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CASE NO. CV03-0183606 :  
NEW ENGLAND ESTATES, LLC :  
V. :  
TOWN OF BRANFORD, ET AL :  
----- X

SUPERIOR COURT  
JUDICIAL DISTRICT  
OF WATERBURY  
SEPTEMBER 11, 2007

*E X C E R P T*

BEFORE: HONORABLE WILLIAM T. CREMINS, JUDGE,  
AND A JURY

APPEARANCES: ATTORNEY JAMES W. BERGENN  
ATTORNEY CHRISTOPHER MATTEI  
ATTORNEY TIMOTHY S. HOLLISTER  
For the Plaintiff New England Estates

ATTORNEY STEVEN R. HUMPHREY  
ATTORNEY BRIAN R. SMITH  
For Thomas Santa Barbara and  
Frank Perrotti, Jr.

ATTORNEY KERRY CALLAHAN  
ATTORNEY DANIEL CANAVAN  
ATTORNEY BARBARA FREDERICK  
For the Defendant Town of Branford

(Morning Session)

(Closing Arguments)

Lisa Longi  
Court Recording Monitor

1 (During the matter the following occurred.)

2 THE COURT: Ladies and gentlemen, again the  
3 evidentiary portion of the matter is concluded. Now  
4 the time is for the attorneys to make their closing  
5 statements and arguments to you.

6 Attorney Bergenn, please.

7 MR. BERGENN: Thank you, Your Honor.

8 You know, we all teach our children and we all  
9 resist learning from our parents something that we all  
10 figure out. You can't always get what you want. And the  
11 founders of our country knew that same thing. The king used  
12 to get what he wants all the time. But they put something  
13 in that constitution that said the other part of that phrase  
14 we've heard. You can't always get what you want, you get  
15 what you need. We're all familiar with that.

16 well, that's how the law works. That's the  
17 constitution. It's rock solid. Can't be avoided like  
18 gravity, where water always goes down hill, like history,  
19 where you already have history and you can't change it,  
20 where landfills are perfect. You can't - and when there's  
21 already been approvals, you can't change it. So you can't  
22 change the constitution, you can't change gravity, you can't  
23 change history.

24 Here, this case is based on the town not  
25 listening to that basic Mick Jagger proposition. They  
26 wanted to get what they want, not what they need. And they  
27 all admitted it.

1           Now, in the opening I told you you were sitting  
2 in the position of a constitution. Cases like this never  
3 happen. And then when the witnesses got on the stand, that  
4 answered the question, what's this guy talking about.  
5 Because - in the opening you guys don't know anything.

6           Now, what do the witnesses tell you.  
7 Stanziale, 25 years in the business. His father, his  
8 grandfather, never heard of this. Three years into a 10-  
9 year project, whop, they just take it. Gordon, 32 years,  
10 dozen towns, never heard of it. DaRos, 64 years in the Town  
11 of Branford, never heard of it except for some easement.

12           Bellamy, the town attorney, never involved  
13 with it. Glezen, town officials, everybody asked said the  
14 same thing. You don't just take property - private  
15 property. There's a reason for that. It's as solid as  
16 gravity and it doesn't change. Now, when you guys do your  
17 justice, I think we can be pretty sure it's not going to  
18 happen again.

19           Nothing good comes easy. Another simple thing  
20 that we've learned that - the hard way, most of us. This  
21 has been a long trial, not like a car accident or a criminal  
22 case. What we had is very well-prepared witnesses.  
23 Professionals reluctant. And sometimes I showed a little  
24 passion for justice. I hope you have the same passion.  
25 You're not allowed to have sympathy for parties. The law  
26 doesn't tell you not to have passion for justice.

27           And we learn something in civics or history,

1 and that is the constitution is alive. All remember that?  
2 well, your role is to extend that live constitution today to  
3 what you now know to be the truth of what happened in this  
4 case. The story is very clear to you. You know what  
5 happened. All I'm going to do is now when I put it  
6 together, you're going to see why it happened the way it  
7 happened.

8                   We start 1988, unanimous approval of the  
9 Fairways golf course. That was a lot of work. Remember,  
10 had Mr. Gordon here and I saved you from having to look at  
11 all this. But this is in evidence. There was no  
12 environmental concern, unanimously passed, landfill at that  
13 time is being tested constantly. They're taking in  
14 municipal solid waste.

15                   why is it passing unanimously. Why no  
16 environmental concern. Because it was run right.  
17 Santa Barbara was running it and Fuss and O'Neill was  
18 testing it, and there were no problems.

19                   Nineteen ninety-one, Santa Barbara buys it at  
20 an auction price. He knows there's no environmental issues.  
21 We just heard that. He knew the land. He ran the landfill  
22 from '84 to '98, 14 years. He knew that it was already  
23 approved for 298 units and golf. What's the town do? They  
24 send him a sewer assessment bill for the 298 bills - 298  
25 units and a tax bill for residential. That stays right  
26 through the time of the taking.

27                   Santa Barbara agrees with the town, I'll pay

1 when units are connected up. But he's a smart guy. He sees  
2 what this is like. A walk to the Sound, a walk to the  
3 center of town, surrounded by residences. How often are you  
4 going to see 77 acres in Connecticut anywhere where you can  
5 just walk to the shore and walk to town center. So he's a  
6 smart guy. He knows it's going to be worth a lot.

7           Nineteen ninety-three is the first time we see  
8 Fuss and O'Neill in another role. They're actually working  
9 for Santa Barbara. And what do they say? We recommend you  
10 go see our site development guys. Why? Because they,  
11 themselves, knew there's nothing wrong with this landfill.

12           So what happens? We continue during that  
13 period of time, all - the permit is going. Gravity's  
14 continuing. Water's going downhill. The constitution is  
15 still operating.

16           Nineteen ninety-seven. What's the town do?  
17 Not only has it been approved in the past, they say future.  
18 That's what it's going to be, moderate to high density.  
19 These are exhibits we're showing you. You're going to have  
20 them if you have any doubts. I don't think you're going to  
21 forget anything because you've watched a lot. But you're  
22 going to have this stuff. It's in evidence.

23           So what happens? While this is going on, the  
24 three men, Stanziale, Pizzalarusso and Forte (phonetic  
25 spellings), they've got lots of years of success, hard work,  
26 conservative estimates, never missed. Don, third generate.  
27 Al and Andy, successful bosses where his wife, Kim, works,

1 about 60-years old. I think that's what he testified to.  
2 That's the evidence. With many successful business  
3 ventures.

4 Two thousand and one, Santa Barbara says, let's  
5 list it. We've sat on it for 10 years. He wants nothing to  
6 do with the real development work. Can't blame the guy when  
7 you look at what you have to go through. So he declines an  
8 offer from somebody else for the price. The three guys form  
9 New England Estates. It's the culmination of life's work.  
10 Most of us knows what that means. Education, experience,  
11 work. You get to a certain point and you got to - as much  
12 as you're going to get. In terms of your skill set, that's  
13 what these guys did.

14 So they say, let's take over. Let's take that  
15 approved plan, let's update it. Let's go down, I'll talk to  
16 my dad in Florida. He's got great ideas. He lived a whole  
17 life doing this stuff. They improved the housing, they  
18 improved the golf course of an approved plan. Okay?

19 Now, what's the Branford inventory looking like  
20 at that point? Well, it's over 25 years old, all their  
21 competition. Almost no new housing developments. Remember,  
22 10 a year. You got 28,000 people in town. Well, we all  
23 know what happens with that when you have increased demand  
24 and no supply. I think even in high school we figure out  
25 what that does.

26 Okay. The prices go up. So 2001 to 2003,  
27 which is the main time that this work by New England

1 Estates, the prices are going up by about 50 percent by the  
2 time they take it. And it's costing them hundreds of  
3 thousands of dollars to do the work. And they're doing a  
4 lot of work. Nights, weekends, crawling around the ground.  
5 You heard it a long time ago. But that's reality. That's  
6 what they were doing. Million dollars. Thousands of hours.  
7 No pay, of course.

8                   Then in 2002, after paying the 10,000 a month  
9 and all this money for all the pros, they apply for the  
10 market-rate housing. That's the second plan. We're calling  
11 it plan A. The approved plan is plan zero. Now we've got  
12 plan A. Two hundred and sixty-eight units. Same boatload  
13 of work.

14                   what happens? They get a wetlands permit.  
15 You've heard, that's the hardest thing to get. Branse  
16 explains, Gordon, Stanziale, they all explain that's hard to  
17 get. Well, why do they get it? Well, they looked at all  
18 this stuff about the landfill, and they grant the permit.  
19 why? That's the truth. That's the reality. Nothing's  
20 wrong with that landfill, and nothing's wrong with that  
21 property next to it.

22                   They also know when they make this application  
23 that Fuss and O'Neill is still working on the landfill.  
24 Now, the interesting thing is, when Fuss and O'Neill was  
25 doing this, this was a year before the April '03. They  
26 don't know that New England Estates and the town are going  
27 through this process.

1           So what do they do? They reveal the truth, the  
2 absolute truth that the town can't get away from. And that  
3 is that the groundwater, if you can show that, still going  
4 downhill. It's - nothing's changed. That the permit is  
5 requiring that there are no impacts on the adjoining land.  
6 The permit's requiring monitor of all the methane and the  
7 groundwater.

8           And then they have a closure plan. No, we  
9 have - actually we have testified - we have Hurley actually  
10 testifying, if we can move ahead. You would have warned the  
11 town if you came to a conclusion that there was some danger  
12 to the health of the residents. Yes. Remember him saying  
13 that? I would have warned the town. He didn't want to say  
14 it. He didn't want to say it. You remember how that's  
15 like. That's where the passion for justice comes in. But  
16 we got the truth. You now know the truth.

17           What else does he know? Well, they have a  
18 closure plan a year earlier. And what's that tell us? The  
19 closure plan tells us everything's okay with the landfill,  
20 the water supply's okay, the groundwater's okay, the  
21 methane's okay. Interesting. They also talk about a future  
22 use. Okay?

23           The town - this is a year earlier. The town is  
24 considering a variety of potential development options. Now  
25 they got it, the 77 acres. They can do anything they want  
26 with the 77 acres. But with the landfill, they're even  
27 considering recreational uses on the landfill itself. So

1 this is all happening before - this is just the truth  
2 happening before what comes up later.

3 Now, the denial is in November of '02. The  
4 first proposal that they had, if you'll recall. I put this  
5 up here. You're not going to have this big old diagram. I  
6 know you have notes. I know you have evidence. But this is  
7 not actually evidence. This is just something to help you  
8 see everything. So if you want to take notes, you're free  
9 to do so.

10 But they - it gets denied in November of '02.  
11 Here we go. Again, there's no environmental issues. Right?  
12 But this is where the - starts. They realize before they  
13 deny it, uh oh, there's a plan B that might come. They've  
14 never had once an 8-30g. Twenty-one years on the job, never  
15 had one.

16 DaRos, how's this work? Rasmussen writes a  
17 memo. She explains. Bellamy's in on it, as it DaRos.  
18 Neither one of them wanted to admit it. Do you remember  
19 when I had them on the stand? Neither one wanted to admit  
20 their role with this. But the fact is it happened. And why  
21 did it happen? Because New England Estates was considering  
22 a plan B because they could sense, ut-oh, after all this  
23 work we may not even get it.

24 So what does this 8-30 provide? It basically  
25 means, we're going to win. New England Estates is going to  
26 win unless there's substantial evidence that the commission  
27 would have to prove that there's something necessary to

1 protect health or safety. That's the only way they can stop  
2 if, if somebody's willing to do this.

3 Now, it's not easy. You've got to set aside 30  
4 percent of the units. You're not going to make as much  
5 money on those. But the state made a deal. If you're  
6 willing to do that, the town can't stop it.

7 So this is what happens. Now we're going - now  
8 plan B is operating, along with plan A. And you've noticed  
9 there's negotiations going on between Rasmussen - Bellamy  
10 and Hollister and Critton. And if you'll recall, during  
11 those negotiations for all those months - she actually said  
12 it was before Christmas. They know that this thing might  
13 come. But they haven't made that decision yet because if  
14 they can, of course he'd rather get something where you  
15 don't have to set aside 30 percent. They've put a lot of  
16 money, a lot of time, and a whole life's work.

17 In any event, they see this coming. They're  
18 meeting all the time. Rasmussen, DaRos, Bellamy. Remember  
19 the weekly, daily. And then what happens in the interim?  
20 They happen to get the Army Corp of Engineers in March -  
21 here we go. Army Corp of Engineers grants a permit. You  
22 heard how hard that is. So not only do they have the  
23 wetlands permit, now they got the Army Corp permit.

24 what's happening at the same time? They're  
25 seeing the potential. They know they can't stop it. If -  
26 unless they have significant evidence of health or safety.

27 So now Bellamy and DaRos each took credit - I

1 thought that was curious, and I hope you caught on to that.  
2 They're each taking credit for, I came up with the idea of  
3 let's look at environmental problems. That might be our  
4 health or safety solution so we can stop this thing.

5           So in March through April they consult Fuss and  
6 O'Neill. Fuss and O'Neill is already on the record, of  
7 course, we now know telling the truth with the facts for  
8 many years with the DEP and with the town. What are they  
9 going to do? Landfill's okay. The 77 acres, it was  
10 approved. In fact, they had actually investigated it and  
11 said, hey, see our development team. What are they going to  
12 do? The landfill's okay. The 77 acres is okay. That's  
13 what the facts are.

14           And by the way, Glezen testified it's almost  
15 never - you get so much detail about property as you had in  
16 this case. All these tests.

17           So what does Hurley say? Well, he tells them  
18 when he meets them, well, there's no exceedances of the  
19 RSR's. And, you know, even if we did find something, we are  
20 required under our permit. We're supposed to fix it. And  
21 he also tells them, if anything did happen - but mind you  
22 we've been doing it for 16 years, nothing's ever happened.  
23 But if anything did happen, we'd have to fix it. And it's  
24 only going to cost you 30 grand to fix it. So that's what  
25 he tells them.

26           So Penny Bellamy has an idea. Instead of doing  
27 an actual study, instead of passing on what they learned

1 from Hurley, they decided to do a summary. Remember that?  
2 Instead of a summary of what he said, they did a letter  
3 report. Not an LEP report, a letter report. Hurley is  
4 willing. why? Because the clients make the call. Bellamy  
5 edits it, three and a half hours for a four-page letter.

6 Now, you saw she was on the stand for about  
7 three and a half hours. You don't think she's write a four-  
8 page letter about six, seven times by that time? She  
9 obviously is heavily involved because this is the idea.  
10 we've got to somehow make this into a health or safety, even  
11 though we know it's not true. We know it's not true because  
12 they did all their work. For all those years, Fuss and  
13 O'Neill, they're just being honest guys documenting it.

14 All coming out right. Except now we've got to  
15 try something new. we've got to create a health or safety  
16 problem. And Bellamy knows her clients well. I don't blame  
17 her. She's got an ethical obligation to do her best for her  
18 clients, even after you're finished. Even after you've  
19 stopped billing them. So that's what she did here. You saw  
20 how hard she was working for them here.

21 Well, she knew what they really wanted there.  
22 She knew the town didn't want the facts from Fuss and  
23 O'Neill. They didn't want the law on eminent domain. They  
24 could have said, hey, write us a letter. Write us a memo.  
25 Can we do this?

26 Instead, Penny - excuse me. Penny Bellamy does  
27 what I call a Henny Penny letter. Anybody remember

1 Henny Penny, the sky is falling down? You know, a little  
2 acorn drops, runs around, the sky is falling down. Well,  
3 that's what they do. They end up having Hurley write this  
4 letter, which is not the truthful summary of the facts. In  
5 fact, we're going to do that for you.

6           There were 14 points. This is what he writes  
7 in the letter. In early March - that's when they get it  
8 in - asked to explain potential implications and summary  
9 what was relayed. What they could have written if they were  
10 asked to actually help the town, honestly figure out what to  
11 do here, they could have said, what are the actual  
12 conditions.

13           They asked second, past disposal operations.  
14 The landfill has two separate disposal areas. What they  
15 could have said is, no permit violations. The Branford  
16 Landfill continuously monitored since the 80's, and no  
17 permit violations.

18           Neighboring properties. Well, there's  
19 residential property northwest of the facility, property to  
20 the north is - and the east is undeveloped. You know what  
21 it looks like. They could have said, the landfill's located  
22 in residential area. Residents that surround the landfill  
23 receive water from the Town of Branford. Those are the  
24 facts.

25           Next. The leachate. This sounds horrible.  
26 Inorganic and organic constituents dissolved and form a  
27 liquid known as leachate. Right? When leachate mixes with

1 groundwater, cause a plume of impacted water, all this  
2 stuff. We don't know how far it goes to the north. That's  
3 what they wrote. That's what the town wanted to see. Okay.  
4 This is what they could have wrote. By the way, the  
5 leachates detected at the landfill enters the southwest  
6 corner of the 77 acres and immediately turns west and south.  
7 And 18 years of Fuss and O maps, and they've been given to  
8 the town and given to the DEP.

9           Three common concerns. Well, the wells could  
10 become impacted, making them unsuitable for drinking. There  
11 could be manmade ponds. Movement of volatile organic  
12 compounds. They could have just written the truth, the  
13 facts, instead of the Henny Penny letter. Common concerns.  
14 There's no concerns. It's not drinking water. There is no  
15 current pond or drainage feature that's been tested and it's  
16 not fine. It's all fine. And there's no VOC's in the  
17 leachate above the RSR's.

18           Next. Elevated concentration of leachate  
19 indicator parameters. If you didn't know yourself, you  
20 didn't know anything about this, you'd be pretty scared what  
21 that all means. But then they, of course, use the word  
22 suggest and impact because they're professionals. They're  
23 professionals. What they could have said if the town wanted  
24 them to write it fully instead of this letter report, 16  
25 years, no RSR's.

26           Decomposition gas. A mix of 50 percent methane  
27 and carbon dioxide. They could have just said, it's tested.

1 It's not a concern. The RTM didn't ask.

2 Two common concerns. Unpleasant odors. And  
3 they admit that currently there's no offensive odors, but  
4 they could have said, they've never had any. Odor has not  
5 been a historical problem and there hasn't been any  
6 municipal solid waste since '91.

7 Methane. It can lead to explosive conditions.  
8 My God, you read that and you kinda go, whoa, we've got some  
9 serious problems. The RTM didn't want to know because the  
10 facts at the time were it confirms there's no offsite  
11 migration. The sampling just the year before, remember they  
12 had seven of them right up on the corner. Fifty-eight  
13 borings.

14 As the waste ages, it generates methane. It  
15 will diminish, however, however, the capping could allow the  
16 gas to move further away and it's difficult to predict.  
17 That's great stuff. Here's the reality. It's diminishing.  
18 The permit requirements requires no migration. And a cap on  
19 the landfill will be vented. That's if they were asked by  
20 the RTM to put down the truth.

21 Potential parcel residential could potentially  
22 place future residents closer to the landfill than anyone  
23 has lived in the past. How many times have you looked at  
24 this during this trial. They're right next door - they're  
25 right underneath the groundwater, and the residents on the  
26 77 acres are not closer. The actual plan does not place  
27 them any closer.

1 Methane gas. Again, potential concerns. Will  
2 become a greater concern if residential homes are  
3 constructed nearby. You've seen the plan. They're not  
4 constructed nearby. So what they would have said is, hey,  
5 far away, not leaving the landfill. It's not a concern.  
6 It's not leaving the landfill.

7 Groundwater. It's possible in the future there  
8 could be some groundwater problems. Might, potentially  
9 could become impacted. What they could have just said,  
10 here's the truth. We've been testing this thing for years.  
11 There's no exceedances of the RSR's. Not drinking -  
12 nobody's drinking the water, and there are no violations.

13 Next. Groundwater volatilization. That sounds  
14 horrible. Could potentially, possibility, may have to  
15 evaluate it. Instead, what they could have just said,  
16 they've been looking at it and there's no VOC's and  
17 exceedances.

18 And then - we're getting to the end here. The  
19 primary focus includes odors from decomposition gases, the  
20 noise from truck traffic. They could have just said,  
21 they're not a concern. It only gets bulky waste. It's not  
22 a historic problem.

23 And the conclusion, the DEP doesn't have any  
24 enforcement actions against the town relating to the  
25 monitoring program. For these reasons, additional  
26 precautions may be necessary. My goodness. What they could  
27 have just simply said, they've been investigating the 77

1 acres. The landfill doesn't indicate any violations and -  
2 that would preclude residential site development.

3           And that's something that he testified to.  
4 That's the reality. Instead, they now see that all these  
5 environmental issues don't add up to health or safety. So  
6 now they're being trapped. Trapped by what? The law. The  
7 law. The state legislature says, if they're willing to do  
8 this, if they're willing to give up the profit you would  
9 ordinarily make by setting aside 30 percent for people who  
10 want to live in Connecticut and it's hard to afford them.  
11 If you're willing to do that, they can't stop it. And they  
12 don't like it in Branford.

13           And the attorney and the LEP, they know that  
14 there's no health or safety evidence. And - that's going to  
15 meet the town's burden of proof. And they're thinking,  
16 however, you know what, New England Estates hasn't  
17 submitted, so maybe we'll get away with this.

18           Ut-oh. Ut-oh. Something happens. April 28<sup>th</sup>.  
19 They're thinking, well maybe they won't do this. It is a  
20 pain giving up a lot of money to do this. Sure enough  
21 though, Beth Critton says, it's coming in a couple of days  
22 or two weeks. Thank God for lawyer bills. It's the first  
23 time that's ever been said.

24           April 30, you've got the phone calls  
25 documented. You think we were going to hear about that if  
26 it wasn't documented in a phone call - in a lawyer bill?  
27 But now we know that happened on April 30. And they know

1 that they got a - they're in trouble.

2           So May 6, they get another letter from  
3 Hollister. Bellamy testified about that. And it's talking  
4 about a plan B, and that we have to do a plan B if we're  
5 not going to get this plan A done. So DaRos does some  
6 thinking. And what do you see? On May 8<sup>th</sup>, this is key,  
7 two days later. There's nothing left to do. He comes up  
8 with a brilliant idea. Let's just take it. Let's just take  
9 it. We thought we could count on gravity. You know, we  
10 thought we could count on the constitution. Let's just take  
11 it.

12           So they don't request an opinion. They don't  
13 have any experience with this, either Bellamy or DaRos.  
14 They don't consult with New England Estates after two years  
15 of work, or with the owner who's lived in Branford his  
16 whole life. At this point, the founders of the constitution  
17 would be groaning. The people who fought for this  
18 constitution would be upset. And you have a right to be  
19 upset too.

20           So what do they do. They've got to act quick.  
21 They have a board of selectman meeting. You heard about  
22 that. No minutes. No plan. No notice to New England  
23 Estates. No technical information. They don't even look at  
24 the plans. In fact, you remember the kind gentleman,  
25 Mr. Walsh. I asked him where it was. He didn't know where  
26 it was. Now, you think if didn't know where it was, you  
27 think the RTM knew where it was?

1           And what does he think this is? Naturally you  
2 think he drew, you remember, the semi-circle around the  
3 landfill because that's how it's being characterized. This  
4 is right next to the landfill. Guess where the houses are.  
5 They're all up here. Guess where the water's going. Under  
6 the existing neighborhood.

7           But that - and he wants to take all kinds of  
8 property around here because they - everybody's all misled.  
9 But that's because the RTM doesn't want to know the facts.  
10 They don't want to know the facts because they admitted to  
11 you, they don't want the housing. That was shocking. We  
12 didn't anticipate we were going to get so many clean  
13 admissions. The board of selectmen, all three of them,  
14 said, yeah, we admit it, we do - we didn't want housing  
15 there. DaRos testified that it was clean. Walsh, Denhardt  
16 agreed.

17           And so now we go to the RTM meetings because  
18 that's really where the auction is. All right? So they  
19 take it in May. They send it over to the RTM. And that -  
20 sorry to take so long. That's your case. That's your case.  
21 What happened at the RTM.

22           Well, one thing you're going to learn is  
23 Exhibit 65. And now what we've done is we've highlighted  
24 the 18 out of 22 who know nothing but two days - two pages.  
25 That's it. Now, a lot of time was spent by the town on all  
26 these other hearings. You know, the two different hearings,  
27 the committee hearings. However, none of the people here

1 saw, heard, except for they heard it at the Stop and Shop.  
2 Right? It was going around town.

3 So you know what happened next. They vote on  
4 the three false reasons. And you know that they're false.  
5 They admit that they're false. When we had Flanigan on the  
6 stand and Baughman on the stand, they were essentially  
7 admitting that the reason they're doing this is to stop the  
8 housing.

9 They're also admitting that you don't have to  
10 take it to investigate. There were four different grounds.  
11 I'm not going to go through those again. But the law says,  
12 you can just investigate. You don't have to take something  
13 to investigate. There was no contamination. You don't need  
14 to take something to remediate contamination when there's no  
15 contamination. Zero evidence.

16 Possible ballfields. Even they admit, that's  
17 just an idea. Dudley, Palluzzi, Flanigan, Baughman,  
18 everybody. They never saw any plans. You know, that was  
19 just an idea. So - and everybody admits - at the RTM  
20 admits - there's very little for you guys to even have to  
21 decide, frankly, because they admit that those are the three  
22 stated reasons. Those weren't the real reason. The real  
23 reason was to stop housing. It's sort of what the case is  
24 about. The Judge is going to instruct you on that.

25 So the act, and they act without asking for  
26 information. They got an attorney and an LEP right there.  
27 New England Estates is stunned. All that work, all that

1 money, a real need for housing, especially at the prices  
2 that they were going to offer them for.

3           And so now we get the ultimate abuse, which is  
4 another issue that you can decide. Abuse. It can't be more  
5 abusive than when you take the whole thing after all this  
6 work. Just take it. Constitution doesn't allow you to do  
7 that.

8           It would be like taking a house because they  
9 want to enlarge a sidewalk. we'll just take the house. Or,  
10 wait a minute, the guy who lived there before you, he used  
11 to change his oil. I think he might have spilled some once  
12 when he changed his oil in the driveway. I think we're  
13 going to take your house. They can't do that. And the only  
14 reason they can't do that is this same constitutional  
15 provision. Rock solid, ever since we stopped the king.

16           Now, the timing of this sudden taking is not an  
17 accident. The town knows that after we submit - and what do  
18 we submit? Once again, this is even more detailed. And  
19 it - by the way, it takes a long time to do it. They're  
20 working on plan B. Remember Mr. Gordon, he's telling all -  
21 you know, we got the bill. We paid the bills. You see  
22 that. That's in evidence.

23           And so they do great detailed plans. Actually  
24 takes up less space because they cut the bedrooms. Less  
25 density even because there's going to be fewer people. But  
26 that's what they're willing to do. why? Because that thing  
27 was a goldmine. This thing - and it was something they were

1 really excited about. You know, Don's dad was really  
2 excited about it. A lot of work. I can barely lift the  
3 thing. But they paid for it.

4 Now, they knew that they were trapped because  
5 they had no real and unavoidable health or safety because we  
6 were willing to make the deal. The deal is, we'll make  
7 less, but we'll still make money. We'll do well by doing  
8 good.

9 And now the Judge is going to instruct you here  
10 that if they had tried to stop it because they're willing to  
11 set aside the 30 percent, New England Estates had the  
12 advantage and they were going to win. They were going to  
13 win. Going to take a year. Branse told you it was going to  
14 take a year. The town even put its own evidence in at the  
15 end of the case.

16 Mr. Hollister, in a memo - he didn't know this  
17 was coming out. He's talking to the clients back in '02 and  
18 says, it's going to take 18 months from your application.  
19 When's the application? The end of May - oh, June 2.  
20 Sorry. But remember that. Just - that's when they first  
21 put this 354 plan in. He says it's going to take 18 months.  
22 If you add six to that, you're at the time of taking, which  
23 is what he predicted. And then it's going to take a year,  
24 which is what Branse told you. So it was going to take a  
25 year before they were going to be able to finish. They were  
26 going to win. The Judge is going to tell you, they were  
27 going to win.

1           So a year later was when they finally, after  
2 four years of work, were going to be able to construct. A  
3 lot of work because the town's fighting them all the way.  
4 So the town stuck with this. But - by the way, they're not  
5 last - this is July 9. They could have made some changes in  
6 that period. Remember, the RTM meets regularly, monthly.  
7 And they're talking about it in the coffee shops and they're  
8 talking - and reading the newspaper. It's all over.

9           And Glezen comes in. A licensed environmental  
10 profession. Remember, tall guy, straight as can be. And he  
11 explained to you that you have immunity. Hurley admitted  
12 the same thing. You have immunity. If you rely on an LEP  
13 opinion, you can't even be sued. He also said, I tested the  
14 property.

15           Now, we've already had IES, who they don't  
16 like, do a phase 1 and a phase 2 limited. We have Glezen do  
17 a phase 1 and a phase 2. Everything's okay. No  
18 exceedances. Just like Fuss and O'Neill when they had  
19 looked at it 10 years earlier when they were working for the  
20 owner and saying, hey, see my development team.

21           So the town has a chance, and they decide never  
22 to reconsider it again. They know everything's okay with  
23 the land. And so they take it. They take it in January of  
24 '04. And now you just go slow forward. Can't fast forward.  
25 Slow forward because this is where we are. Two years, eight  
26 months later. That's all that really has happened. We've  
27 just waited for this day.

1           I'm going to spend a little time on damages  
2 because that's what this case is about. We didn't do this  
3 just to prove we're right. We did this because they took  
4 something. And when you take something from somebody else,  
5 we know this lesson. Same lesson when we're kids. You got  
6 to pay for it. You break something, you take something, you  
7 got to pay for it.

8           Town took the property with no true public  
9 need. And when they did take it, they were right in the  
10 middle of their success. Three years, a lot of work, a lot  
11 of money. One year later they were going to finally  
12 prevail, as the Judge will inform you. So then eight months  
13 from that, they were going to start actually selling after  
14 all that work.

15           And how much money? Don't give us sympathy.  
16 We don't want it. If you remember, I did voir dire. I  
17 talked to every one of you individually. I don't want  
18 sympathy. I want the law. That's what we expect. As  
19 members of this country, we have a right to it under the  
20 constitution.

21           So these three guys in New England Estates,  
22 they lose everything. The town wipes it out. Keeps it for  
23 itself to do whatever it wants today. This - all this work.  
24 And do you remember when I asked Mr. DaRos just as I was  
25 sitting down on some re-re-re-re-redirect, and I said, well,  
26 that was a waste. Oh, no, it wasn't a waste. And I just  
27 wanted to die. And I hope you did too. Well, now the

1 town - maybe it's not a waste because guess who has it. The  
2 town. And they can do anything, anything they want.

3           So what do we do? We hire the best. The best.  
4 Mr. Kappel. Conrad Kappel. Very conservative guy. He even  
5 does work for other lawyers. Very tough. He's in charge of  
6 compliance at Blum and Shapiro. He sets the national  
7 standards chosen by his peers. He sits on the ethics chair.  
8 why did we do that? well, the same reason New England  
9 Estates, when they saw what they had, they hired the best  
10 they can everywhere because they believe in what they're  
11 doing.

12           Their first lawyer, the - guy who was actually  
13 on the commission when it was approved in 1988. Remember  
14 that? Gibson. And all the way through, they're hiring  
15 botanists, they're hiring Codespoti, who did the previous  
16 one. They're always hiring the very best.

17           So Kappel. There's not a shred of evidence  
18 that the town brought in, because they knew they couldn't.  
19 They subpoenaed the accountant. They got all the records.  
20 Ut-oh, Kappel comes in and ties it all back. Everything's  
21 accurate. Everything's truthful. Funny enough, they make  
22 money all the time. They're very hard working. They're  
23 very conservative. And that's just the way it is.

24           So he does his reports. And he finds out  
25 further they do good homes. They do it for less cost than  
26 many others. And they - he's seen that they've actually  
27 been willing to put out a million bucks of their own. It's

1 a lot of money for Don Stanziale. And over three years, and  
2 they only needed \$600,000 more. And he also added something  
3 for a very conservative guy, if you didn't pick up on it.  
4 They were beautiful. He went and he looked at some of their  
5 past work. They do beautiful work.

6           And the town doesn't call one witness. They  
7 don't have any evidence to attack any of that. What do they  
8 do? They ask a bunch of questions. They try to, you know,  
9 suggest that he's speculative. You think Mr. Kappel has  
10 ever speculated on anything in his life? This guy adds  
11 things to hurt us. All right? That - I'm not happy about  
12 that, but that's what happened. Okay.

13           So what's the town do? They know they can't  
14 get evidence that's going to beat him up, so they're just  
15 going to throw in a bunch of questions and hope that that  
16 will motivate you to do what I call the second taking.  
17 They've got it. They've got this property. And now they're  
18 going to come up here and they're going to tell you, well,  
19 don't give them all the money that they would have made.  
20 And if you give a dollar less, you are rewarding what they  
21 did. You can't do that.

22           If you find the facts and you follow the law  
23 and you conclude what happened based on reliable evidence,  
24 you cannot do a dollar less. One dollar less is paying them  
25 a dollar. Paying them a dollar for doing what they did.  
26 And they still have the property. They can do whatever they  
27 want.

1                   So what's he do, Kappel? He studies all the  
2 units. Talks about the seven years. He notes the big rise  
3 in prices. And what everybody took for granted, New England  
4 Estates took for granted the gravity. You know, the water  
5 was keep - going to go downhill. The history. It was  
6 approved before, 16 years of everything's fine. Hiring the  
7 best and honest professionals that they can. They could  
8 never imagine what actually would have happened. That  
9 somebody in flagrant violation of the constitution just take  
10 it because they don't want housing.

11                   So the only thing that you're supposed to take  
12 into account, number 1, the amount of the investment  
13 expenses. If we can have 137. That lays out what they are.  
14 You saw them. It's \$1.2 million. And these are actual  
15 checks. Remember, they were paying for everything all the  
16 way through. It adds up to 951,000. And the interest at  
17 the lowest rate brings that to 1.192. Okay. But you're  
18 going to have that in evidence, 137.

19                   Next. Lost - option agreement. They had to  
20 pay all this money. But that's actually already in the 1.2.  
21 That's not extra money. That's - you're going to see the  
22 checks. And then the next thing that you have to consider  
23 is the lost profits. The lost profits are actually written  
24 in to be 11.2. Okay. And if you could call out that other  
25 one, just so we can see it.

26                   This is, in fact, what the number adds up to.  
27 And how do we get there? This is a summary, and I'm going

1 to show you another one. But remember, he went through all  
2 the records. He went through all their past records. He  
3 talked to their accountant. He looked at their tax returns.  
4 He did his own independent research. And then he beat us up  
5 a little bit. And he comes out with this is how much  
6 they're going to earn over seven years, the 87,000. All the  
7 costs are 67. They're going to earn \$20 million plus by the  
8 end. And then he discounts it 22.85 percent.

9           Now, this is subtle. I'm not sure you picked  
10 up on this. But I asked him, I said, wait a second, is that  
11 the same percentage you used at the very beginning when they  
12 hadn't done anything. He said, yeah. But think about this.  
13 The big risks are done. What are the two biggest risks?  
14 What's going to happen to the market. It went up by 50  
15 percent.

16           What's the other biggest risk? Whether it's  
17 going to be approved. The Judge is going to inform you, it  
18 was going to be approved. The biggest risks are done. All  
19 they got to do now is execute. And they've executed in the  
20 past, all of them, with complete success. So this is  
21 aggressive, and this hurts. But it's reality.

22           Can we go to that other callout, please. What  
23 happens is by aggressing it - by discounting it aggressively  
24 with all that risk down to the 64 back a year after the  
25 taking when they could have gotten started, and then you add  
26 the interest at that rate. Today, or last week, it was  
27 11.2. okay?

1                   But he's so conservative - you remember he  
2 described - 89a, please. He described where he beat us up a  
3 little bit. For example, unit construction. He said  
4 they've done it for 78. They told me they were going to do  
5 it for 80. I said 86. I said, do you have any grounds for  
6 that. No. But he did it. So if you take the percentage of  
7 that, eight over - excuse me, six over eighty-six. That's  
8 how much his actual opinion was that we were going to lose  
9 on top of the \$11 million.

10                   Then he adds a contingency of \$2.3 million. I  
11 think it was seven percent. I can't remember now if it was  
12 seven or seven and - five or seven and a half percent. But  
13 he just throws that in. He says, well, you never know what  
14 might happen. I said, well you've already studied  
15 everything. What did you think was going to happen. So  
16 that is what the numbers are.

17                   Now, in the beginning when I asked you to  
18 consider what the evidence is going to be, the Judge is  
19 going to tell you that very same thing. You know, tipping  
20 the scales ever so slightly. I'm going to suggest to you,  
21 it's a thud. You can't even get the scale to work. The  
22 evidence here is overwhelming. There is nothing that's  
23 really been put into evidence that's contrary to this.  
24 Okay? You got \$1.2 million. You got \$11.2 million. And  
25 you'll have this, so you can do your own math.

26                   So the town took a very special dream. Life  
27 savings, all that work, crawling around the property. And

1 many of us have done things like that, where you work for  
2 three years. Imagine working for three years and then  
3 you're told your whole field is gone. Your degree is  
4 worthless. well, that's what this is like. When you work  
5 for three years, no pay, all because you expect something  
6 good. And it's at the end of your career.

7           So if you feel yourself wincing or groaning at  
8 the complete disregard for the constitution, the complete  
9 disregard for these human beings, the complete disregard for  
10 private property, for, well, it's not a waste, well, we  
11 didn't have a plan at all. If you find yourself wincing and  
12 groaning, that's okay.

13           If you find yourself disturbed when RTM says,  
14 well, we listened at the Stop and Shop, that's the  
15 democratic process. Hello. The democratic process, to  
16 listen at the Stop and Shop? You got a lawyer and a LEP,  
17 you got history, you got reality, you got facts. And we  
18 don't go to the Stop and Shop and talk to you about it.  
19 That's not the democratic process that these founders put in  
20 our constitution.

21           well, what you heard is, they can't have the  
22 environmental facts the way they want. They can't stop it  
23 in court. They can't always get what they want. But they  
24 did. They did. They got what they want. Until now. Until  
25 you step in. Two years, eight months later.

26           And you may remember that in high school, most  
27 of us don't like to, but we did learn about the Bill of

1 Rights. And that's what protects individuals against the  
2 majority. You have the right to free speech. You have the  
3 right to free religion. And you have the right to private  
4 property. You can't always get what you want. You get what  
5 you need. The town didn't need it, and they concede it.  
6 And now they're daring you to do the same thing they did. I  
7 don't think you're going to do it. Thank you.

8 THE COURT: Okay. Thank you, counsel.

9 Attorney Callahan, please.

10 MR. CALLAHAN: Yes, Your Honor.

11 First of all, folks. I'm just going to talk to  
12 you. I'm not going to dare you to do anything. That's not  
13 my job. I will, however, begin by thanking you. This has  
14 been a long trial. You've heard a lot of evidence. You  
15 have patiently endured the shuttling back and forth to the  
16 jury room. You're giving us your patience and your  
17 attention today on a day when we as a people remember those  
18 who lost their lives and their loved ones six years ago.

19 I've come to understand, based on the evidence  
20 that's been presented and the way that some of you have  
21 reacted to it, that there has been in this room on occasion  
22 some very palpable disapproval of some of the actions taken  
23 by the town, some of the decisions that have been made by  
24 town leaders.

25 I'd ask you to recall that the vast majority of  
26 those leaders, including all of the people on the RTM, are  
27 elected volunteers who are trying to do what they believe is

1 best for the town. Trying to do it within the law. whether  
2 they are perfect all the time, I'm not going to make that  
3 argument to you. Of course not.

4           If this case were a simple negligence case, a  
5 simple you shoulda, coulda done it differently, my task  
6 standing before you today in closing argument would be a  
7 truly daunting one. However, the claims that the plaintiffs  
8 have made are based in bad faith. Based on assertions that  
9 were pretextual, i.e. lying reasons. The town collectively  
10 lied about why they were taking the property, not just for  
11 the heck of it, but in order to prevent the development of  
12 affordable housing.

13           That the town acted in a manner that was  
14 unreasonable, and unreasonable in the law does not have a  
15 common everyday definition. It means palpably, without  
16 justification or reasonable basis. It's more than simply  
17 acts about which people may disagree.

18           Thus, the fact that a judgment call may be  
19 questioned, the fact that there may be disagreement about  
20 the manner in which the town could have proceeded, that's  
21 not enough to establish liability under 42 USC Section 1983,  
22 which is the civil rights statute that provides the  
23 plaintiff with a vehicle through which to challenge the  
24 town's conduct in court.

25           The other theory that you have heard and that  
26 you will hear about is the plaintiff's claim that there's  
27 been an abuse of power. well, that's a very broad and

1 general term. But in our law, it encompassed conduct that  
2 is arbitrary, fraudulent, deceptive, or dishonest. Even if  
3 you find that the town officials, Unc (phonetic spelling)  
4 DaRos, Bob Denhardt, Penny Bellamy, even if you find that  
5 there was things that they could have done, additional  
6 information that they could have obtained, these were people  
7 who sat on the stand and told you what they did and why they  
8 did it. They didn't try to conform.

9           You know, investigate, remediate, and possible  
10 use as playing fields. All right. A lawyer writes that up.  
11 The witnesses who made the decisions, the people who deliver  
12 the information to the board of selectmen, the board of  
13 finance, and the RTM, they didn't come into court and sit in  
14 the witness stand and try and conjure some way to fit their  
15 thinking into investigate, remediate, possible playing  
16 fields, because that's what some lawyer wrote. They came in  
17 and told you as best they could under the confines of the  
18 evidence, what they did and why they did it.

19           You may very well believe that Branford  
20 officials acted hastily, without getting all of the  
21 information that they could or should have gotten at the  
22 time or before the environmental condition of the 77-acre  
23 property was fully known. Those are fair points.

24           There's always more that you can do to  
25 investigate something. There's always more that you can  
26 look at before you make a decision. I grant that. But the  
27 fact that the town made a decision that they believed to be

1 in the best interest of its citizens, its tax payers, is not  
2 necessarily bad faith abuse of power just because somebody  
3 could have gone about it a different way.

4           And again, the bad faith standard that had been  
5 pled, the fact that questions could be raised, don't  
6 establish that people like John Opie or Dan Baughman, who  
7 was awfully sick at the time, or Bob Denhardt, or  
8 Fran Walsh, who I grant you is not a particularly good  
9 reader in aerial maps, or Unc DaRos, or Cathy Fox, who works  
10 with groups that advocate affordable housing, acted in a way  
11 that was in bad faith or in any way, shape, or form  
12 discriminatory.

13           We've seen all kinds of documents both sides  
14 have showed you. You've listened to all kinds of objections  
15 over evidence, over whether or not, you know, a letter from  
16 Attorney Hollister to Attorney Bellamy comes in. All that's  
17 part of the case. But what the case is really about is  
18 about people. The town has been sued, but the town is a  
19 municipal entity. It's a spot on a map. A town does not  
20 act, except through its people.

21           what you've seen is people who certainly did  
22 not collectively act to injure, to discriminate, or in any  
23 way to block affordable housing. But they acted because  
24 they believed collectively that its land - that their  
25 landfill, the town's landfill, its leachate plume, its  
26 methane issues, were the town's responsibility. That it was  
27 their problem, that they had to take control of it, that

1 they had to clean it up, and that they weren't going to  
2 trust others to do it. That they believed they needed to do  
3 it so that they could protect themselves, the town itself,  
4 from the liability that you've heard discussed. And the  
5 future residents, the people who would otherwise end up  
6 living in very close proximity to that landfill.

7           And you heard throughout what the people of  
8 Branford and their governing bodies learned was that this  
9 thing - this landfill, it's alive. Even after you close it.  
10 Even though municipal solid waste hadn't been received since  
11 the early 90's, there was still sewage sludge and  
12 contaminated soil going onto that landfill. There was bulky  
13 waste going into that landfill.

14           what they heard, and it's right in the  
15 transcript when Fuss and O'Neill went to the RTM  
16 administrative services meeting, is that you don't know  
17 what's going to happen with these things. They're alive.  
18 They can change. What's okay now could be a huge problem  
19 for the town and its residents down the road.

20           Now, there has been, throughout the course of  
21 the trial and in closing arguments, discussions about an  
22 approval that a different developer obtained for a  
23 different, although very similar, project in 1988. As  
24 Ms. Rasmussen testified, the approval - or the project that  
25 was submitted in 1988, like the project was submitted - that  
26 was submitted in 1992, nobody ever showed the town officials  
27 how - and if you look at this aerial photo, I mean - and I

1 don't claim any expertise in aerial photos. But you can see  
2 that it's lower. That it's depressed. That it's dip, a  
3 spoon, a bowl, a pit, however you want to think of it. Make  
4 up your own adjectives.

5           But as Ms. Rasmussen, nobody, neither Wendell  
6 Rice (phonetic spelling) in 1988, nor New England Estates in  
7 2002, ever came in to the Town of Branford that said - and  
8 said, we have a plan, and here's how we're going to fill  
9 that hole back in before we think we can start putting  
10 houses, lawns, trees, shrubs, golf courses, etc. on top of  
11 it.

12           As several witnesses, including a Ms. Hall, the  
13 town solid waste manager, and Mr. Hurley, and I think you  
14 also heard this to some extent early in the trial from  
15 Mr. Dudley, when it comes to environmental testing and  
16 environmental regulation, standards change. The technology  
17 with which environmental testing is done is rapidly  
18 evolving.

19           Thus the fact that another developer got town,  
20 only town, you've heard no evidence that they got the state  
21 approvals, but only town approvals in 1988 in another era it  
22 totally irrelevant. Fourteen years in the context of  
23 development and environmental testing, environmental  
24 sensitivity, environmental awareness, and environmental  
25 regulation is an eternity.

26           Also, you'll recall that - I'm going to make a  
27 reference here to Plaintiff's Exhibit 11. And this is going

1 back into the early 1990's. When Mr. Hurley was on the  
2 stand during the plaintiff's case in chief, he was asked a  
3 lot about the fact that the town had had to pay to bring  
4 water to all of the residents - residences within 1,000 feet  
5 of the landfill back in '91. I'm sure you recall that.

6 And Mr. Hurley was asked - there was this  
7 letter introduced back from 1989 wherein Mr. Hurley said, in  
8 my opinion, the water quality of most of the domestic wells  
9 is impacted by brackish water and the condition of the well  
10 and immediate surrounding areas, rather than by leachate  
11 migration of the landfill.

12 Now - and you saw testimony from people like  
13 John Opie, Unc DaRos. They were around back when this  
14 happened. Cheryl Morris, Kathy Fox, they were aware of all  
15 of this. Attorney Bellamy was aware of all of this. But  
16 what does it tell us? What it says is that even though  
17 there's no evidence that the well problems were related to  
18 the landfill's leachate plume, the town still bore the  
19 substantial cost of connecting all those homes to public  
20 water.

21 So it's what Mr. DaRos referred to in the  
22 course of the hearing between the administrative services  
23 committee as liability by perception. The town's  
24 experience, and this isn't looking to any other place or any  
25 other circumstance, but the town's own experience is that we  
26 got stuck with the bill for putting all - you know, bringing  
27 public water to all of those houses. It wasn't our fault.

1 Our engineers told us it didn't have anything to do with the  
2 leachate plume, but we still got the bill for it.

3 And again, this was part of the collective  
4 knowledge of the governing bodies of the town, even though  
5 New England Estates' lawyers weren't able to send a court  
6 reporter there such that they had a transcript that we can  
7 show you.

8 The town knew, I mean, back in the early 90's,  
9 under those circumstances, that the town could be held  
10 responsible regardless of fault, regardless of the fact that  
11 they monitored. Regardless of the fact that Fuss and  
12 O'Neill told them the landfill was being operated in  
13 compliance, and that that liability could be indefinite.

14 Now, in the early 1990's, Mr. Santa Barbara and  
15 Mr. Perrotti bought the property, as you know. And there  
16 was just, you know, statements made on closing or  
17 examination, I forget which, that, you know, this was a  
18 great site. It's a walk to the sound. It's a walk to  
19 downtown. But as the 1993 letter from Fuss and O'Neill  
20 reveals, well, this - you know, this great site was - it was  
21 supposedly going to be land banked and set aside for  
22 residential use when - you know, when the residential real  
23 estate market cycled back up.

24 As that same letter from Fuss and O'Neill makes  
25 clear, what the prior owners were trying to do with it was  
26 to turn the whole thing into a bulky waste dump, near the  
27 Sound, a short walk from downtown. And a broad Fuss and

1 O'Neill statement saying, you might want to talk to our  
2 development guys, is a far cry from any statement by Fuss  
3 and O'Neill saying, hey, we think it would be a great idea  
4 to put 300 residences there in the shadow of the town's  
5 landfill.

6 Now, in 2002, as we all know, New England  
7 Estates filed an application to put 268 units and golf  
8 course on that property. It became clear, obviously by  
9 October, because here's a letter that was put in - it's a  
10 copy of the letter put in during the plaintiff's case in  
11 chief, from Mr. Santa Barbara.

12 Now, it's October 2002, which we know is before  
13 the denial done by the planning and zoning commission. And  
14 again, it suggests that the evidence that we've heard reveals  
15 that at the time, what was being discussed in planning and  
16 zoning and what the issues were publically in terms of  
17 opposition were that the people who resided in the area on  
18 those two, you know, narrow residential streets, Tabor Drive  
19 and Pine Orchard - the opposition that had come out was  
20 about traffic and density.

21 So here's where we get to affordable housing.  
22 And in this in the - in the time period in which the first  
23 affordable housing balloon is floated, if you will. And I  
24 will suggest to you that what this letter says is what we  
25 see from October of 2002 through the spring of 2003, which  
26 is if you don't give us what we want, if you don't let us  
27 develop multifamily dense use on that property, we're going

1 to come back and we're going to shove 370 units down your  
2 throat.

3 Mr. Branse talked when he was on the stand  
4 about the fact that affordable housing is sometimes used by  
5 developers as a means of obtaining leverage and using it  
6 against the towns in order to get approvals of what they  
7 want.

8 November 12, Mr. Forte's own statement.  
9 November 12, 2002. All right? We know that we will be  
10 denied at the P and Z meeting on November 21, 2002 and have  
11 already taken actions to assure approval. We met with  
12 Attorney Hollister and he said affordable housing would take  
13 an additional 18 months to get this approved through the  
14 process of a turndown in the P and Z and approval in the  
15 Connecticut Supreme Court.

16 So to the extent that you've heard testimony  
17 that if you're willing to set aside 30 units - 30 percent of  
18 the units for people who make a little bit less money, you  
19 get an advantage, it's a good thing to do, you're doing good  
20 by doing right, that's not what this was all about. This  
21 was about, we can't get our approvals through the zoning  
22 process, so we're going to use the courts to hammer it  
23 through. Says it right there in Mr. Forte's own words.

24 Now, again, we all know that the application  
25 was denied. And in the negotiations that followed, I don't  
26 even have to rely on my own clients' testimony here. When  
27 we start talking about the affordable housing issue,

1 Mr. Stanziale himself offered during his examination that  
2 when New England Estates and the town and their respective  
3 lawyers were talking about a possible way to reach an  
4 amicable resolution, that it was the town in the form of  
5 Shirley Rasmussen, the town planner, who said, you know,  
6 hey, you know, you've come in with this 240-unit market-rate  
7 age-restricted scaled-down-a-little-bit proposal.

8           And the discussion was, in Mr. Stanziale's own  
9 words, you know, what could we do to make this more  
10 palatable for the town. what do you think might interest  
11 the town such that we can get an approval. And  
12 Shirley Rasmussen's response was, how about some affordable  
13 housing, especially for older people. we could really use  
14 that.

15           So to say that the town was jumping out of its  
16 skin because back in October, the affordable housing idea  
17 had been floated, or because there was supposedly a plan B  
18 in the works, is just disingenuous. The town never had any  
19 problem with affordable housing. The town suggested the use  
20 of affordable housing as a means of making the proposal more  
21 acceptable to Branford as a committee.

22           And remember Attorney Bellamy's testimony that  
23 when it came to the concept of affordable housing, the side  
24 that balked at it was the plaintiffs. It was New England  
25 Estates. They didn't like the idea of affordable housing  
26 because it was going to cost them money.

27           And I suggest to you that they didn't like the

1 idea for two reasons. Is one, on the 60 percent units,  
2 you're just losing money outright. Two, on the 80 percent  
3 units, you're hoping to breakeven. Three, because of the  
4 nature of this site, because of its size, and because of the  
5 fact that Mr. Cosgrove had stripped it down to nothing, that  
6 site required a lot of infrastructure cost. And they didn't  
7 like affordable housing because if you can't spread the  
8 infrastructure costs across all the units, it effects your  
9 profitability.

10 Also, it was during the process of these  
11 negotiations, and I talked to you about this in opening  
12 statements. Remember too that it was in approximately March  
13 of 90 - of 2003 that Attorney Bellamy contacted Fuss and  
14 O'Neill. And the circumstances as she recounted were as  
15 follows.

16 She and Mr. Hollister had gone back and forth  
17 in negotiations. And the parties, they had pretty much, on  
18 the substance, put a deal together. It was going to be 240  
19 age-restricted market-rate units. And what was happening  
20 is the town lawyers were trying to figure out a way that it  
21 was possible to settle this because New England Estates  
22 didn't want to do a new application to planning and zoning,  
23 and the planning and zoning commission wanted a new  
24 application.

25 So what they were working on was resolving the  
26 procedural aspects of a resolution. It was at that point,  
27 and as Penny Bellamy described it, she stepped back and

1 said, okay, wait a minute. There's a big picture here. And  
2 if this was somebody coming in and wanting to put a landfill  
3 next to a residence, we'd say, no. That's crazy. So why  
4 isn't the same true the other way around.

5                   So she thought to call Fuss and O'Neill. And  
6 she was asked very pointedly by Attorney Bergenn about the  
7 point of view - I'm sorry, this was Mr. Hurley who was asked  
8 very pointedly about the town's point of view as expressed  
9 by Penny Bellamy.

10                   And what Mr. Hurley's testimony and Ms. Bellamy  
11 testimony revealed is, she didn't have a point of view. She  
12 was just saying, look, we're talking about, you know, an  
13 awfully big residential development right next to the  
14 landfill. Are there issues that we should be thinking  
15 about? And he said, yes, there are. And he put them in  
16 writing on April 16<sup>th</sup> in a letter that Ms. Bellamy  
17 acknowledged that she looked at and denied having changed  
18 the meaning of.

19                   So it was in that context that these  
20 environmental issues arose. And it was in that context that  
21 that it became terribly apparent to the town, especially  
22 Unc DaRos, Penny Bellamy, Ms. Rasmussen, that neither New  
23 England Estates nor the environmental engineers that New  
24 England Estates had hired, were really prepared to deal with  
25 these issues.

26                   I've got to go back and get my transcripts.

27                   And these issues were expressed throughout the

1 meetings of the RTM and the administrative services  
2 subcommittee.

3 I'm on June 18<sup>th</sup>, administrative services  
4 subcommittee. And this is issues about the property, the 77  
5 acres. Page 2, Mr. Schwanfelder referred to it as the pit.  
6 Page 3, what Mr. DaRos says, the issue was what was on the  
7 property, not the landfill. What was on the property. And  
8 then talks about the fact that they had only had a phase 1  
9 done.

10 Page 4, Mr. DaRos saying, and then what would  
11 happen as these developers go along. The developers are  
12 long gone. We have a history of that. People come in, they  
13 develop, you'll never see them again. And the fact that the  
14 town has a liability by perception, if I get a rash or it  
15 must because - be because of the landfill.

16 All right. Again, this is another thing that  
17 goes to this issue of all they have is what happened at the  
18 meeting. No, they have lifetimes of experiences. And the  
19 amount of contamination that was caused by the landfill is  
20 questionable - this is Mr. DaRos - because as you all know,  
21 that site is 30-years old or more, and we all have witnessed  
22 what happened to that particular piece of property over the  
23 past 30 years. And I don't know how without a very  
24 extensive environmental research what we'll know is on that  
25 site.

26 In May of 2003, Mr. DaRos put IES together with  
27 Fuss and O'Neill such that there could be some resolution

1 about what was on that site, that 77-acre parcel. In  
2 Defendant's Exhibit VV, a letter from IES to Fuss and  
3 O'Neill, there is an acknowledgment based on the meeting  
4 that had taken place between the two groups of engineers.  
5 This is a proposal by IES to do additional work. It's an  
6 acknowledge that we need to do a lot more before we  
7 determine what's on that property.

8           But what we learn is that not only did IES  
9 never do this work, they never even went and looked at the  
10 public records that were available at the DEP. And when  
11 asked, they basically verified something that Mr. DaRos told  
12 administrative services, which is, we didn't get paid to do  
13 it. We don't have the budget to do a proper investigation  
14 of this site.

15           And as Mr. DaRos said, page 9, this is what he,  
16 as the first selectman, is conveying. There could be other  
17 problems at that site, but the town would get blamed for it  
18 only because of the proximity of the landfill. You may  
19 disagree with it. You may think he's wrong.

20           But I don't think there's any doubt that  
21 Mr. DaRos said what he believed, and the people at the  
22 meeting listened to him. Not because they wanted to stick  
23 it to anybody. Not because they were discriminating against  
24 them. But because they believed that what Mr. DaRos was  
25 saying was true. There were problems with that site. And  
26 that ultimately those problems, regardless of whose fault  
27 they were, were going to be laid at the town's door.

1           Just a couple more examples of where that line  
2 of reasoning appears throughout the transcript. July 2<sup>nd</sup>  
3 there is several instances. Okay. And this is Mr. Hurley  
4 telling administrative services on July 2<sup>nd</sup> that in general,  
5 there's leachate - it migrates away from that landfill in  
6 almost every direction, to some degree. We've all seen, you  
7 know, the property line with the curved line on it.  
8 Understood.

9           But these were people who came to a meeting on  
10 July 2<sup>nd</sup> seeking information from their engineers. And they  
11 got it. Okay. It's not bad faith that they listened to  
12 their engineers saying, oh, you know, the leachate is going  
13 off of that property in every direction.

14           And again, on page 33, Mr. Baughman asks, so we  
15 don't have any records of what's going on on that property,  
16 the 77 acres. And Mr. DaRos says, none whatsoever. You  
17 have no record of what's going on. Now, in all fairness,  
18 there's some things that happened to the owner that was out  
19 of his control, talking about dumping on that property. It  
20 says later, when the landfill was - you'll find stuff that  
21 was dumped on that property. I'm not blaming the owner, but  
22 the fact is a fact.

23           So it was known. This property had not only a  
24 history of quarrying, it had a history of storage and  
25 repairs, and defunct equipment, as you've seen from some of  
26 the reports that I went through with Mr. Santa Barbara  
27 during cross examination. It was so overgrown you couldn't

1 really tell what was on there. But to the extent that you  
2 could see, there was equipment, there were drums, there were  
3 piles of garbage, there were piles of construction debris,  
4 there were old appliances. The town - the members of the  
5 town's RTM that acted knew that. It was part of their  
6 collective knowledge.

7           Also, on June 30<sup>th</sup> - well, let me see.

8           So that the town, in effect, decided that the  
9 developers could not be trusted to deal with this problem.  
10 And I ask you when you consider that determination to look  
11 at the incentives. As Mr. DaRos testified before the RTM,  
12 as Attorney Bergenn has brought out through several of the  
13 witnesses, it's the client that controls the scope of what  
14 somebody does, whether it be the environmental engineer or  
15 some other lawyer.

16           I ask you to ask yourselves whether you think a  
17 developer wants to go in - I'm not knocking the developer.  
18 What they want to do is they want to go in, they want to  
19 build their project, they want to do a good job, they want a  
20 project that they could be prove of, and more over, they  
21 want a project that they can sell. And then they want to go  
22 on to the next project. I ask you to ask yourselves whether  
23 they have an incentive to spend money to find environmental  
24 problems that can do nothing but cause them delay and  
25 expense.

26           Now, during this same era, or this same period  
27 of time in the spring of 19 - I'm sorry, 2003, it became

1 very clear to Mr. DaRos that despite the concerns that he  
2 and other people in Branford had about that property and its  
3 history, they didn't even want to be bothered with a phase  
4 2. As Mr. Hurley testified, you can't say anything about  
5 the feasibility of doing anything on that site without at  
6 least a phase 3. But they didn't even want to do a phase 2,  
7 and that, according to Mr. DaRos, set up a flair.

8           They disregarded the problem, and you heard  
9 that to some extent from - a limited extent from  
10 Attorney Bruno to the extent that she was allowed to  
11 testify, and you heard it from Attorney Bellamy. That it  
12 was - we don't - there's no problems out there. You're just  
13 doing this to jerk us around. It was in that context.

14           And I suggest to you, that is consistent with  
15 some of the things that you heard during the course of the  
16 plaintiff's case in chief. That to the extent that this  
17 site present challenges, and Attorney Bergenn asked  
18 Mr. Stanziale about them, like it's down to the bedroom,  
19 like it's been denuded of all its organic material. No big  
20 deal. That's easy. We blast and we blast. No problem.  
21 This whole thing was easy. It would have been a cakewalk.

22           A similar response was given to the  
23 environmental concerns that the town raised. And that was a  
24 dismissive one. That's also consistent with the fact -  
25 Ms. Rasmussen's testimony, who addressed with New England  
26 Estates on several occasions this whole idea about, you've  
27 got to fill in the hole. And she never got back more than

1 some vague response about composting or something about  
2 stump grinding. Imagine how many stumps you've have to  
3 grind to fill 77 acres.

4           with regard to the property's acquisition,  
5 we've operated under a couple of fictions. First is that  
6 the RTM acts alone. You've heard substantial evidence from  
7 town officials that in terms of a property acquisition such  
8 as this, the RTM does not act alone. The board of selectmen  
9 has to make the motion and send it on. The board of finance  
10 has to approve it, or all the approvals don't do you any  
11 good whatsoever because without the board of finance, you  
12 don't have the money.

13           So that all of these entities had to act, and  
14 that the - you know, and there's another point here, is the  
15 RTM members, the selectmen, the board of finance members,  
16 didn't cease to have eyes, ears, memories, and brains just  
17 because there wasn't a court reporter present, ended up  
18 being an official meeting.

19           It's not just that somebody talked at Stop and  
20 Shop. It's that people who made these decisions gathered  
21 their knowledge over a course of time and through many  
22 sources. Nobody - you saw the 18 names highlighted. And I  
23 brought in other people from that list, such as Kathy Fox,  
24 to show you that nobody but nobody voted to acquire this  
25 property based on a two-page summary in a transcript from  
26 Dan Baughman.

27           They had researched this issue. They had

1 received the packets of materials that they get before the  
2 RTM meetings. They had discussed this amongst themselves.  
3 As Mr. Opie testified, each party caucused on that issue  
4 before they went into the RTM meeting.

5           So the idea that made a decision based on a  
6 very brief recounting by Dan Baughman was he told you he was  
7 very sick at the time, is simply not true. That's not what  
8 happens. I'm not claiming these people perfect, but there's  
9 no evidence that they weren't reasonably conscientious.  
10 They made a conscientious effort to get the facts and to do  
11 what they thought was right.

12           Now, on May 21<sup>st</sup>, the board of selectmen voted.  
13 And again, we talk about them as a collective entity, but  
14 they are just - Unc DaRos, Bob Denhardt, Fran Walsh. Now,  
15 Unc - Mr. DaRos was the driving force behind this. But  
16 remember two things, please. He didn't, you know, first  
17 come into contact with New England Estates and say, I got to  
18 take this project. He tried to work with them. He - the  
19 town paid Fuss and O'Neill, at Unc DaRos' initiation, to get  
20 together with New England Estates to see if the  
21 environmental issues - if there could at least be an  
22 agreement on how they needed to be addressed before we put  
23 200-plus residences on that property.

24           I'd also ask you to consider that throughout  
25 his life, Mr. DaRos has made his living as a contractor. I  
26 mean, he understands. He's not trying to go out and stick  
27 it to one of his own in this context. Yet he was convinced

1 that the developers would be gone and that the problems of  
2 that site would end up being the town's responsibility.

3 Mr. Denhardt also testified that his issue was  
4 not what kind of housing was out there or, you know,  
5 discriminating against anybody. But they're subjecting the  
6 town to boundless and indefinite liability to take houses  
7 and put them on a site that's industrially zoned in the  
8 first place. Again, you can disagree with what the  
9 selectmen did. But it's not bad faith.

10 Importantly, at the June 18<sup>th</sup> meeting of the -  
11 of administrative services, it was Mr. DaRos who said, you  
12 know, we're being asked to change the rules here. We're  
13 being asked to rewrite everything such that an  
14 industrially-zoned piece of property - and remember, this  
15 thing had a PDD on it for five years, '88 to '93. Since  
16 then, as Ms. Rasmussen testified, it has been in an  
17 industrial zone.

18 So we have - we're - as Mr. DaRos spoke, we're  
19 being asked to change the rules so that people can put all  
20 this housing on an industrially-zoned property. And you  
21 heard from Mr. DaRos, and even from Mr. Kappel, that this  
22 development is done via - and this was Mr. Kappel's words -  
23 disposal LLC's such that once the project is done and sold  
24 out, the LLC is gone.

25 You know, Eisenglass (phonetic spelling) Road.  
26 You've heard that. That was to build a couple houses. New  
27 England Estates was to do this. That's gone. And what was

1 being conveyed to - by Mr. DaRos and by the other people,  
2 Ms. Hall, Ms. Rasmussen, Mr. Dudley, the town's  
3 professionals who appeared on the 18<sup>th</sup> - there are some  
4 issues that we should really be concerned about.

5 I said a moment ago Unc DaRos was the driving  
6 force, and I stand by that. But it was also Unc DaRos at  
7 that June 18<sup>th</sup> meeting who said, hey, wait a minute. I'm  
8 not an engineer, and you should hear from Fuss and O'Neill.  
9 If the idea was, we're in a panic because, you know, the  
10 word affordable housing has been mentioned, and we have to  
11 go out and we have to take this property now, all they had  
12 to do on June 18<sup>th</sup> was vote. But it was Mr. DaRos and  
13 Mr. Baughman who said, you know, no. We don't have enough  
14 information yet. We need to get the engineers in here, and  
15 we need to meet because we need to do it right.

16 Those engineers appeared on the 2<sup>nd</sup>, and you'll  
17 have the transcript in the jury room. What they conveyed to  
18 the members of the RTM administrative services was  
19 essentially, you can't - there's no assurances at all with  
20 landfills. Putting residences next door to landfills, you -  
21 you're - when a problem may emerge, you have no idea. It  
22 could be fine now, and 30 years down the road you could be  
23 facing an environmental nightmare. That's what was conveyed  
24 by the engineers to the members of the administrative  
25 services committee.

26 whether that was right, whether you disagree  
27 with that advice, may be an issue, but not for this case as

1 long as the administrative services committee members acted  
2 in good faith in accepting those representations from the  
3 professionals.

4           The next big meeting, of course, is July 9,  
5 2003. That's where Mr. Baughman gave his two-page rendition  
6 of what had happened in the administrative services. That's  
7 also where, without question, Attorney Hollister and New  
8 England Estates' representatives were present. That's also  
9 where, without any serious question, Attorney Hollister, if  
10 he wished to address the body, he was going to make that  
11 decision, had the opportunity to do so.

12           There was mention in that meeting of access to  
13 the property for environmental study. The environmental  
14 issues on that property. Remember the technical information  
15 that administrative services had requested. And at no point  
16 during that meeting did the New England Estates' attorney  
17 say, well, no, no, guys, you're wrong. You can come on the  
18 property any time you want. We just - you know, we've put a  
19 lot of work into this project, and we just want to see it go  
20 forward.

21           And Mr. Baughman said, there's all kinds of  
22 unknown conditions up on that parcel. There was no, relax,  
23 everything's fine on that parcel. And your own engineers  
24 have been telling you so for the last 16 years. There was  
25 no offer of any information of any access of any mutual  
26 intent to try to work something out such that this project  
27 that you've heard about, all the work they did, all the

1 money that they invested, could be saved.

2           Instead, the appearances at those meetings of  
3 the full RTM on the 9<sup>th</sup> and the 13<sup>th</sup> look, in retrospect and  
4 with a glance of the transcripts, a lot more like lying in  
5 wait to take advantage of litigation than any genuine effort  
6 to work with the town and make the project work.

7           Your Honor, I'm not going to be long, but more  
8 than two minutes.

9           THE COURT: Why don't you finish. That's  
10 probably -

11           MR. CALLAHAN: Thank you.

12           THE COURT: Thank you.

13           MR. CALLAHAN: As long as everybody's okay  
14 with -

15           THE COURT: No, I think that's probably the  
16 best way to do it.

17           MR. CALLAHAN: Okay.

18           THE COURT: Thank you.

19           MR. CALLAHAN: Now, to some degree, to recap.  
20 Among the board of selectmen, the vote was unanimous that  
21 this is what they should do in the best interest of the  
22 town. The board of finance, the vote was unanimous. The  
23 administrative services vote was unanimous. As Kathy Fox  
24 testified, ways and means, the vote was unanimous. The full  
25 RTM, the vote was unanimous twice. And we're talking about  
26 a bad faith claim.

27           Now, that's an awful lot of people who have

1 consistently and uniformly been either deceived or  
2 deceptive, fooled or foolish, fraudulent or defrauded, or  
3 discriminatory or diked. I suggest to you that none of  
4 those occurred.

5           As further evidence of that, please recall  
6 Attorney Bellamy's testimony because she indicated that in  
7 between the July 9<sup>th</sup> meeting and the August 13<sup>th</sup> meeting, the  
8 town got sued by New England Estates. And you've heard the  
9 date. July 18, 2003, New England Estates filed a lawsuit.  
10 Ms. Penny Bellamy testified, part of that was an injunction.  
11 All right?

12           As of August 13<sup>th</sup>, the RTM had approved the  
13 acquisition of the property by negotiation or eminent  
14 domain. August 13<sup>th</sup>, after the board of finance and the RTM  
15 had voted, they had the money. They could have gone to  
16 court August 14<sup>th</sup> and said, we're taking title to the  
17 property.

18           However, what the town did, and you heard this  
19 from Ms. Bellamy and Mr. Opie, was awaited the outcome of  
20 the legal proceedings because they didn't want to do  
21 anything that was illegal or wrongful. So they waited for  
22 the outcome, and then took title in January of 2004.

23           Some comments on damages, although, of course,  
24 as you know, my position is that what these elected  
25 volunteers did - you may disagree with it, I understand.  
26 All I'm saying to you is that what they did was not bad  
27 faith. It was not fraudulent. It was not an abuse of

1 power. So therefore, there hasn't been a constitutional  
2 violation.

3 I would be remiss, however, if I didn't speak  
4 briefly about damages. First of all, there's the property  
5 owners here, Mr. Santa Barbara and Mr. Perrotti. And  
6 nothing personal to them at all, but they're - you've heard,  
7 and you will hear in the Judge's instructions, that there  
8 has been another proceeding in which they, as the owners of  
9 the property, had a right to full redress for any claims  
10 that they have. And that, in effect, they've already had  
11 their award in another proceeding, and that there is nothing  
12 further that they're entitled to in this one. Our law  
13 doesn't allow you to bring two separate actions and then  
14 pick and choose which result you like the best.

15 when it comes to Mr. Kappel, there was a remark  
16 made during Attorney Bergenn's closing that one of things  
17 that Mr. Kappel saw about these sketches, oh, they did  
18 beautiful work. He was talking about Quail Run. That's not  
19 these guys. That was a different LLC run by Mr. Forte and  
20 Mr. Vissello (phonetic spelling). Granted, on the property  
21 Mr. Stanziale happened to be one of the contractors. But  
22 that - Quail Run doesn't tell you anything about New England  
23 Estates.

24 what Mr. Kappel did, however, tells you  
25 something about him. He is a CPA. He is governed by the  
26 rules of the American Institute of Certified Public  
27 Accountants. He clearly indicated in his testimony, in the

1 report that he submitted beforehand, that he did his  
2 projections – remember, his cash flows and discounted back –  
3 that he did those in accordance with AICPA standards. And  
4 that in order to perform his job, his professional duty  
5 within those standards, he had to make assumptions that were  
6 reasonable under the circumstances.

7           And he did so because, for example, he said it  
8 cost \$86 a square foot. I'm going to say that because to  
9 the extent that we have a history of a – at least one-third  
10 related entity on Quail Run, well, they built a much smaller  
11 project, and that was 2003 to 2005, whereas I'm looking at  
12 2005 out to 2011. So he made a very reasonable assumption  
13 that the costs in this future period would be somewhere  
14 higher.

15           He also – because you've got – I mean, you've  
16 got this period projecting out over a seven-year period. So  
17 reasonably, and in accordance with AICPA standards, he put  
18 in a loss contingency. Amidst coaxing in questioning at  
19 trial, he tried to back off from those things. All right?

20           If they were reasonable and if they were within  
21 AICPA guidelines when they made them, they don't become  
22 unreasonable, nor do they become subject to removal from his  
23 calculations simply because the defendant was – the  
24 defendant was precluded from introducing expert testimony or  
25 because, you know, now at trial, defendants don't have an  
26 expert, so we can do whatever we want. All right.

27           He took what he put in, what the professional

1 standards required. The fact that he sought to take them  
2 out in an effort to pump up the number goes to the credit  
3 that should be given his testimony in this case.

4 In addition, the law provides that in a case  
5 such as this one, where the issue is a taking, damages are  
6 measured from the date that the taking occurred. January  
7 2004. Mr. Kappel started his calculation in January of  
8 2005. The effect is you discount that - take your income  
9 stream, and you discount it back one year less. Adds to the  
10 number. That's just there.

11 Third factor. After seeking to decrease  
12 expenses, Mr. Kappel waited into prejudgment interest. He  
13 used the wrong rate because you don't award a high-risk  
14 interest rate when the risks associated with the development  
15 are not going to be taken. And as he acknowledged on cross,  
16 prejudgment interest is a topic not for expert testimony,  
17 but for a judicial determination.

18 So his effort to bump the number up from 6.45  
19 million to over \$11 million be venturing into an area where  
20 not only does he not belong, but he knows he doesn't belong,  
21 is indicative of bias that goes to the credibility of the  
22 testimony. He did the numbers. He projected what the  
23 profits would be. He brought them back. The number that -  
24 his opinion is the 6.45 number, not all these additions that  
25 were tried to be inserted at the last minute.

26 Couple other things, and then I'll sit down.  
27 Mr. Kappel's view of the world. You'll recall that on cross

1 examination, I went through with him what he called the  
2 bases for his opinions. And there were nine of them. But  
3 when we - by the time we got through with them, what was  
4 clear with what these bases of the opinions were, were  
5 really a series of nine assumptions about the viability of  
6 the plan, the sale prices, the availability of financing,  
7 the terms of financing, costs of construction, closing and  
8 administrative costs, and importantly, the rate at which a  
9 local market already saturated with multifamily housing -  
10 remember Shirley Rasmussen saying our housing stock is  
11 already almost 50 percent multifamily. The rate at which  
12 354 new units would be absorbed.

13           And this affects everything because as this was  
14 structured, the way Mr. Kappel did it was, he doesn't have  
15 him making any money in the first two years. But they're  
16 paying back their debt. So that when they hit that 75  
17 percent completion mark - this is what he testified to -  
18 it's then that all the profits that make up those - the  
19 numbers that he discounted back are accumulated.

20           What I suggest to you is it's a house of cards  
21 because if you change the absorption rate and say, well, you  
22 know, we're not selling the units as fast as we thought we  
23 would. There's a slum in the market. All these things. It  
24 goes right through. It affects the borrowing. It affects  
25 the interest expense. Any one assumption has a ripple  
26 effect throughout the entire calculation, which renders the  
27 whole thing remarkably conjectural and unreliable.

1           He also had a series of assumptions including  
2 site restoration costs. And I just want to talk briefly  
3 about one specific point here. He and Mr. Gordon both  
4 talked about - he and Mr. Gordon both talked about phasing.  
5 All right?

6           And what they were saying - Mr. Gordon was say,  
7 well, you know, one of the - the way that you're going to be  
8 able to start building condos in six months and selling them  
9 in eight is you're just going to do a phase. And Mr. Gordon  
10 said, well, yeah, you can - all your site stuff, you know,  
11 the roads, sewers, filling in, planting, all that stuff, you  
12 can do that in phases too.

13           what I ask you to think about is phase 1.  
14 Okay. It's over here on the western portion of this site.  
15 And figure if you draw an imaginary line through that  
16 because there's no physical border. what I'd ask you to  
17 consider is how do you put a road through the middle, along  
18 the bedrock base here, and then fill in the site around it?

19           where do you think the fill is going to go?  
20 How do you do - how do you fill in phase 1 and build the  
21 road, while leaving all the invasive species and all the -  
22 this lower, you know, area out on phase 2? You don't have  
23 to be an engineer to figure out if you fill up phase 1 and  
24 you don't fill up phase 2, where's it all going to go the  
25 first time it rains?

26           so they relied on - perhaps Mr. Kappel - based  
27 on assumptions provided by Mr. Gordon, relied on something

1 that just doesn't make any sense. And that is that you can  
2 phase the infrastructure work such that you're selling  
3 condos in eight months. And if you take that assumption  
4 out, the house of cards that is Mr. Kappel's opinion falls  
5 apart.

6 In addition, there was no evidence that  
7 Mr. Kappel could rely upon that Mr. Stanziale,  
8 Mr. Pizzalarusso, and Mr. Forte, and that they may be  
9 successful businessmen, they may be the nicest guys in the  
10 world, but there is no evidence whatsoever that they had any  
11 experience of building a project of anywhere near this  
12 magnitude that contained anywhere near as many physical  
13 challenges and anything regarding affordable housing.

14 when you start with no facts, no company  
15 history, capacity, capability, or profitability, you can  
16 make the numbers whatever you want them to be. Conjecture  
17 laid upon speculation augmented by a plainly high risk and  
18 inapplicable interest rate does not form a reasonable basis  
19 for an award of damages. It's certainly not the basis for  
20 an eleventh hour effort to nearly double the number with an  
21 inappropriate interest rate applied by intrusion of an  
22 expert witness into an area of judicial function and  
23 discretion.

24 Ladies and gentlemen, Branford's officials, all  
25 elected and mostly volunteers, wanted and tried to do what  
26 they thought was best for the town, for its taxpayers, for  
27 its present and future residents, and for the next

1 generations to come. They didn't discriminate against  
2 affordable housing, but they invited it.

3           They, from the board of selectmen, to the board  
4 of finance, to the RTM and two of its committees, voted  
5 consistently and unanimously to acquire a property seen in  
6 good faith as unsafe for residential use. They collectively  
7 believed that putting 354 units on what was described as a  
8 blighted and denuded 77-acre pit in the shadow of the  
9 landfill, was a terribly bad idea for the town and for those  
10 who might occupy the project that was to be placed adjacent  
11 to the landfill. They perceived undefined, indefinite, and  
12 infinite liability, and potential difficulties to the future  
13 residents of that site.

14           The town's recognized obligation to pay just  
15 compensation is the subject of another proceeding that has  
16 already been tried to this Court. Both owners and the  
17 developers were plaintiffs in that proceeding. They've had  
18 their day in court, but they have come back for more. They  
19 are not entitled, however, to more than one trial or more  
20 than one award.

21           Their heightened characterization of the town's  
22 use of its inherent, necessary, and indeed formal power of  
23 eminent domain as abusive, unfounded, discriminatory, false,  
24 pretextual, doesn't change that. The town collectively,  
25 unanimously, exercised its judgment. The fact that  
26 reasonable minds, such as yours, may disagree with that  
27 judgment does not transform well-intentioned acts to be bad

1 faith, nor do the plaintiff's charges transform the town's  
2 constitutional duty to pay just compensation into an  
3 obligation to award windfall profits on a risky and  
4 speculative venture.

5           Again, I know it's been a long one. I  
6 appreciate your patient, your time. Thank you.

7           THE COURT: Okay. Thank you, counsel. I  
8 think, ladies and gentlemen, we'll stop here. And  
9 again, arguments are not completed yet. As I think  
10 I mentioned early on, the plaintiff has the right to  
11 make first argument, the defendant argues, then the  
12 plaintiff has the right to make a second argument.  
13 You also have an argument from Attorney Humphrey for  
14 Mr. Perrotti and Santa Barbara.

15           The reason why the plaintiff has a right to  
16 make two arguments is that the plaintiff has the  
17 burden of proof.

18           we will stop here. We're going to take an  
19 hour. Please try to be back if you can by 10 after  
20 so we can resume right at 2:15. Don't discuss the  
21 case in any way. Don't discuss anything this  
22 morning that you heard. Leave your books in your  
23 chair, closed. And we will see you - hopefully we  
24 can start right at 2:15. Okay?

25           (The jury exited the courtroom.)

26           THE COURT: Counsel, what I'm going to ask,  
27 please, is during lunch hour if you could together

1 view the exhibits. Make sure that we are all in  
2 agreement as to all the full exhibits that are going  
3 to go to the jury when they begin their  
4 deliberations. Okay. And we'll try to start at  
5 2:15.

6 MR. BERGENN: Your Honor, should we wait until  
7 you come back because there were a couple of things  
8 that were said there that I think need to be  
9 corrected. I thought it was really grossly improper  
10 after this Court's already ruled on the issue, to -

11 THE COURT: Well, let's -

12 MR. CALLAHAN: What issue?

13 THE COURT: - wait until -

14 MR. BERGENN: Fine.

15 THE COURT: I want the clerk back in here.  
16 We'll do that at 2:15.

17 MR. BERGENN: Okay.

18 THE COURT: Okay.

19 MR. BERGENN: Thank you, Your Honor.

20 (The luncheon recess was held, after which the  
21 matter continued.)

SUPERIOR COURT  
JUDICIAL DISTRICT OF WATERBURY

NEW ENGLAND ESTATES, LLC

V.

TOWN OF BRANFORD, ET AL

DOCKET: CV03-0183606

*E X C E R P T*

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

This is to certify that the foregoing is a true and accurate transcript excerpt of the proceedings in the above entitled matter, heard before the Honorable William T. Cremins, Judge of the Superior Court, and a jury, on the eleventh day of September, 2007.

Dated at Waterbury, Connecticut, this twenty-seventh day of September, 2007.

  
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Lisa Longi  
Court Recording Monitor  
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