MONICA PETERS *v.* NUMAN SENMAN
(AC 40438)

Keller, Prescott and Harper, Js.

Syllabus

The plaintiff brought this action seeking joint custody of the parties' minor child. After the trial court rendered judgment granting joint legal custody to the parties and primary physical custody to the defendant, the plaintiff filed a motion for modification of custody. During the pendency of the custody modification proceedings, the plaintiff also filed two motions seeking a declaratory judgment that certain fundamental rights guaranteed by the federal and state constitutions deprived the court of the authority to adjudicate parental custody conflicts under the best interests of the child standard. Thereafter, the court rendered judgment denying in part the plaintiff's motion for modification of custody, dismissing her motions for a declaratory judgment and awarding attorney's fees to the defendant. On the plaintiff's appeal to this court, *held*:

1. The plaintiff's claim that the court violated her fourteenth amendment rights by terminating a portion of certain rights provided to her under the Individuals with Disabilities Education Act (act) (20 U.S.C. § 1400 et seq.) without conducting a fitness hearing was not reviewable, the plaintiff having failed to brief the claim adequately; moreover, even if the issue of federal preemption had been adequately briefed, it would not have any applicability to the precise claim as framed by the plaintiff, as the plaintiff stated in her brief that she was not appealing from the trial court's decision declining to modify the existing order that she has no authority to change the location of the child's schooling, which was the sole basis for her claim under the act.

2. The trial court did not err in dismissing the plaintiff's motions for a declaratory judgment that the court had no authority under the federal and state constitutions to intervene in her long-standing custody disputes with her child's father; the plaintiff's constitutional claims were meritless, as she fundamentally misunderstood when declaratory relief judgment is statutorily available and failed to recognized the difference between unwarranted governmental or third-party actions intruding upon the lives of intact families, as opposed to the obligation of family courts to hear and decide cases brought before them by one parent against the other.
3. The trial court did not err in denying the plaintiff's motion for modification of custody; the court carefully considered and applied the criteria set forth in the applicable statute (§ 46b-56), the court's factual determination that there had not been a change in circumstances warranting an increase in the plaintiff's parental access during the school year or any change in how decisions affecting the child are made was supported by the evidence, and the plaintiff did not explain how she derived her mathematical computations to support her claim that the court miscalculated the number of home to home transitions the child would experience under her proposed orders.
4. The trial court did not err in awarding the defendant $3500 for a portion of his attorney's fees; that court, which considered all of the relevant statutory (§ 46b-62) criteria, as well as the parties' testimony, evidence and an affidavit of legal fees filed by the defendant's counsel, found the amount and hourly rate set forth in the affidavit to be reasonable, and concluded from all the credible evidence that the plaintiff was in a financial position to contribute to a portion of fees incurred by the defendant for the third course of litigation on the same topic concerning the plaintiff's access to the minor child, and the trial court's failure to address the plaintiff's objection to the defendant's request for attorney's fees was harmless error, as the objection failed to address the criteria in § 46b-62.

Argued April 9—officially released October 29, 2019

Procedural History

Application for custody of the parties' minor child, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the court, *Suarez, J.*, rendered judgment granting joint legal custody to the parties and primary physical custody to the defendant; thereafter, the matter was referred to the Regional Family Trial Docket at Middletown, where the court, *Hon. Barbara M. Quinn*, judge trial referee, denied in part the plaintiff's amended motion for modification of custody,

dismissed the plaintiff's motions for a declaratory judgment and awarded attorney's fees to the defendant, and the plaintiff appealed to this court; thereafter, the court, *Hon. Barbara M. Quinn*, judge trial referee, denied the plaintiff's motion for articulation; subsequently, this court granted the plaintiff's motion for review of the denial of her motion for articulation and ordered the relief requested in part; thereafter, the plaintiff filed an amended appeal. *Affirmed.*

Monica L. Syzmonik, self-represented, the appellant (plaintiff).

Opinion

KELLER, J. The self-represented plaintiff, Monica L. Peters,[1] appeals from the trial court's decisions denying, in part, her postjudgment amended motion for modification of custody and awarding attorney's fees to the defendant. The plaintiff also challenges the trial court's decision dismissing two motions she filed during the pendency of the custody modification proceedings, in which she sought a declaratory judgment that certain fundamental rights guaranteed by the United States constitution deprived the court of the authority to adjudicate parental custodial conflicts under the best interests of the child standard. On appeal, the plaintiff claims that the court (1) "[violated her] fourteenth amendment and other rights by terminating a portion of her rights under the Individuals with Disabilities Education Act

[1] The plaintiff has remarried and is now known as Monica L. Syzmonik. In the trial court, the plaintiff was represented at times by various counsel but also represented herself at other times. She is appearing as a self-represented party for purposes of this appeal. We note that the defendant did not participate in this appeal. This court entered an order on April 25, 2018, providing that this appeal would be considered solely on the basis of the plaintiff's brief and the record, as defined by Practice Book § 60-4, in light of the defendant's failure to comply with this court's April 10, 2018 order requiring him to file a brief on or before April 24, 2018. Accordingly, we have considered this appeal on the basis of the plaintiff's brief, the record, and the plaintiff's oral arguments before this court.

(IDEA) [20 U.S.C. § 1400 et seq.] without conducting a fitness hearing"; (2) erred in concluding that she lacked "standing to request a declaratory judgment to adjudicate her constitutional rights as a fit parent," and violated her right to due process and abused its discretion by not ruling on her motions for declaratory judgment before trial commenced; (3) violated her and her child's rights under the first and fourteenth amendments to the United States constitution by failing to apply the proper balancing test under *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); (4) erred in awarding attorney's fees to the defendant, Numan Senman; (5) erred in failing to grant her motion for modification of custody; and (6) erred in using its own opinions to infringe on her "fundamental rights to her child," circumvented her due process right to cross examine the judge, and made clearly erroneous findings regarding her proposed orders and the needs of the child. We affirm the judgment of the court.

The following facts, as found by the court, and procedural history are relevant to this appeal. The parties have never been married. The court previously awarded the parties joint legal custody of their minor son (child), and determined that his primary residence would be with the defendant. On October 22, 2015, the plaintiff filed a motion to modify the joint custody orders pertaining to the child, who has autism and was eight years old at the time of filing and ten years old by the time the hearing on the motion occurred. In her motion for modification, the plaintiff sought shared decision making by both parents and primary residence of the child with her because she claimed she resides in a school district better able to provide for his specialized needs. On November 7, 2016, the plaintiff filed an amended motion for modification that included allegations that the prior order as to custody infringed on the constitutional rights she had asserted in prior motions she filed

seeking a declaratory ruling. In proposed orders dated February 2, 2017, the defendant noted his objection to the plaintiff's motions seeking a declaratory judgment and amended motion for modification. He also sought the clarification or removal of certain mediation orders in the original joint custody orders, supervised parental access for the plaintiff due to his concerns about her husband, and attorney's fees.

A trial was held on February 15, 16 and 17, 2017. The court issued its decision on the plaintiff's motions for a declaratory judgment on April 6, 2017. It issued its decision on the plaintiff's motion for modification on April 7, 2017.

In its decision on the motion for modification, the court noted that "[t]he matter of [the child's] primary residence has now been litigated by his never married parents three times since he was four years old. All hearings have been initiated by the plaintiff . . . . The first contested hearing began in late 2010 and ended with a decision on March 22, 2011, that awarded joint custody of [the child] to both parents, and primary residence to [the defendant]. There were orders regarding access, insurance, child support and tax exemptions. [The child's] best interests were found to be with continued stability in [the defendant's] care.

"The second contested evidentiary hearing on the issue of [the child's] residential placement was conducted before Judge Holly Abery-Wetstone. It began with [the] plaintiff's motion seeking both equal decision-making privileges . . . and an equal parenting schedule. [On] October 21, 2013, the relief the plaintiff sought was denied, but changes to the earlier orders were made. Decision making was divided between the parties, with the [defendant] having final authority over issues of physical health, general welfare, extracurricular activities, religious upbringing and choice of school

system. The [plaintiff] was awarded final decision-making authority relating to the treatment of [the child's] autism, as she has been a good advocate for him. The orders were clarified to state that she had no authority to change his school [and] provided for a mediation mechanism to resolve disputes. . . .

"As noted, less than three years after the last fully contested hearing, a motion to modify, seeking essentially similar relief has been again filed by the plaintiff . . . ."

The court considered this case as one of "high conflict" since the parties first formed a relationship, a conflict that continued with respect to the child's care due to their very different parenting styles and inability to agree on most issues. "As noted by Judge Abery-Wetstone and apparent during the course of this trial, they have no effective means of coparenting or indeed communicating, largely because they have such differing viewpoints and personalities."

The court found that since the child was approximately two years old, he had remained without interruption in the defendant's care, with the plaintiff "coming in and out of his life as the parties reconciled or ended their relationship multiple times between 2006 to 2010." The child had resided in a home the defendant purchased since 2009 and had only known the Vernon school system. He is the only child in the defendant's home. The defendant has a flexible work schedule and is able to care for his son largely without assistance. The child has friends in the community and school. According to the defendant, the child is well supported by his individual education plan (IEP) and his teachers, a one-on-one paraprofessional and the defendant, who regularly supervises his school work, and is doing well academically.

The court stated that despite the plaintiff's dissatisfaction with the child's plan for transitioning to middle school in Vernon, "by history and current testimony, routine, stability and predictability of his living situation have been provided to [the child] primarily by [the defendant] for most of this child's life." The court noted that the plaintiff asserted that her changed living circumstances, her marriage and the birth of her daughter by her new husband are all changes in circumstances that supported her quest for a change in the child's primary residence, but considered most of these changes to be personal to the plaintiff and not based on events in the child's life. The plaintiff's two major claims were that her life had changed dramatically since she was last before the court regarding custody and that her son's low test scores were proof that his current school system is inadequate.

The court found the plaintiff's claims as to the unsuitability of his current schooling in Vernon were unsupported by any evidence about what could be expected of the child, in light of his age and special needs as a child with autism. The plaintiff produced no expert testimony, and the court noted that "[o]utcome does not prove causation" because school performance, especially for an autistic child, is only one of a multitude of factors that could have brought about such results. The court also noted that the plaintiff failed to present any evidence that the Glastonbury school system would provide the child with a better education.[2]

The court agreed with the defendant that a change of residence for the child was something that the plaintiff wants for herself to prove she is an adequate parent.

[2] The court indicated it had carefully reviewed a sealed exhibit containing the child's Vernon school records and it presented "a skilled and careful assessment of [the child's] current academic situation and psychological testing and a detailed plan for how to support his continuing needs for support in the classroom."

It concluded that the plaintiff had an unwillingness to take into account the details of the child's daily life, nor was she able "to provide a nuanced account of [the child] in her demand for a change of his residence. His connections to the [Vernon] community in which he has grown appeared to have no relevance to her, nor the stability that he has had where he now resides. The plaintiff did not appear to carefully consider what might be best for him, even if it went counter to her own desires."

The court found that the plaintiff believes that because she had not been previously found to be an unfit parent, she is entitled to equal time with and responsibility for the child. The court noted, however, that the plaintiff's lack of fitness or fitness as a parent was not the crux of the issue before the court. "Many children caught up in custody disputes are fortunate to have two fit parents, as these parents each appear to be. But for the court, it is what is in [the child's] best interests that must be considered. Fitness is but one of the many criteria to be considered. As our Supreme Court many years ago concluded . . . '[i]n the search for an appropriate custodial placement, the primary focus of the court is the best interests of the child . . . .' "

The court found fault with both parents, but concluded that the defendant had "been the parent who has most reliably cared for [the child] and rearranged his life to provide for the stability and predictability of care both parents agree [the child] needs. There has been no change in [the defendant's] commitment for many years."

The court noted its concerns about the plaintiff, indicating that "[h]er myopic view of the superior quality of her new family life as the only valid outlook raises questions in the court's mind about what her conduct towards her son might be in the future, should her son reside with her. As he ages, [the child's] own behavior

and outlook, which reflect similarities to those of [the defendant], are likely to conflict with those of [the plaintiff]. . . . Also, what would his integration in her family life be like, as it includes a young half-sister, and two older children of her husband who visit from time to time, as well as the plaintiff's new husband? While the plaintiff points to the fact that [the child] enjoys his visit with her and her new family, visits are different from a more permanent residence with reduced access to [the defendant]. Whatever else can be said about it, the court finds that the plaintiff's household is not a quiet household where the focus is only on [the child] with established and clear patterns of daily living."

The court also found that the defendant had some valid concerns about the plaintiff's new husband but declined to order only supervised access by the plaintiff. In assessing the validity of the defendant's concerns, the court took judicial notice of a trial court memorandum of decision in the case of *Szymonik* v. *Szymonik*, Superior Court, judicial district of Hartford, Docket No. FA-06-4027147-S (January 6, 2017). The court noted that that decision, which involved a postdissolution motion for modification filed by the plaintiff's husband regarding his children, recited "concerning conduct and behavior." In particular, the court noted that the decision "details some questionable parenting on Mr. Syzmonik's part and an appalling lack of sensitivity to his children's emotional needs in his own high-conflict custody case."

Much of the evidence presented at trial reflected the parties' difficulty to reach an agreement concerning issues involving the child, as well as the problems encountered by the parties surrounding their physical exchanges of the child for visits. The court found that in the past, the plaintiff has "been unable to return the child promptly or to pick him up without incident. Those difficulties have lessened since her new husband

provides the transportation, although his conduct has also caused some difficulties. Nonetheless, these facts do point to [the] plaintiff's historical issues with routine and predictability. Shifting the responsibility for punctuality to a third party does not address her need to demonstrate that she can provide routine and predictability herself. The plaintiff's proposed plan would increase the physical exchanges of the child between the parents. In formulating her plan, it is apparent that she did not consider how the increased changes in his routine would impact [the child]."

The court added, "[t]hat [the plaintiff] loves and wishes the best for her son is not in question. It is the methods by which she seeks that outcome which rather sharply outline what the court views as her deficits as a parent. The same dismissive and condescending pattern of conduct towards the defendant continues in her attempts to mediate all orders with the defendant, including those which were specifically stated in the decree. She simply would not accept the defendant's refusal to mediate established orders and actively blames him for what she sees as his 'failure.' She cannot appreciate her own failure to proceed in a reasonable manner to resolve disputes. The orders entered in 2013 very explicitly set forth those matters which are to be mediated and those which are ordered, a distinction apparently not clear to the plaintiff."

After considering all the relevant statutory criteria set forth in General Statutes § 46b-56 and the best interests of the child factors as articulated in the case law, the court found that the best interests of "this special needs child" are served by remaining in the primary residential care of the defendant, as previously ordered.

The court denied the plaintiff's motion to modify the child's primary residence and for an equal sharing of time. It also denied the defendant's claim for supervised

access by the plaintiff and removed the mediation provisions in the prior court order as unworkable. It further awarded attorney's fees of $3500 to the defendant. Attached to the court's decision was a Schedule A, which contained the court's parental access orders and other various provisions regarding each parties' decision-making authority,[3] including, inter alia, a parenting schedule, orders pertaining to the child's extracurricular activities, sharing information as to the child, communication and parenting guidelines, and various transportation and relocation orders.

The court also ordered that future motions to modify would not be entertained without leave of the court and unless six coparenting counseling sessions have been completed in good faith by the parties with a provider of their own choosing, although no coparenting sessions were otherwise ordered.

On April 12, 2017, the defendant filed a motion for articulation, which the court granted on April 28, 2017, making a minor change to permit the parties to alternate time with the child during the annual April school spring break. On April 25, 2017, the plaintiff filed a motion for reconsideration of the court's April 6, 2017 decision on her request for a declaratory judgment, which the court summarily denied on April 28, 2017. On April 26, 2017, the plaintiff filed a motion for reconsideration, to vacate and "to uphold constitutional rights." The court denied this motion on April 28, 2017. On May 5, 2017, the plaintiff filed a motion for clarification regarding

[3] The court granted final decision-making authority, after good faith consultation with the other parent, to the defendant on issues of physical health, general welfare, extracurricular activities, religious upbringing and choice of school system, and to the plaintiff on matters relating to the treatment of the child's autism. The plaintiff has no authority to change the child's school. These orders are very similar to the previous orders entered by Judge Abery-Wetstone in 2013, except the parties' obligation to mediate certain matters was eliminated.

child support. The court issued a clarification order on May 9, 2017, indicating that any matters concerning child support were never referred to the Regional Family Trial Docket in the judicial district of Middlesex at Middletown for her consideration and any child support matters remained before the Superior Court in the judicial district of Tolland. This appeal followed on May 15, 2017, and was subsequently amended on December 29, 2017.

On September 8, 2017, the plaintiff filed a motion for articulation, which the court summarily denied on October 18, 2017. On October 20, 2017, the plaintiff filed a motion for review with this court. This court, on December 13, 2017, granted review and granted in part the relief requested, ordering the trial court "to articulate the factual and legal basis for its award of $3500 in attorney's fees to the defendant in the April 7, 2017 memorandum of decision and how it calculated that award of attorney's fees." On January 18, 2018, the court issued its articulation. Additional facts will be set forth as necessary.

Before analyzing the claims raised in the present appeal, we set forth our well established standard of review in domestic relations matters. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . .

"In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 362, 190 A.3d 68 (2018).

"General Statutes § 46b-56 provides trial courts with the statutory authority to modify an order of custody or visitation. When making that determination, however, a court must satisfy two requirements. First, modification of a custody award [must] be based upon either a material change of circumstances which alters the court's finding of the best interests of the child . . . or a finding that the custody order sought to be modified was not based upon the best interests of the child. . . . Second, the court shall consider the best interests of the child, and in doing so may consider several factors. General Statutes § 46b-56 (c)."[4] (Citation omitted; internal quotation marks omitted.) *Harris* v. *Hamilton*, 141 Conn. App. 208, 219, 61 A.3d 542 (2013).

[4] General Statutes § 46b-56 (c) provides: "In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of the following factors: (1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of

We further note that a trial court's factual findings may be reversed on appeal only if they are clearly erroneous. To the extent that the plaintiff claims that the trial court should have credited certain evidence over other evidence that the court did credit, it is well settled that such matters are exclusively within the province of the trial court. See *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 377, 999 A.2d 721 (2010).

We apply these principles to the present case in our review of the trial court's findings and conclusions with respect to its modification of the custody order. We have thoroughly reviewed the plaintiff's arguments, the history of the case as reflected in the court file and prior decisions, of which the court took notice, the testimony, exhibits,[5] and the court's thorough decisions.

the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision."

[5] The clerk's office of the Superior Court for the judicial district of Tolland mistakenly destroyed the exhibits in this case. In accordance with this court's authority to order the trial court to complete the trial court record for the proper presentation of the appeal; see Practice Book § 60-2; on May 7, 2019, this court ordered the trial court "to rectify the record so that copies of the exhibits that were admitted at the trial on February 15, 2017, February 16, 2017 and February 17, 2017 are provided to the Appellate Court on or before July 5, 2019. To assist the trial court in complying with this order, the court may, if it deems necessary, hold a hearing during which it may hear oral arguments, take evidence or receive and approve a stipulation of counsel of record."

On June 6, 2019, this court issued a second order extending the deadline for the trial court's compliance to August 9, 2019. To facilitate the trial court's rectification, this court attached to its order a list describing the sixteen exhibits admitted as full exhibits during the trial proceedings based on our initial review of the trial transcripts.

On June 14, 2019, the trial court held a status conference and issued orders directing the plaintiff to contact her former counsel and the child's school to secure the school records she had previously provided to the court as Exhibits 6 and 13. The plaintiff also was ordered to submit to the

court three photographs of her residence that had been admitted as Exhibit 8 and to contact TD Bank, her bank, to obtain a pay activity printout dated January 17, 2017, which had been admitted as Exhibit 12. The defendant was ordered to attempt to find Exhibit A, an e-mail dated February 1, 2017, which had been sent by the plaintiff to the defendant directing him to communicate with her husband about child support, as well as to provide a spreadsheet of child support payments and an e-mail regarding bank records, which had been admitted as Exhibit 14. At the June 14, 2019 status conference, the plaintiff indicated that she would provide copies of the photographs of her son and other children that she previously had submitted.

Despite the willingness to cooperate that she demonstrated to the court at the status conference, in response to the court's orders regarding rectification of the record, on July 18, 2019, the plaintiff filed with this court a "Motion to Vacate Order," claiming, inter alia, that the trial court had exceeded its authority under this court's order, and that it ordered the plaintiff to produce exhibits which the court had "used against her, which may violate her fifth amendment rights," including three photographs of the plaintiff's home, which the court relied on in ordering that the plaintiff pay a portion of the defendant's attorney's fees. On July 19, 2019, we denied the plaintiff's motion to vacate order.

On August 7, 2019, the trial court filed a "Rectification of Record, In Part," indicating that it had attempted to rectify the record, and that, at a status conference on July 19, 2019, the defendant had provided copies of exhibits he had located, including copies of *some* of the plaintiff's exhibits, which the court accepted after review. The court then stated: "The plaintiff contested the jurisdiction of this court to issue its interim orders re rectification after the status conference on June 14, 2019, directing the parties to use their best efforts to complete certain tasks. She did not wish to provide any school records for her son, as she could not now be entirely sure of the content of those records and it might prejudice her case, she claimed. She reported that her attorney had no copies of any exhibits submitted at trial. She failed, without any explanation, to provide any copies of the photographs that she had previously introduced at trial. It is also the case that many of the exhibits concerned themselves with visitation claims and payment of child support, two issues which were not before the court, as the court reminded the parties and counsel at trial. The plaintiff also now asserts that the exhibits in question are not relevant to her present appeal. *It is apparent that she had no interest in supplying any additional copies of missing exhibits.*" (Emphasis added.)

Judge Quinn is correct in indicating in her order that many of the missing exhibits were not relevant to the issues before the court, such as issues concerning visitation and payment of child support. The record, however, suggests that some of the missing exhibits might be relevant to the issues raised on appeal. For example, the plaintiff claims that, after determining that the child would fare better in a quiet and structured setting where all focus would be on him, the court erroneously concluded that the defendant's home as primary residence best met the child's needs. The plaintiff claims there was no evidence to support that determination. Undoubtedly, the psychological report which had been submitted with the school records as Exhibit 13 and reviewed by the court might be quite pertinent to this claim.

I

The plaintiff's first claim is that the court violated her fourteenth amendment rights by terminating a portion of certain rights provided to her under IDEA without conducting a fitness hearing. We decline to review this claim because it is inadequately briefed.

"Although we are solicitous of the rights of [self-represented] litigants . . . [s]uch a litigant is bound by the same rules . . . and procedure as those qualified to practice law. . . . [W]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . As this court has observed, [a]ssignments of error

Additionally, the plaintiff contests the partial award of attorney's fees to the defendant. In awarding the defendant those fees, the trial court, in determining that the plaintiff had sufficient assets to pay a portion of the defendant's fees under General Statutes § 46b-62, relied, in part, on missing Exhibit 8, which consisted of three photographs of the plaintiff and her family at her residence. In its decision, the court remarked that this exhibit had depicted the plaintiff's "very comfortable lifestyle."

This court consistently has noted that " '[i]t is the responsibility of the appellant to provide an adequate record for review.' " *Federal National Mortgage Assn.* v. *Buhl*, 186 Conn. App. 743, 753, 201 A.3d 485 (2018) (quoting Practice Book § 61-10), cert. denied, 331 Conn. 906, 202 A.3d 1022 (2019). The plaintiff has refused to present the child's school records and the three photographs, which had been admitted as Exhibits 6, 8 and 13, respectively, based, in part, on her position that these exhibits would now prejudice her on appeal. Thus, it is reasonable for this court to assume that those missing exhibits support the trial court's factual determinations that the child requires a structured, quiet setting with singular focus on his needs and that the plaintiff has a "very comfortable lifestyle."

As we have observed, the trial court in part was able to rectify the record. Furthermore, as the trial court noted, many of the missing exhibits were not directly related to the issues before it. On the basis of the exhibits that the parties provided to the court in connection with its efforts to rectify the record as well as the detailed discussion of many of the remaining missing exhibits at trial, as recorded in the transcript, particularly with respect to email exchanges between the parties, we conclude that the absence of the missing exhibits is not fatal to our ability to review the claims raised on appeal or affect the outcome of the appeal. See *Finch* v. *Earl*, 104 Conn. App. 515, 519, n.5, 935 A.2d 172 (2007) (reasoning that, despite

which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Tarzia*, 186 Conn. App. 800, 813, 201 A.3d 511 (2019).

Before addressing the adequacy of the plaintiff's brief with respect to this claim, we note that the issue of the plaintiff's rights under the IDEA was not raised before the trial court until the plaintiff filed a Practice Book §11-11 motion "for reconsideration, motion to vacate, and motion to uphold constitutional rights," after the court issued its memorandum of decision on the motion for modification. In her analysis of the present claim, the plaintiff argues that the court lacked subject matter jurisdiction to make an order that prohibited her from any decision making as to the choice of the child's school because the federal IDEA law preempts the state court from addressing the issue of school choice. In her brief, however, the plaintiff merely makes the bald assertion that the doctrine of federal preemption deprives the family court of subject matter jurisdiction, with no citation to any particular statutory or case-specific authority.[6]

Even if we were to conclude that the issue of federal preemption was adequately briefed, it would not have any applicability to the precise claim as framed by the plaintiff. The plaintiff states in her brief that she is *not* appealing from the court's decision declining to modify the existing order that she has no authority to change the location of the child's schooling, which is the sole basis for her claim that pursuant to federal preemption principles, IDEA has been violated by such a restriction.

missing exhibits, record provided adequate basis for appellate court to review claims raised on appeal), and cases cited therein.

[6] Moreover, the Second Circuit Court of Appeals has held that IDEA leaves intact a state's authority to determine who may make educational decisions on behalf of a child, so long as the state does so in a manner consistent with federal statutes. The court stated that "allocation of parental rights under the IDEA is best left to local domestic law." *Taylor* v. *Vermont Dept. of Education*, 313 F.3d 768, 780 (2d Cir. 2002).

Accordingly, we decline to review the plaintiff's claim for being inadequately briefed.

II

In her first, second and third claims, the plaintiff also argues that, under various provisions of the United States and Connecticut constitutions, she is entitled, as a fit parent, to equivalent rights of access and decision making with the defendant and, therefore, the court erred in not declaring this to be so as a matter of law and in not granting her such equivalent rights of access and decision making with respect to the child.[7] We disagree.

In its decision on the plaintiff's two motions for declaratory rulings, the court indicated: "In these motions, the plaintiff seeks to instruct the court on federal constitutional principles which she asserts must be applied in this family case. She further seeks to assert the validity of these principles in the dispute she has with [the defendant]. As our Supreme Court cases have held, this is not the proper application of the declaratory judgment statute or the Practice Book requirements. The procedure is not available to establish abstract principles of law nor to secure advice on that law. See *Norwalk Teachers' Assn.* v. *Board of Education*, [138 Conn. 269, 272, 83 A.2d 482 (1951)] and *Tellier* v. *Zarnowski*, [157 Conn. 370, 373, 254 A.2d 568 (1969)]. . . .

"Her arguments and legal citations also reflect a significant misunderstanding of the law and the legal consequences of her own actions in seeking relief from this court. All of her arguments and citations refer to

[7] The plaintiff avoids explaining how such absolutely equivalent rights to access and decision making are workable or how they may affect the child when, as the court noted in the present case, "these parents have had a volatile and unstable relationship full of high conflict since they first formed a relationship. Now, years after their on-again and off-again relationship ended, their conflict continues with respect to [the child] and his care. What is apparent is that they have very different parenting styles and do not agree on most things; in particular those matters relating to [the child]."

circumstances in which a state initiates legal action against an intact family, usually a claim based on child abuse or neglect. This would be a child protection proceeding under the juvenile laws of the state. In such circumstances, absent the abuse or neglect being proven, there is an expectation of privacy and federal constitutional protections are applicable . . . in cases involving the removal of a child from the family unit and placement with third parties.

"The instant case, however, is one in which the state of Connecticut has not initiated any legal action. It is one where the plaintiff herself sought the assistance of the Superior Court . . . in securing orders concerning her child. By so doing, she has voluntarily submitted herself and her family to the jurisdiction of the . . . court and its statutory framework to secure the relief she desires. She has repeatedly litigated her family claims in the family court since 2010. She has been accorded full due process and the right to be heard. She has testified, presented evidence and otherwise taken full advantage of the constitutional protections available to her. . . . Her disappointment in the fact that two previous judges have not seen fit to award her primary physical residence of her son does not invalidate the process, nor require the application of legal principles which belong to another legal arena altogether."

We afford plenary review to the plaintiff's claim. See, e.g., *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 155, 957 A.2d 407 (2008) (constitutional claims subject to plenary review). We need not undertake an in depth analysis of the claim, however, because we agree with the court that the plaintiff's arguments are based on her fundamental misunderstanding of when and how declaratory judgment relief is available pursuant to General Statutes § 52-29, and her failure to recognize the difference between unwarranted governmental or third-party actions intruding upon the lives

of intact families[8] as opposed to the obligation of family courts to hear and decide cases brought before them by one parent against the other.

The original application for custody and the subsequent motions for modification in the present case all were initiated by the plaintiff, yet she argues that the courts have violated her fundamental rights as a parent in intervening to resolve her disputes. In the plaintiff's opinion, conflict between fit parents does not in itself provide a necessity for state action. In sum, the plaintiff, who has filed an application for custody and two subsequent motions for modification of custody, sought a declaratory judgment from the court ruling that the court had no business intervening in her long-standing custody disputes with her child's father. We consider her constitutional claims meritless, and they warrant no further discussion.[9]

III

In her fifth and sixth claims, the plaintiff makes the related arguments that the court erred in denying her motion for modification of custody by failing to recognize a material change in circumstances due to "the

[8] Among other authorities, the plaintiff relies on cases that involved constitutional challenges to third-party visitation statutes. See *Troxel* v. *Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), and *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002).

[9] In her brief, the plaintiff discusses, with little reference to controlling authority, some, but not all, of the constitutional claims she presented to the court in her pretrial motions for a declaratory judgment, which the court denied on April 6, 2017. These claims essentially discuss why the use of the best interest standard in custody proceedings constitutes a denial of (1) her first amendment right of free family association between parent and child for purposes of intimate and expressive communication and her right to associate or disassociate a private romantic relationship; (2) her rights under the fourteenth amendment and article first, § 20 of the Connecticut constitution to the same protections as married persons in regard to questionable governmental actions, which include custody proceedings when both parents are "fit"; and (3) her first amendment right to convey religious ideas through free speech and to teach her child religious beliefs.

natural changing needs of the child entering adolescence," upon which the plaintiff does not elaborate; by expressing "baseless" opinions; and by making clearly erroneous mathematical findings regarding the plaintiff's proposed orders and clearly erroneous findings about the child's needs. We have thoroughly reviewed the record and conclude that the court's factual determination that there had not been a change in circumstances warranting an increase in the plaintiff's parental access during the school year[10] or any change in how decisions affecting the child are made is supported by the evidence.

The record reflects that the court carefully considered and applied the criteria set forth in General Statutes § 46b-56, including properly opining on the capacity and disposition of the parents to understand and meet the needs of the child, one of the § 46b-56 criterion. The court's factual findings as to the plaintiff's motivations in seeking a modification[11] and the child's needs as a child with autism were amply supported by the evidence and the reasonable inferences drawn therefrom and are not clearly erroneous. As the court found, the plaintiff's assertions that the Vernon school system and/or the defendant were not properly addressing the child's educational needs were unsupported. The court noted that the plaintiff "provided no information about what could be expected of a child of her son's age and with his special needs as an autistic child" other than to present the court with his test scores with no expert or a more wholesale analysis. When the court stated that the plaintiff "was not able to provide a nuanced account of [the child] in her demand for a change of

[10] As the plaintiff acknowledges, the court modified the parental access orders to provide the plaintiff with access to her son for fifteen additional days during the summer vacation.

[11] Contrary to the plaintiff's assertion, "motivation necessarily involves a question of fact to be resolved by a [factfinder]." (Citation omitted.) *Cotto* v. *United Technologies Corp.*, 251 Conn. 1, 47, 738 A.2d 623 (1999).

his residence," it then explained that the plaintiff's "emotional claims to prove herself the 'better' parent" lacked careful consideration of what might be best for the child, even if it went counter to her own desires.

The plaintiff also claims the court "miscalculated the number of home-to-home transitions the child would experience under [her] proposed orders and determined that [the] plaintiff's plan had more home-to-home transitions than what the child already was experiencing," which prejudiced the court's decision. The court, however, never used the phrase "home-to-home" transitions, but noted "increased changes in [the child's] routine." On the basis of the evidence before the court and in light of the plaintiff's proposed orders, these changes in the child's routine might have included the increased number of times that the child would have had to be transported to and from school in Vernon from Glastonbury, where the plaintiff resides, as well as the increased access afforded to the plaintiff during school vacations. We decline to speculate as to how the plaintiff derived her mathematical computations, and she does not fully explain them, or how the court mathematically derived its conclusion as to increased changes in the child's routine.

Finally, the plaintiff argues that the court had no evidentiary basis to conclude that the child requires a quiet household where the focus is only on him with established and clear patterns of daily living. The court concluded that it was the defendant who consistently had provided the child with such an environment. As previously noted, the court indicated it had reviewed the case file and the child's school records, which included a psychological evaluation of the child.[12] In addition, during his testimony on February 17, 2017, the defendant noted for the court that in an ex parte

[12] See footnote 5 of this opinion.

motion for custody filed by the plaintiff, she herself had admitted the child is easily stressed by sudden changes to his schedule. There also was testimony from both parties that during the first four or five months after the child began visiting the plaintiff and her family in Glastonbury, he exhibited "stimming," self-stimulatory behavior that is a common symptom of autism. Additionally, in his testimony, the defendant observed that, when the child visits the plaintiff, he "just plays in his room by himself."

For the foregoing reasons, we are not persuaded by the plaintiff's claim that the court erred in denying her motion for modification of custody.

IV

The plaintiff's final claim is that the court erred in awarding the defendant $3500 for a portion of his attorney's fees. The plaintiff claims that the court committed plain error by finding that she did not work outside the home when she worked part time, and by finding that the plaintiff elected not to file a financial affidavit or to respond to the defendant's motion for attorney's fees. She argues that as a result of ignoring her financial affidavit and objection to the motion for attorney's fees, the court extrapolated its findings of fact relative to the fee award from the plaintiff's testimony and three photographs of the plaintiff's living room that reflected a "very comfortable lifestyle." We disagree.

On February 15, 2017, the defendant filed proposed orders that included a request that the court award him attorney's fees. During the hearing of February 17, 2017, counsel for the defendant advised the court of the outstanding issue concerning attorney's fees, and that the parties had agreed to stipulate that the defendant still owed him "approximately $15,000." Whether such a stipulation existed is unclear, as counsel for the plaintiff responded to the representation of the defendant's counsel by stating that "the plaintiff is going to respond

as to whether or not she is in agreement that there are outstanding fees." She further indicated that "the plaintiff reserves her right within the context of this case to present her opposition to any outstanding fees."

The court then indicated it would require the parties to present financial affidavits. Counsel for the defendant indicated he would present one to the court before the end of the day, and the file contains a financial affidavit from the defendant dated February 17, 2017.[13] The court later advised counsel for the plaintiff that she could file a written response to the defendant's request for attorney's fees and the plaintiff's financial affidavit within two weeks. On February 23, 2017, the plaintiff filed an objection to the defendant's request, which contained the following assertion with respect to the court's request for the plaintiff's financial affidavit: "Finally, asking for the parties to submit financial affidavits, unrelated to child support, prior to knowing the outcome of the hearing, represents an unwarranted exploratory search. The calculation of income for purposes of addressing attorney's fees is an exploratory search and division of property years after the parties separated, in which [the] plaintiff objects."[14]

[13] Although the box for "plaintiff" is checked on this affidavit, it is signed by the defendant and notarized by the defendant's attorney, so we are certain this is the defendant's affidavit.

[14] Although the plaintiff claims that the court failed to consider her financial affidavit, the language of her objection to the defendant's request for attorney's fees undermines that contention. In addition, we have thoroughly searched the record and, although it reflects that the defendant submitted a financial affidavit in connection with the February, 2017, hearing, the plaintiff failed to submit a financial affidavit at or near the time of the hearing. As such, her claim that the court erroneously found she did not work outside the home, when in fact, she claims that she works on a part-time basis as an "abdominal therapist," is the result of her own deliberate failure to present the court with evidence to support her version of the facts. Additionally, although she testified that her office hours were approximately ten hours a week, we observe that the plaintiff's office hours do not necessarily support a finding that she generates income during her office hours. Additionally, we observe that the plaintiff also indicated that she had "drastically" reduced her employment since her daughter's birth. Moreover,

On September 8, 2017, the plaintiff filed a motion for articulation to request the legal and factual basis for rulings that were the subject of several of the claims raised on appeal. On October 12, 2017, the court denied her motion. On October 20, 2017, the plaintiff filed a motion for review before this court that included a request that the trial court be ordered to articulate the legal basis and statutory criteria on which it relied in granting attorney's fees to the defendant. On December 13, 2017, this court granted review and granted, in part, the relief requested. Specifically, this court ordered the trial court to articulate "the factual and legal basis for its award of $3500 in attorney's fees to the defendant in the April 7, 2017 memorandum of decision and how it calculated that award of attorney's fees." The trial court subsequently complied with this order.

We begin with our standard of review, as set forth in *Pena* v. *Gladstone*, 168 Conn. App. 141, 148–49, 144 A.3d 1085 (2016). Pursuant to General Statutes § 46b-62,[15] "[i]n dissolution proceedings, the court may order either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in General Statutes § 46b-82 . . . . This includes postdissolution proceedings affecting the custody of minor children. . . . Whether to allow counsel fees, and if so in what amount, calls for the exercise of judicial discretion.

even if the court had found that the plaintiff was in fact earning some income on her own, it only would have added to the court's assessment of her ability to pay the attorney's fees at issue, and we are not persuaded that such a finding would have changed the court's ultimate decision to award the defendant a portion of his requested fees.

[15] General Statutes § 46b-62 provides, in relevant part: "In any proceeding seeking relief under the provisions of this chapter . . . the court may order either spouse or, if such proceeding concerns the custody, care, education, visitation or support of a minor child, either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82. . . ."

. . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did. . . . The court's function in reviewing such discretionary decisions is to determine whether the decision of the trial court was clearly erroneous in view of the evidence and pleadings in the whole record. . . . [J]udicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . In making those determinations, [this court] allow[s] every reasonable presumption . . . in favor of the correctness of [the trial court's] action. . . . We also note that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . It is axiomatic that we defer to the trial court's assessment of the credibility of witnesses and the weight to afford their testimony. . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Pena* v. *Gladstone*, supra, 148–49.

The test for an award of attorney's fees pursuant to General Statutes § 46b-62 is not based only on a consideration of whether the party moving for an award of such fees has ample liquid assets. If the prospective recipient of the fee award does not possess such assets, then § 46b-62 requires that the trial court look to and examine the total financial resources of the respective parties and the other criteria set forth in § 46b-82 to determine whether it would be equitable to award attorney's fees under the circumstances. The criteria set forth in § 46b-82 include "the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties . . . ."

In its articulation, the court indicated that it had reviewed an affidavit of legal fees filed by the defen-

dant's attorney, which reflected a billing rate of $245 an hour with fees of $7817.65 incurred as of January, 2017, and an estimate of an additional $7150 in fees to be incurred for a total of $14,976.65 through the conclusion of the trial. The court found the amount and hourly rate to be reasonable. The court stated that it had considered the parties' respective financial abilities and the criteria set forth in § 46b-82 (a).

The court then found that the defendant's affidavit reflects that he earned a gross income of $1400 a week from employment and had a net income of $1000 a week. The court found that the defendant carried many of the regular expenses for the maintenance of the child. It further noted that the testimony revealed that the plaintiff and her new husband had an approximately one year old daughter. In addition, with her husband's support and payment of expenses, the court found that the plaintiff was able to stay home caring for that child and no longer worked outside the home. The court indicated that the evidence, which included photographs and other information, also reflected that the plaintiff and her husband enjoyed a very comfortable lifestyle[16] and that the plaintiff was able to secure the services of counsel for herself. The court concluded, from all the credible evidence, that the plaintiff was in a financial position to contribute to a portion of the fees incurred by the defendant "for the third course of litigation on the same topic concerning access to her child."

The plaintiff also complains that the court indicated she had not responded to the defendant's request for attorney's fees despite the fact that she filed a written objection to the request approximately two weeks after

[16] See footnote 6 of this opinion.

the contested hearing concluded. In that objection, which was drafted by the plaintiff's attorney, the plaintiff failed to focus on the governing law the court properly applied, § 46b-62, and instead relies on accusations of misconduct on the part of the defendant's attorney and argues that the award of fees would have the effect of penalizing her for seeking to secure her fundamental rights to her child. Because the plaintiff's objection never addressed the relevant criteria in § 46b-62, which nowhere requires a determination whether the plaintiff's motion for modification was filed in good faith, we believe the court's failure to acknowledge her inapposite objection was error, but that, under the circumstances present, it constituted harmless error because it was unlikely to have impacted the result of this case.

We further note that in considering the criteria under § 46b-62, the court is not required to make express findings on each of those statutory criteria. See *Talbot* v. *Talbot*, 148 Conn. App. 279, 292, 85 A.3d 40, cert. denied, 311 Conn. 954, 97 A.3d 984 (2014). On the basis of our review of the full record, we conclude that the court did not abuse its broad discretion in granting the defendant a small portion of his attorney's fees, $3500. The court specifically stated it had considered all the relevant statutory criteria, as well as the parties' testimony, evidence and the defendant's financial affidavit. If the court was unable to consider the plaintiff's financial situation in more detail, the plaintiff has no one to blame but herself because she refused to file a financial affidavit.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEFFREY K. WARD (AC 40534)

Alvord, Sheldon and Moll, Js.*

Syllabus

The defendant, who had been convicted, on pleas of guilty, of the crimes of manslaughter in the first degree and assault in the first degree in connection with an incident that occurred at a motel, appealed to this court from the trial court's denial of his motion to correct an illegal sentence. The defendant had a long history of untreated mental health issues for which he began treatment after his arrest. After the court canvassed the defendant, the court accepted his pleas of guilty and sentenced him to a total effective sentence of twenty-five years of incarceration. Thereafter, the defendant filed a motion to correct an illegal sentence, claiming, inter alia, that he was incompetent at the time of his sentencing hearing and, therefore, that his sentence was imposed in an illegal manner. On appeal to this court, the defendant claimed that the trial court improperly dismissed his motion to correct illegal sentence for lack of subject matter jurisdiction. *Held:*

1. The defendant could not prevail on his unpreserved claim that his due process rights, under the federal constitution, were violated when the trial court failed to refer his motion to correct to the sentencing judge, whom the defendant claimed was familiar with the defendant and his mental health issues, and was better situated to consider the issues raised in the motion to correct; this court previously has determined that due process does not require the sentencing court to hear and adjudicate a defendant's motion to correct an illegal sentence or a sentence imposed in an illegal manner, there was no appellate authority in support of the defendant's claim, and due process, which seeks to assure a defendant a fair trial, not a perfect one, does not mandate that a motion to correct an illegal sentence or a sentence imposed in an illegal matter be heard by the judge whom the defendant preferred or who had the greatest familiarity with the defendant.
2. The trial court did not err in dismissing the motion to correct an illegal sentence for lack of subject matter jurisdiction, as the defendant failed to set forth a colorable claim that his sentence was imposed in an illegal manner; the defendant's motion failed to establish any possibility that he was incompetent at the time of sentencing or that there was sufficient information before the sentencing court requiring a competency examination and hearing prior to the defendant's sentencing, although the parties and the sentencing court were aware that the defendant had a history of mental health issues, nothing in the transcripts indicated that

* The listing of the judges reflects their seniority status on this court as of the date of oral argument.

he had been incompetent when he was sentenced or that a competency evaluation and hearing prior to sentencing were required, and a police report, psychiatric report and records on which the defendant relied in support of his claim could not be viewed reasonably to support a conclusion that he was incompetent at the time of sentencing, as those records suggested that the defendant had a history of mental health issues and was at risk of experiencing symptoms in the future, but failed to demonstrate that there was any likelihood that he was incompetent when sentenced.

(*One judge dissenting in part and concurring in part*)

Argued February 11—officially released October 29, 2019

Procedural History

Substitute information charging the defendant with the crimes of manslaughter in the first degree and assault in the first degree, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Alexander*, *J.*, on pleas of guilty; judgment of guilty; thereafter, the court, *Dewey*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Aimee Lynn Mahon, assigned counsel, with whom was *Temmy Ann Miller*, assigned counsel, for the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *John F. Fahey*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Jeffrey K. Ward, appeals from the judgment of the trial court dismissing his motion to correct a sentence imposed in an illegal manner (motion to correct). On appeal, the defendant claims that the court erred in (1) adjudicating the motion to correct, rather than referring the motion to the sentencing court, and (2) concluding that it lacked subject

matter jurisdiction over the motion to correct.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the appeal. On June 25, 2012, pursuant to a plea agreement, the defendant pleaded guilty to manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1) and assault in the first degree in violation of General Statutes § 53a-59 (a) (1) in connection with an incident that had occurred at a motel in Enfield on September 29, 2011. After canvassing the defendant, the trial court, *Alexander, J.*, accepted the defendant's guilty pleas. On July 23, 2012, following a sentencing hearing, Judge Alexander sentenced the defendant to a period of twenty years of incarceration on the count of manslaughter in the first degree and five years of incarceration on the count of assault in the first degree, to run consecutively to the sentence on the count of manslaughter in the first degree, for a total effective sentence of twenty-five years of incarceration, as agreed to by the parties.[2] The defendant did not appeal from his conviction.

On November 3, 2016, pursuant to Practice Book § 43-22, the defendant filed the motion to correct, accompanied by a memorandum of law and exhibits. Specifically, the defendant contended that his sentence was imposed in an illegal manner on the grounds that (1) he had been incompetent at the time of sentencing and (2) the sentencing court had failed to order, sua sponte, that a competency evaluation and hearing be conducted pursuant to General Statutes § 54-56d before the defendant's sentencing on the basis of information known to the sentencing court.

[1] For ease of discussion, we address the defendant's claims in a different order than they are set forth in his principal appellate brief.

[2] In addition to pleading guilty to manslaughter in the first degree and assault in the first degree, the defendant admitted to two counts of violating his probation in violation of General Statutes § 53a-32. Judge Alexander revoked and terminated the defendant's probations.

On November 17, 2016, the trial court, *Dewey*, *J.*, held a hearing on the motion to correct. At the outset of the hearing, the state argued that the court lacked subject matter jurisdiction over the motion to correct, contending that the defendant's claims should be raised by way of a petition for a writ of habeas corpus. In addition, the state argued that the record did not demonstrate that the defendant's sentence was imposed in an illegal manner. The defendant argued that the court had subject matter jurisdiction over the motion to correct because his alleged incompetence at the time of sentencing and the sentencing court's failure to order, sua sponte, that a competency evaluation and hearing be conducted before sentencing were germane to the legality of the manner in which his sentence was imposed. Following argument, the court reserved its decision regarding jurisdiction and heard the parties on the merits of the motion to correct. On March 7, 2017, the court issued a memorandum of decision dismissing the motion to correct for lack of subject matter jurisdiction. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that Judge Dewey erred in hearing and ruling on the motion to correct, rather than referring the motion to correct to Judge Alexander, the sentencing judge. Specifically, the defendant asserts that due process[3] required the motion to correct to be adjudicated by Judge Alexander, who, as the sentencing judge, had observed and interacted with the defendant, was familiar with the defendant and his mental health issues, and was better situated to consider the issues raised in the motion to correct. We are not persuaded.

[3] The defendant does not specify whether his due process claim is raised pursuant to the federal constitution or the state constitution. Therefore, we treat the defendant's claim as limited to the federal constitution. See *State* v. *Alvarez*, 257 Conn. 782, 796 n.10, 778 A.2d 938 (2001).

As a preliminary matter, the defendant concedes that this claim is unpreserved;[4] he argues, however, that his unpreserved claim is reviewable pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40. "The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *State* v. *Jerrell R.*, 187 Conn. App. 537, 543, 202 A.3d 1044, cert. denied, 331 Conn. 918, 204 A.3d 1160 (2019).

At the outset, in response to a question raised by the state in its appellate brief, we note that the defendant's unpreserved claim does not fall within the ambit of those cases that stand for the proposition that a defendant is not entitled to *Golding* review of an unpreserved claim challenging the legality of a sentence that was not raised by way of a motion to correct an illegal sentence. See, e.g., *State* v. *Gang Jin*, 179 Conn. App. 185, 195–96, 179 A.3d 266 (2018). Here, the unpreserved claim at issue concerns the actions of Judge Dewey

[4] Not only did the defendant never request that Judge Alexander adjudicate the motion to correct, but the proposed order attached to the motion to correct specifically contemplated Judge Dewey being the deciding authority.

in not referring the motion to correct to Judge Alexander, as opposed to the legality of the sentence imposed by Judge Alexander, and, thus, *Golding* review may be available. See *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 67 n.2, 967 A.2d 41 (2009) (rejecting respondent's argument that *Golding* review inapplicable in all circumstances arising from appeal from judgment of habeas court and concluding that *Golding* review may be available to challenge certain actions of habeas court); see also *State* v. *White*, 182 Conn. App. 656, 673–74, 191 A.3d 172 (concluding that defendant's unpreserved claim, that trial court erred by not recusing itself from hearing merits of motion to correct illegal sentence, failed under third prong of *Golding*), cert. denied, 330 Conn. 924, 194 A.3d 291 (2018).

The defendant's unpreserved claim, that, as a matter of law, the sentencing court was the only judicial authority permitted to decide the motion to correct, meets the first two prongs of *Golding* and, therefore, is reviewable. Turning to the first prong of *Golding*, we conclude that the record is adequate to review the defendant's claim of error. With respect to the second prong of *Golding*, the defendant's due process claim is of constitutional magnitude. See *State* v. *Battle*, 192 Conn. App. 128, 144, A.3d (2019) (claim that defendant's right to due process was violated because sentencing court did not act on motion to correct illegal sentence was of constitutional magnitude).

Although the defendant's due process claim is reviewable, we conclude that the claim does not satisfy the third prong of *Golding* in light of this court's recent decision in *State* v. *Battle*, supra, 192 Conn. App. 146–47, wherein this court concluded that due process does not require the sentencing court to hear and adjudicate a defendant's motion to correct an illegal sentence or a sentence imposed in an illegal manner.

In *Battle*, this court observed that the current version of Practice Book § 43-22[5] "does not limit the 'judicial authority' empowered to correct an illegal sentence or a sentence imposed in an illegal manner to the sentencing court." Id., 145. This court further observed that there was no appellate authority "holding that a defendant's motion to correct an illegal sentence or a sentence imposed in an illegal manner *must* be heard and adjudicated by the particular judge who imposed the sentence." (Emphasis in original.) Id. Ultimately, this court concluded: "Due process does not mandate that a motion to correct an illegal sentence or a sentence imposed in an illegal manner be heard by the judge whom the defendant prefers or who has the greatest familiarity with the defendant. Due process seeks to assure a defendant a fair trial, not a perfect one." (Internal quotation marks omitted.) Id., 146–47.

The defendant's due process claim is controlled by *Battle*. Accordingly, we conclude that the defendant in the present case did not suffer a due process violation and, therefore, his claim fails under the third prong of *Golding*.[6]

[5] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[6] In his reply brief, the defendant asserts for the first time that we should invoke our inherent supervisory authority to review his unpreserved claim if we conclude that his claim fails under *Golding*. "Generally, this court does not consider claims raised for the first time in a reply brief." *Perry* v. *State*, 94 Conn. App. 733, 740 n.5, 894 A.2d 367, cert. denied, 278 Conn. 915, 899 A.2d 621 (2006). Even if the defendant's request were proper, we observe that "[b]ypass doctrines permitting the review of unpreserved claims such as [*Golding*] and plain error, are generally adequate to protect the rights of the defendant and the integrity of the judicial system . . . . [T]he supervisory authority of this state's appellate courts is not intended to serve as a bypass to the bypass, permitting the review of unpreserved claims of case specific error—constitutional or not—that are not otherwise amenable to relief under *Golding* or the plain error doctrine. Rather, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . Thus, a defendant seeking review of an unpreserved claim under our supervisory authority must demonstrate that his claim is one that, as a matter of policy, is relevant to the perceived

II

We now turn to the defendant's claim that the court erred in dismissing the motion to correct for lack of subject matter jurisdiction. Specifically, the defendant asserts that the court misconstrued his claim in the motion to correct, which led the court to conclude erroneously that it lacked subject matter jurisdiction over the motion to correct. He contends that he raised a colorable claim contesting the legality of the manner in which his sentence was imposed, thereby invoking the court's subject matter jurisdiction. Although we agree with the defendant that the court's analysis in dismissing the motion to correct was flawed, we nevertheless conclude that the defendant failed to present a colorable claim that his sentence was imposed in an illegal manner, and, thus, the court properly dismissed the motion to correct for lack of subject matter jurisdiction.

We begin by setting forth the relevant standard of review and legal principles that guide our analysis of the defendant's claim. "Because the defendant's [claim] pertain[s] to the subject matter jurisdiction of the trial court, [it] . . . present[s] a question of law subject to the plenary standard of review. . . .

"The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so

fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide the lower courts in the administration of justice in all aspects of the criminal process." (Internal quotation marks omitted.) *State* v. *Leach*, 165 Conn. App. 28, 35–36, 138 A.3d 445, cert. denied, 323 Conn. 948, 169 A.3d 792 (2016). We see no reason to invoke our supervisory powers here.

because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. . . . Because it is well established that the jurisdiction of the trial court terminates once a defendant has been sentenced, a trial court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . .

"[Practice Book] § 43-22 embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. . . . Thus, if the defendant cannot demonstrate that his motion to correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it. . . . [I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack. . . .

"[A]n illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Jason B.*, 176 Conn. App. 236, 242–44, 170 A.3d 139 (2017). Pursuant

to § 54-56d (a), "[a] defendant shall not be tried, convicted *or sentenced* while the defendant is not competent. For the purposes of this section, a defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense." (Emphasis added.) A defendant is presumed to be competent, and the burden of proving that a defendant is not competent is on the party raising the issue, or on the state if the trial court raises the issue. See General Statutes § 54-56d (b). In addition, "[i]f, at any time during a criminal proceeding, it appears that the defendant is not competent, counsel for the defendant or for the state, or the court, on its own motion, may request an examination to determine the defendant's competency." General Statutes § 54-56d (c).

In the motion to correct, the defendant claimed that his sentence was imposed in an illegal manner because (1) he had been incompetent at the time of sentencing and (2) the sentencing court had failed to order, sua sponte, that a competency hearing be held prior to sentencing on the basis of information known to the court. The defendant also asserted that he had been incompetent when he had entered his guilty pleas on June 25, 2012, and that he believed that he was entitled to withdraw his guilty pleas if the motion to correct were granted and a new sentencing hearing were ordered; however, he stated expressly in the motion to correct that "[t]he issue [raised in the motion to correct] . . . is [the defendant's] sentencing, and given [the defendant's] incompetence at the time, it was imposed in an illegal manner." In addition, during the hearing held on the motion to correct, defense counsel stressed that the defendant was not challenging the legality of his sentence but, rather, the legality of the manner in which it was imposed. The defendant submitted the following with the motion to correct: four pretrial transcripts and the sentencing transcript; a police report;

a report completed following a psychiatric evaluation of the defendant (psychiatric report), which was filed under seal; and certain of the defendant's psychiatric records from the Department of Correction (psychiatric records), which were filed under seal.

In its memorandum of decision dismissing the motion to correct, the court interpreted the defendant's chief claim to be that "[the defendant] was incompetent at the time of sentencing and, consequently, the sentence was imposed in an illegal manner." The court continued: "The difficulty with the defendant's position is that the sentencing procedure in the present case complied with all constitutional and statutory requirements." Citing *State* v. *Robles*, 169 Conn. App. 127, 133, 150 A.3d 687 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017), the court determined that the defendant's claims did not fall into any of the categories of claims identified in *Robles* over which a trial court has jurisdiction to modify a sentence after it has commenced. The court then determined that, in substance, the defendant was making an improper collateral attack on his conviction on the basis of his purported incompetence. The court determined that the defendant had entered his guilty pleas knowingly, intelligently, and voluntarily, and that a motion to correct was not the proper vehicle by which to challenge the voluntariness of his pleas.

In addition, the court stated that the defendant "suggests that the trial court has an obligation, sua sponte, to suspect the defendant's competency. Nothing in the record before the trial court reflected an inappropriate mental health status. To the contrary, there was a presumption in favor of competence." The court determined that nothing in the pretrial proceedings demonstrated that the defendant was unable to assist in his defense or to consult with his counsel, and that the court's participation in the pretrial proceedings had not put the court on notice that a more searching inquiry

into the defendant's competence to enter his guilty pleas was necessary.

We agree with the defendant that the court's analysis in dismissing the motion to correct was flawed. After the court correctly construed the defendant's claim to be that his sentence was imposed in an illegal manner stemming from his alleged incompetence at the time of sentencing, the court determined that the defendant's claim failed to fall into any of the categories recited in *Robles* and, thus, the court lacked jurisdiction to consider it. In *Robles*, this court stated in relevant part: "Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable. . . . [I]f a defendant's claim falls within one of these four categories the trial court has jurisdiction to modify a sentence after it has commenced. . . . If the claim is not within one of these categories, then the court must dismiss the claim for a lack of jurisdiction and not consider its merits." (Internal quotation marks omitted.) *State* v. *Robles*, supra, 169 Conn. App. 133. The foregoing analysis applies, however, only to a claim that a sentence is illegal, as opposed to a claim that a sentence was imposed in an illegal manner.[7] See *State* v. *Evans*, 329 Conn. 770, 779–80, 189 A.3d 1184 (2018) (discussing trial court's

[7] The excerpt in *Robles* cited by the trial court quotes language that was first set forth by our Supreme Court in *State* v. *Lawrence*, 281 Conn. 147, 156–57, 913 A.2d 428 (2007), in analyzing the parameters of a claim that a sentence is illegal.

jurisdiction to entertain claims challenging legality of sentence and legality of manner in which sentence imposed), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019). Thus, the court erred in relying on *Robles* in adjudicating the defendant's claim that his sentence was imposed in an illegal manner. In addition, the court's determination that it lacked subject matter jurisdiction over the motion to correct because the defendant was collaterally attacking his conviction and the validity of his guilty pleas was erroneous. Although the defendant argued that he would seek to withdraw his guilty pleas *if* the court granted the motion to correct and ordered a new sentencing hearing, the pleadings and the record make clear that the singular focus of the motion to correct was the sentencing proceeding and the legality of the manner in which the defendant's sentence was imposed. Thus, the court's examination of the circumstances surrounding the defendant's guilty pleas and its focus on his competence at the time that he had entered his guilty pleas were misplaced.

Although the court's analysis in dismissing the motion to correct was flawed, we nevertheless conclude that the court properly dismissed the motion to correct for lack of subject matter jurisdiction on different grounds. See *HSBC Bank USA, National Assn.* v. *Lahr*, 165 Conn. App. 144, 151, 138 A.3d 1064 (2016) (affirming judgment of trial court on different grounds). The defendant asserts that he raised a colorable claim in the motion to correct asserting that his sentence was imposed in an illegal manner and, thus, the court had subject matter jurisdiction to entertain the motion to correct.[8] We disagree and conclude that the motion to correct, on its

[8] On June 24, 2019, after the parties had submitted their respective appellate briefs and following oral argument, we, sua sponte, ordered the parties to file supplemental briefs addressing the following question: "Whether the facts pleaded by the defendant in support of his motion to correct a sentence imposed in an illegal manner were sufficient to state a colorable claim of incompetency at sentencing. See *State* v. *Mukhtaar*, 189 Conn. App. 144,

face, did not set forth a colorable claim contesting the legality of the manner in which the defendant's sentence was imposed, thereby depriving the court of subject matter jurisdiction.

"Recently, our Supreme Court explained [in *State* v. *Delgado*, 323 Conn. 801, 810, 151 A.3d 345 (2016)], in addressing the trial court's dismissal on jurisdictional grounds of a motion to correct an illegal sentence that [t]he subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal. . . . At issue is whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence. . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence. . . .

"Therefore, as made clear by our Supreme Court in *Delgado*, for the trial court to have jurisdiction over a defendant's motion to correct a sentence that was imposed in an illegal manner, the defendant must put forth a colorable claim that his sentence, in fact, was imposed in an illegal manner. A colorable claim is [a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law). . . . For jurisdictional purposes, to establish a colorable claim, a party must demonstrate that there is a possibility, rather than a certainty, that a factual basis necessary to establish jurisdiction exists." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Jason B.*, supra, 176 Conn. App. 244–45.

150 n.6., 207 A.3d 29 (2019); *State* v. *Jason B.*, [supra], 176 Conn. App. [244–45]." The parties filed their respective supplemental briefs on July 8, 2019.

In *State* v. *Jason B.*, supra, 176 Conn. App. 241–42, the defendant filed a "motion to correct an illegal sentence," asserting that his sentence was imposed in an illegal manner because, on the basis of statements made by the sentencing court at his sentencing hearing, the sentencing court had considered information that was inaccurate and outside of the record when imposing his sentence. The trial court dismissed the defendant's motion for lack of subject matter jurisdiction, concluding that the defendant had not raised a colorable claim that his sentence was imposed in an illegal manner. Id., 242. On appeal, this court affirmed the judgment. Id., 248. After reviewing the record, this court determined that the sentencing court's statements at issue in the defendant's motion to correct could not reasonably be viewed as demonstrating that the court considered information that was inaccurate or outside of the record. Id., 245–47. Accordingly, this court concluded that the defendant's motion to correct, on its face, failed to present a colorable claim invoking the subject matter jurisdiction of the trial court. Id.

Here, in the motion to correct, the defendant asserted that his sentence was imposed in an illegal manner because (1) he had been incompetent at the time of sentencing and (2) the sentencing court had failed to order, sua sponte, a competency evaluation and hearing on the basis of information known to the court when it had sentenced the defendant. The defendant attached several exhibits to the motion to correct to support his assertions. Guided by the rationale of *Jason B.*, and for the reasons discussed as follows, we conclude that the motion to correct, on its face, did not set forth a colorable claim that the defendant's sentence was imposed in an illegal manner.

In support of the motion to correct, the defendant relied on transcripts of several pretrial proceedings and the sentencing hearing. During a pretrial proceeding on

April 10, 2012, defense counsel informed Judge Alexander that the defendant had undergone a psychiatric evaluation during the prior week and that counsel expected to receive the psychiatric report in the immediate future. Judge Alexander stated that she intended to review the psychiatric report "before we can start discussing any disposition . . . ." During a pretrial proceeding on April 26, 2012, defense counsel informed Judge Alexander that additional information needed to be provided to the psychiatrist to complete the psychiatric report for the court's review. During a pretrial proceeding on May 15, 2012, the court stated that it was going to continue the case as a result of ongoing plea discussions. There was no mention of the defendant's psychiatric evaluation or mental health during the May 15, 2012 hearing. During a pretrial proceeding on June 25, 2012, after canvassing the defendant, the trial court accepted the defendant's guilty pleas. There was no discussion of the defendant's psychiatric evaluation or mental health at that time. During the sentencing hearing on July 23, 2012, the prosecutor stated that sentencing the defendant to a total effective sentence of twenty-five years of incarceration was an appropriate disposition as a result of the defendant's "psychiatric background" and "mental health history." In addition, defense counsel represented that the defendant had been experiencing "psychotic symptoms which diminished his capacity to conform his behavior to the law" at the time of the incident in September, 2011. Defense counsel also noted that the psychiatrist hired by defense counsel to evaluate the defendant had diagnosed him with paranoid type schizophrenia; the defendant had been suffering from a mental illness throughout most of his adult life; in October, 2011, following his incarceration, the defendant began receiving mental health treatment and taking anti-psychotic medication; and the defendant's symptoms had improved significantly and,

at the time of the sentencing hearing, he was "calm, rational, and . . . [understood] and [appreciated] the seriousness of this situation." Before sentencing the defendant, Judge Alexander acknowledged that the defendant had a "mental health disease," she accepted defense counsel's representations that the Department of Correction was treating the defendant, and she commented that she hoped the defendant would continue to take the proper medication as it was "essential for [his] clear thinking." In the motion to correct, the defendant asserted that the transcripts demonstrated that the parties and Judge Alexander were aware that the defendant had "serious mental health issues" prior to his sentencing.

Next, the defendant relied on a police report dated September 30, 2011. The police report indicated that during an interview conducted by a police detective on that day, the defendant inserted a pencil approximately five to six inches into his right nostril and, after the detective had intervened, the defendant attempted to stab himself in the neck with the pencil, causing a minor laceration. In the motion to correct, the defendant asserted that the police report helped demonstrate that he had been incompetent at the time that he was sentenced.

The next item on which the defendant relied was the psychiatric report, which included a cover letter dated May 8, 2012. The psychiatrist who authored the psychiatric report based his findings on information that he had gathered from, inter alia, a ninety minute interview with the defendant conducted on April 5, 2012, three and one-half months before sentencing. In the motion to correct, the defendant asserted that the psychiatric report contained findings establishing that the defendant was socially withdrawn as an adolescent[9] and

[9] The defendant was born in 1977.

began experiencing auditory hallucinations in his early twenties, which led the defendant to attempt to commit suicide on multiple occasions; the defendant experienced episodes of paranoid ideation and depression; the defendant displayed significant mood symptoms and obsessive and compulsive symptoms, which interfered with his ability to think; the defendant had paranoid type schizophrenia; the defendant had been receiving and responding well to anti-psychotic medication, but he had suffered from psychotic symptoms for many years without treatment, which could contribute to an increased likelihood of worse, chronic, and/or more frequent exacerbations of symptoms; and even with continued treatment, the defendant was at a significant risk of continuing to suffer symptoms of his schizophrenia. The defendant contended that the findings set forth in the psychiatric report helped demonstrate that he had been incompetent when sentenced.

Last, the defendant relied on the psychiatric records, which comprised clinical records from the Department of Correction. In the motion to correct, the defendant asserted that the psychiatric records revealed that in October, 2011, the defendant reportedly was having auditory hallucinations and exhibiting paranoid thought processes, and that he did not believe that his medications were working; on May 4, 2012, the defendant reportedly failed to take several doses of medication; on May 31, 2012, the defendant reportedly was referred to "psych for med. re-evaluation" and reportedly stated that he had "agreed to 20 years for murder" but was not yet sentenced; on July 2, 2012, the defendant reportedly missed multiple doses of medication, although he was not exhibiting symptoms of his psychosis; on July 11, 2012, the defendant reportedly missed taking his medication "intermittently" and reportedly was hearing voices at night; on July 13, 2012, the defendant reportedly stated that he was going to be sentenced to twenty

years of incarceration for manslaughter and that his medication was working to suppress the voices but not his depression; and on August 24, 2012, the defendant reportedly stated that he had been sentenced to thirty years of incarceration for manslaughter. The defendant contended that the psychiatric records helped establish that he had been incompetent at the time of his sentencing.

We conclude that, on its face, the motion to correct did not raise the possibility that the defendant was incompetent at the time of his sentencing or that Judge Alexander had information prior to sentencing that required her to order that a competency evaluation and hearing be conducted. The pretrial and sentencing transcripts indicate that the parties and Judge Alexander were aware that the defendant had a history of mental health issues, but nothing in the transcripts raises any indication that the defendant had been incompetent when he was sentenced or that a competency evaluation and hearing prior to sentencing were required. Likewise, the police report, the psychiatric report, and the psychiatric records cannot be viewed reasonably to support a conclusion that the defendant was incompetent at the time of sentencing.[10] The incident described in the police report, which occurred in September, 2011, well before the defendant's sentencing and before the defendant had begun receiving mental health treatment from the Department of Correction, provides no support for the proposition that the defendant was incompetent at the time of sentencing. The psychiatric report, dated over two months prior to the defendant's sentencing, suggests that the defendant had a history of mental health issues and was at risk of

[10] There is nothing in the record to suggest that Judge Alexander had been provided with the police report, the psychiatric report, or the psychiatric records prior to sentencing, and, thus, Judge Alexander could not have relied on those documents to consider ordering that a competency evaluation and hearing be conducted.

experiencing symptoms in the future, but it does not establish that there was any likelihood that the defendant was incompetent when sentenced. Similarly, the representations in the psychiatric records that, in the weeks and months preceding his sentencing, the defendant had failed to maintain a strict medication schedule and had experienced symptoms associated with his mental health issues do not imply that the defendant was incompetent when sentenced. In addition, the statements reportedly made by the defendant before and after his sentencing suggesting that he misunderstood the length of his sentence cannot be viewed rationally as establishing that he was not competent at the time of his sentencing. Accordingly, the defendant failed to raise a colorable claim in the motion to correct that his sentence was imposed in an illegal manner.[11]

The defendant, citing *State* v. *Evans*, supra, 329 Conn. 770, appears to contend that his claim that his sentence

[11] We observe that in *State* v. *Mukhtaar*, supra, 189 Conn. App. 149–50, the defendant appealed from a judgment dismissing his motion to correct an illegal sentence in which he asserted that his sentence was illegal because, inter alia, the trial court had failed to order a competency hearing on his behalf before or after his criminal trial. This court concluded that the trial court lacked jurisdiction to entertain that claim because the defendant was not attacking the sentencing proceeding itself. Id., 150. In a footnote, this court additionally stated that "a claim regarding a defendant's competency at the sentencing proceeding; see General Statutes § 54-56d (a); or a claim that the court failed to inquire, sua sponte, into a defendant's competency at the sentencing proceeding when there is sufficient evidence at that proceeding to raise a reasonable doubt as to whether that defendant can understand the proceeding or assist in his or her defense therein; *State* v. *Yeaw*, 162 Conn. App. 382, 389–90, 131 A.3d 1172 (2016); would fall within the jurisdiction of the trial court for the purpose of a motion to correct an illegal sentence filed pursuant to Practice Book § 43-22." Id., 150 n.6. Our conclusion that the court lacked subject matter jurisdiction over the motion to correct in the present case does not conflict with the aforementioned language in *Mukhtaar*. If the defendant had raised a colorable claim in the motion to correct regarding his competency at the time of his sentencing or the sentencing court's failure to order that a competency evaluation and hearing be conducted, then the court would have had subject matter jurisdiction over the motion. Because the defendant failed to raise a colorable claim in the motion to correct, however, the court lacked subject matter jurisdiction to entertain the motion.

was imposed in an illegal manner is colorable per se because his claim challenges the actions of the sentencing court and, if successful, would require a new sentencing hearing. We are not persuaded.

In *Evans*, our Supreme Court concluded that the trial court had subject matter jurisdiction over a motion to correct an illegal sentence filed by the defendant, in which the defendant claimed that his sentence was illegal because, inter alia, under United States Supreme Court precedent, the sentence exceeded the relevant statutory limits. Id., 775. In analyzing whether the court had subject matter jurisdiction to entertain the defendant's claim, our Supreme Court stated that "[t]he jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . We emphasize, however, that this general principle that there is a strong presumption in favor of jurisdiction . . . in criminal cases . . . is considered in light of the common-law rule that, once a defendant's sentence has begun [the] court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . Thus, the presumption in favor of jurisdiction does not itself broaden the nature of the postsentencing claims over which the court may exercise jurisdiction in criminal cases, but merely serves to emphasize that the jurisdictional inquiry is guided by the plausibility that the defendant's claim is a challenge to his sentence, rather than its ultimate legal correctness. . . . In determining whether it is plausible that the defendant's motion challenged the sentence, rather than the underlying trial or conviction, we consider the nature of the specific legal claim raised therein." (Citations omitted; internal quotation marks omitted.) Id., 784.

Our Supreme Court determined that the defendant had presented a "sufficiently plausible" interpretation of the statutes at issue in that case to render his claim "colorable for the purpose of jurisdiction over his motion [to correct an illegal sentence]" and observed that the defendant was not requesting that his conviction be disturbed but, rather, was seeking a remand for resentencing. Id., 786.

Evans supports, rather than conflicts with, our conclusion that the defendant failed to set forth a colorable claim that his sentence was imposed in an illegal manner. In *Evans*, our Supreme Court did not conclude that the defendant had raised a colorable claim contesting the legality of his sentence merely because the defendant's claim was directed to the validity of his sentence and the defendant would be entitled to a new sentencing hearing if the claim was successful; instead, our Supreme Court determined that the defendant's claim was colorable on the ground that the defendant had set forth a "sufficiently plausible" interpretation of the statutory scheme underlying his contention that his sentence exceeded statutory limits. Id., 785–86. In the present case, in contrast, the defendant's claim is not colorable because the defendant's motion to correct, on its face, failed to establish any possibility that he was incompetent at the time of sentencing or that there was sufficient information before Judge Alexander requiring a competency examination and hearing prior to the defendant's sentencing.

In sum, we conclude that the court lacked subject matter jurisdiction to entertain the motion to correct on the basis that the defendant failed to set forth a colorable claim in the motion to correct that his sentence was imposed in an illegal manner. Therefore, the court properly dismissed the motion to correct for lack of subject matter jurisdiction.

The judgment is affirmed.

In this opinion ALVORD, J., concurred.

SHELDON, J., concurring in part and dissenting in part. I agree with my colleagues' determination, in part I of their majority opinion, that the defendant's first claim of error—an unpreserved claim that the trial court improperly failed to refer his motion to correct an illegal sentence to the judge who imposed the challenged sentence upon him—is not reviewable and reversible under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), for the reasons stated in this court's recent decision in *State* v. *Battle*, 192 Conn. App. 128, 146-47, A.3d (2019).[1] As for the defendant's second, and principal, claim, however—that the trial court erred in dismissing his motion to correct for lack of subject matter jurisdiction because the motion purportedly challenged only the legality of his underlying conviction rather than the legality of the manner in which his sentence was imposed—I disagree with that portion of the majority's decision, in part II thereof, which concludes that, despite legal error in the trial court's jurisdictional analysis, its judgment of dismissal should be affirmed on the alternative ground that the claims pleaded in the motion to correct are not colorable claims. Concluding, as I do, that the defendant's motion to correct does state a colorable claim that he was incompetent at the time he was sentenced, which this court has recognized as a valid legal basis for moving to correct a sentence on the ground that it was imposed in an illegal manner; see *State* v. *Mukhtaar*, 189 Conn. App. 144, 150 n.6., 207 A.3d 29 (2019); I would reverse the judgment of the trial court and remand this case for further proceedings on that potentially viable

[1] Although I do not believe that the majority has reason to reach and decide the claim discussed in part I of their opinion, in light of their conclusion in part II of the opinion that the trial court lacked subject matter jurisdiction over the defendant's principal claim, I would reach that issue and dispose of it as the majority has done due to its likelihood of arising on remand if the court ordered remand as I have proposed.

aspect of the defendant's motion to correct. I respectfully dissent from the majority's conclusion to the contrary.

"[F]or the trial court to have jurisdiction over a defendant's motion to correct a sentence that was imposed in an illegal manner, the defendant must put forth a colorable claim that his sentence, in fact, was imposed in an illegal manner. A colorable claim is [a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law). . . . For jurisdictional purposes, to establish a colorable claim, a party must demonstrate that there is a possibility, rather than a certainty, that a factual basis necessary to establish jurisdiction exists." (Citation omitted; internal quotation marks omitted.) *State* v. *Jason B.*, 176 Conn. App. 236, 245, 170 A.3d 139 (2017). "A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he might prevail." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 784, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

To assess the colorability of a claim presented in a motion to correct, the court must examine the facts pleaded in the motion and in the documents and materials attached to the motion and/or relied on therein. Upon viewing such pleaded facts in the light most favorable to sustaining its exercise of jurisdiction over the claims based on them; see *Keller* v. *Beckenstein*, 305 Conn. 523, 531, 46 A.3d 102 (2012) ("[i]t is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged"); the court must exercise jurisdiction over any claim it finds to be colorable,

because such pleaded facts, if proved, establish a possibility that jurisdiction over the claim exists.

In his motion to correct, the defendant expressly claimed that he was sentenced in an illegal manner because he was incompetent at the time of sentencing. He filed the motion along with a detailed memorandum of law in which he argued both his incompetency at sentencing claim and an alternative claim that the sentencing court sentenced him in an illegal manner by failing to order, sua sponte, that his mental competency be evaluated by mental health professionals before it sentenced him. The defendant argued both claims in his memorandum on the basis of an extensive set of records and materials, all attached to his memorandum, which documented his lengthy history of suffering from and receiving treatment for paranoid schizophrenia, a serious mental illness that had sometimes caused him to experience hallucinations.

The defendant recounted in his memorandum that at his sentencing hearing, there was discussion of his psychiatric background, including his diagnosis of paranoid schizophrenia, by both the prosecutor and his defense attorney. The court, he noted, was presented with a report from his forensic psychiatrist, Dr. Peter Morgan, who stated that he had "suffered from the psychotic symptoms for many years without treatment, and this may contribute to an increased likelihood of worse symptoms, more chronic symptoms and/or more frequent exacerbations of symptoms." The defendant further noted that his attorney had told the court that he had been receiving mental health treatment while incarcerated, which included the administration of antipsychotic medication. He also reported that his attorney had told the court at sentencing that his symptoms had improved to the point that he was then "calm, rational, and understood and appreciated the seriousness of the situation."

Notwithstanding his attorney's foregoing representations to the court as to the course of his treatment while incarcerated and improving mental health at the time of sentencing, the defendant argued in his memorandum that substantial additional evidence had become available since the date of sentencing that shed new and important light on the course of his mental illness and psychiatric treatment prior to sentencing. The defendant argued that this new information, which was set forth in the documents and materials attached to his memorandum, demonstrated that he may not have been competent when he was sentenced despite his counsel's reassuring observations to the contrary. He claimed, more particularly, that the following events, all documented in attached records from the Department of Correction (department), demonstrated that he may have lacked a rational and factual understanding of the proceedings against him on the date he was sentenced. First, before he entered his guilty plea on June 25, 2012, the clinical records of the department reported that he had missed several doses of his prescribed anti-psychotic medication. Second, although he had agreed with the state to plead guilty to manslaughter in the first degree and assault in the first degree in exchange for a total effective sentence of twenty-five years of incarceration, he told department staff that he had agreed to a sentence of twenty years in exchange for a guilty plea to murder. Third, in the period following his guilty plea but before his sentencing on July 23, 2012, department records reported that the defendant was continuing to miss doses of his prescribed anti-psychotic medication intermittently, and at times reported experiencing auditory hallucinations. Fourth, in that same time frame, he again misstated the terms of his plea agreement, reporting incorrectly that he would be sentenced to twenty years of incarceration on the charge of manslaughter. Fifth, approximately

one month after he was sentenced to a term of twenty-five years of incarceration, he told his mental health treaters a third time that he was confused about his sentence, informing a department social worker that he was then serving a thirty year sentence for manslaughter.

On the basis of the foregoing facts, I agree with the majority's conclusion that the defendant failed to put forth a colorable claim that the trial court was required to inquire into his competence on the date he was sentenced based on the facts before it at that time.[2] I believe, however, that the defendant did put forth a colorable claim that he was incompetent in fact at the time of sentencing based primarily upon the new facts, which were documented in department records that had first come to light after the date of his sentencing. The distinction between the two claims for this purpose lies in the difference between the more limited information that was known to the sentencing court on the date of sentencing and the fuller factual record that was

[2] I note that the state argues that the defendant's claim that he was incompetent when he was sentenced, as evidenced by information that was never before the sentencing court, does not fall within the purview of Practice Book § 43-22 because the claim does not relate to any alleged error on the part of the sentencing court. In support of its argument, the state cites *State* v. *Parker*, 295 Conn. 825, 992 A.2d 1103 (2010), for the proposition that a trial court lacks subject matter jurisdiction to consider a defendant's motion to correct when the motion does not relate to any improper action by the trial court. Thus, the state argues that without evidence that the sentencing court knew of the information in the department's records at the time of sentencing, the defendant could not have been sentenced in an illegal manner. The state's reliance on *Parker* is misplaced. It is axiomatic that there are claims that fall within the purview of Practice Book § 43-22 that do not require the court to have had knowledge of the alleged error. For example, a judge who relies on materially untrue or unreliable information at sentencing imposes sentence in an illegal manner even though he or she does not then know that the information so relied on is inaccurate. See e.g., *Townsend* v. *Burke*, 334 U.S. 736, 741, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948). Therefore, I reject the state's assertion that the court must have had knowledge of the additional evidence raised in the motion to correct at the time of sentencing for his claim to be colorable.

presented to the trial court in support of the defendant's motion to correct.

On the basis of the record before the sentencing court, which included defense counsel's contemporaneous report as to the defendant's ongoing treatment regimen and improving lucidity, I would agree with the state and the majority that the sentencing court had no obligation to order a competency evaluation, sua sponte, because there was insufficient evidence before the court to raise a reasonable doubt that he then lacked a rational and factual understanding of the proceedings against him, and thus was incompetent. See *State* v. *Yeaw*, 162 Conn. App. 382, 389–90, 131 A.3d 1172 (2016). By contrast, the additional, well documented facts presented to the trial court in the motion to correct concerning the defendant's failure to take his prescribed anti-psychotic medication in the weeks before he was sentenced, his contemporaneous experiencing of auditory hallucinations and his confusion, before and after he was sentenced, about the terms of his plea bargain and the length of his sentence, both as agreed to and as imposed, raise at least a genuine possibility that when he was sentenced he was incompetent because he lacked a rational and factual understanding of the proceedings against him due to his ongoing mental illness.

In announcing its decision that the defendant's claim that he was incompetent when he was sentenced was not colorable, the majority wrote that "the statements reportedly made by the defendant before and after his sentencing suggesting that he misunderstood the length of his sentence cannot be viewed rationally as establishing that he was not competent at the time of sentencing." Insofar as the majority's conclusion suggests that the defendant had the burden of proving that he was not competent at the time of sentencing in order for his claim to be considered colorable, it is simply incorrect. The defendant need not convince the court that he

will prevail on his claim, nor even that he will probably prevail on it, for the claim to be considered colorable; rather, he need only demonstrate that if the facts he had pleaded in support of the claim are proved, there is a possibility that he will prevail on that claim.[3] Insofar as the majority's conclusion can be read as a determination that the facts pleaded by the defendant, if proved, would be insufficient to raise even the possibility that he was incompetent at the time of sentencing, I respectfully disagree. Considered in light of the defendant's lengthy mental health history, his documented statements expressing confusion about the nature of his plea agreement and the length of his sentence, his documented failure to follow his treatment regimen in the weeks before he was sentenced and his contemporaneous experiencing of auditory hallucinations, combine to raise at least the possibility that he was incompetent when he was sentenced, and are thus sufficient to put forth a colorable claim that his sentence was imposed in an illegal manner.

[3] Similarly, the state has argued that the defendant failed to set forth a colorable claim that he was incompetent at sentencing because existing law presumes a defendant's competence; see General Statutes § 54-56d. This argument is also unavailing. The state asserts that the facts cited by the defendant in support of his claim may establish that he suffered from mental health issues, but are insufficient to overcome the presumption of competence to establish a colorable claim. The state's argument suggests that in order to establish jurisdiction for his motion to correct, the defendant is required to prove the merits of his claim, which in the present case would have required him to overcome the presumption of competence. As this court recently explained in *State* v. *Jason B.*, supra, 176 Conn. App. 244: "At issue is whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 that would, *if the merits of the claim were reached and decided in the defendant's* favor, require correction of a sentence." (Emphasis altered). The state misconstrues this language to suggest that a defendant must prove that he would succeed on the merits of his motion to correct before it may be heard. This is not so. In order to establish subject matter jurisdiction over the motion to correct, the defendant needed only to present sufficient facts to establish that his claim of incompetence is a "possibility, rather than a certainty"; *State* v. *Jason B.*, supra, 245; and is "superficially well founded but may ultimately be deemed invalid." *State* v. *Evans*, supra, 329 Conn. 784.

For the foregoing reasons, I would conclude that the court erred in dismissing the defendant's motion to correct, and would reverse the judgment of the trial court and remand this case for further proceedings on the defendant's colorable claim that he was sentenced in an illegal manner because he was incompetent when he was sentenced. Therefore, I respectfully dissent from part II of the majority opinion.

SUMMIT SAUGATUCK, LLC *v.* WATER POLLUTION CONTROL AUTHORITY OF THE TOWN OF WESTPORT (AC 41949)

Prescott, Bright and Bear, Js.

Syllabus

The plaintiff appealed to the trial court from the decision of the defendant Water Pollution Control Authority of the Town of Westport denying the plaintiff's application for a sewer extension. After the matter was tried to the court, the court remanded the application for a new hearing, at which the plaintiff could produce new evidence germane to the equitable disposition of its application. Following a new hearing, the defendant again denied the plaintiff's application, and the plaintiff appealed to the trial court, which rendered judgment sustaining the second appeal, reversing the defendant's denial of the application, and remanding the application for conditional approval subject to the completion of ongoing improvements and upgrades to the sanitary sewer system. Thereafter, the defendant, on the granting of certification, appealed to this court. *Held* that the trial court improperly rendered judgment sustaining the plaintiff's appeal and remanding the matter to the defendant with direction to grant the sewer extension application, as the decision of whether to grant a conditional approval of a sewer extension application was properly left to the discretion of the defendant, and the court impermissibly substituted its own discretion and judgment for that of the defendant by overriding its decision and ordering a conditional approval of the application: the fact that a conditional approval of an application would be a viable option available to an agency in considering an application does not mean that the agency must exercise that option whenever possible and in all situations, the defendant here chose to reject the rationale relied on by the trial court in favor of a more cautious approach that required the plaintiff to file a new application once it could demonstrate that sufficient sewer capacity existed for the planned development, and the record did not support a conclusion that the defendant's

decision was illegal, arbitrary or an abuse of discretion; moreover, the defendant was entitled to a presumption of regularity in its decision-making process, as it had provided the additional rationale that it was a settled policy of the defendant not to grant conditional approval of applications, there was unrebutted testimony that the defendant had not granted a conditional approval in more than thirty years, which was sufficient to demonstrate that the defendant had a practice to refrain from granting conditional approvals, and, by choosing not to do so in the present case, it was acting in accordance with its usual practices and procedures.

Argued April 22—officially released October 29, 2019

Procedural History

Appeal from the decision of the defendant denying plaintiff's application for a sewer extension for an affordable housing development, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the judicial district of Hartford, Land Use Litigation Docket, where the matter was tried to the court, *Shluger*, *J.*; judgment sustaining the appeal and remanding the application; thereafter, following a hearing on remand, the defendant denied the plaintiff's application, and the plaintiff appealed to the Superior Court from the denial of its application; subsequently, the court, *Shluger*, *J.*, rendered judgment sustaining the appeal, from which the defendant, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Peter V. Gelderman, for the appellant (defendant).

Timothy S. Hollister, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendant, the Water Pollution Control Authority for the Town of Westport, appeals from the judgment of the trial court sustaining the appeal of the plaintiff, Summit Saugatuck, LLC, from the defendant's decision to deny the plaintiff's application for a sewer extension to service a proposed affordable housing development. The court remanded

the matter back to the defendant with direction to approve conditionally the sewer extension application subject to the completion of ongoing improvements and upgrades of capacity to the sanitary sewer system in the town of Westport (town). On appeal, the defendant claims that the trial court, by sustaining the appeal and ordering a conditional approval of the application, improperly substituted its own judgment for the reasoned and lawful discretion exercised by the defendant. We agree and, accordingly, reverse the judgment of the trial court.[1]

The record reveals the following facts and procedural history. The plaintiff owns property or options to purchase property in an area of town that is zoned for high

[1] The defendant also claims that the trial court improperly determined that the defendant had the authority to grant the application despite a negative report from the town's planning and zoning commission that was issued pursuant to General Statutes § 8-24. That provision provides in relevant part that "[n]o municipal agency or legislative body shall . . . extend public utilities . . . until the proposal to take such action has been referred to the [municipal planning and zoning] commission for a report. . . ." Because we reverse the judgment of the trial court on the basis of the defendant's claim that the court improperly substituted its judgment for that of the defendant, it is unnecessary to decide whether the court correctly determined that a negative § 8-24 report by the town's zoning commission did not preclude, as a matter of law, the granting of the sewer extension application by the defendant. We conclude that this issue is not likely to recur on remand because our disposition requires no further action on the present application and, thus, we do not exercise our discretion to review it. See, e.g., *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 164, 971 A.2d 676 (2009) (addressing claim likely to arise during proceeding on remand); *Barlow* v. *Commissioner of Correction*, 166 Conn. App. 408, 427, 142 A.3d 290 (2016) (same), appeal dismissed, 328 Conn. 610, 182 A.3d 78 (2018). Furthermore, it is entirely speculative on the present record whether this precise issue, which raises complicated questions of statutory construction, is likely to arise again in the present case even if the plaintiff renews or files a revised sewer extension application and that application is referred for a new § 8-24 report. The primary reason for the prior negative report was the unfinished sewer repairs and upgrades, which may no longer be an issue. Given our reversal of the judgment on other grounds, any further discussion of the issue would be tantamount to an advisory opinion, which we cannot render. See *Tyler E. Lyman, Inc.* v. *Lodrini*, 78 Conn. App. 582, 589–90 n.5, 828 A.2d 676 (2003).

density development to be served by the town's sewer system. The plaintiff seeks to develop its property for multifamily residential use. A sewer extension from the town's system is needed to service the planned development.

In October, 2014, the plaintiff, pursuant to General Statutes § 7-246a,[2] applied to the defendant for approval of a private sewer extension for a proposed 186 unit affordable housing development.[3] Because a proposed sewer extension is deemed a municipal improvement, the defendant referred the application to the town's planning and zoning commission (zoning commission) for a report pursuant to General Statutes § 8-24. See footnote 1 of this opinion.

On January 8, 2015, the zoning commission held a hearing on the plaintiff's application. Steven Edwards, the town's public works director at the time, testified at the hearing that the town's existing sewer system required repairs and upgrades before it could handle the additional sewage from the proposed development. Specifically, Edwards explained that replacement of a force main running under the Saugatuck River and one of the pump stations could take up to five years.

[2] General Statutes § 7-246a provides: "(a) Whenever an application or request is made to a water pollution control authority or sewer district for (1) a determination of the adequacy of sewer capacity related to a proposed use of land, (2) approval to hook up to a sewer system at the expense of the applicant, or (3) approval of any other proposal for wastewater treatment or disposal at the expense of the applicant, the water pollution control authority or sewer district shall make a decision on such application or request within sixty-five days from the date of receipt, as defined in subsection (c) of section 8-7d, of such application or request. The applicant may consent to one or more extensions of such period, provided the total of such extensions shall not exceed sixty-five days.

"(b) Notwithstanding any other provision of the general statutes, an appeal may be taken from an action of a water pollution control agency or sewer district pursuant to subsection (a) of this section in accordance with section 8-8."

[3] In addition to the sewer extension, the application also sought a sewer capacity allocation and conditional approval to connect to the sewer system.

Edwards thought a reasonable goal for the completion of the upgrade/repairs would be the summer of 2017.

The zoning commission issued a negative report on January 26, 2015. The plaintiff elected to withdraw its application with the defendant at that time.

The plaintiff subsequently entered into an agreement with an affiliate of the Westport Housing Authority (affiliate) pursuant to which the plaintiff would develop eighty-five market rate units and the affiliate would develop seventy adjacent affordable housing units. On April 11, 2016, the plaintiff reapplied to the defendant to construct a private sewer extension to service this new planned development.

In June, 2016, the defendant referred the plaintiff's latest application to the zoning commission for a § 8-24 report. Following a hearing on July 7, 2016, the zoning commission again issued a negative report due to the as yet incomplete upgrades to the sewer system, which it concluded were not likely to be accomplished for another two to four years.[4] Despite the negative report, the plaintiff chose not to withdraw its application from consideration by the defendant. The defendant then held a public hearing on the plaintiff's sewer extension application on July 21, 2016. At that hearing, the plaintiff offered evidence about the projected timeline for the completion of the sewer upgrades and proposed that the defendant approve its application conditioned upon the final completion of all necessary upgrades to the sewer as well as the receipt of necessary wetlands and site plan approvals.

The defendant denied the plaintiff's application on July 27, 2016. The defendant concluded, in relevant part, that (1) the application violated a town policy that

[4] The town had appropriated money needed to upgrade the sewer system in 2015 and had contracted out the design work.

purportedly required a positive § 8-24 report from the zoning commission as a prerequisite to proceeding with a sewer extension application; (2) regardless of that policy, § 8-24 itself required a positive report from the zoning commission before the defendant could approve an application unless approval was obtained from the representative town meeting,[5] which had not occurred here; and (3) given remaining uncertainties and risks associated with the planned force main replacement and pump station upgrade, it would be unwise for the defendant to issue an approval conditioned upon the plaintiff's agreement to defer construction of the sewer extension until repairs were completed rather than simply requiring the plaintiff to wait and reapply after all necessary repairs and improvements were finished and sufficient capacity existed.

The plaintiff filed an appeal from that ruling with the Superior Court on August 31, 2016. In addition to its supporting brief, the plaintiff filed a motion for permission to supplement the record. The defendant objected to the motion to supplement and later filed its brief opposing the plaintiff's appeal. The plaintiff filed a reply brief and a second motion for permission to supplement the record. The matter was heard on April 26, 2017.

In a decision filed on August 1, 2017, the trial court sustained the plaintiff's appeal. The court determined that the negative report issued by the zoning commission pursuant to § 8-24 was only advisory in nature and in no way was binding on the defendant, and, thus, it

[5] The representative town meeting is the legislative body of the town. General Statutes § 8-24 provides in relevant part that "[a] proposal disapproved by the commission shall be adopted by the municipality . . . only after the subsequent approval of the proposal by (A) a two-thirds vote of the town council where one exists, or a majority vote of those present and voting in an annual or special town meeting, or (B) a two-thirds vote of the representative town meeting or city council or the warden and burgesses, as the case may be. . . ."

had been improper for the defendant to rely primarily on the negative report of the zoning commission as the basis for denying the plaintiff's sewer application, rather than considering the merits of the application.[6] Accordingly, the court remanded the application to the defendant "for a new hearing on the matter, at which [the plaintiff] may produce new evidence germane to the equitable disposition of its application."[7]

On September 27, 2017, the defendant held a hearing in accordance with the court's remand order, which was continued to October 25, 2017. Because the plaintiff's joint venture agreement with the affiliate had terminated, the plaintiff informed the defendant on remand that it was pursuing the application with respect to a new affordable housing plan that consisted of 187 units for which the plaintiff would be the sole developer.[8] The plaintiff presented evidence that the construction of the force main replacement and the upgrade

[6] The trial court found that the zoning commission's negative report was not based on any identified concern regarding the plan of development or existing zoning regulations but solely on the basis of sewer capacity, which was an issue for the defendant and outside the authority of the zoning commission to consider. This observation caused the court to question the motive behind the zoning commission's decision to issue a negative report. The court made no express finding, however, that the defendant's decision was similarly the result of an improper motive or bias.

[7] The plaintiff's motions to supplement the record sought to offer evidence demonstrating that the sewer upgrades and repairs were on track to be completed by the summer of 2017, which contradicted the testimony of the public works director that the repairs could take as long as four years to complete. The defendant argued that the evidence the plaintiff sought to admit postdated its decision to deny the sewer extension application and, thus, was not relevant to the issues raised in the appeal. The court determined that the additional evidence was "necessary for the equitable disposition of the appeal" and granted the motions to supplement the record. The defendant has not challenged the court's decision to grant those motions as part of its appeal to this court. Furthermore, the supplemental information at issue was presented to and considered by the defendant on remand.

[8] Although the defendant later argued to the trial court that this change in development plans exceeded the scope of the court's remand order, the court rejected that argument indicating that, although the plaintiff revised the number of units from 155 to 187, that change had no meaningful effect

to the pump station were scheduled to begin in December, 2017, and were to be completed in March, 2018. The plaintiff also submitted evidence demonstrating that all municipal, state, and federal permits for the sewer construction had issued and that the project was funded fully.

On October 25, 2017, the defendant nevertheless again denied the plaintiff's supplemented sewer extension application. It provided the following reasons for its decision: (1) "[T]he estimated date of completion of the replacement of the force main under the Saugatuck River and the upgrades to Pump Station # 2 is likely to be summer of 2018"; (2) "currently there is not sufficient capacity in the system to accommodate the proposed sewer line extension"; (3) the defendant agreed with Edwards' recommendation "against approving any project, whether conditional or not, that required more capacity than is available"; (4) the defendant, as a matter of policy, had never granted a conditional approval because "[e]vents could occur after a conditional approval that, if known at the time of approval, would have caused an application to be denied or modified," and "[t]here is no reason to grant approvals to extend a sewer prior to the time when the extension can physically be implemented"; (5) "[a]llocation of capacity prior to the completion of necessary work by the town is unfair to other developers and potential users who have been advised to wait until the work is complete to file applications"; (6) "although it is not the function of the [defendant] to consider land use issues in making its decisions (other than to the extent capacity may be affected), the application submitted by the [plaintiff] pursuant to the remand order was substantially different from the application that is the

on the issue of available capacity and, therefore, was inconsequential in nature. In the present appeal, the defendant has not challenged this aspect of the court's decision.

subject of the appeal"; and (7) "[the plaintiff] failed to provide a compelling reason to grant a conditional approval. The [plaintiff's] only stated reason was that it would benefit its ability to plan its project. That reason does not outweigh the public policy reasons for not granting conditional approvals (as set forth in item #4 . . .)."

The plaintiff again appealed the denial of its application to the Superior Court, arguing that its property was located in the town's sewer district and, thus, could not be developed without sewer access. The plaintiff further claimed that the record was clear that ample sewer capacity exists or soon would exist for the proposed use, there had been no showing of any engineering impediments to tying into the sewer system, and the sewer extension would be privately funded. According to the plaintiff, on those facts, the defendant had a nondiscretionary duty to grant the sewer extension application or, in the alternative, abused its discretion by failing to do so.

Following briefing, the appeal was heard on April 3, 2018.[9] The court again sustained the plaintiff's appeal and reversed the decision of the defendant. In a memorandum of decision filed on May 7, 2018, the court

[9] In its brief to this court, the plaintiff claims that, at the April 3, 2018 hearing, the parties stipulated that the new force main had been installed under the Saugatuck River but was not yet connected to the town's sewer system, although this would be accomplished within forty-five to sixty days. The parties also allegedly stipulated that the upgrade to the pump station would occur no later than August, 2018 and that, once these steps were completed, the town's sewer system would have sufficient capacity for the plaintiff's proposed residential development. If such a written stipulation or motion was filed, it does not appear in the record. Furthermore, neither of the parties included a copy of any written stipulation in its appendix, and, if oral, neither party ordered a transcript of the hearing before the trial court. Accordingly, we have no way of verifying what facts, if any, were stipulated to before the trial court. This lacuna in the record hampers our consideration of whether and to what degree the alleged stipulated facts may have influenced the court's decision to sustain the appeal and to order the conditional approval of the plaintiff's application.

rejected the plaintiff's argument that the defendant had a ministerial duty to grant its extension because the plaintiff did not seek merely to connect to an existing sewer system but to construct an extension to that system, which required the defendant to exercise judgment and discretion. See *Dauti Construction, LLC* v. *Water & Sewer Authority*, 125 Conn. App. 652, 664, 10 A.3d 84 (2010) (noting that, in determining whether water pollution control authority's action was ministerial or discretionary in nature, courts distinguish between requests to connect to an existing sewer system and those seeking to construct an extension to sewer system), cert. denied, 300 Conn. 924, 15 A.3d 629 (2011). The court nevertheless agreed with the plaintiff that the defendant's denial of the sewer extension application was arbitrary and an abuse of its discretion. The court concluded that the defendant had based its decision primarily on the fact that the sewer upgrades and repairs necessary to provide the capacity for the plaintiff's proposed development had not been completed, rather than on any potential topographical or engineering considerations. Rather than render a decision on the basis of the merits of the application, the court determined that the defendant arbitrarily had decided that the application was premature and that issuing a conditional approval was against an established policy.

The court remanded the application to the defendant for a second time, now with direction that it conditionally approve the application for the project as amended, subject to the following conditions: "(1) Construction of the sewer extension may not begin until such time as the force main replacement under the Saugatuck River and the upgrade of the pump station number two are complete and the town's public works director confirms that the public sewer system has the capacity to receive, transport, and discharge to the treatment plant the sewage to be discharged from the applicant's

proposed multifamily residential development. Construction of the sewer extension includes cutting of trees and clearing of vegetation.

"(2) The applicant understands and accepts that it may be assessed a cost of an upgrade to the capacity of pump station number two." This court subsequently granted the defendant's petition for certification to appeal, and the defendant timely filed the present appeal.[10]

The defendant claims that, by sustaining the plaintiff's appeal and remanding the matter back to the defendant with direction to grant the sewer extension application, the trial court improperly substituted its own

[10] The trial court's judgment remanding the case to the defendant raises the issue of whether the trial court's ruling constitutes an appealable final judgment. Appeals from the decisions of water pollution control authorities are not governed by the Uniform Administrative Procedure Act, General Statutes § 4-183 (j), which expressly provides that "a remand is a final judgment." Rather, such appeals are governed by § 7-246a (b), which provides in relevant part that "an appeal may be taken from an action of a water pollution control agency . . . in accordance with [General Statutes §] 8-8," the statute governing appeals from zoning boards and commissions. Thus, as with a zoning appeal, "it is the scope of the remand order in [a] particular case that determines the finality of [a] trial court's judgment." (Internal quotation marks omitted.) *Barry* v. *Historic District Commission*, 108 Conn. App. 682, 688, 950 A.2d 1, cert. denied, 289 Conn. 942, 959 A.2d 1008, cert. denied, 289 Conn. 943, 959 A.2d 1008 (2008). "A judgment of remand is final if it so concludes the rights of the parties that further proceedings cannot affect them. . . . A judgment of remand is not final, however, if it requires [the agency to make] further evidentiary determinations that are not merely ministerial." (Citations omitted; internal quotation marks omitted.) *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 130, 653 A.2d 798 (1995). In the present case, the trial court's remand order directed the agency to approve the plaintiff's sewer extension application and did not require it to make further evidentiary determinations before doing so. Consequently, the trial court's decision so concluded the rights of the parties that further proceedings could not affect them, and, thus, the trial court's remand order constitutes an appealable final judgment. See id., 131; see also *Children's School, Inc.* v. *Zoning Board of Appeals*, 66 Conn. App. 615, 617–19, 785 A.2d 607 (final judgment because remand ordered approval of special exception application subject to conditions and zoning board not required to make further evidentiary determinations), cert. denied, 259 Conn. 903, 789 A.2d 990 (2001).

judgment for the reasoned and lawful discretion exercised by the defendant. The defendant advances several arguments related to its claim. First, it argues that the court failed to identify any specific statute or regulation that the defendant violated by denying the sewer extension application, which had included a request to grant conditional approval. Next, it argues that, although the court concluded that the defendant did not have a ministerial duty to grant the application but, rather, was entitled to exercise its discretion in determining whether to approve the application, the court effectively rendered the decision ministerial by concluding that because the plaintiff's application complied with all of the defendant's engineering and administrative requirements, the failure to grant approval was arbitrary. The defendant further argues that, contrary to the court's decision, there was evidence in the record demonstrating that the defendant had not granted a conditional approval in the past thirty years, which effectively constituted a policy to which the defendant was entitled to adhere. Finally, the defendant contends that the court used language that appeared to imply, without any supporting evidence, that the defendant's denial of the application was motivated by a bias against affordable housing.

The plaintiff counters that, on the basis of the record presented, the court properly determined that the defendant acted arbitrarily and abused its discretion in failing to grant a conditional approval. In addition to reasserting its argument that the defendant had a ministerial obligation to approve the sewer extension application, the plaintiff contends that, even if the defendant's action was discretionary, it abused that discretion because it used its limited authority over the sewer system to make a land use decision and to improperly thwart an unwanted multifamily residential development. We agree with defendant that, under the circumstances, whether to grant a conditional approval of a sewer extension application was a decision properly

left to the discretion of the defendant, and the court impermissibly substituted its own discretion and judgment for that of the defendant by overriding its decision and ordering a conditional approval of the application.

We begin by setting forth applicable principles of law, including our standard of review. "[W]ater pollution control authorities are quasi-municipal corporations created pursuant to statute that may exercise the power to acquire, construct, maintain, supervise, manage and operate a sewer system and perform any act pertinent to the collection, transportation and disposal of sewage. . . . In defining the powers and duties of such authorities, [General Statutes] § 7-247 (a) provides, inter alia, that they may establish and revise rules and regulations for the supervision, management, control, operation and use of a sewerage system, including rules and regulations prohibiting or regulating the discharge into a sewerage system of any sewage or any stormwater runoff which in the opinion of the water pollution control authority will adversely affect any part or any process of the sewerage system . . . ." (Citation omitted; internal quotation marks omitted.) *Dauti Construction, LLC* v. *Water & Sewer Authority*, supra, 125 Conn. App. 661.

Accordingly, "[i]n considering an application for sewer service, a water pollution control authority performs an administrative function related to the exercise of its powers. . . . When a water pollution control authority performs its administrative functions, a reviewing court's standard of review of the [authority's] action is limited to whether it was illegal, arbitrary or in abuse of [its] discretion . . . . Moreover, there is a strong presumption of regularity in the proceedings of a public agency, and we give such agencies broad discretion in the performance of their administrative duties, provided that no statute or regulation is violated. . . .

"With respect to factual findings, a reviewing court is bound by the substantial evidence rule, according to which, [c]onclusions reached by [the authority] must be upheld by the trial court if they are reasonably supported by the record. . . . The question is not whether the trial court would have reached the same conclusion, but whether the record before the [authority] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a [water pollution control authority's] findings, it cannot substitute its judgment as to the weight of the evidence for that of the [authority]. . . . If there is conflicting evidence in support of the [authority's] stated rationale, the reviewing court . . . cannot substitute its judgment for that of the [authority]. . . . The [authority's] decision must be sustained if an examination of the record discloses evidence that supports *any one of the reasons given*. . . . Accordingly, we review the record to ascertain whether it contains such substantial evidence and whether the decision of the defendant was rendered in an arbitrary or discriminatory fashion. . . . We review the court's decision to determine if, when reviewing the decision of the administrative agency, it acted unreasonably, illegally, or in abuse of its discretion." (Citation omitted; emphasis added; internal quotation marks omitted.) *Landmark Development Group, LLC* v. *Water & Sewer Commission*, 184 Conn. App. 303, 316–17, 194 A.3d 1241, cert. denied, 330 Conn. 937, 195 A.3d 385, cert. denied, 330 Conn. 937, 195 A.3d 386 (2018).

As our Supreme Court has emphasized, "water pollution control authorities are afforded broad discretion in deciding whether to provide sewer service to property owners, but cannot exercise that discretion in an arbitrary or discriminatory manner . . . ." *Forest Walk, LLC* v. *Water Pollution Control Authority*, 291 Conn. 271, 279, 968 A.2d 345 (2009). Only if it appears that a

public agency reasonably could have reached only one conclusion is it proper for a court to "direct that agency to do that which the conclusion requires." *Dauti Construction, LLC* v. *Water & Sewer Authority*, supra, 125 Conn. App. 664.

Turning to the present case, one of the reasons stated by the defendant for denying the supplemented application was that there currently was insufficient capacity in the sewer system to service the proposed development. Although it was anticipated that the system would have the necessary capacity once the ongoing repairs and upgrades to it were completed, the defendant also concluded that granting an approval conditioned on the future completion of such work was unwarranted. In accordance with applicable standards of review, unless that rationale was illegal, arbitrary, or constituted an abuse of discretion, it was entitled to deference from the court. See *Landmark Development Group, LLC* v. *Water & Sewer Commission*, supra, 184 Conn. App. 316.

A municipal land use or related administrative agency generally may conditionally approve an application submitted for its consideration provided that the conditions imposed "are within the scope of the agency's statutory authority and are an attempt to implement its existing regulations for a specific project on which the agency acts in an administrative capacity." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 22:16, p. 721. Our appellate courts have upheld the use of conditional approvals with respect to land use related applications noting that, even in cases in which the application is conditioned on events outside the control of the granting authority, such as obtaining approval from another agency, a conditional approval can "achieve greater flexibility in zoning administration by avoiding stalemates between a zoning authority and other municipal agencies over which it

has no control." *Blaker* v. *Planning & Zoning Commission*, 212 Conn. 471, 482, 562 A.2d 1093 (1989). The mere fact, however, that a conditional approval of an application would be a viable option available to an agency in considering an application does not mean that the agency must exercise that option whenever possible and in all situations.

In *CMB Capital Appreciation, LLC* v. *Planning & Zoning Commission*, 124 Conn. App. 379, 4 A.3d 1256 (2010), cert. granted, 299 Conn. 925, 11 A.3d 150 (2011) (appeal withdrawn September 15, 2011), this court was asked to decide whether it was proper for the trial court to order the planning and zoning commission to approve conditionally an affordable housing site plan application that was filed pursuant to General Statutes § 8-30g and which the commission had denied on the ground that a necessary sewer connection application, most likely, would be denied. This court affirmed the decision of the trial court, concluding that, rather than denying the application, the commission was required to grant the affordable housing application on the condition that the plaintiff obtain approval from the sewer authority. Id., 394, 399. In reaching this conclusion, this court provided an overview of our case law regarding conditional approvals. See id., 386–90.

Of particular relevance to the present appeal, is this court's discussion in *CMB Capital Appreciation, LLC*, of *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 653 A.2d 798 (1995), in which our Supreme Court held that, unless a zoning commission could demonstrate that its refusal to grant the conditional approval of an affordable housing application was necessary to protect substantial public interests, "the conditional granting of [the application] was not only authorized *but required*." (Emphasis added.) Id., 164. In discussing conditional approvals in general, our Supreme Court in *Kaufman* noted, however, that even though a commission is *empowered* to grant conditional approval of

an application, the mere existence of such authority does not "demonstrate that the commission was . . . required to do so. In our past cases approving conditional zoning, we have described conditional zoning *not as an obligation*, but as a means of achieving greater flexibility in zoning administration . . . ." (Emphasis added; internal quotation marks omitted.) Id., 165. Although the court in *Kaufman* proceeded to hold that conditional zoning *was an obligation in the context of an affordable housing application* because imposing such a requirement would help to advance an expressed legislative goal of encouraging the construction of affordable housing; id., 164; the court's language strongly suggests that, outside of that specific context, whether to grant conditional approval of an application remains a matter of agency discretion. Moreover, in *AvalonBay Communities, Inc.* v. *Sewer Commission*, 270 Conn. 409, 431–433, 853 A.2d 497 (2004), our Supreme Court made clear that the rules governing zoning approval of affordable housing applications did not extend to the decisions of a water pollution control authority, and "the legislature has not required water pollution control authorities to treat applications related to developments with affordable housing components differently from applications for other types of developments, as it has with other municipal bodies." Id., 432–33.

Unlike in *Kaufman* and *CMB Capital Appreciation, LLC*, the application at issue in the present appeal was not for zoning approval of an affordable housing application filed pursuant to § 8-30g, but an application for a sewer extension filed pursuant to § 7-246a.[11] Nevertheless, the court concluded that granting conditional approval of the sewer extension application was required to afford the plaintiff the opportunity to con-

[11] The court indicated in its memorandum of decision that the parties conceded at argument that § 8-30g does not apply to this case.

tinue to make progress on its affordable housing project while at the same time protecting against any risk of harm to the public's interest in proper waste water management. By stating that a "conditional approval in the present case would protect against the risk of harm to the public [interest]," the court substituted its own decision-making calculus for that of the municipal agency entrusted with discretionary authority over such matters. The court also mistakenly cited to *CMB Capital Appreciation, LLC* v. *Planning & Zoning Commission*, supra, 124 Conn. App. 391, for the proposition that a conditional approval of the application would advance "the legislative purpose of encouraging the construction of affordable housing" (internal quotation marks omitted); even though such consideration should be limited to affordable housing zoning applications and not to applications before a water pollution control authority. See *AvalonBay Communities, Inc.* v. *Sewer Commission*, supra, 270 Conn. 431–33.

In exercising its discretion, the defendant chose to reject the rationale relied on by the trial court in favor of a more cautious approach that required the plaintiff to file a new application once it could demonstrate that sufficient sewer capacity existed for the planned development. Although the defendant's decision is contrary to the approach the trial court favored, the record does not support a conclusion that the defendant's decision was illegal, arbitrary, or an abuse of discretion. Accordingly, the defendant was entitled to a presumption of regularity in its decision-making process. See *Landmark Development Group, LLC* v. *Water & Sewer Commission*, supra, 184 Conn. App. 316 ("question is not whether the trial court would have reached the same conclusion, but whether the record before the [authority] supports the decision reached" [internal quotation marks omitted]). In exercising its discretion not to grant a conditional approval in this case, the

defendant explained that unknown and unforeseen problems potentially could arise between the time of approval and the completion of the sewer upgrades that could adversely impact the town. Although the plaintiff attempts to make much of the fact that the defendant did not provide specific examples of the types of problems it foresaw, we are unconvinced that the lack of detailed explication so undermined the defendant's reasoning as to permit the trial court to disregard it and substitute what the court clearly believed was a more equitable outcome.

Finally, the defendant provided the additional rationale that it was a settled policy of the defendant not to grant conditional approval of applications. The court found that there was no evidence that any such policy existed. The existence of an officially promulgated policy, however, was not essential in order to justify the position taken by the defendant. There was unrebutted testimony by Edwards that the defendant had not granted a conditional approval in more than thirty years. That testimony was evidence upon which the defendant was entitled to rely, and it was sufficient to demonstrate that the defendant had a practice to refrain from granting conditional approvals and, by choosing not to do so in the present case, it was not acting arbitrarily but, rather, in accordance with its usual practices and procedures. Having reviewed the record and the arguments of the parties, we conclude that the court improperly substituted its own discretion and judgment for that of the defendant.

The judgment is reversed and the case is remanded with direction to render judgment denying the plaintiff's appeal.

In this opinion the other judges concurred.

VICTOR A. WOZNIAK ET AL. *v.* TOWN OF COLCHESTER (AC 41275)

Alvord, Elgo and Moll, Js.

Syllabus

The plaintiffs, V and O, appealed to this court from the summary judgment rendered by the trial court in favor of the defendant town of Colchester. The plaintiffs owned an undeveloped parcel of real property located in Colchester in an area that is designated as a flood zone on a map prepared by the Federal Emergency Management Agency (FEMA). A survey indicated that the map incorrectly located a portion of a brook on the property, which the plaintiffs claimed caused the property to be improperly designated as being in a flood zone. V submitted to FEMA an application for a Letter of Map Amendment to correct the map, and FEMA requested additional information. The plaintiffs thereafter demanded that the defendant file an application for a Letter of Map Revision (LOMR) with FEMA on their behalf, and when the defendant declined, the plaintiffs commenced this action seeking a writ of mandamus to compel the defendant to do so. The plaintiffs contended that the applicable federal regulations (44 C.F.R. §§ 65.3 and 65.7) impose a ministerial duty on the defendant to file a LOMR application on their behalf to rectify the incorrect depiction of their property on the map. After the plaintiffs appealed to this court from the summary judgment rendered in the defendant's favor, the defendant filed a motion to dismiss the appeal, alleging that the appeal had been rendered moot by certain recent developments. Specifically, in 2016, FEMA officials informed the defendant of a new program that was intended to help communities reduce their flood risk. The defendant's town engineer asked FEMA to review the flood zone mapping in the area of the subject brook for potential conflicts between the flood limits shown on the map and the actual flood limit elevations based on topography. In 2018, FEMA notified the defendant that it had completed the discovery portion of the new program and had selected the brook for an upcoming study. This court denied the defendant's motion to dismiss the appeal without prejudice. *Held*:

1. The defendant's claim that the appeal was moot was unavailing, as FEMA's pending study of the brook did not render the appeal moot; correspondence from FEMA to the defendant indicated that the new program was being implemented for the first time, and the record did not indicate when the program would conclude or when any final determination regarding the brook would transpire, and, guided by the fundamental precept that this court must indulge every reasonable presumption in favor of jurisdiction in resolving the issue of mootness, this court could not conclude on the limited record before it that the pending review of

the brook under the program necessarily deprived this court of the ability to provide the plaintiffs with any meaningful relief.

2. The trial court properly rendered summary judgment in favor of the defendant and determined that there was no genuine issue of material fact that the plaintiffs were not entitled to a writ of mandamus to compel the defendant to file a LOMR application on their behalf:

a. Despite the plaintiffs' contention that the defendant owed a duty to initiate a LOMR application pursuant to § 65.3, by its plain language § 65.3 concerns physical changes to property, it was undisputed that no physical change affecting flooding conditions had occurred with respect to the plaintiffs' property, as the plaintiffs' claim was that the brook was improperly depicted on a portion of their property since the map was promulgated, and, therefore, in the absence of any allegation that the plaintiffs' property underwent any physical change or that it was affected by a physical change to another property, the plaintiffs' claim was untenable; moreover, to the extent that the plaintiffs attempted to inject new factual allegations into the case for the first time on appeal, such allegations were improper, having never been raised before the trial court, and this court declined to consider them.

b. The plaintiffs could not prevail in their claim that § 65.7 imposed a ministerial duty on the defendant to file a LOMR application to correct the inaccurate description of the brook on their behalf: a prerequisite to the extraordinary relief afforded by a writ of mandamus is the existence of a ministerial duty, and a community's determination pursuant to § 65.7, as to whether any "practicable alternatives exist" to revising the boundaries of a previously adopted floodway is a quintessentially discretionary function, as opposed to a ministerial function, as that determination requires a community to exercise its judgment as to whether alternatives to revising such boundaries are practical; moreover, the applicable federal regulation (44 C.F.R. § 72.1) expressly indicates that LOMR applications are predicated on proposed or actual manmade alterations within the floodplain, § 65.7 plainly and unambiguously concerns changes to floodways, and because the plaintiffs did not allege any manmade alterations or physical changes affecting their property or the designation thereof, § 65.7 was inapposite to the present case.

c. The plaintiffs did not demonstrate that they had no adequate remedy at law: the plaintiffs neither alleged in their complaint nor provided any evidence that property owners are precluded from filing LOMR applications, and a review of the regulatory scheme indicated that property owners were not precluded from filing LOMR applications, as the National Flood Insurance Program plainly envisions the filing of LOMR applications by parties other than local communities such as the defendant; moreover, the instructions provided by FEMA for completing LOMR applications require the submission of a concurrence form with signatures of the requester, community official and engineer, the purpose of which is to ensure that the community is aware of the impacts of

the LOMR application and which was further evidence that the program envisions applicants other than local communities, and the plaintiffs presented no basis on which this court reasonably could conclude that a property owner is prohibited, as a matter of federal administrative law, from filing a LOMR application, and the availability of that legal remedy, which would provide the plaintiffs the relief that they sought, was fatal to their mandamus action.

Argued April 9—officially released October 29, 2019

Procedural History

Action seeking, inter alia, a writ of mandamus, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Knox, J.*, granted the motion filed by the defendant for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court; thereafter, the defendant filed a motion to dismiss the appeal, which this court denied without prejudice. *Affirmed.*

Paul M. Geraghty, for the appellants (plaintiffs).

Matthew Ranelli, with whom, on the brief, was *Amber N. Sarno*, for the appellee (defendant).

Opinion

ELGO, J. This case concerns the obligation of a municipality to file an application on behalf of a property owner to correct flood maps promulgated by federal administrative authorities. The plaintiffs, Victor A. Wozniak and Olga E. Wozniak,[1] appeal from the summary judgment rendered in favor of the defendant, the town of Colchester. The dispositive issue is whether the trial court properly determined that no genuine issue of material fact existed as to whether the plain-

[1] For purposes of clarity, we refer to Victor A. Wozniak and Olga E. Wozniak collectively as the plaintiffs and to Victor A. Wozniak individually by his surname.

tiffs were entitled to a writ of mandamus.[2] We affirm the judgment of the trial court.

We begin by providing necessary context for the present dispute. "Prior to 1968, there was a growing concern that the private insurance industry was unable to offer reasonably priced flood insurance on a national basis. . . . Congress passed the National Flood Insurance Act (NFIA) of 1968 to address this concern.[3] The purposes of the NFIA were to provide affordable flood insurance throughout the nation, encourage appropriate land use that would minimize the exposure of property to flood damage and loss, and thereby reduce federal expenditures for flood losses and disaster assistance. . . . To that end, NFIA authorized the Federal Emergency Management Agency (FEMA) to establish and carry out the National Flood Insurance Program . . . . There are three basic components of [that program]: (1) the identification and mapping of flood-prone communities, (2) the requirement that communities adopt and enforce floodplain management regulations that meet minimum eligibility criteria in order to qualify for flood insurance, and (3) the provision of flood insurance." (Citations omitted; footnote added; internal quotation marks omitted.) *National Wildlife Federation* v. *Federal Emergency Management Agency*, United States District Court, Docket No. C11-2044 (RSM), 2014 WL 5449859 *1 (W.D. Wash. October 24, 2014); see also 44 C.F.R. § 59.2.

[2] The plaintiffs also claim that the court improperly rendered summary judgment in favor of the defendant on their inverse condemnation and negligence claims. On appeal, the plaintiffs concede that the viability of those claims is wholly dependent upon their mandamus claim, as they are premised on the defendant's alleged duty "to submit an application to correct the flood map." In light of our resolution of the plaintiffs' principal claim, we agree with the plaintiffs that their inverse condemnation and negligence claims necessarily must fail. We, therefore, do not consider those claims in any detail.

[3] See 42 U.S.C. § 4001 et seq.

To carry out its mandate, the NFIA authorizes FEMA to "identify and publish information with respect to all flood plain areas, including coastal areas located in the United States, which have special flood hazards"[4] and to "establish or update flood-risk zone data in all such areas, and make estimates with respect to the rates of probable flood caused loss for the various flood risk zones for each of these areas . . . ." 42 U.S.C. § 4101 (a). That data then is memorialized on a flood insurance rate map, which is "an official map of a community, on which the Federal Insurance Administrator has delineated both the special hazard areas and the risk premium zones applicable to the community. . . ." 44 C.F.R. § 59.1. The present action concerns the mapping of flood prone areas in the defendant municipality.

The following facts are gleaned from the pleadings, affidavits, and other proof submitted, viewed in a light most favorable to the plaintiff. See *Dubinsky* v. *Black*, 185 Conn. App. 53, 56, 196 A.3d 870 (2018). The defendant is a community, as that term is defined in the code,[5] that has participated in the National Flood Insurance Program since 1982, and thus is obligated to adopt adequate flood plain management regulations consistent with federal criteria. See 44 C.F.R. § 60.1. The defendant is also a mapping partner under FEMA guidelines for map modernization that helps "[ensure] the accuracy" of flood insurance rate maps prepared by FEMA.

[4] The Code of Federal Regulations (code) defines "[a]rea of special flood hazard" as "the land in the flood plain within a community subject to a 1 percent or greater chance of flooding in any given year." 44 C.F.R. § 59.1. It defines "[f]lood plain or flood-prone area" in relevant part as "any land area susceptible to being inundated by water from any source . . . ." Id. We further note that the term "flood plain" is spelled as both one word and as two words in federal authorities. See, e.g., 42 U.S.C. § 4101; 44 C.F.R. § 59.1.

[5] The code defines "community" in relevant part as "any State or area or political subdivision thereof . . . which has authority to adopt and enforce flood plain management regulations for the areas within its jurisdiction." 44 C.F.R. § 59.1.

At all relevant times, the plaintiffs owned real property known as 159 Lebanon Avenue in Colchester (property), an undeveloped parcel of vacant land. The property is located in an area that is designated as a flood zone on Flood Insurance Rate Map number 09011C0154G (map) prepared by FEMA and dated July 18, 2011. In light of that designation, the plaintiffs had a survey of the property performed, which indicated that the map incorrectly located a portion of Judd Brook on the property. As Wozniak averred in his July 14, 2017 affidavit, the survey confirmed that the map "incorrectly depicts the location of Judd Brook, resulting in our [p]roperty being wrongfully determined to be in a flood zone."

On April 4, 2012, Wozniak brought that alleged inaccuracy to FEMA's attention by submitting an application for a Letter of Map Amendment (LOMA).[6] That application consisted of a two page letter from Wozniak, in which he indicated that "[t]he property is for sale and buyers don't want to hear about flood plains and flood insurance," and attached three maps of the area in question. As Wozniak explained in his application, "[u]sing Photoshop, [he] approximated the actual course of Judd Brook and added notes" on one of those maps. By letter dated May 25, 2012, a FEMA official responded to Wozniak's LOMA application by requesting additional information.[7] There is no indication in the record before

[6] The record also indicates that, on March 27, 2012, the defendant's First Selectman, Gregg Schuster, signed a community acknowledgement form for the plaintiffs' LOMA submission.

[7] In that correspondence, the FEMA official informed Wozniak that certain "forms or supporting data, which were omitted from your previous submittal, must be provided: The metes and bounds description that was previously submitted includes a portion of the Judd Brook. Portion of streams/brooks cannot be removed from the Special Flood Hazard Area. Please revise the metes and bounds area to only include land. All corrections must be certified by a licensed land surveyor or professional engineer. If the updates to the metes and bounds area changes the lowest lot elevation provided on the elevation form, the form should be updated as well. If the lowest lot elevation does not change please provide a certified letter from the surveyor or

us that the plaintiffs ever responded to that request or provided any further documentation to FEMA in connection therewith.

The record also contains three letters sent to the plaintiffs from the defendant's First Selectman, Gregg Schuster, in the summer and fall of 2012. In his August 1, 2012 letter, Schuster stated: "Based on the [defendant's] review of the materials you submitted, specifically FEMA's May 25, 2012 letter of [r]eply regarding your LOMA application, it appears you have been asked to supply additional data in order for FEMA to continue processing your request. It does not appear that they are asking you to submit a [Letter of Map Revision (LOMR)] application. In any event, as was done for your LOMA application, if in fact you are required to file a LOMR, the [defendant's] Chief Executive Officer . . . would assist you to the extent of reviewing your application and signing a concurrence form contained within your application. The [defendant] has done this for other private property LOMR applications in the past. However, all materials and maps required to complete the submission to FEMA are the private property owner's responsibility." In his September 7, 2012 letter, Schuster similarly stated that "[a]fter speaking with FEMA representatives, including Caitlin Clifford, who you recommended that we speak with, it is our understanding that as the property owner, there is no reason why you cannot continue with your LOMA application. Should you continue with your LOMA application, the [defendant] would be more than happy to assist you by giving you concurrence through the First Selectman's

engineer that completes the new map and description stating such. Please note that if all of the required items are not submitted within 90 days of the date of this letter, any subsequent request will be treated as an original submittal and will be subject to all submittal procedures." (Emphasis omitted.)

Office." In a third letter dated October 16, 2012, Schuster provided the plaintiffs detailed advice on how to prepare a "successful LOMA application."[8]

In the months that followed, the plaintiffs continued to furnish the defendant with various documentation regarding the apparent inaccuracy on the map. As they allege in their operative complaint: "On various dates between October of 2012 and January of 2013 the [p]laintiffs submitted to the [defendant] scientific data which showed . . . the existing [map] for the [property] and the adjacent property to be incorrect. Specifically, the [p]laintiffs' survey showed that Judd Brook Channel as shown on the [map] was not in fact in the location shown on the [map] and that it was not on the [property]. Plaintiffs through historical data and survey data demonstrated that the sluiceway was located on

[8] More specifically, Schuster stated in relevant part: "Upon reviewing the submitted documentation and telephone conversation with town staff with [FEMA representative Caitlin Clifford] the following procedure is recommend[ed] for a successful LOMA application.

"1. The depicted limits of the flood zone should be a curvature-linear line that shows the elevation of the floodway as the actual topography of the site as it exists in comparison to the established floodway elevations as determined by the FEMA mapping. This area must not encroach upon the actual (field determined) location of Judd Brook or any back water areas below the established flood plain elevation. It also [is] recommended that both sides of the existing Judd Brook be more clearly defined on the submitted mapping, with topographic information shown for the complete affected area. The information must be submitted with a Licensed Land Surveyor's certification.

"2. Once the mapping is revised, the submission to Ms. Clifford should indicate that the information submitted involves field verified and determined topographic information and should be referred to her supervisor that is an engineer for evaluation. This was noted in the telephone conversation with Ms. Clifford that her 'authority' and limits of evaluation are simply map overlay and that sites that require determination of topographic information are conducted at the supervisory level above her.

"This should provide the most expedient process for the successful determination of your LOMA [a]pplication. Should you continue with your LOMA application, the [defendant] would be more than happy to assist you by giving you concurrence through the First Selectman's Office."

the abutting property and as a result the flood plain elevation for the [property] was incorrect. This incorrect depiction places a significant portion of the [property] in the flood plain when it is not. As a result of this error, a substantial, if not the entire portion, of the [property] is rendered unusable." The plaintiffs thus demanded that the defendant file a LOMR application with FEMA on their behalf to correct the map in question.

When the defendant declined to do so, this litigation ensued. The plaintiffs' operative complaint contains three counts. In the first, they seek a writ of mandamus to compel the defendant to file a LOMR application on their behalf to correct the alleged error on the map. The second count sounds in inverse condemnation, alleging that the defendant's failure to file a LOMR application "effectively resulted in a confiscation of the [p]roperty without compensation." In the third count, the plaintiffs alleged negligence on the defendant's part "in carrying out its obligations under the National Flood Insurance Program by failing to file a [LOMR] with FEMA." The defendants filed an answer, as well as a special defense to the third count of the complaint, on August 11, 2015. On August 18, 2016, the plaintiffs filed a certificate of closed pleadings, in which they requested a court trial.

The defendants thereafter filed a motion for summary judgment, which was accompanied by several exhibits, including application forms and instructions for both LOMR and LOMA applications. In response, the plaintiffs filed an opposition, to which they attached copies of various correspondence and Wozniak's affidavit. The court heard argument from the parties on November 13, 2017. In its subsequent memorandum of decision, the court concluded that no genuine issue of material fact existed as to any of the three counts alleged in the complaint and that the defendant was entitled to judgment as a matter of law. Accordingly, the court

rendered summary judgment in its favor. From that judgment, the plaintiffs now appeal.

I

As a preliminary matter, we address a question of mootness. Approximately ten months after the commencement of the present appeal, the defendant filed a motion to dismiss, in which it alleged that the plaintiffs' challenge to the court's ruling on their mandamus claim had been rendered moot by recent developments. Appended to that motion were copies of correspondence from FEMA officials who, in October, 2016, informed the defendant of a "new FEMA program" known as "Risk Mapping, Assessment, and Planning," or "Risk MAP," that was intended to help "communities identify, assess, and reduce their flood risk" by "combining quality engineering with updated flood hazard data . . . ." In implementing that new program, FEMA solicited "any data . . . [that the defendant] would like to have taken into consideration when reviewing [the defendant's] flood risk . . . ." The defendant's town engineer responded to that request by asking FEMA to review, inter alia, "the Flood Zone mapping on [the map] in the area of Judd Brook, North of Lebanon Avenue/State Route 16 for potential conflict between the flood limits/extents shown on the map and the actual flood limit elevations based on topography."[9] By letter dated October 17, 2018, a FEMA official notified the defendant it had completed the "discovery" portion of the Risk MAP program and had "selected" Judd Brook for a detailed study as part of its upcoming "engineering and mapping" activities.

The plaintiffs filed an objection to the motion to dismiss on December 3, 2018. Weeks later, they filed a supplement to the facts recited therein, in which the plaintiffs stipulated in relevant part that Judd Brook

[9] The plaintiffs' property lies north of Lebanon Avenue/State Route 16.

"will be reviewed [and] surveyed as part of the proposed field study" to be conducted by FEMA as part of the Risk MAP program. They nevertheless maintained that the pendency of that study did not render the present appeal moot. By order dated March 13, 2019, this court denied the defendant's motion to dismiss "without prejudice to the panel that hears the merits of the appeal considering the issues raised in the motion to dismiss." At oral argument before this court, the parties renewed their respective claims, as set forth in the pleadings on the motion to dismiss.

The question of mootness implicates the subject matter jurisdiction of this court and thus "may be raised at any time . . . ." *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 143, 60 A.3d 946 (2013). "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . A case is considered moot if [the] court cannot grant the appellant any practical relief through its disposition of the merits . . . ." (Citations omitted; internal quotation marks omitted.) *JP Morgan Chase Bank, N.A.* v. *Mendez*, 320 Conn. 1, 6, 127 A.3d 994 (2015). "In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 54, 161 A.3d 537 (2017). Our review of the question of mootness is plenary. *State* v. *Rodriguez*, 320 Conn. 694, 699, 132 A.3d 731 (2016).

We agree with the plaintiffs that FEMA's pending field study of Judd Brook does not render the present appeal moot. As FEMA officials plainly indicated in the October, 2016 letter to the defendant, Risk MAP is a

"new" program that is being implemented for the first time. Although the record before us, as supplemented by the materials appended to the defendant's motion to dismiss, indicates that implementation of the Risk MAP program in the lower Connecticut watershed began in November, 2016, the record is bereft of any indication as to when that program ultimately will conclude. In this regard, it bears emphasis that two years passed from the time that FEMA notified the defendant of implementation of the Risk MAP program in the lower Connecticut watershed to its announcement that Judd Brook had been selected for a detailed study during that program. Furthermore, in the October 17, 2018 letter to the defendant confirming that selection, the FEMA official cautioned the defendant that although field surveying "will be occurring during 2019," it was but one step in the Risk MAP program and that "[a]s this project continues, the [United States Geological Survey] will be conducting a number of other meetings with the stakeholders in the Lower Connecticut Valley Watershed to communicate the progress of the project and to solicit comments about draft and preliminary products." (Emphasis omitted.) In short, there is no indication in the record before us as to when the Risk MAP program will conclude and when any final determination regarding the delineation and designation of Judd Brook on the map will transpire.

Because the question of mootness implicates the subject matter jurisdiction of this court, we are obligated to indulge every reasonable presumption in favor of jurisdiction in resolving that issue. See *Mendillo* v. *Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 523, 187 A.3d 1154 (2018); *Simes* v. *Simes*, 95 Conn. App. 39, 42, 895 A.2d 852 (2006). Guided by that fundamental precept, we cannot conclude, on the limited record before us, that the pending review of Judd Brook under the Risk MAP program necessarily deprives this court of the

ability to provide the plaintiffs with any meaningful relief. Should they prevail in this appeal, the plaintiffs would secure an order of mandamus directing the defendant to submit a LOMR application on their behalf. That relief could well provide a more expeditious resolution of the mapping issue regarding their property than the ongoing Risk MAP program, whose terminal date remains unknown. For that reason, we conclude that the present appeal is not moot and turn our attention to the merits of the plaintiff's claim.

II

On appeal, the plaintiffs contend that the court improperly rendered summary judgment in favor of the defendant on their mandamus claim. We disagree.

The standard that governs our review of the trial court's decision to grant summary judgment is well established. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . [T]he moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted;

internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018). "The test is whether the party moving for summary judgment would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *SS-II, LLC* v. *Bridge Street Associates*, 293 Conn. 287, 294, 977 A.2d 189 (2009).

In the present case, the plaintiffs seek a writ of mandamus to compel the defendant to file a LOMR application on their behalf. Mandamus is an ancient common law writ "with deep roots in the American legal tradition . . . ." *Hennessey* v. *Bridgeport*, 213 Conn. 656, 658, 569 A.2d 1122 (1990); see also *Rapp* v. *Van Dusen*, 350 F.2d 806, 811–12 (3d Cir. 1965). It is an order directed at public officials that is injunctive in nature. 1 D. Dobbs, Law of Remedies (2d Ed. 1993) § 2.9 (1), p.226; see also *Hamblen* v. *Kentucky Cabinet for Health & Family Services*, 322 S.W.3d 511, 518 (Ky. App. 2010) (mandamus "is quintessentially injunctive in nature"); 2 E. Stephenson, Connecticut Civil Procedure (3d Ed. 2002) § 224 (a), p.565 (mandamus a prerogative writ designed to give state superintendence of activities of public officers). As our Supreme Court has emphasized, "[t]he writ of mandamus is an extraordinary remedy to be applied only under exceptional conditions, and is not to be extended beyond its well-established limits." *Lahiff* v. *St. Joseph's Total Abstinence Society*, 76 Conn. 648, 651, 57 A. 692 (1904); see also *Cook-Littman* v. *Board of Selectmen*, 328 Conn. 758, 767 n.9, 184 A.3d 253 (2018); *AvalonBay Communities, Inc.* v. *Sewer Commission*, 270 Conn. 409, 416–17, 853 A.2d 497 (2004).

"[M]andamus neither gives nor defines rights which one does not already have. It enforces, it commands, performance of a duty. It acts at the instance of one having a complete and immediate legal right; it cannot and it does not act upon a doubtful or a contested right . . . ." (Internal quotation marks omitted.) *Hennessey*

v. *Bridgeport*, supra, 213 Conn. 659. Accordingly, "[a] party seeking a writ of mandamus must establish: (1) that the plaintiff has a clear legal right to the performance of a duty by the defendant; (2) that the defendant has no discretion with respect to the performance of that duty; and (3) that the plaintiff has no adequate remedy at law." (Internal quotation marks omitted.) *Stewart* v. *Watertown*, 303 Conn. 699, 711–12, 38 A.3d 72 (2012).

The plaintiffs claim that the defendant possesses a ministerial duty to file a LOMR application with FEMA on their behalf to rectify the allegedly improper designation of their property, as alleged in the operative complaint. In rendering summary judgment, the court concluded that no genuine issue of material fact existed to support such a duty on the part of the defendant. We agree.

A

Undisputed Facts

Critical to our analysis are certain facts that are not disputed by the parties. As the trial court noted in its memorandum of decision, a portion of the property has been designated in a flood area "since inception of the [map] and continues to be so designated. . . . [T]here is no dispute that [sometime] prior to 2011, Judd Brook was diverted into piping on [an adjacent parcel to the south of the plaintiffs' property]. It is undisputed this diversion on the [adjacent] parcel did not affect the location of . . . Judd Brook on the plaintiffs' property [and that] the point of discharge following the rerouting of . . . Judd Brook did not change."[10]

[10] As Wozniak stated in his July 14, 2017 affidavit, "Judd Brook had been relocated years ago such that it is not located where it is as shown on the [map]. . . . Judd Brook to the south was rerouted by being place[d] in [reinforced concrete] pipe *but this did not affect its location on our property.*" (Emphasis added.)

The plaintiffs' claim, as set forth in their operative complaint and Wozniak's affidavit, is not that a physical change to Judd Brook transpired that affected their property. Rather, they claim that Judd Brook has been improperly depicted on a portion of their property since the map first was promulgated, which resulted in incorrect flood plain elevations on the property.[11] That "incorrect depiction," the plaintiffs allege, "places a significant portion of [the] property in the flood plain when it is not."

B

Relevant Federal Authority

It is well established that, in construing individual regulations, we do not read them in isolation, but rather in light of the entire act. See, e.g., *Historic District Commission* v. *Hall*, 282 Conn. 672, 684, 923 A.2d 726 (2007) ("Legislative intent is not to be found in an isolated sentence; the whole statute must be considered. . . . In construing [an] act . . . this court makes every part operative and harmonious with every other part insofar as is possible . . . ." [Citation omitted; internal quotation marks omitted.]). Notably, the NFIA requires FEMA to review flood maps once every five years to assess the need to update all flood plain areas and flood risk zones. See 42 U.S.C. § 4101 (e). In addition to that quinquennial requirement, communities that participate in the National Flood Insurance Program act as partners with FEMA to ensure the accuracy of its flood insurance rate maps. Under federal law, FEMA is authorized to revise and update those maps "upon the request from any State or local government stating that specific floodplain areas or flood-risk zones in the State or locality need revision or updating, if sufficient technical data justifying the request is submitted . . . ." 42 U.S.C. § 4101 (f) (2).

[11] As the plaintiffs note in their appellate reply brief, they "do not dispute that the location of Judd Brook as shown on the [map] has always been incorrect . . . ."

The National Flood Insurance Program, which is codified at 44 C.F.R. § 59.1 et seq., specifies the manner by which communities may file a request with FEMA to revise a flood insurance rate map. The mandamus action now before us is predicated on the plaintiffs' contention that 44 C.F.R. §§ 65.3 and 65.7 impose a ministerial duty on the defendant to file a LOMR to rectify the incorrect depiction of their property on the map. For its part, the defendant acknowledges that, as a mapping partner, it is permitted to request revisions to flood insurance rate maps. It nonetheless maintains that federal law imposes no mandatory duty on municipalities to do so at the behest of a property owner. Our analysis, therefore, centers on the relevant provisions of the National Flood Insurance Program.

In considering those provisions, we note that "[a]dministrative regulations have the full force and effect of statutory law and are interpreted using the same process as statutory construction, namely, under the well established principles of General Statutes § 1-2z. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . [Section] 1-2z directs this court to first consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning is plain and unambiguous and does not yield absurd or unworkable results, we shall not consider extratextual evidence of the meaning of the statute. . . . Only if we determine that the statute is not plain and unambiguous or yields absurd or unworkable results may we consider extratextual evidence of its meaning such as the legislative history and circumstances surrounding its enactment . . . the legislative policy it was designed to implement . . . its

relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Citations omitted; internal quotation marks omitted.) *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 603–604, 89 A.3d 841 (2014); see also *Forest Watch* v. *United States Forest Service*, 410 F.3d 115, 117 (2d Cir. 2005) (applying plain meaning rule to interpretation of federal regulation); *Gianetti* v. *Norwalk Hospital*, 211 Conn. 51, 60, 557 A.2d 1249 (1989) (interpreting "agency regulations in accordance with accepted rules of statutory construction"); 1A N. Singer & J. Singer, Sutherland Statutory Construction (7th Ed. 2009) § 31:6, pp. 698–99 (observing that rules of statutory construction also govern interpretation of administrative regulations).

The National Flood Insurance Program provides distinct administrative mechanisms, known as LOMAs and LOMRs, to correct alleged inaccuracies on flood insurance rate maps. A LOMA is an administrative procedure intended to provide recourse to the "owner or lessee of property who believes his property has been inadvertently included" in a special flood hazard area or regulatory floodway when there has not been "any alteration of topography . . . ." 44 C.F.R. § 70.1. That procedure permits such an owner or lessee to "submit scientific or technical information" to FEMA, which is required to review that information and notify the applicant of its decision within sixty days. 44 C.F.R. §§ 70.3–70.4. When FEMA determines that a particular property has been inadvertently included in a special flood hazard area or regulatory floodway, it issues a LOMA that specifies (1) the name of the municipality in which the property lies, (2) the number of the erroneous flood insurance rate map, and (3) the identification of the property to be excluded from the previous designation.

44 C.F.R. § 70.5. FEMA then distributes copies of the LOMA to various entities and publishes notice in the Federal Register when a change of base flood elevations has occurred. 44 C.F.R. §§ 70.6–70.7. LOMAs thus exist to "correct the inadvertent inclusion of properties in the regulatory floodway depicted on a [flood insurance rate map]." *Coalition for a Sustainable Delta* v. *Federal Emergency Management Agency*, 812 F. Supp. 2d 1089, 1124 (E.D. Cal. 2011).

By contrast, a request for a LOMR is "based on proposed or actual manmade alterations within the floodplain, such as the placement of fill; modification of a channel; construction or modification of a bridge, culvert, levee, or similar measure; or construction of single or multiple residential or commercial structures on single or multiple lots." 44 C.F.R. § 72.1. The code defines a LOMR in relevant part as "FEMA's modification to an effective Flood Insurance Rate Map . . . . LOMRs are generally based on the implementation of physical measures that affect the hydrologic or hydraulic characteristics of a flooding source and thus result in the modification of the existing regulatory floodway, the effective base flood elevations, or the [special flood hazard area]. . . ." 44 C.F.R. § 72.2. Unlike a LOMA, which is an official notice that a particular property should not be included in a special flood hazard area or regulatory floodway, the issuance of a LOMR by FEMA results in an official revision to the flood insurance rate map itself. Id. The plaintiffs' mandamus action concerns the defendant's alleged duty to file a LOMR application on their behalf pursuant to 44 C.F.R. §§ 65.3 and 65.7.

1

In their principal appellate brief, the plaintiffs contend that the defendant owed them a duty to "to initiate the LOMR process, as is mandated under 44 C.F.R. § 65.3." (Footnote omitted.) By its plain language, § 65.3

concerns physical changes to property. It provides: "A community's base flood elevations may increase or decrease resulting from *physical changes affecting flooding conditions*. As soon as practicable, but not later than six months after the date such information becomes available, a community *shall notify the Administrator of the changes* by submitting technical or scientific data in accordance with this part. Such a submission is necessary so that upon *confirmation of those physical changes affecting flooding conditions*, risk premium rates and flood plain management requirements will be based upon current data." (Emphasis added.) Section 65.3, therefore, plainly and unambiguously applies to situations involving physical changes affecting flooding conditions.

In the present case, it is undisputed that no physical change affecting flooding conditions has occurred with respect to the plaintiffs' property. Their claim, as memorialized in the operative complaint and Wozniak's July 14, 2017 affidavit, is that Judd Brook has been improperly depicted on a portion of their property since the map first was promulgated. See part II A of this opinion. The plaintiffs have made no factual allegation that their property has undergone any physical change or that it has been affected by a physical change to another property. Absent such allegations, the plaintiffs' claim that the defendant had a duty under 44 C.F.R. § 65.3 to file a LOMR application on their behalf is untenable. Because § 65.3 applies only when there are "physical changes affecting flooding conditions," there is no genuine issue of material fact regarding its inapplicability to the present case, in which the sole issue raised by the plaintiffs is the incorrect depiction of Judd Brook on their property.

Perhaps cognizant of that shortcoming, the plaintiffs have attempted to inject new factual allegations into the case for the first time on appeal. They allege in their

principal appellate brief that the trial court's analysis "ignores entirely the fact that the relocation and underground piping of Judd Brook on the [adjacent] parcel changed the character of the floodway, which precipitated a change to the flow rate of the floodway, and has altered the floodplain, in which the plaintiffs' property is located." (Emphasis omitted.) The plaintiffs further allege that "the flooding on the [adjacent] parcel was caused by the removal of the dam for the Hayward Pond up-stream therefrom. The pond was a holding pond that flooded the area upstream. Removing it caused flooding downstream." Neither the operative complaint nor Wozniak's July 14, 2017 affidavit contains those allegations. Such allegations are patently improper, having never been raised in the pleadings before the trial court.[12] We therefore decline to consider them. See, e.g., *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 249 n.46, 828 A.2d 64 (2003) (declining to consider claims raised for first time on appeal "because the plaintiffs never properly raised them in the trial court by pleading them in their complaint"); *Link* v. *Shelton*, 186 Conn. 623, 628, 443 A.2d 902 (1982) ("new facts alleged . . . for the first time on appeal" improper because they "were not part of the pleadings or affidavits below"); *Stevens* v. *Helming*, 163 Conn. App. 241, 246–48, 135 A.3d 728 (2016) (observing that "[i]n ruling on the defendants' motion for summary judgment, the court could consider only the facts alleged in the pleadings" and emphasizing that "[s]imple fairness requires that a defendant not be forced to defend against facts that are not clearly pleaded in a complaint").

2

The plaintiffs also allege that 44 C.F.R. § 65.7 imposes a ministerial duty on the defendant to file a LOMR to

[12] In this regard, we note that the plaintiffs had ample opportunity to refine their factual allegations, having filed their original complaint on March 11, 2013, their first amended complaint on May 15, 2015, and the operative complaint—their second amended complaint—on July 21, 2015, the latter of which was in response to a request to revise filed by the defendant.

correct the inaccurate depiction of Judd Brook on their property. We disagree.

Titled "Floodway revisions," 44 C.F.R. § 65.7 (a) provides in relevant part: "Floodway data is developed as part of FEMA Flood Insurance Studies and is utilized by communities to select and adopt floodways as part of the flood plain management program . . . . When it has been determined by a community that no practicable alternatives exist to revising the boundaries of its previously adopted floodway, the procedures below shall be followed. . . ." The section then proceeds to outline certain data and certification requirements, as well as the submission procedure for revision requests.

A prerequisite to the extraordinary relief afforded by a writ of mandamus is the existence of a duty that is ministerial in nature. As our Supreme Court has explained, "[i]t is axiomatic that [t]he duty [that a writ of mandamus] compels must be a ministerial one; the writ will not lie to compel the performance of a duty which is discretionary. . . . Consequently, a writ of mandamus will lie only to direct performance of a ministerial act which requires no exercise of a public officer's judgment or discretion. . . . Discretion is determined from the nature of the act or thing to be done . . . ." (Citations omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Sewer Commission*, supra, 270 Conn. 422.

Here, the act or thing to be done is the determination by a community that "no practicable alternatives exist" to revising the boundaries of a previously adopted floodway. The act of determining whether any "practicable alternatives exist" is a quintessentially discretionary function, as it requires a community to exercise its judgment as to whether alternatives to revising such boundaries are practical in nature. As but one example, a community such as the defendant might reasonably

conclude that the detailed study of Judd Brook that FEMA is conducting as part of the Risk MAP program in the lower Connecticut watershed is a practical alternative to the submission of a LOMR application pursuant to 44 C.F.R. § 65.7. Because § 65.7 imparts discretion on participating communities to evaluate whether any practical alternatives exist, we disagree with the plaintiffs that it is ministerial in nature.

We also are mindful that individual regulations are not to be construed in isolation, but rather in light of the entire act. See *Historic District Commission* v. *Hall*, supra, 282 Conn. 684. The code expressly indicates that requests for LOMRs are predicated on "proposed or actual manmade alterations within the floodplain"; 44 C.F.R. § 72.1; and are "based on the implementation of *physical measures* that affect the hydrologic or hydraulic characteristics of a flooding source and thus *result in the modification of the existing regulatory floodway*, the effective base flood elevations, or the [special flood hazard area]. . . ." (Emphasis added.) 44 C.F.R. § 72.2. Section 65.7, in turn, plainly and unambiguously concerns "changes" to floodways. See 44 C.F.R. § 65.7 (b) ("[d]ata requirements when base flood elevation changes are requested"); 44 C.F.R. § 65.7 (c) ("[d]ata requirements for changes not associated with base flood elevation changes"); 44 C.F.R. § 65.7 (e) ("[a]ll requests that involve changes to floodways shall be submitted to the appropriate FEMA Regional Office"). As discussed in part II B 1 of this opinion, the plaintiffs have not alleged any manmade alterations or physical changes affecting their property or the designation thereof in their operative complaint. Their claim is that Judd Brook has been incorrectly depicted on their property since the flood insurance rate map for the area first was promulgated. Accordingly, 44 C.F.R. § 65.7 is inapposite to the present case. We therefore conclude that no genuine issue of material fact exists

as to whether the defendant had a ministerial duty to file a LOMR application on behalf of the plaintiffs in the present case.

III

The plaintiffs' claim suffers a further infirmity. To obtain a writ of mandamus, the plaintiffs also must demonstrate that they have no adequate remedy at law. *Stewart* v. *Watertown*, supra, 303 Conn. 711–12. The plaintiffs have neither alleged in their operative complaint nor provided any evidence that property owners are precluded from filing LOMR applications with FEMA.

A review of the regulatory scheme governing the LOMR application process indicates otherwise. Part 72 of the National Flood Insurance Program sets forth the procedures that govern LOMR applications. See 44 C.F.R. § 72.1. Section 72.4 of chapter 44 of the code specifies submittal and payment procedures for LOMR applications. In particular, § 72.4 (e) provides: "The entity that applies to FEMA through the local community for review is responsible for the cost of the review. The local community incurs no financial obligation under the reimbursement procedures of this part *when another party* sends the application to FEMA."[13] (Emphasis added.) Thus, the National Flood Insurance Program plainly envisions the filing of LOMR applications by parties other than local communities such as the defendant. In such instances, it is that other party— and not the local community—that bears the financial burden that accompanies the filing of a LOMR application.

The instructions provided by FEMA for completing LOMR applications, which the defendant submitted in support of its motion for summary judgment, further

[13] Section 72.4 (h) (1) likewise obligates FEMA to "[n]otify *the requester and the community* within 60 days as to the adequacy of the submittal . . . ." (Emphasis added.)

demonstrate that property owners are permitted to file LOMR applications. FEMA's "Instructions for Completing the Application Forms for Conditional Letters of Map Revision and Letters of Map Revision" state in relevant part that "[s]ubmissions to [FEMA] for revisions to . . . [f]lood [i]nsurance [r]ate [m]aps . . . by *individual* and community requesters will require the signing of application forms." (Emphasis added.) Those instructions explain that LOMR applications must include the submission of a "concurrence form" that "requires the signatures of the requester, community official, and engineer." As the instructions expressly indicate, the manifest purpose of the concurrence form is to "ensure that the community is aware of the impacts of the [LOMR] request . . . ." For that reason, the instructions require the concurrence form to be signed by both the "[r]evision [r]equester"[14] and "the [chief executive officer] for the community involved in [the requested] revision . . . ." The requirement that an applicant seeking a LOMR obtain the concurrence of the community in which the property in question resides is further evidence that the National Flood Insurance Program envisions applicants other than local communities.

The case law from various jurisdictions is replete with examples in which individual property owners have applied for, and obtained, LOMRs from FEMA. See, e.g., *McCrory* v. *Administrator of Federal Emergency Management Agency*, 22 F. Supp. 3d 279, 284–85 (S.D.N.Y. 2014) (noting that LOMRs exist to permit "individuals, organizations and municipalities to request a localized update" to flood insurance rate maps and stating that individual property owners in that case

[14] FEMA's "Instructions for Completing the Overview & Concurrence Form" state that the revision requester "should *own the property* involved in the request or have legal authority to represent a group/firm/organization or other entity in legal actions pertaining to the [National Flood Insurance Program]." (Emphasis added.)

"applied for the LOMR" and "FEMA approved the application"), aff'd, 600 Fed. Appx. 807 (2d Cir. 2015); *National Wildlife Federation* v. *Federal Emergency Management Agency*, supra, 2014 WL 5449859 *16 (explaining that "property owners" may "apply for a LOMR from FEMA"); *Somers Mill Associates, Inc.* v. *Fuss & O'Neill, Inc.*, Superior Court, judicial district of New Britain, Docket No. X03-CV-00-0503944 (March 7, 2002) (noting that FEMA issued LOMR to resolve discrepancy in flood insurance rate map in response to "a request initiated" by plaintiff property owners), aff'd sub nom. *Ahearn* v. *Fuss & O'Neill, Inc.*, 78 Conn. App. 202, 826 A.2d 1224, cert. denied, 266 Conn. 903, 832 A.2d 64 (2003); *Samuel's Furniture, Inc.* v. *Washington Dept. of Ecology*, 147 Wn.2d 440, 446, 54 P.3d 1194 (2002) ("Although the [local municipality] believed that the project was not within the shoreline jurisdiction, it suggested that [the plaintiff property owner] obtain a [LOMR] from FEMA to remove the portion of [the plaintiff's] property at issue from the FEMA floodway designation. [The individual property owner] sought and obtained the LOMR, thus removing the property from the FEMA floodway."). In addition, the record before us contains copies of correspondence between the defendant's First Selectman and Wozniak, in which the First Selectman expressly indicated that the defendant had filed concurrence forms "for other private property LOMR applications in the past." The First Selectman further advised Wozniak that, in the event that the plaintiffs filed a LOMR application on their own behalf, the defendant would provide assistance by reviewing the application and signing a concurrence form.

The plaintiffs have presented no basis on which this court reasonably could conclude that an individual property owner is prohibited, as a matter of federal administrative law, from filing a LOMR application with FEMA. The relevant federal regulations and the materials submitted in connection with the motion for summary judgment all contemplate such filings by property

owners, and the case law reflects that property owners routinely apply for and secure LOMRs from FEMA. The availability of that legal remedy, which would provide the plaintiffs the very relief they seek, is fatal to their mandamus action. See *Sterner* v. *Saugatuck Harbor Yacht Club, Inc.*, 188 Conn. 531, 534, 450 A.2d 369 (1982) ("for mandamus to lie, the plaintiff must have no other adequate remedy"); 55 C.J.S., Mandamus § 7 (2009) ("mandamus is used sparingly . . . and only when it is the sole available remedy"). We therefore conclude that the trial court properly rendered summary judgment in favor of the defendant in the present case.

The judgment is affirmed.

In this opinion the other judges concurred.