STATE OF CONNECTICUT

SUPREME COURT

S.C. 18132

NEW ENGLAND ESTATES, LLC

VS.

TOWN OF BRANFORD, ET AL.

BRIEF OF DEFENDANT-APPELLANT, TOWN OF BRANFORD

TO BE ARGUED BY:

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NATURE OF PROCEEDINGS AND FACTS OF CASE

This appeal asks several questions, a principal one being whether plaintiffs claiming that a single parcel of land was unconstitutionally taken by a town can split their grievance into two separate lawsuits, resulting in two separate multi-million-dollar damage awards for the same taking of the same parcel of land.

On May 21, 2003, the Town of Branford Board of Selectmen voted to request that the Town acquire a single 77-acre parcel adjacent to the Town landfill. Previously, New England Estates, LLC (NEE), which had an unrecorded and unexercised option at the time of the taking to buy the property for $ 4.85 million, had filed an application with the Branford Planning & Zoning Commission for 268 market-rate units, but it had been denied in November 2002. On May 30, 2003 NEE filed an affordable housing application with the Commission pursuant to C.G.S. § 8-30g. On June 26, 2003, NEE withdrew that application and submitted a new § 8-30g application.

On July 9, 2003, the Representative Town Meeting, Branford's legislative body, voted to take that 77-acre parcel for public purposes including the "investigation, elimination of environmental contamination, and possible development of playing fields." (Exh. SS; App. A27). NEE sued under 42 U.S.C. § 1983, seeking damages and injunctive relief. NEE, soon joined by the actual owners, Frank Perrotti, Jr. and Thomas Santa Barbara, Jr. as defendants-cross claimants (together the "plaintiffs"), alleged that the federal takings clause had been violated because the parcel was not being taken for "public use," as the takings clause requires (R. ,).[1] They did not identify (and never have identified) any private party for whose use the parcel was allegedly being taken. Rather, their claim was and is that the parcel was taken to block NEE's affordable housing plans.

A hearing for temporary injunction was held later in 2003. On December 18 the court (DeMayo, J.) denied relief, finding no evidence of bad faith by the Town and finding

[1] Other state and federal claims initially made by NEE against the Town and various Town officials did not survive to trial (R. ,).

that the claim was unlikely to prevail on the merits (R.). On that date the Town filed its statement of compensation of $1,167,800 with the clerk of the Superior Court in New Haven (R.), and on January 5, 2004, the clerk issued a certificate of taking, which stated that the property was taken "for the purpose of investigating, remediating, monitoring and using for a public purpose commensurate with its condition") (App. A29).

In a separate proceeding (the Compensation Case), NEE and the owners challenged the statement of compensation, though this time focusing on the inadequacy of the compensation (R. ,). The Compensation Case reached judgment first, on August 3, 2007, when following trial the court (Cremins, J.) ordered $4,600,000 in just compensation to them (R.). Four appeals from that judgment, S.C. 18089 to 18092, are pending.

This separate § 1983 case, likewise challenging the taking under the takings clause, then went to trial before a jury. Having abandoned their request for injunctive relief after failing at the temporary injunction stage, the plaintiffs made no effort to recover the property that they professed had been taken improperly (R. ,). Instead, they focused solely on their demand for more cash. Though the issue of proper recompense for the taking had just been decided, the court left it to the jury to consider again.

The jury found that the Town's "taking of the 77 acre Tabor Drive Property violated the federal takings clause because each of the Town's three reasons offered for the taking was either 'pretextual and invalid,' or 'unreasonable,' or an 'abuse' of power, as the court has explained these standards" (R.). It awarded NEE an additional $12,435,914.78 and the owners an additional $340,000 as recompense for the taking (R.). The Town's motions for judgment n.o.v., for new trial and for a remittitur were denied (R.). The Town has appealed and NEE has cross appealed (R.).

One thing was taken: a parcel of undeveloped land. One legal provision was invoked: the federal takings clause. Yet the plaintiffs and their lawyers, by artfully splitting their claims into two separate cases, managed to milk two multi-million dollar judgments from a single taking of a single parcel resulting in a single injury.

ARGUMENT

I. The plaintiffs' double recovery was unlawful.

Standard of Review: Pure issue of law; review is plenary.

Introduction – The rule against double recovery protects the defendants.

Our law has long recognized the "simple and time-honored maxim that a 'plaintiff may be compensated only once for his just damages for the same injury.'" *Gionfriddo v. Gartenhaus Café*, 211 Conn. 67, 71 (1989) (quoting *Virgo v. Lyons*, 209 Conn. 497, 509 (1988)). This principle is at the very root of fairness, and its branches spread broadly across legal doctrine, encompassing the doctrines of res judicata, *Fink v. Golenbock*, 238 Conn. 183, 191-92 (1996), collateral estoppel, *Virgo*, 209 Conn. at 502, one satisfaction, *Gionfriddo*, 211 Conn. at 71-72, election of remedies, *Suarez v. Dickmont Plastics Corp.*, 229 Conn. 99, 116 (1994) (doctrine "designed to prevent double redress for the same injury"), and joinder, *Jacoby v. Brinckerhoff*, 250 Conn. 86, 92 (1999) (holding that joinder of certain claims and parties is mandatory so as to avoid the "hazard of double recovery").

This Court has repeatedly admonished that "a litigant may recover just damages only once." *Gionfriddo*, 211 Conn. at 72. "The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such an economic waste." *Carlson v. Waterbury Hospital*, 280 Conn. 125, 150 n.30 (quoting *Rowe v. Goulet*, 89 Conn. App. 836, 849, 875 A.2d 564 (2005)).

The "one satisfaction" rule provides one of many examples of doctrines meant to prevent double recovery. Commonly applied in cases involving a plaintiff seeking recovery against multiple defendants in consecutive suits, the doctrine springs from the fundamental maxim that the issue of damages, once litigated, may not be relitigated. "The adjudication of the amount of the loss also has the effect of establishing the limit of the injured party's entitlement to redress, whoever the obligor may be. This is because the determination of the amount of the loss resulting from actual litigation of the issue of damages results in the

injured person's being precluded from relitigating the damages question." *Gionfriddo*, 211 Conn. at 72 n.5 (citation omitted). Even where the formal requirements of doctrines like collateral estoppel or res judicata are not met, the one satisfaction rule nonetheless bars a plaintiff from seeking additional damages arising out of the same underlying injury. *Id.* at 75-76 (precluding plaintiff from suing liquor establishment for wrongful death where plaintiff had already obtained full satisfaction of judgment from prior suit against drunk driver and vehicle lessor); *see also Cheryl Terry Enter., Ltd. v. Hartford*, 270 Conn. 619, 649 (2004); *Haynes v. Yale-New Haven Hospital*, 243 Conn. 17, 29 n.14 (1997).

The rule against double recovery unquestionably applies to constitutional claims that seek damages for injuries already compensated by statutory or common law claims. In *Cheryl Terry*, this Court held that a plaintiff bringing a constitutional violation against a municipality could not recover twice – once for a constitutional claim, and again for a statutory claim arising out of the same injury. *See also Virgo v. Lyons*, 209 Conn. 497 (1988) (plaintiff could not recover twice, once for a constitutional claim, and again for a common law claim arising out of the same injury).

This "simple and time-honored maxim" that "a plaintiff may be compensated only once for his just damages for the same injury" forms a principal backdrop of this appeal. The plaintiffs' misguided arguments that they are somehow entitled to wring two judgments out of one taking must be measured against that backdrop.

A. Res judicata barred a second award of remuneration.

This case involved a single parcel of land at 48-86 Tabor Drive in Branford. So did the Compensation Case. This case involved a taking that occurred on January 5, 2004. So did the Compensation Case. This case involved a claim about that taking of that parcel, brought by NEE, Perrotti and Santa Barbara against the Town. So did the Compensation Case that went to judgment before it. The Town's claim of res judicata was rejected by the trial court (R. ; App. A49, A66).

While the plaintiffs parsed the words "just compensation" from the takings clause of the federal constitution in the first case, they chose to rely on the words "public use" from the takings clause of the federal constitution in this case. But any new theories raised in this case could and should have been raised in the first case (if they have any validity at all). Because the plaintiffs could have raised those theories in the first case – a case involving the same transaction between the same parties – and because the court entered final judgment in that case before this one went to trial, res judicata precluded the plaintiffs from pursuing their other theories in this second case.

This is a straightforward application of the fundamental doctrine of res judicata:

> [A]n existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. . . . If the same cause of action is again sued on, the judgment is a bar with respect to any claims relating to the cause of action which were actually made *or which might have been made.*

Powell v. Infinity Ins. Co., 282 Conn. 594, 600 (2007) (quoting *Wade's Dairy, Inc. v. Fairfield,* 181 Conn. 556, 559-60 (1980)) (emphasis added; citations omitted).[2]

All of the prerequisites are met. The Superior Court issued a "final judgment rendered upon the merits" on August 3, 2007. No party has claimed that the judgment was procured through "fraud or collusion." The Superior Court was indisputably "a court of competent jurisdiction." Accordingly, "the judgment is conclusive," "as to the parties," "in all other actions," including this one.

Because all of the prerequisites are met, the only question is whether the claims brought in this case are "claims relating to the cause of action . . . which might have been made" in the first action. *Powell*, 282 Conn. at 600. Like most states, Connecticut defines a "cause of action" as the underlying "transaction" which occurred among the parties. *See*

[2] Section 1983 claims are subject to the same res judicata rules as any other claims. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 338 (2005); *Migra v. Warren City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 81-85 (1984).

Fink v. Golenbock, 238 Conn. 183, 191 (1996). A transaction is "determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation" and "whether they form a convenient trial unit . . . ." *Id.*

> A cause of action is "that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief. Even though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action
>
> . . . .
>
> That the remedies sought [under alternative legal theories] are somewhat different does not alter the fact that the cause of action is the same.

Bridgeport Hydraulic Co. v. Pearson, 139 Conn. 186, 197, 198 (1952) (citations omitted).

A single event, the taking of plaintiffs' property, gave rise to a single cause of action, and the plaintiffs litigated the same cause of action against the same party in both cases. The facts could not be any more closely "related in time, space, origin, or motivation," since they involve the same taking of the same property on the same day in the same place by the same party with the same motivation. *Fink*, 238 Conn. at 191-92. They are thus part of the same "cause of action," and "any claims relating to the cause of action . . . which might have been made" are barred by res judicata. *Powell*, 282 Conn. at 600.

That the prior judgment is on appeal is of no moment. *LaBow v. Rubin*, 95 Conn. App. 454, 467, cert. denied, 280 Conn. 933 (2006). "In Connecticut, this court has held the judgment of a trial court to be final, despite a pending appeal, when the issue was . . . the applicability of the rules of res judicata." *Enfield Federal Savings & Loan Assn. v. Bissell,* 184 Conn. 569, 573 (1981) (citations omitted).

The plaintiffs could have litigated their public use takings clause claims – to the extent they exist – with their just compensation takings clause claims in the first action. The Superior Court, as a court of general jurisdiction, could have adjudicated both claims (i.e., theories) in the same lawsuit and provided the plaintiffs with all relief to which they were due. The first judgment thus precluded the plaintiffs' second action.[3]

[3] Even if the Superior Court were not a court of general jurisdiction, the legislature has provided specific statutory authority by which the plaintiffs could have argued their public

B. Collateral estoppel barred a second determination of remuneration.

Plaintiffs litigated the issue of their remuneration for the taking in the Compensation Case, and under the doctrine of collateral estoppel should have been barred from relitigating the issue in this § 1983 case.

> [C]ollateral estoppel, or issue preclusion . . . prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties or those in privity with them upon a different claim. An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered.

Powell, 282 Conn. at 600-601 (citations and internal punctuation omitted). The Town's claim of collateral estoppel was rejected by the trial court (R. ; App. A49, A66).

The issue of plaintiffs' remuneration was actually litigated in the Compensation Case. Judgment there could not have been rendered without a determination of the appropriate amount of remuneration. This Court decided a substantially similar case in *Virgo v. Lyons*, 209 Conn. 497 (1988). In *Virgo*, police officers had falsely arrested the plaintiff and used excessive force against him. Virgo brought a Section 1983 action, prevailing on his excessive force claim before a jury. A week later, Virgo filed another suit

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use theories in the first trial. A person whose property has been taken may challenge a condemning entity's statement of compensation pursuant to C.G.S. § 8-132. Section 8-132, applicable to municipal takings via §§ 48-6 and 48-12, allows a "person claiming to be aggrieved by the statement of compensation . . . [to] apply to the superior court . . . for a review of such statement of compensation." Conn. Gen. Stat. § 8-132(a). The Town declared the public uses to which it intended to put the parcel in its statement of compensation: "On July 9, 2003, the governing body of the condemnor duly voted to acquire the hereinafter described property for the purpose of investigating, remediating, monitoring and using for a public purpose commensurate with its condition." Statement of Compensation, ¶ 3. This Court has held that § 8-132 accords plaintiffs review of "the *entire* statement of compensation." *Transp. Plaza Assoc. v. Powers*, 203 Conn. 364, 370, 525 A.2d 68, 72 (1987) (emphasis in original) (amount of land taken revised by the referees). The plaintiffs thus could have challenged the public use declaration in their § 8-132 application. In *Water Commissioners v. Manchester*, 87 Conn. 193 (1913), in which the condemnor was in fact a municipal agency, the agency petitioned for the appointment of appraisers to determine compensation. The property owner resisted the petition by claiming the taking was improper. While the property owner lost on the merits, it was unquestioned that this was a proper way to raise the legality of the taking.

seeking recovery for state claims arising from the same injuries. *See id.* at 498-500. On appeal, this Court estopped the plaintiff from seeking additional compensation. While the legal claims in the federal and state cases were different, "both causes of action arose out of the same alleged wrongs, allegedly committed by the same defendants, and involved the same injuries." *Id.* at 502. "[T]he damages that the plaintiff claims in the present state court action would again compensate him for the same actual injuries arising from the same incident." *Id.* at 507. The same is true here: both suits arose from the same alleged wrong and both sought compensation for the same injury. Plaintiffs should have been collaterally estopped from relitigating their remuneration in this case.

Plaintiffs may argue that the remuneration available for their just compensation claim is somehow distinct from the remuneration available for their wrongful taking claim. Specifically, they may argue that under *Comm'r of Transp. v. Rocky Mountain, LLC*, 277 Conn. 696, 711-12 (2006), they were not entitled to lost profits as a remedy for their just compensation claim, and so should not be estopped from seeking lost profits via their wrongful taking claim. Even if lost profits were recoverable for a wrongful taking (but see Issues I.C. and II, *infra*), any such profits would compensate for the same harm that was compensated in the Compensation Case, i.e., the taking of their property. In other words, although plaintiffs "may be dissatisfied with the damages [they] received in the [just compensation] action, the fact remains that [they have] already litigated the issue of damages and [they] cannot relitigate that issue." *Virgo*, 209 Conn. at 509. That plaintiffs seek to relitigate the issue of remuneration based on an alternative measure of damages is irrelevant for purposes of collateral estoppel.

This Court rejected plaintiffs' argument in *Albahary v. Bristol*, 276 Conn. 426 (2005). There the plaintiffs owned property with groundwater polluted from a neighboring landfill operated by the city of Bristol. After discovering the contamination, the city condemned an easement over the plaintiffs' property so that the city could enter the property, collect samples and environmental data related to the contamination, and remediate the

contamination. *Id.* at 428-31. The plaintiffs appealed the city's valuation of the easement to the Superior Court, but before proceedings on the state court condemnation action began, plaintiffs filed an action seeking recovery for the groundwater contamination. The contamination action reached judgment before the condemnation case. *Id.* at 432. In the contamination action, plaintiffs alleged and prevailed on multiple claims including negligence, *id.* at n.4, but the court denied money damages as speculative, *id.* at 432, instead ordering the city to provide the plaintiffs with an alternate water source and to indemnify the plaintiffs against any future claims of environmental liability. *Id.* at 432-33. Dissatisfied that they could not receive money damages for the contamination, plaintiffs sought damages in the second case, the just compensation case, claiming that because the contamination was tantamount to inverse condemnation, the valuation of the easement should include contamination damages. *See id.* at 436-37.

This Court precluded plaintiffs from seeking such damages in the second suit because the first court had already "ordered a remedy to compensate the plaintiffs fully for the property damage." *Id.* at 445.

> To compensate the plaintiffs in the present [second] action for the diminution in their property value in order to place them in the same position that they would have been in if the contamination never had occurred would result in a double recovery for plaintiffs. They would receive *both* a permanent source of potable drinking water and permanent indemnification of any future environmental claims against them *and* compensation on the basis of the value of the land in its uncontaminated condition.

Id. at 446 (emphasis in original). The Court precluded any relitigation of the issue of recompense even though the recovery in the first court was predicated on a different claim, their *negligence* claim rather than their claim for *just compensation*. *Id.* at 448.

Just like the *Albahary* plaintiffs, plaintiffs here seek compensation under two different legal theories, in two different lawsuits, for a single harm. Plaintiffs argue that they are entitled to more remuneration for their wrongful takings claim than for their just compensation claim, but the legal theory used to obtain compensation is irrelevant for collateral estoppel purposes. What matters is whether plaintiffs' real-world injury has been

compensated. The principles underlying collateral estoppel doctrine, promoting judicial economy, preventing inconsistent judgments, and providing repose to defendants, *see Powell*, 282 Conn. at 601-02, stop parties from re-litigating the issue of remuneration on a new theory in an effort to get more money for the same injury.

C. The takings clause itself barred double recovery.

Even if the plaintiffs' double recovery were not barred by res judicata, collateral estoppel, or any other rule against double recovery, the federal takings clause itself prohibits it. The only monetary remedy for a violation of the takings clause is just compensation for what has been taken. Where a plaintiff believes that his property will be taken for a non-public use, it may seek injunctive relief blocking the taking or returning the property. As a plurality noted in *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 713 (1999), "when the government initiates formal condemnation procedures, a landowner may question whether the proposed taking is for public use. The landowner who raises this issue, however, seeks not to establish the government's liability for damages, but to prevent the government from taking his property at all." When a plaintiff believes that the taken property will be utilized for some non-public use, "the relief desired by a landowner making this contention is analogous not to damages but to an injunction . . . ." *Id.*; *accord id.* at 741 (Souter, J., dissenting) (agreeing with plurality on this point); *see also generally infra* at 15, 16. As the Town claimed at trial, injunctions protect against takings for non-public uses; damages protect against takings without just compensation (App. A161-63). The structure of the takings clause itself protects against double recovery.

The trial court disregarded this structure, allowing the plaintiffs to create a novel cause of action for damages under the takings clause. By allowing the jury to consider damages for a claim of non-public use, the trial court violated not only *Monterey*, but also the teaching of *Wilkie v. Robbins*, 127 S.Ct. 2588 (2007). *Wilkie* involved takings claims brought in the analogous context of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), which permits plaintiffs to bring claims directly under the federal constitution.

Considering and rejecting a novel federal takings claim for damages, the Court cautioned against creating new kinds of causes of action for damages from improper governmental condemnation actions because the "cure would be worse than the disease." *Id.* at 2604. As in *Wilkie*, there is no reason for this Court to recognize a novel claim to damages.

D. The plaintiffs elected their remedy by pursuing just compensation and, in any event, the Owners waived their right to challenge the validity of the taking by voluntarily accepting funds deposited by the Town.

By withdrawing their injunctive claims and pursuing just compensation, the Town claimed the plaintiffs elected their remedy and waived their right to challenge the lawfulness of the taking (App. A48, A49, A158-163). *Suarez*, 229 Conn. at 116. The trial court itself ruled that "lost profits can be recovered in such a condemnation proceeding [under C.G.S. § 8-132]" (App. A65). Also, generally "the right to accept the fruits of a judgment or order, and the right to appeal therefrom, are not concurrent, but are wholly inconsistent, and an election of either is a waiver and renunciation of the other." *Connecticut Light & Power Co. v. Public Utilities Control Authority*, 176 Conn. 191, 201 (1978) (quoting Annot., 169 A.L.R. 985, 988 (1947). "This general preclusion has been variously termed as waiver, estoppel, acceptance of benefits creating mootness, and acquiescence in judgment." *Downtown Brewing Co., Inc. v. Mayor of Ocean City*, 370 Md. 145, 149 (2002).

In condemnation cases, an owner's voluntary acceptance of funds paid into the court to satisfy the compensation award precludes a condemnee from challenging the condemnation on any ground other than the sufficiency of the award. *Id.* at 149-50. The rule applies equally to the acceptance of funds before or after entry of judgment. *See, e.g., Durham v. Bates*, 273 N.C. 336 (1968) (waiver applicable where plaintiffs withdrew funds before entry of final compensation award). The rule of waiver through acceptance of compensation funds has been uniformly followed by every jurisdiction that has considered it.[4] It is well settled here in Connecticut:

[4] *See*, e.g., *Riverside v. Progressive Investment Club of Kansas City, Inc.*, 45 S.W.3d 905, 909 (Mo. App. 2001); *Fulton County v. Threatt*, 435 S.E.2d 672, 674 (Ga. App. 1993);

> [B]y receiving the money, he has waived the objection, if it existed. Is he to be permitted to hold the property, as if nothing had been done, and likewise, to retain the money, the equivalent of the property, as due to him for the injury suffered? He must have known, and must be held to have known, the supposed difficulty, when he took the money out of the treasury, so that his act can be construed to be nothing less than a ratification of what was done by the city, and his full consent to have *Water* street opened for public use.

Hawley v. Harrall, 19 Conn. 142, 151-52 (1848).

On April 27, 2004, the owners moved for disbursement of the Town's deposit on account of the just compensation. The court (DeMayo, J.) granted that motion on November 16, 2004, and the money was disbursed on December 7, 2004 (R.). When the owners accepted the funds provided by the Town, they waived any claims to the wrongfulness of the taking, though they retained their claims to the alleged unjustness of the compensation. The court rejected this claim by the Town (App. A66).

The procedural mechanism by which the plaintiffs' assert a wrongful takings claim is irrelevant to the question of waiver. Here, the plaintiffs asserted their theory of wrongful taking in a § 1983 suit brought in the Superior Court as a court of general jurisdiction. In *Hawley*, this Court applied the rule even though the plaintiff had asserted his theory of wrongful taking in a trespass action, which he brought when the city tore down a wooden building located on the condemned property. The withdrawal of funds intended to compensate the property owner for the taking waives any challenge to the taking except a contention that the amount of compensation is insufficient.

II. The takings claim for damages in this case was unripe.

Standard of Review: Pure issue of law; subject matter jurisdiction; review is plenary.

A claim under § 1983 that the federal takings clause has been violated is not ripe until the plaintiff has availed itself of state law mechanisms intended to clarify the exact scope of the taking and give the state an opportunity to redress any wrong. In *Williamson*

Redevelopment Agency of Salt Lake City v. Tanner, 740 P.2d 1296, 1300 (Utah 1987); *Tejas Gas Corp. v. Herrin*, 716 S.W.2d 45, 45 (Tex. 1986); *In re Courthouse in City of New York*, 216 N.Y. 489, 494-95 (1916).

County Regional Planning Comm. v. Hamilton Bank, 473 U.S. 172 (1985), the U.S. Supreme Court held that this ripeness requirement is intended to particularize the controversy by allowing a state – in both its legislative and judicial aspects – to cure any alleged illegality in the taking. It ensures that the state "has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson County*, 473 U.S. at 192. Until a plaintiff has employed the mechanisms that the state provides to cure the alleged illegality, "the State's action . . . is not 'complete' . . . ." *Id.* at 195.

A plaintiff must take every available state law step to challenge an alleged takings clause violation, whether that means pursuing an administrative relief mechanism, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981), requesting a variance, waiver or other adjudicatory resolution at the local level, *Williamson County*, 473 U.S. at 172, or even a challenge under the state constitution. *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir.), cert. denied, 507 U.S. 987 (1992) (holding that since state constitution did not squarely foreclose possible takings claim, federal claim was not ripe until state law relief had been sought). *See also Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir.), cert. denied, 128 S.Ct. 415 (2007) (same).

By bringing such challenges, the State (or its political subdivision) is able to adjust the initial decision, by increasing the compensation provided, providing a waiver or variance that provides relief from a restrictive decision, or blocking or undoing a wrongful taking. Only by bringing such challenges does the state have the opportunity to come to a "final, definitive position" on the taking that permits federal constitutional review of the state's action. *Williamson County*, 473 U.S. at 191.

Like the U.S. Supreme Court, this Court has held that a plaintiff cannot take the extraordinary step of claiming a violation of the takings clause unless and until it has availed itself of the ordinary procedures that state law provides to challenge the taking. *Melillo v. New Haven*, 249 Conn. 138 (1999), rejected the plaintiffs' takings clause claim for that exact reason. Though they had brought a claim seeking compensation "under the

takings clause of the fifth amendment," this Court held "that the plaintiffs are not entitled to consideration of that claim because of the existence of a legally sufficient procedure, under article first, § 11, of the constitution of Connecticut" to seek to remediate the alleged takings clause violation. *Id.* at 154 n.28. *See San Remo Hotel*, 545 U.S. at 351 n.2 (Rehnquist, C.J., concurring) (noting that *Melillo* adopted the *Williamson County* rule as state law).

The requirement that a plaintiff give the state an opportunity to arrive "at a definitive position on the issue that inflicts an actual, concrete injury" applies regardless of the theory about how the Taking Clause was violated. *See Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 452 (7th Cir. 2002) ("[W]e have had the opportunity to consider the ripeness requirements imposed on litigants by federal courts seeking to challenge takings for private purpose. In each case, we held that the court lacked subject matter jurisdiction because the claim was not ripe for review due to the failure of the plaintiffs to seek state remedies"); *see also Forseth v. Village of Sussex*, 199 F.3d 363, 370 (7th Cir. 2000); *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177, 179 (7th Cir. 1996); *Gamble v. Eau Claire County*, 5 F.3d 285, 288 (7th Cir. 1993), cert. denied, 510 U.S. 1129 (1994).

Some courts have sought to limit the ripeness requirement. But those cases asked whether a plaintiff alleging a wrongful taking must seek *compensation* in state proceedings before the wrongful taking claim is ripe. None considered whether a plaintiff alleging a wrongful taking must seek a mandatory *injunction* returning the wrongfully taken property before it is ripe. *See e.g.*, *Rumber v. District of Columbia*, 487 F.3d 941 (D.C. Cir. 2007) (not considering whether failure to seek mandatory injunction available under state law renders takings claim unripe); *Montgomery v. Carter County*, 226 F.3d 758 (6th Cir. 2000) (same); *Samaad v. City of Dallas*, 940 F.2d 925, 936-37 (5th Cir. 1991) (same).

Certainly none considered the common law injunction available under Connecticut law, which is no more and no less a state judicial remedial procedure than the procedure for obtaining just compensation. State law allows a property owner to challenge a taking by the common law injunction. *Fishman v. Stamford*, 159 Conn. 116, 121, cert. denied, 399

U.S. 905 (1970) (holding that a claim for injunctive relief is appropriate way to stop illegal condemnation); *see also Aposporos v. Urban Redevelopment Comm.*, 259 Conn. 563 (2002) (injunctive challenge before taking successful). Importantly, state law even permits a property owner to seek an injunction returning the property if it has already been unlawfully taken. *Pequonnock Yacht Club, Inc. v. Bridgeport*, 259 Conn. 592 (2002)(mandatory injunctive challenge after taking successful).

When a condemnee wishes to challenge an initial decision by the condemnor, the propriety of the use is reviewed by injunction – in court – and the compensation is reviewed by application – also in court. In both, the final determination, whether of public use or just compensation, is made by judicial decision. In *Melillo*, the plaintiffs claimed that the takings clause had been violated because they had not received just compensation for a regulatory taking. This Court held that the claim was unripe because just compensation could be sought through ordinary state law means. In that case, an inverse condemnation action was the ordinary state law means. Here, the plaintiffs claimed that the takings clause was violated because they were subjected to a physical taking that was not for public use, and a request for a mandatory injunction was the ordinary state law means.

As with other necessary challenges under state law, 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.[5] If a plaintiff successfully challenges public use in state court and secures a mandatory injunction returning the property, then the plaintiff has suffered only a temporary taking. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318 (1987)

[5] In certain extreme circumstances it would be futile to seek a mandatory injunction returning the property, as where property is destroyed immediately following a taking: e.g., where a dock is destroyed to clear the way for dredging. *Cf. Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455, *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) (recognizing futility exception to ripeness requirement for federal takings clause claim but finding it inapplicable on facts). Such circumstances were not present here.

(recognizing temporary takings). If a plaintiff does not succeed in securing a mandatory injunction from the state court returning the property, then the plaintiff has suffered a permanent taking. In either event, the state has only come to a "final, definitive position" on the taking when it makes that determination. *Williamson County*, 473 U.S. at 191.

The plaintiffs in this case made a strategic choice to abandon any request for injunctive relief. The inability to secure a temporary injunction did not, of course, preclude the entry of a permanent injunction, any more than the denial of a pre-judgment remedy precludes an award at trial. Their strategic choice precluded the state from coming to a final definitive position, and made it impossible for the property they claimed to have been wrongfully taken to be returned. *See Monterey,* 526 U.S. at 710 (1999) (holding that if an "adequate post deprivation remedy [had] been available, [plaintiff] would have suffered no constitutional injury from the taking alone").

Instead, the plaintiffs chose to seek only more money. As a tactical trial maneuver, that choice worked, giving the plaintiffs the chance to persuade a jury to pile on millions of dollars more than the judge had in the Compensation Case.[6] But that strategic choice wrongfully permitted the plaintiffs to litigate their public use claim before the duration of any wrongful taking was properly determined, and denied the state court the opportunity to cure the alleged wrong through permanent injunction. The claim was thus not ripe. Because the claim was not ripe, the trial court in this case lacked subject matter jurisdiction. *See Esposito v. Specyalski*, 268 Conn. 336 (2004).

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[6] The court's findings on permanent injunctive relief would have been entitled to collateral estoppel effect in any later jury trial. The same is true for a property owner with a just compensation claim: he must avail himself of state law remedies (there, a challenge to the compensation in state court) before the federal takings clause claim ripens, and any federal takings clause claim is subject to the collateral estoppel effect of the compensation challenge in state court. *San Remo Hotel*, 545 U.S. at 346-47.

III. The takings clause precludes takings for private use, not claims that a taking was "unreasonable," an "abuse of power" or a "pretextual" taking for another public use, or lacked a plan.

Standard of Review: Pure issue of law; review is plenary. To the extent the Town claims that pretextual public use without more does not violate the takings clause, the Town seeks *Golding* or plain error review. The issue is one of federal constitutional law and the record is adequate for review. The *Golding* rule applies to civil cases. *Corcoran v. Taylor*, 65 Conn. App. 340, 349 n.6, cert. denied, 258 Conn. 925 (2001); see *Shawmut Mortgage Co. v. Wheat*, 245 Conn. 744, 755 n.9 (1998). In addition, while plain error is normally a rule of reversibility rather than reviewability; *Cogswell v. American Transit Ins. Co.*, 282 Conn. 505, 521-22 (2007); an exception exists for matters of public importance. *Collins v. Colonial Penn Ins. Co.*, 257 Conn. 718, 727 n.14 (2001). The proper construction of the takings clause after *Kelo v. New London*, 545 U.S. 469 (2005), is such an issue.

The takings clause ensures that governments taking private property provide owners with just compensation and that such takings occur only for public use.[7] Yet the plaintiffs claim that the "public use" guarantee means something more. They convinced the trial court below to allow the jury to consider not just whether the Town had taken the property for something other than a public use – i.e., for some private use – but also whether the town had taken the property for what they considered a "bad" public use: a "pretextual" public use or an "unreasonable" public use or a public use that constituted an "abuse of power." None of these three constitute a cognizable takings clause claim. The plaintiffs also convinced the trial court to impose the requirement that there be a plan, which the takings clause does not require.

A. Pretext without more is not a takings clause violation.

Neither constitutional text, nor history nor case law supports the plaintiffs' claim that a "pretextual" taking without more violates the federal takings clause. The text of the

[7] See *Scotland County v. Johnson*, 131 N.C. App. 765, 773 (1998) (use of land as buffer zone to landfill was a public use).

federal takings clause provides: "nor shall private property be taken for public use without just compensation." The text says nothing about "pretextual" takings. Governmental "pretext" would matter only if it were used to conceal a violation of one of the two protections: a non-public use, or unjust compensation. Nothing in constitutional history suggests otherwise.

Like the constitutional text and history, the case law does not support the plaintiffs' claim. The U.S. Supreme Court has never recognized even the possibility of a "pretextual" takings claim brought by a plaintiff who did not allege that the property would be put to private use. Nor has this Court. Nor have any of the federal courts of appeals. In the handful of cases where pretext claims have been permitted to proceed, the plaintiff has claimed that the condemned property would be transferred to a private party. *See, e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (holding town's public use claim pretextual because taking aimed only at satisfying private retailer's expansion demands) (cited in *Kelo*, 545 U.S. at 487 n.17).

In other words, the allegation of "pretext" is that the government says it will put the property to public use, but really will put the property to private use. The leading case in this area is *Kelo*, and this is what it says, *id.* at 477 (emphasis added):

> On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.
>
> . . .
>
> As for the first proposition, the City would no doubt be forbidden from taking petitioners' land *for the purpose of conferring a private benefit on a particular private party.*
>
> . . .
>
> Nor would the City be allowed to take property under the mere pretext of a public purpose, *when its actual purpose was to bestow a private benefit.*

Where, as here, a plaintiff makes no allegation of private use, an assertion of "pretext" does not allege a violation of the takings clause. It is merely an invitation to a jury to substitute its judgment for the government's judgment. While "there is, of course, a role

for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power"; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984); that role "is 'an extremely narrow' one." *Id.* (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954). Judicial deference is required "because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power." *Midkiff*, 467 U.S. at 244. "Without exception, our cases have defined [the public use requirement] broadly, reflecting our longstanding policy of deference to legislative judgments in this field." *Kelo*, 545 U.S. at 480. To put it plainly: "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman*, 348 U.S. at 32; *see also Goldstein v. Pataki*, 516 F.3d 50, 57 (2d Cir. 2008), petition for cert. filed Mar. 31, 2008 (reviewing U.S. Supreme Court case law and concluding that in "doctrine and in practice, the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate," not the scrutiny of the courts).

So at the end of the day what the plaintiffs are left with is a claim that the pretext *itself* is the takings clause violation. That is to say, their claim is that they do not need to prove that the real reason was to benefit a private party; they only need to prove that the real reason was not the one given. But that improperly changes the focus away from the purpose of the takings clause, which as *Kelo* confirms is to prevent the government from taking the property of any private person for the sole purpose of transferring it to another private person. Because plaintiffs have not alleged that the Town's actual purpose was to benefit private parties, their pretext claim fails as a matter of law.

B. Unreasonable conduct and abuse of power are not takings clause violations either.

The trial court also allowed the jury to return a verdict for the plaintiffs if it concluded that the taking was "unreasonable" or an "abuse of power." From the start of the case in 2003 until August 2007, the only takings claim set forth by the plaintiffs was a "pretextual

bad faith exercise of the power of eminent domain" to block development of the plaintiffs' housing plans (R. ,). Just prior to the start of trial, the court denied permission to add "unreasonable" and "abuse of power" allegations (App. A42). During trial the plaintiffs tried again, and this time they succeeded (R. ,).

The trial court, over the Town's objection, granted the plaintiffs' motion during trial to amend their complaints to permit them to allege that the taking was a "bad faith exercise of the power of eminent domain in that it was pretextual **or** unreasonable **or** an abuse of power" (R. , ; emphasis added). The court then instructed the jury that to "prove that the town acted in bad faith and violated their rights under the Takings clause of the Fifth Amendment, the plaintiffs must prove by a preponderance of the evidence that as to each of the three reasons that the town of Branford has asserted for its use of eminent domain that **either** (1) the town's stated reason was pretextual and its actual reason was invalid; **or** (2) the town acted unreasonably; **or** (3) the town abused its power" (App. A170) (emphasis added). The Town excepted to the instruction (App. A181-82). The corresponding interrogatory asked the jury to answer whether the takings clause was violated because "each of the town's three reasons offered for the taking was either 'pretextual and invalid,' **or** 'unreasonable,' **or** 'abuse' of power . . ." (R.) (emphasis added). The jury answered "yes".

This instruction might have been proper if the plaintiffs had alleged a violation of state law. *See Gohld Realty Co. v. Hartford*, 141 Conn. 135, 146 (1954) (noting that when "the legislature delegates the making of [a necessity] determination to another agency, the decision of that agency is conclusive; it is open to judicial review only to discover if it was unreasonable or in bad faith or was an abuse of the power conferred"). Yet *Gohld Realty Co.* and its progeny decided questions only of state law. *See Kelo v. New London*, 268

Conn. 1, 29 n. 29 (2004), aff'd, 545 U.S. 469 (2005) (referring to *Gohld Realty Co.* as a state law case).[8]

The federal takings clause protects against takings that are not for public use, or takings that fail to provide just compensation. It does not protect against takings that a fact-finder characterizes as "unreasonable" or an "abuse of power." As this Court knows first-hand, the exercise of eminent domain is not always popular. Given the unpopularity of eminent domain, it would not be surprising if owners, and developers speculating through option contracts, could sometimes convince a jury that a taking was "unreasonable" or an "abuse of power." But allowing a jury to find a taking to have violated the federal takings clause because the jury concludes that the taking was "unreasonable" or an "abuse of power" would run completely contrary to the constitution and case law, as discussed in *Kelo*, *Midkiff* and *Berman*, *supra,* at 18-19.[9]

Because the jury could have returned a verdict for the plaintiffs on the basis of any one of the three theories (pretext, unreasonableness, abuse of power), the verdict would have to be set aside if any of the theories failed to state a claim under the federal takings clause. *Curry v. Burns*, 225 Conn. 782, 801 (1993). But because the plaintiffs did not

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[8] The court need not determine whether the rule in *Gohld Realty Co.* is derived from the state constitution, state statutes or administrative law principles, as plaintiffs' claim in this case is not based on state law in any shape or form.

[9] As with the case law, nothing in the constitutional text or history supports the notion that courts can review the reasonableness or good faith of a legislative decision to take private property. James Madison, the key architect of the takings clause, predicted that political action would frequently result in takings of private property that were justified only by majoritarian political will. Madison believed that any problems stemming from unreasonable or abusive legislative takings would be resolved through the political process, not by courts evaluating the reasonableness or good faith of the asserted public uses. *See, e.g.*, Remarks of James Madison (debate of June 26, 1787), in 1 Records of the Federal Convention of 1787, at 421, 422-23 (Max Farrand ed., 1966), and James Madison, Note to His Speech on the Right of Suffrage, in 3 Farrand, at 450, 454. *See generally* James Madison, The Federalist No. 10 (Clinton Rossiter ed., 1961); 1 William Blackstone, Commentaries with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia (St. George Tucker ed., 1803).

claim that the Town aimed to benefit a private party, all three fail to state a claim under the federal takings clause. Therefore, no verdict for the plaintiffs was permissible.

C. Lack of a plan is not a takings clause violation.

The trial court instructed the jury that the "town's use of eminent domain *must* follow a plan in which the land is taken for public use, public purpose, or public benefit." (App. A166) (emphasis added). That instruction presumably referred to the urban renewal statutes. *See* Conn. Gen. Stat. § 8-142 ("Any urban renewal project undertaken pursuant to section 8-141 shall be undertaken in accordance with an urban renewal plan for the area of the project"). But even if that statute applied here,[10] there is no authority for imposing on a condemning authority the duty to proceed pursuant to a plan without violating the takings clause. The only constitutional duty is to provide just compensation for a public use – nothing else. Because the court did not submit to the jury an interrogatory asking whether the Town followed a plan, and because the Town properly objected to the instruction on the requirement of a plan (App. A182), under *Curry v. Burns* the trial court's erroneous instruction was harmful.

IV. NEE's unrecorded and unexercised option is a contract right, not a property right protected by the takings clause.

Standard of Review: Pure issue of law; review is plenary.

Typically it does not matter to a town whether an option-holder's right is properly characterized as a contract right or a property right. Regardless, a town has a right to condemn property for public use, and it has an obligation to pay just compensation. The Town pursued the option issue at trial (R. ; A160-61) and pursues it now only because of the convoluted procedural posture in which it finds itself, where the actual owners and the

[10] The Town used its eminent domain power pursuant to the general statute defining municipal powers, C.G.S. § 7-148(c)(3)(A) (granting municipalities the power to "[t]ake . . . hold, condemn, . . . such real and personal property or interest therein . . . [for] any public use or purpose"), and the plaintiffs did not claim otherwise. Unlike the urban renewal and redevelopment statutes, nothing in § 7-148 requires that a municipality develop or follow a land use plan.

option-holder were compensated in one proceeding, only to then generate another award (primarily allotted to the option holder) in a second proceeding. Put simply, NEE's double recovery has made central an issue that would otherwise be unimportant.

State law defines what constitutes property for the purposes of the takings clause of the Fifth Amendment. When determining the scope of property rights protected by it, courts look to "'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth amendments." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). "Property interests, of course, are not created by the Constitution." *Roth,* 408 U.S. at 577. Whether NEE's option to purchase the condemned property was protected by the takings clause turns, then, on whether an unexercised option, untethered to any other interest in land, constitutes a protected property interest under Connecticut law. *See, e.g., Pro-Eco, Inc. v. Bd. of Comm'rs*, 57 F.3d 505, 509-10 (7th Cir.), *cert. denied*, 516 U.S. 1028 (1995); *Superior-FCR Landfill, Inc. v. County of Wright*, 59 F.Supp.2d 929, 935 (D. Minn. 1999).

The large majority of jurisdictions that have considered whether an option is a constitutionally-protected property interest have found that it is not.[11] *See e.g., Pro-Eco*, 57

[11] The states are Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, and Vermont. *Temple Hoyne Buell Found. v. Holland & Hart*, 851 P.2d 192, 197 (Colo. App. 1992) (option is not property interest for the purposes of the Rule Against Perpetuities); *Cravero v. Florida State Turnpike Auth.*, 91 So.2d 312, 316 (Fl. 1957) (option is not compensable property interest in eminent domain proceeding); *N. Border Pipeline Co. v. 86.72 Acres of Land*, 1998 WL 698935, at * 2 (N.D. Ill. Oct. 2, 1998) (eminent domain) (citing Illinois state court cases); *Haney v. Denny*, 135 Ind. App. 317, 335 (1963) (eminent domain); *Caldwell v. Frazier*, 65 Kan. 24, 27 (1902) (optionees not entitled to restoration of optioned property following fire); *Ashland v. Kittle*, 347 S.W.2d 522, 524 (Ky. 1961) (eminent domain); *Layne v. City of Mandeville*, 743 So.2d 1263, 1268 (La. App.), cert. denied, 754 So.2d 966 (La. 1999) (eminent domain); *Cornell-Andrew Smelting Co. v. Boston & P.R. Corp.*, 209 Mass. 298, 307 (1911) (eminent domain); *Oaks v. Montague Tp.*, 2001 WL 1512033, at *7, *9 (Mich. App. Nov. 27, 2001) (inverse condemnation); *Gamble v. Garlock*, 116 Minn. 59, 62 (1911) (optionee not entitled to setoff of purchase price where property is damaged prior to exercise of option); *Hennessey v. Wilson*, 225 Miss. 366, 369 (1955) (eminent domain); *Phillips Petroleum Co. v. City of Omaha*, 171 Neb. 457, 466 (1960) (eminent domain); *State By and Through*

F.3d at 509-10 (holding that takings clause does not protect "mere contract rights" and that plaintiff, who held option contract, was due no compensation).

Some of these jurisdictions will nevertheless consider an option when valuing a lease that includes an option to renew or to purchase, *E.g., N. Border Pipeline Co. v. 86.72 Acres of Land*, 1998 WL 698935, at * 2 (N.D. Ill. Oct. 2, 1998); *State v. Jan-Mar, Inc.*, 210 N.J. Super. 236 (1985); just as they value any other clause in the lease. Others will never consider an option, even when included in a lease. *In re Delaware Sections,* 18 A.D.2d 437, 440-41 (1963) ("A mere holder of an option has no interest in the land which is subject to the option until the exercise thereof. We can find no authority which would require a different result where the claimant is both a lessee and an optionee") (internal citation omitted); *see also Haney v. Denny*, 135 Ind. App. 317 (1963).

A small minority, just two jurisdictions, treat an option as a compensable property interest. *Petition of Governor Mifflin Joint Sch. Auth.*, 401 Pa. 387, 395 (1960); *County of San Diego v. Miller*, 13 Cal.3d 684 (1975).[12] However, *Miller* is based on very different facts, where "no increase in the total condemnation award will result from allocating compensation to the optionee." *Id.* at 691. The court recognized, though, that "in some instances concern may be justified from fear the condemnees may increase the eventual

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Adams v. New Jersey Zinc Co., 40 N.J. 560, 576 (1963) (eminent domain); *In re Water Front on Upper New York Bay*, 246 N.Y. 1, 33 (1927) (eminent domain); *Anderson v. Blixt*, 72 N.W.2d 799, 808 (N.D. 1955) (Rule Against Perpetuities); *State v. De Lay*, 181 N.E.2d 706, 708 (Ohio App. 1959) (eminent domain); *LaGue v. State*, 128 Vt. 212, 214 (1969) (eminent domain); *see also In re Continental Properties, Inc.*, 15 B.R. 732, 736 (Bankr. D. Haw. 1981) ("a person having an option to purchase land, has no equitable or legal interest in and to the land"); *Groth v. Continental Oil Co.*, 84 Idaho 409, 414 (1962) (holding that "no estate or interest in the property could pass until the conditions of the [option] were fully complied with"); *Kramer v. Schmidt*, 62 Mont. 568, 572 (1922) ("The holder of the option, then, acquires nothing but a personal privilege to purchase, which does not ripen into an interest in the land until he chooses to exercise the privilege").

[12] A third, Nevada, has left open the possibility of treating options as compensable property, but, recognizing their inherently speculative nature, would treat them as compensable only where the facts show that "exercise of the option is a *foregone conclusion*." *State ex rel. Nevada Dept. of Transp. v. Las Vegas Bldg. Materials, Inc.,* 104 Nev. 479, 486 (1988) (emphasis in original).

One Connecticut trial court has embraced the 2-state view. *Newington v. Estate of Young*, 47 Conn. Supp. 65 (Super. Ct. 2000).

condemnation award by collusive action," but found those concerns not present there. *Id.* at 692. The facts here – involving a double recovery of recompense – justify that concern.

Connecticut case law is consistent with the substantial majority view. In *Patterson v. Farmington Street Ry. Co.*, 76 Conn. 628 (1904), this Court, considering a claim that an option contract to purchase bonds gave the plaintiff a property right in the bonds, flatly held that an option contract "gives no property interest in the subject-matter." *Id.* at 642; *see also id.* at 653 (finding that plaintiff's contract was "plainly an option-contract" and so rejecting plaintiff's claim). Whether the subject of the option is real property or personal property, the principle is the same.

That an option is not by itself a property interest does not mean that an option included as part of an independent property interest – such as a lease – does not affect the independent property interest's value. In *Canterbury Realty Co. v. Ives*, 153 Conn. 377 (1966), for instance, this Court concluded that "all elements legitimately affecting the value of the lease should be considered" when determining the fair value of a lease. *Id.* at 384-85. Accordingly, the trial referee was required to consider the effect of an unexercised option to renew on the value of the lease. *Id.* at 385; *see also Texaco, Inc. v. Comm'r of Transp.*, 34 Conn. Supp. 194 (Super. Ct. 1977) (applying *Canterbury* to valuation of lease including option). The option to renew was relevant only insofar as it affected valuation of the underlying property interest, the lease.

The *Canterbury* approach is consistent with the majority view and the historic rule. A lease is a property interest. An option in a lease, like any other term or covenant contained in the lease, may affect the value of the lease, but is not by itself a property interest. That is why many states treat options included in leases differently from bare options independent of any other property interest. *E.g., N. Border Pipeline Co. v. 86.72 Acres of Land*, 1998 WL 698935, at * 2 (N.D. Ill. Oct. 2, 1998) (distinguishing independent option to purchase land from option to purchase contained in a 99-year lease); *State v. Jan-Mar,*

Inc., 210 N.J. Super. 236 (1985) (distinguishing option included in lease from a "naked" option); *Spokane Sch. Dist. No. 81 v. Parzybok*, 96 Wash. 2d 95, 104 (1981) (same).

NEE had no leasehold interest in the condemned property but claims that its option constituted a protected property interest. The minority view, on which NEE depends, hampers the ability of market participants to negotiate for optimal allocations of risk. In addition, it fails to consider the speculative nature of options to purchase. An option is "an offer by one to sell within a limited time and a right acquired by the other to accept or reject such offer within such time." *Cutter Dev. Corp. v. Peluso*, 212 Conn. 107, 110 (1989) (quoting 77 Am. Jur. 2d, *Vendor and Purchaser* § 28). Optionees limit their risk exposure by paying to keep open an offer to sell without incurring any obligation ever to obtain an interest in the subject property. As a result, a potential purchaser can evaluate various risks – market downturns, local, state and federal land use approvals, availability of financing – before committing to purchase property. "The owner is bound by his offer, but no obligation is imposed upon the optionee. He has nothing but a continuing, irrevocable proposal to sell him the property, which will not ripen into anything more unless and until he exercises it, which he may do or not entirely as he pleases." *State by Adams v. New Jersey Zinc Co.*, 40 N.J. 560, 576 (1963).

Whether a given option will be exercised is simply fodder for speculation. An option is a "mere possibility that may or may never materialize [and, thus,] cannot be said to constitute an 'estate' or 'interest' in real property." *Ashland v. Kittle*, 347 S.W.2d 522, 523 (Ky. 1961). Having decided not to assume the obligations or risks associated with property ownership, an optionee should not be entitled to compensation for loss of the property. For this reason, it is not surprising that "[t]he holder of an unexercised option to purchase property generally does not have an insurable interest in the property." 4 Appleman on Insurance Law and Practice § 2182 (Supp. 2007). Because he does not own property, he cannot insure property. Conversely, where an optionee has assumed risks associated with

property by entering into a lease, it has assumed a different status and is appropriately treated as having a protected property interest.

Market participants should be free to allocate the risks associated with property ownership as they see fit. While some optionees would prefer the right to share in condemnation or insurance proceeds, others would prefer an option that came at a lower price because it lacked this benefit. Yet the 2-state rule put forth by plaintiffs limits the ability of individual actors in the free market to negotiate for risk. If optionees could assert independent constitutional claims against condemnors, they can try to get more than what they bargained for. Rather than seeking any share to which they are entitled from the owner under the option agreement, optionees could assert claims against the government, waiting to see if they could generate a larger recovery in that forum than in a contractual claim against the owner. The majority rule is simpler and more equitable: sellers and buyers have the flexibility to allocate risk as they see fit, and if a taking occurs, the owner seeks compensation and the compensation is awarded as the parties themselves allocated.

Because NEE held an unexercised option, untethered to a lease or any other established interest in property, it had no interest protected by the takings clause.

V. If the Town prevails in its valuation appeals, the judgment here must fall too.

Standard of Review: Pure issue of law; review is plenary.

Concerning whether or not it was reasonably probable that the approvals essential to the plaintiffs' proposed § 8-30g housing project would have been granted, the court precluded inquiry on the ground of collateral estoppel: that it decided to the contrary in the valuation case (App. A68-70). Over exception, the court then charged the jury accordingly (App. A173, A184).

Whether the ruling was proper or not, the probability or non-probability that the Town's § 8-30g rejection would have been reversed on appeal will likely be decided by this Court in S.C. 18089-18092. If it is and this Court holds that it is not probable that the § 8-

30g rejection would have been reversed, then the charge to the jury was both erroneous and harmful and both judgments must fall.

VI. The plaintiffs failed to present sufficient evidence of lost profits and used the wrong date for the calculations.

Standard of Review: This Court must determine whether the evidence supports the verdict when viewed in the light most favorable to the prevailing parties. *Cheryl Terry*, 270 Conn. at 639. Whether the accountant calculated damages from the wrong date is a legal question subject to plenary review. *First Federal Savings & Loan Assn. of Rochester v. Charter Appraisal Co.*, 247 Conn. 597, 603 (1999).

A. The Evidence Fails to Prove Lost Profits with Reasonable Certainty.

The evidence proffered in this case fails meet the threshold set forth in *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 69 (1998), that damages for lost profits "must be proved with reasonable certainty."

> Although we recognize that damages for lost profits may be difficult to prove with exactitude[,] such damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount with *reasonable certainty*. . . . Consequently, we have permitted lost profits to be calculated by extrapolating from past profits. . . . We have stated, however, that the plaintiff cannot recover for the mere possibility of making a profit. . . . A damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record evidence.
>
> In order to recover lost profits, therefore, the plaintiff must present sufficiently accurate and complete evidence for the trier of fact to be able to estimate those profits with reasonable certainty.

Id. at 69-70 (emphasis in original; citations and internal quotations omitted). When determining lost profits for a new business, the trier may consider the plaintiff's experience, prelitigation projections, and the experience of third parties in similar businesses, and there must be "a substantial similarity between the facts forming the basis of the profits projections and the business opportunity that was destroyed." *Id.* at 73-74.

The Town filed a motion in limine objecting to evidence of lost profits as being too speculative (App. A49). The Town asserted that NEE could not extrapolate lost profits

from past profits because it had not developed a comparable property, and that NEE could not establish with reasonable certainty that it would have obtained the necessary approvals, would have built the development, or sold the units for a profit. The court denied the motion (App. A66). The trial court should have granted the motion because the evidence presented at trial was indeed insufficient to prove lost profits with reasonable certainty as NEE's primary witness, accountant Conrad Kappel, who had no real estate or construction experience, relied on several unsupported assumptions in offering his projections as to lost profits: (1) that NEE would have won an appeal of the decision denying its affordable housing application, obtained the necessary approvals within one year of the taking, and would start selling within the last third of 2005; (2) that the development costs would be comparable to the cost of developing a much smaller complex in a different part of the state that had no golf course, unlike NEE's proposal; and (3) that the market-rate units would sell for $279,900 the first two years year and for $299,900 for the five years thereafter.

Initially, Kappel assumed that NEE would have all necessary approvals in place by January 1, 2005 (App. A155). The only testimony remotely related to the timing of the approvals came from Attorney Mark Branse, who testified generally about the mechanics of an affordable housing appeal and that plenary review applied to such decisions (App. A77-83). Branse *did not* testify as to the amount of time required to complete the affordable housing appeal, nor did he testify as to the likelihood that the Appellate Court would grant certification to appeal.[13] Further, Branse offered no opinion as to when NEE would obtain

[13] Branse did not testify that NEE would prevail on its affordable housing appeal because the trial court held that the Town was collaterally estopped from arguing that the NEE would not have succeeded on it affordable housing appeal based on the court's findings in the compensation case (App. A68-70).

the necessary permits from the State Traffic Commission for the roads and the Department of Environmental Protection for the storm-water discharge. Thus, Kappel, and therefore the jury, had no basis to determine that NEE would be able to begin work on the project by January 1, 2005. Accordingly, any conclusion as to the timing of sales necessarily rested on improper speculation.

Further, the projects Kappel examined were not sufficiently similar to the proposal here to support the assumptions Kappel made. See *Beverly Hills*, 247 Conn. at 27 (comparison of the plaintiff's start-up fitness franchise to World Gym was not reasonable where the plaintiff's expert conceded that the two were not similar). Kappel testified that his projected cost of $86 per square foot to develop a proposal for 354 units with a golf course based on comparisons to substantially smaller and less complicated developments. He assumed, for instance, that the cost of developing the project would run five times that of another project, Quail Run Village, a 72-unit project located on a five-acre site in North Haven, on which two of NEE's three principals were involved as developer (Exh. 139; App. A91-94). He stated, "Fairways would have essentially been for NEE, the building of . . . five Quail Run projects on one site" (App. A90). He derived his $86-per-square-foot development costs from the cost of developing Quail Run Village and determined that the total cost for developing NEE's proposal would be $46 million, or approximately 5 times the cost of developing Quail Run Village. Similarly, he assumed administration costs would run 6.1% of sales based on Quail Run Village and assumed that all units would sell (App. A118).

The other projects Kappel examined were smaller than Quail Run Village. Strawberry Hill in Hamden consisted of 32 condominium units, 22 or 23 of which were completed by the end of 2006 and 8 or 9 of which were sold (App. A85). Isinglass Road,

LLC, in Shelton was comprised of single-family homes. State Street Holding in Hamden had begun construction in 2005 of its 30 condominium units and had only three sales so far. Pondview Estates, which consisted of 16 condominium units in North Haven with no sales in its first year (App. A96-98). Based on these projects, Kappel assumed that NEE would obtain funding and have sales activity as early as 8 months into the first year of the project (App. A101).

Thus the largest of the purported comparable projects involved only 72 units of market-rate housing on five acres in North Haven. The rest were substantially smaller. There is no evidence that any of these projects included golf courses, nor does the record indicate the condition of the land prior to the development. Consequently, this evidence merely demonstrates, at most, that NEE's principals have had some success at developing smaller, less complicated projects. There is no evidence that NEE as an entity had developed projects like the one at issue here.

In addition, Kappel conceded that he is not a builder or real estate appraiser (App. A95, A109). Given the substantial differences between the putative comparables and NEE's proposal here, the use of those comparables for determining construction costs yields nothing more than speculation by an accountant with no experience in real estate or construction.

Kappel also used these comparisons to determine the accuracy of the ability of NEE principals to predict the cost of developing a project (App. A91). Cf. *Cheryl Terry,* 270 Conn. at 641 (plaintiff's own track record of estimating bids was competent to support testimony of lost profits). While Ms. Terry may have been able to project costs on a per-bus basis and adapt such predictions to Hartford, it was another matter for NEE to project costs of a substantially larger project with complications such as site restoration and

environmental issues, as well as a golf course, which was a new element. Also, *Cheryl Terry* was an anti-trust action, which imposes a lower burden on plaintiffs when proving damages. 270 Conn. at 648 n.18 (distinguishing *Beverly Hills* on that basis).

Kappel also relied on faulty assumptions to determine the prices for the units in NEE's proposal. He began by examining a list of condominium sales for Branford during 2001-02 and increased the values to 2006 based on a Warren Group report (Exh. 134; App. A103-05). Based on this information, he assumed that NEE's suggested list price for the market-rate condos at $279,900 was reasonable. He further assumed, based on the Warren Group report and discussions with NEE's principals, that the price would increase in the second year to $289,900 and for the remaining years the price would be $299,900 (App. A106, A111).

These assumptions are faulty in the absence of testimony by a real estate expert. Kappel conceded that he is not an appraiser and did not read Michaud's appraisal report until after his own appraisal of the 77 acres at issue (App. A109). Indeed, Kappel acknowledged that the housing market had "somewhat of a downturn in prices, that prices would have recovered not necessarily to the tune that they were in the last few years from a – from these statistics on Exhibit 135 [ID only] *but I'm in no position to predict what those percentage increases would be*" (App. A112) (emphasis added)). Kappel's estimate of the sales prices for the units is mere speculation.

Finally, Kappel assumed that NEE would obtain approximately $36 million to finance the project, based on the financing obtained in the purported comparables and conversations with NEE's principals (App. A156). There is nothing in the record to show that either NEE or its principals have *any* history of borrowing on that scale (App. A156-57).

In short, Kappel assumed that the project would commence a year after the taking without any evidence as to time it would take to prosecute an affordable housing appeal and obtain other approvals; assumed that it would cost $86 per square foot to develop based on the cost for building substantially different projects; assumed the reasonableness of the selling prices for the units after talking with NEE principals, who had never built an affordable housing project before; and assumed that NEE would obtain $36 million of financing without any evidence that it had previously received financing of this magnitude. "In order to remove the assessment of damages from the realm of speculation, it is necessary to tie the award of damages to objective verifiable facts that bear a logical relationship to projected future profitability." *Beverly Hills*, 247 Conn. at 76. The evidence here does not meet this requirement. Accordingly, the judgment should be reversed.[14]

B. Kappel Used the Wrong Date to Calculate Damages and Improperly Added Interest.

Kappel's testimony erroneously calculated the damages as of the date of trial rather than the date of the taking. The Town unsuccessfully challenged Kappel on this basis (App. A125-35). Damages in § 1983 actions generally follow analogous common law rules. "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to the plaintiff by the defendant's breach of duty." *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (emphasis in original; citations and internal quotations omitted). See also *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 306-07, 310 (1986) (plaintiff must prove actual damages, not abstract value for constitutional rights). Because damages

[14] The Town disclosed experts to oppose Kappel but the court barred their testimony as a sanction. This matter was an expert-intensive case about liability and damages. The preclusion ruling eviscerated the Town's defense. This harsh sanction was an abuse of discretion. The Town believes the ruling was reversible error. However, given the presence of so many important issues of law and given the abuse of discretion standard on this issue, the Town does not press it.

for § 1983 in general follow common law rules, determining the proper date for calculating damages also turns on analogous common law doctrine.

Here the owners claimed that they were entitled to compensation for the profits they lost as result of the taking. Previously, this Court has recognized that where lost profits play a role in determining the value of a destroyed business, the calculation is based on the date of the wrongdoing or the date of the destruction of the business. For instance, in *West Haven Sound Development Corp. v. West Haven*, 201 Conn. 305, 317 (1986), the plaintiff's expert properly capitalized future lost profits as of the date of the breach of the contract at issue, even though the restaurant continued to operate at a loss for a few years subsequent to the breach. This Court remanded the case for a new trial, however, because there was no evidence as to the value of the restaurant, which could operate in another location, after the breach. *Id.* at 324-25. In *Westport Taxi Service, Inc. v. Westport Transit Dist.*, 235 Conn. 1, 33-34 (1995), the trial court properly capitalized projected profits on the date the plaintiff ceased operations. In *Burr v. Lichtenheim*, 190 Conn. 351, 360 (1983), the trial court properly determined lost profits for the period in which the defendant wrongfully maintained a lis pendens on the plaintiff's property.

Similarly, in the context of eminent domain, this Court has established that just compensation is calculated on the date of the taking, *Tandet v. Urban Redevelopment Comm.*, 179 Conn. 293, 298 (1979), unless there is an earlier de facto taking; *Textron, Inc. v. Wood*, 167 Conn. 334, 346 (1974), which the plaintiffs do not claim. The Town claimed that damages should be calculated as of the date of taking; the trial court treated the Town's claim as challenging Kappel's methodology and determined that the evidence survived *State v. Porter*, 241 Conn. 57 (1997)(en banc) (App. A125-29).

Despite the clear date for determining damages, Kappel did not provide evidence as to lost profits on the date of the taking. Rather he testified to lost profits of $6.45 million as

of January 1, 2005. Thus Kappel was already off by one year in his calculation. To this, he added a compound interest rate of 22.85% to September 1, 2007, the time of trial (App. A138-39, A143-44). Kappel explained that

> [T]he rated used to calculate the present value at the beginning of the—calculate the present value as of the trial date based on the present value that was calculated at the beginning of the project, should be based on the economic rate, which would be the developer's profit rate in this case, or B, *prejudgment interest*.
>
> The—my reference to prejudgment interest in my report was that, you know, as a lay person I don't know whether this case is subject to prejudgment interest, or what the rules are. But that's the Court's discretion.

(App. A157a; emphasis added). Shortly thereafter, Kappel stated that he rejected a lower rate "[b]ecause it's—it is not reflective of the economic rate necessary to determine what the damages to the plaintiffs are as of the trial date." (App. A157b). Thus, the record is clear that Kappel relied on an improper standard by adding a very large sum of interest to the damages from a date one year after the taking to the date of trial. As a result, Kappel improperly inflated the damages and so did the jury.

Kappel's reference to prejudgment interest is telling. Essentially he admitted that his testimony was an alternative to a direct award of prejudgment interest. Since the jury was not charged on the subject of prejudgment interest (assuming arguendo that it was permissible at all), Kappel's proxy for such interest was improper.

Kappel's use of the wrong standard to determine damages requires a reversal.

CONCLUSION

The judgment should be reversed and the case remanded to the Superior Court to enter judgment for the defendant Town of Branford on the complaint of NEE and the cross complaint of the owners. In the alternative a new trial should be ordered.

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