FLYNN, J., concurring in part and dissenting in part. I concur with the majority's conclusion that a new trial is required at which evidence of environmental contamination and remediation costs will be admissible. I respectfully dissent with respect to the formula set forth by the majority concerning the valuation of the property, and I join in Chief Justice McDonald's concurring and dissenting opinion.

I

The majority concludes, and I agree, that evidence of environmental contamination and remediation costs are relevant to the valuation of real property acquired by eminent domain and are admissible in a condemnation proceeding to show the effect, if any, that those factors had on the fair market value of the property on the date of the taking. It is unlikely that any willing buyer would ignore environmental damage or fail to consider remediation costs in negotiating a purchase price. Since the offer of proof at trial concerned hearsay evidence about environmental issues that would come in through an appraiser, in my concurrence with this part of the opinion, I would also hold that such testimony should first be preceded by the actual testimony of the underly-

ing environmental expert. This testimony should, prior to its being offered, be subjected to the standard set forth in *State* v. *Porter*, 241 Conn. 57, 80–81, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).

The fact that an expert opinion relies in part on hearsay evidence does not render the opinion inadmissible, but the hearsay source relied upon must be reliable and the expert must have sufficient experience to evaluate the information. *Vigliotti* v. *Campano*, 104 Conn. 464, 465, 133 A. 579 (1926). Such reliance by appraisers makes sense with respect to reliance on multiple listings and other similar trustworthy sales data. It does not make sense with respect to scientific environmental data, related regulatory issues, costs necessary to remediate and other aspects of environmental contamination unless the underlying expert's testimony has been admitted. See *State* v. *Porter*, supra, 241 Conn. 80–81.

II

I respectfully dissent from the majority's valuation formula for the trial court to follow. The majority sets forth a formula that first values the contaminated property by establishing a fair market value, and then deducts from that value the loss caused by any environmental contamination of that property. Specifically, the majority holds that ''the fair market value may be arrived at by (1) evidence of sales of uncontaminated comparable property, (2) discounted by some factor, not necessarily dollar-for-dollar, but not necessarily precluding dollar-for-dollar, in the fact-finding discretion of the court, including the costs of the remediation. To conclude otherwise could result in a fictional fair market value of the condemned property.''

This formula focuses solely on the value of the property taken, but neglects to permit the trial judge to award damages for the total loss to the property owner resulting from the taking, including any consequential damages. Furthermore, it does not adequately address a possible windfall reaped by the condemnor or its assigns at the condemnee's expense.

At the outset, it is worth reviewing that both the fifth amendment to the United States constitution, as applied to the states through the due process clause of the fourteenth amendment, and article first, § 11, of our state constitution, provide that private property shall not be taken for public use without just compensation. *Santini* v. *Connecticut Hazardous Waste Management Service*, 251 Conn. 121, 136, 739 A.2d 680 (1999), cert. denied, 530 U.S. 1225, 120 S. Ct. 2238, 147 L. Ed. 2d 266 (2000). The measure of damages to be awarded to the condemnee in an eminent domain proceeding is the loss to the owner from the taking, and not its value to the condemnor. *Gray Line Bus Co.* v. *Greater Bridgeport Transit District*, 188 Conn. 417, 427, 449 A.2d 1036

(1982).

This court has recognized in the past that one valuation formula cannot fit all cases. ''[T]he question of what is just compensation is an equitable one rather than a strictly legal or technical one. The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken.'' (Internal quotation marks omitted.) *Alemany* v. *Commissioner of Transportation*, 215 Conn. 437, 444, 576 A.2d 503 (1990).

Fifth amendment considerations have caused courts to depart from the strict fair market value formula of measuring only the property condemned. In fact, in severance cases, this court has not hesitated to depart from the focus on the fair market value of the land taken. The court has looked to the entire loss caused by the taking. A severance occurs when the condemning authority takes only part of the whole of the condemnee's land. In such cases, this court has considered not only the value of the property taken, but also any resulting diminution in the value of the remaining property not taken. *D'Addario* v. *Commissioner of Transportation*, 180 Conn. 355, 363, 429 A.2d 890 (1980); *Tandet* v. *Urban Redevelopment Commission*, 179 Conn. 293, 298, 426 A.2d 280 (1979). The rationale behind looking not just to the value of the part of the condemnee's property taken, but also to consequential damages caused to the remaining property not taken, is that it is unjust to expect the condemnee to bear damages for which the public should stand.

Another instance when courts will fashion and apply other standards is ''[w]hen market value has been too difficult to find, or when its application would result in *manifest injustice* to [the] owner or public . . . .'' (Emphasis added; internal quotation marks omitted.) *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 512, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979).

No one method of valuation, however, is controlling in the trier's determination of just compensation. ''The trier may select the one most appropriate to the case before him in arriving at his own conclusion as to the value of a land interest.'' *Laurel, Inc.* v. *Commissioner of Transportation*, 180 Conn. 11, 37, 428 A.2d 789 (1980). ''[A] trial court may seek aid in the testimony of experts, but must ultimately make its own independent determination of fair compensation . . . on the basis of all the circumstances bearing upon value.'' (Citation omitted; internal quotation marks omitted.) *French* v. *Clinton*, 215 Conn. 197, 202–203, 575 A.2d 686 (1990). ''Our cases have reaffirmed the principle that, because each parcel of real property is in some ways unique, trial courts must be afforded substantial discretion in choosing the most appropriate method of determining the value of a taken property.'' (Internal quotation

marks omitted.) *Commissioner of Transportation* v. *Towpath Associates*, 255 Conn. 529, 541, 767 A.2d 1169 (2001).

With these principles in mind, I first take issue with the majority's formula for determining the condemnee's damages by focusing on comparative sales data from sales of similar uncontaminated property diminished by some factor for the cost of remediation of the contaminated property taken from the condemnee. This formula can result in manifest injustice to the landowner in this case because it is not compensated for other consequential damages, beyond the fair market value of the land, which nonetheless arise from the taking. Furthermore, the formula takes from the trial judge hearing the evidence in the case the necessary power he or she always has had to evaluate the whole loss arising from the condemnation and to fashion remedial equitable compensation.

Second, the majority formula does not permit the trial judge to compensate the condemnee adequately if the evidence proves the windfall argument made by the defendant. In *Gray Line Bus Co.* v. *Greater Bridgeport Transit District*, supra, 188 Conn. 429–30, this court pronounced the windfall exception to the general rule by stating: ''Although benefit to the taker may not be the measure of damages in a condemnation proceeding, it is not wholly irrelevant in deciding whether the taking of a particular form of property merits some award. The basic principle that private property may not be taken without just compensation is offended where a public authority is permitted to receive *a windfall of substantial value* without some recognition of the interest of the owners in the form of a reasonable award.'' (Emphasis added.)

The Court of Appeals of New York confronted a difficult valuation problem resulting from the taking of the Hudson Tubes, a construction linking Manhattan with New Jersey, which would not have a ready market value and which actually would cost money to fill in and close down and thus, have a negative value. *In the Matter of Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 20 N.Y.2d 457, 464–66, 231 N.E.2d 734, 285 N.Y.S.2d 24 (1967), cert. denied, 390 U.S. 1002, 88 S. Ct. 1244, 20 L. Ed. 2d 103 (1968). Because the condemning agency would acquire something that would have cost $400 million to replace and would still use after the condemnation, the court rejected a conventional sales data approach to valuation. Id., 467. The court deviated from the fair market value approach because this was a situation where its application would have produced an unfair result. Id., 468.

Relying on portions of the oral arguments before this court, the majority holds that ''[w]e are not convinced that such an unfair result or a windfall to the town has occurred in the present case, where the town, subse-

quent to the taking, sold the property to Windham Mills for $1 and has not brought a remediation action,'' and further holds that whatever remediation costs that were incurred after the taking have been covered largely by federal and state funds. Reliance on that sparse record should not circumscribe the trial judge who must hear this case on retrial. The actual evidence may in fact show that the amount by which the condemning authority wishes to diminish the value of the condemned property due to environmental contamination and remediation costs has never been spent, need not have been spent, will not need to be spent, or may be far less than appraisal testimony might otherwise indicate. If the condemnation award is reduced substantially due to remediation, which never occurs or which does occur but costs far less than the reduction, a windfall may result.

I would alter the majority's formula to permit the trial judge to fashion a more equitable award. First, just compensation should include compensation to the condemnee for any right lost by the taking to recover remediation costs from prior owners pursuant to the Comprehensive Environmental Response, Compensation and Liability Act; 42 U.S.C. § 9601 et seq.; because no remediation costs had been incurred by the condemnee prior to the taking as required by that federal law.[1] Otherwise, the condemnation would result in a taking that would leave the condemnee worse off after the taking than before the taking because its financial compensation was reduced by an imputed cost of remediation that the very condemnation action robbed it of any right to recover.

Second, the trial judge should be free to provide equitably in his or her award for any increased exposure to third party claims that has been imposed on the condemnee as a result of the taking. The condemnee would suffer a diminution of the value of its property by the introduction of evidence of environmental contamination, damage and remediation costs. The condemnee would still remain potentially liable, however, for those same costs as a prior owner to any subsequent owners, such as the nonprofit corporation to which the city conveyed its interest. Essentially, before the taking, the condemnee was not liable to any subsequent titleholder who became the sole owner of the contaminated property. For example, there was no liability to the nonprofit corporation, which had obtained title from the condemnor. After the taking, however, there is a risk of double liability for contamination because the condemnee, after diminution of his award for environmental damage, may face liability for the same damage in a subsequent federal proceeding by a subsequent owner, which liability is joint and several under the Comprehensive Environmental Response, Compensation and Liability Act.

Third, the record is silent on whether the federal Environmental Protection Agency or the state department of environmental protection had made any pollution abatement orders prior to the taking. The trial judge should be left free upon retrial to fashion an equitable award. If there have been no such orders, but there is to be some diminution in the compensation paid to the condemnee because of potential liability relating to future agency orders, then the trial judge should be free to require the condemning authority to place the diminution sum due to environmental contamination and remediation costs in trust to cover future remediation costs. If the sums necessary to remediate in order to satisfy actual agency orders exceed or equal the amount reduced from the fair market value of that award, the corpus should become the sole property of the condemnor. If the amount of award diminution due to remediation cost is never paid because neither environmental agency ever issues an order, or because orders are issued but the cost of their compliance is far less than the sum by which the condemnation award is diminished, then the unused balance should go to the condemnee. The trial judge should set the terms and duration of the trust imposed, as just compensation may require.

In sum, any formula for arriving at the condemnee's damages should be broad enough to permit the trial judge to award all the just damages to the condemnee arising from the taking. Because the damages formula set out by the majority does not, I respectfully dissent from that part of the opinion.

[1] It is important to note that a right of cost recovery does not arise under 42 U.S.C. § 9607 until a party has incurred *some* remediation costs. See 7A P. Nichols, Eminent Domain (3d Ed. Rev. 2000, P. Rohan & M. Reskin eds.) § 13B.04 [1], p. 13B-104; see also *United States* v. *Taylor*, 909 F. Sup. 355, 363 (D.N.C. 1995) (stating that "a party must, in some degree, actually conduct the cleanup"); *Jones* v. *Inmont Corp.*, 584 F. Sup. 1425, 1430 (D. Ohio 1984) (holding that "some costs must be incurred prior to the filing of a suit under the liability provision of section 9607, but cleanup need not be completed prior to the filing of such a suit").

In the present case, the condemnee did not conduct *any* remediation prior to the taking and, therefore, may have lost the right to seek remediation costs pursuant to 42 U.S.C. § 9607.