SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. NO. 18132

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

V.

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

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

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INTRODUCTION

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

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

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

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

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

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

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

COUNTER STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

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

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

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

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

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

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

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

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

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

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

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

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

B. Owners' Contract With NEE; NEE's Development Efforts.

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

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

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

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

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

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

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

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

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

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

C. <u>Town's Use of Eminent Domain</u>.

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

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

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

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

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

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

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

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

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

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

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

A225.

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

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

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

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

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

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

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

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

D. <u>Trial Evidence Regarding Bad Faith; Jury Verdict</u>.

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

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

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

1. "Investigation" of environmental condition.

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

2. "Remediation" of environmental contamination.

Carver Glezen of Triton Environmental testified that the Tabor parcel was safe for residential use, based on Fuss & O'Neill's 16 years of testing, the April 2003 IES Phase II, and his own firm's August 2003 confirmatory testing. 12T 101, 13T 19-60. David Hurley of Fuss & O'Neill conceded that his firm's quarterly and annual reports documented consistent compliance with the DEP landfill permit and the absence of contamination of adjacent properties. He testified that if the Town had asked him in 2003, based on his own firm's reports, to write an opinion letter as an LEP stating that the Tabor parcel was safe for residential use, he could have done so. 26T 94-101. Flanigan agreed that the RTM had no basis to condemn in order to remediate and that the environmental evidence was speculative. 24T 38. So did DaRos, 36T 40-42. Bellamy conceded that Fuss & O'Neill's April 16 letter did not support the taking. 33T 72, 110.

3. "Possible playing fields."

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

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

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

5. The Town's rush to condemn.

Finally, the jury heard a recounting of the Town's precipitous action and disregard of fundamental fairness. As of July 2003, NEE was not ready to start construction and in fact

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

had just filed its zoning application. The Town's environmental concerns, if valid, would be aired before the PZC at the upcoming public hearings. But the Town acted to avoid that process.

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

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

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

At the July 9, 2003 RTM meeting (PE 65, 66) – which also was not a public hearing – 18 of the 22 members present had not attended either of the Committee meetings and thus were relying completely on Baughman for a recommendation and the basis for eminent domain. 20T 72-73; 21T 19-20; 23T 37-39. In remarks lasting less than six minutes, Baughman reported erroneously that eminent domain was necessary because the site was possibly contaminated and the Owners had denied the Town access to the site to

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

6. Verdict and award.

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Scope of the Takings Clause.

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

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

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

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

B. NEE's Environmental Permits Are Protected Interests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. NEE PROVED, AND ITS EXPERT PROPERLY CALCULATED, LOST PROFITS.

A. Town's Limited Appeal; Standard Of Review.

The Town has *not* contested $1.2 million in development expenses that that the jury awarded to NEE or the $340,000 in option payments awarded to the Owners. Thus, if the Court affirms liability, the plaintiffs are entitled to at least these amounts.

In considering the Town's motion to set aside the verdict, the trial court had to determine whether the evidence, viewed in the light most favorable to the prevailing party, reasonably supported the jury's verdict. *Cheryl Terry Enter., Ltd. v. Hartford*, 270 Conn. 619, 638 (2004). This Court, in turn, reviews the trial court's decision for abuse of discretion, "according great weight to the action of the trial court and indulging every reasonable presumption in favor of its correctness." *Id.* Litigants have a constitutional right to have juries decide questions of fact, and the amount of damages to be awarded is a matter peculiarly within the province of the jury. *Id*. at 638-39.

B. Factual Bases For Lost Profits Calculation.[33]

NEE proved its lost profits through the testimony of NEE principal Don Stanziale (10T and 11T, A287-A444) and forensic accounting expert Conrad Kappel (28T-31T, A572-

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[33] Without citing the relevant statutes or regulations, the Town claims (at 30) that NEE needed approvals from the State Traffic Commission and the DEP. That is not the case. NEE's site plan did not propose an exit/entrance on a state road, nor does the parcel abut one. *See* General Statutes § 14-311(a). In 2002, the Town's own traffic consultant concluded that the 268-unit plan provided safe traffic access even to the adjacent local streets. There are no "tidal" wetlands on the parcel (*see* NEE's Brief in S.C. Nos. 18089/18091 at 31). NEE's only remaining matter with DEP was a general permit for stormwater, which does not require a regulatory review and is not governed by a statute or regulation. *See* www.ct.gov/dep/cwp/view.asp?a-2709&g=324212&depNavGID=1643.

In addition, the Town states (at 29) that the record contains no facts about the timing of the § 8-30g appeal. That issue was decided in the valuation appeals. The plaintiffs' appraisals were premised on final zoning approval being received in early 2005. The trial court accepted those appraisals. *See* R72, 78. As the Town recognizes its own Brief (at 27-28 and 29 n.13), the § 8-30g issue is raised in the valuation appeals and cannot be relitigated here. Kappel therefore properly took the timing as an assumption from the valuation decision. 29T 41; 30T 62; 31T 4-5.

A856).[34] Stanziale described his three decades of construction experience and the professional backgrounds of his partners, Forte and Pizzolorusso, in real estate finance and marketing. 10T 5-119.[35] Stanziale also described his thorough due diligence regarding the suitability of the Tabor parcel for residential development. 10T 30-50. Based on the detailed construction plans that already existed and his experience in construction estimating, Stanziale prepared a detailed construction budget and in 2002 a pro forma. TE K, A176. Stanziale specifically described the expected costs of topsoil replacement to support the landscaping plan. 10T 52-55. Landscape architect Jeffrey Gordon supported Stanziale's testimony regarding the cost of topsoil, roads, and the nine executive golf holes. 4T 94-95; 5T 22-33.

Applying his professional expertise,[36] Kappel verified the components of, and formulated, an economic cash flow calculation, and used it to determine lost profits. PE 138, A173; 28T 96-104. In calculating lost profits, Kappel reviewed NEE's general ledger, checkbook, and tax returns. PE 110, A160; PE 137, A172; 28T 105-06; 29T 14-15; 31T 21-30. To verify NEE's ability to estimate costs and build in accordance with its plan, he reviewed the financial records of five other recent developments in which one or more of NEE's principals was involved, PE 139, A174, and PE 140, A175, including the 72-unit Quail Run condominium in North Haven.[37] 10T 15-16, 23, 87; 11T 8-10, 78; 28T 110, 123;

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[34] The Town incorrectly asserts (at 33 n.14) that the trial court barred the Town from putting on an expert as to damages. The Town may be referring to late-disclosed environmental experts, but the Town did not at any time proffer a damages expert to oppose Kappel.

[35] The transcript pages cited in this subsection align with the Appendix as follows: 10T is A287-A404. 11T is A405-A444. 28T is A572-A664. 29T is A665-A767. 30T is A768-A814. 31T is A815-A856.

[36] Kappel had extensive experience in construction accounting. PE 90, A156 (C.V.). Thus, the assertion in the Town's Brief (at 29) that Kappel was inexperienced is incorrect.

[37] The Town dismisses Quail Run as only one example and as a development "smaller" than NEE's plan for the Tabor parcel. It makes Quail Run sound like a child's erector set. In fact, over the course of three years, NEE's principals planned, obtained permits for, constructed, marketed, and sold, at a 30 percent overall net profit,

29T 19-30. He verified NEE's projected construction costs for roads and infrastructure and the square foot cost of unit construction. 10T 49-54; 28T 109-15. He verified the ability of NEE's principals to borrow $36 million in total over the course of development at four levels (land acquisition, unit construction, partner contributions, line of credit) and the availability of construction and permanent financing in the amounts needed. 12T 28-29; 28T 117-22; 29T 7-13, 40; 30T 74. He verified from several sources, including real estate agents, Branford's land records, and Warren Group statistics, that the intended price of $279,900 for a new two bedroom, 1,200+ square foot condominium in Branford was reasonable. PE 134, A171; PE 140, A175; TE M, A181; 10T 30-32, 106-07, 114; 12T 30-34; 29T 49-65; 31T 15-17, 33-34. He similarly verified absorption rates and demand for two bedroom condominiums (both market-rate and price-restricted) in the projected price ranges. 10T 3, 9, 56, 112-13; 12T 18, 27-28; 28T 100-02; 29T 35; 31T; 18 T9. Finally, he verified the proposed construction schedule and the availability to NEE of contractors and labor. 29T 66; 30T 54, 63.[38] Thus, Mr. Kappel verified every single component of his lost profits calculation.

Moreover, Kappel's lost profits calculation was demonstrably conservative in several ways. He used a unit construction cost of $86 per square foot, even though the actual cost at Quail Run had been $78 per square foot. 10T 49-54; 28T 109-15. He included general and administrative expenses at 5.1 percent of total costs, even though he concluded that this was higher than necessary. 28T 34-35, 53, 109. Kappel assumed modest price escalation through 2007 but then assumed no increases beyond $299,000 for the

_____ (continued)

72 residential condominium units of the same size, construction type, density, amenities, and price range as they proposed in Branford. 11T 8-10; 29T 29-31. PE 139, A174. Each of the five phases planned in Branford was equivalent to Quail Run. The facts in the record about Quail Run are compelling proof that NEE had the experience to replicate its North Haven success in Branford.

[38] The Town states that NEE had not built previously using § 8-30g. But affordable housing administration is simply income verification and maximum price calculation, in which Forte and Pizzolorusso were well versed.

remaining buildout period. 29T 66. He expressly took into account possible future market downturns and possible delays in final permitting. 31T 36-38. He estimated NEE's interest rate as borrowing at prime plus one, even though prime rate was available (and could have been locked in). 28T 120. He included a general contingency category even though risk had been accounted for elsewhere. 28T 75.

Using this verified, conservative information, Kappel prepared a cash flow model that separately calculated sources of cash (partner capital, borrowing, unit sales); uses of cash (construction costs, interest on borrowing); and operating costs, and molded these elements into a consolidated cash flow projection over the projected buildout. PE 138, A173. Notably, he did not provide for NEE's principals to draw cash from sales as they occurred. 10T 62; 29T 70-71, 83. He calculated the total profit, $20 million as of the end of sales, and discounted that profit to the date of trial. Based on those calculations (as limited by the trial court, *see* § VI, *infra*), he opined that an award of $11.2 million in lost profits and $1.2 million in development expenses was the minimum needed to make NEE whole as of the trial date. PE 138, A173; 30T 20-21, 46-47.

C. Legal Standards For Lost Profits.

This federal civil rights case is governed by federal law as stated in *Carey v. Piphus*, 435 U.S. 247 (1978), which holds that a successful plaintiff has a right under federal law to be "made whole." *Carey* directs that a successful civil rights litigant should be awarded, and a civil rights violator be assessed, the full measure of compensatory damages, unencumbered or limited by state tort law. *See* S. Nahmod, Civil Rights and Civil Liberties Litigation (4th Ed. 2007) § 4:7 at 4-23. If state law would result in less compensation than *Carey's* "make whole" directive, federal uniformity and the vindication of the federal right should prevail. *See Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969), cited in Nahmod, *supra*, § 4:7 at 4-24 n.3. If, for example, a state passed a tort-reform statute placing a dollar limit on recovery of compensatory damages for a violation of federal civil rights law, under the Supremacy Clause of the U.S. Constitution, that limit would be

unenforceable. *Id.* Moreover, § 1983 is a remedial statute; when a defendant's wrongdoing makes calculation of damages difficult, the standard is "just and reasonable." *Raishevich v. Foster*, 247 F.3d 337 (2d Cir. 2001). To award less than what would make the plaintiff whole would grant a windfall a party that violated the federal Bill of Rights.

This federal supremacy extends to awards of prejudgment interest. A trial court's first inquiry is whether an award of such interest would make the plaintiff whole under *Carey*, and if not, a different calculation must be used. *See Gierlinger v. Gleason*, 160 F.3d 858, 873 (2d Cir. 1998); *Zuchel v. City and County of Denver*, 997 F.2d 730, 746 (10th Cir. 1993); Nahmod*, supra,* § 4:9 at 4-33 to 4-34.

In *Beverly Hills Concepts v. Schatz & Schatz*, 247 Conn. 48 (1998), this Court held that relevant factors in whether a lost profits calculation meets the reasonable certainty test include the plaintiffs' experience in the same business or type of business, *id.* at 72-73 (not necessarily the same corporate entity); experience in the same type of business subsequent to the wrongdoing in the case at bar, *id.* at 73; the experience of independent third parties in similar businesses, *id.*; the plaintiffs' years of experience in the subject business, *id.* at 74; and pre-litigation profit projections. *Id. Beverly Hills* also discusses the time for which lost profits are projected, noting cases that have allowed lost profits over periods based on contracts and leases over a period of ten to fifteen years, and pointing out that the shorter the time period, the more acceptable the calculation. *Id.* at 77.

Connecticut cases on lost profits, including *Beverly Hills Concepts* and *Cheryl Terry Enterprises*, prescribe a flexible approach to lost profits, so long as the principle of reasonable certainty is observed. "A damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record evidence." *Beverly Hills*, 247 Conn. at 70. A calculation of lost profits is necessarily hypothetical, that is, a prediction of events that never occurred. *See id.* at 64 ("The wrongdoer has created the problem; [the] wrongdoer cannot now complain that the damages cannot be measured exactly"). The

antidote to this problem is to ensure that lost profits are proved to a reasonable certainty. *Id.* at 66, 69.

In this case, NEE presented voluminous, documented evidence on each of the categories listed in *Beverly Hills*, and more. The Town did not proffer an opposing expert. The Town concedes that the jury was properly instructed about lost profits, and the trial court expressly gave the Town's attorney wide latitude on cross examination. The Town has no basis to claim that NEE's proof of lost profits was speculative, or that the jury's award should not stand.

D. The Date Of Trial Was The Correct Measure.

Regarding the Town's claim that Kappel's lost profits calculation used the wrong date, it is important to understand what Kappel did, and why. It is, of course, standard to calculate loss of future income by discounting[39] the future revenue stream back to a single point in time. In this case, Kappel, using his consolidated cash flow model, calculated the total net profit, $20 million, that NEE would have earned at the conclusion of the build out. PE 138. This calculation was based on a 22-percent internal rate of return which was more conservative than the 30 percent rate that NEE had just earned at Quail Run.[40] Kappel discounted the $20 million to the date of trial, September 1, 2007.[41]

The Town argues – without any expert testimony – that (1) Kappel should have discounted the $20 million, not to the date of trial, and not even to the January 2005 start of construction, but to *the date of the taking*, January 5, 2004; and (2) the trial court should have limited lost profits to this amount, or (3) at most, added pre-judgment interest from January 2004 to the September 2007 trial date.

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[39] The discount rate is a question of fact, *see* R. Dunn, Recovery of Damage for Lost Profits (5th ed. 1988) § 6.25; *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 341 (1988). The Town has not challenged the rate used by Kappel.

[40] Stanziale explained why building the June 2003 plan would be easier, and less expensive on a per-unit basis, than Quail Run. 11T 26-28.

[41] *But see* NEE's Practice Book § 63-4(a)(1)(B) claim, *infra*.

The Town's position ignores the facts, logic, and case law. First, the Town did not destroy an existing business on January 5, 2004. It used eminent domain to block NEE from *starting* construction and selling condominiums in 2005. Thus, the January 2004 taking date is irrelevant because the business had not commenced at that time. The Town argues, in essence, that the lost profits calculation should be discounted for a full year *before* NEE would have started construction. The Town's only basis for this argument is cases such as *Westport Taxi Service, Inc. v. Westport Transit Dist.,* 235 Conn. 1 (1995), which involved termination of an existing business, where profits were discounted to the date of the tort, *i.e.* the destruction of the business. Again, the Town ignores the fact that the constitutional tort in this case prevented NEE's commencement of its business.

Second, real estate development usually involves a period of uncompensated planning and development, negative cash flow during the start of construction, and profits earned during the latter phases of the development. Stanziale testified that this would have occurred in this case, 10T 16; and Kappel's cash flow model, PE 133, A173, verified this timing. Where profits will result from "performance over an extended time period," all or most of which would have occurred after the trial date, they are most accurately calculated as of the time of trial, that is, to where the plaintiffs would have been had the defendant not interfered with the establishment and conduct of the business. *See Energy Capital Corp. v. U.S.*, 302 F.3d 1314, 1330 (Fed. Cir. 2002); *Northern Helex Co. v. U.S.*, 634 F.2d 557, 564 (Ct. Cl. 1980); *Franconia Assocs. v. U.S.*, 61 Fed. Cl. 718, 762-64 (2004), cited in R. Dunn, Recovery of Damages for Lost Profits, (2005 and 2007 Supp.) § 6.24 at 542; *Purina Mills LLC v. Less*, 295 F. Supp. 2d 1017, 1047-48 (N.D. Iowa 2003). In *Energy Capital*, the plaintiff corporation had a contract with the federal Department of Housing and Urban Development ("HUD") for improving energy use and efficiency at HUD-owned properties. The contract provided for a complex series of payments to the plaintiff over multiple years. Energy Capital proved a breach. The court addressed whether the plaintiff's lost profits should be measured at the date of the breach or the date of judgment:

> In many cases, the appropriate date for calculation of damages is the date of breach. *See Estate of Berg v. United States*, 687 F.2d 377, 380, 231 Ct. Cl. 466, 469 (1982). That rule does not apply, however, to anticipated profits or to other expectancy damages that, absent the breach, would have accrued on an ongoing basis over the course of the contract. In those circumstances, damages are measured throughout the course of the contract. To prevent unjust enrichment of the plaintiff, the damages that would have arisen after the date of judgment ("future lost profits") must be discounted to the date of judgment [citing *Northern Helix*, 634 F.2d at 564].

Because most of Energy Capital's lost profit would have been earned after the date of judgment, discounting to that date was the correct measure. Here, NEE's profits would have been earned principally after the date of judgment (as cited above), and thus Kappel correctly discounted to that date.[42]

Third, by discounting to the date of trial, Kappel presented a calculation that was more precise than discounting to January 2004 or January 2005 and then adding prejudgment interest. Kappel's calculation better tracked the facts in evidence than the fiction of discounting to the date of taking and an award of prejudgment interest from that date. The calculation advocated by the Town discounts the damages to an irrelevant date and then brings this distorted amount forward to the trial date at the rate assessed for the wrongful withholding of money, rather than recognizing the documented, expected performance of NEE's business, as proved to a reasonable certainty at trial.

The trial court considered Kappel's calculation, including the discounting and rate, under its "gatekeeper" function as to methodology, and expressly granted the Town's attorneys broad latitude on cross-examination to challenge the methodology used and the underlying facts. The Town's attorneys conducted their cross-examination, but did not challenge – much less undermine – Kappel's methodology, as the jury's verdict demonstrates. Thus, the trial court correctly first satisfied itself that Kappel's methodology

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[42] The Town's reference (at 33-34) to just compensation being measured on the date of taking is irrelevant to plaintiffs' consequential damages claim.

was well-established and accepted in the field of forensic accounting; *see State v. Porter*, 241 Conn. 57 (1997); *Daubert v. Merrell Dow*, 509 U.S. 579 (1993); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and then gave the Town's attorneys wide latitude on cross-examination; and then issued a correct instruction on lost profits.

In the final analysis, the proper check and balance on plaintiffs' calculation of lost profits is whether its factual basis was proven to a reasonable certainty. If NEE established reasonable certainty in its evidentiary presentation, which it did, then the calculation method that most precisely made it whole as required by *Carey* was the one to be used. This is precisely what the plaintiffs presented to the jury.

VI. THE TRIAL COURT ERRED IN PRECLUDING NEE'S EXPERT FROM UPDATING HIS DAMAGE CALCULATION.

NEE filed a cross appeal in this case, asking, in its preliminary statement of the issue, whether the trial court erred in granting the Town's motion to preclude Conrad Kappel from testifying about an update to his January 2007 report that was prepared and produced prior to the date of his deposition. Upon further review, NEE has concluded that this issue should have been raised under Practice Book § 63-4(a)(1)(B) rather than upon cross appeal, because NEE was not aggrieved by the judgment in this case. Accordingly, it asks this Court to consider this claim under Practice Book § 63-4(a)(1)(B) if the Town is awarded a new trial. *See Erickson v. Erickson*, 246 Conn. 359, 370 n.9 (1998); *Cadle Co. v. D'Addario*, 268 Conn. 441 (2004). This evidentiary ruling is reviewed for abuse of discretion. *Viera v. Cohen,* 283 Conn. 412, 444 (2007).

It is undisputed that NEE's original disclosure of Kappel, in November 2006, was timely. In his report of January 23, 2007, Kappel expressly reserved supplementing his analysis. 24T 4-15; 28T 33-75, A573-A615. The Town did not notice Kappel's deposition until the eve of trial, August 2, 2007, but when it did, Kappel updated his report, as he expected to, in light of additional information obtained from Stanziale about 2007 sales at Quail Run and another development. He concluded that his January 2007 assumptions

regarding contingencies and overhead had been unduly conservative. 28T 33-35. He prepared an addendum dated July 30, 2007. NEE's attorney faxed the addendum to the Town's attorney on August 1, who conceded that he had reviewed it before Kappel's deposition. 28T 38-42, A578 -A582.

The Town moved to preclude Kappel from testifying (R233) about the addendum, arguing only that it was untimely. 28T 45, A585. The court precluded Kappel from testifying about the addendum. 28T 46, A586. The trial court erred in treating the update as untimely and in failing to apply the standard set out in § 13-4(4) to analyze whether exclusion was warranted.

Under Practice Book §§ 13-4(4) (A869) and 13-15 (A870) a party that has timely disclosed an expert and provided his report has a continuing duty to supplement that report. In this case Kappel concluded, based on data generated after his January 2007 report (2007 unit sales), that four of his assumptions were more conservative than warranted. The Town's counsel had an opportunity to depose Kappel about the addendum. That is all that is required by Practice Book § 13-4(4) and § 13-15.

The trial court erred in treating the addendum as untimely. Under Practice Book § 13-4(4), a trial court may preclude expert testimony if a party fails to disclose an expert's *name* in accordance with the scheduling requirements of the rule. However, in this case, it is undisputed that NEE's original disclosures was timely. *See Roberto v. Honeywell, Inc.*, 43 Conn. App. 161, 164-65 n.4, *cert. denied*, 239 Conn. 941 (1996).

Even if the July 30 disclosure had been untimely (which it was not), the trial court erred in failing to apply the test for exclusion of evidence spelled out in § 13-4(4); (1) if the party opposing the evidence was unduly prejudiced by the late disclosure; (2) if the disclosure will cause undue interference with the orderly progress of the trial; or (3) if bad faith was involved. None of those circumstances was present here. The Town was not prejudiced. Its attorney did not claim unfair surprise. 28T 40-41, A580-A581. He did not claim that the late disclosure would disrupt the orderly progress of the trial or that NEE had

acted in bad faith. NEE's attorney supplied the addendum when the Town attorney noticed Kappel's deposition. Moreover, the addendum updated four discrete items, on a reasonable basis. The court abused its discretion in excluding the addendum.

That the Town waited until the last minute to depose Kappel cannot be held against NEE. NEE was harmed when the trial court refused to allow Kappel to update his calculation. On review of NEE's actual cost experience in 2007, Kappel recognized that his January 2007 calculation was less than what his update showed to be reasonably certain. The exclusion of his supplemental opinion deprived NEE of its right to be made whole under 42 U.S.C. § 1983. *See Carey*, 435 U.S. 247 (1978).

If the Town is granted a new trial, this ruling should be reviewed under Practice Book § 63-4(a)(1)(B) and reversed.

CONCLUSION

For these reasons, the plaintiffs respectfully submit that the judgment should be affirmed.

Dated: August 22, 2008

RESPECTFULLY SUBMITTED,

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CERTIFICATION AS TO PRACTICE BOOK § 67-2

This is to certify that the foregoing Brief complies with Practice Book § 67-2.

_____
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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Joint Brief was mailed, postage prepaid, this 22nd day of August, 2008, to:

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SUPREME COURT
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STATE OF CONNECTICUT

S.C. NO. 18132

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PLAINTIFFS / APPELLEES

V.

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