ALLCO RENEWABLE ENERGY LIMITED ET AL. *v.* FREEDOM OF INFORMATION COMMISSION ET AL.

(AC 42992)

Bright, C. J., and Elgo and Alexander, Js.

Syllabus

The plaintiffs, a solar development company and its principal, appealed to this court from the judgment of the trial court dismissing their appeal from the final decision of the defendant Freedom of Information Commission. The plaintiffs requested certain records from the defendant Department of Energy and Environmental Protection relating to its request for proposals issued to solicit offers from developers for large-scale clean energy contracts. The RFP indicated that each bidder was to submit a public version of its proposal, with any confidential business information redacted, as well as an unredacted version of the proposal that identified all confidential and proprietary information. The RFP informed bidders that the department would disclose certain information in its final determination but that it would take reasonable steps to protect confidential information. The department retained independent consultants to evaluate the costs and benefits of the proposals submitted using a market simulation model. The result of the analysis was an answer key that compiled the data submitted by the bidders, including

confidential, proprietary information. The department denied the plaintiffs' request for the release of the answer key, stating that it was a trade secret exempt from disclosure requirements pursuant to the applicable provision (§ 1-210 (b) (5)) of the Freedom of Information Act (§ 1-200 et seq.). The plaintiffs appealed from the department's denial to the commission, which, following a hearing, denied the appeal. The plaintiffs then appealed to the trial court, which affirmed the decision of the commission, and the plaintiffs appealed to this court. *Held*:

1. The trial court properly determined that the commission's conclusion that the answer key met the trade secret criteria set forth in § 1-210 (b) (5) (A) (i) was supported by substantial evidence: the department engaged in trade by coordinating the RFP and using the answer key to analyze the proposals, as the process required making a significant investment within a highly competitive industry for the benefit of ratepayers across the state; moreover, even though the department did not have any direct competitors in the renewable energy industry, it was a participant with a direct interest in ensuring competitive rates because it had a statutory duty to obtain value for ratepayers; furthermore, there was sufficient evidence to find that the answer key held economic value to the department based on the resources expended to develop it, its value to the market, and the significance of the resulting projects to ratepayers, and that the answer key's value derived from its secrecy, as its confidentiality was required to maintain the integrity of the state's procurement process.
2. The trial court properly determined that the commission's conclusion that the bidders and the department intended for the information submitted to be given and maintained as confidential information in accordance with § 1-210 (b) (5) (A) (ii) and (B) was supported by substantial evidence: the commission's determination that reasonable efforts were made to maintain the secrecy of the information was supported by testimony given at the commission hearing indicating that nondisclosure agreements were made, that bidders relied on the department's guarantees of confidentiality, and that certain bidders pursued protective orders with respect to the information; moreover, based on the testimony at the hearing, there was substantial evidence to support the conclusion that the information was "given in confidence" in accordance with § 1-210 (b) (5) (B) because, although the RFP stated that the department intended to disclose certain bid information in its final determination, the department gave express assurances of, and the bidders had resulting expectations of, confidentiality with respect to a majority of the information.

Argued November 19, 2020—officially released June 8, 2021

Procedural History

Appeal from the decision of the named defendant dismissing the plaintiffs' complaint regarding a records

request submitted to the defendant Department of Energy and Environmental Protection, brought to the Superior Court in the judicial district of New Britain, where the court, *Huddleston*, *J.*, rendered judgment dismissing the appeal, from which the plaintiffs appealed to this court. *Affirmed.*

Michael Melone, for the appellants, with whom, on the brief, was *Thomas Melone*, self-represented, the appellant (plaintiffs).

Paula S. Pearlman, commission counsel, for the appellee (named defendant).

Robert Snook, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (defendant Department of Energy and Environmental Protection).

Opinion

ELGO, J. The plaintiffs, Allco Renewable Energy Limited (Allco) and its principal Thomas Melone, appeal from the judgment of the Superior Court dismissing their appeal from the final decision of the defendant Freedom of Information Commission (commission), in which the court concluded that the commission properly dismissed the plaintiffs' request for certain documents of the codefendant Department of Energy and Environmental Protection (department).[1] On appeal, the plaintiffs claim that the court improperly concluded that the commission correctly applied General Statutes § 1-210 (b) (5) (A) and (B) of the Freedom of Information Act (act), General Statutes § 1-200 et seq. We affirm the judgment of the Superior Court.

The following undisputed facts, which were found by the commission, are relevant to this appeal. On November 12, 2015, the department issued a request for proposals (RFP), pursuant to No. 13-303 of the 2013 Public

[1] The commission has adopted the brief of the department in this appeal.

Acts and No. 15-107 of the 2015 Public Acts.[2] The RFP, issued in coordination with officials from Massachusetts and Rhode Island for the purpose of meeting clean energy goals in a cost-effective manner, sought to solicit offers from developers for large-scale clean energy contracts. Parties in each state then would "select the project(s) that is/are most beneficial to its customers and consistent with its particular Procurement Statutes. Consequently, evaluation and selection [would] involve an iterative process by which, after an initial threshold examination followed by a quantitative analysis of the bids, the parties from each state [would] review and rank bids based on the qualitative requirements of their respective state."

The RFP also established an "Evaluation Team" (team), comprised of "the soliciting parties, electric distribution companies (EDCs)[3] . . . the Connecticut Procurement Manager, the Connecticut Office of Consumer Counsel, the Connecticut Attorney General and the Massachusetts Department of Energy Resources, who evaluated and ranked the bids." (Footnote added.)

[2] An Act Concerning Connecticut's Clean Energy Goals; Public Acts 2013, No. 13-303, §§ 6 and 7; was codified at General Statutes §§ 16a-3f and 16a-3g. An Act Concerning Affordable and Reliable Energy; Public Acts 2015, No. 15-107, § 1; was codified at General Statutes § 16a-3j. These three statutes provide for the department to solicit from providers of Class I renewable energy sources proposals that are in the interest of ratepayers.

[3] General Statutes § 16-1 (23) defines "electric distribution company" as "any person providing electric transmission or distribution services within the state, but does not include: (A) A private power producer, as defined in section 16-243b; (B) a municipal electric utility established under chapter 101, other than a participating municipal electric utility; (C) a municipal electric energy cooperative established under chapter 101a; (D) an electric cooperative established under chapter 597; (E) any other electric utility owned, leased, maintained, operated, managed or controlled by any unit of local government under any general statute or special act; (F) an electric supplier; (G) an entity approved to submeter pursuant to section 16-19ff; or (H) a municipality, state or federal governmental entity authorized to distribute electricity across a public highway or street pursuant to section 16-243aa . . . ."

The team retained independent consultants, most notably Levitan & Associates, Inc. (Levitan), to aid its evaluation and solicited input from ISO New England, Inc., a federally regulated grid operator for the New England region. The RFP informed bidders that the department would disclose certain information in its final determination and would take reasonable steps where necessary to protect confidential information. Representatives of utility companies on the team signed an agreement known as the "Utility Standard of Conduct," which prohibited discussion of the RFP between EDC personnel on the team and EDC personnel involved in bid preparation.

Various companies submitted a total of thirty-one proposals. After receiving the bids,[4] the department selected nine projects in Connecticut, including two proposed by the wind power development companies Antrim Wind Energy, LLC (Antrim), and Cassadaga Wind, LLC (Cassadaga). Accordingly, the department notified the EDCs and directed them to negotiate contracts with the nine selected projects. Six of the project proposals, including Cassadaga's proposal, resulted in agreed upon, long-term contracts with the state of Connecticut. These projects were then subject to regulatory review by the Public Utilities Regulatory Authority (PURA) and were approved on September 13, 2017.

Allco is a solar development company that competes in the market at issue and had submitted unsuccessful

[4] The trial court noted that it "recognize[d] the distinction between bids submitted pursuant to an invitation for bids and proposals submitted in response to a request for proposals. See *Hartford* v. *Freedom of Information Commission*, 41 Conn. App. 67, 70 n.3, 674 A.2d 462 (1996). There is no dispute that the proceeding at issue in this appeal was a request for proposals. Nevertheless, the RFP itself described the responses to the RFP as 'bids' and the developers submitting such responses as 'bidders.' . . . The commission followed this colloquial usage in its decision, and the court will similarly follow it herein." (Citation omitted.) We similarly follow this convention in this opinion.

bids in several other renewable energy procurements by the department in the past. On December 1, 2016, the plaintiffs submitted a freedom of information request via e-mail to the department. In that request, the plaintiffs sought disclosure of responses to the RFP made by several bidders, including Antrim and Cassadaga, as well as "any record or file made by the [department] in connection with the contract award process." The department denied the request in an e-mail sent on January 17, 2017. In that response, the department stated in relevant part that it "does not have any records to produce in response to this request because they are exempt from disclosure under the [act] . . . §§ 1-210 (b) (24), 1-210 (b) (4), and 1-210 (b) (5)."[5]

The plaintiffs appealed from the department's denial to the commission on February 16, 2017. The commission held a contested hearing, in which Antrim and Cassadaga intervened, on October 16, November 9 and November 17, 2017. At the hearing, the department provided the plaintiffs with a compact disc containing unredacted copies of documents that did not fall within the relied on exemptions. The plaintiffs narrowed the scope of their request to records concerning the Antrim and Cassadaga proposals, as well as the content of a document known as the "Levitan Answer Key" (answer key). At the time of this appeal, only the disclosure of the answer key remains at issue.

Following the hearing, the commission reviewed unredacted copies of the disputed records in camera. The commission then issued a written decision in which it found that the answer key was "in its entirety . . . of the kind included in the nonexhaustive list contained in [§ 1-210 (b) (5) (A)]. . . . It is found that the [a]nswer [k]ey (i) derives independent economic value, actual

[5] The department later abandoned its claims under § 1-210 (b) (4) and (24), and the commission did not address them in its decision.

or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that were reasonable under the circumstances to maintain secrecy." (Citation omitted; internal quotation marks omitted.) The commission, therefore, denied the plaintiffs' appeal with respect to the answer key. From that decision, the plaintiffs appealed to the Superior Court. In a detailed memorandum of decision dated March 18, 2019, the court affirmed the decision of the commission, and this appeal followed.

On appeal, the plaintiffs claim that the court improperly concluded that the commission correctly determined that (1) the answer key qualified as a "trade secret" within the ambit of § 1-210 (b) (5) (A) and (2) the information in the answer key was both given and kept in secrecy in accordance with § 1-210 (b) (5) (A) and (B). In response, the department argues that the information in the answer key fully satisfies the definition of a "trade secret" and that it was subject to strict confidentiality. We agree with the department.

We begin by setting forth the relevant legal principles and applicable standard of review. "It is well established that [j]udicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes § 4-166 et seq.] . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . .

"Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand

if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a [public] agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010). "This court is required to defer to the subordinate facts found by the commission, if there is substantial evidence to support those findings." (Internal quotation marks omitted.) *Dept. of Public Utilities* v. *Freedom of Information Commission*, 55 Conn. App. 527, 531, 739 A.2d 328 (1999). "Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . . The burden is on the [plaintiffs] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record." (Internal quotation marks omitted.) *Sams* v. *Dept.*

of Environmental Protection, 308 Conn. 359, 374, 63 A.3d 953 (2013).

The department is a public agency within the meaning of General Statutes § 1-200 (1). Public agencies "within the meaning of § 1-200 (1) . . . [are] . . . required under the act to disclose public records unless disclosure is otherwise limited or prohibited by law."[6] *University of Connecticut* v. *Freedom of Information Commission*, 303 Conn. 724, 733, 36 A.3d 663 (2012) (*UConn*); see also *Maher* v. *Freedom of Information Commission*, 192 Conn. 310, 314–15, 472 A.2d 321 (1984) ("[s]ince . . . the [agency at issue here] is a [public] agency for purposes of the [act], [it] is bound . . . to maintain its records as public records available for public inspection unless these records fall within one of the statutory exemptions to disclosure").

The act sets forth several exemptions that "reflect a legislative intention to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality. . . . [I]t is this balance of the governmental and private needs for confidentiality with the public right to know that must govern the interpretation and application of the [act]. The general rule, under the act, however, is disclosure. . . . Exceptions to that rule will be narrowly construed in light of the underlying purpose of the act . . . and the burden of proving the applicability of an exemption rests upon the agency claiming it." (Internal quotation marks omitted.) *Maher* v. *Freedom of Information Commission*, supra, 192 Conn. 315. "[D]isclosure under the act does not turn on the motive for the request. Nonetheless . . . the question of whether . . . persons . . . could obtain economic value from the disclosure would be relevant in assessing whether the information constitutes a trade secret." *UConn*, supra, 303 Conn. 728 n.5.

[6] General Statutes § 1-200 (5) defines "public records" as "any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency . . . ."

Section 1-210 provides in relevant part: "(b) Nothing in the [act] shall be construed to require disclosure of . . . (5) (A) Trade secrets, which for purposes of the [act], are defined as information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts or detailed production budgets that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy . . . ." The trade secret exemption codified in § 1-210 (b) (5) (A) analyzes "the nature and accessibility of the information, not . . . the status or characteristics of the entity creating and maintaining that information." *UConn*, supra, 303 Conn. 734. "[T]o constitute a trade secret, information must be of the kind included in the nonexhaustive list contained in the statute." *Elm City Cheese Co.* v. *Federico*, 251 Conn. 59, 70, 752 A.2d 1037 (1999). "[T]o qualify for a trade secret exemption . . . [a] substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means." (Internal quotation marks omitted.) *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, 274 Conn. 179, 194, 874 A.2d 785 (2005) (*Director*).

Our Supreme Court previously construed the term "trade secret" in *Town & Country House & Homes Service, Inc.* v. *Evans*, 150 Conn. 314, 318–20, 189 A.2d 390 (1963) (*Town & Country*). In that case, relying on the commentary to § 757 of the Restatement of Torts, the court stated that "[s]ome of the factors to be considered in determining whether given information is a trade secret are (1) the extent to which the information is known outside the business; (2) the extent to which it

is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Town & Country*, supra, 319; see 4 Restatement, Torts § 757, comment (b), p. 6 (1939).

This court has referenced the definition of trade secrets set forth in *Town & Country* when applying the trade secret exemption under the act. See *Dept. of Public Utilities* v. *Freedom of Information Commission*, supra, 55 Conn. App. 531–32. At its core, "[t]he basis for the protection of trade secrets is that the recipient obtains through a confidential relationship something he did not know previously." *Allen Mfg. Co.* v. *Loika*, 145 Conn. 509, 517, 144 A.2d 306 (1958). "The question of whether information sought to be protected . . . rises to the level of a trade secret is one of fact for the trial court." (Internal quotation marks omitted.) *Elm City Cheese Co.* v. *Federico*, supra, 251 Conn. 68.

I

The plaintiffs first claim that the court improperly concluded that the commission correctly determined that the answer key at issue was exempt pursuant to § 1-210 (b) (5) (A). They argue that, under § 1-210 (b) (5) (A) (i), the answer key cannot be a trade secret in light of our Supreme Court's decision in *UConn* because the department did not engage in "trade." We do not agree.

The following additional facts were found by the commission. Connecticut, Massachusetts, and Rhode Island coordinated to issue requests for proposals. The goal of each state's RFP was to procure renewable energy contracts so as to help meet clean energy goals in a

manner that would provide savings for ratepayers. The team constituted a collaboration between a number of prominent parties including, among others, the department, the EDCs, several Connecticut agencies, and the Massachusetts Department of Energy Resources. It also solicited input from independent contractors, most notably Levitan, and the regional grid operator, ISO New England, Inc. The department invested "significant resources" in organizing the RFP, disbursing $330,000 for the contract with Levitan and dedicating hundreds of work hours to the procurement process.

The commission found that the renewable energy industry was highly competitive and that the information at issue was "highly market sensitive and unique to the particular RFP proposals." After it was retained by the department, Levitan evaluated the costs and benefits of bids using a market simulation model known as "Aurora." The result of this analysis constituted the answer key, which the department asserted was "a compilation of extraordinarily complicated data, huge amounts of data and includes . . . confidential proprietary information submitted by all bidders, and cannot be replicated." (Internal quotation marks omitted.) The department argued before the commission that the confidentiality of the answer key was "essential to maintaining the integrity of the state's procurement process, confidence of prospective bidders in future RFPs, and quality and competitiveness of the bids received." The department also asserted that future RFPs would be impacted because bidders could discern confidential information from the answer key that would provide them with an advantage.[7] Moreover, the department contended that disclosure would not only chill future

[7] At oral argument before this court, the department argued that, even though the answer key is geared toward the 2015 RFP, pricing information can be "back[ed] out" and the department's process could be reverse engineered to obtain future forecasts from past prices.

bids, but also impair the ability of participating states to meet their goals because bidders would be able to adjust their proposals to gain a competitive advantage. In particular, the department cited the "millions of Connecticut ratepayer dollars" at risk if the answer key were to be mishandled and testified that the RFP's projected savings amounted to approximately $330 million.

In its written decision, the commission found that the answer key contained "highly market sensitive" information and derived independent economic value from its secrecy and, accordingly, that it is a trade secret exempt from disclosure under § 1-210 (b) (5) (A). On appeal, the Superior Court upheld the commission's findings, noting that, "[a]s several witnesses testified at the hearing, the market for clean energy is intensely competitive. Development costs are high and the availability of opportunities to contract with utilities for the sale of electricity are very limited. The RFP required developers to provide highly sensitive commercial information, including operational and financial information that were closely guarded by the developers." Regarding the answer key, the court noted: "According to the department's witnesses, the . . . answer key itself is the output of an extensive and complicated computer modeling of energy production for every hour of twenty years, calculated for each of the projects proposed in response to the RFP. The input that went into the modeling included the confidential information provided by developers. . . . The output itself—that is, the four page spreadsheet for which the department asserted the trade secret exemption—discloses the final ranking of the projects, information about the costs and benefits of each proposal, and . . . scores for each project. A person knowledgeable about the industry could use the information presented in the . . . answer key to back out other information that would reveal confidential pricing information . . . ." The court also noted the

department's concern that disclosure of the answer key would reveal not only confidential developer information but also sensitive information about the department's own analyses. Analyzing the information in the answer key under the *Town & Country* test and the evidence on the record, the court concluded that "the information in the [answer key] is evidence of the kind identified in § 1-210 (b) (5) (A)."

On appeal, the plaintiffs now argue that the department cannot claim trade secret protection for the answer key because it did not "engag[e] in trade" by conducting the RFP. In *UConn*, supra, 303 Conn. 727, on which the plaintiffs principally rely, an alumni group sought disclosure of various databases containing the information of donors, subscribers, and ticket buyers. The court held that the definition of trade secret under §1-210 (b) (5) (A), on its face, "focuses exclusively on the nature and accessibility of the information"; id., 734; rejecting the commission's argument that the university, as a public agency, could not claim trade secret protection because it "is not principally engaged in a trade." Id., 726. *UConn* establishes that a public agency may hold a trade secret regardless of whether it regularly engages in trade, so long as the nature and accessibility of the document at issue qualifies it as a trade secret. Id., 734. In distinguishing *UConn* from the present case, the plaintiffs contrast the conduct of the university in "marketing and selling" school event tickets with the department's conduct as a "regulator." They assert that the nature of the information must include being used in a trade, stating: "If there is no trade, there is no trade secret." They argue that extending the exemption to the answer key would effectively read the word "trade" out of the term "trade secret" because the department did not engage in trade when it promulgated and administered the RFP.

To assess the plaintiffs' claim, we begin with the language of the act. In defining a trade secret for the purposes of the act, § 1-210 (b) (5) (A) highlights economic value and secrecy as the two determinative factors.[8] "Trade secret" is a legal term of art. "If the information meets the statutory criteria, it is a trade secret . . . ." *UConn*, supra, 303 Conn. 734. The term is defined in § 1-210 (b) (5) (A) (i) as deriving "independent economic value, actual or potential, from not being generally known to . . . other persons who can obtain economic value from [its] disclosure or use." If information qualifies as a trade secret under the statutory criteria, it is then also true that "*the entity creating that information would be engaged in a trade for purposes of the act* even if it was not so engaged for all purposes." (Emphasis added.) *UConn*, supra, 734. Furthermore, as the trial court noted, in accordance with the holding of *UConn*, "to address the nature of the information at

[8] Section 1-210 (b) (5) (A) requires only that the information derives independent economic value from its secrecy and is the subject of reasonable efforts to maintain that secrecy. Accordingly, the department may still claim a trade secret on the basis of the information's value even if the economic benefit ultimately goes to the ratepayers. In arguing that the holder of a trade secret must receive an economic benefit itself, the plaintiffs cite the Restatement (Third) of Unfair Competition, which transferred and modernized the section of the 1939 Restatement of Torts addressed in *Town & Country*. It defines a trade secret as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." Restatement (Third), Unfair Competition § 39, p. 425 (1995). We are not persuaded that this subsequent iteration of the Restatement supports a contrary conclusion. First, it extends beyond businesses to "other enterprise[s]"; comment (d) to § 39 clarifies that "nonprofit entities such as charitable, educational, governmental, fraternal, and religious organizations can also claim trade secret protection for economically valuable information . . . ." Id., comment (d), p. 429; see also *UConn*, supra, 303 Conn. 734–35 (noting that the trade secret definition in § 1-210 (b) (5) (A) "mirrors the definition under Connecticut's Uniform Trade Secrets Act," which includes government agencies in its definition of "person"). Second, the language of § 39 also does not, on its face, require that the economic advantage must accrue to the entity claiming trade secret protection itself.

issue, the analysis must consider the competitive nature of the industry involved . . . .''

The inquiry necessarily considers the extent to which the economic value of the thing being assessed inheres in the secrecy by which it is developed and maintained.[9] A ''substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means.'' (Internal quotation marks omitted.) *Director*, supra, 274 Conn. 194. Beyond that, ''[i]t is not possible to state precise criteria for determining the existence of a trade secret. The status of information claimed as a trade secret must be ascertained through a comparative evaluation of all the relevant factors, including the value, secrecy, and definiteness of the information . . . .''[10] Restatement (Third), Unfair Competition § 39, comment (d), p. 430 (1995). Our review of the record reveals that the nature of the information in the answer key inherently relates to trade and that its value is a function of the secrecy involved in both its development and use.

First, the department fundamentally engaged in commerce in this case. General Statutes § 22a-2d charges the department with fulfilling goals for the purposes of energy policy and regulation, which include ratepayer cost maintenance.[11] The commission found that the RFP

[9] Similarly, the *Town & Country* test, generally stated, looks to the information's availability, value, and cost of development and to the measures taken to maintain its secrecy. See *Town & Country*, supra, 150 Conn. 319. At its core, the test effectively seeks to conduct a cost-benefit analysis between the countervailing interests of privacy and full disclosure.

[10] We note that, although a case specific evaluation of the nature of the information still is required, information like that contained in the answer key often qualifies as a trade secret. Our Supreme Court has stated that ''financial details [such as] costs, pricing and bidding . . . fully meet the definition of trade secrets set forth in [*Town & Country*] . . . .'' *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 126, 222 A.2d 220 (1966).

[11] General Statutes § 22a-2d (a) provides in relevant part: ''There is established a Department of Energy and Environmental Protection, which shall have jurisdiction relating to the preservation and protection of the air, water and other natural resources of the state, energy and policy planning and

was a multistate effort to meet clean energy goals and achieve cost savings for ratepayers. It further found that the renewable energy procurement process is highly competitive and that the department "invested significant resources . . . including . . . $330,000 on the contract with Levitan," with the expectation of significant ratepayer savings in the amount of $330 million. Although "the primary economic value identified" accrued to the ratepayers, the department played a key role in generating that value. The court described the department as acting "at least in part as a procurement agent" for the EDCs. Accordingly, this case features a state entity that, as a commercial actor, has made a significant investment within a heavily competitive industry for the benefit of ratepayers across the state. Therefore, like the state treasurer who analyzes investments for the benefit of the state, here the department engages in trade by coordinating the RFP and using the answer key to analyze multimillion dollar proposals to benefit the state and its ratepayers.

The plaintiffs argue that the answer key cannot be a "trade" secret because "there is no value [in] the information to the competitors (because there are none)." The plaintiffs read the fourth *Town & Country* factor too narrowly.[12] The department has a statutory duty to obtain value for ratepayers. Thus, although it has

regulation and advancement of telecommunications and related technology. For the purposes of energy policy and regulation, the department shall have the following goals: (1) Reducing rates and decreasing costs for Connecticut's ratepayers, (2) ensuring the reliability and safety of our state's energy supply, (3) increasing the use of clean energy and technologies that support clean energy, and (4) developing the state's energy-related economy. . . . The Public Utilities Regulatory Authority within the department shall be responsible for all matters of rate regulation for public utilities and regulated entities under title 16 and shall promote policies that will lead to just and reasonable utility rates. . . ."

[12] The plaintiffs' appeal centers most prominently on the fourth factor. We note that the court also found that the remaining five factors of the *Town & Country* test support the classification of the answer key as a trade secret.

no *direct* competitors, the department is nevertheless a participant in the industry with a direct interest in ensuring competitive rates. There is no rational reason to exclude the department from trade secret protection simply because it seeks to cultivate a competitive market of bidders as opposed to being itself a bidder in the industry.

Second, the court concluded that there was sufficient evidence before the commission for it to find both that (1) the information held economic value to the department on the basis of the evidence presented concerning the resources expended to develop it, its value to the market, and the significance of the projects to ratepayers and (2) the information's value to the department derived from its being held confidential from the market at large. Our review of the record confirms that these findings were fully supported by the evidence. The purpose of the RFP was to obtain significant savings to ratepayers at a statewide level. The commission found that the renewable energy market is highly competitive. If made public, as the department testified, bidders would be able to extract sensitive details about developer submitted pricing information and departmental analyses, including details that would aid in future bids. Significant consequences, thus, could result to ratepayers in the state. Although the plaintiffs question the necessity of the answer key's secrecy, we cannot disturb the commission's conclusion when the evidence in the record supports it. The record as a whole reflects that the answer key's entire benefit relies on the department holding it in confidence in order to ensure the integrity of the undertaking for public benefit.

The plaintiffs' hyperbolic argument that classifying the department's conduct as a trade would render the act "useless, as every government agency could claim an exemption," misses the point. If acting as a regulator could never constitute trade, then it would eviscerate

the ability of a public agency to raise the trade secret exemption when necessitated by the public interest. As our Supreme Court has observed, the act "does not confer upon the public an absolute right to all government information." *Wilson* v. *Freedom of Information Commission*, 181 Conn. 324, 328, 435 A.2d 353 (1980). Rather, it "reflects a legislative intention to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality." Id. *Wilson* directs the court to balance these countervailing interests as they apply to the case before it, in order to determine the applicability of the exemptions in the act. See *Commissioner of Consumer Protection* v. *Freedom of Information Commission*, 207 Conn. 698, 701, 542 A.2d 321 (1988).

The present case actually provides a more compelling rationale for secrecy than that which was provided in *UConn*. The enterprise undertaken by the department aims to provide added benefit for ratepayers, as directed by statute. In other words, this case represents a quintessential example of a public agency acting on its statutory mandate to protect the public interest. See footnote 11 of this opinion. The state has an interest in the benefits that accrue from the RFP process. See *UConn*, supra, 303 Conn. 736–37 ("It cannot reasonably be questioned that the university expends considerable resources of the state . . . . The state's ability to recoup costs or reap the financial benefits for such efforts would be seriously undermined if any member of the public could obtain such information simply by filing a request under the act. . . . Although the act embodies a public policy in favor of disclosure, that presumption is subject to clear limits within which the university may claim an exemption." (Citations omitted.)) Here, the stakes are considerably higher than what was at issue in *UConn*. The present case deals not with an institution's customer lists but with statewide utilities delivering value

to the public. We further note the need for caution when a party seeking disclosure is not a disinterested member of the public but an industry competitor that participates in bidding processes conducted by the department. See id., 728 n.5.

In light of the foregoing, we conclude that the court properly determined that the commission's conclusion that the answer key required confidentiality was supported by substantial evidence and that the department met its burden of proving that the answer key met the statutory trade secret criteria. Accordingly, the plaintiffs' first claim fails.

II

The plaintiffs next claim that the answer key does not constitute a "secret" within the term "trade secret." In support of this contention, the plaintiffs raise two arguments. First, they argue that the Superior Court misapplied the "secrecy" requirement of § 1-210 (b) (5) (A) (ii) in this case because the department did not make reasonable efforts to maintain the secrecy of the information in the answer key. Second, they argue that the information was not "given in confidence" to the department under § 1-210 (b) (5) (B)[13] because the developers did not have a reasonable expectation that their information would be kept private. We disagree.

The following additional facts, as found by the commission, are relevant to this claim. When the department issued the RFP, it "required bidders to submit copies of a 'public version' of each proposal. If a bidder chose to redact information that it deemed to be 'confidential business information' from the public version of its proposal, then it was also required to submit an unredacted

[13] General Statutes § 1-210 provides in relevant part: "(b) Nothing in the [act] shall be construed to require disclosure of . . . (5) . . . (B) Commercial or financial information given in confidence, not required by statute . . . ."

version of the proposal and to identify all confidential or proprietary information, including pricing. The public version of each proposal was posted on the public website established for the New England Clean Energy RFP." The RFP required that any communications concerning it be submitted via e-mail to the team and prohibited bidders from direct contact with any member of the team and any related consultant.

"The RFP informed bidders that: 'The [e]valuation [t]eam shall use commercially reasonable efforts to treat the confidential information that it receives from bidders in a confidential manner and will not use such information for any purpose other than in connection with this RFP. . . . If confidential information is sought in any regulatory or judicial inquiry or proceeding or pursuant to a request for information by a government agency with supervisory authority over any of the EDCs, reasonable steps shall be taken to limit disclosure and use of said confidential information through the use of nondisclosure agreements or requests for orders seeking protective treatment, and bidders shall be informed that the confidential information is being sought.' "

"The RFP also advised bidders that: 'As it has done with previous RFPs, [the department] intends to disclose certain bid information in its final determination once contract negotiations are completed and a filing is made with PURA . . . . At this time, [the department] anticipates such disclosure will include some information attributed to named projects responsive to the [Connecticut] portion of the RFP: specifically, the qualitative and quantitative score and threshold eligibility determinations attributed to specific projects responsive to the [Connecticut] portion of this RFP, and pricing data for winning bids. [The department] may also disclose aggregate or average pricing data for all bids responsive to the [Connecticut] portion of the RFP but without attribution to specific projects.' "

Appendix G of the RFP stated, as pertaining to Connecticut: "With this submission of information claimed and labeled as confidential, you must provide the legal basis for your confidentiality claim, describe what efforts have been taken to keep the information confidential, and provide whether the information sought to be protected has an independent economic value by not being readily known in the industry. With your legal support and reasonable justification for confidentiality . . . the Connecticut state agencies participating on the Soliciting Parties will be better equipped to safeguard your confidential information should it become the subject of [an inquiry under the act]. . . . All information for winning bidders, including confidential information, will be released and become public 180 days after contracts have been executed and approved by all relevant regulatory authorities, unless otherwise ordered by the Connecticut PURA."

Representatives from both intervenors testified at the hearing before the commission that they relied on the department's assurances of discretion. Cassadaga submitted its proposal in both redacted and unredacted form with the understanding that the department would keep its information confidential and notify it in the event of a request for disclosure. Cassadaga also obtained two protective orders from PURA, which remained in effect at the time of the hearings before the commission. A representative from Cassadaga testified that the records in question were sensitive and included information protected by third-party nondisclosure agreements into which Cassadaga had entered. A representative from Antrim testified that its information was also highly sensitive and valuable and, where applicable, covered by third-party nondisclosure agreements. Antrim relied on the RFP's representations in submitting both redacted and unredacted proposals to the department along with

a letter outlining its need for confidentiality. In the absence of the RFP's assurances, Antrim testified that it would not have submitted a proposal.

The commission found that "the renewable energy market and the procurement process for renewable energy is highly competitive, and that the information at issue in this matter including, but not limited to, costs, pricing and bidding information, is highly market sensitive and unique to the particular RFP proposals." The commission further found that the department took various measures to keep the answer key confidential. Namely, "[t]he specific criteria and information provided by [the department] were shared only with those individuals on the [team] and Levitan. Further, within [the department], limited access to the [a]nswer [k]ey was granted only to a small set of employees within its Bureau of Energy and Technology Policy assigned to work on the procurement process.[14] During the PURA regulatory review of the executed contracts, [the department] also sought to protect the [a]nswer [k]ey by filing a motion for protective order, which was granted and still in effect at the time of the hearings in this matter." (Footnote added.)

The commission also found that Levitan and the team members were required to sign nondisclosure agreements. The EDC representatives on the team were further required to sign an agreement, known as the "Utility Standard of Conduct," that barred them from discussing the RFP with EDC personnel involved in the RFP bidding process. Accordingly, the commission concluded, and the court agreed, that the answer key derived independent economic value from its secrecy and, accordingly, that it is a trade secret exempt from disclosure under § 1-210 (b) (5) (A).

[14] The trial court also found that the record contained evidence that unredacted proposals were logged and stored in locked cabinets with limited access.

On appeal, the plaintiffs first argue that the information in the answer key was neither "the subject of efforts that are reasonable under the circumstances to maintain secrecy" in accordance with § 1-210 (b) (5) (A) (ii), nor "[c]ommercial or financial information given in confidence, not required by statute," to the department in accordance with § 1-210 (b) (5) (B), because the department failed to ensure confidentiality by imposing sufficient restrictions in the form of nondisclosure agreements. They insist that there was no evidence to support the commission's findings that nondisclosure agreements existed because testimony was conflicting and the department did not produce the agreements[15] and, thus, they argue that when the Utility Standard of Conduct expired, there was no further obligation of confidentiality. The plaintiffs also advance the closely related argument that the information was not "given in confidence" per § 1-210 (b) (5) (B) on the basis of (1) their claim that nondisclosure agreements were not produced and (2) the department's representations to bidders concerning the public disclosure of information, which they claim meant that the bidders "had no reasonable expectation that their bids would be held in confidence." The plaintiffs' arguments are unavailing.

The requirement of § 1-210 (b) (5) (A) (ii) is highly fact specific and focuses on reasonableness. "The question of whether, in a specific case, a party has made reasonable efforts to maintain the secrecy of a purported trade secret is by nature a highly fact-specific inquiry. . . . What may be adequate under the peculiar facts of one case might be considered inadequate under the facts of another. According to [General Statutes]

[15] At oral argument before this court, the department admitted that it no longer has copies of the nondisclosure agreements but asserted that, at the time of the events at issue, the agreements existed. As discussed in this opinion, the department presented sufficient evidence for the commission to make such a finding.

§ 35-51 (d) (2), the efforts need only be reasonable under the circumstances . . . .'' (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Elm City Cheese Co.* v. *Federico*, supra, 251 Conn. 80. As for the ''given in confidence'' requirement, we have not had occasion previously to interpret it. In its decision, the commission construed the phrase ''commercial or financial information, given in confidence,'' which is contained within § 1-210 (b) (5) (B).[16] Noting that ''Connecticut appellate case law has not defined [the phrase],'' the commission looked to federal case law for guidance, as well as to Connecticut authority in *Lash* v. *Freedom of Information Commission*, 300 Conn. 511, 14 A.3d 998 (2011), *Dept. of Public Utilities* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-99-0498510-S (January 12, 2001) (29 Conn. L. Rptr. 215), and *Chief of Staff* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-98-0492654-S (August 12, 1999) (25 Conn. L. Rptr. 270). The commission concluded that '' 'given in confidence' . . . requires an intent to give confidential information, based on context or inference, such as where there is an express or implied assurance of confidentiality, where the information is not available to the public from any other source, or where the information is such that [it] would not customarily be disclosed by the person who provided it.'' The Superior Court subsequently concluded that ''the commission's construction of the phrases 'given in confidence' and 'not required by statute' was careful, thorough, and consistent with the principles of statutory construction applied by Connecticut's courts.'' We agree with the commission's well reasoned analysis.

[16] Because the plaintiffs do not address the phrase ''required by statute'' in their brief, we focus solely on the ''given in confidence'' requirement of § 1-210 (b) (5) (B).

The record before us belies the plaintiffs' argument that the commission clearly erred in finding that nondisclosure agreements had been made. The commission's finding is supported by the testimony offered at the hearing before the commission. It is further supported by the evidence that Cassadaga and Antrim relied on confidentiality guarantees, as well as on the department's other efforts to maintain secrecy, such as pursuing protective orders. We must defer to the commission's findings of fact, which were sufficiently supported by the evidence before it.

As the court correctly noted, this case readily is distinguishable from *Dept. of Public Utilities* v. *Freedom of Information Commission*, supra, 55 Conn. App. 532, in which there was "no evidence that the study was to be kept confidential." In that case, the lack of a confidentiality agreement or other "efforts to limit . . . dissemination," as well as the wide distribution of the information at issue, defeated the claim of secrecy. Id., 533. The plaintiffs claim that *Dept. of Public Utilities* is "directly on point" because of the lack of nondisclosure agreements in the present case, but the evidence here supports the findings by the commission and the court that nondisclosure agreements had been executed.[17] Similarly, the plaintiffs' reliance on *Elm City Cheese Co.* v. *Federico*, supra, 251 Conn. 86, for the proposition that "precautionary measures [such as] requiring

[17] In the trial court proceeding underlying the appeal in *UConn*, the Superior Court found that the university "also established that it has taken reasonable efforts to maintain the secrecy of the list. It has denied requests for disclosure in the past and has never provided the entire list to anyone outside of the [u]niversity." *University of Connecticut* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-09-4021320-S (April 21, 2010) (49 Conn. L. Rptr. 856, 862), aff'd, 303 Conn. 724, 36 A.3d 663 (2012). By comparison, the department's efforts in the present case, including the execution of nondisclosure agreements and motions for protective order, similarly reflect an intent to guard the information in the answer key.

employees to sign confidentiality agreements'' are important, is misplaced because, unlike in *Elm City Cheese Co.*, the record here indicates that nondisclosure agreements were produced. The commission was free to weigh the testimony before it and conclude that nondisclosure agreements had bound the team. "[B]ecause the [commission] is the [fact finder] in this case, we decline to appraise and weigh the evidence considered by the [commission] in reaching its determination on the challenged findings." *Board of Education* v. *Freedom of Information Commission*, 208 Conn. 442, 452, 545 A.2d 1064 (1988). Accordingly, we reject the plaintiffs' claim that the time limited Utility Standard of Conduct is the only agreement in play here,[18] and, thus, the plaintiffs' reliance on case law in which time limited nondisclosure agreements were insufficient to afford trade secret protection is inapplicable here.

The plaintiffs also argue that the RFP put bidders on notice that the information was subject to disclosure. Read in full, the RFP plainly advised bidders that certain information would be disclosed and that other information would be kept confidential. The RFP disclosed to bidders that, "[a]s it has done with previous RFPs, [the department] intends to disclose *certain* bid information in its final determination once contract negotiations are completed and a filing is made with PURA . . . ." (Emphasis added.) At the same time, Appendix G of the RFP contained a disclaimer regarding the act, advising that "[w]ith your legal support and *reasonable justification for confidentiality* . . . the Connecticut state agencies participating on the Soliciting Parties *will be*

[18] The plaintiffs argue in their brief that, "[i]f the EDC representatives were required to sign nondisclosure agreements, there would have been no need for them to sign the Utility Standard of Conduct." This speculative contention is not proof of the absence of nondisclosure agreements and, in any case, it asks this court to make a factual finding, which we cannot do. See *Batista* v. *Cortes*, 203 Conn. App. 365, 372, 248 A.3d 763 (2021) (appellate court does not act as fact finder).

better equipped to safeguard your confidential information should it become the subject of a Connecticut Freedom of Information Act inquiry. . . . All information for winning bidders, including confidential information, will be released and become public 180 days after contracts have been executed and approved by all relevant regulatory authorities, *unless otherwise ordered by the Connecticut PURA*." (Emphasis added.) The plain language of the RFP makes clear that if a bidder requested, with appropriate justification, that its information be held confidential, the department would take measures to protect it. Moreover, the RFP, as the court put it, "contained an important qualifier: it indicated that information would be disclosed unless otherwise ordered by PURA." (Internal quotation marks omitted.) The commission found that Cassadaga, per the testimony of its representative, relied on this qualifier in submitting its bid and sought protective orders, which were granted by PURA. Antrim's representative also testified that it relied on the RFP's assurances of confidentiality and discretion. We agree that there was substantial evidence to support the conclusion that the department intended to give express assurances of, and that the bidders had resulting expectations of, confidentiality.

The context of the situation also indicates that confidentiality was implied by the representations and conduct of the parties involved in the RFP. Our review of the record supports the commission's finding that there was a clear understanding between the department and the bidders that sensitive information would be protected. Ignoring the evidence in the record, the plaintiffs argue that the decision of the Superior Court in *Chief of Staff* v. *Freedom of Information Commission*, supra, 25 Conn. L. Rptr. 271, in which the administrative record disclosed that the city of Hartford (city) had given "no express assurance of confidentiality" to developers

responding to an RFP, applies to the present case. However, the court in *Chief of Staff* construed the trade secret exemption as referring to the provision of information both "under an express assurance of confidentiality *or in circumstances from which such an assurance could reasonably be inferred*." (Emphasis added; internal quotation marks omitted.) Id. Turning to that second question, the court stated that "[w]hether there was an implied assurance of confidentiality presents a close question" because a majority of the developers had an understanding of confidentiality with the city, but, fatally, the city had informed the developers that their proposals would be disseminated. Id. The court recognized that "[w]hether the circumstances show an implied assurance of confidentiality is ordinarily a question of fact" and deferred to the commission's factual finding that "the majority of the information was not given in confidence." Id. The cumulative evidence before the commission, namely the testimony concerning nondisclosure agreements and Antrim's and Cassadaga's reliance on the department's representations, sufficiently supported the commission's conclusion that the bidders and the department understood confidentiality to be an important consideration. Moreover, unlike in *Chief of Staff*, the RFP in the present case did not promise full disclosure by its terms. After reviewing the evidence before it, the commission concluded that the answer key was given in confidence.

Applying the commission's construction of the phrase "given in confidence" to the commission's findings, we agree with the trial court that the commission properly concluded that the bidders and the department mutually intended to submit and collect confidential information, respectively. This conclusion is supported by the hearing testimony provided by representatives from Cassadaga and Antrim, which the commission evidently credited. That testimony also supports the department's

assertions regarding the existence of nondisclosure agreements. We therefore conclude that the commission's determination with respect to § 1-210 (b) (5) (B) is supported by the record.

The judgment is affirmed.

In this opinion the other judges concurred.

FRANCIS ANDERSON *v.* COMMISSIONER OF CORRECTION
(AC 42032)

Alvord, Elgo and Cradle, Js.

Syllabus

The petitioner, who had been convicted of assault of a peace officer while incarcerated, sought a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance by failing to adequately investigate his case, failing to explain to him the strengths and weaknesses of his case and failing to meaningfully explain the plea offers made to him and the likely range of sentences that he faced. The habeas court rendered judgment denying the petition, concluding, inter alia, that the petitioner had failed to prove that his trial counsel's representation of him was deficient or that he was prejudiced by this alleged deficiency. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. On appeal, the petitioner claimed that the habeas court incorrectly concluded that his trial counsel did not provide ineffective assistance by failing to pursue a defense of lack of capacity due to mental disease or defect. *Held* that the judgment of the habeas court denying the petition for a writ of habeas corpus was affirmed; the habeas court having thoroughly addressed the petitioner's argument raised in this appeal, this court adopted the habeas court's well reasoned decision as a proper statement of the relevant facts, issues and the applicable law on those issues.

Argued February 9—officially released June 8, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Farley*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

James P. Sexton, assigned counsel, with whom, on the brief, were *Megan L. Wade* and *Meryl R. Gersz*, assigned counsel, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Jaclyn Preville Delude*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Francis Anderson, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court incorrectly concluded that his trial counsel did not provide ineffective assistance by failing to pursue a defense of lack of capacity due to mental disease or defect (lack of capacity). We affirm the judgment of the habeas court.[1]

On March 3, 2011, the petitioner pleaded guilty to two counts of assault of a peace officer in violation of General Statutes (Rev. to 2009) § 53a-167c. The petitioner's conviction resulted from events that transpired on September 30, 2009, when the petitioner, while serving a prior sentence, assaulted two officers from the Department of Correction. The trial court, *Hon. Terence A. Sullivan*, judge trial referee, sentenced the petitioner to a total effective sentence of five years of incarceration, to be served consecutively to any previous sentence he already was serving.

[1] The petitioner also challenges the habeas court's determination that he failed to prove that he was prejudiced by his counsel's representation of him. Because we conclude that the habeas court correctly determined that his counsel's performance was not constitutionally deficient, we do not reach the petitioner's prejudice claim. See, e.g., *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 606, 103 A.3d 954 (2014) (reviewing court can find against petitioner on either performance or prejudice prong of ineffective assistance of counsel claim).

On February 19, 2013, the petitioner filed an amended petition for a writ of habeas corpus.[2] In his amended petition, the petitioner claimed that his trial counsel, Douglas Ovian, provided ineffective assistance by failing to adequately investigate his case, failing to explain to him the strengths and weaknesses of his case and failing to meaningfully explain the plea offers made to him and the likely range of sentences that he faced.

On July 25, 2018, following a three day trial and the filing of posttrial briefs by the parties, the habeas court, *Farley*, *J.*, issued a memorandum of decision in which it concluded that the petitioner failed to prove that Ovian's representation of him was deficient or that he was prejudiced by this alleged deficiency. In so concluding, the habeas court began by noting that "[t]he petitioner's case, as presented at trial and in his posttrial brief, focuses specifically upon his attorney's failure to adequately explore and explain a potential defense of lack of capacity, as an alternative to his guilty pleas, and to otherwise provide an effective defense based on the petitioner's mental health issues." The court then set forth the following relevant facts. "[The petitioner] has a long history of violent behavior and mental illness. In the underlying case, [the petitioner] was charged with assaulting two correctional officers when they entered his cell immediately after having, in [the petitioner's] opinion, mistreated another inmate with mental illness. This was not the first such occasion. [The petitioner] has a long history of assaults against correctional officers and others. His psychological issues and behavioral problems date back to his childhood and he has been in and out of correctional facilities since his youth. The incident underlying the conviction that is the subject of this habeas petition occurred in September, 2009, at Northern Correctional Institution. [The petitioner] was

[2] The petitioner initially filed a petition for a writ of habeas corpus on May 19, 2011.

charged with two counts of assault [of a peace officer] in violation of General Statutes (Rev. to 2009) § 53a-167c, class C felonies, as well as an infraction for failure to comply with fingerprinting [requirements] in violation of General Statutes § 29-17. The felony counts exposed him to up to twenty years of incarceration and any sentence was required by statute to run consecutively to the sentence he was serving at the time. Subsequently, accounting for his prior history, the state filed [a] part B [information] charging [the petitioner] as a persistent felony offender in violation of General Statutes § 53a-40 (g) and as a persistent serious felony offender in violation of General Statutes § 53a-40 (c). These additional charges increased [the petitioner's] exposure to up to forty years of incarceration. On March 3, 2011, after a jury had been selected, [the petitioner] pleaded guilty to the two assault counts under an open plea, the state having agreed to drop the part B counts in exchange for the guilty plea. Thus, at sentencing [the petitioner] faced a total exposure of twenty years. He was sentenced to five years to serve on each of the two counts, to run concurrently with each other and consecutive to the sentence he was then serving. . . .

"Following [the petitioner's] arraignment on the original charges . . . Ovian was assigned to represent him. At the time . . . Ovian had over twenty years of experience with the Division of Public Defender Services and had served as a public defender in the Tolland judicial district for over three years. [The petitioner] made numerous appearances in court prior to trial. . . . Ovian met with [the petitioner] on these occasions and had the opportunity to explore at length with him the underlying events and his criminal and psychological history. . . . Ovian directed his staff to compile a record of [the petitioner's] mental health history and treatment and to prepare a summary of that history, as well as [the petitioner's] criminal history. Extensive records were obtained, dating back to a psychological evaluation performed by . . . Donald Grayson in 2000,

which in turn reviewed [the petitioner's] prior records. It is not clear, however, that . . . Ovian had the entirety of [the petitioner's] mental health records, in particular a 1982 report from Riverview School prepared when [the petitioner] was twelve years old, records from a prior commitment to [what is now] Whiting Forensic [Hospital (Whiting)] in 2005, and some community treatment in 2007. The summary prepared for . . . Ovian, however, does reference the 2005 admission to Whiting, as well as [the petitioner's] childhood history.

"Over the course of the pretrial proceedings in the case . . . Ovian regularly discussed [the petitioner's] mental health issues with him and how those issues might relate to a defense strategy in the case. These discussions included a 'colloquial' discussion of a potential lack of capacity defense. By 'colloquial' . . . Ovian means a discussion in layman's terms, as distinguished from a technical, legal discussion. The petitioner makes much of the fact that . . . Ovian does not have written notes concerning the discussion of a lack of capacity defense with him. . . . Ovian, however, freely acknowledged areas of his recollection that were unclear and deferred to [the petitioner's] recollection on occasion. He was very clear in recalling that he did address the subject of a potential lack of capacitydefense with [the petitioner] and the court credits his testimony on that point despite [the petitioner's] contradictory testimony. It is [the petitioner's] testimony the court finds is not credible. According to [the petitioner] . . . Ovian never discussed the following subjects with him: the facts of the case; the strengths and weaknesses of the case; the minimum and maximum penalties he faced; a plea offer from the state of eighteen months to serve; the option of a court trial rather than a jury trial; and a potential lack of capacity defense. [The petitioner] does acknowledge that he discussed his mental health

issues with . . . Ovian, but he maintains that . . . Ovian ignored those issues. The court does not find [the petitioner's] testimony concerning how . . . Ovian conducted the defense and the nature of his dealings with . . . Ovian to be credible.

"Following his initial meetings with [the petitioner] and the review of his mental health history . . . Ovian was of the view that a lack of capacity defense was not a viable option for [the petitioner]. The history reflected diagnoses of post-traumatic stress disorder [PTSD], personality disorder, borderline intellectual functioning and substance abuse. Despite the extensive mental health history, however, it was . . . Ovian's view that the facts did not support a claim that [the petitioner] lacked the capacity either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law. In addition to his assessment that a lack of capacity defense was not viable . . . Ovian also considered the pursuit of that defense as strategically unsound because it would potentially expose [the petitioner] to a period of confinement significantly longer than what could be negotiated in a plea agreement with the state. . . . Ovian raised the subject of [the petitioner's] extensive mental health history with the state in plea negotiations. At one point . . . Ovian obtained a plea offer from the state that would have resulted in an agreed upon sentence of eighteen months to serve. [The petitioner], however, rejected that offer.

"[Ovian] discussed the merits of a lack of capacity defense, in addition to the strategic disadvantages of pursuing that defense, with [the petitioner]. He also checked his own opinion of the merits of such a defense by obtaining an expert opinion on the issue. At the time of jury selection . . . Ovian referred [the petitioner] to . . . Kenneth Selig, a psychiatrist and an attorney, for evaluation. . . . Ovian testified that, among other things, he discussed the viability of a lack of capacity

defense with . . . Selig and, based on that discussion, reaffirmed his view that it was not a viable defense for [the petitioner]. . . . Ovian relayed that opinion to [the petitioner]. [The petitioner] denies ever meeting with . . . Selig, but the transcripts of the proceedings in the underlying case are consistent with the facts as described by . . . Ovian and include references to the lack of capacity issue.

"[The petitioner's] chief concern throughout . . . Ovian's representation was the inadequate mental health care he received as an inmate. This became a focus of the defense strategy in the case, particularly after a video of the underlying events undermined [the petitioner's] claim of self-defense. As the trial approached . . . Ovian pursued a strategy he hoped would limit the potential period during which [the petitioner] would be confined and at the same time raise the possibility that the nature of his confinement would be substantially the same as if he had successfully pursued a lack of capacity defense. To this end . . . Ovian's referral to . . . Selig was aimed at determining whether there were any undiagnosed mental health conditions applicable to [the petitioner] that should be weighed in his sentencing. . . . That effort was unavailing. [Ovian] persisted, however, and negotiated an open plea agreement on the assault charges, subject to the state's further agreement that [the petitioner] would be referred for a psychiatric examination pursuant to General Statutes § 17a-566.[3] That process opened

[3] General Statutes § 17a-566 provides in relevant part: "(a) Except as provided in section 17a-574 any court prior to sentencing a person convicted of an offense for which the penalty may be imprisonment in the Connecticut Correctional Institution at Somers . . . may if it appears to the court that such person has psychiatric disabilities and is dangerous to himself or others, upon its own motion or upon request of any of the persons enumerated in subsection (b) of this section and a subsequent finding that such request is justified, order the commissioner to conduct an examination of the convicted defendant by qualified personnel of the hospital. Upon completion of such examination the examiner shall report in writing to the court. Such report shall indicate whether the convicted defendant should be committed to the

up the prospect that [the petitioner] could plead guilty, cap his exposure to incarceration and still be held in the custody of the Department of Mental Health and Addiction Services at [Whiting]. Despite [the petitioner's] claim to the contrary, the court finds that . . . Ovian explained this strategy and this process to [the petitioner] and informed him that the results of the § 17a-566 examination were uncertain.

"On March 3, 2011, [the petitioner] pleaded guilty under the *Alford* doctrine[4] pursuant to the plea agreement negotiated by . . . Ovian. He was thoroughly canvassed by the court and then referred for an initial examination pursuant to § 17a-566. In advance of the examination, [the petitioner] took issue with one of the examiners assigned to the matter, claiming that she had a bias against him. . . . Ovian looked into that claim, which was counter to his own experience with the examiner, by speaking with her and becoming assured it would not be an issue. The examiners concluded, however, that despite [the petitioner's] extensive history of mental illness and behavioral difficulties, he

diagnostic unit of the hospital for additional examination or should be sentenced in accordance with the conviction. . . .

"(b) The request for such examination may be made by the state's attorney or assistant state's attorney who prosecuted the defendant for an offense specified in this section, or by the defendant or his attorney in his behalf. . . ."

In 2018, the statute was amended to replace references to "division" and "institute" with "hospital" to reflect the name change of the Whiting Forensic Division of Connecticut Valley Hospital, formerly Whiting Forensic Institute, to Whiting Forensic Hospital.

[4] "Under *North Carolina* v. *Alford*, [400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)], a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Walker*, 187 Conn. App. 776, 778 n.2, 204 A.3d 38, cert. denied, 331 Conn. 914, 204 A.3d 703 (2019).

could be treated appropriately by the Department of Correction and no referral to [Whiting] was recommended. This conclusion was consistent with the opinion expressed orally to . . . Ovian by . . . Selig. [The petitioner] took issue with the results of the examination but, because they were consistent with . . . Selig's conclusions . . . Ovian did not challenge them. Rather than antagonize the state with a request for a continuance and the retention of yet another expert, which . . . Ovian believed might negatively impact the state's position at sentencing . . . Ovian proceeded with the presentence investigation process and sentencing, where the court would have access to the § 17a-566 report and additional background information. The transcript of the sentencing hearing reflects the fact that the court had been provided with the available mental health information, including the § 17a-566 report, that detailed [the petitioner's] childhood abuse, troubled past and extensive psychiatric history. . . . Ovian leaned on those materials in presenting his argument to the court and even invited the court to order further examination of [the petitioner], despite the recommendations in the § 17a-566 report. The court's remarks reflect that these issues were considered by the court in deciding upon a sentence.

"After disposition of the 2009 case, [the petitioner] was again charged with assaulting a correction officer in July, 2012. Attorney Cynthia Love represented [the petitioner] on that charge, which was prosecuted in Norwich. . . . Love referred [the petitioner] for evaluation by . . . Andrew Meisler, a clinical and forensic psychologist. Meisler authored a report dated February 13, 2013, offering his opinions on [the petitioner's] mental condition and the factors that contributed to the 2012 incident. In addition to [the petitioner's] prior diagnoses . . . Meisler diagnosed [the petitioner] with '[c]omplex PTSD' which, as he explained at trial in

this case, is a diagnosis that has been considered for recognition but is not currently recognized by the Diagnostic and Statistical Manual of Mental Disorders (DSM-5). It distinguishes a subset of individuals with PTSD who, based on the nature of their underlying trauma, suffer 'much greater disruptions in relationship to others, self-regulation . . . .' In the case of [the petitioner] . . . Meisler's opinion is that certain triggers in his environment cause [the petitioner] to lose the ability to control his behavior. . . . Meisler perceives a pattern of events that lead [the petitioner] into a violent incident, including a change in his surroundings combined with a decrease or elimination of medication therapy and a circumstance in which [the petitioner] perceives a threat that triggers an impulsive, violent reaction.

"With . . . Meisler's support, [the petitioner] went to trial on the 2012 charges and was acquitted on a lack of capacity defense in July, 2013. . . . Meisler was subsequently disclosed as an expert in this case. Pointing out that the 2009 incident followed a transfer of [the petitioner] to Northern Correctional Institution, what . . . Meisler views as a 'negative assessment by psychiatric staff at Northern [Correctional Institution]' and a discontinuance of medications . . . Meisler believes [that the petitioner] was destabilized at the time of the 2009 incident as well. In response to what [the petitioner] perceived to be unfair treatment of another inmate by correction officers . . . Meisler opines that when [the petitioner] assaulted the correction officers in 2009, he was 'suffering from acute mental illness with marked impairments in emotional regulation and impulse control that prevented him from controlling his behavior in accordance with the law.' " (Footnotes added and omitted.)

With that factual underlayment, the court then addressed the petitioner's claim that Ovian's representation of him was constitutionally deficient because he

failed to present a lack of capacity defense.[5] The court reasoned: "The outcome of [the petitioner's] trial arising out of the 2012 charge of assaulting a correction officer unavoidably enhances the effect of hindsight on the defense strategy pursued by . . . Ovian in connection with the 2009 charges. It is essential, therefore, to emphasize that the court has a responsibility in this case to reconstruct the circumstances as they were presented to . . . Ovian and to evaluate the representation he provided from his perspective at the time, not through the prism of hindsight. While . . . Ovian did not consider a lack of capacity defense viable on its merits, he also perceived it as potentially counterproductive. With charges pending that exposed [the petitioner] to forty years of incarceration, a successful lack of capacity defense would nevertheless have left [the petitioner] at risk of being confined for a very long time, subject to future determinations concerning his eligibility for release. See General Statutes § 17a-580 et seq. This prospect stood in contrast to the period of confinement under consideration by the state in plea negotiations, as little as eighteen months at one point.

[5] The habeas court stated that the petitioner claimed, at trial and in his posttrial brief, that Ovian's representation of him was deficient because Ovian "conducted the majority of the defense without consulting with an expert regarding a potential lack of capacity defense, waiting until the eve of trial to retain . . . Selig; failed to properly supervise his staff charged with the responsibility to compile the records of [the petitioner's] mental health history; failed to obtain all the mental health records and provide them to . . . Selig; failed to keep [the petitioner] informed and failed to explain to him all potential defenses and the potential mitigating impacts arising out of his mental health condition; limited the scope of . . . Selig's inquiry to what treatment would be appropriate for [the petitioner] were he to be released to the community; failed to retain an expert and challenge the recommendations in the § 17a-566 report; failed to make proper use of the § 17a-566 report and other mental health records at the sentencing hearing; and failed to maintain thorough notes on all the conversations he had while conducting [the petitioner's] defense." Because the petitioner's challenge on appeal is focused on Ovian's failure to obtain all of the petitioner's mental health records and to present a lack of capacity defense, we focus on the portions of the habeas court's analysis that address those issues.

. . . Ovian discussed this strategic consideration with [the petitioner], in addition to the merits of a lack of capacity defense. . . .

"Meisler's testimony in this case establishes, to the court's satisfaction, that a plausible defense of lack of capacity could have been developed and pursued by . . . Ovian. Given the serious and persistent mental health issues exhibited by [the petitioner], and the correlation between those issues and his violent behavior, it was something to consider and the court finds . . . Ovian took the initial steps to look into that defense. Having done so, it was incumbent upon him to obtain a complete mental health history and to obtain a thoroughly informed expert opinion on how [the petitioner's] mental health issues might impact his defense. Having recognized that responsibility . . . Ovian did not carry it out completely. He delegated the task of obtaining the complete history and did not ensure that task had been properly completed. He recognized the need to consult with an expert early on in the case, but did not do so until the time of jury selection. To the extent that his performance is subject to criticism, these are the principal considerations."

The habeas court analogized the factual circumstances in this case to those presented in this court's earlier decision in *Ramos* v. *Commissioner of Correction*, 172 Conn. App. 282, 159 A.3d 1174, cert. denied, 327 Conn. 904, 170 A.3d 1 (2017). The court explained that, in *Ramos*, the petitioner's counsel had "requested his medical records from the Department of Correction . . . and, upon receipt, forwarded them to . . . Peter Zelman, a forensic psychiatrist. The records obtained from [the Department of Correction], however, belonged to another inmate with the same name but with far fewer psychiatric issues and a much less severe drug history than the petitioner. This error was not discovered by [the petitioner's counsel] during her representation of the petitioner. The habeas petition alleged [the

petitioner's counsel] rendered ineffective assistance based on her failure to ensure that the records relied upon by . . . Zelman were accurate. The court agreed that counsel had fallen short of her responsibilities because she had 'assumed an obligation to conduct her investigation in a constitutionally adequate manner, which required her to obtain and furnish accurate medical information to the expert with whom she consulted . . . so that the expert's opinion would be well-grounded and she could appropriately rely upon it in developing her case strategy and advising her client whether to go to trial.' Id., 300–301."

With *Ramos* in mind, the habeas court reasoned: "Like [the petitioner's counsel in *Ramos*] . . . Ovian erred by not ensuring that his office had obtained a complete set of [the petitioner's] mental health records. It was not his intention to do anything less than that and he relied on his staff to complete that task, but still it remained his responsibility."[6]

The court continued: "The court's analysis of . . . Ovian's performance is complicated by the fact that there was a substantial strategic consideration overlaying the incomplete investigation of a defense based on lack of capacity. Even if . . . Ovian had determined that a lack of capacity defense was conceivable, it was also his view that pursuing that defense was not the wisest strategy, given the difference between [the petitioner's] exposure and the prison time being contemplated in plea negotiations. [Ovian] believed that [the

[6] We note that, in *Ramos*, the habeas court did not find that the petitioner's counsel was constitutionally ineffective. This court rejected the petitioner's challenge to the habeas court's judgment in *Ramos* on the ground that he failed to satisfy the prejudice prong of his ineffective assistance claim. See *Ramos* v. *Commissioner of Correction*, supra, 172 Conn. App. 301–302. This court noted, however, that it was "at least debatable among jurists of reason whether the making of such a mistake when reviewing critical medical records that purportedly belong to one's own client satisfies the minimum requirements of our state and federal constitutions as to the adequacy of trial counsel's performance." Id., 301.

petitioner's] mental health issues could be put to better use in attempting to negotiate a plea agreement that would limit the length of [the petitioner's] confinement and also create an opportunity to argue that [the petitioner] should be confined at Whiting. That is the strategy he discussed with [the petitioner] extensively and the one that ultimately played out at the time of the plea and sentencing. . . .

"First, the court does not agree that . . . Ovian's pursuit of a mitigation strategy on the basis of [the petitioner's] mental health problems, rather than a lack of capacity defense, was deficient. This was a strategic decision, explained in detail to [the petitioner], which was not principally based upon the merits of a potential lack of capacity defense, but rather a strategy that . . . Ovian believed was in [the petitioner's] overall best interests. '[T]o establish deficient performance by counsel, a defendant must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms . . . . Moreover, strategic decisions of counsel, although not entirely immune from review, are entitled to substantial deference by the court.' . . . *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 31, [188 A.3d 1] (2018), [cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019)]. While strategic decisions do not excuse inadequate investigations, 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.' Id., 32, quoting *Strickland* v. *Washington*, [466 U.S. 668, 690–91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. In this case, based on the totality of the circumstances, the court concludes that . . . Ovian's decision to pursue a mitigation strategy met the standard of objective reasonableness, even though he and . . . Selig did not have a complete set of [the petitioner's] mental health records. They both did have

access to . . . Grayson's 2000 evaluation, which . . . Meisler himself characterized as 'a thorough record review and evaluation,' as well as [the petitioner's] extensive, more recent records from [the Department of Correction]. Whatever information the missing records might have added, the court concludes they would not have changed . . . Ovian's strategy, which was based upon his perception that it was not in [the petitioner's] best interests to pursue a lack of capacity defense. That was a strategic decision entitled to substantial deference. See *Pladsen* v. *Commissioner of Correction*, 96 Conn. App. 849, [850–51], 902 A.2d 704 (2006) (same strategy pursued by . . . Ovian was not ineffective assistance of counsel)."[7] (Citations omitted.)

On the basis of the foregoing, the court concluded: "In sum, while . . . Ovian's performance may be subject to some legitimate criticism relating to the failure to obtain a complete medical history . . . in the totality of the circumstances these shortcomings do not constitute 'errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the [s]ixth [a]mendment.' *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 30, quoting *Strickland* v. *Washington*, [supra] 466 U.S. 687." The court also concluded that the petitioner failed to prove that he was prejudiced by Ovian's allegedly deficient representation of him. Accordingly, the court denied the petition for a writ of habeas corpus. The court thereafter granted the petitioner's petition for certification to appeal, and this appeal followed.

The standard of review in a habeas corpus proceeding challenging the effective assistance of trial counsel is well settled. "To succeed on a claim of ineffective assis-

[7] We note that Meisler acknowledged that Grayson's report, which Ovian had obtained and forwarded to Selig, provided a thorough review of the petitioner's mental health history. Therefore, any records obtained by Ovian pertaining to the time period covered in Grayson's report would have been cumulative of the records that Ovian had obtained and given to Selig.

tance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"On appeal, [a]lthough the underlying historical facts found by the habeas court may not be disturbed unless they [are] clearly erroneous, whether those facts constituted a violation of the petitioner's rights [to the effective assistance of counsel] under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Citations omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 830–31, 234 A.3d 78, cert. granted, 335 Conn. 931, 236 A.3d 218 (2020).

On appeal, the petitioner claims that the habeas court erred in rejecting his claim that Ovian rendered ineffective assistance of counsel by failing to pursue a lack of capacity defense. Specifically, the petitioner claims that the habeas court erred in concluding that Ovian's representation was not deficient because it erroneously assumed that Ovian would still have pursued a mitigation strategy, versus a lack of capacity defense, if he had obtained all of the petitioner's medical records, and his trial strategy did not advance the petitioner's

litigation objective, which, in this case, was to obtain mental health treatment at Whiting.

We have examined the record on appeal, the briefs and arguments of the parties, and conclude that the judgment of the habeas court, *Farley*, *J.*, should be affirmed. Because the habeas court thoroughly addressed the petitioner's argument raised in this appeal that Ovian's representation of him was constitutionally deficient, we adopt its well reasoned decision, as quoted at length herein, as a proper statement of both the facts and the applicable law on that issue. Any further discussion by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Brander* v. *Stoddard*, 173 Conn. App. 730, 732, 164 A.3d 889, cert. denied, 327 Conn. 928, 171 A.3d 456 (2017).

The judgment is affirmed.

In this opinion the other judges concurred.

MARY JACKSON ET AL. *v.* PENNYMAC LOAN SERVICES, LLC
(AC 43042)

Bright, C. J., and Prescott and Flynn, Js.

Syllabus

The plaintiffs appealed from the trial court's dismissal of their action against the defendant, a mortgage servicing company, in which they alleged that the defendant violated the mortgage release statute (§ 49-8) by failing to provide a timely and valid release of their mortgage. The court dismissed the action for lack of subject matter jurisdiction due to the plaintiffs' alleged failure to demonstrate their compliance with the requirements of § 49-8 (c) regarding the statutory demand notice for release of the mortgage. This ground was not argued by the defendant in its motion to dismiss. On appeal, the plaintiffs claimed that the trial court deprived them of due process by dismissing their action on a ground that the court raised sua sponte without affording them notice or an opportunity to be heard. *Held*:

1. The trial court improperly granted the motion to dismiss, as that court improperly addressed, sua sponte, the issue of the plaintiffs' alleged noncompliance with the statutory demand notice requirements in § 49-8 (c) without first providing the plaintiffs with notice or a reasonable opportunity to submit evidence of their compliance with those requirements; the plaintiffs were not given the opportunity to contest whether they were required to demonstrate on the notice that was attached to the complaint that the notice had been received by the defendant or its attorney, and the defendant's special defenses that alleged that the plaintiffs failed to satisfy all conditions precedent, including sending the required written demand notice to the defendant, were insufficient to place the plaintiffs on notice that they were required to demonstrate that they complied with the notice requirements of § 49-8 (c); moreover, any alleged failure to satisfy the written demand notice requirements did not deprive the court of jurisdiction to hear the matter, but rather impacted the court's authority to grant the relief sought by the plaintiffs; furthermore, regardless of whether the issue was jurisdictional or simply related to the court's authority, due process required the defendant to have raised in its motion to dismiss the issue of the plaintiffs' compliance with the statutory demand notice requirements of § 49-8 (c) or, failing that, required the court to have provided the parties with notice that the statutory demand notice requirements issue was to be decided before it granted the defendant's motion to dismiss on that ground.
2. The defendant could not prevail on its claim that the dismissal of the plaintiffs' action could be affirmed on the alternative ground that they were not aggrieved pursuant to § 49-8 because they did not suffer any harm and, therefore, did not have standing, as § 49-8 was a penalty statute that did not require the plaintiffs to suffer actual damages; the defendant did not provide evidence that it complied with the statute (§ 49-9a) that would have upheld the defendant's release of mortgage that contained a "scrivener's error," and the plain language of § 49-8 provided damages for aggrieved persons if the mortgagee fails to execute or deliver a timely release of mortgage, and the plaintiffs, who allegedly did not receive a timely release of the mortgage on their property after they undisputedly sold the property in a short sale, were accordingly aggrieved persons within the meaning of § 49-8.

Argued November 12, 2020—officially released June 8, 2021

Procedural History

Action to recover damages for the defendant's failure to timely release a certain mortgage, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wilson, J.*; dismissed the

plaintiffs' action, and the plaintiffs appealed to this court. *Reversed*; *further proceedings*.

Sabato P. Fiano, with whom, on the brief, was *Lori A. DaSilva-Fiano*, for the appellants (plaintiffs).

Jeffrey C. Ankrom, with whom, on the brief, was *Donald E. Frechette*, for the appellee (defendant).

Opinion

FLYNN, J. The plaintiffs, Mary Jackson and Johnnie Jackson, appeal from the judgment of the trial court granting the motion of the defendant, Pennymac Loan Services, LLC, to dismiss the action of the plaintiffs in which they alleged that the defendant violated General Statutes § 49-8 (c) by failing to provide a timely release of their mortgage. The defendant did not argue in its motion that the action should be dismissed for lack of subject matter jurisdiction due to the plaintiffs' alleged failure to satisfy the requirements of § 49-8 (c) regarding a statutory demand notice for release of the mortgage. Nevertheless, the court dismissed the action on that ground. On appeal, the plaintiffs claim that the court deprived them of due process by dismissing their action on a ground that the court had raised sua sponte without affording them notice or an opportunity to be heard. We agree with the plaintiffs that neither the defendant's motion to dismiss nor the court alerted them that their alleged noncompliance with the statutory demand notice requirements in § 49-8 (c) was at issue and, accordingly, we reverse the judgment of the trial court.

At the outset, we note that at the center of the plaintiffs' appeal is § 49-8, which concerns, inter alia, the release of a satisfied mortgage, and provides in relevant part: "(a) The mortgagee or a person authorized by law to release the mortgage shall execute and deliver a release to the extent of the satisfaction tendered before or against receipt of the release: (1) Upon the

satisfaction of the mortgage . . . . (c) The mortgagee or plaintiff or the plaintiff's attorney, as the case may be, shall execute and deliver a release within sixty days from the date a written request for a release of such encumbrance (1) was sent to such mortgagee, plaintiff or plaintiff's attorney at the person's last-known address by registered or certified mail, postage prepaid, return receipt requested, or (2) was received by such mortgagee, plaintiff or plaintiff's attorney from a private messenger or courier service or through any means of communication, including electronic communication, reasonably calculated to give the person the written request or a copy of it. The mortgagee or plaintiff shall be liable for damages to any person aggrieved at the rate of two hundred dollars for each week after the expiration of such sixty days up to a maximum of five thousand dollars or in an amount equal to the loss sustained by such aggrieved person as a result of the failure of the mortgagee or plaintiff or the plaintiff's attorney to execute and deliver a release, whichever is greater, plus costs and reasonable attorney's fees."

The following facts and procedural history, as stated by the trial court, are relevant to the resolution of the plaintiffs' claims on appeal. "On May 7, 2018, the plaintiffs . . . filed a two count complaint against the defendant . . . alleging the following facts. The plaintiffs owned property known as 261 Winthrop Avenue in New Haven, Connecticut (property). [The] property was encumbered by a mortgage given by the plaintiffs, dated October 13, 2010, and recorded on October 15, 2010, in the New Haven land records (land records) that, after several assignments, was assigned to the defendant by assignment dated January 2, 2014, and recorded on January 14, 2014, in the land records. On or about January 20, 2016, the plaintiffs paid off the mortgage to the defendant by wire transfer in accordance with the defendant's payoff statement, which the plaintiffs and the defendant had negotiated. The

defendant was notified of the statutorily mandated sixty day period to issue a valid release of the mortgage pursuant to . . . § 49-8, but the defendant failed to timely provide a proper and valid executed release of mortgage within that time period. The defendant violated § 49-8 and is liable for statutory damages in the amount of $5000, plus reasonable attorney's fees and costs." (Footnotes omitted.) The court further stated that the defendant filed an answer and special defenses in which it alleged that it was assigned the subject mortgage on the property and received sufficient funds to pay off the mortgage, however, the defendant denied that it had failed to provide a proper and valid release. The defendant moved to dismiss the action for lack of subject matter jurisdiction on the grounds that the plaintiffs were neither classically nor statutorily aggrieved. Alternatively, the defendant sought summary judgment.

In a decision filed May 21, 2019, the court granted the defendant's motion to dismiss. The court determined that "§ 49-8 is a penalty statute, and the plaintiffs can be, potentially, statutorily aggrieved simply by not having received a timely valid release from the defendant within sixty days of the requisite notice/request for release of mortgage having been sent and/or received . . . . The plaintiffs can only be aggrieved pursuant to § 49-8 if they have strictly complied with the statutory notice provisions." Although the court never notified the plaintiffs that it was considering granting the motion to dismiss on grounds that it had raised sua sponte concerning the plaintiffs' compliance with the statutory demand notice requirements in § 49-8 (c), it, nonetheless, did so. It concluded that the plaintiffs had not complied with these requirements: "First, the plaintiffs fail to indicate on the notice itself, and fail to present other evidence in support, that the notice was 'sent' to the defendant by registered or

certified mail, return receipt requested, as required by the statute. Second, the plaintiffs fail to indicate on the notice itself, and fail to present other evidence in support, that the notice was 'received' by the defendant or the defendant's attorney from a private messenger or courier service or through any means of communication, including electronic communication, as required by statute. . . . The court has further reason to doubt that the plaintiffs have sufficiently complied with the requirements in the statute; specifically, that the plaintiffs sent such notice to the defendant's last known address. In the assignment of the mortgage to the defendant, the address for the defendant is listed as: 6101 Condor Drive, Moorpark, CA 93021-2603. . . . The notice, however, lists a different zip code than the one provided on the assignment. The notice is addressed with the zip code 93201." (Internal quotation marks omitted.) The court concluded that, because "the plaintiffs have not met their burden of establishing that they complied with statutory demand notice in § 49-8, the court lacks subject matter jurisdiction. Therefore, the defendant's motion to dismiss is granted. In light of the court's ruling on the motion to dismiss, it need not address the alternate motion for summary judgment." This appeal followed.

I

The plaintiffs claim that the court violated their right to due process when it granted the defendant's motion to dismiss on grounds that the court had raised sua sponte. The plaintiffs specifically contend that the defendant did not raise in its motion to dismiss the issue of their alleged failure to satisfy the statutory demand notice requirements in § 49-8 (c), and that the court did not give them notice or an opportunity to be heard and present evidence of their compliance on that issue before it determined that their failure to satisfy those statutory requirements caused them to lack standing. We agree.

The following principles guide our analysis. Our review of the court's decision on a motion to dismiss is plenary. See *Izzo* v. *Quinn*, 170 Conn. App. 631, 636, 155 A.3d 315 (2017). Additionally, our review of whether a party has been deprived of due process is a question of law over which our review is plenary. See *Mikucka* v. *St. Lucian's Residence, Inc.*, 183 Conn. App. 147, 160–61, 191 A.3d 1083 (2018).

The language of § 49-8 (c) indicates that the defendant is required to provide a release of mortgage, to the extent of the satisfaction, within sixty days from the date that the plaintiffs properly sent a written demand for release of such mortgage or from the date that it was properly received. General Statutes § 49-8 (c). The issue of the plaintiffs' alleged failure to comply with the statutory demand notice requirements in § 49-8 (c), however, was not raised by the defendant in its motion to dismiss, in its accompanying memorandum of law, or during argument on the motion to dismiss. Rather, in its motion to dismiss, the defendant claimed that the plaintiffs lacked standing because "they never suffered any harm and thus are neither classically nor statutorily aggrieved." In its memorandum of law in support of its motion to dismiss, the defendant argued that the plaintiffs did not suffer an injury because the defendant had provided a release of mortgage that was effective to discharge the mortgage, despite a "typographical error," and that the plaintiffs were not aggrieved because they were not the owners of the property.

Although the plaintiffs, in their complaint, alleged an injury to an interest protected by § 49-8, the court determined that the plaintiffs were not aggrieved because they had failed to *demonstrate*, by the notice itself or by other evidence, that they had complied strictly with the requirements regarding a statutory demand notice for release of mortgage in § 49-8 (c). "A fundamental premise of due process is that a court

cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . . Generally, when the exercise of the court's discretion depends on issues of fact which are disputed, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." (Citation omitted; internal quotation marks omitted.) *Szot* v. *Szot*, 41 Conn. App. 238, 241, 674 A.2d 1384 (1996); see also *Conboy* v. *State*, 292 Conn. 642, 652, 974 A.2d 669 (2009) ("where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts").

We conclude that the court improperly addressed, sua sponte, the issue of the plaintiffs' alleged noncompliance with the statutory demand notice requirements in § 49-8 (c) without first providing the plaintiffs with notice or a reasonable opportunity to submit evidence of their compliance with those requirements. Additionally, the plaintiffs did not have an opportunity to contest whether they were required to demonstrate on the notice that was attached to the complaint that the notice had been received by the defendant mortgagee or its attorney.

The defendant argues that the court properly concluded that the plaintiffs failed to demonstrate that they had complied with the statutory written demand notice for release of mortgage requirements in § 49-8 (c). The defendant argues that the plaintiffs "had sufficient opportunity to demonstrate they fulfilled all conditions precedent" and that the plaintiffs "refused to present any evidence" of their compliance with the statutory demand notice requirements in § 49-8 (c). The defendant's argument, however, *presumes* that the plaintiffs knew that compliance with the statutory demand notice

requirements in § 49-8 (c) was at issue in the motion to dismiss and that they had an opportunity to present evidence. This argument *ignores* the dispositive fact that neither the defendant movant nor the court notified the plaintiffs that an issue to be decided by the court in ruling on the defendant's motion to dismiss was whether the plaintiffs had complied with those statutory requirements.

The defendant, nonetheless, contends that the plaintiffs somehow were on notice that the court might grant the motion to dismiss, sua sponte, on grounds relating to the plaintiffs' compliance with the statutory demand notice requirements in § 49-8 (c) by virtue of the defendant's special defenses. The defendant raised as a special defense to the complaint that the plaintiffs failed to satisfy all conditions precedent, including sending the required written demand notice to the defendant. We are not persuaded.

If the defendant wanted to place the plaintiffs on notice that it was seeking to have the court address this issue when ruling on its motion to dismiss, it needed to raise the issue *in connection* with its motion to dismiss. The defendant's special defenses did not place the plaintiffs on notice that the issue, which was never raised in the motion to dismiss, could be the dispositive basis for the court's decision. "The purpose of requiring written motions is not only the orderly administration of justice . . . but the fundamental requirement of due process of law." (Citation omitted; internal quotation marks omitted.) *Berglass* v. *Berglass*, 71 Conn. App. 771, 783, 804 A.2d 889 (2002).

The defendant next cites *Ghent* v. *Meadowhaven Condominium, Inc.*, 77 Conn. App. 276, 823 A.2d 355 (2003), as authority for its contention that it was the plaintiffs' burden, somehow, to anticipate that the court would raise, sua sponte, the issue of their alleged non-

compliance with the statutory demand notice requirements in § 49-8 (c), which the defendant argues is a condition precedent that must be satisfied in order for the trial court to have subject matter jurisdiction. The defendant contends that the plaintiffs' failure to satisfy that condition precedent warrants this court's dismissal of the appeal for lack of jurisdiction. We disagree.

This court decided in *Ghent* that the requirements in "[General Statutes] §§ 49-8 and 49-13 act as a limitation on the trial court's general authority to grant relief, but do not involve its subject matter jurisdiction . . . ." Id., 278 n.1. "A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Although related, the court's authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court to hear and determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute." (Citations omitted; internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999). Consequently, any alleged failure to satisfy the written demand notice requirement, does not deprive the court of jurisdiction to hear the matter, but rather it impacts the court's authority to grant the relief sought by the plaintiffs. Furthermore, regardless of whether the issue is jurisdictional or simply relates to the trial court's authority, due process requires the movant to have raised in its motion to dismiss the issue of the plaintiffs' compliance with the statutory demand notice requirements in § 49-8 (c) or, failing that, requires that the court to have provided the parties with notice that the issue was to be decided before it granted the defendant's motion to dismiss on that ground. Lack of that notice prevented the plaintiffs from presenting evidence that they had complied with the statutory demand notice requirements in § 49-8 (c).

II

The defendant argues that the court's granting of the motion to dismiss should be affirmed on the alternative grounds that the plaintiffs were not aggrieved pursuant to § 49-8 and, therefore, did not have standing because they (1) did not suffer any damages and cannot demonstrate any legally cognizable harm, (2) did not suffer any possibility of harm, and (3) are not the owners of the property. The defendant raised these issues in its motion to dismiss and the court, in its memorandum of decision, disagreed with the defendant's standing arguments. We also are not persuaded by these arguments.

Our review of a court's legal conclusion regarding standing is plenary. *Heinonen* v. *Gupton*, 173 Conn. App. 54, 59, 162 A.3d 70, cert. denied, 327 Conn. 902, 169 A.3d 794 (2017). To establish statutory standing, the plaintiffs must "claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, 198 Conn. App. 392, 402, 234 A.3d 111 (2020). Statutory interpretation involves a question of law over which our review is plenary. *Friezo* v. *Friezo*, 281 Conn. 166, 180, 914 A.2d 533 (2007).

Section 49-8 sounds in tort and prescribes damages for a breach of the statutory duty to release a mortgage. *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 200–201, 931 A.2d 916 (2007). In their complaint, the plaintiffs claimed an injury to an interest protected by § 49-8, namely, the defendant's failure to release the mortgage timely following their satisfaction of the mortgage, which is sufficient to demonstrate standing under the statute. "A statutorily aggrieved person need not have sustained any injury." *Lewis* v. *Planning & Zoning Commission*, 62 Conn. App. 284, 297, 771 A.2d 167 (2001).

Section 49-8 (c) specifies that the mortgagee is liable to an aggrieved person for the greater of either $200 for each week after the expiration of the sixty days up to a maximum of $5000 or an amount equal to the loss sustained by the aggrieved person as a result of the failure to execute and deliver a release. General Statutes § 49-8 (c). This court held in *Bellemare* v. *Wachovia Mortgage Corp.*, 94 Conn. App. 593, 602, 894 A.2d 335 (2006), aff'd, 284 Conn. 193, 931 A.2d 916 (2007), that, "even though § 49-8 allows the aggrieved party to recover actual damages, the statute does not require that the aggrieved party suffer actual damages in order to recover. In that light, it is apparent that the right vested in mortgagors by § 49-8 is to exact a penalty on a mortgagee who fails, on proper demand, to provide a release of mortgage within the statutorily prescribed time. Because the wronged party is entitled to an award of damages irrespective of whether there has been a showing of actual damages, the statute best can be understood as a coercive means to penalize those who violate its prescriptions." Because § 49-8 is a penalty statute that does not require the plaintiffs to suffer actual damages, the defendant cannot prevail on its argument that the plaintiffs lack standing because they did not suffer actual damages.

The defendant further argues that the plaintiffs lacked standing because they have not suffered any possibility of harm. The defendant contends that the original release can be considered valid pursuant to General Statutes § 49-9a, despite a "scrivener's error." The defendant noted in its appellate brief that it had executed the release as the attorney-in-fact for Bank of America, N.A., when the defendant, as the mortgagee, should have executed the release in its own name, Pennymac Loan Services, LLC. The release states that "Bank of America, N.A., is the holder of a certain Mortgage that was made by Mary L. Jackson and Johnnie Jackson . . . Bank of America, N.A., does hereby

acknowledge that it has received full payment and satisfaction . . . and in consideration thereof, does hereby cancel and release said Mortgage." The release was signed by "Bank of America, N.A., by Pennymac Loan Services, LLC, its Attorney-in-Fact . . . Kristopher Sandberg." In its memorandum of law in support of its motion to dismiss, the defendant noted that although it, and not Bank of America, N.A., was the mortgagee, pursuant to the savings clause of § 49-9a, a release is valid as if it had appeared in the name of the mortgagee. Section 49-9a (a) provides in relevant part that "a release of mortgage executed by any person other than an individual that is invalid because it is not issued or executed by, or fails to appear in the name of the record holder of the mortgage on one, two, three or four-family residential real property located in this state . . . shall be as valid as if it had been issued or executed by, or appeared in the name of, the record holder of the mortgage . . . provided *an affidavit is recorded* in the land records of the town where the mortgage was recorded [and states certain facts as specified in subdivisions (1) through (4) of subsection (a)]." (Emphasis added.) The court determined that it was not necessary to address the defendant's argument regarding § 49-9a. The court noted that, even if that statute were applicable, the statute requires that an affidavit be recorded in the land records as a condition precedent, and the defendant failed to provide the court with a copy of such an affidavit and that the defendant's attorney noted that he had not filed such an affidavit. We agree with the court that in the absence of evidence of the recording of an affidavit pursuant to § 49-9a (a), the defendant could not invoke that statute.

Alternatively, the defendant contends that the original release was effective despite a "scrivener's error" and further argues that, regardless of the effectiveness of the original release, the corrected release was retro-

actively effective as to the date of the recording of the original release. The court was not persuaded by these arguments and neither are we. In order to establish standing, the plaintiffs need only "a colorable claim of injury," and they can establish aggrievement by demonstrating "a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Orange*, 256 Conn. 557, 568, 775 A.2d 284 (2001). The plaintiffs allege in their complaint that they paid off the mortgage and that the defendant failed to timely release the mortgage after having been given notice. These allegations contain a colorable claim of injury. The issues of whether the original release was valid or whether the corrected release cured any defect do not implicate standing. Instead, those issues relate to the merits of the plaintiffs' claim that the defendant violated § 49-8 by failing to release the mortgage timely.

The defendant additionally argues, as an alternative ground for affirmance, that the plaintiffs did not suffer any monetary damages and, therefore, lack standing because they were not the owners of the property and had received forgiveness of $72,256.44 through a short sale of the property. In their complaint, the plaintiffs alleged that the defendant failed to provide a valid timely release of mortgage and that "[a]t all times herein mentioned" the plaintiffs were the owners of the property. Attached as an exhibit to the complaint was a copy of a document in which the defendant approved the plaintiffs' request for a short sale of the property and provided that, if certain terms, which included the defendant receiving the net proceeds from the sale, were met then the defendant would release the mortgage upon its satisfaction. Also attached to the complaint was a copy of a January 25, 2016 wire transfer receipt showing the negotiated payment from the plaintiffs to the defendant. The defendant attached to its

"motion to dismiss or, in the alternative, for summary judgment" an affidavit of Johnny Morton, a foreclosure operations supervisor of the defendant, in which Morton stated that, in January, 2016, the defendant agreed to accept all net proceeds of a short sale of the property in exchange for satisfaction of the mortgage, and that, on January 25, 2016, the defendant was paid in full satisfaction of the mortgage. In its memorandum of law in opposition to the defendant's motion to dismiss, the plaintiffs do not dispute the existence of a short sale, but contend that they have standing to bring an action pursuant to § 49-8 because Superior Court case law indicates that a homeowner who gave a warranty deed to an eventual buyer of the property has a legally protected interest in providing clear and marketable title to that property. See *New England Home Buyers, LLC* v. *DMR Builders, LLC*, Superior Court, judicial district of Waterbury, Docket No. CV-08-5011625-S (May 5, 2009).

Although the trial court did not find facts relating to the ownership of the property, it is undisputed that there was an agreement for a short sale of the property. The court concluded that the defendant could not prevail on its arguments regarding standing and stated that "[t]he statute clearly contemplates that a mortgagor can bring an action pursuant to § 49-8, and that a party does not have to suffer actual loss or injury in order to be 'aggrieved' pursuant to this statute," and determined that the plaintiffs, as the mortgagors, were potentially aggrieved parties pursuant to § 49-8 if they satisfied the statutory demand notice provision of the statute.

The defendant has not cited any case law, nor are we aware of any, that provides that *mortgagors* who alleged in their complaint that the mortgagee failed to timely release their mortgage, somehow, are not aggrieved pursuant to § 49-8. The plain language of § 49-8 (c) provides that "[t]he mortgagee . . . shall be liable for damages to *any person aggrieved* . . . ." (Emphasis

added.) This court's decision in *Hall* v. *Kasper Associates*, *Inc.*, 81 Conn. App. 808, 846 A.2d 228 (2004), reinforces the notion that the ability to be aggrieved pursuant to § 49-8 (c) is not exclusive to property owners. In *Hall*, the seller's attorney who had signed an agreement that indemnified the title insurer from any loss suffered as a result of an unreleased mortgage encumbrance was a "person aggrieved" pursuant to § 49-8 (c). Id., 812–13.

Even if we were to conclude that the statute is ambiguous; see General Statutes § 1-2z; we nonetheless would reach the same conclusion in light of the following legislative history. In *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 94 Conn. App. 604–605, which concerned whether the trial court properly determined that the tort statute of limitations applied to the claim of the plaintiff mortgagor, who had sold her home, that the defendant mortgagee failed to deliver a timely release of mortgage upon her satisfaction of the mortgage, this court noted: "[I]n 1986, during the hearings to amend § 49-8a, the cousin of § 49-8, Representative William L. Wollenberg noted the 'constant problem in the real estate [world] with mortgage releases . . . . When it comes time to sell a house or any real estate a release of that mortgage is necessary. . . . What has developed is an extreme difficulty in getting out of state mortgage companies and financial people . . . [t]o . . . give you the pay off, let alone a formal release of the mortgage for the land records.' 29 H.R. Proc., Pt. 11, 1986 Sess., pp. 4167–68. . . . [I]n 1995, § 49-8 was amended as part of 'An Act Concerning Release or Satisfaction of a Mortgage Lien.' Public Acts 1995, No. 95-102, § 1. The stated purpose of 'An Act Concerning Release or Satisfaction of a Mortgage Lien' was to 'revise the procedure for the release or satisfaction of a mortgage lien by increasing incentives to assure lenders comply with laws requiring releases and by enhancing the remedies and options available to mortgagors and attorneys when

lenders fail to comply.' . . . Accordingly, the legislative history and statutory scheme of § 49-8 establish that the statute was enacted and continues not only to protect property owners, but it has a more general purpose of enhancing the marketability of titles and facilitating economic intercourse in deeded transactions. See id.; Conn. Joint Standing Committee Hearings, Banks, 1979 Sess., pp. 283–84; 29 H.R. Proc., Pt. 11, 1986 Sess., pp. 4166–68." (Citations omitted; emphasis omitted.)

The plain language of the statute provides damages for aggrieved persons if the mortgagee fails to execute or deliver a timely release of mortgage. See General Statutes § 49-8 (c). The legislative history makes clear that the statute is meant to facilitate the marketability of properties by penalizing mortgagees who fail to provide mortgagors with a timely release of mortgage. The plaintiff mortgagors, who allegedly did not receive a timely release of the mortgage on their property after they undisputedly sold the property in a short sale, are aggrieved persons within the meaning of § 49-8 (c). Accordingly, we determine that the defendant cannot prevail on its standing arguments.

We conclude that the court improperly granted the defendant's motion to dismiss because it, sua sponte, raised and addressed the issue regarding the plaintiffs' compliance with the statutory demand notice requirements of § 49-8 (c) without providing them with notice or an opportunity to be heard. We do not agree with the defendant that the court's decision can be affirmed on the alternative grounds it has raised.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

ELIYAHU MIRLIS *v.* YESHIVA OF NEW HAVEN, INC.
(AC 44016)

Alvord, Elgo and Cradle, Js.

Syllabus

The plaintiff sought to foreclosure a judgment lien on certain real property owned by the defendant in connection with an unsatisfied judgment from a previous case involving the parties. The plaintiff submitted an appraisal before the trial court valuing the property at $960,000, and the defendant submitted an appraisal valuing the property at $390,000. Following a hearing, the court found the fair market value of the property to be $620,000, and rendered a judgment of strict foreclosure in favor of the plaintiff, from which the defendant appealed to this court. *Held* that the trial court did not improperly determine the fair market value of the property: the record contained ample documentary and testimonial evidence regarding the valuation of the property in question; moreover, in light of the significant disagreements between the expert appraisers offered by the parties, the court reasonably could conclude that a compromise figure best reflected the fair market value of the property.

Argued February 9—officially released June 8, 2021

Procedural History

Action to foreclose a judgment lien on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Spader*, *J.*, granted the plaintiff's motion for summary judgment as to liability only; thereafter, the matter was tried to the court, *Baio*, *J.*; subsequently, the court granted the defendant's motion to substitute a cash bond subject to certain conditions; thereafter, the court, *Baio*, *J.*, rendered judgment of strict foreclosure, from which the defendant appealed to this court. *Affirmed.*

Jeffrey M. Sklarz, for the appellant (defendant).

John L. Cesaroni, with whom, on the brief, was *James M. Moriarty*, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, Yeshiva of New Haven, Inc.,[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Eliyahu Mirlis. On appeal, the defendant claims that the court improperly determined the valuation of the property in question. We affirm the judgment of the trial court.

The relevant facts are not in dispute. The defendant is a Connecticut corporation that operated an orthodox Jewish high school in New Haven. In 2016, the plaintiff brought an action in federal court against the defendant and Daniel Greer,[2] "alleging that Greer, a rabbi and the former chief administrator of [the defendant], sexually abused him for several years while he was a student at the high school." *Mirlis* v. *Greer*, 952 F.3d 36, 40 (2d Cir. 2020), cert. denied, U.S. , 141 S. Ct. 1265, 209 L. Ed. 2d 8 (2021). Following a trial, the jury returned a verdict in favor of the plaintiff. The United States District Court for the District of Connecticut rendered judgment accordingly and entered a total award of $21,749,041.10, which included punitive damages and offer of compromise interest. The United States Court of Appeals for the Second Circuit subsequently affirmed the propriety of that judgment. Id., 51.

At all relevant times, the defendant owned real property known as 765 Elm Street in New Haven (property). When the judgment in his federal case went unsatisfied, the plaintiff filed a judgment lien on the property, which was recorded on the New Haven land records.[3] He then

[1] In its complaint, the plaintiff named the defendant in full as "Yeshiva of New Haven, Inc. FKA The Gan, Inc. FKA The Gan School, Tikvah High School and Yeshiva of New Haven, Inc."

[2] Greer is not a party to this foreclosure action.

[3] That judgment lien states in relevant part: "The judgment obtained by [the plaintiff] was in the amount of . . . $21,749,041.10, as of June 6, 2017. No amount of the judgment obtained by [the plaintiff] against [the defendant] has been paid to date, and the entire amount is due thereon."

commenced this action in the Superior Court to foreclose on that lien.

On November 8, 2017, the plaintiff filed a motion for summary judgment as to liability only. The defendant did not oppose that motion, which the court granted on January 16, 2018. The plaintiff thereafter filed a motion for a judgment of strict foreclosure, which was accompanied by an eighty-three page written appraisal of the property. That appraisal concluded that the fair market value of the property was $960,000. The defendant filed an objection to the motion for strict foreclosure, claiming that "there is a dispute as to the value" of the property. Appended to the defendant's opposition was a two page written appraisal that specified a fair market value of $375,000 for the property. The defendant later submitted a more comprehensive written appraisal that estimated the fair market value of the property at $390,000.

The court held an evidentiary hearing on the valuation dispute, at which each party submitted the testimony and written report of their respective appraisers. Both expert appraisers testified that they had used the sales comparison approach to determine the property's fair market value. Utilizing that approach, the defendant's appraiser, Patrick Wellspeak, initially estimated the value of the property to be $500,000 in light of comparable sales. Wellspeak then explained that he deducted $110,000 from that estimate due to "environmental issues" on the property, which resulted in a fair market value of $390,000. Wellspeak conceded that his conclusions with respect to those issues were predicated on a report prepared by Derrick Jones, who identified environmental issues that allegedly existed on the property.[4] On cross-examination, Wellspeak was asked if he did

[4] In his testimony, Wellspeak stated: "So Mr. Jones identified four primary environmental issues. One was dealing with an underground storage tank. The other was lead in the water for the drinking fountains. A third was lead paint on the windows. And the fourth was asbestos in the flooring."

anything apart from reviewing Jones' report and speaking with him to assess the environmental condition of the property; Wellspeak replied, "No, those would be the only things that I did, reviewed his report and then had conversations with him."

The plaintiff's appraiser, Patrick Craffey, concluded that the fair market value of the property in light of comparable sales was $960,000. Craffey testified that he first "became aware" of Jones' report after he had performed his appraisal and explained that the report did not change his conclusions as to the value of the property, as his appraisal was "made irrespective of any environmental contamination."

In its subsequent memorandum of decision, the court began by noting that, in reaching its conclusions, it had "carefully and fully considered and weighed all of the evidence received at the hearing; evaluated the credibility of the witnesses; assessed the weight, if any, to be given specific evidence and measured the probative force of conflicting evidence; reviewed all exhibits, relevant statutes, and case law; and has drawn such inferences from the evidence, or facts established by the evidence, that it deems reasonable and logical." The court noted that both appraisers had utilized the sales comparison method to determine fair market value and had agreed that the highest and best use of the property was as a school. The court further found that the parties' respective appraisers, "while employing the same . . . method for valuation . . . took different approaches in doing so. . . . [T]he parties each took issue with the properties chosen by the other appraiser in determining the comparative sales." The court also noted that, unlike Craffey, Wellspeak had considered "environmental impact on the fair market value."

The court emphasized that "[t]he ultimate opinions regarding valuation were at considerable variance. Both parties take issue with the comparable sales considered

by the other, and each takes issue with the other's treatment of environmental concerns." The court continued: "When confronted with conflicting evidence as to valuation, the trier may properly conclude that under all the circumstances a compromise figure most accurately reflects fair market value." The court then found, in light of "all of the evidence presented," that the fair market value of the property was $620,000. The court thereafter rendered a judgment of strict foreclosure in favor of the plaintiff, and this appeal followed.

On appeal, the defendant claims that the court improperly determined the fair market value of the property, contending that "no evidence" supported its valuation. We disagree.

Under Connecticut law, a judgment lien on real property may be foreclosed in the same manner as a mortgage on that property. General Statutes § 52-380a (c). The standard of review that governs mortgage foreclosure proceedings thus applies to this judgment lien foreclosure appeal. "It is in the trial court's province to determine the valuation of mortgaged property, usually guided by expert witnesses, relevant circumstances bearing on value, and its own knowledge. . . . The trial court also determines the credibility and weight accorded to the witnesses, their testimony, and the evidence admitted. . . . Thus, the trial court's conclusion regarding the fair market value of the mortgaged property will be upheld unless there was an error of law or a legal or logical inconsistency with the facts found. . . . Its determination of valuation will stand unless it appears on the record . . . that the [trial] court misapplied or overlooked, or gave a wrong or improper effect to, any test or consideration which it was [its] duty to regard." (Citations omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 320 Conn. 91, 96, 128 A.3d 471 (2016).

In the present case, the court was presented with conflicting expert testimony concerning the proper val-

uation of the property in question. Those experts disagreed on precisely which sales should be considered under the sales comparison approach to valuation,[5] as well as the extent to which environmental concerns factored into the analysis. As a result, there was a significant discrepancy between the $960,000 valuation of the property provided by the plaintiff's appraiser and the $390,000 valuation provided by the defendant's appraiser.

As our Supreme Court has explained, "the trial court *may* set the property value at a compromise figure when confronted with conflicting expert testimony as to valuation . . . ." (Emphasis in original.) *Eichman* v. *J & J Building Co.*, 216 Conn. 443, 452, 582 A.2d 182 (1990). In *New Haven Savings Bank* v. *West Haven Sound Development*, 190 Conn. 60, 67, 459 A.2d 999 (1983), the trial court "was confronted with conflicting expert opinion testimony concerning valuation of the subject property." Although the defendants in that case—like the defendant here—claimed on appeal that "there was 'no evidence' upon which the court could have reached its valuation figure," our Supreme Court rejected that claim, stating: "When confronted with conflicting evidence as to valuation, the trier may properly conclude that under all the circumstances a compro-

[5] The plaintiff's appraiser selected four comparable sales for purposes of his May 30, 2019 valuation of the property: (1) the January, 2019 sale of the Paier College of Art in Hamden for $1 million; (2) the August, 2017 sale of Learn Academy in New London for $1.9 million; (3) the October, 2014 sale of a Montessori school in West Hartford for $1,450,000; and (4) the June, 2014 sale of Museum Academy in Bloomfield for $2.8 million. His report provided details on all four sales, as well as a sales comparison analysis and market conditions adjustment. By contrast, the defendant's appraiser selected five different sales for purposes of his August 2, 2019 valuation of the property: (1) the April, 2019 sale of a school property on Greene Street in New Haven for $1.2 million; (2) the December, 2018 sale of a school property on Clifford Street in Hartford for $1,411,000; (3) the June, 2017 sale of a school property on Whalley Avenue in New Haven for $1,525,000; (4) the April, 2016 sale of a school property on Cedar Grove in New London for $600,000; and (5) the June, 2015 sale of an office building on State Street in New Haven for $552,500.

mise figure most accurately reflects fair market value." Id., 70. The court further held that "such an approach, which was clearly an effort to give due regard to all circumstances, was reasonable." Id.; accord *Whitney Center*, *Inc.* v. *Hamden*, 4 Conn. App. 426, 429–30, 494 A.2d 624 (1985) (applying *New Haven Savings Bank* and concluding that trial court properly determined that " 'this is a case where under all the circumstances a compromise figure will most accurately reflect the fair market value' "). That logic applies equally to the present case.

Contrary to the contention of the defendant, the record before us contains ample documentary and testimonial evidence regarding the valuation of the property in question. Moreover, in light of the significant disagreements between the expert appraisers offered by the parties, the court reasonably could conclude that a compromise figure best reflected the fair market value of the property. Accordingly, the defendant's challenge to that valuation fails.[6]

The judgment is affirmed.

In this opinion the other judges concurred.

[6] We are compelled to note that, in its principal appellate brief, the defendant also argues that this court "should reverse the foreclosure judgment," stating in full: "Since the defendant has an absolute right to substitute a bond in lieu of the judgment lien, the foreclosure judgment should not have entered. . . . The plaintiff did not appeal this decision of the trial court." (Citation omitted.) The defendant has provided neither legal authority nor analysis to substantiate that bald assertion. "[Our Supreme Court] repeatedly [has] stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Taylor* v. *Mucci*, 288 Conn. 379, 383 n.4, 952 A.2d 776 (2008); see also *Northeast Ct. Economic Alliance*, *Inc.* v. *ATC Partnership*, 272 Conn. 14, 51 n.23, 861 A.2d 473 (2004) ("[i]nasmuch as the plaintiffs' briefing of the . . . issue constitutes an abstract assertion completely devoid of citation to legal authority or the appropriate standard of review, we exercise our discretion to decline to review this claim as inadequately briefed"); *Russell* v. *Russell*, 91 Conn. App. 619, 635, 882 A.2d 98 (parties must analyze relationship between facts of case and applicable law), cert. denied, 276 Conn. 924, 925, 888 A.2d 92 (2005). We therefore decline to review that abstract assertion.

GEORGE BERKA *v.* CITY OF MIDDLETOWN ET AL.
(AC 43853)

Alvord, Elgo and Albis, Js.

Syllabus

The plaintiff appealed to the Superior Court from the decision of the defendant citation hearing officer for the defendant city of Middletown upholding a citation assessed against him for violating the city's anti-blight ordinance. The court upheld six of the seven blight violations alleged against the plaintiff and calculated a resulting fine, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly granted the defendants' motion to strike the plaintiff's request for a jury trial; the plaintiff cited no authority that would support his challenge to the plain language of the rule of practice (§ 23-51) that governs petitions to reopen citation assessments and provides that there is no right to a hearing before a jury in such circumstances.
2. The plaintiff could not prevail on his claim that the citation hearing officer had a conflict of interest: the plaintiff never raised this issue before the citation hearing officer, which precluded him from raising the issue on appeal; moreover, even if the citation hearing officer had a conflict of interest, the hearing on appeal before the trial court was a de novo proceeding, and any possible prejudice would have been cured because the decision of the trial court, not that of the citation hearing officer, was on appeal.
3. This court declined to address the merits of the plaintiff's constitutional claims as they were not properly before the trial court, which never ruled on them, and could not be reviewed for the first time on appeal: the plaintiff filed a request to amend his complaint that included constitutional claims three days prior to the de novo hearing, and his attempted amendment failed to comport with the requirements of the rules of practice (§§ 10-1 and 10-60) regarding the amendment of pleadings, such that the court sustained the defendants' objection to the plaintiff's request to amend; accordingly, the court did not abuse its discretion in refusing to permit the plaintiff to amend his petition or to argue those constitutional issues at the de novo hearing.
4. The trial court's factual findings challenged by the plaintiff on appeal were not clearly erroneous; the findings were supported by evidence in the record, and this court was not left with a definite and firm conviction that any mistake had been committed.

Argued February 3—officially released June 8, 2021

Procedural History

Petition to reopen a citation assessment issued by the named defendant, brought to the Superior Court in the judicial district of Middlesex, where the court, *Domnarski*, *J.*, granted the defendants' motion to strike the plaintiff's claim for a jury trial; thereafter, the court, *Hon. Edward S. Domnarski*, judge trial referee, rendered judgment denying the petition, from which the plaintiff appealed to this court. *Affirmed.*

George Berka, self-represented, the appellant (plaintiff).

Brig Smith, general counsel, for the appellees (defendants).

Opinion

ALBIS, J. The plaintiff, George Berka, appeals from the judgment of the trial court denying his petition to reopen a municipal blight citation assessment and upholding a failure to pay fines notice issued by the defendant city of Middletown (city), with respect to six blight violations that existed on the plaintiff's rental property located at 5 Maple Place in Middletown (property). Specifically, the plaintiff claims that (1) he should have been granted a jury trial, (2) he should have been allowed to raise constitutional issues related to the blight ordinance at his appeal hearing, (3) the blight citation violated his constitutional rights, (4) boarded windows should not constitute blight, (5) it was neither fair nor reasonable to expect him to pour concrete and to paint in the winter, (6) the blight enforcement officer was not qualified to make structural assessments about the property, (7) the siding on his home was not "seriously damaged," (8) the outside structural walls of his home were watertight, (9) there was no garbage, rubbish, or refuse being stored or accumulated in public view, and

(10) the hearing officer, defendant Sylvia K. Rutkowska,[1] had a conflict of interest. We disagree, and, accordingly, affirm the judgment of the trial court.

The following chronology is drawn from the trial court's memorandum of decision. "By letter dated January 10, 2018, the [city] gave the plaintiff a notice of blight for [the property] . . . . The notice referred to seven blight conditions.[2] . . . The [city] issued the plaintiff a blight citation on February 14, 2018, for the seven separate violations of the blight ordinance and imposed a $100 per day civil fine for each violation. . . . On March 28, 2018, the [city] issued a failure to pay fines notice for blight violations. . . . The failure to pay fines notice stated that accumulated fines totaled $29,400 (42 days x $700). The notice also advised the plaintiff of his right to appeal. An appeal hearing was conducted by a citation hearing officer on May 2, 2018. The hearing officer issued a revised notice of decision/assessment on May 7, 2018, assessing fines through the date of the appeal, which resulted in a total of $53,900 (77 days x $700)." (Citations omitted; footnote added.)

The plaintiff appealed that decision to the Superior Court by filing a petition to reopen a municipal blight citation assessment pursuant to General Statutes § 7-

[1] In this opinion we refer to the city and Rutkowska individually by name where necessary and collectively as the defendants.

[2] In its decision, the court noted the blight conditions referenced in the notice of blight as follows: "(1) missing, broken or boarded windows or doors, if the building is not vacant or abandoned . . . (2) broken glass, crumbling stone or other conditions reflective of deterioration or inadequate maintenance . . . (3) a collapsing or missing exterior wall, roof, floor, stairs, porch, railings, basement hatchways, chimneys, gutters, awnings or other features . . . (4) siding or roofing that is seriously damaged, missing, faded or peeling; (5) the outside structure walls are not weather[tight] [or] watertight, that is evidenced by having any holes, loose boards, or any broken, cracked or damaged siding that admits rain, cold air, dampness, rodents, insects or vermin . . . (6) garbage, rubbish, refuse, accumulating refuse, putrescible items, trash or other accumulated debris that is being stored or accumulated in public view . . . [and] (7) abandoned or inoperable vehicles are improperly stored on the premises . . . ." (Citations omitted.)

152c (g) and Practice Book § 23-51,[3] and the court held a de novo hearing on the petition on November 7, 2019.[4] At that hearing, the court heard testimony from Michelle Ford, the blight enforcement officer for the city at the time of the May 2, 2018 hearing. Ford testified that she had inspected the subject property on February 13, 2018, and March 27, 2018, that she took photographs of the alleged blight conditions on both occasions, and that she issued the blight citation and failure to pay fines notices. In its January 16, 2020 memorandum of decision, the court upheld six of the seven blight violations.[5] The court explained that it had "carefully considered Ford's testimony and thoroughly reviewed the [inspection] photographs," and that it found that six violations existed on, and the fines accrued from, February 14, 2018, through March 27, 2018. The court calculated the resulting fine as $25,200 (42 days x $600). This appeal followed. Additional facts will be set forth as necessary.

[3] General Statutes § 7-152c (g) provides: "A person against whom an assessment has been entered pursuant to this section is entitled to judicial review by way of appeal. An appeal shall be instituted within thirty days of the mailing of notice of such assessment by filing a petition to reopen assessment, together with an entry fee in an amount equal to the entry fee for a small claims case pursuant to section 52-259, at a superior court facility designated by the Chief Court Administrator, which shall entitle such person to a hearing in accordance with the rules of the judges of the Superior Court."

Practice Book § 23-51 provides: "(a) Any aggrieved person who wishes to appeal a parking or citation assessment issued by a town, city, borough or other municipality shall file with the clerk of the court within the time limited by statute a petition to open assessment with a copy of the notice of assessment annexed thereto. A copy of the petition with the notice of assessment annexed shall be sent by the petitioner by certified mail to the town, city, borough or municipality involved.

"(b) Upon receipt of the petition, the clerk of the court, after consultation with the presiding judge, shall set a hearing date on the petition and shall notify the parties thereof. There shall be no pleadings subsequent to the petition.

"(c) The hearing on the petition shall be de novo. There shall be no right to a hearing before a jury."

[4] The parties refer to the petition as a "complaint."

[5] With respect to the seventh alleged violation, the court found that there was no evidence to establish that the trailer stored on the plaintiff's property was mechanically inoperable.

I

The plaintiff claims that he was entitled to a jury trial in his appeal of the blight citation. We disagree.

The following additional facts are relevant to our resolution of this claim. On November 13, 2018, the plaintiff requested a jury trial of his appeal. On October 30, 2019, the defendants filed a motion to strike the plaintiff's request for a jury trial on the ground that there is no right to a jury trial in citation assessment appeals pursuant to Practice Book § 23-51 (c). On November 6, 2019, the court granted the defendants' motion.

The plaintiff's claim is governed by Practice Book § 23-51, which is titled "Petition To Open Parking or Citation Assessment," and provides in subsection (c) that "[t]he hearing on the petition shall be de novo. There shall be no right to a hearing before a jury." Nevertheless, the plaintiff argues that "blight citations are grouped together with parking tickets, which are generally around $20 . . . . Perhaps the authors here had these types of 'small' citations in mind when writing this section, and it is understandable that they likely saw these small citations as 'too trivial' to warrant a jury trial. However, a $53,900 blight fine is a 'far cry' from a $20 parking ticket! Doesn't a case in which a person's home is on the line deserve a hearing before a jury?" The plaintiff cites no authority that would support his challenge to the plain language of § 23-51. We are not persuaded, and, accordingly, the trial court properly granted the defendants' motion to strike the plaintiff's request for a jury trial.

II

The plaintiff next claims that Rutkowska "may have had a conflict of interest." He claims that "[p]rior to being permitted to appeal his blight citation to the Supe-

rior Court, [he was required to] attend a hearing on the matter before the city officials and a 'citation hearing officer,' whom the city designates. Th[e] hearing officer who presided over this hearing . . . Rutkowska, is actually a local attorney, who has business dealings and an attorney-client relationship with the city." (Emphasis omitted.) The plaintiff, therefore, claims that Rutkowska was unlikely to be objective and that her potential conflict of interest "may have caused the plaintiff to be prejudiced . . . ."

At oral argument before this court, the plaintiff conceded that he never raised this issue at the hearing before Rutkowska. The failure to raise the claim of bias of the administrative hearing officer at the time of the hearing precludes the plaintiff from raising the issue on appeal. See *Moraski* v. *Connecticut Board of Examiners of Embalmers & Funeral Directors*, 291 Conn. 242, 261–62, 967 A.2d 1199 (2009). Moreover, even if Rutkowska did have a conflict of interest, as the plaintiff claimed, the hearing on appeal before the trial court was a de novo proceeding, and, therefore, any possible prejudice would be cured. Because the decision of the trial court, and not that of Rutkowska, is currently on appeal, we agree with the court that the de novo hearing on appeal before the trial court cured any possible prejudice to the plaintiff.

III

We next turn to the plaintiff's two constitutional arguments. The plaintiff claims that (1) he should have been permitted to raise constitutional issues with respect to his blight citation during the appeal hearing, and (2) the blight citation violated the first, fourth, fifth, and eighth amendments to the United States constitution. We conclude that the trial court did not abuse its discretion in denying the plaintiff's requests to raise those constitutional claims, and, consequently, we decline to address them on their merits.

The following additional facts are relevant to our resolution of these claims. On November 4, 2019, the plaintiff filed a request to amend the complaint and an amended complaint[6] that included his constitutional claims. The defendants objected to that request on November 5, 2019, and the court sustained their objection on December 5, 2019. Nevertheless, the plaintiff notes in his appellate brief that, "during the hearing, the plaintiff had again asked the judge if he could present testimony as to why he believed this entire blight citation to be unconstitutional in the first place, and, again, the judge denied the plaintiff's request."

Practice Book § 10-60 provides in relevant part: "(a) . . . [A] party may amend his or her pleadings . . . at any time . . . in the following manner: (1) By order of judicial authority; or (2) By written consent of the adverse party; or (3) By filing a request for leave to file an amendment together with . . . (B) an additional document showing the portion or portions of the original pleading or other parts of the record or proceedings with the added language underlined and the deleted language stricken through or bracketed. . . .

"(b) The judicial authority may restrain such amendments so far as may be necessary to compel the parties to join issue in a reasonable time for trial. . . ." "Whether to allow an amendment is a matter left to the sound discretion of the trial court. [An appellate] court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [amending party's] burden . . . to demonstrate that the trial court clearly abused its discretion." (Internal quotation marks omitted.) *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 184, 73 A.3d 742 (2013).

[6] See footnote 4 of this opinion.

Practice Book § 23-51 provides in relevant part: "(a) Any aggrieved person who wishes to appeal a parking or citation assessment issued by a town, city, borough or other municipality shall file with the clerk of the court within the time limited by statute a petition to open assessment with a copy of the notice of assessment annexed thereto. . . .

"(b) Upon receipt of the petition, the clerk of the court . . . shall set a hearing date on the petition and shall notify the parties thereof. There shall be no pleadings subsequent to the petition."

The record reveals that the plaintiff filed his request to amend on November 4, 2019, merely three days prior to the de novo hearing that was held on November 7, 2019, and that his attempted amendment failed to comport with the requirements of Practice Book §§ 10-1 and 10-60 (a) (3). Accordingly, we conclude that the trial court did not abuse its discretion in refusing to permit the plaintiff to amend his petition or to argue those constitutional issues at the de novo hearing.

Consequently, because the plaintiff's constitutional arguments were not properly before the trial court, which, therefore, never ruled on them, we cannot review them for the first time on appeal. "Our appellate courts, as a general practice, will not review claims made for the first time on appeal." (Internal quotation marks omitted.) *Guzman* v. *Yeroz*, 167 Conn. App. 420, 426, 143 A.3d 661, cert. denied, 323 Conn. 923, 150 A.3d 1152 (2016). "It is well established that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.) *Council* v. *Commissioner of Correction*, 286 Conn. 477, 498, 944 A.2d 340 (2008). "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided

by the trial court." (Citations omitted; internal quotation marks omitted.) *Burnham* v. *Karl & Gelb, P.C.*, 252 Conn. 153, 170–71, 745 A.2d 178 (2000); see also Practice Book § 60-5. Accordingly, we decline to address the merits of the plaintiff's constitutional claims.

IV

Finally, the plaintiff challenges six of the trial court's findings of fact. Specifically, he claims that boarded windows should not constitute blight, that it was neither fair nor reasonable to expect him to pour concrete and to paint in the winter, that the blight enforcement officer was not qualified to make structural assessments about the property, that the siding on his home was not "seriously damaged," that the outside structural walls of his home were watertight, and that there was no garbage, rubbish, or refuse being stored or accumulated in public view. We conclude that the court's factual findings are not clearly erroneous.

"The trier of facts is the judge of the credibility of the testimony and of the weight to be accorded it. . . . [A finding of fact] will not be reversed or modified unless it is clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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. . . . The weight to be given to the evidence and to the credibility of witnesses is solely within the determination of the trier of fact. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Cohen* v. *Roll-A-*

Cover, *LLC*, 131 Conn. App. 443, 450–51, 27 A.3d 1, cert. denied, 303 Conn. 915, 33 A.3d 739 (2011).

The factual findings challenged by the plaintiff on appeal were supported by evidence in the record, and we are not left with a definite and firm conviction that any mistake has been committed. With respect to the plaintiff's claim that he should not have been required to paint and pour concrete in the winter, we further note that the plaintiff conceded at oral argument before this court that he did not request additional time from the city to comply with those requirements in warmer weather. Additionally, we need not reach the issue of the blight enforcement officer's qualifications, because the trial court determined independently, after reviewing the photographs of the property, that the structural blight conditions existed. The trial court's findings are not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.