

STATE OF CONNECTICUT
SUPERIOR COURT
JUDICIAL DISTRICT OF WATERBURY

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NEW ENGLAND ESTATES)
VS.) DATED: SEPTEMBER 11, 2007
TOWN OF BRANFORD) DOCKET NO. X06-CV03-0183606
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P.M. SESSION

BEFORE:

THE HONORABLE WILLIAM T. CREMINS

APPEARANCES:

JAMES W. BERGENN, ESQ.
TIMOTHY S. HOLLISTER, ESQ.
(REPRESENTING PLAINTIFF,
NEW ENGLAND ESTATES)

STEVEN R. HUMPHREY, ESQ.
BRIAN R. SMITH, ESQ.
(REPRESENTING PLAINTIFFS
THOMAS SANTA BARBARA AND FRANK PERROTTI, JR.)

KERRY CALLAHAN, ESQ.
DANIEL CANAVAN, ESQ.
BARBARA FREDERICK, ESQ.
(REPRESENTING DEFENDANT
TOWN OF BRANFORD)

LINDA D. RINALDI
COURT MONITOR

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1 THE COURT: Please have a seat. Good afternoon.
2 Counsel, I'm going to ask Attorney Carlucci to pass
3 out there are six sets of the verdict forms,
4 interrogatories and the charge. The charge we've gone
5 over. Please take a look at the verdict forms. I've
6 made some changes, minor changes in the verdict forms,
7 just from a clarity standpoint, and also to conform to
8 the evidence as presented in the latter stages of the
9 trial, especially with respect to Messrs. Santa
10 Barbara and Perrotti. So look at those. Again, these
11 are what I propose to give to the jury when they get
12 the case.

13 Now, questions on the argument?

14 MR. HUMPHREY: May I, Your Honor?

15 THE COURT: Please.

16 MR. HUMPHREY: Your Honor, we would on behalf of
17 the owners request a curative instruction. Mr.
18 Bergenn has some other points that he's concerned
19 with, but we believe that the jury should be
20 instructed that during closing argument there was
21 reference to another dispute or another lawsuit
22 involving the same parties and that the plaintiffs are
23 trying to double dip, get two bites of the apple. We
24 believe that that was clearly an incorrect argument
25 based on prior rulings in this case and that we would
26 request a curative instruction which tells the jury
27 the instructions are there, to ignore that, and what

1 occurred in another case has no bearing on the facts
2 and issues presented here, and has no bearing on what
3 verdict you render in this case. Your duty is to
4 decide this case based on what has been admitted into
5 evidence in this courtroom and not on any information
6 about other issues that were not presented in this
7 courtroom, nor should you draw any inference from the
8 lawyers' comments. We believe that that -- from our
9 point of view that's very important in terms of what
10 the owners are seeking to recover here, which is
11 separate and distinct from what was involved in the
12 prior case which the order of the Court was not to
13 mention that case.

14 THE COURT: Attorney Bergenn, please.

15 MR. BERGENN: Yes. Three specific violations,
16 each of which, with all due respect to defense
17 counsel, cannot be construed as anything other than an
18 intentional violation of a court order. And I'll
19 start with the one identified by Mr. Humphrey.

20 Obviously there's been some battles over this
21 issue, and the Court said that that's not to be
22 considered expressly, and we've gone over these
23 instructions many, many times.

24 What was expressed, and the record will bear it
25 out, is that we're going for a second bite. Nothing
26 could be more prejudicial than to imply that we have
27 already lost. Everybody knows what a second bite

1 means. We can probably look it up in a dictionary.
2 It means that we took a bite and we lost, and now
3 we're coming back in again. So that's really, really
4 not only intentionally against the Court's rules, but
5 very directly and materially misleading. I'm going to
6 propose that the jury instruction now before further
7 proceedings in the case so that it is directed where
8 it belongs is that at least with respect to New
9 England claims here are not part of that proceeding.
10 That is, New England's claims here are not part of
11 that proceeding. And this is the one and only suit
12 that New England Estates has for the jury to consider.
13 Anything shy of that, they will be left with the
14 intentional misunderstanding.

15 The second is the injunction. Obviously, there's
16 been enormous discussion, argument, research, analysis
17 and rulings on that issue. And this wasn't just
18 putting the word "injunction" in. This Court called
19 the jury out, sat here with a lawyer on the stand and
20 said that's not coming in. After all that work to
21 keep Attorney Bellamy from going there, then this is
22 what we hear. They wanted not to disobey a court
23 order. There was an injunction. The word
24 "injunction" was used, but they wanted to do the right
25 thing. They wanted to wait and then do the right
26 thing. And the implication by design has to be that
27 there was an injunction that was denied. There's no

1 other way you can look at that. If they're waiting,
2 and they wanted to do the right thing, and then they
3 proceeded, it suggests -- everybody understands a
4 syllogism -- it suggests the intervening cause was the
5 Court's ruling, you may proceed.

6 Now, the Court's ruling that you may proceed is
7 directly contrary to the relevant law here. The
8 Court's ruling you may proceed simply means we did not
9 meet at that time the extraordinary burden to get an
10 injunction. In fact, the Court's ruling on the
11 relevant points was the exact opposite of what was
12 suggested directly to this jury. The Court's ruling
13 was not to approve or authorize any of the town's
14 conduct. The Court did not approve or authorize any
15 conduct by the town. Second, the Court ruled this
16 case can proceed by New England Estates to seek
17 damages against the town.

18 So I'm proposing, Your Honor, the only way at
19 this juncture to repair the intentional flouting of
20 the order and misleading of the Court -- of the jury,
21 excuse me, on a direct issue it to repair it directly
22 where the injury is. The Court decided -- the Court
23 decisions in this case have not approved or authorized
24 any of the town's conduct, and the Court has approved
25 New England Estates to proceed to this case to seek
26 damages.

27 And then the third violation is admittedly a much

1 more difficult one, and that is insertion throughout
2 of personal subjective beliefs. Now, we've litigated
3 that, and I believe this Court gave the town enormous
4 latitude, and, you know, I respect what the Court was
5 trying to do, to let them go into beliefs that really
6 have to be personal beliefs but characterized as in
7 your role as an RTM member, but the fact of the matter
8 is all that came in. Didn't change the law. And
9 under the law individual beliefs as a matter of law
10 are not relevant. Towns act by meetings and votes,
11 period. We are challenging meetings and votes,
12 period. We can't challenge subjective beliefs, and
13 counsel knows that.

14 So counsel inserts subjective beliefs, and the
15 Court gives a lot of latitude, but notwithstanding
16 that latitude, during the course of the trial we
17 struggled our way through that. We got through it
18 only now to find during summation Mr. DeRos believes
19 this, Mr. DeRos believes that. All these people
20 believe these things around the town. They're good
21 people. It's about people. It's not about people,
22 and that's what the summation was, it's about people.
23 It's not about people. It's about a town, and I'm
24 suggesting, Your Honor, that a simple instruction at
25 this juncture would be individual beliefs are not
26 relevant. As a matter of law the town acts only
27 through meetings.

1 And I would ask Your Honor if those three very
2 short repairs be issued before we proceed further in
3 the case because we forbear or forbore, whatever we
4 did, we held back from interrupting the summation
5 because I just think that's the right thing to do.
6 But that doesn't mean that this jury has not been
7 affirmatively misled on material points directly
8 against court orders.

9 THE COURT: Attorney Callahan, any comments?

10 MR. CALLAHAN: Just, certainly, I didn't intend
11 to do all the horrible things I'm accused of
12 intentionally.

13 As far as the other case goes, I was just looking
14 for it. There's -- I remember there being reference
15 to it in the jury instructions.

16 In addition, Your Honor, counsel always wants to
17 have it both ways. The plaintiffs get to mention the
18 fact repeatedly that the defendants just took the
19 property. It's unconstitutional. They just went in
20 there and snatched it away without any mention of the
21 fact that the constitutional issue is taking without
22 just compensation, and that that's an issue for
23 another proceeding. I believe that's in the
24 instructions. I couldn't find it in the few minutes.

25 The injunction, my memory is that Attorney
26 Bellamy said in an answer in the jury's presence not
27 stricken that there was an injunction proceeding

1 brought and that's part of the evidence. If that's
2 incorrect, I will stand corrected, but my recollection
3 is she said on, and I don't remember if it was direct
4 or cross, but we got sued and there was an injunction
5 proceeding brought. That's the reason I referenced
6 that in -- and I didn't. I stayed strictly within the
7 Court's order of I didn't say what happened. I said
8 that there was a proceeding brought which is
9 consistent with what the witnesses said, and the town
10 waited until it was resolved before it took title
11 which is what the witnesses said.

12 The third I don't need to address.

13 MR. BERGENN: Your Honor, on the second one I
14 accept counsel's representations it was not
15 intentional. However, this Court I know does remember
16 because as soon as that word came out, we jumped. The
17 jury was sent out. You admonished the witness. We
18 went through it and you admonished the witness. You
19 were very gentile about it, but the fact of the matter
20 is it was very clear to all in this courtroom that
21 that was wrong. And she had to keep asking you, you
22 mean all I can say is a proceeding, and she kind of
23 gave this, you know, look, this shrug. And you went
24 through it, and you went through it again. And only
25 after that does she come back in. So I accept that it
26 wasn't intentional, but that doesn't forgive it if
27 after we go through all of that, what am I supposed to

1 do for my clients? I stand up, I say wait a minute,
2 and you respond instantly. We cure the problem only
3 to have the very problem shoved right in my client's
4 face.

5 THE COURT: I'm going to refer counsel in all of
6 these matters to page four of the charge. This was
7 addressed with the jury when they first came in right
8 after they were sworn. The charge to the jury clearly
9 indicates, and I'll point out two matters, one, it is
10 their duty to decide the case based on what has been
11 admitted into evidence in this courtroom only, not on
12 any information about the issues that was not
13 presented in this courtroom.

14 Secondly -- that's on page five, at the top of
15 the page. On page four, the following are not
16 evidence: Statements made by the attorneys, including
17 statements made in both their opening statements and
18 in their closing arguments are not evidence.

19 My feeling is that the jury will follow the
20 instructions. They have been told twice -- once, and
21 they will be told again, that statements by counsel
22 are not evidence. The evidence is the testimony of
23 the witnesses and the full exhibits presented during
24 the trial. So other than the regular charge which I
25 intend to give, I will not -- I don't think it's
26 necessary at this point to give any other curative
27 instructions.

1 MR. BERGENN: May I address the Court very
2 briefly?

3 THE COURT: Please.

4 MR. BERGENN: That is, they were also told that
5 the Court instructs them on the law, and when someone
6 does something directly contrary to this Court's
7 orders on the law, and it doesn't get corrected by the
8 Court, then that's all they have. We don't have the
9 instructions on those points in your instructions. We
10 spent time limited by the Practice Book to 15 or 16,
11 whatever it is.

12 THE COURT: Fifteen I believe.

13 MR. BERGENN: Thank you. And we don't have
14 instructions on this. So now what you're saying is I
15 tell you the law, that's not the law, they hear the
16 law from him, and they don't hear any other law. That
17 can't be right.

18 What I'm suggesting, Your Honor, is the three
19 things that I'm proposing, very brief, no falderal, at
20 least let them know the law. They've heard something
21 that's contrary to the law, and the Court -- I think
22 the Court felt confident it didn't have to put an
23 instruction, and we didn't object because we wouldn't
24 imagine that this could have happened, but it did
25 happen. So I'm further asking Your Honor, and I know
26 there's not a lot of time, but I have in mind pretty
27 simple things. And as a further repair, Your Honor, I

1 did reserve 20 minutes for rebuttal. And although I
2 actually went faster than I ever have before in this
3 trial, but I actually went faster than I anticipated,
4 and now I have 20 minutes. Now I've got things that
5 are wrong as a matter of law, but I have other things
6 that are just factual things that I want to be able to
7 rebut. So I'm further asking for an additional ten
8 minutes as a partial repair for this abuse.

9 THE COURT: Attorney Callahan.

10 MR. CALLAHAN: It's somewhat amazing that
11 whatever effort I make to defend my client that
12 offends whatever narrow corridor or alley the
13 plaintiffs have tried to shove me into with abusive
14 and outrageous defenses, but again, this is what we've
15 seen throughout the case. People talk, Your Honor
16 rules, Your Honor rules, and the plaintiffs get up and
17 talk some more. So my feeling is Your Honor made a
18 ruling, and we should move on and conclude this
19 matter.

20 THE COURT: Counsel, as you indicated, you have I
21 believe 20 minutes remaining. Let me check. I
22 believe that's correct. Again, as I indicated, I'm
23 not going to make any additional -- give any
24 additional instructions to the panel at this point. I
25 think that in toto the charge to the jury adequately
26 addresses any concerns.

27 Okay. Let's bring the panel out, please.

1 Attorney Humphrey, I assume with you standing up
2 that you will go and then Attorney Bergenn will.
3 Thank you. I will explain that to the jury.

4 (Whereupon, the jury entered the courtroom.)

5 THE COURT: Ask counsel to please stipulate to
6 the presence of all the jurors.

7 MR. CALLAHAN: Yes, Your Honor.

8 MR. BERGENN: Yes, Your Honor.

9 THE COURT: Ladies and gentlemen, just so you
10 understand again, as I mentioned before we broke, now
11 Attorney Humphrey for Mr. Santa Barbara and Perrotti
12 will make their closing argument to you, and then
13 Attorney Bergenn will have the opportunity to make a
14 final argument.

15 At that point, depending on the time, we'll
16 probably take a break, and then I will give you the
17 charge on the law in this case, but that's how we're
18 going to proceed.

19 Counsel, please.

20 MR. HUMPHREY: Thank you, Your Honor.

21 MR. HUMPHREY'S CLOSING ARGUMENT:

22 Good afternoon, ladies and gentlemen. What we are going
23 to try to discuss through on this is the position of the
24 owners. And I recognize in all of this that it seemed like
25 we're taking a behind the scenes or a little lower approach,
26 but the issue to us is just as important as it is to New
27 England Estates. And so what I will do here is go through a

1 few of the procedural things and point those out, and then
2 also explain what we believe the evidence supports and what
3 we would ask that the jury do with respect to the claims of
4 the owners.

5 First of all, the complaint and the other pleadings, the
6 complaint, the answer, and special defenses, you will all
7 have copies of these pleadings in the jury room, and you can
8 refer to them throughout your discussions.

9 In our complaint we have 24 different paragraphs that are
10 in it, and of those there are only six that are denied by the
11 town of Branford. So I'd just like to go through those
12 quickly. They're 17, 18 and 19. And in these counts which
13 are disputed by the town, basically alleged that Branford in
14 this proceeding and prior to here has failed to produce any
15 documentation that the property was unsafe or unsuited for
16 development or to support condemnation of the property
17 because of unsafe or contaminated state.

18 And we submit, while that's still denied, the defendant's
19 deny it, that the evidence, in fact, in this case has shown,
20 whether the documents or the testimony, that there is nothing
21 on this site that would prevent, hinder or otherwise make it
22 difficult to develop the property.

23 The first selectman testified that he had no knowledge of
24 any property. You heard that when Mr. Santa Barbara and Mr.
25 Perrotti met with him in June he stated we have -- I have no
26 knowledge of any problems with respect to your property.

27 Sixteen years of testing have shown no problem. Offsite

1 they show no problem with the landfill. So we submit that
2 the evidence in this case is clear that although the
3 defendants deny it that on the cross complaint the owners of
4 the property and New England have shown otherwise.

5 Paragraph 18. At no time prior to the condemnation did
6 the town produce any documentation to support its position
7 that the property was suitable for or previously identified
8 for any public use.

9 With respect to this we believe that the town's own,
10 whether elected officials or their appointed officials,
11 employees of the town, have all said that there is not a
12 problem with respect to the property. They did not identify
13 any public use prior to their decision to try to take the
14 property from us. What I believe is there was a decision to
15 take the property and then we'll decide afterwards. There
16 was no plan. You did not see the selectman, the RTM,
17 studying for six months, a year, two years what property they
18 needed for ballparks, getting outside consultants to come to
19 those meetings, make recommendations as to what property, if
20 any, should be condemned or purchased for ballparks. They
21 had absolutely no use in May, June, July through 2004 for
22 that property. And so we submit the evidence, again, does
23 not support the denial of that paragraph, or conversely, that
24 the plaintiffs have shown that there was no plan.

25 And a plan is not just a concern in somebody's head. A
26 plan is done out. It has financials with it. It has reasons
27 for doing it. It's something set forth in a number of

1 documents that would have gone through a number of
2 departments within the town. It just doesn't pop up and
3 somebody has to draw a sketch with some ballfields just
4 before a meeting.

5 Number 19. At no time prior to the condemnation, the town
6 or any of its agencies requested permission to conduct
7 environmental testing of the property. Again, I think that's
8 clear. New England and the owners have testified no one
9 asked them, and all the town officials said they did not ask
10 them.

11 And I think maybe one of the most telling things, there
12 were four reasons, statutory reasons or ordinance reasons
13 within a town. The town had the ability to go in and get
14 onto that property. The owners had signed a document which
15 gave permission to go on it.

16 In addition, when I asked the first selectman, the town
17 has a 50-foot sewer easement that runs all the way through
18 that property. They could have done -- and it goes from the
19 top to the bottom. They could have done all the testing
20 without anybody's permission. So I think the evidence is
21 overwhelming with respect to that, and that we have proved
22 Paragraph 19.

23 The next three paragraphs that are denied are 22 -- let's
24 do 22 first. And this is the crux, obviously the crux of the
25 case. We're alleging that the town acted in bad faith, abuse
26 of its power and/or so unreasonably with respect to all the
27 evidence that was available to them, all the facts and

1 information that were available to those people in deciding
2 to take the property.

3 Now, in Paragraph 22 you will see when you get it, we list
4 a number of reasons that are set forth -- I won't go through
5 each of those -- that we claim are the bases to show why the
6 town acted unreasonably or in bad faith or abuse of its
7 power. Again, we submit that the town has not put in any
8 evidence that would dispute any of those items.

9 Okay, 23, please. And 23 is if the town had not used
10 eminent domain to take the 77 acres, plaintiff New England
11 Estates would have received through the local process, and
12 you'll be instructed by the Court that they would have gotten
13 approval of their plan, and that they would have proceeded to
14 development and, importantly from the owner's standpoint or
15 view, they would have exercised their option.

16 And the town has argued that it's speculative that they
17 would have exercised their option. I would submit to you
18 it's not speculative at all. The property had increased in
19 value substantially, so somebody is not going to just let
20 that option go -- expire. New England had made every single
21 option payment, paid more than \$200,000 over time. They had
22 invested a lot of other money in all the plans, et cetera.

23 So I submit to you it's not speculative, and we believe
24 the evidence shows that New England would have exercised that
25 option. And also, if New England had, they would have been
26 able to sell it to somebody else who would have exercised
27 that option that they own.

1 Paragraph 24. This is our claim that the damages we
2 suffered, in particular under the failure to be able to sell
3 the property under the option agreement, were directly the
4 result of the condemnation. I believe that there's nothing
5 else that stopped us from getting the payments that we would
6 have been due under that option agreement.

7 So specifically what are we asking, what are the owners
8 asking the jurors for? We're asking you for the \$250,000
9 that we did not get paid off the contract, and the \$90,000
10 that was the option payments that would have been made for
11 that year that would have taken to finalize the permits. So
12 it's a total that the owners are asking for of \$340,000 with
13 respect to their claim.

14 Again, it's obviously a lot smaller, a lot smaller loss
15 than what New England claims to have suffered, but it's just
16 as important to the owners, and it's very important to them,
17 and we believe that the evidence supports the jury finding as
18 to liability that the taking was either bad faith,
19 unreasonable or an abuse of the town's powers.

20 The burden of proof that you've heard about you heard
21 about it when you were first brought in as jurors. You saw
22 it in the movie, and His Honor instructed you after you were
23 seated as jurors, and you will get the final instruction.
24 The burden of proof for the owners is the same as it is for
25 New England. We have to show by a preponderance of the
26 evidence, the better evidence, that the allegations that we
27 have made are the ones that have been proven. Mr. Bergenn

1 used the scale example. If you just tip the scales a little
2 bit, that's enough to succeed. I would submit to you that
3 the evidence goes far beyond that and is much more than a
4 preponderance of evidence that has been put into evidence
5 here.

6 And as part of that, the owners are standing in the same
7 shoes as New England as far as all the evidence that was
8 presented in the case. So to the extent that witnesses were
9 put on by New England and testified with respect to
10 activities that they did, that evidence is also for or to the
11 detriment of the owners in the case.

12 Now, with respect to this property, when I listened to the
13 argument or the statements of some of the witnesses, picking
14 on my property, you know, my pit that's there, at this point
15 in time I don't think -- I think that anybody would like to
16 have that piece of property and have the ability to develop
17 that piece of property. Nothing changed on that property
18 from the time it was purchased by the owners in 1991 until
19 January of 2004. It is not a showing of any environmental
20 problems. There is not a showing of any change. When you
21 look at the photo -- let's pull up three, please. It just
22 had a lot of scrub growth on that property, and that property
23 can be cleaned up for development quite quickly, but nothing
24 has changed in there. The property has been sitting there
25 for that 14, 15, 16 year period of time. We believe and
26 emphasized before, it's been -- the landfill next to it has
27 been tested, and if you want to -- if there's any concern,

1 it's going to be tested for 30 more years after it's -- the
2 small end, the northern end is closed off. So that if
3 anything develops, and it's tested quarterly, it has to be
4 fixed immediately. So the threat of a problem is, if there
5 ever was a threat, it's not very large. And, also, if it
6 ever happened, it would have to be fixed immediately. So as
7 far as the 77 acres, it is not impacted by the landfill.

8 Beyond that, you heard the testimony of the first
9 selectman. They were going to use that landfill for parks
10 anyway. It's been closed to municipal solid waste for 12,
11 13, 14 years at the time of the condemnation. There hadn't
12 been any problems. The problems historically get less and
13 less as a possibility or a concern the older the property is.
14 And now it has been seeded over the top and planted, and so
15 95 percent, 90 percent of that landfill is already covered
16 with vegetation and there are trees planted around the
17 bottom.

18 Now, in addition to what's -- the property was approved,
19 as you've heard many, many times, in 1988 for development.
20 Again, nothing changed between then and 2004 with respect to
21 this property. There was no event, no outside event, no
22 internal event that contaminated this property or in any way
23 affected it as far as a developable piece of property. If
24 anything, one thing that had happened for external forces was
25 it had gotten more valuable over that period of time.

26 The town's own plan of development, you've seen the
27 exhibits on that, showed that and continued to show that as

1 high density residential right up to the time. Mr. Perrotti
2 and Mr. Santa Barbara paid taxes on it as if it was zoned for
3 that. It was never changed, and the town did not produce, at
4 least I did not hear any, did not produce a single piece of
5 evidence to show that something impacted that property, that
6 something changed, and it didn't change.

7 Shirley Rasmussen sat through from 1988 all the way to the
8 end. She suggested affordable housing. Never popped up that
9 there was -- you know, you guys are going to have a problem,
10 you, New England, or you, the owners, you're going to have a
11 problem, owners transferring this property or New England
12 developing it because there were all these environmental
13 problems. That was never, ever mentioned by the town.

14 I believe with respect to the town's plan or lack thereof,
15 the RTM members expressed it best when they said there was no
16 plan. We took that property for other reasons. We didn't
17 want -- and don't just isolate on affordable housing. We
18 didn't want housing there. We just didn't want housing.
19 They had no reason to stop housing, but just in their mind
20 somebody has told them, and, you know, some idea they
21 shouldn't have housing. They have a four-minute meeting, and
22 they vote no housing. We're going to condemn this, and
23 that's how we stop the housing. We don't ever have to worry,
24 again about -- we want to address that issue. We're just
25 going to condemn that property, and there was no basis for
26 them to act in that fashion to take that property.

27 The other that struck me, since I had more time to sit and

1 ask questions of the witnesses than other people, there was
2 so much information available to the town, to the RTM members
3 and to everybody else that they just didn't avail themselves
4 of. You can't put your head in the sand and take the
5 property. They had a lawyer throughout all this. They could
6 have asked for legal opinions. How do we condemn this
7 property? What's the legal way to condemn this property?
8 What could we do? They had all the environmental testing.
9 They called Hurley in. They could have had him do the phase
10 one, phase two studies. He volunteered. He said his firm
11 had the capability to do it. They never did that. Come the
12 fall they get another -- and New England did a phase two.
13 It's title limited, but they did do the phase two. They get
14 this. In the fall there's another environmental report. The
15 town does nothing. They don't call anybody, they don't read
16 any of the material that they have available in their own
17 offices that they've been accepting all that time. It's
18 stacked piled in boxes, or whatever it is. They did not have
19 a reason, and they never went out and tried to find out
20 anything. And that conduct is in my view, I would argue to
21 you, that conduct is so unreasonable that even that shows bad
22 faith. You cannot sit there with reports and say I'm going
23 to go do something even though those reports don't support
24 what my position is an elected official in a municipality.

25 The other thing is what was the reason for the necessity
26 for such haste? In this case you'll also get an instruction
27 from His Honor that you take your own experience, your own

1 common sense when you walk through that door. You don't get
2 rid of that. Your own experience and common sense of how
3 long it takes municipalities to act and do things, get things
4 done. We heard the testimony it took six, seven months just
5 to do their department budget, and that's one small item in
6 the town. This was done in six or seven weeks. Seventy-
7 seven acres, a large amount of money spent without looking at
8 any records, trying to test it, trying to find out anything
9 about the property.

10 I submit there was no reason for such haste and to ignore
11 all the records in the town, and, again, that kind of action
12 or lack of action by the elected members is unreasonable, it
13 is an abuse of their power, and it also constitutes and
14 amounts to bad faith by not looking at the records. The town
15 paid for these for part of the time. Mr. Santa Barbara and
16 Mr. Perrotti paid for it while the landfill was being
17 operated. They paid for those. But the town had all that
18 information, and it was going to be required for the next 30
19 to 35 years.

20 So the 1983 claim, and that's the constitutional claim we
21 have, we have to prove that they acted under the color of
22 state law or federal law, and that has been admitted in the
23 case. So that element is admitted.

24 Secondly, we have to prove that we were deprived of
25 rights, and since we were the owners of the property and the
26 property is gone, we have been deprived of that property, and
27 at least as far as to the owners, I believe that fact, item

1 number two, is admitted.

2 The third part is we have to prove that the taking was the
3 proximate cause of our loss. In other words, we would not
4 have suffered that loss but for the taking, and I submit the
5 simple logic we would not have incurred the loss on the
6 contract but for this taking on January 5, 2004. New England
7 made every single payment on time.

8 The inland/wetlands permit was granted, as you've just
9 seen, in March of '03, just before all this activity took
10 place. That also is evidence, at least from the plaintiff's
11 point of view, that there was nothing wrong with this
12 property, and it wasn't an environmental thing that was going
13 to impact.

14 And so what you have here is nothing having happened to
15 the property, nothing having happened to the landfill, and,
16 yet, the town proceeds. And that leaves one reason. They
17 don't need to remediate. They don't need to investigate.
18 They didn't even try to investigate. And they don't need
19 ballfields. So that leaves one reason, and that is they
20 wanted to stop housing, and whether it's affordable housing
21 or it's residential multi-family housing.

22 And what happened is the town came up with what I'll
23 describe as a bad or flawed idea. And they started with a
24 bad idea, and that bad idea was to take the property.
25 Someone got that idea. And then that just snowballed, and
26 you took a bad idea, and then you made a bad decision on a
27 bad idea. And you made a bad decision based upon no

1 information, no discussion, no analysis and no plan. So you
2 get to the end of that and you have what amounts to a bad
3 faith unreasonable abuse of power, grab the 77 acres by the
4 town. And we believe, we submit, that the evidence has shown
5 this.

6 Total ignorance is not a defense. You can't just ignore
7 all this stuff and say I'm going to do it. I know there may
8 be stuff out there, or I don't know whether there's stuff out
9 there, but I'm not going to ask. You can't do that. That's
10 not good faith. That's not the way elected officials,
11 appointed officials operate under the constitution.

12 Finally, I think oftentimes when you don't have an answer
13 or you don't have a defense, you go attack the other side.
14 And that's what I really heard here. You know, the property
15 is a piece of junk. The people didn't do a phase two when
16 they could of when actually they did do a phase two. So what
17 the attack has been on, it's not the defense of the town and
18 what they failed to do, didn't do, but it's been attacked on
19 either the owners or the developers don't know how to
20 develop. They've never built anything this big, and so
21 forth. So while the town had the financial ability to hire
22 the consultants, to hire Fuss and O'Neill to do the phase
23 one, phase two, or any other company. Fuss and O'Neill isn't
24 the only other company that could have been hired. While
25 they had the legal staff, or whatever, available to them,
26 they could have gotten all the legal opinions that they
27 needed in this case. They just didn't do that.

1 And I submit to you on behalf of the owners that that is
2 the bad faith and would ask you to award Mr. Perrotti and Mr.
3 Santa Barbara the amounts under the contract that they would
4 have received, and also, very importantly, the first part,
5 you have to get the liability before that, that I believe
6 they have proved their case and are entitled to a verdict
7 against the Town of Branford for an illegal taking.

8 Thank you.

9 THE COURT: Thank you, counsel. Attorney
10 Bergenn, please.

11 MR. BERGENN: Thank you, Your Honor.

12 MR. BERGENN'S REBUTTAL ARGUMENT:

13 I don't blame the attorney for the town saying to you the
14 case is about the people. That's what I would do if I
15 approached things that way, especially when I know the
16 opposite is the truth, and the Judge is going to tell you
17 that. This isn't a case about the people; it's a case about
18 the RTM. It's a case about the town.

19 And why would the attorneys say it's a case about the
20 people? Because the RTM is indefensible. You can't defend
21 the RTM. In fact, right after saying that we hear, well, you
22 know, we didn't come up here to try to say these three
23 reasons were the real reasons. Remember I told you during my
24 summation I was surprised that they admitted to all this
25 because basically what they admitted to was liability. They
26 admitted that the three reasons weren't the true reasons. So
27 I guess they get some credit for not committing perjury.

1 But, this isn't a perjury case. We can't bring a case
2 against perjury. We brought a case against what they did,
3 and now they've admitted it, that what they said, those three
4 reasons, were not true, and they all admitted it one after
5 another. But it's not about them. We're not here because
6 we're mad at the people. We're here because we're mad at
7 what the town did. So keep that in mind.

8 The attorney further conceded, basically, well, you may
9 think it was hasty. This is before they had enough
10 information. Well, basically those concessions are that it's
11 unreasonable. There's no reasonable basis to take property
12 on those three stated reasons.

13 Now, then they talked about this is a case about the
14 people. Well, we're the people. Mr. Santa Barbara lived in
15 the town his whole life. He's paid taxes. He has civil
16 rights. He has the Bill of Rights. They're supposed to
17 honor those people, too, and when they don't it's okay, as
18 long as you can hire all the best experts and then come in
19 front of a jury all those years later and withstand all the
20 battering, all the basic slander.

21 Now, they also said, well, they had to take control to
22 clean it up. Well, that's a new one. That would have been
23 interesting to hear if one of the witnesses said that, given
24 that in April of '02, one year earlier, they already had the
25 landfill report. I'm not going to do all that again, but you
26 saw what the landfill report was. It was a summary. That's
27 a summary, not these little letter things. That's a summary.

1 It summarized. Everything is good with the landfill.

2 So -- and remember, too, when they said they had to come
3 in and clean it up, Mr. DeRos said it's clean. Not only did
4 he say it was clean, when he testified, that parcel of land
5 is clean today, Mr. Frank Santa Barbara and Frank Perrotti
6 both were at a meeting with Mr. DeRos. Mr. DeRos said the
7 land is clean. So now they want to have it both ways. And
8 there's something that you all learn when you grow up, which
9 if you tell the truth it's pretty easy. You just keep saying
10 the same thing. It doesn't matter when you said it, you
11 remember it.

12 And now the rest of the summation was basically how this
13 good attorney, very good attorney, how does he deal when the
14 facts are bad, when the facts are all over the place, when
15 the facts show that it's not the truth because they're all
16 run in different directions.

17 For example, they took it because they had to clean it up
18 when they already said it was clean. Well, you can't do
19 that, not in a court of law.

20 They're talking about this big dip, the 77 acres, and
21 there was no plan for that. You heard Gordon. Maybe they
22 thought you were going to forget. Jeff Gordon testified,
23 detailed plan, as to what they were going to do. Mr.
24 Stanziale talked to other excavators. He's got experience.
25 He runs his own excavation business. And this was easy, and
26 so, instead, after you hear evidence, and the Judge is going
27 to tell you, evidence, you hear, well, they just said it was

1 easy. Well, yeah, because it was easy. If you've got some
2 evidence that it's not easy, bring it in. They didn't bring
3 it in. They just wanted to be able to make those kinds of
4 arguments.

5 Liability by perception. Do you remember that one? Now,
6 first of all, that doesn't relate here because everyone
7 remembers where the ground water goes, it goes right where
8 people live. There's not going to be any liability, never
9 was. They've had 30-plus years. They're arguing, you never
10 know, you never know. Well, I guess you never do, really.
11 You know, another 2000 years, you never know. But we do know
12 is that they've had 30 years and they've never had a problem.

13 Then they're criticizing us for having a court reporter
14 there. Can you imagine if we didn't have a court reporter
15 there? Can you imagine us trying to establish what happened?
16 The problem is we did have a court reporter. It was two
17 pages, 90 seconds. Read it to yourselves in the jury room.
18 That's the entire decision-making process, 18 out of 22
19 people, 90 seconds. Take it. We don't want housing. And
20 the resolution has these three reasons. Nobody cares about
21 those three reasons. They've admitted every one of them,
22 admitted it. They didn't care about those reasons. They've
23 admitted it's a pretext.

24 Now, remember when Bellamy was on the stand and she
25 couldn't even recall these meetings. She got kind of snippy
26 with me at one point when I just asked her again, I said,
27 please look at it. Then all of a sudden I sit down, the

1 other lawyer gets up, man, she remembers everything. You
2 know, it's offensive.

3 The Santa Barbara letter. And the Santa Barbara letter
4 which we have put up there before basically was saying, hey,
5 look, this is what's going to happen. We're going to go to
6 plan A and this is plan B. But the fact of the matter is
7 they're now saying that this is a threat. It's a threat.
8 This is -- Mr. Hollister is just saying, well, 18 months to
9 get this approved through the process, if it's turned down
10 and approved with the Connecticut Supreme Court. So help me
11 God, I'll use the law. That's the threat, we're going to
12 follow the law. That's the threat. That's offensive.

13 Now, they do have an antipathy. Counsel has to work with
14 his client. His client is on this record. This trial is
15 filled with it. They hate the law. They're not against
16 affordable housing, they're just against housing. It happens
17 to be, you're allowed to be against housing, and you can deny
18 it, but once somebody accepts the offer of the State, you
19 can't. You can't do it any more. So they're mad at it.
20 They don't want to be in court. They don't want to follow
21 this law. So they get mad when we threaten to use the law.
22 That's crazy.

23 I don't think they thought that America is going to work
24 the way it did in this case. They didn't think that we would
25 have the staying power after blowing a million bucks and
26 three years and all these experts, I don't think they
27 believed that I'd be standing here today holding them

1 accountable. And you know what, I really don't. What I said
2 isn't the law. The Judge says the law, but what you say is
3 what counts. And I am counting on you. New England Estates
4 is counting on you. We're respecting you. That's why we're
5 here.

6 Now, the reason I -- can we pull up the date thing? You
7 know, they didn't have a problem with affordable housing.
8 Remember that? This is one of the many lies. They don't
9 have a problem with affordable housing. Well, because
10 Shirley really liked it, but then they called our effort to
11 use affordable housing a threat. So what is it? Well,
12 that's what happens when a lawyer has got to do something
13 with this town. Look, the town says it wants it, but then it
14 says when we say we're going to use it, oh, no, you're
15 threatening us with affordable housing. You're threatening
16 us with what we want. Come on, it's got to be one or the
17 other.

18 But I can tell you what it is. That came up -- can we do
19 that highlight the five, eight? The reason affordable
20 housing is in this court is only because of one thing -- when
21 they finally realized it is coming, we're going to go with
22 plan B. Sure, we'd rather do it to the market. We'd make a
23 lot more money. But you're leaving us no choice, so we're
24 going to do it the other way, and we'll do the right thing.
25 And all of a sudden, ran out of options. This is why
26 affordable housing they didn't want. It's because there's
27 law behind it, and with the law now the only thing we can do

1 to stop it is to take it.

2 There are a bunch of other lies. The 30 years. The site
3 is 30 years old. Lifetime experience. Remember DeRos was
4 saying everybody has been there, everybody knows what it's
5 like. But DeRos said it's clean. Liability by perception.
6 There are other countries in history and right now on this
7 earth where you can do that, where you can take things
8 because of perceptions. Not in this country. You can't just
9 take a business. You can't just take something that people
10 have been working on with their own freedom. We all have
11 freedom to do what we want with our lives. And you can count
12 on things like history, gravity, the constitution. You can
13 count on them.

14 Then they say, well, we weren't prepared to deal with the
15 issues. Are they kidding? We do a phase one, a phase two,
16 we've got Glezen coming in, a phase one, a phase two. They
17 don't do a thing except they pay their guy thousands, and
18 thousands, and thousands of dollars to prepare to answer my
19 questions. You know why? Because they knew how hard that
20 was going to be, answering my questions, because I'm just
21 dealing with the truth. I'm not dealing with some henny
22 penny letter. I'm dealing with the truth. I know the truth
23 is going to matter to you.

24 Then they say what incentive did we have. Here's another
25 lie. What incentive do we have to find it out? The fact is
26 there's evidence in this case that every single estimate was
27 conservative. They kept running the numbers, and running the

1 numbers, and running the numbers, and Kappel kept saying
2 himself he was impressed. They always beat their
3 projections, always beat the projections. Isn't that
4 interesting. This is speculative. They subpoena the
5 records. They don't bring anything in. They attack Kappel.
6 But you can't just attack Kappel. You don't make a decision
7 based on, well, that was pretty interesting point. No. You
8 make your decision based on evidence. And the evidence is
9 they always are conservative.

10 Now, do conservative people who want no surprises and
11 never had one, never had a surprise? They're not going to
12 want to find out what the heck is going on on that property.
13 They've got more incentive. The town takes the property and
14 they don't even look at it.

15 And then they criticize him more saying it's easy when
16 he's got a hundred percent success his whole career, and then
17 he spends hundreds of thousands of dollars to get the
18 details.

19 Now, there are a few things that were said that I have to
20 correct. They're just wrong.

21 First, New England Estates isn't taking a second bite at
22 the apple. This was our first bite. This is the only case
23 we have. This is -- our claims are part of no proceeding
24 other than this one. This is the only suit that the jury can
25 consider and the only suit where we can get recovery for all
26 of this money out of our pocket and all of the money that was
27 taken from us. This case has to be decided based on what the

1 RTM did, not what people were thinking, not because they're
2 nice people. I'm sure they're nice people. They bring up
3 somebody whose doing all kinds of charitable things. That's
4 wonderful. We're not suing people because they don't do
5 enough charitable things.

6 There has been, in fact, no ruling other than rulings that
7 specifically approve of our coming to you and getting
8 damages. There's never been a ruling that approved anything,
9 anything, that they did. Not one ruling has authorized
10 anything that they've done.

11 The attacking of credibility of Kappel. Yes, he did
12 projections, but remember, you may not, he's an auditor, and
13 he does projections for different reasons. And we said do a
14 projection, and he did projections based on how he would do
15 an audit and how he'd do financial statements. Okay. And
16 that's different than actual gonna happen. So he's got
17 perfect credibility, and you don't take him down by just
18 saying that because, in fact, he's a very proud man. He's
19 lived a long career at the top of his game, highest ethics.
20 There's never been any fact to impeach his credibility.

21 Now, that's the damages, \$20,000,000, that is the damages.
22 What he did is he discounted it back to today, okay, but
23 that's the damages, \$20,000,000. What did they say? We're
24 not going to get that \$20,000,000, okay. Further he said
25 that there's no basis for this. This isn't going to happen.
26 So that goes straight to the bottom line. It's actually
27 \$23,000,000, and remember the construction costs, he just

1 added six bucks, just added. If you take the six bucks out,
2 that drops it another two-and-a-half million dollars off
3 that. That's what he actually testifies as to what's
4 actually going to happen. But he did provide projections.
5 Early on in this case he gave projections, and he testified
6 to those projections. Remember that? And that's really what
7 this case is about. He's projecting this \$20,000,000 back to
8 11.2, and I'm telling you that is so conservative. The idea
9 there's some variation in absorption rate, when he basically
10 took back millions of dollars from New England Estates
11 because that's how you stay on top of your game. He wants to
12 be so bulletproof, and it worked. They didn't drop a single
13 bullet. They had nothing besides just the ability to argue
14 here, his view of the world, all these assumptions. Do you
15 remember when he went through those? Every, single
16 assumption was based on fact. Not one underlying fact was
17 attacked. We just call in assumptions. Well, everything in
18 the future is an assumption, but if it's based on facts and
19 you've got somebody like Kappel, you can trust it to a
20 reasonable degree of certainty. Now remember, to go from the
21 20,000,000 down to the 11.2, and then you had to add the 1.2,
22 we're only getting 50 percent. Most of us don't like working
23 for 50 percent. Okay. We don't like that. But that's a
24 number that you can count on. That's a number that is so
25 conservative, that 11.2 plus the other number you're going to
26 have here, the 1.2, that if a dollar comes back less than
27 that, it's going to be a very, very bad message. It's going

1 to be a message that you can come in here and just start
2 spinning things and not bringing any evidence and count on
3 the fact that maybe the constitution doesn't mean that much
4 to these jurors. But we went through what's called the jury
5 selection process, and you might have thought it was a little
6 weird. I'm sure it was. I never had to be on the wrong end
7 of it. But when I'm talking about all those little details,
8 well, they were important to me because I didn't want to have
9 people here who couldn't understand and didn't have the
10 courage to follow the law. And I knew we weren't going to
11 need sympathy. I knew we just needed time, facts and law.
12 You've given me your time. I've given you the facts, the
13 Judge is going to give you the law. It's going to work.
14 When you're done the constitution will be alive, not the
15 landfill is going to be alive, the swamp thing. The landfill
16 is alive. I'll tell you what's alive. The constitution is
17 alive. And there's actually in the constitution such a thing
18 called a jury trial. That's the other reason we're here. So
19 we're pretty happy right now with this constitution. A lot
20 of other people are going to be watching this, and I hope you
21 all revere this constitution, the constitution that people
22 die for, a constitution that was designed brilliantly, well
23 before Mick Jagger, that says you can't always get what you
24 want; you get what you need. The town took what it wanted.
25 It admits it doesn't need it, but now it's got it. All we
26 want is what they took. Three years of hard work, a lot of
27 money. Do the right thing.

1 THE COURT: Okay. Thank you, counsel. Ladies
2 and gentlemen, what we're going to do is we're going
3 to take 15 minutes, exactly 15 minutes I hope, then
4 we'll come back, I will instruct you on the law in
5 this case that you are to follow, and then depending
6 how long that instruction takes, I would hope to at
7 least get you started this afternoon in your
8 deliberations. So we're going to take just 15 minutes
9 and resume right at 3:30, okay.

10 (Whereupon, court recessed and resumed as
11 follows:)

12 THE COURT: Please have a seat. Before we begin,
13 if there's anyone in the courtroom that thinks they
14 might have to go out within the next 45 minutes to an
15 hour, I'd ask you to do that now because we don't like
16 to have people going in and out during the time that
17 the charge is given to the jury.

18 Okay, you can get the panel.

19 (Whereupon, the jury entered the courtroom.)

20 THE COURT: Ask counsel to stipulate to the
21 presence of all the jurors.

22 MR. CALLAHAN: Yes, Your Honor.

23 MR. BERGENN: Yes, Your Honor.

24 THE COURT: Ladies and gentlemen, the next step
25 in the process, you've heard the evidence, you have
26 heard the final arguments of counsel, the next step is
27 for me to charge you on the law that you are to apply

1 in this case.

2 Before I begin, I want to make just a few general
3 comments. First of all, thank you for your attention
4 during this trial. I've noticed you've been paying
5 attention to all of the witnesses and all of the
6 evidence. Again, that's why our system works, it
7 doesn't work otherwise, and we all appreciate that.

8 I want to thank counsel for their professional
9 and competent presentation of this case to you which
10 you have seen over these past couple of weeks is an
11 excellent representation of our legal system, of our
12 advocacy system and why it works so well. So I thank
13 them for that.

14 I'd like to be able to sit here and off the top
15 of my head read these instructions to you, but that
16 would only create the possibility that I would make a
17 mistake, so I'm going to read the instructions to you,
18 and as you'll hear in a minute, I'm not going to have
19 you take any notes during the instruction because you
20 will have a copy of these instructions with you during
21 your deliberations.

22 This is broken down into several pieces. I'll
23 give you the headings and then the text below those
24 headings.

25 **THE COURT'S CHARGE:**

26 **ROLE OF JUDGE/ROLE OF JURY**

27 Ladies and gentlemen of the jury, you have listened to

1 the evidence and to the arguments of counsel, and it is now
2 time to listen to me as I charge you on the law that applies
3 to this dispute.

4 You as the jury and I as the judge have two separate
5 functions. It is your function to find what the facts are in
6 this case; with respect to the facts, you and you alone are
7 charged with that responsibility. My function is to instruct
8 you as to the law to be applied to the facts that you find in
9 order to decide this case.

10 I do not have any preference as to the outcome of this
11 case. I have not meant to convey by facial expressions, or
12 tone of voice, or in any other way at any time during the
13 trial any preference or inclination as to how you should
14 decide the facts, and you should not make any such
15 interpretations.

16 If, in my instructions to you, I refer to one party more
17 than the other, or do anything that in your mind suggests a
18 preference for one side or the other, it is not done on
19 purpose. My task has been to apply the rules of evidence and
20 to instruct you as to the law. It is for you alone to decide
21 on the outcome of this case.

22 These instructions will be given in three parts. In
23 this first part, I will instruct you on certain general rules
24 and principles of law that apply in all civil jury trials.
25 In the second part, I will instruct you on the substantive
26 issues you must decide in reaching your verdict in this case.
27 Finally, in the third part, I will instruct you on the

1 mechanics of the deliberation process and the procedure by
2 which you must return your verdicts.

3 You may not take notes during these instructions, for
4 two reasons. First, you must not be distracted by your note-
5 taking and miss any portion of the instructions as I deliver
6 them. Under our law, the instructions must be read and
7 understood together as an integrated whole. Second, it is
8 not necessary for you to take notes as you will have a copy
9 of these instructions for your use during deliberations.
10 Please understand, however, that if you later wish to have
11 any of these instructions clarified, you may so request in
12 writing by a note from your foreperson. If you make such a
13 request, I will promptly respond to it after discussing it
14 with the attorneys.

15 **DUTY TO FOLLOW THE LAW**

16 It is your duty to follow my instructions and
17 conscientiously apply the law as I give it to you to the
18 facts as you find them in order to arrive at your ultimate
19 verdict. If you should have a different idea of what the law
20 is or even what you feel it ought to be, you must disregard
21 your own notions and apply the law as I give it to you. The
22 parties are counting on having their claims decided according
23 to particular legal standards that are the same for everyone,
24 and those are the standards I will give you and that you must
25 follow.

26 If what counsel said about the law differs from what I
27 tell you, you will dismiss from your minds what they may have

1 said to you. You must decide this case based only on the law
2 that I furnish to you and on the basis of all of the law as I
3 give it to you regardless of the order of my instructions.
4 You must not single out any particular instruction or give it
5 more or less emphasis than any others, but rather you must
6 apply all of my instructions on the law that apply to the
7 facts as you find them.

8 **DUTY TO DECIDE ON THE EVIDENCE**

9 You are to determine what the facts are by careful
10 consideration of all the evidence presented and based solely
11 upon the evidence, giving to each part of the evidence the
12 weight you consider it deserves in reaching your ultimate
13 conclusion. When I say evidence, I include the following:
14 Testimony by witnesses in court, including what you may have
15 observed in any demonstrations they presented during their
16 testimony; exhibits that have been received into evidence as
17 full exhibits, including any pictures or documents that are
18 full exhibits. The testimonial evidence includes both what
19 was said on direct examination and what was said on cross-
20 examination and any additional direct or cross-examination,
21 without regard to which party called the witness.

22 There are a number of things that you may have been seen
23 or heard during the trial which are not evidence and which
24 you cannot use in deciding whether a party has proven a
25 claim.

26 The following are not evidence: The statements made by
27 attorneys, including statements made both in their opening

1 statements and in their closing arguments are not evidence.
2 Testimony or exhibits that were offered but refused or
3 stricken by me or that I told you to disregard must not be
4 relied upon as evidence in resolving the case. Exhibits
5 marked for identification that were not received in evidence
6 as full exhibits are not evidence.

7 Your duty is to decide the case based on what has been
8 admitted into evidence in this courtroom only, and not on any
9 information about the issues that was not presented in this
10 courtroom.

11 It's my right to make comments to you on the evidence,
12 but when I do that, such comments are merely to suggest to
13 you what point of law or what controversy I am speaking
14 about. If I refer to certain facts or certain evidence in
15 the case, do not assume that I mean to emphasize those facts
16 or that evidence and do not limit your consideration to the
17 things that I may mention.

18 Likewise, you should attach no importance to it if I
19 should mention one party more than the other. If I should
20 overlook any evidence in the case, you'll supply it from your
21 own recollection; if I incorrectly state anything about the
22 evidence in relation to what you remember, you should apply
23 your own recollection and correct my error.

24 In the same way, what any of the attorneys may have said
25 in their respective summaries to you as to the facts or
26 evidence in the case should have weight with you only if
27 their recollection agrees with your own; otherwise, it is

1 your own recollection of the facts and evidence which should
2 have weight in your deliberations.

3 **DIRECT AND CIRCUMSTANTIAL EVIDENCE**

4 There are, generally speaking, two types of evidence
5 from which a jury can properly find the facts of the case.
6 One is direct evidence, such as the testimony of an eye
7 witness. The other is indirect or circumstantial evidence,
8 that is, the inferences which may be drawn reasonably and
9 logically from the proven facts.

10 Let me give you an example of what I mean by direct
11 evidence and circumstantial evidence. If you're sitting in a
12 certain courtroom on Grand Street and hear a siren increasing
13 and then decreasing in volume as it goes by the building,
14 that's direct evidence of the siren. Those hearing the siren
15 are unable to see outside. However, it is also
16 circumstantial evidence that there is an emergency vehicle of
17 some type going by the building.

18 As a general rule, the law makes no distinction between
19 direct and circumstantial evidence, but simply requires that
20 the jury find the facts in accordance with a preponderance of
21 all the evidence in the case, both direct and circumstantial.
22 Thus, both direct and circumstantial evidence are permissible
23 evidence and each type should be treated equally.

24 In your consideration of the evidence, you are not
25 limited to the statements of the witnesses, that is, the
26 exact words that they use. On the contrary, you are
27 permitted to draw from facts, which you have found to have

1 been proven, such reasonable inferences as seem justified in
2 light of your experience.

3 While you may make inferences and rely on circumstantial
4 evidence, you should be careful not to resort to guesswork or
5 speculation or conjecture to determine the facts in the case.

6 RULINGS ON OBJECTIONS

7 A trial is governed by rules of evidence. It is my duty
8 to apply these rules to the testimony and exhibits offered by
9 the parties to determine if that evidence should be admitted
10 for you to consider. Attorneys have the right and sometimes
11 the obligation to object to evidence that is offered and seek
12 a ruling as to the admissibility of that evidence under the
13 rules. You should not hold it against an attorney, or the
14 party they represent, if the attorney objects to evidence or
15 moves to strike evidence, regardless of the judge's ruling.
16 Just because evidence is admitted after an objection, you are
17 not required to treat the evidence as true, but you should
18 weigh and consider it in the same way as any -- as other
19 evidence.

20 You should not infer from my rulings on evidence that I
21 favor or disfavor any party or attorney; I am merely
22 enforcing the rules of evidence so as to assure a fair trial.
23 Do not speculate as to what the answers would have been had I
24 not sustained an objection and do not place any emphasis on a
25 piece of evidence merely because I overruled an objection as
26 to it.

27 STRICKEN EVIDENCE

1 Some evidence may have come before you in error, and at
2 the time that it occurred, I ordered that the evidence
3 stricken and told you that you must disregard it. That
4 evidence is not a part of this case and you must not consider
5 that evidence in reaching your verdict.

6 **BURDEN OF PROOF**

7 Plaintiff has the burden of proving each essential
8 element of their -- plaintiffs have the burden of proving
9 each essential element of their claims. I will review those
10 elements with you in one moment. The defendants do not have
11 to present evidence to disprove the plaintiffs' claim.

12 **STANDARD OF PROOF**

13 In order to meet their burden of proof, the plaintiffs
14 must satisfy you that their claims on an issue are more
15 probable than not. You may have heard in criminal cases that
16 proof must be beyond a reasonable doubt, but I must emphasize
17 to you that this is not a criminal case, and you are not
18 deciding criminal guilt or innocence. In civil cases such as
19 this one, a different standard of proof applies. The
20 plaintiff who asserts a claim has the burden of proving it by
21 a fair preponderance of the evidence, that is, the better or
22 weightier evidence must establish that, more probably than
23 not, the assertion is true.

24 In weighing the evidence, keep in mind that it is the
25 quality and not the quantity of evidence that is important.
26 One piece of believable evidence may weigh so heavily in your
27 mind as to overcome a multitude of less credible evidence.

1 The weight to be accorded each piece of evidence is for you
2 to decide. You may not resort to speculation or guessing in
3 attempting to find the facts of the case.

4 As an example of what I mean, imagine in your minds the
5 scales of justice. Put all the evidence on the scales,
6 regardless of which party offered it, separating the evidence
7 favoring each side. If the scales tip, even slightly, in
8 favor of the assertion, you would find the assertion has been
9 proved by a fair preponderance of the evidence. If the
10 scales remain even, or if they tip against the party making
11 the claim, then that party has failed to establish that
12 assertion.

13 CREDIBILITY OF WITNESSES

14 The credibility of witnesses and the weight to be given
15 to their testimony are matters for you as jurors to
16 determine. However, there are some principles that you
17 should keep in mind. No fact is, of course, to be determined
18 merely by the number of witnesses who testify for or against
19 it; as I just said, it is the quality and not the quantity of
20 testimony that controls.

21 In weighing the testimony of each witness you should
22 consider the witness' appearance on the stand and whether the
23 witness had an interest of whatever sort in the outcome of
24 the trial. You should consider a witness' opportunity and
25 ability to observe facts correctly and to remember them truly
26 and accurately. You should test the evidence each witness
27 gives you by your own knowledge of human nature and the

1 motives that influence and control human actions. You may
2 consider the reasonableness of what the witness says and the
3 consistency or inconsistency of his or her testimony. You
4 may consider his or her testimony in relation to facts that
5 you find to have been otherwise proven.

6 You may believe all of what a witness tells you, some of
7 what a witness tells you, or none of what a particular
8 witness tells you. You need not believe any particular
9 number of witnesses and you may reject uncontradicted
10 testimony if you find it reasonable to do so. In short, you
11 are to apply the same considerations and use the same sound
12 judgment and common sense that you use for questions of truth
13 and veracity in your daily life.

14 FALSE TESTIMONY

15 If you believe that a witness testified falsely as to a
16 part of his or her testimony, you may chose to disbelieve
17 other parts of his or her testimony, or the whole of it, but
18 you are not required to do so. You should bear in mind that
19 inconsistencies and contradictions within a witness'
20 testimony or between that testimony and other evidence do not
21 necessarily mean that the witness is lying. Failures of
22 memory may be the reason for some inconsistencies and
23 contradictions. Yet, if you find that a witness has
24 testified falsely as to an issue, you should, of course, take
25 that into account in assessing the credibility of the
26 remainder of his or her testimony.

27 EXPERT WITNESSES

1 Ordinarily, a witness cannot give an opinion about
2 anything, but rather is limited to testimony as to the facts
3 within that witness' personal knowledge. Expert witnesses
4 are people who, because of their training, education, and
5 experience, have knowledge beyond that of the ordinary
6 person. We have had the testimony of a number of expert
7 witnesses in this case. Because of that expertise in
8 whatever field they happen to be in, expert witnesses are
9 allowed to give their opinions. These are rules of the court
10 which control those who may give expert testimony. We have
11 had certain individuals who testified here only as fact
12 witnesses rather than as experts and, thus, did not give
13 opinions. Nevertheless, those who testified as experts gave
14 opinions. However, the facts that these witnesses may
15 qualify as experts -- let me restate that. However, the fact
16 that these witnesses may qualify as experts does not mean
17 that you have to accept their opinions. You can accept their
18 opinions or reject them.

19 In making your decision as to whether to believe an
20 expert's opinion, you should consider the expert's education,
21 training and experience in his or her particular field; the
22 information available to the expert, including the facts,
23 documents, or other physical evidence relied upon by the
24 expert; the expert's opportunity and ability to examine those
25 things; the expert's ability to recall the activities and
26 facts that form the basis of the opinion; and the expert's
27 ability to tell you accurately about the facts, activity and

1 the basis for the opinion.

2 You should ask yourselves about the methods employed by
3 the expert and the reliability of the result. You should
4 further consider whether the opinions stated by the
5 expert have a rational and reasonable basis in the evidence.
6 Based on all of these things, together with your general
7 observation and assessments of the witnesses, in line with
8 the factors I mentioned in assessing the credibility of
9 witnesses, it is then up to you to decide whether or not to
10 accept the opinion. You may believe all, some, or none of
11 the testimony of an expert witness. In other words, an
12 expert's testimony is subject to your review like that of any
13 other witness.

14 HYPOTHETICAL QUESTIONS

15 An expert witness may state an opinion in response to a
16 hypothetical question, and the experts have done so in this
17 case. A hypothetical question is one in which the witness is
18 asked to assume that certain facts are true and to give an
19 opinion based on those assumptions. The value of the opinion
20 given by the expert in response to a hypothetical question
21 depends upon the relevance, validity and completeness of the
22 facts they were asked to assume.

23 The weight that you give to the opinion of an expert
24 will depend on whether you find that the facts assumed were
25 proven, and whether the facts relied on in reaching the
26 opinion were complete, or whether material facts were omitted
27 or not considered. Like all other evidence, an expert's

1 answer to a hypothetical question may be accepted or
2 rejected, in whole or in part, according to your best
3 judgment.

4 USE OF NOTES DURING DELIBERATIONS

5 As I told you at the beginning of the trial, the notes
6 you may have taken are simply aids to your individual memory.

7 When you deliberate, you should rely on your independent
8 recollection of the evidence you have seen and heard during
9 the trial. You should not give precedence to your own notes
10 or to any other juror's notes over your own independent
11 recollection of the evidence, because, as we all know, notes
12 are not necessarily accurate or complete.

13 Jurors who have not taken notes should rely on their own
14 recollection of the evidence and should not be influenced in
15 any way by the fact that other jurors have taken notes. Your
16 deliberations should be determined not by what is or is not
17 in your notes but by your independent recollection of the
18 evidence. If you have a question about any particular
19 testimony, you may ask to have it read or played back to you
20 from the official record, so there is no need to rely on
21 notes.

22 SYMPATHY/PREJUDICE

23 Obviously, your verdict must not be reached on the basis
24 of sympathy for any party or on the basis of prejudice in
25 favor of or against any party. The parties come to court
26 asking simply for an impartial determination of the disputed
27 issues based on the facts and the law. That is what they are

1 entitled to and that is how you should approach the decision
2 in this case.

3 42 U.S. Code Section 1983

4 The claims of the plaintiffs, New England Estates,
5 L.L.C., Frank Perrotti, Jr., and Thomas Santa Barbara, Jr.,
6 are brought under a federal civil rights statute that
7 provides a remedy to individuals or corporations deprived of
8 a constitutional right under color of state law. As it
9 applies to this case, Section 1983 of Title 42 of the United
10 States Code provides in relevant part:

11 "Every person who, under color of any statute,
12 ordinance, regulation, custom or usage of any State subjects
13 or causes to be subjected, any citizen of the United States
14 or other person within the jurisdiction thereof to the
15 deprivation of any rights, privileges or immunities secured
16 by the Constitution shall be liable to the party injured in
17 an action at law."

18 Section 1983 creates a form of liability in favor of
19 persons who have been deprived of rights, privileges and
20 immunities secured to them by the United States
21 Constitution.

22 TAKING CLAUSE OF THE FIFTH AMENDMENT TO THE U.S.

23 CONSTITUTION

24 Every government, including a town government, has the
25 power to "take" land from private individuals, even if they
26 do not want to sell their land. This power is called
27 "eminent domain." Eminent domain is a necessary and

1 inherent power of government. For example, eminent domain
2 is used when a government needs to lay out a street or a
3 highway, build a new public facility such as a school or a
4 fire station, or lay a sewer pipe or water line. If the
5 owner does not agree to sell the land that the government
6 needs, the government may take it over the owner's
7 objection, subject to limitations and protections that I
8 will discuss. This is sometimes referred to as "condemning
9 the property" or "condemnation." The terms "eminent
10 domain" and "condemnation" mean the same thing.

11 A town's use of eminent domain must follow a plan in
12 which the land is taken for public use, public purpose, or
13 public benefit.

14 The Bill of Rights in our federal Constitution
15 protects individuals from a government abusing its powers.
16 The Fifth Amendment to the Constitution is part of the Bill
17 of Rights, contains what is called the "Takings Clause."
18 The Takings Clause states that private property may be
19 taken for a public purpose or public use so long as the
20 government pays just compensation. The term "public use"
21 is synonymous with public benefit or advantage. Just
22 compensation is measured by the fair market value of the
23 subject property at the time of the taking.

24 When a town uses eminent domain, it "takes" the
25 property from its owner, so we refer to this as a "taking."

26 As I just explained, Section 1983 provides a remedy
27 for violations of a federal constitutional right. The

1 particular constitutional rights that the plaintiffs claim
2 were violated are their rights under the Takings Clause of
3 the Fifth Amendment to the United States Constitution.

4 The alleged constitutional violation before you is the
5 plaintiffs' claim that the town's use of eminent domain to
6 take the 77 acres was a pretextual, bad faith exercise of
7 the power of eminent domain and not for a public use or
8 purpose. The plaintiffs allege that the Town took the 77-
9 acre property not for a public use or purpose, but to block
10 development of housing. I will define what constitutes a
11 "bad faith" taking in a moment.

12 **BURDEN OF PROOF APPLICABLE TO A**

13 **SECTION 1983 CLAIM**

14 The plaintiffs have the burden of proving each and
15 every element of their Section 1983 claim by a
16 preponderance of the evidence. I have previously defined
17 the term preponderance for you. If you find that the one
18 or more of the plaintiffs has failed to prove any one of
19 the elements of a Section 1983 claim, you must return a
20 verdict against such plaintiff and in favor of the town.

21 **ELEMENTS OF A SECTION 1983 CLAIM**

22 As applied to this case, Section 1983 means that a town
23 may not use the powers it has been delegated by the state
24 such as the taking clause to violate federal constitutional
25 rights of the plaintiffs.

26 To establish a claim under Section 1983, the
27 plaintiffs must establish, by a preponderance of

1 the evidence, each of the following three elements:

2 First, that the conduct complained of was
3 committed by a municipality acting under color of
4 state law;

5 Second, this conduct deprived the plaintiffs of
6 rights, privileges or immunities secured by the Takings
7 Clause of the Fifth Amendment to the United States
8 Constitution; and

9 Third, that the defendant's acts were the proximate
10 cause of the injuries and consequential damages
11 sustained by the plaintiffs.

12 **SECTION 1983 ELEMENT: ACTION UNDER**
13 **COLOR OF STATE LAW**

14 The first element of a Section 1983 claim is that the
15 defendant acted under color of state law. It is undisputed
16 that the town acted under the color of state law. I
17 instruct you to find for the plaintiffs on this element, and
18 the town has admitted this in its answer.

19 **DETERMINATION OF LIABILITY TO BE BASED ONLY ON ACTION**
20 **OF TOWN'S LEGISLATIVE BODY, THE REPRESENTATIVE TOWN MEETING**

21 In this case, the plaintiffs have sued the town of
22 Branford as a single entity. The plaintiffs have not sued
23 any town officials or representatives individually, in
24 either their official or individual capacities. The power
25 of eminent domain can only be exercised by the town acting
26 formally through its government body, which in this case is
27 the Representative Town Meeting or RTM. The "eminent

1 domain" process in Branford also involves the Board of
2 Selectmen and Finance Committee, with these other bodies
3 being necessary but not sufficient to the eminent domain
4 process. Only the RTM can authorize eminent domain.

5 In this case, the RTM voted to adopt a resolution
6 authorizing eminent domain on July 9, 2003, and the RTM's
7 vote was carried out with court filings on December 18,
8 2003, and January 5, 2004. Your determination of liability,
9 therefore, should focus on the resolution passed by the RTM
10 and the basis, or lack of basis, for the resolution.

11 The action that is relevant for determining liability
12 for the use of eminent domain is the action of the RTM. The
13 RTM's action includes the information that it received or
14 obtained, the action it took, and the reasons stated for
15 that action.

16 **SECTION 1983 ELEMENT: CONSTITUTIONALLY-PROTECTED**
17 **PROPERTY INTEREST**

18 Under the Takings Clause of the Fifth Amendment, the
19 plaintiffs must first prove that the town's use of eminent
20 domain deprived them of a property interest that is
21 protected by the United States Constitution. I instruct you
22 that as of January, 2004, when the town of Branford took the
23 77 acres by eminent domain, Frank Perrotti, Jr. and Thomas
24 Santa Barbara, Jr. owned the 77 acres and they had an option
25 contract to sell the property to New England Estates; thus,
26 Santa Barbara and Perrotti had a constitutionally protected
27 interest under the Taking Clause of the Fifth Amendment to

1 the United States Constitution in the 77 acres.

2 I instruct you that as of January, 2004, when the town
3 of Branford took the 77 acres by eminent domain, New England
4 Estates had a constitutionally-protected interest under the
5 Taking Clause of the Fifth Amendment to the United States
6 Constitution in the property. That interest arose from the
7 option agreement that it had with Mr. Perrotti and Mr. Santa
8 Barbara to purchase the 77-acre property.

9 Consequently, the plaintiffs had a constitutionally-
10 protected interest under the Taking Clause of the Fifth
11 Amendment to the United States Constitution in the property
12 at issue.

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

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

1 violated the plaintiffs' Fifth Amendment Takings Clause
2 rights.

3 **REASONS FOR CONDEMNATION INVALID IF TOWN ACTED BY**

4 **PRETEXT/INVALID REASON**

5 I will now instruct you further as to the standards of
6 liability for a bad faith use of eminent domain. The first
7 basis on which the plaintiffs may prove a violation is that
8 each of the town's stated reasons for the taking was
9 pretextual, and the actual reasons were invalid.

10 "Pretextual" means that the stated reason was not the real
11 or actual reason.

12 Next, the plaintiffs must prove that the actual reasons
13 stated for the taking were invalid, illegal, false or
14 improper. Accordingly, if you find that each of the reasons
15 stated by the town for the taking was not the actual reason
16 for the taking, and the actual reasons were invalid,
17 illegal, false or improper, then the town acted in violation
18 of the plaintiffs' rights with respect to those stated
19 reasons.

20 **REASONS FOR CONDEMNATION INVALID IF TOWN ACTED UNREASONABLY**

21 **IN USE OF EMINENT DOMAIN**

22 A second way in which the plaintiffs may prove each of
23 the town's stated reasons to be unconstitutional is by
24 showing that the stated reasons were unreasonable.

25 "Unreasonable" means not justified by the facts and
26 circumstances existing at the time of the taking.

27 "Unreasonable" action does not mean simply action about

1 which people may disagree, or action that was debatable. In
2 this context it means without justification, or having no
3 basis. Whether a town's use of eminent domain is
4 unreasonable includes whether the use of eminent domain was
5 "necessary" or "excessive" in the sense that the town took
6 significantly more acreage than was needed to accomplish its
7 stated purpose.

8 ABUSE OF POWER

9 A third way in which the plaintiffs may prove each of
10 the town's stated reasons to be unconstitutional is to prove
11 that the taking of land resulted from an abuse of government
12 power. I instruct you that abuse of government power means
13 action by the town that is arbitrary, deceptive, fraudulent
14 or dishonest. Thus, the plaintiffs must prove that the
15 taking was for an arbitrary, deceptive, fraudulent or
16 dishonest purpose. Thus, this standard is a third way that
17 the plaintiffs may prove an unconstitutional use of eminent
18 domain.

19 SECTION 1983 ELEMENT: CAUSATION AND DAMAGES

20 The plaintiffs must prove that the town's acts were
21 the proximate cause of the injuries sustained by them.
22 Proximate cause means that there must be a sufficient
23 causal connection between the act or omission of the town
24 and any injury or damage sustained by the plaintiffs. An
25 act or omission is a proximate cause if it was a
26 substantial factor in bringing about or actually causing
27 injury, that is, if the injury or damage was a reasonably

1 foreseeable consequence of the town's act or omission.
2 If an injury was a direct result or a reasonably probable
3 consequence of the town's act or omission, it was
4 proximately caused by such act or omission.

5 In order to recover damages for any injury, the
6 plaintiffs must show by a preponderance of the evidence
7 that such injury would not have occurred without the
8 conduct of the town.

9 **ISSUES DETERMINED IN PRIOR PROCEEDINGS**

10 Based on the issues decided by the court in a prior
11 valuation proceeding that the highest and best use of the
12 subject property was for residential development. I
13 instruct you that it was reasonably probable that the 77-
14 acre parcel, but for the taking, could have been devoted
15 to the proposed residential use, that is the 354 unit
16 affordable housing plan proposed by the plaintiffs New
17 England Estates. Based on the issues decided by the
18 court in a prior valuation proceeding, I further instruct
19 you that it was reasonably probable that the necessary
20 administrative approvals for the 354 unit project would
21 have been obtained.

22 **DAMAGES**

23 Just because I am instructing you on how to award
24 damages does not mean that I have any opinion on whether or
25 not the town should be held liable. If you find that the
26 town acted in bad faith in exercising its power of eminent
27 domain, then you must consider the issue of actual damages.

1 If you return a verdict for the plaintiff or plaintiffs, then
2 you must award the plaintiff or plaintiffs a sum of money as
3 you believe will fairly and justly compensate the plaintiff
4 or plaintiffs for any injuries you believe the plaintiff or
5 plaintiffs actually sustained as a direct consequence of the
6 conduct of the defendant. You may award actual damages only
7 for those injuries which you find the plaintiff or plaintiffs
8 have proven with reasonable certainty. Moreover, you may
9 award actual damages only for those injuries which you find
10 the plaintiff or plaintiffs have proven by a preponderance of
11 evidence to have been the direct result of conduct in
12 violation of the Takings Clause of the Fifth Amendment. That
13 is, you may not simply award actual damages for any injury
14 suffered by the plaintiff or plaintiffs; rather, you may
15 award actual damages only for those injuries that are the
16 direct result of actions by the town and that are a direct
17 result of conduct by the town that violated the plaintiff or
18 plaintiffs' rights under the Takings Clause of the Fifth
19 Amendment. Actual damages must not be based on speculation
20 or sympathy. They must be based on the evidence presented at
21 trial, and only on that evidence.

22 **PLAINTIFFS ARE NOT CLAIMING, AND YOU MUST NOT AWARD,**
23 **DAMAGES FOR THE VALUE OF THE LAND**

24 The Takings Clause of the Fifth Amendment requires the
25 government, when it takes land by eminent domain, to pay the
26 owners "just compensation" for the fair market value of the
27 land. In addition to this case, there is a dispute among

1 Thomas Santa Barbara, Jr. and Frank Perrotti, Jr. as owners,
2 New England Estates as an option holder, and the town of
3 Branford as to just compensation for the land. That issue,
4 however, is one that our law requires the court, not the
5 jury, to decide, and thus it has been addressed in a
6 separate proceeding. Thus, I instruct you that in this
7 case, the plaintiffs make no claim regarding the fair market
8 value of the land, and you are not to consider it. In
9 particular, you should not speculate about the value of the
10 land, or what if any amount Mr. Santa Barbara, Mr. Perrotti,
11 and New England Estates may receive for the land.

12 **NEW ENGLAND ESTATE'S CLAIM FOR LOST PROFITS AND INVESTMENT**

13 **EXPENSES BY ITS PRINCIPALS MUST BE PROVEN BY REASONABLE**

14 **CERTAINTY**

15 The burden of proving the damages to which the
16 plaintiff or plaintiffs are entitled rests upon the
17 plaintiff or plaintiffs. As to lost profits and investment
18 expenses by its principals, it is necessary that New England
19 Estates furnish you with proof that enables you to find,
20 with reasonable certainty, what its profits would have been
21 and what the investment expenses by the principals was. You
22 must not guess or speculate. Reasonable certainty is the
23 test.

24 It is not enough for New England Estates to show that
25 it planned to proceed with the particular 354-unit
26 development. Rather, New England Estates must show that it
27 "would have" done so. If you conclude that New England

1 Estates would have proceeded with the 354-unit development,
2 you cannot award lost profits unless, in view of the
3 evidence, you are able to find, with a reasonable degree of
4 certainty, what New England Estates would have earned from
5 the sale of the 354-units, when the units would have been
6 sold and what New England Estate's expenses would have been,
7 had it proceeded with the development.

8 Again, any award of lost profits must be grounded in
9 fact rather than speculation. Should you find that New
10 England Estates claims for lost profits is speculative, you
11 cannot award it damages for lost profits.

12 DAMAGES FOR THOMAS SANTA BARBARA, JR. &

13 FRANK PERROTTI, JR.

14 Frank Perrotti, Jr. and Thomas Santa Barbara, Jr. claim
15 that as a result of the town violating their constitutional
16 rights, they incurred monetary damages, including loss of
17 option payments due to them from New England Estates under
18 the option contract, loss of payment of the full option
19 contract price due to them from New England Estates.

20 NOMINAL DAMAGES

21 If you find that the town deprived one or more of the
22 plaintiffs of rights protected by the Takings Clause of the
23 Fifth Amendment but you also find that the plaintiff or
24 plaintiffs failed to prove actual damages, then you must
25 return an award of damages in some nominal or token amount
26 not to exceed the sum of one dollar. Nominal damages must be

1 awarded when a plaintiff has been deprived by a defendant of
2 a constitutional right, but has suffered no actual damages as
3 a natural consequence of that deprivation.

4 I will soon explain the verdict forms to you and then
5 you may retire to the jury deliberation room. You should not
6 begin your deliberations until the exhibits and the verdict
7 forms are delivered to you by the clerk. This will occur
8 after the attorneys have had an opportunity to check that all
9 the exhibits are present. This may take a few moments.

10 So a couple of things are possibly going to happen. The
11 attorneys also have a right to comment on the charge that I
12 have just given to you. If there are any additions,
13 corrections or deletions to the charge, we'll have everyone
14 come back out. I will reread those portions of the charge to
15 you. Again, notice I said no deliberations yet.

16 If there is an rereading of any part of the charge,
17 we'll do that. I will then have the alternate jurors come
18 out. I wish to speak to them for a few minutes. Again,
19 still no deliberations yet.

20 When you have received all of the full exhibits, again,
21 you get a copy of the charge, the first thing you need to do
22 is to elect a foreperson, someone to basically speak for the
23 jury in communications with the Court. So you get the
24 exhibits, the first thing you do is to elect a foreperson.
25 After you've done that, then and only then can you begin your
26 deliberations.

27 You can only deliberate when you are all together in the

1 jury deliberation room. If someone has to step out for a
2 moment, you have to stop your deliberations. You can only
3 deliberate when all of you are together in the room at the
4 same time.

5 If you have any questions, as I said earlier in the
6 charge, if you want any testimony played back, what you have
7 to do is write down in a note, and you'll have some note
8 paper, as specifically as you can what testimony you wish to
9 have played back. There will be someone outside the door of
10 the deliberation room. Just take the note, put it in an
11 envelope, hand it to the -- maybe Attorney Carlucci will be
12 there. And then that will be brought to me. I'll discuss it
13 with the attorneys, and then we'll bring you in and decide
14 how we're going to respond.

15 When there is a note, if there is a question, again, it
16 has to be written out. Be as specific as you can. It has to
17 be signed and dated by the foreperson, and that's for any
18 questions that you have not only for testimony to be read
19 back, if you have any questions on the charge and you wish a
20 portion of the charge reread, again you are going to have a
21 copy of this, but really, if there's any questions at all,
22 put the questions in the form of a note, have it signed and
23 dated by the foreperson. We'll get the note and we'll
24 address the note as best we can after we receive it.

25 When you have reached a verdict, again, you should
26 indicate that you have reached a verdict to whoever is
27 outside of the door at the time. Don't tell the person what

1 the verdict is. Just indicate that you have reached a
2 verdict and then your verdict will be delivered here in open
3 court.

4 You're going to have verdict forms and you're going to
5 have interrogatories. The interrogatories are believe are
6 self-explanatory. They are specific questions that you must
7 answer. Based on your answer to the interrogatories, it will
8 direct you to one or the other of the verdict forms.

9 The interrogatories need to be signed, and the verdict
10 form you use needs to be signed. Again, that is all done by
11 the foreperson. The foreperson signs the interrogatories,
12 signs whatever verdict form you determine is appropriate,
13 puts the date on it, and when you have reached your verdict,
14 just indicate in the note you've reached a verdict, then you
15 come out with the verdict forms, and then we'll go over the
16 verdict forms here in open court.

17 So looking at the hour, we'll see if we can try to get
18 you started this afternoon, but again, no deliberations, no
19 discussions of any kind. You can take your notebooks with
20 you. What will happen is when you leave at the end of the
21 day we'll gather up the notebooks again, put them in a secure
22 place and then get them back to you in the morning.

23 And what we'll do, just so you know what the schedule is
24 going to be, when you come in, we're going to open court just
25 briefly just so we can make a record that you're all here,
26 and then you can continue with your deliberations.

27 So with that, again, the attorneys have a right to

1 comment. No discussions. Don't do anything until you have
2 those exhibits and the alternate jurors have come out. But
3 thank you very much for your attention.

4 (Whereupon, the jury left the courtroom.)

5 THE COURT: Counsel, comments, please. Have a
6 seat everyone, please. Attorney Callahan, please.

7 MR. CALLAHAN: Attorney Frederick will handle
8 our exceptions, but if you'd like for us to do it
9 first, that's fine.

10 MS. FREDERICK: I have a number of objections.

11 THE COURT: Okay. Let me have the page number
12 and the particular charge where you have an
13 exception, please.

14 MS. FREDERICK: Okay. Your Honor, perhaps if
15 the plaintiffs could go first so I could get you
16 the page numbers because I did not do that on my
17 form.

18 THE COURT: Counsel, if you're ready, please.

19 MR. HOLLISTER: Your Honor, one correction.
20 This is pretty minor. But on page 22, the elements
21 of a 1983 claim. I don't think -- in the second
22 line I don't think it's accurate to say that the
23 takings clause of the Fifth Amendment is delegated
24 by the state of Connecticut. So perhaps it should
25 say delegated by the state of Connecticut such as
26 the power to take by eminent domain. Do you see
27 what I'm saying? The state of Connecticut doesn't

1 delegate the taking clause. If anything, it's
2 probably the other way around.

3 THE COURT: So what is your suggestion,
4 please?

5 MR. HOLLISTER: Instead of takings clause
6 insert power to take by eminent domain because that
7 is what the state delegates to the towns.

8 THE COURT: Can you read me the first sentence
9 as you're suggesting it, please?

10 MR. HOLLISTER: Sure. The only change would
11 be to the second line which would read: been
12 delegated by the state of Connecticut such as the
13 power to take by eminent domain, comma, and then
14 the rest. Take out the words "takings clause".

15 THE COURT: Any comment on that? That seems
16 more of a textural matter than a substantive
17 matter.

18 MR. CALLAHAN: I agree, Your Honor.

19 THE COURT: Okay.

20 MR. CALLAHAN: And I agree that they're not
21 delegated by the state of Connecticut.

22 THE COURT: So that sentence would read: As
23 applied to this case, Section 1983 means that a
24 town may not use the powers it has been delegated
25 by the state of Connecticut such as the power to
26 take by eminent domain to violate?

27 MR. HOLLISTER: Correct.

1 THE COURT: Thank you.

2 MR. HOLLISTER: Your Honor, on page 19 the
3 two-line paragraph in the middle. Our objection is
4 the words "must follow a plan". As we had argued
5 previously, it should be stronger than that. In
6 words or substance it should say must act pursuant
7 to a publicly considered and adopted plan. I
8 believe that was in there previously and I --

9 THE COURT: That was in there. That was
10 discussed yesterday at the charge conference, and
11 so that --

12 MR. HUMPHREY: The owners join in that.

13 THE COURT: Okay. I assume that will be the
14 case, but I think this adequately states it.

15 MR. HOLLISTER: Your Honor, on page 25, at the
16 end of the large first paragraph. We would ask
17 that the reference to the protected property
18 interest of New England Estates include the permits
19 that it was entitled to. I believe that was in the
20 charge previously, but it now only refers to the
21 option contract. The permits were granted to New
22 England Estates, and those are, having been
23 granted, clearly property interests.

24 MR. CALLAHAN: Your Honor, they're clearly
25 property interests only under the substantive due
26 process clause. We've been through that, but -- so
27 we object to the request, or to the exception, Your

1 Honor, I guess would be the proper term.

2 THE COURT: Wasn't this the argument that you
3 were making, counsel?

4 MR. HUMPHREY: Yes, Your Honor. We would
5 request also that with respect to the owners and
6 the cases which I cited to the Court earlier today
7 regarding the fact that permits are a property
8 interest, and they go with -- they attach to the
9 property, and so they're clearly further interests
10 of both the owner and the --

11 THE COURT: Again, the damages testimony from
12 Mr. Kappel, I don't recall a specific reference to
13 the permits as having an independent --

14 MR. HOLLISTER: No, Your Honor, and Mr.
15 Humphrey's argument is separate from mine. I'm
16 proceeding under Board of Regents versus Roth,
17 United States Supreme Court, that property
18 interests under the Fifth Amendment are defined by
19 state law, and the cases under Board of Regents
20 versus Roth say that once a permit has been
21 granted, it becomes a property interest. Even the
22 Natale versus Ridgefield case says that. I just
23 don't -- we're only asking that the recognition of
24 our property interest not be limited to the option
25 contract because it was the option contract plus
26 the two permits that we had received.

27 MR. HUMPHREY: The Roth case is what relied --

1 the Natale case and the other case, the Club case,
2 are both a progeny of Roth. So we claim that,
3 again, that's another property.

4 THE COURT: Attorney Frederick, comments?

5 MS. FREDERICK: To the best of my knowledge
6 the Natale case and the second case that we were
7 provided with today are substantive due process
8 claims, not claims brought under the takings clause
9 of the Fifth Amendment.

10 THE COURT: I think this adequately lays the
11 foundation for the jury, so I'm not going to add
12 that.

13 MR. HOLLISTER: Okay. Next, Your Honor, on
14 page 31, which is the issues determined in prior
15 proceedings against. It's something we've gone
16 over, but we would ask that that instruction and
17 with a reference to within approximately one year.
18 I know we've been over that before.

19 THE COURT: Again, as I've indicated for the
20 record, I did check. This is precisely the
21 language that I put on the record when I indicated
22 that on the issue of collateral estoppel had been
23 determined, and this is the exact language, so I'm
24 going to stay with this language.

25 MR. HOLLISTER: The next one, Your Honor, is
26 on page 32, the damages, and again, this is
27 something you've heard before. We believe that

1 that charge to be consistent with the U.S. Supreme
2 Court decision in Carey versus Piphus and to
3 reflect the fact that Section 1983 is a remedial --
4 has a remedial purpose or deterrent purpose under
5 the Bill of Rights, and the Carey case makes
6 specific reference to this so-called compensation
7 principle that this charge on damages should use
8 the words, or in substance, make whole as opposed
9 to just a strict focus on actual injuries proven to
10 reasonable certainty. It is slightly more than
11 that. Actually, I shouldn't say slight. It is
12 more than that under Carey versus Piphus, and
13 again, you've heard that before.

14 THE COURT: Again, that's, I think, adequately
15 covered on the record, and I think the -- I assume,
16 counsel --

17 MR. HUMPHREY: For the record, we join in
18 that, Your Honor.

19 THE COURT: I think this adequately states the
20 issue of damages for the jury.

21 MR. HOLLISTER: Okay. Next, Your Honor, is
22 the two -- failure to charge on the two corrective
23 instructions that Mr. Bergenn commented on at the
24 beginning of the afternoon session. One would be
25 that there is no other case in which New England
26 Estates is able to seek damages as it does in this
27 case, and second is the reference to the injunction

1 action made in the town's closing statement. Just
2 reiterating those as --

3 THE COURT: And again, as indicated, I think
4 when read in total the charge here clearly
5 instructs the jury that they are to consider only
6 the evidence presented in this case and, further,
7 they are to follow the law as I give it to them,
8 whether they agree with that law or not. And
9 finally, that arguments of counsel are not evidence
10 and not to be considered as evidence by the jurors.
11 So I think based on those three things, Attorney
12 Humphrey --

13 MR. HUMPHREY: And we made a corrective -- we
14 requested a corrective instruction also.

15 THE COURT: Thank you.

16 MR. HOLLISTER: Your Honor, our last exception
17 is draft instructions that we have provided
18 previously to the Court which the Court did not
19 give, and there's five of them. If I could just
20 list those.

21 THE COURT: Please.

22 MR. HOLLISTER: Number one is the qualified
23 immunity charge that we submitted dated September
24 6, 2007.

25 And then from our August 27 second revised set
26 of jury charges, number two, which is eminent
27 domain being strictly construed.

1 Number 12, lack of planning as a form of
2 unreasonable conduct.

3 Number 14, which is the instruction where we
4 go through items of conduct that we believe are not
5 proper public purposes and on which the Court
6 should instruct as a matter of law. For example,
7 eminent domain may not be used to block a zoning
8 application process. So as laid out in number 14.

9 And then finally, number 18 of that August 27
10 submission, once the land was taken New England
11 Estates had no right to appeal to the Court. So
12 the failure to include that in the charge.

13 And that completes our exceptions, Your Honor.

14 THE COURT: Okay. Attorney Frederick, please

15 MR. HUMPHREY: Just one --

16 THE COURT: I'm sorry. Attorney Humphrey.

17 MR. HUMPHREY: We join in those, and then I
18 believe that -- I did not hear the Judge instruct
19 the jury that the verdict needs to be unanimous
20 which you have on page 37. But the Court was
21 speaking directly to the jury.

22 THE COURT: No, I will read in its entirety 37
23 and 38. I tried to do that, but I'll read it in
24 its entirety.

25 MR. HUMPHREY: I'm not asking for that, Your
26 Honor, just that --

27 THE COURT: No, I think I should read it in

1 its entirety. I think that's appropriate.

2 Counsel.

3 MS. FREDERICK: Yes, Your Honor. First, as a
4 preliminary matter, just for the record so it's
5 clear, the Court did find that New England Estates
6 could have sought lost profits in the just
7 compensation proceeding, and I'd just like to have
8 that on the record since it's come up this
9 afternoon.

10 As to our exceptions, the first is that to
11 instructing the jury that New England Estates had a
12 property interest in the 77 acres of land. That's
13 page 25.

14 Second is instructing the jury that that
15 property interest is protected by the Fifth
16 Amendment takings clause.

17 Next is instructing the jury that by --

18 THE COURT: Again, this is still page 25,
19 counsel?

20 MS. FREDERICK: Page 25.

21 THE COURT: Thank you.

22 MS. FREDERICK: This is, excuse me, not
23 instructing the jury -- this is on pages 26 through
24 28 -- that under Connecticut law certain uses such
25 as investigation, remediation of environmental
26 concern, future recreational uses, limitation of
27 town liability and all constitute public uses and

1 purposes within the meaning of the takings clause
2 of the Fifth Amendment.

3 Next, instructing the jury that eminent domain
4 requires the formal plan. This is page 19. The
5 cases -- it's our reading of the cases that discuss
6 such a requirement involves takings authorized
7 under redevelopment statutes that expressly require
8 such a plan, and those statutes are not at issue in
9 this case.

10 Page 27, not instructing the jury that bad
11 faith requires conscious wrongdoing and/or actual
12 malevolence, and that poor judgment and negligence
13 do not suffice to prove bad faith.

14 Also page 27, not instructing the jury that in
15 order to prove their bad faith claims the
16 plaintiffs had to prove that the town's motivation
17 in taking the property was not related to the
18 impact of the landfill. On the suitability of the
19 property for residential development, but was
20 instead, in fact, motivated by the desire to
21 prevent affordable housing.

22 On pages 26 through 28 the town objects to the
23 Court's instructions on unreasonable abuse of
24 power, and again, as set forth in our prior
25 objections, we believe that those standards are
26 from cases decided under the state constitution and
27 also that they constitute separate liabilities --

1 series of liabilities separate and distinct from
2 bad faith.

3 Also on pages 26 through 28, instructing the
4 jury regarding these additional theories of
5 liability that were pleaded by virtue of the Third
6 Amendment complaint.

7 Also on pages 26 through 28, failing to
8 instruct the jury that the applicable standard, if
9 you get to this theory not of bad faith but the
10 grounds for taking were inadequate, that the actual
11 standards under federal law are rationally related
12 to a conceivable public purpose and/or palpably
13 without reasonable foundation.

14 As to the damages instruction on page 32, not
15 instructing the jury that the date for measuring
16 New England Estates' claim for damages for lost
17 profits is at the time of the taking.

18 Submitting the issue of whether New England
19 Estates is entitled to interest going forward from
20 the date on which damages are measured to the time
21 of trial to the jury. I don't think that's a jury
22 issue. That's also, I guess, would be page 32.

23 Submitting New England Estates' claims for
24 lost profits to the jury because, again, our
25 position is that they're speculative.

26 Not instructing the jury that, as we have
27 requested in the directed verdict motions, that

1 having sought just compensation the plaintiffs are
2 not entitled to anything but nominal damages or
3 damages at all.

4 Also on page 34, New England Estates claim
5 being that but for the taking it would have
6 developed the property, submitting also a claim for
7 the pretaking expenses to the jury.

8 As to page 24, the instruction regarding the
9 action of the RTM. It's the town's position that
10 the charter specifies the process by which the town
11 exercises eminent domain and all aspects of the
12 process, including the circumstances under which
13 the filing is necessary to effectuate the RTM votes
14 were made are relevant.

15 On page 31, instructing the jury that, and
16 this, again, goes to the collateral estoppel
17 findings, instructing the jury that it was
18 reasonably probable but for the taking the property
19 could have been devoted to residential development.
20 That is the 354-unit project.

21 And also instructing the jury that it is
22 reasonably probable that the approvals for that
23 development would have been obtained.

24 And the last, I think, is -- let me just make
25 sure -- is page 28, submitting the theory that the
26 town or the apparent theory that the town took a
27 quantity of land that is greater than that which is

1 necessary to the jury.

2 And we make these exceptions without waiving
3 the requests and objections that we filed
4 previously with the Court as to this.

5 THE COURT: I understand that.

6 MS. FREDERICK: Thank you.

7 THE COURT: Again, what I am going to do is
8 bring the jury back out and reread page 22, and
9 then read in its entirety page 37 and 38.

10 Okay. If we could bring the entire panel out,
11 please.

12 Counsel, have you had an opportunity to review
13 and agree on the exhibits at this point? Yes, no?

14 MR. HOLLISTER: I'm told there is only one
15 potential issue, but I don't know what it is, so --

16 THE COURT: My suggestion is going to be as
17 follows, looking at the hour as to --

18 (Whereupon, the jury entered the courtroom.)

19 THE COURT: Ask counsel please stipulate to
20 the presence of all the jurors.

21 MR. BERGENN: Yes, Your Honor.

22 MR. HUMPHREY: Yes, Your Honor.

23 MR. CALLAHAN: Yes, Your Honor.

24 THE COURT: Ladies and gentlemen, there is two
25 matters I need to reread to you.

26 On the elements of a Section 1983 claim, and
27 again, I've made this correction on the copy that

1 you are going to receive. As applied to this
2 case, Section 1983 means that a town may not use
3 the powers it has been delegated by the state of
4 Connecticut such as the powers to take by eminent
5 domain to violate federal constitutional rights of
6 the plaintiff.

7 To establish a claim under Section 1983,
8 plaintiffs must establish by a preponderance of the
9 evidence each of the following three elements:

10 First, that the conduct complained of was
11 committed by a municipality acting under color of
12 state law.

13 Second, that this conduct deprived the
14 plaintiff of rights, privileges or immunity secured
15 by the takings clause of the Fifth Amendment of the
16 United States Constitution.

17 And third, that the defendant's acts were the
18 proximate cause of the injuries and consequential
19 damages sustained by the plaintiffs.

20 I'm also going to read in its entirety process
21 for jurors' deliberations. Again, you're going to
22 have this with you when you deliberate.

23 I will soon explain the verdict forms to you
24 and then you may retire to the jury deliberation
25 room. You should not begin your deliberations
26 until the exhibits and the verdict forms are
27 delivered to you by the clerk. This will occur

1 after the attorneys have had an opportunity to
2 check that all the exhibits are present, and again,
3 this may take a few moments.

4 While waiting for the exhibits to be
5 delivered, your first task will be to elect a
6 foreperson. Then, after you have received the
7 exhibits you will begin deliberating. If you have
8 questions during your deliberations, the foreperson
9 should write the jury's question on a sheet of
10 paper, sign and date it, knock on the door. The
11 question will then be brought to me, and I will
12 respond in open court. It may take a few minutes
13 to assemble the staff before you are brought to the
14 courtroom to hear the response. Please try to make
15 any questions very precise. We cannot engage in an
16 informal dialogue, and I will respond only to the
17 question on the paper.

18 If you need to have any testimony read or
19 played back, follow the same procedure: on a sheet
20 of paper specify what it is that you want to hear
21 as precisely as you can. For example, if you know
22 that you want to hear only the direct examination
23 or only the cross examination, or a portion thereof
24 of a particular witness, specify that. Otherwise,
25 we will have to repeat the whole testimony.

26 Now, your verdict must be unanimous. There is
27 no such thing as a majority vote of a jury in

1 Connecticut. Rather, you must all agree on the
2 verdict.

3 When you are in the jury room, please listen
4 to each other and discuss the evidence and issues
5 amongst yourselves. Each of you has the duty to
6 consult with one another and to deliberate in an
7 effort to agree unanimously on a verdict if you can
8 do so without violating your own individual
9 consciences. While each of you must decide the
10 case for yourself and not merely acquiesce in the
11 conclusion of your fellow jurors, you should
12 examine the issues and the evidence before you with
13 candor and frankness and with proper regard for the
14 opinions of each other.

15 No one will hurry you. If you are not able to
16 reach a verdict today, you will resume your
17 deliberations tomorrow. You may have as much time
18 as you need to reach a verdict.

19 When you have reached a verdict, knock on the
20 door and the court clerk will alert me. Do not
21 tell the clerk what the verdict is; it will be
22 delivered here in open court.

23 When the jury is asked if it has reached a
24 verdict, the foreperson should respond and give the
25 verdict form to the court clerk. The verdict will
26 be read twice to you. You will each be asked to
27 respond whether it is your verdict, as a check that

1 the verdict is, in fact, unanimous.

2 That's a little more detail of what I tried to
3 do off the top of my head a few moments ago.

4 I think what we're going to do is I'm going to
5 ask you to go back into the jury room for just a
6 few minutes. I do want to talk to the alternates.
7 Probably, looking at the hour, once I have spoken
8 to the alternate jurors, we're probably going to
9 have you go for the day rather than try to rush
10 things and get you the evidence, and then you'll
11 have five minutes or so.

12 Again, the first thing you have to do, again,
13 is to elect a foreperson. You can't elect a
14 foreperson until really you have all of the
15 evidence and exhibits with you. So procedurally
16 I'm going to have everyone go back. I'm going to
17 have the alternates come out, and then we'll bring
18 everybody out and adjourn for the day, and then
19 we'll speak to you about the time for tomorrow. So
20 at this point I'm going to ask all of you to go
21 back to the deliberation room, please.

22 (Whereupon, the jury left the courtroom.)

23 MR. BERGENN: Your Honor, is your practice
24 just to let them go now? There has been some
25 instances where something has happened and --

26 THE COURT: Well, what I will do and I do is I
27 will let them go but I will tell them that they

1 still cannot talk about the case, discuss it with
2 anyone because it's possible that they may be
3 called back, so they'll be instructed not to talk
4 until we know we have a verdict.

5 Counsel, as I indicated, tomorrow morning
6 we'll just open court very briefly to make sure
7 that everyone agrees on the record. I'd like to
8 start at 9:30, please, get them started as soon as
9 possible.

10 (Whereupon, the alternate jurors entered the
11 courtroom.)

12 THE COURT: Have a seat. I just want to talk
13 to you for a moment.

14 I realize this is a little bit like getting
15 all suited up and then you don't get to be in the
16 game, but please understand how important your
17 participation is.

18 As you saw, we did have one of the jurors who
19 was not able to finish the trial, and one of the
20 alternates was asked to come in and take the place
21 of that regular juror.

22 What I'm going to ask you to do, and this
23 doesn't happen very often, but it can happen. I'm
24 going to ask you not to talk about the case to
25 anyone at this point. If for any reason one of the
26 jurors is unable to complete the deliberations, for
27 whatever reason, we may ask one of you to come

1 back, and then we would start the deliberations all
2 over again. So it's important until you know, and
3 we will notify you when there is a verdict, at that
4 point you can speak, if you wish to, but that's
5 entirely up to you. But until you've heard that
6 there's a verdict, I'm going to ask you not to talk
7 to anyone about the case because it is possible
8 that we may have to have one of you come back.

9 Do we have phone numbers for each of them?

10 THE CLERK: Yes, we do.

11 THE COURT: Okay. So, again, thank you for
12 your participation. We do appreciate it.
13 Obviously, we'll let you know as soon as we have
14 something. I know we all appreciate your
15 participation during these last couple of weeks,
16 but without alternates serving, again, we wouldn't
17 be able to have a system. So with that, thank you
18 very much, and I don't know if you've left anything
19 in the room, but, again, we'll let you know as soon
20 as we have a verdict. Thank you very much.

21 (Whereupon, the alternate jurors left the
22 courtroom.)

23 THE COURT: All right, counsel, what I'm going
24 to suggest is if we could have everyone here.
25 We'll have the jurors here for 9:30. We can get
26 all the exhibits lined up, then we can get them
27 started as soon as possible.

1 (Whereupon, the jury entered the courtroom.)

2 THE COURT: Again, looking at the hour, we're
3 going to collect your notebooks from you at this
4 point. We're going to ask you to be here, please,
5 at 9:15. We can get started right at 9:30, get all
6 the exhibits together, get them to you.

7 Again, as I've been saying, don't discuss the
8 case with anyone, don't talk about it amongst
9 yourselves on the way out. The only time you can
10 talk about the case is when you're in the room,
11 you've got all the exhibits and you're all
12 together. Absent that, you can't have any
13 discussions. No media attention, no independent
14 investigation. All those rules still apply, and
15 with that, thank you very much and we will see you
16 in the morning. Thank you. So we're adjourned.

17 (Whereupon, court adjourned.)

NO. X06-CV03-0183606

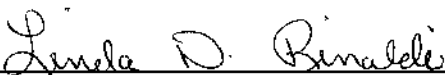
-----X
 NEW ENGLAND ESTATES)
)
 VS.)
)
 TOWN OF BRANFORD)
 -----X

SUPERIOR COURT OF CONNECTICUT
JUDICIAL DISTRICT OF WATERBURY
SEPTEMBER 11, 2007

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

This is to certify that I, Linda D. Rinaldi, court recording monitor in and for the State of Connecticut, certify that the foregoing is a true and accurate transcript of the electronic recordings taken with reference to the above-entitled matter, heard before the Honorable William Cremins, Judge, at the Waterbury Superior Court, Judicial District of Waterbury on September 11, 2007

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



 Linda D. Rinaldi
 Court Monitor