STATE OF CONNECTICUT *v.* PAUL A. QUINTILIANO (AC 43137)

Bright, C. J., and Moll and DiPentima, Js.

Syllabus

Convicted of the crime of criminal mischief in the first degree in connection with a property dispute with his neighbor, C, the defendant appealed to this court, claiming, inter alia, that there was insufficient evidence to demonstrate that he had no reasonable ground to believe that he had a right to remove certain trees C had planted on C's land. The defendant claimed to enjoy deeded easement rights to the land in question. C planted a number of trees, some of which were located along the border of the land subject to the easement, and the defendant, following advice from attorneys, subsequently dug up the trees along the border. The state charged the defendant with criminal mischief in the first degree for intentionally causing damage in excess of $1500 to C's tangible property without a reasonable ground to believe he had the right to do so. *Held*:

1. The trial court's finding that the trees were beyond the easement area was clearly erroneous; there was insufficient evidence in the record to establish the precise location of the easement area or the location of the trees in relation thereto, as none of the maps admitted into evidence established where the deeded easement actually ended or depicted the location of the trees, the witness testimony was imprecise and inadequate to support the court's finding, and there was no expert testimony presented on the topic of the location of the easement area or the trees.
2. The evidence adduced at trial was insufficient to support the defendant's conviction of criminal mischief in the first degree: the trial court failed to recognized the defendant's right under Connecticut easement law to remove the obstructing trees from his right-of-way without first seeking judicial intervention; moreover, because the court failed to recognize the defendant's right, it erred in finding that it was not credible that an attorney would advise his client that the client was entitled to remove property that was blocking access to a right-of-way granted in an easement, and, as a result, improperly concluded that, as a matter of law, the defendant could not have had a reasonable ground to believe that he had the right to remove the trees from the easement area; accordingly, a judgment of acquittal was directed.

Argued February 18—officially released August 17, 2021

Procedural History

Substitute information charging the defendant with the crime of criminal mischief in the first degree, brought

to the Superior Court in the judicial district of Waterbury, geographical area number four, and tried to the court, *Crawford*, *J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal; judgment of guilty, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

Alexander Copp, with whom were *Neil R. Marcus*, and, on the brief, *Barbara M. Schellenberg*, for the appellant (defendant).

Linda F. Currie, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Joseph Danielowski*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. In this criminal appeal, which arises out of a property dispute between neighbors, the defendant, Paul A. Quintiliano, appeals from the judgment of conviction, rendered after a trial to the court, of criminal mischief in the first degree in violation of General Statutes § 53a-115 (a) (1).[1] On appeal, the defendant claims, inter alia, that there was insufficient evidence to demonstrate that he had no reasonable ground to believe that he had a right to remove certain trees planted by his former neighbor, Brian Collins, on a portion of land then owned by Collins with respect to which the defendant claimed to enjoy deeded or prescriptive easement rights.[2] We agree and, accordingly, reverse the judgment of the trial court.

[1] General Statutes § 53a-115 provides in relevant part: "(a) A person is guilty of criminal mischief in the first degree when: (1) With intent to cause damage to tangible property of another and having no reasonable ground to believe that such person has a right to do so, such person damages tangible property of another in an amount exceeding one thousand five hundred dollars . . . .

"(b) Criminal mischief in the first degree is a class D felony."

[2] The defendant also claims that the state presented insufficient evidence of (1) intent to cause damage to tangible property of another and (2) damage to tangible property of another in an amount exceeding $1500. In light

The following facts, as set forth in the court's memorandum of decision, are relevant to our decision. "On June 25, 2017 . . . Collins, and the defendant . . . owned lots in a subdivision in Southbury. [Collins] owned lot number [23.04], and the defendant owned lot number [23.03] . . . . There are two warranty deeds . . . and a quitclaim deed . . . . Each [deed] references a common driveway agreement, hereinafter referred to as a CDA. . . . The CDA includes an easement granted by the owner of lot number [23.04] to the owner of lot number [23.03]. The easement granted a perpetual right-of-way for ingress and egress, by foot or vehicle, including the right to construct, pave and maintain a driveway and use the same in common with the owner, present and future. The easement area is within the northerly most 1000 feet of the 30 foot wide portion of lot number [23.04] adjoining the westerly boundary of lot number [23.03] and lot number [23.02]. . . . The CDA was signed on June 2, 1993, and the easement runs with the land.

"Prior to 2013, the defendant had a box truck and small white tent parked in the corner of his lot. He used this for storage. His wife said [that] the small tent had been destroyed. [Collins] gave the defendant permission to access the storage area from the common driveway. [The defendant's wife] also stated [that] the permission was granted approximately one year before [Collins] started planting, and [Collins] had promised to leave access to the storage area on the property. And that was granted about one year before [Collins] started planting the trees.

"In 2013, the defendant erected a very large green tent and attached it to the box truck located on his property. The defendant expanded his excavating business in 2013. [Collins] stated that the defendant never came down to the area prior to erecting the large green

of our resolution of the defendant's first claim, we need not address his other claims.

tent. He was always in the back area on his property—on his own property. [The defendant's wife] said the defendant went down twice a week, and she drove down once every other week as she used the storage area to store items connected with her eBay business. However, it is unclear when she started her eBay business. The defendant did not live on the premises between 2002 and 2010. Furthermore, the defendant could access the storage area on his own lot without having to use the common driveway. With the expansion of his excavating business, the large green tent was needed to store additional equipment connected with that business. After the erection of the large green tent, the defendant started coming down to the area. . . .

"In 2013 or 2014, [Collins] informed the defendant he would be planting trees. On June 3, 2016, [Collins] paid Green Giant Arborvitaes Rapid Grow [$5423.21] for forty-three or forty-four trees to include the planting of the trees . . . . The trees were planted on June 11, 2016, eighteen of which were along the border beyond the thirty foot wide portion of lot number [23.04] adjoining the westerly boundary of lot number [23.03] and lot number [23.02]. After [Collins] planted the trees, the defendant informed him that he would tear out the trees. [Collins] also noticed one tree had been knocked over.

"[Collins] called the police and Officer [Brian] McKirryher responded. The defendant told the officer he had used the area for fifteen years. Officer McKirryher informed the defendant that any right he believed he had should be determined in a civil proceeding, but if he ran over the trees, there would be consequences. [Collins] said the officer told the defendant that it would be a crime.

"Thereafter, the defendant sent a letter to [Collins] informing him that he had four days to remove the trees

and that his attorney had advised him he could take out ten of the trees. . . .

"[O]n June 25, 2017, eighteen of the trees had been dug up and thrown on the side of the road . . . . [Collins] called the police. When the officer arrived, he saw the trees uprooted and on the side of the road in dirt. He also saw the defendant's excavator. Later he saw the defendant on the excavator, and he also saw the area where the defendant had ripped up the trees. The defendant informed the officer that the trees wouldn't die if they were watered and replanted and that his attorney had advised him he had a right to access the large green tent he had put up. And the trees blocked the access to his shed, and his attorney told him he had a right to tear them up. The officer informed the defendant that he had a right to access his property."

The defendant subsequently was charged by way of a substitute information with criminal mischief in the first degree in violation of § 53a-115 (a) (1), which provides that "[a] person is guilty of criminal mischief in the first degree when . . . [w]ith intent to cause damage to tangible property of another and having no reasonable ground to believe that such person has a right to do so, such person damages tangible property of another in an amount exceeding one thousand five hundred dollars."

A bench trial took place on March 18, 19, 20 and 25, 2019. On March 19, 2019, after the close of the state's case-in-chief, the defendant orally moved for a judgment of acquittal on the ground that the state had failed to present sufficient evidence of each element to convict him of criminal mischief in the first degree beyond a reasonable doubt. The court denied the motion. On March 20, 2019, after the close of evidence, the defendant again moved for a judgment of acquittal. The court deferred ruling until after closing arguments and subsequently denied the motion. The defendant additionally

submitted to the court written proposed legal findings as to each element of § 53a-115 (a) (1). The court rejected all of the defendant's proposed legal findings.

On March 25, 2019, the court found the defendant guilty of criminal mischief in the first degree in violation of § 53a-115 (a) (1). With specific regard to the third element of § 53a-115 (a) (1) (i.e., no reasonable ground to believe that one has the right to cause damage to tangible property of another), the court found: "The defendant had no reasonable ground to believe he had a right to tear out the trees and dump them on the side of the road. No reasonable person in his situation considering his point of view would believe he had a right to damage the trees. He had been given permission to access the storage area and he hardly—he never used or seldom used that until 2013, after he erected the large green tent and attached it to his box truck. His wife stated that they had been given permission approximately one year before the planting and that [Collins] in the planting had promised access. The defendant could access the storage area on his property without having to cross [Collins'] property. So if there is a right, then there was no need to be given permission or a promise to have access to the storage area. And the access to the storage area on his own property . . . over [Collins'] property is different than having access to a storage area on his property.

"It is not credible that an attorney would advise the defendant that the remedy for blocking a right-of-way granted in an easement is to destroy the property that is blocking access.[3] But, again, this is access to the shed

[3] During trial, the defendant's wife testified that two attorneys, Attorney Walter Flynn and Attorney Neil Marcus, separately advised the couple that they could uproot the trees. More specifically, she testified that Attorney Flynn advised them that "[b]ased on the deed, [they] had the right to drive over the trees . . . ." In addition, she testified that her belief that she was able to use the driveway to get to the shed was "based on the deed and that [they] used it for over twenty years and . . . were informed [they] could just drive over them."

and the tent, which is a storage area as opposed to blocking access in terms of ingress and egress onto his own property. The proper course of conduct as suggested by the officer was to go to civil court and have the question about the boundaries or the extent of the easement with the right for ingress and egress resolved in that forum. That advice, if given, the defendant and his wife did not follow it in terms of the advice from counsel, according to [the defendant's wife], because they were not that kind of people, but they clearly did not, in 2016, after saying if it wasn't removed in four days, they had a right to tear the trees out or, at a minimum, ten of the eighteen that were ripped out.

"In Connecticut, a [prescriptive] easement is acquired with continued and uninterrupted use for fifteen years. The state presented evidence that showed that there was no continued and uninterrupted use for fifteen years, that use being access to [the defendant's] storage shed that was located on his property. There was no evidence that the defendant could not enter or leave his property. To the contrary, he built a driveway off of the common driveway down to his own property. So there was definitely ingress and egress to his lot. So under the circumstances as laid out, no reasonable person would believe that, being in the defendant's position, that he had a right to access the storage shed on his own property via [Collins'] property."[4] (Footnote added.)

On June 14, 2019, the court sentenced the defendant to eighteen months of incarceration, execution suspended, followed by three years of probation. The court also ordered the defendant to pay $2218.58 in restitution. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[4] The court further found that "there [was] no evidence that the defendant was told he could *uproot* the trees. The advice [of counsel] appears, from the testimony of [Collins] and [the defendant's wife], that they were told that they had an easement and they had a right-of-way. The easement gives them the right for ingress and egress onto their lot." (Emphasis added.)

The defendant claims on appeal that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that he had no reasonable ground to believe that he had a right to remove the trees. In support of this claim, the defendant makes, inter alia, three contentions that we find dispositive: (1) the state failed to establish the location of the deeded easement area and the location of the trees in relation thereto; (2) the trial court failed to recognize the right of a dominant estate holder of a right-of-way easement, appurtenant to his or her adjoining land, to remove obstructions placed in the right-of-way that materially interfere with his or her reasonable enjoyment of the easement; and (3) as a result of the foregoing failure, the court further erred by not finding it credible that an attorney would so advise his client.[5] We agree with each of these contentions.[6]

Before we address the merits of the defendant's claim, we set forth the applicable standard of review. "In reviewing a sufficiency of the evidence claim, we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [fact finder's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Bradbury*, 196 Conn. App. 510, 515, 230 A.3d 877, cert. denied, 335 Conn. 925, 234 A.3d 980 (2020).

[5] Because the defendant's second and third contentions are closely interrelated, we address them together in part II of this opinion.

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

"A challenge to the sufficiency of the evidence is based on the court's factual findings. The proper standard of review is whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence 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." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Edwards*, 148 Conn. App. 760, 765, 87 A.3d 1144 (2014). "[A] defendant is entitled to a judgment of acquittal and retrial is barred if an appellate court determines that the evidence is insufficient to support the conviction." (Internal quotation marks omitted.) *State* v. *Tenay*, 156 Conn. App. 792, 801–802, 114 A.3d 931 (2015).

I

As a threshold matter, we first turn to the defendant's argument that the state failed to establish the location of the deeded easement area and the location of the trees in relation thereto. We agree with the defendant.[7]

By way of review, in its memorandum of decision, the trial court stated that "[t]he CDA includes an easement granted by the owner of lot number [23.04] to the owner of lot number [23.03]. The easement granted a perpetual right-of-way for ingress and egress, by foot or vehicle, including the right to construct, pave and maintain a driveway and use the same in common with the owner, present and future. The easement area is within the

[7] In light of our determination that the court erred with respect to the deeded easement and the rights related thereto, it is unnecessary for us to reach the defendant's arguments challenging the trial court's finding that a prescriptive easement did not exist. Thus, unless the context dictates otherwise, our references in this opinion to the "easement" are to the deeded easement.

northerly most 1000 feet of the 30 foot wide portion of lot number [23.04] adjoining the westerly boundary of lot number [23.03] and lot number [23.02]. . . . The CDA was signed on June 2, 1993, and the easement runs with the land." The court additionally found that "[t]he trees were planted on June 11, 2016, eighteen of which were along the border *beyond* the thirty foot wide portion of lot number [23.04] adjoining the westerly boundary of lot number [23.03] and lot number [23.02]." (Emphasis added.) Stated differently, the court found that the trees were planted "beyond" the easement area and concluded that, "under the circumstances as laid out, no reasonable person would believe that, being in the defendant's position . . . he had a right to access the storage shed on his own property via [Collins'] property."

Mindful of the standard of review principles recited previously, we conclude that, to the extent the court found that the trees were planted outside the easement area, such finding was clearly erroneous because there was insufficient evidence to establish the precise location of the easement area or the location of the trees in relation thereto. As an initial matter, none of the maps admitted into evidence (1) establishes where the 1000 foot deeded easement actually ends, or (2) depicts the location of the trees. In addition, the testimony of the witnesses who testified as to these issues—Collins and the defendant's wife—was imprecise and simply inadequate to support the court's finding that the trees were planted outside the easement area. Finally, there was no expert testimony on which the trial court could rely to make such finding. See *Thurlow* v. *Hulten*, 173 Conn. App. 694, 725, 164 A.3d 858 (2017) ("[w]here the testimony of witnesses as to the location of the land described in deeds is in conflict, it becomes a question of fact for the determination of the court which may rely upon the opinions of experts to resolve the problem and it is the court's duty to accept that testimony or

evidence which appears more credible" (internal quotation marks omitted)).

In light of the foregoing, the court's finding that the trees were beyond the easement area is clearly erroneous.

II

We next address the defendant's contention that the trial court erred in failing to recognize the legal principle that "any easement that grants a right of ingress and egress includes the right to remove any structure which constitutes a material obstruction to the rightful enjoyment of the easement, or which renders that enjoyment less beneficial or convenient than before its erection." The defendant also makes the related contention that, as a result of the foregoing failure, the court further erred by not finding it credible, effectively as a matter of law, that an attorney would so advise his client. We agree with both contentions.

We first briefly address the applicable standard of review. "When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Northeast Ct. Economic Alliance, Inc.* v. *ATC Partnership*, 256 Conn. 813, 827, 776 A.2d 1068 (2001). Although we generally defer to "the determinations of the trial court regarding factual findings on issues of credibility, unless they are clearly erroneous," the scope of our review remains plenary when the ultimate issue before the trial court was not truly a credibility question, but rather a question of law. *Lisiewski* v. *Seidel*, 72 Conn. App. 861, 870, 806 A.2d 1121; see id., 870–71 (in case involving property dispute, when deed at issue contained clear and unambiguous language, trial court's determination that plaintiff's expert witness testified credibly regarding latent ambiguity in deed did not restrict this court's plenary

review of legal questions regarding proper construction of deeds), cert. denied, 262 Conn. 921, 812 A.2d 865 (2002), and cert. denied, 262 Conn. 922, 812 A.2d 865 (2002).

Our analysis of this claim requires a discussion of certain principles of Connecticut easement law. "It is well settled that [a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." (Internal quotation marks omitted.) *Celentano* v. *Rocque*, 282 Conn. 645, 660, 923 A.2d 709 (2007). "An easement has six primary characteristics: (1) it is an interest in land in the possession of another, (2) it is an interest of a limited use or enjoyment, (3) it can be protected from interference by third parties, (4) it cannot be terminated at will by the possessor of the servient land, (5) it is not a normal incident of a possessory land interest, and (6) it is capable of creation by conveyance . . . . An easement may be affirmative or negative; appurtenant or in gross . . . .

"An affirmative easement authorizes uses of land that would be viewed as actionable trespasses if no easement existed. A right of way across a neighbor's property is a common example of an affirmative easement. . . .

"Although an easement does not create an ownership interest in the servient estate but creates a mere privilege to use the servient estate in a particular manner, an easement involves limited rights to enjoy or to restrict another's use of property. . . . If an easement is created to benefit and does benefit the possessor of the land in his use of the land, the benefit of that easement is appurtenant to the land. The land is being benefited by the easement in the neighboring property. . . . An important characteristic of appurtenant easements is that they continue in the respective properties, rather

than being merely personal rights of the parties involved. The easement's benefit or its burden passes with every conveyance affecting either the servient or dominant property." (Citations omitted; internal quotation marks omitted.) *Kepple* v. *Dohrmann*, 141 Conn. App. 238, 246, 249–50, 60 A.3d 1031 (2013).

Our Supreme Court previously has recognized the right of a dominant estate holder of a right-of-way easement, appurtenant to his or her adjoining land, to remove obstructions placed in the right-of-way that materially interfere with his or her reasonable enjoyment of the easement. In *Blanchard* v. *Maxson*, 84 Conn. 429, 80 A. 206 (1911), the plaintiff had erected a fence within a laneway to prevent the defendant and his tenants from having access thereto from a certain point on the defendant's land. The defendant later removed the fence, "doing no other damage than was necessary to accomplish that result." Id., 432 (preliminary statement of facts and procedural history). The plaintiff brought an action sounding in trespass, and judgment was rendered for the defendant. Id., 430 (same). On appeal, our Supreme Court found no error, concluding that the laneway was subject to a right-of-way easement appurtenant to the defendant's adjoining land. Id., 433. The court reasoned: "The fact that the defendant has never owned the fee to any part of the land covered by the lane does not militate against his right to keep it free from obstructions. Any structure which could not properly be placed thereon, and which constituted an obstruction to his free and full use of the lane in his rightful enjoyment of the easement, would be removable by him as a nuisance. *Greist* v. *Amrhyn*, 80 Conn. 280, 290, [68 A. 521 (1907)]. The fact that the fence which he took down did not wholly prevent passage up and down the lane did not save it from being an unlawful obstruction. Erected as it was, without reasonable justification or purpose, it was a nuisance abatable by him, if it materially interfered with his reasonable enjoyment of the easement, or rendered that

enjoyment less beneficial or convenient than before its erection." *Blanchard* v. *Maxson*, supra, 435–36; see also *Smith* v. *Muellner*, 283 Conn. 510, 518, 932 A.2d 382 (2007) ("The owner of the soil [over which a right-of-way exists] retains full dominion over his land subject merely to the right-of-way. . . . The owner may make any use of his land which does not interfere with a reasonable use of the way." (Internal quotation marks omitted.)); *Greist* v. *Amrhyn*, supra, 290–91 ("[O]ne in possession of premises to which an easement is appurtenant may have an action for a disturbance or obstruction of such easement. A tenant or a cestui que trust in possession of the dominant estate may have such an action for the injury to his possession. . . . It follows that he may remove the obstruction as a nuisance." (Citations omitted.)).

The state has not cited any authority—and we are not aware of any—that stands for the proposition that a dominant estate holder, with respect to a right-of-way easement appurtenant to his or her adjoining land, must seek judicial intervention prior to exercising the right to remove obstructions placed in the right-of-way that materially interfere with his or her reasonable enjoyment of the easement. The lack of such a requirement necessarily was implied in the aforementioned cases and was expressly acknowledged in the ancient case of *Quintard* v. *Bishop*, 29 Conn. 366, 373 (1860). In *Quintard*, our Supreme Court rejected the argument that, rather than clearing an obstruction (i.e., a fence) from the subject right-of-way, the defendant covenantee should have brought a civil action against the covenantor who placed the obstruction thereon. Id. The court stated: "[I]f the defendant had a clear right of way, he might insist that it should be in a condition to be used; and as the fence was removed avowedly for this purpose, he did no more than the law justified him in doing." Id.; see also 28A C.J.S. 640–41, Easements § 236 (2019) ("An obstruction placed in a private way is a

nuisance, and may be removed by any person having a right to use the right-of-way, provided the person can do so without a breach of the peace. . . . In removing obstructions the owner of the dominant tenement must do no unnecessary damage. *If the owner of the land has covenanted to keep the way open, the grantee need not in case of an obstruction resort to an action for a breach of the covenant, but may herself remove the obstruction.*" (Emphasis added; footnotes omitted.)).

In the present case, the trial court failed to recognize the foregoing right under Connecticut easement law, stating, in the form of a credibility determination relating to testimony by the defendant's wife, that "[i]t is not credible that an attorney would advise the defendant that the remedy for blocking a right-of-way granted in an easement is to destroy the property that is blocking access. . . . The proper course of conduct as suggested by the officer was to go to civil court and have the question about the boundaries or the extent of the easement with the right for ingress and egress resolved in that forum." Thus, the court improperly concluded that, as a matter of law, the defendant could not have had a reasonable ground to believe that he had the right to remove the obstructions from the easement area without first seeking judicial intervention.

In considering the foregoing errors, we find *State* v. *Hoskins*, 35 Conn. Supp. 587, 401 A.2d 619 (App. Sess. 1978), on which the defendant relies, to be particularly instructive. In *Hoskins*, the Appellate Session, inter alia, set aside the judgment of conviction of criminal mischief in the third degree pursuant to General Statutes (Rev. to 1975) § 53a-117, which also required the state to prove that the defendant had "no reasonable ground to believe that he had a right to [damage tangible property of another]." Id., 595. In that case, the defendant was a minister of a church who painted a religious message on plywood boards attached to the exterior of the church by the city of Hartford. Id., 589. Because

the ownership of the plywood boards was unclear, the Appellate Session reasoned that, if the boards were church property, then the city's consent was not needed and the facts supported "the reasonable hypothesis that the defendant . . . painted the message with the church's acquiescence, if not its blessing." Id., 595–96. On the basis of the record before it, the Appellate Session concluded that the trial court "could not find beyond a reasonable doubt that when he painted the message the defendant had no reasonable ground to believe that he had a right to do so." Id., 596.

Similarly here, based on the record before it, the court could not find beyond a reasonable doubt that when the defendant removed the trees, he had no reasonable ground to believe that he had a right to do so. Because the evidence is insufficient to support the conviction, the defendant is entitled to a judgment of acquittal.

The judgment is reversed and the case is remanded with direction to render a judgment of acquittal.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* FELIMON C.* (AC 43686)

Elgo, Cradle and Harper, Js.

Syllabus

Convicted, following a plea of guilty, of the crimes of sexual assault in the second degree and risk of injury to a child, the defendant appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The fourteen year old victim of the sexual

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

assault indicated in a forensic interview that she and the defendant had engaged in two sexual encounters and, subsequently, she became pregnant. The victim delivered the child and arrangements were made for her sister to adopt the child. Under the plea agreement, the defendant's sentence included a condition of probation that he would not contest or interfere with the adoption of the child conceived by the sexual assault. The defendant claimed that the condition of probation at issue violated his constitutional rights and that the condition exceeded the court's authority. The court denied the defendant's motion, finding that the provisions of the applicable statute (§ 53a-30) were not exhaustive and that, given the severity of the offense, the condition was bargained for and was reasonable. Following oral argument before this court, this court ordered the trial court to resolve certain factual issues that were not clear from the record, and, after a hearing, the trial court found that the defendant's parental rights had been terminated by the Probate Court, the defendant's appeal of that decision had been dismissed, and the child had been adopted by order of the Probate Court. *Held* that because the defendant's parental rights had been terminated and the child had been adopted, the appeal was moot: the provisions of the applicable statute (§ 45a-719) concerning a motion to open or set aside a judgment terminating parental rights make clear that the court may not grant such a motion, if, prior to the filing of such a motion, a final decree of adoption has been issued; moreover, with respect to the adoption of the child, even if an avenue to challenge the adoption existed, the defendant would lack standing to pursue it, and, accordingly, this court could not grant the defendant any practical relief.

Argued April 12—officially released August 17, 2021

Procedural History

Information charging the defendant with the crimes of sexual assault in the second degree and risk of injury to a child, brought to the Superior Court in the judicial district of Danbury, where the defendant was presented to the court, *Krumeich, J.*, on a plea of guilty; judgment of guilty in accordance with the plea; thereafter, the court, *D'Andrea, J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Appeal dismissed.*

Judie Marshall, for the appellant (defendant).

Christopher A. Alexy, senior assistant state's attorney, with whom were *Melissa L. Streeto*, senior assistant state's attorney, and, on the brief, *Stephen J. Sedensky III*, state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Felimon C., appeals from the judgment of the trial court denying his motion to correct an illegal sentence. Specifically, he claims that (1) the sentencing court lacked statutory authority to impose a condition of probation prohibiting him from contesting the adoption of the minor child conceived as a result of his sexual assault (condition), (2) the condition was illegal because it violated his constitutionally protected right to familial association, (3) he did not waive his right to challenge the condition by voluntarily entering into a plea agreement, and (4) the appropriate remedy is to retain "the original sentence while striking the unlawful condition of probation." Because the defendant's parental rights have been terminated and the minor child has been adopted, we conclude that the appeal is moot.

The following facts and procedural history are relevant to our disposition of this appeal. On February 29, 2016, detectives with the Danbury Police Department were dispatched to Danbury Hospital following a reported sexual assault. Upon their arrival, they learned that the victim, who was fourteen years old, was three months pregnant. The detectives conducted a forensic interview, during which the victim indicated that she and the thirty-one year old defendant had begun exchanging text messages after he had delivered pizza to her home, and, following two sexual encounters, she became pregnant. The victim ultimately delivered the child, and arrangements were made for her sister to adopt the child.

On September 7, 2017, the defendant entered a guilty plea before the court, *Krumeich*, *J.*, to sexual assault in the second degree and risk of injury to a child. The agreed on disposition was a term of "fifteen years [of incarceration], execution suspended after . . . one

[year], followed by twenty years [of] probation." Additionally, under the plea agreement the sentence included the condition that the defendant would not contest or interfere with the adoption of the minor child conceived by the sexual assault. On October 19, 2017, the court, *Welch*, *J.*, sentenced the defendant in accordance with the plea agreement. The court also entered a no contact standing criminal protective order in favor of the victim and specified that "this order also protects the [victim's] minor children. This order shall remain in full force and effect until October 19, 2032."

On February 20, 2019, the defendant filed a motion to correct an illegal sentence, asserting that the condition violated his "constitutional rights under the first amendment and the due process clauses of the fifth and fourteenth amendments to the United States constitution and article first, §§ 8, 9, and 14, of the Connecticut constitution," and that the condition exceeded the court's authority "pursuant to General Statutes § 53a-30." He argued that he has a constitutional right to familial association and that, "[b]y requiring the defendant . . . to refrain from contesting [the] termination of his parental rights, the court's order require[d] the defendant to choose between exercising his right to contest the termination of his [parental] rights or risk violating his probation." With respect to § 53a-30, the defendant argued that the court lacked statutory authority to impose the condition because it was "not [one of the] specifically enumerated condition[s]" set forth in the statute. The defendant alleged that the proper remedy was to resentence him in accordance with the plea agreement and omit the condition concerning the adoption.

The trial court, *D'Andrea*, *J.*, heard argument on the defendant's motion to correct an illegal sentence on June 4, 2019. On October 1, 2019, the court issued a memorandum of decision denying the motion. The

court found that the provisions of § 53a-30 (a) are not exhaustive, and that, given the severity of the offense against the victim, "the condition of not contesting the adoption was one not only bargained for, but reasonable under all of the circumstances, and provided for the protection of the victim and the victim's child."

This appeal followed. On appeal, the parties disagree with respect to whether the defendant's parental rights had been terminated and whether the adoption had been completed prior to the hearing on the defendant's motion to correct an illegal sentence. The state argues that "[t]he record reveals that, on an unspecified date prior to the hearing on the defendant's motion, the defendant's parental rights had been terminated and the adoption had been completed in the Hartford [Regional Children's] Probate Court." The defendant counters that "the record does not reflect the child had been adopted" and that, "[c]ontrary to the state's assertion, there is nothing in the record indicating that the adoption had been finalized at the time of the hearing. The portion of the transcript referenced by the state [in support of its claim that the] adoption had been finalized, instead, addressed parental rights, which counsel for the defendant represented had been terminated."

Oral argument was held before this court on April 12, 2021. On May 25, 2021, we ordered the trial court, sua sponte, to resolve the following factual issues that were not clear from the record: "(1) Were the defendant's parental rights terminated, and, if so, when? (2) Was there an appeal of the decision terminating the defendant's parental rights and, if so, what is the outcome of that appeal? (3) Are adoption proceedings pending, or has the minor child been adopted and, if so, when did that order enter?" After a hearing, the trial court issued the following factual findings on June 24, 2021: "[T]he court finds (1) that the [defendant's] parental

rights were terminated by the Hartford Regional [Children's] Probate Court on December 17, 2018 . . . (2) that there was an appeal of the Hartford Regional [Children's] Probate [Court's decision] filed by the defendant . . . on January 16, 2019, in the Superior Court [in the judicial district of Fairfield] . . . Juvenile Matters at Bridgeport, which appeal was dismissed by the court for failure to appear and prosecute on July 31, 2019, and no further proceedings have occurred in the matter . . . [and] (3) that the minor child has been adopted by order of the Farmington Regional Probate Court on December 23, 2020."

Thereafter, we issued the following order on June 29, 2021: "The court having received the trial court's findings and having taken judicial notice of the attached documents hereby sua sponte orders the parties to file supplemental briefs, of no more than [ten] pages [within fourteen days] giving reasons, if any, why this appeal should not be dismissed as moot."

"Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *Wilcox* v. *Ferraina*, 100 Conn. App. 541, 547–48, 920 A.2d 316 (2007). "In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." *Hechtman* v. *Savitsky*, 62 Conn. App. 654, 659, 772 A.2d 673 (2001).

On the basis of the trial court's findings of fact and the parties' supplemental briefs, we conclude that this appeal is moot. With respect to the termination of parental rights, the state argues that, because the adoption has been finalized, no court has the authority to open, set aside, or modify the termination of the defendant's parental rights. The defendant contends that the termination and adoption may be opened. The provisions of General Statutes § 45a-719, however, make clear that "[t]he court may grant a motion to open or set aside a judgment terminating parental rights . . . *except that no such motion or petition may be granted if a final decree of adoption has been issued prior to the filing of any such motion or petition*." (Emphasis added). Moreover, with respect to the adoption, we agree with the state that, even if an avenue to challenge the adoption existed, the defendant would lack standing to pursue it. See General Statutes § 45a-731 ("[a] final decree of adoption . . . shall have the following effect in this state . . . (5) . . . the legal relationship between the adopted person and the adopted person's biological parent or parents . . . is terminated for all purposes").

In his supplemental brief, the defendant requests, as relief, that we "reverse the decision of the trial court, remand, and order the trial court to correct the defendant's sentence by striking the condition of probation prohibiting him from contesting the termination of his parental rights and the adoption of his minor child." The minor child, however, has been adopted, the defendant's parental rights have been terminated, and the defendant's appeal of the termination of his parental rights was dismissed. Accordingly, we can no longer grant the defendant practical relief, and this appeal is moot.

The appeal is dismissed.

In this opinion the other judges concurred.

BERNARD W. NUSSBAUM ET AL. *v.* DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION
(AC 43865)

Bright, C. J., and Clark and Bear, Js.

Syllabus

The plaintiffs, N and the trust of which N was the sole trustee, appealed to this court from the judgment of the trial court dismissing their administrative appeal from the decision of the Commissioner of Energy and Environmental Protection denying N's application for a permit to maintain fences on certain real property owned by the trust adjacent to Long Island Sound and ordering that the fences be removed. N had installed the fences, without the required permit from the defendant, the Department of Energy and Environmental Protection, in part to deter public access to the area waterward of the mean high waterline in front of the property. The property on the waterward side is public land held in trust by the state. The department thereafter issued to N a notice of violation, informing him that the fences were unauthorized and ordered him to remove them. After a hearing, a department hearing officer issued a decision recommending that N's permit application be denied. The commissioner adopted the hearing officer's decision and issued a final decision affirming the denial of the permit application and directing the hearing officer to finalize the removal order. The trial court concluded, inter alia, that the record contained substantial evidence to support the commissioner's determination that the fences were constructed on public land to deter public access to that land, and that the commissioner's decision and removal order were not unreasonable, arbitrary, capricious, illegal or an abuse of discretion. *Held* that upon this court's review of the record, and the briefs and arguments of the parties, the judgment of the trial court was affirmed, and this court adopted the trial court's thorough and well reasoned memorandum of decision as a proper statement of the facts and the applicable law on the issues.

Argued May 18—officially released August 17, 2021

Procedural History

Appeal from the decision of the defendant denying a permit application to maintain a fence on certain real property of the plaintiff Bernard W. Nussbaum Revocable Trust, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*,

J.; judgment dismissing the appeal, from which the plaintiffs appealed to this court. *Affirmed.*

John P. Casey, with whom were *Evan J. Seeman* and, on the brief, *Andrew A. DePeau*, for the appellants (plaintiffs).

David H. Wrinn, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiffs, Bernard W. Nussbaum (Nussbaum) and the Bernard W. Nussbaum Revocable Trust (trust),[1] appeal from the judgment of the trial court dismissing their administrative appeal from the final decision of the Commissioner of Energy and Environmental Protection (commissioner), denying Nussbaum's application for a permit for two post and wire fences previously erected on certain shoreline property and ordering that the fences be removed. On appeal, the plaintiffs claim that the court erred in concluding (1) that the commissioner's final decision was not arbitrary, illegal, or an abuse of discretion, and (2) that the defendant, the Department of Energy and Environmental Protection (department), (a) properly considered that, under Connecticut law, changes to land, either natural or man-made, which amount to reclamation or erosion, *may*, under certain circumstances, alter the mean high waterline bordering private shoreline property, (b) correctly determined the location of the mean high waterline bordering the plaintiffs' property, and (c) properly balanced the plaintiffs' private rights with the public's interest in land held in trust under the statutes concerning structures, dredging, and fill; General Statutes §§ 22a-359 through 22a-363; and the Coastal Management Act,

[1] In this opinion, we refer to Nussbaum and the trust collectively as the plaintiffs, and individually by name when necessary.

General Statutes § 22a-90 et seq. We affirm the judgment of the trial court.

The record discloses the following relevant facts. The trust owns real property located at 100 and 104 Sea Beach Drive in Stamford (property), which is adjacent to Long Island Sound (sound).[2] The boundary of the property adjacent to the sound is defined by the mean high waterline and ends on the landward side of the mean high waterline. The property on the waterward side of the mean high waterline is public land held in trust by the state of Connecticut. There is a seawall on the property that generally runs parallel to the edge of the sound.

Without having first obtained a required permit from the department, Nussbaum installed two fences that run perpendicular to the seawall toward the sound. One of the fences is twenty-four and one-half feet in length, and the other one is twenty-seven and one-half feet in length. Nussbaum installed the fences, at least in part, to deter public access to the area waterward of the mean high waterline in front of the property.[3] In 2002, prior to the installation of the fences, the department had granted Nussbaum permission to place a small area of large stones, or "riprap," generally perpendicular to the seawall extending out into the sound. The area of riprap is comprised of large individual rocks with nothing, other than the ground on which they are placed, joining them. The fences at issue were installed on the riprap.

On July 16, 2012, the department issued a notice of violation to Nussbaum that the fences were unauthorized and ordered him to remove them. The fences were not removed. Instead, on October 30, 2014, Nussbaum filed an after-the-fact application with the department

[2] In their administrative appeal, the plaintiffs alleged that Nussbaum is the sole trustee of the trust.

[3] The area is covered by rocks; it is not a sandy beach. People generally access the area to fish.

for a permit for the fences. The department tentatively denied the permit application, and, on November 30, 2015, ordered that the fences be removed. Following timely requests for hearings on both the permit application and the removal order, the matters were consolidated for hearing purposes. A public comment hearing was held on August 4, 2016, and an evidentiary hearing was held on October 6, 2016. The department hearing officer issued his decision on April 21, 2017, recommending to the commissioner that the permit application be denied. The commissioner adopted the decision of the hearing officer as his own and issued a final decision on February 6, 2018, affirming the denial of the permit application and directing the hearing officer to finalize the removal order.

On March 21, 2018, the plaintiffs appealed the commissioner's decision to the Superior Court pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. See General Statutes § 4-183.[4] In their administrative appeal, the plaintiffs claimed that (1) they were aggrieved by the commissioner's final decision because it was illegal, arbitrary, capricious, and constituted an abuse of discretion, (2) their substantial rights were prejudiced because the commissioner's findings, inferences, conclusions or decision were in violation of statutory provisions or in excess of the commissioner's statutory authority, (3) their use and enjoyment of the property and the waters of the sound to which it is contiguous are adversely affected by the decision, and (4) the order to remove

[4] General Statutes § 4-183 provides in relevant part: "(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. The filing of a petition for reconsideration is not a prerequisite to the filing of such an appeal. . . .

"(i) The appeal shall be conducted by the court without a jury and shall be confined to the record. . . . The court, upon request, shall hear oral argument and receive written briefs. . . ."

the fence will allow members of the public to continue to trespass on the property and be at risk of injury due to the dangerous conditions on the property and its shoreline.

Following the parties' submission of briefs, the court heard argument on November 12, 2019, and issued a memorandum of decision on November 14, 2019, dismissing the plaintiffs' administrative appeal. The plaintiffs filed a motion for reconsideration and reargument on December 3, 2019, to which the defendant objected on January 2, 2020. The court granted the motion for reargument and held a hearing on the motion for reconsideration on January 9, 2020. The court issued an amended memorandum of decision on January 10, 2020, concluding that the department properly balanced the rights of the plaintiffs and the public, and that the record contains substantial evidence to support the commissioner's decision. The court also denied the motion for reconsideration.[5] The plaintiffs appealed to this court.

"Our standard of review of administrative agency rulings is well established. . . . Judicial review of an administrative decision is a creature of statute . . . and [§ 4-183 (j)] permits modification or reversal of an agency's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) [i]n violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error or law; (5) clearly erroneous in view of the reliable,

[5] In its amended memorandum of decision, the court stated that the motion for reconsideration identified areas of the original decision that appeared to be unclear. The perceived lack of clarity arose primarily from nomenclature used by the court. The amended decision clarified those areas but did not substantively affect the court's decision or judgment. The motion for reconsideration did not raise any issue that caused the court to change substantially its decision or judgment.

probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . . .

"Under the UAPA, the scope of our review of an administrative agency's decision is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the appellate] court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citations omitted; internal quotation marks omitted.) *Miller* v. *Dept. of Agriculture*, 168 Conn. App. 255, 265–66, 145 A.3d 393, cert. denied, 323 Conn. 936, 151 A.3d 386 (2016). "It is fundamental that a plaintiff has the burden of proving the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion . . . ." (Internal quotation marks omitted.) Id., 266.

In addressing the plaintiffs' claims in the administrative appeal, the court concluded that the commissioner's decision and the removal order were not unreasonable, arbitrary, capricious, illegal or an abuse of discretion. First, the court addressed the plaintiffs' claim that installation of riprap at the end of the property and into the sound moved the mean high watermark further into the sea and extended the boundary line between the property owned by the trust and the land held in trust by the state. The court observed that the

commissioner had recognized the common-law principle of reclamation by which natural or man-made structures, such as the riprap on which the fences were constructed, *may*, in certain circumstances, change the mean high waterline and, thus, extend a landowner's property into what might otherwise constitute public land held in trust by the state. It concluded, however, that the question of whether the riprap in the present case constituted reclaimed land was primarily a question of fact and that the commissioner reasonably determined, with substantial evidentiary support in the record, that the riprap had not changed the mean high waterline. Specifically, it concluded: "Seawater flows around the rocks and within the riprap. The tidal waters reach the face of the seawall, even directly behind the riprap. As such, the riprap does not stop the seawater from reaching the seawall with each high tide. Nearly all of the rocks composing the riprap are submerged at high tide. The facts substantially support the commissioner's finding that the mean high waterline did not change in this case. . . . The foregoing conclusion means that, essentially, all of the fences are on land [held] by the state in trust for the public." (Footnote omitted.)

Having concluded that the commissioner's determination that the fences were constructed on public land was supported by substantial evidence in the record, the court then addressed the plaintiffs' claim that the commissioner had failed to properly balance, pursuant to § 22a-359 (a),[6] the plaintiffs' asserted private property

[6] General Statutes § 22a-359 (a) provides in relevant part: "The Commissioner of Energy and Environmental Protection shall regulate dredging and the erection of structures and the placement of fill, and work incidental thereto, in the tidal, coastal or navigable waters of the state waterward of the coastal jurisdiction line. Any decisions made by the commissioner pursuant to this section shall be made with due regard for indigenous aquatic life, fish and wildlife, the prevention or alleviation of shore erosion and coastal flooding, the use and development of adjoining uplands . . . the use and development of adjacent lands and properties and the interests of the state, including pollution control, water quality, recreational use of public

rights in constructing the fences against the public's interest in accessing the public land that the fences obstruct. The court noted that the commissioner considered the plaintiffs' asserted rights (1) to quiet enjoyment of the land upward of the mean high waterline, (2) to be free from private nuisance, (3) to be free from trespass, and (4) to be free from lawsuits for injuries sustained by the public on public land held in trust by the state. The court concluded that, in balancing the rights asserted by the plaintiffs against the public's right to access the public land, the commissioner properly found that the plaintiffs' interests could be protected adequately without the fences, which, by design, significantly impair public access to the public land held in trust. Last, the court observed that the commissioner had acknowledged generally a landowner's ancient common-law littoral right to use and wharf out into an intertidal area, but also noted that such rights are not absolute and must be balanced against the public's right to access the land below the mean high waterline. Moreover, the commissioner determined that the very purpose of the fences was to deter the public's access to the area below the mean high waterline, not to facilitate the plaintiffs' littoral rights to access the water. In sum, the court found that the record contained substantial evidence to support the commissioner's findings and conclusions, which were reasonable under the circumstances.

We have reviewed the record and the proceedings in the trial court in accordance with the applicable standard of review. Our review of the record, as well as the briefs and arguments of the parties on appeal, persuades us that the judgment of the court should be affirmed. We, therefore, adopt the court's thorough and well reasoned amended memorandum of decision as a

water and management of coastal resources, with proper regard for the rights and interests of all persons concerned."

proper statement of the facts and the applicable law on the issues. See *Nussbaum* v. *Dept. of Energy & Environmental Protection*, Superior Court, judicial district of New Britain, Docket No. CV-18-6043337-S (January 10, 2020) (reprinted at 206 Conn. App. 742, A.3d). Any further discussion of the issues by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Lawrence* v. *Dept. of Energy & Environmental Protection*, 178 Conn. App. 615, 618, 176 A.3d 608 (2017).

The judgment is affirmed.

APPENDIX

BERNARD W. NUSSBAUM ET AL. *v.* DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION*

Superior Court, Judicial District of New Britain
File No. CV-18-6043337-S

Memorandum filed January 10, 2020

Proceedings

Memorandum of decision on plaintiffs' appeal from decision by defendant denying permit application to maintain fences and ordering removal of fences. *Appeal dismissed.*

John P. Casey, *Evan J. Seeman* and *Andrew A. DePeau*, for the plaintiffs.

Sharon M. Seligman and *David H. Wrinn*, assistant attorneys general, for the defendant.

* Affirmed. *Nussbaum* v. *Dept. of Energy & Environmental Protection*, 206 Conn. App. 734, A.3d (2021).

Opinion

CORDANI, J.

INTRODUCTION

This is an administrative appeal of a final decision of the Department of Energy and Environmental Protection (defendant) denying the permit application of Bernard W. Nussbaum and the Bernard W. Nussbaum Revocable Trust (collectively, plaintiff) and ordering the plaintiff to remove certain fencing previously installed by the plaintiff.

This amended decision is being provided in response to the plaintiff's motion for reconsideration and reargument. The plaintiff's motion points out several areas where the plaintiff considers the court's original decision to be unclear, and, as such, this amended decision clarifies those areas. However, the plaintiff's motion does not raise any issue that causes the court to substantively change its decision or the judgment entered. The perceived unclarity arises, primarily, merely from certain nomenclature used by the court but does not substantively affect the decision or the judgment. Accordingly, the plaintiff's motion for reconsideration and reargument is respectfully denied.

FACTS AND PROCEDURAL HISTORY

The plaintiff owns property located at 100 and 104 Sea Beach Drive in Stamford (property). The property is adjacent to Long Island Sound. On its edge that is adjacent to Long Island Sound, the property line is defined by the mean high waterline, with the plaintiff's property ending on the landward side of the mean high waterline and property owned by the state of Connecticut as public trust on the waterward side of the mean high waterline. There is a seawall that generally runs parallel to the edge of Long Island Sound.

The plaintiff installed two fences. The date of the installation of the fences is not clear; however, it is clear that the fences were installed without a necessary permit from the defendant. The two fences separately run generally perpendicular to the seawall toward Long Island Sound. One fence is 24.5 feet in length, and the other is 27.5 feet in length. In 2002, the plaintiff, with the permission of the defendant, placed a small area[1] of large stones or riprap generally perpendicular to the seawall extending out into Long Island Sound. This area of riprap, placed by the plaintiff, is composed of large individual rocks with nothing, other than the ground on which they are placed, joining the rocks.

On July 16, 2012, the defendant issued the plaintiff a notice of violation for the two unpermitted fences and required that the fences be removed. The fences were not removed. On October 30, 2014, the plaintiff filed an after-the-fact permit application for the fences with the defendant. The defendant's staff issued a tentative determination to deny the plaintiff's permit application, and, on November 30, 2015, issued an order for the fences to be removed. The plaintiff timely requested hearings on both the permit application and the removal order. The matters were consolidated for hearing purposes. A public comment hearing was held on August 4, 2016, and an evidentiary hearing was held on October 6, 2016. The hearing officer issued his decision on April 21, 2017, recommending that the commissioner deny the permit application. A final decision was issued by the commissioner on February 6, 2018, affirming the denial of the permit applications and directing the hearing officer to finalize the removal order. The plaintiff has appealed the administrative action to this court.

[1] This area of stones, placed by the plaintiff, is referred to by the plaintiff as riprap and extends perpendicularly outward from the face of the seawall into the Sound. There is also a stone peninsula referred to as a "groin" in the applicable technical terminology, which also extends perpendicularly into the Sound.

The plaintiff is classically aggrieved because the final decision being appealed refused him a permit to maintain two fences and ordered him to remove the fences. Thus, specific legal issues, personal to the plaintiff and his property, are affected by the decision.

STANDARD OF REVIEW

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.[2] Judicial review of an administrative decision in an appeal under the UAPA is limited. See, e.g., *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.

[2] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law: (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. . . ."

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes, "[c]ases that present pure questions of law . . . 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." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

ANALYSIS

The fences in question cannot be lawfully installed and maintained without a permit issued by the defendant.[3] In order to be granted a permit, the fences must generally comply with the statutes concerning structures, dredging and fill (General Statutes §§ 22a-359 through 22a-363) and the Coastal Management Act (General Statutes §§ 22a-90 through 22a-111).[4] In making a decision as to whether a permit should issue for these fences, the commissioner was required to consider and balance the private landowner's property rights with the state's and the public's interest and rights in land, which is held in public trust, to determine whether the structure, the fences in this case, unreasonably impair the public rights in view of the balance of rights.

[3] Both the plaintiff and the defendant agree that at least some portion of the fences extend beyond the private property boundary of the plaintiff into land owned by the state in public trust. The parties only disagree about the extent of the incursion. Both parties agree that a permit from the defendant is necessary to install and maintain the fences. Each of the fences is within the defendant's permitting jurisdiction because they are waterward of the coastal jurisdiction line, which runs along the waterward face of the seawall.

[4] The parties agreed that the fences do not cause an adverse environmental impact and, thus, focused on balancing the plaintiff's asserted property rights against the right of the public to access the public trust (i.e., land waterward of the mean high waterline) to determine whether or not the public's access to the public trust was unreasonably impaired.

The fences in this matter were installed, at least in part, for the purpose of inhibiting the access of the public to the beach area waterward of the mean high waterline.[5] As noted previously, areas waterward of the mean high waterline are owned by the state in trust for the public. The plaintiff sought to inhibit public access to the public trust adjacent to his property for several reasons. He found that inhibiting access lessened the likelihood that the public would trespass on his property. He found that accessing the rocky area adjacent to his property was unsafe for the public. Finally, he found that some members of the public, when accessing the public trust created a nuisance that inhibited his peaceful enjoyment of his adjacent private property. The foregoing property interests were asserted on the plaintiff's side of the balance.[6]

On the other side of the balance, the public has a right to access and use the public beach, rocky or not, which includes the area adjacent to the property waterward of the mean high waterline, provided that right does not include trespassing on private property. In fact, General Statutes § 22a-92 (c) (1) (K) states that, in permitting any new coastal structure, public access to and along the public beach below the mean high waterline must not be unreasonably impaired.

In balancing these interests and determining reasonableness, we first must consider the extent of the incursion by the fences into the public trust. Neither party

[5] The permit application for the fences states that their purpose is to "deter the general public from using the immediate area around a rock strewn jetty which becomes [covered] by high tide waters. . . . The fences do not completely prohibit public access, but provide a visible barrier and warning [that, in the opinion of the applicant, the area] is unsafe and not monitored. There are other more safer areas nearby that the public could use for fishing." It should be noted that the "rock strewn jetty" referred to is part of the public trust.

[6] Although not directly asserted, a landowner bordering water has a right to wharf out into the water subject to reasonable regulation and subject to the public's right to access to the public trust.

disputes that at least a portion of each fence extends beyond the property owned by the plaintiff into the public trust. The parties only disagree about the extent of the incursion. The disagreement in this regard revolves around determining whether installation of the riprap shifted the mean high waterline.[7] Mean high waterline means the line where the arithmetic mean of the high water heights observed over a specific cycle (the National Tidal Datum Epoch) meets the shore. Thus, the mean high waterline is a fact to be measured for any particular piece of real estate. It is important because it determines the property boundary when private property borders the sea. For purposes of this appeal, it therefore determines the extent of the incursion of the fences onto public property.

The parties both agree that the mean high waterline, and therefore the property line, was at the waterward face of the seawall in the area of the fences prior to installation of the riprap. The plaintiff argues that installation of the riprap moved the mean high waterline farther into the sea. The defendant disagrees. It is clear that changes to the land may shift the mean high waterline. In both *Lockwood* v. *New York & New Haven Railroad Co.*, 37 Conn. 387, 391 (1870), and in *Rapoport* v. *Zoning Board of Appeals*, 301 Conn. 22, 49–50, 19 A.3d 622 (2011), our Supreme Court accepted that, changes to the land, either natural or man-made, which amount to either land reclamation or erosion, may change the mean high waterline. Thus, it is clear that changing the mean high waterline is theoretically possible. The question is, did the installation of the riprap change the mean high waterline in this case. The commissioner found that it did not. The court finds that this conclusion

[7] The permit issued for installation of the riprap noted that the authorization to install the riprap "conveys no property rights in real estate or material, nor any exclusive privileges, and is further subject to any and all public and private rights."

is supported by substantial evidence in the record, is not a clear error of law, is not arbitrary and capricious, and is not an abuse of discretion.

The riprap is a series of large rocks running perpendicular into the sea. Nothing connects the rocks other than their placement on the ground. Seawater flows around the rocks and within the riprap. The tidal waters reach the face of the seawall, even directly behind the riprap. As such, the riprap does not stop the seawater from reaching the seawall with each tide. Nearly all of the rocks composing the riprap are submerged at high tide. These facts substantially support the commissioner's finding that the mean high waterline did not change in this case.[8] The commissioner understood that the mean high waterline could theoretically change based on physical changes to the land but found in this case that the riprap did not in fact change the mean high waterline because of the physical attributes of the riprap and its physical interaction with the sea, and, as such, the riprap did not amount to reclaimed land.[9]

[8] The plaintiff's expert (Raymond L. Redniss) testified that the installation of the riprap did not change the mean high waterline for property boundary purposes but did change it for permitting purposes. This argument makes no sense. The mean high waterline is a fact that is measured. It cannot have two disparate answers. The defendant's expert (Brian D. Florek) testified that the mean high waterline remained coincident with the waterward face of the seawall in the area of the fences, and that the riprap was not a solid [or continuous] surface, and, as a result, could not move the mean high waterline. Given Florek's evidence, it is clear that the commissioner's finding is supported by substantial evidence in the record.

[9] In his final decision dated February 6, 2018, on page 8, the commissioner states: "Hearing Officer [Brendan] Schain found that the placement of the riprap *did not create the type of "reclamation"* that could result in a permanent accession to Mr. Nussbaum's property because water continues to flow over and around the riprap to the base of the seawall." (Emphasis added.) The hearing officer found that the riprap was not a continuous solid surface and, as such, the placement of the riprap did not constitute reclamation and did not move the mean high waterline. Thus, the commissioner, and the hearing officer, understood that reclamation could theoretically occur; however, they factually found that placement of the riprap was not reclamation and did not move the mean high waterline because of the physical attributes of the riprap and its interaction with the sea. Surveying expert

The foregoing conclusion means that, essentially, all of the fences are on land owned by the state in trust for the public.[10] As noted previously, the purpose of the fences is to restrict public access to areas within the public trust.[11] The record evidence indicates that the fences have in fact been significant deterrents to public access.[12]

In balancing the property rights of the plaintiff against the rights of the state and public to access the public trust,[13] the commissioner considered the following private property rights: (i) right to quiet enjoyment, (ii) right to be free from private nuisance, (iii) right to be free from trespass, and (iv) the right to be free from lawsuits for injuries sustained by the public.[14] In balancing these rights against the right of public access to the public beach, the hearing officer found that each of the foregoing private property rights can be exercised without the need to deter or constrain public access to the land of the public trust. The right to be free from trespass on the plaintiff's private property may be exercised by placing a fence on the private property line

Brian D. Florek agreed and testified as such, clearly providing substantial evidence in support of the foregoing findings by the commissioner and the hearing officer.

[10] However, regardless of the analysis of the riprap and the mean high waterline, a portion of the fences extends into the public trust, and the plaintiff has not asserted any property right which would justify his placing a fence on public land with the very purpose and function of impeding the public's access to its own land.

[11] There are about eight to ten feet between the end of the fences and the mean low waterline.

[12] The plaintiff himself confirmed this fact in his testimony concerning aggrievement at the hearing in this matter.

[13] The public has a right to access the land extending from the mean high waterline waterward to the water, although this right of access does not include a right to trespass on private property. In this area it is possible for the public to access the public trust without trespassing on the private property of the plaintiff.

[14] See April 21, 2017 hearing officer decision on page 10, first paragraph. The commissioner also considered the plaintiff's right to wharf out into the water.

within the private property of the plaintiff,[15] as opposed to extending a fence onto the public trust. The right to quiet enjoyment and to be free from nuisance can be asserted by contacting and cooperating with the public authorities in the enforcement of existing law.[16] The right to be free from lawsuits for injuries occurring on the plaintiff's private property may be asserted by placing a fence on the edge of his property, placing appropriate signs and/or contacting and cooperating with the authorities in the enforcement of existing law. Accordingly, the hearing officer found that the exercise of the plaintiff's private property rights did not justify placing a fence on public property when balanced against the right of the public to have access to the public property. This court finds no fault in the hearing officer's analysis and balancing, for it would be quite an unusual circumstance for one person's private property rights to extend as far as placing a fence on someone else's property for the very purpose of deterring access by the other owner to their own property.

The hearing officer correctly noted that the aforementioned private property rights asserted by the plaintiff concerned the use of his "upland property," meaning the property whose title is actually owned by the plaintiff. Thus, the hearing officer properly considered this in his balance of rights, ultimately concluding, as noted, that the rights asserted did not justify the fences' interference with the public's right to access the public trust.

Although not frontally asserted by the plaintiff, the hearing officer also considered and contrasted the

[15] The plaintiff previously had such a fence, but it was destroyed in a hurricane. The plaintiff has not sought permission to reconstruct such a fence within the bounds of his private property.

[16] The type of nuisance complained of by the plaintiff, such as litter, cannot justify the draconian remedy of preventing the public from accessing its own land, particularly when less drastic and more typical means of addressing the issue are available.

plaintiff's littoral rights, which, as a shore property owner, do authorize him to use the intertidal area, subject to the applicable statutes and regulations, and subject to the public's rights. These rights are ancient common-law rights that are subject to a balancing against the public's right to access the public trust. Thus, littoral rights include the right to wharf out into the water, and to build a pier, dock or other structure whose purpose is to facilitate the coastal landowner's access to and use of the water. These rights are not absolute and have been properly regulated. Here, the hearing officer compared those rights to the plaintiff's desire to place the fences. The hearing officer properly noted that, when authorization is given to construct wharfs, piers and other structures, the authorizations always seek to ensure that the structure does not unreasonably impair the public access. In this case, the very purpose, intent and function of the fence is to impair the public's access. Accordingly, the comparison further justified the hearing officer's rejection of the plaintiff's permit application.

The plaintiff takes the commissioner to task on several primary points. First, the plaintiff asserts that the commissioner's failure to find that the installation of the riprap moved the mean high waterline is inconsistent with *Lockwood* and *Rapoport*. Such is not the case. Clearly, the common law, and the foregoing two cases, recognize that natural and/or man-made structures or action *may* change the mean high waterline. However, whether the mean high waterline has in fact changed is primarily a fact question to be measured and assessed. Here, the commissioner considered the riprap and reasonably concluded, with substantial evidentiary support in the record, that the riprap had not changed the mean high waterline.[17]

[17] The plaintiff correctly points out that the mean high waterline is determined by elevation measurement, measuring where the water intersects the shore. However, the plaintiff ignores the issue that the finder of fact must

Second, the plaintiff claims that the commissioner did not consider all of the plaintiff's property rights in conducting the balance. The plaintiff complains that the commissioner only considered the plaintiff's littoral rights. Such is clearly not the case. The commissioner considered all of the property rights asserted by the plaintiff, as reflected in the April 21, 2017 decision. In this court's view, the commissioner considered and balanced all rights asserted by the plaintiff but arrived at the reasonable conclusion that the plaintiff's rights did not justify the incursion of the fences into the public's right of access. The court finds no clear error in this conclusion. In this regard, the commissioner properly considered and weighed the fact that the very purpose, intention and function of the fences is to impair public access to the public trust.[18]

The plaintiff asserts that the fences are also meant to protect the public, essentially, from itself. In this regard, the record indicates that the groin is slippery and that fishermen have gotten surrounded by the incoming tide when fishing on the groin. See footnote 1 of this opinion. Despite the foregoing, the plaintiff is not in a position to place a fence on public property even if it would function to protect the public by impeding its access to a dangerous area. Decisions to protect the public on public land are best left to the public itself and/or to the government.

CONCLUSION

Given the standard of review in this administrative appeal, and given the factually intensive determinations

determine—whether a specific structure, such as the riprap, constitutes land or the shore. Here, the commissioner determined, as supported by the evidence of surveying expert Brian D. Florek, that the riprap was not a continuous solid structure and did not amount to reclamation.

[18] Contrary to the plaintiff's assertions, the commissioner did not seek to maintain a policy of denying all structures, other than docks and piers, below the mean high waterline. Instead, the commissioner properly balanced the asserted private property rights against the public's right to access to

of determining the mean high waterline and then balancing the private property interests against the public's interest in access to the public trust land, the court finds that the record contains substantial evidence to support the commissioner's conclusions,[19] and the conclusions reached are reasonable. The court finds no clear error of law and no abuse of discretion in the underlying decision to deny the permit application and require removal of the unpermitted fences.

ORDER

The plaintiff's motion for reconsideration is denied.

The appeal is dismissed.

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the public trust and reached a conclusion that these two fences failed in the balance.

[19] The commissioner adopted the decision of the hearing officer as his own.