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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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SCHALLER, J., dissenting. I agree with the assemblage doctrine that the majority has formulated as a matter of first impression. I must respectfully dissent, however, because on the basis of my reading of the trial court's memorandum of decision, I conclude that the case was not decided on the basis of a theory of assemblage analysis.

The court's memorandum of decision is not clear as to the basis for the damages award in favor of the plaintiffs, Frank Franc and Anna Franc, pertaining to both affected parcels.[1] Nonetheless, a close reading of the memorandum of decision reveals that the court determined valuation on the basis of its determination concerning the actual ownership of the parcels. It appears that the court decided, incorrectly in my opinion, that Frank Franc had an ownership interest in both parcels on the basis of a deed ''correction'' theory. In footnote 1 of the memorandum, the court states: ''The [prior owners] conveyed this land (the commercial strip) to coplaintiff Anna Franc. In 1992, after the lateral support litigation had begun, a deed 'corrected' the ownership status so that [the plaintiffs] appear together as owners, as Mr. Franc testified was the original intent, *a claim the court accepts*, consistent as it is with a lifetime of cohabitation and joint endeavors.'' (Emphasis added.) Aside from that statement, the court does not explain its basis for choosing to value the two parcels, separately owned until four years after the litigation began and eight years after the damage, together for purposes of the damages award.

The uncertainty as to the court's basis of decision that has prompted division within this panel also is shared by the parties to the appeal. It is true that the parties on appeal have raised arguments concerning a possible assemblage theory that they speculate may have been used by the court. Although the parties have *cursorily* addressed assemblage, I believe that it is not appropriate for this court to decide the appeal on the basis of a newly formulated assemblage doctrine because neither the parties nor the trial court had a fair opportunity to address that issue *fully and adequately*. Given the trial court's evident reliance on the status of title to the two affected parcels and a deed ''correction'' theory, it is not appropriate for us, in essence, to apply *retrospectively* a newly formulated doctrine to the controversy in this case.

From the record, it appears that the damages issue was not tried on the basis of any particular theory of assemblage. Although it is true that the court did use some terms and phrases that might be applicable to an assemblage doctrine, that terminology was not used in the context of an actual assemblage analysis, but rather

was a coincidental use of terms and phrases that commonly are used in the context of trials involving real property. Moreover, regardless of the wording used by the court, it is revealing that the court never once used the term ''assemblage'' in the memorandum when it was using words and phrases that might be applicable to an assemblage theory. Although the court may have used some assemblage terms, it was not doing so in the context of an assemblage ruling. Moreover, although the majority asserts that the court's valuation rationale is exposed in a colloquy between the court and counsel, as opposed to in the footnote in the *memorandum of decision*, I am not persuaded. Discussion between the court and counsel does not in any way qualify as, or substitute for, findings or legal conclusions of the court that are stated in its memorandum of decision. I conclude, therefore, contrary to the implications in the majority opinion, that the trial court did not make findings and conclusions *in the context of* an assemblage doctrine.

The majority, for example, states that ''a trial court, in a case where assemblage analysis is proposed, will best be able to make a determination as to whether a potential integrated use was sufficiently likely to have affected market value by carefully considering *all* of the surrounding circumstances, rather than being constrained by a rigid factor bound approach.'' (Emphasis in original.) In this case, it cannot be said that assemblage analysis was ''proposed'' or that the court considered ''all of the surrounding circumstances.'' No findings were made specifically pertaining to assemblage, although the court coincidentally may have considered some of the relevant circumstances, albeit without knowing that it was obligated to consider the assemblage doctrine formulated by the majority.

The majority also states: ''A general rule requiring that the proposed assemblage was *reasonably probable* rather than speculative and remote has the advantage of being able to meet both concerns.'' (Emphasis added.) The term ''reasonably probable'' was not mentioned in the trial court's memorandum of decision because that standard was not known to the parties or to the court at the time. The majority next states that it will address the trial court's ''analysis'' but, in my view, it *superimposes* on the actual analysis of the trial court a *reconstruction* of the ''analysis'' based on the new assemblage doctrine. The majority states that ''[o]ur review of the record convinces us that the court's assemblage approach to valuation was not improper because there was ample evidence to show that the potential integration of the parcel and the strip for the enhanced use as a residential development and an access road thereto was reasonably probable and not speculative or remote.'' These words and these *findings* were made by the majority, not by the trial court. The trial court made no findings concerning the ''reasonable

probability'' of the integration of the parcel and the strip. The majority adds that ''[t]he court thus had a strong basis on which to conclude that it was reasonably probable that [the plaintiffs] would have collaborated on the development of the land had it not been damaged and, further, that there were no regulatory barriers to such development.'' The trial court did *not* so find or so conclude because, of course, it could not be expected to know what doctrine to apply.

The majority then determines that the court's valuation was not clearly erroneous when, as I have pointed out, its valuation apparently was conducted on the basis of a ''corrected'' deed ownership theory. As stated previously, the trial court's use of words and phrases that are applicable to trials involving real property generally cannot be imputed to an assemblage theory when the court itself has failed even to use the term ''assemblage'' in its memorandum of decision or to convey to the parties in the memorandum that it was applying some sort of assemblage doctrine. The case is, in effect, *decided de novo* in this appellate forum on the basis of an assemblage doctrine that has been formulated long after the trial. If, by chance, the parties coincidentally addressed in their briefs some of the pertinent factors pertaining to our new doctrine of assemblage, that is not a fair substitute for an opportunity to address all the factors. I believe that the fairest resolution would be to remand the case to the trial court for a new trial on the damages issue. At the very least, the parties should be allowed to brief the damages issue on the basis of the trial record as it bears on assemblage doctrine. Although I agree with the assemblage doctrine that the majority has formulated after extensive analysis of Connecticut decisions, numerous sibling state decisions and treatises, I believe that the parties did not have a fair and adequate opportunity to address the issue of what assemblage doctrine should apply.

I acknowledge, given the nature of this case, that the damages award is compelling. Even though liability was conceded and even though substantial damage was inflicted, both parties deserve an opportunity to address fully the issue that will be dispositive. That may not serve *judicial economy* in this situation, but I do not believe that we should decide a case on the basis of an application of a doctrine that was adopted on appeal and not fully addressed by the parties or the trial court. Accordingly, I would reverse the judgment and remand the case for a new trial on the issue of damages. At the very least, the parties should have the opportunity to brief the dispositive issue. For these and other reasons, I respectfully dissent.

[1] The defendant, Bethel Holding Company, filed a motion for articulation of the decision, which the trial court denied. The defendant did not file a motion for review with this court. Although a motion for review would have been a sensible step to take, I cannot say that after the denial of the articulation motion, the defendant was wrong to rely on what appeared to be the trial court's reliance on common ownership of the parcels, albeit

mistakenly based on a "deed correction" theory.