IN RE MADISON C. ET AL.*
(AC 44926)

Moll, Cradle and Clark, Js.

Syllabus

The respondent mother, whose parental rights as to her minor children previously had been terminated, appealed from the judgment of the trial court granting the motion to strike her petition for a new trial filed by the Commissioner of Children and Families. In her petition, the mother made allegations that she claimed constituted newly discovered evidence that, if known during the pendency of her termination trial, would have affected the outcome, specifically, that the court had approved permanency plans following the termination trial seeking to reunite the minor children with their father and that, following her release from prison after the termination trial, she had achieved a degree of personal rehabilitation sufficient to encourage the belief that she could resume a responsible position in the children's lives. The court concluded that the mother had failed to plead sufficient facts for a new trial pursuant to statute (§ 52-270). On the plaintiff's appeal, *held* that the trial court properly granted the motion to strike the petition for a new trial as it failed to state a claim on which relief could be granted: the mother's allegations in her petition did not constitute newly discovered evidence

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

as the court's orders approving new permanency plans were entered well after the termination trial had ended and judgment had been rendered terminating the mother's parental rights and, thus, were not facts that existed at the time of her trial; moreover, the mother's allegation that she had achieved a degree of personal rehabilitation sufficient to encourage the belief that she could resume a responsible position in her children's lives also concerned events that occurred after her trial and were but a change in circumstances, as evidence in support of facts or events that did not exist or had not yet occurred at the time of trial is not and cannot be newly discovered.

Argued February 3—officially released June 8, 2022**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the petitions were withdrawn as to the respondent father; thereafter, the matter was tried to the court, *Aaron, J.*; judgments terminating the respondent mother's parental rights, from which the respondent mother appealed to this court, *Bright, C. J.*, and *Suarez and Lavery, Js.*, which affirmed the judgments; subsequently, the respondent mother filed a petition for a new trial and the court, *C. Taylor, J.*, granted the motion to strike the petition filed by the Commissioner of Children and Families and rendered judgment thereon, from which the respondent mother appealed to this court. *Affirmed.*

Albert J. Oneto IV, assigned counsel, for the appellant (respondent mother).

Benjamin Abrams, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner Commissioner of Children and Families).

** June 8, 2022, the date this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

CLARK, J. Following the termination of her parental rights as to her three children,[1] the respondent, Patricia K., filed a petition for a new trial (petition),[2] pursuant to General Statutes § 52-270.[3] In response, the Commissioner of Children and Families (commissioner) filed a motion to strike for failure to state a claim upon which relief can be granted, which the court ultimately granted and rendered judgment thereon. The respondent appeals from that judgment, claiming that the court improperly granted the motion to strike her petition because she had alleged newly discovered evidence that, if known during the pendency of her trial, likely would have altered the outcome.[4] Because the facts averred in the respondent's petition do not constitute newly discovered evidence within the meaning of § 52-270, we affirm the judgment of the trial court.

The following facts, as summarized by this court in the respondent's direct appeal from the judgments terminating her parental rights; see *In re Madison C.*, 201 Conn. App. 184, 241 A.3d 756, cert. denied, 335 Conn.

[1] See *In re Madison C.*, 201 Conn. App. 184, 241 A.3d 756, cert. denied, 335 Conn. 985, 242 A.3d 480 (2020).

[2] The respondent filed a consolidated petition for a new trial with respect to the judgments terminating her parental rights as to the three minor children.

[3] General Statutes § 52-270 (a) provides: "The Superior Court may grant a new trial of any action that may come before it, for mispleading, the discovery of new evidence or want of actual notice of the action to any defendant or of a reasonable opportunity to appear and defend, when a just defense in whole or part existed, or the want of actual notice to any plaintiff of the entry of a nonsuit for failure to appear at trial or dismissal for failure to prosecute with reasonable diligence, or for other reasonable cause, according to the usual rules in such cases. The judges of the Superior Court may in addition provide by rule for the granting of new trials upon prompt request in cases where the parties or their counsel have not adequately protected their rights during the original trial of an action."

[4] The attorneys for all three minor children, the guardians ad litem for Ryan and Andrew, and counsel for the foster mother to Ryan submitted statements, pursuant to Practice Book § 79-6 (c), adopting the commissioner's brief on appeal.

985, 242 A.3d 480 (2020); and procedural history are relevant to our resolution of this appeal. The respondent and Chester C. are the biological parents of Madison, Ryan, and Andrew. Id., 186. The Department of Children and Families (department) became involved with the family in 2013, when Madison tested positive for marijuana and methadone upon birth. Id. Ryan, too, tested positive for marijuana and methadone when he was born in 2015. Id. Both Madison and Ryan were discharged from the hospital in the care of their parents. Id. In April, 2017, the police responded to a domestic dispute at the family's home where they found drug paraphernalia. Id. The police also found that the house was in deplorable condition. Id. On May 2, 2017, Madison and Ryan were removed from their parents' care pursuant to an order of temporary custody and placed in a nonrelative foster home. Id. That day, the commissioner also filed neglect petitions as to Madison and Ryan, alleging that they were being permitted to live under conditions, circumstances, or associations injurious to their well-being. Id.

When Andrew was born in November, 2017, he tested positive for marijuana, methadone, and cocaine. Id., 187. Pursuant to an order of temporary custody, Andrew was discharged from the hospital to the care of a nonrelative foster family. Id. On November 20, 2017, the commissioner filed a neglect petition as to Andrew on the basis of predictive neglect. Id. On November 30, 2017, the court, *Hon. Barbara M. Quinn*, judge trial referee, consolidated the three neglect petitions, adjudicated the children neglected, and ordered them committed to the custody of the commissioner. Id. The court also ordered specific steps for the respondent and Chester C. Id.

On February 1, 2019, the commissioner filed petitions to terminate the parental rights of the respondent and Chester C. to each of the three children "on the grounds

that the court in the prior proceeding found the children to have been neglected, and [the parents] had failed to achieve the degree of personal rehabilitation that would encourage the belief that, within a reasonable time and considering the ages and needs of the children, they could assume a responsible position in their children's lives."[5] Id.; see General Statutes § 17a-112 (j) (3) (B) (i). The court, *Aaron, J.*, tried the termination of parental rights petitions on August 5, 6, 7, and 16, 2019.[6] *In re Madison C.*, supra, 201 Conn. App. 188. On August 16, 2019, prior to the close of evidence, the commissioner withdrew the termination petitions as to Chester C.[7] Id.

The court issued a memorandum of decision on November 8, 2019, granting the petitions to terminate the respondent's parental rights to the children. Id. In the adjudicatory phase of the proceedings, the court found by clear and convincing evidence that the respondent had not and would not achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the ages and needs of all three children, she could assume a responsible position in their lives. Id., 188–89.

[5] The respondent had "a long history of substance abuse, specifically with heroin, and ha[d] been on methadone maintenance intermittently since 2012." *In re Madison C.*, supra, 201 Conn. App. 187. Her treatment "oscillated, with periods of sobriety interrupted by intense relapses." (Internal quotation marks omitted.) Id. As a result of the respondent's substance abuse issues, she had many interactions with the criminal justice system. Id. In April, 2017, she was arrested and charged with risk of injury to a child in connection with the domestic dispute that led to the removal of Madison and Ryan from her care. Id. She ultimately was convicted of risk of injury to a child. Id., 188.

[6] The respondent was incarcerated at the time of the termination of parental rights trial as a result of her conviction for risk of injury to a child. See footnote 5 of this opinion.

[7] During the pendency of the trial, on August 14, 2019, the commissioner also filed a motion to review Andrew's permanency plan, with the goal of reuniting Andrew with Chester C. In addition, when the termination of parental rights petitions against Chester C. were withdrawn on August 16, the court ordered specific steps for Chester C. and canvassed him with respect to that order.

In the dispositional phase of the proceedings, the court made findings on the criteria set forth in § 17a-112 (k), and "noted that the respondent had not successfully taken advantage of or complied with the services provided by the department and had not shown a willingness or ability to provide a safe and nurturing environment in which she appropriately could parent the children. Additionally, the court found that there was credible evidence to suggest that the 'toxic relationship between the parents and [the] respondent's overbearing and manipulative behavior toward [Chester C.] is an impediment to [Chester C.'s] effective parenting of the children.' " Id., 189. The court rendered judgments terminating the respondent's parental rights to each of the children. The respondent appealed.

On appeal to this court, the respondent did not challenge Judge Aaron's findings that she had failed to rehabilitate, had not taken advantage of the services offered to her by the department, had not shown a willingness or ability to provide a safe and nurturing environment for the children or that her behavior toward Chester C. was an impediment to his ability to effectively parent the children. See id., 189. Rather, she claimed that the "court deprived her of her substantive due process rights as guaranteed by the fourteenth amendment to the United States constitution because termination of her parental rights was not the least restrictive means necessary to ensure the state's compelling interest in protecting the best interests of the children." Id., 189–90.

The respondent's argument that there were less restrictive alternatives to the termination of her parental rights was predicated on the commissioner's withdrawal, on the last day of trial, of the termination petitions as to Chester C., which resulted in the commissioner's filing of new permanency plans to reunify the children with Chester C., rather than to place them for adoption. Id.,

191. She argued that, because there was a change of permanency plans, "alternatives to termination were appropriate because the court did not base its decision on a finding that she posed a physical threat to the safety of the children or that she would abuse her parental status in ways that could harm the children if the children were reunified with Chester C. Rather, she argue[d], the court based its decision to terminate [her parental rights] on its concern that she was 'an impediment to [the] father's effective parenting of the children.' She contend[ed] that the trial court's concerns about the potential for her to undermine Chester C.'s parenting could have been addressed through further orders limiting her guardianship, rather than by terminating her parental rights." Id. The respondent, however, acknowledged that she had not preserved this claim of constitutional error at trial; id., 190; and sought to prevail on appeal pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

This court concluded that the record was inadequate to review the respondent's unpreserved constitutional claim and affirmed the judgments of the trial court. *In re Madison C.*, supra, 201 Conn. App. 196; see also *State* v. *Golding*, supra, 213 Conn. 239 (party can prevail on constitutional claim that was not preserved at trial only if record is adequate to review alleged error). In reaching this conclusion, this court noted that the respondent had not proposed any alternative permanency plans at trial that would have addressed the trial court's concerns while allowing her to maintain her parental rights. *In re Madison C.*, supra, 196. "[T]he only possible reference to an alternative plan came, not during the presentation of evidence, but during closing arguments when the respondent's counsel stated: 'If your plan is to reunify with the father and not free these children for adoption, I submit that my client's parental rights should

not be terminated in this matter.' " Id., 194. In the absence of alternative proposals, the trial court had no factual predicates on which to make a finding as to whether there were narrower means, other than termination, available to protect the children's welfare and afford them permanency. Id., 194–96. Accordingly, this court concluded that the respondent's failure to raise this claim at trial, file a motion to reargue or seek an articulation as to whether the court had considered alternatives to terminating her parental rights "left the record devoid of evidence and findings necessary to review her constitutional claim." Id., 194.

On January 21, 2021, the respondent filed the instant petition for a new termination of parental rights trial pursuant to § 52-270. She alleged in relevant part that "[o]n or about August 16, 2019, the . . . commissioner withdrew the petitions to terminate [Chester C.'s] parental rights, but proceeded with a trial to terminate the [respondent's] parental rights. . . . [P]ursuant to the fourteenth amendment to the United States constitution, the . . . commissioner was constitutionally prohibited from obtaining judgments of the Superior Court terminating [her] parental rights absent a compelling governmental interest." The respondent further averred that termination of her parental rights "was or may not have been necessary" in one or more of the following ways: "to secure for the children a permanent placement as required by General Statutes §§ 17a-110, 17a-110a, and 17a-11a . . . [or] to protect the children's essential health and safety because less drastic measures were available to the . . . commissioner . . . ."[8]

[8] The respondent also alleged that termination of her "parental rights was or may not have been necessary for the . . . commissioner to continue receiving federal funding pursuant to the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115." In its memorandum of decision, the court, *C. Taylor, J*, concluded that this basis for a new trial was legally insufficient because the respondent had not alleged any newly discovered evidence in her petition as to this issue. The respondent does not challenge that ruling on appeal.

The respondent asserted as the ground for a new trial that she had "discovered material evidence in her favor that she could not have reasonably discovered before or during trial . . . ." The newly discovered evidence she alleged in support of her claim were the permanency plans seeking to reunify Madison, Ryan, and Andrew with Chester C., which the court, *C. Taylor*, *J*., approved several months after the termination of parental rights trial had concluded.[9] Additionally, the respondent alleged that there was newly discovered evidence demonstrating that she had "achieved a degree of personal rehabilitation sufficient to encourage the belief that she could resume a responsible position in her children's lives." Specifically, the respondent alleged that, after her release from prison on June 11, 2020; see footnotes 5 and 6 of this opinion; she "found gainful employment, completed parenting education, graduated from intensive outpatient substance abuse treatment . . . engaged in mental health counseling . . . [and] did not interfere with [Chester C.'s] effective parenting of the children . . . ."

On February 23, 2021, the commissioner filed a motion to strike the petition, arguing that the petition did not allege "newly discovered evidence" within the meaning of § 52-270 because it alleged events that occurred *after* the conclusion of the termination of parental rights trial. On March 15, 2021, the respondent filed a memorandum in opposition to the motion to strike. Judge Taylor held a hearing on the motion to strike on May 24, 2021,[10] and summarily granted the motion on the same date. The court issued a written articulation of its decision on July 15, 2021.

In its articulation, the court first addressed the respondent's claim that, when the commissioner withdrew the

[9] The court approved new permanency plans for Madison and Ryan on January 2, 2020, and a new permanency plan for Andrew on January 23, 2020.

[10] The intervening foster parents of Andrew also filed a motion to strike the respondent's petition on the day of the hearing.

termination petitions against Chester C., she gained a constitutional defense to the termination petitions against her because the children were no longer going to be adopted, and there was no compelling state need to terminate her parental rights. The court noted that the respondent had pursued this claim on direct appeal and that this court had concluded that the respondent had failed to provide an adequate record for review. As to the respondent's allegation that she was entitled to a new trial because she had achieved a greater degree of rehabilitation than the court was led to believe at the trial on the termination petitions, the court observed that she could have made such arguments in her appeal from the judgments terminating her parental rights.

In sum, the court concluded that the respondent's petition had failed to plead sufficient facts to support a petition for a new trial and granted the motion to strike, explaining that, "[i]f an allegation as to a change of circumstances *after* trial constituted a sufficient basis to grant a new trial on a termination of parental rights petition, a parent could prevent a child from achieving permanency and stability indefinitely." (Emphasis added.) The respondent subsequently appealed to this court.[11]

On appeal, the respondent claims that the trial court improperly granted the motion to strike her petition because she alleged facts sufficient to state a claim for a new trial pursuant to § 52-270 on the ground of newly discovered evidence. Specifically, she argues that her petition alleged that, following the conclusion of her

[11] On July 30, 2021, this court sua sponte ordered the parties to file memoranda of law giving reasons why the original appeal should not be dismissed on the ground that judgment had not been rendered on the stricken petition for a new trial. Thereafter, the respondent moved the trial court for judgment on the stricken complaint. On August 11, 2021, Judge Taylor granted that motion and rendered judgment on the stricken petition. The respondent subsequently withdrew her original appeal and filed the present appeal on August 30, 2021.

trial, she discovered new evidence demonstrating that it was unnecessary, as a matter of due process, to terminate her parental rights because *after her parental rights had been terminated* (1) the trial court approved permanency plans for the children calling for reunification with Chester C. and (2) she had rehabilitated to a point where she could safely assume a responsible position in the lives of her children, contrary to what Judge Aaron had been led to believe at trial. The commissioner argues that, for purposes of § 52-270, newly discovered evidence must be evidence of facts that existed at the time of the original trial and, therefore, the court properly granted the motion to strike the respondent's petition. We agree with the commissioner.

We begin our discussion by setting forth our standard of review. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on [a motion to strike] is plenary." (Internal quotation marks omitted.) *Hirsch* v. *Woermer*, 184 Conn. App. 583, 587, 195 A.3d 1182, cert. denied, 330 Conn. 938, 195 A.3d 384 (2018). "We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Thomas* v. *State*, 130 Conn. App. 533, 543, 24 A.3d 12, cert. denied, 302 Conn. 945, 30 A.3d 2 (2011). "It is fundamental that in determining the sufficiency of a complaint challenged by a [party's] motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 350, 71 A.3d 480 (2013). A motion to strike, however, is properly granted by the

trial court "if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003).

A trial court's authority to grant a petition for a new trial is set forth in § 52-270 (a), which provides in relevant part that "[t]he Superior Court may grant a new trial of any action that may come before it, for . . . the discovery of new evidence . . . ." What constitutes newly discovered evidence is not defined by statute, but "[t]he law on the subject of new trials for [the discovery of new evidence] is well settled in this state by a long and uniform course of judicial decisions . . . ." *Hamlin* v. *State*, 48 Conn. 92, 93 (1880). Our appellate case law establishes that "[a] party is entitled to a new trial on the ground of newly discovered evidence if such evidence is, in fact, newly discovered, will be material to the issue on a new trial, could not have been discovered and produced, on the trial which was had, by the exercise of due diligence, is not merely cumulative and is likely to produce a different result." (Internal quotation marks omitted.) *Johnson* v. *Raffy's Café I, LLC*, 173 Conn. App. 193, 211, 163 A.3d 672 (2017); see also *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1987), as further refined in *Shabazz* v. *State*, 259 Conn. 811, 827–28, 792 A.2d 797 (2002); *Hamlin* v. *State*, supra, 93–94. "This strict standard is meant to effectuate the underlying equitable principle that once a judgment is rendered it is to be considered final, and should not be disturbed by posttrial motions except for a compelling reason." (Internal quotation marks omitted.) *Asherman* v. *State*, supra, 434.

It is well established that the granting of a new trial "is not intended to reach errors available on appeal of which the party should have been aware at the time when an appeal might have been taken. . . . It is an additional safeguard to prevent injustice in cases where

the usual remedy by appeal does not lie or where, if there is an adequate remedy by appeal, the party has been prevented from pursuing it by fraud, mistake or accident. . . . [Section 52-270] does not furnish a substitute for, nor an alternative to, an ordinary appeal, but applies only when no other remedy is adequate and when in equity and good conscience relief against a judgment should be granted." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *LaBow* v. *LaBow*, 69 Conn. App. 760, 766, 796 A.2d 592, cert. denied, 261 Conn. 903, 802 A.2d 853 (2002). "[T]he causes for which new trials may be granted . . . are only such as show that the parties did not have a fair and full hearing at the first trial . . . ." (Internal quotation marks omitted.) *In re Jonathan M.*, 255 Conn. 208, 239, 764 A.2d 739 (2001).

I

We first consider the respondent's allegation that, several months after the conclusion of the trial on the petition to terminate her parental rights, the court entered orders approving new permanency plans for the children, which called for reunification with Chester C. Because those orders were entered well after the trial had ended and judgment had been rendered terminating the respondent's parental rights, we conclude that the respondent has not alleged the existence of newly discovered evidence within the meaning of § 52-270. As a result, the court properly concluded that this allegation does not state a claim for a new trial on the basis of newly discovered evidence.

Our case law makes clear that a party seeking a new trial under § 52-270 on the basis of the discovery of new evidence must allege evidence of facts or events that existed at the time of the original proceeding. See *Lozada* v. *Warden*, 24 Conn. App. 723, 725, 591 A.2d 1272 (1991) (evidence of first habeas counsel's ineffec-

tiveness is not newly discovered evidence sufficient to support petition for new trial because such evidence did not exist, but rather was generated, at time of first habeas trial), aff'd, 223 Conn. 834, 613 A.2d 818 (1992); *Wendt* v. *Wendt*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA-99-0172598-S (March 2, 2001) (newly discovered evidence must be based on facts in existence at trial); *State* v. *Goodwin*, 3 Conn. Cir. 386, 390–91, 215 A.2d 913 (evidence that is inadmissible at time of trial because it did not exist at time of trial is not newly discovered evidence), cert. denied, 153 Conn. 725, 213 A.2d 525 (1965); see also Black's Law Dictionary (11th Ed. 2019) p. 701 ("newly discovered evidence" is evidence in existence at time of trial, which then unknown to party, is later discovered). Evidence in support of facts or events that did not exist or had not yet occurred at the time of trial, is not, and cannot be, newly discovered.

Our conclusion that a petition for a new trial on the ground of newly discovered evidence must be based on evidence offered to prove facts that existed at the time of the original trial is consistent with this state's well settled standard governing the merits of a petition for a new trial. In Connecticut, a party seeking to prevail on a petition for a new trial on the ground of newly discovered evidence must demonstrate that the evidence "could not have been discovered and produced [in] the former trial by the exercise of due diligence." (Internal quotation marks omitted.) *Skakel* v. *State*, 295 Conn. 447, 507, 991 A.2d 414 (2010). "[I]f the new evidence relied upon could have been known with reasonable diligence, a new trial will not be granted." (Internal quotation marks omitted.) Id., 506. The requirement that a party must have exercised due diligence to discover what could have been known at trial is impossible to square with a definition of newly discovered evidence that includes evidence of facts that did not exist at the

time of trial. A party simply cannot be expected to diligently pursue evidence establishing facts that did not exist at trial. See *Wendt* v. *Wendt*, supra, Superior Court, Docket No. FA-99-0172598-S ("[b]y definition, evidence of posttrial events can *never* be discovered at the time of trial, regardless of the degree of diligence exercised" (emphasis in original)).

The respondent nevertheless contends that our Supreme Court's decisions in *Kubeck* v. *Foremost Foods Co*., 190 Conn. 667, 461 A.2d 1380 (1983), and *Taborsky* v. *State*, 142 Conn. 619, 116 A.2d 433 (1955), stand for the proposition that a trial court may grant a petition for a new trial even though the alleged newly discovered evidence seeks to establish facts or events that occurred or came into existence after a trial has ended. We are not persuaded.

In *Kubeck*, the plaintiff commenced a personal injury action after sustaining injuries in a motor vehicle crash. *Kubeck* v. *Foremost Foods Co*., supra, 190 Conn. 668. Because the court found in favor of the plaintiff as to liability on summary judgment, only the issue of damages was tried to the jury, which awarded the plaintiff $10,000. Id. The plaintiff later filed a petition for a new trial in light of newly discovered evidence indicating that she had suffered a disc injury in the motor vehicle collision and that, therefore, the original judgment was inadequate and a new trial would produce a different result. Id., 668–71. The trial court denied her petition on the ground that she had failed to show that the new evidence could not have been discovered with due diligence prior to the first trial. Id., 671. On appeal, our Supreme Court reversed the court's judgment, concluding that the court had abused its discretion because, in finding that the plaintiff had failed to exercise due diligence, it had erroneously imputed to the plaintiff the failure of her doctors to discover the injury. Id., 672–74.

Kubeck did not hold that a petition for a new trial "need not be predicated on facts existing at the time of trial." Nothing in *Kubeck* suggests that the newly discovered medical condition at issue in that case did not exist at the time of trial. On the contrary, our Supreme Court noted that the trial court had found that the disc injury was causally related to the motor vehicle crash and that the trial court's conclusion that the plaintiff had failed to exercise due diligence was supportable only if the failure of the plaintiff's doctors to discover the disc injury prior to trial was imputed to the plaintiff. Id., 672–73. In other words, the analysis in *Kubeck* presumed that the disc injury existed at the time of trial but was unknown to the plaintiff.

Our Supreme Court's decision in *Taborsky* is no more helpful to the respondent. In that case, the court reversed the judgment of the trial court, which had denied a petition for a new criminal trial on the ground of newly discovered evidence bearing on the competency of a key state's witness in a murder trial. *Taborsky* v. *State*, supra, 142 Conn. 621, 624–29, 634. In concluding that the trial court had erred in denying the petition, our Supreme Court noted that there was evidence at the hearing on the petition establishing that the witness' mental disability, the extent of which was not known to the petitioner until shortly after trial, had existed prior to and during the pendency of the petitioner's trial and was therefore evidence likely to bring about a different result in a new trial. Id., 628–33. In considering whether evidence of the witness' competency would be admissible and relevant to the issue of the witness' credibility in a new trial, in the event that the witness was unavailable to testify and transcripts of the witness' prior testimony were offered; id., 624; the court observed that, "since a condition of mental [disability] is always a more or less continuous one, it would be proper, *in order to ascertain the fact of its existence at a certain*

time, to consider its existence at a subsequent time." (Emphasis added.) Id., 629–30. Furthermore, although the court acknowledged that a new trial ordinarily will not be granted on the ground of impeachment evidence, it concluded that the impeachment evidence in *Taborsky* went "to the very sanity of the key witness, without whose evidence the accused could not have been convicted." Id., 632.

Thus, the respondent's reliance on *Taborsky* as standing for the proposition that newly discovered evidence need not be predicated on facts existing at the time of trial is misplaced. The decision makes clear that the petitioner in that case was granted a new trial because the discovery of new evidence bearing on the competency of a crucial state's witness called into question the veracity of the witness' testimony against the petitioner at the time of the original trial. The petitioner in that case did not merely allege a change in the witness' competency subsequent to the trial and unrelated to the veracity of that witness at the time of the original trial.

In sum, our case law, including the authorities relied upon by the respondent, plainly establish that, for purposes of seeking a new trial on the ground of newly discovered evidence, the evidence must be offered to prove facts that existed or events that occurred at the time of the original proceeding. This requirement helps to ensure that a petition for a new trial on the basis of newly discovered evidence is not used to undermine the finality of judgments. As our appellate courts have observed, the standard a party must satisfy to obtain a new trial is "strict and is meant to effectuate the underlying equitable principle that once a judgment is rendered it is to be considered final, and should not be disturbed by posttrial [proceedings] except for a compelling reason." (Internal quotation marks omitted.) *Jones* v. *State*, 328 Conn. 84, 92–93, 177 A.3d 534 (2018); see also *Carter* v. *State*, 159 Conn. App. 209, 222–23,

122 A.3d 720, cert. denied, 319 Conn. 930, 125 A.3d 204 (2015). "There must be an end of litigation, and for that reason the rules governing new trials should be strictly adhered to." (Internal quotation marks omitted.) *Gonirenki* v. *American Steel & Wire Co.*, 106 Conn. 1, 12, 137 A. 26 (1927); see also *Lancaster* v. *Bank of New York*, 147 Conn. 566, 578, 164 A.2d 392 (1960) (without rule limiting right to new trial on basis of new evidence merely affecting witness's credibility, "there might never be an end to litigation" (internal quotation marks omitted)). "Finality of litigation is essential so that parties may rely on judgments in ordering their private affairs and so that the moral force of court judgments will not be undermined. The law favors finality of judgments . . . ." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Mamudi*, 197 Conn. App. 31, 48, 231 A.3d 297, cert. denied, 335 Conn 921, 231 A.3d 1169 (2020).

This principle of law is especially important in child protection matters. As Judge Taylor aptly observed, if a parent's allegation of a change in circumstances after a judgment is rendered is a sufficient basis for a new trial, a parent could prevent a child from achieving permanency and stability indefinitely. "Time is of the essence in child custody cases. . . . This furthers the express public policy of this state to provide all of its children a safe, stable nurturing environment. . . . When the child whose interest is to be protected is very young, delay in adjudication imposes a particularly serious cost on governmental functioning." (Citations omitted; internal quotation marks omitted.) *In re Juvenile Appeal*, 187 Conn. 431, 439–40, 446 A.2d 808 (1982); see also *In re Davonta V.*, 285 Conn. 483, 494, 940 A.2d 733 (2008) (our appellate cases have "noted consistently the importance of permanency in children's lives" (internal quotation marks omitted)). "There is little that can be as detrimental to a child's sound development

as uncertainty . . . especially when such uncertainty is prolonged." *Lehman* v. *Lycoming County Children's Services Agency*, 458 U.S. 502, 513–14, 102 S. Ct. 3231, 73 L. Ed. 2d 928 (1982). Thus, a "[s]tate's interest in finality is unusually strong" with respect to disputes involving the termination of parental rights. Id., 513.

Although the respondent acknowledges that the law favors finality of litigation, she argues that "the principle must yield on occasion when it appears that its application will result in a miscarriage of justice" and that the circumstances alleged in her petition warrant the exercise of the trial court's equitable powers.[12] We acknowledge that "[a] petition for a new trial under § 52-270 is a proceeding essentially equitable in nature"; (internal quotation marks omitted) *Jacobs* v. *Fazzano*, 59 Conn. App. 716, 722, 757 A.2d 1215 (2000); and "provides a critical procedural mechanism for remedying an injustice." (Internal quotation marks omitted.) *Mitchell* v. *State*, 338 Conn. 66, 74, 257 A.3d 259 (2021). That said, the grounds that may be asserted to support a petition for a new trial are circumscribed by statute. See *Black v. Universal C.I.T. Credit Corp.*, 150 Conn. 188, 192, 187 A.2d 243 (1962) (petition for new trial "is authorized, and its scope is limited, by the terms of the

[12] The respondent's assertion that she is entitled to equitable relief from the judgment terminating her parental rights is predicated, in part, on her contention that her direct appeal from that judgment was a "*per se*" inadequate remedy. (Emphasis in original.) That contention lacks merit. In her direct appeal, the respondent claimed that she was deprived of her due process rights because termination of her parental rights was not the least restrictive means necessary to achieve a compelling state interest once the commissioner withdrew the termination petitions as to Chester C. *In re Madison C.*, supra, 201 Conn. App. 191. This court declined to review her constitutional claim because she failed to raise it at trial and had failed to create an adequate record for review under *Golding*. Id., 190, 194. It was not impossible for her to have created such a record, however. The respondent could have availed herself of appellate review of her constitutional claim by raising it in the termination trial or ensuring the record was adequate for review under *Golding*.

statute"). The party seeking a new trial "has the burden of proving by a preponderance of the evidence that [he or she] is entitled to a new trial on the grounds claimed." (Internal quotation marks omitted.) *Jacobs* v. *Fazzano*, supra, 723. Accordingly, the fundamental question before the trial court on the commissioner's motion to strike in this appeal was whether the facts alleged in the respondent's petition stated a claim for a new trial pursuant to § 52-270. Because the court's orders approving new permanency plans did not occur until after the respondent's trial, they were not facts in existence at the time of her trial and, consequently, did not constitute newly discovered evidence. These allegations thus failed to satisfy the threshold requirement of stating a claim upon which equitable relief may be granted.

II

For the same reasons discussed in part I of this opinion, the respondent's claim that she is entitled to a new trial for the discovery of new evidence establishing that she rehabilitated to a greater extent than what the trial court was led to believe at her trial also fails. In her petition for a new trial, the respondent alleged that, following her release from prison on June 11, 2020, which was approximately seven months after the court terminated her parental rights, she found gainful employment, graduated from intensive outpatient substance abuse treatment, finished relapse prevention therapy, and engaged in counseling to address her mental health issues. She also alleged that she had not interfered with Chester C.'s effective parenting of the children and that she had "achieved a degree of personal rehabilitation sufficient to encourage the belief that she could resume a responsible position in her children's lives." On appeal, she argues that the court improperly struck her petition as to this claim because it alleges newly discovered evidence that establishes that the termination of her parental rights was not necessary to achieve a compel-

ling government interest and, therefore, is evidence likely to produce a different result at a new trial.

Like the respondent's allegations relating to the orders approving new permanency plans with respect to Chester C., these allegations concern events that occurred *after* the respondent's trial, which concluded on August 16, 2019. If anything, these allegations are but a change in circumstances and, consequently, are not legally sufficient to support a petition for a new trial based on newly discovered evidence under § 52-270.

For the foregoing reasons, we conclude that the court properly granted the motion to strike the respondent's petition for a new trial as it failed to state a claim on which relief could be granted.

The judgment is affirmed.

In this opinion the other judges concurred.

CITY OF MERIDEN *v.* AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1016 ET AL. (AC 44483)

Moll, Suarez and DiPentima, Js.

Syllabus

The plaintiff city sought to confirm an arbitration award issued in connection with the termination of the defendant's employment as a police officer for the city. The city's chief of police, C, requested an internal affairs investigation of the defendant on the basis of his alleged insubordination and misappropriation of public funds after he enrolled in a training course at the city's expense even though his request to attend that training had been denied. Upon learning of this investigation, the defendant filed a complaint against C in which he alleged a pattern of retaliatory conduct. An independent consultant, R, was hired to conduct the internal affairs investigation of the defendant, and he concluded, in relevant part, that the insubordination allegation was substantiated. The city hired an attorney, A, to investigate the defendant's allegations against C. A concluded that the totality of the evidence did not support,

and in many instances was contradictory to, a finding of retaliation by C. As a result of A's findings, the city manager placed the defendant on administrative leave and requested that an internal affairs investigation be conducted regarding the defendant's allegations against C. R was retained to act as an independent hearing officer. R reviewed the results of A's investigation and determined that many of the defendant's allegations against C were not made in good faith and that some were knowingly false, and that the defendant violated certain police department rules and an order pertaining to topics such as accountability, dishonesty and retaliatory conduct. Upon R's recommendation, the city terminated the defendant's employment. The defendant's union filed a grievance on behalf of the defendant, which was submitted to arbitration. After a hearing, the arbitration panel made numerous factual findings and issued its award, which stated that the defendant's termination had been for just cause. The city filed an application with the trial court to confirm the award, and the defendant subsequently filed an application to vacate the award. Following a hearing, the trial court rendered judgment granting the city's application to confirm the award and denying the defendant's application to vacate the award, from which the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court applied the incorrect legal standard when it reviewed his application to vacate the arbitration award because he alleged that the award was procured by corruption, fraud or undue means pursuant to the applicable statute (§ 52-418 (a) (1)): the trial court properly determined that § 52-418 (a) (1)) did not apply to warrant vacatur of the arbitration award because, although the defendant repeatedly asserted, without any factual support, that an e-mail he discovered after the arbitration hearing was concealed from him and that the e-mail contained facts material to the panel's determination, the trial court did not have reason to consider that e-mail when rendering its decision, as the defendant did not provide the court with an affidavit to authenticate the e-mail or to show that he was the individual referenced in the e-mail; moreover, the defendant offered no explanation as to how he obtained the e-mail or why he was unable to discover it prior to the arbitration hearing; furthermore, the defendant's arguments concerning the e-mail and the effect it would have had on the award had he introduced it as evidence at the arbitration hearing were purely speculative.
2. The defendant could not prevail on his claim that the trial court erred in determining that the arbitration procedure was fair and impartial on the basis of his claim that the panel improperly allowed C to be present at the arbitration hearing while his subordinates were testifying: although the defendant argued that C's presence at the hearing had a chilling effect on the subordinates' testimony, he acknowledged that he could not point to any specific instances in which that testimony was

affected by C's presence and did not cite case law to support his arguments; moreover, the defendant did not argue that C should have been sequestered in order to prevent him from shaping his testimony to falsely corroborate the testimony of another witness, which is the purpose of sequestration; furthermore, it was for the arbitration panel to determine whether and when sequestration was to occur.

3. The defendant could not prevail on his claim that the trial court erred by overlooking the arbitration panel's reliance on an investigation that was not fair and impartial: although the defendant attempted to raise public policy concerns about the panel's alleged reliance on A's investigation by arguing that A's representation of the city and C in other matters prevented her from conducting a fair and impartial investigation of C in the present case, the defendant was essentially raising an evidentiary claim, and, because the submission to arbitration was unrestricted, the trial court was not permitted to review the evidence considered by the panel, and this court would not review the award for errors of fact; moreover, because the defendant had the opportunity to raise his concerns about A at the arbitration hearing and it was within the province of the panel to consider A's relationship with the city and C and what effect, if any, those relationships had on her investigation, the defendant failed to identify a clear public policy that allegedly was violated by the panel's award.

Argued February 14—officially released June 14, 2022

Procedural History

Application to confirm an arbitration award, brought to the Superior Court in the judicial district of New Haven, where the defendant Patrick Gaynor filed an application to vacate the award; thereafter, the case was tried to the court, *Young, J.*; judgment denying the defendant's application to vacate and granting the plaintiff's application to confirm, from which the defendant Patrick Gaynor appealed to this court. *Affirmed.*

Patrick Gaynor, self-represented, the appellant (defendant).

Michael J. Rose, with whom, on the brief, was *Christopher M. Neary*, for the appellee (plaintiff).

Opinion

DiPENTIMA, J. The self-represented defendant, Patrick Gaynor, appeals from the judgment of the trial

court denying his application to vacate an arbitration award rendered in favor of the plaintiff, the city of Meriden (city), in which a three member arbitration panel determined that the city had just cause to terminate his employment.[1] On appeal, the defendant claims that the court erred (1) in applying the standard for vacating an arbitration award because the award allegedly was procured by corruption, fraud or undue means, (2) in determining that the arbitration procedure was fair and impartial and (3) by overlooking the panel's reliance on an investigation that was not fair and impartial. We affirm the judgment of the court.

The following facts as found by the arbitration panel and procedural history are relevant to our resolution of the defendant's appeal. The defendant was employed by the city as a police officer with the rank of captain. On June 12, 2015, the defendant requested permission from Jeffrey Cossette, the city's chief of police, to take a training course in leadership, organizational behavior, and project management through Northwestern University. At that time, the defendant was serving as acting communications director, which is a position that can be filled by a nonpolice officer.[2] Cossette denied the defendant's request, citing budgetary considerations. Notwithstanding that denial, at the city's expense, the defendant signed up for the course at a cost of $4000 plus a $165 registration fee.

On September 1, 2016, Cossette requested that an internal affairs investigation be initiated on the basis

[1] Gaynor's union, American Federation of State, County and Municipal Employees, Local 1016, also was named as a defendant in the underlying action, but did not participate in this appeal. Accordingly, we will refer to Gaynor as the defendant throughout this opinion. The defendant declined union representation and retained his own counsel for the arbitration proceedings. He was self-represented before the trial court and is self-represented on appeal.

[2] The arbitration panel, however, found that the training program "was designed for police leadership functions."

of the defendant's alleged insubordination and misappropriation of public funds. Upon learning of the investigation, the defendant filed a complaint[3] against Cossette in which he alleged a pattern of retaliatory conduct as a result of his involvement in a criminal prosecution against Cossette's son.[4] Because of the defendant's complaint against Cossette, an independent consultant, Charles Reynolds,[5] was hired to make a determination regarding the defendant's alleged insubordination and misappropriation of public funds. Reynolds determined that the allegation of misappropriation of public funds was not substantiated because, as acting communications director, the defendant had the authority to expend those funds. Reynolds found that the allegation of insubordination, however, was substantiated.

The city hired Attorney Paula Anthony of Berchem, Moses & Devlin, P.C., to investigate the defendant's allegations against Cossette. Anthony conducted interviews and collected evidence. Anthony concluded that " '[t]he totality of the evidence reviewed does not support, and in many instances is contradictory to, a finding of retaliation.' " Upon receipt of Anthony's findings, the city manager placed the defendant on administrative leave and requested that an internal affairs investigation be conducted regarding the defendant's allegations against Cossette. Sergeant Christopher Fry, who worked

[3] Although the arbitration panel's factual findings do not indicate with what entity the defendant filed his complaint, we note that the city investigated the allegations in the complaint.

[4] Cossette's son was indicted by a federal grand jury on November 14, 2012, and thereafter was tried, convicted, and imprisoned for criminal conduct not specified in this record. The defendant had brought the son's conduct to light and testified at his criminal trial.

[5] The arbitration panel described Reynolds as "a highly experienced prior police chief turned independent consultant, who has worked on the Oversight Commission for Police Reform in Northern Ireland, for the Department of Justice Civil Rights Division working on consent decrees, and [is] currently working for a federal judge in Oakland, California, monitoring the compliance with that city's negotiated [p]olice [d]epartment consent decree."

for the city's police department, conducted the investigation and concluded that the defendant had violated several of the department's policies and orders. Reynolds was retained to act as an independent hearing officer to review the results of the investigation and make recommendations based on those results.

Reynolds conducted a *Loudermill* hearing[6] on May 19, 2017, which lasted eight hours.[7] Reynolds evaluated the defendant's allegations against Cossette and found that none of the allegations had merit. In fact, Reynolds determined that many of the allegations were not made in good faith and that some were knowingly false. Reynolds further determined that the defendant violated two of the police department's rules and one of its orders pertaining to topics such as accountability, dishonesty and retaliatory conduct. Reynolds considered recommending that the defendant be demoted and receive counseling, but he ultimately recommended that the defendant's employment be terminated. Reynolds stated that " '[t]he overriding thing was the reckless regard for the truth, you know, how he didn't engage in fact finding and truthfulness, which is the stock in trade of a police officer . . . so the only option I had was to recommend termination.' "

The city terminated the defendant's employment in June, 2017. The defendant's union, American Federation of State, County and Municipal Employees, Local 1016, filed a grievance on behalf of the defendant, which was submitted to arbitration before the state Board of

[6] Pursuant to *Board of Education* v. *Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), due process entitles a "tenured public employee" to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." "The opportunity to present one's 'side of the story' is generally referred to as a *Loudermill* hearing." *AFSCME, Council 4, Local 2663* v. *Dept. of Children & Families*, 317 Conn. 238, 243 n.3, 117 A.3d 470 (2015).

[7] The defendant attended the hearing and was represented by counsel.

Mediation and Arbitration. The city and the defendant jointly submitted the following questions to be decided by the arbitration panel: "Was the termination of [the defendant] for just cause? If not, what shall the remedy be?" The submission was unrestricted. A panel of three arbitrators (panel) conducted a hearing over the course of twelve days, from November 3, 2017, through May 23, 2019. The parties then submitted posthearing briefs. On March 10, 2020, the panel issued its award, which stated: "The termination of [the defendant] was for just cause."[8]

The panel made a series of factual findings and noted that the defendant "was provided an extraordinarily wide latitude over the twelve days of hearings to provide any evidence, even with the most tangential relevance, to rebut the city's evidence supporting its decision to terminate his employment." The panel stated: "This case is about a dishonest employee." The panel found, among other things, that the defendant made allegations against Cossette that "he knew were false, or recklessly added them to the litany of allegations with no concern whether they were false or not." The panel stated that the defendant "was clearly untruthful when testifying under oath" concerning a conversation he had had with an acquaintance, and that "it was readily observable that the [defendant] attempted to steer" the testimony of that acquaintance during his testimony at the hearing. The panel further noted that there was "a pattern of untruths and reckless disregard for the truth" by the defendant, and that he was trying to "bring down" Cossette.

On March 19, 2020, the city filed an application to confirm the arbitration award in the Superior Court. On April 17, 2020, the defendant filed an application to

[8] In his brief to this court, the defendant represents that one of the arbitrators dissented to the award. The record reflects, however, that the arbitration award was signed by all three arbitrators on the panel.

vacate the award. In that motion, he argued that there was "evident partiality on the part of the arbitrators" and stated that the arbitrators "committed misconduct" that prejudiced him. Specifically, he argued that the panel "refus[ed] to hear evidence pertinent and material to the controversy," "allow[ed] the [city] to introduce audio recordings for which the defendant had not been disciplined," "refus[ed] to compel [the city's] witness to disclose the identity of another who purportedly had information relevant to the proceedings," "refus[ed] the defendant's request to sequester the [city's] investigator . . . who was a material witness to the controversy," and "permit[ed] [the investigator] to fabricate an allegation that was prejudicial toward the defendant and refus[ed] to allow the defendant's counsel to examine [the investigator] regarding his allegations . . . ." He also argued that the award violated public policy because it punished the defendant for "bringing forth good faith complaints of misconduct by a law enforcement official that were not fairly and fully investigated . . . ." On November 2, 2020, upon agreement of the parties, the court held a hearing on both the city's application and the defendant's application.

On January 4, 2021, the court issued a memorandum of decision in which it denied the defendant's application to vacate the award.[9] The court stated that the "only proper issue" before it was whether the award conformed to the submission. The court concluded that it did. The court stated that the defendant "[did] not attack the conformity of the award to the submission" and "offered no evidence to suggest that the award does not conform."

The court noted that it "[found] none of the [defendant's] assertions to be credible even if they were justiciable and subject to review." The court stated that

[9] The court simultaneously granted the city's application to confirm the arbitration award.

the defendant "substantially reassert[ed] the claims he made both at the arbitration hearing and in a voluminous posthearing brief. Those assertions [were] repeated in the present hearing: the underlying investigation was faulty and the investigators were biased. Neither of these are properly for the court's review." The court noted that the defendant presented ten claims of retaliation by Cossette, and "[t]he arbitrators found each to be meritless, with specific bases for each finding. The arbitrators found multiple instances of [the defendant's] conduct which independently provided a basis for termination.

"In the hearing itself, the arbitrators . . . found [the defendant] to be reckless and untruthful. They found the testimony of [the defendant's] witness 'unreliable.' Each determination by the arbitrators is set forth with particularity." The court further stated: "It must be noted how vociferously the panel characterized [the defendant's] lack of credibility, both witnessed firsthand and by investigators. The arbitrators cited specific instances of [the defendant's] false statements and baseless accusations of retaliation both in the various investigations and in the hearing itself . . . ."

The court concluded: "Despite lengthy argument and hundreds of pages of filings, [the defendant] has failed to establish that the award was procured by corruption, fraud or undue means. He has shown no evident partiality or corruption on the part of any arbitrator. There is no assertion that the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown. There is no evidence that the arbitrators refused to hear evidence pertinent and material to the controversy or of any other action by which the rights of [the defendant] were prejudiced. There is no evidence that the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was

not made. There is no claim of statutory violation or violation of public policy. In short, [the defendant] has not met his burden of proof in his application for vacatur, even if the submission had been restricted." This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the relevant principles of law and standard of review, which are applicable to each of the defendant's claims. "When considering a motion to vacate an unrestricted arbitration award, a trial court should not substitute its judgment for that of the arbitrators. Judicial review of arbitral decisions is narrowly confined. . . . When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement. . . . When the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission. . . . In other words, [u]nder an unrestricted submission, the arbitrators' decision is considered final and binding; *thus, the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact*. . . . Furthermore, [e]very reasonable presumption and intendment will be made in favor of the award and of the arbitrator's acts and proceedings." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Kellogg* v. *Middlesex Mutual Assurance Co.*, 326 Conn. 638, 645–46, 165 A.3d 1228 (2017).

"In light of these constraints, a court may vacate an unrestricted arbitration award only under certain limited conditions: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . [or] (3) the award contravenes one or more of the statutory proscriptions of [General Stat-

utes] § 52-418." (Internal quotation marks omitted.) Id., 646. We review de novo the court's determination as to whether any of those exceptions apply. See, e.g., *Norwalk Medical Group, P.C.* v. *Yee*, 199 Conn. App. 208, 216, 235 A.3d 540 (2020); *Toland* v. *Toland*, 179 Conn. App. 800, 810, 182 A.3d 651, cert. denied, 328 Conn. 935, 183 A.3d 1174 (2018). We review the court's findings of fact for clear error. *Henry* v. *Imbruce*, 178 Conn. App. 820, 828, 177 A.3d 1168 (2017).

In the present case, the submission was unrestricted. The defendant does not challenge the award's conformance to the submission. Rather, his first two claims assert that the award should be vacated pursuant to § 52-418 (a), which provides in relevant part that "the superior court . . . shall make an order vacating the award if it finds . . . (1) . . . the award has been procured by corruption, fraud or undue means . . . ." We interpret the defendant's third claim as arguing that the award violates public policy.[10] We will address each claim in turn.

I

The defendant first claims that the court erred in applying the standard for vacating an arbitration award because the award was procured by corruption, fraud or undue means. We conclude that the court applied the correct standard when reviewing the defendant's application to vacate the arbitration award. Furthermore, we reject the defendant's contention that the award was procured by corruption, fraud or undue means.

As best we can discern, the defendant challenges the court's statement in its memorandum of decision that "[t]he only proper issue before the court is whether [the defendant] has met his burden to produce evidence sufficient to show that [the award] does not conform

[10] The defendant listed six issues in his brief; we have reframed the issues briefed for clarity.

to the submission." We interpret his claim as arguing that because the court only considered whether the award conformed to the submission, it failed to consider whether the award should be vacated pursuant to § 52-418 (a) (1). Specifically, he asserts that he presented the court with evidence that the award relied on perjured testimony and that the court overlooked this evidence when rendering its decision on his motion.

The following additional procedural history is relevant to our resolution of this claim. Deputy Chief Timothy Topulos testified at the arbitration hearing that he and the defendant had a personal friendship and a good working relationship. After the arbitration panel issued its award, the defendant claims to have obtained an e-mail from Topulos to the former city manager in which Topulos referenced an unnamed employee "who held [the police department] hostage for so many years" and "undermin[ed] [the police department's] mission and the public's trust and confidence . . . ."

In his brief to this court, the defendant argues that he is the employee referenced in Topulos' e-mail. He repeatedly asserts, without any factual support, that Topulos "concealed" this e-mail from him and the panel and that the e-mail contained facts material to the panel's determination. Specifically, the defendant argues that the e-mail contradicts Topulos' testimony about his relationship with the defendant and that "[t]he award relied on Topulos' feelings of friendship and his liking of [the defendant] . . . ." Because the defendant purportedly discovered this e-mail after the arbitration hearing and could not present it to the panel, he asserts that the panel was not aware of Topulos' animus toward him when it issued its award. The court did not mention Topulos' e-mail in its memorandum of decision, nor did it inquire further about the e-mail when the defendant brought the e-mail to the court's attention at the hearing.

Upon our review de novo of the court's decision, we conclude that the court properly determined that § 52-418 (a) (1) did not apply to warrant vacatur of the award.[11] We further conclude that the court did not have reason to consider Topulos' e-mail when rendering its decision. The defendant did not provide the court with an affidavit to authenticate the e-mail or to show that he was the unnamed employee referenced by Topulos. Rather, his arguments concerning the e-mail, and the effect it would have had on the award had he introduced it as evidence at the arbitration hearing, are purely speculative. Furthermore, the defendant offered no explanation as to how he obtained this e-mail or why he was unable to discover it prior to the arbitration hearing. A mere allegation, without evidentiary support, that an individual has intentionally concealed material facts is insufficient to demonstrate that an arbitration award has been procured by corruption, fraud or undue means. See *Doctor's Associates, Inc.* v. *Windham*, 146 Conn. App. 768, 781, 81 A.3d 230 (2013). Accordingly, the defendant's claim fails.[12]

[11] As stated previously, the court stated in its memorandum of decision that the defendant "failed to establish that the award was procured by corruption, fraud or undue means." This statement indicates that the court considered the defendant's argument that the award should be vacated pursuant to § 52-418 (a) (1), rather than solely considering whether the award conformed to the submission.

[12] Even if we were to accept the defendant's arguments as true, we note that the panel's factual findings make clear that the arbitration award did not hinge on Topulos' testimony. Over the course of the twelve day hearing, the parties presented evidence and the panel heard testimony from a number of witnesses, including the defendant. Although the panel referenced Topulos' testimony to support some of its findings, it made a number of other findings about the defendant's conduct that were supported by other evidence. The court stated in its memorandum of decision that "[i]t must be noted how vociferously the panel characterized [the defendant's] lack of credibility" and that "[t]he arbitrators cited specific instances of [the defendant's] false statements and baseless accusations of retaliation both in the various investigations and in the hearing itself . . . ." Thus, we fail to see how this e-mail would have had any impact on the panel's award had the defendant presented it to the panel as evidence.

II

The defendant claims that the court erred in determining that the arbitration procedure was fair and impartial. Specifically, as we can best discern, he argues that the award contravenes § 52-418 (a) (1). The defendant claims that the panel wrongly allowed Cossette to be present at the arbitration hearing while his subordinates were testifying, over the defendant's objection. The defendant argues that Cossette's presence had a chilling effect on the testimony of his subordinates. The defendant argues that, although he "cannot demonstrate that witnesses were chilled or changed [their] testimony based on Cossette's presence, the [panel's] ruling in permitting Cossette to remain created a substantial risk that this would occur . . . ."[13]

In analyzing this claim, the defendant makes a series of conclusory allegations, many of which he made before the trial court. In fact, he acknowledges that he cannot point to any specific instances in which the testimony of Cossette's subordinates was affected by Cossette's presence. Additionally, he does not cite case law to support his arguments. As our Supreme Court has stated, "[t]he obvious purpose of sequestering a witness while another is giving his testimony is to prevent the one sequestered from shaping his testimony to corroborate

[13] The defendant also argues that he did not have an opportunity to "fully examine" Fry, who accused him of tampering with his witness during the hearing. In its arbitration award, the panel stated that "it was readily observable that the [defendant] attempted to steer" the testimony of a witness, "rendering both [the defendant and the witness] complicit in providing false testimony" during the hearing. The defendant represents that the panel did not observe him trying to steer the witness' testimony by making facial expressions and shaking his head while the witness was testifying. Rather, he contends that it was Fry who brought his behavior to the panel's attention. He argues that the panel did not allow him to cross-examine Fry about his allegations of witness tampering. In light of the limited scope of review over the parties' unrestricted submission, we decline to reach the merits of this argument, as it constitutes an improper challenge to the panel's factual findings and other actions.

falsely the testimony of the other . . . ." (Internal quotation marks omitted.) *State* v. *Nguyen*, 253 Conn. 639, 649–50, 756 A.2d 833 (2000). The defendant does not argue that the panel should have sequestered Cossette for that purpose. Furthermore, as the court noted in its memorandum of decision, it was for the panel to "determine whether and when sequestration [was] to occur." Accordingly, we reject this claim.

III

Lastly, the defendant claims that the court erred by overlooking the panel's reliance on an investigation that was not fair and impartial.[14] We disagree.

In his brief to this court, the defendant makes several references to the public policy concerns of having Anthony investigate the allegations that he had made against Cossette in his grievance. Therefore, we reasonably can interpret his claim as arguing that the award violates public policy because the panel relied in part on Anthony's investigation in issuing its award.[15] In his brief to this court, the defendant states that attorneys from Berchem, Moses & Devlin, P.C., including Anthony, have represented the city and Cossette "in various labor/pension matters prior to the [defendant's] complaint, during the pendency of the investigation, and

[14] This claim pertains to Anthony's investigation of Cossette, which was conducted in response to the defendant's grievance against Cossette. In his brief to this court, the defendant raises two related claims about this investigation. First, he claims that the court erred in overlooking that the panel relied on an investigation that did not comply with General Statutes § 7-294bb, which is titled "[s]tate and local police policy concerning complaints from the public alleging misconduct committed by law enforcement personnel." Second, he claims that the court erred in overlooking the panel's reliance on Anthony's investigation, which could not have been conducted in a fair and impartial manner because of Anthony's duty to her clients. We address these claims together.

[15] The court did not interpret the defendant's application to vacate the arbitration award as making any arguments that the award violated public policy. In its memorandum of decision, the court stated that there was "no claim of . . . violation of public policy."

thereafter." He argues that Anthony's representation of the city and Cossette prevented her from conducting a fair and impartial investigation of Cossette "while also fulfilling her duty to her clients in reviewing [the defendant's] claims and advising her clients of potential legal issues." He further argues that Anthony was "precluded from divulging information that would be [adverse] to the position of her clients, [who are the city] and Cossette."

"Our Supreme Court in *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, [252 Conn. 416, 747 A.2d 1017 (2000)], enunciated the proper standard of review for determining whether an arbitral decision violates a clear public policy. . . . *Schoonmaker* require[s] a two-step analysis in cases such as this one in which a party raises the issue of a violation of public policy in an arbitral award. First, we must determine whether a clear public policy can be identified. Second, if a clear public policy can be identified, we must then address the ultimate question of whether the award itself conforms with that policy." (Citation omitted; internal quotation marks omitted.) *Toland* v. *Toland*, supra, 179 Conn. App. 811–12.

Although the defendant attempts to make a public policy argument about the award, he essentially raises an evidentiary claim about Anthony's investigation and the findings therein. By challenging the panel's "reliance" on Anthony's investigation, he is challenging the method through which the panel decided to admit and weigh evidence related to Anthony's investigation. Because the submission was unrestricted, the trial court was not permitted to review the evidence considered by the panel, nor will we review the award for errors of fact. The defendant had the opportunity to raise his concerns about Anthony at the arbitration hearing. It was within the province of the panel to consider Anthony's relationship with the city and Cossette and what

effect, if any, those relationships had on her investigation, her report and the findings therein. Therefore, the defendant failed to identify a clear public policy that allegedly was violated by the panel's award. Accordingly, we conclude that the court did not err in its review of the defendant's arguments challenging the panel's reliance on Anthony's investigation.

The judgment is affirmed.

In this opinion the other judges concurred.

ONE ELMCROFT STAMFORD, LLC *v.* ZONING BOARD OF APPEALS OF THE CITY OF STAMFORD ET AL.
(AC 41208)

Elgo, Moll and Lavery, Js.

Syllabus

The plaintiff appealed to the Superior Court from the decision by the defendant Zoning Board of Appeals of the City of Stamford granting the application of the defendant P, filed on behalf of the defendant P Co., for approval for the location of an automotive repair business on certain real property. The board had referred P Co.'s application to the city's Planning Board and Engineering Bureau for comment. The Planning Board recommended that the application be denied. The Engineering Bureau did not object to the application but expressed various concerns. The board thereafter published notice of a public hearing on the application, which stated that P Co. sought to operate a used car dealership on the property. The board approved the application subject to certain conditions, which included concerns expressed by the Engineering Bureau. The plaintiff, which owned property that abutted the site at issue, claimed, inter alia, that the board failed to conduct a suitability analysis, as required by statute ([Rev. to 2003] § 14-55). The Superior Court concluded that the board had given due consideration to the suitability of the property and rendered judgment denying the appeal. The plaintiff then appealed to this court, which concluded that the General Assembly had not repealed § 14-55 in 2003, and reversed the Superior Court's judgment and remanded the case for further proceedings. The defendants then appealed to the Supreme Court, which determined that the General Assembly had repealed § 14-55 in 2003 and

reversed in part this court's judgment and remanded the case to this court to consider the plaintiff's remaining claims. *Held*:

1. The plaintiff's claim that the notice of the public hearing on P Co.'s application was defective and, thus, deprived the board of jurisdiction to consider the application, was unavailing; because the legislature has not enacted a proper substitute for § 14-55, which had set forth the requirements for prehearing notice regarding location approval applications, the board could not have lacked jurisdiction to hear the application, as it was not statutorily required to provide such notice at the time P Co. filed its application in 2016.
2. The plaintiff could not prevail on its contention that the board violated its right to fundamental fairness because the notice of the public hearing was misleading in that it did not sufficiently describe P Co.'s intended use of the property: although the notice stated that the property would be used for the sale of used cars, P clarified at the public hearing that, although used cars occasionally would be sold on the property, the primary intended use of the property was for general automotive repair, and, because the applicable zoning regulation (§ 19.A.3.b) referred to the statute (§ 14-54) applicable to the board's authority to hear and decide location approval applications, the defendants sufficiently apprised the plaintiff of the proposed use of the property, as the statutory (§ 14-51 (a) (2)) definition of used car dealer, which encompassed automotive repair and used car sales, accurately described the proposed use of the property; moreover, in accordance with the applicable zoning regulation (§ 20.B.1), the board provided written notice of the public hearing to all owners of property, including the plaintiff, within the applicable boundary area of the property at issue, which described the proposed use of the property as automotive repair and used car dealer.
3. The board applied an incorrect legal standard in ruling on P Co.'s location approval application and mistakenly believed it could not deny such application because the proposed use was permitted in the zone at issue: the board's collective statement of its basis for granting P Co.'s application expressly applied the legal standard under the regulation (§ 19.B.2.a (2)) that governs variance approvals rather than § 19.A.3.b, which is applicable to location approval applications; moreover, the board's assertion that its error was merely clerical was belied by the record, which demonstrated that it exceeded its statutory authority and its authority under § 19.A.3 when it referred P Co.'s application to the city's engineering and planning agencies, and, as the board was required by § 19.A.3 to hear and decide the application, its error in treating the application as a variance request was exacerbated by the terms of its approval, which required P Co. to comply with all concerns articulated by the Engineering Bureau; furthermore, because the members of the board were obligated as agents of the state to make a determination in reviewing P Co.'s location approval application, they were mistaken in

their belief that they lacked the authority to deny the application because P Co.'s proposed use was permitted in the zone at issue.

4. The board did not commit an error of law by failing to distinguish the denial by a different municipal entity seven years earlier of a location approval application for a different business to operate a used car dealership on the property at issue; the plaintiff's reliance on the "impotent to reverse" rule, which precludes a municipal agency from revisiting its prior decisions and revoking its duly enacted action, was unavailing because the board did not make any prior determinations or render a decision on the earlier application, as that denial was rendered by a different municipal entity that, at that time, had powers and duties distinct from those of the board, and P Co.'s application was filed after the legislature's amendment (Public Acts 2016, No. 16-55, § 4) of § 14-54, which transferred from that different municipal entity to the board the authority to act on location approval applications.

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

Argued September 13, 2021—officially released June 14, 2022

Procedural History

Appeal from the decision by the named defendant granting the application of the defendant Pisano Brothers Automotive, Inc., et al. for approval to locate an automotive repair business on certain real property, brought to the Superior Court in the judicial district of New Britain and transferred to the judicial district of Stamford-Norwalk, where the case was tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment denying the plaintiff's appeal, from which the plaintiff appealed to this court, *Sheldon*, *Elgo* and *Lavery*, *Js.*, which reversed the trial court's judgment and remanded the case to that court for further proceedings, and the defendant Pasquale Pisano et al., on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment and remanded the case to this court for further proceedings. *Reversed in part; further proceedings.*

Jeffrey P. Nichols, with whom was *Amy Souchuns* and, on the brief, *John W. Knuff*, for the appellant (plaintiff).

Gerald M. Fox III, for the appellees (defendant Pasquale Pisano et al.).

Opinion

ELGO, J. This administrative appeal returns to us on remand from our Supreme Court. *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, 337 Conn. 806, 256 A.3d 151 (2021) (*Elmcroft II*). In *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, 192 Conn. App. 275, 283–89, 217 A.3d 1015 (2019) (*Elmcroft I*), rev'd, 337 Conn. 806, 256 A.3d 151 (2021), this court concluded, inter alia, that General Statutes (Rev. to 2003) § 14-55[1] had not been repealed and required the defendant Zoning Board of Appeals of the City of Stamford (board) to consider the suitability of the location in question as a prerequisite to the granting of a certificate of location approval in accordance with General Statutes § 14-54. Following its grant of certification to the defendants, Pisano Brothers Automotive, Inc., and Pasquale Pisano; see *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, 333 Conn. 936, 218 A.3d 594 (2019); the Supreme Court concluded, as a matter of law, that § 14-55 had been repealed by Public Acts 2003, No. 03-184, § 10. See *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 337 Conn. 809–10. The court thus reversed the judgment of this court and remanded the matter to us with direction to consider the remaining claims of the plaintiff, One Elmcroft Stamford, LLC. See id., 826.

In accordance with that order, we now consider whether the Superior Court properly rejected the plaintiff's claims that the board (1) lacked subject matter

[1] General Statutes (Rev. to 2003) § 14-55 provides in relevant part: "No such certificate shall be issued until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway and effect on public travel."

All references to § 14-55 in this opinion are to the 2003 revision of the General Statutes.

jurisdiction to hear the application due to defective legal notice, (2) violated the plaintiff's right to fundamental fairness in administrative proceedings, (3) applied an improper legal standard in granting the certificate of location approval, and (4) failed to "consider or distinguish" a prior denial of a certificate of approval application for the location in question. We affirm in part and reverse in part the judgment of the Superior Court.

The relevant facts are largely undisputed. On June 1, 2016, Pisano Brothers Automotive, Inc., entered into a lease for a 6500 square foot parcel of real property known as 86 Elmcroft Road (property), which is located in the "M-G General Industrial District" in Stamford.[2] On that same date, Pisano, acting on behalf of Pisano Brothers Automotive, Inc., applied for a "used car dealer" license from the Department of Motor Vehicles (department).[3] In that application, Pisano listed himself as vice president of Pisano Brothers Automotive, Inc.

Pursuant to § 14-54, "[a]ny person who desires to obtain a license for dealing in or repairing motor vehicles" must first obtain "a certificate of approval of the location for which such license is desired" (location approval) from the applicable municipal zoning agency, which, in this case, was the board. In accordance with that statutory imperative, Pisano filed an application with the board for a location approval on July 14, 2016 (Pisano application),[4] on a preprinted form furnished

[2] In the various materials in the record before us, that district is described interchangeably as the "M-G zone" and the "MG zone."

[3] The application form provided by the department asks applicants to specify the "type of license" being requested and contains four boxes labeled "new car dealer," "used car dealer, "general repairer," and "limited repairer." On the application completed by Pisano, he checked "used car dealer."

[4] In *Elmcroft I*, this court concluded that Pisano "had standing to apply to the board for location approval." *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 192 Conn. App. 283. No party petitioned for certification to appeal to the Supreme Court with respect to the propriety of that determination. For clarity, we refer to Pasquale Pisano and Pisano Brothers Automotive, Inc., collectively as the applicant and individually by name.

by the board. The first page of that form asks applicants to provide the requested information "in ink" and then lists boxes for five distinct applications: "Variance(s)," "Special Exception," "Appeal from Decision of Zoning Enforcement Officer," "Extension of Time," and "Motor Vehicle"; Pisano checked "Motor Vehicle." Pisano then provided handwritten details regarding the location of the property, the owner of the property, and the applicant on page one of the form.

The second page of the application form contains a section titled "VARIANCES" and directs applicants to "complete this section *for variance requests only*. See a Zoning Enforcement Officer for help in completing this section." (Emphasis added.) Unlike the information provided on page one of the application, which is set forth in an upright block script, the variance section on page two contains the following in a strikingly larger and italicized cursive script: "APA TAB II #55 to allow a used car dealer to be located in an MG zone."[5] Although it is unclear from the record exactly who made that notation on the application form, Pisano explained at the subsequent public hearing that, in preparing the application, he had met with the city's land use officials, including the zoning enforcement officer, who worked with him to complete the application. That testimony is confirmed by the fact that the variance section of the application submitted by Pisano is stamped "ZONING ENFORCEMENT APPROVAL For Submission to Zoning Board of Appeals" and contains the signature of that official.[6]

[5] The "APA TAB II #55" notation ostensibly is a reference to "Appendix A—Table II" of the Stamford Zoning Regulations, which pertains to permitted uses in commercial and industrial districts. "Auto Sales Area, Used" is listed as number fifty-five on that table.

[6] The record before us also contains an "application packet" review form, which specifies that "all applications must be reviewed by zoning enforcement prior to ZBA submittal." That form also contains the signature of the zoning enforcement officer.

Section 19.B of the Stamford Zoning Regulations (regulations) governs variance applications, and § 19.B.1 memorializes the board's "power after public notice and hearing to determine and vary the application of these regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values."[7] Notably, § 19.B.3.d authorizes the board to refer variance applications to the Stamford Planning Board, which, "in reviewing such matters, shall set forth its opinion as to whether or not the proposed use or feature is in reasonable harmony with the various elements and objectives of the Master Plan and the comprehensive zoning plan . . . ." Stamford Zoning Regs., § 19.B.3.d (2). The regulations also authorize the board to refer variance applications "to other [a]gencies." Stamford Zoning Regs., § 19.B.3.e.

Upon receiving the Pisano application, the board referred it to other Stamford land use agencies "[i]n accordance with [§] 19 of the [regulations]," including the Planning Board and the Engineering Bureau. Those referrals expressly sought "comments" on what the board labeled a variance request.[8]

[7] That regulatory provision comports with the statutory mandate of General Statutes § 8-6 (a), which provides in relevant part: "The zoning board of appeals shall have the following duties . . . (3) to determine and vary the application of the zoning bylaws, ordinances or regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual hardship so that substantial justice will be done and the public safety and welfare secured . . . ."

[8] The record before us contains the board's formal referral of the Pisano application to various land use agencies. Appended to that referral is a document titled "Zoning Board of Appeals Referrals," next to which "86 Elmcroft Road" is handwritten. Under the section titled "Variances," the boxes corresponding to several municipal agencies are checked, including the Planning Board and the Engineering Bureau.

In a subsequent correspondence dated August 4, 2016, the Engineering Bureau informed the board that it had "reviewed plans for a variance to allow for a used car dealer to be located in the M-G Zone" and that it "has found the [proposed use] will not result in any adverse drainage impacts as there will be no increase in impervious coverage." The Engineering Bureau thus indicated that it "does not object to [the Pisano] application proceeding with the approval process with the following condition: New concrete curb and sidewalk shall be installed along the frontage of the property." The Engineering Bureau concluded by noting that "[c]urrently there is no sidewalk at this location and adjacent properties are equipped with sidewalks. Measures shall be taken to prevent vehicles from parking within the City [right-of-way]."

The board also received a letter from the Planning Board dated September 8, 2016, which stated that it had reviewed the Pisano application "in accordance with the provisions of the Stamford Zoning Regulations." The letter continued: "The Planning Board unanimously recommended *DENIAL* of [the Pisano application]. It is the opinion of the [Planning] Board that the proposed application does not keep with the character of the neighborhood and finds these requests are not consistent with the 2015 Master Plan Category #9 (Urban Mixed-Use)."[9] (Emphasis in original.)

The board scheduled a public hearing on the Pisano application and published legal notice in a local newspaper on September 1 and 7, 2016.[10] The board then held

[9] We reiterate that the regulations require the Planning Board, in reviewing a *variance* application, to "set forth its opinion as to whether or not the proposed use or feature is in reasonable harmony with the various elements and objectives of the Master Plan . . . ." Stamford Zoning Regs., § 19.B.3.d (2).

[10] The notice published by the board stated:

"CITY OF STAMFORD

"ZONING BOARD OF APPEALS

"LEGAL NOTICE

the public hearing on the Pisano application on September 14, 2016. At its outset, Chair Claire D. Friedlander read the correspondence from the Engineering Bureau and the Planning Board into the record, which began by noting that the Engineering Bureau "has reviewed the plans for a variance to allow for a used car dealer to be located in the MG zone . . . ."[11]

Attorney Gerald M. Fox III then appeared on behalf of the applicant and explained that Pisano Brothers Automotive, Inc., had been in business as an automobile repair shop in Stamford for more than twenty years. Fox further indicated that "[t]he used car dealer aspect of this application is not one that is something that [the applicant] uses very often . . . . [Pisano Brothers Automotive, Inc.] probably sells . . . less than five [cars] a year." Pisano also appeared at the hearing and stated that, although there would be occasional used car sales, the primary business conducted on the property would be general automotive repair.[12] Pisano confirmed

"The [board] will hold a public hearing and meeting on Wednesday, September 14, 2016, at 7 PM in the Cafeteria located on the 4th floor of the Stamford Government Center Building, 888 Washington Boulevard, Stamford at which time and place the following application will be considered:

"Application #059-16 of [Pisano] for a [m]otor [v]ehicle approval of Table II, Appendix A, #55 (Auto Sales Requirements) of the [regulations] in order to allow a [u]sed [c]ar [d]ealer to operate and be located in an MG zone. Said property is located on the east side of Elmcroft Road in an MG zone and is known as 86 Elmcroft Road. This application is exempt from Coastal Area Management Approval, Exemption Number 10C.

"At the above mentioned time and place a public hearing will be held and all interested parties are invited to attend. After the public hearing, there may be a meeting to discuss and possibly decide the application and any other business pending before the [b]oard." (Emphasis omitted.)

[11] That statement mirrors the notation on the "variance" section of the Pisano application.

[12] With respect to the used car dealer aspect of his business, Pisano stated that there would be "no prices, no signs, no nothing" on any used cars stored on the property. He further explained that, "if I do sell a car, it's usually to a customer that comes in and asks, do you have anything for sale. That's the only reason. Otherwise, there's no banners or anything like that. I'm not—if I do sell cars, it would be anywhere from one to five a year at the most."

that the property contained a total of six parking spaces, as depicted on an "improvement location survey" that he submitted to the board. Pisano also confirmed that his business provided towing services for its customers "from eight [a.m.] to five [p.m.]" but was "not triple AAA." Pisano acknowledged that a tow truck would be stored inside the existing building on the property.

At the hearing, multiple board members raised public safety concerns in light of the limited parking available on the 6500 square foot property. For example, prior to opening the floor for public comment, Friedlander emphasized to the applicant that, "we've had tow truck issues in this neighborhood over the years, and I think that's why we have people who are concerned about that. Tow trucks have been over the streets. They haven't been [stored completely] on the property, and there's a real concern that there's not—that's why you're getting the questions that you're getting . . . . [I]f [the Pisano application is] going to be approved, there has to be some kind of blood faith oath that nothing will be [parked] off the property at any time." Another board member, John A. Sedlak, expressed his concern that, when he recently visited the property, "there were ten cars parked in front—well, actually, eleven cars—[and] the parking lot was totally full. There was one car parked out on [a] sidewalk so you couldn't—you had to go out and walk out in the street." Sedlak then asked who was "storing all these cars there," to which Pisano replied, "I am." Sedlak responded, "Well, you're parking a car on the sidewalk right now." When Friedlander asked Pisano if he would "be comfortable with a limitation [on the number of] cars on the outside of the property at any time," Fox responded, "[t]hat's no problem, yes," and Pisano agreed, stating, "[w]e could do that."

During the public comment portion of the hearing, the board heard from John Darosa, a neighbor who

resided at 62 Elmcroft Road. Darosa began his remarks by stating in relevant part: "I am totally against the proposal. A few years ago, East Coast Towing wanted that building. They wanted to lease [the property], and we had some serious concerns as residents. . . . I'm hearing some of the same things tonight that I heard with East Coast Towing. I don't know if there's any kinfolk or not with this operation and East Coast Towing, but it seems like it's pretty much the same type of thing." Darosa contrasted the property with other businesses in the area, noting that those properties were "secluded" from the "main roads" and were not "eyesores . . . ." Darosa noted that parking was "a mess" on the property and that it "looks terrible," emphasizing that the sidewalk "disappears" in front of the property. Darosa thus opined that, "to put a car dealership [on the property], whether he's bringing in ten cars or fixing . . . cars, there's no way to hide them. The property is too small, at least that's what I think, and we went over this with East Coast Towing a few years ago and I think you guys realized that. . . . [I]t's just not a fit for the area."

The board also heard from Stamford resident Al Sgritta, who noted that cars were being stored on a property on Taff Avenue that was "not being attended to by the local authorities. They just came to look the other way. And I'm sure the same thing [will occur on the property] with vehicles being stored and towing trucks being stored. And you said, well, it's just there temporarily, and it's temporarily every day. . . . [W]hat will happen there on [the property] is a strong possibility."

When public comment concluded, Fox addressed the board and emphasized that the property was located in the M-G zone. He continued: "A lot of things can go there as of right because of the way the state of Connecticut has chosen to deal with used car dealers and car repair, [so] *this board does have to approve*

the location." (Emphasis added.) At the same time, Fox stated that the board had "the opportunity to put some limitations on what [the applicant] can do that, hopefully, will alleviate some of the concerns that you've heard tonight," and then noted several potential conditions that the board could attach to its approval. In his comments, Pisano likewise indicated that he was open to the board's attaching conditions to its approval and emphasized that the property was in the M-G zone, where an automobile repair business is a permitted use. After Pisano concluded his remarks, the public hearing was closed.

When deliberations on the Pisano application began, board member Georgiana White stated in relevant part: "I feel that this has been made more complicated than it is. . . . Because there's a misunderstanding, perfectly understandable but, nonetheless, a misunderstanding, a misconception . . . . I don't think the neighbors really understand it, but the key here, to me . . . is [that the property is in] an MG zone, and there are businesses that can move in tomorrow that would not appear here." White further opined that the "only reason" the applicant was before the board was because of the "label" of its business as a car repair shop. White also noted that what she saw as "advantageous" was that the board had "the opportunity to try to make it even more acceptable to the neighborhood here" by attaching certain conditions to its approval. In his remarks, Sedlak agreed with White that the board's hands were tied in light of the fact that an automobile repair business was a permitted use in the M-G zone under the regulations. As he stated, "unfortunately, this . . . property is a lousy property for a repair shop, terrible. . . . It's lousy, but it's permitted."[13] Board member Nino Anto-

[13] Sedlak also articulated his frustration with the zoning classification of the area in question, stating: "Why the hell hasn't the Planning Board and the Zoning Board over the many, many years changed that side of the street to something different from [the] MG zone. . . . [T]he Zoning Board and

nelli similarly stated that "this is a good opportunity [to] improve the building [on the property]. . . . Because again, it's an MG zone. Anybody can move in."

After discussing various conditions of approval, the board granted the location approval subject to fourteen detailed conditions. The board's certificate of decision, which was signed by Friedlander and recorded on the Stamford land records, contained an explicit "statement of its findings and approval," which states: "The board finds . . . [t]hat the aforesaid circumstances of conditions is/are such that the strict application of the provisions of these [r]egulations would deprive the [applicant] of the reasonable use of such land or building(s) and the granting of the application is necessary for the reasonable use of the land or building(s). The [b]oard GRANTS a Motor Vehicle approval of Table II, Appendix A, #55 (Auto Sales Requirements) of the Zoning Regulations in order to allow a Used Car Dealer to operate and be located in an [M-G] zone." The board attached fourteen conditions to its approval, which it characterized as "restrictions" in its certificate of decision.[14]

the Planning Board have not done a good job. . . . [T]he zoning should have been changed on this [area] years ago."

[14] The conditions attached to the board's approval were:

"1. All concerns of the Engineering [Bureau] shall be adhered to.

"2. There shall be no more than [six] cars parked in the front.

"3. The [applicant] shall make an effort to contact the Engineering Bureau and discuss having [it] add sidewalks to the area.

"4. The hours of operation shall be [8 a.m. to 6 p.m.], Monday through Saturday.

"5. There shall be no vehicular parking between the front property line and the curb on Elmcroft Road.

"6. There shall be one tow truck only on the premises.

"7. There shall be year round evergreen screening around the property.

"8. There shall be no auto body shop or painting of cars on the premises.

"9. All cars belonging to visitors, patrons or employees shall be parked on the site at all times.

"10. No vehicle repairs shall be permitted outside of the building.

"11. No impact tools shall be used outside of the building.

"12. No storage of inoperative vehicles shall be permitted outside of the building.

At all relevant times, the plaintiff was the owner of abutting property at 126 Elmcroft Road. Following the board's decision to grant the location approval application, the plaintiff commenced an administrative appeal in the Superior Court pursuant to General Statutes §§ 14-57 and 4-183.[15] The plaintiff claimed, inter alia, that the board (1) lacked subject matter jurisdiction to hear the Pisano application due to defective legal notice, (2) violated its right to fundamental fairness in administrative proceedings, (3) "acted illegally, arbitrarily, and in abuse of discretion" by applying an improper legal standard to the location approval request, and (4) failed "to consider or distinguish the Zoning Board's decision, dated December 14, 2009, that the [p]roperty was unsuitable for use as a used car dealership." The court, *Hon. Taggart D. Adams*, judge trial referee, rejected the plaintiff's claims and concluded that substantial evidence existed to support the board's decision. From that judgment, the plaintiff appealed to this court.

I

We first consider the plaintiff's claim that the board lacked subject matter jurisdiction to hear the Pisano application due to an alleged defect in the prehearing notice published in a local newspaper. It is well established that "subject matter jurisdiction is a threshold matter that we must resolve in order to address [a party's] other claims." *In re Joshua S.*, 260 Conn. 182,

"13. Outside visible storage of any automotive equipment including tires, batteries, auto parts, etc., shall not be permitted.

"14. The location, size, and appearance of the building and improvements shall be as per plan depicted on IMPROVEMENT LOCATION SURVEY, dated revised [July 15, 2016], copies of which are on file in the office of the [board]."

[15] General Statutes § 14-57 provides: "Any person aggrieved by the performance of any act [regarding the issuance of dealers' and repairers' licenses] by such local authority may take an appeal therefrom to the superior court for the judicial district within which such town or city is situated, or in accordance with the provisions of [§] 4-183. Any such appeal shall be privileged."

191 n.11, 796 A.2d 1141 (2002). A determination regarding subject matter jurisdiction presents a question of law, over which our review is plenary. See, e.g., *Vitale* v. *Zoning Board of Appeals*, 279 Conn. 672, 678, 904 A.2d 182 (2006).

Not all claims of improper notice are jurisdictional in nature. See, e.g., *Lauer* v. *Zoning Commission*, 220 Conn. 455, 462, 600 A.2d 310 (1991) (failure to give personal notice to specific individual not jurisdictional defect); *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, 75 Conn. App. 45, 52, 815 A.2d 145 (2003) (emphasizing that "notice requirements may be jurisdictional"). At the same time, our Supreme Court has "long held that failure to give newspaper notice is a subject matter jurisdictional defect . . . . Noncompliance with the statutory requirement of public notice invalidates the subsequent action by the zoning board . . . ." (Citations omitted.) *Koepke* v. *Zoning Board of Appeals*, 223 Conn. 171, 175, 610 A.2d 1301 (1992); see also *Wright* v. *Zoning Board of Appeals*, 174 Conn. 488, 491, 391 A.2d 146 (1978) ("[c]ompliance with prescribed notice requirements is a prerequisite to a valid action by a zoning board of appeals and failure to give proper notice constitutes a jurisdictional defect"); *Koskoff* v. *Planning & Zoning Commission*, 27 Conn. App. 443, 447, 607 A.2d 1146 ("[s]trict compliance with statutory mandates regarding notice to the public is necessary"), cert. granted, 222 Conn. 912, 608 A.2d 695 (1992) (appeal withdrawn November 10, 1992); R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 46:1, p. 3 ("[c]ompliance with the statutory requirement as to notice of the public hearing is a prerequisite to valid action by the agency"). Our analysis begins, therefore, with the statutory notice requirements for location approval applications.

As this court has observed, § 14-55 set forth "the jurisdictional requirements for a prehearing notice"

regarding location approval applications.[16] *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, supra, 75 Conn. App. 52. The General Assembly, however, repealed that statute in 2003; see *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 337 Conn. 809; and it has not enacted a proper substitute of any kind.[17] As a result, no statutory notice requirements have existed for location approval applications filed pursuant to § 14-54 in the nearly nineteen years since § 14-55 was repealed.

When Pisano filed his application for a location approval in 2016, the board was not statutorily obligated to provide notice of the public hearing on that application. A fortiori, the board could not have lacked subject matter jurisdiction over the Pisano application due to noncompliance with statutory notice requirements.

II

The plaintiff alternatively argues that, even if the board had subject matter jurisdiction to hold a public

[16] General Statutes (Rev. to 2003) § 14-55 provides in relevant part: "In any town, city or borough the local authorities referred to in [§] 14-54 shall, upon receipt of an application for a certificate of approval . . . assign the same for hearing within sixty-five days of the receipt of such application. Notice of the time and place of such hearing shall be published in a newspaper having a general circulation in such town, city or borough at least twice, at intervals of not less than two days, the first not more than fifteen, nor less than ten days, and the last not less than two days before the date of such hearing and sent by certified mail to the applicant not less than fifteen days before the date of such hearing. . . ."

[17] We recognize that, on June 4, 2003, the legislature passed No. 03-265, § 9, of the 2003 Public Acts, which "purported to amend § 14-55 by appending two new sentences to the previously existing language." *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 337 Conn. 810. For the reasons discussed in its comprehensive decision, our Supreme Court concluded that this attempted amendment of § 14-55 was ineffective in light of the legislature's repeal of § 14-55 days earlier. Id., 817–22. The Supreme Court thus held that "despite having passed multiple amendments to the statutory scheme governing certificates of approval of the location . . . the legislature has not yet seen fit to reenact the provisions previously set forth in § 14-55." (Citation omitted.) Id., 825.

hearing on the Pisano application, it violated the plaintiff's right to fundamental fairness by insufficiently describing the proposed use of the property in its prehearing notice. We do not agree.

The procedural right involved in administrative proceedings properly is described as the right to fundamental fairness, as distinguished from the due process rights that arise in judicial proceedings. *Grimes* v. *Conservation Commission*, 243 Conn. 266, 273 n.11, 703 A.2d 101 (1997). "While proceedings before [administrative agencies] are informal and are conducted without regard to the strict rules of evidence . . . they cannot be so conducted as to violate the fundamental rules of natural justice. . . . Fundamentals of natural justice require that there must be due notice of the hearing . . . ." (Citations omitted; internal quotation marks omitted.) *Megin* v. *Zoning Board of Appeals*, 106 Conn. App. 602, 608, 942 A.2d 511, cert. denied, 289 Conn. 901, 957 A.2d 871 (2008). Whether the right to fundamental fairness has been violated in an administrative proceeding is a question of law over which our review is plenary. See id. Moreover, "the burden of proving that the notice was defective rests on the persons asserting its insufficiency." *Peters* v. *Environmental Protection Board*, 25 Conn. App. 164, 170, 593 A.2d 975 (1991).

As this court observed in a case involving a location approval application, "the purpose of a prehearing notice is to permit members of the general public to prepare intelligently for a public hearing at which they may be heard about the merits of a pending application. . . . [I]mperfections in the contents of a notice do not automatically deprive a zoning board of the authority to act on an application. A notice is not misleading even though it does not describe the proposed action in detail or with exactitude. . . . Presumably, our courts have allowed zoning boards and administrative agencies some latitude with respect to such defects so as to

avoid the harsh consequences of a jurisdictional defect, which permits a disappointed litigant to question a zoning board decision long after board proceedings have concluded . . . .'' (Citations omitted; internal quotation marks omitted.) *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, supra, 75 Conn. App. 52–53. ''A notice is proper . . . if it fairly and sufficiently apprises the public of the action proposed, making possible intelligent preparation for participation in the hearing.'' *Cocivi* v. *Plan & Zoning Commission*, 20 Conn. App. 705, 708, 570 A.2d 226, cert. denied, 214 Conn. 808, 573 A.2d 319 (1990).

The prehearing notice published in the local newspaper stated in relevant part that a public hearing would be held on the Pisano application ''for a [m]otor [v]ehicle approval of Table II, Appendix A, #55 (Auto Sales Requirements) of the [regulations] in order to allow a [u]sed [c]ar [d]ealer to operate and be located in an MG zone. . . .'' See footnote 10 of this opinion. At the public hearing, Pisano clarified that the primary intended use of the property was not used car sales, but general automotive repair. In light of that admission, the plaintiff contends that the legal notice provided by the board was misleading, as it did not sufficiently describe the intended use of the property.

As this court has noted, ''zoning boards of appeal are creatures of statute'' that ''possess a limited authority, as circumscribed by statute, the scope of which cannot be enlarged or limited by either the board or the local zoning regulations.'' *Komondy* v. *Zoning Board of Appeals*, 127 Conn. App. 669, 679, 16 A.3d 741 (2011). The municipal regulations here specify the limited duties of the board, which include review of location approval applications. See Stamford Zoning Regs., § 19.A.3. With particular respect to ''Dealers' and Repairers' Licenses,'' the regulations refer to § 14-54 and recognize the board's

authority to "hear and decide" location approval applications in accordance therewith. Stamford Zoning Regs., § 19.A.3.b. That authority derives exclusively from title 14, chapter 246, part III (d) of the General Statutes, which governs the issuance of dealers' and repairers' licenses in this state.

Significantly, that statutory scheme delineates only four types of licensees—"[n]ew car dealer, "[u]sed car dealer," "[r]epairer," and "[l]imited repairer."[18] General Statutes § 14-51. For licensing purposes, a repairer is defined as "any person, firm or corporation qualified to conduct such business in accordance with the requirements of [§] 14-52a, having a suitable facility and having adequate equipment, engaged in repairing, overhauling, adjusting, assembling or disassembling any motor vehicle, but shall exclude a person engaged in making repairs to tires, upholstering, glazing, general blacksmithing, welding and machine work on motor vehicle parts when parts involving such work are disassembled or reassembled by a licensed repairer." General Statutes § 14-51 (a) (3). By contrast, a used car dealer is defined in relevant part as "any person, firm or corporation engaged in the business of merchandising motor vehicles other than new who may, incidental to such business, repair motor vehicles."[19] General Statutes § 14-51 (a) (2). In light of the undisputed fact that the applicant's intended use of the property included *both* general automotive repairs and the sale of used cars, the latter definition more accurately describes that proposed use, as it encompasses both automotive repair and used car sales.[20]

[18] It is undisputed that Pisano Brothers Automotive, Inc., is not a new car dealer or a limited repairer.

[19] At the public hearing, Fox explained that he had asked the zoning enforcement officer about the proper classification of the proposed use on the property. The zoning enforcement officer informed him that he thought that a "repair shop would be a less intrusive use than a used [car dealer], so it would fall into that category" as a used car dealer.

[20] For that reason, we reject the plaintiff's ancillary contention that the "use described at the hearing was different than the license sought from the [department] . . . ."

Furthermore, it is undisputed that, in addition to the legal notice that the board published in a local newspaper, the applicant provided written notice of the public hearing to all owners of property within "100 feet . . . of the boundary area" of the property—including the plaintiff—in accordance with § 20.B.1 of the regulations. In that notice, the applicant described the proposed use of the property as follows: "Automotive repair/used car dealer." The record contains a certificate of mailing from the United States Postal Service, which indicates that the applicant mailed that notice to the plaintiff on September 2, 2016, almost two weeks prior to the public hearing.[21] At no time has the plaintiff alleged that it did not receive that written notice or description of the proposed use of the property.

In light of the foregoing, we conclude that the applicant sufficiently apprised the plaintiff of the proposed use of the property. The plaintiff, therefore, cannot establish a violation of its right to fundamental fairness.

III

We turn next to the plaintiff's contention that the board applied an improper legal standard in granting the certificate of location approval. Because that claim involves a question of law, our review is plenary. See *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 586–87, 170 A.3d 73 (2017).

A

Before considering the specific claims advanced by the plaintiff, additional context is necessary. Under Connecticut law, the approval of the proposed location by a municipal zoning board is a prerequisite to the issuance of a state license to deal in or repair motor vehicles. See General Statutes § 14-54; *Mohican Valley*

[21] No member or representative of the plaintiff participated in the public hearing on the Pisano application.

Concrete Corp. v. *Zoning Board of Appeals*, supra, 75 Conn. App. 45. When a municipal zoning board reviews a location approval application pursuant to § 14-54, it acts as "a special agent of the state." *Vicino* v. *Zoning Board of Appeals*, 28 Conn. App. 500, 504, 611 A.2d 444 (1992). As the Supreme Court explained, "[i]n receiving and hearing and, eventually, in denying the application, the [municipal zoning board] was not functioning under either the municipal zoning ordinance or the zoning statutes. . . . It was acting in a special capacity. It was serving as the local agency named by the General Assembly to determine whether a certificate of approval should be issued." (Citations omitted.) *Mason* v. *Board of Zoning Appeals*, 143 Conn. 634, 637, 124 A.2d 920 (1956); see also *Sun Oil Co.* v. *Zoning Board of Appeals*, 154 Conn. 32, 35, 221 A.2d 267 (1966) ("[o]btaining a certificate of approval . . . is not a zoning matter"); *Dubiel* v. *Zoning Board of Appeals*, 147 Conn. 517, 520, 162 A.2d 711 (1960) (when acting on location approval application, "the board is not dealing primarily with zoning but is performing a separate function delegated to it as an agency of the state"); *Charchenko* v. *Kelley*, 140 Conn. 210, 213, 98 A.2d 915 (1953) ("the determination of the propriety of utilizing the plaintiff's premises as a location for his proposed business is an administrative matter").

Because it is acting as an "agent of the state," a municipal zoning board "must follow the statutory criteria in determining whether to issue the certificate of approval." *Vicino* v. *Zoning Board of Appeals*, supra, 28 Conn. App. 505; accord *Mason* v. *Board of Zoning Appeals*, supra, 143 Conn. 637–38 (explaining that "[i]t is to [the General Statutes], then, that we must turn to find the test for the [municipal zoning board] to apply in reaching its determination" on location approval application and emphasizing that zoning board "could legally go

no further than to apply the test incorporated in the statute"). For more than one-half century, location approval applications were evaluated pursuant to a statutory standard that required consideration of the suitability of the location in question, as most recently codified in § 14-55. See, e.g., *New Haven College, Inc.* v. *Zoning Board of Appeals*, 154 Conn. 540, 542–43, 227 A.2d 427 (1967); *Atlantic Refining Co.* v. *Zoning Board of Appeals*, 142 Conn. 64, 66, 111 A.2d 1 (1955); *Colonial Beacon Oil Co.* v. *Zoning Board of Appeals*, 128 Conn. 351, 354, 23 A.2d 151 (1941). Pursuant to that statutory standard, a municipal zoning agency was not permitted to grant a location approval unless "such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway, and effect on public travel." (Internal quotation marks omitted.) *Vicino* v. *Zoning Board of Appeals*, supra, 505. As our Supreme Court noted, "the language of the statute [was] explicit in stating what the board [was] to consider when it acts on an application." *New Haven College, Inc.* v. *Zoning Board of Appeals*, supra, 543.

In light of the legislature's repeal of § 14-55 in 2003; see *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 337 Conn. 809; that statutory standard no longer exists. As a result, municipal zoning boards are left in a precarious predicament: pursuant to § 14-54, they remain obligated to act on location approval applications as administrative agencies of the state, yet are bereft of any statutory standard to apply to such applications.[22] The challenge in acting on such applica-

[22] As one judge noted, "[w]e have the perhaps odd situation where these local zoning boards are posited as agents of the state but do not apply state mandated criteria in deciding to issue certificates of location approval." *Glenn* v. *Zoning Board of Appeals*, Superior Court, judicial district of New Haven, Docket No. CV-05-4010376-S (March 30, 2006) (*Corradino, J.*) (41 Conn. L. Rptr. 140, 143).

tions is compounded by the fact that "members of a [municipal] zoning board typically are laypersons more familiar with their community than with the niceties of applicable law" and that "[z]oning boards ordinarily conduct their proceedings with some degree of informality." (Internal quotation marks omitted.) *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, supra, 75 Conn. App. 50. As this court has observed, "[i]n light of these institutional realities, the legislature may well have thought it useful to provide specific statutory guidance for the manner in which zoning boards should conduct their proceedings . . . ." Id. With the repeal of § 14-55, such legislative guidance no longer is provided to municipal zoning boards.

As our Supreme Court emphasized in *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 337 Conn. 825, the courts of this state cannot act as plenary lawgivers. See *Ashmore* v. *Hartford Hospital*, 331 Conn. 777, 787, 208 A.3d 256 (2019); *Hayes* v. *Smith*, 194 Conn. 52, 65, 480 A.2d 425 (1984). "We are not in the business of writing statutes; that is the province of the legislature." *State* v. *Rupar*, 293 Conn. 489, 511, 978 A.2d 502 (2009). Only the General Assembly can fill the legislative void created by the repeal of § 14-55.

The question, then, is what standard remains following the repeal of § 14-55. In this regard, we note the observation in *Charchenko* v. *Kelley*, supra, 140 Conn. 212–13, that "[w]hether or not a location for repairing automobiles and for dealing in used cars should be approved is to be determined upon the basis of the situation actually existing when the certificate of approval is sought. . . . An inquiry to resolve this question involved a consideration of all relevant circumstances." (Citation omitted.) In the absence of statutory criteria like those previously specified in § 14-55; see footnote 1 of this opinion; it is left to municipal zoning boards to determine, in their discretion, the factors

relevant to their decision on whether to grant a location approval.[23]

Because municipal zoning boards act on location approval applications as administrative agencies of the state, appeals of such decisions are "governed not by General Statutes § 8-8, but by [§] 14-57." *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, supra, 75 Conn. App. 47 n.6. Section 14-57, in turn, "incorporates the rules contained in [§] 4-183 of the Uniform Administrative Procedure Act [General Statutes § 4-166 et seq.]." Id.; see footnote 15 of this opinion. Pursuant to § 4-183 (j), a reviewing 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." Accordingly, a municipal zoning board's decision on a location approval application will be reversed only when it violates the precepts outlined in § 4-183 (j). With that context in mind, we turn to the plaintiff's claims.

[23] Due to the repeal of § 14-55, zoning boards no longer are *obligated* to conduct a suitability analysis by applying the factors specified therein. At the same time, we are aware of no authority that would preclude consideration of those factors, notwithstanding repeal of that statute. As the plaintiff's counsel noted at oral argument before this court, "I don't think [a zoning board] could be faulted for applying a suitability analysis." We concur with that observation. A zoning board likewise is free to consider whether "the use of the proposed location will . . . imperil the safety of the public." *Atlantic Refining Co.* v. *Zoning Board of Appeals*, 150 Conn. 558, 561, 192 A.2d 40 (1963).

B

On appeal, the plaintiff contends that the board committed an error of law by applying an improper legal standard to the location approval application submitted by Pisano.[24] More specifically, the plaintiff submits that the board (1) improperly treated the Pisano application as a variance request and (2) operated under the mistaken belief that a municipal zoning board lacks authority to deny a location approval application when the proposed use is permitted in the zone in question. We agree.

1

In *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 192 Conn. App. 293–96, this court concluded that the board had rendered a formal, official, collective statement of the reason for its decision in its certificate of decision on the Pisano application, which was recorded on the Stamford land records on September 29, 2016.[25] See generally *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 672–76, 111 A.3d 473 (2015). For that reason, this court determined that the Superior Court improperly had searched beyond that stated reason in contravention of the maxim that

[24] In the principal appellate brief that it filed when this appeal was commenced, the plaintiff claimed that the board "decided the [Pisano] application under the wrong standard." After the Supreme Court remanded the case to this court with direction to consider the plaintiff's remaining claims; see *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 337 Conn. 826; the plaintiff requested permission to file "an expedited, supplemental brief addressing how the Supreme Court's partial reversal . . . affects the scope of the Appellate Court's review on remand." This court subsequently ordered the parties to file supplemental briefs addressing, inter alia, the question of whether, "irrespective of the issue of compliance with the repealed § 14-55," the board committed reversible error by applying an improper legal standard. The plaintiff and the applicant thereafter filed supplemental briefs in accordance with that order; the board did not file a supplemental brief or response of any kind.

[25] Friedlander signed that certificate of decision in her official capacity as chair of the board.

a court "should not go behind the official statement of the board." *Chevron Oil Co.* v. *Zoning Board of Appeals*, 170 Conn. 146, 153, 365 A.2d 387 (1976); see also *DeMaria* v. *Planning & Zoning Commission*, 159 Conn. 534, 541, 271 A.2d 105 (1970) (when zoning agency has "formally stated" reason for its decision, court should not go behind that official, collective statement to search record for other reasons supporting decision); *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, supra, 75 Conn. App. 51 (noting that "[t]he same rule" applicable to land use appeals applies in administrative appeals involving location approvals). Following our decision in *Elmcroft I*, no party petitioned for certification to appeal to the Supreme Court to challenge the propriety of that determination. We concur with, and are bound by, that settled determination. See *State* v. *Joseph B.*, 187 Conn. App. 106, 124 n.13, 201 A.3d 1108 ("we cannot overrule a decision made by another panel of this court absent en banc consideration"), cert. denied, 331 Conn. 908, 202 A.3d 1023 (2019).

In its certificate of decision on the Pisano application, the board set forth an explicit "statement of its findings and approval," stating in relevant part: "The board finds . . . [t]hat the aforesaid circumstances or conditions is/are such that the strict application of the provisions of these [r]egulations would deprive the [applicant] of the reasonable use of such land or building(s) and the granting of the application is necessary for the reasonable use of the land or building(s)." That language is identical to the standard contained in § 19.B.2.a (2) of the regulations for variance requests.[26] As the Superior

[26] Section 19.B.2.a of the regulations provides in relevant part: "In considering a variance application, the [b]oard shall state upon its record the specific written findings regarding all of the following conditions . . . . (2) . . . [T]he aforesaid circumstances or conditions are such that the strict application of the provisions of these [r]egulations would deprive the applicant of the reasonable use of such land or [b]uilding and the granting of the variance is necessary for the reasonable use of the land or [b]uilding."

Court noted in its memorandum of decision, the board's certificate of decision "looks and reads like a variance" approval. Our Supreme Court agreed with that observation. See *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 337 Conn. 812 n.8.

We conclude that the collective statement of the basis of the board's decision indicates that the board improperly applied the legal standard that governs variance approvals under the regulations. Although the board alleges that this collective statement was a mere clerical error, the record belies that claim and demonstrates that the board misunderstood its proper role in acting on location approval applications. For example, upon its receipt of the Pisano application, the board referred it to, among other Stamford agencies, the Engineering Board and Planning Board and requested their "comments" on what the board characterized as a variance request. See footnote 8 of this opinion. Nothing in the General Statutes authorizes a municipal zoning board, when acting on a location approval application as an agent of the state, to solicit feedback on the application from other municipal agencies. Furthermore, although the regulations permit the board to make such referrals when *variances* are requested; see Stamford Zoning Regs., § 19.B.3; they confer no such authority with respect to location approval requests. To the contrary, the regulations specifically require the board to "hear and decide" location approval applications for dealers' and repairers' licenses "in accordance with . . . [§§] 14-54 and [14-55] . . . ."[27] Stamford Zoning Regs.,

[27] The regulations in effect at the time that Pisano filed his application in 2016 antedate the decision of our Supreme Court in *Elmcroft II*, which clarified that § 14-55 had been repealed by the legislature in 2003. Following its repeal, § 14-55 "must be considered . . . as if it never existed." (Internal quotation marks omitted.) *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 337 Conn. 821; see also *State* v. *Daley*, 29 Conn. 272, 275 (1860) ("[t]he effect of [the] repeal was, for the most obvious reason, that the law, as to any proceedings under it which were not past and closed, must be considered as if it had never existed").

§ 19.A.3.b. By referring the Pisano location approval application to other municipal agencies, the board exceeded its authority under § 19.A.3 of the regulations.[28]

The board's error in treating the Pisano application as a variance request was exacerbated by the terms of its subsequent approval. In its August 4, 2016 memorandum on the Pisano application, sent in response to the variance referral issued by the board, the Engineering Bureau informed the board that it had "reviewed plans for a variance to allow for a used car dealer to be located in the M-G Zone" and indicated that it "does not object to [the Pisano] application proceeding with the approval process with the following condition: New concrete curb and sidewalk shall be installed along the frontage of the property."[29] The Engineering Bureau also stated that "[c]urrently there is no sidewalk at this location and adjacent properties are equipped with sidewalks. Measures shall be taken to prevent vehicles from parking within the City [right-of-way]." In its certificate of decision, the board specifically conditioned its approval of the Pisano application on "[a]ll concerns of the Engineering [Bureau being] adhered to."[30] See footnote 14 of this opinion.

[28] In that respect, the board's referral more aptly is characterized as an unlawful procedure in contravention of § 4-183 (j) (3).

[29] That correspondence was read into the record at the public hearing.

[30] We also are troubled by the board's belated effort to minimize its reliance on the variance standard contained in § 19.B.2.a (2) of the regulations. The plaintiff commenced this administrative appeal on November 14, 2016. The plaintiff filed a memorandum of law in support thereof on February 27, 2017; the board and the applicant filed their respective memoranda in opposition on April 20 and 21, 2017. On September 18, 2017—two days before argument on the appeal was scheduled in the Superior Court—the board recorded a "revised certificate of decision" on the Stamford land records regarding the Pisano application. That certificate is identical to the one recorded one year earlier, with one exception. The statement of the board's findings is omitted, with the following language inserted in its place: "NOTE—This corrected [c]ertificate eliminates 'variance' language on the original [c]ertificate of [d]ecision . . . since [the Pisano application] is not a variance application, it is an application for [c]ertificate of [a]pproval for location of a [u]sed [c]ar [d]ealership." As this court noted in *Elmcroft I*,

In the present case, the board issued a formal, official, collective statement of its decision, in which it expressly applied the legal standard that governs variance approvals under § 19.B.2.a (2) of the regulations to its review of a location approval application pursuant to § 19.A.3.b of the regulations. The board also issued a "variance" referral of the Pisano application to other municipal agencies, despite the fact that the board had no authority to do so under the regulations or the General Statutes. Moreover, the terms of the board's decision required the applicant to comply with "[a]ll concerns" articulated by a separate municipal agency. Those transgressions constitute errors of law that compromised the integrity of this administrative proceeding.

2

The plaintiff also contends that the board applied an incorrect legal standard by operating under the mistaken belief that a municipal zoning board lacks authority to deny a location approval application when the proposed use is permitted in the zone in question. The record substantiates that contention.

During the public hearing, the board heard from Darosa, a neighbor who opined that the 6500 square foot property was "too small" for the applicant's proposed use and that such use was "not a fit for the area." In

that revised certificate "was submitted to the Superior Court in a supplemental return of record. The record contains no indication as to how this revised decision was made, and it does not appear to have been issued in accordance with the modification procedures set forth in General Statutes § 4-181a et seq. It does not appear that the Superior Court considered the revised [certificate] when rendering its judgment." *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 192 Conn. App. 291 n.9. Although we agree that this purported correction cannot properly be considered the formal, collective statement of the basis of the board's decision on the Pisano application, the recording of that document nonetheless suggests a tacit acknowledgment by the board that an improper standard was specified as the collective basis of its decision in the original certificate.

light of his concerns, an unidentified board member asked Darosa: "Is there something [the applicant] can do that would make [the proposed use] acceptable . . . if you could say, this is what I want, and we make that a condition [of approval] before [the applicant] proceeds, what would be on your wish list, or is there nothing?" Darosa responded in the negative, stating that the proposed use "just doesn't fit." Friedlander then explained to Darosa that she thought the question about potential conditions was asked "because [the applicant's proposed use] does have a right to exist" in the M-G zone. When Darosa replied, "Mm hmm, okay," Friedlander noted that "the question is how could it be made more palatable . . . ."[31]

The board's deliberations on the Pisano application began with White's statement that "this [application] has been made more complicated than it is. . . . Because there's a misunderstanding, perfectly understandable but, nonetheless, a misunderstanding, a misconception . . . . I don't think the neighbors really understand it, but *the key here, to me* . . . is [that the property is in] an MG zone, and there are businesses that can move in tomorrow that would not appear here." (Emphasis added.) White opined that the "only reason" the applicant was before the board was because of the "label" of its business as a car repair shop and stated that the board nevertheless had "the opportunity to try to make [the proposed use] even more acceptable to the neighborhood here" by attaching certain conditions

[31] After the public comment portion of the hearing concluded, Fox similarly stated: "[O]ne of the things that strikes me is that it is [in] an MG zone, this property. A lot of things can go there as of right because of the way the state of Connecticut has chosen to deal with used car dealers and car repair, [so] *this board does have to approve* the location." (Emphasis added.) Fox then noted that the board had "the opportunity to put some limitations on what [the applicant] can do that, hopefully, will alleviate some of the concerns that you've heard tonight," and then discussed several potential conditions that the board could attach to its approval.

to its approval. Friedlander agreed that the board could impose conditions but emphasized that "[t]hey have to be reasonable." At that point, Sedlak agreed with White that the board's hands were tied in light of the fact that an automobile repair business was a permitted use in the M-G zone under the regulations. As he stated, "unfortunately, this property is a lousy property for a repair shop, terrible. . . . It's lousy, but it's permitted." When Friedlander asked Antonelli if he had "anything you want to say" on the Pisano application, Antonelli similarly stated that "this is a good opportunity [to] improve the building [on the property]. . . . Because, again, it's an MG zone. Anybody can move in." Sedlak then replied: "Wait a second. We're still discussing this case. . . . There's conditions to be put on this." The board then discussed various potential conditions and granted the location approval.[32]

The transcript of the public hearing supports the plaintiff's contention that the board members mistakenly believed that a municipal zoning board lacks discretion to deny a location approval application when the proposed use is permitted in the zone in question. That perception is contrary to established precedent.

[32] The record indicates that, at the time of the hearing, the board was comprised of four regular members—Friedlander, Sedlak, White, and Antonelli—and two alternate members, Ernest Matarasso and Matthew Tripolitsiotis. Although the transcript of the public hearing does not indicate that Tripolitsiotis was designated to act on the Pisano application in accordance with General Statutes § 8-5a; see, e.g., *Komondy* v. *Zoning Board of Appeals*, supra, 127 Conn. App. 675–76; and Tripolitsiotis is not identified in any manner in that transcript, the minutes of the board's September 14, 2016 meeting state that Tripolitsiotis voted to approve the Pisano application along with the four regular members of the board.

The transcript of the September 14, 2016 meeting also indicates that the members of the board never formally voted on the Pisano application, nor was any motion to approve the application made by any member. Rather, following a discussion of potential conditions, Friedlander simply declared: "Application 059-16, 86 Elmcroft Road has been approved, five votes in favor, none in opposition with the following conditions."

In *Mrowka* v. *Board of Zoning Appeals*, 134 Conn. 149, 149–51, 55 A.2d 909 (1947), the applicants sought licenses to sell gasoline and to conduct automobile repairs on a property in Plainville, both of which required them to obtain a location approval from the municipal zoning board of appeals. The zoning board denied the application due to traffic and safety concerns, and the plaintiffs appealed to the Superior Court. Id., 149–52. In reversing the determination of the zoning board, the Superior Court predicated its conclusion on the fact that "the lot in question is in an industrial zone" where "the use the plaintiffs propose to make of it is permissible in such a zone . . . ." Id., 152. The court emphasized that other commercial uses of nearby properties existed in the zone and opined that "no greater hazard would be created by the use of the premises for a gasoline station than by other uses permitted in such a zone." Id., 153. The court thus concluded that "[t]o exclude a gas station as a traffic hazard and yet regard the other enumerated uses as less likely to add to those traffic congestions or hazards inherent in any built up industrial zone seems to the court to be unsupported by rationality and therefore unreasonable and arbitrary and so to that extent unlawful." (Internal quotation marks omitted.) Id. The Supreme Court disavowed that reasoning, stating in relevant part: "To approve the court's reasoning would not only go against the judgment of the legislature but would destroy the right of a zoning board ever to refuse a certificate of approval for a gasoline station the proposed location of which was in an industrial zone, a conclusion which cannot be sound." Id., 154. The Supreme Court further characterized the Superior Court's reasoning as an "error in the fundamental basis of [its] decision . . . ." Id.

This court reached a similar conclusion in *Ferreira* v. *Zoning Board of Appeals*, 48 Conn. App. 599, 712 A.2d 423 (1998). Like the applicant here, the plaintiff

in *Ferreira* sought a used car dealer license and, accordingly, filed a location approval application with the zoning board pursuant to § 14-54. Id., 600. Following a hearing, the zoning board denied the application, concluding that the proposed location was not suitable for such use. Id., 602. On appeal, the Superior Court "reasoned that, because the proposed use was permitted by existing zoning laws of the city of Shelton, it was presumed to be suitable." Id., 602–603. The Superior Court thus reversed the decision of the zoning board. Id., 602. From that judgment, the zoning board appealed to this court, which rejected the reasoning of the Superior Court. In reversing its judgment, we concluded that the Superior Court had "improperly substituted its judgment for that of the board" and that substantial evidence existed in the record to support the board's conclusion that the location was not suitable for the plaintiff's proposed use. Id., 604–605.

Mrowka and *Ferreira* stand for the proposition that the fact that a proposed use is permitted in a particular zone does not obligate a zoning board to grant a location approval application. Indeed, *all* applications filed pursuant to § 14-54 necessarily involve uses that are permitted to some degree, as "[a] certificate of approval for a particular use cannot be issued if that use would violate zoning regulations." *Raymond* v. *Zoning Board of Appeals*, 164 Conn. 85, 89, 318 A.2d 119 (1972).

The General Assembly, in designating municipal zoning boards as agents of the state, entrusts in them the responsibility "to *determine* whether a certificate of approval should be issued." (Emphasis added.) *Mason* v. *Board of Zoning Appeals*, supra, 143 Conn. 637; see also id., 638 ("under the statute, the [zoning board] was to give or refuse to give its approval of a geographical site"); *Charchenko* v. *Kelly*, supra, 140 Conn. 212 ("[w]hether or not a location for repairing automobiles and for dealing in used cars should be approved is to

be determined upon the basis of the situation actually existing when the certificate of approval is sought" and should entail "consideration of all relevant circumstances"); *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, supra, 75 Conn. App. 59–60 (§ 14-54 "requires local zoning boards to decide the suitability of the location of an automobile dealership"); *East Coast Towing, Ltd.* v. *Stamford*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-09-6002900-S (June 30, 2010) (50 Conn. L. Rptr. 225, 227) ("The intention of § 14-54 is to have some relevant review of the placement of such a business. To allow an interpretation of the statutory requirement that approval is simply a 'rubber stamp' would ignore the purpose of the statute, that is, to permit the local authority that has knowledge and familiarity with the location to analyze . . . whether the operation is suitable for the location. It would be meaningless to enact a statute requiring a permit process if there was no discretion afforded the local authority to determine if the use 'fits' within the surrounding area."). When a zoning board is presented with a location approval application, it acts not in its zoning capacity, but as an agent of the state. See, e.g., *Sun Oil Co.* v. *Zoning Board of Appeals*, supra, 154 Conn. 35; *Dubiel* v. *Zoning Board of Appeals*, supra, 147 Conn. 520. Accordingly, in reviewing a location approval application, a municipal zoning board is obligated to make a determination, irrespective of the permitted nature of the proposed use, on whether a certificate of approval should issue. As a matter of law, the members of the board were mistaken in concluding otherwise during their deliberations.

IV

The plaintiff also contends that the board committed an error of law by failing to "consider or distinguish" a prior denial of a location approval application to operate a similar business on the property. That claim

requires us to consider the proper application of the "impotent to reverse" rule, which presents a question of law subject to plenary review.[33] See *Purnell* v. *Inland Wetlands & Watercourses Commission*, 209 Conn. App. 688, 719, 269 A.3d 124, cert. denied, 343 Conn. 908, A.3d (2022).

A

In many ways, the impotent to reverse rule operates as the administrative agency equivalent of the doctrine of stare decisis.[34] As this court recently explained, "[t]he impotent to reverse rule has governed the conduct of municipal administrative agencies in this state for more than ninety years. . . . [F]rom the inception of [land use regulation] to the present time, [our appellate courts] have uniformly held that a [municipal land use agency] should not ordinarily be permitted to review

[33] Although our conclusion in part III of this opinion that the board erroneously applied an incorrect legal standard is dispositive of the appeal and necessitates a remand to the board for a new hearing, the plaintiff's impotent to reverse claim is almost certain to arise on remand. We, therefore, deem it appropriate to address that claim. See, e.g., *Oudheusden* v. *Oudheusden*, 338 Conn. 761, 778, 259 A.3d 598 (2021); *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 325, 63 A.3d 896 (2013). By contrast, we decline to address the plaintiff's claim that the conditions that were attached to the board's approval; see footnote 14 of this opinion; are impossible to satisfy. We decline to speculate as to (1) whether the board, on remand, will grant the location approval application, (2) whether the board, on remand, will attach any conditions to such approval, and (3) the nature of any such conditions. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009) (speculation and conjecture have no place in appellate review).

[34] "The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of [decision-making] consistency . . . and . . . is an obvious manifestation of the notion that [decision-making] consistency itself has normative value." (Internal quotation marks omitted.) *Spiotti* v. *Wolcott*, 326 Conn. 190, 201, 163 A.3d 46 (2017).

its own decisions and revoke action once duly taken. . . . Otherwise . . . there would be no finality to the proceeding and the decision would be subject to change at the whim of the board or through influence exerted on its members. . . .

"At the same time . . . although [f]inality of decision is . . . desirable in the administrative context . . . that principle is by no means inflexible. . . . The impotent to reverse rule thus embodies an important limitation on the ability of an administrative agency to reconsider its prior determinations, while at the same time affording a degree of flexibility in limited circumstances. The rule dictates that an administrative agency cannot reverse a prior decision unless there has been a change of conditions or other considerations have intervened which materially affect the merits of the matter decided. . . . Mere change in conditions or other factors is not enough; only proof of material change permits an agency to reconsider its prior determination. . . . Moreover, the impotent to reverse rule applies . . . only when the subsequent application seeks substantially the same relief as that sought in the former. And it is for the administrative agency, in the first instance, to decide whether the requested relief in both applications is substantially the same."[35] (Citations omitted; internal quotation marks omitted.) Id., 719–21.

Accordingly, in applying the impotent to reverse rule, a municipal administrative agency must make two distinct factual determinations. The agency must determine (1) whether the application in question seeks substantially the same relief as that sought in a previous

[35] Our Supreme Court has held that the impotent to reverse rule applies in the specific context of location approval applications. See *Mason* v. *Board of Zoning Appeals*, supra, 143 Conn. 639 (observing, in case involving location approval application, "that, after an administrative agency has made a decision relating to the use of real property, it is ordinarily powerless to reverse itself, although it may do so if a change in circumstances has occurred since its prior decision, or other considerations materially affecting the

application that was decided by that agency and (2) whether a change of conditions or other considerations have intervened that materially affect the merits of the agency's decision on that prior application. See id., 720–21. Those factual questions must be answered by the municipal administrative agency in the first instance and cannot be decided by a reviewing court. See *Fiorilla* v. *Zoning Board of Appeals*, 144 Conn. 275, 279, 129 A.2d 619 (1957); *Hoffman* v. *Kelly*, 138 Conn. 614, 618, 88 A.2d 382 (1952); see also *Purnell* v. *Inland Wetlands & Watercourses Commission*, supra, 720–21; cf. *Hunter Ridge, LLC* v. *Planning & Zoning Commission*, 318 Conn. 431, 445, 122 A.3d 533 (2015) (Superior Court sits as appellate tribunal when hearing administrative appeal); *Shanahan* v. *Dept. of Environmental Protection*, 305 Conn. 681, 716 n.23, 47 A.3d 364 (2012) (appellate tribunal cannot find facts).

B

The plaintiff's claim is predicated on the undisputed fact that, in 2009, a company known as East Coast Towing, Ltd. (East Coast), applied for a location approval to operate a used car dealership on the property, which business included the "repair of vehicles and the storage of tow trucks" on the property. *East Coast Towing, Ltd.* v. *Zoning Board*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6003028-S (March 2, 2011) (51 Conn. L. Rptr. 572, 573). Following a public hearing at which "members of the public opposed the application claiming that the [property] was unsuitable for the proposed use"; id.; the Zoning Board of the City of Stamford (agency) denied the location approval application. Id. East Coast appealed the propriety of that decision to the Superior Court, which concluded that there was substantial evidence to support the reasons stated by the agency for its denial of

merits of the subject matter have intervened and no vested rights have arisen").

the application on suitability grounds pursuant to § 14-55.[36] Id., 578. The court, therefore, dismissed the administrative appeal. See id.

Like the East Coast application, the Pisano application here seeks a location approval to conduct used car sales, automotive repair, and the storage of a tow truck on the property. Because it involves a similar location approval request, the plaintiff posits that the board "committed legal error when it failed to address its 2009 decision [on the East Coast application] denying [a] location approval at the exact same site." The plaintiff further submits that, pursuant to the impotent to reverse rule, the board "should have compared the two [applications], and it was legal error for the [board] to reverse *its prior denial* without giving due consideration to whether circumstances had changed." (Emphasis added.) On the particular facts of this anomalous case, we disagree.

The impotent to reverse rule precludes a municipal administrative agency from revisiting "*its own decisions* and revok[ing] action once duly taken." (Emphasis added.) *Mitchell Land Co.* v. *Planning & Zoning Board of Appeals*, 140 Conn. 527, 533, 102 A.2d 316 (1953); see also *Malmstrom* v. *Zoning Board of Appeals*, 152 Conn. 385, 390, 207 A.2d 375 (1965) ("[o]rdinarily, an administrative agency cannot reverse a prior decision"); *Fiorilla* v. *Zoning Board of Appeals*, supra, 144 Conn. 279 (specifying when administrative agency is justified "in reversing itself"). The impotent to reverse rule "thus

[36] In light of the legislature's repeal of § 14-55 in 2003, the propriety of the agency's December 14, 2009 denial of the East Coast application is questionable. We note in this regard that the Superior Court, in its 2011 decision affirming that denial, erroneously concluded that "§ 14-55 was actually not repealed in [2003] and that the statute remains in effect . . . ." *East Coast Towing, Ltd.* v. *Zoning Board*, supra, 51 Conn. L. Rptr. 577; contra *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 337 Conn. 809 (concluding that § 14-55 was repealed in 2003).

embodies an important limitation on the ability of an administrative agency to reconsider *its prior determinations* . . . ." (Emphasis added.) *Purnell* v. *Inland Wetlands & Watercourses Commission*, supra, 209 Conn. App. 720.

Contrary to the plaintiff's contention before both the Superior Court and this court, the board did *not* make any prior determinations or render a decision on the East Coast location approval application in 2009. Rather, that decision was made by the agency, which, at the time, was the entity designated by statute to act on location approval applications. See General Statutes (Rev. to 2003) § 14-54 (a). Critically, the agency and the board are separate municipal administrative agencies with distinct powers and duties under the city charter. See Stamford Charter §§ C6-40-1 and C6-50-1.

In 2016, the General Assembly amended § 14-54. See Public Acts 2016, No. 16-55, § 4. As a result of that amendment, the authority to act on approval location applications in Stamford was transferred from the agency to the board, effective July 1, 2016. The Pisano application was filed two weeks later. The fact that the board and its members had no previous involvement, and made no determinations, with respect to the East Coast location approval application undermines any claim that, in granting the Pisano application, the board improperly reversed itself in contravention of the impotent to reverse rule.

In its reply to the supplemental appellate brief filed by the applicant, the plaintiff suggests that the fact that the agency, rather than the board, decided the East Coast location approval application is a "distinction without a difference." The plaintiff has provided no authority to support that assertion, nor are we aware of any. The concurring and dissenting opinion likewise has identified no authority in which the impotent to

reverse rule has been applied against a municipal agency that did not itself act on a prior application.

Furthermore, the record in the present case indicates that, although the use of the property by East Coast was vaguely alluded to by Darosa during the public hearing, the board never was apprised that the agency had rendered a decision on a location approval application for the property. Neither the agency's decision on the East Coast application nor the Superior Court's decision upholding the agency's determination was furnished to the board. In such circumstances, it would be imprudent and inequitable to impute constructive notice on the part of board members of the substance of the proceeding before, and the decision of, a separate municipal agency seven years earlier. In this regard, we are mindful that members of municipal administrative agencies like the board "typically are laypersons more familiar with their community than with the niceties of applicable law"; *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, supra, 75 Conn. App. 50; and that their "procedural expertise may not always comply with the multitudinous statutory mandates under which they operate." *Gagnon* v. *Inland Wetlands & Watercourses Commission*, 213 Conn. 604, 611, 569 A.2d 1094 (1990). On the particular circumstances of this case, we conclude that the board did not commit an error of law by failing to distinguish the agency's 2009 denial of the location approval application by East Coast.[37]

[37] This opinion should not be construed to preclude the parties, on remand, from providing the board with evidence regarding the East Coast location approval application and the agency's decision to deny that request in 2009. The board, as arbiter of credibility, is entitled to assign whatever weight it deems appropriate to such evidence. See *Cadlerock Properties Joint Venture, L.P.* v. *Commissioner of Environmental Protection*, 253 Conn. 661, 676, 757 A.2d 1 (2000) ("[n]either this court nor the [Superior Court] may . . . substitute its own judgment for that of the administrative agency on the weight of the evidence" (internal quotation marks omitted)), cert. denied, 531 U.S. 1148, 121 S. Ct. 1089, 148 L. Ed. 2d 963 (2001).

V

As a final matter, we briefly address an ancillary issue raised sua sponte in the concurring and dissenting opinion regarding the ability of a municipal zoning board to conditionally approve a location approval application. Our Supreme Court has explained that "[w]ell established principles govern further proceedings after a remand by this court. In carrying out a mandate of [the Supreme Court], the [lower] court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . This is the guiding principle that the [lower] court must observe." (Internal quotation marks omitted.) *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 522, 686 A.2d 481 (1996). In *Elmcroft II*, our Supreme Court remanded the case to this court with specific direction to "consider the plaintiff's remaining claims." *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 337 Conn. 826. In this administrative appeal, the plaintiff has not raised any claim regarding the authority of a municipal zoning board, in acting on a location approval application pursuant to § 14-54, to condition its approval on an applicant's compliance with particular restrictions. Accordingly, that issue is beyond the scope of the remand ordered by our Supreme Court.

We recognize that municipal zoning agencies routinely attach conditions to location approvals. See, e.g., *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, supra, 75 Conn. App. 56 n.11; id., 62 (noting, in case in which board attached conditions to its approval, that "the board might have taken account of the willingness of the defendants to accept a certificate of approval with conditions designed to mitigate some of the concerns raised by the plaintiffs"); *University Realty, Inc.* v. *Planning Commission*, 3 Conn. App. 556, 558, 490 A.2d 96 (1985) (affirming decision to grant location approval that "was subject to certain conditions, one

of which was approval from the defendant of the site development of the property as required by the city zoning regulations"); *Modern Tire Recapping Co.* v. *Town Plan & Zoning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-13-6041410-S (December 30, 2013) (commission granted location approval "with conditions"); *Gibson* v. *New Haven City Plan Commission*, Superior Court, judicial district of New Haven, Docket No. CV-07-4027997-S (October 27, 2008) (zoning board granted location approval subject to multiple conditions); *Zaldumbide* v. *Zoning Board of Appeals*, Superior Court, judicial district of Fairfield, Docket No. CV-90-270866 (July 23, 1992) (same). Moreover, the "application for automobile dealer's or repairer's license" form prepared by the department specifically asks whether "there are any restrictions placed on the licensee's uses of the property" by the municipal zoning agency.

At the same time, we are aware of no statutory authority for such conditional approval. Although the General Assembly expressly has conferred authority on municipal agencies to render conditional approval in certain contexts; see, e.g., General Statutes § 8-2 (a) (special permits granted by zoning agency may be subject "to conditions necessary to protect the public health, safety, convenience and property values"); General Statutes § 22a-42a (d) (1) (inland wetlands agency may impose conditions on permit to conduct regulated activity); it has not done so with respect to location approvals granted pursuant to § 14-54. Nonetheless, our Supreme Court has recognized, in another context, that "[a] zoning board of appeals may, *without express* [*statutory*] *authorization*, attach reasonable conditions to the grant of a variance." (Emphasis added.) *Burlington* v. *Jencik*, 168 Conn. 506, 509, 362 A.2d 1338 (1975). Mindful of the limited scope of our review on remand, we leave for another day the question of a zoning board's

authority to render conditional approval on an application filed pursuant to § 14-54.

The judgment is reversed in part and the case is remanded to the Superior Court with direction to remand the case to the Zoning Board of Appeals for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion MOLL, J., concurred.

LAVERY, J., concurring in part and dissenting in part. I agree that the judgment of the trial court should be reversed in part and that the case should be remanded to the court with direction to remand the case to the defendant Zoning Board of Appeals of the City of Stamford (board) for a new hearing. Specifically, I agree that the board (1) did not lack subject matter jurisdiction to hear the application, (2) did not violate the right of the plaintiff, One Elmcroft Stamford, LLC, to fundamental fairness with its prehearing notice, (3) improperly treated the application for a certificate of approval of location (Pisano application) filed by the defendant Pisano Brothers Automotive, Inc. (Pisano Brothers),[1] as one for a variance, and (4) operated under the mistaken belief that a municipal zoning board lacks the authority to deny a location approval application when the proposed use is permitted in the zone in question. Additionally, I agree with the majority's conclusion that it "concur[s] with, and [is] bound by," this court's "settled determination" in *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, 192 Conn. App. 275, 293–97, 217 A.3d 1015 (2019), rev'd, 337 Conn. 806, 256 A.3d 151 (2021) (*Elmcroft I*), that the trial court erred by searching beyond the board's stated reason for approving the

[1] Where necessary, I will refer to Pisano Brothers Automotive, Inc., as Pisano Brothers and to the defendant Pasquale Pisano as the defendant.

Pisano application.[2] I respectfully disagree, however, with the majority's conclusion that the board did not err by failing to distinguish a prior denial of a location approval application to operate a similar business on the property. Additionally, I believe that we must address the board's imposition of conditions on the certificate of approval when it erroneously reviewed the Pisano application under the variance standard. I, therefore, concur in part and respectfully dissent in part.

I

First, I believe that the board erred by failing to distinguish the present case from the decision in *East Coast Towing, Ltd.* v. *Zoning Board*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6003028-S (March 2, 2011) (51 Conn. L. Rptr. 572) (*East Coast Towing*), which involved the same property. On remand, if the board decides to issue a certificate of approval of location for the property, I strongly believe that it must articulate on the record why it is departing from that decision.

To reiterate, in *East Coast Towing*, an applicant proposed in 2009 to use the property in the present case as a base of operations for its towing business (East Coast Towing application). Id., 572–73. After a public hearing, the Zoning Board of the City of Stamford (agency)

[2] As this court noted in *Elmcroft I*, the trial court's review of the board's decision was governed by the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq. *One Elmcroft Stamford, LLC* v. *Zoning Board of Appeals*, supra, 192 Conn. App. 279; see also *Vicino* v. *Zoning Board of Appeals*, 28 Conn. App. 500, 504–505, 611 A.2d 444 (1992). Thus, because the board stated on the record its reasons for approving the application, the trial court could not look beyond those reasons to uphold the board's decision. See, e.g., *Azzarito* v. *Planning & Zoning Commission*, 79 Conn. App. 614, 618, 830 A.2d 827 ("[w]hen a [board] states its reasons in support of its decision on the record, the court goes no further, but if the [board] has not articulated its reasons, the court must search the entire record to find a basis for the [board's] decision" (internal quotation marks omitted)), cert. denied, 266 Conn. 924, 835 A.2d 471 (2003).

declined to issue a certificate of approval of location.[3] Id., 573. In reaching its decision, the agency applied the suitability standards in General Statutes (Rev. to 2003) § 14-55.[4] Id., 574.

The plaintiff applicant appealed to the Superior Court and argued in relevant part that § 14-55 had been repealed and that the agency was not permitted to consider the standards set forth in that statute when reviewing its application. Id., 573–74. The plaintiff further argued that the agency was required to approve the application once it determined that the proposed use was one permitted in the M-G general industrial

[3] In its resolution disapproving the application, the agency made the following findings:

"1. The subject property is already intensively used for a 24/7 tow truck operation with the stated intention to keep ten (10) tow trucks on the property;

"2. David M. Emerson, Executive Director of the Environmental Protection Board, has recommended that a traffic operations and management plan be provided to demonstrate that tow trucks and vehicles will not be staged and queued on the city street. Mr. Emerson concludes that the use will have a significant impact on the character of the site and surroundings resulting from the need to park tow trucks on call and to move and store cars awaiting release to their owners.

"3. Howard J. Weissberg, P.E., Senior Transportation Engineer, Tighe & Bond, has submitted a review of traffic, parking and safety issues and notes that only one parking space is available to support used car inventory, customer parking and tow truck parking. Mr. Weissberg further reports that due to the size of the lot and building there is limited traffic circulation and the potential for on-street parking and the back out of trucks and vehicles, creating a potential conflict with traffic flow and safety concerns on Elmcroft Road.

"4. Significant concerns for safety of neighborhood children and nuisance conditions and diesel fumes from the 24/7 towing and repair operations was expressed by residents and owners of adjacent residential properties, elected officials and representatives of the South End Neighborhood Revitalization Zone.

"5. The South End is rapidly becoming more residential in character, with an estimated 4,000 new housing units and major public parks planned immediately north and west of the subject property." (Internal quotation marks omitted.) *East Coast Towing, Ltd.* v. *Zoning Board*, supra, 51 Conn. L. Rptr. 574.

[4] All references to § 14-55 in this opinion are to the 2003 revision of the General Statutes.

zone. Id., 574. The court concluded that § 14-55 had not been repealed and dismissed the appeal after concluding that there was substantial evidence to support the reasons stated by the agency for its denial of the application. Id., 577–78.

The plaintiff in the present case maintains that the board is bound by the agency's decision on the East Coast Towing application and that it should have articulated why it departed from the prior denial when it granted the Pisano application. As part of the legal standard that the plaintiff invites this court to adopt, it argues that, on remand, the board "must either follow or expressly distinguish" the decision in *East Coast Towing*. Two cases from our Supreme Court support the plaintiff's position. First, *Hoffman* v. *Kelly*, 138 Conn. 614, 88 A.2d 382 (1952), involved an appeal from the denial by the Liquor Control Commission (commission) of the plaintiff's application for a druggist liquor permit. The commission found that the property was unsuitable because, "having considered the number of like outlets in the neighborhood, [the commission] found that the granting of a permit in this locality would have been detrimental to public interest, and because the commission was satisfied that there had been no change in the neighborhood since [its] prior denials." Id. The plaintiff appealed to the trial court, and, after hearing additional evidence and finding facts, the court sustained the appeal and ordered the commission to issue a permit to the plaintiff. See id.

On appeal to our Supreme Court, the commission argued "that its denial of the permit [was] justified under the principle of law which ordinarily renders every administrative agency impotent to reverse itself unless (1) a change of conditions has occurred since its prior decision or (2) other considerations materially affecting the merits of the subject matter have intervened and no vested rights have arisen." Id., 616–17. The court

concluded that the trial court impermissibly found that there had been a change of conditions by finding its own facts and reaching its own conclusion, rather than determining, on the basis of the facts found by the commission, whether the commission's conclusion was unreasonable or illogical. See id., 617. The court noted that, to support a denial of the permit on the ground that the commission was bound by its earlier decision, the commission needed to make findings that the conditions in the neighborhood had not changed and that there were no new considerations materially affecting the subject matter. See id. Because the commission did not make such findings, the reasons it supplied did not support its denial of the permit on the ground that it was not free to reverse its prior decision. Id. The court stated that it is for the commission to say "whether new considerations have arisen, what they are and whether they so materially change the aspect of the case that they will justify a change of decision." Id., 618. Our Supreme Court remanded the case to the trial court with direction to remand the case to the commission "to be proceeded with in accordance with law." Id.

Second, *Mason* v. *Board of Zoning Appeals*, 143 Conn. 634, 124 A.2d 920 (1956), involved an appeal from the refusal by the Board of Zoning Appeals of the City of Bridgeport (board of zoning appeals) to issue a certificate approving the plaintiff's property "as a suitable location for carrying on the business of repairing motor vehicles." Id., 635. The board of zoning appeals previously had issued to the plaintiff's brother a certificate approving the same property as a suitable location for motor vehicle repairs. Id. Five years later, the brother transferred title to the property and his interest in the business to the plaintiff. Id., 635–36. The plaintiff submitted an application to the board of zoning appeals for a certificate of approval. Id., 636. A public hearing was held on the plaintiff's application at which neigh-

bors complained about the hours of operation of the brother's business, along with noise and fumes caused by the car repairs. Id. The board of zoning appeals also received from the Bridgeport Fire Department a report detailing hazards that existed on the premises. Id. At the conclusion of the hearing, the board of zoning appeals denied the plaintiff's application without stating in the record its reason for doing so. Id.

On appeal to our Supreme Court, the plaintiff claimed that the board of zoning appeals acted arbitrarily, illegally, and in abuse of its discretion in issuing a certificate of approval to his brother and then reversing its ruling when it declined to issue a certificate to him, even though no change of circumstances had occurred since it first approved the location. Id. Our Supreme Court, citing *Hoffman*, stated: "[A]fter an administrative agency has made a decision relating to the use of real property, it is ordinarily powerless to reverse itself, although it may do so if a change in circumstances has occurred since its prior decision, or other considerations materially affecting the merits of the subject matter have intervened and no vested rights have arisen." Id., 639. The court concluded that, because there was nothing in the record to show a change of circumstances since the prior decision of the board of zoning appeals, that entity acted illegally in reversing itself. See id.

In the present case, the defendant and Pisano Brothers argue that the board should not be bound by the agency's 2009 decision on the East Coast Towing application because, among other things, the decision was made by a different administrative agency that is a separate and independent branch of Stamford's land use department. The majority agrees with this argument.

As the majority notes, in 2009, when the hearing on the East Coast Towing application took place, General Statutes (Rev. to 2009) § 14-54 delegated to *the agency*

the authority to review location approval applications and to issue certificates of approval of location. In 2016, shortly before the hearing on the Pisano application, the legislature amended § 14-54, which now delegates to *the board* the authority to review these applications and issue these certificates. See Public Acts 2016, No. 16-55, § 4. Accordingly, the majority does not address the applicability of our Supreme Court's decisions in *Hoffman* v. *Kelly*, supra, 138 Conn. 614, and *Mason* v. *Board of Zoning Appeals*, supra, 143 Conn. 634.

I strongly disagree with the majority's conclusion that "[t]he fact that the board and its members had no previous involvement, and made no determinations, with respect to the East Coast [Towing] location approval application undermines any claim that, in granting the Pisano application, the board improperly reversed itself . . . ." In reaching this conclusion, the majority states that "the agency and the board are separate municipal administrative agencies with distinct powers and duties under the city charter." The majority's emphasis on the differences between the agency and the board is misplaced and inconsequential, as it ignores that neither entity was exercising its zoning powers when it reviewed the location approval applications for the property.

For all intents and purposes, the agency and the board were the same entity when they reviewed the respective applications. Both the agency and the board acted as the agent of the Commissioner of Motor Vehicles pursuant to the power delegated to them by § 14-54. See, e.g., *New Haven College, Inc.* v. *Zoning Board of Appeals*, 154 Conn. 540, 542, 227 A.2d 427 (1967); *Dubiel* v. *Zoning Board of Appeals*, 147 Conn. 517, 520, 162 A.2d 711 (1960). In other words, the agency and the board occupied the same role, had the same powers, and were tasked with issuing the same certificate pursuant to the same statute. Thus, I do not see a distinction between

the entities in this context, and I believe that the agency's prior decisions on location approval applications should have precedential value.

Because of the majority's holding, zoning boards of appeal can now ignore all location approval decisions made by other land use agencies prior to 2016. For example, if the owner of an automobile repair shop, which received its certificate of approval from a municipality's planning and zoning commission prior to 2016, transfers ownership of the business to an unrelated party, that party would need to seek approval from the municipality's zoning board of appeals. When reviewing the party's application, the zoning board of appeals will not be bound by the planning and zoning commission's prior decision on the location, and it can deny the new owner's application even if no change in circumstances has occurred. Thus, allowing boards of appeals to reverse the decisions of other land use agencies without providing justification could lead to inconsistent and unpredictable results for future property owners. Furthermore, in the present case, the Superior Court upheld the agency's denial of the East Coast Towing application. That the court upheld a decision disapproving the location of the same property only adds to the precedential value of the agency's decision.

If, on remand, the board decides to issue a certificate of approval on the Pisano application, I believe that it must also articulate whether a change in circumstances has occurred since the agency's decision on the East Coast Towing application. The board should develop a record that supports its decision, as a reviewing court will not be able to supply its own reasons to uphold this decision. I am not suggesting that the board *cannot* reverse the agency's prior decision regarding the property. Rather, if the board issues a certificate of approval on remand, I simply believe that it must state on the record its reasons for departing from the prior decision.

II

I also take issue with the majority's failure to address the board's imposition of conditions on the certificate of approval when it erroneously reviewed the Pisano application under the variance standard. The board attached fourteen conditions to its certificate of approval of the Pisano application. The trial court did not address the issue of whether the board had the authority to attach those conditions, even though the proposed use of the property was fully permitted in the M-G zone in which the property is located. On appeal, neither party specifically challenges the board's authority to attach those conditions. I believe that this issue, however, is subsumed within the plaintiff's broader claim that the board erred by treating the Pisano application as one for a variance. Put differently, the board attached conditions to the certificate of approval *because* it impermissibly reviewed the Pisano application as if it were an application for a variance.

"In general terms, conditions may be attached to variances, special permits, site plans . . . and regulated activities permits." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 21:14, p. 680. There exist statutes that permit municipal zoning agencies to impose conditions on applicants in certain situations. See, e.g., General Statutes § 8-2 (a) (special permits granted by zoning agency may be subject "to conditions necessary to protect the public health, safety, convenience and property values"); General Statutes § 22a-42a (d) (1) (inland wetlands agency may impose conditions on permit to conduct regulated activity). Section 14-54, however, grants municipal land use agencies only the power either to issue or decline to issue certificates of approval of the locations for which licenses are sought. The statute does not explicitly give these agencies the power to attach conditions to the certificates of approval that they issue. In the

present case, as I previously have noted, the board was acting as an agent of the Commissioner of Motor Vehicles and, therefore, could act only with the powers delegated to it by § 14-54.

I recognize that in *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, 75 Conn. App. 45, 48, 815 A.2d 145 (2003), a zoning board of appeals attached conditions to its certificate of approval. Pursuant to the local zoning regulations, "the approval took the form of granting the [applicants] a special exception." Id., 47. Thus, the zoning regulations are what provided the zoning board of appeals with the authority to attach conditions to the applicants' use of the property. Furthermore, in upholding the decision of the zoning board of appeals, this court noted that "the board might have taken account of the willingness of the defendants to accept a certificate of approval with conditions designed to mitigate some of the concerns raised by the plaintiffs." Id., 62.

In the present case, however, the proposed use of the property is permitted as of right in the M-G zone in which the property is located. Thus, there are no independent zoning regulations that permitted the board to attach conditions to its approval. Furthermore, my review of the hearing transcript reveals that, unlike the situation in *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, supra, 75 Conn. App. 62, neither the defendant nor his counsel agreed to several of the fourteen conditions listed in the board's written decision. For example, the board imposed restrictions on parking, vehicle storage, and equipment storage that were not expressly discussed at the hearing.

I also recognize that there is a Department of Motor Vehicles form titled "application for automobile dealer's or repairer's license" that suggests that the board in the present case was permitted to restrict the use of

the property when it issued its certificate of approval.[5] Section 2 of this form, which is to be completed "by local authorities of the city . . . in which the location is proposed," asks: "Are there any restrictions placed on the licensee's use of the property?" If the local authority that completes the form answers in the affirmative, it must attach a copy of the restrictions that it has imposed on the licensee. This form, however, does not provide any explanation for when a local zoning authority can impose "restrictions" on its approval of an application. For example, this section could apply in situations in which, as in *Mohican Valley Concrete Corp.* v. *Zoning Board of Appeals*, supra, 75 Conn. App. 47 n.4, 48 and n.7, local zoning regulations permit a local zoning authority to attach conditions to an applicant's use of a property. In the absence of any statutory language granting local zoning authorities the authority to restrict a licensee's use of a property when issuing a certificate of approval, simply including this question on the form does not mean that local zoning authorities possess such statutory authority.

In the present case, it is apparent that the board attached conditions to its certificate of approval because it acted as though it was reviewing a variance request under the Stamford zoning regulations. Accordingly, I believe that the majority's failure to address the board's attachment of conditions to the certificate is inconsistent with its conclusion that "the board improperly applied the legal standard that governs variance approvals under the regulations." These two errors inextricably are tied together. By not addressing whether the board could have attached conditions to the certificate of approval, the majority has invalidated the underlying error of the board while leaving intact a result of its

[5] This form is to be submitted to the Department of Motor Vehicles after a hearing on an application has taken place and a local zoning authority has issued a certificate of approval of a proposed location.

error. On remand, if the board decides to approve the Pisano application, I do not believe that it can attach conditions to its approval because (1) it does not have the statutory authority to do so, and (2) there are no zoning regulations that independently provide the board with this authority.

For the foregoing reasons, I concur in part and respectfully dissent in part.

STATE OF CONNECTICUT *v.* JAHMON HAKEEM NORRIS (AC 44024)

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

Syllabus

Convicted under two informations of the crimes of risk of injury to a child, assault in the third degree, breach of the peace in the second degree and interfering with an officer, the defendant appealed to this court. The defendant's convictions stemmed from his involvement in a domestic violence incident with his girlfriend, which her minor child witnessed, and from his aggressive behavior with a police officer and hospital staff after he was brought to a hospital following the domestic violence incident. He claimed that the trial court improperly failed to conduct an adequate independent inquiry into his competency to stand trial and to order a competency hearing at the start of trial following a prior evaluation in which he had been found competent to stand trial. He also claimed that the court improperly granted the state's motion for joinder of the cases for trial because the conduct alleged in the domestic violence assault case was significantly more brutal and shocking than the conduct at the hospital alleged in the interfering with an officer case. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's motion for a competency evaluation or in failing to conduct an independent inquiry into his competency, the defendant having failed to meet his burden that, at the time he moved for the competency evaluation, the court had before it specific factual allegations that, if true, would have constituted substantial evidence of mental impairment: the court, before ruling on the motion, engaged in extensive dialogue with the defendant, observed his demeanor, took notice of his general pattern of disruptive conduct, reviewed the competency report in the case file, and determined that the defendant was competent to stand trial and

that his repeated disruptions and assertions that he did not understand were a delay tactic and specifically referenced the defendant's behavior when denying the motion; moreover, the court concluded that, on the basis of the defendant's comments and ability to remain calm and cooperative during the initial stages of jury selection, the defendant clearly understood what was happening; furthermore, the court did not err in relying, in part, on the defendant's previous competency evaluation, as the defendant failed to produce any evidence that demonstrated that his condition had changed since that evaluation, and the previous report was not the only source of information on which the court relied in making its determination.

2. The trial court did not abuse its discretion in consolidating the two informations for trial, as the defendant failed to demonstrate that joinder resulted in substantial prejudice to him: although the trial court erred by joining the defendant's two cases for trial because the defendant's conduct with respect to the domestic violence assault charge was significantly more brutal and shocking than his conduct at the hospital relating to the interfering with an officer charge, the court's explicit instructions to the jury to consider each charge separately in reaching its verdict sufficiently cured the risk of substantial prejudice to the defendant and, therefore, preserved the jury's ability to fairly and impartially consider the offenses charged in the jointly tried cases; moreover, it was highly unlikely that the violent nature of the facts adduced in the domestic violence case prejudiced the jury's verdict as to the defendant's state of mind in the interfering with an officer case because the facts of what happened at the hospital were undisputed; furthermore, the fact that the jury acquitted the defendant of charges in both cases highlighted the limited prejudicial impact that joinder had.

Argued January 3—officially released June 14, 2022

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of risk of injury to a child, interfering with an officer, breach of the peace in the second degree, interfering with an emergency call, assault in the third degree, threatening in the second degree and strangulation in the second degree, and substitute information, in the second case, charging the defendant with the crimes of assault on a public safety officer and interfering with an officer, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the court, *Doyle, J.*, granted the defendant's motion for a competency

evaluation; thereafter, following a competency hearing, the court, *Doyle*, *J.*, determined that the defendant was competent to stand trial; subsequently, the court, *Klatt*, *J.*, granted the state's motion for joinder and denied the defendant's motion for a competency evaluation; thereafter, the matter was tried to the jury before *Klatt*, *J.*; verdicts and judgments of guilty of risk of injury to a child, assault in the third degree, breach of the peace in the second degree and interfering with an officer, from which the defendant appealed to this court. *Affirmed.*

Naomi T. Fetterman, assigned counsel, for the appellant (defendant).

Melissa Patterson, senior assistant state's attorney, with whom were *Anne Holley*, senior assistant state's attorney, and, on the brief, *Maureen Platt*, state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Jahmon Hakeem Norris, appeals from the judgments of conviction, rendered by the trial court following a jury trial, of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (2), assault in the third degree in violation of General Statutes § 53a-61 (a) (1), and interfering with an officer in violation of General Statutes § 53a-167a. On appeal, the defendant claims that the court abused its discretion by (1) failing to conduct an adequate independent inquiry into the defendant's competency to stand trial and order a competency hearing pursuant to General Statutes § 54-56d[1]

[1] General Statutes § 54-56d (c) provides: "If, at any time during a criminal proceeding, it appears that the defendant is not competent, counsel for the defendant or for the state, or the court, on its own motion, may request an examination to determine the defendant's competency."

and (2) improperly granting the state's motion for joinder for trial of the charge of interfering with an officer with the other charges the defendant faced. We affirm the judgments of the trial court.

The following facts, which reasonably could have been found by the jury, and procedural history inform our review of the defendant's claims. In February, 2018, the defendant rekindled a friendship with T.[2] At that time, the defendant was having financial difficulties and needed help, so T allowed him to live with her and her children at her Waterbury apartment. By April, 2018, T and the defendant were in a romantic relationship.

On the morning of April 14, 2018, the defendant, T, and T's six year old daughter, I, were all at the apartment. The defendant and T were arguing because the defendant had asked her for money to visit his daughter in New Haven, but T did not have any money to give him. As the argument progressed, the defendant became more aggressive with T and eventually pushed her into the kitchen. At that point, T asked the defendant to leave, but he refused and began walking toward her. T told him, "Do not put your hands on me," but the defendant kept coming. T grabbed a knife to defend herself, but the defendant broke the blade off of the knife while it was still in her hand.

The fight between the defendant and T then became more physical. The defendant grabbed at T, struck her, bit her, held her down on the couch, ripped her clothes off, spat in her face, pressed his arm against her throat, grabbed her by the hair, threw her onto the kitchen floor, and then hit her again, this time in the mouth,

[2] In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

which caused her to bleed onto the floor. The defendant later instructed I to clean up her mother's blood.

During the fight, T told I to leave the apartment, but the defendant prevented I from leaving. T also repeatedly tried to call 911, but the defendant took her phone. The defendant eventually gave T her phone back so that she could try to find someone to give the defendant money. T used that opportunity to text several people and tell them that she needed help because the defendant would not let her go.

One of the people who received a text from T called the police, and two officers from the Waterbury Police Department, Brian Gutierrez and Justin DeVaull, were dispatched to T's apartment to conduct a welfare check. After arriving at the apartment building, the officers knocked on the exterior front door but no one answered. They eventually located an open window and used that to enter the building. The officers then found the door to T's apartment, knocked, and identified themselves. The defendant partially opened the door but with the chain lock still in place. The officers identified themselves again and told the defendant that they were there for a welfare check, but the defendant slammed the door shut. The officers then kicked the door down so that they could check on T. Upon entering the apartment, they found T in the kitchen, crying and shaking, and with bruises to her neck, back, and lip, and bite marks on both sides of her body. I was also in the kitchen with T and appeared scared. The officers then arrested the defendant.

After the defendant was arrested, he was taken to St. Mary's Hospital in Waterbury. Officer Joseph Civitella accompanied the defendant to the hospital and was assigned to guard him while he was being treated. The defendant was seen by a physician, who determined that he needed X-rays. While the defendant and Civitella

waited for him to be x-rayed, the defendant became agitated and impatient. Civitella unsuccessfully tried to calm him down, but the defendant, who was partially handcuffed to a stretcher, became physically aggressive and launched himself off of the stretcher and onto the floor. Civitella requested assistance to get the defendant back on the stretcher. A fellow officer, as well as hospital security staff and a patient care assistant, Raphael Pages, came to help. While the group was struggling to return the defendant to the stretcher, he began banging his head against the wall. Pages, in an attempt to restrain the defendant, placed his hand over the defendant's face. The defendant then bit Pages' finger through his medical glove, causing Pages to bleed.

The state charged the defendant in two separate informations—one relating to the domestic violence incident in T's apartment and one relating to the defendant's actions at the hospital. With respect to the domestic violence incident, the defendant was charged with risk of injury to a child, interfering with an officer, breach of the peace in the second degree, interfering with an emergency call, assault in the third degree, threatening in the second degree, and strangulation in the second degree. With respect to the hospital incident, the defendant was charged with assault on a public safety officer and interfering with an officer.

Prior to the defendant's trial, the state filed a motion to join the two informations for trial, which the court, *Klatt, J.*, granted.[3] A jury trial followed. With respect to the domestic violence incident, the defendant testified that T was the aggressor and that he had acted in self-defense. He also testified that he never prevented I from leaving the apartment. As to the hospital incident, the defendant admitted to throwing himself off of the

[3] Additional facts about the joinder of the two informations will be provided in part II of this opinion.

stretcher and biting Pages but claimed that he only bit Pages because Pages was restricting his ability to breathe.

After the conclusion of the trial, the jury found the defendant guilty of risk of injury to a child, assault in the third degree, and breach of the peace in the second degree in the domestic violence case, and guilty of interfering with an officer in the hospital case. The jury acquitted the defendant of the remaining charges in both cases. The court accepted the jury's verdict and sentenced the defendant to a total effective term of twelve years of incarceration, execution suspended after six years, with five years of probation. This appeal followed. Additional facts and procedural history will be set forth below as needed.

I

The defendant first claims that the court abused its discretion by failing to conduct an independent inquiry into his competency to stand trial and, consequently, failing to order a competency hearing pursuant to § 54-56d. We are not persuaded.

The following additional facts and procedural history are necessary to our resolution of these claims. Defense counsel was appointed for the defendant on May 15, 2018, and, thereafter, moved for a competency evaluation pursuant to § 54-56d, which the court, *Doyle, J.*, granted. Suzanne Ducate, a psychiatrist, performed the defendant's competency evaluation and issued a report in which she concluded that the defendant was able to understand the proceedings against him and assist in his own defense. On December 10, 2018, the court held a competency hearing at which the defendant was found competent to stand trial.

On July 26, 2019, the defendant filed a motion for a speedy trial, which was granted on September 11, 2019.

Two days later, defense counsel made an oral motion to withdraw as counsel, which the court granted. Thereafter, Attorney Jared Millbrandt was appointed to represent the defendant. Then, on November 6, 2019, the parties appeared before the court for a hearing on the state's motion for joinder and the start of jury selection. At the start of the hearing, the defendant indicated that he wanted to address the court. The court warned the defendant against doing so, but the defendant iterated his wish to speak. The defendant then remarked as follows:

"In all due respect, Your Honor, I don't believe that I'm ready to go to trial. I wasn't briefed or prepared to go to trial; I just met this attorney . . . maybe less than a month [ago]. We had two sessions in Cheshire, and since then it's—I'm not prepared. I don't know nothing about the jury. I don't know about the selection. I don't know what to ask him. I wasn't told anything. Today was supposed to have been a day where we schedule, and . . . I was supposed to have another chance of seeing my lawyer to talk to him about jury duty, or how to pick [a] jury, or what to say to the jury, or what the jury is."

The parties then had a short conversation with the court about the defendant's previously granted motion for a speedy trial. The parties also agreed that jury selection had been scheduled to start that day. The court then explained to the defendant that his speedy trial motion had "[set] into motion a series of steps, which lead to jury selection." The court further noted that there was no indication that defense counsel was unprepared to select a jury. In response, the defendant reiterated his belief that he and Millbrandt were not prepared for jury selection and that it was in the defendant's best interest to reschedule the proceedings. Defense counsel denied being unprepared, and the court denied the defendant's motion for a continuance.

The court next attempted to hear the state's motion for joinder, but the defendant interrupted the proceedings again, this time stating: "I don't want to work with [Millbrandt] no more. It's over. I don't want to work with you, so I don't know how that's going to work. I'd rather represent myself. I'm fine." The court advised the defendant against representing himself and also warned him that continued disruptions would not be tolerated. The court took no action on the defendant's request to have defense counsel removed.

After hearing arguments from the parties on the state's motion for joinder, the court granted that motion. Because the state had filed two substitute informations in order to correct some typographical errors, the court ordered that the defendant be put to plea on the substitute informations. At that point, the defendant remarked: "Your Honor, I don't know what's going on." The court explained that, as a matter of procedure, the defendant needed to enter his not guilty pleas again. The following colloquy then took place:

"The Defendant: So what about the splitting the two cases and not joining? That's what we—

"The Court: I granted the state's motion to join them, so it's one trial that you're facing. Two separate information[s], but one trial that you're facing.

"The Defendant: So, you're saying that the jury's going to hear both cases at the same time?

"The Court: Correct.

"The Defendant: But that's—I thought that's what we were arguing about. Your Honor, see, this is what I'm—

"The Court: And I get that, sir. Your counsel made—again, your—

"The Defendant: He made an argument just now for that?

"The Court: He argued it, he filed a brief.

"The Defendant: Wait a minute. When did he argue on—that's what I'm just trying to understand. I don't understand.

"The Court: Sir, I am not getting into a conversation with you about what just happened. You heard your attorney argue. I have already indicated that he has filed a motion. I've listened to both arguments—

"The Defendant: Can I see that motion? Oh, this is the motion?

"The Court: I have done—I have listened to both arguments—

"The Defendant: Yes.

"The Court: I've researched the case law, and I've made a ruling. Just because . . . the court doesn't rule in your favor, does not mean that a lawyer is not doing his job. Now, put the defendant to plea. . . .

"The Defendant: No, I don't understand what's going on."

The court again attempted to put the defendant to plea, first on the information in the domestic violence case, to which the defendant pleaded not guilty. The court next asked the defendant if he was electing a trial by the court or a trial by jury, to which the defendant again professed, "I don't know what's going on." The court explained the difference between a jury trial and a bench trial, but the defendant continued to state that he did not understand what was happening. This led to another exchange between the court, the defendant, and defense counsel:

"The Defendant: Okay. And what are we doing right now?

"[Defense Counsel]: We're picking a jury, as I've explained to you a number of times.

"The Defendant: I don't understand you. I don't understand it.

"[Defense Counsel]: Your Honor, at this point I don't know what more I can say to the court.

"The Court: Sir, are you electing to a court or a jury?

"The Defendant: If I'm asking Your Honor, if I'm being forced, I don't want to be forced to say anything that I [don't] understand. That's why I'm asking. I don't— and I see that you're getting frustrated because you're feeling like I—

"The Court: What don't you understand about what's happening?

"The Defendant: I just don't understand what's going on. I don't know why I'm pleading guilty, okay—

"The Court: You're not pleading guilty, you're pleading not guilty.

"The Defendant: Okay. I don't understand why I'm not—

"The Court: What don't you understand about being told that you're being asked whether or not you want a jury trial? You filed the motion for [a] speedy trial. You're telling me you don't understand. What don't you understand about this process?

"The Defendant: I filed for a motion because that's what I discussed with my lawyer, that that was for my best interest.

"The Court: Okay.

"The Defendant: To push the case forward. But, since then I don't understand where—like, what's today and how like, you're telling me to plead—not plead guilty,

and to pick for a jury. And that you said something about you and the court and the state, or whatever.

"The Court: All right.

"The Defendant: I'm not playing to—you know, I don't—

"The Court: Sir, I don't—quite frankly I'm going to have it noted for the record that it appears to me that the defendant fully understands what's happening, and is attempting to be obstructionist. So, again—

"The Defendant: Okay.

"The Court: [A]re you electing to a jury trial?

"The Defendant: Your Honor—

"The Court: Do you want a jury to make a decision as to whether or not you're guilty or not guilty, or do you want a judge to make a decision as to whether or not you're guilty or not guilty? It's that simple. It's not difficult to understand. You're an intelligent young man, make that choice now.

"The Defendant: I don't—I don't—what do you want me to do, man?"

Defense counsel then asked for a five minute recess, which the court granted. After the parties returned to the courtroom, defense counsel moved for a competency evaluation, stating: "Your Honor, at this time I just would like to make a record. I met with [the defendant] in an effort to discuss what is happening here today again. I emphasize[d] that we are here to begin jury selection in his case, for which he had prior counsel file a speedy trial motion. He repeatedly indicated to me he doesn't understand what's happening. At this point I'm making a motion pursuant to [§] 54-56d, as he does not apparently have the ability to assist in his own defense, nor understand the charges against him."

The defendant then interrupted, again stating that he did not understand what was happening. Defense counsel explained that he was moving for a competency evaluation to determine whether the defendant understood the nature of the charges against him, as had previously occurred in the case. The defendant proclaimed to have no memory of a prior competency evaluation, at which point the prosecutor interrupted and noted that the defendant had previously undergone a competency evaluation and been found competent to stand trial. The court then reviewed the competency report in the case file. Thereafter, the court remarked:

"All right. I've reviewed the file. I'll indicate for the record that apparently the defendant's indication that he doesn't know, he doesn't understand, has been a repeated theme throughout this particular prosecution.

"The psychiatrist who examined him indicated that he was uncooperative throughout the process. He repeatedly responded to her, I don't know, I don't remember, it's none of your business. That he claimed [that] he developed some type of amnesia when he was incarcerated. I lost my memory at [the Department of Correction]. I can't remember things. But it's simply—the bottom line determination is overall, and I'm quoting from the [competency] report. 'Overall it is the evaluator's opinion that [the defendant's] uncooperativeness during the evaluation and his lack of psychiatric symptoms or signs indicate that his performance during much of the evaluation is not considered to be an accurate representation of his abilities [or knowledge] base, especially with his past history of involvement with the legal system.' I think he is attempting to simply prolong or postpone things, rather than to get to—ultimately get to the trial. I do not see where his behavior or anything that [the defendant] has said is indicative of the fact that he's not capable of understanding or not capable of assisting his counsel. He may be unwilling

to do so, but that is not the same as being incapable. So, in light of that, and in light of the fact that there has been a recent evaluation, and I've seen nothing different other than he repeats the same thing again and again and again, I'll deny any motion for evaluation."

In response, the defendant remarked: "Your Honor, like I said, I'm not playing any games with you. I'm not trying to manipulate the system." The court responded that such a comment told the court that the defendant was "fully capable and understanding of the system and [had] the ability to proceed." The substitute informations were again read to the defendant, who continued to claim that he did not understand. The court then entered pleas of not guilty on all of the charges in both informations and elected a jury trial on the defendant's behalf. Thereafter, the court ordered the defendant to cooperate with defense counsel and warned him that, if he disrupted the proceedings again, he would be held in contempt. At that point, one final conversation between the court and the defendant occurred:

"The Defendant: I'm not going to cause any problems. But, Your Honor—

"The Court: Very good.

"The Defendant: [Y]ou just met me, Your Honor, and you already have an idea of who I am, and I continue to say the same thing—

"The Court: I have no idea who you are sir.

"The Defendant: I continue to say the same thing. This whole . . . almost eighteen months I haven't known anything that's going on with my case, Your Honor. I don't know anything.

"The Court: And simply saying I don't know, doesn't quite frankly help you at this point in time.

"The Defendant: How is that not helping me? I'm not trying to ask for help, but how do I suppose to talk to a jury, get up on the stand when I wasn't—I don't know anything about my defense. It's in my—like, I don't have a defense, Your Honor.

"The Court: Sir, again—

"The Defendant: You just—all right. You just—it's all about this man and he's fighting—he might as well take—he might as well take the sentence that I have.

"The Court: Okay.

"The Defendant: You giving my life to this man right here.

"The Court: Well, what everyone is trying to tell you is you are accused of a crime. You have a right to a trial. You are being given the opportunity for that trial. What I am trying to warn you about is, based on your past behavior this morning, we should have already been jury selecting. Instead, we have continually—you have continually stopped the events by claiming that you don't know what's happening, when it's abundantly clear that you do know what's happening.

"The Defendant: How is that?

"The Court: That is because I'm listening to what you've said."

Despite the court's repeated warnings, the defendant continued to disrupt the remaining jury selection proceedings by making loud comments to Millbrandt and asking the court questions about jury selection. This led the court ultimately to remark: "All right. Counsel, for the last time, and I am not repeating it. If your client interrupts one more time with the loud questioning of you, which is clearly heard throughout the whole courtroom, and possibly infecting the jury, and I would note that he certainly managed to keep quiet and not

interrupt during the time when he needed to. So, in my opinion, this is all a show by him."

We begin by setting forth the standard of review and legal principles that guide our analysis. "We review the court's ruling on a motion for a competency evaluation under the abuse of discretion standard. . . . In determining whether the trial court [has] abused its discretion, this court must make every reasonable presumption in favor of [the correctness of] its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *State* v. *Kendall*, 123 Conn. App. 625, 651, 2 A.3d 990, cert. denied, 299 Conn. 902, 10 A.3d 521 (2010).

"[T]he conviction of an accused person who is not legally competent to stand trial violates the due process of law guaranteed by the state and federal constitutions. . . . This rule imposes a constitutional obligation, [on the trial court], to undertake an independent judicial inquiry, in appropriate circumstances, into a defendant's competency to stand trial . . . . [Section] 54-56d (a) codified this constitutional mandate, providing in relevant part: A defendant shall not be tried, convicted or sentenced while the defendant is not competent. [A] defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense.

"This statutory definition mirrors the federal competency standard enunciated in *Dusky* v. *United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (per curiam). According to *Dusky*, the test for competency must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has

a rational as well as factual understanding of the proceedings against him. . . .

"Although § 54-56d (b) presumes the competency of defendants, when a reasonable doubt concerning the defendant's competency is raised, the trial court must order a competency examination. . . . Thus, [a]s a matter of due process, the trial court is required to conduct an independent inquiry into the defendant's competence whenever he makes specific factual allegations that, if true, would constitute substantial evidence of mental impairment. . . . Substantial evidence is a term of art. Evidence encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is substantial if it raises a reasonable doubt about the defendant's competency . . . . The trial court should carefully weigh the need for a hearing in each case, but this is not to say that a hearing should be available on demand." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Jordan*, 151 Conn. App. 1, 30–32, 92 A.3d 1032, cert. denied, 314 Conn. 909, 100 A.3d 402 (2014).

The defendant claims that his convictions should be reversed, and a new hearing ordered to determine whether a competency evaluation is required, because the court in the present case failed to conduct an adequate, independent inquiry into his competency and, thus, violated his due process rights. In support of his claim, the defendant principally relies on *State* v. *Dort*, 315 Conn. 151, 106 A.3d 277 (2014). Specifically, he claims that "the extent of the 'inquiry' conducted by the court was to review a stale competency evaluation and unilaterally interpret [the defendant's] behavior as obstinate and dilatory. As in *Dort* . . . this is insufficient to satisfy the court's constitutional mandate."

Because the facts of this case are markedly different than those in *Dort*, we are not persuaded.

In *Dort*, our Supreme Court affirmed this court's reversal of the defendant's judgment of conviction following the trial court's denial of the defendant's request for a competency hearing. *State* v. Dort, supra, 315 Conn. 153–55. As in the present case, the defendant in *Dort* was found competent to stand trial after an earlier competency evaluation was done. Id., 156. Before the start of jury selection, however, defense counsel requested a second competency evaluation. Id., 156–57. In requesting that evaluation, defense counsel provided several detailed representations to the court regarding why further inquiry into the defendant's competency was required. Id., 156–59. Specifically, defense counsel told the court that his client had a fundamental misunderstanding as to "what can be put forward as a defense in this case" and "the seriousness of the charges in light of the defense." (Internal quotation marks omitted.) Id., 158. Defense counsel also informed the court that "attempting to extrapolate the relevant information from [the defendant] in order for [counsel] to go forward with his defense is virtually impossible" and that the current circumstances were not merely a tactical disagreement between him and the defendant. (Internal quotation marks omitted.) Id. When pressed by the court for more details, defense counsel asserted that the defendant lacked a sufficient understanding of certain facts that were highly relevant to the case.[4] Id., 159.

[4] Defense counsel specifically stated: "And there's been things he's seized upon, including the fact that there's . . . an alleged gun. And he's been informed that that's not whether the gun is operable or whether it's a rubber gun or it's made of wood—that does not constitute a defense. I cannot for the life of me extrapolate much more in the way of facts from him at this juncture. I don't know whether it's because he's seizing up today or what . . . but I need the information that he's talking about because the charges have just changed and now that's not an issue." (Internal quotation marks omitted.) *State* v. *Dort*, supra, 315 Conn. 174–75.

The court then reviewed the earlier competency report and, based largely on that report, denied the defendant's motion for a competency evaluation after finding that the statements made by defense counsel in support of the motion did not constitute substantial evidence that would give rise to a concern regarding the defendant's competency. Id., 175. In denying the defendant's motion, the court did not canvass the defendant regarding his competency or consider the defendant's behavior in court. Id., 176. The court also denied the defendant's request to address the court regarding his competency to stand trial. Id., 159–60. The defendant then appealed to this court.

On appeal, we reversed the trial court's judgment of conviction, holding that the court had abused its discretion by disregarding defense counsel's assertions that the defendant was not competent without conducting any further inquiry into the defendant's competence. *State* v. *Dort*, 138 Conn. App. 401, 412, 51 A.3d 1186 (2012), aff'd, 315 Conn. 151, 106 A.3d 277 (2014). We specifically concluded that the court's inquiry into the defendant's competence was insufficient because the court never made "any reference to the defendant's behavior or any relevant communications with the defendant" and "also refused the defendant the opportunity to address the court on [the issue of competency]." Id.

The state then appealed to our Supreme Court. On appeal, the Supreme Court affirmed this court's reversal of the judgment of the trial court, albeit on different grounds. *State* v. *Dort*, supra, 315 Conn. 178. The court focused on whether the allegations made by the defendant in support of his motion for a competency evaluation constituted substantial evidence of mental impairment such that further inquiry into the impairment was required by the trial court and, if so, whether the court sufficiently conducted such an inquiry. Id., 169–70. The

court then concluded that "[t]he statements made by defense counsel in support of the defendant's motion for a competency hearing represent the sort of specific, fact laden allegations that, if true, would constitute substantial evidence of mental impairment on the part of the defendant." Id., 178. Accordingly, the court concluded that the trial court abused its discretion when it rejected defense counsel's statements and instead relied solely on the "seven month old competency report." Id.

The court also rejected the state's argument that the trial court properly relied on its own observations of the defendant instead of relying on counsel's representations. Id., 182. The court held: "Although we agree with the state that a trial court need not automatically defer to the opinion of defense counsel on the matter of the defendant's competence when the trial court sees evidence contradicting those representations before his or her own eyes; see, e.g., *State* v. *DesLaurier*, [230 Conn. 572, 589–90, 646 A.2d 108 (1994)]; we disagree that the defendant was canvassed here, and we note that the trial court did not deny the defendant's motion on the basis of its own in-court observations regarding the defendant's behavior." Id.

The facts of this case are distinguishable from those in *Dort* in two important respects. First, in the present case, unlike in *Dort*, defense counsel failed to make any specific or detailed factual representations in support of his motion for a competency evaluation. Instead, defense counsel stated only that the defendant had "repeatedly indicated to me he doesn't understand what's happening" and that defense counsel therefore believed that the defendant "does not apparently have the ability to assist in his own defense, nor understand the charges against him." These representations were vague in nature and unsupported by any particular allegations that might have constituted substantial evidence of the

defendant's lack of competency. Trial courts are only required to conduct an independent inquiry into a defendant's competency when the defendant "makes *specific* factual allegations that, if true, would constitute substantial evidence of mental impairment." (Emphasis added; internal quotation marks omitted.) *State* v. *Jordan*, supra, 151 Conn. App. 31. Such specific factual allegations simply do not exist in the present case. Accordingly, the court did not abuse its discretion when it declined to conduct a more thorough independent inquiry than it did into the defendant's competency.

Second, unlike in *Dort*, the court in the present case conducted a thorough inquiry into the defendant's competency by engaging in extensive dialogues with the defendant both before and after Millbrandt moved for a competency evaluation, and it made reference to its observation of the defendant's behavior when discussing the defendant's competency. As we set forth previously in detail, the court and the defendant had several in-depth conversations over the course of the proceedings on November 6, 2019. During these lengthy exchanges, the court was able to speak directly with the defendant and observe his demeanor, as well as take notice of a general pattern of disruptive conduct by the defendant. In addition, the court also reviewed the competency report in the case file and determined that the report confirmed the court's own observations that the defendant was competent to stand trial and that his repeated disruptions and assertions that he did not understand were simply a delay tactic.

Furthermore, even after the court denied the defendant's motion for a competency evaluation, the court continued to take into account the defendant's behavior, including his comments that he was not "playing games" or trying to manipulate the system, as well as the defendant's ability to remain calm and cooperative during the initial stages of jury selection. On the basis of these additional observations, the court again con-

cluded that, the defendant's repeated assertions notwithstanding, it was abundantly clear that the defendant did, in fact, understand what was happening.

Thus, the bases for the court's denial of a competency evaluation in this case were much different than that in *Dort*. In *State* v. *Dort*, supra, 315 Conn. 182, "the trial court did not deny the defendant's motion on the basis of its own in-court observations regarding the defendant's behavior." In the present case, by contrast, the court specifically referenced the defendant's behavior, which it had observed at length, when denying the motion for a competency evaluation. This court has held that relying on such information is sufficient. See *State* v. *Jordan*, supra, 151 Conn. App. 35–37 (court's denial of defendant's motion for competency evaluation was not abuse of its discretion when denial was based on court's review of previous competency report and court's own observations of defendant). This court also previously has held that behavior of a defendant similar to that observed by the court in this case does not require a competency evaluation. See *State* v. *Johnson*, 22 Conn. App. 477, 489, 578 A.2d 1085 (defendant's "obstreperous, uncooperative or belligerent behavior did not obligate the court to order a competency examination," particularly when defendant's behavior showed he had ability to be cooperative but did not want to), cert. denied, 216 Conn. 817, 580 A.2d 63 (1990); see also *State* v. *Paulino*, 127 Conn. App. 51, 66, 12 A.3d 628 (2011) ("although the defendant did admit that he often was confused by court procedures, a lack of legal expertise is not indicative of incompetence").

Consequently, contrary to the defendant's claim, the court was not required to accept defense counsel's bald assertion that the defendant lacked the capacity to understand the proceedings and assist in his own defense. First, it is clear from the transcript of the November 6, 2019 hearing that the court did consider defense counsel's allegations regarding the defendant's

competency. It simply was unpersuaded by those allegations, in large part because the court had been able to observe and talk with the defendant during the hearing. On the basis of the court's own observations of and interactions with the defendant, it was reasonable for the court to give less weight to defense counsel's representations regarding the defendant's competency. Second, we are unpersuaded by the defendant's argument that his counsel's opinion regarding his competency was entitled to greater weight because the motion for a competency evaluation was made after a brief recess during which counsel had an opportunity to talk privately with the defendant. Following the recess, defense counsel provided the court with no specific factual allegations concerning the defendant's lack of competency. Furthermore, the court engaged in an extensive dialogue with the defendant after the recess and specifically referred to its observations of and interactions with the defendant when it denied the defendant's motion.

We also reject the defendant's argument that the court should not have considered the defendant's prior competency evaluation because it was one year old. In *State* v. *Jordan*, supra, 151 Conn. App. 36–37, the defendant made the same argument. In response, this court noted: "The defendant . . . has not cited, and we have not found, any case law that establishes a bright line rule as to when a competency report becomes stale. *State* v. *Mordasky*, 84 Conn. App. 436, 447, 853 A.2d 626 (2004). Rather, the court's inquiry when deciding whether to order another competency evaluation is whether the defendant's condition has materially changed since a previous finding of competence." (Internal quotation marks omitted.) *State* v. *Jordan*, supra, 37. As was true of the defendant in *Jordan*, in the present case, the defendant failed to produce any evidence that demonstrated that his condition had changed since the 2018

evaluation. Moreover, as previously noted in this opinion, the 2018 competency report was not the only source of information on which the court relied when making its decision. Accordingly, the court's reliance, in part, on the 2018 competency report does not undermine our conclusion that the court did not abuse its discretion in denying the defendant's motion for a competency evaluation.

The defendant also argues that, by relying on the previous competency report to deny his motion, the court ignored and discounted the defendant's prior history of mental impairment. We disagree. The report specifically discussed the defendant's mental health history, and there is nothing in the record to indicate that the court did not consider that portion of the report in denying the defendant's motion.

Finally, the defendant argues that the court erred when it failed to canvass the defendant before denying his motion. There are two problems with this argument. First, it assumes that there was no canvass of the defendant in the present case. As set forth previously in this opinion, the court had extensive discussions with the defendant from which it could form an opinion as to the defendant's competency. During these discussions, the defendant initially stated that he was not ready to go to trial, had not had sufficient time to meet with his counsel, who he did not believe was prepared for trial, and had questions about the jury selection process. He also asked whether the cases were going to be tried separately. Thus, he demonstrated that he understood what was happening but just did not want to go forward with jury selection on a consolidated trial that day. It was only after the court told the defendant that jury selection was going forward that he began stating that he did not understand what was happening. The court then engaged in further discussions with the defendant before defense counsel made his motion for a compe-

tency evaluation, which the court denied. Although the court did not specifically ask the defendant if he understood the nature of the charges against him and whether could assist in his own defense, it simply is inaccurate to say that the court did not canvass the defendant. Second, in *Dort*, the Supreme Court made clear that some form of a canvass of the defendant was required because defense counsel had made "specific, fact laden allegations that, if true, would constitute substantial evidence of mental impairment on the part of the defendant." *State* v. *Dort*, supra, 315 Conn. 178. In the present case, no such allegations were made.

In sum, for the foregoing reasons, we conclude that the court did not abuse its discretion by denying the defendant's motion for a competency evaluation or conducting a further inquiry of its own before denying the motion.

II

The defendant next claims that the court erred when it granted the state's motion to join for trial the charges in the two separate informations. Specifically, the defendant argues that joinder was improper under the second *State* v. *Boscarino*, 204 Conn. 714, 723, 529 A.2d 1260 (1987) factor because the conduct alleged in the domestic violence case was "of a brutal or shocking nature, far in excess of the allegations underlying the interfering with an officer charge [in the hospital case]." The defendant further argues that insufficient jury instructions were given to cure the prejudicial effect of the joinder. We agree that the court erred in joining the charges in the two separate informations, but we also conclude that, under the circumstances of this case, the court's instructions to the jury were sufficient to cure any prejudice caused by the joinder.

The following additional facts and procedural history are necessary to our resolution of this claim. On September 23, 2018, the state filed a motion for joinder of

the charges in the two informations, claiming that the "charges involve discrete, easily distinguishable factual scenarios . . . the crimes are not violent in nature and do not concern brutal or shocking conduct on the defendant's part . . . the incidents are consecutive events . . . and . . . the trial will not be complex." On November 6, 2019, the defendant filed an objection to the motion, asserting that joinder was "inappropriate as it would result in significant and substantial prejudice to the defendant [and] allow the jury to hear repetitious allegations concerning violent conduct and might allow the jury to conclude guilt based on what amounts to propensity evidence."

Also on November 6, 2019, the court, *Klatt, J.*, held a hearing on the state's motion. At the hearing, the prosecutor conceded that the evidence in the two cases was not cross admissible but argued that joinder was nonetheless proper. Defense counsel disagreed and argued that joinder of the two cases would "amount to propensity evidence, thus allowing the jury to conclude that, because [the defendant] is charged in two informations occurring on the same date, or two separate incidents occurring on the same date, that he is essentially a bad person." The court then conducted an analysis under *State* v. *Boscarino*, supra, 204 Conn. 722–24, and concluded that joinder would not substantially prejudice the defendant because (1) the charges were discreet and based on easily distinguishable facts, (2) the crimes, although violent in nature, were not shocking to the conscience, and (3) joinder would not result in a lengthy or complicated trial. The charges in the two informations were then joined for presentation at a single trial. On appeal, the defendant challenges only the court's conclusion as to the second *Boscarino* factor.

We first set forth the standard of review and legal principles that guide our analysis. "The principles that govern our review of a trial court's ruling on a motion

for joinder . . . are well established. Practice Book § 41-19 provides that [t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together. . . . In deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate court may not disturb. . . . The defendant bears a heavy burden of showing that [joinder] resulted in substantial injustice, and that any resulting prejudice was beyond the curative power of the court's instructions. . . .

"A long line of cases establishes that the paramount concern [when joining informations] is whether the defendant's right to a fair trial will be impaired. Therefore, in considering whether joinder is proper, this court has recognized that, where evidence of one incident would be admissible at the trial of the other incident, separate trials would provide the defendant no significant benefit. . . . Under such circumstances, the defendant would not ordinarily be substantially prejudiced by joinder of the offenses for a single trial. . . . Accordingly, we have found joinder to be proper where the evidence of other crimes or uncharged misconduct [was] cross admissible at separate trials. . . . Where evidence is cross admissible, therefore, our inquiry ends.

"Substantial prejudice does not necessarily result from [joinder] even [if the] evidence of one offense would not have been admissible at a separate trial involving the second offense. . . . Consolidation under such circumstances, however, may expose the defendant to potential prejudice for three reasons: First, when several charges have been made against the defendant, the jury may consider that a person charged with doing so many things is a bad [person] who must have done something, and may cumulate evidence against him . . . . Second, the jury may have used the evidence of

one case to convict the defendant in another case even though that evidence would have been inadmissible at a separate trial. . . . [Third] joinder of cases that are factually similar but legally unconnected . . . present[s] the . . . danger that a defendant will be subjected to the omnipresent risk . . . that although so much [of the evidence] as would be admissible upon any one of the charges might not [persuade the jury] of the accused's guilt, the sum of it will convince them as to all. . . .

"[Accordingly, the] court's discretion regarding joinder . . . is not unlimited; rather, that discretion must be exercised in a manner consistent with the defendant's right to a fair trial. Consequently, [in *State* v. *Boscarino*, supra, 204 Conn. 722–24, our Supreme Court] identified several factors that a trial court should consider in deciding whether a severance or [denial of joinder] may be necessary to avoid undue prejudice resulting from consolidation of multiple charges for trial. These factors include: (1) whether the charges involve discrete, easily distinguishable factual scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial. . . . If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." (Citation omitted; internal quotation marks omitted.) *State* v. *McKethan*, 184 Conn. App. 187, 194–96, 194 A.3d 293, cert. denied, 330 Conn. 931, 194 A.3d 779 (2018).

Before turning to the merits of the defendant's joinder claim we address the state's argument that the claim was not properly preserved for appellate review. The state argues that the claim is unpreserved because (1) "the defendant never contested the state's representation of the facts as they relate to the second *Boscarino*

factor" and (2) "when [T] testified at trial, the defendant never moved to sever based on the supposed change in factual circumstances, namely, the more shocking or brutal nature of the 'domestic violence' case allegations." We disagree and conclude that this claim was preserved.

The state is correct that, as summarized above, the defendant never specifically addressed the second *Boscarino* factor in either his written objection or at the hearing. The court, however, in its ruling on the state's motion for joinder, did address that factor, stating in relevant part: "The crimes, while they are violent in nature, are certainly not so shocking to the conscience that the second factor would be triggered." Because the court addressed the issue now raised on appeal, the claim was properly preserved for appellate review. See *State* v. *McKethan*, supra, 184 Conn. App. 194 n.2 (defendant's challenge to second *Boscarino* factor was preserved even though defendant did not specifically challenge factor before trial court because court addressed second factor in its ruling). Furthermore, the fact that the defendant did not move to sever the two cases after T testified does not undermine our conclusion that the defendant's claim is preserved. Again, because the trial court specifically addressed the violent nature of the defendant's charges in its ruling on the state's motion for joinder, the claim is preserved. See id. ("Unlike the trial court in [*State* v.] *Snowden*, [171 Conn. App. 608, 157 A.3d 1209, cert. denied, 326 Conn. 903, 163 A.3d 1204 (2017)], the trial court in this case specifically addressed the violent nature of the defendant's murder charge in its ruling, which the defendant presently challenges on appeal. We therefore conclude that the defendant's claim is preserved for appellate review.").

We now move to the merits of the defendant's claim. We agree with the defendant that the second *Boscarino*

factor weighs against joinder and that the court consequently abused its discretion when it joined for trial the charges in the two informations.

"Whether one or more offenses involved brutal or shocking conduct likely to arouse the passions of the jurors must be ascertained by comparing the relative levels of violence used to perpetrate the offenses charged in each information." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 551, 34 A.3d 370 (2012). The domestic violence case was based on allegations and evidence that the defendant struck, bit, strangled, spit at, and grabbed T, and, at one point, threw her onto the kitchen floor and hit her in the mouth so hard that she began to bleed. In the hospital case, however, far less violence was involved. Although the defendant did bite a hospital employee during that incident, that was the only violence committed and the incident was described by the hospital's security supervisor as "[j]ust another day at work. Unruly patient and just honestly another day at work." Because the defendant's conduct in the domestic violence case was significantly more brutal and shocking than his conduct in the hospital case, we conclude that the second *Boscarino* factor weighs against joinder. See *State* v. *Ellis*, 270 Conn. 337, 378, 852 A.2d 676 (2004) (defendant's abuse of one victim was substantially more egregious than his abuse of other victims and, therefore, joinder was improper under second *Boscarino* factor). Accordingly, the court erred when it found that the second *Boscarino* factor was not triggered and, thus, abused its discretion when it joined for trial the charges in the two informations.

Our analysis of this claim, however, does not end here. Having concluded that joinder of the defendant's two cases was improper, we must decide whether the court's jury instructions cured any potential prejudice. In assessing any prejudice to the defendant it is

important to note that any prejudice to the defendant could have occurred only with respect to the charges in the hospital case, which was the case that involved substantially less egregious allegations. By contrast, the fact that the jury heard evidence regarding the hospital case was not prejudicial to the defendant, under the second *Boscarino* factor, in the domestic violence case because the allegations in the domestic violence case were more shocking and brutal. See *State* v. *Payne*, supra, 303 Conn. 554 n.19. Consequently, we must determine whether the joinder of the charges in the two informations prejudiced the defendant in the hospital case.

"On appeal, the burden rests with the defendant to show that joinder was improper by proving substantial prejudice that could not be cured by the trial court's instructions to the jury. . . . [A]lthough a curative instruction is not inevitably sufficient to overcome the prejudicial impact of [inadmissible other crimes] evidence . . . where the likelihood of prejudice is not overwhelming, such curative instructions may tip the balance in favor of a finding that the defendant's right to a fair trial has been preserved." (Citation omitted; internal quotation marks omitted.) *State* v. *McKethan*, supra, 184 Conn. App. 198.

In the present case, the court instructed the jury as follows with regard to the charges against the defendant:

"The defendant here is charged with ten counts in two separate informations. The defendant is entitled to and must be given by you, a separate and independent determination of whether he is guilty or not guilty as to each count. Each of the counts charged is a separate crime. The state is required to prove each element in each count beyond a reasonable doubt.

"Each count must be deliberated upon separately. The total number of counts charge[d] does not add to the strength of the state's case. You may find that some evidence applies . . . to more than one count, in more than one information. The evidence, however, must be considered separately as to each element in each count. Each count is a separate entity.

"You must consider each count separately and return a separate verdict for each count. This means you may reach opposite verdicts on different counts. A decision on one count does not bind your decision on another account. Now, again, as I have indicated, the defendant is charged in two separate informations."

The court further instructed the jury on the two separate counts of interfering with an officer as follows:

"Now, interfering with an officer. The defendant is charged in two separate counts with interfering with an officer. . . . Now, I will remind you of my previous instructions on multiple charges during your deliberations.

"The defendant is charged with two counts of interfering with an officer. While the elements are the same, each of the counts charged is a separate crime. The state charges that separate incidents occurred at different times, in different locations, and with three distinct complainants. Each count must be considered separately, and must be given by you a separate and independent determination of whether [the defendant] is guilty or not guilty as to each count."

The defendant argues that these instructions were insufficient because, despite the court's repeated instruction that each count was to be considered separately, the court never instructed the jury that the evidence in both cases was not cross admissible, and, thus, that the jury could not consider the evidence in the domestic

violence case in determining the defendant's guilt in the hospital case.

Although we agree that it is better practice for a trial court to give a specific instruction that the evidence is not cross admissible, we conclude that the jury instructions given in this case were adequate because the risk of prejudice was very low. See *State* v. *McKethan*, supra, 184 Conn. App. 199 (court's repeated instructions to jury that each count must be considered separately cured prejudice caused by joinder because risk of prejudice was not overwhelming). We reach this conclusion for two reasons. First, the instructions given by the court in the present case, with one exception, were very similar to those given by the trial court in *McKethan*, which this court determined were sufficient to cure any possible prejudice resulting from the erroneous joinder. Id. The one difference between the instructions in this case and those in *McKethan* is that, in this case, the court instructed the jury that it may find that some evidence applies "in more than one information." That single statement should not have been made by the court because the state conceded that the evidence supporting each information was not cross admissible. Nevertheless, we cannot conclude that the defendant was prejudiced by this error. The error was an isolated occurrence outweighed by the court's repeated instructions to the jury that it must consider each count against the defendant separately. Moreover, the defendant did not object to the statement after the court made it. In fact, on appeal the defendant has not claimed any error as a result of this statement.

Second, although the defendant's state of mind was at issue regarding the hospital incident, there was no dispute as to the events that occurred during that incident. The defendant himself testified at trial that he threw himself off of the stretcher and bit a hospital employee while receiving treatment at St. Mary's and, at oral argument before this court, the defendant again

conceded that the events of the hospital incident were not in dispute. Given that what happened at the hospital is undisputed, we conclude that it is highly unlikely that the violent nature of the facts adduced in the domestic violence case could have prejudiced the jury's verdict as to his state of mind during the hospital incident. This conclusion is strengthened by the fact that the jury acquitted the defendant of charges in both cases, including of the more serious charge of assault of a police officer in the hospital case, which highlights the limited prejudicial impact that joinder had. See *State* v. *Davis*, 286 Conn. 17, 37, 942 A.2d 373 (2008) ("by acquitting the defendant of all of the offenses charged in [case A], the jury evidently was able to keep the three cases separate and did not blindly condemn the defendant on the basis of the evidence adduced in [case B]"), overruled on other grounds by *State* v. *Payne*, 303 Conn. 528, 549, 34 A.3d 370 (2012); see also *State* v. *Atkinson*, 235 Conn. 748, 766, 670 A.2d 276 (1996) ("by returning a verdict of not guilty on the charge of possession of a weapon in a correctional institution . . . the jury evidently was able to separate the two cases and did not blindly condemn the defendant on his participation in the murder"); *State* v. *Gerald A.*, 183 Conn. App. 82, 123 n.21, 191 A.3d 1003 ("[w]e conclude that acquittal of the charges related to [one victim's] allegations demonstrates that the jury properly considered each information separately"), cert. denied, 330 Conn. 914, 193 A.3d 1210 (2018); *State* v. *Rodriguez*, 91 Conn. App. 112, 120–21, 881 A.2d 371 ("Although the jury found the defendant guilty of all the counts of burglary, attempt to commit burglary, larceny and criminal trespass that it considered, it found the defendant not guilty of one count of breach of the peace in the second degree. That acquittal demonstrated that the jury was able to consider each count separately and, therefore, was not confused or prejudiced against the defendant."), cert.

denied, 276 Conn. 909, 886 A.2d 423 (2005). But see *State* v. *Boscarino*, supra, 204 Conn. 724 (acquittals in joined cases did not "establish that the results in the four cases, had they been separately tried, would have been the same").

Although we conclude that the court's instructions, on the specific facts of the present case, were sufficient, as noted previously in this opinion, it would have been preferable for the court expressly to have informed the jury that the evidence adduced by the state with regard to the domestic violence case was not admissible as proof in the hospital case, and to have informed the jury that the cases had been consolidated solely for the purpose of judicial economy. See *State* v. *Delgado*, 243 Conn. 523, 536 n.13, 707 A.2d 1 (1998) (advising that better practice when cases have been joined is to explicitly instruct that evidence in one case is not admissible as proof in separate case). Giving such an instruction further minimizes any potential prejudice that might come with joining charges in separate informations and serves to underscore for the jury that it must consider the evidence in each case separately.[5]

In sum, for the reasons we have explained, we conclude that, even though the court erred by joining the defendant's two cases, the jury instructions that the court gave sufficiently cured the risk of prejudice to

[5] Our review of the Connecticut Judicial Branch's model criminal jury instructions reveals that the model instructions on multiple informations do not contain the language that we have suggested here. See Connecticut Criminal Jury Instructions 2.6-11, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited June 3, 2022). Accordingly, we encourage the Criminal Jury Instruction Committee to consider adding language to the model instructions directing that, where cases have been joined but the evidence is not cross admissible, the jury cannot use evidence from one case to reach its result in another. The committee may find the jury instructions discussed in *State* v. *Boscarino*, supra, 204 Conn. 719 n.6, and *State* v. *Iovieno*, 14 Conn. App. 710, 722 n.7, 543 A.2d 766, cert. denied, 209 Conn. 805, 548 A.2d 440 (1988), to be helpful examples of such instructions.

the defendant and, therefore, preserved the jury's ability to fairly and impartially consider the offenses charged in the jointly tried cases. We therefore conclude that the court did not abuse its discretion in consolidating the two informations for trial.

The judgments are affirmed.

In this opinion the other judges concurred.

JEFFERSON SOLAR, LLC *v.* FUELCELL ENERGY, INC., ET AL. (AC 44777)

Elgo, Cradle and Alexander, Js.

Syllabus

The plaintiff, an energy company, sought to recover damages for, inter alia, an alleged violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), in connection with an alleged false bid certification submitted by the defendants, competing energy companies, in an attempt to secure a long-term clean energy contract with a utility company. As part of the bidding process, the defendants were required to demonstrate that they had full control over the property for the proposed energy facility. The plaintiff alleged that the city of Derby, in executing an option agreement to lease certain land to the defendants, failed to comply with the city charter and with statutory notice requirements, which effectively invalidated the defendants' option agreement. The plaintiff claimed it suffered damages in lost revenue that it would have received in securing the contract but for the defendants' false bid certification that was ultimately chosen. Thereafter, the defendants filed a motion to dismiss the complaint on the ground that the plaintiff lacked standing to pursue its CUTPA claim, which the trial court granted. On the plaintiff's appeal to this court, *held*: the trial court did not err in concluding that the plaintiff lacked standing to maintain its CUTPA action against the defendants, as the plaintiff's claims were remote and indirect because, if the defendants' knowingly submitted a false bid and the option agreement was unlawful and without legal effect as the plaintiff alleged, the utility company that was a party to the energy facility contract would have been a directly injured party and would have been best suited to seek a remedy for the harm; moreover, although the plaintiff claimed that it was certain to have received the contract in question if the defendants lacked the necessary site control, because that contention was not alleged in the operative complaint and was

undermined by the plain language of the request for bids, which stated that the utility company retained discretion in awarding shared clean energy facility contracts and reserved the right to reject any or all offers, the plaintiff's purported injuries were purely speculative.

Argued March 1—officially released June 14, 2022

Procedural History

Action to recover damages for, inter alia, a violation of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Young*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed*.

Thomas Melone, for the appellant (plaintiff).

Proloy K. Das, with whom were *Jennifer M. DelMonico* and, on the brief, *Terence J. Brunau*, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Jefferson Solar, LLC, appeals from the judgment of the trial court granting the motion to dismiss filed by the defendants, FuelCell Energy, Inc. (FuelCell), and SCEF1 Fuel Cell, LLC (company). On appeal, the plaintiff claims that the court improperly concluded that it lacked standing to maintain an action under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. We affirm the judgment of the trial court.

"A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . In deciding a jurisdictional question raised by a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing

them in a manner most favorable to the pleader. . . . [W]hen the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings." (Citations omitted; internal quotation marks omitted.) *North Sails Group, LLC* v. *Boards & More GMBH*, 340 Conn. 266, 269–70, 264 A.3d 1 (2021).

This case concerns the procurement of a long-term agreement for a clean energy facility. Appended to the defendants' motion to dismiss, as an exhibit to the affidavit of Frank Wolak, senior vice president of sales at FuelCell, was a request for production (request) jointly issued by Eversource Energy and the United Illuminating Company (United Illuminating) on April 30, 2020, for a contract to sell energy pursuant to the shared clean energy facility program codified in General Statutes § 16-244z. All such contracts require approval by the Public Utilities Regulatory Agency (PURA). See General Statutes § 16-244z (a) (2).

Pursuant to the terms of the request, "bids that [did] not include . . . proof of site control" would "not be considered." Section 4.4 of the request provides, as a prerequisite to eligibility, that a bidder must submit a "Bid Certification Form, including the affidavit from the owner of the project site and the applicable documentation demonstrating that the Bidder has control

of the generation site, or an unconditional right, granted by the property owner, to acquire such control . . . ." Section 2.4.1 further specifies what is required for "Proof of Site Control," stating in relevant part: "The Bidder must demonstrate that it has control of the generation site, or an unconditional right, granted by the property owner, to acquire such control. . . . In order to be considered to have site control for generation, the Bidder must provide copies of executed documents between the Bidder and [the] property owner showing one of the following: (a) that the Bidder owns the site or has a lease or easement with respect to the site on which the [facility] will be located . . . or (b) that the Bidder has an unconditional option agreement to purchase or lease the site . . . ."

The plaintiff and the company each submitted bids in response to the request. The company proposed a 2.8 megawatt fuel cell facility on land owned by the city of Derby (city) and located at 49 Coon Hollow Road (property). Its bid included the affidavit of Richard Dziekan, the mayor of the city, in which he attested that the company had "control of the generation site, or an unconditional right . . . to acquire such control."[1] That bid also included a copy of an option to lease agreement between the city and FuelCell regarding the property (option agreement), as well as an assignment of that option from FuelCell to the company (assignment).[2] The company's bid ultimately was selected for a project in United Illuminating territory.

The plaintiff thereafter commenced the present action against the defendants. The operative complaint is dated October 22, 2020, and contains two counts.[3] In count one, the plaintiff sought a declaratory ruling that the option agreement "does not provide the defendants

[1] A copy of the company's bid was submitted as an exhibit to Wolak's affidavit in support of the defendants' motion to dismiss.

[2] The company is a subsidiary of FuelCell.

[3] This action was commenced by service of process on November 2, 2020.

with any legally enforceable rights" due to the city's alleged failure to comply with the requirements of the city charter and General Statutes § 7-163e. In count two, the plaintiff alleged that the defendants had submitted "a false bid certification" in violation of CUTPA as a result of the city's alleged failure to comply with the requirements of the city charter and § 7-163e "prior to executing" the option agreement.

On December 10, 2020, the defendants filed a motion to dismiss the action, alleging, inter alia, that the plaintiff lacked standing.[4] That motion was accompanied by Wolak's affidavit and copies of the request, the company's bid, the option agreement, and the assignment. On December 21, 2020, the plaintiff filed an objection to the motion to dismiss, but did not submit counteraffidavits or any other evidence.

On February 18, 2021, the court ordered "all briefing, documentation and affidavits" related to the motion to dismiss to be filed by March 19, 2021. In accordance with that order, both parties filed supplemental briefs on March 19, 2021. At that time, the plaintiff offered the affidavit of its attorney, Thomas Melone, who averred

[4] Because the issue of the plaintiff's standing implicates the subject matter jurisdiction of the court; see *Rodriguez* v. *Kaiaffa, LLC*, 337 Conn. 248, 274, 253 A.3d 13 (2020); "all other action in the case must come to a halt until such a determination is made." (Internal quotation marks omitted.) *Igersheim* v. *Bezrutczyk*, 197 Conn. App. 412, 420, 231 A.3d 1276 (2020). For that reason, the plaintiff's subsequent filing of an amended complaint on December 21, 2020, was improper. As this court has noted, "our Supreme Court has explicitly held that the court cannot consider any amended pleading before ruling on the motion to dismiss. See *Federal Deposit Ins. Corp.* v. *Peabody, N.E., Inc.*, 239 Conn. 93, 99, 680 A.2d 1321 (1996) (inappropriate for court to consider amended third-party complaint rather than initial complaint, when acting on state's motion to dismiss for lack of subject matter jurisdiction); *Gurliacci* v. *Mayer*, 218 Conn. 531, 545, 590 A.2d 914 (1991) ('[b]y considering the motion to amend prior to ruling on the challenge to the court's subject matter jurisdiction, the court acted inconsistently with the rule that, as soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made')." *Igersheim* v. *Bezrutczyk*, supra, 420.

that the plaintiff had provided notice of the action to the city. The defendants also submitted additional documentation.[5] In its "further objection" to the motion to dismiss, the plaintiff stated in relevant part: "The foundation of the plaintiff's challenge rests on the nonbinding option [agreement] executed between [the defendants] and the [city]. . . . The [city] failed to engage in any competitive process for its disposition of a real property interest, violating its city charter and [§] 7-163e."

By memorandum of decision dated April 30, 2021, the court granted the motion to dismiss. The court first concluded that the plaintiff's request for a declaratory ruling was not ripe for adjudication, as "PURA [had] not yet approved the [company's] bid . . . ." The court then concluded that the plaintiff lacked standing to bring its CUTPA claim against the defendants, as its alleged injuries "are remote and indirect." Accordingly, the court rendered a judgment of dismissal, and this appeal followed.

On appeal, the plaintiff claims that the court improperly concluded that it lacked standing to maintain the CUTPA action alleged in count two of its complaint.[6] We do not agree.

[5] The defendants appended six documents to their March 19, 2021 filing. Exhibit A is a copy of the January 22, 2021 notice from PURA informing the parties that it had denied the plaintiff's challenges to the bid submitted by the company because they "do not rise to the level of a programmatic deficiency . . . ." Exhibits B and C are notices from PURA regarding its "Review of Statewide Shared Clean Energy Facility Program Requirements," while Exhibit D is the "Shared Clean Energy Facility ('SCEF') Tariff Terms Agreement Subscriber Organization" dated January 22, 2021. Exhibit E is a twenty-two page document titled "The United Illuminating Company Shared Clean Energy Facility Rider Subscriber Organization Terms and Conditions," and Exhibit F is a research report from the Office of Legislative Research dated October 1, 2018, on energy procurements.

[6] In this appeal, the plaintiff does not contest the propriety of the court's determination that the request for a declaratory ruling set forth in count one was not ripe for adjudication.

"The issue of standing implicates a court's subject matter jurisdiction and is subject to plenary review." *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 137, 161 A.3d 1227 (2017). "To establish standing to raise an issue for adjudication, a complainant must make a colorable claim of direct injury." *Connecticut Associated Builders & Contractors* v. *Hartford*, 251 Conn. 169, 178, 740 A.2d 813 (1999). "The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . . [I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. [When], for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." (Citations omitted.) *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 347–48, 780 A.2d 98 (2001). As our Supreme Court has explained, "notwithstanding the broad language and remedial purpose of CUTPA, we have applied traditional common-law principles of remoteness . . . to determine whether a party has standing to bring an action under CUTPA." (Footnote omitted.) *Vacco* v. *Microsoft Corp.*, 260 Conn. 59, 88, 793 A.2d 1048 (2002).

Connecticut courts "employ a three part policy analysis . . . [in applying] the general principle that plaintiffs with indirect injuries lack standing to sue. . . . First, the more indirect an injury is, the more difficult it becomes to determine the amount of [the] plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors. Second, recognizing claims by the indirectly injured would require courts to adopt

complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries. Third, struggling with the first two problems is unnecessary [when] there are directly injured parties who can remedy the harm without these attendant problems." (Internal quotation marks omitted.) *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, 302 Conn. 464, 469–70, 28 A.3d 958 (2011).

It is undisputed that the company, as part of its bid, submitted both the affidavit of Mayor Dziekan, in which he attested that the company had "control of the generation site, or an unconditional right . . . to acquire such control," and a copy of the option agreement between the city and FuelCell, which option was assigned to the company. Those materials demonstrate that the company's bid comported with the requirement, set forth in §§ 2.4.1 and 4.4 of the request, that a bidder submit proof "that it has control of the generation site, or an unconditional right, granted by the property owner, to acquire such control."

The plaintiff's quarrel is not with the adequacy of the company's bid, but rather its legitimacy. In its complaint, the plaintiff alleged that the city's failure to comply with the "bid process" requirements of § 22 of the city charter and § 7-163e rendered the option agreement "unlawful," "without legal effect," and "void and illusory." The plaintiff further alleged that, as a result of the city's failure to comply with those requirements, "the [option agreement] does not provide the defendants with the unconditional right required by the [request] requirements." For that reason, the plaintiff alleged that the defendants had submitted "a false bid certification" in violation of CUTPA, which allegedly caused the plaintiff to suffer "an ascertainable loss of money because [it] will lose the revenue from the [shared clean energy facility program] that it would

have received but for [the] defendants' submission of a false bid certification."

In its memorandum of decision, the trial court noted that, if the option agreement was unlawful and without legal effect as the plaintiff alleged, and the defendants did not have control of the site, the defendants "will be unable to fulfil their obligations under the contract. Presumably, the project would then be the subject of another [request for production], in which the plaintiff most strenuously asserts it will prevail. The direct recipient of any injury resulting from false certification would be [United Illuminating], the beneficiary of the project. [United Illuminating] would presumably have at least one cause of action against the defendants. Additionally, the real party with purported unclean hands is [the city], which is claimed to have ignored its own city charter in order to furnish the option to lease to the defendants. The plaintiff has not brought an action against [the city], nor does it appear that the plaintiff has standing to maintain such an action. The plaintiff's claims are remote and indirect. If there is a potential victim of the defendants' alleged duplicity, it is [United Illuminating], not the plaintiff. The plaintiff lacks standing to bring the CUTPA claim."

We concur with that reasoning. If the defendants knowingly submitted a false bid, as the plaintiff alleges, the utility company that was a party to the contract for the shared clean energy facility would be a directly injured party and would be best suited to seek a remedy for the harm. Moreover, although the plaintiff on appeal claims that it was "100 percent certai[n]" to receive the shared clean energy facility contract in question if the defendants lacked the necessary site control, that contention is not alleged in the operative complaint and is undermined by the plain language of the request. On its first page, the request states: "EVERSOURCE AND [THE UNITED ILLUMINATING COMPANY] RESERVE

THE RIGHT TO REJECT ANY OR ALL OFFERS OR PROPOSALS." Section 1.8 of the request further provides in relevant part that "[t]he [utility] [c]ompanies will evaluate all conforming Bids . . . however, the [utility] [c]ompanies make no commitment to any Bidder that it will accept any Bid(s)." Section 3.1.3 further confirms that the utility companies retain discretion in awarding a shared clean energy facility contract, stating: "Bids that are not selected as winning Bids may remain active on 'standby.' If one or more Bidders who were selected . . . do not execute the [s]tandard [a]greement, the next lower cost Bid *may* be offered an award." (Emphasis added.) See *A. Dubreuil & Sons, Inc.* v. *Lisbon*, 215 Conn. 604, 610–11, 577 A.2d 709 (1990) (observing that use of word "shall" in contract signifies mandatory directive while use of word "may" generally "imports permissive conduct and the use of discretion" and "is an indication that the parties expressly intended something other than [a] mandatory" obligation); 17A C.J.S. Contracts § 428 (2022) ("[i]n the construction of contracts, the word 'may' ordinarily is regarded as permissive, rather than mandatory"). Because the utility companies, by the plain terms of the request, retained discretion in awarding shared clean energy facility contracts and reserved the right to reject any or all offers, the plaintiff's purported injuries are purely speculative. See, e.g., *State* v. *Dixon*, 114 Conn. App. 1, 9, 967 A.2d 1242 ("aggrievement or standing to appeal requires something more than conjecture or speculation of injury"), cert. denied, 292 Conn. 910, 973 A.2d 108 (2009); *Goldfisher* v. *Connecticut Siting Council*, 95 Conn. App. 193, 198, 895 A.2d 286 (2006) ("mere speculation that harm may ensue is not an adequate basis for finding aggrievement").

We, therefore, agree with the trial court's determination that the plaintiff lacked standing to maintain its

CUTPA action against the defendants. For that reason, the court properly granted the motion to dismiss.

The judgment is affirmed.

DANIEL WINE *v.* WILLIAM MULLIGAN ET AL.
(AC 44261)

Alexander, Suarez and Sheldon, Js.

Syllabus

The incarcerated plaintiff sought to recover damages from the defendants, employees of the Department of Correction, alleging, inter alia, that the defendants improperly confiscated materials in his outgoing mail in violation of his constitutional right of access to the courts. The defendants filed a motion to strike the complaint, arguing that the conduct alleged did not constitute a violation of his constitutional rights and because the plaintiff failed to allege the specific personal involvement of four of the defendants in the conduct claimed to constitute a violation. The trial court granted the defendants' motion to strike and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the plaintiff could not prevail on his claim that the trial court erred in granting the defendants' motion to strike: the plaintiff's complaint failed to allege the specific personal involvement of the defendants C, M, S and T in the actual confiscation of his mail, and, therefore, the plaintiff could not prevail on his claim as to those defendants because he failed to assert that they personally were involved in the alleged violation; moreover, the court properly granted the defendants' motion to strike as to the defendant W because, although the plaintiff alleged that W confiscated his mail, he failed to allege that he suffered any actual injury as a result of such confiscation; furthermore, because the plaintiff did not allege that the materials were being mailed to his attorney or to the court, he failed to plead that the confiscation hindered his efforts to pursue a legal claim or that his access to the courts was frustrated or impeded by their confiscation.

Argued February 15—officially released June 14, 2022

Procedural History

Action to recover damages for the alleged violation of the plaintiff's constitutional rights, and for other relief, brought to the Superior Court in the judicial district of

Hartford, where the court, *Cobb, J.*, granted the defendants' motion to strike the plaintiff's complaint; thereafter, the court, *Noble, J.*, granted the defendants' motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Daniel Wine, self-represented, the appellant (plaintiff).

Jacob McChesney, with whom, on the brief, were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellees (defendants).

Opinion

PER CURIAM. The self-represented plaintiff, Daniel Wine, appeals from the judgment of the trial court rendered after it granted the defendants'[1] motion to strike his complaint. On appeal, the plaintiff contends that the court erred in granting this motion because the stricken complaint adequately stated a claim that the defendants had violated his constitutional right of access to the courts. We disagree, and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts and procedural history. At all times relevant to this appeal, the plaintiff was incarcerated at the MacDougall-Walker Correctional Institution (MacDougall). In July, 2019, the plaintiff initiated the present action pursuant to 42 U.S.C. § 1983.[2] The plaintiff alleged in his complaint that, on

[1] The defendants in this action are five Department of Correction employees: Rollin Cook, the then Commissioner of Correction; William Mulligan, the warden of MacDougall-Walker Correctional Institution; Peter Sacuta, a correction officer; Shaila Tucker, a counselor; and Correction Lieutenant Roy Weldon.

[2] The universe of legal claims triggering the right of access to the courts includes "civil rights actions—i.e., actions under 42 U.S.C. § 1983 to vindicate basic constitutional rights." (Internal quotation marks omitted.) *Lewis* v. *Casey*, 518 U.S. 343, 354, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

January 25, 2019, the defendants improperly confiscated materials in his outgoing mail,[3] and that such improper confiscation violated his constitutional rights of access to the courts and to equal protection of the law. Specifically, the plaintiff alleged that Rollin Cook, the then Commissioner of Correction, was responsible for the overall operation of the Department of Correction's correctional facilities, which included MacDougall. The plaintiff alleged that he had written to Correction Lieutenant Roy Weldon requesting an informal resolution regarding the confiscation of his mail. In his claim against William Mulligan, the warden of MacDougall, the plaintiff alleged that Mulligan was "legally responsible for the operation of [MacDougall] and for the welfare of all the inmates in that prison." The plaintiff alleged that he also had written to Mulligan requesting an informal resolution regarding the confiscation of his mail. The plaintiff claimed that he had a conversation with Peter Sacuta, a correction officer, regarding the confiscated materials. The plaintiff alleged that Sacuta told him that "any material containing [Uniform Commercial Code] material will be confiscated as unauthorized information by him at the time he is making copies or doing notary."[4] The plaintiff

[3] The plaintiff alleged that the confiscated materials related to three different legal matters: (1) a visitation application concerning his three minor children; (2) an action alleging that a therapist treating his children had violated the "copywritten/copy trademark/trade name" of his children; and (3) documents necessary to "restart" a non-profit organization. All of the confiscated materials were addressed to the plaintiff's sister, "who has power of attorney for [his] business and legal matters . . . ."

[4] In the memorandum in support of their motion to strike, the defendants contended that "the plaintiff's descriptions of his civil lawsuits appear to be the type of legal harassment regularly engaged in by so-called 'sovereign citizens.' . . . 'The sovereign citizens are a loosely affiliated group who believe that the state and federal governments lack constitutional legitimacy and therefore have no authority to regulate their behavior.' . . . Such individuals believe that they can free themselves of government control 'by filing [Uniform Commercial Code] financing statements, thereby acquiring an interest in their strawman,' and thereafter demand that others 'pay enormous sums of money to use the strawman's name.' " (Citations omitted.)

further alleged that he handed a manila envelope containing his materials to Shaila Tucker, a counselor, and asked her to seal the envelope but she declined to do so, stating that "the mailroom may want to check it." Finally, the plaintiff alleged that Weldon seized his outgoing mail on January 25, 2019. The plaintiff sought an injunction and compensatory and punitive damages.

On August 22, 2019, the defendants filed a motion to strike the plaintiff's complaint for failure to plead a valid cause of action and failure to state a claim upon which relief could be granted. In the memorandum in support of their motion to strike, the defendants argued that the plaintiff's complaint was legally deficient because the conduct alleged did not constitute a violation of his constitutional rights, and that the plaintiff failed to allege the specific personal involvement of four of the defendants in the conduct claimed to constitute a constitutional violation. The defendants argued that "only [Weldon] was alleged to have confiscated the plaintiff's outgoing mail" and, therefore, the plaintiff had failed to adequately allege a § 1983 claim against Cook, Mulligan, Sacuta, and Tucker. As to the plaintiff's claim that the defendants had violated his right of access to the courts, the defendants first argued that the materials confiscated from the plaintiff did not relate to a challenge of any of the plaintiff's criminal convictions or resulting sentences, or to any alleged violation of his constitutional rights, as required to establish a viable access to the courts claim. The defendants further argued that the plaintiff's allegations were legally insufficient because he failed to set forth any claim that he suffered any injury in fact as a result of the defendants' allegedly unconstitutional conduct. As to his equal protection claim, the defendants argued that the plaintiff's complaint was legally deficient because it failed to allege any disparate treatment by them of similarly situated individuals or that the confiscation

of his outgoing mail was not rationally related to the Department of Corrections' "security protocol or some other legitimate penological interest."

On January 29, 2020, the court granted the defendants' motion to strike the plaintiff's complaint "[f]or the reasons stated in the defendants' memorandum."[5] On February 26, 2020, the defendants filed a motion for judgment, which the court granted on March 9, 2020. This appeal followed. On appeal, the plaintiff claims that the court improperly granted the defendants' motion to strike because he sufficiently alleged a violation of his right of access to the courts in his complaint.[6]

We begin our analysis with the standard of review. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on the [defendants' motion] is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the

[5] We note that, generally, a trial court should not adopt as its decision the moving party's memorandum of law. See, e.g., *Hartford* v. *Tucker*, 8 Conn. App. 209, 214 n.10, 512 A.2d 944 (1986) ("[w]e must note our concern with the trial court's adoption and incorporation by reference in its memorandum of decision of the city's fifty-nine page trial brief 'as the basis for its decision,' rather than finding its own facts and making independent conclusions"). Although we continue to discourage a trial court's adoption of a moving party's memorandum as the basis for its decision, its use of that procedure in this case does not affect our resolution of the claims raised on appeal.

[6] The plaintiff raised a distinct claim related to the court's striking of his equal protection claim. Because, on appeal, the plaintiff failed to adequately brief his equal protection claim, we deem that claim abandoned. "We repeatedly have 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.) *Traylor* v. *State*, 332 Conn. 789, 804–805, 213 A.3d 467 (2019).

complaint would support a cause of action, the motion to strike must be denied. . . . Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a [defendants'] motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Piccolo* v. *American Auto Sales, LLC*, 195 Conn. App. 486, 489–90, 225 A.3d 961 (2020).

We next set forth the legal principles relevant to our resolution of the plaintiff's appeal. To state a viable claim for denial of access to the courts against an individual defendant pursuant to § 1983, the plaintiff must allege the personal involvement in the alleged denial of access of that particular defendant. See *Tangreti* v. *Bachmann*, 983 F.3d 609, 618 (2d Cir. 2020) (plaintiff "must plead and prove that each [g]overnment-official defendant, through the official's own individual actions, has violated the [c]onstitution" (internal quotation marks omitted)); *Davis* v. *Goord*, 320 F.3d 346, 351 (2d Cir. 2003) ("a plaintiff must allege that the defendant took or was responsible for actions that hindered [a plaintiff's] efforts to pursue a legal claim" (internal quotation marks omitted)); *Wright* v. *Smith*, 21 F.3d 496, 501 (2d Cir. 1994) ("[i]t is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983" (internal quotation marks omitted)).

Upon our thorough review of the pleadings, we conclude that the plaintiff's complaint failed to allege the specific personal involvement of the defendants Cook, Mulligan, Sacuta, and Tucker in the actual confiscation of his mail. Therefore, as the defendants advanced in

their motion to strike and accompanying memorandum in support of their motion, the plaintiff cannot prevail on his claim pursuant to § 1983 against these four defendants because he failed to assert that they personally were involved in the alleged violation. See, e.g., *Tangreti* v. *Bachmann*, supra, 983 F.3d 618.

We next address the plaintiff's allegations against Weldon. It is well established that all incarcerated individuals have a constitutional right of access to the courts that is "adequate, effective, and meaningful." *Bounds* v. *Smith*, 430 U.S. 817, 822, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977); see also *Washington* v. *Meachum*, 238 Conn. 692, 735, 680 A.2d 262 (1996). A review of United States Supreme Court jurisprudence consistently establishes that states are required to "shoulder affirmative obligations to assure all prisoners meaningful access to the courts." *Bounds* v. *Smith*, supra, 824. In *Bounds*, the United States Supreme Court held that "prison authorities [are required] to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Id., 828. The Supreme Court explained, however, that "while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision . . . does not foreclose alternative means to achieve that goal." Id., 830. The required assistance "may take many forms and *Bounds* . . . guarantees no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." (Internal quotation marks omitted.) *Cooke* v. *Commissioner of Correction*, 194 Conn. App. 807, 829, 222 A.3d 1000 (2019), cert. denied, 335 Conn. 911, 228 A.3d 1041 (2020).

Additionally, to state a viable claim that his right of access to the courts has been violated, the plaintiff must

allege that, as a result of a specific defendant's conduct, he suffered an actual injury. "Insofar as the right vindicated by *Bounds* is concerned, meaningful access to the courts is the touchstone . . . and the inmate therefore must go one step further and demonstrate that the alleged shortcomings . . . hindered his efforts to pursue a legal claim." (Citation omitted; internal quotation marks omitted.) *Lewis* v. *Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). "Mere delay in being able to work on one's legal action or communicate with the courts does not rise to the level of a constitutional violation." (Internal quotation marks omitted.) *Davis* v. *Goord*, supra, 320 F.3d 352; see id. (plaintiff's access to courts claim failed because he did not allege that "interference with his mail . . . caused him to miss court deadlines or in any way prejudiced his legal actions"). Furthermore, "the injury requirement is not satisfied by just any type of frustrated legal claim. Nearly all of the access-to-courts cases in the *Bounds* line involved attempts by inmates to pursue direct appeals from the convictions for which they were incarcerated . . . or habeas petitions . . . . [T]his universe of relevant claims [was extended] only slightly, to 'civil rights actions'—i.e., actions under 42 U.S.C. § 1983 to vindicate 'basic constitutional rights.' " (Citations omitted.) *Lewis* v. *Casey*, supra, 354. The right of access to the courts "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. . . . Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." (Emphasis omitted.) Id., 355; see also *Cooke* v. *Commissioner of Correction*, supra, 194 Conn. App. 828–29.

Although the plaintiff alleged that Weldon confiscated his mail, he failed to allege that he suffered any

actual injury as a result of such confiscation. Because he did not allege that the materials were being mailed to his attorney or to the court, the plaintiff failed to plead that the confiscation "hindered his efforts to pursue a legal claim" or that his access to the courts was "frustrated or was being impeded" by their confiscation.[7] *Lewis* v. *Casey*, supra, 518 U.S. 351, 353, 355. Again, as the defendants argued in their motion to strike and accompanying memorandum in support of their motion, the plaintiff's failure to allege that he suffered an actual injury as a result of the defendants' allegedly unconstitutional conduct defeats his claim that he was entitled to relief under § 1983 on the basis of such conduct.

Therefore, we conclude that the plaintiff's claims against each defendant were properly stricken.

The judgment is affirmed.

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[7] The plaintiff alleged that the confiscated materials were being sent to his sister, a third party, and not to the plaintiff's attorney or to the court. As a result, we need not address the merits of whether the confiscated documents related to legal actions that fall within the "universe of . . . claims" recognized by the courts to support a denial of access to the courts claim. *Lewis* v. *Casey*, supra, 518 U.S. 354–55; see also *Cooke* v. *Commissioner of Correction*, supra, 194 Conn. App. 828–29.