VERTEFEUILLE, J., with whom SULLIVAN, J., joins, dissenting. I respectfully dissent. The dispositive issue in this case is not whether the trial court properly concluded that the defendants'[1] condemnation awards should be increased. Rather, the principal question is whether, in increasing the awards based on its consideration of the existing bridge abutments on the properties, the trial court's factual findings were clearly erroneous. The majority concludes that the trial court's determination that the properties have a special adaptability for a highest and best use as a bridge site was speculative because it was unsupported by the record. The majority therefore concludes that the trial court's increase of the defendants' condemnation award was improper. Because I would find that the trial court did not abuse its discretion by *considering* the special adaptability of the abutments when it assessed the defendants' damages and, most importantly, because the trial court's findings were not clearly erroneous, I must dissent.

The function of the trial court in condemnation hearings is to determine as closely as possible the just compensation for the property taken. *Alemany* v. *Commissioner of Transportation*, 215 Conn. 437, 444, 576 A.2d 503 (1990). This court has held that, in condem-

nation hearings, the value placed by the trial court on the property taken is a matter of fact and that this court should uphold the trial court's finding unless it was clearly erroneous. *Gebrian* v. *Bristol Redevelopment Agency*, 171 Conn. 565, 571, 370 A.2d 1055 (1976); *Birnbaum* v. *Ives*, 163 Conn. 12, 20–23, 301 A.2d 262 (1972); *Sorenson Transportation Co.* v. *State*, 3 Conn. App. 329, 333, 488 A.2d 458, cert. denied, 196 Conn. 801, 491 A.2d 1105 (1985).

We have afforded trial courts substantial discretion in choosing the most appropriate method of valuing the property taken. *Robinson* v. *Westport*, 222 Conn. 402, 410, 610 A.2d 611 (1992); *French* v. *Clinton*, 215 Conn. 197, 200, 575 A.2d 686 (1990). "The usual measure of just compensation is the fair market value or the price that would probably result from fair negotiations between a willing seller and a willing buyer, taking into account *all* the factors, *including* the highest and best or most advantageous use, *weighing and evaluating* the circumstances, the evidence, the opinions expressed by the witnesses and *considering* the use to which the premises have been devoted and which may have enhanced its value." (Emphasis added.) *Wronowski* v. *Redevelopment Agency*, 180 Conn. 579, 585, 430 A.2d 1284 (1980); see also *D'Addario* v. *Commissioner of Transportation*, 180 Conn. 355, 365, 429 A.2d 890 (1980); *Tandet* v. *Urban Redevelopment Commission*, 179 Conn. 293, 298, 426 A.2d 280 (1979); *Mazzola* v. *Commissioner of Transportation*, 175 Conn. 576, 581–82, 402 A.2d 786 (1978); *Birnbaum* v. *Ives*, supra, 163 Conn. 18; *Connecticut Printers, Inc.* v. *Redevelopment Agency*, 159 Conn. 407, 410–11, 270 A.2d 549 (1970); *Stanley Works* v. *New Britain Redevelopment Agency*, 155 Conn. 86, 102, 230 A.2d 9 (1967). "The general rule is that the loss to the owner from the taking, and not its value to the condemnor, is the measure of the damages to be awarded in eminent domain proceedings." *Gray Line Bus Co.* v. *Greater Bridgeport Transit District*, 188 Conn. 417, 427, 449 A.2d 1036 (1982). As the majority recognizes in its opinion, however, the question of just compensation is a matter of equity rather than a strictly legal or technical matter. *Alemany* v. *Commissioner of Transportation*, supra, 215 Conn. 444.

A trial court must reach its determination of value and fair compensation for the taken property "in light of all the circumstances, the evidence, its general knowledge and its viewing of the premises." (Internal quotation marks omitted.) *Robinson* v. *Westport*, supra, 222 Conn. 410; see also *French* v. *Clinton*, supra, 215 Conn. 200. In prior decisions, this court has afforded the trial court the discretion to consider its own visual observations of the taken property in its determination of its value. *Birnbaum* v. *Ives*, supra, 163 Conn. 20. This court has concluded that a trial court's visual observations "are as much evidence as the evidence

presented [to the trial court] by the witnesses under oath.'' Id.; see *Gentile* v. *Ives*, 159 Conn. 443, 452, 270 A.2d 680 (1970), cert. denied, 400 U.S. 1008, 91 S. Ct. 566, 27 L. Ed. 2d 621 (1971); *Houston* v. *Highway Commissioner*, 152 Conn. 557, 558, 210 A.2d 176 (1965). This court has also held that the trial court has the discretion to disregard the opinion of an expert or appraiser. *Birnbaum* v. *Ives*, supra, 20–21. We also have concluded consistently that the trial court has the discretion to use other measures to determine value when the fair market value measure of damages does not fully compensate the owner of the taken property. *Alemany* v. *Commissioner of Transportation*, supra, 215 Conn. 444; *Birnbaum* v. *Ives*, supra, 18; *Connecticut Printers, Inc.* v. *Redevelopment Agency*, supra, 159 Conn. 414. With these standards in mind, I will address what I see as various problems with the majority's opinion.

I first take issue with the majority's reading of the factual findings made by the trial court and its analysis based upon that reading. Specifically, the majority concludes that the trial court analyzed the properties separately and not in tandem when it reached its determination of the properties' value. After reaching that conclusion, the majority proceeds to consider the properties as separate parcels for purposes of its legal analysis rather than considering them jointly. The majority then concludes that the trial court's consideration of the abutments' joint usage is speculative. This simply is wrong. The evidence demonstrates conclusively that the trial court considered the properties in tandem.

The trial court's memorandum of decision clearly demonstrates that, although the trial court heard the evidence concerning the two properties separately in two immediately consecutive trials, it considered the properties in tandem when it made its determination of value.[2] Moreover, the evidence demonstrated that the plaintiff, the commissioner of the department of transportation (department), had condemned the properties on the very same day, virtually simultaneously through two consecutive deposits, for the purpose of using the two adjacent properties *together* in order to construct a new highway bridge connecting one bridge abutment with the other. The department's construction plans, which were reviewed by the trial court, clearly show that the department had planned to use the properties jointly. Additionally, the defendants' real estate appraiser, Peter R. Marsele, testified concerning the possible joint uses of the properties as a bicycle path or hiking trail, never stating that the abutments could be used separately.[3] Moreover, the abutments were historically used together to support a railroad bridge that had spanned the Nepaug River. Despite the clear evidence that the department intended to use the properties jointly, as they had been in the past, the

majority persists in considering each property separately. Unlike the majority, I would uphold the trial court's consideration of the properties in tandem.

Second, the majority's opinion also pointedly ignores the ''windfall exception'' to the general rule enunciated in *Gray Line Bus Co.* v. *Greater Bridgeport Transit District*, supra, 188 Conn. 429–30, and quoted in the trial court's memorandum of decision. In *Gray Line Bus Co.*, this court stated: ''Although benefit to the taker may not be the measure of damages in a condemnation proceeding, *it is not wholly irrelevant* in deciding whether the taking of a particular form of property merits some award. The basic principle that private property may not be taken without just compensation is offended *where a public authority is permitted to receive a windfall of substantial value* without some recognition of the interest of the owners in the form of a reasonable award.'' (Emphasis added.) Id.

There was testimony from the defendants' structural engineer, James A. Thompson, that supported the trial court's consideration of the windfall exception. Thompson, whose occupation as a civil engineer required him to review cost estimates by contractors, testified that he evaluated the replacement cost of the abutments on the defendants' properties. He determined the replacement costs of the abutments by estimating the cost that the department did not have to expend for the new bridge construction due to the existing abutments. His evaluation included a review of the department's construction plans, which incorporated the existing abutments into the construction of the new bridge. Thompson also considered the structure and adaptability of the abutments to the department's construction plans, as well as the existing life of the abutments. Thompson estimated that the value of each abutment, based on the cost savings to the department, was $91,779 and $91,271 for the abutments on the Towpath and Wilusz properties, respectively.

On the basis of this evidence, the trial court, which has substantial discretion when choosing the most appropriate method in reaching a determination of value for condemned property; see *Robinson* v. *Westport*, supra, 222 Conn. 410; considered the substantial cost savings to the department when it determined the value of the taken properties. The trial court's *consideration* of the department's substantial cost savings is further evidenced by the trial court's awards of $22,300 and $24,100 for the Towpath and Wilusz properties, respectively, instead of awarding damages to the defendants equal to the appraisal figure submitted by Thompson. Because this court previously has held that a benefit to the taker is not wholly irrelevant when the taker receives a windfall of substantial value; see *Gray Line Bus Co.* v. *Greater Bridgeport Transit District*, supra, 188 Conn. 429–30; I would conclude that the

substantial windfall the department will receive here by taking the properties with the abutments thereon establishes sufficient grounds for the trial court to increase the amount of compensation the department must pay the defendants for the taken property.

Third, I cannot agree with the majority that we must reverse the trial court's judgment and order a new trial based on the trial court's conclusion that there is a special adaptability of the Towpath and Wilusz properties for the highest and best use to bridge the Nepaug River. Even if we were to assume that there is insufficient evidence to warrant such a finding, the trial court's assessment of the damages to Towpath and Wilusz, totaling $22,300 and $24,100, respectively, was not based solely on this special adaptability finding. The trial court's memorandum of decision did not allocate separate values to the independent components of its assessment. See id., 421. The trial court does detail, however, the evidence relating to the various components that were taken into consideration in arriving at the total awards. See id. The trial court, under the duty with which it is charged, reached an assessment of damages that encompassed all the circumstances, all of the evidence, and its general knowledge, which *included* the factor of special adaptability. Cf. *Robinson* v. *Westport*, supra, 222 Conn. 410.

In its memorandum of decision, the trial court closely examined the testimony of the parties' appraisal witnesses. After it determined that the department's appraiser, Cynthia L. Bess, had reached an improper conclusion because she failed to consider certain facts the court deemed important in reaching a correct appraisal, the only remaining appraisal testimony was that of the defendants' appraiser, Marsele. The trial court, however, did not merely accept the testimony of Marsele as the definitive word with regard to the properties' value; rather, it found improprieties in his appraisal as well.[4] The trial court also considered the testimony of the structural engineer, Thompson, who, on behalf of the defendants, testified with regard to the replacement cost of the abutments. In addition, the trial court examined the department's construction plans.

After the trial court found that the abutments were structures that had become affixed to the properties and that it had to consider the value of the abutments in determining the defendants' compensation, the trial court also considered other factors. See 4 P. Nichols, Eminent Domain (3d Ed. Rev. 2000, J. Sackman & B. Van Brunt eds.) § 13.01; id., pp. 13-3 through 13-4 ("[t]he public entity must . . . compensate the owner for all that is attached to the underlying soil"). To reach a fair compensation for the taken property, the trial court weighed the reproduction cost of the abutments. It looked at the zoning restrictions and regulations in the district where the properties were located. Additionally,

the trial court considered the properties' fair market value and the benefit of the abutments to the department. It also took into account the special adaptability of the properties for bridging the Nepaug River and concluded that this use was the properties' highest and best use. Furthermore, the trial court personally viewed the properties and their surrounding areas. After considering all of these factors, the trial court reached a determination of the properties' value, which resulted in the defendants' award of compensation.

The trial court reached an independent determination of value and fair compensation. Keeping in mind that: (1) Bess determined that the damage to Towpath and Wilusz was $1175 and $1575, respectively; (2) Marsele determined that the damage to Towpath and Wilusz was $91,800 and $92,100, respectively; and (3) Thompson testified that the department would save over $180,000 by taking these particular properties with the abutments as opposed to constructing new bridge abutments; the trial court reached the conclusion that Towpath's and Wilusz' total damages were $22,300 and $24,100, respectively. There was evidence before the trial court that the properties were especially desirable or adaptable to construct a bridge thereon and that properties of similar adaptability for this purpose were not available in that area. See *Gray Line Bus Co.* v. *Greater Bridgeport Transit District*, supra, 188 Conn. 420. The trial court did not rest its determination exclusively on its finding of the properties' special adaptability, but, rather, based its assessment on numerous factors.[5] As such, I cannot support today's decision to reverse the trial court's findings merely because the majority believes that one of the factors the trial court considered is not adequately supported.

Finally, the majority does not conclude that there is any fault in the legal standards the trial court used to reach its assessment of the properties. Cf. *Unkelbach* v. *McNary*, 244 Conn. 350, 367, 710 A.2d 717 (1998). Rather, the majority concludes that there is an ''absence of evidence'' to warrant an increase of the defendants' award. This, however, is not a case in which there is no evidence in the record to support the increase of the defendants' awards. Nevertheless, the majority ignores the factual findings made by the trial court and, effectively, has usurped the function of the trial court by substituting its own findings for those of the trial court. Where the trial court has made findings of fact, which it is afforded substantial deference to do, we are limited to affirming those findings unless they are clearly erroneous. *Robinson* v. *Westport*, supra, 222 Conn. 410; *Gebrian* v. *Bristol Redevelopment Agency*, supra, 171 Conn. 571. Under the circumstances of this case, I see no reason to abandon this standard. I would affirm the trial court's findings and, therefore, I respectfully dissent.[6]

[1] The defendant in the first case is Towpath Associates (Towpath) and

the defendants in the second case are Joseph F. Wilusz and Carol C. Wilusz, in her capacity as administratrix of Joseph F. Wilusz' estate (Wilusz). References herein to those parties jointly are to the "defendants."

[2] The trial court stated: "The court finds that the highest and best use of the subject *properties* is *their* use in the manner proposed by the takings for the relocation and realignment of Powder Mill Road and the replacement of its unsafe and abandoned bridge, *or* a similar use bridging the Nepaug River, utilizing the existing abutments on its banks, and building a roadway for transportation or recreational purposes over and incorporating the abandoned railroad trackbed existing on the properties. There is a special adaptability of the subject premises for such highest and best use." (Emphasis added.)

[3] Marsele testified to the following: "[T]he best use to which this property can be put is for use of the existing bridge abutment to relocate Powder Mill Road as proposed for the taking by the state of Connecticut. It also has other use[s], Your Honor, but they would all be of bridge uses in nature. I can't think of anything other than bridge uses by various agencies that could use such a facility. . . . This piece could easily be spanned for connecting this abutment to another abutment on the other side of the Nepaug River to create either a bike path and/or a walking path to facilitate recreation. That usually is done by either a town or some of these private organizations that are interested in nature, what we call the state nature trail."

[4] The trial court, having determined that Marsele incorrectly concluded that the Towpath taking was a partial taking, concluded that the Towpath taking was in fact a total taking.

[5] The trial court specifically stated that its finding of value was based on "all the circumstances, consideration of the evidence, general knowledge of the elements constituting value, and a viewing of the property and surrounding area . . . ."

[6] In footnote 12 of its opinion, the majority interprets this dissent as concluding that even if the trial court's finding concerning the special adaptability of the properties was improper, we should nevertheless defer to the trial court's ultimate assessment. In light of the analysis set forth herein, it should be apparent that the majority improperly characterizes this dissent.