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ZARELLA, J., with whom SULLIVAN, C. J., and KATZ, J., join, concurring in part and dissenting in part. Another court observed in a different context: ''A man's home may be his castle, but that does not keep the Government from taking it.'' *Hendler* v. *United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991). That is because, ''[a]s an incident to its sovereignty, the Government has the authority to take private property for a public purpose.''[1] Id. At the time that our federal constitution was written, a government taking meant just that, namely, a taking for a government purpose such as for a public building. Id. As the population grew and the collective needs of our society changed, however, the takings power was construed more broadly. Governmental authorities condemned private properties not just for a ''public use,'' but also to achieve a ''public benefit'' such as the elimination of urban blight. Today, an even more expansive interpretation of public use in certain jurisdictions permits the taking of property for private economic development. To many, this represents a sea change in the evolution of the law of takings because it blurs the distinction between public purpose and private benefit and cannot help but raise the specter that the power will be used to favor purely private interests. This case therefore presents the court with a rare and timely opportunity to address a constitutional issue of great significance, that is, whether there are limits to the government's authority to take private property by eminent domain when the public purpose is private economic development, and, if so, how those limits should be defined and enforced.

I believe that the majority reaches the wrong result with respect to the plaintiffs' properties, in part because it overlooks the fact that private economic development differs in many important respects from how we have defined a public use in the past. Accordingly, although I concur in parts I,[2] III and V[3] of the majority opinion regarding the applicability of chapter 132 of the General Statutes[4] to nonvacant land, the constitutionality of delegating the eminent domain power to the New London Development Corporation (development corporation), and the plaintiffs' equal protection claims, respectively, I disagree with the majority's conclusions in parts II, IV and VI pertaining to private economic development[5] as a public use under the Connecticut and federal constitutions and the taking of the plaintiffs' properties on parcels 3 and 4A.

I begin by noting that, because this is a case of first impression, this court has not considered, prior to today, many of the issues raised by the parties to this appeal, including whether chapter 132 of the General Statutes is constitutional. I further note that this court

has not examined, for nearly a century, the authority of the state to exercise its power of eminent domain for the public benefit when accompanied by a corresponding benefit to private interests.[6] See *Connecticut College* v. *Calvert*, 87 Conn. 421, 424–28, 88 A. 633 (1913); *Evergreen Cemetery Assn.* v. *Beecher*, 53 Conn. 551, 553, 5 A. 353 (1886). Thus, it is important to undertake a review of property rights, the eminent domain power and the evolution of the public use requirement before addressing the issues raised by the plaintiffs in this appeal.

Part I A of this dissent briefly explores, from a historical standpoint, both the nature of the sovereign's taking authority and the development of the concept of private property rights. Part I B examines the historical development of the takings clauses of the state and federal constitutions, with particular emphasis on the changing concept of public use.

Part II examines the degree of deference due to the legislature in its determination of what constitutes a public use, as well as the appropriate role of the court in ensuring that the condemnees' constitutional rights under the state and federal constitutions are not infringed. This part of the opinion also addresses whether different levels of judicial review are required depending on the nature of the public use under consideration.

Part III applies the principles enunciated in part II to the specific facts of this case as found by the trial court. Part IV summarizes my concerns, expressed throughout this opinion, as to the use of the eminent domain power in furtherance of private economic development.

In summary, I conclude that the legislature should be accorded great deference in determining what constitutes a public use, that the courts have a limited role in reviewing that determination, that chapter 132 of the General Statutes is facially constitutional, that, as the category of public use changes from one of direct public use to indirect public benefit in the form of private economic development, the level of judicial inquiry must increase in order to protect the legitimate interests of the condemnee, and, finally, that the taking of homes on parcels 3 and 4A, as described in the development plan, was not warranted on the basis of the facts found by the trial court and the principles set forth in this opinion.

I

HISTORICAL DEVELOPMENT OF PRIVATE PROPERTY RIGHTS, EMINENT DOMAIN AND THE PUBLIC USE CLAUSE

A

Private Property Rights and Eminent Domain

I agree with this court's observation that ''[a] public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, changing conceptions of the scope and functions of government, and other differing circumstances brought about by an increase in population and new modes of communication and transportation.'' (Internal quotation marks omitted.) *Katz* v. *Brandon*, 156 Conn. 521, 532, 245 A.2d 579 (1968). I also recognize that the concept of public use has evolved over the course of our nation's history from the taking of private property for actual use by the public to the taking of property to further the public good or to secure some public benefit. See 2A P. Nichols, Eminent Domain (3d Ed. Rev. 2003, J. Sackman ed.) § 7.01[1], p. 7-16. I believe, however, that when this court is called upon to decide claims arising under chapter 132 of the General Statutes, it must be ever mindful, not only of a sovereign's historical power to acquire private property for a public use, but also of our nation's long-held commitment, shared by this state, to protect private property from unnecessary takings. See J. Lazzarotti, ''Public Use or Public Abuse,'' 68 UMKC L. Rev. 49, 55 (1999); see also *Pequonnock Yacht Club, Inc.* v. *Bridgeport*, 259 Conn. 592, 601, 790 A.2d 1178 (2002) (authority to condemn strictly construed against taking party).

Private property rights developed as a legal concept in Europe during the demise of feudalism. See J. Lazzarotti, supra, 68 UMKC L. Rev. 53. The Magna Carta recognized the necessity of protecting private property rights in 1225 in providing that ''[n]o Freeman shall be . . . desseised of his Freehold . . . but by lawful Judgment of his Peers, or by the Law of the Land.'' Magna Carta, c. XXIX (1225). The text of our federal constitution reflects a similar intent that private property rights be fully protected. See, e.g., U.S. Const., amends. V and XIV. The idea that the protection of private property is a principal aim of our society was affirmed by former United States Representative John A. Bingham, drafter of the fourth amendment, when he declared that ''natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied by the broad and comprehensive word 'person' . . . guarding those sacred rights which are as universal and indestructible as the human race, that 'no person shall be deprived of life, liberty, or property but by due process of law, nor shall private property be taken without just compensation.' '' Cong. Globe, 35th Cong., 2d Sess., p. 983 (1859). Bingham also declared that ''the absolute equality of all, and the equal protection of each, are principles of our Constitution . . . . It protects not only life and liberty, but also property, the product of labor.'' Cong. Globe, 34th Cong., 3d Sess., App., p. 140 (1857). In Connecticut, private property rights were so firmly entrenched by the time of the state constitutional convention in 1818 that the

takings clause of the new constitution, which provided that ''[t]he property of no person shall be taken for public use without just compensation therefor''; Conn. Const. (1818), art. I, § 11; was adopted without debate. W. Horton, The Connecticut State Constitution: A Reference Guide (1993) p. 70.

Nevertheless, the right of the sovereign to condemn private property also has deep historical roots, purportedly dating back to the Romans. L. Berger, ''The Public Use Requirement in Eminent Domain,'' 57 Or. L. Rev. 203, 204 (1978). The term ''eminent domain'' was used in the seventeenth century work, De Jure Belli et Pacis, in which Hugo Grotius, a renowned legal scholar, discussed the government's authority ''to take private property for reasons of extreme necessity or public utility upon payment of compensation.'' Id. In our own country, the taking of private property for a public use was a well accepted principle in colonial times. 2A P. Nichols, supra, § 7.01[3], p. 7-17. Eminent domain was employed to support mills, to create roads, to build canals and bridges; id., § 7.07[3], p. 7-200.1; and to drain private lands. Id., § 7.01[3], p. 7-17. As the power was used more frequently, however, controversy ensued. Id., pp. 7-17 through 7-18. Beginning with Pennsylvania and Vermont, in 1776 and 1777, states sought in their early constitutions to place specific limitations on the power of eminent domain. Id., p. 7-18. Since that time, courts have sought, and sometimes struggled, to interpret the public use clause in light of state regulations and changes in the nation's economy that have transformed our society in unforeseen ways.

B

Evolution of the Public Use Requirement

A review of the law on takings reveals that the definition of ''public use,'' when considered in the context of the eminent domain power, has no precise or fixed meaning. Id., § 7.02[1], p. 7-24. Some courts have narrowly construed the public use clause to mean that property acquired by eminent domain actually must be used by the public, or that the public must have the opportunity to use the acquired property. Id., § 7.02[2], p. 7-26; see, e.g., *Rockingham County Light & Power Co.* v. *Hobbs*, 72 N.H. 531, 534, 58 A. 46 (1904). Under a narrow reading of the term, public use includes public buildings, utilities, schools and roads. *Pocantico Water-Works Co.* v. *Bird*, 130 N.Y. 249, 259, 29 N.E. 246 (1891); 2A P. Nichols, supra, § 7.02[6], p. 7-36.1.

Other courts have construed the public use clause more broadly to include a use that furthers the public good or the general welfare, or one that secures some public benefit. 2A P. Nichols, supra, § 7.01[1], pp. 7-15 through 7-16; see id., § 7.02[3], p. 7-29; see also *Olmstead* v. *Camp*, 33 Conn. 532, 546 (1866) (''[p]ublic use' may . . . mean public usefulness, utility or advantage, or

what is productive of general benefit''). Under this more expansive interpretation of the term, the United States Supreme Court has held that the scope of eminent domain is ''coterminous with the scope of a sovereign's police powers.''[7] *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 240, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984). Historically, the most dramatic example of takings under a broad construction of the public use clause is the acquisition of property for the redevelopment of blighted areas, whereby the stated public purpose is to reduce the menace to the public health, safety, morals and welfare of the community by ''eliminating substandard, insanitary, deteriorated, deteriorating, slum or blighted conditions . . . [and] preventing recurrence of such conditions in the area . . . .'' General Statutes § 8-124.

Private economic development pursuant to chapter 132 of the General Statutes can be distinguished in at least two important respects from previous notions of public use. First, traditional takings almost always are followed by an immediate or reasonably foreseeable public benefit. See, e.g., *Gohld Realty Co.* v. *Hartford*, 141 Conn. 135, 138–39, 104 A.2d 365 (1954) (condemnation of properties followed soon thereafter by relocation of project area residents and demolition of substandard structures); *Olmstead* v. *Camp*, supra, 33 Conn. 551 (land taken by flooding contemporaneously with continuous operation of grist mill). In contrast, large-scale, private economic development projects authorized under chapter 132 of the General Statutes may not be completed for decades. In the present case, the municipal development plan (development plan), by its own terms, will be in full force and effect for a period of thirty years.[8] Accordingly, there may be much more uncertainty as to when and how the public may benefit when property is condemned for private economic development.

Second, the public benefit derived from a conventional taking typically flows from the actions of the taking party. See, e.g., *Hawaii Housing Authority* v. *Midkiff*, supra, 467 U.S. 229 (public benefit achieved as result of housing authority's transfer of title from lessors to lessees); *Gohld Realty Co.* v. *Hartford*, supra, 141 Conn. 142 (public benefit achieved by redevelopment agency's elimination of substandard structures and other evidence of blight on condemned properties); *Olmstead* v. *Camp*, supra, 33 Conn. 551 (public benefit achieved by private property owner's operation of grist mill). In contrast, takings for private economic development require the taking party to transfer ownership of the condemned land to private developers who subsequently execute a plan to accomplish the public purpose. Because public agencies must work hand in glove with private developers to achieve plan objectives, the taking agency may employ the power to favor purely private interests. See, e.g., *Southwestern Illinois Devel-*

opment Authority v. *National City Environmental, LLC*, 199 Ill. 2d 225, 240–41, 768 N.E.2d 1 (taking of property for expansion of private parking facility deemed not for public purpose), cert. denied, 537 U.S. 880, 123 S. Ct. 88, 154 L. Ed. 2d 135 (2002). The trial court in the present case recognized this problem when it stated in its memorandum of decision that ''powerful business groups or companies [may] exercise their influence to gain their ends with . . . little corresponding benefit to the public.'' The majority makes a similar observation. See part II A of the majority opinion (recognizing ''potential for abuse of the eminent domain power'').

A direct comparison of the statutory provisions on redevelopment and the corresponding provisions pertaining to private economic development illustrates the unique constitutional problem that may arise when the taking of private property for a public purpose also bestows significant benefits on private developers. Under chapter 130 of the General Statutes,[9] the redevelopment scheme, an area in need of revitalization is identified, properties are acquired, structures are demolished as necessary to eliminate blighted conditions and site improvements are made prior to the disposition of the cleared and improved land. See generally General Statutes § 8-124 et seq. The declaration of public policy contained in chapter 130 expressly provides that the disposition of property is ''incidental to'' the elimination of blight and the activities surrounding the elimination of blight enumerated in the statute,[10] which are ''public uses and purposes for which public money may be expended and the power of eminent domain exercised . . . .'' General Statutes § 8-124. Consequently, the public benefit in a redevelopment project is clearly defined and well understood. It also can be accomplished relatively quickly and with a high degree of certainty because a public agency, funded with public money, is charged with bringing it about.

In contrast, municipal development projects undertaken pursuant to chapter 132 of the General Statutes involve the expenditure of funds to acquire and to improve land, water and vacated commercial plants for the far more abstract and ill-defined goals of promoting the ''continued growth of industry and business within the state'' and ''meet[ing] the needs of industry and business . . . .''[11] General Statutes § 8-186. The statutory scheme contains no clear description of how those goals are to be accomplished, except by conveyance of the properties to private parties. Disposition of the properties is thus essential, rather than incidental, to achieving the public purpose. Although the properties, once conveyed, are subject to land use restrictions and, in some cases, oversight by state agencies, there is no *statutory* assurance that the public will benefit from the development to follow or that the development even will occur. As the trial court observed, ''[t]he very nature

of economic development-type projects is such that their accomplishment [is] based on financial predictions and possibilities that cannot be certain and [is] dependent on equally uncertain competitive factors.''

The underlying uncertainty as to whether the public benefit will be achieved as planned in private economic development projects is expressly recognized in General Statutes § 8-200 (b). That statute provides that a development plan may be abandoned within three years of its approval, and that any properties acquired thereunder may be conveyed free of the plan's restrictions if they cannot be conveyed to a private party at fair market value pursuant to the plan.[12] General Statutes § 8-200 (b). The statutory scheme dealing with redevelopment contains no similar provision, and need not, because the public purpose of eliminating blight is accomplished at the time of the taking. Whatever occurs thereafter is irrelevant to the takings issue. Accordingly, under chapter 132 of the General Statutes, the possibility that a project may be abandoned after properties have been taken by eminent domain, when combined with the inherent uncertainty that the expected public benefit will be achieved in any particular case, raises serious concerns regarding the limits of the takings power that cannot be ignored.

Recent developments in the law of certain jurisdictions that permit condemnations for private economic development have caused one commentator to remark that most observers believe that the public use limitation on the power of eminent domain is a ''dead letter.'' T. Merrill, ''The Economics of Public Use,'' 72 Cornell L. Rev. 61, 61 (1986). Critics question the propriety of condemning private property merely because a newly proposed use promises a greater public benefit than an existing use. See, e.g., *Poletown Neighborhood Council* v. *Detroit*, 410 Mich. 616, 647, 676, 304 N.W.2d 455 (1981) (Ryan, J., dissenting). They note that ''[a]ny business enterprise produces benefits to society at large,'' and, consequently, ''there is virtually no limit to the use of condemnation to aid private businesses.'' Id., 644 (Fitzgerald, J., dissenting). Thus, it is not surprising, as the majority concedes, that many ''express alarm at what they consider to be a situation rife with the potential for abuse of the eminent domain power.'' Part II A of the majority opinion. In its memorandum of decision, the trial court acknowledged the danger of rendering the takings clauses of the federal and state constitutions meaningless and ignoring the private values of home and property ''by allowing free rein to expanding capital markets.'' Ironically, the controversy has developed notwithstanding the existence of well established law advising that ''[t]he authority to condemn is to be strictly construed in favor of the owner and against the condemnor.'' *Pequonnock Yacht Club, Inc.* v. *Bridgeport*, supra, 259 Conn. 601; accord *State* v. *McCook*, 109 Conn. 621, 630, 147 A. 126 (1929); see also 3 P. Nichols, supra,

§ 9.02[3], pp. 9-19 through 9-20.

Growing fears regarding the potential abuse of the eminent domain power cannot be dismissed as idle speculation on the part of commentators. As municipalities increasingly struggle to provide public services with limited financial resources, governmental authorities are encouraging more intensive economic development to generate additional tax revenue, to create new jobs and to jump start local economies. Accordingly, there is a gathering storm of public debate as to whether the use of eminent domain to acquire property for private economic development in nonblighted areas is justified. I believe that such debate is essential to clarify the role of the legislature in making determinations of public use and the corresponding role of the courts in safeguarding the rights of private property owners who fear that the takings power will be used solely to benefit private interests. The complementary roles of the legislature and the judiciary as interpreters and guardians of the takings power thus require further examination.

II

JUDICIAL DEFERENCE TO LEGISLATIVE DETERMINATIONS OF PUBLIC USE

A

Determinations by State Legislatures

The suggestion frequently is made that courts have abdicated their role as interpreter of the law by showing unusual deference to legislative determinations of public use. See, e.g., S. Jones, Note, ''Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment,'' 50 Syracuse L. Rev. 286, 301 (2000). Proper consideration of the issue, however, requires that a distinction be made between public use determinations by state legislative bodies and determinations by local public authorities that specific properties should be condemned.

It is well established that judicial deference to determinations of public use by state legislatures is appropriate. E.g., *Berman* v. *Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954) (''[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive''); see *Hawaii Housing Authority* v. *Midkiff*, supra, 467 U.S. 241. The logic behind this principle is that the power to take property is a function of the ''principle of consent inherent in a representative government.'' M. Harrington, '' 'Public Use' and the Original Understanding of the So-Called 'Takings' Clause,'' 53 Hastings L.J. 1245, 1247 (2002). ''[L]egislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.'' *Hawaii Housing Authority* v. *Midkiff*, supra, 244.

Nevertheless, judicial deference to legislative declarations of public use does not require complete abdication of judicial responsibility. Id., 240 (''There is . . . a role for courts to play in reviewing a legislature's judgment of what constitutes a public use . . . . But . . . it is an extremely narrow one.'' [Internal quotation marks omitted.]); *Olmstead* v. *Camp*, supra, 33 Conn. 551 (''[t]he sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the courts''). In fact, the last Connecticut case to address the issue recognized that the question of ''[w]hether the purpose for which a statute authorizes the condemnation of property constitutes a public use is, in the end, a judicial question to be resolved by the courts . . . but, in resolving it, great weight must be given to the determination of the legislature.'' (Citation omitted.) *Gohld Realty Co.* v. *Hartford*, supra, 141 Conn. 141. Accordingly, I agree with the majority that judicial deference to determinations of public use by state legislative bodies is appropriate, but emphasize that the courts are empowered to resolve disputes when such determinations are challenged.

B

Determinations by Local Public Agencies

The majority notes, with respect to the decisions of local public authorities regarding specific condemnations, that ''[t]he determination of what property is necessary to be taken in any given case in order to effectuate the public purpose is, under our constitution, a matter for the exercise of the legislative power.'' (Internal quotation marks omitted.) Part IV A of the majority opinion; accord *Gohld Realty Co.* v. *Hartford*, supra, 141 Conn. 146. The majority further notes that Connecticut courts typically defer to the legislative determination of necessity and limit their review to whether the decision of the taking agency was unreasonable, had been made in bad faith or constituted an abuse of power. See part IV A of the majority opinion; see also *Gohld Realty Co.* v. *Hartford*, supra, 146; *Adams* v. *Greenwich Water Co.*, 138 Conn. 205, 213–14, 83 A.2d 177 (1951); *Water Commissioners* v. *Johnson*, 86 Conn. 151, 159, 84 A. 727 (1912).

For example, when a local legislative body determines that a new road is required, the court must defer to the local determination as to where the prospective road should be located and which properties should be taken to accomplish that purpose. In the absence of unreasonableness, fraud, or abuse of power, the determination regarding the location of the prospective road falls within the discretion of the local legislative body. The fact that there may be another possible road location that would accomplish the same objective will not

avail a property owner who seeks to challenge the taking because local legislative determinations concerning what constitutes a public use and what properties need to be taken to effectuate that use are entitled to judicial deference. I agree with the majority with respect to these principles.

Where I part company from the majority is on the issue of whether the *actual* use to be implemented will serve the public purpose described in the development plan at issue in the present case. The trial court and the majority frame the issue as whether there are reasonable assurances of a future public use. They treat the matter as one of control over development of the property *following* its disposition and focus on the statutory and contractual constraints in place to ensure that private sector participants will adhere to the provisions of the development plan. The majority concludes that the terms of the development plan regarding parcel-specific uses and continuing state oversight during the development process will provide sufficient assurances that the properties will be developed in accordance with the plan's objectives.

I submit that such an analysis must focus not only on the possible statutory, contractual and planning constraints that would ensure a public use, but also on the *temporal* question of whether there is any reasonable prospect that the expected development will, *in fact*, occur. Moreover, in determining whether the actual use to be implemented will serve a public purpose, I would follow the standard established in two earlier cases and grant no deference to the legislative authority because such a determination lies within the province of the trial court. See, e.g., *Connecticut College* v. *Calvert*, supra, 87 Conn. 428.

In *Connecticut College*, this court ''accept[ed] and endors[ed] the legislative declaration that the higher education of women is in its nature a public use'' for which the eminent domain power may be exercised. Id. The court reserved for itself, however, the authority to resolve questions regarding the *implementation* of the claimed public use in any specific case. See id., 423–24, 428. ''It is for the legislature to say whether any given use is governmental in its nature or not, subject to review by the courts only in exceptional cases of extreme wrong . . . . But the question whether in any given instance the use is or will be *administered* as a public or as a private use, is *a question which must of necessity be determined by the courts in accordance with the facts of the particular case in hand*.'' (Emphasis added.) Id., 428.

In making the foregoing distinction, the court relied on *Evergreen Cemetery Assn.* v. *Beecher*, supra, 53 Conn. 551, in which the court sustained a demurrer to a petition for the appointment of appraisers in condemnation proceedings brought under state law concerning

the taking of property for the establishment of cemeteries. Id., 552–53; see *Connecticut College* v. *Calvert*, supra, 87 Conn. 428–29. The court in *Connecticut College* noted: ''[I]n the course of its opinion [the court in *Evergreen Cemetery Assn.*] pointed out that although the establishment of cemeteries was a use which was public in its nature . . . the petition was insufficient because it did not appear that the petitioner's cemetery was one in which the public had or could acquire the right to bury their dead . . . .'' *Connecticut College* v. *Calvert*, supra, 429; see *Evergreen Cemetery Assn.* v. *Beecher*, supra, 553. That precedent, which the majority, sub silentio, overrules today, stands for the proposition that a trial court charged with determining whether the *actual* use of the property taken will in fact be for a public or private purpose need not defer to the views of the local legislative body.[13] See *Connecticut College* v. *Calvert*, supra, 428.

Connecticut is not alone in concluding that courts may inquire into the *actual* purpose for which property is to be condemned, even when it is claimed that the condemnation is for a public purpose. See 27 Am. Jur. 2d 112–13, Eminent Domain § 555 (1996). In *State ex rel. Tacoma Industrial Co.* v. *White River Power Co.*, 39 Wash. 648, 82 P. 150 (1905), the respondent power company was authorized to build and operate water-generated power plants that supply electricity to, inter alia, public users in designated cities in the state of Washington. Id., 661. The power company filed a petition seeking to condemn certain private property. Id. At a preliminary hearing on the matter, the lower court found that the proposed use was public in nature and ordered a jury impaneled to assess the damages owed to the property owners. Id. In reviewing the lower court's order, the Washington Supreme Court concluded that ''the grounds of public benefit upon which the taking is proposed are vague, and the use which the public is to have of the property, or how the public is to be benefited by the use of it . . . is by no means fixed and definite. . . .

''It is not claimed that there is a present demand for the 50,000 electrical horse power. It is not claimed that the [power company] has a franchise to enter any of the cities or towns mentioned, or that it will or can obtain one. It does not appear that there are any street or other railways to utilize its product. It is not under contract or obligation to furnish electricity to any person, or for any purpose.'' Id., 667. The court determined that the proposed condemnation was not for a public purpose and, therefore, reversed the lower court's order. Id., 670–71.

Significantly, the Washington Supreme Court did not rely merely on the stated purpose of the taking in reaching its conclusion but, rather, examined all of the available evidence to determine whether the actual use

would, in fact, be for a public or private purpose. See id., 667–71. Many other courts have adopted similar reasoning. See *Kessler* v. *Indianapolis*, 199 Ind. 420, 426, 157 N.E. 547 (1927) (courts not limited to consideration of whether use described in condemnation proceedings is public but may consider ''surrounding facts and circumstances tending to show what is the *actual, principal and real use to be made* of the property'' [emphasis added]); see also *Walker* v. *Shasta Power Co.*, 160 F. 856, 860 (9th Cir. 1908) (corporation's right of eminent domain is not tested solely by description of public uses and private purposes contained in articles of incorporation, but may be determined ''by evidence aliunde showing the *actual* purpose in view'' [emphasis added]); *Wilton* v. *St. Johns*, 98 Fla. 26, 47, 123 So. 527 (1929) (''courts have the ultimate power and duty to determine . . . whether . . . [condemnation in any given case] is *in fact* for [a] public or a private use'' [emphasis added]); *Brown* v. *Gerald*, 100 Me. 351, 357, 61 A. 785 (1905) (*actual purpose* of taking authorized by power company's charter was ''open to judicial inquiry''); *Kirkwood* v. *Venable*, 351 Mo. 460, 466–68, 173 S.W.2d 8 (1943) (inasmuch as evidence indicated that condemned property was needed for public park, was suitable for public park and would be used by city for public park, court determined that condemnation was for public use); *Kansas City* v. *Liebi*, 298 Mo. 569, 591, 593, 252 S.W. 404 (1923) (evidence established that protective ordinance restricting use of and condemning rights to property would prevent overcrowding and make city more attractive, thereby promoting health, general welfare, growth and general prosperity of city, and that considerable part of community would *actually use or benefit from* contemplated improvement); *Charlotte* v. *Heath*, 226 N.C. 750, 754, 756, 40 S.E.2d 600 (1946) (evidence established that intended use of right-of-way allowing property owners living outside city limits to connect to sewer lines *would be* public); *State ex rel. Harlan* v. *Centralia-Chehalis Electric Ry. & Power Co.*, 42 Wash. 632, 639–40, 85 P. 344 (1906) (in determining question of public use in case in which power company sought to condemn land, court was ''not confined to . . . the description of those objects and purposes as set forth in the [company's] articles of [incorporation], but [could consider] evidence aliunde . . . showing the *actual* business proposed to be conducted'' [emphasis added; internal quotation marks omitted]); cf. *Linggi* v. *Garovotti*, 45 Cal. 2d 20, 27, 286 P.2d 15 (1955) (private party authorized by statute to acquire easement by eminent domain for sewer connection to existing public sewer system must make strong evidentiary showing establishing that taking *will* benefit public). Accordingly, judicial review to determine whether a particular use will *in fact* be for a public or private purpose has been an accepted practice for nearly a century.

The importance of judicial review in determining whether property taken by eminent domain for private economic development will in fact be used for a public purpose cannot be underestimated. Economic growth is a far more indirect and nebulous benefit than the building of roads and courthouses or the elimination of urban blight. Indeed, plans for future hotels and office buildings that purportedly will add jobs and tax revenue to the economic base of a community are just as likely to be viewed as a bonanza to the developers who build them as they are a benefit to the public. Furthermore, in the absence of statutory safeguards to ensure that the public purpose will be accomplished, there are too many unknown factors, such as a weak economy, that may derail such a project in the early and intermediate stages of its implementation.

The economic conditions that existed when this court rendered its earliest decision regarding a taking for private economic development;[14] *Olmstead* v. *Camp*, supra, 33 Conn. 532; were very different in nature from the economic conditions that now define our world. The petitioner in that case, Samuel E. Olmstead, was a grocery merchant in a manufacturing community in which the public relied on Olmstead's store for all of their supplies, including ground feed for pigs, poultry, cows and other domestic animals. Id., 536 (reporter's case summary). Olmstead owned land upon which he had erected a water mill ''for the purpose of grinding [the] flour and feed [that were sold at his store] and for doing custom work such as is usually done in a country mill . . . .''[15] Id., 533 (reporter's case summary). The land also contained a mill pond and a dam. Id. Olmstead found it necessary to raise the dam and flood the property of the respondent, Samuel R.P. Camp, in order to ensure the proper operation of the mill. Id. Olmstead petitioned the court under the Flowage Act of 1864[16] to grant him the right to flood Camp's land and to determine the damages owed. Id., 532 (reporter's case summary).

A court-appointed committee concluded that the flooding of Camp's property was for a public use. Id., 534 (reporter's case summary). The committee determined that Olmstead could raise the dam, had a right to keep and to maintain it permanently and, consequently, owed certain damages to Camp. Id. Camp appealed from the committee's decision.

On appeal, this court upheld the committee's decision and found in favor of Olmstead. Id., 552. The court characterized the issue to be decided as one ''involving [the] rights of property guaranteed by the fundamental law, and . . . the interests of business and the prosperity of the state.'' Id., 545. The court concluded: ''From the first settlement of the country grist-mills of this description have been in some sense peculiar institutions, invested with a general interest. Towns have pro-

cured them to be established and maintained. The state has regulated their tolls. In many instances they have been not merely a convenience, but almost a necessity in the community.'' Id., 552.

The court thus observed that grist mills played an integral part in the subsistence of the local community because they ground the feed and flour upon which the economic lifeblood of the community depended. The court described the proper functioning of grist mills not only as consonant with the public interest, but, in certain instances, as essential to the community's continued viability. Accordingly, the raising of the height of the dam and the taking of Camp's property were akin to the taking of property today for use by a public utility. See, e.g., *Connecticut College* v. *Calvert*, supra, 87 Conn. 426 (characterizing public use for which land was taken in *Olmstead* as ''governmental'' in nature because of great advantage to community). In stark contrast, the private development contemplated under chapter 132 of the General Statutes only can be described as ''governmental'' in nature if the benefits of increased tax revenue and new jobs are actually realized.

I therefore submit that, just as the taking of non-blighted property in a blighted area is subject to additional scrutiny to determine whether the taking is ''essential'' to the redevelopment plan; see *Pequonnock Yacht Club, Inc.* v. *Bridgeport*, supra, 259 Conn. 605; so, too, should a heightened standard of judicial review be required to ensure that the constitutional rights of private property owners are protected adequately when property is taken for private economic development under chapter 132 of the General Statutes. Justice demands no less.

C

Heightened Judicial Review

Other jurisdictions with similar concerns have attempted to create more exacting standards of judicial scrutiny in the context of takings for private economic development. In *Poletown Neighborhood Council* v. *Detroit*, supra, 410 Mich. 616, in which property was to be acquired for the construction of a General Motors assembly plant; id., 628; the majority adopted a standard of heightened scrutiny requiring substantial proof of a clear and significant public benefit in determining whether the contemplated use constituted a legitimate public purpose. Id., 634–35. Finding that standard insufficient, one of the two dissenting justices in *Poletown Neighborhood Council* proposed a stricter standard of review that would require a showing of ''1) *public* necessity of the extreme sort, 2) continuing accountability to the *public*, and 3) selection of land according to facts of independent *public* significance.'' (Emphasis in original.) Id., 674–75 (Ryan, J., dissenting). More

recently, the suggestion has been made that property rights should be elevated to the status of a ''fundamental'' right and that a strict scrutiny analysis should be conducted when property is taken for private economic development. See S. Jones, Note, supra, 50 Syracuse L. Rev. 314.

In its memorandum of decision, the trial court in the present case declared that ''[t]here are, in fact, limits on the constitutional propriety of using the power of eminent domain for . . . 'pure economic development . . . .' '' The trial court rejected a standard of heightened scrutiny, however, on the basis of *Bugryn* v. *Bristol*, 63 Conn. App. 98, 774 A.2d 1042, cert. denied, 256 Conn. 927, 776 A.2d 1143, cert. denied, 534 U.S. 1019, 122 S. Ct. 544, 151 L. Ed. 2d 422 (2001), in which the Appellate Court stated that ''our Supreme Court has not applied a heightened standard of review in previous disputes concerning the nature of a taking . . . .'' Id., 102 n.7. The present case, therefore, provides this court with an opportunity to consider the heightened standard of judicial review that the court in *Bugryn* identified as lacking.

I submit that judicial review of the condemnations in the present case should consist of a four step process in which the burden of proof is shifted between the respective parties at various stages in the analysis. See, e.g., *Potter* v. *Chicago Pneumatic Tool Co.*, 241 Conn. 199, 235–37, 694 A.2d 1319 (1997) (setting forth evidentiary framework through which burden of proof is shifted between parties in product liability action). Judicial review should begin with consideration of whether the statutory scheme is facially constitutional. In light of well established judicial deference to determinations of public use by state legislative bodies, the party opposing the taking should bear the initial burden of proving that the contemplated public use of private economic development is unconstitutional. Should that party succeed in meeting its difficult burden, the inquiry should end and no taking should be permitted.

If the court concludes, however, that the proposed economic development is a valid public use, the party opposing the taking should bear the additional burden of proving, in accordance with the deferential standard of review afforded to legislative determinations of public use, that the primary intent of the particular economic development plan is to benefit private, rather than public, interests. Should that burden also be met, any taking pursuant to the plan should be deemed unconstitutional and the inquiry should end.

In the event that the court concludes that the plan is constitutional, the burden should shift to the taking party to prove that the specific economic development contemplated by the plan will, in fact, result in a public benefit.[17] ''[T]he burden [of proof] properly rests upon the party who must establish the affirmative proposi-

tion, to whose case the fact in question is essential, who has the burden of pleading a fact, who has readier access to knowledge about the fact, or whose contention departs from what would be expected in the light of everyday experience." *Albert Mendel & Son, Inc.* v. *Krogh*, 4 Conn. App. 117, 124 n.6, 492 A.2d 536 (1985). Accordingly, shifting the burden of proof is appropriate at this point in the inquiry because the taking party has greater access than the opposing party to information regarding developer interest in the properties and the progress of negotiations relating to the disposition of the properties.

The level of proof necessary to meet the burden of establishing that the anticipated economic development will result in a public benefit should be clear and convincing evidence. The clear and convincing standard traditionally applies in civil cases "to protect particularly important individual interests . . . ." (Internal quotation marks omitted.) *State* v. *Rizzo*, 266 Conn. 171, 211 n.22, 833 A.2d 363 (2003), quoting *Addington* v. *Texas*, 441 U.S. 418, 424, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). "[I]n cases governed by this burden, because society regards the individual interests involved to be very important, and because society imposes most of the risk of error on the party so burdened, we also require a very high degree of subjective certitude for the burden to be satisfied: the fact finder must be persuaded to a high degree of probability."[18] *State* v. *Rizzo*, supra, 211 n.22. In other words, the party must prove that "the evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. . . . [The clear and convincing standard is] a very demanding standard that should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." (Citation omitted; internal quotation marks omitted.) *Durso* v. *Vessichio*, 79 Conn. App. 112, 123, 828 A.2d 1280 (2003).

In civil cases involving property disputes, differing levels of proof are required depending on the type of claim under consideration. For example, clear and convincing evidence is required to prove a claim that land has been taken by adverse possession. E.g., *Wildwood Associates, Ltd.* v. *Esposito*, 211 Conn. 36, 42, 557 A.2d 1241 (1989). This is because title becomes absolute in the adverse possessor if that standard of proof is satisfied. Takings for private economic development resemble takings by adverse possession because property owners in both situations lose title to their land. Accordingly, it is consistent with existing law to place the burden on the taking party and to require that the standard of proof be clear and convincing evidence when property is taken by eminent domain for private economic development.

I also believe that the clear and convincing standard is compelled in this context because of the tremendous social costs of the takings, costs that are difficult to quantify but that are nonetheless real. The fact that certain families have lived in their homes for decades and wish to remain should not, in my view, be summarily dismissed as part of a cost-benefit analysis typically performed by the legislature. At a minimum, the distress suffered by the plaintiffs because of their relocation to another neighborhood that lacks the same comforting familiarity and associations as their old neighborhood should be considered as additional justification for a higher level of proof. I therefore believe that the best way to protect the rights of property owners in cases involving takings for private economic development is to require that the taking party prove by clear and convincing evidence that development prospects are such that the condemned property will, in fact, be used for the intended public purpose.

Courts and legislatures have employed the clear and convincing standard of proof in other constitutional, legislative and common-law contexts involving important questions of fact. *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 796, 700 A.2d 1108 (1997). For example, when constitutional rights are at stake, as in the present case, a nonparent petitioning for visitation pursuant to General Statutes § 46b-59 must prove the requisite relationship and the harm that would result from the denial of visitation by clear and convincing evidence in order to protect the parents' liberty interests in the care, custody and control of their children. *Roth* v. *Weston*, 259 Conn. 202, 228, 232, 789 A.2d 431 (2002). "[D]ue process [also] requires [that] the clear and convincing test be applied to the termination of parental rights because it is the *complete severance* by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent . . . ." (Emphasis in original.) Id., 231. In still another context, we have held that, in order to protect a criminal defendant's constitutional right of confrontation, the state must prove "a compelling need for excluding the defendant from the witness room during the videotaping of a minor victim's testimony"; *State* v. *Jarzbek*, 204 Conn. 683, 704, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988); by establishing, by clear and convincing evidence, that the defendant's presence would seriously call into question the trustworthiness of the victim's testimony. Id., 704–705. I submit that the taking of private property for private economic development is equally deserving of this very demanding standard of proof for all of the foregoing reasons,[19] especially in light of the fact that such projects may be abandoned within three years of their approval if market conditions change and the plan of development cannot be implemented. See General Statutes § 8-200 (b).

The trial court's subsidiary findings as to the actual future use of the properties taken are findings of fact that should not be overturned unless they are clearly erroneous. See, e.g., *State* v. *Pinder*, 250 Conn. 385, 420, 736 A.2d 857 (1999); *State* v. *Atkinson*, 235 Conn. 748, 759, 670 A.2d 276 (1996). In light of the constitutional interests at stake, however, the issue of whether the properties actually will be used for a public purpose is an ultimate issue that should be reviewed by this court on the basis of its own ''scrupulous examination'' of the record. *State* v. *Pinder*, supra, 420. This is necessary to ensure that judicial review ''comports with constitutional standards of due process.'' (Internal quotation marks omitted.) *State* v. *Hafford*, 252 Conn. 274, 298, 746 A.2d 150 (trial court's finding that confession was voluntary closely scrutinized to protect defendant's constitutional rights), cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000).

Finally, if the trial court concludes that the condemned property will be used for a public purpose, it should be incumbent upon the party opposing the taking, on the basis of the deferential standard of review that we accord to legislative determinations of public use, to prove that the specific condemnation at issue is not reasonably necessary to implement the plan.

The shifting of the burden of proof, as suggested, is not unusual in circumstances in which we have deemed constitutional interests to be extremely significant. For example, a burden shifting analysis has been adopted in employment discrimination cases. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802–805, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (after complainant establishes prima facie case of discrimination, employer must articulate legitimate, nondiscriminatory reasons for adverse employment action and complainant then must prove employer engaged in intentional discrimination); see also *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142–43, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); *Board of Education* v. *Commission on Human Rights & Opportunities*, 266 Conn. 492, 505–506, 832 A.2d 660 (2003). The burden of proof also is shifted to the decision-making party in affordable housing land use appeals. General Statutes § 8-30g (in administrative appeal from decision to deny application, burden on local commission to prove that decision is supported by sufficient evidence in record); see *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, 256 Conn. 674, 733, 780 A.2d 1 (2001); see also *West Hartford Interfaith Coalition, Inc.* v. *Town Council*, 228 Conn. 498, 514, 636 A.2d 1342 (1994) (legislature ''placed the burden of proof on the commission . . . and not, as in traditional land use appeals, on the applicant'' [internal quotation marks omitted]). Claims that a prosecutor has used peremptory challenges in violation of the equal protection clause are treated in a similar manner. See,

e.g., *Batson* v. *Kentucky*, 476 U.S. 79, 97–98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (following defendant's prima facie showing that prosecutor exercised peremptory challenge on basis of race, burden shifts to prosecutor to articulate race-neutral explanation for striking juror after which burden shifts to defendant to show that prosecutor's articulated reasons are insufficient or merely pretextual); see also *State* v. *Dehaney*, 261 Conn. 336, 344–45, 803 A.2d 267 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003). Harmless error analysis involves a comparable approach when the alleged impropriety is of constitutional magnitude in that the burden to prove that the constitutional error was harmless beyond a reasonable doubt rests with the state. E.g., *State* v. *Francis*, 267 Conn. 162, 188, 836 A.2d 1191 (2003); *State* v. *Cavell*, 235 Conn. 711, 720, 670 A.2d 261 (1996). Accordingly, the adoption of a burden shifting analysis in cases involving the taking of property for private economic development is consistent with our approach in other contexts in which a constitutional right is at stake.

The adoption of a burden shifting analysis also is consistent with the takings procedure followed in other jurisdictions that do not place the burden of attacking a routine taking on the property owner, as Connecticut does. See generally 27 Am. Jur. 2d 45, supra, § 479. General Statutes § 48-23 provides in relevant part: ''When, under the provisions of any statute authorizing the condemnation of land in the exercise of the right of eminent domain, an appraisal of damages has been returned to the clerk of the Superior Court . . . and when the amount of appraisal has been paid or secured to be paid or deposited with the State Treasurer . . . any judge of the Superior Court may, upon application and proof of such payment or deposit, order such clerk to issue an execution commanding a state marshal to put the parties entitled thereto into peaceable possession of the land so condemned.''[20] The procedure for taking property by eminent domain in Connecticut is less hospitable to the property owner than in most other jurisdictions because ''the party to whom is delegated the right to determine whether particular land is necessary for a public use need only allege in his application to the court that he has so determined, leaving the burden of attack upon the adverse party.'' *Bridgeport Hydraulic Co.* v. *Rempsen*, 124 Conn. 437, 442, 200 A. 348 (1938); see also *Hall* v. *Weston*, 167 Conn. 49, 63, 355 A.2d 79 (1974) (''burden of attacking [town's statutory] authority [to condemn land] rested upon the [property owner]''). The primary means available to challenge the condemnation are: (1) an action to enjoin the taking; e.g., *Bridgeport Hydraulic Co.* v. *Rempsen*, supra, 442; or (2) a request that the court review the statement of compensation filed by the taking party. See General Statutes § 8-132.

In contrast, the most common method of condemning

land in other jurisdictions is for the taking party to file in court a petition to take the property. 27 Am. Jur. 2d 45, supra, § 479. After the property owner and all other persons having an interest in the land sought to be condemned are joined in the action, a hearing is held at which the condemnor first must establish "its right to condemn the land, and, in some [jurisdictions], the necessity of the taking." Id. If the court is satisfied that the taking is justified, damages are assessed and a final award is rendered. Id. In jurisdictions that follow this procedure, the burden, therefore, is not on the property owner to attack the condemnation but, rather, on the condemnor to establish its right to condemn. See id. A similar approach has been adopted for use in the federal courts. Pursuant to rule 71A of the Federal Rules of Civil Procedure, the condemning party files a complaint identifying the property to be taken. Fed. R. Civ. P. 71A (c) (2). If the property owner objects to the taking, he may file an objection or defense, and the issue subsequently may be tried to the court or a jury. Fed. R. Civ. P. 71A (e) and (h). Accordingly, shifting the burden of proof, as proposed in this opinion, is consistent with the allocation of the burden of proof in other jurisdictions.

III

JUDICIAL REVIEW OF THE CONDEMNATIONS

Applying the foregoing principles to the facts of this case, I agree with the majority that the legislative determination of public use, as expressed in chapter 132 of the General Statutes, is constitutional. I also agree that the primary purpose of the takings is to benefit the public. I do not agree, however, that the condemnations are constitutional in light of the fact that the record does not contain clear and convincing evidence to establish that the properties actually will be developed to achieve a public purpose. The foregoing conclusion being dispositive of this appeal, the court need not reach the issue of whether the condemnations are reasonably necessary to implement the development plan.

A

The Facial Constitutionality of Chapter 132 of the General Statutes

The first issue to be addressed under the proposed standard of review is whether chapter 132 of the General Statutes—§ 8-186 in particular—is facially constitutional insofar as it authorizes the use of the eminent domain power for private economic development. The majority explains that its analysis of this issue will be guided by the principle that the challenging party must prove the unconstitutionality of the statute beyond a reasonable doubt; e.g., *State* v. *Ball*, 260 Conn. 275, 280–81, 796 A.2d 542 (2002); and that it will review the statutory scheme pursuant to the well settled standard of substantial deference to the legislature's determination of public use. See part II A of the majority opinion.

After examining the relevant case law of our state, our sister states and the United States Supreme Court, the majority ultimately concludes that private economic development projects, created and implemented pursuant to chapter 132 of the General Statutes, which create new jobs, increase tax revenue, and contribute to urban revitalization, satisfy the takings clauses of the federal and state constitutions. See id.

I agree with the conclusion of the majority but do not agree entirely with the majority's analysis. Although the plaintiffs must prove the unconstitutionality of the statutory scheme beyond a reasonable doubt, the proper standard for reviewing the underlying claim is whether the state legislature ''*rationally could have believed* that the [statute] would promote its objective.'' (Emphasis in original.) *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 672, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981); accord *Hawaii Housing Authority* v. *Midkiff*, supra, 467 U.S. 242; see also *Housing Authority* v. *Higginbotham*, 135 Tex. 158, 165, 143 S.W.2d 79 (1940) (legislative declaration of particular use is ''binding upon the courts unless such use is clearly and palpably of a private character'' [internal quotation marks omitted]); 26 Am. Jur. 2d 503, Eminent Domain § 61 (1996).

In *Hawaii Housing Authority*, the United States Supreme Court declared that ''[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers.'' *Hawaii Housing Authority* v. *Midkiff*, supra, 467 U.S. 240. As was previously noted; see footnote 7 of this opinion; the police power is commonly understood as ''the state's power to preserve and to promote the general welfare and . . . whatever affects the peace, security, safety, morals, health, and general welfare of the community . . . .'' 16A Am. Jur. 2d 251, Constitutional Law § 315 (1998); see also *Reid* v. *Zoning Board of Appeals*, 235 Conn. 850, 855, 670 A.2d 1271 (1996); *Raybestos-Manhattan, Inc.* v. *Planning & Zoning Commission*, 186 Conn. 466, 471, 442 A.2d 65 (1982). Guided by the principle of judicial deference to the legislative determination of public use, I therefore conclude, like the majority, that takings for private economic development are facially constitutional because Connecticut and federal courts have embraced, for more than a century, a broad construction of the public use clauses of the federal and state constitutions.

Almost 140 years ago, this court expressly rejected a narrow interpretation of the term ''public use'' as ''possession, occupation . . . [or] direct enjoyment . . . by the public''; *Olmstead* v. *Camp*, supra, 33 Conn. 546; and determined, instead, that the term means ''public usefulness, utility or advantage, or what is productive of general benefit . . . .'' Id. The court in *Olmstead* also advocated an interpretation of public use that could include private economic development when it made

the following remarks about the far-reaching regional, and even national, effects of the water powered grist mill: ''It would be difficult to conceive a greater public benefit than garnering up the waste waters of innumerable streams and rivers and ponds and lakes, and compelling them with a gigantic energy to turn machinery and drive mills, and thereby build up cities and villages, and extend the business, the wealth, the population and the prosperity of the state. It is obvious that those sections of the country which afford the greatest facilities for the business of manufacturing and the mechanic arts, must become the workshops and warehouses of other vast regions not possessing these advantages . . . . It is of incalculable importance to this state to keep pace with others in the progress of improvements, and to render to its citizens the fullest opportunity for success in an industrial competition.'' Id., 551.

The court's broad definition of public use in *Olmstead* was reaffirmed in *Gohld Realty Co.* v. *Hartford*, supra, 141 Conn. 141 (''public use means 'public usefulness, utility or advantage, or what is productive of general benefit' '), and later echoed in *Katz* v. *Brandon*, supra, 156 Conn. 532–33 (''The modern trend of authority is to expand and liberally construe the meaning of public purpose. The test of public use is . . . the right of the public to receive and enjoy its benefit.'' [Internal quotation marks omitted.]).

In *Hawaii Housing Authority*, the United States Supreme Court determined that a compensated taking is not proscribed by the takings clause when it is ''rationally related to a conceivable public purpose . . . .'' *Hawaii Housing Authority* v. *Midkiff*, supra, 467 U.S. 241. Accordingly, the definition of public use in General Statutes § 8-186, namely, ''the continued growth of industry and business within the state,'' survives the plaintiffs' facial constitutional challenge inasmuch as our legislature rationally could have concluded that the taking of private property for such a purpose would be of general benefit to the public.[21]

B

Whether the Primary Purpose of the Condemnations Is To Serve the Public Interest

The next step in the analysis is to consider, under the deferential standard of review, whether the primary purpose of the condemnations is to serve the public interest, with private benefits being incidental thereto, or whether private interests are paramount and the public purpose is incidental. In its discussion of this issue, the majority characterizes the trial court's determination that the takings were intended primarily to benefit the public as a finding of fact to be reviewed by this court under the clearly erroneous standard. See part II B of the majority opinion. The majority then concludes that the trial court's finding that the takings

primarily were intended to serve the public interest, with private benefits being incidental thereto, was not clearly erroneous. See id.

I agree with the majority that the takings were *intended* primarily to benefit the public. I disagree, however, that the trial court's determination regarding the public purpose of the condemnations is a factual finding subject to deferential review.

"The question [of] what is a public use is always one of law"; 2 T. Cooley, Constitutional Limitations (8th Ed. 1927) p. 1141; accord *Poletown Neighborhood Council* v. *Detroit*, supra, 410 Mich. 639 (Fitzgerald, J., dissenting); or, as in the present case, a mixed question of fact and law, because the trial court's determination as to public use rests on numerous factual findings regarding the goals, motives and interests of the public officials and private parties associated with the project. See, e.g., *State* v. *Silva*, 65 Conn. App. 234, 255, 738 A.2d 7 (mixed questions of fact and law involve application of legal standard to historical fact determinations), cert. denied, 258 Conn. 929, 783 A.2d 1031 (2001). Accordingly, we review the trial court's factual findings for clear error but review de novo the court's legal determination that the takings primarily were intended to serve the public interest. See, e.g., *State* v. *Gibbs*, 254 Conn. 578, 592, 758 A.2d 327 (2000).

"[T]he line of demarcation between a use that is public and one that is strictly and entirely private is a line not eas[ily] . . . drawn." (Internal quotation marks omitted.) *Olmstead* v. *Camp*, supra, 33 Conn. 547. This is especially true in the present case, in which private interests potentially stand to gain significant financial benefits under the development plan. I nonetheless agree with the majority that the evidence in the record supports a finding that the condemnations of the plaintiffs' properties primarily were intended to serve the public interest, and that the development plan, on its face, and the goals and objectives set forth therein are in accord with chapter 132 of the General Statutes. Accordingly, there is no need to repeat in detail all of the facts upon which the majority relies.

The record clearly demonstrates that the development plan was not intended primarily to serve the interests of Pfizer, Inc., or any other private entity but, rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront. Furthermore, the proposed project is being undertaken in an economically "distressed" municipality in need of a stimulus to invigorate the local economy. Accordingly, the goals of the development plan are consistent with the important public interest described in General Statutes § 8-186 of promoting the economic welfare of the state through the "growth of industry and business

within the state'' and ''meet[ing] the needs of industry and business . . . .'' Nevertheless, the conclusion that the development plan was intended primarily to benefit the public, per se, is insufficient to justify the takings.

C

Whether the Development Plan Will Result in a Public Benefit

In my view, the development plan as a whole cannot be considered apart from the condemnations because the constitutionality of condemnations undertaken for the purpose of private economic development depends not only on the professed goals of the development plan, but also on the prospect of their achievement. Accordingly, the taking party must assume the burden of proving, by clear and convincing evidence, that the anticipated public benefit will be realized. The determination of whether the taking party has met this burden of proof involves an independent evaluation of the evidence by the court, with no deference granted to the local legislative authority. In the present case, the evidence fails to establish that the foregoing burden has been met.[22]

The record contains scant evidence to suggest that the predicted public benefit will be realized with any reasonable certainty. To the contrary, the evidence establishes that, at the time of the takings, there was no signed agreement to develop the properties, the economic climate was poor and the development plan contained no conditions pertaining to future development agreements that would ensure achievement of the intended public benefit if development were to occur.

The development plan calls for a hotel and conference center on parcel 1, residential dwellings on parcel 2, commercial office space on parcel 3, parking and marina support on parcel 4A, marina and water-related uses on parcel 4B, commercial office and retail space on parcels 5A, 5B and 5C, waterfront commercial uses on parcel 6, and additional office space on parcel 7. Despite extensive negotiations, however, no development agreement, which the trial court described as a ''necessary engine to start any development project,'' had been signed at the time of the takings. In fact, Marty Jones, president of Corcoran Jennison, the designated developer for parcels 1, 2 and 3, testified at a deposition that she could not even predict when such an agreement would be signed, although she was ''optimistic'' that it would be soon. Without an agreement, however, it is impossible to determine whether future development of the area primarily will benefit the public or even benefit the public at all. Several key project participants expressly recognized the importance of an agreement to such a determination in correspondence regarding the project and anticipated lawsuit.[23]

Nevertheless, some minimal evidence was admitted

as to the terms of a "proposed" agreement,[24] and, insofar as those terms provide for the leasing of parcels 1, 2 and 3 to Corcoran Jennison by the development corporation at a rate of $1 per year for a term of ninety-nine years, they appear to be more beneficial to the developer than to the city. Under the agreement, it appears that the city would be locked into a long-term commitment to a single developer, who then would be in a position to reap substantial financial rewards without a corresponding penalty if the developer does not perform as expected. In addition, the very generous terms of the proposed agreement are indicative of either an extremely weak real estate market or a possible violation of General Statutes § 8-200 (b) because that statute suggests that property acquired pursuant to chapter 132 of the General Statutes must be sold or leased to a developer at "fair market value" or "fair rental value . . . ." Accordingly, the terms of the unsigned, proposed agreement do not appear to be consistent with the long-term public interest.

Furthermore, the evidence in the record establishes that the real estate market at the time of the takings was depressed and that prospects, therefore, were poor that the contemplated public use could be achieved with any reasonable certainty. Specifically, the trial court stated that "[t]he [development plan] itself says that as of the date of its preparation its studies show that rent levels [of] class A office buildings have stabilized, but are below the level needed to support new speculative construction. In fact, historical values of class A office buildings have not recovered sufficiently to justify new construction except for end users." The trial court also referred to testimony that "[the city of] New London is still recovering from the recession of the early 1990s . . . market values are still well below replacement cost and new construction is generally not feasible. . . . [T]he demand for class A office space in New London at the present time is soft . . . ." (Internal quotation marks omitted.) Indeed, testimony revealed that newly constructed office buildings in Shaw's Cove, an area adjacent to the project area, had not been fully occupied for more than fifteen years. Similar testimony described unsuccessful efforts by the redevelopment agency, over the course of several years, to attract investor interest in the construction of commercial office space at still another nearby location.

Additional testimony revealed that commercial real estate brokers had received few inquiries from companies with similar needs to those of Pfizer, Inc., and that, because it is difficult for the city of New London to compete against the city of New Haven in the market for biotechnology-bioscience office space, it is not economically feasible to develop this type of office space without a definite end user that will pay the rent to support the cost. Specific testimony adduced as to parcel 3 revealed that, in light of the uncertainty sur-

rounding demand and the feasibility of creating biotechnology-bioscience office space, and in light of the fact that office development on parcel 3 probably would be deferred until after the development of office space on parcel 2, any design should remain flexible to accommodate future demand. The trial court relied on testimony that ''market conditions do not justify construction of new commercial space . . . on a speculative basis.'' (Internal quotation marks omitted.) Furthermore, the trial court noted that ''buildings are not built without tenants and as of June, 2001, there were no tenant commitments as to . . . the new[ly] proposed office buildings.'' (Internal quotation marks omitted.) The court also relied on testimony that ''flexibility is needed in this type of planning. Market conditions change and sites are developed over decades not years. There must be an ability reserved to make alterations as market conditions change.''

A close examination of the proposed plan from a financial standpoint also suggests that there were only limited prospects of a public benefit at the time of the takings. Although the trial court noted that the project ultimately would generate increased tax revenue, there apparently was no consideration of the loss in revenue that could result from the relocation of former residents and taxpayers out of the area during the ten, twenty or even thirty years that might be needed to fully implement the development plan.

Moreover, although the city tax assessor projected that annual tax revenue from the project, when fully implemented, was expected to increase sevenfold to approximately $2.6 million, she also testified that her projection was based on an estimate of the square footage to be constructed, a figure that was subject to change. Indeed, testimony confirmed that the square footage and proposed uses very likely would change over the course of the project. In addition, due to the lack of a development schedule, there was no testimony as to when the projected tax revenue would be realized. Accordingly, the tax assessor's revenue projection may not come to fruition if the area is not developed in the manner and in the time frame predicted.

For example, the projected receipt of $422,100 in annual revenue from parcel 4A does not take into account the tax assessor's opinion that the property may be exempt from taxation if developed for a museum owned by the federal government, as one proposal had suggested. State or nonprofit ownership of the museum would generate a portion of the projected revenue, but revenue would fall well below the $422,100 currently estimated. Moreover, the tax assessor's opinion that the market value of a museum that costs $30 million to build would be only $18 million is yet another indication of the depressed real estate market. Finally, and perhaps most significantly, the expected public invest-

ment in the project area of close to $80 million for a potential increase in annual tax revenue of $680,544 to $1,249,843,[25] at best, hardly can be considered a major financial benefit to the public. Accordingly, the projected increase in tax revenue should not be accepted at face value and does not support the conclusion that the project will further the public good.

Various other elements of the plan also are problematical. The record contains no evidence that the indirect benefits projected under the plan, namely, spin-off economic activities and between 500 and 940 indirect new jobs, will indeed be realized. There also is no evidence as to when in the next thirty years such benefits might be realized. In addition, although the trial court relied on testimony that the city of New London has limited high end housing, it also noted that there was little explanation as to why seventy to ninety high end attached residences would significantly improve the overall housing situation in a distressed municipality. The trial court further noted that high end housing concentrated in one small area of the city would not be likely to have a multiplier effect. Accordingly, the only possible positive consequence of the housing to be constructed appears to be a limited increase in tax revenue. This revenue is impossible to evaluate, however, because it is not yet known whether a future development agreement will include a tax abatement incentive to encourage development of the property or other terms and conditions that may not be in accord with the general purposes set forth in the development plan or the applicable statutory scheme.

The development plan also contains few, if any, performance requirements for future developers. Section 6.2 of the plan, which concerns the disposition of the properties, contains a general description of restrictions on parcel use but no firm timetable for project implementation, no indication as to whether future developers will be offered tax abatements or other incentives that might not be in the public interest, and no indication of possible penalties if developers do not perform as required. Moreover, § 6.2.3 of the development plan provides that ''[p]roceeds from sale of disposition parcels shall be used to offset costs of implementation of this [development plan].'' The provision in the development plan that purports to lease parcels 1, 2 and 3 to a developer at the sum of $1 per year for a term of ninety-nine years is particularly troubling when viewed in this context.

The defendants note that the budget for the project is almost $80 million, of which approximately $31.1 million has been spent to date, that the project has been approved by numerous state and local agencies, that the city of New London has spent thousands of dollars planning road improvements to make the site more attractive to prospective tenants and that other proper-

ties in the project area have been acquired in accordance with the plan objectives. This has little bearing, however, on whether there is any reasonable certainty that the planned public benefit will be realized. As the trial court conceded, ''the protections afforded by the [takings] clauses of the federal and state constitutions would be hollow indeed'' if takings were found to be constitutional merely because the condemning authority and various government agencies thought and acted as if they were so.

The record, therefore, fails to establish that there was any momentum in the project from a development standpoint or any reasonable development prospects for parcels 3 and 4A at the time of the takings. Evidence to the contrary consists of vague predictions of future demand. The trial court noted, for example, that according to the development plan, ''the city [of New London] is at the *threshold* of major economic revitalization and the key catalyst is the Pfizer [Inc.] research facility''; (emphasis added); and that ''a significant shortage of office space [was expected] by 2010,'' but none of the evidence in the record supports this conclusion. In most of the important economic development cases cited by the majority to support its analysis, developers had been identified and were prepared to develop the properties in question. See, e.g., *Poletown Neighborhood Council* v. *Detroit*, supra, 410 Mich. 628 (property to be conveyed to General Motors Corporation for construction of automobile assembly plant); *Southwestern Illinois Development Authority* v. *National City Environmental, LLC*, supra, 199 Ill. 2d 229–30 (property to be conveyed to Gateway International Motorsports Corporation for expansion of racetrack parking facilities); *Olmstead* v. *Camp*, supra, 33 Conn. 551 (property subject to taking to be used in operation of existing grist mill).

Although the trial court acknowledged that, for economic development policy to be practical, a substantial period of time might have to pass before a project plan can be accomplished, it nonetheless declared that ''[t]he intent of chapter 132 [of the General Statutes] would be crippled if government intervention would only be feasible if immediate project development is possible—economically distressed communities are the very ones where, despite state intervention, project accomplishment might be difficult.'' On the other hand, I would submit that government intervention to take nonblighted properties by eminent domain is unwarranted in *any* circumstance in which there is no realistic prospect of a future public benefit. In the present case, there is no development agreement or time frame within which the proposed development must take place; indeed, all of the evidence suggests that the real estate market is depressed and the development plan itself contains no detailed provisions to *ensure* that the future use will serve the public interest. Accordingly, the

record in the present case does not contain clear and convincing evidence to establish that this portion of the test has been satisfied. I therefore would conclude that the takings are unconstitutional.

Having concluded that there is no reasonable certainty that the proposed public benefit will be accomplished, there is no need to consider whether the condemnations are reasonably necessary to implement the plan.[26] I therefore need not address the majority's analysis of that issue.

IV

CONCLUSION

In summary, I believe that chapter 132 of the General Statutes is constitutional on its face.[27] Additionally, there is very little evidence to support the plaintiffs' claim that the development plan was created primarily for the benefit of private interests. The benefits expressed in the development plan, namely, an increased tax base, job creation and the revitalization of the city of New London, as well as other evidence presented at trial, support the majority's conclusion that the plan is consistent with the public purpose and the goals set forth in chapter 132 of the General Statutes. See part II of the majority opinion. Nevertheless, the takings of the plaintiffs' properties are unconstitutional because, in my view, the evidence is not clear and convincing that the property taken *actually* will be used for a public purpose.

To highlight this concern, consider the following hypothetical. A town is economically distressed and has seen no significant development for years. In good faith, and in accordance with the procedural prerequisites contained in chapter 132 of the General Statutes, the town creates a master plan of development in 1999 that designates an area within the city limits for mixed use development. A marketing study is completed while the plan is being drafted and demonstrates no significant shortage of office space until 2010, no immediate demand for hotel space without a corporate user that will subsidize the occupancy of up to one half of the projected 200 room facility, and no demonstrated demand for up-scale residential units to fulfill local housing needs. Despite this scenario, the town proceeds with the plan of development and settles on the above uses.

Further efforts result in a determination regarding the scope of the project and the location and general size of various proposed buildings. The master plan is submitted to a public hearing and subsequently approved by the local governing body. The plan projects that the new development will create between 518 and 867 construction jobs and 1200 and 2300 direct or indirect permanent jobs, and will result in an estimated sevenfold increase in annual property tax revenue. The

master plan does not include any minimum standards that the contemplated private developer will be required to satisfy.[28] While the taking authority has had numerous discussions with a particular developer, there has been no agreement on the terms of a development agreement. Nevertheless, the taking authority purchases certain parcels of land in the economic development area and takes other properties by eminent domain. No one contends, under this scenario, that the properties acquired by eminent domain are not reasonably necessary for development to occur as provided in the master plan.

Now consider the following scenario. *Six months after the takings are completed*, an interested developer is located. The developer contends that the economic conditions of the town and region are such that the project is not economically feasible unless the development agreement requires the town and the taking authority to do the following: (1) remediate the environmental conditions affecting the property, (2) replace the road and utility infrastructure, and (3) take measures to reduce the risk of coastal flooding, all at a cost of more than $70 million. Additionally, the developer insists that the town abate property taxes on properties located in the development area for a period of years and, rather than require the developer to purchase the improved property at fair market value, enter into an agreement with the developer to lease the property for ninety-nine years for the sum of $1 per year. Furthermore, the developer agrees to commence construction only after he is able to find viable tenants for the property or when a particular economic index for the area indicates demand for the uses, such as when the vacancy rate for class A office space drops below a certain level.

As I understand the majority's view, after according deference to the taking authority, the takings in the above scenario, which occur six months before any of the terms of the development agreement are known, would withstand a challenge by property owners who wish to remain in their homes. I, however, would find the takings to be, at best, premature. The majority has created a test that can aptly be described as the ''Field of Dreams''[29] test. The majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough. Thus, the test is premised on the concept that ''if you build it, [they] will come,'' and fails to protect adequately the rights of private property owners.

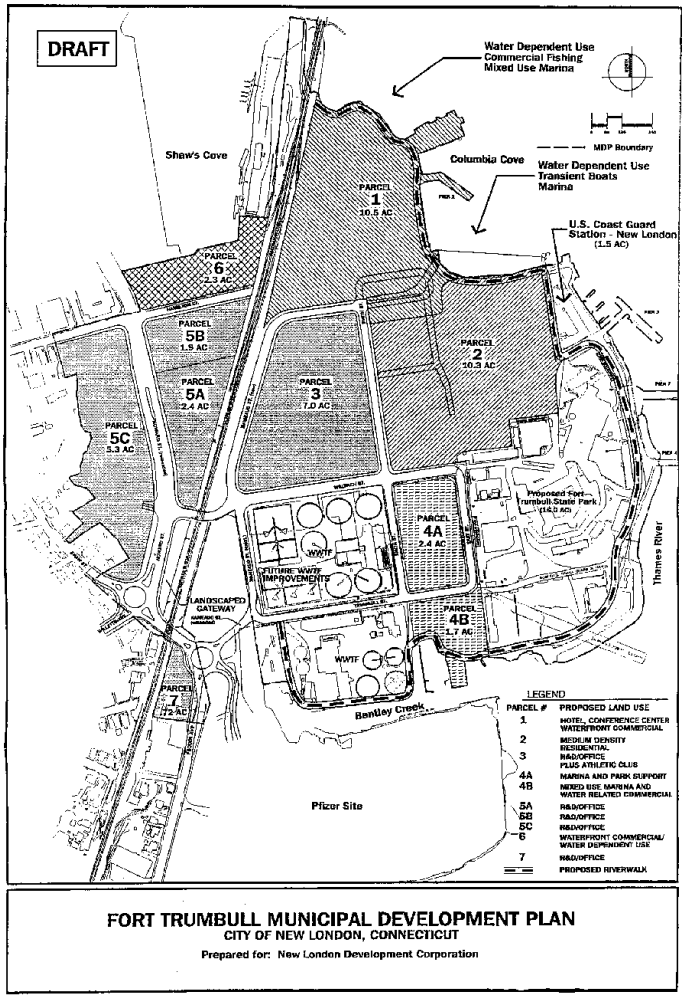
I am not suggesting that an absolute guarantee is necessary to ensure that private economic development will occur as planned. Such a guarantee would be unrealistic in light of the fact that many unforeseen events could affect the plan's implementation. For example, positive economic trends might falter and committed developers might be confronted with unanticipated dif-

ficulties that impair their ability to carry out plan objectives. When such difficulties are apparent at the very outset of the planning process, however, a course of action should not be endorsed based entirely on speculation.

To conclude, I would grant the legislature no deference on this issue and place the burden on the taking authority to establish by clear and convincing evidence that the public benefit anticipated in the economic development agreement is reasonably ensured. This, in my view, cannot be accomplished without knowing initially what the actual public benefit will be. In the present case, it is entirely unknown whether the public interest will be served. There are no assurances of a public use in the development plan; there was no signed development agreement at the time of the takings; and all of the evidence suggests that the economic climate will not support the project so that the public benefits can be realized. The determination of whether the private benefit will be incidental to the public benefit requires an examination of all of the pieces to the puzzle. Accordingly, I respectfully dissent from parts II, IV and VI of the majority opinion.

(*See Appendix on page 173.*)

APPENDIX



[1] "It is a fundamental principle of law that the power to appropriate private property for public use is an attribute of sovereignty and essential to the existence of government. . . . It attaches to every man's land and is paramount to his right of ownership. . . . It lies dormant in the state until set in motion by legislative enactment." (Citations omitted.) *Northeastern Gas Transmission Co.* v. *Collins*, 138 Conn. 582, 586, 87 A.2d 139 (1952).

[2] I disagree in large part with the majority's analysis in part I of its opinion. Any discussion about this issue is unnecessary, however, in light of my conclusion that chapter 132 of the General Statutes applies to nonvacant land.

[3] Although I agree with the majority's conclusion in part V of its opinion, my conclusion that the taking of the plaintiffs' properties is unconstitutional for other reasons is dispositive of the appeal, and, thus, the court need not reach the plaintiffs' equal protection claims.

[4] General Statutes §§ 8-186 through 8-200b.

[5] The term "private economic development," as used in this opinion, refers to the type of development permitted under chapter 132 of the General Statutes.

[6] In redevelopment projects, it is the elimination of blight, and not the development that follows, that constitutes the public benefit. See generally General Statutes § 8-124.

[7] The police power has been described as "extensive, elastic, and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the state's power to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, safety, morals, health, and general welfare of the community . . . ." 16A Am. Jur. 2d 251, Constitutional Law § 315 (1998).

[8] Section 12.0 of the development plan provides in relevant part: "This [development plan] and/or any modification hereof shall be in full force and effect for a period of thirty . . . years from the date of first approval . . . by the City Council of the City of New London. . . ."

[9] General Statutes §§ 8-125 through 8-169w.

[10] Pursuant to § 8-124, those activities include the acquisition of property, the removal of structures, the improvement of sites, the exercise of powers by municipalities, and any assistance offered by any public body.

[11] General Statutes § 8-187 (10) defines the term ''business purpose'' as ''includ[ing] . . . any commercial, financial or retail enterprise and . . . any enterprise which promotes tourism and any property that produces income.'' This definition does little, however, to illuminate the meaning of ''private economic development'' as that term is used in chapter 132 of the General Statutes.

[12] General Statutes § 8-200 provides in relevant part: ''(b) If after three years from the date of approval of the development plan the development agency has been unable to transfer by sale or lease at fair market value or fair rental value, as the case may be, the whole or any part of the real property acquired in the project area to any person in accordance with the project plan, and no grant has been made for such project pursuant to section 8-195, the municipality may, by vote of its legislative body, abandon the project plan and such real property may be conveyed free of any restriction, obligation or procedure imposed by the plan but shall be subject to all other local and state laws, ordinances or regulations.''

[13] The majority's claim that its ''conclusion in the present case is consistent with the principles set forth in [*Connecticut College* and *Evergreen Cemetery Assn.*]''; footnote 62 of the majority opinion; is misplaced. The majority misses the point in concluding ''that the trial court properly determined that there are sufficient statutory and contractual constraints in place to [ensure] that private sector participants will adhere to the provisions of the development plan.'' Part II C of the majority opinion. As I note in this opinion the question is not whether the development plan and the statutes reasonably ensure adherence to the development plan, but, rather, whether ''private sector participants'' are available and willing to develop the property and whether the terms by which they agree to develop the property will result in a public benefit such that the private benefit will be incidental thereto.

[14] In *Olmstead*, a private party effected the taking; see *Olmstead* v. *Camp*, supra, 33 Conn. 532 (reporter's case summary); but for a purpose that the court concluded was public. Id., 551.

[15] The court found that Olmstead had leased the mill to his brother-in-law, Jonathan Camp, Jr., for an indefinite period. *Olmstead* v. *Camp*, supra, 33 Conn. 535 (reporter's case summary). The court also found that ''there was no agreement that Camp should do custom grinding for the public, which obligated him to do it; but such had been the practice from the time when the mill was erected, and it was the expectation of the parties to the lease that the practice would be continued.'' Id., 535–36 (reporter's case summary).

[16] Public Acts 1864, c. XXVI, §§ 1 and 2, codified as amended at General Statutes (1866 Rev.) tit. 1, c. 16, § 388, provided: ''Sec. 1. That when any person shall desire to set up a water mill on his own land, or upon land of another with his consent, and to erect a dam on the same, for working such mill by water, which dam would flow water on to land belonging to any other person, he may obtain the right to flow said land upon the terms and conditions, and subject to the regulations, hereinafter expressed.

''Sec. 2. Any person wishing to flow land as aforesaid, if he can not agree with the owner, or owners, as to the damages to be paid, may bring his petition to the superior court for the county where the land to be overflowed, or any part of it, lies, which petition shall contain such a description of the land to be overflowed and of the dam, its location, and proposed height, as that the record will show with certainty the matter that shall be determined, and shall be served on the respondent according to law requiring service of petitioners in such court.''

[17] The majority's conclusion that there is ''no basis, in reason, precedent, policy or practicality'' for judicial review to determine whether the proposed economic development will, in fact, occur; footnote 62 of the majority opinion; reflects a complete misunderstanding of the law of this and other jurisdictions. See part II B of this opinion; see also *Walker* v. *Shasta Power Co.*, supra, 160 F. 860; *Connecticut College* v. *Calvert*, supra, 87 Conn. 428; *Evergreen Cemetery Assn.* v. *Beecher*, supra, 53 Conn. 553; *Linggi* v. *Garovotti*, supra, 45 Cal. 2d 27; *Wilton* v. *St. Johns*, supra, 98 Fla. 47; *Kessler* v. *Indianapolis*, supra, 199 Ind. 426; *Brown* v. *Gerald*, supra, 100 Me. 357; *Kirkwood* v. *Venable*, supra, 351 Mo. 466–68; *Kansas City* v. *Liebi*, supra, 298 Mo. 591; *Charlotte* v. *Heath*, supra, 226 N.C. 754, 756; *State ex rel. Harlan* v. *Centralia-Chehalis Electric Ry. & Power Co.*, supra, 42 Wash. 639–40; *State ex rel. Tacoma Industrial Co.* v. *White River Power Co.*, supra, 39

Wash. 667–71.

[18] I contrast this standard of proof with the standard of proof in the typical civil case between private parties, i.e., preponderance of the evidence. In the typical civil case, society is minimally concerned with the outcome, and the litigants share the risk of error in roughly equal fashion. E.g., *State* v. *Rizzo*, supra, 266 Conn. 210. In such a case, ''we require only a modicum of subjective certitude on the part of the fact finder: [as] long as the fact finder is persuaded that the plaintiff's assertions are probably more true—by no more than a ratio of fifty-one to forty-nine—the plaintiff has met his burden of persuasion.

''At the other end of the spectrum is the criminal case. In such a case, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error on itself . . . by requiring . . . that the state prove the guilt of an accused beyond a reasonable doubt.'' (Internal quotation marks omitted.) Id., 210–11.

[19] The majority's assertion that the clear and convincing standard should not be applied to evidence that the proposed development will, in fact, occur because the standard ''is reserved for past events, and not for predictions of future events''; footnote 62 of the majority opinion; is not only incorrect, but entirely misses the point of the present analysis. As to the assertion's validity, the majority need only consider the fact that when the state wishes to exclude a criminal defendant from the witness room during the videotaping of a minor victim's testimony, it must establish by clear and convincing evidence that the defendant's presence ''would . . . seriously [call] into question'' the trustworthiness of the victim's testimony. *State* v. *Jarzbek*, supra, 204 Conn. 704–705. Obviously, the testimony in question is the *future* testimony of the minor victim. The clear and convincing standard also is used in proceedings involving the termination of parental rights to determine whether the evidence is sufficient to establish that ''the natural parent cannot or *will not* provide a normal family home for the child.'' (Emphasis added; internal quotation marks omitted.) *Santosky* v. *Kramer*, 455 U.S. 745, 767, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), quoting N.Y. Soc. Serv. Law § 384-b (1) (a) (iv) (McKinney Sup. 1981). More important, however, is the fact that the evidentiary showing suggested in the present case does not require a prediction of future events, but testimony and documentation as to the *present development environment*, which, if persuasive, might include signed development agreements, marketing studies that indicate a near-term demand for the proposed uses and evidence of economic trends that would support economic development within the three year time period before the condemnor is permitted to abandon the project and convey the acquired properties to developers free of the plan's restrictions. See General Statutes § 8-200 (b). In other words, although the purpose of such evidence is to document the probability that future development will occur as planned, the evidence itself would be grounded in present realities.

[20] See also General Statutes §§ 8-128 through 8-133.

[21] I note that the plaintiffs have not raised the issue of whether the statutory scheme is facially unconstitutional on the basis of a lack of adequate standards to ensure that the public purpose will be achieved. ''When a legislative body retains a police power, articulated standards and guidelines to limit the exercise of the police power are unnecessary. . . . Police powers which are delegated, however, must include minimum standards and guidelines for their application. . . . The failure to provide standards and guidelines for the application of the police power constitutes a delegation of legislative power repugnant to the due process clause of the Fourteenth Amendment.'' (Citations omitted.) *Cary* v. *Rapid City*, 559 N.W.2d 891, 895, (S.D. 1997); see 16A Am. Jur. 2d 257, supra, § 320; see also *Berman* v. *Parker*, supra, 348 U.S. 35 (standards contained in redevelopment statute sufficiently definite to sustain delegation of authority to administrative agencies to execute plan for eliminating blight).

Chapter 132 of the General Statutes contains numerous technical specifications regarding the content and adoption of a plan, project financing, the acquisition and transfer of properties and other matters. See generally General Statutes § 8-186 et seq. There are no statutory guidelines and criteria, however, to ensure that the plan primarily will benefit the public and, thereafter, that the proposed public benefit will be achieved. This is in stark contrast to chapter 130 of the General Statutes, in which the public purpose is defined as the elimination of blight and detailed guidance is provided as

to how that purpose is to be accomplished. See generally General Statutes § 8-124 et seq.

[22] In my view, the evidence in the record also is insufficient to establish that the preponderance of the evidence standard has been met.

[23] On March 6, 2002, Claire Gaudiani, president of the development corporation, sent an e-mail to several other project participants, including Jones and David Goebel, executive director of the development corporation, which stated: ''What became clear during the executive committee meeting with the [development corporation] yesterday morning [is] that we absolutely posi[tively] need a fully signed and executable set of documents, including the real estate agreement, by May [1]. The importance of this fact to the law suit is apparently very high.'' The same sentiment was expressed by Goebel in an e-mail sent to Jones, among others, on March 27, 2001, when he stated that ''concluding the development agreement prior to the start of the Institute law suit will go a long way to deflate the argument that property is being taken with no plan in place. In fact, we feel this is crucial.'' Corcoran Jennison also realized the importance of a signed development agreement when Jones testified in a deposition taken on June 22, 2001, that she had received communications from others involved in the project that such an agreement should be in place prior to commencement of the trial in order to demonstrate that the project was moving forward.

[24] The court's knowledge of the agreement is derived from the very brief document entered into evidence as plaintiff's exhibit JJJ and the testimony of various witnesses and deponents. The document in evidence contains only the first page of the proposed agreement. That page refers to the acquisition and demolition of properties by the development corporation, but not to any obligation on the part of the developer or other terms regarding the leasing of the properties in question.

[25] These figures, which differ from the figures to which the tax assessor testified, are the figures contained in the development plan and quoted in the majority opinion. According to the tax assessor, the annual property tax revenue derived from the project area was approximately $362,111 prior to project approval, but was expected to increase to approximately $2,603,696 following completion of the project. If borne out, this constitutes an increase of approximately $2,241,585, far more than that projected by the development plan.

[26] I note, however, that I disagree with the majority's conclusion that the trial court improperly determined that the takings on parcel 4A were not reasonably necessary because the proposed use was too vague and uncertain. See part VI of the majority opinion.

[27] See footnote 21 of this opinion, however, for a brief discussion of constitutional concerns that the plaintiffs have not raised on appeal.

[28] Such minimum standards might include a commencement date for the project, a construction schedule, a guaranteed number of jobs to be created, selection criteria for potential developers, financing requirements, the nature and timing of land disposition and a commitment as to the amount received in property taxes as a percentage of assessed value.

[29] Field of Dreams (Universal Studios 1989).