
SUPREME COURT

OF THE

State of Connecticut

—
S.C. 19558

**DATTCO, INC., COLLINS BUS SERVICE, INC., NASON PARTNERS, LLC
d/b/a KELLY TRANSIT COMPANY, LLC, and THE NEW BRITAIN TRANSPORTATION COMPANY**

V.

JAMES REDEKER, COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT

—
BRIEF OF PLAINTIFFS/APPELLANTS
—

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II. PLAINTIFFS/APPELLANTS' STATEMENT OF THE ISSUES

1. Did the Trial Court commit reversible error in interpreting Conn. Gen. Stat. Section 13b-36(a), which authorizes the Commissioner of Transportation to condemn "facilities," to permit the Commissioner to condemn the Plaintiff/Appellants' Certificates of Public Convenience and Necessity?
2. Did the Trial Court commit reversible error in concluding that the Plaintiffs/Appellants have an adequate remedy at law?

III. INTRODUCTION AND STATEMENT OF THE CASE.

This case presents the important question of whether the Commissioner of Transportation has the authority under Conn. Gen. Stat. §13b-36(a) to condemn Certificates of Public Convenience and Necessity issued to four private bus companies pursuant to Conn. Gen. Stat. §13b-80? Section 13b-80 provides the statutory scheme for issuing and regulating the Plaintiffs' Certificates, and identifies whether those Certificates may be suspended or revoked. Section 13b-36(a) permits the Commissioner to condemn only "land, buildings, equipment or facilities." We submit that §13b-36(a) may not be read, either by its express terms or by necessary implication, to permit the Commissioner to condemn intangible property such as these Certificates as "facilities".

IV. STATEMENT OF FACTS AND PROCEEDINGS.

The Plaintiffs are four privately held bus companies – all family businesses – which have been providing express commuter or local bus service for many years, in some cases many generations. Plaintiff Dattco, Inc., located in New Britain, operates express bus service from Waterbury, Cheshire, Bristol, Southington, and New Britain to Hartford, and provides local service in New Britain, all pursuant to Certificate of Public Convenience and Necessity No. 11, issued prior to October, 1979 pursuant to Conn. Gen. Stat. § 13b-80¹ or its predecessor. (Appendix, p. A52) Plaintiff The New Britain

¹ Section 13b-80 provides, in pertinent part:

No person, association, limited liability company or corporation shall operate a motor bus without having obtained a certificate from the Department of Transportation. . . specifying the route and certifying that public convenience and necessity require the operation of a motor bus or motor buses over such route. . . . The department may amend or, for sufficient cause shown, may suspend or revoke any such certificate. . . . Any certificate issued pursuant to

Transportation Company (“NBT”), headquartered in Berlin, operates local bus service in New Britain and Berlin, and provides local commuter service between New Britain and Hartford pursuant to Certificate No. 10, issued prior to October, 1979 (Appendix, p. A70). Plaintiff Collins Bus Service, headquartered in Vernon, provides express bus commuter service between Vernon and Hartford pursuant to Certificate Nos. 303 and 466, issued prior to October, 1979. (Appendix, p. A58) Plaintiff Nason Partners, LLP, d/b/a/ Kelley Transit Company, operates express bus commuter service between Torrington and Hartford and provides local service in Torrington pursuant to Certificate No. 3, issued prior to October, 1979. (Appendix, p. A64). By virtue of their Certificates and Conn. Gen. Stat. §13b-80, the Plaintiffs have been the exclusive providers of the bus service over the routes covered by their Certificates.

By Notice dated on or about March 26, 2014, the Commissioner of the Department of Transportation (“Commissioner”) notified each Plaintiff of his intent to condemn their Certificates (Appendix, pp. A42 – A50), citing as authority for the purported taking of the Certificate, *inter alia*, Conn. Gen. Stat. §13b-36(a), which provides, in pertinent part:

The commissioner may purchase or take and, in the name of the state, may acquire title in fee simple to, or any lesser estate, interest or right in, **any land buildings, equipment or facilities** which the commissioner finds necessary for the operation or improvement of transportation services. (Emphasis added)²

this section by the Division of Public Utility Control within the Department of Business Regulation prior to October 1, 1979, shall remain valid unless suspended or revoked by the Department of Transportation.

² Alternatively, the Commissioner claims authority to condemn the certificates pursuant to Conn. Gen. Stat. § 13b-34, which provides that the Commissioner shall have the power to contract (§13b-34 (a)), hire, lease, acquire and dispose of property (§13b-34 (c)), or sell, repurchase and sublease any such equipment or facilities (§13b-34 (h)).

Following the Notice issued by the Commissioner, and pursuant to Conn. Gen. Stat. § 52-471 *et seq.*, by separate Complaints the Plaintiffs sought permanent injunctions preventing and enjoining the Commissioner from condemning their respective Certificates of Public Convenience and Necessity on the grounds that the Commissioner lacks the statutory authority to condemn the Certificates at issue. (Appendix pp. A52 – A70) Each Plaintiff further claimed that it may be deprived of its Certificate(s) only after a hearing at which it was proven that cause exists to suspend or revoke their Certificate(s), pursuant to Conn. Gen. Stat. §13b-80, and only because they are not satisfying the public need for the service. (Appendix, pp. A52, A58, A64, A70). The cases were consolidated for all purposes, and transferred to the Hartford Superior Court by Orders dated September 25, 2014. (Docket No., 110.86; Appendix, p. A2; Docket No. 108.86, Appendix, p. A6; Docket No. 106.86, Appendix, p. A10; Docket No. 103.86, Appendix, p. A14).

These actions for injunctive relief were not the first claims brought by the Plaintiffs arising from action taken by the Commissioner or the Department of Transportation. In September, 2010, the Department issued a request for proposals from bus operators seeking to provide service over routes which the Plaintiffs had been operating for many years pursuant to their certificates. In November, 2010, the Department announced its intent to award some of the routes operated by some of the Plaintiffs to others, including other Plaintiffs. All of the Plaintiffs brought an action in the

The Trial Court did not base its decision on these provisions. (Memorandum of Decision, p. 6, n. 5; Appendix, p. A22) To the extent the Commissioner intends to rely upon these provisions as alternative grounds upon which to affirm we will address these issues in our Reply Brief.

Superior Court in New Britain to enjoin the completion of any such awards. On November 18, 2010, the Trial Court (Levine, S.T.R.) issued a temporary injunction precluding such awards. Thereafter, Judge Levine concluded that the Plaintiff's Certificates were property interests protected by the Connecticut and U.S. States Constitutions, and further enjoined the Commissioner or the Department from awarding any of Plaintiff's routes to others. *See Dattco, Inc. v. State Department of Transportation*, No. CV106007261S, 2012 Conn. Super. LEXIS 1529 (Connecticut Superior Court, June 8, 2012, Levine, S.T.R.)(Appendix, p. A888) While the case remained pending before Judge Levine the Commissioner issued his notices seeking to condemn Plaintiffs' Certificates.

As the Trial Court (Shortall, J.T.R.) recognized here, the impetus for the Commissioner's conduct was the opening of the Busway between Hartford and New Britain (Memorandum of Decision, p. 4; Appendix, p. A20). Plaintiffs Dattco and NBT have claimed exclusive rights to operate over the Busway by virtue of their Certificates. Dattco commenced an action to enjoin operation of Route 101 of the Busway and certain other routes within the CTFAstrak system by an entity other than Dattco, Docket No. HHB-CV-14-6026255 S (Appendix, p. A788), and NBT brought an action to enjoin operation of Route 102 and certain other routes within the CTFAstrak system by any entity other than NBT, Docket No. HHB-CV-15-6028323 (Appendix, p. A821). In each case the Plaintiffs and the Commissioner reached an interim agreement pending the outcome of this Appeal (Appendix, pp. A795, A840).

In support of the Plaintiffs' Motion for Summary Judgment, Donald DeVivo, the President of Dattco, submitted an affidavit which provided undisputed evidence.

(Appendix, p. A169) That evidence included notice that the DOT intended to operate the busway (paragraph 9); that Dattco has had the exclusive right to operate the bus routes covered by its Certificate (paragraph 12); that the busway incorporates many of the routes covered by Dattco's Certificate (paragraph 14); and that the DOT intends to operate or allow others to operate along the routes for which Dattco has exclusivity (paragraph 15)(See Appendix, p. A169).

Both parties to the current case moved for summary judgment. The Plaintiffs asked that the Court conclude that the Commissioner does not have the statutory authority to condemn the Certificates (Appendix, pp. A88 – A93), while the Commissioner argued to the contrary (Appendix, pp. A183 – A187).

By Memorandum of Decision dated December 4, 2014, Judge Shortall held that the Commissioner does have the authority to condemn the Plaintiffs' Certificates, concluding that the term "facilities" in Conn. Gen. Stat. Section 13b-36(a) may be read broadly enough to include the power to take intangible assets. (Memorandum of Decision, p. 19; Appendix, p. A35) Nevertheless, Judge Shortall further ruled: "In order to preserve the status quo pending a potential appeal, it is FURTHER ORDERED that the temporary injunction entered by the court (Levine, J.) shall remain in effect until the expiration of the period within which an appeal from this decision may be taken." (*Id.*, Appendix, p. A36) All of the Plaintiffs appealed to the Appellate Court from the judgment entered upon Judge Shortall's Memorandum of Decision (Appendix, p. A715), and thereafter this Court transferred the appeal to itself on October 15, 2015.

By Ruling dated March 2, 2015, Judge Shortall further articulated his ruling, noting that since an appeal had been taken from his December 4, 2014 decision, the

automatic stay provisions of Practice Book Section 61-11 is applicable, and “[i]n entering its order [of December 4, 2014] this court had no intention that it affect any proceeding other than the one before it.” Accordingly, the temporary injunction issued by Judge Levine remains in effect. (Articulation, p. 2; Appendix, p. A41)

V. ARGUMENT

A. Standard of Review.

The standard of review from the granting of a motion for summary judgment is plenary. *Michael J. Ferri, Trustee v. Nancy Powell-Ferri*, 317 Conn. 223, 228, 116 A. 3d 297 (June 16, 2015).

B. The Certificates are Property Rights and Entitled to Due Process Protections.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part, “No State shall . . . deprive any person of life, liberty or property, without due process of law.” Similarly, the Connecticut Constitution provides that “No person shall be . . . deprived of life, liberty or property without due process of law. . .” The U.S. Supreme Court has through its jurisprudence enlarged the scope of interests identified as property protected by the procedural guarantees of the Due Process Clause. *Board of Regents v. Roth*, 408 U.S. 564, 571 n. 9 (1972). Accordingly, a property interest, as contemplated to be within the parameters of the due process clause, includes rights to governmental benefits conferred by statute (e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970)), or by contract (e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972)). As the Court in *Roth* explained, a property right exists when a person has “more than an abstract need or desire for [a benefit]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Roth, supra*, 408 U.S. at 577.

It has long been recognized that a company may acquire a property interest in a privilege, a license, a certificate or a franchise. Once acquired, the interest in property is protected by the Due Process Clause. “[P]rocedural protection is sought in connection with a state’s revocation of a *status*” *S&D Maintenance Co. Inc. v. Goldin*, 844 F. 2d 962, 966 (2d Cir. 1988)(emphasis in original).

This Court has firmly concluded that the Certificate is a property right. In *Gray Line Bus Company v. Greater Bridgeport Transit District*, 188 Conn. 417, 423 (1982) the Court held, “[a] profitable franchise³ has been recognized as a property right entitled to constitutional protection.” (emphasis added). “A franchise is an incorporeal, hereditaments, known as a species of property, as well as any estate in lands.” *Hartford and New Haven Railroad, supra*, 17 Conn. at 60.

This Court’s holding that these Certificates are property rights deserving of due process protection is consistent with the holdings in other states. See, for example, *In re Hathorn’s Transportation Company, Inc.*, 121 Vt. 349, 353-354 (1960)(certificate of public good could not be lost by reason of action or inaction of the possessor, even in bankruptcy; the certificate, having been granted following a hearing, could be revoked only following a public hearing, and no other company could be granted the routes covered by the certificate. “It is well settled that a certificate of this nature is a franchise, and is a property right”)(emphasis added); *Delmarva Power & Light Company v. City of Seaford*, 575 A. 2d 1089, 1098-1099 (Del. 1990)(even a non-

³ That a franchise issued by the State creates property rights deserving of constitutional protection has long been recognized by the Court. See, e.g., *Enfield’s Toll Bridge Company v. The Connecticut River Company*, 7 Conn. 28, 46-47 (1828); *Enfield Toll Bridge Company v. Hartford and New Haven Railroad Company*, 17 Conn. 40, 55-56 (1845).

exclusive franchise created by the grant of a certificate is a property right entitled to due process); *Bohl v. Schenectady*, 128 Misc. 863, 866-67, 220 N.Y.S. 349 (1927) (Certificate of public convenience granted to bus company over specific streets could not be revoked by a change in city ordinance eliminating the route covered by the certificate; "A franchise is a grant under authority of government conferring special right to do an act or a series of acts of public concern which . . . becomes an irrevocable contract. . . . The right which is acquired under such a grant has all the attributes of property and after it has been given and exercised, it cannot be revoked. It is a grant of a property right, assignable, taxable, alienable, . . . subject to . . . condemnation under the exercise of the power of eminent domain."); *Fifth Avenue Coach Lines, Inc.*, 22 N.Y.2d 613, 625, 294 N.Y.S. 2d 502, 510 (1968); *Dixie Greyhound Lines, Inc., v. Mississippi Public Service Commission et al.*, 190 Miss. 704, 722 (1941) ("franchise to operate a transportation motor bus over the highways under an existing certificate is a property right").

The Commissioner has reluctantly⁴ acknowledged that the Certificates are property rights, as his attempts to condemn them make clear, and as the Trial Court found, "[f]or the purpose of this litigation, at least . . ." (Memorandum of Decision, p. 7; Appendix, p. A23) The Trial Court went even further, correctly stating that the proposition [that the plaintiffs have a property right in their certificates] seems to the Court firmly established in Connecticut law (*Id.*), citing *Gray Lines Bus, supra*. (Memorandum of Decision, p. 7; Appendix, p. A23).

⁴ The Commissioner for the past four years refused to acknowledge the nature of the Certificate as a vested property right. See *Dattco, supra*, 2012 Conn. Super LEXIS 1524, *2 (Appendix, p. A888).

C. **Section 13b-36(a) of the General Statutes Does Not Permit the Commissioner of Transportation to Condemn the Bus Companies' Certificates of Public Convenience and Necessity.**

Since the early 1900s it has been the statutory law in Connecticut that no entity is permitted to operate bus service within the state without having a Certificate of Public Convenience and Necessity issued pursuant to § 13b-80 or its predecessors.

Plaintiffs' Certificates have never been suspended or revoked. (See DeVivo Affidavit, paragraph 8; Appendix, p. A170). There has never been a finding of sufficient cause to suspend or revoke any of their Certificates. The DOT has never identified any reason why any of these Certificates should be suspended or revoked or condemned. (Memorandum of Decision, p. 3; Appendix, p. A19).

By virtue of possessing these Certificates each company has an exclusive right to operate bus service (in other words, a franchise) over the route or routes covered by the Certificates. *Gray Line Bus Company, supra*, 188 Conn. at 423. While §13b-80 provides the Department the power to amend, suspend or revoke the Certificates, that statute does not provide for any authority to condemn a Certificate.

There is no statutory authority which empowers the Commissioner to condemn the Certificates at issue. The power of condemnation is a specific grant of authority from the Legislature to a state agency.

A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication; and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained. In other words, statutes conferring the power must be strictly construed. Clear legislative authority must be shown to justify the taking. Authority cannot be implied or inferred from vague or doubtful language. When the matter is doubtful it

must be resolved in favor of the property owner.

18 Am. Jur., Eminent Domain, Sec. 26. (Appendix, p. A747).

The Legislature has the power to vest the authority to condemn property in a state agency and to set the metes and bounds of that power. However, the grant of this power by the government must "be strictly construed, and this is especially true with respect to the power of eminent domain." *Middletown v. F. L. Caulkins Auto. Co.*, 19 Conn. Supp. 45, 48 (Conn. Super. Ct. 1954). "[T]he authority to condemn [is to] be strictly construed in favor of the owner of the property taken and against the condemnor" *State v. McCook*, 109 Conn. 621, 630 (1929). "When the legislature delegates the making of that determination to another agency, the decision of that agency is conclusive; it is open to judicial review only to discover if it was unreasonable or in bad faith or was an abuse of the power conferred." (Internal quotation marks omitted.) *Industrial Park Assoc. v. State*, CV 02394050 S, 2002 Conn. Super. LEXIS 3768 (Conn. Super. Ct. Nov. 21, 2002)(Appendix, p. A891); *Aposporos v. Urban Redevelopment Commission*, 259 Conn. 563, 571-72 (2002). Here, the Commissioner has attempted to exceed the powers conferred upon him; that is an abuse of power.

The statutory scheme cited by the Commissioner in the Notices of Condemnation as the legal authority to condemn the Certificates provides a mechanism and a procedure to revoke or suspend the Certificates, but not to condemn the Certificates. Conn. Gen. Stat. §13b-80 reads in pertinent part as follows: "Any certificate issued pursuant to this section by the Division of Public Utility Control within the Department of Business Regulation prior to October 1, 1979, **shall remain valid unless suspended or revoked** by the Department of Transportation" (emphasis added), and for so long as

the parties holding such certificates comply with applicable rules and regulations. At no time has the Department taken any action to suspend or revoke those certificates. There is no language in Section 13b-80 authorizing the Commissioner to condemn the Certificates. In this case, however, the Commissioner, by its actions in seeking to condemn the Plaintiffs' certificates, has impaired the Plaintiffs' property interests in their certificates without due process.⁵

1. **Section 13b-32(a) sets forth the limits of the Commissioner's Authority to Condemn**

Section 13b-36(a) does provide the Commissioner with limited authority to condemn. Specifically, "The commissioner may purchase or take and, in the name of the state, may acquire title in fee simple to, or any lesser estate, interest or right in, any land, buildings, equipment or facilities which the commissioner finds necessary for the operation or improvement of transportation services." The Trial Court correctly found (Memorandum of Decision, p. 10; Appendix, p. A26), that the Commissioner cannot find the authority to condemn the Certificates the terms "land", "buildings" or "equipment." Notably absent from the list of the kinds of property which the Commissioner has the power to condemn are intangibles such as the Certificates owned by the Plaintiffs. Had the legislature wanted to authorize the Commissioner to have the power to take such intangibles the legislature no doubt would have so authorized.

⁵ The due process clause of the 14th Amendment to the U.S. Constitution provides, "No State shall . . . deprive any person of life, liberty or property, without due process of law" The Connecticut Constitution provides, in Article first, Section 8, "No person shall be . . . deprived of life, liberty or property without due process of law"

2. Unlike Section 13b-36, Section 7-273e Does Permit Condemnation of the Certificates, But Only As Showing The Company is Not Meeting the Public Need.

The statutory framework of Conn. Gen. Stat § §13b-36 and 13b-80 stands in stark contrast to the statutory scheme outlined in Conn. Gen. Stat. § 7-273e, which authorizes transit districts to acquire franchises by eminent domain. *Westport Taxi Service, Inc. v. Westport Transit District*, No. CV 97 0041301 S, 1991 Conn. Super. LEXIS 1498, *46 (June 28, 1991, Katz, J)(Appendix, p. A905). Conn. Gen. Stat. § 7-273e(c) reads, in relevant part:

Where either by hearing or waiver it has been determined that a franchise is suitable for acquisition pursuant to subsection (b) of this section, the **transit district shall have the power to acquire by eminent domain all or any part of the franchise and of the holder's transit system, including the holder's real estate or interests therein, personal property, and funds** under the control or held for the use of or the benefit of such holder. Where the transit district and the holder of such franchise and property cannot agree upon the amount to be paid to the holder for any franchise or property thus taken, the transit district shall proceed in the same manner specified for redevelopment agencies in accordance with sections 8-129 to 8-133, inclusive.

(emphasis added).

Conn. Gen. Stat. § 7-273e, which delineates certain powers of a Transit District, sets forth the criteria the Transit District must use to determine if acquisition by condemnation of a certificate is appropriate. The statute requires notice to the holder of the Certificate at issue and then a public hearing to determine:

(1) That public convenience and necessity require the continuance of transit service within the area, (2) **that the present franchise holder is or will be incapable of continuing to offer satisfactory service**, (3) that it is improbable that such franchise will be sought by a private concern and (4) that continuance of transit service may require the operation of such service by a transit district.

(emphasis added) Conn. Gen. Stat. § 7-273e(b).

The legislative history of Public Act 74-342, codified in part at Conn. Gen. Stat. §§13b-34 and 7-273e, addresses this issue. Edward Lane-Reticker, then Chairman of the Greater Hartford Chamber's Transportation Committee which worked on putting the bill together, testified before the Joint Standing Committee on Finance and Transportation on March 19, 1974. Mr. Lane-Reticker stated:

The eminent domain power here is modeled on 7-273b, sub c of the General Statutes, also Chapter 103A. We have included clearly, the franchises as well as the real and personal property of an operating transit company. We've done that in the recognition that there is considerable question – legal question, as to what may or needs to be acquired when the State or some political sub-division of the State takes over a private company of this type. Does it have to buy the franchises? Some lawyers think it does. Some lawyers think it does not. But in any event, we have provided the power here so that it can be done and if the courts should decide that that is – that the franchise has to be acquired, obviously it would be impossible to deprive a person of property without compensation in any constitutional way. So at least we have the enabling power if that is necessary.

(Appendix, p. A751). If the Legislature had wanted to include intangible assets, such as these Certificates, either within the term "facilities" or as a specie of property which the Commissioner was authorized to condemn, the Legislature "easily could have done so." After all, it did just that in Conn. Gen. Stat. § 7-273e. Thus, the absence of the terms "intangible property" or "Certificates of Public Convenience and Necessity" "in the statute indicates that the legislature meant to omit them. To interpret the statute as including these expressions would undeniably alter its meaning. Courts must interpret statutes as they are written . . . and cannot, by judicial construction, read into them provisions which are not clearly stated." *Lucarelli v. State of Connecticut*, 16 Conn. App. 65, 70, 546 A. 2d 940 (1988), citing *Thornton Real Estate, Inc. v. Lobdell*, 184 Conn. 228, 230, 439 A. 2d 946 (1981); *Houston v. Warden*, 169 Conn. 247, 251, 363 A.

2d 121 (1975); *Muha v. United Oil Co.*, 180 Conn. 720, 730, 433 A. 2d 1009 (1980).

When the legislature wants to give the power to condemn a certificate, or franchise, it knows how to do it.

"It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous." *Dorry v. Garden*, 313 Conn. 516, 525 (2014). It is clear from a plain reading of the claimed statutory authority, the Legislature did not vest the Commissioner with the power of condemnation with regard to Certificates of Public Convenience and Necessity.

D. The Term "Facilities" Cannot Be Read To Include These Certificates.

It is clear when articulating the powers conferred on the Commissioner that "facility" means "buildings and real property". There is no plausible construction of the statute that could lead to the conclusion that "facility" means intangible property rights. There is no reference in the entire statutory scheme to a "facility" being an intangible right.⁶ Conn. Gen. Stat. §13b-79kk defines "Public transportation facilities" as "rail,

⁶ The following list is illustrative and not exhaustive: Conn. Gen. Stat. § 4-255: "Facility" means any public works or transportation project used as public infrastructure that generates revenue as a function of its operation; Conn. Gen. Stat. § 4b-24a: "state facility" means buildings and real property owned or leased by the state; Conn. Gen. Stat. § 4e-1: "Infrastructure facility" means a building, structure or network of buildings, structures, pipes, controls and equipment that provide transportation, utilities, public education or public safety services. Infrastructure facility includes government office buildings, public schools, jails, water treatment plants, distribution systems and pumping stations, wastewater treatment plants, collections systems and pumping stations, solid waste disposal plants, incinerators, landfills, and related facilities, public roads and streets, highways, public parking facilities, public transportation systems, terminals and rolling stock, rail, air and water port structures, terminals and equipment; Conn. Gen. Stat. § 7-202: "parking facilities" means lots, garages, parking terminals or other

busway and bus stations and associated improvements, including, but not limited to, parking.” Conn. Gen. Stat. §13b-34 reads in relevant part : “[T]he commissioner may in the name of the state acquire or obtain the use of **facilities** and equipment . . .”

(emphasis added) Conn. Gen. Stat. §13b-34 used to refer Conn. Gen. Stat. §4-26b when discussing the powers of the commissioner in this regard. P.A. 81-421 repealed Subsec. (g) of Conn. Gen. Stat. §13b-34, which contained this reference. Conn. Gen. Stat. §4-26b (now Conn. Gen. Stat. §4-23) defines “facility” as follows: “[a]s used in this section, ‘facility’ means buildings and real property owned or leased by the state. The Secretary of the Office of Policy and Management shall establish guidelines which further define such term.” Each statutory reference that defines “facility” specifies the facility is a physical object, not an intangible right.

1. **“Facilities” Has Been Defined To Include Only Real or Personal Property, Not Intangibles.**

This interpretation of the statute is consistent with the Court’s holding in *Charter Communications v. University of Connecticut et al*, X07CV000072038S, 2000 Conn. Super. LEXIS 3087 (Conn. Super. Ct. Nov. 2, 2000)(Appendix, p. A879). In *Charter Communications*, a cable company argued that it had a statutory right to condemn state owned property under C.G.S. §16-333a, a “forced-access” statute that provided for the condemnation of certain property for the installation of cable wiring. *Id.* The State

structures and accommodations . . . Conn. Gen. Stat. § 7-329b: “Port facilities” means (A) wharves, docks, piers, vessels, air or bus terminals, railroad tracks or terminals, cold storage and refrigerating plants, warehouses, elevators, freight-handling machinery and

such equipment . . . ; Conn. Gen. Stat. § 8-243: “Related facilities” means commercial, office, health, welfare, administrative, recreational, community and service facilities incidental and pertinent to housing as determined by the authority.

argued, and the Court agreed, that since the language of the statute was “not made specifically applicable to property owned by the State, its provisions cannot be understood to apply to state owned property”. The language of the statute applied to property owned by a “person, firm, or corporation”; since property owned by the State was not included, the Court strictly construed the language of the statute and held such property was beyond the reach of the powers of condemnation conferred by the statute.

Thus, the Trial Court committed reversible error in concluding (Memorandum of Decision, p. 13; Appendix, p. A29) that the word “facilities” must be construed to embrace the ability of the Commissioner to condemn the Plaintiffs’ Certificates. In reaching this conclusion, the Trial Court ignored all of those Connecticut statutes, cited above, which make it clear that the term “facilities” applies only to physical properties, noting only that these statutes do not appear in Chapter 242. The Trial Court did not explain why it should matter that these statutes do not appear in Chapter 242, and for good reason. It does not matter.

Moreover, when a term is ambiguous or not defined in the statutes, courts “look to the common understanding expressed in the law and in dictionaries.” *In re Bachand*, 306 Conn. 37, 44 (2012). The term “facility” is defined as something (as a hospital) that is built, installed, or established to serve a particular purpose.” Merriam-Webster’s Collegiate Dictionary.⁷ (Appendix, p. A937)

⁷ See also American Heritage® Dictionary of the English Language, Fifth Edition, Copyright © 2011 by Houghton Mifflin Harcourt Publishing Company (“A building, room, array of equipment, or a number of such things, designed to serve a particular function”); Dictionary of Military and Associated Terms. (2005) (“A real property entity consisting of one or more of the following: a building, a structure, a utility system, pavement, and underlying land”).

2. **Section 13b-36 Cannot Be Read To Include The Power To Condemn By Clear or Necessary Implication**

It is, of course, well-settled that when the legislature “delegates to another the power to exercise the right of eminent domain, the extent of the power is limited by the express terms or clear implications of the statute authorizing its exercise.” *Northeastern Gas Transmission Co. v. Collins*, 138 Conn. 582, 592, 87 A. 2d 139, 145 (1952). The Trial Court misinterpreted the phrase “clear implications”, holding that because the legislature granted to the Commissioner the power to take all of the companies’ physical assets, the Commissioner has, “by necessary implication”, the term “facilities” gives to the Commissioner the right to condemn the Plaintiffs’ Certificates (Memorandum of Decision, pp. 18-19; Appendix, pp. A34 – A35). This circular reasoning of the Trial Court must be rejected.

The phrase “clear implication” is not a phrase permitting the expansion of the right to condemn, but is a limitation on that right. See, e.g., *State v. McCook*, 109 Conn. 621, 630 (1929) It is more likely, given how the legislature has defined the term facilities in other statutes, that the legislature in § 13b-36 was using the term to refer to physical assets than to intangible assets, especially since it has, in § 7-273e, specifically authorized the taking of these Certificates. If the legislature has identified by statute the manner in which a Certificate issued pursuant to § 13b-80 can be condemned – and § 7-273e provides that the condemnation can occur only after a finding that the need is no longer being met – it cannot be said that the legislature clearly implied in § 13b-36 that the Commissioner had the power to condemn these same Certificates.

3. The Legislature's Reaction To The Trial Court's Decision Establishes That The Right To Condemn The Certificate Is Not Clearly Implied In The Statute

It is obvious from the reaction of the legislature to Judge Shortall's Decision that it was not by the "clear implication" or "necessary implication" of the statute that the term "facilities" should mean intangible assets such as the Certificates. Almost before the ink was dry on Judge Shortall's ruling several bills were introduced in the legislature. One, S.B. 881, was introduced to clarify the language of § 13b-36 to specifically mean that the term "facilities" does not include intangible assets. (Appendix, p. A759-A761) Another, H.B. 6821, was introduced to clarify the language of § 13b-36 to specifically mean that the term "facilities" does include intangible assets, and to specifically authorize the Commissioner to condemn such assets. (Appendix, p. A762-A779) The doctrine of legislative acquiescence therefore cannot be applied to this case; to the contrary, that the legislature sought to act immediately may be seen as a rejection of the Trial Court's analysis. See, e.g., *Vincent v. City of New Haven*, 285 Conn. 778, 791, n. 14, 941 A. 2d 932 (2008) and cases cited therein.

Neither bill became law. The significance of these competing bills in the legislature, for purposes of this case, is to demonstrate that given these competing interpretations of Section 13b-36, the statute cannot, as a matter of law, be interpreted that by clear or necessary implication the term "facilities" includes intangible assets. In order for a taking by eminent domain to be constitutionally valid "[i]t must appear that the government intended to exercise this high sovereign right, by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent." *State v. McCook*, 109 Conn. 621,629, 147 A. 126 (1929), quoting *Boston &*

Lowell R. Corp. v. Salem & Lowell R. Co., 68 Mass. 1, 37 (1854). Given that the legislature has, in § 7-273e, demonstrated it knows how to give the power to condemn these Certificates, and given that the legislature has indicated that the language of § 13b-36 does not clearly give the Commissioner the right to condemn, it cannot be said that the Commissioner has the right to condemn either by clear and express terms or by necessary implication.

4. **Denying The Right To Condemn The Certificates Does Not Render The Term “Facilities” Superfluous.**

The Trial Court further concluded that to exclude the Plaintiffs' Certificates from the term “facilities” would render the term superfluous (Memorandum of Decision, p. 13; Appendix, p. A29). Again, the Trial Court erred. Given that the legislature knows how to define the term “facilities”, that it chose not to in § 13b-36 does not give the Commissioner, or the Trial Court, the power to read the term expansively, especially since the grant of a power to condemn must be strictly construed, since the power of eminent domain is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice. *Los Angeles v. Koyer*, 48 Cal. App. 720, 725 (Cal. App. 1920). The delegation of the power to condemn by the legislature must be read narrowly, as a limitation of the legislature's authority, and not as a grant of authority to be broadly interpreted. *Northeastern Gas Transmission Co.*, *supra*, 138 Conn. at 591.

5. **The Commissioner's Ability To Operate The Busway Is Not Defeated By Denying How The Right to Condemn The Certificates**

The Trial Court also erred in concluding that the Commissioner's ability to implement the busway would be defeated, because the Commissioner “would be able to take by eminent domain all of the concomitants of the companies' franchises to operate

public bus service but not the franchises themselves . . . and would be powerless to substitute other methods of conveyance or other carriers.” (Memorandum of Decision, p. 15; Appendix, p. A31). While it is true that the Commissioner would not be able to substitute other conveyances or carriers over the busway, that is the very point of the exclusive franchise law set forth in § 13b-80. The Statute gives those companies whose routes are covered by the busway the sole and exclusive right to operate the service over those routes, so long as they are meeting the public need. There has been no indication that the Plaintiffs are not meeting the public need, and there is no evidence in the record that even if the Commissioner condemned their land or buildings or equipment they could not somehow satisfy their obligations to meet the public need.

Moreover, the Commissioner can, through its contracts with the Plaintiffs, ensure that the Plaintiffs are operating the service over the busway at terms that make sense. As the Trial Court observed in *Nason Partners, LLC v. Northwestern Connecticut Transit District*, No. LLICV135007436S, 2013 Conn. Super. LEXIS 1425, *13, n. 7 (Conn. Super. Ct. June 28, 2013, Danaher, J.)(Appendix, p. A900), “the certificate guarantees exclusive rights to operate, and the contract merely sets the terms of service.” A review of the contracts entered into by the Plaintiffs with the DOT (Exhibits to Plaintiffs’ Motion for Summary Judgment, Appendix, pp. A101 – A159), reveals that the Plaintiffs and the Commissioner are able to enter into contracts to provide the service covered by Plaintiffs’ Certificates, including the busway.

6. **Granting The Commissioner The Right To Condemn The Certificates Would Render Section 13b-80 Superfluous**

Since the Trial Court erred in concluding that the Commissioner must have the right to condemn the Certificates because he has the right to condemn everything else,

the Trial Court necessarily erred in concluding that “to permit the commissioner to take the companies’ certificates by eminent domain does not render § 13b-80 superfluous” (Memorandum of Decision, p. 16; Appendix, p. A32). Although the Trial Court recognized that Section 13b-80 authorizes the Commissioner to suspend or revoke a Certificate when a bus company is no longer meeting the needs of the public, (*Id.*; Appendix, p. A32) the Trial Court ignored that portion of the Statute which provides that the grant of the Certificate is the grant of an exclusive franchise which may not be taken away, either by revocation or condemnation, merely because the Commissioner would like there to be another carrier providing the service over the route being operated by the carrier with an existing Certificate. Section 13b-80 and § 7-273e both require that before a Certificate can be revoked or condemned there must be a finding that the bus company is not meeting the public need. Before the power to condemn may be exercised there must be some public necessity, *McCook, supra*, 109 Conn. at 629, and there is no evidence of such a need here. To permit the Commissioner to condemn a Certificate instead of using the revocation process available to the Commissioner is to render that revocation process a nullity, and would render § 13b-80 superfluous.

E. No Cases Have Been Found Which Authorize The Taking Of Those Certificates of Public Convenience and Necessity

The Trial Court’s conclusion that the Commissioner had the right, pursuant to § 13b-36, to condemn the Plaintiffs’ Certificates is not only contrary to the analysis set forth above, but is also contrary to the Trial Court’s own research. As the Trial Court noted, it “unearthed only two cases in the country considering whether the term “facilities” in a condemnation statute included not only the physical assets but also the exclusive right to provide services held by a utility company by way of a certificate of

public convenience and necessity.” (Memorandum of Decision, p. 11-12; Appendix, pp. A27 – A28). In both cases the Court found that there was no right to condemn the certificates. The Trial Court made no effort to distinguish the holding in *Mississippi Power & Light Co. v. City of Clarksdale*, 288 So. 2d 9 (Miss. 1973), which recognized that condemning the plaintiff’s facilities cannot be constitutionally applied in include the plaintiff’s operating rights pursuant to its certificate. Indeed, the holding there is not distinguishable from the facts present here.

The Trial Court did attempt to distinguish the holding in *Lynnwood Utility Co. v. City of Franklin*, 1990 Tenn. App. LEXIS 229 (Tenn. Ct. of Appeals, Middle Section 1990)(Appendix, p. A896), which concluded that “facilities” meant “physical facilities and not a right to serve an area.” Significantly, the Trial Court either missed or ignored the most significant conclusion of the Tennessee Court: “**A Certificate of Public Convenience and Necessity is not a facility.**” *Id.*, at *10. (emphasis added)

F. The Bus Companies Do Not Have an Adequate Remedy at Law.

The Trial Court concluded (Memorandum of Decision, p. 20; Appendix, p. A36) that the Plaintiffs have an adequate remedy at law inasmuch as they can challenge the amount of compensation paid by the Commissioner for the condemned Certificates. The Trial Court’s conclusion, however, is based upon its determination that the Commissioner has the right to condemn. In the absence of a right in the Commissioner to condemn the Certificates, the Plaintiffs have no right to compensation, and therefore no remedy at law, adequate or otherwise.⁸

⁸ Judge Shortall’s conclusion is inconsistent with his prior analysis in a condemnation matter, *Riverfront Future Partners v. Gilbert*, No. CV106003228, 2010 Conn. Super. LEXIS 3037 (Conn. Super Ct. December 2, 2010, Shortall, J.T.R.)(Appendix, p. A922).

This Court has long held that the holder of a Certificate of Public Convenience and Necessity may obtain injunctive relief against the operation of similar service along parallel tracks, where no public convenience and necessity is shown for the similar parallel service. *In re Application of Shelton Street Reg. Co.*, 69 Conn. 626, 631 (1897). Where, as here, a statute confers an exclusive franchise, an injunction is appropriate to prevent infringement of those franchise rights. *New England Railroad Co. v. Central Railway & Electric Co.*, 69 Conn. 47, 55 (1897). Irreparable harm exists when a Certificate is taken without due process, and without following the statutory scheme set forth in § 13b-80. “The deprivation of constitutional rights constitutes irreparable injury.” *Byars v. City of Waterbury*, 1999 Conn. Super. LEXIS 1741 (Conn. Super. Ct. June 3, 1999)(Appendix, p. A866); relying on *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); see also *South Lyme Prop. Owners Ass'n v. Town of Old Lyme*, 121 F. Supp. 2d 195, 204 (D. Conn. 2000)(deprivation of vested property rights a per se constitution harm). In *Hart Twin Volvo Corporation v. Department of Motor Vehicles*, 165 Conn. 42, 327 A. 2d. 588 (1973), this Court recognized that a license, being a property right, “remains such . . . so long as the laws pertaining to its use are obeyed”. *Id.*, at 48, n.1. Where, as here, the deprivation of a constitutional right is threatened, no further showing of irreparable injury is necessary. See, e.g., *Mitchell v. Cuomo*, 748 F. 2d 804, 806 (2d. Cir. 1984). Given that Plaintiffs possess a constitutionally protected interest in their Certificates, they will suffer irreparable harm if

in which the Court recognizing that “[t]he authority to condemn is to be strictly construed in favor of the owner and against the condemnor.” (internal citation omitted), issued a permanent injunction after the Court found there was no right to condemn.

the Commissioner is permitted to condemn those Certificates without having the statutory authority to do so.

VI. CONCLUSION.

For all the foregoing reasons, this Court should conclude that the Trial Court committed reversible error, reverse the decision and judgment of the Trial Court, and remand the matter to the Trial Court with instructions to enter judgment in favor of the Plaintiffs and permanently enjoin the Commissioner from condemning the Plaintiffs' Certificates of Public Convenience and Necessity.

Respectfully Submitted,

THE PLAINTIFFS/APPELLANTS,

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CERTIFICATION OF COMPLIANCE

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate procedure § 67-2, that on this 2nd day of November, 2015:

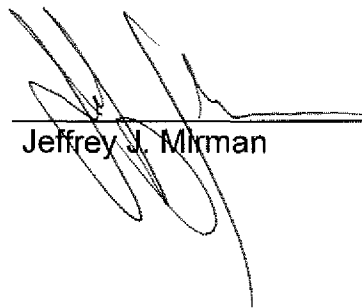
(1) The electronically submitted brief and appendix was delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address was provided; and

(2) The electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law; and

(3) A copy of the brief and appendix was sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) The brief and appendix filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) The brief complies with all provisions of this rule.



Jeffrey J. Mirman

CERTIFICATION OF SERVICE

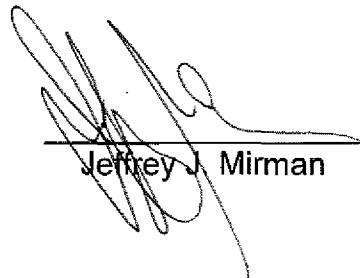
I hereby certify that on 2nd day of November, 2015, a copy of the Plaintiffs/Appellants' Brief was mailed postage-prepaid and sent via electronic mail in compliance with Practice Book §62-7 to the following counsel of record:

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