Pay attention to this map.

Next. Then June 23, remember the third thing to do was -- The first thing to do was investigate. Well, June 23, Fuss and O'Neil, the same one who had done the landfill, says, hey, we can investigate it. Surprise, surprise, they don't ask them to do it, they just take the land. They don't ask them to investigate.

Next. They submit the proposal, then our

plan is resubmitted. We put the golf course back in. We thought maybe they didn't want the golf course, and we resubmit it.

Next. They have another committee meeting. And then they vote. Not surprisingly it's the same vote and the same issue, to investigate and remediate environmental contamination and possibly to develop the property as playing fields.

A couple months later they authorize the money. Then we're continuing with the process about trying to get this 354 unit Plan B. By the way, the units went up --

THE COURT: I'm sorry, you've got two minutes left.

MR. BERGENN: Okay. Thank you.

The next 2 please. Essentially these last few months we're still finding out no contamination. And then the town takes it.

The question is why did the town take it? It used eminent domain not for public use, but so they didn't have to play by the rules. They knew if they didn't take this property that we'd be able to go right to court, they'd have to show some kind of health or safety concern. They knew there was no health or safety concern. They said we're going to take

it to investigate, but they knew they could investigate already. The record is going to show you that our application said you can come and investigate, the regulation said that we can investigate, so you don't need to take to investigate.

To remediate, they knew there was nothing to remediate.

For ball fields, they never spent a dime. They had plans for ball fields in town, but not there.

So all these reasons were not the real reasons. What were the real reasons? They wanted to stop it. We talked to the town officials and the town officials admit that they knew these things, that they could investigate, that there were no -- there was no contamination and this really isn't necessary for ball fields. They admit that. And they also admitted they wanted to stop housing on this property. That's conceded.

In the end, you're going to see why we came to court. We didn't have any other choice. They took the property. We can't proceed in court, they've got it.

And finally, we're going to be finishing our case with an independent expert who is

just going to explain why it is that when you spend over a million dollars over three years doing a proposal just improving what had been done before, and you use builders who have done this before and made money at it, and they're willing to work for four and a half years before their first sale, and you do it from 01 to 04, and we all remember that's when housing was really going up. If you do that and you're willing to wait it out, you make a lot of money.

THE COURT: Counsel, that -- you need to stop here.

MR. BERGENN: Thank you.

THE COURT: Attorney Humphrey next. Attorney Humphrey, any opening comments?

MR. HUMPHREY: Yes, your Honor.

THE COURT: Why don't we do that now please.

MR. HUMPHREY: Everybody has to have a prop.

Good afternoon, ladies and gentlemen. My name is Steve Humphrey, and along with my partner and clients, we represent the individuals who were the actual owners of the 77 acres.

Tom Santa Barbara, would you stand up

please. And Frank Perrotti.

Tom lives in Branford and Frank lives in Hamden, and they were the gentlemen who -- Thank you. They were the gentlemen who in 1991 decided to and did go, as you'll hear, the evidence will show, went to a bankruptcy auction and purchased the 77 acres.

In this case, as you've heard briefly, New England is -- I know from the video you've seen you know this, but I'd like to set up a graph because it's sometimes easier to follow.

The plaintiff is New England Estates. And what they did in this case, after the condemnation and they were no longer able to develop the property, they brought the lawsuit and they sued Branford, and that's the named defendant. And in addition to suing Branford, they also had to name the owners of the property as defendants in the complaint, so they're additional parties. So in addition to the town it's also the owners.

In this case, what the owners have done is file a cross-complaint. The plaintiff have their complaint, it goes against Branford, and in the complaint there are no allegations, and New England is not seeking to recover anything from the owners, it's that they're the owners

of the property and under the procedural rules needed to name the owners of the property.

The owners filed a cross-claim also against Branford, because we believe, as the evidence will show, we also suffered by reason of the improper taking, the improper, unreasonable taking.

So there are two claims actually against Branford, one by New England and then the one by the owners. The owners are not making any claim at all against New England, so both parties are making their claims against the Town of Branford.

Now, in this trial the owners will be going second, but New England will be putting on the evidence. Most of the evidence that goes in is also pertinent to the claim made by the owners, because we're claiming the same thing, that the taking was not proper.

The damage suffered by New England are different from the damages suffered by the owners. The owners suffered because a portion of the contract wasn't paid, and we'll get into that, the evidence. We believe the evidence will show and will demonstrate to you the loss that the owners suffered because of the condemnation.

During the course of this trial there'll be some days when either Brain or I are not here, it's probably because we're back preparing for the next witnesses that will be coming up, and there may be days when both Mr. Santa Barbara and Mr. Perrotti may not be here. But it's -- What I want the jury in a positive way to do is remember that the owners -- the claim of the owners is not of the same magnitude, I think the evidence will show as we get into it, but we are seeking relief which we believe is appropriate and we believe during the testimony we will show you exactly what those -- what the losses were that the owners suffered.

The owners in this whole process really is kind of passive. We signed a contract. New England had the option to purchase our property. They had the obligation, also the right, to go file all the applications and seek to get the permits that they needed to proceed with the development. The option contract will be put into evidence and it will show that at such time as they got their approval, they then were obligated to close or purchase. I believe many of you own real estate, so you know you go to the closing and

purchase the property. Because of the condemnation, that never occurred. The closing never occurred.

So we are here to recover what we will attempt to show you people, and believe we can show you, the losses we suffered as a result of that closing not taking place.

In advance, I thank you. It's a difficult case because you'll be sitting there for a while, but thank you for your attention. We'll start with the witnesses shortly after the defendants have their opportunity to speak with you. Thank you.

THE COURT: Attorney Callahan, please.

MR. CALLAHAN: Good afternoon. May it please the Court, counsel, members of the jury. I'm Kerry Callahan and I represent the Town of Branford.

The Constitution prevents any governmental body from taking private property without paying just compensation. Please understand at the outset that this is not a case about just compensation. Just compensation is decided elsewhere. The Town of Branford always expected and is prepared to pay just compensation for the property. That has nothing to do with this suit. That's been

decided in this court in another proceeding. We're back for another bite at the apple.

A couple things I'll comment on initially, at the end of his remarks Attorney Bergenn indicated that the defendants here in a deliberate and malicious way went through all this detailed subterfuge that you were just -- that was displayed to you in order to prevent housing from being erected on this site. What I'd like to do for a few moments is talk to you about the case that was actually pled and the case that we're here to try, because that case is about the town's deliberate and pretextual effort to prevent New England Estates from putting affordable housing on this site.

The other point that is worth mentioning at this juncture is you've just been told, well, if you say you're going to put affordable housing, he'll dedicate 30 percent to affordable housing, then what you can effectively do is shift the burden to the town. All right. If you go in with a regular zoning application and the town doesn't like it, it's too dense, traffic, noise, any number of reasons, the town's zoning authority governs and they can turn it down. If you go

to court there's great deference paid to the decision-making authority of the local body. What the affordable housing statute does in Section 8-30(g) is it reverses that if it's an affordable housing complex that's being proposed and it shifts the burden of proof. However, what you weren't told is the statute was changed.

This was a market rate proposal. They were making a market rate proposal. When they tried to use the affordable housing to get what they wanted from the Town of Branford, the statute has been changed. And it said that if the idea is that you have industrial land and somebody via an affordable housing development is going to try and take -- and shove down the town's throat the concept of you've got to take your industrial land and make it residential, because we're saying it's affordable housing. The statute was changed to say no, that burden-shifting process doesn't take place at all if the land was zoned industrial.

This land was zoned industrial from the outset of zoning regulations in the Town of Branford, except for one brief period between 1988 and 1993 when a prior development on this

site was considered and failed.

Now, the plaintiff has alleged, and I'm going to kind of go the old-fashioned way and just read a couple things from the pleadings. The plaintiff, New England Estates, LLC, which we're going to refer to in short as NEE, is a Connecticut limited liability company with a principle place of business at 765 Main Street, Monroe, Connecticut. The principles are Don Stanziale, Alan Bittenersaew (phonetic) and Andrew Forte.

Now, more importantly, the defendant, Town of Branford, is a municipal corporation of the State of Connecticut. The town is governed by a charter and a code of ordinances. Under the charter, the First Selectman is the chief elected official. The Board of Selectman is the town's administrative board. And the legislative authority of the town is vested in a 30 member representative town meeting.

And the reason I read that is because of the case that the plaintiffs have actually pled, which is that all those people, the Board of Selectman, the administrative services board of the RTM, the whole 30 member representative town meeting, either

collectively or individually deliberately lied about what their reasoning was for wanting to take this parcel, and that the real reasons hidden behind all these lies was that they wanted to prevent New England Estates from putting in 354 units of affordable housing.

Now, after that section I've just quoted, the complaint goes on to talk about the history of the parcel. And I believe that the evidence we're going to present through the people who have actually been in Branford, who know this area, who know this parcel and who know the adjacent landfills, yes, landfills, because there's actually 2 to the south of this property, is that once upon a time this thing was a farm.

Then a gentleman named Cosgrove took title to the property and -- This is an opening statement, not an argument. I'll use the plaintiff's language. This Mr. Cosgrove then for several decades prior to any of contact for the -- he used it for several decades prior to any of contract for the excavation of earth materials, including sand, gravel and topsoil and the deposit of earth materials excavated elsewhere. That's what the plaintiffs are claiming.

So the 77-acre parcel that you were shown from way afar was actually over the decades before Mr. Perrotti and Mr. Santa Barbara acquired it, effectively turned into a 77-acre hole. What you will learn through the witnesses testimony is that the -- that this mining operation that also involved the deposit of things like construction debris and excavation materials from other sites, that prior use denuded this site of organic material, i.e., the stuff that you need if you're going to grow stuff like lawns around a housing complex, put in rhododendrons, azaleas.

It was stripped in many places all the way down to the bedrock. Over the years it became covered with what is described in many of the exhibits that you'll see related to landscaping as invasive species, weeds, scrub, junk brush that can go essentially on rock and very thin soil. And amongst this scrub brush and scraggly little trees was an assortment of old mining equipment, junk cars, old 55-gallon drums, construction debris and some leftovers from the neighboring landfills.

Now, the fact that there were environmental problems in this area, as

counsel noted, was well known to the town. The town had to spend a ton of money in their early 1990s delivering city water to anyone within a thousand feet of the landfill because of the environmental concerns that the Department of Environmental Protection had with their drinking water, because of the potential impact of the adjacent landfills.

Now, Mr. Perrotti and Mr. Santa Barbara, who had run the dump, bought this piece in 1991, and I think the implication that you heard was that this was, you know, because it was a nice pristine site, well, the evidence will show that what Mr. Perrotti and Mr. Santa Barbara did was they tried to turn the 77 acres, which had already been turned into, in effect, a pit, into a landfill. That didn't happen and then the property essentially went quiet until 2001 when New England Estates purchased an option and sought to resurrect and dust off a 14 year old project for a 298 unit housing development.

Now, in 2002 New England Estates effectively submitted the same plan that had been sent in 14 years earlier. You can imagine in the world of environmental regulation and real estate development that

these don't stay the same, standards, regulations do evolve over 14 year periods.

The planning and zoning commission for a variety of reasons that you will hear, including the fact that this was -- there was a lot of hypothetical left in this plan. By the time this thing went to planning and zoning, and you'll hear this -- Margaret Hall is here and she's the solid waste manager in Branford and the selectman were aware and the town planner was aware, when they went to zoning, when they tried to get this project through the approval process, New England Estates had never in any comprehensive, viable or credible way, presented a plan that said we've got a big hole, this is how we're going to fill it up, because we've got to fill it before we build roads on it and before we put houses on it. That was never addressed.

So that this was going to be built and it was going to be a big, you know, and profitable real estate development, at that stage there was not a sufficient foundation, either in theory or in reality a foundation of earth and materials at the site to support even the idea that this was going to be --

Now, once the application to the planning

and zoning commission was denied in November of 2002, as often happens, there were discussions back and forth about trying to resolve the parties' differences. Those went back and forth between Attorney Hollister, who represents New England Estates, and Attorney Penelope Bellamy who at the time was Branford's town attorney.

Now, the discussions that were taking place immediately prior to the raising of the environmental concerns by the town was the 240 unit development that had zero affordable housing. It wasn't an issue. It was 240 units structured 80 percent 55 or older. So what we will suggest through the evidence that we present is if the town sought to discriminate against affordable housing, as has been alleged, well, all they had to do was agree to the 240 unit over 55 housing.

But as that resolution was being discussed in March of 2003 and the town's attorney -- she'll describe better for you than I can, but I'll give you a preview. The town's attorney in effect said, wait a minute, if we had, you know, a 240 -- 200 plus residences sitting here, would we in this day in age and in this day of sensitivity to

environmental issues, let somebody put a garbage dump next to it? This raised concerns because -- of course, we wouldn't.

So she's an attorney. She's not an environmental expert. She contacted the folks at Fuss and O'Neil whose familiarity with the landfill went back into the 80s. She says, hey, we're talking about a resolution here that could put a whole lot of housing, a lot of families, a lot of people on this piece of property adjacent to our dump, the dump that we're responsible for.

Here's a couple important concepts, and I'm no environmental, but one is a term you'll hear a lot is called leachate and as rain falls on garbage, of course, it trickles through garbage and it eventually picks up stuff from the decomposing garbage and can come into contact with the ground water. Once it comes into contact with the ground water, it flows with the ground water and that flow doesn't recognize property lines, so it can communicate into other properties. You've already seen Attorney Bergenn's presentation, how it was headed out through the property out into the tidal wetlands.

The other issue, and this is tied to the

whole closure concept, is you've got methane. One of the gasses that is created by decomposing junk is methane. Now, methane has been tested for around the border of the property and on the landfill itself, and you'll see the results that said, you know, at times there were very high levels of methane and that on the property there had been methane detected, but it was below the point at which environmental folks think it's going to, you know, blow up.

So those are a couple of the concepts that were out there. So what was told by Fuss and O'Neil, and this is the town officials who rely on the expertise of their consulting professional, yeah, you've got concerns. We know that what's been found migrated from our landfill onto the adjacent property and at this point doesn't violate state RSR's.

However, what you've got to deal with in a project of the magnitude that you're talking about, especially a residential project, is a few things. One, methane. The landfill was in the process of being capped, covered with clay. This landfill, by the way, increased in size dramatically between 1988 and 2002. When you cap it with clay the methane can't go up

anymore. It wants to go somewhere. It can go sideways. The same with leachate, it's going to go somewhere. So one of the concerns that Fuss and O'Neil raised with the developers and with the town was what you can't do is go in there -- I mean, this site is reduced to rock. We've got to blast it. We've got to tunnel through it. We've got to put conduits in there. You're talking about the possibility of foundations. You refill those. That's -- Even if the readings were not so high on the property now to implicate the regulations, you worry about creating preferential pathways, i.e., you dig a hole for an electrical conduit and you invite the methane or you can potentially invite the methane or that leachate plume into this site on which you want to put 240 plus families. That's an issue. We've got to make sure that they deal with it. And it wasn't at the time you can never build anything there, that's not possible, as you'll hear from some of the witnesses, including the folks from Fuss and O'Neil, just about anything is possible if you'll pay for it. It doesn't necessarily make the project feasible.

So the end product of Attorney Bellamy's

asking herself these questions and involving Fuss and O'Neil is that they go back to the developers and say, and this is in a meeting - - there's meetings that take place throughout April and May of 2003, you only have a Phase 1. Phase 1 is an environmental surgery that just says, here's some areas that you might want to look at.

The town basically, in the person of its First Selectman, Anthony DaRos, says, wait a minute, you're talking about 240 units next to a dump. Where's your Phase II? Well, we don't want to do that. We want our approvals first. We don't want to spend the money on Phase II. This sends up a red flag to Mr. DaRos, but he doesn't say get out, we're taking your property. He walks through -- He gets them, in effect, lends them Fuss and O'Neil at the town's expense and says, here, IES, in effect, you're not giving us the warm and fuzzies here, we're not comfortable with you, but we're going to get our engineers to explain to you the information that we need to be satisfied that if you build this thing you're not going to create the preferential pathways that are going to invite contamination into the site, because then

you're going to fill it with people and then you're going to be gone, and then those people, when they have problems with their property, problems with their health, who do you think they're going to look to. They're going to look to us, the Town of Branford, that it's our dump, it's our garbage, it's our lethane and its methane. Did I say lethane? I meant leachate. Sorry.

All right. After this meeting took place, and there's another pivotal day here, it's May 15, 2003. So Fuss and O'Neil asked and paid by the town to explain to IES, here's the information that we need so we can make -- we'd be comfortable about going forward with this. May 15, there's another meeting after which Mr. DaRos, as the First Selectman of the Town of Branford, receives information from his professionals that says in a nutshell, they haven't really addressed any of our concerns. Neither the developers, nor their environmental consultants, or their landscape engineers have shown any ability to or desire to take the environmental challenges that this property presents seriously or to give us any clear indication how they think they're going to take a 77 acre pit and fill it with

material that will allow the growth of things like the plants and the trees that are shown on their plans.

At that juncture, Mr. DaRos was also very familiar with the fact that other municipalities that had allowed or had participated in developments at or near their landfills had faced huge exposure and tremendously expensive problems later on. Based on that knowledge, based on his background, it was Mr. DaRos who will be a witness and who will describe to you his reasoning was anything but pretextural. He felt that it was the responsibility of the town to take ownership of this property, that it was not appropriate to expose future generations of Branford taxpayers to indefinite and unbounded liability to potential residents of this site, nor did he feel that it was responsible to take this site and to subject its future residents to the health concerns that could be, one, affiliated with the property and, two, laid at the town's doorstep if they ever materialized.

Now, again, referring to their pleading, and I'm quoting: "The allegation here is a pretextural bad faith exercise of the power of

eminent domain." Not we didn't get it right. Not you could have done some more testing. Not you could have asked some more questions. Pretextural, bad faith.

Our witnesses will come and describe to you that their concern from the first meeting at which the Board of Selectman said we think we should take this property and pay for it. Those three people, all the way to the end of the process, when the thirty member representative town meeting voted, one, to take the property and, two, to pay for it, that all of those people throughout the process genuinely believed that what they were doing was responsible, was for the benefit of the town, to protect the town from endless liability, to protect the town from the exposure and to protect the health of the community.

Whether or not somebody thinks that's right or wrong is not the issue. It's whether or not the reasoning was pretextural and, as Attorney Bergenn himself described, intentionally false.

Now, I suggest that you will not need to get to the issue of damages once you've heard the town witnesses describe why they did what

they did. But once we get into damages in this case, that's where facts and evidence leave us adrift and send us off to float on a sea of assumptions, speculation and opinions, because lost profits is necessarily based on a consideration of the plaintiff trying to say to us collectively, you have to find what would have happened if the property was not taken.

I'll suggest to you a couple of things. The evidence that you will hear, and I use as an example the fact that New England Estates had not dealt with the fact that they were going to have to blast bedrock. They had not dealt with the fact that they've got to fill this 77-acre hole. One of the possibilities is that this was thing was never going to get approved or built. The evidence I believe will demonstrate to you too that another possibility is it would get approved, it might get built or partly built, but it wouldn't be profitable. Another is that it could be sold. Another is that it could be profitable.

But the law requires the plaintiff prove damages to a reasonable degree of certainty. And what you will find is -- There will be a presentation of damages to you, it's been done

three times by Mr. Cavanaugh, three times by the same witness, and each of those -- and on each of those three occasions the number has been vastly different from its predecessor. What I will suggest to you is that this demonstrates that when you take a projection that is based on zero factual reality you can make the numbers do whatever you want.

From the -- What you will hear from the defendants' witnesses, based on what existed at the time that this property was taken, was the developers plans were to develop, there was no viable means presented of addressing the site remediation issues that were there and that were prevalent throughout this site. And that there was no, again, indication that the developers or the parties that were working with them were capable of or even willing to invest the time, effort and money that needed to be invested to deal with these environmental issues.

Now, I'll get to speak to you directly again, and directly without, you know, the exhibits and all the props and all the evidence and things like that, at the conclusion of the case or the presentation of the evidence. At that time, I will ask you to

return a verdict in the defendant's favor. If New England Estates has been held to its burden of proving that a pretextual, bad faith taking has occurred, I trust that you will see the reasonableness of that request, because it is that burden that the plaintiffs cannot meet. Ultimately, you will see that the town, through its elected and appointed officials, acted in good faith with the town's best interests at heart and for a public purpose.

Again, I thank you for your time and your attention throughout the course of this.

THE COURT: Thank you, counsel.

*

*

*

NO. CV-03-0183606 : SUPERIOR COURT
 NEW ENGLAND ESTATES LLC : JUDICIAL DISTRICT
 VERSUS OF WATERBURY
 TOWN OF BRANFORD, ET AL : AUGUST 14, 2007
 - - - - - X

C E R T I F I C A T I O N

This is to certify that I, Jacqueline Sagliano, certify that the foregoing is a true and accurate transcript of the electronic recording taken with reference to the above-entitled matter on August 14, 2007 before THE HONORABLE WILLIAM C. CREMINS.

Dated at Waterbury, Connecticut, on this 6th day of September 2007.

Jacqueline Sagliano

 JACQUELINE SAGLIANO
 COURT RECORDING MONITOR