ROBERT PARKER ET AL. *v.* ZONING COMMISSION OF THE TOWN OF WASHINGTON ET AL.
(AC 44130)

Elgo, Moll and Sheldon, Js.

Syllabus

The plaintiffs, owners of real property located within 100 feet of that of the defendant W Co., appealed to the Superior Court from the decision of the defendant Zoning Commission of the Town of Washington granting W Co.'s application to modify a special permit for the construction of an inn. W Co.'s predecessor in title, W, had sought a special permit in 2008 to construct the inn. The commission denied the request in 2011,

and W appealed to the Superior Court. While the appeal was pending, the commission granted W a special permit to operate a school on the property. The Superior Court thereafter upheld the commission's denial of the request for the special permit to construct the inn, and W appealed to this court. While W's appeal was pending before this court, the parties in that appeal entered into a settlement agreement in 2013 that permitted W to pursue construction of the inn, known as the main building, and associated appurtenances. The settlement agreement also contained sixteen conditions regarding the construction, and W agreed to surrender the special permit approval that it had obtained for a school. At a special meeting in January, 2013, the commission approved the settlement agreement and incorporated into it a 2012 revision of an architect's site plan for the inn, two architectural renderings and conditions that were contained in the special permit approval for the school. Thereafter, a motion for approval of the settlement agreement was filed with the Superior Court pursuant to statute (§ 8-8 (n)). The court approved the settlement agreement, thereby memorializing W's ability to construct the inn. W Co. then filed its application with the commission to modify the special permit that was approved in the commission's special meeting. The application was accompanied by, inter alia, a new site development plan for the inn that was revised to 2018. The commission conducted a hearing during which members of the public opined that the 2018 site development plan constituted an expansion of the nonconforming structure that was memorialized in the 2012 plan and approved as part of the settlement agreement. The commission thereafter approved W Co.'s application to modify the special permit in accordance with the 2018 site development plan and attached twenty-five conditions to that approval. The plaintiff property owners appealed to the Superior Court, claiming, inter alia, that the commission improperly authorized the expansion of a nonconforming structure and a nonconforming use in contravention of the zoning regulations. The court rejected that contention and dismissed the plaintiffs' appeal, concluding that the commission had substantial evidence before it to approve and modify W Co.'s application. On the granting of certification, the plaintiffs appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that the Superior Court improperly concluded that the commission's approval of W Co.'s special permit modification did not constitute an impermissible expansion of a nonconforming structure:

a. Although the main building depicted in the 2012 site plan did not satisfy the common-law standard for a nonconforming use, insofar as it did not comply with the lot line setback requirements in the zoning regulations and was not in existence in 2012 when it was merely a contemplated use of the property, because the commission and the court ratified the settlement agreement and all statutory requirements were

satisfied, the proposed main building constituted a lawful, albeit nonconforming, structure that could not be expanded or enlarged within the setback area in the absence of a variance from the town's Zoning Board of Appeals.

b. The plaintiffs' claim that the commission authorized an impermissible vertical expansion of the nonconforming main building was unavailing, notwithstanding the plaintiffs' assertion that a height limitation could be found in W's proposed plan for the school and sewage discharge plans W had submitted for state approval: the Superior Court properly determined that the commission did not authorize an impermissible expansion when it approved W Co.'s special permit modification, as the plans for the school and sewer discharge were not part of the settlement agreement, which described the 2012 site development as the complete site plan, and the settlement agreement did not specify a height limitation, which was never discussed at the special meeting; moreover, the architectural renderings did not contain dimensions or numerical specifications, the record contained no indication that the commission considered those renderings as accurate depictions of the height of the proposed main building, and the commission was entitled to credit testimony that the architectural renderings were offered merely for illustrative purposes and that the parties to the settlement agreement did not undertake to create a comprehensive agreement; furthermore, contrary to the plaintiffs' contention, the commission did not authorize an expansion of the floor area or volume of the main building, as the settlement agreement did not contain a restriction as to the floor area or volume of the main building, and the commission members who approved W Co.'s application to modify the special permit in 2018 and were members of the commission in 2013 when it approved the settlement agreement were entitled to rely on their personal knowledge of the settlement agreement and the special meeting.

2. The plaintiffs could not prevail on their claim that the Superior Court improperly concluded that W Co.'s special permit application did not constitute an impermissible expansion of a nonconforming use, which was based on their assertions that only accessory uses mentioned in the settlement agreement were permitted and that the inclusion of a bar, a prefunction meeting area and a meeting room/library were not permitted accessory uses: the record contained substantial evidence that the parties to the settlement agreement did not intend to restrict accessory uses to only those specifically mentioned in the settlement agreement and did not include floor plans that depicted the uses contemplated for the interior of the main building, as the transcript of the special meeting contained no discussion of the scope of accessory uses, no floor plans were presented at that hearing, and the commission heard testimony from a party to the settlement agreement, which it was entitled to credit, that the parties to that agreement never undertook to create a comprehensive agreement; moreover, the bar, prefunction meeting

area and meeting room/library were permitted accessory uses, as the commission reasonably could have found that those uses had commonly, habitually and by long practice been established as reasonably associated with the primary use of an inn in Washington, the commission used the only existing inn in town as a de facto model of what the term "inn" meant, as the zoning regulations did not define "inn," there was uncontroverted evidence that the existing inn featured a bar, libraries and meeting areas, and the commission reasonably could have found that W Co.'s use of the property would not result in a substantial difference in effect on the surrounding neighborhood, there having been evidence that all of the accessory uses W Co. proposed were typical of what inns do and that the proposed uses were of a smaller scale than those at the existing inn; furthermore, the proposed accessory uses in the settlement agreement were the same as those approved in the commission's granting of W Co.'s motion to modify the special permit, and the commission required as a condition of its approval of the special permit modification that the approval was subject to all of the conditions and limitations in the settlement agreement as well as the more restrictive limitations the commission imposed in its approval of the settlement agreement.

3. The plaintiffs' claim that the Superior Court failed to require compliance with the special permit standards in the zoning regulations was unavailing, as the plaintiffs failed to rebut the strong presumption of regularity that attaches to the conduct of zoning commissions: the commission reasonably could have concluded that W Co.'s proposed use of the property comported with the intent and objectives of the zoning regulations and the town's plan of conservation and development, and was in harmony with the orderly development of the town and surrounding neighborhood; moreover, the zoning regulations previously had authorized use of the property as an inn, the settlement agreement plainly permitted the use of the property in that manner and provided a mechanism for modification of the plans contained in that agreement, and, although the commission did not render an official, collective statement of reasons for its action, as required by statute (§ 8-3c (b)), noncompliance with that imperative was commonplace and condoned by decades of appellate authority; furthermore, the commission gave ample attention to the propriety and the impact of W Co.'s proposed use of the property, the commission was cognizant of the fact that the only other inn in Washington had featured comparable primary and accessory uses for decades, the commission was well aware of the protracted procedural history of the proposed use, and the changes in the special permit application did not materially alter those considerations.

Argued March 15, 2021—officially released January 11, 2022

Procedural History

Appeal from the decision of the named defendant granting the application of the defendant 101 Wykeham

Road, LLC, for the modification of a special permit for the construction of an inn, and for other relief, brought to the Superior Court in the judicial district of Litchfield at Torrington and transferred to the judicial district of Waterbury, Complex Litigation Docket; thereafter, the case was tried to the court, *Bellis*, *J.*; judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. *Affirmed*.

Gail E. McTaggart, for the appellants (plaintiffs).

Michael A. Zizka, for the appellee (named defendant).

Peter V. Gelderman, for the appellee (defendant Erika Klauer et al.).

Teresa R. Peacocke, self-represented, the appellee (defendant).

Opinion

ELGO, J. The plaintiffs, Robert L. Parker, Peter E. Rogness, and Randi M. Solomon, trustee for the Randi M. Solomon Revocable Trust, appeal from the judgment of the Superior Court denying their appeal from the decision of the defendant Zoning Commission of the Town of Washington (commission) to grant the application of the defendant 101 Wykeham Road, LLC (applicant), to modify a special permit previously approved by the commission in 2013 pursuant to a settlement agreement.[1] On appeal, the plaintiffs claim that the court improperly concluded that the application did not constitute an impermissible expansion of both a nonconforming structure and a nonconforming use. The plaintiffs further claim that the court "failed to require

[1] In their complaint, the plaintiffs also named Erika Klauer and Teresa Rosen Peacocke as defendants, as they were either parties to the settlement agreement at issue or successors to parties thereto.

compliance with [the] special permit standards" contained in the Washington Zoning Regulations (regulations).[2] We affirm the judgment of the Superior Court.[3]

This appeal concerns the development of a 26.9 acre parcel of real property owned by the applicant and known as 101 Wykeham Road in Washington (property). The property is located in the "R-1 Farming and Residential" zoning district.[4] Among the uses authorized by special permit in that zone is an "Inn or Tourist home." Washington Zoning Regs., § 4.4.1. The regulations, however, provide no definition of the terms "inn" or "tourist home."

In May, 2008, an entity known as Wykeham Rise, LLC (Wykeham), the predecessor in title to the applicant, applied for a special permit to construct an "inn and associated appurtenances" on the property. Following a lengthy hearing over the course of several months, the commission, by a vote of three to two, denied that application.[5] Wykeham appealed from that decision to the Superior Court, claiming that (1) the commission lacked a valid reason for its denial, and (2) the commission's decision must be reversed due to the improper

[2] Unless otherwise indicated, all references to the regulations in this opinion pertain to the September 12, 2017 revision thereof.

[3] "In hearing appeals from decisions of a planning and zoning commission, the Superior Court acts as an appellate body." *North Haven Holdings Ltd. Partnership* v. *Planning & Zoning Commission*, 146 Conn. App. 316, 319 n.2, 77 A.3d 866 (2013).

[4] The regulations contain an explicit statement of purpose regarding the "R-1 Farming and Residential" zoning district. Section 4.1 of the regulations provides: "It is intended that development in this district, which covers most of the Town of Washington, will consist primarily of scattered residential, agricultural and related uses, open space, low intensity recreational activities, and other uses that will retain the rural character and natural beauty of the Town."

[5] The commission did not provide a collective statement of the reasons for its denial of the special permit, as required by General Statutes § 8-3c (b). See *Wykeham Rise, LLC* v. *Washington*, Superior Court, judicial district of Litchfield, Docket No. CV-09-4007939-S (October 11, 2011).

participation of alternate members in its deliberations and the improper predetermination of the merits of the application by one regular member of the commission.

While that appeal was pending before the Superior Court, Wykeham alternatively sought special permit approval to operate a school on the property,[6] and it is undisputed that the commission granted such approval. Although the record before this court is voluminous and contains materials that reference "Wykeham University," it does not contain copies of any such special permit applications or the commission's formal decision to approve such a special permit. The record nonetheless indicates that Wykeham agreed, as a condition to the settlement agreement at issue in this appeal, to surrender the special permit approval that it had obtained for a school once the settlement agreement was ratified. See footnote 7 of this opinion.

In October, 2011, the Superior Court issued its memorandum of decision on Wykeham's appeal from the commission's denial of its request for a special permit to construct an inn on the property. The court concluded that none of Wykeham's claims constituted reversible error. At the same time, the court noted its concern about the conduct of the commission, stating in relevant part: "The court observes . . . that certain commission members engaged in a level of conduct that skirted the boundaries of what is appropriate for municipal public officials sitting on a commission. First, during the course of the five public hearings held on Wykeham's application . . . Commissioner [Valerie] Friedman

[6] For almost one century, the property was used for educational purposes. "From 1907 until 1988, the property was the site of the Wykeham Rise School, a private college preparatory boarding school for girls. In 1988, the property was sold to Swiss Hospitality Institute, which operated a postsecondary residential hotel school between 1992 and 2003." *Peacocke* v. *Zoning Commission*, Superior Court, judicial district of Litchfield, Docket No. CV-11-6003862-S (February 7, 2013).

made observations and comments that might lead one to believe that the application was being predetermined and prejudiced in such a way that the principles of fundamental fairness during the proceedings were being undercut. . . . The court finds that . . . Commissioner Friedman, as a sitting member of the commission, created the appearance, in form, if not in substance, of predetermination and, therefore, contradicted the spirit of the statutory mandate of General Statutes § 8-11. The court further observes that the participation by [two] alternate commission members . . . in the deliberative process by way of comment or submission on why the application should be denied, was inappropriate.'' The court concluded with the following admonition: ''The court . . . strongly advises that Chairman [David] Owen, along with all of the commissioner members, should undertake some remedial training and orientation concerning their duties as municipal public officials sitting on boards and commissions, including their obligation to remain impartial and nonjudgmental during such proceedings, and to withhold judgment until all of the evidence and arguments have been presented for their deliberation.'' *Wykeham Rise, LLC* v. *Zoning Commission*, Superior Court, judicial district of Litchfield, Docket No. CV-09-4007939-S (October 11, 2011).

Wykeham then filed a petition for certification, seeking appellate review of the propriety of that judgment, which this court granted. In addition to Wykeham and the commission, the parties to that appeal included three neighboring property owners—Eric A. Federer, Wendy R. Federer, and Teresa Rosen Peacocke.

While that appeal was pending, the parties settled their differences and entered into an agreement dated January 9, 2013 (settlement agreement). That settlement agreement noted that Wykeham ''desires to con-

struct and operate an inn" on the property and then set forth sixteen "terms and conditions by and under which neither [the Federers] nor Peacocke would oppose Wykeham in its efforts to obtain [c]ommission approval [of] an [i]nn on the [p]roperty."[7] At a special

[7] The sixteen conditions contained in the settlement agreement state:

"1. The Inn's complete site plan is represented in the attached document as Overall Site Plan for Applicant Matthew & Erika Klauer Development: Wykeham Project Date: July 8, 2011 Scale 1" = 60' SHEET 050.1 Revised to 11/19/12, Prepared by Arthur H. Howland & Associates P.C. ('Site Plan').

"2. The Inn will contain a maximum of fifty-four (54) guest room units ('Units').

"3. There will be a maximum of one hundred (100) parking spaces provided on the Property. There will be no 'overflow' parking.

"4. The Inn's restaurant shall be open to the public but shall have a total maximum seating capacity of sixty-eight (68) seats during normal operations, excluding weddings, or 'paid for events.' Of the maximum seating capacity, no more than thirty (30) seats shall be outdoor seating.

"5. The Inn's spa and fitness center will be limited to the area within the building that is labeled 'Fitness Building' on the Site Plan and cannot exceed floor area totaling more than 11,400 square feet SAVE THAT a single exercise room no larger than 3,800 square feet and containing only exercise equipment may be located within the 'Main Building,' labeled as such as depicted on the Site Plan. If the single exercise room is located in the Main Building, the size of the Fitness Building would then be reduced by the same amount so that the combined floor area devoted to spa and fitness facilities in the Fitness Building and Main Building cannot exceed 11,400 square feet in total. There shall be no treatment rooms in the Main Building under any circumstances and treatment rooms in the Fitness Building may not be used for overnight stays. Wykeham will not issue 'day passes' for the spa and fitness center or for any such exercise room.

"6. The existing driveway of the Property that intersects Bell Hill Road will be permanently abandoned.

"7. There will be no amplified sound on the grounds or outside the footprints of all fully constructed and enclosed buildings at any time. Non-amplified sound is allowed; however, non-amplified music must cease 30 minutes after local sunset.

"8. The pool house shall be permitted to serve alcohol but will not have any grill or cooking equipment. There shall be no outside grill on the Property. The pool house and pool shall open no earlier than 8:00 a.m. and close no later than at 8:00 p.m. each day. Wykeham shall use best efforts to minimize noise or raucous behavior at the pool house or pool. All exterior lights shall be subject to the lighting standards of the [regulations] in effect at the time this Agreement is fully executed by the parties herein.

"9. There shall be no more than twenty-four (24) tented events between and only during the period from May 1 through October 31 of each calendar year and no more than one (1) tented event may be held per day. Tented events may be held in two general locations, the first being north of the

meeting held on January 7, 2013,[8] the commission, by a vote of four to one, approved the settlement agree-

Main Building (as those specific locations are depicted on the Site Plan) and the second being south of the Main Building (the specific south side locations are as depicted on the Site Plan.) Of the twenty-four (24) tented events, up to but no more than twelve (12) tented events may occur on the south side of the Main Building during any one calendar year. The balance of the twenty-four (24) total number of tented events that may be held in a calendar year, less the actual number of tented events not to exceed twelve (12) that occur on the south side in any calendar year, shall be allowed on the north side. No buildings, tents or other structures shall be constructed, placed or erected above, or on the ground in the Restricted Area as depicted on the Site Plan. No permanent or temporary parking is permitted in the Restricted Area. No food or beverages, including but not limited to, alcohol beverages, shall be prepared or served in the Restricted Area.

"10. A separate 'Stipulated Judgment' by and between Wykeham and Federer relating to *Wykeham Rise LLC* v. *Eric A. Federer, et ux.*, Docket No. LLI-CV-08-4007541-S, [judicial district] of Litchfield at Litchfield, will be signed by the parties therein and filed with the court for approval contemporaneously with the submission for approval of this Agreement by the court.

"11. Any amendments to this Settlement Agreement must be consented to by all the parties herein or their heirs, successors or assigns.

"12. If any provision of this settlement agreement is deemed unenforceable or against public policy by a court of competent jurisdiction, such provision shall be deemed severable from the remainder of the Agreement and shall not affect any other provision or, if such provision should not be wholly severable then, to the maximum extent possible, the remainder of this Agreement shall be modified so as to maintain the original intent and remain in full force and effect.

"13. Each of the parties represent that he, she or it has the complete authorization and power to execute this Agreement in an individual capacity, on behalf of an LLC, or Commission as the case may be and that all necessary approvals, signatures or consents of any other person or entity has been obtained and that this Agreement is a valid and binding obligation of the individuals, Wykeham Rise, LLC and the Commission and such Agreement does not violate any law, rule, regulation, contract or agreement otherwise enforceable against the respective parties.

"14. This settlement agreement shall be construed in accordance with the laws of the State of Connecticut.

"15. Once this Settlement Agreement has its Approval, Wykeham shall give up and surrender its two existing approvals for a school granted by the Commission on December 27, 2010, and February 14, 2012.

"16. This Settlement Agreement may be signed in counterparts and the parties may rely on facsimile or email copies provided to each as long as the originals are thereafter provided so that an original composed of all original counterparts may be presented to the Court for approval."

[8] The record before us contains the minutes of the January 7, 2013 special meeting and a partial transcript that was provided to the commission by

ment "per the site development plan by Arthur H. Howland and Associates, dated July 8, 2011, revised to December 17, 2012, 32 sheets" (2012 plan). The commission also incorporated by reference into its approval "[t]he architectural renderings [marked] 'A' and 'B' "[9] and six conditions of approval that were contained in its previous special permit approval to operate a school on the property.[10]

Attorney Gail E. McTaggart as part of her memorandum to the commission dated July 23, 2018. In that memorandum, McTaggart states: "[E]xcluded [from the special meeting transcript] are [forty] minutes of public comment (and the few replies by [the commission's counsel and Wykeham's engineer]). Once public comment was closed, the remainder is fully transcribed, except for one [thirteen] minute discussion about construction on Sundays (and a brief discussion of building materials)."

[9] The transcript of the January 7, 2013 special meeting indicates that two architectural renderings were provided to the commission to illustrate the look of the proposed inn. Those renderings were offered in response to a question from the commission's administrative assistant, Janet M. Hill, who asked: "I thought the rustic country kind of architecture would be back, but now it sounds like we're at the school application [design] and you've got a factory warehouse. Which is it? For the architecture?" In response, Paul S. Szymanski, a civil engineer and president of Arthur H. Howland & Associates, P.C., stated: "We can give a—would you like a representative rendering for the record? It doesn't look exactly like the school." When Hill replied in the affirmative, Szymanski shared those renderings and explained that, "what we did was we significantly . . . improved the rooflines, adding gable ends throughout . . . breaking up the windows . . . adding additional glass in several places. . . . [A]nd breaking up what previously looked like one extended building." When the commission later prepared to make a motion to approve the settlement agreement, its legal counsel suggested referencing those "renderings," which were marked as "rendering 'A' and rendering 'B.' "

[10] A printed copy of one page of the commission's prior motion to approve the special permit to operate a school on the property, which contained seven conditions of approval, was marked "1/7/13 Proposed Conditions—No #5" and was signed by Chairman Gary Fitzherbert. One condition, which was listed as number five on that document and pertained to the sale of liquor, was crossed out. The remaining six conditions state:

"1. All modifications to the approved plans must be approved by the [commission] or its authorized agent prior to implementation,

"2. As-built drawings shall be submitted to the [commission] upon the completion of the foundations and again upon completion of framing. The as-built drawings must be approved by the [c]ommission or its authorized agent before commencement of further construction. The [c]ommission

Following the commission's approval of the settlement agreement, a motion for approval was filed with the Superior Court pursuant to General Statutes § 8-8 (n), as the appeal of the commission's 2008 decision to deny Wykeham's special permit request remained pending.[11] Through legal counsel, the plaintiffs in the present action—who were not parties to the settlement agreement or the proceeding before the Superior Court—opposed the settlement agreement.[12] After hearing from all interested parties, the court concluded that

may, at the expense of the applicant, submit such drawings to a professional for evaluation,

"3. Outside construction may take place only between 7:00 a.m. and 5:00 p.m. Monday through Friday and between 8:00 a.m. and 4:00 p.m. on Saturday and Sunday. No blasting, no operation of heavy equipment, and no site work, are permitted on Saturday or Sunday, before 8:00 a.m. on Monday through Friday, and on Memorial Day, Fourth of July, and Labor Day,

"4. A performance bond, in the form of an irrevocable letter of credit from a financial institution with offices in Connecticut, in an amount to be determined in consultation with the [c]ommission's attorney, by an engineer approved by the [c]ommission and paid for by the applicant, shall be secured before disturbance of the site begins,

"[5.] The applicant shall, in addition to the proposed buffering, intersperse a sufficient number of evergreen trees with the existing and proposed vegetation to reasonably buffer the lower parking lot visibility from Wykeham Road, and

"[6.] Benchmark elevations for the building height shall be established for each building per Section 11.7.2.3 of the [regulations]."

[11] General Statutes § 8-8 (n) provides in relevant part: "No [zoning] appeal . . . shall be withdrawn and no settlement between the parties to any such appeal shall be effective unless and until a hearing has been held before the Superior Court and such court has approved such proposed withdrawal or settlement."

[12] On January 3, 2013, mere weeks before the settlement agreement was approved by the court; see *Wykeham Rise, LLC* v. *Zoning Commission*, Docket No. CV-09-4007939-S, 2013 WL 951156 (Conn. Super. February 5, 2013); the plaintiffs, along with Mitchell J. Solomon, trustee for the Mitchell J. Solomon Revocable Trust, filed a motion to intervene in the pending appeal of the commission's 2008 decision to deny Wykeham's special permit request. In denying that motion, the court stated in relevant part: "The appeal began on December 29, 2008, and the motion to intervene was not filed until January 3, 2013, a delay of four years. The appeal has already been heard and decided by the Superior Court and appealed to the Appellate Court. The proposed intervenors admit in their motion to intervene that

the settlement agreement "reflects honest, good faith compromise on the part of all parties to this appeal." *Wykeham Rise, LLC* v. *Zoning Commission*, Docket No. CV-09-4007939-S, 2013 WL 951156, *1 (Conn. Super. February 5, 2013). The court further emphasized that "[t]he settlement reflects a substantially reduced project, which should be much more acceptable to the neighbors. The settlement includes the following: (1) the removal of some buildings which were part of the original proposal; (2) reduced parking; (3) reduced restaurant; (4) a prohibition on amplified music; (5) closure of one means of access and egress; (6) limitation on the number of events which can be held; [and] (7) plantings to screen the activities of the project." Id. Accordingly, the court approved the settlement agreement, thereby memorializing Wykeham's ability to construct an inn on the property, as depicted on the 2012 plan.[13] See footnote 7 of this opinion.

they 'have a track record of involvement in various zoning applications filed by the plaintiff for the same property as the subject appeal.' They make the extremely weak argument that they decided not to intervene in this case because it involves a denial of the project. They must have been well aware that three other neighbors intervened and that the appeal to the Appellate Court would involve a preargument conference for the purpose of trying to settle the matter. It is hard to imagine a more untimely motion to intervene. The delay and prejudice to the present parties would be extreme if the motion to intervene is granted. The parties have spent considerable time and expense to bring the appeal to the point that . . . it can be settled. The intervention would prevent the settlement from taking place because the proposed intervenors oppose it and there can be no settlement if one or more of the parties to the case do not support it." *Wykeham Rise, LLC* v. *Zoning Commission*, Superior Court, judicial district of Litchfield, Docket No. CV-09-4007939-S (February 4, 2013) (55 Conn. L. Rptr. 479, 480).

[13] No appeal was taken from the judgment approving the settlement agreement. In all subsequent proceedings before the commission and the Superior Court, the parties agreed that the commission's 2013 approval of the settlement agreement was tantamount to special permit approval to construct an inn on the property in accordance with the 2012 plan and the conditions specified in the settlement agreement, and no claim to the contrary has been raised in this appeal. Indeed, the plaintiffs repeatedly refer to the "2013 special permit" in their principal appellate brief.

The settlement agreement also contemplates modification of the 2012 plan. In this regard, the agreement requires that "[a]ny amendments to this [s]ettlement [a]greement must be consented to by all the parties herein or their heirs, successors or assigns." The settlement agreement further provides that "[a]ll modifications to the approved plans must be approved by the [commission] or its authorized agent prior to implementation."

On March 22, 2018, the applicant, as successor in title to the property, filed an application for the "modification of [the] existing special permit" that had been approved by the commission at its January 7, 2013 special meeting (modification application). That application was accompanied by several documents, including a new site development plan prepared by Arthur H. Howland & Associates, P.C., dated December 2, 2016, revised to February 5, 2018 (2018 plan),[14] a copy of the applicant's February 8, 2018 application for a building permit and related documentation,[15] and copies of both

[14] The 2018 plan was revised further on March 20, June 18 and July 2, 2018, in ways immaterial to the present appeal.

[15] As part of that application, the applicant submitted a letter from Paul S. Szymanski, a civil engineer and president of Arthur H. Howland & Associates, P.C., "to clarify and note all modifications [contained in the 2018 plan] in comparison to the original approved site plan as part of the settlement agreement. These are the only modifications to the [2012 plan] requested:

"1. Regrading along the rear and east side of the Main Building.

"2. Addition of a retaining wall on the east side of the building and minor modification to the existing retaining wall already approved on the east side of the Main Building.

"3. Removal of the [twenty air conditioning] pads at the rear of the Main Building.

"4. Addition of [three] emergency egress landings at the Main Building, [three] emergency egress landings at the Pool House (added since last Public Hearing) and [one] emergency egress landing at the Spa House (added since last Public Hearing) with associated gathering areas and pathways to comply with the Building Code.

"5. Since the last Public Hearing, addition of a pull-off area approximately [five foot by twenty foot] adjacent to the driveway in front of the Spa House to satisfy Building Code requirements [of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq.]. This necessitated moving the Spa House [five] feet closer to the drive."

the settlement agreement and the commission's January 7, 2013 approval thereof.[16]

In accordance with the instructions provided by the commission on its special permit application form, the application also included a written description of the proposed modification. In that correspondence, the applicant's legal counsel stated in relevant part: "The [a]pplicant's goal is to build the [i]nn that it is entitled to build as a result of the settlement agreement reached with the [commission] in January of 2013 and approved by the court on February 5, 2013. To do that, the [a]pplicant [is requesting] a modification to the [2012 plan] incorporated into the [s]ettlement [a]greement. This modification is in part necessary in order to comply with newer building code requirements for fire egress. It is also discretionary in part as the [a]pplicant wishes to add grading and stone walls in the rear of the main building. . . . It is noted that there is an inconsistency between the [2012 plan] footprint . . . which defines the footprint of the main building, and [r]enderings A & B, (incorporated into the [commission's] approval of the [s]ettlement [a]greement). To wit, the footprint of the [r]enderings (to the extent that it is discernable) does not comply with the [s]ettlement [a]greement/[2012 plan]. Understanding the limited purpose of the [r]enderings was merely to demonstrate the architectural style of the main building, the [s]ettlement [a]greement/[2012 plan] was used for the footprint and the [r]enderings for the architectural [style; therefore, the] plans submitted substantially comply with both."

The commission held a public hearing on the modification application on April 17, and July 19 and 23, 2018,

Paul S. Szymanski concluded that letter by stating that "[t]hese are the *only* revisions being requested and are graphically represented on [the 2018 plan]." (Emphasis in original.)

[16] The commission's notice of approval of the settlement agreement was filed in the Washington land records at volume 231, pages 1131–32.

at which it received documentary and testimonial evidence.[17] One contentious issue concerned the applicant's proposal to permit individual ownership of guest room units at the inn, as multifamily housing was not permitted under the regulations. Another major issue with the 2018 plan was the proposed addition of a 2000 square foot ballroom and parking concerns related thereto. Some members of the public also opined that the 2018 plan constituted an expansion of the nonconforming structure memorialized in the 2012 plan and approved as part of the settlement agreement. In response, Peacocke, who had opposed Wykeham's 2008 special permit application and who was a party to the settlement agreement, stated at the public hearing: "I just [want] to remind members of the commission . . . that there were four attorneys who negotiated and drafted the [settlement agreement]. If we had intended to create an exclusionary agreement itemizing all and only those matters, we'd have said so, and we didn't. . . . [W]e . . . never undertook to create a comprehensive agreement . . . ."

The commission also was presented with evidence as to how the applicant's proposal compared with the Mayflower Inn, which was located "right down the road" from the property and was "the only inn in [Washington]" at that time. Commission members were reminded that, because the regulations do not define the term "inn," the commission had "repeatedly said [that] it uses the Mayflower Inn . . . as a de facto model of what [constitutes] an inn . . . in Washington." Due to the similarity of the Mayflower Inn to the applicant's proposal, Paul S. Szymanski, a civil engineer, testified that the Mayflower Inn provided "a wonderful

[17] Meetings scheduled for May 15 and June 25, 2018, were cancelled due to a tornado warning in the area and a continuance request, respectively.

basis for comparison," and the commission was presented with evidence as to how the applicant's proposal compared with that existing inn.[18]

The commission deliberated the merits of the applicant's modification request over the course of three nights on August 7, 27 and 28, 2018. At the conclusion of those deliberations, the commission, by a vote of

[18] In addition to testimonial evidence presented at the public hearing, the commission received a written "side-by-side comparison" of the applicant's proposal and the Mayflower Inn, which states in relevant part: "Mayflower has thirty units while [the applicant's proposal] plans to have thirty-seven units. Fifty-four units were approved by the settlement agreement . . . yet only thirty-seven are planned—seven more than the Mayflower. Mayflower has nine buildings while [the applicant's proposal] will have six. Both [the applicant's proposal] and Mayflower have a restaurant with an accompanying bar—Mayflower has eighty-five dining seats while [the applicant's proposal] has sixty-eight. Mayflower is able to have outdoor dining as well on its porch which would add seats—but [the applicant's proposal] is limited to sixty-eight seats and only thirty of those can be moved outside. [The applicant's proposal] is limited to twenty-four maximum outdoor events such as weddings per year while Mayflower has indicated nearly 100 weddings are held every year. Mayflower has two gyms—one in its main building and one in its spa. Mayflower offers memberships at both venues. [The applicant's proposal] has only one spa. The dedicated spa building at Mayflower is 20,000 square feet (this does not include the square footage of gym space in the main building) while [the applicant's proposed] spa and gym will be under 11,000 square feet. The Mayflower has tennis courts—[the applicant's proposal] will have none. The Mayflower has two libraries and reading rooms—[the applicant] plans to have one. Mayflower has six separate venues for ballroom/meeting rooms while [the applicant's proposal] will have two. The total square footage of the various Mayflower meetings spaces is over 5000 square feet while [the applicant's proposal] is 3500 [square feet]. Mayflower also has a dedicated business center; one is not planned at this time [in the applicant's proposal]. Mayflower has two gift shops—[the applicant's proposal] has . . . one. Mayflower has two swimming pools—one indoor and one outdoor—[the applicant's proposal] will have only one. The total number of parking spaces is ninety-five at Mayflower and 100 for [the applicant's proposal]. What is clear here is that all of these offerings and attributes are typical of what Inns do. As the Chairman [of the commission] says—the definition of an 'inn' is governed by the one that still exists in Washington. [The applicant] is not proposing to do anything that the Mayflower is not already [doing, and in] every [instance] save room count, [the applicant's] planned activities are [of] a smaller scale than what is currently offered—and what has been offered at Mayflower for decades."

three to two, approved the application to modify the existing special permit in accordance with the 2018 plan.[19] The commission attached twenty-five detailed conditions to that approval.[20] See General Statutes § 8-2 (a) (special permits may be subject "to conditions

[19] Of the eight members on the commission, only three—Nicholas N. Solley, David Werkhoven, and Raymond W. Reich—had served on the commission when the settlement agreement was approved in 2013. Those three members all voted to approve the 2018 modification request.

[20] The conditions attached to the commission's approval state:

"1. This approval remains subject to all of the conditions and limitations set forth in the settlement agreement approved by the commission on January 7, 2013, together with the conditions of approval that were incorporated into the commission's motion for approval of the settlement agreement.

"2. The commission finds that the separate ownership of guest room units is inconsistent with its interpretation of the word 'inn' as used in the [regulations]. An 'inn' is a lodging facility owned and managed by a single ownership entity, with rooms available for transient occupancy by lessees. Therefore, a condition of approval is that the 'inn' must be owned as an undivided property. Guest room units, however they may be designated, may not be separately owned.

"3. No guest room units shall have a kitchen.

"4. No guest room unit shall contain a refrigerator having a capacity larger than 4.0 cubic feet.

"5. No guest room unit shall have a stove, stove top, oven or convection oven.

"6. No guest room unit shall have any cooking facilities, including microwave ovens.

"7. No guest room unit shall have a dishwasher.

"8. No guest room unit shall have a washing machine or dryer.

"9. The interior floor plans shall be modified to eliminate the ballroom, because that use was neither contemplated nor approved in 2013 and, [without reductions in the uses actually approved in 2013], would expand or extend the nonconforming nature of the principal use. In addition, the applicant failed to prove that 100 parking spaces allowed under the 2013 approval would be adequate to accommodate the additional use.

"10. The emergency accessway shall be used for emergency purposes only and shall not be used to service the pool, poolhouse, or tented vans.

"11. As-built drawings shall be submitted to the [commission] upon the completion of the foundations and again upon the completion of framing. The as-built drawings must be approved by the commission or its authorized agent(s) before commencement of further construction. The commission shall, at the expense of the applicant, refer such drawings to a professional engineer and/or a surveyor for review.

"12. Outside construction may take place only between 7:00 a.m. and 5:00 p.m. Monday through Friday and between 8:00 a.m. and 4:00 p.m. Saturday and Sunday. No blasting, no operation of heavy equipment, and no site work are permitted on Saturday or Sunday, before 8:00 a.m. Monday through Friday, and on Memorial Day, Fourth of July, and Labor Day.

necessary to protect the public health, safety, convenience and property values"); *Carpenter* v. *Planning & Zoning Commission*, 176 Conn. 581, 594, 409 A.2d 1029 (1979) (§ 8-2 "expressly" provides that municipal "commission[s] [are] authorized to impose conditions as a prerequisite to certain uses of lands"); *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 576, 170 A.3d 73 (2017) ("in granting a special permit, the commission has the authority to

"13. In accordance with Section 13.4 of the [regulations], a performance bond, in the form of a cash bond or an irrevocable letter of credit from a financial institution with offices in Connecticut, in an amount and for items to be determined by the commission in consultation with the commission's attorney and/or by an engineer approved by the commission and paid for by the applicant, shall be secured before disturbance of the site begins.

"14. No day passes or memberships of any kind may be issued for the spa, which is to be used by overnight guests only.

"15. No day passes or memberships of any kind may be issued for the pool, which is to be used by overnight guests only.

"16. The finish floor levels for the main inn building shall not exceed those shown on Sheet SD.1, revised to 12/17/12 as was approved in the [settlement agreement].

"17. The main inn building is limited to five levels: two underground and three above ground.

"18. Outdoor lighting must comply with the requirements of Section 12.15 of the [regulations]. A plan for all such lighting must be submitted to and approved by the [commission] prior to the commencement of any construction.

"19. All cottages shall be limited to two floors only per Sheet SD.1, revised to 12/17/12.

"20. There shall be no kitchen in the pool house.

"21. Written approval by the fire marshal shall be submitted to the commission prior to the issuance of the special permit.

"22. Written approval by the [Department of Energy and Environmental Protection] of the final septic plans shall be submitted to the commission prior to the issuance of the special permit.

"23. Written approval by Aquarion Water Company of the final plans for the water supply shall be submitted to the commission prior to the issuance of the special permit and shall include (a) determination that the water supply is adequate to service the 'inn' and sprinkler systems, and (b) a statement of how many additional wells will be needed and where they will be located. The applicant must also provide the commission with a signed statement that it agrees to pay for all required system improvements. . . .

"24. Any further modifications to any of the approved plans . . . must be submitted to and approved by the [commission] prior to implementation.

"25. No passenger drop offs by buses carrying fifteen passengers or more." (Citation omitted.)

place reasonable restrictions on the proposed use"). Notably, the commission prohibited both the proposed ballroom and individual ownership of guest room units. See footnote 20 of this opinion. Although the commission did not provide a collective statement of the basis of its decision,[21] the motion it granted to approve the modification application concluded by stating: "The [c]ommission finds that all of the foregoing conditions must be met in order for the proposed use to be successfully accommodated on the chosen site in accordance with the applicable [regulations]. Therefore, if a court should determine that any of the foregoing conditions are invalid or unlawful, this approval shall be null and void . . . ."

The plaintiffs, all of whom are owners of property located within 100 feet of the applicant's property,[22] filed a timely appeal with the Superior Court, challenging the propriety of the commission's decision to grant the modification application. The plaintiffs claimed, among other things, that the commission improperly authorized the expansion of both a nonconforming structure and a nonconforming use in contravention of

[21] While the record indicates that commission members engaged in extensive deliberations over several nights during which they expressed their individual views on a variety of issues, the commission nonetheless did not furnish "a formal, official, collective statement of reasons for its action." *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, 220 Conn. 527, 544, 600 A.2d 757 (1991); see also *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 673–76, 111 A.3d 473 (2015) (neither individual reasons stated by land use agency members during deliberations nor remarks of member in making motion to grant application constitute collective statement). As a result, this court is obligated, pursuant to well established precedent, to search the entire record to ascertain whether the evidence reveals any proper basis for the commission's decision to approve the modification application. See *Harris* v. *Zoning Commission*, 259 Conn. 402, 423, 788 A.2d 1239 (2002).

[22] "[P]ursuant to . . . § 8-8 (a), a person may derive standing to appeal based solely upon his status as an abutting landowner or as a landowner within 100 feet of the subject property." *Pierce* v. *Zoning Board of Appeals*, 7 Conn. App. 632, 635–36, 509 A.2d 1085 (1986).

the regulations. The court rejected that contention and further concluded that the commission "had substantial evidence to approve and modify the application and did so only after imposing certain conditions to protect the public health and safety. The court finds that the commission did not act arbitrarily or illegally . . . ." Accordingly, the court dismissed the appeal.

The plaintiffs thereafter filed a petition with this court for certification to appeal pursuant to § 8-8 (o).[23] We granted the plaintiffs' petition, and this appeal followed.

Before considering the claims advanced by the plaintiffs in this appeal, we note certain well established principles. "[T]he function of a special permit is to allow a property owner to use his property in a manner expressly permitted under the zoning regulations, subject to certain conditions necessary to protect the public health, safety, convenience, and surrounding property values. . . . The basic rationale for the special permit [is] . . . that while certain [specially permitted] land uses may be generally compatible with the uses permitted as of right in particular zoning districts, their nature is such that their precise location and mode of operation must be regulated because of the topography, traffic problems, neighboring uses, etc., of the site." (Citation omitted; internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, supra, 176 Conn. App. 585–86.

Judicial review of a commission's decision to grant or deny a special permit must be mindful of "the significant discretion that a commission is afforded . . . . In reviewing a decision of a zoning [commission], a reviewing court is bound by the substantial evidence rule, according to which . . . [c]onclusions reached by

[23] Although § 8-8 (o) has been amended since the events at issue, that amendment is not relevant to this appeal. We therefore refer to the current revision of § 8-8 (o).

[a zoning] commission must be upheld by the [Superior Court] if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [commission]. . . . The question is not whether the [Superior Court] would have reached the same conclusion . . . but whether the record before the [commission] supports the decision reached. . . . If [the Superior Court] finds that there is substantial evidence to support a zoning [commission's] findings, it cannot substitute its judgment for that of the [commission]. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The [commission's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given. . . . Moreover, [s]ubstantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . .

"[T]he substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . In light of the significant amount of deference that the substantial evidence standard affords a commission, the court has described it as an important limitation on the power of the courts to overturn a decision of an administrative agency . . . [that] provide[s] a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action. . . . [O]n appeal, judicial review [of a commission's denial of a special permit application] is confined to the question of whether the commission abused its discretion in finding that an applicant failed to demonstrate compliance with the requirements of applicable zoning regulations. *When there is evidence*

in the record to substantiate the commission's determination, the determination must stand." (Citations omitted; emphasis in original; internal quotation marks omitted.) *McLoughlin* v. *Planning & Zoning Commission*, 200 Conn. App. 307, 318–20, 240 A.3d 709, cert. granted, 335 Conn. 978, 241 A.3d 131 (2020). At the same time, when a question of law is presented, such as the proper interpretation of a zoning regulation, our review is plenary. See, e.g., *Reardon* v. *Zoning Board of Appeals*, 311 Conn. 356, 364, 87 A.3d 1070 (2014); *Zimnoch* v. *Planning & Zoning Commission*, 302 Conn. 535, 547, 29 A.3d 898 (2011).

This appeal concerns the alleged expansion of a "nonconforming use," a term of art with both general and specific meaning. In *Munroe* v. *Zoning Board of Appeals*, 75 Conn. App. 796, 818 A.2d 72 (2003), this court, citing a noted treatise on land use in this state, observed that, "[t]he term nonconforming uses is often used without consideration as to what aspect of the use of property is nonconforming, and in determining whether an activity is an expansion or change of a nonconforming use, the nature of the nonconformity is important." (Internal quotation marks omitted.) Id., 806. The court then detailed four distinct types of nonconformity: "(1) nonconforming use—the use of the land or structure on it is nonconforming (e.g., commercial use in a residential zone); (2) a nonconforming lot—the lot is undersized, irregularly shaped, has inadequate width or depth or inadequate frontage; (3) nonconforming building or structure—the structure does not meet the minimum or maximum size requirements, floor area ratio, height or bulk requirements of the existing zoning regulations; (4) nonconformity as to location of structure, i.e., it does not conform with one or more of the setback requirements." (Internal quotation marks omitted.) Id.; see also *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 690 n.20, 111 A.3d 473 (2015). In the present

case, the first and fourth types of nonconformity are implicated, as the plaintiffs claim that the commission improperly approved the expansion of both a nonconforming structure and a nonconforming use on the property. We address each claim in turn.

I

We begin with the plaintiffs' contention that the court improperly concluded that the applicant's proposal did not constitute an impermissible expansion of a nonconforming structure. To resolve that claim, we must determine, as a threshold matter, whether the principles that govern nonconforming uses are applicable under the unique facts and circumstances of this case.[24] That inquiry entails consideration of not only the undisputed fact that the alleged nonconformity was the direct result of the settlement agreement ratified by the Superior Court in 2013 but, also, the undisputed fact that, at all relevant times, no structure proposed by the applicant existed on the property, nor had construction of any such structure commenced.

A

"A nonconformity is a use or structure prohibited by the zoning regulations [that] is permitted because of its existence at the time that the regulations [were] adopted." *Adolphson* v. *Zoning Board of Appeals*, 205 Conn. 703, 710, 535 A.2d 799 (1988). "Where a nonconformity exists, it is a vested right which adheres to the land itself. . . . A vested right . . . to continue the nonconforming use is in the land . . . . [T]he right to a nonconforming use is a property right and . . . any provision of a statute or ordinance which takes away that right in an unreasonable manner, or in a manner not grounded on the public welfare, is invalid. A lawfully

[24] In its appellate brief, the commission maintains that, given the particular facts and circumstances now before us, the principles governing nonconforming uses do not apply to this appeal.

established nonconforming use is a vested right and is entitled to constitutional protection." (Citation omitted; internal quotation marks omitted.) *Petruzzi* v. *Zoning Board of Appeals*, 176 Conn. 479, 483–84, 408 A.2d 243 (1979). As this court has noted, "[o]ur General Statutes recognize and protect this bedrock principle." *Verrillo* v. *Zoning Board of Appeals*, supra, 155 Conn. App. 684; see General Statutes § 8-2 (a) (prohibiting municipality from amortizing or eliminating nonconformities through enactment or amendment of zoning regulations); General Statutes § 8-13a (a) (providing statutory protection to certain nonconforming "building[s] or other structure[s]"); General Statutes § 8-26a (b) (3) (providing that change in subdivision or zoning regulations, or boundaries of districts, "shall not alter or affect a nonconforming use or structure as provided in [§] 8-2").

Although the right to continue a nonconforming use is statutorily protected, it is equally well established that, absent extraordinary circumstances warranting variance of the zoning regulations by a municipal zoning board of appeals,[25] such nonconformity cannot be expanded or enlarged. As our Supreme Court has explained, "nonconforming uses should be abolished or reduced to conformity as quickly as the fair interest of the parties will permit—[i]n no case should they be allowed to increase." (Internal quotation marks omitted.) *Adolphson* v. *Zoning Board of Appeals*, supra, 205 Conn. 710; see also *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 243, 662 A.2d 1179 (1995) ("a nonconforming structure cannot be increased in size in violation of zoning ordinances"); *Blum* v. *Lisbon Leasing Corp.*, 173 Conn. 175, 181, 377 A.2d 280 (1977) (noting "the indisputable goal of zoning to reduce

[25] See, e.g., *McMahon* v. *Board of Zoning Appeals*, 140 Conn. 433, 101 A.2d 284 (1953); cf. *MacKenzie* v. *Planning & Zoning Commission*, 146 Conn. App. 406, 427–30, 77 A.3d 904 (2013) (variance power rests exclusively with zoning board of appeals).

nonconforming to conforming uses with all the speed justice will tolerate"); *Kleinsmith* v. *Planning & Zoning Commission*, 157 Conn. 303, 314, 254 A.2d 486 (1968) ("[t]he advantages which the owners of nonconforming property acquire by the enactment of a zoning ordinance are not to be subsequently augmented except as permitted by the ordinance"); *Guilford* v. *Landon*, 146 Conn. 178, 182, 148 A.2d 551 (1959) ("the accepted policy of zoning . . . is to prevent the extension of nonconforming uses"); *Planning & Zoning Commission* v. *Craft*, 12 Conn. App. 90, 96, 529 A.2d 1328 ("[z]oning regulations in general seek the elimination of nonconforming uses, not their creation or enlargement"), cert. denied, 205 Conn. 804, 531 A.2d 937 (1987). Those principles are memorialized in the regulations at issue here, which provide in relevant part that "[i]t is . . . the intent of these regulations that the nonconforming aspects of [any nonconforming] lots and structures shall not be enlarged, expanded, or extended . . . . A nonconforming use of a structure or lot shall not be extended, expanded, or enlarged . . . ."[26] Washington Zoning Regs., § 17.1.

[26] See also Washington Zoning Regs., § 17.3.A ("no such nonconforming use shall be enlarged or increased, nor extended to occupy a greater area of the lot than was occupied at the time such use became nonconforming under these [r]egulations"); Washington Zoning Regs., § 17.4.A ("[N]o such nonconforming structure may be enlarged, extended, or otherwise altered in such a way as to increase the area, volume, or percentage of the structure that is nonconforming or to create, increase, enlarge, or extend any other nonconformity as to the structure or the lot. This prohibition includes, but is not limited to, any horizontal or vertical extension or expansion of a structure within a required setback area."). The regulations similarly provide that, "[o]n any nonconforming structure or portion of a structure containing a nonconforming use, repairs and maintenance may be done provided that the nonconforming aspects of the structure (e.g., setbacks from lot lines, height), as well as the cubic content of the nonconforming portions of the structure *shall not be increased*. . . . Any nonconforming structure that has been damaged by fire, explosion, or act of nature may be repaired, rebuilt, or replaced within two years of such damage, provided that such repairs, rebuilding, or replacement *does not extend nor expand any nonconforming aspect* of the affected building." (Emphasis added.) Washington Zoning Regs., § 17.8.

1

Under the traditional analysis applicable to nonconforming uses, "[f]or a use to be considered nonconforming . . . [it] must possess two characteristics. First, it must be *lawful* and second, it must be *in existence* at the time that the zoning regulation making the use nonconforming was enacted." (Emphasis in original.) *Helicopter Associates, Inc.* v. *Stamford*, 201 Conn. 700, 712, 519 A.2d 49 (1986); see also Washington Zoning Regs., § 17.4 (permitting "a lawfully constructed, but currently nonconforming, structure" to be "continued so long as it remains otherwise lawful"); Washington Zoning Regs., § 17.1 (intent of nonconforming use regulations is to permit nonconforming structures that existed "before the [r]egulations as currently amended were passed" to "continue until they are removed"). The proposed structure in question here, known as the "main building," possesses neither characteristic.

A "lawful" use is one that complied with both "state law" and all zoning regulations that were in effect when the use commenced. *Helicopter Associates, Inc.* v. *Stamford*, supra, 201 Conn. 712. At all relevant times, the applicable regulation governing a "Tourist Home or Inn" provided in relevant part that "the minimum setback of any structure . . . shall be . . . [fifty] feet from any lot line."[27] Washington Zoning Regs., § 13.9.C. The footprint[28] of the main building, as depicted on the

[27] A setback is "a zoning limitation that prohibits construction" within a specified distance from a property line. *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 200 n.2, 658 A.2d 559 (1995); see also *Vivian* v. *Zoning Board of Appeals*, 77 Conn. App. 340, 350, 823 A.2d 374 (2003) ("[t]he setback is the distance between the point where a building touches the ground and the property line"); Black's Law Dictionary (9th Ed. 2009) p. 1496 (defining setback as "[t]he minimum amount of space required between a lot line and a building line"). The regulations here define "setback" in relevant part as "the shortest distance from a structure to a lot line, public right of way, or wetland or watercourse. . . ." Washington Zoning Regs., § 21.1.60.

[28] See *Simko* v. *Ervin*, 234 Conn. 498, 509, 661 A.2d 1018 (1995) (*Berdon, J.*, dissenting) ("the term 'footprint' . . . is commonly used, and universally understood, to refer to the boundaries of a building"); *Campbell* v. *Tiverton*

2012 plan that was incorporated by reference into the settlement agreement, was, at its closest point, to be located thirty-one feet from the property line. That location thus resulted in a nineteen foot intrusion into the setback area. Accordingly, the main building depicted on the 2012 plan cannot be deemed a lawful structure, as it does not comply with the setback requirements of the regulations. See *Helicopter Associates, Inc.* v. *Stamford*, supra, 712.

In addition, to constitute a nonconforming structure under established case law, the main building had to "be *in existence* at the time that the zoning regulation making the use nonconforming was enacted." (Emphasis in original.) Id. The precedent of our Supreme Court instructs that "[t]o be a nonconforming use the use must be actual. It is not enough that it be a contemplated use [or] that the property was bought for the particular use. The property must be so utilized as to be irrevocably committed to that use." (Internal quotation marks omitted.) *Francini* v. *Zoning Board of Appeals*, 228 Conn. 785, 789, 639 A.2d 519 (1994); see also *Karls* v. *Alexandra Realty Corp.*, 179 Conn. 390, 399, 426 A.2d 784 (1980) (explaining that, "to be irrevocably committed to a particular use, there must have been a significant amount of preliminary or preparatory work done on the property prior to the enactment of the zoning regulations which unequivocally indicates that the property was going to be used for that particular purpose"); *Petruzzi* v. *Zoning Board of Appeals*, supra, 176 Conn. 482–83 ("[t]he lot and building in question" qualified as legally protected nonconforming uses because they were in existence prior to enactment of zoning regulations and had not "changed in size or shape");

Zoning Board, 15 A.3d 1015, 1020 (R.I. 2011) (defining footprint as "the exterior perimeter of the foundation" of structure); Black's Law Dictionary (9th Ed. 2009) p. 717 (defining footprint in land use context as "[t]he shape of a building's base").

Lebanon v. *Woods*, 153 Conn. 182, 197, 215 A.2d 112 (1965) (because tract of land "was not 'irrevocably committed' to development," it "was not a nonconforming use"); *MacKenzie* v. *Town Planning & Zoning Commission*, 149 Conn. 678, 684, 183 A.2d 619 (1962) ("a contemplated use cannot constitute an actual use"); *Corsino* v. *Grover*, 148 Conn. 299, 308, 170 A.2d 267 (1961) ("[a] proposed use cannot constitute an existing nonconforming use"); *Fairlawns Cemetery Assn., Inc.* v. *Zoning Commission*, 138 Conn. 434, 444, 86 A.2d 74 (1952) (To establish a nonconforming use, "[i]t is not enough that it be a contemplated use, even though plans for that have been put on paper. . . . It is not enough that the property was bought for the particular purpose." (Citations omitted.)); *DeFelice* v. *Zoning Board of Appeals*, 130 Conn. 156, 161, 32 A.2d 635 (1943) ("[a]ctual use as distinguished from merely contemplated use" is required).

Although the main building was a contemplated use of the property, and its footprint was memorialized in the 2012 plan, there is no basis in the record to conclude that the property was irrevocably committed to that use. There is no evidence that construction of that structure ever commenced, nor has any party so argued. The main building was merely contemplated but did not actually exist. As a result, it does not satisfy the common-law standard for a nonconforming use.

2

That determination does not end our inquiry, as that common-law standard evolved in cases concerning nonconforming uses that "antedate the enactment of zoning" regulations. *Petruzzi* v. *Zoning Board of Appeals*, supra, 176 Conn. 482; see also *Pleasant View Farms Development, Inc.* v. *Zoning Board of Appeals*, 218 Conn. 265, 271–73, 588 A.2d 1372 (1991); *Helicopter Associates, Inc.* v. *Stamford*, supra, 201 Conn. 711;

Poneleit v. *Dudas*, 141 Conn. 413, 419–20, 106 A.2d 479 (1954); *Lane* v. *Cashman*, 179 Conn. App. 394, 438–39, 180 A.3d 13 (2018); *Verrillo* v. *Zoning Board of Appeals*, supra, 155 Conn. App. 683–87. Given that context, the present case is fundamentally distinct, in that it originates not from a preexisting use on the property but, rather, a settlement agreement regarding a proposed use. That crucial distinction requires us to more carefully consider the precise nature of the use at issue in this appeal.

As one treatise notes, a variety of uses of land are entitled to protection under our law, including special permit uses, nonconforming uses, and "[a]uthorized illegal uses . . . allowed by variance granted by the zoning board of appeals." R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 52:1, p. 219. The use at issue here—the operation of an inn on the property with a main building partially inside the setback area—technically is not the proper subject of a special permit, as the application did not strictly comply with the setback requirements of § 13.9 of the regulations. It also is not an illegal use authorized by a variance issued by the Zoning Board of Appeals of the Town of Washington. Rather, the use here is something altogether different and is perhaps best described as a lawful use resulting from the approval of a settlement agreement by both the municipal zoning commission and the Superior Court.

"[S]ettlement of disputes . . . is to be encouraged as sound public policy." (Internal quotation marks omitted.) *Yale University* v. *Out of the Box, LLC*, 118 Conn. App. 800, 809 n.7, 990 A.2d 869 (2010). In the context of a municipal land use agency's settlement of a pending appeal, there exists a "powerful interest in the promotion of settlement of litigation by agreement of the parties." *Sendak* v. *Planning & Zoning Commission*, 7 Conn. App. 238, 242, 508 A.2d 781 (1986). Moreover,

the statutory requirement that any settlement involving a municipal land use agency must be approved by the Superior Court following a hearing; see footnote 11 of this opinion; "provides a forum for the presentation of any challenges to a settlement, including any allegations of bad faith, collusion or other improper conduct by the parties to the settlement," and "serves to protect the public interest by guarding against any attempt on the part of the settling parties to evade judicial review and scrutiny by potentially aggrieved landowners." *Brookridge District Assn.* v. *Planning & Zoning Commission*, 259 Conn. 607, 616, 793 A.2d 215 (2002); see also *Willimantic Car Wash, Inc.* v. *Zoning Board of Appeals*, 247 Conn. 732, 742 n.16, 724 A.2d 1108 (1999) (legislative history of § 8-8 (n) "indicates that the requirement of court approval was designed to guard against surreptitious dealing between zoning boards and applicants, to avoid frivolous appeals initiated for 'leverage,' and to ensure that settlements are fair"). That statutory requirement "recognizes . . . the legitimacy of settlement of zoning cases . . . ." *Brookridge District Assn.* v. *Planning & Zoning Commission*, supra, 617.

As was the case in *Brookridge District Assn.*, the settlement agreement in the present case resolved a pending appeal involving the commission and an applicant that had been denied an application for a special permit. See *Wykeham Rise, LLC* v. *Zoning Commission*, supra, 2013 WL 951156. The settlement agreement was formally approved by the commission at a special meeting held on January 7, 2013, and thereafter was approved by the Superior Court following a hearing conducted in accordance with § 8-8 (n). Because all statutory requirements were followed and the settlement agreement was ratified by both the commission and the Superior Court, we agree with the plaintiffs

that the proposed main building, as depicted in the 2012 plan, constitutes a lawful use of the property.[29]

Although lawful, the main building does not comply with the setback requirements for structures constructed on property that is used as an inn. At all relevant times, § 13.9.C of the regulations required a fifty foot setback "from any lot line."[30] The regulations define

[29] The plaintiffs concede that the main building depicted in the 2012 plan is a lawful use. In their principal appellate brief, they state in relevant part: "The main building . . . stands approved in 2013, and is therefore 'lawful' . . . ."

[30] Our review of the record indicates that all parties that participated in the commission's review of Wykeham's 2008 special permit application, as well as all parties to the 2013 settlement agreement and the hearing before the Superior Court, overlooked this specific setback requirement. The regulations in this regard may have contributed to the confusion, as they contain multiple setback requirements that ostensibly could apply to the property. Section 11 of the regulations is titled "Density, Lot Size, and Other Dimensional Requirements." Section 11.6.1.A then specifies a thirty foot "[r]ear" and a fifteen foot "[s]ide" setback requirement "[f]or buildings and structures used in part or wholly for [b]usiness." The site plans submitted as part of Wykeham's proposal, and the 2012 plan in particular, contain a yellow boundary that is labeled "30 [Foot] Side Yard."

Section 11.6.1 nonetheless includes a crucial condition to those setback requirements, stating that they apply "[u]nless otherwise specified in the particular zone for a commercial lot . . . ." Section 13.9.B, in turn, specifies the minimum setback requirements for "any structure" constructed as part of a "Tourist Home or Inn." Because the proposed use of the property indisputably is as an inn, the fifty foot lot line setback of § 13.9.C applies to the main building, which lies thirty-one feet from the side lot line on the 2012 plan.

In *Torrington* v. *Zoning Commission*, 261 Conn. 759, 770, 806 A.2d 1020 (2002), a municipal zoning commission entered into a settlement agreement that "varied to some extent the zoning regulations applicable to the property in question" despite the fact that the variance power is statutorily allocated to the zoning board of appeals. In rejecting a challenge to the propriety of that settlement agreement, our Supreme Court explained that "[i]t is not enough that the conduct in question was in violation of the applicable zoning statutes or regulations. It must be shown that the conduct was so far outside what could have been regarded as a valid exercise of zoning power that there could not have been any justified reliance on it." Id., 768. The court emphasized that the zoning commission's decision to enter into the settlement agreement "served to settle a vigorously contested appeal"; id., 770; and that the plaintiff challenging the propriety of that agreement "does

a "nonconforming building" as "[a] building, which does not conform to all the applicable provisions of these [r]egulations." Washington Zoning Regs., § 21.1.49. Because it does not comply with the lot line setback requirements of § 13.9.C of the regulations, the main building is nonconforming under the regulations.

We therefore conclude that the main building depicted in the 2012 plan and incorporated into the settlement agreement constitutes a lawful, albeit nonconforming, structure as a result of the approval of the settlement agreement by the Superior Court. The principles that govern nonconforming uses in this state thus apply to such lawful nonconforming structures. Like any nonconforming structure, the main building depicted in the 2012 plan cannot be expanded or enlarged within the setback area in the absence of a variance from the Zoning Board of Appeals.

B

The question, then, is whether the commission improperly authorized the expansion of that nonconforming structure when it approved the modification application in 2018. In its memorandum of decision, the Superior Court concluded that the commission properly determined that the modification application did not constitute an impermissible expansion of a nonconforming structure. Our review of that determination is guided by the substantial evidence standard. See, e.g., *Zachs* v. *Zoning Board of Appeals*, 218 Conn. 324, 329–30, 589 A.2d 351 (1991); *Woodbury Donuts, LLC* v. *Zoning*

not contend that the [settlement agreement] was the product of bad faith, collusion, or other improper conduct." Id., 771. Perhaps most importantly, the court noted that "it was not entirely obvious that the [zoning] commission's conduct in entering into the [settlement agreement] was outside its purview." Id., 770. For those reasons, the court concluded that the parties reasonably could rely on that settlement agreement. See id., 776. That logic applies equally to the present case.

Board of Appeals, 139 Conn. App. 748, 760 n.11, 57 A.3d 810 (2012).

The regulations prohibit the expansion of nonconforming structures.[31] To determine whether the commission improperly approved the expansion of the nonconforming main building within the setback area, we must determine, as a preliminary matter, the extent of the nonconformity that was memorialized in the 2013 settlement agreement.

1

"A settlement agreement . . . is a contract among the parties." *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 532, 4 A.3d 288 (2010). At its essence, a settlement agreement that resolves a pending zoning appeal in accordance with § 8-8 (n) is a stipulated judgment, as it is "a contract of the parties acknowledged in open court and . . . recorded by a court of competent jurisdiction . . . [and] is binding to the same degree as a judgment obtained through litigation . . . ." (Citation omitted; internal quotation marks omitted.) *Doe* v. *Roe*, 246 Conn. 652, 664–65 n.22, 717 A.2d 706 (1998). We thus interpret the settlement agreement before us "according to general principles governing the construction of contracts. . . . [T]he language used [in a contract] must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . .

[31] See Washington Zoning Regs., § 17.1 ("It is . . . the intent of these Regulations that the nonconforming aspects of [any nonconforming] lots and structures shall not be enlarged, expanded, or extended . . . . A nonconforming use of a structure . . . shall not be extended, expanded, or enlarged . . . ."); Washington Zoning Regs., § 17.4.A ("[N]o such nonconforming structure may be enlarged, extended, or otherwise altered in such a way as to increase the area, volume, or percentage of the structure that is nonconforming or to create, increase, enlarge, or extend any other nonconformity as to the structure or the lot. This prohibition includes, but is not limited to, any horizontal or vertical extension or expansion of a structure within a required setback area.").

Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. . . . [Additionally], in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Citation omitted; internal quotation marks omitted.) *Awdziewicz* v. *Meriden*, 317 Conn. 122, 129–30, 115 A.3d 1084 (2015). Furthermore, "[t]he interpretation of the intention of the parties to the settlement agreement is a question of fact . . . and we review such a determination by an administrative agency to determine if it is supported by substantial evidence." (Citation omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 219 Conn. 51, 66–67, 591 A.2d 1231 (1991).

The settlement agreement consists of five components: (1) the settlement agreement document itself, which contains sixteen conditions; see footnote 7 of this opinion; (2) the commission's January 7, 2013 approval of the settlement agreement;[32] (3) the 2012 plan, which was incorporated by reference into both the settlement agreement document and the commission's motion to approve the settlement agreement; (4) six additional conditions that the commission attached to its approval; see footnote 10 of this opinion; and (5) the two architectural renderings. See footnote 9 of this opinion.

Those materials contain little in the way of dimensional limitation on the proposed main building. The 2012 plan is pivotal in that regard, as it was incorporated by reference into both the settlement agreement and

[32] The January 7, 2013 motion to approve the settlement agreement states in relevant part: "The [commission] hereby approves the [s]ettlement [a]greement . . . per the [2012 plan], the architectural renderings, A and B . . . and the [six] proposed conditions of approval . . . ."

the commission's approval. The 2012 plan circumscribes the parameters of the footprint of the main building. It is undisputed that the main building depicted in the 2018 plan sat on the same footprint as it did in the 2012 plan and did not intrude farther into the setback area, and the commission was presented with evidence to that effect.[33] Accordingly, there was no horizontal expansion of that lawful nonconforming structure, nor has any party so claimed.

Rather, the plaintiffs claim that the commission improperly approved a vertical expansion of the nonconforming main building. Whether the vertical extension of an existing footprint constitutes an impermissible expansion of a nonconformity depends on the particular language employed in the applicable zoning regulations. See *E & F Associates, LLC* v. *Zoning Board of Appeals*, 320 Conn. 9, 12 n.3, 127 A.3d 986 (2015) (noting that "variances were required because the vertical expansion of the building within the applicable setbacks constituted a prohibited expansion of the nonconforming use under the [Fairfield] zoning regulations"); *Munroe* v. *Zoning Board of Appeals*, supra, 75 Conn. App. 811 (concluding that vertical expansion of nonconforming structure through addition of second story caused "a substantial increase in the nonconformity" in contravention of Branford zoning regulations); *Doyen* v. *Zoning Board of Appeals*, 67 Conn. App. 597, 602, 612, 789

[33] The 2018 plan contained two minor alterations that are not in dispute. Three emergency egress landings and a five by twenty foot pull-off area were added to comply with building code requirements and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq. On appeal, the plaintiffs do not claim that those additions constituted an impermissible expansion of a nonconforming structure. Indeed, such modifications of nonconforming structures are permitted under the regulations. See Washington Zoning Regs., § 17.8 ("[n]othing in these Regulations shall be deemed to prohibit any modifications that are determined . . . to be necessary to strengthen or restore to a safe condition any structure or part thereof").

A.2d 478 (vertical expansion of nonconforming structure permitted under Essex zoning regulations), cert. denied, 260 Conn. 901, 793 A.2d 1088 (2002).

The regulations here proscribe the vertical expansion of nonconforming structures.[34] The settlement agreement, however, contains no restriction on the height of the main building. Notably, the 2012 plan does not specify the height or volume of that building, and neither the conditions included in the settlement agreement document nor the conditions imposed by the commission contain any such dimensions or height restrictions.[35]

Although no height limitation is specified anywhere in the settlement agreement materials, the plaintiffs submit that such a limitation may be found in two other materials, namely, Wykeham's proposed "university" plans from a previous special permit application (school plans) and a set of plans that were submitted to the Department of Energy and Environmental Protection in December, 2012, as part of an application for a general permit to discharge from subsurface sewage disposal

[34] See Washington Zoning Regs., § 17.4.A ("[N]o such nonconforming structure may be enlarged, extended, or otherwise altered in such a way as to increase the area, volume, or percentage of the structure that is nonconforming . . . . This prohibition includes . . . vertical extension or expansion of a structure within a required setback area.").

[35] The one condition tangentially related to the issue of height pertained to its method of calculation. When the commission approved the settlement agreement on January 7, 2013, the sixth condition imposed by the commission stated: "Benchmark elevations for the building height shall be established for each building per Section 11.7.2.3 of the [regulations]." Section 11.7.2.3 of the regulations provides: "For purposes of determining the total vertical height and mean height of a structure, please refer to the definitions in Section 21 of 'Average Finished Grade' and 'Average Pre Existing Grade.' This average must be determined in the field prior to any site disturbance. A benchmark elevation distinguished and defined from the pre existing average grade must be marked on site and mapped prior to any land disturbance. This benchmark shall be maintained throughout the duration of construction and used to confirm the total vertical height and mean height of the structure after construction."

systems on the property (discharge permit plans).[36] It nonetheless remains that the commission did not reference the school plans or the discharge permit plans in either its motion to approve the settlement agreement or the conditions attached to its approval. Had the commission wanted to incorporate those plans into its approval of the settlement agreement, it certainly knew how to do so, as it had done with both the 2012 plan and the two architectural renderings. See *Joseph General Contracting, Inc.* v. *Couto*, 317 Conn. 565, 579, 119 A.3d 570 (2015). In this regard, we note that the settlement agreement document that was before the commission described the 2012 plan as the "complete site plan" for the proposed inn. Yet, the commission chose to incorporate only "the [2012 plan], the [two] architectural renderings . . . and the [six] conditions of approval" into its approval of the settlement agreement. Put simply, the school plans and the discharge permit plans are not part of the settlement agreement that was approved by the commission and the Superior Court.

Although the settlement agreement did incorporate two architectural renderings, those "representative" renderings do not contain any dimensions or numerical specifications. Moreover, the transcript of the January 7, 2013 special meeting indicates that those renderings were offered merely for illustrative purposes regarding the design of the main building. See footnote 9 of this opinion. There is no indication whatsoever in the record before us that the commission considered those renderings as accurate depictions of the height of the proposed main building; indeed, the height of the main building never was discussed at the commission's January 7, 2013 special meeting.

At the public hearing held on the modification application five years later, Reese Owens, an architect,

[36] Neither the school plans nor the discharge permit plans were submitted to the commission in connection with the January 7, 2013 special meeting.

opined that the height of the main building that was approved as part of the settlement agreement could be extrapolated from a comparison of the architectural renderings and the discharge permit plans.[37] Although that may be true, there is no indication in the record before us that commission members in 2013 ever made that comparison or intended to impose a height restriction on the main building stemming therefrom. We reiterate that the height of the main building was a topic never broached at the January 7, 2013 special meeting.

Moreover, the commission heard testimony at the 2018 public hearing from Szymanski, a civil engineer who (1) was involved in the drafting of both the 2012 and 2018 plans, (2) had participated in the 2013 special meeting, and (3) offered the architectural renderings in response to a question from the commission's administrative assistant as to the design of the main building. Szymanski unequivocally stated at the 2018 public hearing that the architectural renderings were provided simply to illustrate "the architectural style" of the main building. The commission, as the sole arbiter of credibility, was entitled to credit that testimony.[38] See, e.g.,

[37] In a letter to the commission that was submitted as part of the 2018 public hearing on the modification application, Owens stated in relevant part that the architectural renderings "are computer generated, [three]-dimensional depictions of a specific building design . . . . They convey quantifiable height, shape, volume and number of stories. The renderings correlate directly to [the discharge permit plans]. There is *NO INTENT* to suggest that the [discharge permit plans] are relevant to any issue other than establishing architectural characteristics of [the architectural renderings]. [The discharge permit] plans were not part of the settlement agreement." (Emphasis in original.) In comparing his analysis of the dimensions of the architectural renderings, Owens opined that the main building depicted on the 2018 plan was approximately six feet and seven inches taller than the architectural renderings.

[38] Our decisional law commonly refers to the "testimony" offered at the public hearings of municipal land use agencies in this state without regard to whether it was offered under oath. See, e.g., *Anatra* v. *Zoning Board of Appeals*, 307 Conn. 728, 745, 59 A.3d 772 (2013) (explaining that "the testimony at the hearing" is relevant to proper construction of variance granted by board); *Alvord Investment, LLC* v. *Zoning Board of Appeals*, 282 Conn. 393, 415, 920 A.2d 1000 (2007) ("the issue was raised in the testimony

Cambodian Buddhist Society of Connecticut, Inc. v. *Planning & Zoning Commission*, 285 Conn. 381, 443, 941 A.2d 868 (2008).

The commissioners also were presented with uncontroverted evidence that the settlement agreement was a compromise between the parties intended to resolve the pending appeal of the denial of Wykeham's special

before the board at the public hearing" (emphasis omitted)); *Jalowiec Realty Associates, L.P.* v. *Planning & Zoning Commission*, 278 Conn. 408, 411, 898 A.2d 157 (2006) (zoning commission continued public hearing "[a]fter hearing testimony from the plaintiff's experts and from members of the public"); *Cameo Park Homes, Inc.* v. *Planning & Zoning Commission*, 150 Conn. 672, 678, 192 A.2d 886 (1963) ("[n]o testimony was offered at the hearing before the commission"); *Cornacchia* v. *Environmental Protection Commission*, 109 Conn. App. 346, 353, 951 A.2d 704 (2008) (noting that "the court relied on testimony from the public hearing" in concluding that substantial evidence existed to support commission's denial of permit); *Urbanowicz* v. *Planning & Zoning Commission*, 87 Conn. App. 277, 297, 865 A.2d 474 (2005) ("the commission heard testimony on the [special permit] application"); *Children's School, Inc.* v. *Zoning Board of Appeals*, 66 Conn. App. 615, 630, 785 A.2d 607 (noting that zoning board "was entitled to credit the testimony . . . adduced during the four days of public hearings"), cert. denied, 259 Conn. 903, 789 A.2d 990 (2001).

In *Parsons* v. *Board of Zoning Appeals*, 140 Conn. 290, 292–93, 99 A.2d 149 (1953), our Supreme Court explained that "[p]roceedings before an administrative board are informal. . . . Such a board is not bound by the strict rules of evidence. . . . The only requirement is that the conduct of the hearing shall not violate the fundamentals of natural justice. That is, there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary . . . ." (Citations omitted.) For that reason, "[t]here is no legal requirement that witnesses before a municipal land use agency must take an oath before testifying." 9 R. Fuller, Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 20:11, p. 611; see also *Loring* v. *Planning & Zoning Commission*, 287 Conn. 746, 758, 950 A.2d 494 (2008) ("[a]n unsworn statement of a party's counsel is competent evidence before a zoning body"); *Parsons* v. *Board of Zoning Appeals*, supra, 293 (board entitled to accept unsworn statements); *Wheeler* v. *Cosgrove*, Superior Court, judicial district of New Haven, Docket No. CV-17-6074630-S (December 12, 2019) (zoning hearings "do not require the swearing in of witnesses so long as an opportunity to refute their testimony is provided"); 1 P. Salkin, American Law of Zoning (5th Ed. 2021) § 8:16 ("[u]nsworn testimony may be received" at zoning hearing). Because the record reflects that the parties were afforded the opportunity to refute the unsworn testimony offered by Szymanski and others at the public hearing, the commission was entitled to consider that testimony.

permit application, to which the commission was a party. In addition, the commission heard testimony from Peacocke, who also was a party to the settlement agreement. Peacocke stated: "I just [want] to remind members of the commission . . . that there were four attorneys who negotiated and drafted the [settlement agreement]. If we had intended to create an exclusionary agreement itemizing all and only those matters, we'd have said so, and we didn't. . . . [W]e . . . never undertook to create a comprehensive agreement . . . ." As our Supreme Court has observed, "[w]e will not insert limitations into a contract when the parties did not do so themselves. . . . This is especially so when, as here, the agreement is between sophisticated . . . parties represented by counsel. . . . In these circumstances, we presume the parties used definitive language to describe their agreement." (Citations omitted.) *Salce* v. *Wolczek*, 314 Conn. 675, 690–91, 104 A.3d 694 (2014); see also *Williams* v. *Lilley*, 67 Conn. 50, 59, 34 A. 765 (1895) ("[w]e assume no right to add a new term to a contract"). Those maxims apply here, as the settlement agreement was crafted by multiple attorneys and subjected to scrutiny at hearings before both the municipal zoning commission and the Superior Court.

That settlement agreement contains no height limitation on the main building, and the record does not reveal an intent on the part of the commission to impose such a restriction in 2013. There is substantial evidence from which the commission, in approving the modification application in 2018, reasonably could conclude that no height restriction was intended to be included in the settlement agreement. We therefore reject the plaintiffs' claim that the commission improperly approved the vertical expansion of a nonconforming structure.

For those same reasons, the plaintiffs' claim that the commission improperly approved an expansion of the floor area or volume of the main building is unavailing.

Significantly, no floor plans were included in the settlement agreement. Moreover, no floor plans were presented to the commission in its review of the settlement agreement. The January 7, 2013 transcript indicates that the floor area and volume of the main building were never discussed at the special meeting.

The settlement agreement likewise does not contain a restriction as to the floor area or volume of the main building. It is noteworthy that the settlement agreement *does* specifically address the maximum floor area of a different structure proposed on the property. Paragraph five of the settlement agreement states in relevant part: "The Inn's spa and fitness center will be limited to the area within the building that is labeled 'Fitness Building' on the Site Plan and cannot exceed floor area totaling more than 11,400 square feet SAVE THAT a single exercise room no larger than 3,800 square feet and containing only exercise equipment may be located within the 'Main Building,' labeled as such as depicted on the Site Plan. If the single exercise room is located in the Main Building, the size of the Fitness Building would then be reduced by the same amount so that the combined floor area devoted to spa and fitness facilities in the Fitness Building and Main Building cannot exceed 11,400 square feet in total." That restriction demonstrates that the parties to the settlement agreement were mindful of floor area considerations and knew how to incorporate such restrictions into that contract. They nevertheless did not include a floor area limitation for the main building in the settlement agreement, and we decline to insert such a limitation into that contract now. See, e.g., *Salce* v. *Wolczek*, supra, 314 Conn. 690–91 ("[w]e will not insert limitations into a contract when the parties did not do so themselves"); *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 279 n.104, 156 A.3d 539 (2017) ("if the parties had intended that the [contract] would provide defense

coverage . . . they easily could have said so expressly"), aff'd, 333 Conn. 343, 216 A.3d 629 (2019).

We also note that all three commissioners who voted to approve the modification application in 2018 were members of the commission when it approved the 2013 settlement agreement. See footnote 19 of this opinion. Those commission members were entitled to rely on their personal knowledge of the settlement agreement and the January 7, 2013 special meeting. See, e.g., *Frito-Lay, Inc.* v. *Planning & Zoning Commission*, 206 Conn. 554, 570, 538 A.2d 1039 (1988) ("commission members may legitimately utilize their personal knowledge in reaching a decision"); *Burnham* v. *Planning & Zoning Commission*, 189 Conn. 261, 267, 455 A.2d 339 (1983) ("members of [a zoning commission] are entitled to take into consideration whatever knowledge they acquire by personal observation"); *Atlantic Refining Co.* v. *Zoning Board of Appeals*, 150 Conn. 558, 562, 192 A.2d 40 (1963) ("[o]bviously, the members of the board had personal knowledge of the situation, and they were entitled to take that knowledge into consideration"). One of those members, Nicholas N. Solley, voted against the approval of the settlement agreement in 2013. During deliberations on the 2018 modification application, another member who was not on the commission in 2013 stated to Solley, "You were there [in 2013] . . . and I would like to hear . . . what you were thinking" at that time. In response, Solley noted that, in considering the settlement agreement in 2013, the commission "didn't even deliberate over . . . any elevations or any . . . floor plans" and stated that the commission "never approved specific floor plans."[39] Solley also stated that, for purposes of comparing the 2018 plan to the settlement

[39] The minutes of the commission's August 7, 2018 deliberations likewise indicate that Solley "stated that [in 2013, the commission] did not deliberate over elevations or [floor plans] because there were none submitted with the site plan."

agreement, "we simply have no baseline from which to, other than [the 2012] plan, from which to draw a comparison . . . ." Commissioner David Werkhoven, who also was a member of the commission in 2013, similarly stated that the commission "never discussed volume requirements" during the special meeting to approve the settlement agreement. Werkhoven further noted that a "floor plan shows you rooms and how they're divided . . . . We didn't . . . get any of that. . . . We didn't talk about that. . . . We talked about the general outline of the [main] building. . . . We didn't say how they could use it or how they couldn't use it." In voting to approve the modification application, those commissioners were free to rely on their personal knowledge of the 2013 settlement agreement proceeding.

On our review of the record, we conclude that substantial evidence exists from which the commission could conclude that no floor area or volume restrictions were included in the settlement agreement. The Superior Court thus properly determined that the commission did not authorize an impermissible expansion of a nonconforming structure when it approved the modification application.

II

The plaintiffs also claim that the court improperly concluded that the applicant's proposal did not constitute an impermissible expansion of a nonconforming use. We disagree.

The following additional facts are relevant to that claim. Subsequent to the commission's approval of the settlement agreement, the regulations were amended to require at least 500 feet of frontage "on a state highway" for any "Tourist Home or Inn"; see Washington Zoning Regs., § 13.9.B; which the property here concededly lacks. As a result, the operation of an inn on the

property is a nonconforming use. Although that nonconforming use is entitled to protection under state law; see General Statutes §§ 8-2 (a) and 8-26a; it cannot be expanded under established precedent and §§ 17.1 and 17.3.A of the regulations. See part I A of this opinion.

A

On appeal, the plaintiffs contend that the commission, in granting the modification application, improperly expanded the scope of that nonconforming use. They argue that only those accessory uses specifically mentioned in the settlement agreement are permitted on the property. See footnote 7 of this opinion. The commission counters that the settlement agreement neither explicitly nor implicitly limited the scope of permissible accessory uses. We agree with the commission.

The regulations in the present case define an "accessory use" as "[a] use customarily incidental and subordinate to a main use and located on the same lot with such main use." Washington Zoning Regs., § 21.1.7; see also *O & G Industries, Inc.* v. *Planning & Zoning Commission*, 232 Conn. 419, 421 n.1, 655 A.2d 1121 (1995) ("[a]ccessory uses are, by definition, uses located on the same lot, and must be subordinate and customarily incidental to, the principal use" (internal quotation marks omitted)). The regulations do not contain an explicit list of permitted accessory uses for inns in Washington. At the same time, the regulations define a "lot" in relevant part as a "parcel of land occupied or capable of being occupied by one principal building and the accessory buildings or uses customarily incidental to it . . . ." Washington Zoning Regs., § 21.1.38. The parties agree that accessory uses are permitted on a lot used principally as an inn. They disagree about the extent to which the settlement agreement here limits accessory uses on the property.

As we have noted, the proper construction of a settlement agreement is governed by principles of contract interpretation. See part I B 1 of this opinion. "A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Santos* v. *Massad-Zion Motor Sales Co.*, 160 Conn. App. 12, 18, 123 A.3d 883, cert. denied, 319 Conn. 959, 125 A.3d 1013 (2015).

The settlement agreement here lacks any language addressing accessory uses generally or indicating that unspecified accessory uses are prohibited on the property. At the same time, the settlement agreement does contain explicit limitations on three accessory uses, namely, the proposed restaurant,[40] the proposed spa and fitness center,[41] and tented events held on the property.[42] No other accessory uses are specified in that

[40] With respect to the proposed restaurant, the settlement agreement states in relevant part: "The Inn's restaurant shall be open to the public but shall have a total maximum seating capacity of sixty-eight (68) seats during normal operations, excluding weddings, or 'paid for events.' Of the maximum seating capacity, no more than thirty (30) seats shall be outdoor seating."

[41] With respect to the proposed spa and fitness center, the settlement agreement states in relevant part: "The Inn's spa and fitness center will be limited to the area within the building that is labeled 'Fitness Building' on the Site Plan and cannot exceed floor area totaling more than 11,400 square feet SAVE THAT a single exercise room no larger than 3,800 square feet and containing only exercise equipment may be located within the 'Main Building,' labeled as such as depicted on the Site Plan. If the single exercise room is located in the Main Building, the size of the Fitness Building would then be reduced by the same amount so that the combined floor area devoted to spa and fitness facilities in the Fitness Building and Main Building cannot exceed 11,400 square feet in total. There shall be no treatment rooms in the Main Building under any circumstances and treatment rooms in the Fitness Building may not be used for overnight stays. Wykeham will not issue 'day passes' for the spa and fitness center or for any such exercise room."

[42] With respect to tented events, the settlement agreement states in relevant part: "There shall be no more than twenty-four (24) tented events

agreement. Because the settlement agreement is susceptible to more than one reasonable interpretation as to the scope of permitted accessory uses, we agree with the commission that the settlement agreement is ambiguous in that regard.

"When a contract is ambiguous the [finder of fact] must consider extrinsic evidence and make factual findings as to the parties' intent." *Chiulli* v. *Chiulli*, Superior Court, judicial district of Hartford, Docket No. CV-12-6036551-S (July 8, 2014) (reprinted at 161 Conn. App. 639, 650, 127 A.3d 1147), aff'd, 161 Conn. App. 638, 127 A.3d 1146 (2015). "The interpretation of the intention of the parties to the settlement agreement is a question of fact . . . and we review such a determination by an administrative agency to determine if it is supported by substantial evidence." (Citation omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, supra, 219 Conn. 66–67.

The record before us contains evidence to substantiate a finding that the parties did not intend to restrict accessory uses on the property to only those addressed in the settlement agreement. Although the record indicates that the parties deliberately incorporated specific

between and only during the period from May 1 through October 31 of each calendar year and no more than one (1) tented event may be held per day. Tented events may be held in two general locations, the first being north of the Main Building (as those specific locations are depicted on the Site Plan) and the second being south of the Main Building (the specific south side locations are as depicted on the Site Plan.) Of the twenty-four (24) tented events, up to but no more than twelve (12) tented events may occur on the south side of the Main Building during any one calendar year. The balance of the twenty-four (24) total number of tented events that may be held in a calendar year, less the actual number of tented events not to exceed twelve (12) that occur on the south side in any calendar year, shall be allowed on the north side. No buildings, tents or other structures shall be constructed, placed or erected above, or on the ground in the Restricted Area as depicted on the Site Plan. No permanent or temporary parking is permitted in the Restricted Area. No food or beverages, including but not limited to, alcoholic beverages, shall be prepared or served in the Restricted Area."

plans into that agreement, such as the 2012 plan and the architectural renderings, they did not include any floor plans depicting the uses contemplated for the interior areas of the main building.[43] The transcript of the January 7, 2013 special meeting contains no discussion of the scope of accessory uses on the property, and the main building in particular, nor were any floor plans presented at that hearing. In addition, the commission heard testimony during the public hearing on the modification application from Peacocke, who was a party to the settlement agreement. Peacocke emphasized that "there were four attorneys who negotiated and drafted the [settlement agreement]. If we had intended to create an exclusionary agreement itemizing all and only those matters, we'd have said so, and we didn't. . . . [W]e . . . never undertook to create a comprehensive agreement . . . ." The commission was entitled to credit that testimony by a party to the settlement agreement. See, e.g., *Gerlt* v. *Planning & Zoning Commission*, 290 Conn. 313, 322, 963 A.2d 31 (2009) (assessing credibility of witnesses is sole province of zoning commission); see also *Landry* v. *Spitz*, 102 Conn. App. 34, 49 n.9, 925 A.2d 334 (2007) ("[t]his court will not revisit credibility determinations" in case regarding interpretation of settlement agreement).

The substantial evidence standard "is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review." (Internal quotation marks omitted.) *Palomba-Bourke* v. *Commissioner of Social Services*, 312 Conn. 196, 202, 92 A.3d 932 (2014). On our review of the whole record, we conclude that substantial evidence exists to support a finding that the parties to the settlement agreement

[43] Detailed floor plans are not required for the issuance of a special permit under the regulations. See Washington Zoning Regs., §§ 13.4 and 14.3.

did not intend to restrict accessory uses on the property to only those specifically mentioned therein.

B

We turn next to the question of whether the uses at issue constitute permissible accessory uses. On appeal, the plaintiffs maintain that the inclusion of a bar, a "prefunction" meeting area, and a "meeting room/library" in the 2018 plan approved by the commission are not permitted accessory uses for inns in Washington.[44] We do not agree.

"[I]n the land use context, the term 'accessory use' traditionally connotes a relationship with the primary use." *Morgenbesser* v. *Aquarion Water Co. of Connecticut*, 276 Conn. 825, 831, 888 A.2d 1078 (2006). As our Supreme Court has explained, "[a]n accessory use is determined specifically by reference to the primary use of the property to which it is incidental." *Loring* v. *Planning & Zoning Commission*, 287 Conn. 746, 767, 950 A.2d 494 (2008). "[An] accessory use [is] a use which is customary in the case of a permitted use and incidental to it. . . . An accessory use under a zoning law is a use which is dependent on or pertains to the principal or main use. . . . The word incidental as employed in a definition of accessory use incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. . . . But incidental, when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of incidental would be to permit any use which is not primary, no matter how unrelated it is to the primary use. . . . In examining the use in

[44] The proposed bar, "prefunction" meeting area, and meeting room/library all are located in the main building.

question, it is not enough to determine that it is incidental in the two meanings of that word as discussed [previously]. The use must be further scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use. . . . In situations where there is no . . . specific provision in the ordinance, the question is the extent to which the principal use as a matter of custom . . . carries with it an incidental use so that as a matter of law, in the absence of a complete prohibition of the claimed incidental use in the ordinance, it will be deemed that the legislative intent was to include it." (Internal quotation marks omitted.) Id., 753–54.

"[W]hether a particular use qualifies as an accessory use is ordinarily a question of fact for the zoning authority, to be determined by it with a liberal discretion." (Internal quotation marks omitted.) *Clifford* v. *Planning & Zoning Commission*, 280 Conn. 434, 451, 908 A.2d 1049 (2006). On appeal, a zoning commission's determination "is subject to a very narrow, deferential scope of review"; id.; and must be sustained if there is substantial evidence in the record to support it. Id., 452; see also *Loring* v. *Planning & Zoning Commission*, supra, 287 Conn. 756.

The primary use of the property here is an inn. Although the regulations do not define the term "inn," the evidence in the record before us indicates that the commission had used the Mayflower Inn, which, at all relevant times, was the only existing inn in town, "as a de facto model of what [the term] inn means in Washington." The record includes uncontroverted evidence that the Mayflower Inn featured a bar, two libraries, and "six separate" meeting areas.[45] The record also contains

[45] The modification application approved by the commission here contained a bar, one "meeting room/library," and one "prefunction" meeting area.

evidence that "all" of the accessory uses proposed by the applicant "are typical of what [i]nns do" and that the proposed uses in question were of "a smaller scale than what is currently offered [and] what has been offered at [the Mayflower Inn] for decades." On that evidence, the commission reasonably could find that the three uses in question had commonly, habitually, and by long practice been established as reasonably associated with the primary use of an inn in Washington. See *Loring* v. *Planning & Zoning Commission*, supra, 287 Conn. 754.

The plaintiffs further claim that the court misapplied the precedent of our Supreme Court in *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 324. We disagree. In *Zachs*, the court explained that, "[i]n deciding whether [a] current activity is within the scope of a nonconforming use consideration should be given to three factors: (1) the extent to which the current use reflects the nature and purpose of the original use; (2) any differences in the character, nature and kind of use involved; and (3) any substantial difference in effect upon the neighborhood resulting from differences in the activities conducted on the property." Id., 332. Here, the original use memorialized in the settlement agreement and the use approved by the granting of the modification application are one and the same: an inn on the property with accessory uses typical of inns in Washington. Indeed, the commission required, as the very first condition attached to its 2018 approval, that "[t]his approval remains *subject to all of the conditions and limitations* set forth in the settlement agreement approved by the commission on January 7, 2013, together with *the conditions* of approval that were incorporated into the commission's motion for approval of the settlement agreement." (Emphasis added.) Moreover, in approving the modification application, the commission imposed additional, more restrictive limitations on the

use of the property.[46] Last, from the evidence adduced at the public hearing, the commission reasonably could find that the use of the property proposed in the modification application would not result in a substantial difference in effect on the surrounding neighborhood.

In light of the foregoing, we conclude that there is evidence in the record to substantiate a finding that the proposed uses in question were within the scope of the lawful nonconforming use memorialized in the settlement agreement. The commission's determination that those uses constituted permissible accessory uses, therefore, was proper.

III

As a final matter, the plaintiffs claim that the court "failed to require compliance with [the] special permit standards" contained in the regulations. We do not agree.

"In an appeal from a decision of a zoning commission, the burden of overthrowing the decision . . . rest[s] squarely upon the appellant." (Internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, supra, 176 Conn. App. 602; see also *Blaker* v. *Planning & Zoning Commission*, 212 Conn. 471, 478, 562 A.2d 1093 (1989) (party challenging action of zoning commission bears burden of proving commission acted improperly); *Chouinard* v. *Zoning*

[46] For example, the commission required the applicant to eliminate the proposed ballroom from the 2018 plan, prohibited the issuance of day passes for the spa and pool areas, and prohibited "passenger drop offs by buses carrying [fifteen] passengers or more." The commission required the main building to be "limited to five levels" and further specified that its "finished floor levels . . . shall not exceed those shown on Sheet SD.1 . . . ." The commission also prohibited individual ownership of guest room units and mandated that guest room units shall not have (1) "a kitchen"; (2) "any cooking facilities," including "a stove, stove top, oven or convection oven"; (3) "a dishwasher"; (4) "a washing machine or dryer"; or (5) a "refrigerator having a capacity larger than 4.0 cubic feet." See footnote 20 of this opinion.

Commission, 139 Conn. 728, 731, 97 A.2d 562 (1953) ("[t]he burden of proof is always on the plaintiff" who challenges zoning commission determination). On our review of the record before us, we conclude that the plaintiffs have not met that burden.

The plaintiffs contend that the commission's approval of the modification application contravened § 13.1.B of the regulations. That claim requires little discussion. Section 13.1.B of the regulations provides in relevant part: "[T]he Commission may approve, modify, or renew a Special Permit in a district where such uses are permitted. . . ." The regulations previously authorized the use of the property as an inn, and the settlement agreement approved by the Superior Court and filed in the Washington land records; see footnote 16 of this opinion; plainly permits the use of the property in that manner. The settlement agreement, to which the commission was a party, also provided a mechanism for the modification of the plans contained in that agreement, which required commission approval. See footnote 10 of this opinion. In light of those undisputed facts, the plaintiff's claim that the commission could not entertain an application to modify the plans contained in the settlement agreement is untenable.

The plaintiffs also argue that the commission failed to consider the standards set forth in §§ 13.1.C.1 and 13.1.C.2 of the regulations[47] and claim that the commission "did not make findings" related thereto. With

[47] Subparagraph 1 of § 13.1.C.1 provides in relevant part: "That the proposed use and any building or other structure in connection therewith are consistent with the objectives of the Plan of Conservation and Development . . . and the intent and requirements of the Zoning Regulations as such documents may be amended." Washington Zoning Regs., § 13.1.C.1.

Subparagraph 2 of § 13.1.C.2 provides: "That the location, type, character, size, scale, proportion, appearance, and intensity of the proposed use and any building or other structure in connection therewith shall be in harmony with and conform to the appropriate and orderly development of the Town and the neighborhood and will not hinder or discourage the appropriate development and use of adjacent property or substantially or permanently impair the value thereof." Washington Zoning Regs., § 13.1.C.2.

respect to the latter contention, we already have noted that the commission did not render a "formal, official, collective statement of reasons for its action"; *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, 220 Conn. 527, 544, 600 A.2d 757 (1991); as required by General Statutes § 8-3c (b), and did not issue a detailed decision with explicit findings. See footnote 21 of this opinion. We are hesitant to ascribe fault in that regard, as noncompliance with that statutory imperative is commonplace in practice and condoned by decades of appellate authority.[48]

As our Supreme Court has observed, "an agency's statutorily required finding cannot be overruled simply because the agency's decision is not explicitly stated on the record." *Samperi* v. *Inland Wetlands Agency*, 226 Conn. 579, 595, 628 A.2d 1286 (1993). When a trial court's decision lacks specificity, this court presumes

[48] See, e.g., *Rapoport* v. *Zoning Board of Appeals*, 301 Conn. 22, 34, 19 A.3d 622 (2011); *Harris* v. *Zoning Commission*, 259 Conn. 402, 420–21, 788 A.2d 1239 (2002); *Paige* v. *Town Plan & Zoning Commission*, 235 Conn. 448, 464, 668 A.2d 340 (1995); *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, supra, 220 Conn. 544–45; *Ward* v. *Zoning Board of Appeals*, 153 Conn. 141, 144, 215 A.2d 104 (1965); *Turek* v. *Zoning Board of Appeals*, 196 Conn. App. 122, 136–37, 229 A.3d 737, cert. denied, 335 Conn. 915, 229 A.3d 729 (2020); *Verrillo* v. *Zoning Board of Appeals*, supra, 155 Conn. App. 672–76; *Malone* v. *Zoning Board of Appeals*, 134 Conn. App. 716, 724, 39 A.3d 1233 (2012); *200 Associates, LLC* v. *Planning & Zoning Commission*, 83 Conn. App. 167, 177–78, 851 A.2d 1175, cert. denied, 271 Conn. 906, 859 A.2d 567 (2004). As one commentator has observed, "Connecticut's various land regulation statutes all provide . . . that commissions 'shall' state the reasons for their decisions on the record. However, Connecticut courts have consistently refused to void decisions made without a statement of reasons, even though all these statutes use 'shall' rather than 'may.' " (Footnote omitted.) T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) pp. 473–74; cf. *Gagnon* v. *Inland Wetlands & Watercourses Commission*, 213 Conn. 604, 611, 569 A.2d 1094 (1990) (public policy reasons make it "practical and fair" for reviewing court to search record of "a local land use body . . . composed of laymen whose procedural expertise may not always comply with the multitudinous statutory mandates under which they operate").

that the trial court made all necessary findings that are supported by the record. See, e.g., *Brett Stone Painting & Maintenance, LLC* v. *New England Bank*, 143 Conn. App. 671, 681, 72 A.3d 1121 (2013); *Young* v. *Commissioner of Correction*, 104 Conn. App. 188, 190 n.1, 932 A.2d 467 (2007), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008). That precept applies equally to our review of the decisions of municipal land use agencies, whose conduct carries "a strong presumption of regularity . . . ." *Murach* v. *Planning & Zoning Commission*, 196 Conn. 192, 205, 491 A.2d 1058 (1985); see also *Hills* v. *Zoning Commission*, 139 Conn. 603, 608, 96 A.2d 212 (1953) (zoning commission action entitled to "every reasonable presumption of validity"); *Levine* v. *Zoning Board of Appeals*, 124 Conn. 53, 57, 198 A. 173 (1938) ("[t]here is a presumption that [municipal land use agencies] have acted . . . upon valid reasons"). When a zoning commission fails to articulate explicit factual findings to support its decision, a reviewing court is obligated to "search the entire record to find a basis for the commission's decision . . . . [I]f *any* reason culled from the record demonstrates a real or reasonable relationship to the general welfare of the community, the decision of the commission must be upheld." (Emphasis in original; internal quotation marks omitted.) *Graff* v. *Zoning Board of Appeals*, 277 Conn. 645, 670, 894 A.2d 285 (2006); see also *Azzarito* v. *Planning & Zoning Commission*, 79 Conn. App. 614, 618, 830 A.2d 827 (reviewing court must search record to find basis for decision when commission "did not make specific factual findings to support its approval of the application"), cert. denied, 266 Conn. 924, 835 A.2d 471 (2003).

The record here indicates that the commission, over the course of three lengthy nights of deliberations, gave ample attention to both the propriety and the impact of the proposed use of the property. The commission

debated the impact of the proposed use on the surrounding neighborhood and discussed in detail both parking and traffic concerns.[49] The commission also gave significant consideration to the intensity of the proposed use, which fostered disagreement among some commissioners. In addition, the commission considered the proposed use in relation to its rural setting, consistent with the stated purpose of the R-1 Farming and Residential zoning district. See footnote 4 of this opinion.

The record also indicates that the commission was cognizant of the fact that the only other inn in Washington was located "right down the road" from the property and had featured comparable primary and accessory uses "for decades." The commission reasonably could find, on the evidence adduced at the public hearing, that the existence of a similar inn in the same area of town supported a conclusion that the use proposed by the applicant comported with the intent and objectives of the regulations, as well as the town's plan of conservation and development. See Washington Zoning Regs., §§ 13.1.C.1 and 13.1.C.2.

Moreover, with respect to the impact on adjacent property, the commission was well aware of the protracted procedural history of this proposed use of the property and the fact that owners of surrounding properties had been involved in the 2008 special permit application proceedings, the 2013 settlement agreement proceedings, and the modification application now at issue. The record of both the public hearing and the commission's deliberations demonstrates that the commissioners were sensitive to the impact of the proposed use on the neighborhood, which led them to impose

[49] During the public hearing, the commission heard expert testimony from Szymanski that the 100 parking spaces reflected on the 2018 plan would be adequate to accommodate the proposed use of the property. That testimony was acknowledged during the commission's deliberations.

additional restrictions on the use of the property as conditions of their approval. See footnote 46 of this opinion.

In that vein, it bears emphasis that the proposal before the commission in 2018 was not a novel one. Both the use of the property as an inn and the "location, type, character, size, scale, proportion, appearance, and intensity" of that use; Washington Zoning Regs., § 13.1.C.2; had been the subject of various proceedings before the commission, as well as the Superior Court, over the course of a decade. On the evidence before it, the commission reasonably could conclude that the changes memorialized in the 2018 plan; see footnote 15 of this opinion; did not materially alter those considerations.

It is true that the commission did not explicitly reference each and every special permit standard contained in the regulations during its many hours of deliberations on August 7, 27 and 28, 2018. It remains that the commission engaged in detailed discussion as to the propriety of the proposed use, particularly with respect to its impact on the surrounding area, and imposed additional restrictions on the use of the property. On our thorough review of the record, we cannot agree with the plaintiffs' contention that the commission ignored the considerations memorialized in §§ 13.1.C.1 and 13.1.C.2 of the regulations. To the contrary, the commission reasonably could conclude, on the basis of the documentary and testimonial evidence before it, that the use proposed by the applicant comported with the intent and objectives of the regulations, as well as the town's plan of conservation and development, and that the proposed use was in harmony with the orderly development of the town and surrounding neighborhood.

The plaintiffs, who bore the burden of proof in this administrative appeal, have not demonstrated that the

modification application violated any special permit standard contained in the regulations. They thus have not rebutted the strong presumption of regularity that attaches to the conduct of zoning commissions in this state. See *Murach* v. *Planning & Zoning Commission*, supra, 196 Conn. 205; cf. *Frito-Lay, Inc.* v. *Planning & Zoning Commission*, supra, 206 Conn. 572–73 (presumption of regularity rebutted when record established that commission did not act within prescribed legislative powers). Accordingly, we conclude that the Superior Court properly dismissed the plaintiffs' appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

MARGUERITE PURNELL ET AL. *v.* INLAND WETLANDS AND WATERCOURSES COMMISSION OF THE TOWN OF WASHINGTON ET AL.
(AC 44083)

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

Syllabus

The plaintiffs, P and G, appealed to this court from the judgment of the Superior Court dismissing their appeal from the decision of the Inland Wetlands and Watercourses Commission of the Town of Washington to grant a permit to W Co. to conduct certain regulated activities on its property pertaining to its proposed construction of an inn. After the expiration in 2018 of a permit the commission had granted in 2008 to conduct regulated activities on the property, W Co. filed a new application that was largely identical to the 2008 proposal but contained minor changes in response to building and safety code requirements. In response to a petition by residents, the commission, pursuant to statute (§ 22a-42a (c) (1)) and the applicable provision (§ 10.03) of the Washington Inland Wetlands and Watercourses Regulations, conducted a public hearing on the new application during which it heard from, inter alia, P, experts who appeared on P's behalf, and, on behalf of W Co., S, the civil engineer who had been involved with the drafting of plans for the development since 2008. S told the commission that W Co. was seeking reapproval of the expired 2008 permit and that it would be incorporating

into its application by reference plans that had been submitted to the commission in 2008. L Co., which had been retained by the commission to review the modifications in the new application, then submitted a report in which it stated that the application was, for the most part, identical to the previously approved application and that its modifications would not result in impacts to wetlands or watercourses. During the public hearing, P objected to the submission of L Co.'s report and the revised plans W Co. had submitted in response to that report. P claimed that she lacked sufficient notice as to the report and stated that she was unable to question L Co., which did not have a representative at the hearing. The commission then continued the hearing, after which a representative of L Co., who was not a civil engineer, thereafter attended the hearing and stated that the plans before the commission were very similar to those presented in connection with the 2008 permit but that he was not comfortable addressing certain engineering issues. The commission thus permitted L Co. to submit written comments, and, after the public hearing concluded, L Co. responded in a letter to the commission as to concerns expressed by civil engineers who had appeared on behalf of P. L Co. stated that those concerns could be addressed as a condition of approval of W Co.'s application and that revisions to W Co.'s proposal would not materially change it or its potential for wetland impacts. The commission thereafter approved W Co.'s permit application, subject to certain conditions, and the plaintiffs, on the granting of certification, appealed, claiming that the commission violated their right to fundamental fairness, failed to consider alternatives to W Co.'s proposal and that the commission's decision to approve the permit application was not supported by substantial evidence. *Held*:

1. The commission's posthearing receipt and consideration of L Co.'s letter that referenced certain data and the conditioning of the commission's approval of W Co.'s application on W Co.'s submission of additional material did not violate the plaintiffs' right to fundamental fairness:

a. The plaintiffs' claim that they were deprived of the opportunity to respond to L Co.'s letter was unavailing: W Co.'s deep test pit data, the only piece of information in the letter that the plaintiffs claimed was not presented at the public hearing, was not new to the commission or the plaintiffs, as it was undisputed that the data was discussed during the public hearing and had been furnished to the commission in connection with the 2008 application; moreover, the commission chairman stated during the public hearing that the prior approvals and record of the 2008 permit would be incorporated into the record of the new application, and the record demonstrated that P was well acquainted with the data, having submitted into evidence at the public hearing a report that included the data.

b. The commission properly imposed conditions that required W Co. to take specific actions to bring the proposed development plan into compliance with applicable legal and regulatory requirements; contrary

to the plaintiffs' claim that the conditions, which were based on recommendations from L Co., in response to comments from P's experts, would not be subjected to the scrutiny of a public hearing, the regulations (§§ 12.09 (a) and 15.05) permitted the commission to conduct a public hearing in response to the submission of the additional material or to suspend, revoke or modify W Co.'s permit if the additional information proved to be inaccurate.

2. Contrary to the plaintiffs' assertion that the commission improperly failed to conduct a de novo review of every aspect of W Co.'s permit application, the commission properly applied the "impotent to reverse rule" and confined its de novo review to the new aspects of W Co.'s proposal; the record demonstrated that the commissioners understood that the impotent to reverse rule precluded them from reversing prior decisions pertaining to the 2008 permit approval unless there had been a change of conditions or other considerations had intervened that materially affected the merits of the matter that had been decided, and the commission implicitly found, and the evidence substantiated, that no material changes affecting those determinations had occurred, as W Co.'s application was largely identical to what had been proposed in the 2008 permit.

3. The plaintiffs could not prevail on their claim that the Superior Court improperly concluded that substantial evidence supported the commission's decision to approve W Co.'s permit application; despite the plaintiffs' contention that the application lacked certain information pertaining to, among other things, the septic system, removal of materials, and stormwater management, the record supported the commission's determination that the application satisfied the strictures of § 8 of the regulations, as S stated at the public hearing that no change to the existing septic system design was proposed, the record included details as to that design, which P appended to her written submission to the commission, W Co.'s site plan depicted specifics regarding materials to be removed, stockpiled or deposited on the property, and W Co. submitted a stormwater management report that L Co. and experts on behalf of P had reviewed.

4. Contrary to the plaintiffs' contention that the Superior Court improperly upheld the approval of W Co.'s permit application in the absence of a finding by the commission of feasible and prudent alternatives, neither of the statutes (§ 22a-41 (b) (1) or § 22a-39 (k)) that required a finding of a feasible and prudent alternative was applicable: the commission, pursuant to § 22a-41 (b) (1), did not make the threshold determination that W Co.'s proposed activity could have a significant impact on wetlands or watercourses, and § 22a-39 (k), which is applicable to a municipality that does not regulate its wetlands and watercourses and authorizes the Commissioner of Energy and Environmental Protection to conduct a public hearing in that municipality, was inapplicable because Washington had enacted inland wetlands and watercourses regulations and designated the commission as the agency charged with regulating

those activities; moreover, the plaintiffs' contention that the commission failed to consider feasible and prudent alternatives to W Co.'s proposal pursuant to the applicable statutes (§§ 22a-19 (b) and 22a-41 (a) (2)) was unavailing, as P and her expert provided documentary and testimonial evidence regarding feasible and prudent alternatives during the public hearing, W Co. stated in its permit application that it had considered alternatives, and the record was replete with discussion of prior wetlands applications regarding the proposed development, including nine modifications to the 2008 permit, which constituted consideration by the commission of feasible and prudent alternatives.

Argued March 8, 2021—officially released January 11, 2022

Procedural History

Appeal from the decision of the named defendant granting the application of the defendant 101 Wykeham Road, LLC, for a permit to conduct certain regulated activities on its property, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the action was withdrawn as to the defendant Commissioner of Energy and Environmental Protection; thereafter, the case was transferred to the judicial district of Waterbury, Complex Litigation Docket, and tried to the court, *Bellis*, *J.*; judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. *Affirmed.*

Gail E. McTaggart, for the appellants (plaintiffs).

Kari L. Olson, for the appellee (named defendant).

David F. Sherwood, for the appellee (defendant 101 Wykeham Road, LLC).

Opinion

ELGO, J. The plaintiffs, Marguerite Purnell and Matilda Giampietro,[1] appeal from the judgment of the

[1] In this opinion, we refer to Purnell and Giampietro individually by name and collectively as the plaintiffs.

Superior Court dismissing their appeal from the decision of the defendant Inland Wetlands and Watercourses Commission of the Town of Washington (commission)[2] to grant the application of the defendant 101 Wykeham Road, LLC (applicant), for a permit to conduct regulated activities pursuant to the Inland Wetlands and Watercourses Act (act), General Statutes § 22a-36 et seq.[3] On appeal, the plaintiffs claim that the court improperly concluded that (1) the commission did not violate their right to fundamental fairness, (2) the commission applied a correct legal standard in reviewing the permit application, (3) the commission's decision was supported by substantial evidence, and (4) the commission was not required to make a finding that no feasible and prudent alternatives existed. We affirm the judgment of the Superior Court.[4]

Like *Parker* v. *Zoning Commission*, 209 Conn. App. 631, A.3d (2022), which we also release today, this appeal concerns the development of a 26.9 acre parcel of real property owned by the applicant and known as 101 Wykeham Road in Washington (property). The property historically had been used for educational purposes.[5] In 2008, an inn and related appurtenances were proposed on the property. That proposed

[2] The commission is the inland wetlands agency of the town of Washington. See Washington Inland Wetlands and Watercourses Regs., § 1.02. Pursuant to General Statutes §§ 22a-36 through 22a-45, it is the entity charged with regulating the use of inland wetlands in that municipality.

[3] In their September 5, 2018 complaint, the plaintiffs also named Robert J. Klee, Commissioner of Energy and Environmental Protection, as a defendant. On October 4, 2018, the plaintiffs withdrew their complaint against Klee.

[4] In hearing appeals from decisions of an inland wetlands agency, the Superior Court acts as an appellate body. See General Statutes § 22a-43.

[5] "From 1907 until 1988, the property was the site of the Wykeham Rise School, a private college preparatory boarding school for girls. In 1988, the property was sold to Swiss Hospitality Institute, which operated a postsecondary residential hotel school between 1992 and 2003." *Peacocke* v. *Zoning Commission*, Superior Court, judicial district of Litchfield, Docket No. CV-11-6003862-S (February 7, 2013).

use was approved in 2013 as the result of a settlement agreement ratified by both the Zoning Commission of the Town of Washington and the Superior Court.[6] See id., 639–41, 643.

As part of that proposed development, the commission received multiple applications pertaining to regulated activities on the property.[7] At all relevant times, the property contained 2.07 acres of inland wetlands[8] and 1150 linear feet of watercourses.[9] The property also contained 9.7 acres of upland review area.[10]

[6] The zoning commission's notice of approval of that settlement agreement was filed in the Washington land records at volume 231, pages 1131–32.

[7] General Statutes § 22a-38 (13) defines a regulated activity as "any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses, but shall not include the specified activities in section 22a-40 . . . ."

In Washington, regulated activities also include "any discharging of storm water on the land, clear cutting, clearing (including clearing of understory), grubbing, filling, grading, paving, excavating, constructing, in wetlands, watercourses or upland review areas . . . . The [commission] may rule that any activity located in an upland review area or in any other non-wetland or non-watercourse area that is likely to impact or affect wetlands and watercourses is a regulated activity." Washington Inland Wetlands and Watercourses Regs., § 2.41.

[8] General Statutes § 22a-38 (15) defines wetlands in relevant part as "land, including submerged land . . . which consists of any of the soil types designated as poorly drained, very poorly drained, alluvial, and floodplain by the National Cooperative Soils Survey . . . ."

The record indicates that "[t]hree areas of wooded wetlands exist in the northwest-western portion of the [property] and a fourth wooded wetland occurs in the southeast corner . . . ."

[9] General Statutes § 22a-38 (16) defines watercourses in relevant part as "rivers, streams, brooks, waterways, lakes, ponds, marshes, swamps, bogs and all other bodies of water, natural or artificial, vernal or intermittent, public or private, which are contained within, flow through or border upon this state or any portion thereof . . . ."

The watercourse at issue here is Kirby Brook, a cold water stream that runs along the northern border of the property.

[10] Upland review areas are "[t]he buffer or setback areas around wetlands and watercourses . . . ." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 11:5, p. 389. In Washington, the upland review area is defined in relevant part as "land within [100] feet, measured

In 2008, the commission granted a permit to conduct regulated activities on the property (2008 permit) in connection with a proposed "inn, spa, fitness center, restaurant, function barn, offices, guest services and lobby, a pool house, tennis court, and . . . guest cottages." That permit was subject to eight conditions.[11]

horizontally, of the boundary of any wetlands or watercourse." Washington Inland Wetlands and Watercourses Regs., § 2.52.

[11] The conditions attached to the 2008 permit to conduct regulated activities on the property provide in relevant part:

"1. A cash performance bond of $50,000 shall be submitted by the applicant prior to the onset of demolition [and] construction, to be held by the Town of Washington throughout the construction and subsequent monitoring periods. . . .

"2. Land-Tech Consultants . . . shall, on behalf of the [c]ommission, monitor job site conditions for any unanticipated erosion and sedimentation risks and to confirm compliance with application details and the use best management practices. . . .

"3. The site shall be monitored according to schedule for two (2) full years after the end of construction, and until the disturbed areas of the site are fully stabilized, whichever is later. The site shall not be deemed to be fully stabilized unless the [c]ommission makes a specific finding to that effect. Long term maintenance of the storm water management system shall comply with the maintenance schedule provided by the applicants . . . . A log of maintenance activities shall be submitted annually to the Land Use Office . . . . All wetland mitigation plantings, buffer plantings, and storm water pond plantings shall be monitored for [three] growing seasons. Dead plants are to be replaced by the applicant as needed during the monitoring period.

"4. The applicants shall conduct water testing and shall submit the results thereof to the Land Use Office . . . .

"5. Weekly reports by the erosion control professional . . . shall be submitted to the Land Use Office throughout all construction phases. A rain gauge shall be installed on site and rainfall amounts recorded in the weekly Erosion Control Reports.

"6. At the time of the preconstruction meeting, construction managers shall deliver detailed and specific construction sequences to the [inland wetlands enforcement officer] and the [c]ommission's consultant. . . .

"7. Any proposed change in the approved plans and/or the supporting documents must be reviewed by the [inland wetlands enforcement officer] prior to implementation. The [inland wetlands enforcement officer] may authorize minor changes or reductions in the scope of regulated activities, provided that any such changes shall be reported to the [c]ommission immediately, and further provided that the [c]ommission may require a permit modification for such changes if it finds that they may have a previously

The 2008 permit was modified numerous times during the following nine years. The commission approved modifications on December 8, 2010, October 27, 2011, and on February 8 and September 26, 2012.[12] On December 10, 2014, and on May 13 and July 8, 2015, the town's inland wetlands enforcement officer[13] approved modifications that, inter alia, reduced the impervious surface area of the proposed development and, at the behest of the municipal fire marshal, reduced the total number of parking spaces. On February 8, 2017, the commission approved a modification to allow the removal of an existing building on the property that had sustained fire damage. On June 14, 2017, the commission approved a further modification "to allow a revision to the regrading of the [m]ain [b]uilding outside of the regulated area and the addition of a retaining wall on the east side of the building and minor revision to the wall adjacent to it." In each instance, the commission or the inland wetlands enforcement officer, as part of that review, necessarily concluded that no adverse impact to wetlands or watercourses would result from the proposed activities.

unanticipated impact on wetlands or watercourses. Any substantial changes, such as changes in location, enlargements, modifications to septic due to [Department of Energy and Environmental Protection] review, or changes that may in any way impact wetlands and/or watercourses must be approved by the [c]ommission prior to implementation.

"8. During the demolition and construction unstabilized or unvegetated site disturbance shall be limited to [three] acres at any one time."

[12] Among the modifications approved by the commission were a reduction in the total lot coverage on the property, a reduction in the total area of the proposed buildings, and the removal of all proposed development in a portion of the property burdened by a conservation easement.

[13] Pursuant to § 12.01 of the Washington Inland Wetlands and Watercourses Regulations, the commission's authorized agent may grant a permit application "as filed or grant it upon other terms, conditions, limitations, or modifications of the regulated activity . . . ." Moreover, the conditions attached to the 2008 permit expressly provide that the inland wetlands enforcement officer "may authorize minor changes or reductions in the scope of regulated activities . . . ." Footnote 11 of this opinion.

It is undisputed that the 2008 permit expired in November, 2017. On February 14, 2018, the applicant filed a new permit application with the commission that contained a largely identical proposal to develop an "inn with appurtenances" on the property. The application incorporated by reference plans that previously had been submitted to the commission in connection with the 2008 permit.[14] The application also indicated that a total of 0.004 acres of wetlands would be disturbed and that no watercourses would be affected by the proposed activities.

The application was accompanied by a letter from Paul S. Szymanski, a civil engineer who had been involved in drafting site development plans for the proposed development since 2008.[15] In that letter, Szymanski stated that the applicant was seeking "reapproval" of the expired 2008 permit, as the proposal consisted of only "a few minor changes to the site development due to the [b]uilding [c]ode review . . . ." Szymanski also emphasized that the applicant was seeking approval "based on the previously permitted project that has been thoroughly vetted." In addition, Szymanski's letter included an overview in narrative form of the 2008 permit, including the approved modifications from 2010 to 2017.

At its February 14, 2018 regular meeting, the commission reviewed the application with Szymanski, who appeared on behalf of the applicant. Szymanski explained to commission members that, although "this

[14] For example, with respect to the removal, deposit, or stockpiling of materials, the applicant stated: "Placement of utility conduit, water mains, sanitary lines, pavement, modified riprap, driveway base per detailed plans previously proposed." Regarding the "[d]escription, work sequence, and duration of activities," the applicant stated: "Please see associated [c]onstruction [s]equence sheets previously approved which are to still be utilized." The application also noted that "[a] detailed mitigation plan was previously approved and is still proposed to remove the previous direct impacts to the wetlands as well as improve the regulated area."

[15] The application included a letter from Erika Klauer, the manager of the applicant company, which states in relevant part: "Please allow [Szymanski]

is a new application," there were only a few "minor changes" to the proposed activities "since [the applicant was] last before you [in 2017] for revisions" to the 2008 permit, which all were in response to building code and safety requirements.[16] Szymanski also informed the commission that the applicant would be incorporating plans previously filed in connection with the 2008 permit, including the construction sequence sheets and the sedimentation and erosion control plan. The commission subsequently conducted a site inspection of the property with Szymanski.[17]

to submit and discuss any issues related to the [application] as I authorize him to work on our behalf with you."

[16] Szymanski explained that, as a part of the special permit process before the zoning commission, the applicant had a building code and safety review conducted, which found that "the main building . . . required the addition of three concrete landings. . . . [W]e need a minimum of fifty foot grass paver, maintained as grass, area that goes to a 500 square foot emergency egress gathering area that's relatively level, [and] there's some minor regrading associated with that. . . . [T]he only activity . . . within the upland review area is approximately half of the concrete pad in the northeast corner, that's located about ninety-five to a hundred feet from the wetlands. It's lateral to the wetlands, so it's not . . . upgradient of it. And [the] egress gathering area [is] located [approximately] thirty feet lateral to the wetland. . . . [T]he closest wetland downgradient is approximately a hundred feet. So, again, [grass paver pedestrian area] would be maintained [in the event that] there's a fire, we need a place where people come out of the building, gather and then disperse. . . .

"As part of the building code review for the fitness spa building [is] the necessity for a five foot by twenty foot pull off at the front of the spa house building. So, what we've done is, we've shifted that building five feet [farther] away from the wetlands. You may recall that building was already outside of the upland review area, but we've moved it even [farther] away. And that necessitated a concrete landing on the left side of the building that's approximately a hundred and forty feet away from the wetlands. And again, that's just a grass area to the driveway [because] the driveway can act as the gathering area. And then in the pool house area, there's three concrete pads added [that] are about 400 feet away from the wetlands. . . . [S]o, since we were last before you for revisions [to the 2008 permit], I . . . believe it was the middle of last year, [those] are the only modifications . . . to the plan."

[17] As our Supreme Court has observed, "[a]lthough site visits are not required by the act . . . they may be necessary for commissioners thoroughly to evaluate property that is the subject of an application." (Footnote

On February 27, 2018, the commission received a petition signed by sixty-two residents of Washington, including Giampietro, requesting a public hearing on the applicant's new application pursuant to General Statutes § 22a-42a (c) (1) and § 10.03 of the Washington Inland Wetlands and Watercourses Regulations (regulations). On April 2, 2018, Purnell, a resident of Cornwall Bridge, filed a verified notice of intervention with the commission pursuant to General Statutes § 22a-19 (a). It is undisputed that Purnell had been involved in the 2008 permit proceedings for the better part of a decade.[18]

In response to the residents' petition,[19] the commission held a lengthy public hearing on the new application over the course of five nights that began on April

omitted.) *Grimes* v. *Conservation Commission*, 243 Conn. 266, 277, 703 A.2d 101 (1997). In the present case, the commission's site visit report states in relevant part: "Szymanski led [a] review of [the] site plan including indication of proposed new buildings, limit of disturbance, rain gardens and handling of rain water discharge."

[18] As but one example, the record includes an October 5, 2011 report to the commission from Land-Tech Consultants, Inc., which had been retained by the commission to review all changes in the new application. The report was prepared, in part, in response to "[a] letter from [Purnell] to the [commission] with attachments dated September 28, 2011." In that report, Land-Tech addressed Purnell's comments on the 2008 permit regarding (1) the "[e]xpanded [p]arking area"; (2) "[i]mpervious [c]over"; (3) "[p]orous [p]avement"; (4) "[r]ain [g]ardens"; (5) "[w]et [p]onds"; (6) "[c]onstruction [s]equence [and] [p]roject [p]hasing"; (7) "[p]ollution [i]ssues"; (8) "[f]easible and [p]rudent [a]lternatives"; and (9) "[m]onitoring and [e]nforcement."

[19] General Statutes § 22a-42a (c) (1) provides in relevant part: "The inland wetlands agency shall not hold a public hearing on [an] application [for a permit to conduct regulated activities] unless the inland wetlands agency determines that the proposed activity may have a significant impact on wetlands or watercourses, a petition signed by at least twenty-five persons who are eighteen years of age or older and who reside in the municipality in which the regulated activity is proposed, requesting a hearing is filed with the agency not later than fourteen days after the date of receipt of such application, or the agency finds that a public hearing regarding such application would be in the public interest. . . ."

In the present case, the public hearing before the commission was not premised on its determination that the activities proposed by the applicant may have a significant impact on wetlands or watercourses or that a public

3, 2018, and concluded on July 11, 2018. The bulk of that hearing consisted of testimony from Purnell and Szymanski. The commission also heard from three experts retained by Purnell[20] and a third-party expert, Christopher P. Allan of Land-Tech Consultants, Inc. (Land-Tech),[21] retained by the commission.

At the outset of the first night of the public hearing, commission Chairman Stephen Wadelton explained that the so-called impotent to reverse rule; see, e.g., *Bradley* v. *Inland Wetlands Agency*, 28 Conn. App. 48, 50, 609 A.2d 1043 (1992); precluded the commission from revisiting its prior determinations made as part of the 2008 permit process "unless there has been significant change to what was previously approved." In light of the commission's extensive review, and ultimate approval, of the 2008 permit, Wadelton asked all in attendance to "limit your comments to . . . what [has] changed significantly from what was approved [as part of the 2008 permit]." After receiving testimony and documentary evidence over the course of two nights from Szymanski, Purnell, her experts from Towne Engineering, Inc., and other interested parties, the commission voted to retain Land-Tech "to review all of the changes" contained in the new application.

Land-Tech thereafter submitted a written report (Land-Tech report), in which it noted that it "has been involved in the review of several inland wetland permit applications for the [c]ommission pertaining to the proposed development of the subject property. These [third-party] reviews included numerous site inspections, detailed reviews of application documents,

hearing would be in the public interest. Rather, the hearing was held following the commission's receipt of the petition from local residents.

[20] Matthew D. Maynard and Joseph H. Boucher of Towne Engineering, Inc., and Steven D. Trinkaus of Trinkaus Engineering, LLC, appeared on behalf of Purnell.

[21] Allan is a professional wetlands scientist and a certified soil scientist.

review of intervenor/public comments and reports, responses to [c]ommission comments and questions, and participation in several public hearings" beginning in 2008. The report then stated that the new application "is for the most part identical to the previously approved application with some minor revisions." After detailing the specific nature of those revisions,[22] the report concluded that "these plan modifications are minor in scope and will not result in any impacts to wetlands or watercourses." The report also included a response to comments from Towne Engineering, Inc., and a handful of recommendations for the commission.

The Land-Tech report was reviewed by the commission at the public meeting on June 20, 2018.[23] At that time, Szymanski provided an overview of a revised set of plans that the applicant recently had submitted in response to comments contained in the Land-Tech report.[24] Szymanski also submitted a revised stormwater management report to the commission.

[22] The report states in relevant part that the new application contained the following revisions:

"[1.] Addition of three concrete landings adjacent to the Main Building at emergency exit points.

"[2.] Addition of a two grass paver emergency gathering areas and walkways from the Main Building on its east and west sides.

"[3.] Addition of two yard drains and associated piping south of the Main Building in place of previously proposed graded drainage swales.

"[4.] Addition of one concrete landing adjacent to the Fitness/Activity Building at emergency exit point with one grass paver walkway.

"[5.] Addition of three concrete landings adjacent to the Pool House at emergency exit points with two proposed grass paver walkways.

"[6.] Addition of a [five foot] by [twenty foot] paved pull-off east of the Fitness/Activity Building.

"[7.] Relocation of the Fitness/Activity Building [five] feet closer to the driveway/pull-off to the east."

[23] The public hearing briefly resumed on May 30, 2018, but no new evidence was presented.

[24] Those revised plans contain twenty-six sheets, seventeen of which were revised to June 18, 2018. The record also contains a letter from Szymanski to the commission dated June 12, 2018, which contains detailed responses to the recommendations contained in the Land-Tech report.

Purnell then addressed the commission and objected to the submission of the Land-Tech report and the applicant's revised plans. Although she conceded that copies of those materials had been furnished to her and her experts a day earlier, she claimed that such notice was insufficient. Purnell also opined that "Land-Tech should be here so that I may [question] them directly." Purnell then turned her attention to changes to the structures proposed for the property, opining that "the members of the [commission are] unfamiliar with many details regarding the size and intensity of the current proposal . . . ." In response, Wadelton noted that "these are all considerations for [the] zoning commission, right?" When Purnell continued discussing the size and floor area of the proposed structures, Wadelton stated: "I'm sorry, yes, this is a public hearing on wetlands concerns, and, so far, I'm not hearing any. . . . I'm not going to waste any more of this commission's time listening to zoning issues because we have no control over that." Purnell then submitted her written comments to the commission, in which she alleged that "[t]he [s]ize of the [p]roposed [f]acility is [s]ignificantly [l]arger" and that "[t]he [u]se of the [f]acility has [i]ntensified."

Joseph H. Boucher and Matthew D. Maynard, the plaintiff's experts from Towne Engineering, Inc., provided a letter to the commission that night, which concerned certain "items [that] still have not been addressed or properly documented" by the applicant. They also offered testimony related thereto. In light of the recent submission of the Land-Tech report and the applicant's revised plans, Boucher respectfully suggested that the commission should not close the public hearing that night. Wadelton agreed, stating that "we should have . . . a representative from Land-Tech here." The commission thus continued the public hearing until July 11, 2018.

On July 5, 2018, the applicant submitted additional revisions to the commission, including an updated storm drainage study. That submission was accompanied by a letter from a colleague of Szymanski, Jeremy R. Oskandy, a senior project manager, summarizing those "[s]upplemental [r]evisions" to the plan.[25] Szymanski provided copies of those revisions to Purnell on July 6, 2018.

At the fifth and final night of the public hearing on July 11, 2018, experts from Towne Engineering, Inc., and Trinkaus Engineering, LLC, appeared on behalf of Purnell and opined that the activities proposed by the applicant would have an adverse impact on wetlands and watercourses on the property. Their comments also were memorialized in two letters that the commission received on the eve of that hearing.

Allan appeared at the hearing on behalf of Land-Tech and noted that the plans currently before the commission were "very similar" to the ones presented as part of the 2008 permit. Allan informed the commission that Land-Tech was satisfied with the applicant's responses to the comments contained in its report and that Land-Tech did not have any additional concerns. At the same time, Allan indicated that he was not comfortable "addressing some of the engineering issues" that had been raised, as he was not a professional engineer. See footnote 21 of this opinion. He thus offered to have Land-Tech submit comments to the commission "on some of [the experts'] letters" after the public hearing concluded, to which Wadelton responded, "[t]he com-

[25] In that letter, Oskandy stated in relevant part: "As requested, we have performed the Hydraulic Grade Analysis and made some adjustments to the storm drainage accordingly. The changes affect [certain] structures . . . mostly regarding invert elevations and pipe configuration. Accordingly, some minor adjustments have been made to the outlet control and protection for the ponds."

mission would definitely appreciate that."[26] After hearing further testimony from Purnell, Szymanski, and other members of the public, the commission closed the public hearing.

Two weeks later, Land-Tech submitted its written response to the commission (Land-Tech letter). That letter began by noting that the commission had asked Land-Tech "to review and comment on two letters received by the [c]ommission" from Towne Engineering, Inc., and Trinkaus Engineering, LLC. Land-Tech disagreed that the activities proposed by the applicant would have an adverse impact on wetlands and watercourses on the property and opined that "the applicant has made significant efforts in the design to mitigate any potential impacts." Land-Tech further stated that certain "comments contained in the Towne Engineering letter regarding plan inconsistencies, errors or conflicts can be addressed, where warranted, by the applicant in a final set of construction plans/reports as a condition of approval, if the application is approved. It is our opinion that these revisions/corrections will not materially change the development proposal or its potential for wetland impacts."[27] (Emphasis

[26] In response to concerns raised by Purnell, Wadelton clarified for the record that Land-Tech "is merely going to respond to information that your experts provided."

[27] In its letter to the commission, Land-Tech noted that certain inconsistencies between the applicant's plan and its stormwater management report could be resolved through the submission of a revised plan with updated calculations. In particular, Land-Tech noted that "[t]here seems to be a discrepancy between the routed discharge rates for Pond #1 and #2 for the [twenty-five] year storm and the rates used to calculate the outlet protection at these discharge points. If the application is approved, the applicant should revise the calculation as necessary and submit revised calculations/plans as a condition of approval." Land-Tech also suggested that, "[i]f the application is approved, the applicant [should] revise the outlet control details to be consistent with the [stormwater management] report calculation on the final plan set." In response to the concern of Towne Engineering, Inc., that "[t]his project only has a conceptual water supply approval," Land-Tech noted that "[t]his comment can be addressed by requiring a final water supply approval as a condition of approval. Any material changes to the

omitted.) In addition, Land-Tech emphasized that "[a]ny *material* changes to the [final set of] plans such as relocation of the water main, structures, driveways, septic system components, stormwater drainage system components, etc. will require [resubmission] of plans and an application to the [c]ommission." (Emphasis added.)

The commission deliberated the merits of the applicant's request for a new permit over the course of two nights on July 31 and August 14, 2018. At the conclusion of those deliberations, the commission unanimously approved the permit application, subject to ten detailed conditions.[28]

proposed water supply will require [resubmission] of plans and an application to the [c]ommission."

[28] The conditions attached to the commission's approval state:

"1. A cash performance bond of $75,000 shall be submitted by the applicant prior to the onset of demolition and construction to be held by the Town of Washington throughout construction and subsequent monitoring periods. These monies may be used by the Town to secure the site in the event that malperformance or neglect by the applicant or [its] agents creates a risk of adverse impact on inland wetlands or watercourses. If the Town uses any bond funds pursuant to this condition, the applicant must, within [fifteen] calendar days, replenish or restore the bond to the full $75,000 amount before construction may continue.

"2. A qualified professional in erosion and sediment control and stormwater management shall on behalf of the [c]ommission, monitor job site conditions for any unanticipated erosion and sedimentation risks and to confirm compliance with application details and the use of best management practices. The applicant shall be responsible for all of this qualified professional's fees for these services and shall, no later than the date of commencement of construction, submit to the [c]ommission a cash bond, which shall be held by the Town and which must be maintained in the amount of $5,000 throughout all phases of construction and monitoring. The Town shall pay the professional's fees from the bond and the applicant shall replenish the bond to the full $5,000 amount within [fifteen] calendar days. The professional will issue a report to the Land Use Office, with a copy to the applicant after each site inspection, generally according to the following guidelines: Consultant's Inspection Schedule: twice per month during general construction phases and periods, seasonally during post construction and throughout the monitoring period, and at any time at the request of the Land Use Enforcement Officer or because of malperformance, neglect, or serious weather situations. Also, the Wetlands Enforcement Officer shall inspect the site once per week during the construction phases.

"3. The site shall be monitored according to schedule for [two] full years after the end of construction, and until the disturbed areas of the site are fully stabilized, whichever is later. The site shall not be deemed to be fully

On September 6, 2018, the plaintiffs commenced an appeal in the Superior Court challenging the propriety of the commission's decision to grant the permit application.[29] They claimed, inter alia, that the commission violated their right to fundamental fairness, that it failed

stabilized unless the [c]ommission makes a specific finding to that effect. Long term maintenance of the stormwater management system shall comply with the maintenance schedule as described on the site development plans. A log of maintenance activities shall be submitted annually to the Land Use Office in December. All wetland mitigation plantings, buffer plantings, and stormwater pond plantings shall be monitored for [three] growing seasons. Dead plants are to be replaced by the applicant as needed during the monitoring period.

"4. Bi weekly (every other week) reports by the erosion control professional noted in the construction sequences shall be submitted to the Land Use Office throughout all construction phases. A rain gauge shall be installed on site and rainfall amounts recorded in the bi weekly erosion control reports.

"5. At the time of the preconstruction meeting, construction managers shall deliver detailed and specific construction sequences to the enforcement officer and to the [c]ommission's consultant. These sequences should adhere to the approved sequences in the file and be augmented by more specific description and timing.

"6. Any proposed change in the approved plans and/or supporting documents must be reviewed by the enforcement officer prior to implementation. The enforcement officer may authorize minor changes or reductions in the scope of regulated activities provided that any such changes shall be reported to the [c]ommission immediately and further provided that the [c]ommission may require a permit modification for such changes if it finds that they may have a previously unanticipated impact on wetlands and watercourses. Any substantial changes such as changes in location, enlargements, modifications to septic due to [Department of Energy and Environmental Protection] review, changes in the sequence of construction, or changes that may in any way impact wetlands and/or watercourses must be approved by the [c]ommission prior to implementation.

"7. During the demolition and construction, unstabilized or unvegetated site disturbance shall be limited to [five] acres at any one time.

"8. Regarding the routed discharge rates for Pond #1 and #2 for the [twenty-five] year storm and the rates used to calculate the outlet protection at these discharge points, the applicant shall revise the calculation as necessary and submit the revised calculations and plans to the Land Use Office and [c]ommission's professional consultant for review prior to the commencement of demolition and construction.

"9. The outlet control details shall be revised to be consistent with the stormwater management report calculations provided on the final plan set.

"10. The applicant shall prepare a minimum of three full plan sets incorporating all revisions and conditions of approval and submit them to the Land Use Office and to [Land-Tech] for review prior to the commencement of demolition and construction."

[29] It is undisputed that Purnell possessed standing as an intervening party and that Giampietro possessed standing as an owner of abutting property. See General Statutes § 22a-43 (a).

to consider feasible and prudent alternatives, and that its decision was not supported by substantial evidence. The court rejected those claims and dismissed the appeal. The plaintiffs then filed a petition with this court for certification to appeal pursuant to General Statutes §§ 8-8 (o) and 22a-43 (e). We granted the plaintiffs' petition and this appeal followed.

As a preliminary matter, we note that the act provides in relevant part that "no regulated activity shall be conducted upon any inland wetland or watercourse without a permit. Any person proposing to conduct or cause to be conducted a regulated activity upon an inland wetland or watercourse shall file an application with the inland wetlands agency of the town or towns wherein the wetland or watercourse in question is located. . . ." General Statutes § 22a-42a (c) (1).

Municipal inland wetlands agencies in this state are "authorized to establish the boundaries of inland wetlands and watercourse areas within [their] jurisdiction. Once such boundaries are established . . . no regulated activity shall be conducted within such boundaries without a permit issued by the local agency. . . . [L]ocal inland wetland bodies are not little environmental protection agencies. Their environmental authority is limited to the wetland and watercourse area that is subject to their jurisdiction. They have no authority to regulate any activity that is situated outside their jurisdictional limits. Although in considering an application for a permit to engage in any regulated activity a local inland wetland agency must . . . take into account the environmental impact of the proposed project, it is the impact on the regulated area that is pertinent, not the environmental impact in general. . . . Thus, an inland wetland agency is limited to considering only environmental matters which impact on inland wetlands." *Connecticut Fund for the Environment, Inc.* v. *Stamford*, 192 Conn. 247, 250, 470 A.2d 1214 (1984).

As our Supreme Court has observed, "[t]he sine qua non of review of inland wetlands applications is a determination [of] whether the proposed activity will cause an *adverse impact* to a wetland or watercourse." (Emphasis in original.) *River Bend Associates, Inc.* v. *Conservation & Inland Wetlands Commission*, 269 Conn. 57, 74, 848 A.2d 395 (2004). "Evidence of general environmental impacts, mere speculation, or general concerns" do not suffice. Id., 71. Rather, "[a]bsent evidence that identifies and specifies the actual harm resulting therefrom, a commission cannot find that the proposed activities will, or are likely to, adversely impact wetlands or watercourses." *Three Levels Corp.* v. *Conservation Commission*, 148 Conn. App. 91, 112, 89 A.3d 3 (2014); see also *River Bend Associates, Inc.* v. *Conservation & Inland Wetlands Commission*, supra, 77–81 (proof of specific, actual harm required); *Cornacchia* v. *Environmental Protection Commission*, 109 Conn. App. 346, 359, 951 A.2d 704 (2008) ("[t]he impact on the wetlands and watercourses must be adverse and must be likely").

In granting the applicant's request for a new permit to conduct regulated activities on the property, the commission in the present case did not provide a collective statement of the basis of its decision, as required by § 22a-42a (d) (1).[30] Notwithstanding that statutory

[30] On the second night of deliberations, the five voting members of the commission each made statements on the merits of the application prior to voting on the motion to approve. All five commissioners opined that the revisions to the development plan proposed by the applicant would not have an adverse impact on the property's wetlands and watercourses. Under established precedent, those individual statements nonetheless cannot constitute the collective statement of the commission. See *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, 220 Conn. 527, 546 n.15, 600 A.2d 757 (1991) (it is not "appropriate for a reviewing court to attempt to glean such a formal, collective statement from the minutes of the discussion by . . . members prior to the commission's vote"); *Welch* v. *Zoning Board of Appeals*, 158 Conn. 208, 214, 257 A.2d 795 (1969) ("individual views" of board members "are not available to show the reason for, or the ground of, the board's decision"); *Verrillo* v.

imperative, our Supreme Court has held that "it is improper for [a] reviewing court to reverse an [inland wetlands] agency decision simply because an agency failed to state its reason for its decision on the record. The reviewing court instead must search the record of the hearings before that commission to determine if there is an adequate basis for its decision. . . . [P]ublic policy reasons make it practical and fair to have a [reviewing] court on appeal search the record of a local land use body . . . composed of laymen whose procedural expertise may not always comply with the multitudinous statutory mandates under which they operate." (Citations omitted; internal quotation marks omitted.) *Samperi* v. *Inland Wetlands Agency*, 226 Conn. 579, 588–89, 628 A.2d 1286 (1993). Accordingly, this court is obligated to search the record to determine whether a proper basis for the commission's decision exists.

I

The plaintiffs claim that the court improperly concluded that the commission did not violate their right to fundamental fairness. More specifically, they contend that the commission improperly considered the LandTech letter that was submitted after the close of the public hearing and improperly conditioned its approval on the submission of additional material by the applicant. We do not agree.

As our Supreme Court has explained, 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).

Zoning Board of Appeals, 155 Conn. App. 657, 674, 111 A.3d 473 (2015) (individual reasons stated by land use agency members during deliberations cannot constitute collective statement of agency).

"While proceedings before [land use 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, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary . . . . [T]he parties involved [must] have an opportunity to know the facts on which the commission is asked to act . . . and to offer rebuttal evidence. . . . In short, [t]he conduct of the hearing must be fundamentally fair." (Citations omitted; internal quotation marks omitted.) *Megin* v. *Zoning Board of Appeals*, 106 Conn. App. 602, 608–609, 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. Id., 608.

A

On appeal, the plaintiffs maintain that the commission's consideration of the Land-Tech letter was improper. Because that letter was submitted to the commission weeks after the public hearing had concluded, the plaintiffs claim that they were deprived of the opportunity to respond to its contents in violation of their right to fundamental fairness.

It is well established that municipal land use agencies "are entitled to technical and professional assistance in matters which are beyond their expertise . . . [and] such assistance may be rendered in executive session. . . . The use of such assistance, however, cannot be extended to the receipt, ex parte, of information supplied by a party to the controversy without affording his opposition an opportunity to know of the information and to offer evidence in explanation or rebuttal."

(Citations omitted.) *Pizzola* v. *Planning & Zoning Commission*, 167 Conn. 202, 208, 355 A.2d 21 (1974). That precept applies equally to information provided by a commission's own experts. As this court has noted, numerous cases "have approved the consideration of information by a local administrative agency supplied to it by its own technical or professional experts outside the confines of the administrative hearing." *Norooz* v. *Inland Wetlands Agency*, 26 Conn. App. 564, 570, 602 A.2d 613 (1992). At the same time, "the common thread [in those cases] is that it is unfair for [any entity] to submit *additional evidence* to the [agency] without giving the other party an opportunity to respond to this additional evidence." (Emphasis in original; internal quotation marks omitted.) Id., 573. Accordingly, "[t]he proper inquiry for a reviewing court, when confronted with an administrative agency's reliance on nonrecord information provided by its technical or professional experts, is a determination of whether the challenged material includes or is based on any fact or evidence that was not previously presented at the public hearing in the matter." Id., 573–74.

On the final night of the public hearing in the present case, Allan responded on behalf of Land-Tech to various concerns raised about the pending application. He nevertheless was hesitant to address "some of the engineering issues" that had been raised in letters from Purnell's experts, as he was not a professional engineer. For that reason, Allan agreed to have Land-Tech submit written comments to the commission on those issues after the public hearing concluded. When Purnell voiced her concern about not being able to respond to Land-Tech's forthcoming comments, Wadelton informed her that Land-Tech "is merely going to respond to information that your experts provided."

In its subsequent letter, Land-Tech did exactly that. That letter began by noting that the commission had

asked Land-Tech "to review and comment on two letters received by the [c]ommission at the July 12, 2018 public hearing." The letter then responded point by point to the concerns enumerated in written correspondence that the commission had received from Towne Engineering, Inc., and Trinkaus Engineering, LLC. Although Land-Tech disagreed with the majority of the concerns and conclusions set forth by those experts, it agreed that the development plan before the commission contained some minor discrepancies and errors. See footnote 27 of this opinion. Land-Tech further opined that certain "comments contained in the Towne Engineering letter regarding plan inconsistencies, errors or conflicts can be addressed, where warranted, by the applicant in a final set of construction plans/reports as a condition of approval, if the application is approved. It is our opinion that these revisions/corrections will not materially change the development proposal or its potential for wetland impacts." In addition, Land-Tech emphasized that "[a]ny *material* changes to the [final set of] plans, such as relocation of the water main, structures, driveways, septic system components, stormwater drainage system components, etc. will require re-submission of plans and an application to the [c]ommission." (Emphasis added.)

On appeal, the plaintiffs have identified only one piece of information referenced in the Land-Tech letter that allegedly was not presented at the public hearing—what they term the "deep test pit data critical for review of the large wet ponds and rain gardens" proposed by the applicant.[31] That information was not new to the commission or the plaintiffs. It is undisputed that the applicant furnished the deep test pit data referenced in the Land-Tech letter to the commission in 2010 in

[31] In its letter, Land-Tech stated that it previously had reviewed test hole data supplied by the applicant for the "proposed rain garden locations" and "the two stormwater ponds . . . ."

connection with the 2008 permit process, as reflected in Land-Tech's October 5, 2011 correspondence with the commission, which is contained in the record before us. Moreover, Szymanski, in an April 6, 2018 letter to the commission regarding that test pit information, quoted directly from that October 5, 2011 correspondence in detailing the nature of those test pits, which information he also recited at the fourth night of the public hearing.[32]

In this regard, it bears emphasis that, on the first night of the public hearing on the new application in 2018, Szymanski explained that the applicant was requesting "that the prior approvals and record [of the 2008 permit] be incorporated" into the record of the new application. Purnell then opined that, because "[t]his is a new application," the commission should "insist that all the material in support of the application [is] included in the file . . . ." In response, Szymanski reiterated that "[t]he record was requested to be incorporated that was previously approved. The . . . reason

[32] In his April 6, 2018 letter to the commission, Szymanski stated in relevant part: "Land-Tech Consultants . . . reviewed the applicant's test pit profiles and the permeability testing results. . . . Test hole data for the two stormwater ponds indicate seasonal high groundwater conditions. The soil data indicates seasonally fluctuating groundwater with a maximum height of [two to three] feet below existing grade in the vicinity of the basins. The stormwater ponds have been designed to maintain a wet bottom, with ponded water to a depth of the lowest basin outlets. The basins are designed such that stormwater storage volume is calculated above the lowest basin outlets and there is no credit for storage below these invert elevations. Any groundwater seeping into the ponds will be continuously drained via the lowest pond outlets with little impact on pond elevations or pond storage volume. Based on [a] review of the basin sizing calculations, the presence of groundwater will not impact the operation of the basins and will not result in the loss of any basin capacity. Soil permeability data has been provided by the applicant for six soil tests conducted within proposed rain garden locations. Undisturbed soil samples were taken at [thirty-six] inch depths for testing. The [thirty-six] inch depth corresponds with the proposed depth of the undisturbed subgrade soils below pervious material used to construct the rain gardens. The permeability tests indicate that the subgrade soils have adequate infiltration capacity. Permeability rates range from approximately [one] foot per day to [eight feet] per day. The applicant's

is . . . it went through an extensive amount of review by a third-party engineer that [the commission] retained on [its] behalf to protect [its] interests. So . . . to not incorporate that would be to ignore the years of work that this commission and the applicant and those who are opposed or in favor of the application did to arrive at the conclusions that were arrived at. To . . . somehow state that all of that should be ignored, just from a commonsense perspective, doesn't make sense. . . . [T]he prior approval was based on that record. It . . . should be incorporated because that's the basis for what we're requesting [for] these minor little tweaks to the [development plan]. I mean . . . [the plan] hasn't changed. The drainage calculations are the same as they were. There's no change. So whether it's taken from one box and put into another box or there's a fresh print it's the same thing."

Purnell then asked, "[a]re we going to incorporate everything all the way back to 2008? Is that what we're talking about?" At that time, the commission's legal counsel interjected: "I appreciate where you're coming from, but there's also a very significant principle under the law that a commission cannot overrule itself absent some significant change in circumstances. They can't turn around . . . one commission can't turn around five years later [and] overturn themselves. And again, that's . . . it's a principle, it's established Supreme Court precedent. There has to be some kind of significant change in circumstances that justifies a commission changing their mind on something they had previously approved. And the reason for that is so that any applicant can rely . . . on their permit or their approval . . . and that it won't be subject to . . . the changing winds of commission members who come and go. . . . There needs to be finality in decision and that's

soil scientist has also stated that seasonal high groundwater conditions were not encountered at the [thirty-six] inch testing depth."

why . . . you have the right to appeal . . . at the time that those decisions are made." When Purnell replied, "I completely understand that," counsel again noted that the applicant had "incorporated [the] documents [from the 2008 permit] into this record."

Moreover, on the second night of the hearing, Wadelton clarified that, at the request of the applicant, "all the previous submissions" would be included in the record. When Purnell asked if that included "all the boxes" of material from the 2008 permit, Wadelton stated: "You've been going through these files since day one," to which Purnell replied, "Yeah, I follow." Wadelton then noted, "I believe you've seen everything that's there." Purnell's knowledge of the record of the 2008 permit proceedings again was discussed during the fourth night of the public hearing, when Wadelton reminded her that there had been a "big discussion" earlier in the hearing as to whether the commission was "going to include everything from all the previous applications." The following colloquy then ensued:

"[Wadelton]: I've been going over that data for eight years now. I'm very familiar [with] what's in [the record of the 2008 permit], and . . . so are you.

"[Purnell]: . . . I know.

"[Wadelton]: Okay. You know everything that's in there . . . ."

More importantly, the record before us demonstrates that Purnell was well acquainted with the deep test pit data in question. In her remarks on the first night of the public hearing, Purnell specifically referenced those test pits and demonstrated a degree of familiarity therewith, stating, in relevant part: "[There are] two deep test pits . . . that have . . . been done on this property. One is in Wet Pond 1 and one is in Wet Pond 2. . . . [T]hey do not bear the typical signature of the

soils that you find in those particular areas or that you would expect to find based on the [National Resources Conservation Service] data."[33] In addition, Purnell submitted a report into evidence at the public hearing that included "[d]eep test pit data" on the property.

The record thus demonstrates that the deep test pit data in question was part of the record of the 2008 permit, which the applicant incorporated by reference into the present proceeding, and it was discussed in detail by Purnell and Szymanski at the public hearing. We therefore conclude that, on the particular facts of this case, the commission's posthearing receipt of the Land-Tech letter referencing that information did not violate the plaintiffs' right to fundamental fairness.

B

The plaintiffs also claim that the commission improperly conditioned its approval on the submission of additional material by the applicant. They contend that the final three conditions imposed by the commission, which required the applicant to submit revised calculations regarding certain stormwater discharge rates, revised outlet control details, and a "final plan set," violate their right to fundamental fairness.[34] We do not agree.

[33] At the public hearing, Szymanski responded to Purnell's comments on the deep test pit data, stating, in relevant part: "[Those] test pits were performed at the request of Land-Tech. They agreed with the findings of the test pits. . . . So the test pits were performed at the request of [the commission's] third-party engineer. They reviewed it. They . . . felt that [it] satisfactorily addressed their concerns."

[34] Those three conditions state in full:

"8. Regarding the routed discharge rates for Pond #1 and #2 for the [twenty-five] year storm and the rates used to calculate the outlet protection at these discharge points, the applicant shall revise the calculation as necessary and submit the revised calculations and plans to the Land Use Office and [c]ommission's professional consultant for review prior to the commencement of demolition and construction.

"9. The outlet control details shall be revised to be consistent with the stormwater management report calculations provided on the final plan set.

"10. The applicant shall prepare a minimum of three full plan sets incorpo-

As our Supreme Court has noted, the appellate courts of this state "previously have held that conditional approvals of wetland permit applications are permissible." *Finley* v. *Inland Wetlands Commission*, 289 Conn. 12, 42, 959 A.2d 569 (2008); see also General Statutes § 22a-42a (d) (1) (inland wetlands agency may impose conditions on permit to conduct regulated activity); *Bochanis* v. *Sweeney*, 148 Conn. App. 616, 620 n.7, 86 A.3d 486 (inland wetlands agency "had the authority to grant the permit only upon the [applicants'] fulfillment of certain conditions"), cert. denied, 311 Conn. 949, 90 A.3d 978 (2014).

The conditions imposed by the commission in the present case were based on recommendations from its consultants at Land-Tech in response to comments from Purnell's experts at Towne Engineering, Inc. The conditions required the applicant to make certain revisions to its development plan. Furthermore, Land-Tech advised the commission that "these revisions/corrections will not materially change the development proposal or its potential for wetland impacts."

The present case thus resembles *Gardiner* v. *Conservation Commission*, 222 Conn. 98, 106, 608 A.2d 672 (1992), in which a land use commission attached conditions to its permit approval that required the applicant to submit additional calculations in response to a request for that information. As in the present case, the plaintiff in *Gardiner* who challenged the propriety of the commission's decision did not allege that "any of the conditions were unreasonable" but, nevertheless, maintained that, "because they require the submission of information that will not be subjected to the scrutiny of a public hearing, his . . . right to a fair hearing [was]

rating all revisions and conditions of approval and submit them to the Land Use Office and to [Land-Tech] for review prior to the commencement of demolition and construction."

violated." Id. Our Supreme Court rejected that contention, stating: "To adopt [the plaintiff's] view would inhibit an inland wetlands agency in imposing such conditions as it deemed necessary to safeguard against the risk of pollution in the light of concerns raised during its deliberations. We conclude that [the plaintiff's] rights were not violated merely by the attachment to a permit of conditions that required the submission of further information after the agency's decision had been rendered." Id.; see also *Finley* v. *Inland Wetlands Commission*, supra, 289 Conn. 52–53 (*Norcott*, *J.*, concurring) ("the commission had the general authority pursuant to § 22a-42a (d) (1) to facilitate the progress of applications that otherwise would fail to comply with the comprehensive environmental regulatory scheme by conditioning their approval on the implementation of measures to cure those deficiencies"). That same logic applies here.

Moreover, the court in *Gardiner* emphasized that the plaintiff was not without recourse in the event that the information submitted by the applicant in response to the conditions of approval raised additional concerns. As it explained: "At this time . . . there has been no violation of [the plaintiff's] right to a fair hearing. We do not know precisely what information will be submitted or what its significance will be with respect to the need for modifications of [the applicant's] proposal. The commission may well provide an opportunity for [the plaintiff] or other interested persons to challenge the information when it is furnished. . . . [A]dministrative boards [should] allow such an opportunity when information pertinent to an application is requested . . . . It is conceivable that an additional public hearing may be held if the information requested should raise serious concerns among the commission members about the likelihood of pollution." (Citations omitted.) *Gardiner* v. *Conservation Commission*, supra, 222

Conn. 104. Furthermore, because the wetlands regulations in that case authorized the commission to revoke a permit if "an activity for which it has granted a permit, or granted a permit with conditions, has had a more severe impact or effect on the inland wetland or watercourse than was projected by the applicant"; (footnote omitted; internal quotation marks omitted.) id.; the court emphasized that the plaintiff would "have an opportunity to review [the applicant's] submission and to inform the commission of any inadequacies that he may discover or any additional concerns raised by the information received." Id., 105.

The regulations in the present case contain two similar provisions. Section 12.09 (a) of the regulations recognizes that the commission "has relied in whole or in part on information provided by the applicant" and then provides that, "if such information subsequently proves to be false, deceptive, incomplete, or inaccurate, the permit may be modified, suspended, or revoked." Section 15.05 similarly authorizes the commission to "suspend or revoke a permit if it finds that the permittee has not complied with the terms, conditions, or limitations set forth in the permit or has exceeded the scope of the work as set forth in the application including application plans. . . . The [commission] shall hold a hearing to provide the [applicant] an opportunity to show that it is in compliance with its permit and any and all requirements for retention of the permit." Washington Inland Wetlands and Watercourses Regs., § 15.05. Accordingly, the commission very well may conduct a hearing in response to the applicant's submission of the additional material required by the final three conditions of approval. We note in this regard that, in its posthearing letter, Land-Tech repeatedly advised the commission that "[a]ny material changes" to the applicant's proposal contained therein would

require the "[resubmission] of plans and an application [for a modification] to the commission."

The three conditions at issue were imposed by the commission in response to feedback it received from both Land-Tech and Purnell's experts. Moreover, those conditions obligated the applicant to take specific actions to bring the proposed development plan into compliance with applicable legal and regulatory requirements. See *Finley* v. *Inland Wetlands Commission*, supra, 289 Conn. 42. We therefore conclude that the imposition of those conditions did not violate the plaintiffs' right to fundamental fairness.

II

The plaintiffs also argue that the court improperly concluded that the commission applied a correct legal standard in reviewing the permit application in 2018. That claim presents a question of law over which our review is plenary. See, e.g., *Hartford Courant Co.* v. *Freedom of Information Commission*, 261 Conn. 86, 96–97, 801 A.2d 759 (2002).

The plaintiffs' claim is predicated on their contention that the commission, in adhering to the impotent to reverse rule, improperly failed to conduct a de novo review of every aspect of the application in question. They misunderstand the nature of that rule.

The impotent to reverse rule has governed the conduct of municipal administrative agencies in this state for more than ninety years. See, e.g., *Grillo* v. *Zoning Board of Appeals*, 206 Conn. 362, 367, 537 A.2d 1030 (1988); *Mynyk* v. *Board of Zoning Appeals*, 151 Conn. 34, 37, 193 A.2d 519 (1963); *Hoffman* v. *Kelly*, 138 Conn. 614, 616–17, 88 A.2d 382 (1952); *St. Patrick's Church Corp.* v. *Daniels*, 113 Conn. 132, 137, 154 A. 343 (1931). As our Supreme Court has explained, "[f]rom the inception of [land use regulation] to the present time, we

have uniformly held that a [municipal land use agency] should not ordinarily be permitted to review 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." (Citations omitted.) *Mitchell Land Co.* v. *Planning & Zoning Board of Appeals*, 140 Conn. 527, 533, 102 A.2d 316 (1953).

At the same time, the court has recognized that, although "[f]inality of decision is . . . desirable" in the administrative context; id., 534; that principle "is by no means inflexible." *Middlesex Theatre, Inc.* v. *Hickey*, 128 Conn. 20, 22, 20 A.2d 412 (1941). 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." *Malmstrom* v. *Zoning Board of Appeals*, 152 Conn. 385, 390–91, 207 A.2d 375 (1965). Mere change in conditions or other factors is not enough; only proof of material change permits an agency to reconsider its prior determination. See, e.g., *Sipperley* v. *Board of Appeals on Zoning*, 140 Conn. 164, 168, 98 A.2d 907 (1953), overruled in part on other grounds by *Fiorilla* v. *Zoning Board of Appeals*, 144 Conn. 275, 279, 129 A.2d 619 (1957); *Rommell* v. *Walsh*, 127 Conn. 272, 277, 16 A.2d 483 (1940); *Burr* v. *Rago*, 120 Conn. 287, 292–93, 180 A. 444 (1935). 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." *Fiorilla* v. *Zoning Board of Appeals*, 144 Conn. 275, 279, 129 A.2d 619 (1957).

The application at issue in this appeal was filed against the backdrop of the 2008 permit, as most recently modified on June 14, 2017. The application materials expressly indicated that the applicant was seeking "reapproval" of the expired 2008 permit, as the proposal consisted of only "a few minor changes" to the development plan to ensure building code compliance. The application expressly incorporated by reference plans that previously had been submitted to the commission in connection with the 2008 permit and further noted that the application was "based on the previously permitted project that has been thoroughly vetted." Given the overwhelming similarity between that application and the 2008 permit, which both sought permission to conduct regulated activities on the property as part of a plan to develop an inn and related appurtenances, we conclude that the commission was well within its discretion to determine that the relief requested in both applications was substantially the same.

The critical question, then, is whether "there has been a change of conditions or other considerations have intervened which materially affect the merits of the matter decided." *Malmstrom* v. *Zoning Board of Appeals*, supra, 152 Conn. 390–91. At the outset of the public hearing conducted in response to the petition from Washington residents, Wadelton explained that, in the absence of proof of material change, the impotent to reverse rule precluded reconsideration of prior determinations made by the commission as part of the 2018 permit. Because the commission already had approved the 2008 permit and numerous modifications, he stated that the commission could not revisit its prior determinations "unless there has been a significant change to

what was previously approved." For that reason, Wadelton asked all in attendance to "limit your comments to . . . what [has] changed significantly from what was approved [as part of the 2008 permit]."

When Purnell later opined at the second night of the hearing that this was a new application that required de novo review of every aspect of the applicant's proposal, Wadelton disagreed, noting that, "for us to go back and reverse decisions, many, several decisions [made as part of the 2008 permit], we need to see [evidence of] significant change . . . ." The commission subsequently received a letter from Washington resident Howard J. Barnet dated May 30, 2018. Although he conceded that he was "not an expert in land use law," Barnet opined that the commission was "applying the wrong legal standard to evaluate the current application" and stated that "[t]his application must be considered on a *de novo* basis." (Emphasis in original.)

In response, the commission sought the advice of its land use counsel, Attorney Kari L. Olson. In her June 18, 2018 memorandum to the commission, Olson disagreed with Purnell and Barnet's contention that the commission was not only permitted but required to conduct a de novo review of every aspect of the new application. She first provided a detailed overview of the impotent to reverse rule, quoting directly from decisions of our Supreme Court and this court. Olson then applied that established precedent to the pending matter, stating: "Thus, regardless of what you call the [a]pplication—new or renewed—this [c]ommission cannot reverse a decision already rendered unless there has been a change of condition or other considerations that materially affect the original decision have intervened and no vested rights have arisen. The linchpin to either [ground] for changing the [c]ommission's mind is the need for the [c]ommission to focus on what has changed between its approval of the lapsed permit and the new

[a]pplication. Thus, it is up to the [c]ommission to determine whether the [a]pplication involves significantly different regulated activities. It also is for the [c]ommission to decide whether there has been a change of condition or other material consideration in the intervening years. To that end, the [c]ommission can require as much information and expert opinion as it deems appropriate under the [r]egulations. But at the end of the day, in the absence of a change in condition or material consideration with no vested rights, the [c]ommission cannot properly overrule its earlier determination." Olson also provided a summary of that memorandum for commission members on the fourth night of the public hearing.

During its subsequent deliberations on the application, the commission recognized that it could only revisit its prior determinations if it first concluded that a material change existed. As one unidentified commission member stated, "you can't reopen everything." The commission then proceeded to consider whether any significant changes had transpired that materially affected the merits of its earlier determinations before ultimately deciding to grant the permit application.[35]

We conclude that the commission properly applied the impotent to reverse rule in the present case. The applicant was seeking the same relief as that sought as

[35] We recognize that both the commission and its legal counsel at times used the term "significant" rather than "material" to describe the metric of any change of conditions or considerations. In the context of the impotent to reverse rule, that is a distinction without a difference. See Black's Law Dictionary (9th Ed. 2009) p. 1066 (defining "material" in relevant part as "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant"); see also *United States ex rel. Moore & Co., P.A.* v. *Majestic Blue Fisheries, LLC*, 812 F.3d 294, 306 (3d Cir. 2016) (noting that " 'material' is defined as 'significant, influential, or relevant' "); *Cuyahoga Metropolitan Housing Authority* v. *United States*, 65 Fed. Cl. 534, 552 n.20 (2005) (noting that "various courts have defined 'material' as meaning 'significant' ").

part of the 2008 permit, and it presented an application that was largely identical to what had been proposed in the 2008 permit, as most recently modified on June 14, 2017.[36] The record demonstrates that the members of the commission understood that, with respect to any of its prior determinations that were made as part of the 2008 permit and the nine modifications thereof, they were permitted to reconsider those determinations only upon a finding that a change of conditions or other considerations had occurred that materially affected the merits of the matter previously decided.

Furthermore, the predicate finding as to whether any material changes had transpired was, in the first instance, a question of fact for the commission to resolve. See, e.g., *Bradley* v. *Inland Wetlands Agency*, supra, 28 Conn. App. 51. Because the commission did not reverse any of its prior determinations, it implicitly found that no material changes affecting those determinations occurred. That finding is reviewed on appeal pursuant to the substantial evidence standard. See *Shanahan* v. *Dept. of Environmental Protection*, 305 Conn. 681, 700, 47 A.3d 364 (2012).

"In challenging an administrative agency action, the plaintiff has the burden of proof. . . . The plaintiff must do more than simply show that another decision maker, such as the trial court, might have reached a different conclusion. Rather than asking the reviewing court to retry the case de novo . . . the plaintiff must establish that substantial evidence does not exist in the record as a whole to support the agency's decision. . . . In reviewing an inland wetlands agency decision made pursuant to the act, the reviewing court must

[36] During the commission's deliberations, Wadelton reminded his colleagues that, although "[t]here definitely have [been] some . . . considerable changes to the plans . . . we have to remember that each time those changes were made they came before the commission, the commission considered those [changes] and approved it . . . ."

sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given. . . . The evidence, however, to support any such reason must be substantial; [t]he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency." (Internal quotation marks omitted.) *Finley* v. *Inland Wetlands Commission*, supra, 289 Conn. 37–38.

"As our Supreme Court has explained, the substantial evidence standard is a compromise between opposing theories of broad or de novo review and restricted review or complete abstention. . . . The substantial evidence standard has been described as a test that is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . Plainly, then, substantial evidence and clearly erroneous are not synonymous standards. . . . The distinction between the clearly erroneous and substantial evidence standards is not an academic one. The clearly erroneous standard of review provides that [a] court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . The substantial evidence standard is even more deferential. Under the substantial evidence standard, a reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . . Significantly, substantial evidence is something less than the weight of the evidence. . . . The substantial evidence standard imposes an important limitation on the power of the courts to overturn a decision of an administrative

agency . . . and [provides] a more restrictive standard of review than [the] clearly erroneous [standard of review]. . . . Because that standard permits less judicial scrutiny than the clearly erroneous standard of review . . . [t]he term substantial evidence appears to be something of a misnomer." (Citations omitted; internal quotation marks omitted.) *Three Levels Corp.* v. *Conservation Commission*, supra, 148 Conn. App. 100–102.

The record before us contains evidence to substantiate a finding that no change of conditions or other considerations had intervened since the 2008 permit last was modified in July, 2017, that materially affected the merits of the commission's prior determinations. Apart from the ample documentary and testimonial evidence introduced over the course of five evenings by the applicant, the record contains two written opinions from Land-Tech, a consultant that the commission retained to evaluate the application before it. In its June 8, 2018 report, Land-Tech advised the commission that "[t]he current application . . . is for the most part identical to the previously approved [2008 permit] with some minor revisions. . . . It is our opinion that these plan modifications are minor in scope and will not result in any impacts to wetlands or watercourses." In its July 25, 2018 letter issued in response to comments from Purnell's experts, Land-Tech opined the certain "revisions/corrections [in response to those comments] will not materially change the development proposal or its potential for wetlands impacts." The commission, as the arbiter of credibility, was entitled to credit that advice. See, e.g., *Three Levels Corp.* v. *Conservation Commission*, supra, 148 Conn. App. 126; *Bradley* v. *Inland Wetlands Agency*, supra, 28 Conn. App. 53.

In its appellate briefs, the plaintiffs list a litany of changes to the plan originally proposed for the property in 2008, including the undisputed fact that a fire in 2017

destroyed what previously was the main building and that the proposed use at one point was changed from a school to an inn. Those changes nonetheless were the subject of prior, approved modifications to the 2008 permit and, thus, cannot constitute a new material change. See, e.g., *Spencer* v. *Board of Zoning Appeals*, 141 Conn. 155, 160, 104 A.2d 373 (1954) (land use agency cannot reverse its prior determination when "[t]he application and the evidence to support it . . . are not essentially different from the application and the evidence previously presented" to agency).

Moreover, as our Supreme Court has observed, "[t]he [appellants] misconceive the import of the principle under discussion. The considerations [embodied in the impotent to reverse rule] do not refer to newly thought of grounds which could have been presented by the earlier application and are recited in a subsequent application asking for relief substantially identical [to] that previously sought. To fall within the principle, the consideration must relate to something that was not and could not have been advanced as a reason . . . upon the prior application. It must relate to some material new factor which was nonexistent when the prior application was [decided]." *Sipperley* v. *Board of Appeals on Zoning*, supra, 140 Conn. 168; see also *Burr* v. *Rago*, supra, 120 Conn. 293 (emphasizing that inquiry centers on whether " 'new conditions have arisen' " and cautioning against giving "too broad a scope to the question of material changes"). Accordingly, the commission properly could determine that any purported changes that were, or could have been, raised during the 2008 permit approval process were not germane to the present application and, thus, were subject to the impotent to reverse rule.

Furthermore, with respect to several new changes identified by the plaintiffs, such as alterations to the septic system design, the water supply plan, the stormwater

management report, the catch basin size, the precipitation data, and the removal of trees along Kirby Brook, the record reveals that those issues were discussed during the public hearing, and there is no indication in the record that they were not subject to de novo review by the commission.[37] Indeed, the commission received evidence on those matters and solicited expert advice thereon from its own consultants. The commission nonetheless concluded that a review of that evidence did not demonstrate that the activities proposed by the applicants were likely to cause an adverse impact to wetlands or watercourses. Cf. *River Bend Associates, Inc.* v. *Conservation & Inland Wetlands Commission*, supra, 269 Conn. 75.

In the present case, the commission was presented with an application that was substantially identical to the one that had been subject to the commission's prior scrutiny, which resulted in the approval of the 2008 permit and its nine modifications. On our review of the record, we conclude that the commission reasonably could conclude that there had not been a change of conditions or other considerations since the 2008 permit last was modified in 2017 that materially affected the merits of the commission's prior determinations. Accordingly, the commission properly applied the impotent to reverse rule and confined its de novo review to the new aspects of the proposal submitted by the applicant.

III

The plaintiffs contend that the court improperly concluded that the commission's decision was supported

[37] We reiterate that, after conducting an initial review of the application at its regular meeting on February 14, 2018, and a site inspection of the property on March 27, 2018, the commission held a public hearing on the application over the course of five nights between April 3 and July 11, 2018. The commission then deliberated the merits of the application for two nights on July 31 and August 14, 2018. As the voluminous return of record before us indicates, the commission's review of the present application was exhaustive.

by substantial evidence. They claim that the applicant's submission was incomplete, as it lacked certain items required by the regulations. We disagree.

The General Statutes require applications for a permit to conduct regulated activities to be "in such form and contain such information as the [municipal] inland wetlands agency may prescribe." General Statutes § 22a-42a (c) (1). The regulations here require applications to "contain such information as is necessary for the [commission] to make a fair and informed determination as to the potential impact on wetlands and/or watercourses of any . . . regulated activity." Washington Inland Wetlands and Watercourses Regs., § 8.03. Section 8.05 of the regulations enumerates several items that "[a]ll applications shall include . . . in writing or on maps or drawings," including a "description of the land in sufficient detail to allow identification of the inland wetlands, watercourses, and upland review areas, the area(s) . . . of wetlands or watercourses to be disturbed, soil type(s), and wetland vegetation," a "site plan showing the proposed activity," and a "detailed construction sequence and construction schedule." Section 8.05 concludes with a notable proviso, which states: "Notwithstanding the foregoing provisions, the [commission] may excuse compliance with any specific requirement of this Section 8.05 if it finds that the information is not necessary to enable [the commission] to determine whether the proposed activities will cause or create the risk of detrimental impacts to wetlands or watercourses."[38]

As one treatise on land use in this state observes, "case law gives little guidance as to what is considered a complete application or a sufficient submission . . . ."

[38] In addition, § 8.06 of the regulations lists several additional items that may be required "[a]t the discretion of the [commission] or when the proposed activity involves a potential significant impact . . . ."

R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 19:3, p. 585. That lack of guidance likely is attributable to the fact that inland wetlands agencies across Connecticut are statutorily authorized to establish their own regulatory requirements for permit applications. See General Statutes § 22a-42a (c) (1). What is clear is that the determination of whether an application is complete belongs to the land use agency in the first instance. The regulations in the present case authorize the commission to deny a permit application that it concludes is incomplete. Washington Inland Wetlands and Watercourses Regs., § 9.08; accord *Three Levels Corp.* v. *Conservation Commission*, supra, 148 Conn. App. 114 ("[a] commission is entitled to deny an application before it due to incompleteness").

The regulations also contemplate an initial review of a permit application by the commission's staff to ensure that it comports with the requirements of § 8 of the regulations. Section 9.01 provides in relevant part that "applicants are urged to submit their applications and written requests well ahead of [commission] meetings to allow [the commission's] staff to check them for completeness and, if necessary, to allow applicants time to submit missing information." That transpired here, as the record indicates that the applicant made an initial submission to the commission in February, 2018. On February 14, 2018, Janet M. Hill, the commission's administrative assistant, sent an e-mail to Szymanski regarding the commission's "application review for completeness." Attached to that e-mail was a memorandum that noted certain omissions in the submitted application.[39] In a letter sent to Hill that same day, Szymanski

[39] Specifically, that memorandum noted that "[s]pecifics on amount, type, and location of materials to be removed, stockpiled, or deposited not provided," "[c]onstruction sequence not provided," "[i]nfo such as when the work will be done, duration of work, equipment to be used, etc. not provided," "the pertinent section of the [United States Geological Survey] map"

responded to each of those concerns and supplemented the application accordingly. No further concerns were raised by the commission's staff or the commission itself regarding the completeness of the application.

On appeal, the plaintiffs renew their claim that the application before the commission was incomplete. A land use agency's determination on that issue is reviewed pursuant to the substantial evidence standard. See *Unistar Properties, LLC* v. *Conservation & Inland Wetlands Commission*, 293 Conn. 93, 113–14, 119–20, 977 A.2d 127 (2009). Under that standard, "the metric applied by a reviewing court is not whether the weight of the evidence supports the finding. As our Supreme Court repeatedly has explained, the substantial evidence test is something less than the weight of the evidence standard. . . . [T]he substantial evidence test permits less judicial scrutiny than the clearly erroneous standard of review. . . . Accordingly, if the record contains any evidence tending to substantiate the commission's finding in a given instance, that determination must stand under the substantial evidence test." (Citations omitted; internal quotation marks omitted.) *Three Levels Corp.* v. *Conservation Commission*, supra, 148 Conn. App. 127–28. In challenging the commission's determination, "the plaintiff carries the burden of proof to show that the challenged action is not supported by the record." *Unistar Properties, LLC* v. *Conservation & Inland Wetlands Commission*, supra, 113.

The plaintiffs claim that the application was deficient in five respects, in that it allegedly lacked (1) "septic repair and installation information," as requested in § III (2) of the application form, (2) the "amount, type and location of materials to be removed, stockpiled, or deposited," as requested in § IV (2) of the application

was not provided, and the "[e]rosion and [s]edimentation [c]ontrol [p]lan was not included."

form, (3) a statement as to "[a]lternatives considered," as requested in § IV (4) of the application form, (4) a stormwater management report, which is not required on the application form, and (5) a written report prepared by a soil scientist, which also is not required on the application form unless "a [s]oil [s]cientist is involved . . . ." We address each in turn.

We begin with the issue of the proposed septic system for the property. On the completed application form that it submitted to the commission, the applicant stated that there would be "[n]o modification to leach fields" currently on the property. At the public hearing, Szymanski reiterated that the applicant was proposing no change to the existing septic system design. At the public hearing, Purnell submitted into evidence a copy of the specifications for the existing septic system on the property. The record includes additional details as to that design in a letter that the applicant submitted to the wastewater management division at the Department of Environmental Protection (now the Department of Energy and Environmental Protection) as part of the 2008 permit process, which Purnell appended to her June 20, 2018 written submission to the commission. Moreover, the septic system is memorialized on the site plan submitted by the applicant.

With respect to the type and location of materials to be removed, stockpiled, or deposited on the property, the completed application states: "Placement of utility conduit, water mains, sanitary lines, pavement, modified riprap, driveway base per detailed plans previously proposed." In his February 14, 2018 letter to Hill, Szymanski also explained that "[t]he only changes proposed since the [2008 permit] is approximately [ten] cubic yards of fill on the east and west for emergency egress and the grass paver gathering areas." In addition, the specifics regarding those materials are depicted on the construction sequence sheets, the sedimentation

and erosion control plan, the planting plan, and the detail sheets contained in the applicant's site plan.

The application form also asks applicants to "[d]escribe alternatives considered and why the proposal described herein was chosen . . . ." In its completed application, the applicant stated that it considered, as an alternative, "utilizing [the] existing site as it was," but noted that the existing site contained "structures and lawn within the wetlands." The applicant further explained that "[a] detailed mitigation plan was previously approved [as part of the 2008 permit] and is still proposed to remove the previous direct impacts to the wetlands as well as [to] improve the regulated area."

As to the issue of stormwater management, the applicant submitted a 209 page stormwater management report prepared for the property in connection with the 2008 permit dated September 7, 2010, as most recently revised to June 18, 2018. Both the experts retained by Purnell and the commission's consultants at Land-Tech reviewed that stormwater management report and commented thereon during the public hearing. The commission, as the arbiter of credibility, was entitled to credit that evidence in concluding that the application satisfied the regulatory requirements. See, e.g., *Unistar Properties, LLC* v. *Conservation & Inland Wetlands Commission*, supra, 293 Conn. 123 ("[i]t is well established that credibility . . . determinations are solely within the province of the commission"); *Briggs* v. *State Employees Retirement Commission*, 210 Conn. 214, 217, 554 A.2d 292 (1989) (court "must defer . . . to the agency's right to believe or disbelieve the evidence presented by any witness . . . in whole or in part"); *Slootskin* v. *Commission on Human Rights & Opportunities*, 72 Conn. App. 452, 463, 806 A.2d 87 (court cannot substitute its judgment for that of agency as to weight of evidence on question of fact), cert. denied, 262 Conn. 910, 810 A.2d 275 (2002).

Last, with respect to the alleged omission of a soil data report, we note that § 8.05 of the regulations contains no such requirement for permit applications. Rather, § 8.06 of the regulations provides that the submission of a soil data report is required only "[a]t the discretion" of the commission or when the proposed activity involves a potential significant impact. In such instances, an applicant must provide a "[d]elineation of wetlands and watercourses on the site by a certified soil scientist and their depiction on the site plan. The soil scientist's report and sketch map or a statement by the soil scientist verifying the location of wetlands and watercourses shown on the site plan shall be submitted." Washington Inland Wetlands and Watercourses Regs., § 8.06 (d). It nonetheless remains that the applicant delineated the boundaries of the wetlands and watercourses on the property and the soil types on the site plan that was submitted to the commission. The applicant also submitted a map of soils on the property that was prepared for a prior owner and that previously was introduced during the 2008 permit process.

As we discussed in part I A of this opinion, the applicant incorporated the record of the 2008 permit, including soil data reports, into the present record. Purnell's discussion of that soil data during the public hearing in 2018 belies the plaintiffs' claim on appeal that "[Purnell] and her experts were foreclosed from reviewing this essential information." Furthermore, as commission members noted during the first night of the public hearing, it was "feasible" to incorporate reports previously submitted as part of the 2008 permit process "because the reports are on file here in a whole bunch of boxes." As Wadelton explained later that night, anyone interested in examining the record of the 2008 permit could "at your own time go down to the Land Use Office. You can pull the records. [The commission's administrative assistant] will help you find" the materials. That advice

is consistent with § 9.07 of the regulations, which provides that "[a]ll applications shall be open for public inspection."

On our review of the record, we conclude that it contains substantial evidence to support a determination by the commission that the application satisfied the strictures of § 8 of the regulations. The court, therefore, properly rejected the plaintiffs' claim.

IV

The plaintiffs also claim that "it was error for the [Superior Court] to uphold this [permit] approval without a feasible and prudent alternative finding" by the commission. Such a finding, the plaintiffs argue, is required by both our General Statutes and the municipal regulations. They are mistaken.

The plaintiffs' claim involves a question of statutory interpretation, over which our review is plenary. See, e.g., *Hunter Ridge, LLC* v. *Planning & Zoning Commission*, 318 Conn. 431, 436, 122 A.3d 533 (2015). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Zoning Commission*, 280 Conn. 405, 413, 908 A.2d 1033 (2006). Those maxims

also govern the construction of municipal land use regulations. See *Moon* v. *Zoning Board of Appeals*, 291 Conn. 16, 20, 966 A.2d 722 (2009); *Graff* v. *Zoning Board of Appeals*, 277 Conn. 645, 652, 894 A.2d 285 (2006).

Our analysis begins with § 22a-42a (c) (1), which provides in relevant part: "The inland wetlands agency shall *not* hold a public hearing on [an] application [for a permit to conduct regulated activities] unless the inland wetlands agency determines that the proposed activity may have a significant impact on wetlands or watercourses, a petition signed by at least twenty-five persons who are eighteen years of age or older and who reside in the municipality in which the regulated activity is proposed, requesting a hearing is filed with the agency not later than fourteen days after the date of receipt of such application, or the agency finds that a public hearing regarding such application would be in the public interest. . . ."[40] (Emphasis added.) Pursuant to the plain language of that statute, a municipal inland wetlands agency is permitted to hold a public hearing on an application to conduct regulated activities in only three instances: (1) when the agency has made a threshold determination that the proposed activity may have a significant impact on wetlands or watercourses; (2) when the agency has determined that a public hearing on the application would be in the public interest; or (3) when the agency receives a timely petition for a public hearing signed by at least twenty-five residents of the municipality in question.

In addition, with respect to any municipality "which does not regulate its wetlands and watercourses"; General Statutes § 22a-39 (i); the act authorizes the Commissioner of Energy and Environmental Protection to conduct a public hearing on applications for a permit to

[40] The regulations contain an identical provision. See Washington Inland Wetlands and Watercourses Regs., § 10.03.

conduct regulated activities in that municipality.[41] General Statutes § 22a-39 (k). Because Washington has enacted inland wetlands and watercourses regulations in accordance with the act and has designated the commission as the agency charged with regulating activities in that municipality; see footnote 2 of this opinion; § 22a-39 (k) is inapplicable to the present case.

With that context in mind, we turn to General Statutes § 22a-41 (b) (1), which specifies precisely when a "feasible and prudent alternative" finding is required under Connecticut law. That statute provides in relevant part: "In the case of an application which received a public hearing pursuant to (A) subsection (k) of section 22a-39, or (B) a finding by the inland wetlands agency that the proposed activity may have a significant impact on wetlands or watercourses, a permit shall not be issued unless the commissioner finds on the basis of the record that a feasible and prudent alternative does not exist. . . ."[42] General Statutes § 22a-41 (b) (1). Section 22a-41 (b) (1) plainly provides that a feasible and prudent alternative finding is required in only two scenarios. The first is when the Commissioner of Energy and Environmental Protection has conducted a public hearing on an application pursuant to § 22a-39 (k). The second is when the municipal land use agency held a public hearing after making a threshold determination that "the proposed activity may have a significant impact

[41] Although not germane to the present case, the act also authorizes the Commissioner of Energy and Environmental Protection to "[g]rant, deny, limit or modify . . . an application for a license or permit for any proposed regulated activity conducted by any department, agency or instrumentality of the state, except any local or regional board of education . . . ." General Statutes § 22a-39 (h).

[42] The regulations similarly provide that, "[i]n the case of an application, which received a public hearing pursuant to a finding by the [commission] that the proposed activity may have a significant impact on wetlands or watercourses, a permit shall not be issued unless the [commission] finds on the basis of the record that a feasible and prudent alternative does not exist." Washington Inland Wetlands and Watercourses Regs., § 11.03.

on wetlands or watercourses . . . .'' See General Statutes § 22a-42a (c) (1).

Neither scenario is implicated here. No hearing was held before the Commissioner of Energy and Environmental Protection. Moreover, the public hearing conducted by the commission over the course of five nights was not predicated on a finding that the activities proposed by the applicant may have a significant impact on wetlands or watercourses. Rather, that hearing was held in response to a petition signed by sixty-two residents of Washington. For that reason, the commission was not required to make a finding that no feasible and prudent alternative existed.

The plaintiffs' reliance on this court's decision in *Starble* v. *Inland Wetlands Commission*, 183 Conn. App. 280, 192 A.3d 428 (2018), is misplaced. Unlike the present case, *Starble* did not involve a public hearing held in response to a petition from local residents but, rather, one held following a determination by ''[t]he commission . . . that the proposed plan could significantly impact the wetlands . . . .'' Id., 283. *Starble* thus is a case in which the second scenario outlined in § 22a-41 (b) (1) is implicated.

Also distinguishable is the decision of our Supreme Court in *Samperi* v. *Inland Wetlands Agency*, supra, 226 Conn. 579. To be sure, the court in *Samperi* held in unequivocal terms that, ''[i]n order to issue a permit, the local inland wetlands agency must find that a feasible and prudent alternative does not exist.'' (Internal quotation marks omitted.) Id., 593. At the time of that decision, however, the operative statute, General Statutes (Rev. to 1991) § 22a-41 (b), provided in relevant part: ''In the case of an [inland wetlands permit] application which received a public hearing, a permit shall not be issued unless the commissioner finds that a feasible and prudent alternative does not exist. . . .'' Id., 581

n.1. Three years after *Samperi* was decided, the General Assembly amended that statute in Public Acts 1996, No. 96-157, § 2, thereby creating subdivisions (1) and (2) of § 22a-41 (b). Because *Samperi* antedated the enactment of the statutory requirements at issue in this case, it has no bearing on the proper construction of § 22a-41 (b) (1).

In the present case, the public hearing was held in response to a petition filed by Washington residents. Because neither of the two scenarios specified in § 22a-41 (b) (1) were implicated, the commission was not statutorily obligated to make a feasible and prudent alternative finding as a precursor to granting the permit application.

We also reject the plaintiffs' ancillary contention that the commission failed to give any consideration to feasible and prudent alternatives to the applicant's proposal in accordance with §§ 22a-19 (b) and 22a-41 (a) (2). To the contrary, the record reveals that, during the public hearing, the commission received documentary and testimonial evidence regarding feasible and prudent alternatives from Purnell, her experts from Towne Engineering, Inc., and Barnet. In addition, the applicant informed the commission, in its permit application, that it had considered "utilizing [the] existing site as it was [with] existing structures and lawn within the wetlands" as an alternative to the proposed development.

The record also indicates that commission members were cognizant of the fact that, although they were required to consider evidence of feasible and prudent alternatives, the commission was not required to make a feasible and prudent alternative finding unless it first determined that the proposal may have a significant impact on wetlands or watercourses. As Wadelton stated during the deliberations on the permit applica-

tion, "[i]t is understood by the commission and noted here that to require the applicant to adopt the findings of feasible and prudent alternatives, the commission must first find that the planned feature has a reasonable probability of causing significant adverse impacts, which would be reduced or eliminated by the alternative. In all discussion to date there has been no such finding."[43]

Furthermore, the record is replete with discussion of prior wetlands applications regarding the proposed development of the property, including nine modifications to the 2008 permit. Indeed, the applicant indicated, in the materials submitted in connection with the permit application, that it was seeking approval "based on the previously permitted project that has been thoroughly vetted." Both the applicant and Purnell provided ample evidence pertaining to those prior applications during the public hearing. As our Supreme Court has explained, "the review of multiple wetlands applications for a site can constitute the consideration by the agency of feasible and prudent alternatives." *Tarullo* v. *Inland Wetlands & Watercourses Commission*, 263 Conn. 572, 582, 821 A.2d 734 (2003). In light of the foregoing, we reject the plaintiffs' contention that the commission failed to give any consideration to the feasible and prudent alternatives raised by the parties.

The judgment is affirmed.

In this opinion the other judges concurred.

[43] Wadelton's remarks also demonstrate that the commission gave due consideration to the alternatives proposed by Purnell and her experts. He stated in relevant part that "much of what was presented as feasible and prudent alternatives were actually nothing more than valid alternative approaches to solving particular engineering problems which one would expect from two different engineers . . . . In several cases, the applicant agreed to the comments . . . and agreed to make the necessary changes to the plan."

ALDIN ASSOCIATES LIMITED PARTNERSHIP *v.* STATE OF CONNECTICUT ET AL.
(AC 44102)

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

Syllabus

The plaintiff appealed from the judgment of the trial court granting the motion to dismiss filed by the defendants, the state and the Commissioner of Energy and Environmental Protection. The plaintiff owned and operated more than five gasoline facilities that had underground storage tanks used for petroleum products located on the premises and, accordingly, was a responsible party and a mid-size station applicant under the Act Concerning Underground Storage Tanks (§ 22a-449a et seq.), which established a clean-up program to reimburse responsible parties for costs incurred in remediating leaking underground storage tanks. The plaintiff remediated some of its properties pursuant to the act and submitted several applications to the Department of Energy and Environmental Protection, seeking reimbursement for the costs it incurred. At the time the plaintiff commenced this action, some of its applications had been approved and paid, at least one had been approved in 2009 but remained unpaid, and the commissioner had failed to act on certain other applications. The plaintiff claimed that the commissioner had unduly and unreasonably delayed the processing and payment of its applications for reimbursement under the program and sought a writ of mandamus ordering the commissioner to pay approved claims and to adjudicate its pending claims. It also sought monetary damages for the commissioner's failure to reimburse the plaintiff and to administer the program within a reasonably timely manner and further claimed that the failure to pay any approved applications and any pending applications that should have been approved violated the takings clause of article first, § 11, of the Connecticut constitution. The defendants moved to dismiss the action for lack of subject matter jurisdiction on the ground that the plaintiff's claims were barred by sovereign immunity. *Held*:

1. The trial court erred by dismissing the plaintiff's request for a writ of mandamus because such a request was not barred by sovereign immunity: contrary to the defendants' claim, to the extent that there remained applications for which the plaintiff had requested a hearing before the commissioner, the plaintiff's mandamus claim was not moot because those applications had not been finally adjudicated for purposes of filing an appeal to the Superior Court under the applicable statute (§ 22a-449g) and the trial court could grant the plaintiff practical relief by ordering the defendants to hold hearings in accordance with the act (§ 22a-449f (h)); moreover, this court determined that, in accordance with our Supreme Court's decisions in *C. R. Klewin Northeast, LLC* v.

Fleming (284 Conn. 250) and *Gold* v. *Rowland* (296 Conn. 186), which required claims for injunctive relief against the state to satisfy one of the exceptions to the doctrine of sovereign immunity, there was no categorical exception to sovereign immunity for applications for writs of mandamus; furthermore, the trial court improperly determined that the plaintiff's requests for mandamus relief had to rise and fall together and, therefore, improperly dismissed the portion of the first count of the complaint seeking a writ of mandamus to compel the defendants to act on its pending applications, as established precedent confirmed that a court may dismiss a portion of a count of a complaint on the basis of sovereign immunity, our Supreme Court's decision in *Miller* v. *Egan* (265 Conn. 301) determined that sovereign immunity will not bar actions seeking declaratory or injunctive relief when the process of statutory interpretation establishes that the state defendants acted beyond their statutory authority, and the allegations in the plaintiff's complaint averred that the defendants' failure to act on its pending applications constituted actions in excess of the defendants' statutory authority; additionally, the plaintiff's mandamus claim was not tantamount to a claim for money damages, as the plaintiff was not seeking compensatory damages for losses it suffered but, rather, sought to compel the defendants to distribute funds to which the act entitled it, and the defendants' failure to pay the plaintiff's approved claim could constitute an act in excess of statutory authority because the act created a mandatory duty to pay approved applications, regardless of the fact that the statute did not specify a time period within which the payment must be made.

2. The trial court properly determined that the state had not waived its sovereign immunity under § 22a-449g and, accordingly, properly dismissed the counts of the plaintiff's complaint that sought monetary damages: the statutory authorization to appeal to the Superior Court from an adverse decision by the commissioner under § 22a-449g did not authorize an action for damages against the state; moreover, the plain language of § 22a-449g, which does not refer to a general cause of action against the state or to the defense of sovereign immunity, did not support the plaintiff's claim of implied waiver of sovereign immunity.

3. The trial court properly determined that the plaintiff had not alleged a property interest sufficient to support a finding of an unconstitutional taking under article first, § 11, of the state constitution: the plaintiff did not possess any of the incidents of ownership identified in *A. Gallo & Co.* v. *Commissioner of Environmental Protection* (309 Conn. 810), as it never possessed the money it claimed it was owed, and, therefore, could not use the money, earn income from it, or transfer it to another party; moreover, because the plaintiff had no control over the disputed funds, its interest in the money was not a vested property interest but, rather, a contingent or expectant interest.

Argued May 12, 2021—officially released January 11, 2022

Procedural History

Application for a writ of mandamus to compel the defendants to adjudicate and make payment on the plaintiff's claims in connection with the state's underground storage tank petroleum clean-up program, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. Robert B. Shapiro*, judge trial referee, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Richard P. Weinstein, with whom was *Sarah Lingenheld*, for the appellant (plaintiff).

Daniel M. Salton, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare Kindall*, solicitor general, and *Matthew I. Levine*, deputy associate attorney general, for the appellees (defendants).

Opinion

MOLL, J. The plaintiff, Aldin Associates Limited Partnership, appeals from the judgment of the trial court granting the motion to dismiss filed by the defendants, the state of Connecticut and Katie Dykes, the Commissioner of Energy and Environmental Protection (commissioner), claiming that the plaintiff's action seeking a writ of mandamus and money damages was barred by sovereign immunity. On appeal, the plaintiff claims that the court improperly granted the motion to dismiss because (1) sovereign immunity does not bar its claim for mandamus relief, (2) the state either expressly or by force of a necessary implication waived its sovereign immunity under General Statutes § 22a-449g, and (3) the plaintiff alleged a property interest protected under the takings clause of the Connecticut constitution. We conclude that the plaintiff's mandamus claim is not

barred by sovereign immunity and, accordingly, reverse in part the judgment of the court.

The following undisputed facts and procedural history are relevant to this appeal. In 1989, the General Assembly enacted legislation titled "An Act Concerning Underground Storage Tanks" (act), which established the underground storage tank petroleum clean-up fund (fund). See Public Acts 1989, No. 89-373 (P.A. 89-373), codified as amended at General Statutes (Rev. to 1991) § 22a-449a et seq. Initially, the act provided that the fund shall be credited one third of the tax imposed on gross earnings derived from the sale of petroleum products under General Statutes § 12-587 and that the fund is to be used by the commissioner to reimburse responsible parties for costs incurred in remediating leaking underground storage tanks.[1] See P.A. 89-373, §§ 3, 4 and 10. A responsible party could apply to the clean-up fund review board (board) for reimbursement from the fund. See P.A. 89-373, §§ 7 and 10.

The act was amended several times during the years following its enactment in 1989. In 1994, the legislature replaced the fund with the underground storage tank petroleum clean-up account (account). See Public Acts 1994, No. 94-130, § 6. In 2009, the General Assembly repealed General Statutes § 22a-449b, which required that a portion of tax revenue collected under § 12-587 be deposited in the account, and replaced the account with the underground storage tank petroleum clean-up program (program) to reimburse responsible parties

[1] A responsible party is "any person who . . . at any time owns, leases, uses or has an interest in the real property on which an underground storage tank system is or was located from which there is or has been a release or suspected release, regardless of when the release or suspected release occurred, or whether such person owned, leased, used or had an interest in the real property at the time the release or suspected release occurred, or whether such person owned, operated, leased or used the underground storage tank system from which the release or suspected release occurred . . . ." General Statutes § 22a-449a (3) (B).

"within available appropriations . . . ." Public Acts, Spec. Sess., June, 2009, No. 09-3, §§ 423 and 513, codified at General Statutes (Supp. 2010) § 22a-449c.

In 2012, the General Assembly replaced the board with the commissioner and cancelled the program. See Public Acts, Spec. Sess., June, 2012, No. 12-1, §§ 252 and 262, codified at General Statutes §§ 22a-449c and 22a-449s. General Statutes § 22a-449t established deadlines for applicants to apply for reimbursement under the program based on the applicant's status as a municipal, small station, mid-size station, large station, or other applicant. Section 261 of Public Act 12-1, which was codified at General Statutes (Rev. to 2013) § 22a-449r, established a reverse auction system. This system was applicable "to all applications submitted by mid-size or large station applicants before, on or after June 15, 2012, including, but not limited to, applications for which payment or reimbursement has been ordered by the commissioner but has not been made. . . ." General Statutes § 22a-449r (c) (2).

Under the reverse auction system, "priority for payment or reimbursement shall be given to those applicants who . . . agree to accept the greatest reduction in the amount ordered for payment or reimbursement by the commissioner under the program . . . ." General Statutes § 22a-449r (c) (4). Section 22a-449r (c) (2) (A) provides in relevant part: "In the fiscal year beginning July 1, 2012, no payment shall be made to mid-size station applicants in excess of thirty-five cents on each dollar the commissioner orders to be paid or reimbursed under the program. In the fiscal year beginning July 1, 2013, and each fiscal year thereafter, such amount shall increase by ten cents on each dollar per fiscal year and in such years no payment or reimbursement shall be made in excess of the amount in effect for such fiscal year. . . ."

The plaintiff owns and operates more than five gasoline facilities where underground storage tanks used for petroleum products are located and, therefore, is a responsible party and a mid-size station applicant under the act.[2] The plaintiff remediated some of its properties pursuant to the act and submitted several applications to the Department of Energy and Environmental Protection seeking reimbursement for the costs it incurred. At the time the plaintiff commenced this action, some of the plaintiff's applications had been approved and paid, at least one application had been approved in 2009 but remained unpaid, and the commissioner had failed to act on the plaintiff's remaining applications.

In 2019, the plaintiff brought this action against the defendants, claiming that the commissioner has unduly and unreasonably delayed the processing and payment of its applications for reimbursement under the program. In the first count of its complaint, the plaintiff sought a writ of mandamus ordering the commissioner "to pay approved claims and to adjudicate those pending claims [that] have not been adjudicated." In the second, fourth, and fifth counts, the plaintiff sought monetary damages on the basis of its allegations that the commissioner failed to reimburse it and failed to administer the program within a reasonably timely manner as required by the act (count two); violated the equal protection clause under article first, § 20, of the Connecticut constitution (count four); and violated the due process clause under article first, § 10, of the Connecticut constitution (count five). In the third count, the plaintiff claimed that the failure to pay any approved but unpaid applications for reimbursement under the

[2] General Statutes § 22a-449a (10) defines " '[m]id-size station applicant' " as "an applicant who owned, operated, leased, used, or had an interest in, at the time such applicant's first application was received by the underground storage tank petroleum clean-up program, six to ninety-nine separate parcels of real property, within or outside of the state, on which an underground storage tank system was or had been previously located . . . ."

act, as well as any pending applications that should be approved, violated the takings clause of article first, § 11, of the Connecticut constitution.[3]

The defendants moved to dismiss the action for lack of subject matter jurisdiction on the ground that the plaintiff's claims were barred by sovereign immunity. The defendants argued that counts one, two, four, and five of the plaintiff's complaint are claims for money damages that are barred by sovereign immunity because there is no statutory waiver of sovereign immunity and because the plaintiff did not obtain permission from the claims commissioner to bring an action against the state. See General Statutes § 4-147 ("[a]ny person wishing to present a claim against the state shall file with the Office of the Claims Commissioner a notice of claim" requesting permission to sue state). The defendants noted that the plaintiff previously had filed a claim with the claims commissioner based on the same facts as those alleged in the present action and that the claims commissioner denied the claim. As to the third count of the complaint, the defendants claimed that the plaintiff failed to allege a property interest sufficient to support its takings claim.

The plaintiff filed an objection to the motion to dismiss, along with an affidavit of Mark R. Temple, a licensed environmental professional who had prepared and filed applications for reimbursement on behalf of the plaintiff. The plaintiff argued that sovereign immunity does not bar its mandamus and takings claims and that the state waived its sovereign immunity pursuant to § 22a-449g, which provides that any applicant aggrieved by a decision of the commissioner may appeal to the Superior Court. In the affidavit, Temple asserted

[3] Article first, § 11, of the Connecticut constitution provides: "The property of no person shall be taken for public use, without just compensation therefor."

that the plaintiff elected to receive 95 percent reimbursement of its approved claims in August, 2018, and that there are available appropriations from which the defendants should pay the plaintiff.

After a hearing, the court granted the defendants' motion to dismiss. The court determined that there was no statutory waiver of sovereign immunity, although it analyzed General Statutes § 22a-449f (g), rather than § 22a-449g as relied on by the plaintiff. Accordingly, the court dismissed the second, fourth, and fifth counts of the complaint seeking monetary damages. The court then addressed the first count of the complaint seeking a writ of mandamus, considering separately the plaintiff's requests for relief in that count. The court determined that the plaintiff's request to compel the commissioner to adjudicate all pending applications satisfied the exception to sovereign immunity for actions by state officers in excess of their statutory authority. The court reasoned that § 22a-449f (h) imposes a mandatory duty on the commissioner to "render a decision as to whether . . . to order payment or reimbursement from the program not more than ninety days after receipt of an application . . . ." General Statutes § 22a-449f (h). The court, however, determined that the request to compel the commissioner to pay the plaintiff's approved 2009 application is barred by sovereign immunity because the act does not impose a duty on the commissioner to pay approved applications within a specific time frame. The court concluded that, although a portion of the first count is not barred by sovereign immunity, the plaintiff's requests for mandamus "must rise and fall together." Accordingly, the court dismissed the first count in its entirety. Finally, the court determined that the third count, alleging an unconstitutional taking, was barred by sovereign immunity because the plaintiff failed to allege a protected property interest under the

takings clause. This appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the plaintiff claims that the court erred by dismissing its request for a writ of mandamus on the ground of sovereign immunity because sovereign immunity does not bar a request for mandamus relief. The plaintiff further claims that, even if sovereign immunity applied to mandamus actions, the court erred in dismissing its first, second, fourth, and fifth counts because the state either expressly or by force of a necessary implication waived its sovereign immunity under § 22a-449g. Finally, the plaintiff claims that it properly alleged a property interest protected under the takings clause of the Connecticut constitution. We address each claim in turn.

We begin by setting forth our standard of review and the relevant legal principles regarding sovereign immunity. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, 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. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Carter* v. *Watson*, 181 Conn. App. 637, 641, 187 A.3d 478 (2018). "Sovereign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which we exercise de novo review. . . .

"The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law. . . . Not only have we recognized the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. . . . Exceptions to this doctrine are few and narrowly construed under our jurisprudence." (Citations omitted; internal quotation marks omitted.) *C. R. Klewin Northeast, LLC* v. *Fleming*, 284 Conn. 250, 257–58, 932 A.2d 1053 (2007) (*Klewin*).

"Our Supreme Court has recognized three exceptions to sovereign immunity: (1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority. . . . In the absence of a proper factual basis in the complaint to support the applicability of these exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper." (Citation omitted; internal quotation marks omitted.) *Braham* v. *Newbould*, 160 Conn. App. 294, 310–11, 124 A.3d 977 (2015).

I

We first address whether the first count of the plaintiff's complaint seeking a writ of mandamus to compel the defendants to pay its approved 2009 application and

to adjudicate those pending applications that have not been adjudicated is barred by sovereign immunity. The following additional facts and procedural history are relevant to this claim.

As previously noted in this opinion, the court separately addressed the plaintiff's requests for relief in the first count of its complaint and concluded that only the plaintiff's request to pay the approved application was barred by sovereign immunity. The court nevertheless dismissed the first count in its entirety, noting that "there is a dearth of decisional authority permitting the court to grant or deny a motion to dismiss part of a single count . . . ." After oral argument before this court, we ordered the parties to file supplemental briefs addressing whether the court properly dismissed the first count of the plaintiff's complaint in its entirety notwithstanding its conclusion that the portion of the plaintiff's mandamus count seeking to compel the commissioner to adjudicate its pending applications is not barred by sovereign immunity. See *Paragon Construction Co.* v. *Dept. of Public Works*, 130 Conn. App. 211, 221 n.10, 23 A.3d 732 (2011).

In *Paragon Construction Co.*, this court noted "that the appellate courts of this state have ordered the dismissal of *portions of a count* of a complaint on the basis of sovereign immunity. See *Fetterman* v. *University of Connecticut*, 192 Conn. 539, 557, 473 A.2d 1176 (1984) (upholding trial court's dismissal of portions of counts contained in plaintiff's complaint on basis of sovereign immunity), superseded by statute on other grounds as stated in *Piteau* v. *Board of Education*, 300 Conn. 667, 680–81, 689, 15 A.3d 1067 (2011); *Ware* v. *State*, 118 Conn. App. 65, 80–81, 983 A.2d 853 (2009) (reversing trial court's judgment denying defendant's motion to dismiss portions of counts contained in plaintiff's complaint on basis of sovereign immunity)." (Emphasis in

original.) *Paragon Construction Co.* v. *Dept. of Public Works*, supra, 130 Conn. App. 221 n.10.

After the parties filed their supplemental briefs, the defendants moved for permission to file a supplemental brief regarding whether the portion of the plaintiff's mandamus count seeking to compel the adjudication of all pending applications is moot. The defendants claimed that, because the commissioner recently had adjudicated all of the plaintiff's pending applications, this portion of the plaintiff's mandamus count is moot. The plaintiff filed an opposition to the defendants' motion, claiming that one application had not been adjudicated and that the mandamus claim is not moot because the plaintiff has the right to request a hearing before the commissioner relating to those applications on which the commissioner rendered an initial decision. We granted the defendants' motion and ordered the parties to file supplemental briefs regarding the mootness issue. Accordingly, we first consider whether the plaintiff's mandamus claim is moot.

A

In their second supplemental brief, the defendants claimed that all of the plaintiff's pending applications had been adjudicated and argued that, "[b]ecause there is no practical relief able to be granted to the plaintiff, the court should conclude that the issue over the trial court's dismissal of said mandamus is now moot, and thus decline to review that claim." In its response, the plaintiff acknowledged that the commissioner had issued decisions on all of its pending applications but argued that the mandamus claim is not moot as to nine of those applications because the plaintiff has requested hearings on those decisions pursuant to § 22a-449f (h). The plaintiff concedes that the portion of its mandamus count seeking to compel the defendants to adjudicate its pending applications is moot as to the remaining

applications for which it has not requested a hearing. We conclude that, to the extent there remain applications for which the plaintiff has requested a hearing, the plaintiff's mandamus claim is not moot.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Burbank* v. *Board of Education*, 299 Conn. 833, 839, 11 A.3d 658 (2011).

In the present case, the plaintiff sought a writ of mandamus ordering the defendants "to adjudicate those pending claims [that] have not been adjudicated." The defendants claim that, for mootness purposes, they have adjudicated all pending applications notwithstanding the plaintiff's right to seek a hearing before the commissioner on those decisions pursuant to § 22a-449f (h). We disagree.

Section 22a-449f (h) provides in relevant part: "The commissioner shall render a decision as to whether . . . to order payment or reimbursement from the program not more than ninety days after receipt of an application . . . . Any person aggrieved by the decision of the commissioner may, not later than twenty days after the date of issuance of such decision, request

a hearing before the commissioner in accordance with the provisions of [the Uniform Administrative Procedure Act]. After such hearing, the commissioner shall consider the information submitted and affirm or modify the decision on the application. . . .'' Under § 22a-449g, ''[a]ny person aggrieved by a decision of the commissioner *after a hearing* pursuant to subsection (h) of section 22a-449f may appeal from such decision to the superior court for the judicial district of New Britain within twenty days after the issuance of such decision. . . .'' (Emphasis added.)

As § 22a-449g makes clear, an applicant may appeal to the Superior Court *after* a hearing under § 22a-449f (h). The plaintiff sought the adjudication of its pending applications, which we construe to include the final adjudication of those applications for purposes of exercising the plaintiff's statutory right to bring an administrative appeal from the commissioner's decision. Accordingly, because certain of the plaintiff's applications have not been finally adjudicated for purposes of filing an appeal to the Superior Court under § 22a-449g, the trial court could grant the plaintiff practical relief by ordering the defendants to hold hearings in accordance with § 22a-449f (h). Thus, because practical relief could follow if we conclude that the court erred in dismissing the portion of the plaintiff's mandamus claim seeking the adjudication of its pending applications, we conclude that this portion of the plaintiff's mandamus claim is not moot as to those applications for which the plaintiff has requested a hearing pursuant to § 22a-449f (h).

B

Having determined that the plaintiff's mandamus claim seeking to compel the defendants to act on its pending applications is not moot, we now consider the plaintiff's claim that sovereign immunity does not bar an application for a writ of mandamus. Specifically, the

plaintiff claims that no exception to sovereign immunity is required for a writ of mandamus because "a mandamus action seeks performance of an act mandated by legislation and therefore no such waiver is required." The defendants claim that there is no categorical exception to sovereign immunity for applications for writs of mandamus. We agree with the defendants.

It is well settled that "[m]andamus is an extraordinary remedy, available in limited circumstances for limited purposes. . . . It is fundamental that the issuance of the writ rests in the discretion of the court, not an arbitrary discretion exercised as a result of caprice but a sound discretion exercised in accordance with recognized principles of law. . . . That discretion will be exercised in favor of issuing the writ only where the plaintiff has a clear legal right to have done that which he seeks. . . . The writ is proper only when (1) the law imposes on the party against whom the writ would run a duty the performance of which is mandatory and not discretionary; (2) the party applying for the writ has a clear legal right to have the duty performed; and (3) there is no other specific adequate remedy." (Internal quotation marks omitted.) *Miles* v. *Foley*, 253 Conn. 381, 391, 752 A.2d 503 (2000).

In support of its claim that a mandamus action is exempt from sovereign immunity, the plaintiff cites *State ex rel. Adams* v. *Crawford*, 99 Conn. 378, 382–83, 121 A. 800 (1923) (*Adams*), in which our Supreme Court explained that, "because the [s]tate is interested in compelling its agents to obey its commands, it is well settled that mandamus will lie to compel the payment of money by public officials when the duty to pay it is plain and the claim is just, undisputed in amount, and based on a clear legal right." The defendants claim that *Adams* does not support the plaintiff's claim because (1) it was decided eighty years before our Supreme Court held in *Miller* v. *Egan*, 265 Conn. 301, 321, 828 A.2d 549 (2003),

that the exception to sovereign immunity for actions in excess of statutory authority does not apply to actions seeking monetary damages, and (2) *Adams* did not discuss sovereign immunity. We agree that *Adams* does not stand for the proposition that sovereign immunity is inapplicable as a matter of law to a request for mandamus relief.

In *Miller*, our Supreme Court explained that, "[i]n the absence of legislative authority . . . we have declined to permit any monetary award against the state or its officials. . . . We have excepted declaratory and injunctive relief from the sovereign immunity doctrine on the ground that a court may fashion these remedies in such a manner as to minimize disruption of government and to afford an opportunity for voluntary compliance with the judgment. . . .

"When sovereign immunity has not been waived, the claims commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim. See General Statutes §§ 4-141 through 4-165b. . . . This legislation expressly bars suits upon claims cognizable by the claims commissioner except as he may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by the [claims] commissioner or other statutory provisions. . . .

"The legislative history and purpose of chapter 53 of the General Statutes; General Statutes §§ 4-141 through 4-165[c]; entitled Claims Against the State, as well as the comprehensive nature of the statutory scheme, support our conclusion that, on a claim for money damages, regardless of whether the plaintiffs have alleged that state officers acted in excess of statutory authority, the plaintiffs must seek a waiver from the claims commissioner before bringing an action against the state in the

Superior Court. The [O]ffice of the [C]laims [C]ommissioner was created by Public Acts 1959, No. 685. Prior to 1959, a claimant who sought to sue the state for monetary damages, in the absence of a statutory waiver by the state, had but one remedy—namely, to seek relief from the legislature, either in the form of a monetary award or permission to sue the state." (Citations omitted; internal quotation marks omitted.) *Miller* v. *Egan*, supra, 265 Conn. 316–18.

"Thus, the comprehensive nature of the statutory scheme, which specifies in detail under what circumstances a plaintiff may bring an action against employees individually, as well as when a plaintiff must seek the authorization of the claims commissioner before proceeding against the state, is consistent with the rule we have established through our case law. That rule is that the exception to sovereign immunity for actions in excess of statutory authority or pursuant to an unconstitutional statute, applies only to actions seeking declaratory or injunctive relief, not to those seeking monetary damages." Id., 320–21.

After *Miller* was decided, our Supreme Court considered whether an application for a writ of mandamus was barred by sovereign immunity in *C. R. Klewin Northeast, LLC* v. *Fleming*, supra, 284 Conn. 250. In *Klewin*, the plaintiff entered into a contract with the Department of Public Works, and issues arose over extra costs. Id., 253–54. The parties reached a settlement providing that the state would pay $1.2 million to the plaintiff, and the governor authorized the Department of Public Works to settle the plaintiff's claim in that amount. Id., 254. After the plaintiff had not received payment, it brought an action against the defendants, the Commissioner of Public Works, the governor, and the state comptroller seeking a writ of mandamus to compel the defendants to comply with the settlement. Id. The trial court rendered summary judgment in favor

of the plaintiff, concluding that the plaintiff was entitled to mandamus relief because the governor's formal approval of the settlement established the plaintiff's legal right to payment and because the defendants had a mandatory duty to pay the plaintiff pursuant to the governor's authorization. Id., 256.

On appeal to our Supreme Court, the defendants claimed, inter alia, that "the plaintiff's action [was] barred by the doctrine of sovereign immunity because (a) the action is tantamount to an action for money damages, and (b) the defendants did not act in excess of any statutory duty under [General Statutes] § 3-7 (c) so as to except them from the protections of sovereign immunity . . . ." Id., 257. Our Supreme Court noted that "[t]he parties' briefs . . . address the issue of sovereign immunity primarily in the context of the questions of whether mandamus relief generally, and mandamus relief to enforce a settlement agreement specifically, constitute the type of equitable relief that falls within the exception to sovereign immunity. . . . Because we conclude that the dispositive question is whether § 3-7 (c) imposed a mandatory duty to pay the plaintiff the $1.2 million under the settlement agreement, such that the failure to do so could constitute an act in excess of statutory authority, we consider the parties' arguments only as they bear on this issue." Id., 260 n.7. The court determined that § 3-7 (c) did not create a mandatory duty in a department official to pay the amount due under the settlement agreement and, therefore, held that the defendants did not act in excess of their statutory authority in failing to do so. Id., 267. Accordingly, the court did not determine that a request for mandamus relief is categorically exempt from the doctrine of sovereign immunity.

In addition, in *Gold* v. *Rowland*, 296 Conn. 186, 214, 994 A.2d 106 (2010), our Supreme Court rejected a claim similar to the plaintiff's claim in the present case. In

Gold, the plaintiff claimed that the exception to sovereign immunity for actions in excess of statutory authority "may be applied to all claims of injunctive relief, regardless of whether the state has acted in excess of its statutory authority or pursuant to an unconstitutional statute." Id. In rejecting that claim, the court stated: "The plaintiff has not cited . . . and our research has not revealed, any case in which this court has concluded that a claim for injunctive relief that did not involve conduct by the state in excess of its statutory authority or pursuant to an unconstitutional statute was not barred by sovereign immunity. Indeed, the cases are to the contrary. See, e.g., *C. R. Klewin Northeast, LLC* v. *Fleming*, [supra, 284 Conn. 259–67] (mandamus action in which plaintiff sought order requiring state to pay plaintiff pursuant to settlement agreement did not come within 'in excess of statutory authority' exception to sovereign immunity in absence of statute requiring state to implement settlement agreements); *Alter & Associates, LLC* v. *Lantz*, 90 Conn. App. 15, 22–23, 876 A.2d 1204 (2005) (alleged failure of state to honor regulation concerning obligations to contract bidders, without more, did not meet 'in excess of statutory authority' exception to sovereign immunity doctrine for equitable claims)." *Gold* v. *Rowland*, supra, 213–14.

Thus, in *Klewin* and *Gold*, our Supreme Court determined that claims for injunctive relief against the state must satisfy one of the exceptions to the doctrine of sovereign immunity. Accordingly, in light of our Supreme Court's reasoning in *Klewin* and *Gold*, we reject the plaintiff's claim that sovereign immunity does not apply to an application for a writ of mandamus.[4]

[4] Nevertheless, as noted by the court in *Klewin*, "one of the requirements for a writ of mandamus is a 'mandatory' duty imposed by law . . . and therefore, there is some overlap in [the] determination as to whether [a statute] creates a mandatory duty both to the applicability of the sovereign immunity exception in *Miller* v. *Egan*, supra, 265 Conn. 314, for actions against a state officer for conduct in excess of statutory authority, and one prong of the test for mandamus actions." (Citation omitted.) *C. R. Klewin*

C

We next consider whether the court properly dismissed the portion of the plaintiff's mandamus claim seeking to compel the defendants to adjudicate its pending applications for reimbursement.

In dismissing the first count of the complaint in its entirety, as all parties now acknowledge, the court overlooked precedent establishing that a court may dismiss only a portion of a count of a complaint on the basis of sovereign immunity. See *Paragon Construction Co.* v. *Dept. of Public Works*, supra, 130 Conn. App. 221 n.10 ("appellate courts of this state have ordered the dismissal of *portions of a count* of a complaint on the basis of sovereign immunity" (emphasis in original)). Accordingly, the court improperly determined that the plaintiff's requests for relief in the first count of its complaint must rise and fall together and, therefore, improperly dismissed the portion of the first count seeking a writ of mandamus to compel the defendants to act on its pending applications.

In their first supplemental brief, the defendants claimed that, although the court had the authority to dismiss a portion of a single count on the basis of sovereign immunity, the court erred in concluding that the exception to sovereign immunity for actions by a state official in excess of his or her statutory authority applied to the plaintiff's mandamus claim. The defendants argue that, in analyzing this exception, the court erred by failing to address whether the plaintiff's complaint included allegations of wrongful conduct for an illegal purpose. We are not persuaded.

Northeast, LLC v. *Fleming*, supra, 284 Conn. 262 n.8. Consequently, in an action for a writ of mandamus against the state, a plaintiff necessarily would have to establish that the third exception to sovereign immunity applies in order to prevail on the merits of a mandamus claim seeking the performance of a mandatory duty. That is, a plaintiff would have to establish that the state official has a mandatory statutory duty and that the official is acting in excess of his or her statutory authority by failing to comply with that duty.

In its complaint, the plaintiff alleged that "[t]he applicable statutes compel the commissioner . . . to act upon said applications, but notwithstanding that said applications were submitted years ago, the commissioner and her predecessor [have] failed to act upon said applications . . . ." In its memorandum of decision, the court noted that "the plaintiff has not explicitly alleged in its complaint that a state official has acted in excess of its statutory authority . . . . Nonetheless, the plaintiff has alleged that the [act] compels the defendants to act upon the plaintiff's applications for reimbursement and that their failure to do so may only be remedied with a writ of mandamus. . . . Since the court, in deciding a motion to dismiss, must consider the allegations in their most favorable light, it is evident that the plaintiff profess[es] to claim breaches of the statutory obligations of the commissioner that are in excess of the defendants' statutory authority." (Citations omitted; internal quotation marks omitted.)

In support of their argument that the plaintiff was required to allege that the defendants acted solely to further their own illegal scheme and not to carry out government policy, the defendants cite our Supreme Court's decision in *Shay* v. *Rossi*, 253 Conn. 134, 170–72, 749 A.2d 1147 (2000), overruled in part by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003), in which the court considered the contours of the exception for acts in excess of an official's statutory authority. In *Shay*, the court noted that case law from other jurisdictions "suggest[ed] that all it takes to trigger the doctrine is to establish, by a process of statutory interpretation, that the defendants' conduct was unauthorized." Id., 171. The court explained that it disagreed with such a suggestion because "the doctrine of sovereign immunity would be too easily overcome. It would mean, for example, that any tort committed by a state official would not be subject to sovereign immunity, because it could

hardly be contended that any such official was statutorily authorized to commit a tort." Id., 172.

In *Miller* v. *Egan*, supra, 265 Conn. 321, however, our Supreme Court held "that the exception to sovereign immunity for actions in excess of statutory authority or pursuant to an unconstitutional statute, applies only to actions seeking declaratory or injunctive relief, not to those seeking monetary damages." Thus, *Miller* overruled *Shay* insofar as the court in *Shay* had held "that sovereign immunity does not bar monetary damages actions against state officials acting in excess of their statutory authority." Id., 325. The court in *Miller* explained that "[t]he primary reason that we declined to adopt the broader definition of the exception [in *Shay*] was our concern that if we did so, the exception to sovereign immunity would . . . swallow the rule . . . and the doctrine of sovereign immunity would be too easily overcome. . . . [T]he concerns we expressed in *Shay* no longer exist. That is, because the exception is limited to actions seeking declaratory or injunctive relief, it is sufficiently narrow and there is simply no danger that the exception will swallow the rule. Therefore, we now conclude that when a process of statutory interpretation establishes that the state officials acted beyond their authority, sovereign immunity does not bar an action seeking declaratory or injunctive relief." (Citations omitted; internal quotation marks omitted.) Id., 326–27.

In light of our Supreme Court's conclusion in *Miller* that sovereign immunity will not bar actions seeking declaratory or injunctive relief when the process of statutory interpretation establishes that the state defendants acted beyond their statutory authority, the defendants' argument regarding the absence of allegations of wrongful conduct for an illegal purpose is unavailing. Accordingly, we agree with the court that, when considered in their most favorable light, the allegations in the

plaintiff's complaint averred that the defendants' failure to act on its pending applications constituted actions in excess of the defendants' statutory authority. Therefore, the court properly considered this exception to sovereign immunity and determined that sovereign immunity does not bar this portion of the plaintiff's mandamus claim.

D

With respect to the portion of the plaintiff's mandamus claim seeking an order requiring the payment of its approved 2009 application, we first address the defendants' argument that such claim ultimately seeks monetary relief and, therefore, should be treated as a claim for money damages pursuant to this court's decision in *Bloom* v. *Dept. of Labor*, 93 Conn. App. 37, 41, 888 A.2d 115, cert. denied, 277 Conn. 912, 894 A.2d 992 (2006). The plaintiff claims that *Bloom* is distinguishable because it did not involve a writ of mandamus and argues that this court's discussion regarding sovereign immunity in *Bloom* was dicta.

In *Bloom*, the plaintiff applied for unemployment compensation benefits after his employment was terminated, and the administrator of the Unemployment Compensation Act (administrator) denied the application. Id., 38. The administrator's decision was affirmed by an appeals referee and by the board of review. Id. The plaintiff then filed an administrative appeal in the Superior Court, and the court dismissed the appeal. Id. Approximately one year after the dismissal of his administrative appeal, the plaintiff filed an action against the Department of Labor, seeking an order compelling the department to hold a new hearing on his unemployment claim. Id., 38–39. The Department of Labor moved to dismiss the action on the grounds of sovereign immunity and the plaintiff's failure to appeal

from the trial court's decision dismissing his administrative appeal. Id., 38. The court denied the motion to dismiss, and the Department of Labor appealed. Id., 39.

On appeal, this court agreed with the defendant that the plaintiff's failure to appeal from the trial court's decision dismissing his administrative appeal concluded his cause of action for unemployment benefits. Id., 39. The court then noted that "[t]he plaintiff cannot overcome the state's sovereign immunity by bringing an identical claim arising from the same underlying proceeding under the guise of a declaratory judgment. . . . The mere framing of the complaint as one for declaratory judgment does not, in and of itself, make it so. . . . Notwithstanding the plaintiff's claims that he is looking only to protect his reputation and not to collect money damages, in his complaint for relief he seeks a mandatory injunction ordering a new unemployment hearing, the purpose of which is to collect damages in the form of unemployment benefits. Therefore, because the plaintiff's claim ultimately is an action for money damages, the doctrine of sovereign immunity bars his action." (Citations omitted.) Id., 41.

In the present case, the court rejected the defendants' claim that the plaintiff's application for a writ of mandamus is tantamount to a claim for money damages, concluding that, "[u]nlike the plaintiff in *Bloom*, who was clearly seeking money damages after having exhausted the bulk of his administrative remedies, the plaintiff here is attempting to obtain an initial decision by the agency, which may or may not lead to reimbursement. . . . Moreover, [t]he fact that a judicial remedy may require one party to pay money to another is not sufficient reason to characterize the relief as money damages." (Citation omitted; internal quotation marks omitted.)

We agree with the plaintiff that *Bloom* is distinguishable from the present case. The plaintiff in *Bloom*

sought to get a second bite at the proverbial apple after he failed to appeal from the dismissal of his administrative appeal, whereas the plaintiff in the present case has not been able to pursue his administrative remedies. Moreover, the plaintiff in the present case seeks to compel the defendants to act in accordance with their statutory duties, whereas the plaintiff in *Bloom* sought to compel the Department of Labor to hold a new hearing on his unemployment claim, which was not provided for by statute.

In addition, we conclude that the plaintiff's mandamus claim is not tantamount to a claim for money damages. The United States Supreme Court has explained: "Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for the reinstatement of an employee with backpay, or for the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions. . . . The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as money damages." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Bowen* v. *Massachusetts*, 487 U.S. 879, 893, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988).

"The term money damages . . . normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 895.

In *Bowen*, the court held that "[t]he [s]tate's suit to enforce [42 U.S.C.] § 1396b (a) of the Medicaid Act, which provides that the [s]ecretary 'shall pay' certain amounts for appropriate Medicaid services, is not a suit seeking money in *compensation* for the damage sustained by the failure of the [f]ederal [g]overnment to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money. The fact that the mandate is one for the payment of money must not be confused with the question whether such payment, in these circumstances, is a payment of money as damages or as specific relief." (Emphasis in original; footnote omitted.) Id., 900–901.

Likewise, in the present case, the plaintiff is not seeking compensatory damages for losses it suffered but, rather, seeks funds to which the act entitles it. Thus, we conclude that the plaintiff's mandamus claim is not tantamount to a claim for money damages.

E

Finally, we consider whether the court properly concluded that, because the act does not impose a duty to pay approved applications within a specific time period, the defendants' failure to reimburse the plaintiff is not an act in excess of their statutory authority.[5]

[5] The plaintiff also claims that the court erred by applying the current version of the act in dismissing the first count of its complaint, arguing that "there is no clear and unequivocal indication that the legislature intended to retroactively apply the changes to § 22a-449c [and] § 22a-449f." We disagree.

"Whether to apply [an act] retroactively or prospectively depends upon the intent of the legislature . . . . [There is a presumption of] legislative intent that statutes affecting substantive rights shall apply prospectively only. . . . This presumption in favor of prospective applicability, however, may be rebutted when the legislature clearly and unequivocally expresses its intent that the legislation shall apply retrospectively." (Internal quotation marks omitted.) *State* v. *Nowell*, 262 Conn. 686, 702, 817 A.2d 76 (2003).

In the present case, the legislature clearly and unequivocally expressed its intent that the amendments to the act regarding the payment of claims be given retrospective effect. Section 22a-449r established the reverse auction system for the payment of claims under the program and specifies that,

The construction of a statute is a question of law subject to de novo review. See *C. R. Klewin Northeast, LLC* v. *Fleming*, supra, 284 Conn. 260. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) Id., 261.

The plaintiff argues that, although the court properly held that the defendants were under a statutory duty to pay the approved 2009 application, it improperly

"[n]otwithstanding the provisions of sections 22a-449a to 22a-449i, inclusive . . . payment or reimbursement to mid-size station applicants . . . under the program shall be in accordance with this subsection . . . . The provisions of this subsection shall create a reverse auction system, and shall apply to all applications submitted by mid-size or large station applicants *before, on or after June 15, 2012, including . . . applications for which payment or reimbursement has been ordered by the commissioner but has not been made. . . .*" (Emphasis added.) General Statutes § 22a-449r (c).

Accordingly, because § 22a-449r applies to all applications submitted before, on, or after June 15, 2012, the current version of the act applies to the plaintiff's mandamus claims.

determined that, because the statute did not require that the defendants reimburse applicants within a particular time period, their failure to pay the plaintiff's approved claim does not constitute an act in excess of statutory authority. We agree.

As previously noted in this opinion, the court determined that the plaintiff's request to compel the commissioner to adjudicate all pending applications satisfied the exception to sovereign immunity for actions by state officers in excess of their statutory authority because § 22a-449f (h) imposes a mandatory duty on the commissioner to "render a decision as to whether . . . to order payment or reimbursement from the program not more than ninety days after receipt of an application . . . ." The court, however, determined that the request to compel the commissioner to pay the plaintiff's approved 2009 application is barred by sovereign immunity because the act does not impose a duty on the commissioner to pay approved applications within a specific time frame.

"The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory. . . . If, however, the . . . provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory . . . . Definitive words, such as must or shall, ordinarily express legislative mandates of nondirectory nature. . . . As we recently noted, the word shall creates a mandatory duty when it is juxtaposed with [a] substantive action verb." (Internal quotation marks omitted.) *State* v. *Reddy*, 135 Conn. App. 65, 72, 42 A.3d 406 (2012).

Section 22a-449c (a) (2) provides in relevant part that "[t]he program shall provide money for reimbursement or payment pursuant to this section . . . within available appropriations, to responsible parties . . . ." Section 22a-449f (c) provides in relevant part that "[t]he commissioner *shall order reimbursement or payment* from the program for any cost paid or incurred, as the case may be, [if all of the conditions for reimbursement are satisfied] . . . ." (Emphasis added.) In the event that an applicant files an administrative appeal from the commissioner's decision pursuant to § 22a-449g, "any portion of the ordered reimbursement or payment that is approved and not the subject of such appeal, *shall be paid* by the commissioner, within available appropriations and subject to the provisions of section 22a-449r, notwithstanding the pendency of the appeal." (Emphasis added.) General Statutes § 22a-449g.

Section 22a-449r (a) (1) establishes the order of priority for payments from the program and directs that "any amount available for purposes of paying applicants under the underground storage tank clean-up program *shall be distributed* as follows: (A) [o]ne-quarter for payment or reimbursement to municipal applicants and other applicants; (B) one-quarter for payment or reimbursement to small station applicants; (C) one-quarter for payment or reimbursement to mid-size station applicants; and (D) one-quarter for payment or reimbursement to large station applicants. If at any time there is an amount remaining in one such category and if in such category there are no pending applications or applications for which payment or reimbursement has been ordered by the commissioner but has not been made . . . then such amount *shall be redistributed* for payment or reimbursement in the following order of priority: (i) [f]irst to municipal applicants and other applicants, (ii) if after redistribution pursuant to subclause (i) of this subdivision there is an amount

remaining, then to small station applicants, (iii) if after redistribution pursuant to subclauses (i) and (ii) of this subdivision there is an amount remaining, then to mid-size station applicants, and (iv) if after redistribution pursuant to subclauses (i), (ii) and (iii) of this subdivision there is an amount remaining, then to large station applicants." (Emphasis added.)

Section 22a-449r (c) (2) (A) provides in relevant part: "In the fiscal year beginning July 1, 2012, no payment shall be made to mid-size station applicants in excess of thirty-five cents on each dollar the commissioner orders to be paid or reimbursed under the program. In the fiscal year beginning July 1, 2013, and each fiscal year thereafter, such amount shall increase by ten cents on each dollar per fiscal year and in such years no payment or reimbursement shall be made in excess of the amount in effect for such fiscal year. After such amount reaches one dollar, it shall no longer increase. . . ."

Section 22a-449r (c) (4) provides in relevant part: "Among mid-size station applicants . . . priority for payment or reimbursement shall be given to those applicants who . . . agree to accept the greatest reduction in the amount ordered for payment or reimbursement by the commissioner under the program, provided such payment shall not exceed the amount set forth in subparagraph (A) or (B) of subdivision (2) of this subsection, as applicable. . . . If there are insufficient funds to satisfy payment and reimbursement of mid-size and large station applicants, the prioritization established pursuant to this subsection shall carry over to the subsequent fiscal quarter, and if necessary, from year to year, provided such prioritization may change based upon a subsequent reduced payment election submitted pursuant to subparagraph (A) (ii) of subdivision (3) of this subsection."

We conclude that the relevant statutes are plain and unambiguous and create a mandatory duty to pay approved applications pursuant to the act. In the act, the word "shall" is juxtaposed with the substantive action verb "paid" when describing the commissioner's role under the act. See *State* v. *Reddy*, supra, 135 Conn. App. 72 ("the word shall creates a mandatory duty when it is juxtaposed with [a] substantive action verb" (internal quotation marks omitted)); cf. *C. R. Klewin Northeast, LLC* v. *Fleming*, supra, 284 Conn. 263 (determining that statutory language " 'shall constitute sufficient authority . . . to pay' " did not create mandatory duty because " 'shall' " was "not juxtaposed with the substantive action verb"). Section 22a-449g expressly provides that "any portion of the ordered reimbursement or payment that is approved and not the subject of such appeal, *shall be paid* by the commissioner, within available appropriations and subject to the provisions of section 22a-449r, notwithstanding the pendency of the appeal." (Emphasis added.) Accordingly, we conclude that the act imposes a mandatory duty on the defendants to pay the approved 2009 application.

We further conclude that the court improperly determined that, in the absence of any requirement that the payment be made in a specific time period, the defendants' failure to do so could not be an act in excess of statutory authority. The act requires that approved applications for reimbursement be paid if certain conditions are met. General Statutes § 22a-449f (c). If those conditions are met, the fact that the statute does not specify a specific time period within which payment must be made does not affect the mandatory nature of the duty to pay. Indeed, § 22a-449r (a) (1) expressly provides that "any amount available for purposes of paying applicants under the underground storage tank clean-up program *shall be distributed* . . . ." (Emphasis added.) Thus, if, as the plaintiff alleges, there are

funds available for purposes of paying the plaintiff, the act imposes a mandatory duty on the defendants to pay the plaintiff. Accordingly, the first count of the plaintiff's complaint seeking a writ of mandamus ordering the defendants to pay its approved application is not barred by sovereign immunity.[6]

II

We next address the plaintiff's claim that the legislature, through § 22a-449g, waived the state's sovereign immunity. The plaintiff notes that the court analyzed § 22a-449f (g), rather than § 22a-449g, and argues that § 22a-449g, either expressly or by force of a necessary implication, waives the state's sovereign immunity. The defendants respond that the statutory authorization to appeal to the Superior Court from an adverse decision by the commissioner under § 22a-449g does not authorize an action for damages against the state. We agree with the defendants.

Whether § 22a-449g either expressly or by force of a necessary implication waives the state's sovereign immunity presents a question of statutory interpretation over which we exercise plenary review. See *Ware* v. *State*, supra, 118 Conn. App. 87. It is well established "that statutes in derogation of sovereign immunity should be strictly construed. . . . Where there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity." (Internal quotation marks omitted.) *C. R. Klewin Northeast, LLC* v. *Fleming*, supra, 284 Conn. 259.

Section 22a-449g provides: "Any person aggrieved by a decision of the commissioner after a hearing pursuant

[6] Because we conclude that the plaintiff's mandamus claim is not barred by sovereign immunity, we need not address the plaintiff's claim that the court erred by dismissing the mandamus count without allowing jurisdictional discovery regarding whether there are "available appropriations" for the defendants to reimburse the plaintiff under the act.

to subsection (h) of section 22a-449f may appeal from such decision to the superior court for the judicial district of New Britain within twenty days after the issuance of such decision. Such appeal shall be in accordance with [the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq.]. All such appeals shall be heard by the court without a jury, and shall have precedence in the order of trial as provided in section 52-192. If an appeal is taken pursuant to this section, any portion of the ordered reimbursement or payment that is approved and not the subject of such appeal, shall be paid by the commissioner, within available appropriations and subject to the provisions of section 22a-449r, notwithstanding the pendency of the appeal."

We conclude that the legislature did not expressly waive the state's sovereign immunity by providing applicants under the act the right to bring an administrative appeal. When the legislature intends to waive the state's sovereign immunity expressly, it knows how to do so. For example, the legislature has waived the state's sovereign immunity with respect to contracts "for the design, construction, construction management, repair or alteration of any highway, bridge, building or other public works of the state . . . ." General Statutes § 4-61 (a). Section 4-61 (a) provides in relevant part that any person who has a claim arising under such a contract with the state may "bring an action against the state to the superior court for the judicial district of Hartford for the purpose of having such claims determined . . . . All legal defenses except governmental immunity shall be reserved to the state."

The express waiver in § 4-61 (a) provides in relevant part that an individual may "bring an action against the state" and specifically prohibits the state from asserting the defense of "governmental immunity . . . ." In contrast, § 22a-449g simply provides an applicant under the act the right to appeal from an adverse decision by the

commissioner to the Superior Court pursuant to the Uniform Administrative Procedure Act. Section 22a-449g does not refer to a general cause of action against the state or to the defense of sovereign immunity. Thus, contrary to the plaintiff's contention, § 22a-449g does not expressly waive the state's sovereign immunity.

Section 22a-449g also does not waive sovereign immunity by force of a necessary implication. As our Supreme Court has explained, "in order for statutory language to give rise to a necessary implication that the state has waived its sovereign immunity, [t]he probability . . . must be apparent, and not a mere matter of conjecture; but . . . necessarily such that from the words employed *an intention to the contrary cannot be supposed*. . . . In other words, in order for a court to conclude that a statute waives sovereign immunity by force of necessary implication, it is not sufficient that the claimed waiver *reasonably* may be implied from the statutory language. It must, by logical necessity, be the *only possible interpretation* of the language." (Citation omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 388–90, 978 A.2d 49 (2009).

The plaintiff argues that § 22a-449g "expressly authorized applicants, such as [the plaintiff], to bring a lawsuit in the Superior Court. . . . The purpose of that lawsuit would be to consider whether the amount ordered by the commissioner is correct, or incorrect, and thus authorizes a suit against the state to determine liability. . . . Even if this court believes it is not express, it certainly waives the state's sovereign immunity by force of a necessary implication." (Citation omitted.)

Section 22a-449g authorizes an applicant to appeal to the Superior Court pursuant to the Uniform Administrative Procedure Act. Significantly, it does not authorize an applicant to "bring a lawsuit in the Superior

Court." The plaintiff essentially argues that, because an administrative appeal challenging the commissioner's final decision would require the court to consider the amount of money to be paid to the applicant, it necessarily follows that the state has waived its sovereign immunity for purposes of permitting damages claims to be brought against it relating to applications under the act. That conclusion, however, is not a necessary one. As our Supreme Court emphasized, "it is not sufficient that the claimed waiver *reasonably* may be implied from the statutory language. It must, by logical necessity, be the *only possible interpretation* of the language." (Emphasis in original.) *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 389–90. Simply put, the plain language of the statute, which authorizes an applicant aggrieved by the commissioner's decision to file an administrative appeal, does not support the plaintiff's claim of an implied waiver of sovereign immunity. Mindful that statutes in derogation of sovereign immunity must be strictly construed, we conclude that the only possible interpretation of § 22a-449g is that an applicant may bring an administrative appeal to challenge an adverse decision by the commissioner. Accordingly, the court properly determined that the state had not waived its sovereign immunity under the act and, therefore, properly dismissed the second, fourth, and fifth counts of the plaintiff's complaint.

III

Last, the plaintiff claims that the court improperly dismissed the third count of its complaint asserting a violation of the takings clause of the Connecticut constitution. The plaintiff argues that it has a constitutionally protected property interest in the payment of its approved 2009 application.[7] We are not persuaded.

[7] Although the plaintiff initially averred that the defendants' failure to pay any approved but unpaid applications for reimbursement under the act, as well as any pending applications that should be approved, violated the takings clause, at oral argument before this court, the plaintiff's counsel

Article first, § 11, of the Connecticut constitution provides that "[t]he property of no person shall be taken for public use, without just compensation therefor." "[M]oney is certainly property . . . . In order to state a claim under the takings clause, however, a plaintiff first must establish that he or she possesses a constitutionally protected interest in the disputed property. . . . Because the [c]onstitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law. . . . As a consequence, [w]hether one's interest or entitlement rises to the level of a protected property right depends upon the extent to which one has been made secure by [s]tate or [f]ederal law in its enjoyment. . . . For a property right to be considered vested, in contrast to one that is expectant or contingent, it must function as a present interest." (Citations omitted; internal quotation marks omitted.) *A. Gallo & Co.* v. *Commissioner of Environmental Protection*, 309 Conn. 810, 824–25, 73 A.3d 693 (2013) (*Gallo*), cert. denied, 572 U.S. 1028, 134 S. Ct. 1540, 188 L. Ed. 2d 581 (2014).

In *Gallo*, twelve beer and soft drink distributors brought an action against the then Commissioner of Environmental Protection seeking a declaratory judgment and damages for the "retroactive taking of their property under certain provisions of Public Acts 2009, No. 09-1, § 15 (P.A. 09-1) . . . ." Id., 812–13. By statute, the plaintiffs were required to collect a five cent refund value on each beverage container sold to a retailer and to reimburse the retailer when the empty container was returned. Id., 814–15. The plaintiffs were required "to open a special interest-bearing account" and to deposit in the account the amount of the refund values for each

clarified that the takings claim involved only the failure to pay the approved 2009 application.

container sold. (Internal quotation marks omitted.) Id., 816. "All interest, dividends and returns earned on the special account were required to be paid into such account, and such moneys were required to be kept separate and apart from all other moneys in the possession [of] the [plaintiffs]." (Internal quotation marks omitted.) Id., 816–17. The plaintiffs were required to pay any reimbursement of the refund value from that account. Id., 817. Public Act 09-1, which was made applicable for a period of four months prior to its effective date from December 1, 2008, through March 31, 2009, "provided that all unclaimed [beverage container] deposits accruing during the designated four month period, which previously had been retained by the plaintiffs, henceforth must be paid to the state." Id., 813 and n.3. The trial court rendered judgment for the plaintiffs, concluding that the retroactive provision of P.A. 09-1 "requiring the plaintiffs to pay to the state any unclaimed deposits and accrued interest from December 1, 2008, through March 31, 2009, was a taking of their property without just compensation . . . ." Id., 820.

On appeal, our Supreme Court "look[ed] for incidents of ownership to determine whether the plaintiffs had a property interest in the unclaimed deposits that warranted constitutional protection. Incidents of ownership include (1) the right to use the property . . . (2) the right to earn income from the property and to contract over its terms with other individuals . . . and (3) the right to dispose of, or transfer, ownership rights permanently to another party." (Citations omitted.) Id., 838. The court concluded "that the plaintiffs had no property interest in the unclaimed deposits because their right to use and control the deposits was severely limited . . . . [A]lthough the act did not address disposition of the unclaimed deposits, it stated in specific terms how such funds were to be managed, including that they were to be deposited in a special interest

bearing account at the Connecticut branch of a financial institution. Even more significant, the [statute] contained no provision allowing the unclaimed deposits to be withdrawn by the distributors. In short, the [statute] did not allow the distributors to withdraw or control the funds placed in the special accounts beyond the parameters established by the . . . provisions [of P.A. 09-1]. Thus, the distributors had no property interest in the unclaimed deposits because they possessed none of the normal incidents of ownership." Id., 838–39.

In the present case, the plaintiff argues that it "has incidents of ownership evincing a property interest in the amounts due [to the plaintiff] pursuant to the [act]. [The plaintiff] has an unequivocal right to the money and the statute places no restrictions on [the plaintiff's] ability to use the money." The defendants respond that "the plaintiff has no more than a future interest in payment of the approved application, because as the plaintiff alleges, the approval has not yet been acted upon by the state." We agree with the defendants.

Although the plaintiff asserts that it has a vested property interest in the approved payment, the plaintiff acknowledges that it "cannot use the money, or earn interest" because the defendants have not paid the plaintiff. Thus, despite the plaintiff's bare assertion to the contrary, it does not possess any of the incidents of ownership identified in *Gallo*. Indeed, the plaintiff never possessed the money it claims it is owed, and, therefore, it could not use the money, earn income from the money, or transfer the money to another party. Given that our Supreme Court held that the plaintiffs in *Gallo* did not possess any incidents of ownership in funds that they maintained in their individual bank accounts, we are unable to conclude that the plaintiff in the present case possesses any incidents of ownership when the plaintiff has no control over the disputed funds. Consequently, the plaintiff's interest in the money

is not a vested property interest but, rather, a contingent or expectant interest. Accordingly, the trial court properly determined that the plaintiff had not alleged a property interest sufficient to support a finding of an unconstitutional taking.

The judgment is reversed as to the first count of the plaintiff's complaint seeking a writ of mandamus, and the case is remanded for further proceedings on that count only; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* BRYANT WILSON (AC 42914)

Alvord, Moll and Clark, Js.

Syllabus

Convicted of the crimes of murder and carrying a pistol without a permit as a result of the shooting death of the victim, the defendant appealed, claiming, inter alia, that he was deprived of his right to present a defense when the trial court improperly instructed the jury about the adequacy of the police investigation. The defendant's theory of defense was that the police conducted an inadequate investigation during which, among other things, they failed to investigate leads, did not attempt to obtain DNA profiles or request DNA testing of certain evidence, and failed to treat four individuals as suspects and take DNA samples from them, even though they were in the vicinity of the shooting at about the time it occurred. The defendant filed a request to charge as to the inadequacy of the police investigation that differed from the model jury instruction on the Judicial Branch website at that time. After conducting a charging conference with counsel, the trial court used the model instruction rather than the defendant's requested charge. The defendant claimed that the court's instructions effectively told the jurors to disregard the adequacy of the police investigation as it related to the strength of the state's case and to disregard his theory of the case. During the pendency of the defendant's appeal, our Supreme Court issued its decision in *State* v. *Gomes* (337 Conn. 826), in which it held that the model jury instruction improperly failed to inform the jury of a defendant's right to present evidence of investigative inadequacy and the jury's right to consider

such deficiencies in evaluating whether the state proved its case beyond a reasonable doubt. *Held*:

1. The trial court erred when it instructed the jury regarding the adequacy of the police investigation, as it was reasonably possible that the instructions misled the jury to believe it could not consider the defendant's arguments as to that issue:

   a. Contrary to the state's assertion that the defendant's claim was unpreserved because it was substantially different from the claim he raised at trial, his written request to charge sufficiently covered the matter, the defendant requested language that was different from and more comprehensive than that contained in the model jury charge on the Judicial Branch website, and his requested charge omitted language that the court in *Gomes* found presented a significant risk of misleading the jury.

   b. The defendant did not waive his preserved claim of instructional error: the defendant did not withdraw his request for a jury instruction on the inadequacy of the police investigation, and nothing in the record of the charging conference demonstrated an intention by the defendant to abandon his request; moreover, a reasonable reading of defense counsel's statement during the charging conference that the court included in its proposed charge two of his instructional requests was that counsel was mistaken as to the content of the court's proposed charge and wrongly believed the court included his proposed investigative inadequacy charge; furthermore, a reasonable reading of the prosecutor's comments during the charging conference was that he did not believe the defendant's request had been effectively withdrawn.

   c. The trial court's use of the model jury instruction on investigative inadequacy was harmful, and, thus, the defendant was entitled to a new trial: the state's case was not strong, as its primary evidence was from jailhouse informants who testified in exchange for beneficial treatment in their pending criminal matters, the physical evidence focused on a hat that was found in bushes near the crime scene, which contained the DNA of two other individuals in addition to that of the defendant, there was no evidence outside of the jailhouse informant testimony that the assailant wore a hat, and the gun allegedly used was problematic in that no forensic evidence linked it to the shooting and no casings were found at the scene; moreover, there were no eyewitnesses to the shooting, and the defendant did not appear on any of the surveillance videos obtained by the police.

2. The trial court did not abuse its discretion by admitting certain uncharged misconduct evidence pertaining to two shootings that occurred subsequent to the victim's death: the probative value of the uncharged misconduct evidence was high, as the subsequent shootings connected the defendant with the gun allegedly used in the homicide of the victim, the defendant's guilty pleas as to the subsequent shootings and a statement he made to the police that he liked to play with guns were probative

of his means and opportunity to commit the charged crimes, and a spent shell casing in a handgun the police recovered at the scene of one of the subsequent shootings, and testimony related thereto, were probative as to the lack of shell casings found at the scene of the victim's homicide; moreover, it was unlikely that the facts of the two subsequent shootings, which were significantly less severe than the charged crimes in that there were no injuries, unduly aroused the emotions of the jurors; furthermore, the uncharged misconduct evidence did not consume an undue amount of time or create an unduly distracting side issue, as the court limited the state to a narrow presentation of the basic facts of the subsequent shootings, the evidence was introduced through the testimony of multiple witnesses interspersed throughout three of the nine days of trial, a limited amount of the evidence was documentary, and the prosecutor did not belabor his examination of the witnesses.

Argued October 14, 2021—officially released January 11, 2022

Procedural History

Substitute information charging the defendant with the crimes of murder and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *Dewey*, *J.*; thereafter, the court granted in part the defendant's motion to preclude certain evidence; verdict and judgment of guilty, from which the defendant appealed. *Reversed*; *new trial.*

Jennifer B. Smith, assistant public defender, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, *Helen J. McLellan*, senior assistant state's attorney, and *Nancy L. Walker*, former assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Bryant Wilson, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a) and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On appeal, the

defendant claims that (1) the trial court's investigative inadequacy jury instruction deprived him of his right to present a defense, and (2) the trial court erred in admitting uncharged misconduct evidence. We reverse the judgment of conviction.

The following evidence was presented to the jury. On August 18, 2014, at approximately 10:45 p.m., the victim, Corey Washington, was shot in the abdomen while he was in the driveway of 62-64 Roberts Street in New Britain. New Britain Police Officer Brian Shea was dispatched to the scene and arrived minutes later. When Officer Shea arrived, New Britain Police Officer Lou Violette was rendering aid to the victim. The victim was transported by ambulance to the Hospital of Central Connecticut in New Britain, where he was pronounced dead at 11:24 p.m. The victim's autopsy revealed that he sustained a single gunshot wound, that the bullet entered the front of his abdomen and exited through his lower back, and that the wound was likely caused by a medium or large caliber type of bullet, such as a nine or ten millimeter, a .38 caliber, or a .44 caliber bullet.

Jerome Blackman, the boyfriend of the victim's mother, was sitting with the victim's mother in his vehicle in the backyard of 60 Roberts Street when he heard a gunshot that sounded like a "loud cannon," followed by two "pop sounds" that he also thought were gunshots, and someone running down the gravel driveway of 62-64 Roberts Street. He could not see the area behind 62-64 Roberts Street because there was a fence obstructing his view. There was a "cut-through" in the fence behind Roberts Street that led to Trinity Street.

Additional police officers arrived at the scene and conducted a search of the area in which the victim was found. The area was dark, illuminated only by scattered streetlights and officers' handheld flashlights. The

police did not find any firearms or shell casings.[1] New Britain Police Officer Rafal Korczak participated in the search. He was directed to search the area of Trinity Street. He located a black and silver San Antonio Spurs cap "stuck in the bushes" next to 59 Trinity Street, which property was located directly behind 62-64 Roberts Street. Detective Kevin Artruc photographed and seized the hat. A forensic science examiner from the DNA unit of the state forensics laboratory determined that there were at least three contributors to the DNA profile on a sample taken from the Spurs cap. The defendant was included as a contributor. When later interviewed, the defendant told the police that, on the night of the shooting, he was either at his girlfriend's house or at the home of his friend, Mark Stepney, at 10 School Street. The defendant described Stepney as "his right-hand man."

The state presented evidence that, two days after the victim was murdered, the defendant was involved in two shootings, one on Maple Street and one on Prospect Street, in which the defendant admitted to having fired a Desert Eagle .44 magnum handgun. No one was harmed in either shooting. While a police officer administered a test[2] to the defendant at the Maple Street location, the defendant said that there would probably be residue on his hands because "I like to play with guns . . . my boys have guns, a .44 magnum." The police recovered five casings from Maple Street. Detective Felix J. Perez testified that he recovered a Desert

[1] At trial, New Britain Police Detective Thai Tran testified that there were several possible reasons why no casing was found at the scene: the shooter could have picked it up, a malfunction with the firearm could have kept the casing within the firearm, a passing vehicle could have picked up the casing in its tire treads, or a revolver could have been used.

[2] The state sought to introduce testimony that the police were administering a gunshot residue test, but the defendant objected. The court precluded reference to a gunshot residue test, limiting the state to the general term "test."

Eagle .44 magnum handgun (Desert Eagle) from underneath a parked vehicle at 10 School Street and that there was "a spent casing" inside the handgun. The defendant told Detective Thai Tran that he had possessed the gun that was recovered from 10 School Street. Forensic examination of the Maple Street casings and the spent casing found inside the Desert Eagle revealed that all of the casings had been fired from that gun.

The state presented the testimony of two jailhouse informants, Shannon Davis and Andrew El Massri.[3] Davis, the defendant's cellmate in November and December, 2014, made a request to speak with the police,[4] met with Detective Tran, and gave a written statement.[5] At trial, Davis testified that the defendant told him that he wanted to rob the victim and had a third party call the victim to set up a purchase of marijuana. Davis further testified that the defendant told him that the victim did not give up anything and that

[3] Correction Officer Dale Brawn testified that Davis and the defendant became cellmates at the MacDougall-Walker Correctional Institution in Suffield on October 28, 2014. Brawn further testified that El Massri was housed in the same unit as the defendant at MacDougall-Walker from January 1 through March, 2015, and that El Massri worked as a barber while incarcerated.

[4] Former Department of Correction Lieutenant Ruben Burgos testified that, on November 19, 2014, he received, through a phone monitor, notification that Davis had information and wanted to speak with a prosecutor or the police, and Burgos interviewed Davis the following day, November 20, 2014. Burgos forwarded Davis' request, and a detective from the New Britain Police Department interviewed Davis. Burgos testified that Davis was interviewed six or seven times.

[5] Davis, a five time convicted felon, asked Detective Tran to speak to a prosecutor in Hartford regarding criminal charges Davis had pending at the time he gave his statement. Davis entered into a cooperation agreement with the state, in which he agreed to provide information about this case and a number of Hartford cases involving shootings that he had witnessed, in exchange for the reduction of his pending criminal charge of home invasion to a charge of attempt to commit assault in the first degree, and the state's recommendation of a suspended sentence on that charge.

the defendant shot the victim, took off running, hopped a fence, and lost his hat. Davis testified that the defendant was concerned that the hat would be found. Davis further testified that the defendant told him that he used "a pretty big gun . . . a 40 40," "Desert Eagle" to shoot the victim, and that "it had .357 bullets in the gun." Davis testified that the defendant told him that he had "stashed the gun next to a house" and that the defendant's friend, who had brought him to the area, was waiting in a car for him on another street where there was a Chinese restaurant.[6] Davis testified that the defendant told him that, after shooting the victim, he had gotten into a shootout using a "totally different" gun. Davis testified that the defendant told him that he had a friend go back to get the Desert Eagle. Davis further testified that the defendant told him that he gave the gun to a "white dude," who gave the gun to the police.

El Massri, who was incarcerated with the defendant in February and March, 2015, also met with Detective Tran and gave a written statement.[7] At the defendant's trial, El Massri testified that he worked as a prison barber and cut the defendant's hair. El Massri testified that the defendant told him about the crime on two occasions when he was cutting his hair and on a third occasion when the two were sitting in a bullpen. El Massri testified that the defendant told him that he and the victim were dating the same woman and had "burned down" each other's houses, and that was when the defendant decided that he was going to murder the victim. El Massri testified that the defendant told him

[6] Detective Tran testified that there was a Chinese food restaurant located on South Main Street.

[7] El Massri had been convicted of eighteen felonies. Following El Massri's statement to Detective Tran and in consideration for his testimony at the defendant's trial, El Massri's existing agreement with the state with respect to certain of his pending felonies was amended to permit him to argue for a lesser sentence.

that he and Tyrell Johnson had set up a "weed sale" so that the defendant could ambush the victim. El Massri testified that the defendant said that Johnson drove the defendant to the area where he waited with a "40 40 or Desert Eagle," and that he shot the victim "three or four times at his chest and stomach area" and took off running to "a girl's house that lived down the street." El Massri testified that the defendant told him that the shooting occurred on Martin Street and that he "put the gun outside in some bushes" and then got a ride to Middletown. El Massri testified that the defendant told him he left a black San Antonio Spurs hat when he ran from the scene and that "he was really worried about that." El Massri testified that the defendant told him that he later went back to get the gun and gave it to "a white guy named Tom," who eventually gave it to the police.

The state also introduced into evidence recordings of three phone calls the defendant had made from prison in September, 2014. In one call, the defendant directed a woman to tell someone to "check Tommy" and that he "ratted on me." In another call, he stated that the "white boy . . . downstairs from Lisa's house" "lied on me to the police." In another call, he again said that "the little white boy over there lied on me to the police . . . ."

The defendant presented the testimony of Robert M. Bloom, a law professor and expert in the area of jailhouse informants. Bloom testified that jailhouse informants are "not as reliable as normal witnesses" because they "have a huge incentive. The incentive is freedom. So, in return for their testimony, they [are] getting a huge incentive." He further testified that, "as a result of DNA exonerations, they look at some of the reasons for the exoneration. And the most recent data indicates that 17 percent of the exonerated individuals, those cases had informants testifying as to their—whatever

the state wanted them to testify to, and these were individuals that were later exonerated." He further testified that the presumption in those cases is that the testimony was false. Bloom identified factors to consider when determining the credibility of a jailhouse informant, including the amount of time the informant is facing in prison; the charges pending against him; whether there is an explicit promise and, if so, what the promises are; whether there is an implicit promise and, if so, that the inmate will testify that no one has made promises to him but will know that he will get some benefit; the informant's knowledge of the criminal justice system; the number of times the informant has met with investigators and who was present; whether there is a transcript of the meeting with the investigators; and the informant's record of convictions and any charges pertaining to the failure to tell the truth.[8]

The defendant offered an alibi defense. Lisa Vidtor, Stepney's mother, testified that the defendant was present at the Maple Street home of a mutual friend, Sherry, on the evening of the murder. Vidtor testified that the defendant, Stepney, and others were present at Sherry's house when she arrived at about 7:30 p.m., and that the defendant stayed there all night. She testified that the defendant was drinking whiskey on the downstairs porch with Stepney, and that she was "up and down the stairs" during the evening. Vidtor also could hear them on the porch, and she had gone downstairs to listen to them singing and rapping. Vidtor testified that the defendant went to bed at about "11 something."

Vidtor remembered that the date was August 18, 2014, because her electricity had been shut off and she had

[8] On rebuttal, the state offered the testimony of Michael Sullivan, chief inspector for the Office of the Chief State's Attorney. Sullivan testified that the following factors are considered in determining the reliability of informant information: whether the informant is in a position where he could have obtained the information as he is claiming and whether there is corroboration of the informant's information.

gone to stay at Sherry's house because of the shutoff. On rebuttal, the state presented the testimony of John Nims, a program manager for Eversource Energy. Nims testified that there was both a request for a disconnect and an actual disconnect of electricity at 10 School Street on August 19, 2014. Vidtor testified that she did not come forward earlier because the police did not come to her and question her. Detective Tran testified on rebuttal that he had called Vidtor on the telephone and went to two addresses with which she was associated to speak with her, but he was unsuccessful at connecting with her.

The defendant was charged in a long form information with murder in violation of § 53a-54a (a) and carrying a pistol without a permit in violation of § 29-35 (a). The matter was tried to a jury, *Dewey*, *J.*, presiding. On October 25, 2017, the jury returned a verdict of guilty of both counts. On January 3, 2018, the court sentenced the defendant to a total effective term of fifty-five years of incarceration, twenty-six years of which were a mandatory minimum, to run consecutively to a sentence the defendant already was serving. This appeal followed. Additional facts and procedural history shall be set forth as necessary to address the claims of the defendant.

I

The defendant's first claim on appeal is that the court's investigative inadequacy jury instruction, which was the model instruction provided on the Judicial Branch website at the time it was given, deprived him of his constitutional right to present a defense of investigative inadequacy. We agree with the defendant.

The following additional procedural history is relevant to this claim. At trial, defense counsel advanced a defense that the police had conducted an inadequate investigation. He elicited testimony from Detective Tran that this was the first case he had investigated as the

lead detective. In addition to eliciting testimony that there were no eyewitnesses placing the defendant at the scene and no surveillance video of the defendant, defense counsel elicited testimony regarding other potential suspects—Levert Wooten, Kenneth Lockhart, Tyrell Johnson, Marcus Baptiste, and Dijon Sackey—and challenged the lack of investigation as to these individuals.

Evidence was presented that the police interviewed Vanessa Gatson, who stated that she was walking her dog on the street when she saw someone walking up to the victim right before he was shot. Gatson stated that the person she saw walk up to the victim was wearing a hoodie with the hood up. Gatson said that she possibly could identify the person, but, subsequently, she was not able to identify the person in a photographic array.[9] On the basis of Gatson's description, the police stopped Wooten, an associate of Lockhart's, while he was walking on South Main Street. The police asked him to stop three times before he complied. Detective Tran testified that Wooten was ruled out as a suspect because there was no information or evidence that he was responsible for the shooting.

Defense counsel emphasized that, in July, 2017, he requested that the state laboratory conduct DNA testing on a Tampa Bay Rays hat that the police had discovered at 325 South Main Street on August 25, 2014. The DNA profile from the swab of the Rays hat was entered into the Combined DNA Index System and resulted in a match to a DNA sample collected from Sackey, a convicted felon. Sackey told Detective Tran that he was

[9] Defense counsel also asked Detective Tran about an interview with Joshua Ocasio, who, three years following the shooting of the victim, told Detective Tran that he was present that night. Ocasio told Detective Tran that he saw someone come up to the victim, a tussle occurred, and gunshots were fired, but he was not able to identify the defendant.

with Wilken Montez on the night of the shooting. Detective Tran did not interview Montez.

Defense counsel also questioned Detective Tran regarding Lockhart, whose name was mentioned as a potential suspect when Detective Tran spoke with Sackey. Surveillance video from NB Mart, a nearby mini-mart on the corner of South Main Street and Roberts Street, showed Lockhart in the mini-mart with two other people about one hour before the shooting. The police obtained surveillance video from 19-21 Roberts Street, which showed three men go into the house at that address at about 9:58 p.m. Although Detective Tran did not review the video from 19-21 Roberts Street during his investigation, he testified that the three men in the video "appeared similar" to Lockhart and the two other people in the NB Mart. Detective Tran had information that Lockhart also wore a Spurs hat. Despite knowing that there was a mixture of DNA on the Spurs hat, Detective Tran did not interview Lockhart or take a buccal swab from him. Detective Tran also was aware that Lockhart was jumped in the neighborhood because of the victim's death and that Lockhart was a friend of Wooten.

There also was evidence that Baptiste had communicated via text message with the victim on the night of his death. The police interviewed Baptiste, who was not forthright with them. Surveillance video from NB Mart showed the victim entering the store with Baptiste at approximately 10:41 p.m. and the two engaging in a transaction. The video showed Baptiste exiting the store at 10:47 p.m., after the victim already had been shot.

Defense counsel elicited Detective Tran's testimony that Johnson, a convicted felon who had been arrested on unrelated charges, came forward on September 10, 2014, with information related to the shooting of the

victim. Detective Tran interviewed Johnson, who told him that, on the night of the shooting, both he and the defendant were present on Roberts Street, Johnson had engaged in a drug transaction with the victim, and Johnson subsequently heard gunshots when he was one block away.[10] According to Detective Tran, the information received from Johnson helped Detective Tran tie the case together. During Detective Tran's testimony, the court instructed the jury: "Once again, ladies and gentlemen, the cross-examination, the information about the police investigation, what was said by the witnesses, is not intended in any way to be viewed as testimony by . . . those witnesses, the only purpose for the question, for the court allowing the questions was to give you the context of the police investigation." The court gave similar limiting instructions during the presentation of other investigation evidence.

Detective Tran testified that he believed the victim's death to be related to a drug transaction. The police seized the victim's cell phone and determined, after reviewing text messages in the days leading up to his death, that he sold drugs, including marijuana and "Molly." One of the last messages received by the victim's phone asked him if he had Molly. The police were not able to trace the number from which the message was sent. Detective Tran did not consider Johnson or Baptiste suspects in the victim's death, despite both men having engaged in drug transactions with the victim shortly before he was shot.

Following this testimony, defense counsel argued to the jury that Detective Tran was inexperienced and that the police had "made a conclusion that [the defendant] committed [the murder] and investigated it with facts to support their conclusion that they already made."

[10] At trial, Johnson invoked his fifth amendment privilege against self-incrimination.

Defense counsel questioned why Detective Tran did not take buccal swabs of Wooten, Lockhart, or Johnson. He further argued that the police should have continued the investigation into Sackey after discovering his DNA on the Tampa Bay Rays hat. He highlighted evidence that both Lockhart and Baptiste were captured on surveillance video in the area and questioned why they were ruled out as suspects. He noted that Wooten, who was wearing a hoodie, was present in the area and failed to comply with police commands to stop. Defense counsel's argument focused on what he contended was the failure of the police to investigate leads and consider other individuals as suspects.

On October 6, 2017, the court requested that counsel provide the court with proposed jury instructions and notified counsel that it would provide its proposed jury instructions before the end of the day. The court stated: "And once I've seen yours, I may, I may not modify. I certainly want to have . . . a jury charge conference, where all of this can be discussed." Later that same day, the court provided counsel with copies of preliminary final instructions and marked them as a court exhibit. Defense counsel then stated: "I did file a request to charge, three different charges," and provided a copy to the court. The court stated: "All right. I'll look at these proposed charges and any others which you might have. Thank you. In light of the fact that you've given me these, I want to look at these before I give you the final, but I will e-mail them before the end of the day today."

The defendant's October 6, 2017 written request to charge, in connection with his defense of inadequate police investigation, provided: "The defense has presented evidence that the prosecution's investigation of this case has been negligent, or purposefully distorted, and not done in good faith. For example, there has been testimony about police officers not viewing crucial

video evidence and officers not investigating other suspects. With respect to these items of evidence, the probative value of that evidence depends on the circumstances in which it was not investigated. If the circumstances raise a reasonable belief of bad faith, fraud or negligence, you may consider that in determining the credibility of the witnesses and the weight, if any, that you chose to give that evidence and their testimony.

"Remember, under the instructions I have given you, if the evidence permits two reasonable interpretations, you must adopt that interpretation which favors the defendant."

The defendant cited as the legal basis for his request *State* v. *Collins*, 299 Conn. 567, 599, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011). The defendant recited as the factual basis for his request: "The lead detective testified that he did not review video showing that Kenneth Lockhart, a named suspect, was in the same store as the victim approximately 45 minutes before the shooting. The lead detective testified that he did not review the video showing that Lockhart was walking into a house on the same street where the victim was shot approximately 45 minutes prior to the shooting. Lockhart was named as a suspect independent of these videos. The police did not follow up on leads. The police did not interview Lockhart. The police did not attempt to obtain DNA profiles from the Tampa Bay Rays hat that was deemed to have evidentiary value. The police did not request DNA testing of the hair fibers found in the San Antonio Spurs hat." The defendant also requested instructions on third-party culpability and jailhouse informant testimony.

On October 7, 2017, the court e-mailed proposed jury instructions to the parties. The court's instructions

included the following charge: "You have heard argument that the police investigation was inadequate and that the police involved in this case were incompetent. The issue for you to decide is not the thoroughness of the investigation or the competence of the police. The only issue you have to determine is whether the state, in the light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he is charged." This proposed charge was consistent with the model criminal jury instruction on investigative inadequacy provided on the Judicial Branch website at the time it was given.

On October 10, 2017, the state filed an objection to the defendant's request to charge. Specifically, with respect to the defendant's proposed inadequate police investigation instruction, the state argued: "The defense has not presented evidence that the police investigation was negligent, purposefully distorted or done in bad faith, or fraud. In addition, *State* v. *Collins* [supra, 299 Conn. 567], cited by the defense, does not support the requested charge." On the same date, the state also submitted a written request to charge. It requested language identical to the model criminal jury instruction on investigative inadequacy. The request to charge quoted, as the supporting law, the commentary to the model instruction, which provided: " 'A defendant may . . . rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect.' *State* v. *Collins*, [supra, 599–600] (finding that such an instruction as this does not preclude the jury from considering the evidence of the police investigation as it might relate to any weaknesses in the state's case). '*Collins* does not require a court to instruct the jury on the quality of police investigation but merely holds that a court may not preclude such evidence

and argument from being presented to the jury for its consideration.' *State* v. *Wright*, 149 Conn. App. 758, 773–74 [89 A.3d 458], cert. denied, 312 Conn. 917 [94 A.3d 641] (2014)."

The court held a charging conference on October 10, 2017. The court stated: "All right, Counsel, you received the request to charge on Friday. Arguments about what you want included—the defense has asked for items to be included." Defense counsel responded: "Your Honor, I believe two of our three requests were included, the adequacy and the instruction on jailhouse informants." The court responded: "Those are standard instructions, yes, they were included. The one that wasn't included . . . was the third-party culpability."[11] Defense counsel then stated that he would "rely on [his] motion" with respect to his arguments on the charge of third-party culpability. After the state argued its objection to the defendant's proposed third-party culpability instruction, the court declined to include the charge in its instructions. The court then considered two unrelated motions in limine filed by the state.

The court then returned to the jury instructions, stating: "Let's get to the instructions. Now, you received copies. I do them page at [a] time. So, any comment on page 1?" The court then asked whether there were any comments on the individual pages from one through six. Defense counsel stated that he had a requested a

[11] The prosecutor also stated: "[I]t was my understanding that Your Honor was going to instruct the jury based on the proposed instructions and not include the defendant's requested instruction. Correct?" The prosecutor further explained: "It was my understanding that Your Honor was going to instruct the jury based on the proposed instructions that were given to counsel. I know that Your Honor did include an instruction on jailhouse informants and an instruction on completeness of the police investigation. I believe Your Honor's instructions are appropriate. I objected to the defendant's specific request." The court responded: "Well, at the time I gave you the instructions, to be quite honest, that was just the time, exactly the time that I received his request to charge, so I did want to consider those as well."

change on page five, which the court denied, and that he also had an objection on page six. When the court stated, "All right. Page seven," which included the investigation instruction, the state raised a point regarding a different instruction on that page. Following resolution of the state's point, the court turned to page eight and then to page nine. Subsequently, the court stated: "Page 10? 11? 12? 13? 14? 15? And 16? All right. That is it, then." Defense counsel then asked whether the clerk would be making copies of the charge because a few changes had been made, and the court responded that copies would be made. Copies were provided to counsel following the charging conference.

The next day, the court instructed the jury.[12] The court provided the investigative inadequacy charge in accordance with its proposed charge, which, as noted previously, was consistent with the model jury charge at the time. At the conclusion of its charge, the court did not ask whether there were any objections, and defense counsel did not object to the charge as given.

As a threshold matter, we first address the state's contentions that the defendant waived his claim of instructional error (1) by changing his claim on appeal and (2) under the rule articulated in *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011), and that he cannot prevail under the plain error doctrine. See Practice Book § 60-5.

A

Preservation

We first address whether the defendant preserved his claim of instructional error. The defendant argues that his claim was properly preserved on the basis of

[12] Before charging the jury, the court made one additional change unrelated to the investigative inadequacy issue and provided copies of the updated charge to counsel.

his having filed a written request to charge. We agree with the defendant.

"[O]ur rules of practice permit criminal defendants to preserve claims of instructional error by filing a timely written request to charge." *State* v. *Ramon A. G.*, 336 Conn. 386, 396, 246 A.3d 481 (2020); see also Practice Book § 42-16.[13] "[A] party may preserve for appeal a claim that an instruction . . . was . . . defective either by: (1) submitting a written request to charge covering the matter; or (2) taking an exception to the charge as given." (Internal quotation marks omitted.) *State* v. *King*, 289 Conn. 496, 505, 958 A.2d 731 (2008).

"Under either method [of submitting a written request to charge or taking an exception to the charge as given], some degree of specificity is required, as a general request to charge or exception will not preserve specific claims. . . . Thus, a claim concerning an improperly delivered jury instruction will not be preserved for appellate review by a request to charge that does not address the specific component at issue . . . or by an exception that fails to articulate the basis relied upon on appeal with specificity." (Citations omitted.) *State* v. *Johnson*, 165 Conn. App. 255, 284–85, 138 A.3d 1108 (claim preserved where defendant filed request to charge and trial court's charge deviated as to specific component from proposed instructions), cert. denied, 322 Conn. 904, 138 A.3d 933 (2016); see also *State* v. *Ramos*, 261 Conn. 156, 170–71, 801 A.2d 788 (2002) ("[i]t does not follow, however, that a request to charge addressed to the subject matter generally, but which omits an instruction on a specific component, preserves

[13] Practice Book § 42-16 provides in relevant part: "An appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of exception. . . ."

a claim that the trial court's instruction regarding that component was defective" (emphasis omitted)), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014); *State* v. *Lee*, 138 Conn. App. 420, 453 n.19, 52 A.3d 736 (2012) ("[i]n order to preserve an objection to a proposed jury instruction, the defendant must plainly put the trial court on notice as to the specific basis for his objection" (internal quotation marks omitted)), rev'd in part on other grounds, 325 Conn. 339, 342, 157 A.3d 651 (2017). Our Supreme Court never has "required, however, a defendant who has submitted a request to charge also to take an exception to a contrary charge, and such a requirement would contravene the plain language of [Practice Book § 42-16]." (Internal quotation marks omitted.) *State* v. *Johnson*, 316 Conn. 45, 54, 111 A.3d 436 (2015).

The defendant in the present case filed a written request to charge. "The question, then, is whether that request sufficiently covered the matter so as to preserve the issue for appellate review. Put differently, the relevant inquiry is whether the defendant's request to charge alerted the trial court to the specific deficiency now claimed on appeal." *State* v. *Ramon A. G.*, 190 Conn. App. 483, 493–94, 211 A.3d 82 (2019), aff'd, 336 Conn. 386, 246 A.3d 481 (2020).

We conclude that the defendant's request sufficiently covered the matter. In his principal brief, the distinct claim presented by the defendant was that "[t]he trial court's instructions, which effectively told the jury to ignore the defendant's defense, violated his constitutional rights to due process and to present a defense." Specifically, the defendant contended that "[t]he defense elicited evidence that the police failed to treat four men as suspects and adequately investigate them, even though they were in close vicinity right around the time of the murder. The police failed to take their DNA samples . . . . The trial court's instruction

directed the jury to disregard the adequacy of the investigation as it related to the strength of the state's case and disregard the defendant's theory of the case."

Following the filing of the parties' initial briefs in this case, this court granted the defendant's motion to stay the appeal pending our Supreme Court's decision in *State* v. *Gomes*, 337 Conn. 826, 853, 256 A.3d 131 (2021). In *Gomes*, our Supreme Court held that the model jury instruction "failed to inform the jury not only of a defendant's right to rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt . . . but also the jury's concomitant right to consider any such deficiencies in evaluating whether the state has proved its case beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) Id. Following the release of *Gomes*, the parties filed supplemental briefing in this case. In the defendant's supplemental brief, he argues that *Gomes* is controlling and requires reversal in the present case.

The state argues that the defendant's claim on appeal is "substantially different" from that raised at trial. We disagree that the claim is different such that it necessitates a conclusion that his claim is unpreserved. We note that the defendant filed a request to charge seeking language different from, and more comprehensive than, that contained in the model charge on investigative inadequacy. Also, the defendant's requested charge omitted the language that our Supreme Court found to have presented a significant risk of misleading the jury; specifically, it omitted the instruction that "the adequacy of the police investigation was *not* for it to decide" and that "the '*only*' issue for the jury was whether the state had proven the defendant's guilt beyond a reasonable doubt." (Emphasis in original.) *State* v. *Gomes*, supra, 337 Conn. 854. Accordingly, we conclude that the defendant's request sufficiently covered the matter such that his appellate claim is preserved.

B

Waiver

We turn next to the question of whether the defendant waived his preserved claim of instructional error. The state argues that the defendant implicitly had waived appellate review of his claim under the rule articulated in *State* v. *Kitchens*, supra, 299 Conn. 483. Under the circumstances of the present case, we find no waiver.

"Whether a defendant has waived the right to challenge the court's jury instructions involves a question of law, over which our review is plenary. . . . The doctrine of implied waiver is based on the idea that counsel had sufficient notice of . . . the jury instructions and was aware of their content . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Lanier*, 205 Conn. App. 586, 622–23, 258 A.3d 770, cert. granted, 338 Conn. 910, 258 A.3d 1280 (2021).

In *Kitchens*, the defendant had neither filed a written request to charge nor taken an exception to the charge after it was delivered, and he sought review under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989). *State* v. *Kitchens*, supra, 299 Conn. 463, 465. Our Supreme Court concluded that, in such circumstances, an implied waiver is manifested under the following conditions: "[W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." Id., 482–83. "The court [in *Kitchens*] explained that affirmative acceptance meant that counsel would need to express satisfaction with the instruction, not merely acquiesce to it." *State* v. *Johnson*, supra, 316 Conn. 53.

Following *Kitchens*, our Supreme Court, in *State* v. *Paige*, 304 Conn. 426, 443, 40 A.3d 279 (2012), explained that different circumstances are presented when a defendant has filed a request to charge. "The issue of waiver in the context of a claim of instructional error typically arises when considering whether a defendant is entitled to review of an unpreserved claim. . . . In such cases, the defendant has failed to follow one of the two routes by which he or she could preserve the claim of instructional error, by either submitting a written request to charge on the matter at issue or taking an exception immediately after the charge is given. . . . We never have required, however, a defendant who has submitted a request to charge also to take an exception to a contrary charge, and such a requirement would contravene the plain language of [Practice Book § 42-16]." (Citations omitted.) Id., 442–43. The court in *Paige* stated: "Nonetheless, even if a claim of instructional error is initially preserved by compliance with Practice Book § [42-16], the defendant may thereafter engage in conduct that manifests an intention to abandon that claim. See *State* v. *Thomas W.*, [301 Conn. 724, 732, 22 A.3d 1242 (2011)] (waiver found when, after defendant objected to proposed instruction, he expressed satisfaction with trial court's proposed curative instruction and did not thereafter object to instruction as given); *State* v. *Mungroo*, 299 Conn. 667, 676, 11 A.3d 132 (2011) (waiver found when, after reviewing court's charge that differed from defendant's proposed instruction at charging conference, defense counsel withdrew his request to charge and accepted trial court's charge); *State* v. *Whitford*, 260 Conn. 610, 632–33, 799 A.2d 1034 (2002) (waiver found when defendant objected to initial instruction, trial court issued supplemental instruction after receiving input from defense counsel, and defense counsel did not object to instruction as given); *State* v. *Jones*, 193 Conn. 70, 87–88, 475 A.2d 1087 (1984) (waiver

found when defendant timely took exception after instruction was given, court consulted with defendant in fashioning supplemental instruction and defendant raised no further objection to either initial charge or supplemental instruction). In each of these cases, the trial court had taken some curative action to address the defendant's initial objection or the defendant had engaged in affirmative conduct that unequivocally demonstrated his intention to abandon the previously preserved objection, such as withdrawing a request to charge." *State* v. *Paige*, supra, 443.

In *Paige*, the court noted that the defendant never had withdrawn her request to charge and that there was "nothing in the record to suggest that the trial court understood her to have done so." Id., 444. The court determined that the "evidence [was] at best ambiguous as to whether the defendant effectively withdrew her request to charge that initially preserved [the] issue for appeal." Id.

In *State* v. *Johnson*, supra, 316 Conn. 52, 55, in which the defendant filed a written request to charge on the issues of constructive and nonexclusive possession, our Supreme Court had occasion to apply what it described as the "heightened standard" it had articulated in *State* v. *Paige*, supra, 304 Conn. 443. In *Johnson*, the trial court provided "both a 'rough' draft instruction and its proposed final instruction to counsel, and asked them on several occasions to review and comment on them." *State* v. *Johnson*, supra, 55. The court did not substitute different language for that requested by the defendant. Id. Rather, it "selectively omitted certain paragraphs altogether." Id., 56. Moreover, "[t]here was never any discussion relating to this charge or this element of the offenses. The defendant never stated that she was withdrawing her request to charge on possession. After the initial draft was submitted for counsel's review, the defendant requested and successfully obtained the

addition of an instruction on inconsistent statements, a matter on which the defendant also had filed a request to charge. When the court twice asked in succession whether the defendant had objections to the instructions just before the charge was given to the jury, defense counsel twice stated that he had no objection." Id.

On the basis of the record in *Johnson*, our Supreme Court was not persuaded that the facts rose "to the level of the type of affirmative conduct that unequivocally demonstrated an intention to abandon the request for a more comprehensive charge on possession." Id. The court reasoned that the "[t]he defendant reasonably could have interpreted the trial court's selective adoption of parts of her possession instruction as a purposeful rejection of the omitted language. . . . [T]he defendant was not required to object to the truncated instruction to preserve her request for the more comprehensive instruction." Id. Moreover, the court stated that defense counsel's "statement that he had no objection to the final instruction may simply have been intended to convey agreement that the language provided, much of which related to matters on which the defendant submitted no requests to charge, was a correct statement of the law, rather than satisfaction with the omission of language that defense counsel specifically had requested and reasonably could have believed had been intentionally rejected." Id. Last, the court stated that defense counsel's "request for the addition of an instruction on inconsistent statements, which defense counsel reasonably could have interpreted as having been inadvertently omitted, does not unambiguously indicate that he was effectively withdrawing his request for a more expansive instruction on possession." Id., 56–57.

As noted previously, the defendant in the present case filed a request to charge on investigative inadequacy. Although the court's preliminary draft instructions

included the model jury instruction rather than the defendant's requested charge, defense counsel stated, during the charging conference, that he believed that "two of our three requests were included, the adequacy and the instruction on jailhouse informants." The court responded: "Those are standard instructions, yes, they were included." The following day, the court instructed the jury using the model jury instruction. The defendant took no exceptions to the charge.

Under the guidance of *Paige* and *Johnson*, we conclude that these facts do not demonstrate an abandonment of the defendant's request for his proposed jury instruction regarding investigative inadequacy. First, we note that the defendant did not withdraw his request to charge. See *State* v. *Johnson*, supra, 316 Conn. 56; *State* v. *Paige*, supra, 304 Conn. 444. Second, our review of the record of the charging conference reveals nothing demonstrating "the type of affirmative conduct that unequivocally demonstrate[s] an intention to abandon the request" for a jury instruction on investigative inadequacy. *State* v. *Johnson*, supra, 56. Defense counsel's statement during the charging conference that he believed that "two of our three requests were included, the adequacy and the instruction on jailhouse informants," was ambiguous. As such, we do not view it as effectively withdrawing his request or expressing approval of the court's proposed charge. See *State* v. *Paige*, supra, 445 (defense counsel's response, "[o]kay. Thank you," to court's confirmation that it was planning to give charge requested by state was ambiguous comment that could not be considered to effectuate withdrawal of request to charge on that issue). A reasonable reading of defense counsel's statement is that he was mistaken as to the content of the court's proposed charge and that he wrongly believed that the court had included his proposed investigative inadequacy charge.

Moreover, with respect to the trial court's reply that, "[t]hose are standard instructions, yes, they were included," defense counsel reasonably could have concluded that the trial court's adoption of the model instruction constituted a rejection of the instruction he proposed in his written request to charge. See *State* v. *Johnson*, supra, 316 Conn. 56 (defendant reasonably could have interpreted trial court's selective adoption of parts of her possession instruction as purposeful rejection of omitted language). Subsequent to this exchange, the prosecutor sought to confirm that the court intended to "instruct the jury based on the proposed instructions that were given to counsel." The prosecutor stated: "I know that Your Honor did include an instruction on jailhouse informants and an instruction on completeness of the police investigation. I believe Your Honor's instructions are appropriate. *I objected to the defendant's specific request.*" (Emphasis added.) The court responded: "Well, at the time I gave you the instructions, to be quite honest, that was just the time, exactly the time that I received his request to charge, so I did want to consider those as well." A reasonable reading of the prosecutor's comments referring back to the state's objection is that he did not believe the defendant's request had been effectively withdrawn. Accordingly, we conclude that the defendant did not abandon his request.

C

Merits

Having concluded that the defendant preserved his claim and did not waive it, we turn to its merits. The defendant argues that the trial court's issuance of the model police investigation instruction was erroneous. The state agrees that, "[i]f this Court finds that the defendant did not waive the instructional error raised on appeal, the defendant has shown, pursuant to *Gomes*

. . . that the trial court erred in giving the model instruction regarding the adequacy of police investigations." The parties disagree, however, as to whether the error was harmless. The defendant maintains that the giving of "the model instruction was extremely harmful because it instructed the jury to disregard evidence about the inadequate investigation—the defendant's theory of defense." The state argues that the error was harmless beyond a reasonable doubt. We agree with the defendant that there is a reasonable possibility that the jury was misled by the trial court's investigative inadequacy instruction, and, therefore, the defendant is entitled to a new trial.

The following well established legal principles guide our analysis of the defendant's claim. "[A] fundamental element of due process of law is the right of a defendant charged with a crime to establish a defense. . . . Where . . . the challenged jury instructions involve a constitutional right, the applicable standard of review is whether there is a reasonable possibility that the jury was misled in reaching its verdict. . . . In evaluating the particular charges at issue, we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law." (Internal quotation marks omitted.) *State* v. *Collins*, supra, 299 Conn. 598–99. "If a requested charge is in substance given, the court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Additionally, we have noted that [a]n

error in instructions in a criminal case is reversible error when it is shown that it is reasonably possible for errors of constitutional dimension or reasonably probable for nonconstitutional errors that the jury [was] misled." (Citations omitted; internal quotation marks omitted.) *State* v. *Aviles*, 277 Conn. 281, 309–10, 891 A.2d 935, cert. denied, 549 U.S. 840, 127 S. Ct. 108, 166 L. Ed. 2d 69 (2006). "A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." (Internal quotation marks omitted.) *State* v. *Gomes*, supra, 337 Conn. 849–50.

In *State* v. *Gomes*, supra, 337 Conn. 828–29, the defendant was convicted of assault in the second degree following a fight at a sports club in Bridgeport. The "main defense advanced by the defendant was that the police had conducted an inadequate investigation of the incident." Id., 832. The defendant sought to persuade the jury that reasonable doubt existed as to the victim's identification of the defendant as the person who had assaulted her. Id. The defendant adduced the testimony of the first two police officers to arrive at the scene of the fight. Id., 848. They testified that they were informed by the police dispatcher that Raphael Morais was a suspect in the assault. Morais was present at the club and was beaten by several club patrons immediately following the assault of the victim, but the police did not investigate him as a suspect. Id. Moreover, the detective who conducted the interviews stated that he viewed Morais as a witness or victim but not as a suspect. Id. The officers testified that, although they were approached at the scene of the fight by several people claiming to have information about the assault, the officers did not ask for their names or contact information or attempt to interview them regarding what they had seen. Id. On the basis of this evidence and other evidence at trial, the defendant contended that, had the police conducted

an adequate investigation, they would have realized that the victim had misidentified him. Id., 847.

Defense counsel in *Gomes* stated in closing arguments that the police did not identify the crime scene, take any photographs of the scene so that the jurors could see the lighting, or attempt to obtain any surveillance video. Id., 832. The defendant filed a written request to charge the jury, which provided in relevant part: "[1] You have heard some arguments that the police investigation was inadequate and biased. [2] The issue for you to decide is not the thoroughness of the investigation or the competence of the police. [3] However, you may consider evidence of the police investigation as it might relate to any weaknesses in the state's case. [4] Again, the only issue you have to determine is whether the state, in light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he is charged." (Internal quotation marks omitted.) Id., 833. During the charging conference, the court informed defense counsel that it would be giving a charge "on the adequacy of the police investigation, in a form that was somewhat similar to the defendant's requested instruction, but that [its instruction] may be a little bit different." (Internal quotation marks omitted.) Id.

The court in *Gomes* instructed the jury using the model jury instruction: "You have heard some arguments that the police investigation was inadequate and that the police involved in the case were incompetent or biased. The issue for you to decide is not the thoroughness of the investigation or the competence of the police. The only issue you have to determine is whether the state, in light of all the evidence before you has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he was charged."

(Internal quotation marks omitted.) Id. "Defense counsel objected to the court's omission of point three of his requested instruction." Id., 833–34.

On appeal, our Supreme Court held that the model jury instruction "failed to inform the jury not only of a defendant's right to 'rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt' . . . but also the jury's concomitant right to consider any such deficiencies in evaluating whether the state has proved its case beyond a reasonable doubt." (Citation omitted.) Id., 853, quoting *State* v. *Collins*, supra, 299 Conn. 599–600. The court stated: "Although the model instruction is similar to the instructions this court approved in [*State* v. *Williams*, 169 Conn. 322, 335–36 nn.2–3 and 336, 363 A.2d 72 (1975)] and *Collins* because it informs the jury not to consider investigative inadequacy 'in the abstract' . . . the model instruction, unlike the instructions in *Williams* and *Collins*, improperly fails to inform the jury that a defendant may present evidence of investigative inadequacy in his or her *particular* case. Indeed, as the defendant argues, the model instruction omits the very language that the court in *Collins* determined rendered the instruction in that case acceptable because it (1) apprised the jury that 'the defendant was entitled to make an investigation and put his evidence before [it],' and (2) directed the jury to determine, based on '*all the evidence* before [it],' including evidence presented by the defendant, whether the state had proved the defendant's guilt beyond a reasonable doubt. . . . The language that the defendant requested be added to the model jury instruction—i.e., that the jury 'may consider evidence of the police investigation as it might relate to any weaknesses in the state's case'—would have similarly apprised the jury of the defendant's right to present an investigative inadequacy defense and the jury's right to consider it in evaluating the strength

of the state's case."[14] (Citations omitted; emphasis in original.) *State* v. *Gomes*, supra, 337 Conn. 853–54.

We agree with the parties that *Gomes* is controlling in the present case. As in *Gomes*, the court gave the model jury instruction ultimately rejected by our Supreme Court. In reliance on *Gomes*, we conclude that the court erred in giving the model instruction.

We next turn to whether the error in the instructions constitutes reversible error. As the court in *Gomes* concluded, "there is a significant risk that the instruction given by the trial court misled the jury to believe that it could *not* consider the defendant's arguments concerning the adequacy of the police investigation. Although the first sentence of the instruction acknowledged that the defendant made arguments that the

[14] The instruction that our Supreme Court in *State* v. *Gomes*, supra, 337 Conn. 856 n.20, "encourage[d]" trial courts to utilize "going forward," and which was subsequently approved by the Judicial Branch's Criminal Jury Instruction Committee as instruction 2.6-14, titled "Adequacy of Police Investigation," provides: "You have heard some testimony of witnesses and arguments by counsel that the state did not <*insert alleged investigative failure(s): e.g., conduct scientific tests, perform a thorough and impartial investigation, follow standard procedure, etc.*>. This is a factor that you may consider in deciding whether the state has met its burden of proof in this case because the defendant may rely on relevant deficiencies or lapses in the police investigation to raise reasonable doubt. Specifically, you may consider whether <*insert evidence of alleged police deficiencies or lapses*> would normally be taken under the circumstances, whether if (that/these) action(s) (was/were) taken, (it/they) could reasonably have been expected to lead to significant evidence of the defendant's guilt or evidence creating a reasonable doubt of his guilt, and whether there are reasonable explanations for the omission of (that/those) actions. If you find that any omissions in the investigation were significant and not reasonably explained, you may consider whether the omissions tend to affect the quality, reliability, or credibility of the evidence presented by the state to prove beyond a reasonable doubt that the defendant is guilty of the count(s) with which (he/she) is charged in the information. The ultimate issue for you to decide, however, is whether the state, in light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the count(s) with which (he/she) is charged." See Connecticut Criminal Jury Instructions 2.6-14, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited January 5, 2022).

police had failed to investigate adequately the crime in question, in the very next sentence, the jury was instructed that the adequacy of the police investigation was *not* for it to decide. This admonishment was reinforced by the third and final sentence that the *only* issue for the jury to decide was whether the state had proven the defendant's guilt beyond a reasonable doubt. . . . Thus, rather than apprising the jury that reasonable doubt could be found to exist if the jury conclude[d] that the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits . . . there is a reasonable possibility that the instruction had the opposite effect and caused the jury to believe that it was *prohibited* from considering any such evidence." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 854–55.

For the same reasons expressed in *Gomes*, we conclude that it is reasonably possible that the jury in the present case was misled to believe that it could not consider the defendant's arguments regarding the adequacy of the police investigation. Moreover, the court in *Gomes* further considered "the relative weakness of the state's case" in determining that the instructional error was harmful to the defendant. Id., 855. In the present case, the state's case was not strong, as the primary evidence consisted of the testimony from two jailhouse informants who recounted inculpatory statements made by the defendant in exchange for beneficial treatment in their own pending criminal matters. In fact, in closing arguments, the prosecutor stated that, "the most significant witnesses, in addition to Mr. Blackman, are Mr. Davis and Mr. El Massri, also Detective [Raymond] Grzegorzek and Detective Tran."

The physical evidence focused on the hat found "stuck in the bushes" near the crime scene. Although the defendant was deemed a contributor to the DNA

found on the hat, there were two other contributors to the DNA on the hat. Moreover, as Officer Korczak testified, the hat was found "stuck in the bushes," which defense counsel argued was not consistent with a hat falling off while an individual was running away. There also was no evidence outside of the jailhouse informant testimony that the victim's assailant wore a hat. The gun that the state alleged to have been used in the homicide was problematic in that there was no forensic evidence linking it to the shooting of the victim. Indeed, there were no casings located at the scene. Moreover, there were no eyewitnesses to the shooting, and the defendant did not appear on any of the surveillance videos obtained by the police. Defense counsel sought to amplify the weaknesses in the state's evidence by highlighting for the jury claimed inadequacies in the police investigation, including the failure to investigate other potential suspects. On the basis of this record, we conclude that there is a reasonable possibility that the jury was misled by the trial court's investigative inadequacy instruction, and, therefore, the defendant is entitled to a new trial.

II

Although our conclusion in part I of this opinion is dispositive of the present appeal, we address the defendant's claim that the trial court improperly admitted uncharged misconduct evidence because it has been raised and fully briefed and is likely to arise on remand. See, e.g., *State* v. *Chyung*, 325 Conn. 236, 260 n.21, 157 A.3d 628 (2017) (addressing claim that court abused its discretion in admitting evidence of uncharged misconduct because issue was likely to arise on remand). We disagree with the defendant that the court abused its discretion.

The following additional facts and procedural history are relevant to the resolution of this claim. On December 30, 2014, the defendant filed a motion for disclosure

of uncharged misconduct. On August 23, 2017, the state filed a notice of uncharged misconduct. The state sought to introduce evidence, inter alia, of (1) the facts of two shootings occurring on August 21, 2014, one on Maple Street and one on Prospect Street; (2) the defendant's statements to a detective admitting involvement in the Maple Street and Prospect Street shootings and that he used a Desert Eagle in those shootings; (3) the defendant's statement in the presence of a police officer after the Maple Street incident that, "I like to play with guns . . . my boys have guns, a .44 magnum"; and (4) the defendant's guilty pleas to the charges arising out of the Maple Street and Prospect Street shootings. The defendant filed a September 5, 2017 motion in limine seeking to preclude admission of the evidence.

On September 18, 2017, the state filed a memorandum of law in support of its notice of uncharged misconduct and responding to the objections raised by the defendant in his motion in limine. In its memorandum of law, the state argued, inter alia, that statements made by the defendant regarding acquisition of the firearm used in the homicide and the Maple Street shooting were relevant to means and opportunity to commit the murder. It further argued that the statements put into context crucial prosecution testimony and completed the story of the crime. The state argued that the defendant's statement that he liked to play with guns was relevant to the issue of motive, means, and opportunity to commit the crime, and it put into context crucial prosecution testimony. The state also argued that the facts of the Prospect Street shooting, the defendant's admissions with respect thereto, and the defendant's statements regarding his possession of the Desert Eagle were relevant to "intent, identity, motive, means and opportunity to commit the murder, it places into context crucial prosecution testimony and is so factually and legally connected to the homicide that it completes the story

of the charged crime of murder and pistol without a permit."

On September 18, 2017, the defendant filed a second motion in limine in response to the state's memorandum of law. A hearing also was held on September 18. The state additionally argued during the hearing that evidence of the use of the firearm in the two other shootings went to the issue of operability. The defendant argued, inter alia, that the evidence sought to be introduced by the state was irrelevant and more prejudicial than probative.

On September 22, 2017, the court issued its memorandum of decision with respect to the motion in limine regarding uncharged misconduct. With respect to the defendant's statement that he liked to play with guns, the court determined that it was admissible as an admission of a party opponent and was relevant to intent to commit murder, as well as to identity, means, and opportunity, and that it was relevant to the element of possession required for conviction of the charge of carrying a pistol without a permit.[15] The court found the statement "highly relevant." The court noted: "In determining prejudice, this court is considering whether the evidence tends to evoke an emotional bias against the defendant. There is always some prejudice from highly probative evidence."

As to the defendant's statements regarding the Maple Street and Prospect Street shootings, the court stated that they were admissions of a party opponent admissible to prove "the defendant's specific intent to commit murder and the identity of the person who shot the decedent. . . . It is also relevant evidence of a critical

[15] In its memorandum of decision, the court stated that the defendant's statement that he liked to play with guns was not uncharged misconduct. It later determined, however, that it did constitute uncharged misconduct.

element of the second offense charged. It also is relevant as indicative of the means and opportunity to commit the offense charged." The court found that "[t]he highly probative evidence is prejudicial, but the prejudicial impact does not outweigh its probative value."

The court next determined that the defendant's guilty pleas to the Maple Street and Prospect Street shootings were admissible. The court stated: "The evidence should be admitted to prove the defendant's specific intent to commit murder and the identity of the person who shot the decedent. It also is relevant as indicative of the means and opportunity to commit the offense charged. Finally, it is relevant evidence of a critical element of the second offense charged." The court found that "[t]he highly probative evidence is prejudicial, but the prejudicial impact does not outweigh its probative value."

Finally, the court determined that the defendant's statements regarding the Desert Eagle also were admissions of a party opponent and should be "admitted to prove the defendant's specific intent to commit murder and the identity of the person who shot the decedent. It also is relevant as indicative of the means and opportunity to commit the offense charged. Finally, it is relevant evidence of a critical element of the second offense charged." The court found that the "highly probative evidence is prejudicial, but the prejudicial impact does not outweigh its probative value." The court stated that it would give the jury a limiting instruction with respect to each instance of uncharged misconduct.

On September 25, 2017, the first day of evidence, the defendant filed a motion in limine requesting that the court reconsider its September 22, 2017 ruling on uncharged misconduct. Specifically, he reiterated his arguments that the evidence was not relevant and that its probative value was outweighed by the danger of

unfair prejudice. He requested, inter alia, that, in the event the court allowed the defendant's statements into evidence, the evidence must be strictly limited to the proffered statements and that additional factual circumstances surrounding the two shootings should not be admitted into evidence.

Before and in relation to the expected testimony of Detective Grzegorzek, there was an extensive and thorough colloquy between the state, defense counsel, and the court with respect to the limitations to be imposed on the evidence regarding the Maple Street and Prospect Street shootings. At the conclusion of these discussions, the court stated that it was admitting evidence that "[the shootings] happened, there was a discharge, there was a gun," and that the police found a 40 40 Desert Eagle and the defendant admitted to using the gun. Detective Grzegorzek testified that, on August 21, 2014, at approximately 12:45 a.m., shots were fired at 213 Maple Street in New Britain, the home of the defendant's girlfriend, Josslin Kinsey. Detective Grzegorzek further testified as to a second incident occurring on August 21, 2014, at approximately 8:45 a.m., in which gunshots were fired at 66 Prospect Street in New Britain, where the defendant lived with his family on the second floor. Detective Grzegorzek testified that no one was injured in either the Maple Street or Prospect Street shootings. Detective Grzegorzek testified that he located the defendant that same day in Middletown and that the defendant agreed to speak with Detective Grzegorzek at the New Britain Police Department. Detective Grzegorzek testified that he asked the defendant about the shooting of the victim and the shootings at Maple Street and Prospect Street. Detective Grzegorzek testified that the defendant initially denied any involvement in all three incidents but later admitted to Detective Grzegorzek that he had fired the gunshots in both the Maple Street and Prospect Street shootings

using the Desert Eagle. Detective Grzegorzek testified that a firearm was recovered following the Prospect Street shooting. On cross-examination, Detective Grzegorzek testified that officers recovered five shell casings from the scene of the Maple Street shooting and one shell casing from the Prospect Street shooting. No limiting instruction was requested or provided following Detective Grzegorzek's testimony.

New Britain Police Officer David Tvardzik, who was dispatched to 213 Maple Street on the report of shots fired, also testified at trial. Over the defendant's objection, Officer Tvardzik testified that, while another officer administered a test to the defendant; see footnote 2 of this opinion; the defendant stated that there would probably be residue on his hands because "I like to play with guns . . . my boys have guns, a .44 magnum." The court gave the jury a contemporaneous limiting instruction.[16] Officer Tvardzik further testified that five shell casings were recovered from the scene of the Maple Street shooting.

Before Detective Perez testified, the defendant again objected to the anticipated evidence regarding the Desert Eagle, the shell casings from the Prospect Street and Maple Street shootings, and the firearms analysis.

[16] The court's limiting instruction provided: "Ladies and gentlemen, the information, the testimony that was just offered by the state, is not being admitted to indicate any bad character, propensity or a criminal tendency by this defendant. The evidence is being admitted solely to show or establish the identity of the person who committed the crimes charged and an element of the crimes charged. You may not consider such evidence as establishing a propensity on the part of the defendant to commit any of the crimes charged or to demonstrate a criminal propensity. You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issue for which it is being offered but only as it bears upon that issue. On the other hand, if you don't believe the evidence or even if you find that it doesn't logically, rationally or conclusively support the issue for which it's being offered, then you may not consider it for any other purpose."

Specifically, he objected on the grounds that such evidence was not relevant and that it was more prejudicial than probative as well as cumulative. Before issuing its ruling, the court stated, as defense counsel had argued, that the challenged evidence was creating "a trial within a trial" and further stated, "I think I tried to make it really clear that I'm trying to focus on Roberts Street and not Maple and Prospect." With that preface, the court permitted the state to introduce into evidence the Desert Eagle to establish means and opportunity and as relevant to the elements involved in the charge of carrying a pistol without a permit, the firearms analysis to establish operability, and the casing located in the gun at the time of its recovery because "it jammed." The court found that the relevance of the five casings from the Maple Street shooting was outweighed by its prejudicial impact.[17] Defense counsel stated: "[I]f the court is allowing the one shell from . . . Prospect Street, I think it would just be consistent to allow the other shells because the jury has already heard that, so I'd ask that that be allowed in. However, I still continue to object to all of the shells. I don't believe that it's relevant at all."

Detective Perez testified that there was a spent casing inside the Desert Eagle when he recovered it from underneath a parked vehicle at 10 School Street.[18] Detective Perez further testified as to the five Maple Street casings, which were admitted into evidence along with the single casing that was found inside the Desert Eagle when he recovered it. Detective Perez testified,

[17] The court excluded evidence of a DNA analysis performed on the Desert Eagle as cumulative. It ruled: "[T]he other forensic testing, at this point, is getting into Maple and Prospect Street rather than Roberts Street and the jury should be focusing on Roberts Street."

[18] On appeal, the defendant "does not contest the admission of evidence that Det[ective] Perez found the Desert Eagle under a car on School Street." He does challenge, however, the admission of the spent casing found inside the gun and the evidence relating to that casing.

on cross-examination, that dropping a firearm could cause an accidental discharge, which could cause the firearm to jam. No contemporaneous limiting instruction was requested or provided following Detective Perez' testimony.

Arielle Van Deusen, a state firearms examiner, testified that she physically examined the Desert Eagle and noted "a little bit of rust to the firearm. So, it wasn't properly maintained or may have gotten damaged from some type of moisture, but otherwise it functions as expected." Van Deusen testified that "[r]ust can cause the firearm to not function always as properly as it should. It could cause it to stick, to be slower to move or it could also cause things to not—the cartridge cases to not eject or extract as they should." Van Deusen test-fired the Desert Eagle and determined that it was operable. Van Deusen testified that the Desert Eagle had fired the casings from both the Maple Street and Prospect Street shootings. Photographs of the comparisons Van Deusen made also were entered into evidence. During Van Deusen's testimony, the court instructed the jury that the evidence of "other actions that took place" was admitted solely to show identity and the elements of the crimes of murder and carrying a pistol without a permit.

On the basis of the court's ruling that the defendant's guilty pleas regarding the Maple Street and Prospect Street shootings were admissible, the defendant agreed to stipulate that he had pleaded guilty to attempted assault in the first degree and reckless endangerment in the first degree with respect to those shootings, and the stipulation was read to the jury. No contemporaneous limiting instruction was requested or provided following the reading of the stipulation.

We first set forth applicable legal principles. "[A]s a general rule, evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the

crime of which the defendant is accused. . . . Such evidence cannot be used to suggest that the defendant has a bad character or a propensity for criminal behavior. . . . The well established exceptions to the general prohibition against the admission of uncharged misconduct are set forth in § 4-5 [c] of the Connecticut Code of Evidence, which provides in relevant part that [e]vidence of other crimes, wrongs or acts of a person is admissible . . . to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony. . . . We have developed a two part test to determine the admissibility of such evidence. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions [set forth in § 4-5 (c) of the Connecticut Code of Evidence]. . . . Second, the probative value of the evidence must outweigh its prejudicial effect. . . . Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling. . . .

"In determining whether the prejudicial effect of otherwise relevant evidence outweighs its probative value, we consider whether: (1) . . . the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) . . . the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) . . . the evidence offered and the counterproof will consume an undue amount of time, and (4) . . . the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Citations omit-

ted; footnote omitted; internal quotation marks omitted.) *State* v. *Raynor*, 337 Conn. 527, 561–62, 254 A.3d 874 (2020).

"We are mindful that [w]hen the trial court has heard a lengthy offer of proof and arguments of counsel before performing the required balancing test, has specifically found that the evidence was highly probative and material, and that its probative value significantly outweighed the prejudicial effect, and has instructed the jury on the limited use of the evidence in order to safeguard against misuse and to minimize the prejudicial impact . . . we have found no abuse of discretion. . . . Proper limiting instructions often mitigate the prejudicial impact of evidence of prior misconduct. . . . Furthermore, a jury is presumed to have followed a court's limiting instructions, which serves to lessen any prejudice resulting from the admission of such evidence." (Internal quotation marks omitted.) *State* v. *Berrios*, 187 Conn. App. 661, 697, 203 A.3d 571, cert. denied, 331 Conn. 917, 204 A.3d 1159 (2019).

The defendant argues on appeal that, "[a]lthough evidence that the defendant possessed and fired the Desert Eagle three days after the murder was relevant and probative, the trial court abused its discretion in admitting the extraneous facts of both shootings, the defendant's guilty pleas to both shootings, Officer Tvardzik's testimony that he heard the defendant say, 'I like to play with guns . . . my boys have guns, a .44 magnum,' the shell casings from both incidents, photographs of the shell casings, and testimony about the recovery of and testing of the shell casings." The defendant argues that anything beyond evidence that he admitted to firing the Desert Eagle three days after the murder, as relevant to prove means, opportunity and identity, was "irrelevant, needlessly cumulative to the defendant's admissions, and unduly prejudicial."

We first address the relevance of the challenged evidence. The defendant concedes the relevance of evidence that he possessed and fired the Desert Eagle three days after the victim's death but argues that any evidence beyond that, including the facts of the shootings, the guilty pleas, his statements, and the shell casings and related evidence, was irrelevant. We disagree.

"Within the law of evidence, relevance is a very broad concept. Evidence is relevant if it has *any* tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact *even to a slight degree*, [as] long as it is not prejudicial or merely cumulative." (Emphasis in original; internal quotation marks omitted.) *State* v. *Collins*, supra, 299 Conn. 587 n.19. On the basis of this broad definition of relevancy, we cannot conclude that the challenged evidence was irrelevant. See id. (rejecting distinction drawn by defendant between simple prior possession of murder weapon and its actual use in shooting several months prior to charged murder). Accordingly, we turn to an analysis of the degree to which the prejudicial effect of the relevant evidence outweighs its probative value.

As found by the trial court, the probative value of the uncharged misconduct, which occurred in close temporal proximity to the charged murder, was high. The evidence of the two subsequent shootings, which connected the defendant with the gun alleged by the state

to have been used in the homicide, and his ensuing guilty pleas, were probative of the defendant's means and opportunity to commit the charged crimes. Likewise, the defendant's statement, "I like to play with guns . . . my boys have guns, a .44 magnum," was equally probative of the defendant's means and opportunity to commit the charged crimes. Finally, the spent casing found inside the Desert Eagle and Van Deusen's related testimony were probative in that they explained the lack of casings found at the scene of the homicide. As the trial court found, the casing found inside the Desert Eagle was relevant to whether the gun jammed. Given that the probative value of the challenged evidence was high, it would be "outweighed only upon a showing of a high degree of prejudice." *State* v. *Morel*, 172 Conn. App. 202, 230, 158 A.3d 848, cert. denied, 326 Conn. 911, 165 A.3d 1252 (2017).

With respect to the prejudicial effect of the evidence, we first consider whether the facts offered may unduly arouse the jurors' emotions or hostility. Our Supreme Court has "repeatedly held that [t]he prejudicial impact of uncharged misconduct evidence is assessed in light of its relative viciousness in comparison with the charged conduct. . . . The rationale behind this proposition is that the jurors' emotions are already aroused by the more severe crime of murder, for which the defendant is charged, and, thus, a less severe, uncharged crime is unlikely to arouse their emotions beyond that point. The question of whether the evidence is unduly prejudicial, however, does not turn solely on the relative severity of the uncharged misconduct. Instead, prejudice is assessed on a continuum—on which severity is a factor—but whether that prejudice is undue can only be determined when it is weighed against the probative value of the evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Raynor*, supra, 337 Conn. 562–63.

In the present case, the Maple Street and Prospect Street shootings were significantly less severe than the charged crimes, which included the charge of murder. Specifically, no one was injured in either subsequent shooting. See, e.g., *State* v. *Campbell*, 328 Conn. 444, 523, 180 A.3d 882 (2018) (shooting at home where defendant believed victim to be staying less vicious than shooting three victims in head at close range). Moreover, the misconduct evidence was presented primarily through the testimony of police officers and state laboratory personnel who investigated the shootings. Cf. *State* v. *Raynor*, supra, 337 Conn. 564 (evidence regarding separate shooting could arouse jurors' emotions where evidence included victim's detailed testimony about shooting, including her feelings of being scared and her actions during shooting). Thus, it is unlikely that the facts of the two subsequent shootings and the evidence related thereto unduly aroused the jurors' emotions.

Moreover, the uncharged misconduct evidence did not create an unduly distracting side issue. Although there was extensive and repeated argument outside the presence of the jury as to the admissibility of the misconduct evidence, the state's presentation of the evidence to the jury was not unduly distracting. First, the court restricted testimony to the facts as to the occurrence of the two shootings, the time and location of the shootings, and the lack of any injuries stemming from the shootings. See *State* v. *Blango*, 103 Conn. App. 100, 111, 927 A.2d 964 (no abuse of discretion in admitting evidence of two separate incidents in which defendant displayed weapon when court limited testimony to that which was necessary to support victim's allegation that defendant displayed gun), cert. denied, 284 Conn. 919, 933 A.2d 721 (2007). With respect to the casings, the court's ruling permitted introduction of only the single casing found inside the Desert Eagle when it was

recovered. The remaining five casings were introduced into evidence at the defendant's request, subject to his continued objection to the admission of all the casings.

Moreover, the introduction of the uncharged misconduct evidence did not consume an undue amount of time. See *State* v. *James G.*, 268 Conn. 382, 401, 844 A.2d 810 (2004) (prior misconduct evidence did not result in "trial within a trial" when it consisted of only twenty-five pages out of approximately 500 pages of trial transcript); *State* v. *Morlo M.*, 206 Conn. App. 660, 693, 261 A.3d 68 (prior misconduct evidence not distracting in amount of time it involved when state elicited victim's testimony regarding two prior assaults without adducing any additional evidence elaborating on details of such assaults), cert. denied, 339 Conn. 910, 261 A.3d 745 (2021). In the present case, the misconduct evidence was introduced primarily through testimony interspersed throughout three days of the nine day trial and also included limited documentary evidence and a concise stipulation that was read to the jury. On the first day of evidence, Detective Grzegorzek testified briefly as to both the Maple Street and Prospect Street shootings.[19] On the second day of evidence, September 26, 2017, Officer Tvardzik testified as to the defendant's statement that he liked to play with guns and that five casings were recovered from Maple Street,[20] in a direct and cross-examination that amounted to only three pages of transcript. That same day, Detective Perez testified as to the spent casing found inside the Desert

[19] Also on the first day of evidence, Officer Tvardzik was called as a witness and briefly mentioned the Maple Street shooting before court was adjourned for the day.

[20] As noted previously, the court found that the relevance of the five casings from the Maple Street shooting was outweighed by its prejudicial impact. Defense counsel, however, requested that, because the court had allowed into evidence the casing from the Prospect Street shooting, that it also allow into evidence the other casings but continued to object to the admission of all the casings.

Eagle when it was recovered and the casings from the Maple Street shooting. On October 2, 2017, Van Deusen testified as to the shell casings from the Maple Street and Prospect Street shootings, and photographs of her comparisons were admitted into evidence. Finally, the stipulation regarding the defendant's guilty pleas was read to the jury on October 4, 2017. Although the challenged evidence was introduced through multiple witnesses, the prosecutor did not belabor his examination of the witnesses, and we cannot say that the presentation of the evidence consumed an undue amount of time.[21]

Finally, in an effort to minimize any prejudice that might arise from the admission of the challenged evidence, the trial court gave a limiting instruction in its final charge[22] to the jury regarding the purposes for

[21] Last, the defendant was not unfairly surprised by the evidence, as it was the subject of pretrial motions and a hearing.

[22] The court gave the following limiting instruction in its final charge: "The state has offered evidence of other acts of misconduct of the defendant. This is not admitted to prove the bad character, propensity or criminal tendencies of the defendant. Such evidence is being admitted solely to show or establish the defendant's intent, the identity of the person who committed the crimes alleged, a motive for the commission of the crimes alleged and an element of the crimes of murder and carrying a pistol without a permit.

"You may not consider such evidence as establishing a propensity on the part of the defendant to commit any crimes charged or to demonstrate criminal propensity. You may consider such evidence if you believe it and further find that it logically, rationally, and conclusively supports the issues for which it is being offered by the state but only as it may bear on the issues indicated above.

"On the other hand, if you do not believe such evidence, or even if you do, if you find that it does not logically, rationally and conclusively support the issues for which it is being offered by the state; namely, the issues indicated above, then you may not consider that testimony for any purpose.

"You may not consider evidence about the misconduct of the defendant for any purpose other than the ones I have just told you, because it may predispose your mind unequivocally to believe that the defendant may be guilty of the offense here charged merely because of the alleged other misconduct. For that reason, you may consider this evidence only on the issues indicated above and for no other purpose."

The court further instructed the jury: "Additionally, there was testimony concerning the defendant's activities on Maple and Prospect Street on the

which it could consider the evidence of other acts of uncharged misconduct of the defendant. It also gave contemporaneous limiting instructions accompanying the testimony of Van Deusen and Officer Tvardzik.[23] "Absent evidence to the contrary, we presume that the jury followed the court's limiting instruction." (Internal quotation marks omitted.) *State* v. *Lynch*, 123 Conn. App. 479, 493–94, 1 A.3d 1254 (2010); cf. *State* v. *Raynor*, supra, 337 Conn. 565 n.23 (recognizing that court gave limiting instructions on three separate occasions but noting that "limiting instructions may feature more prominently in a harmless error analysis").

Our Supreme Court has explained that "the care with which the [trial] court weighed the evidence and devised measures for reducing its prejudicial effect militates against a finding of abuse of discretion." (Internal quotation marks omitted.) *State* v. *Cutler*, 293 Conn. 303, 313, 977 A.2d 209 (2009), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014). In the present case, the court took care to weigh the evidence, which it previously had determined was highly probative. Specifically, it heard and considered lengthy arguments as to the challenged evidence and excluded the evidence it determined to be unduly prejudicial, i.e., the five casings, or cumulative. See footnote 16 of this opinion. With respect to the evidence it did admit, the court reduced its prejudicial effect by limiting the state to a narrow presentation of the basic facts as to the two shootings and by providing the jury with limiting instructions as to the purposes for which it

dates following the crime at issue. Comments made to the investigating officers are not to be used as indicative of any bad character or propensity to commit any crime. They are to be used for the limited purpose indicated earlier."

[23] Although the court did not issue a contemporaneous limiting instruction with the testimony of Detective Grzegorzek or the reading of the stipulation as to the defendant's guilty pleas, we note that the defendant did not request a limiting instruction at that time.

could consider the evidence. Accordingly, we conclude that the court did not abuse its discretion by admitting the uncharged misconduct evidence.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

CASMIER ZUBROWSKI *v.* COMMISSIONER OF CORRECTION (AC 43981)

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

Syllabus

The petitioner, who had been convicted of murder in connection with the death of his wife, sought a writ of habeas corpus, claiming that he received ineffective assistance from his criminal trial counsel. At the criminal trial, the petitioner's trial counsel had acknowledged that the petitioner killed the victim and raised the defenses of extreme emotional disturbance and intoxication. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly concluded that the petitioner's trial counsel did not render ineffective assistance by declining to consult with and present the testimony of a crime scene reconstruction expert, the petitioner having failed to demonstrate deficient performance: although the petitioner argued that a crime scene reconstruction expert could have reviewed conclusions made by S, a detective who testified about the crime scene, and could have determined whether the evidence at the crime scene supported the defense theories, the decision of the petitioner's trial counsel not to consult with a crime scene reconstruction expert was reasonable given that S's testimony did not undermine the petitioner's theory of the case and because, through their cross-examination of S and during closing arguments, they were able to highlight the potential concerns regarding the crime scene and argue that the haphazard nature of the petitioner's alleged efforts to clean up the crime scene supported the theories of defense regarding the petitioner's mental state.
2. The habeas court properly concluded that the petitioner's trial counsel did not render ineffective assistance by declining to consult with and present the testimony of a forensic toxicologist, the petitioner having failed to demonstrate deficient performance: although the petitioner argued that a forensic toxicologist could have testified about the effects

of his prescription medications to support his intoxication defense, apart from the evidence about his alcohol consumption, there was no evidence in the record regarding whether the petitioner took any of his prescription medications prior to committing the homicide.

3. The petitioner could not prevail on his claim that his trial counsel provided ineffective assistance by failing to adequately object to or otherwise seek to preclude the testimony of B, the petitioner's daughter, regarding his prior misconduct: because the record confirmed that there was ample evidence that the petitioner killed the victim, a fact admitted by the petitioner during the criminal and habeas trials, and that the jury considered, and rejected, the petitioner's extreme emotional disturbance and intoxication defenses, the petitioner could not demonstrate that there was a reasonable probability that the outcome of his criminal trial would have been different in the absence of his counsel's allegedly deficient performance; moreover, in the petitioner's direct appeal, this court concluded that the trial court minimized the potential prejudice of the prior misconduct evidence by giving the jury detailed limiting instructions as to the role that evidence was to play in its deliberations, which further supported this court's conclusion in the present appeal that the petitioner failed to demonstrate the prejudice necessary to prevail on his ineffective assistance of counsel claim.

Argued September 21, 2021—officially released January 11, 2022

Procedural History

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

Andrew P. O'Shea, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Tamara Grosso*, former assistant state's attorney, for the appellee (respondent).

Opinion

BEAR, J. The petitioner, Casmier Zubrowski, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court incorrectly

concluded that his trial counsel did not provide ineffective assistance as defined in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts, as recited by this court in the petitioner's direct appeal, and procedural history are relevant to our resolution of this appeal. "On January 1, 2002, the [petitioner] and his wife, the victim, lived in a condominium complex in Bristol. At approximately 7 or 8 p.m., on December 31, 2001, the [petitioner] invited his brother, Bruno Zubrowski [Bruno], who lived in the same complex, to celebrate New Year's Eve with them at their condominium. During the evening, the brothers and the victim consumed substantial amounts of alcohol, including beer, vodka and schnapps. The [petitioner] consumed most of the vodka and also drank one to two beers. At approximately 10 p.m., an argument ensued concerning the cause of a hole in the drywall in the [petitioner's] home. Feeling uncomfortable with this argument, [Bruno] decided to return to his own condominium. The [petitioner] accompanied his brother back to his condominium where he 'picked up a couple of beers' after which he returned home.

"At 12:53 a.m., Officer Albert Myers, a dispatcher for the Bristol [P]olice [D]epartment, received a 911 call from the [petitioner], who told the officer that his wife was dead, that she had slashed her throat and that she was not breathing. After Myers advised the [petitioner] that assistance would be sent promptly, the [petitioner] stated, 'immediately, I mean, this—this may not be half an hour ago. I was upstairs, you know. I don't—the blood is all over.' Although the call was terminated abruptly, Myers called back and asked what had happened. The [petitioner] again requested assistance, stating that he thought his wife was dead. Also, in response to Myers' questions, the [petitioner] reiterated that he

did not know what had happened, that he and his wife had gotten into an argument and that his wife said that she was going to slash her throat. The [petitioner] also stated that he had gone upstairs and then had returned downstairs, and 'there was blood all over.'

"Officers Lawrence DeSimone and Thomas Grimaldi responded to the 911 call, arriving at the [petitioner's] home while he was still talking on the phone with Myers. When the officers knocked on the door, the [petitioner] responded, clad only in white, blood spattered briefs. He told the officers that 'his wife had cut her throat and she was dead.' The officers and the [petitioner] then walked to the kitchen where the victim was lying motionless on her back on the floor with a substantial amount of blood spread about the kitchen area. The officers also noted that the victim had lacerations about her throat and face and that a knife lay adjacent to her. Faced with this scene, Grimaldi asked DeSimone to take the [petitioner] into the living room.

"Once DeSimone escorted the [petitioner] into the living room, he had the [petitioner] sit down and he asked him, 'what happened?' The [petitioner] stated that when he arrived home from work, he had found his brother and his wife drinking and that his brother had left shortly after he arrived. He told DeSimone that he and his wife argued about a hole in the drywall at the base of the stairwell and that she said she was going to cut her throat. The [petitioner] stated that because she had made the same threat before, he did not take it seriously and went to bed. He further stated that one hour later, while he was upstairs, he heard a loud crash and called out and heard no answer. He then went downstairs where he found his wife lying on the kitchen floor. He turned her over and attempted to resuscitate her and then ran to his brother's condominium. Getting no response from his brother, he returned home and called the police.

"From the house, DeSimone and Grimaldi called Detective Kevin Hayes to investigate. After introducing himself to the [petitioner], Hayes asked the [petitioner] to come to the police station and make a statement. At that juncture and unprovoked by any questioning from Hayes, the [petitioner] told him that 'she killed herself, you know, she cut her throat, you know,' which, in essence, was the same information he had disclosed to the 911 dispatcher and DeSimone. The [petitioner] agreed to accompany Hayes to the police station where he made a written statement, the contents of which were similar to the version of events that he had given to the police at his home.

"The [petitioner] subsequently was charged with murder in violation of [General Statutes] § 53a-54a. After the jury found the [petitioner] guilty, he was sentenced to a total effective term of imprisonment of thirty-five years." *State* v. *Zubrowski*, 101 Conn. App. 379, 381–83, 921 A.2d 667 (2007), appeal dismissed, 289 Conn. 55, 956 A.2d 578 (2008), cert. denied, *Zubrowski* v. *Connecticut*, 555 U.S. 1216, 129 S. Ct. 1533, 173 L. Ed. 2d 663 (2009). The petitioner was represented at his criminal trial by attorneys Jeffrey Kestenband and William Paetzold.

On September 14, 2017, the petitioner filed a petition for a writ of habeas corpus, alleging that his constitutional right to the effective assistance of counsel had been violated. The petitioner's ineffective assistance claims were premised on three allegations of deficient performance, namely, that trial counsel failed to (1) adequately consult with and present the testimony of a crime scene reconstruction expert, (2) adequately consult with and present the testimony of a forensic toxicologist or present another source of evidence regarding the effects of his prescription medications,

and (3) adequately object to or otherwise seek to preclude the testimony of the petitioner's daughter, Beata Zubrowski (Beata).[1]

On February 10, 2020, after a trial, the habeas court rendered judgment denying the petition for a writ of habeas corpus after concluding that "[t]he petitioner . . . failed to prove his claims of ineffective assistance by Attorneys Kestenband and Paetzold." On February 20, 2020, the petitioner filed a petition for certification to appeal from the habeas court's denial of his three claims of ineffective assistance, which petition was granted by the habeas court, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by setting forth our standard of review and the legal standards relevant to the petitioner's claims. Although "[t]he underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous"; (internal quotation marks omitted) *Mozell* v. *Commissioner of Correction*, 87 Conn. App. 560, 564–65, 867 A.2d 51, cert. denied, 273 Conn. 934, 875 A.2d 543 (2005); "the effectiveness of an attorney's representation of a criminal defendant is a mixed determination of law and fact that . . . requires plenary review . . . ." (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 458, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*,

[1] The petitioner, in his posttrial habeas brief, acknowledged that the sole issue at his criminal trial was his state of mind when he killed his wife. The petitioner argued that he did not have the specific intent required for the crime of murder, and he set forth the affirmative defense of extreme emotional disturbance. He also set forth an intoxication defense.

[supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong." (Internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

When reviewing a claim of ineffective assistance of counsel, a "court can find against a petitioner on either ground, whichever is easier." *Valeriano* v. *Bronson*, 209 Conn. 75, 86, 546 A.2d 1380 (1988). To satisfy the performance prong of *Strickland*, a petitioner must show that counsel's representation "fell below an objective standard of reasonableness in order to establish ineffective performance. . . . In other words, the petitioner must demonstrate that [counsel's] representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . In analyzing [counsel's] performance, we indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . . The petitioner bears the burden of overcoming this presumption." (Citations omitted; internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, supra, 275 Conn. 460. To satisfy the prejudice prong of *Strickland*, "a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) Id., 458.

I

The petitioner's first claim is that his right to the effective assistance of counsel was violated by the failure of Kestenband and Paetzold to consult with and present the testimony of a crime scene reconstruction

expert.[2] Specifically, the petitioner argues that, because "the state's crime scene reconstructionist [Detective Nicholas F. Sabetta of the Connecticut State Police] . . . provided opinions that undermined [the petitioner's] theory of the case . . . any competent counsel would have . . . consulted with an independent crime scene reconstructionist to review . . . Sabetta's conclusions and determine whether there was any evidence in the crime scene supporting the mental state defenses being pursued." The petitioner further argues that, but for the failure of Kestenband and Paetzold to conduct such a consultation, there is a reasonable probability that the outcome of the trial would have been more favorable to the petitioner. In response, the respondent, the Commissioner of Correction, argues, inter alia, that the habeas court correctly concluded that Kestenband and Paetzold did not perform deficiently because they engaged in extensive cross-examination of Sabetta and addressed the issue of the petitioner's conduct after the victim's death during closing argument. We agree with the respondent.

At the petitioner's criminal trial, Sabetta testified, as the habeas court recounted, "about the crime scene, his investigation, and the extensive report he authored." After the conclusion of the state's direct examination of Sabetta, Paetzold[3] cross-examined Sabetta. The focus of the cross-examination was to establish that the petitioner, because of his then-existing mental state, was unable to make any meaningful or coherent effort to clean up the bloody crime scene in order to hide his commission of the crime. In his closing argument, Paetzold attempted to discredit the statements Sabetta made

[2] The habeas court noted that the petitioner's arguments concerning this claim were "tethered to the central issue at the criminal trial: his mental state at the time he killed his wife."

[3] The habeas court noted that Paetzold, prior to attending law school, was employed by the State Forensics Laboratory in the field of criminalistics, including arson analysis and crime scene reconstruction.

about the crime scene and the petitioner's alleged efforts to clean up the crime scene, arguing that the petitioner did not have the state of mind necessary to clean up the crime scene in any meaningful way or otherwise to do anything that evidenced consciousness of guilt. He also recalled for the jury the testimony of David Krulee, a forensic psychiatrist, which he argued supported the petitioner's defenses of extreme emotional disturbance and intoxication.[4]

In light of Paetzold's cross-examination of Sabetta and his closing argument, as well as our review of the record, we agree with the habeas court that Kestenband and Paetzold did not render deficient performance by declining to consult with a crime scene reconstruction expert. Upon our review of the record, we also agree with the habeas court that Sabetta's testimony did not undermine the petitioner's theory of the case. As the habeas court stated in its well reasoned decision: "The crime scene does reflect some cleanup efforts, which may have been haphazard. This is not inconsistent with the petitioner's dual defenses. As elicited through cross-examination of . . . Sabetta and argued to the jury during closing argument, the haphazard and incomplete nature of the cleanup indicates that the petitioner was not aware of what he was doing and, instead, was still operating under the influence of intoxicants or extreme emotional disturbance. . . . Paetzold highlighted the lack of wipe marks and the lack of heavy blood stains leading to the bathroom. He pointed out that there were no stains on the bottle of [carpet cleaner] which undermines the theory that it was used to clean up the scene.

[4] Addressing the testimony of Krulee, the habeas court stated: "Krulee concluded that the petitioner was overcome by intense anger and lost self-control due to the combination of that anger and his intoxication. . . . Krulee thought there were three distinct psychological/psychiatric phases the petitioner experienced that night: first, intoxication and dissociation; second, sleep and amnesia; and third, acute stress upon finding his dead wife and not remembering that he had committed the violent killing."

He argued to the jury that, in fact, the incomplete and haphazard cleaning supported the theory that the petitioner killed his wife under the fog of either intoxication or [extreme emotional disturbance], went up to bed and then woke up a few hours later to discover what had happened. This was an entirely sound theory given the state of the evidence.

"Given all of the foregoing, the court concludes that the petitioner has failed to show that trial counsel rendered deficient performance by not consulting with a crime scene reconstruction expert. . . . [T]rial counsel did not view the crime scene evidence as evidence that would alter the dual defenses they developed. The defense strategy and decision to not consult with and utilize a crime scene reconstruction expert were reasonable . . . . The cross-examination of . . . Sabetta during the criminal trial was effective and brought to the jury's attention potential concerns regarding the crime scene and the haphazard nature of the cleanup that supported the petitioner's defenses." Accordingly, with respect to the petitioner's claim that his trial counsel provided ineffective assistance by failing to consult with a crime scene reconstruction expert, the habeas court properly concluded that the petitioner failed to show deficient performance as required by *Strickland*.

II

The petitioner next claims that his right to the effective assistance of counsel was violated by the failure of Kestenband and Paetzold to consult with and present the testimony of a forensic toxicologist. Specifically, the petitioner argues that "competent counsel would have investigated the effects of the various prescription drugs he had been taking at the time of [the victim's] death," and that "[h]ad trial counsel adduced such evidence . . . there is a reasonable probability that the outcome of the trial would have been more favorable

to the petitioner." In response, the respondent argues that Kestenband and Paetzold were not ineffective in not hiring a forensic toxicologist "[b]ecause there was no evidence that the petitioner took any of his medications on the night of the crime . . . ." We agree with the respondent.

At the petitioner's criminal trial, Kestenband and Paetzold presented the testimony of Phillip Watsky, the petitioner's primary care physician from May, 1997, to September, 2001. Watsky testified that, during this period of time, he treated the petitioner for hypertension and elevated cholesterol levels, as well as for prostate cancer after he was diagnosed in 2000. Watsky testified that, while he was treating the petitioner, he prescribed the following medications: Alprazolam for anxiety; Percocet for back pain; Diovan for high blood pressure; and Lipitor for elevated cholesterol. Watsky further testified that "Diovan and Lipitor were . . . taken on a daily basis . . . [and] Percocet and . . . Alprazolam were taken on an as needed basis."

On the basis of this testimony, and the testimony of Bruno that "he heard a pill bottle rattling noise coming from the petitioner's pants pocket," the petitioner now argues that "it is an entirely obvious and reasonable inference to make that an individual afflicted with life-threatening cancer would take the medications . . . ." Having reviewed the record, however, we agree with the conclusion of the habeas court that "it is entirely speculative [whether] the petitioner took any of his prescribed medications prior to committing the homicide . . . [because] [t]here is no evidence shedding light [on the question of] whether the petitioner took any medications preceding the homicide." Because there is no such evidence in the record, the petitioner failed to prove that Kestenband and Paetzold provided ineffective assistance by failing to consult with and

present the testimony of a forensic toxicologist. Accordingly, the petitioner failed to show that the representation provided by his trial counsel constituted ineffective assistance with respect to this claim.

III

The petitioner's final claim is that his right to the effective assistance of counsel was violated by the failure of Kestenband and Paetzold to adequately object to or otherwise seek to preclude Beata's testimony regarding the petitioner's prior misconduct. Specifically, the petitioner argues that "there was no reasonable strategic basis to reject the state's offer to limit Beata's prior misconduct testimony," and that there is a reasonable probability that, but for trial counsel's deficient performance, the outcome of the criminal trial would have been more favorable to the petitioner. In response, the respondent argues, inter alia, that the habeas court was correct in concluding that the petitioner failed to show prejudice arising from counsel's handling of Beata's testimony. We agree with the respondent.

In its memorandum of decision, the habeas court set forth the following relevant facts and procedural history: "Trial counsel objected to the state calling [Beata] as a witness. That objection, in part made on the ground that her testimony would be prejudicial to the [petitioner], was overruled. After trial counsel consulted with the petitioner, [they] indicated [that they were] willing to stipulate to [the] identity of the petitioner as the individual who committed the homicide in exchange for the state not putting on evidence of the petitioner's prior violence toward [the victim]. The [state] indicated that [it] was willing to agree to the [petitioner's] proposal but reserved the right to call [Beata] if the [petitioner] did not follow through with the stipulation, as well as ask her generally about the

petitioner's attitude toward [the victim] without getting into specific prior acts of violence.

"Attorney Kestenband expressed concern to the court that the [petitioner] did not know what [Beata] would testify to, so the [petitioner] was operating at a disadvantage. The court recessed to give trial counsel the opportunity to work out the stipulation. After the recess, the court indicated that counsel and the court had discussed in chambers how to proceed: [Beata] would testify in the absence of the jury, after which defense counsel could discuss her testimony with the petitioner and decide whether or not they would agree to enter into a stipulation. [Beata] then testified in the absence of the jury. After an additional recess, [Kestenband] indicated to the court that the [petitioner] would not stipulate and that [Beata's] testimony to the jury could proceed.

"[Beata's] testimony included . . . her recounting for the jury an incident in which [the petitioner] was violent toward [the victim]. According to [Beata], [the victim] was friendly and easy going. She described the petitioner as mostly disrespectful toward [the victim]. [Beata] recalled a family picnic during which the petitioner's conduct toward [the victim] became violent. The petitioner, according to [Beata], became physically violent several times . . . by grabbing [the victim] by her hair and pulling her toward him with force.

"In addition to her testimony about the picnic incident, [Beata] testified that the petitioner called her the morning after the homicide. The petitioner informed her [that] the police were there and that [the victim] was dead. The petitioner explained what he encountered after he went downstairs and discovered the crime scene. The petitioner also told her that the victim must have killed herself. [Beata] testified that the petitioner wanted her to come over and help him because he did

not know what to do. She refused to go over to the petitioner's house, which caused the petitioner to be verbally abusive to her . . . . [Beata] then hung up the telephone. On cross-examination, [Kestenband] elicited from [Beata] that the petitioner was a chronic alcoholic who always had a drink in his hand when she saw him. The petitioner, however, usually did not appear drunk to her in spite of the alcohol he was consuming."

The petitioner now argues that Kestenband and Paetzold rendered deficient performance by deciding not to enter into a stipulation with the state to limit Beata's testimony regarding the petitioner's prior misconduct and that he was prejudiced by this allegedly deficient performance. Specifically, the petitioner argues that, if Kestenband and Paetzold had followed through with the proposed stipulation, there is a reasonable probability that the outcome of the proceedings would have been different because "[t]he state's case against the petitioner on the murder charge was far from compelling, as evidenced by the more than two full days the jury took for its deliberations." We conclude, as did the habeas court, that the petitioner has failed to establish prejudice.

When addressing Beata's testimony, the habeas court stated: "[T]he petitioner has failed to show how he was prejudiced . . . . There was ample evidence that the petitioner killed his wife; the [extreme emotional disturbance] and intoxication defenses were considered by the jury but rejected. . . . Further supporting this court's conclusion is our Appellate Court's holding that the trial court did not err in admitting [Beata's] testimony because it 'was probative and not unduly prejudicial and admissible . . . on the issues of intent and motive.' "[5] We agree with the conclusion of the habeas

[5] The habeas court also found that trial counsel's decisions concerning Beata's testimony were reasonable under the circumstances existing during the trial and did not constitute deficient performance: "Trial counsel's decisions during the trial, in response to the court's denial of the [petitioner's]

court. Our review of the record confirms that there was ample evidence that the petitioner killed the victim, a fact admitted by the petitioner during the criminal and habeas trials, and that the jury considered, and rejected, the petitioner's extreme emotional disturbance and intoxication defenses. This conclusion is further supported by the decision of this court in the petitioner's direct appeal, in which we concluded, in the context of reviewing the admissibility of Beata's testimony, that "the [trial] court minimized the potential prejudice to the [petitioner] of the prior misconduct evidence by giving the jury detailed limiting instructions as to the role the evidence was to play in its deliberations, and the court repeated its admonition to the jury in its final instructions." *State* v. *Zubrowski*, supra, 101 Conn. App. 396.

We conclude that the petitioner has failed to show that there is a reasonable probability that, but for the decision of Kestenband and Paetzold not to further

motion in limine, were reasonable. The state was willing to stipulate with the defense, but was only willing to forgo asking [Beata] about specific acts of violence. Trial counsel's benefit/harm assessment of [Beata's] testimony must be accorded deference unless there were no reasonable strategic grounds to not stipulate. *Strickland* v. *Washington*, [supra, 466 U.S. 688] ('Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.'). The evidence [Beata] presented could assist the defense because of the information she provided about the petitioner's alcohol consumption and potential for unpredictable violent behavior. The court acknowledges that her testimony also carried the risk of not helping, or even potentially harming, the petitioner's defenses. But this court cannot substitute its own assessment for that made midtrial by defense counsel, who had a reasonable strategy under the circumstances. Accordingly, the petitioner has failed to prove that trial counsel were deficient in their performance."

Because we conclude that the habeas court properly found that the petitioner failed to show prejudice relating to counsel's handling of Beata's testimony, we do not address the court's finding that there was no deficient performance.

object to or otherwise seek to preclude Beata's testimony regarding the petitioner's prior misconduct, the result of the proceeding would have been different. Accordingly, because the petitioner failed to show that he was prejudiced by the allegedly deficient performance of his trial counsel, his claim of ineffective assistance of counsel must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

SERENA BAKER *v.* OSCAR ARGUETA
(AC 43827)

Prescott, Moll and DiPentima, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and making certain orders regarding the parties' finances and custody of the parties' two minor children. During the pendency of this appeal, the defendant filed a motion for articulation requesting that the court articulate several aspects of its original decision related to its finding of the defendant's presumptive child support amount. Thereafter, the trial court issued, sua sponte, a corrected memorandum of decision in which it found that the defendant's presumptive child support amount was $275 per week, rather than the $294 per week it had found in its original decision, and, subsequently, denied the defendant's motion for articulation. On appeal, the defendant raised claims relating to the child support award entered by the court in its original decision, asserting that the court incorrectly found that his presumptive child support amount was $294 per week. *Held* that this court lacked subject matter jurisdiction to entertain the defendant's appeal as that appeal became moot when the court issued a corrected memorandum of decision: the defendant's claims related only to the child support award in the court's original decision, the defendant did not challenge, by way of an amended appeal, the court's corrected decision, in which the court reversed itself and resolved the matter at issue in the defendant's favor, and there was no practical relief that this court could afford the defendant.

Argued November 30, 2021—officially released January 11, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *McLaughlin*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *McLaughlin*, *J.*, issued a corrected memorandum of decision. *Appeal dismissed.*

David N. Rubin, for the appellant (defendant).

Joseph T. O'Connor, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant, Oscar Argueta, appeals from the judgment of the trial court, rendered on January 8, 2020, dissolving his marriage to the plaintiff, Serena Baker. On appeal, the defendant raises claims of error relating to the child support award entered by the court in its January 8, 2020 memorandum of decision. We conclude that the defendant's claims became moot during the pendency of this appeal when the court issued a corrected memorandum of decision on May 22, 2020, which the defendant has not challenged by way of an amended appeal. Accordingly, we dismiss the appeal as moot.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. The parties were married in 2009. Two children were born of the marriage, one in 2014 and the other in 2016.

On September 17, 2018, the plaintiff commenced the present dissolution action. The matter was tried to the court, *McLaughlin*, *J.*, on December 17 and 18, 2019.

On January 8, 2020, the court issued a memorandum of decision rendering a dissolution judgment (original

decision). In accordance with a pendente lite parenting plan that it incorporated into the original decision,[1] the court awarded the parties joint legal custody of their children, with the children's primary residence being with the plaintiff. Additionally, the court ordered the defendant to pay child support to the plaintiff. In calculating the defendant's child support obligation, the court indicated that both parties had submitted child support guidelines worksheets pursuant to Practice Book § 25-30 (e).[2] The court referenced two worksheets that were appended to the original decision as Addendum A and Addendum B, respectively. Addendum A, identified by the court as the "[p]laintiff's worksheet" dated December 17, 2019, calculated the defendant's presumptive child support obligation under the child support guidelines, as set forth in § 46b-215a-1 et seq. of the Regulations of Connecticut State Agencies, to be $275 per week. Addendum B, identified by the court as the "[d]efendant's worksheet" dated December 5, 2019, calculated the presumptive support amount to be $294 per week. The court found the presumptive support amount to be $294 per week as set forth in Addendum B, and, after determining that a deviation was warranted because the presumptive support amount was inequitable or inappropriate on the basis of two deviation criteria under § 46b-215a-5c (b) of the regulations (coordination of total family support and the best interests of the parties' minor children), the court ordered the defendant to pay $338 per week, or $1465 per month, in child support. On January 21, 2020, the defendant filed this appeal from the original decision.

[1] The court modified one provision of the parenting plan concerning the defendant's parenting time.

[2] Practice Book § 25-30 (e) provides: "Where there is a minor child who requires support, the parties shall file a completed child support and arrearage guidelines worksheet at the time of any court hearing concerning child support; or at the time of a final hearing in an action for dissolution of marriage or civil union, legal separation, annulment, custody or visitation."

On March 10, 2020, the defendant filed a motion for articulation requesting that the court articulate several aspects of the original decision. Of import, the defendant asked the court to articulate the following: (1) whether the court mistakenly had referred to the child support guidelines worksheet appended to the original decision as Addendum A as the "[p]laintiff's worksheet" notwithstanding that the defendant had completed it; (2) whether the court mistakenly had relied on the worksheet appended to the original decision as Addendum B, which also had been completed by the defendant, to find that the defendant's presumptive child support obligation was $294 per week when Addendum B had been superseded by Addendum A; and (3) whether the correct presumptive support amount was $275 per week, as reflected in Addendum A.

On May 22, 2020, the court issued, sua sponte, a corrected memorandum of decision (corrected decision), the purpose of which was to "[correct] the court's child support orders in [the original decision] to comport with the proper child support guidelines worksheet." In the portion of the corrected decision addressing child support, the court stated that "the defendant . . . submit[ted] a child support guidelines worksheet at the commencement of the trial pursuant to Practice Book § 25-30 (e); the plaintiff did not.[3] Pursuant to the defendant's worksheet dated December 17, 2019 [i.e., Addendum A], the weekly presumptive child support amount is $275 . . . paid from the defendant

[3] On March 10, 2020, the defendant filed a motion for rectification requesting that the court rectify the record by including several documents purportedly submitted by the parties to the court, including a child support guidelines worksheet completed by the plaintiff dated December 10, 2019. On January 15, 2021, the court granted the motion for rectification except insofar as the defendant moved to add the plaintiff's child support guidelines worksheet to the record, finding that the plaintiff's worksheet was not in the court file and was not provided to the court prior to trial.

to the plaintiff." (Footnote added.) After making a finding that the presumptive support amount was $275 per week, the court deviated from that amount and ordered the defendant to pay $313 per week, or $1356 per month, in child support.[4] The corrected decision otherwise mirrored the original decision. The defendant did not file an amended appeal from the corrected decision. On June 23, 2020, the court summarily denied the defendant's motion for articulation.[5] Additional facts and procedural history will be set forth as necessary.

Before proceeding with our analysis, we briefly explain what we distill to be the defendant's claims on appeal. In the argument section of his principal appellate brief, the sole discernable claim raised by the defendant is that (1) in the original decision, the court improperly found that his presumptive child support obligation was $294 per week, and (2) notwithstanding that the court, in recognition of its error, issued the corrected decision in which it reduced his child support obligation upon a finding that the presumptive support amount was $275 per week, the original decision must be reversed and the matter must be remanded for a new trial. In the conclusion section of that brief, without any supporting analysis, the defendant asks us to "approve . . . the following conclusions:" (1) the court improperly found that the presumptive support amount was $294 per week; (2) the court improperly "failed to determine the presumptive support amounts, child support award, child care costs, health care coverage, health care expenses, worksheet, child support award

[4] In the original decision, the court determined that a deviation from the defendant's presumptive child support obligation was warranted on the basis of two deviation criteria. In contrast, in the corrected decision, the court did not identify expressly any deviation criteria in ordering a deviation from the presumptive support amount. As we explain later in this opinion, there are no claims before us that are predicated on the corrected decision.

[5] The defendant did not file a motion for review of the denial of his motion for articulation. See Practice Book § 66-7.

components, health care coverage contribution, payment of unreimbursed expenses, the presumptive order for unreimbursed expenses, the child care contribution and the noncustodial parent's share of qualifying costs for a contribution from the noncustodial parent only for child care costs for the two minor children of the parties"; (3) the court improperly determined that deviating from the presumptive support amount was warranted on the basis of two deviation criteria when it failed to make factual findings supporting the deviation and when there was no evidence to support the deviation; (4) the court improperly ordered a deviation from the presumptive support amount notwithstanding that the plaintiff did not indicate that a deviation was warranted on a child support guidelines worksheet completed by her dated December 10, 2019; and (5) the court made an improper factual finding regarding rental income received by the defendant from a certain commercial property.[6] During oral argument before this court, the defendant's counsel clarified that the defendant's claims of error all related to the proper calculation of the defendant's child support obligation.

On the basis of his principal appellate brief and his counsel's statements during oral argument before this court, we conclude that the crux of the defendant's appeal is that, in the original decision, the court incorrectly found that the defendant's presumptive child support obligation was $294 per week and that, as a result of the court's error, a new trial is necessary. The "conclusions" that the defendant requests that we "approve" all share a nexus to the court's finding of the presumptive support amount in the original decision.

[6] In the conclusion section of his principal appellate brief, the defendant also requests that we "approve" the conclusion that the court made correct findings as to the parties' respective net incomes. This is not a cognizable claim of error.

In her appellate brief, the plaintiff argues, inter alia, that the defendant's claims are moot because there is no practical relief that we can afford him following the issuance of the corrected decision, which the defendant has not challenged by way of an amended appeal. We agree.

"We begin with the well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction . . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . Mootness implicates this court's subject matter jurisdiction, raising a question of law over which we exercise plenary review." (Citation omitted; internal quotation marks omitted.) *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 679–80, 899 A.2d 586 (2006).

"Under our well established jurisprudence, [m]ootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . . In other words, the ultimate question is whether the determination of the controversy will result in practical relief to the complainant. . . .

"In considering the effect of the opening of a judgment on a pending appeal, then, the appropriate question is whether the change to the judgment has affected the issue on appeal. If, in opening the judgment, the trial court reverses itself and resolves the matter at issue on appeal in the appellant's favor, it is clear that the appeal is moot as there is no further practical relief that may be afforded. . . . Conversely, if the judgment

is opened to address issues entirely unrelated to the appeal, the opening of the judgment has had no effect on the availability of relief. A more difficult question may be presented if the trial court addresses the matter at issue on appeal, but does not entirely afford the appellant the relief sought. In such cases, the extent to which the trial court alters the judgment may require either a new appeal or an amended appeal. . . . As [t]he determination of whether a claim has become moot is fact sensitive . . . the facts of each case similarly must dictate the appropriate procedure to follow." (Citations omitted; internal quotation marks omitted.) Id., 691–92.

As we set forth earlier in this opinion, we construe the defendant's cardinal claim on appeal, on which all of his other claims rely, to be that his presumptive child support obligation found by the court in the original decision was incorrect. After the defendant had filed this appeal from the original decision, the court issued the corrected decision in which it acknowledged committing error as to its original finding of the presumptive support amount, found the correct presumptive support amount, and reduced the defendant's child support obligation. In essence, the court opened the original decision and substituted a new judgment for it. Thus, we conclude that the court in the corrected decision "reverse[d] itself and resolve[d] the matter at issue on appeal in the appellant's favor," and, accordingly, this "appeal is moot as there is no further practical relief that may be afforded" the defendant. Id., 692.

In his reply brief, the defendant does not offer any appreciable response to the argument that the corrected decision afforded him the relief that he seeks in this appeal.[7] Instead, the defendant maintains that his presumptive child support obligation found by the court

[7] During oral argument before this court, the defendant's counsel asserted for the first time that this appeal was not moot because the defendant was obligated to pay the incorrect amount of child support set forth in the

in the original decision was a clerical error that the court corrected in the corrected decision, which relates back to the original decision, thereby obviating the need to file an amended appeal from the corrected decision. At the outset, we note that this argument appears to be inconsistent with the defendant's claim that the court's error in finding his presumptive support amount in the original decision necessitates a reversal and a remand for a new trial. In addition, as we explain later in this opinion, the defendant's failure to file an amended appeal would bar him from challenging the child support award in the corrected decision; however, whether the defendant filed an amended appeal has no bearing on our conclusion that there is no practical relief that we may afford him as to his claims in this appeal, which relate only to the child support award in the original decision.[8]

In any event, we are not convinced by the defendant's argument that his presumptive child support obligation found by the court in the original decision was a clerical error. "A distinction . . . must be drawn between matters of substance and clerical errors, the distinction being that mere clerical errors may be corrected at any time . . . . A clerical error does not challenge the court's ability to reach the conclusion that it did reach,

original decision in the interim between the original decision and the corrected decision. Under the circumstances of this case, we reject this assertion. The record before us is silent as to whether the defendant has paid child support under the original decision, and there is no indication in the record that the defendant has requested that the trial court credit him for any child support overpayments made pursuant to the original decision.

[8] During oral argument before this court, the defendant's counsel made a fleeting suggestion that the defendant's claims on appeal were not limited to the original decision, but rather extended to the corrected decision. This contention is belied by the defendant's appellate briefs, which do not contain any cognizable claims challenging the corrected decision. Moreover, as we explain later in this opinion, the defendant was obligated to file an amended appeal from the corrected decision if he intended to claim error with respect to the child support award set forth in the corrected decision.

but involves the failure to preserve or correctly represent in the record the actual decision of the court. . . . In other words, it is clerical error if the judgment as recorded fails to agree with the judgment in fact rendered . . . .'' (Citations omitted; internal quotation marks omitted.) *Maguire* v. *Maguire*, 222 Conn. 32, 39–40, 608 A.2d 79 (1992).

Here, the original decision reflected the defendant's presumptive child support obligation that the court found at the time of the judgment rendered on January 8, 2020, notwithstanding that the court later realized that it had relied on the wrong child support guidelines worksheet in finding the presumptive support amount. Put simply, the original decision accurately reflected the January 8, 2020 judgment rendered by the court. By making a new finding as to the presumptive support amount and by recalculating the defendant's child support obligation in the corrected decision, the court opened the original decision and modified it substantively. As such, the child support award in the corrected decision superseded the child support award in the original decision. If the defendant wished to challenge the child support award in the corrected decision, then it was incumbent on him to file an amended appeal from the corrected decision pursuant to Practice Book § 61-9, which he did not do.

In sum, we conclude that the defendant's claims on appeal, which relate only to the court's finding in the original decision that the defendant's presumptive child support obligation was $294 per week, have been rendered moot as a result of the corrected decision, in which the court found the presumptive support amount to be $275 per week and reduced the defendant's child support obligation.[9] Whether the court committed error

[9] Our decision dismissing this appeal as moot encompasses the claims labeled by the defendant as ''conclusions'' in the conclusion section of his principal appellate brief. Even if we had subject matter jurisdiction over those claims vis-à-vis this appeal, we would not review their merits because,

in the corrected decision is not a question before us in this appeal. Because the defendant's claims are moot, we are without subject matter jurisdiction to entertain this appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

DEJAN ROBERT COKIC *v.* FIORE POWERSPORTS, LLC, ET AL.
(AC 44368)

Alexander, Suarez and DiPentima, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, including V Co., for, inter alia, conversion, relating to the repair of a jet ski. The trial court rendered judgment for the defendants. Thereafter, V Co. filed a postjudgment motion for attorney's fees, alleging that the plaintiff brought the claim against it in bad faith. The plaintiff objected to that motion. The court ordered that the plaintiff's counsel, L, provide any evidence found in discovery to explain why the plaintiff believed he had a colorable claim against V Co. The plaintiff filed a response to that order. Subsequently, and without scheduling a hearing, the court granted V Co.'s motion for attorney's fees, stating that the plaintiff had provided no evidence of a colorable claim. Thereafter, the court granted the plaintiff's motion for clarification of its order granting attorney's fees and specified that the order was against both the plaintiff and L, and the plaintiff and L appealed to this court. *Held*:

1. This court dismissed the appeal in part to the extent it was brought by L in connection with the award of attorney's fees to V Co.; as L was not a party to the underlying action, the court lacked subject matter jurisdiction over his portion of the appeal.

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as the plaintiff argues in her appellate brief, they are inadequately briefed. See, e.g., *Onofrio* v. *Mineri*, 207 Conn. App. 630, 637–38, A.3d (2021) (declining to reach merits of inadequately briefed claim). Moreover, under our rules of practice, an appellant's claims of error should be delineated in the argument section of the appellant's principal appellate brief; see Practice Book § 67-4 (e); whereas the conclusion section of the brief should comprise "[a] short conclusion stating the precise relief sought." Practice Book § 67-4 (f).

2. The trial court erred in granting V Co.'s motion for attorney's fees; the plaintiff was denied the opportunity to be heard on the motion, as the court never held a hearing on the issue of attorney's fees.

Argued October 14, 2021—officially released January 11, 2022

Procedural History

Action to recover damages for, inter alia, a violation of the Creditors' Collection Practices Act, brought to the Superior Court in the judicial district of Ansonia-Milford, and tried to the court, *Hon. Arthur A. Hiller*, judge trial referee; judgment for the defendants; thereafter, the court granted the postjudgment motion for attorney's fees filed by the defendant Village Marina, LLC, and the plaintiff and Peter A. Lachmann appealed to this court. *Appeal dismissed in part*; *reversed in part*; *further proceedings*.

Peter A. Lachmann, for the appellant (plaintiff).

Peter A. Lachmann, self-represented, the appellant.

Steven P. Kular, for the appellee (defendant Village Marina, LLC).

Opinion

SUAREZ, J. In this action, the plaintiff, Dejan Robert Cokic, brought various claims against multiple defendants seeking monetary damages in connection with the repair of a jet ski. The plaintiff and his attorney, Peter A. Lachmann, appeal from the judgment of the trial court awarding $893.75 in attorney's fees to the defendant Village Marina, LLC.[1] On appeal, the plaintiff

[1] There were three defendants in the underlying action—Fiore Powersports, LLC, its principal, Christopher G. Fiore, and Village Marina, LLC. After considering the plaintiff's claims during a bench trial, the court rendered judgment for the defendants. None of the defendants filed a brief in this appeal. On December 21, 2020, Village Marina, LLC, filed a notice of intent not to file a brief and simply requested that this court affirm the decision of the trial court. On February 11, 2021, following the final deadline for the defendants to file a brief, this court ordered that the appeal "will be considered on the basis of the [plaintiff's] brief and the record, as defined by Practice Book [§] 60-4, only." For convenience, we refer in this opinion to Village Marina, LLC, as the defendant. We refer to the other defendants by name.

and Lachmann both claim that the trial court erred in granting the motion for attorney's fees and raise seven issues for our consideration.[2] Insofar as the appeal was brought by Lachmann, the appeal is dismissed because Lachmann was not a party to the underlying action and, therefore, the court lacks jurisdiction over that portion of the appeal. Insofar as the appeal was brought by the plaintiff, however, the judgment of the trial court is reversed with respect to the award of attorney's fees, and the case is remanded for further proceedings on that issue.

The following facts, as found by the court, and procedural history are relevant to this appeal. A friend of the plaintiff brought a jet ski to Fiore Powersports, LLC (Fiore Powersports), for repair. The form that authorized the repairs listed Pruven Performance, Inc. (Pruven Performance), as the owner of the jet ski and the party responsible for payment. After the repairs were completed, an invoice was provided to Pruven Performance. One night, the jet ski was removed from Fiore Powersports, without payment or permission, and brought to the plaintiff's residence. Fiore Powersports commenced a small claims action against Pruven Performance to recover the cost of the repair work, and, on January 29, 2016, judgment was rendered in favor of Fiore Powersports in the amount of $1908.80.

In December, 2016, the plaintiff commenced the underlying action in this appeal against Fiore Powersports, its principal, Christopher Fiore, and the defen-

[2] The plaintiff and Lachmann claim that the trial court erred in granting the motion for attorney's fees for the following reasons: (1) the motion was filed past the deadline imposed by Practice Book § 11-21; (2) the motion was not accompanied by contemporaneous time records; (3) the court failed to allow the plaintiff an opportunity to fully litigate the motion; (4) the motion sought attorney's fees only for filing the motion itself; (5) there was no clear evidence presented that the challenged actions were entirely without color; (6) the court ordered sanctions based on a single challenged event; and (7) the court ordered sanctions when no motion for sanctions had been filed.

dant. The plaintiff brought several claims against Fiore Powersports, Fiore, and the defendant related to the repair of the jet ski, including claims for conversion, fraud, and negligence, as well as claims under the Creditors' Collection Practices Act, General Statutes § 36a-645 et seq., and the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. On July 30, 2019, after considering the plaintiff's claims during a bench trial, the court rendered judgment for Fiore Powersports, Fiore, and the defendant. In its memorandum of decision, with respect to the claims against the defendant, the trial court specifically found that "[n]o document, and no credible evidence ties or implicates . . . [the defendant] into or with the claims made by the plaintiff, with any contract or agreement with the plaintiff, with any work on the jet ski, or with any representation, statement or misstatement about the jet ski."

On September 3, 2019, the defendant filed a postjudgment motion for attorney's fees. The motion requested that the court "award attorney's fees against the plaintiff and or the plaintiff's counsel for bringing this action against . . . [the defendant] in bad faith." The plaintiff objected, arguing, inter alia, that the court did not give the plaintiff an opportunity to be heard on the issue of attorney's fees. On January 13, 2020, the court ordered that the plaintiff's counsel provide, by February 6, 2020, any evidence found in discovery to explain why the plaintiff believed that he would have a colorable claim against the defendant. The plaintiff filed a response to the order.

On October 14, 2020, without scheduling a hearing, the court granted the motion for attorney's fees and awarded $893.75 to the defendant. The plaintiff then sought clarification of the court's order granting attorney's fees to the defendant. In a memorandum of decision on the motion for clarification, the court stated that, following its order of January 13, 2020, in which it

ordered the plaintiff to provide any evidence "indicating that [the defendant] has responsibility or ownership in this action," the plaintiff provided no such evidence. The court further stated that what the plaintiff did provide to the court in "claimed compliance [with the order] . . . totally failed."

The court also addressed the plaintiff's request to clarify "whether the order is against [the] plaintiff or [the] plaintiff's counsel." The court stated that the order was issued "against both the plaintiff and [the] plaintiff's counsel" because "[n]o facts known to the plaintiff or his counsel . . . would allow a reasonable person or a reasonable attorney to conclude that a colorable claim might be established against the defendant . . . ."

On November 5, 2020, the plaintiff and Lachmann filed this appeal from the decision of the court granting the motion for attorney's fees against both the plaintiff and Lachmann. The appeal form lists Lachmann as both a party to the appeal and appellate counsel.

On September 30, 2021, the appellate clerk notified the plaintiff and Lachmann to be prepared to address at oral argument whether the portion of the present appeal brought by Lachmann should be dismissed because he is not a party to the underlying action.

I

We first address whether the portion of the appeal brought by Lachmann should be dismissed because he was not a party to the underlying action. We conclude that, because Lachmann was not a party to the underlying action, this court lacks subject matter jurisdiction over his portion of the appeal, and therefore, it is dismissed.

We begin by setting forth legal principles governing the right to appeal. "Appeals from the Superior Court to this court are governed by General Statutes § 52-263,

which expressly provides that appeals may be taken by an aggrieved party." *Leydon* v. *Greenwich*, 57 Conn. App. 727, 730, 750 A.2d 492 (2000). Section 52-263 provides in relevant part: "[I]f either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial . . . he may appeal to the court having jurisdiction from the final judgment of the court . . . ." "[T]he statute explicitly sets out three criteria that must be met in order to establish subject matter jurisdiction for appellate review: (1) the appellant must be a party; (2) the appellant must be aggrieved by the trial court's decision; and (3) the appeal must be taken from a final judgment." *State* v. *Salmon*, 250 Conn. 147, 153, 735 A.2d 333 (1999).

In the present case, we focus on the first of these three criteria. "Ordinarily, the word party has a technical legal meaning, referring to those by or against whom a legal suit is brought . . . the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons. . . . This definition of party, which we also have labeled party status in court . . . includes only those who are parties to the underlying action." (Citations omitted; internal quotation marks omitted.) Id., 154. "[S]omeone not a party to the underlying action [has] no right of review pursuant to § 52-263." Id., 162. "[O]nly an actual party to the underlying action may file an appeal." *Leydon* v. *Greenwich*, supra, 57 Conn. App. 730.

This court has held that an attorney cannot appeal from an action in which he or she was not a party in order to challenge a sanction order in that underlying action. See id., 730–31. In *Leydon*, an attorney attempted to appeal from the court's imposition of sanctions against him in the underlying matter, *Leydon* v. *Greenwich*, 57 Conn. App. 712, 750 A.2d 1122 (2000), rev'd in part, 257 Conn. 318, 777 A.2d 552 (2001), which challenged an ordinance of the town of Greenwich that

restricted the use of its public parks and public beaches to residents of the town. *Leydon* v. *Greenwich*, supra, 57 Conn. App. 728. The attorney, who did not represent a party in the underlying case, filed an amicus brief without requesting permission from the court. Id., 729. The court later issued an order to the attorney to "appear and show cause why he should not be sanctioned for filing an amicus curiae brief without following the rules of practice." Id. The court held that an amicus curiae brief could not be filed without first obtaining permission from the court and imposed on the attorney sanctions, which included reading the entire Connecticut Practice Book. Id., 729–30. The attorney attempted to appeal from the court's imposition of sanctions, but he did not initiate a separate proceeding; rather, he brought the appeal "within the framework of the underlying . . . case." Id., 730. The court dismissed the appeal because the attorney was not a party to the underlying action, and, thus, the court lacked subject matter jurisdiction over the appeal. Id., 730–31. We find *Leydon* v. *Greenwich*, supra, 57 Conn. App. 727, to be instructive in the present case.

It is undisputed that Lachmann was the plaintiff's attorney in the underlying action and has appealed from the court's order that he pay attorney's fees to the defendant. Although Lachmann was involved in the underlying action as an attorney, he was not a *party* in that case because he was not an individual "by or against whom [the] legal suit [was] brought . . . ." (Internal quotation marks omitted.) *State* v. *Salmon*, supra, 250 Conn. 154. Because Lachmann was not a party, he has no right of appellate review pursuant to § 52-263. Accordingly, the present appeal must be dismissed in part to the extent that it was brought by Lachmann.

II

We next consider the plaintiff's claim that the court erred in granting the defendant's motion for attorney's

fees.[3] The plaintiff argues, inter alia, that the court erred in failing to provide the plaintiff a hearing on the defendant's motion for attorney's fees. We agree.

We begin by setting forth the legal principles that apply to the plaintiff's claim. Our courts recognize both the American rule and the bad faith exception to the rule for attorney's fees. See *Maris* v. *McGrath*, 269 Conn. 834, 844, 850 A.2d 133 (2004). Under the American rule, "the prevailing litigant is ordinarily not entitled to collect a reasonable [attorney's] fee from the loser. . . . That rule does not apply, however, where the opposing party has acted in bad faith. . . . It is generally accepted that the court has the inherent authority to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . This bad faith exception applies, not only to the filing of an action, but also in the conduct of the litigation. . . . It applies both to the party and his counsel. . . . Moreover, the trial court must make a specific finding as to whether counsel's [or a party's] conduct . . . constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers to impose attorney's fees for engaging in bad faith litigation practices." (Citations omitted; internal quotation marks omitted.) Id., 844–45. "[T]he task of determining whether sanctions should be imposed is inherently fact bound, and requires carefully circumscribed discretion to be exercised by the trial court." *Fattibene* v. *Kealey*, 18 Conn. App. 344, 362, 558 A.2d 677 (1989).

[3] We note that this court does have subject matter jurisdiction over the appeal insofar as it was brought by the plaintiff, who is a party to the underlying action and is aggrieved by the sanction on appeal. See *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 198 Conn. App. 671, 673, 234 A.3d 997 (2020). This court has recognized that a party may appeal from the trial court's order of sanctions in which the court awarded another party attorney's fees and litigation costs. See id., 673.

Despite the court's discretion in this area, "[a]s a procedural matter, before imposing any such sanctions, the court must afford the sanctioned party or attorney a proper hearing on the . . . motion for sanctions. . . . There must be fair notice and an opportunity for a hearing on the record." (Citation omitted; internal quotation marks omitted.) *Maris* v. *McGrath*, supra, 269 Conn. 844.

In the present case, the defendant's motion for attorney's fees alleged that the plaintiff brought the claim in bad faith. The plaintiff objected to the defendant's motion for attorney's fees, arguing that he had not been given an opportunity to be heard on this issue. The court subsequently ordered the plaintiff to provide, in writing, evidence to indicate why the plaintiff believed that he would have a colorable claim against the defendant. The plaintiff provided evidence to the court in an attempt to comply with the order, but the court dismissed the evidence as unresponsive to its inquiry and later granted the defendant's motion for attorney's fees. The court, however, never held a hearing on the issue of attorney's fees. Accordingly, we conclude that the plaintiff was denied the opportunity to be heard on the motion for attorney's fees.

The appeal, insofar as it was brought by Lachmann, is dismissed; with respect to the appeal brought by the plaintiff, the judgment is reversed only as to the award of attorney's fees against the plaintiff and the case is remanded for a hearing on the issue of attorney's fees.

In this opinion the other judges concurred.

LENDINGHOME MARKETPLACE, LLC *v.* TRADITIONS OIL GROUP, LLC (AC 44450)

Prescott, Cradle and DiPentima, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the defendant, which was defaulted for failure to appear. Thereafter, the trial court granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon. The plaintiff sent notice of the judgment to the defendant, and certified to the court that notice had been mailed, pursuant to the applicable rule of practice (§ 17-22) and the court's uniform foreclosure standing orders. The defendant failed to redeem the property on or before its law day and title to the property vested in the plaintiff. More than one year after the passage of the law day, the defendant filed a motion to open the judgment of strict foreclosure. The court denied the defendant's motion to open and its subsequent motion to reargue/reconsider that ruling, and the defendant appealed to this court. *Held* that the trial court did not abuse its discretion in denying the defendant's motion to open the judgment of strict foreclosure and its motion to reargue/reconsider that ruling: the particularized factual allegations in this case did not present the rare and extreme circumstances that would justify granting the defendant the extraordinary equitable relief it sought, namely, opening the judgment of strict foreclosure more than one year after title had vested absolutely in the plaintiff, in contravention of the applicable statute (§ 49-15), given that the defendant raised no argument that it improperly had been defaulted for failure to appear or that the court lacked personal jurisdiction over it due to improper service, the record disclosed no nefarious conduct on the part of the plaintiff, and title had already passed to a nonparty purchaser; moreover, although the defendant asserted that it never received the notices sent by the plaintiff, that failure was not fairly attributable to the plaintiff but, instead, to the defendant's apparent failure to update its mailing address on file with the Secretary of the State; furthermore, because there was no error in the court's denial of the defendant's motion to open, the court did not abuse its discretion in denying the defendant's motion to reargue/reconsider that ruling.

Submitted on briefs September 13, 2021—officially released January 11, 2022

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought

to the Superior Court in the judicial district of New Britain, where the defendant was defaulted for failure to appear; thereafter, the court, *Hon. Joseph M. Shortall*, judge trial referee, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Aurigemma*, *J.*, denied the defendant's motion to open the judgment, and the defendant appealed to this court. *Affirmed.*

Elio Morgan submitted a brief for the appellant (defendant).

Patricia M. Lattanzio submitted a brief for the appellee (plaintiff).

Opinion

PRESCOTT, J. In this mortgage foreclosure action, the defendant, Traditions Oil Group, LLC, which was defaulted for failure to appear, appeals from the trial court's denial of its motion to open the judgment of strict foreclosure rendered in favor of the plaintiff, LendingHome Marketplace, LLC, and from the denial of its subsequent motion to reargue/reconsider that ruling. Although the defendant filed its motion to open more than one year after the passage of the law day set by the court, the defendant nonetheless claims that the court improperly denied its motions because (1) the passing of the law day did not vest absolute title to the subject property in the plaintiff due to the plaintiff's alleged failure to comply with notice requirements in the court's uniform foreclosure standing orders and Practice Book § 17-22;[1] (2) the court's finding that the

[1] Practice Book § 17-22 provides: "A notice of every nonsuit for failure to enter an appearance or judgment after default for failure to enter an appearance, which notice includes the terms of the judgment, shall be sent by mail or electronic delivery within ten days of the entry of judgment by counsel of the prevailing party to the party against whom it is directed and a copy of such notice shall be filed with the clerk's office. Proof of service shall be in accordance with [Practice Book §] 10-14."

Section D of the Superior Court Standing Orders JD-CV-104 provides: "Within [ten] days following the entry of judgment of strict foreclosure, the plaintiff must send a letter by certified mail, return receipt requested, and

plaintiff had complied with those notice requirements was clearly erroneous; (3) the court failed to hold a hearing on the motion to open in violation of the defendant's right to due process; and (4) the court abused its discretion by summarily denying the defendant's motion to reargue. We conclude that the court properly denied the defendant's motions and, accordingly, affirm the judgment of the court.

The record reveals the following relevant facts and procedural history. The plaintiff commenced the underlying foreclosure action on June 28, 2019, with respect to certain property in Newington. According to the complaint, in 2018, the plaintiff had brought a prior action to foreclose a mortgage on the property, which mortgage secured a note executed by REI Holdings, LLC (REI), in the principal sum of $185,200.[2] This prior foreclosure action, in which REI also was defaulted for failure to appear, ended in a November 5, 2018 judgment of strict foreclosure rendered in favor of the plaintiff, with the law day set to expire after December 5, 2018. Prior to that date, however, the defendant, who was not a party to the prior action, asserted an interest in the subject property by recording on the Newington land records

by regular mail, to all non-appearing defendant owners of the equity and a copy of the notice must be sent to the clerk's office. The letter must contain the following information: a.) the letter is being sent by order of the Superior Court; b.) the terms of the judgment of strict foreclosure; c.) non-appearing defendant owner(s) of equity risk the loss of the property if they fail to take steps to protect their interest in the property on or before the defendant owners' law day; d.) non-appearing defendant owner(s) should either file an individual appearance or have counsel file an appearance in order to protect their interest in the equity. The plaintiff must file the return receipt with the Court. THE PLAINTIFF MUST NOT FILE A CERTIFICATE OF FORECLOSURE ON THE LAND RECORDS BEFORE PROOF OF MAILING HAS BEEN FILED WITH THE COURT." (Emphasis in original.)

[2] Although the complaint states that the mortgage at issue was executed by an Elberta McCormack, this appears to be a drafting error. McCormack's name does not appear on the mortgage or any other relevant document. A copy of the mortgage was attached to the complaint in the prior action and shows that the mortgagor was REI.

a statutory form quitclaim deed dated May 18, 2017. The plaintiff commenced the present action to foreclose the defendant's interest in accordance with General Statutes § 49-30.[3]

Process was served on June 28, 2019, in accordance with General Statutes § 34-243r. According to the marshal's return of service, the marshal effectuated service of process by leaving two copies at the Office of the Secretary of the State, which was the defendant's registered agent for service of process, and by sending additional copies via certified mail to the defendant's principal office address in New York City as reflected on the company's registration certificate filed with the Secretary of the State. By statute, all foreign limited liability companies are required to register with the Secretary of the State and the requisite foreign registration certificate must include the street and mailing addresses of the company's principal office. See General Statutes §§ 34-275a and 34-275b. Any changes to a company's address must be provided to the Secretary of the State on the company's annual report. General Statutes § 34-247k (a) (2) and (b). The marshal filed a supplemental return of service on August 2, 2019, showing that the postal service had returned to the marshal the process mailed to the New York address as "unclaimed" and "unable to forward."

[3] General Statutes § 49-30 provides: "When a mortgage or lien on real estate has been foreclosed and one or more parties owning any interest in or holding an encumbrance on such real estate subsequent or subordinate to such mortgage or lien has been omitted or has not been foreclosed of such interest or encumbrance because of improper service of process or for any other reason, all other parties foreclosed by the foreclosure judgment shall be bound thereby as fully as if no such omission or defect had occurred and shall not retain any equity or right to redeem such foreclosed real estate. Such omission or failure to properly foreclose such party or parties may be completely cured and cleared by deed or foreclosure or other proper legal proceedings to which the only necessary parties shall be the party acquiring such foreclosure title, or his successor in title, and the party or parties thus not foreclosed, or their respective successors in title."

On August 8, 2019, the defendant was defaulted for failure to file an appearance. On September 9, 2019, the plaintiff filed a motion for a judgment of strict foreclosure, which the court subsequently granted on September 23, 2019. A law day for the defendant was set for October 21, 2019.[4]

On September 30, 2019, the plaintiff, in accordance with Practice Book § 17-22, filed with the court a copy of a notice of the entry of a judgment of strict foreclosure, which the plaintiff's counsel certified he mailed to the defendant by first class mail to the defendant's New York address. In addition, the plaintiff filed a copy of the letter that it had sent to the defendant at the same New York address via certified and regular mail pursuant to the court's uniform foreclosure standing orders, which notified the defendant of the entry of the judgment of strict foreclosure and its terms, including the law day and that the defendant risked loss of any potential equity in the property if it failed to take action before the law day passed. The defendant failed to redeem the property on or before its law day and, accordingly, title to the property vested in the plaintiff.[5] See *Ocwen*

[4] The court also found that the debt as of the judgment date was $244,478.09 and that the fair market value of the property was $150,000.

[5] "In Connecticut, a mortgagee has legal title to the mortgaged property and the mortgagor has equitable title, also called the equity of redemption. . . . The equity of redemption gives the mortgagor the right to redeem the legal title previously conveyed by performing whatever conditions are specified in the mortgage, the most important of which is usually the payment of money. . . . Under our law, an action for strict foreclosure is brought by a mortgagee who, holding legal title, seeks not to enforce a forfeiture but rather to foreclose an equity of redemption unless the mortgagor satisfies the debt on or before his law day. . . . Accordingly, [if] a foreclosure decree has become absolute by the passing of the law days, the outstanding rights of redemption have been cut off and the title has become unconditional in the plaintiff, with a consequent and accompanying right to possession. The qualified title which the plaintiff had previously held under his mortgage had become an absolute one." (Citation omitted; internal quotation marks omitted.) *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 97, 172 A.3d 1263 (2017).

Federal Bank, FSB v. *Charles*, 95 Conn. App. 315, 322–23, 898 A.2d 197, cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006); see also General Statutes § 49-15. The plaintiff filed a certificate of foreclosure on the Newington land records on November 1, 2019.

On November 2, 2020, more than one year after its law day had passed, the defendant filed an appearance with the court and a motion to open and vacate the judgment of strict foreclosure. A supporting affidavit signed by Jay Seinfeld, the managing member of the defendant, was attached to the motion to open. According to the motion and the affidavit, the defendant never received the notice of the entry of the judgment of strict foreclosure, and the plaintiff "intentionally misrepresented otherwise to the court by way of its false certification in violation of the trial court's standing orders." The plaintiff filed an objection to the motion to open. Attached to the objection as an exhibit were copies of the addressed envelopes and tracking results printed from the United States Postal Service website. The plaintiff also filed a supplemental objection that informed the court that the subject property had been sold to a third party for value on January 17, 2020. The plaintiff attached to the supplemental objection a copy of the recorded deed.

The trial court, *Aurigemma*, *J.*, denied the defendant's motion to open. In its order, the court first noted the sale of the property to a third party. It then stated: "[T]he defendant has failed to file any affidavit indicating that it did not receive notice or indicating the date on which it did receive notice.[6] Also denied for the

[6] It is not clear from the court's statement whether the court meant that no affidavit was attached to the motion or only that the attached affidavit lacked the specific information identified by the court. In either instance, we agree with the defendant that the court's statement is belied by the record. As previously indicated, the defendant attached a supporting affidavit to its motion to open. The defendant averred through its managing member that "[a]t no time subsequent to September 23, 2019 was [any correspondence] detailing the notice of judgment in the above captioned matter

reasons set forth in the plaintiff's objections . . . . The plaintiff complied with the service and notice requirements." (Footnote added.) The court subsequently denied without comment the defendant's motion to reargue and reconsider the denial of the motion to open. This appeal followed.[7]

The defendant claims that the court improperly denied its motions because (1) the plaintiff's alleged failure to comply with notice requirements in the court's uniform foreclosure standing orders and Practice Book § 17-22 meant title never passed to plaintiff following the running of the law day; (2) the court's finding that the plaintiff complied with all notice requirements was clearly erroneous; (3) the court violated the defendant's right to due process by failing to hold a hearing on the motion to open; and (4) the court abused its discretion by summarily denying the defendant's motion to reargue/reconsider the denial of the motion to open. We conclude, for the reasons that follow, that the court properly denied the defendant's motions in accordance with General Statutes § 49-15.

"The relevant standard of review is well established. Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing an

received by the [defendant] as certified or regular mail" and that "[t]he terms of the judgment . . . only became known after title had arguably passed to the [plaintiff]." Thus, the defendant both provided the court with an affidavit and indicated in that affidavit that it had not received notice of the judgment. Nevertheless, we are convinced that this error by the court was harmless because even if the court had acknowledged the affidavit and the defendant's assertion that it did not receive notice, the facts averred in the affidavit do not establish that this is the type of "rare and exceptional" case warranting the extraordinary relief sought by the defendant. See *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 377, 260 A.3d 1187 (2021).

[7] On September 7, 2021, this court ordered the parties to file supplemental briefs addressing the applicability to the present appeal of our Supreme Court's decision in *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 260 A.3d 1187 (2021), which was released on June 23, 2021, after the parties had filed their principal briefs.

application to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion. . . . The trial court's findings of fact, by contrast, are subject to the clearly erroneous standard of review." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 381–82, 260 A.3d 1187 (2021).

As our Supreme Court has stated, "[t]he law governing strict foreclosure lies at the crossroads between the equitable remedies provided by the judiciary and the statutory remedies provided by the legislature." *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 256, 708 A.2d 1378 (1998). Particularly relevant to the present appeal is § 49-15, which places express statutory limits on the discretionary power of the Superior Court to open a judgment of strict foreclosure once law days have passed.

Section 49-15 (a) provides in relevant part: "(1) Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, *provided no such judgment shall be opened after the title has become absolute in any encumbrancer* except as provided in subdivision (2) of this subsection.

"(2) Any judgment foreclosing the title to real estate by strict foreclosure may be opened after title has become absolute in any encumbrancer upon agreement of each party to the foreclosure action who filed an appearance in the action and any person who acquired an interest in the real estate after title became absolute

in any encumbrancer, provided (A) such judgment may not be opened more than four months after the date such judgment was entered or more than thirty days after title became absolute in any encumbrancer, whichever is later, and (B) the rights and interests of each party, regardless of whether the party filed an appearance in the action, and any person who acquired an interest in the real estate after title became absolute in any encumbrancer, are restored to the status that existed on the date the judgment was entered." (Emphasis added.)

The defendant's motion to open in the present case primarily was predicated on its claim that the plaintiff falsely had certified its compliance with the terms of the court's standing orders. The defendant also heavily relied on this court's opinion in *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 85 A.3d 1 (2014), as supporting its argument that the trial court should have exercised its equitable powers to open the judgment, in contravention of § 49-15, even though title had vested absolutely in the plaintiff.

In *Melahn*, the plaintiff had failed to give proper notice to the nonappearing defendants by regular and certified mail in accordance with the court's standing orders; see id., 4–5; which requires all foreclosure plaintiffs to send a letter detailing the terms of the judgment rendered to any nonappearing defendant owners within ten days following the entry of a judgment of strict foreclosure. Those standing orders further provide that a plaintiff cannot file a certificate of foreclosure on the relevant land records until it has provided the court with proof that the aforementioned letter has been mailed. The plaintiff in *Melahn* did not mail its notice of the judgment until four days before the law days were set to run and notice was not actually received

by the defendant until the actual law day. Id., 4. Furthermore, although the plaintiff in *Melahn* certified its compliance with the court, the notice that it sent did not contain all of the information required under the standing orders. Id., 4–5. This court reasoned that these deficiencies represented the type of "rare and extreme" case in which equity will permit a court to provide relief in response to "an egregious mistake" on the basis of "the unusual specific facts and circumstances . . . including the omissions and falsification by the plaintiff constituting its noncompliance with the strict foreclosure judgment of the court . . . ." (Internal quotation marks omitted.) Id., 3, 11–12. Under those particular circumstances, and because no fault could be attributed to the defendant, this court concluded that the trial court had authority to open the judgment of strict foreclosure despite § 49-15's prohibition against doing so after law days have passed and title has become absolute in any encumbrancer. See id., 12–13; see also General Statutes § 49-15.

More recently, in *U.S. Bank National Assn.* v. *Rothermel*, supra, 339 Conn. 366, our Supreme Court reaffirmed the basic principle that at least some equitable claims could be raised after title had passed in a foreclosure matter as a basis for opening the judgment, but only in "rare and exceptional cases." Id., 377. It stated that the exceptions that might justify equitable interference are limited and must be determined on a case-by-case basis.[8] See id., 376, 379 n.11. Specifically, our Supreme Court cautioned: "[T]he jurisdictional conclusion reached in the present appeal should not be taken

[8] Although the court in *Rothermel* cited to *Cavallo* v. *Derby Savings Bank*, 188 Conn. 281, 449 A.2d 986 (1982), for the proposition that "[f]raud, accident, mistake, and surprise are recognized grounds for equitable interference"; (internal quotation marks omitted) id., 285; the court did not provide any additional guidance regarding what might qualify in the future as a rare and exceptional case. See *U.S. Bank National Assn.* v. *Rothermel*, supra, 339 Conn. 379.

as an invitation for parties in strict foreclosure proceedings to repackage motions to open the judgment filed after the passage of the law days in a manner that superficially invokes the inherent powers underlying [*New Milford Savings Bank* v. *Jajer*, supra, 244 Conn. 251] or *Melahn*. Exceptions to the general rule against postvesting motions to open judgments of strict foreclosure are, in fact, rare and exceptional. A bare assertion that equity requires such relief is insufficient; as in the present case, the party seeking to invoke the trial court's continuing jurisdiction must base their motion to open on particularized *factual allegations that could support a claim cognizable in equity*. Trial courts may, under existing case law, grant motions to dismiss pursuant to § 49-15 in cases in which a claim raised in a postvesting motion to open fails to present colorable grounds for equitable relief under these limited exceptions, and appellate courts may continue to summarily dismiss appeals taken from those rulings. We note that such a dismissal in the Appellate Court would occur only after the appellant has been given the opportunity to submit a response to an appellee's motion to dismiss or to present argument giving reasons why the case should not be dismissed in response to the court's own motion." (Emphasis added.) *U.S. Bank National Assn.* v. *Rothermel*, supra, 379 n.11.

The present case is readily distinguishable from *Melahn*, and, like in *Rothermel*, we do not view the present case as raising the type of rare and extreme circumstances that would justify departing from the statutory mandate set forth in § 49-15. See id., 384. On the basis of our review of the facts and procedural history of this case, we conclude that the trial court correctly denied the motion to open because the particularized factual allegations did not justify granting the defendant the extraordinary equitable relief it sought. The defendant raised no argument that it improperly had been defaulted for failure to appear or that the trial court's judgment of strict foreclosure should be opened on the

ground that the court lacked personal jurisdiction over it due to improper service of process. The record discloses no nefarious conduct on the part of the plaintiff that could warrant opening the judgment at such a late date, particularly when title to the subject property has already passed to a nonparty purchaser. The defendant raises an immaterial challenge to the content of the notice sent by the plaintiff, and it cannot claim that the notice was not timely mailed by the plaintiff. Accordingly, none of the defects identified by the court in *Melahn* as a basis for its decision to open the judgment in that case is present here.

Although the defendant asserts that it never received the notices sent by the plaintiff, this failure is not fairly attributable to the plaintiff but to the defendant's apparent failure to update its mailing address on file with the Secretary of the State. In short, we reject the defendant's claim that the court abused its discretion by denying its postjudgment motion to open because the defendant has failed to overcome the significant hurdle of alleging factual allegations necessary to avoid the statutory prohibition set forth in § 49-15. Because there was no error in the court's ruling, we also conclude that the court did not abuse its discretion in denying the defendant's motion to reargue/reconsider.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DORAINE REED
(AC 42509)

Elgo, Moll and Lavery, Js.

Syllabus

Convicted of the crimes of larceny in the first degree, attempt to commit larceny in the first degree, larceny in the second degree and conspiracy to commit larceny in the first degree in connection with certain financial

transactions involving an elderly victim, the defendant appealed to this court. The defendant was hired as an in-home aide for the victim, and increasingly involved herself in the victim's life. A few months after the defendant was hired, the pastor of the defendant's church was granted power of attorney over the victim, and from that point forward the victim's banking activity began to diverge from several long-standing patterns. Increasing sums of money were being withdrawn from the victim's bank accounts and used by the defendant to pay for her various personal expenses. Following a trial, the jury returned a verdict of guilty of all four counts against the defendant. *Held*:

1. The defendant could not prevail on her claim that the trial court improperly instructed the jury as to the wrongfulness element of the offense of larceny, the charge to the jury having adequately conveyed the appropriate levels of intent for both taking and retaining property in accordance with *State* v. *Saez* (115 Conn. App. 295), which outlined the state's obligation to show that the defendant acted with the subjective desire or knowledge that her actions constituted stealing: the court's charge to the jury, when considered as a whole and in light of the penal code's definition of larceny, was sufficient to adequately guide the jury; moreover, the language in the court's charge linking the requirement that the state must prove the defendant intended to permanently deprive the owner of his property with the requirement that the state must prove that the defendant took the property with an unlawful purpose adequately conveyed the requirement that the defendant must have intended to take the property wrongfully, such that the jury properly was apprised of the elements of larceny and the bar that the state had to meet with respect to the specific intent requirement in order to convict the defendant.

2. The defendant could not prevail on her claim that the jury instructions provided by the trial court granted the jury impermissibly broad latitude in considering the possibility of the victim's mental incapacity, that contention not being supported by the plain language of the court's instructions: the jury was informed that, even if it concluded that the victim was mentally incapacitated in any way, the instructions did not mandate a conclusion that the victim could not and did not consent to the defendant's taking of the property, and, by instructing the jury that it "may" determine that the victim's mental incapacity prevented him from consenting to the taking of his property, the charge permitted the jury to exercise its discretion and consider whether the evidence before it supported such a finding; moreover, the jury charge clarified that an owner's inability to consent must be paired with the defendant's awareness of that inability in order to satisfy the wrongfulness requirement of larceny, and the charge contained sufficient safeguards against the jurors improperly drawing conclusions as to the wrongfulness of the defendant's conduct.

Argued September 13, 2021—officially released January 11, 2022

Procedural History

Substitute information charging the defendant with the crimes of larceny in the first degree, attempt to commit larceny in the first degree, larceny in the second degree, and conspiracy to commit larceny in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *E. Richards, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Richard E. Condon, Jr., senior assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Howard S. Stein*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Doraine Reed, appeals from the judgment of conviction, rendered following a jury trial, of larceny in the first degree in violation of General Statutes §§ 53a-119 and 53a-122 (a) (2), attempt to commit larceny in the first degree in violation of General Statutes §§ 53a-49 (a) (2), 53a-119, and 53a-122 (a) (3), larceny in the second degree in violation of General Statutes §§ 53a-119 (1) and (2) and 53a-123 (a) (5), and conspiracy to commit larceny in the first degree in violation of General Statutes §§ 53a-48, 53a-119, and 53a-122 (a) (2). On appeal, the defendant raises two claims of instructional error. First, the defendant asserts that the trial court failed to instruct the jury that the specific intent requirement for any taking or appropriation of property in the charge of larceny must also apply to the "wrongfulness" element of the offense. The defendant also claims that the court improperly instructed the jury regarding the victim's possible mental incapacity and his ability to consent to the transfer

of his property to the defendant. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts on the basis of the evidence presented at trial. The victim, Arthur Devack, was an elderly widower who had been dealing with several health problems in the years leading up to his interactions with the defendant. Following a period of treatment for bladder cancer in 2009, the victim fell at his home and subsequently spent time in a rehabilitation facility. Upon his discharge from that facility, the victim's daughter, Cathy Devack,[1] spent several months living with the victim and serving as his caregiver. In February, 2010, Cathy hired the defendant as an in-home aide for her father.[2] Over the next several months, the defendant increasingly involved herself in the victim's life. This included instances of the defendant's friends and family visiting the victim's home, even at times when the defendant was not present. The defendant also appeared without warning at a restaurant where the victim and Cathy were dining.

On April 9, 2010, Cathy and the victim's grandson visited the victim at his home to discuss implementing a power of attorney. The defendant arrived during the meeting, joined the conversation, and then suggested to the victim that his family would "put [him] into a home" or "put [him] away" if the power of attorney

[1] For purposes of clarity, we refer to the victim's daughter by her first name in this opinion.

[2] At the time of her placement with the victim, the defendant recently had been hired by Helping Hands, an agency that provides in-home care for senior citizens. Shortly after the defendant was assigned to the victim's care, the victim manifested his intent to hire the defendant directly. Cathy informed Helping Hands that the victim would no longer be utilizing the company's services. Although the owner of Helping Hands passed this information on to the defendant, the defendant did not respond and thereafter had no further contact with Helping Hands. As a result, the defendant's initial criminal background check was never completed by Helping Hands.

came to pass. The victim became agitated and insisted that his family leave the residence. Cathy had no further contact with the victim prior to his death on June 21, 2010.[3]

Shortly after the April 9, 2010 altercation, Robert Genevicz, the pastor of the defendant's church, was granted power of attorney over the victim.[4] From this point forward, the victim's banking activity began to diverge from several long-standing patterns. On April 12, 2010, the victim's three accounts at the Sikorsky Credit Union (credit union) were closed, and new checking and savings accounts were opened up at the credit union. In June, 2010, an existing reverse mortgage on the victim's house was converted into a lump sum payout of $226,040.10.

At trial, Michele Paige, a forensic fraud examiner affiliated with the state's attorney's office, testified that the victim "was a very modest guy" who "didn't spend frivolously." Yet, in the course of the two months between when Genevicz obtained power of attorney and the victim's death, increasing sums of money were withdrawn from the victim's accounts. These outlays then were used by the defendant to pay for new furniture, maintenance and upkeep on her own properties, and outstanding legal fees. Notably, on June 15, 2010, six days before the victim's death, the victim purchased a 2003 Hummer H2 motor vehicle. Two days later, Genevicz, acting through the power of attorney, sold the vehicle to the defendant. Although Genevicz signed a

[3] Following the April 9, 2010 incident, the defendant filed a complaint against Cathy with the Trumbull Police Department, in which she alleged that Cathy had assaulted the victim. Cathy was arrested shortly thereafter and made subject to a protective order that prevented her from having any contact with the victim. The charges against Cathy were dropped after the victim's death.

[4] Genevicz' conduct with respect to the victim was the subject of a separate criminal proceeding, and the jury in the present case was not privy to any information concerning that matter.

receipt indicating that the defendant had paid the victim ten dollars less than the original purchase price for the vehicle, no such funds were ever deposited into any of the victim's accounts.

Following investigations by the Trumbull Police Department and the forensic fraud examiner of the Office of the State's Attorney, the defendant was arrested on February 26, 2015, and charged with larceny in the first degree and conspiracy to commit larceny in the first degree. The state filed an amended substitute information on September 18, 2018, charging the defendant with attempt to commit larceny in the first degree and larceny in the second degree, in addition to the two charges set forth in the initial information.[5]

The evidentiary portion of the trial commenced on September 25, 2018, and continued through October 17, 2018. The jury then returned a verdict of guilty of all four counts and the court sentenced the defendant to a total of twenty years of incarceration, execution suspended after nine years, followed by five years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court improperly instructed the jury as to the wrongfulness element of the offense of larceny. The defendant specifically argues that the court's charge to the jury failed to instruct that in order for the defendant to be convicted of larceny, she must have been found to intend specifi-

[5] The state also filed two substitute informations on March 18, 2015, and April 26, 2017. The information dated March 18, 2015, contained no material changes with respect to the initial information. The information dated April 26, 2017, charged the defendant with attempt to commit larceny in the first degree and larceny in the second degree in addition to the initial charges of larceny in the first degree and conspiracy to commit larceny in the first degree.

cally that the taking and appropriation of property be wrongful. We disagree.

The following additional facts are relevant to this claim. On October 4, 2018, the defendant filed an amended set of preliminary requests to charge. With respect to the intent element of larceny, the defendant requested the following additional language: "I have instructed you that for each count of the information, the state has the burden of proving beyond a reasonable doubt that in regard to any property taken, or attempted to be taken, the defendant must have acted with the specific intent to deprive the owner of the property or to appropriate it to herself or a third person. *In addition to that requirement, the state must also prove beyond a reasonable doubt that the defendant specifically intended to do so 'wrongfully.'* You will recall that I have instructed you that the word 'wrongfully' as used in the larceny statutes means that the property must have been taken without legal justification or excuse. It is not enough for the state to prove beyond a reasonable doubt that a person intentionally took property of another and that the taking was wrongful. A person who takes another's property under a mistaken belief that such taking is not wrongful does not possess the intent required for a conviction of larceny. The state must also prove beyond a reasonable doubt that the defendant had the intent, or conscious objective to take the property 'wrongfully,' as I have defined that term for you." (Emphasis added.) In support of her request, the defendant cited to General Statutes §§ 53a-5, 53a-6 (a) (1), and 53a-119, as well as *State* v. *Saez*, 115 Conn. App. 295, 302, 972 A.2d 277, cert. denied, 293 Conn. 909, 978 A.2d 1113 (2009).[6] The defendant also described,

[6] General Statutes § 53a-5 provides: "When the commission of an offense defined in this title, or some element of an offense, requires a particular mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms 'intentionally', 'knowingly', 'recklessly' or 'criminal negligence', or by use of terms, such as 'with intent to defraud' and 'knowing it to be false', describing a specific kind of intent or knowledge.

as a factual basis underlying the request, "[e]xpected evidence pertaining to appropriation of the property of [the victim]."

The court's eventual charge to the jury instructed in relevant part that "a person commits larceny with intent to . . . deprive another of property or to appropriate that property to himself or a third person" when "he wrongfully takes, obtains, or withholds such property from an owner. The state must prove that the property was taken with the specific intention of depriving the owner . . . of it or appropriating it to himself or to some third person. To intend to deprive another of property means, insofar as it applies here, intending to withhold it or cause it to be withheld from him permanently or for so long a time or under such circumstances that the major portion of its economic value or benefit is lost to him." The court further charged: "I remind you that the burden of proving intent beyond a reasonable doubt is on the state. It is essential that the state must prove beyond a reasonable doubt that the person who took the property had the unlawful purpose, that is, to permanently deprive the owner of it, or the intention in his or her mind at the time an attempt to take the property was made. The state must also show the attempted taking was wrongful. Larceny includes any wrongful taking of property away from the possession or control of the person entitled to it, including taking by force. The word wrongfully as used in the statute means that the property must have been taken without legal justification or excuse, color of right, or consent of the owner. When property is

When one and only one of such terms appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears."

General Statutes § 53a-6 (a) (1) provides in relevant part: "A person shall not be relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief of fact, unless . . . [s]uch factual mistake negates the mental state required for the commission of an offense . . . ."

obtained with the knowing consent of the owner, the taking is not wrongful."

The defendant objected to the court's instruction before and after the court delivered its charge to the jury. On October 18, 2018, the defendant moved for a new trial due to the court's alleged failure to properly instruct the jury on the intent requirement as it pertained to the wrongfulness element of larceny. The court denied that motion before sentencing the defendant on December 12, 2018.

"We review the defendant's claim of instructional impropriety pursuant to the following standard of review. The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *State* v. *Lavigne*, 307 Conn. 592, 599–600, 57 A.3d 332 (2012).

"[T]he essential elements of larceny are: (1) the wrongful taking or carrying away of the personal property of another; (2) the existence of a felonious intent in the taker to deprive the owner of [the property] permanently; and (3) the lack of consent of the owner." (Internal quotation marks omitted.) *State* v. *Adams*, 327 Conn. 297, 305–306, 173 A.3d 943 (2017). "Because

larceny is a specific intent crime, the state must show that the defendant acted with the subjective desire or knowledge that his actions constituted stealing. . . . Larceny involves both taking and retaining. The criminal intent involved in larceny relates to both aspects. The taking must be wrongful, that is, without color of right or excuse for the act . . . and without the knowing consent of the owner. . . . The requisite intent for retention is permanency." (Internal quotation marks omitted.) *State* v. *Saez*, supra, 115 Conn. App. 302.

In asserting that the specific intent requirement for any taking or appropriation of property in the charge of larceny must also apply to the "wrongfulness" element of the offense, the defendant relies on *Saez*. She essentially argues that the court's instruction improperly obviated the state's obligation under *Saez* to "show that the defendant acted with the subjective desire or knowledge that his actions constituted stealing." Id. We disagree. The charge to the jury adequately conveyed the appropriate levels of intent for both taking and retaining property in accordance with *Saez*. Moreover, nothing in *Saez* extends this requirement to mandate language linking specific intent and wrongfulness. We are convinced that the court's charge to the jury, when considered as a whole and in light of the penal code's definition of larceny, was sufficient to adequately guide the jury.

In this regard, we find particularly instructive our earlier decision in *State* v. *Flowers*, 69 Conn. App. 57, 797 A.2d 1122, cert. denied, 260 Conn. 929, 798 A.2d 972 (2002). In *Flowers*, the defendant was charged with robbery in the first degree, for which larceny is a predicate offense. Id., 67–68. On appeal, the defendant claimed that the trial court erred in failing to provide the exact statutory definition of larceny in its charge to the jury. Id., 67. Although this court described the instructions as "imperfect, or technically incomplete," it

nevertheless concluded that the instructions adequately "conveyed the essential characteristics of larceny" to the jury. Id., 70–71.

Although the trial court in the present case did not adopt the precise language requested by the defendant, the court instructed: "I remind you that the burden of proving intent beyond a reasonable doubt is on the state. It is essential that the state must prove beyond a reasonable doubt that *the person who took the property had the unlawful purpose, that is, to permanently deprive the owner of it, or the intention in his or her mind at the time an attempt to take the property was made. The state must also show the attempted taking was wrongful. Larceny includes any wrongful taking of property away from the possession or control of the person entitled to it, including taking by force. The word wrongfully as used in the statute means that the property must have been taken without legal justification or excuse, color of right, or consent of the owner.*" (Emphasis added.) In our view, this language linking (1) the requirement that the state must prove the defendant intended to permanently deprive the owner of his property with (2) the requirement that the state must prove that the defendant took the property with an unlawful purpose adequately conveyed the requirement that the defendant must have intended to take the property wrongfully. In light of that language, we are convinced that the jury properly was apprised of the elements of larceny and the bar that the state had to meet with respect to the specific intent requirement in order to convict the defendant.

We also agree with the state that, in essence, the defendant's request to charge on the issue of intent amounted to no more than a denial of the requisite intent. This court has held that "a denial of the intent to wrongfully withhold [property] . . . is not a legally

recognized defense"; (citation omitted) *State* v. *Kurrus*, 137 Conn. App. 604, 612, 49 A.3d 260, cert. denied, 307 Conn. 923, 55 A.3d 566 (2012); and, accordingly, does not merit a specific charge to that effect. We, therefore, reject the defendant's claim.

II

The defendant next argues that the jury instructions provided by the court granted the jury impermissibly broad latitude in considering the possibility of the victim's mental incapacity. We agree with the state that the defendant's contention is not supported by the plain language of the instruction.

The relevant portion of the court's charge to the jury stated: "When property is obtained with the knowing consent of the owner, the taking is not wrongful. A person acts knowingly with respect to his or her conduct when he or she is aware of the nature of the conduct. However, the owner's mental incapacity, if any, may be considered by you as evidence of an inability to knowingly consent to the defendant's obtaining the property. When the defendant is aware of the owner's inability to knowingly consent, the obtaining of the property would be nonconsensual and wrongful. If you find that the complainant did not knowingly consent to the defendant's obtaining the property and the defendant was aware of his inability to knowingly consent, the obtaining of the property would be nonconsensual and wrongful. These are questions of fact for you to decide. You may consider all the evidence presented and give to it whatever credibility and weight you deem is appropriate in accordance with my instructions." At the close of trial, the defendant took exception to this portion of the charge on the ground that the charge wrongly "equate[d] mental incapacity in any degree with an inability to knowingly consent to someone tak-

ing the property,"[7] which the court noted. The defendant took a postcharge exception on similar grounds.

On appeal, the defendant disagrees with the notion that "any" mental incapacity could have been considered by the jury in determining whether the victim had the ability to consent.[8] We first note that, as the state points out, the jury was informed that, even if it concluded that the victim was mentally incapacitated in any way, the instructions did not mandate a conclusion that the victim could not and did not consent to the defendant's taking of the property. By instructing the jury that it "may" determine that mental incapacity on the part of the victim prevented the victim from consenting to the taking of his property, the charge permitted the jury to exercise its discretion and consider whether the evidence before it supported such a finding.[9] In addition, the charge clarified that an inability to consent must be paired with the defendant's awareness of said inability in order to satisfy the wrongfulness

[7] Importantly, the defendant conceded at trial that the victim's mental capacity "[could] be considered on the issue of" the "inability to knowingly consent to the [transfer of property]."

[8] In particular, the defendant takes issue with the trial court's reliance on *State* v. *Calonico*, 256 Conn. 135, 770 A.2d 454 (2001), insofar as *Calonico* turned on the sufficiency of the evidence in that case (as opposed to the appropriateness of a jury instruction) and its partial reliance on case law from other states. We find these distinctions immaterial. The passages the court cited during its colloquy with defense counsel discuss the intent required to sustain a conviction of larceny, which does not hinge on the particular type of error alleged on appeal. See id., 160–63. Additionally, although the portion of *Calonico* that discussed mental incapacity did cite to case law from outside of this state; id., 153–55; it still constitutes binding authority from the highest court in this state. See *State* v. *Siler*, 204 Conn. App. 171, 178, 253 A.3d 995 (2021) ("[a]s an intermediate appellate tribunal, this court is not at liberty to modify, reconsider, or overrule the precedent of our Supreme Court").

[9] We emphasize that the two claims raised by the defendant in this appeal concern the propriety of the jury instructions. The defendant has not disputed the sufficiency of the evidence adduced at trial in either her motion for a new trial or her appeal before this court.

requirement of larceny. In this respect, the charge to the jury contained sufficient safeguards against the jurors improperly drawing conclusions as to the wrongfulness of the defendant's conduct. In light of the foregoing, we conclude that the defendant has not established instructional error in the present case.

The judgment is affirmed.

In this opinion the other judges concurred.