SCHALLER, J., dissenting. I respectfully submit that summary judgment in favor of the defendant, the town of East Haddam, on the basis of the application of General Statutes § 10-241a,[1] is not appropriate. "A condemnation is valid if, *at the time of the taking*, the government's exercise of eminent domain served a valid statutory purpose." (Emphasis added.) *Heirs of Guerra* v. *United States*, 207 F.3d 763, 767 (5th Cir.), cert. denied, 531 U.S. 979, 121 S. Ct. 428, 148 L. Ed. 2d 436 (2000). Section 10-241a provides in relevant part that "[a]ny local or regional school district may take, by eminent domain, land which has been fixed upon as a site, or addition to a site, of a public school building, and which is necessary for such purpose or for outbuildings or convenient accommodations for its schools . . . ." As a threshold matter, therefore, it is unquestionable that, in order for a taking to be valid under § 10-241a, the land sought to be condemned must have a school purpose. As the trial court, the Appellate Court, and the majority opinion observe, the critical issue presented by this case is whether the defendant's taking of the plaintiffs'[2] land by eminent domain was entirely for school purposes. In the procedural context of a motion for summary judgment, the question is whether a genuine issue of material fact exists as to whether the taking, which was authorized by a referendum vote,[3] was entirely for school purposes. I believe that there is a genuine issue of fact as to that critical issue. Accordingly, I dissent.

The plaintiffs argue that the referendum authorized takings for *two* valid statutory purposes: a school purpose and other municipal purposes.[4] Specifically, the plaintiffs argue that the "general purposes" and "open space" portions of the taking are *not* for school purposes at all, but represent separate and additional municipal purposes. Accordingly, because those portions were not taken for school purposes, the plaintiffs argue that the taking of those portions must have been authorized by General Statutes § 48-6 (a),[5] which refers to municipalities' general eminent domain power. If the plaintiffs are correct, then § 48-6 (a) explicitly required the defendant to commence condemnation proceedings within six months.[6] In that case, the portions of the taking authorized under § 48-6 (a) would become void *only* if the defendant failed to act within the statutorily proscribed time period, which the defendant failed to do. Under the plaintiffs' argument, they can show that summary judgment was improper in this case if they can show that a genuine issue of material fact exists as to whether some portions of the taking were not for a school purpose at all, but for a separate and additional municipal purpose, thus implicating the provisions of § 48-6 (a).[7]

The defendant does not dispute that more than six months had expired between the time of the referendum vote and the time that the defendant began condemnation proceedings against the plaintiffs.[8] On appeal, the defendant claims that, because the taking was entirely for school purposes, the taking was authorized by § 10-241a, which it argues does not limit the time within which the defendant must proceed with condemnation proceedings. As a threshold matter, therefore, the defendant must demonstrate that, as a matter of law, the taking was done *entirely* under the authority of § 10-241a.

One additional point not discussed in the majority opinion is significant. Although the defendant would have us assume that it has consistently carried out this condemnation pursuant to § 10-241a, that is an open question. Neither the statement of compensation nor the language of the question presented by the referendum vote refer to either §§ 10-241a or 48-6. The defendant first asserted that it acted pursuant to § 10-241a in its answer to the plaintiffs' complaint, which, of course, it had to assert because the six month time period applicable to takings pursuant to § 48-6 had already expired. Accordingly, it is unclear whether the defendant *initially* acted pursuant to § 10-241a or § 48-6 or both.[9]

Before turning to a review of the evidence submitted to the trial court, I note two other important principles of law. First, in the context of a motion for summary judgment, the evidence must be viewed *in the light most favorable to the nonmoving party*, in the present case, the plaintiffs. *Stearns & Wheeler, LLC* v. *Kowalsky Bros., Inc.*, 289 Conn. 1, 7, 955 A.2d 538 (2008). Second, it is well settled that the "authority to condemn is to be *strictly construed in favor of the owner* and against the condemner . . . ." (Emphasis added.) *West Hartford* v. *Talcott*, 138 Conn. 82, 90, 82 A.2d 351 (1951).

In this case, we are presented with an unusual evidentiary situation in which the plaintiffs submitted to the trial court the question that was the subject of the referendum vote, which constitutes a municipal *legislative* act with special legal significance that cannot be overlooked,[10] as their evidence that portions of the taking are not for school purposes. The defendant, on the other hand, takes an approach that is internally inconsistent. It argues, on the one hand, that we must determine the purpose of the taking from the text of the referendum question. On the other hand, the defendant submitted to the trial court the affidavits of Bradley Parker, the defendant's first selectman, and James Ventres, the defendant's land use administrator, both of whom purport to assert, as individuals, that the entire taking was for school purposes. Although I agree with the defendant's first argument that the appropriate determination must be made on the basis of the text

of the referendum question, it is clear to me that the result is not at all what the defendant asserts.

In determining whether the purpose of the taking was entirely for a school purpose, or included additional municipal purposes, I turn first to the text of the referendum question; see footnote 3 of this opinion; which provides in relevant part that the defendant shall "appropriate $24,500,000 for *the New Middle School Project* including, but not limited to . . . the acquisition . . . of approximately 226 . . . acres of [the plaintiffs'] property . . . provided, however approximately 30 . . . acres be used for *the New Middle School Project*, approximately 50 . . . acres be used for *general purposes* and the remaining real property of approximately 146 . . . acres be designated as *open space* . . . ." (Emphasis added.) It is readily apparent from the text that only approximately thirty acres have been set aside for the New Middle School Project. My conclusion relies on the fact that, throughout the text of the referendum question, the defendant, by capitalizing the term "New Middle School Project," treated that phrase as a term of art and, by so doing, made it clear that only approximately thirty acres will be used for the actual school related portion of the project. It is unknown, moreover, from the text of the referendum question, whether the approximately fifty acres for general purposes and the approximately 146 acres for open space are in any way related to a school purpose.

The phrase "general purposes" in the referendum question is by its very nature ambiguous and cannot, as a matter of law, be said to apply exclusively to a school purpose, as opposed to another nonschool related municipal purpose. The text of the notice of referendum, however, which also was submitted to the trial court, uses the more specific phrase "general *municipal* purposes"; (emphasis added); rather than general purposes. Significantly, the term "municipal purposes" is the identical term used for takings under § 48-6 (a). See footnote 5 of this opinion. Accordingly, rather than resolving the lingering ambiguity in the defendant's favor, the notice of referendum, which was required by law[11] and was posted prior to the actual referendum vote, supports the contention that a genuine issue of fact exists as to the purpose of the taking.[12]

More revealing, however, is the portion of the referendum question regarding the designation of approximately 146 acres as open space. The term "open space" has a particular meaning in our state's legal nomenclature[13] and nothing in that meaning would suggest, as a matter of law, a school purpose. General Statutes § 12-107e (a),[14] which codifies the process for classifying land as open space land, is also instructive. Section 12-107e (a) provides in relevant part that a planning commission may "designate" land as open space land "provided such designation is approved by a majority

vote of the legislative body of such municipality. . . ." In the present case, the text of the referendum question provides that "the remaining real property of approximately 146 . . . acres be *designated* as open space." (Emphasis added.) The defendant's choice of the phrase *designate as open space*, a phrase with a particular legal meaning, and the submission of such designation to a municipal vote, is a strong indication that the designation of approximately 146 acres as open space was a result in and of itself, and one that does not, at least as a matter of law, relate to a school purpose. In summary, the ambiguous text of the referendum question establishes a genuine issue of material fact as to whether this condemnation is entirely for school purposes, or whether it includes other general municipal purposes, including the designation of open space, which would, as the plaintiffs argue, implicate § 48-6 (a).

Trial proceedings would give the parties the opportunity to prove whether the areas taken for general purposes and open space were taken for school purposes as defined by law or, instead, were in addition to the area specifically designated for school purposes. The plaintiffs, for example, could point to extratextual sources such as the minutes of the school building committee's public hearing or the special town meeting called prior to the referendum vote, which are akin to the type of legislative history we routinely rely on to interpret the legislative acts of our General Assembly. *Kelly* v. *New Haven*, 275 Conn. 580, 611 n.33, 881 A.2d 978 (2005).

As noted previously in this dissenting opinion, the defendant submitted in the summary judgment proceedings the affidavits of Parker and Ventres, which purport to establish that the general purposes and open space portions, as designated in the referendum, were for a school purpose. At the outset, I make the following observations. First, the submission of these affidavits is in conflict with the defendant's principal argument that "[the] statements of [the] selectmen . . . board of finance, zoning commission or any other agency which may have considered the matter, simply do not bear upon the court's review." Second, for purposes of interpreting a legislative act, I am unaware of any authority for relying on statements by an individual that were made *subsequent* to the enactment of that legislative act.[15] Rather, in the area of eminent domain, it is the purpose *at the time of the taking* that is relevant; see *Heirs of Guerra* v. *United States*, supra, 207 F.3d 767; not an after-the-fact justification. Finally, even if it were appropriate to rely on postenactment statements, such as the affidavits submitted by the defendant, to interpret the referendum question, it would not alter the ultimate conclusion, namely, that summary judgment is not appropriate in this case.

According to Ventres' affidavit, approximately sixty-

one acres will be utilized for the actual school building, roadways, ball fields and septic fields, and an additional 22.5 acres will be set aside for future expansion of playing fields and related school facilities. According to Ventres, therefore, the defendant intends to use only approximately eighty acres for school purposes. Even crediting Ventres' statements, the taking also includes approximately 146 acres of open space.[16] The defendant's affidavits do not support the proposition that the open space is for a school purpose. Ventres statement, which was made *after* the crucial referendum vote, implicitly concedes that approximately 146 acres will not be used for school purposes. The affidavits indicate merely that the defendant took the open space because it was substantially nondevelopable or had difficult access.[17] While these may be *reasons* for taking the open space, they do not address the statutory test, namely, whether that portion of the taking was for a school purpose. Furthermore, in addition to Ventres' implicit concession that the entire parcel is not for school purposes, Parker explicitly conceded the point when he stated that "it was determined that acquisition of *most* of the [plaintiffs' property] . . . would be necessary for purposes of the planned school project . . . ." (Emphasis added.) On the basis of this concession alone, namely, that some portions of the taking were *not* for a school purpose, I believe that the plaintiffs deserve the opportunity to present evidence in support of their position at trial rather than having that opportunity foreclosed by summary judgment.[18]

In reaching a different conclusion, the defendant and the majority argue that, because the first sentence of the referendum question mentions only an appropriation for the New Middle School Project and no other projects, *every* item that follows is also entirely for the school project. I cannot agree that this court can properly consider only a selected portion of the text of a municipality's legislative action to determine its meaning. See, e.g., *Broadnax* v. *New Haven*, 270 Conn. 133, 161, 851 A.2d 1113 (2004) (in interpreting town charter or municipal ordinance, effect should be given to every section, paragraph, sentence, clause and word in instrument and related laws). The majority further argues that it would be "entirely unrealistic" to construe § 10-241a to limit towns to "the footprint of the school building and related construction and to exclude land required for the other uses" that the defendant described in its affidavits. As the majority observes, those other uses consisted of the lawns, roads, septic systems, playing fields and open space between the school and the surrounding area. Although I agree, of course, with this aspect of the majority's interpretation of § 10-241a, I cannot agree with the application of that statement to the facts of this case.

In essence, the majority seems to suggest that the approximately thirty acres designated for the New Mid-

dle School Project, which the plaintiffs do *not* dispute as related to school purposes, would restrict the defendant to the "footprint of the school building" and would exclude the other related uses. That argument, in my view, represents a fundamental misunderstanding of the record before us. The referendum question clearly indicates that the new school building will occupy a space of approximately 96,000 square feet. That area, however, represents only approximately 2.20 acres of land.[19] Accordingly, under the facts of this case, there are approximately 27.80 undisputed acres remaining to construct the other related items such as roads, fields and parking. I do not believe it is feasible to conclude, basically as a matter of law, without appropriate factual support produced before the trial court, that the 196 acres for general purposes and open space[20] can be shown to be related to the school purpose.

In short, the problem in the present case is not that the defendant lacked the authority to take the general purposes and open space portions but, rather, that unless such taking was for a school purpose the defendant was required to act within the statutorily prescribed six month period for nonschool related municipal takings as set forth in § 48-6 (a). Because there is an issue of fact as to whether the taking of approximately fifty acres for general purposes and approximately 146 acres for open space was for a school purpose or separate from such purpose, summary judgment is not appropriate at this stage of the proceedings. For those reasons, I would affirm the judgment of the Appellate Court.

On remand, I would envision two possible scenarios: First, the defendant may be able to demonstrate that the entire taking was for a school purpose, in which case the defendant would prevail. Second, the defendant may fail to demonstrate that some or all of the general purposes and open space portions were taken for a school purpose. In that case, the trial court may set aside some portions of the taking; in which case, those portions would either revert back to the plaintiffs or the defendant would proceed anew under § 48-6 (a).[21]

For the foregoing reasons, I respectfully dissent.

[1] See footnote 2 of the majority opinion.

[2] The plaintiffs are Leo Gold, Joan S. Levy and the executors of the estate of Bernard Manger, Harold Bernstein and Joseph Lieberman.

[3] For ease of reference, I reprint the entire referendum question: "Shall the [defendant] appropriate $24,500,000 for the New Middle School Project including, but not limited to, (a) the acquisition by purchase or eminent domain of approximately 226 . . . acres of real property located off Clark Gates Road, East Haddam on the following parcels: Map # 74, Lot 3, Map # 73, Lot 20-1, Map # 74, Lot 009A, provided, however approximately 30 . . . acres be used for the New Middle School Project, approximately 50 . . . acres be used for general purposes and the remaining real property of approximately 146 . . . acres be designated as open space, (b) the construction of a new middle school of approximately 96,000 square feet to house grades [four through eight], (c) the construction of parking areas and drives, ball fields and soccer fields, (d) site improvements and (e) all alterations, repairs and improvements in connection therewith, as well as engineering, architectural and temporary and permanent financing costs, authorize the

issuance of bonds and notes in the amount of $24,500,000 to finance such appropriation and authorize the Board of Selectmen to acquire such real property."

[4] The majority asserts that "the plaintiffs make no claim that their land will not, in fact, be used for school purposes." I disagree. While the plaintiffs concede that approximately thirty acres will be used for a school purpose, as the referendum expressly reflects, the plaintiffs make no concession that the other approximately 196 acres will be used for a school purpose. Instead, the plaintiffs affirmatively assert that those acres will *not* be used for a school purpose but, rather, will be used for other municipal purposes.

[5] General Statutes § 48-6 (a) provides: "Any municipal corporation having the right to purchase real property for its municipal purposes which has, in accordance with its charter or the general statutes, voted to purchase the same shall have power to take or acquire such real property, within the corporate limits of such municipal corporation, and if such municipal corporation cannot agree with any owner upon the amount to be paid for any real property thus taken, it shall proceed in the manner provided by section 48-12 within six months after such vote or such vote shall be void."

[6] This is a critical point. The plaintiffs do not argue that the defendant's taking, including the taking of open space, was not authorized by law but, rather, that because the taking was not entirely for school purposes, the defendant was required to act within the six month time limit set forth in § 48-6 (a), which the defendant indisputably failed to do.

[7] To be sure, there will be circumstances in which a portion of a school taking will serve two purposes. For example, a baseball field associated with new school construction might serve both a school purpose, and also serve a broader purpose, such as providing a field for an adult softball league. This case does not present us with the question of which reason should take precedence, if such a distinction matters, because the plaintiffs claim that there is no associated school purpose for the portions taken for general purposes and open space.

[8] The referendum vote occurred on June 24, 2004. Approximately eighteen months later, on January 5, 2006, the defendant filed its statement of compensation with the clerk of the superior court.

[9] I also observe that the defendant initially could have acted pursuant to General Statutes § 48-5, which grants a town the same powers, and subjects the town to the same regulations, as school districts when taking land for school purposes.

[10] The term "referendum" in this context generally means "[t]he determination of questions as to certain existing or proposed legislation by reference to a vote of the people, employed in determining questions covering wide ranges, among the more general of which are . . . the incurring of municipal indebtedness." Ballentine's Law Dictionary (3d Ed. 1969).

[11] General Statutes § 7-9c provides in relevant part: "Unless otherwise provided by law, a referendum on any question may be held at such hours as is provided in section 7-9b and on such date as the legislative body of the political subdivision holding such referendum shall determine pursuant to the provisions of the local charter, special act or home rule ordinance or not earlier than the thirtieth day following the day upon which the municipal clerk, upon instruction from the legislative body, *issues a warning* therefor by publishing a notice thereof in a newspaper having a general circulation in the municipality. . . ." (Emphasis added.)

[12] The notice of referendum provides that "approximately [fifty] . . . acres [would] be used for general *municipal* purposes," whereas the referendum question provides that "approximately [fifty] . . . acres [would] be used for general purposes . . . ." (Emphasis added.) On appeal, the defendant does not explain why the term "municipal," as used in the notice of referendum, was removed from the final referendum question. To my mind, this seems to indicate that prior to the vote, the defendant envisioned that some portion of the land could be developed in the future for *municipal* purposes.

[13] General Statutes § 12-107b (3) defines " 'open space land' " as "any area of land, including forest land, land designated as wetland under section 22a-30 and not excluding farm land, the preservation or restriction of the use of which would (A) maintain and enhance the conservation of natural or scenic resources, (B) protect natural streams or water supply, (C) promote conservation of soils, wetlands, beaches or tidal marshes, (D) enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open spaces, (E) enhance public recreation opportunities, (F) preserve historic sites, or (G)

promote orderly urban or suburban development . . . ."

[14] General Statutes § 12-107e provides in relevant part: "(a) The planning commission of any municipality in preparing a plan of conservation and development for such municipality *may designate upon such plan areas which it recommends for preservation as areas of open space land, provided such designation is approved by a majority vote of the legislative body of such municipality*. . . ." (Emphasis added.)

[15] This would be akin to relying on the statements of a state legislator, made after a vote, to interpret a state statute—an action we have never condoned. This assertion excludes circumstances when the statements are made in the context of a subsequent amendment to the original legislation, a circumstance not presented by the facts of this case.

[16] Because Ventres' affidavit describes the open space land as nondevelopable, it is clear that the approximately eighty acres that he describes for the buildings and future expansion consist of the thirty acre and the fifty acre portions described in the referendum. Thus, it is clear that the remaining land consists of approximately 146 acres of open space.

[17] Ventres' affidavit indicates that the balance of the land, that is, the portion other than the approximately eighty acres, is "either not subject to development or substantially constrained by the location of wetlands, ponds, steep slopes and other similar constraints." The defendant, relying on that assessment, argued in its memorandum in support of its motion for summary judgment that by not taking the open space it "would have left the owners with portions of their property with no access or very difficult access and would have left only property which is substantially nondevelopable due to the existence of wetlands, ledges and steep slopes."

[18] Regardless of whether the plaintiffs have claimed that the affidavits support their position; see footnote 9 of the majority opinion; the affidavits do, in fact, support the plaintiffs' position. Construing any ambiguity in Parker's affidavit to support the defendant's position does not adhere to the directive to construe the evidence in the light most favorable to the nonmoving party. *Stearns & Wheeler, LLC* v. *Kowalsky Bros., Inc.*, supra, 289 Conn. 7.

[19] I take judicial notice that one acre equals 43,560 square feet. The World Almanac (2008) p. 348.

[20] I emphasize that the designated open space portion is approximately *twice* the size of the eighty acres allegedly needed for the entire school project, including the buildings, roadways, ball fields and septic fields, and *four times* the size of the entirety of Bushnell Park in Hartford, which I notice as consisting of thirty-seven acres. See http://www.bushnellpark.org/Content/Bushnell Park Foundation.asp; see also *Sheff* v. *O'Neill*, 248 Conn. 1, 38 n.42, 678 A.2d 1267 (1996) (permitting judicial notice of certain statistics).

[21] The legal issue as to whether there is a time limit for takings under § 10-241a, which is implicated by the issues in this case, was discussed in the parties' briefs. The concept that a town has a six month time limit when it condemns property for general municipal purposes but has absolutely no time limit when it condemns private property for school purposes seems contrary to basic principles of law, reason and common sense. It would appear that the standard of review that requires strictly construing the authority to condemn *against the condemnor* and in favor of the owner would militate against the defendant, especially where it may be that a portion of the taking is for school purposes and a portion is not for school purposes. Because the issue was not thoroughly briefed and because the construction of the school is complete, raising equitable concerns that would militate against voiding the entire taking in any event, resolution of this issue should await another day.