WALGREEN EASTERN COMPANY, INC. *v.* TOWN OF WEST HARTFORD (SC 19750)

Palmer, Robinson, D'Auria, Prescott and Mullins, Js.*

Syllabus

Pursuant to statute (§ 12-63b [b]), in determining the true and actual value of real property by capitalizing net income based on market rent for similar properties, an assessor "shall consider the actual rental income applicable with respect to such real property under the terms of an existing contract of lease at the time of such determination."

The plaintiff, W Co., the lessee of certain real property in the defendant town, appealed to the trial court from the decision of the town's board of assessment appeals upholding a valuation of that property by the town assessor. The property is improved with a remodeled, freestanding retail pharmacy that is located near a high volume intersection with a traffic signal. In 2004, W Co. signed a seventy-five year lease for the property under which it is responsible for, inter alia, the payment of all property taxes. In conducting a subsequent assessment, the town assessor determined the fair market value of the property to be $5,020,000. W Co. subsequently appealed to the board, which upheld the town assessor's valuation. W Co. appealed from the board's decision to the trial court, seeking equitable relief pursuant to statute (§ 12-117a), and further alleging that the town's assessment of the property was manifestly excessive pursuant to statue (§ 12-119). At trial, W Co. presented testimony of two appraisers, B and M, who both valued the property at $3 million. In reaching that valuation, B and M defined the relevant market as general retail or commercial use, but declined to adjust their calculation of market rent to account for the actual income generated by the property under W Co.'s lease, concluding that the rate established

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

in that lease was above the market rate. In response, the town presented testimony from a third appraiser, K, who valued the property at $4.9 million. In reaching that valuation, K identified a national chain pharmacy submarket and gave substantive consideration to the actual rental income generated by the property. The trial court, crediting K's testimony, found that the highest and best use of the property was as a retail pharmacy, determined that its true and actual value was $4.9 million, and, therefore, concluded that the town assessor had overvalued the property and ordered reimbursement or credit for any overpayment of taxes. In accepting K's valuation, the trial court concluded that B and M had failed to consider actual rental income as required by § 12-63b (b). The trial court also found that W Co. had not met its burden of establishing that the town's assessment was manifestly excessive under § 12-119. On W Co.'s appeal from the trial court's judgment, *held*:

1. W Co. could not prevail on its claim that the relief awarded by the trial court was insufficient, the trial court having properly determined the true and actual value of the property: the trial court properly rejected appraisal methods used by B and M, this court having concluded that *First Bethel Associates* v. *Bethel* (231 Conn. 731), which requires that actual rental income be considered under the income capitalization market approach, remains good law, and that, contrary to W Co.'s claim, neither the amount of time that has passed since the lease was negotiated nor the length of the lease is a factor contemplated in § 12-63b (b); moreover, the trial court's consideration of the rents paid under the lease as one indicator of the true and actual value of the property was consistent authorized and required by the statutory scheme; furthermore, the trial court's determination that the highest and best use of the property is as a retail pharmacy was not clearly erroneous, as the court's factual findings regarding the individual characteristics of the property and the existence of a national chain pharmacy submarket were supported by the evidence in the record and by case law from other jurisdictions.
2. The trial court correctly determined that the plaintiff failed to establish a manifestly excessive assessment of the property under § 12-119; in light of testimony demonstrating that the town applied the same process to valuing other properties and the trial court's ultimate determination as to the property's true and actual value, the circumstances presented did not rise to the extraordinary level that would warrant relief under § 12-119.

Argued October 19, 2017—officially released July 24, 2018

Procedural History

Appeal from the decision of the defendant's board of assessment appeals upholding the town assessor's valuation of certain of the plaintiff's real property,

brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of New Britain, where the case was tried to the court, *Schuman, J.*; judgment for the defendant in part and for the plaintiff in part, from which the plaintiff appealed. *Affirmed.*

Elliott B. Pollack, with whom, on the brief, was *Tiffany K. Spinella*, for the appellant (plaintiff).

Patrick G. Alair, corporation counsel, for the appellee (defendant).

Kari L. Olson and *Proloy K. Das* filed a brief for the Connecticut Conference of Municipalities as amicus curiae.

Opinion

MULLINS, J. The plaintiff, Walgreen Eastern Company, Inc., appeals from the judgment of the trial court denying, in part, its appeal from the decision of the Board of Assessment Appeals (board) of the defendant, the town of West Hartford (town). The trial court concluded that the plaintiff had established aggrievement under General Statutes § 12-117a[1] because the town

[1] General Statutes § 12-117a provides in relevant part: "Any person, including any lessee of real property whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes, claiming to be aggrieved by the action of the board of tax review or the board of assessment appeals, as the case may be, in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom, with respect to the assessment list for the assessment year commencing October 1, 1989, October 1, 1990, October 1, 1991, October 1, 1992, October 1, 1993, October 1, 1994, or October 1, 1995, and with respect to the assessment list for assessment years thereafter, to the superior court for the judicial district in which such town or city is situated, which shall be accompanied by a citation to such town or city to appear before said court. . . . The court shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable . . . ."

Although § 12-117a was amended in 2013; see Public Acts 2013, No. 13-276, § 5; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

overvalued its property. The court then found a new valuation for the subject property and ordered the town to provide the plaintiff with the appropriate reimbursement or credit for any overpayment plus interest. In addition, the trial court also determined that the town's assessment was not manifestly excessive under General Statutes § 12-119.[2]

In the present appeal, the plaintiff claims that, although the trial court correctly determined that the plaintiff had established aggrievement by showing that the town's valuation of the property was excessive, it incorrectly (1) determined the true and actual value of the subject property, and (2) concluded that the town's valuation of the subject property was not manifestly excessive. We disagree and, accordingly, affirm the judgment of the trial court.

The following relevant facts and procedural history are set forth in the trial court's memorandum of decision. "The subject property is a 1.45 acre improved parcel located [at] 940 South Quaker Lane in the town. The property abuts another parcel to the south, with which it was once merged, near the intersection of South Quaker Lane, which is to the west, and New Britain Avenue, which is to the south, in the Elmwood section of the town.

[2] General Statutes § 12-119 provides in relevant part: "When it is claimed that a tax has been laid on property not taxable in the town or city in whose tax list such property was set, or that a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof or any lessee thereof whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes, prior to the payment of such tax, may, in addition to the other remedies provided by law, make application for relief to the superior court for the judicial district in which such town or city is situated. . . . In all such actions, the Superior Court shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains . . . ."

"The improvement on the subject property is a 12,805 square foot building originally constructed in 1949 as a movie theater. In 2003, a developer, Nixon Plainville, LLC, purchased the subject property and the adjoining property to the south for $2,500,000, formally subdivided them, and began to convert the building on the subject property into a Walgreens pharmacy. In appraisal terms, the property was of the 'build to suit' type.

"The developer entered into a 'triple net' or 'NNN' lease with the plaintiff under which the plaintiff was responsible for the payment of all insurance, maintenance, and property tax expenses. The lease commenced in December, 2004, but the pharmacy did not open until 2006. The lease runs for seventy-five years, but the plaintiff can terminate it after twenty-five years and every five years thereafter. The rent is fixed at $430,000 per year for the term of the lease plus a small percentage of the gross sales. This rate converts to $33.58 per square foot.

"In 2006, the developer sold the subject property to Maple West Hartford, LLC, which has been described as an investor, for $6,718,750. There have been no further sales of the property.

"The pharmacy now has parking space for approximately [seventy-five] cars. Some of the parking space is shared with Webster Bank, which occupies the property to the south. There is no drive-up service window for the pharmacy. Although the pharmacy is not on the exact corner of South Quaker Lane and New Britain Avenue, it is near the corner. There is a full, two-way auto[mobile] access from and to South Quaker Lane. From New Britain Avenue, cars going westbound can make a right turn into a driveway, marked by a Walgreens sign, that goes behind the bank on the corner and into the [plaintiff's] parking lot.

"The pharmacy is visible from the road from all directions except westbound. The westbound view from New Britain Avenue is blocked by the bank and a tree. The intersection of South Quaker Lane and New Britain Avenue has high traffic volume and has a traffic light."

In accordance with the town's statutory obligation; see General Statutes § 12-62 (b) (1);[3] the assessor conducted a town wide revaluation of all real estate for the grand list of October 1, 2011, and determined that the subject property had a fair market value of $5,020,000 and an assessment value of $3,514,000. The plaintiff challenged the valuation and appealed to the board pursuant to General Statutes § 12-111 (a). The board upheld the assessor's valuation, and the plaintiff appealed to the Superior Court pursuant to §§ 12-117a and 12-119.

In its appeal to the Superior Court, the plaintiff's complaint contained two separate counts. In count one, the plaintiff alleged, pursuant to § 12-117a, that it was aggrieved by the actions of the board because the assessor's valuation of the property exceeded 70 percent of its true and actual value on the assessment date. In count two, the plaintiff alleged, pursuant to § 12-119, that the valuation was "manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of the property." The plaintiff thus sought a reduction

[3] General Statutes § 12-62 (b) (1) provides: "Commencing October 1, 2006, each town shall implement a revaluation not later than the first day of October that follows, by five years, the October first assessment date on which the town's previous revaluation became effective, provided, a town that opted to defer a revaluation, pursuant to section 12-62*l*, shall implement a revaluation not later than the first day of October that follows, by five years, the October first assessment date on which the town's deferred revaluation became effective. The town shall use assessments derived from each such revaluation for the purpose of levying property taxes for the assessment year in which such revaluation is effective and for each assessment year that follows until the ensuing revaluation becomes effective."

in the amount of the tax and the valuation on which it had been based.

At trial, the plaintiff presented the testimony of two appraisers, Anthony Barna and Richard Michaud, who both valued the property at $3 million. The town presented the testimony of two appraisers: John Leary, who performed the revaluation for the town, and Christopher Kerin, who valued the property at $4,900,000. The trial court credited Kerin's testimony and determined that the true and actual value of the property was $4,900,000.[4] As a result, the court concluded that the assessor had overvalued the property by assigning it a true and actual value of $5,020,000. Accordingly, because the true and actual value was less than the value assigned by the assessor, the court found that the plaintiff had satisfied its burden of proving

[4] General Statutes § 12-63b provides: "(a) The assessor or board of assessors in any town, at any time, when determining the present true and actual value of real property as provided in section 12-63, which property is used primarily for the purpose of producing rental income, exclusive of such property used solely for residential purposes, containing not more than six dwelling units and in which the owner resides, shall determine such value on the basis of an appraisal which shall include to the extent applicable with respect to such property, consideration of each of the following methods of appraisal: (1) Replacement cost less depreciation, plus the market value of the land, (2) capitalization of net income based on market rent for similar property, and (3) a sales comparison approach based on current bona fide sales of comparable property. The provisions of this section shall not be applicable with respect to any housing assisted by the federal or state government except any such housing for which the federal assistance directly related to rent for each unit in such housing is no less than the difference between the fair market rent for each such unit in the applicable area and the amount of rent payable by the tenant in each such unit, as determined under the federal program providing for such assistance.

"(b) For purposes of subdivision (2) of subsection (a) of this section and, generally, in its use as a factor in any appraisal with respect to real property used primarily for the purpose of producing rental income, the term 'market rent' means the rental income that such property would most probably command on the open market as indicated by present rentals being paid for comparable space. In determining market rent the assessor shall consider the actual rental income applicable with respect to such real property under the terms of an existing contract of lease at the time of such determination."

aggrievement, and, therefore, the court found in favor of the plaintiff on count one. Addressing count two, the trial court found that the plaintiff had not met its burden of establishing that the assessment was manifestly excessive under § 12-119. The court then rendered judgment in favor of the plaintiff on its § 12-117a count and in favor of the town on the plaintiff's § 12-119 count. The plaintiff appealed.[5]

I

In its appeal from the § 12-117a count, the plaintiff claims that, although the trial court correctly concluded that it had established aggrievement by proving that the assessor had overvalued its property, the relief awarded was insufficient because the trial court improperly determined the true and actual value of the subject property. Specifically, the plaintiff alleges that the trial court improperly (1) applied General Statutes § 12-63b (b), (2) valued the leased fee interest, rather than the fee simple interest, and (3) selected too narrow a highest and best use for the property.[6] We disagree.

We begin with the principles governing municipal tax appeals. "Section 12-117a, which allows taxpayers to appeal the decisions of municipal boards of [assessment appeals] to the Superior Court, provide[s] a method by which an owner of property may directly call in question the valuation placed by assessors upon his property.

[5] The plaintiff appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[6] The plaintiff also claims that the trial court improperly valued the user—namely, the value of the plaintiff as a company and its value in the location—rather than the value of the property. In support of its claim, the plaintiff relies solely on the fact that the trial court incorrectly considered the plaintiff's lease when valuing the subject property. As we explain in parts I A and I B of this opinion, the trial court properly considered rent due under the plaintiff's lease pursuant to § 12-63b (b). Accordingly, for the reasons fully set forth in parts I A and I B of this opinion, we reject the plaintiff's claim that the trial court improperly valued the user instead of the subject property.

. . . In a § 12-117a appeal, the trial court performs a two step function. The burden, in the first instance, is upon the plaintiff to show that he has, in fact, been aggrieved by the action of the board in that his property has been overassessed. . . . In this regard, [m]ere overvaluation is sufficient to justify redress under [§ 12-117a], and the court is not limited to a review of whether an assessment has been unreasonable or discriminatory or has resulted in substantial overvaluation. . . . Whether a property has been overvalued for tax assessment purposes is a question of fact for the trier. . . . The trier arrives at his own conclusions as to the value of land by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and his own general knowledge of the elements going to establish value including his own view of the property. . . .

"Only after the court determines that the taxpayer has met his burden of proving that the assessor's valuation was excessive and that the refusal of the board of [assessment appeals] to alter the assessment was improper, however, may the court then proceed to the second step in a § 12-117a appeal and exercise its equitable power to grant such relief as to justice and equity appertains . . . . If a taxpayer is found to be aggrieved by the decision of the board of [assessment appeals], the court tries the matter de novo and the ultimate question is the ascertainment of the true and actual value of the applicant's property." (Citations omitted; internal quotation marks omitted.) *Konover* v. *West Hartford*, 242 Conn. 727, 734–35, 699 A.2d 158 (1997).

In the present case, the trial court found that the plaintiff met its burden of proving that the assessor's valuation was excessive and that the board's refusal to alter the assessment was improper. The court then proceeded to the second step in the § 12-117a claim, namely, determining the appropriate relief based on the

true and actual value of the applicant's property. The plaintiff now challenges the trial court's judgment on the ground that the trial court's finding regarding the true and actual value of the subject property was excessive.

"In a tax appeal taken from the trial court to the Appellate Court or to this court, the question of overvaluation usually is a factual one subject to the clearly erroneous standard of review. . . . Under this deferential standard, [w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported. . . . Additionally, [i]t is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . Simply put, a trial court is afforded wide discretion in making factual findings and may properly render judgment for a town based solely upon its finding that the method of valuation espoused by a taxpayer's appraiser is unpersuasive. . . .

"Conversely, we review de novo a trial court's decision of law. [W]hen a tax appeal . . . raises a claim that challenges the propriety of a particular appraisal method in light of a generally applicable rule of law, our review of the trial court's determination whether to apply the rule is plenary. . . . To be sure, if the trial court rejects a method of appraisal because it determined that the appraiser's calculations were incorrect

or based on a flawed formula in that case, or because it determined that an appraisal method was inappropriate for the particular piece of property, that decision is reviewed under the abuse of discretion standard. . . . Only when the trial court rejects a method of appraisal as a matter of law will we exercise plenary review. . . .

"Thus, the starting point in any tax appeal taken from the Superior Court, including the present appeal, is a determination as to whether the trial court reached its decision through (1) the exercise of its discretion in crediting evidence and expert witness testimony, or (2) as a matter of law." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, 308 Conn. 87, 100–102, 61 A.3d 461 (2013).

A

The plaintiff first claims that the trial court did not properly apply § 12-63b (b)[7] in valuing the subject property because the court considered the actual rental income under the lease (contract rent) in calculating the true and actual value of the property. Specifically, the plaintiff argues that the trial court improperly rejected the appraisals submitted by the plaintiff's appraisers because they did not include consideration of the contract rent. The plaintiff asserts that the language of § 12-63b (b) does not mandate that the assessor consider contract rents, and that contract rent in the present case was not relevant to establish the true and actual value of the subject property in 2011 because the lease had been negotiated in 2003. Furthermore, the plaintiff asserts that the trial court's reliance on *First Bethel Associates* v. *Bethel*, 231 Conn. 731, 651 A.2d 1279 (1995), is misplaced because the holding of *First Bethel Associates* subsequently was modified or

[7] See footnote 4 of this opinion.

overturned. We reject the plaintiff's claim regarding the application of § 12-63b (b).

"[W]hen a tax appeal, like the present one, raises a claim that challenges the propriety of a particular appraisal method in light of a generally applicable rule of law, our review of the trial court's determination whether to apply the rule is plenary. See *Sheridan* v. *Killingly*, 278 Conn. 252, 260, 897 A.2d 90 (2006) (applying plenary review to claim that trial court improperly rejected assessor's attribution of value of leasehold interest to lessor's property); see also *Torres* v. *Waterbury*, 249 Conn. 110, 118, 733 A.2d 817 (1999) (legal conclusions in municipal tax appeal [are] subject to plenary review)." *Breezy Knoll Assn., Inc.* v. *Morris*, 286 Conn. 766, 776–77, 946 A.2d 215 (2008).

In the present case, the plaintiff challenges the trial court's decision to reject the appraisal method used by the plaintiff's experts and to adopt the appraisal method used by the town's expert. More specifically, the plaintiff's claim is that the trial court rejected the plaintiff's method of appraisal as a matter of law because the plaintiff's experts failed to consider both contract rent and market rent in the portion of their appraisals based on the income capitalization approach.[8] Accordingly, we conclude that our review of the trial court's decision is plenary.

[8] The trial court explained: "As a practical matter, the issue here devolves into a question of defining the relevant market or, in reality, the highest and best use of the property. If a market exists for properties that produce relatively high rents with minimal landlord responsibilities, then the leased fee value of the sale may coincide with the fee simple value. In this case, as discussed, it is possible to identify this sort of discrete market in the case of properties suitable for building and renting to a single pharmacy with a triple net lease. As discussed, the subject property has these characteristics.

"It therefore follows that the highest and best use of the property is to lease it to a retail pharmacy and that it is fully permissible to consider the rental potential of the property in determining the true and actual value of its fee simple interest. Only Kerin's appraisal takes this approach. For these reasons, the court credits Kerin's appraisal."

The following additional facts are necessary to resolve the plaintiff's claim. All three appraisers and the trial court used the income capitalization approach and the comparable sales approach to value the subject property. The trial court found that the two appraisals prepared by the plaintiff's experts did not consider the contract rent in their calculations based on the income capitalization approach to value the subject property pursuant to § 12-63b, whereas Kerin, the town's expert, did consider the contract rent.

The trial court explained as follows: "Barna and Michaud, the plaintiff's appraisers, determined that the market rent for comparable triple net retail properties, which included stores in in-line shopping centers, averaged $20 and $22 per square foot, respectively. They calculated the subject property's contractual rent at $33.58 per square foot. They declined to adjust the market rate for their analyses because the contract rate was above market.

"Kerin, looking at pharmacies only, found the average market rental rate to be $32.16 per square foot. Because the contract [rental] rate of $33.58 [per square foot] was similar, he used a rate of $32 per square foot for the income capitalization analysis."

The trial court then concluded: "The analysis of Barna and Michaud did not comply with the statutory command to 'consider the actual rental income . . . .' General Statutes § 12-63b (b)." The court explained: "The court cannot interpret this [statutory] phrase to be meaningless or superfluous. . . . Yet that is what Barna and Michaud have done. Their only 'consideration' of the actual rental income was to mention it in their reports. They automatically rejected further consideration of actual rental income because in their opinion it was above the market. They did not attempt to reconcile contract rents and market rents, as did

Kerin. Essentially, Barna and Michaud gave the contract rents no substantive consideration at all. . . . Accordingly, the court cannot accept their approach." (Citations omitted.)

General Statutes § 12-63 (a) provides in relevant part that, with certain enumerated exceptions not relevant to this appeal, "[t]he present true and actual value of . . . property shall be deemed by all assessors and boards of assessment appeals to be the fair market value thereof and not its value at a forced or auction sale." Section 12-63b (a) specifies three different methods of calculation to produce a valuation of the true and actual value of the property: "(1) Replacement cost less depreciation, plus the market value of the land, (2) capitalization of net income based on market rent for similar property, and (3) a sales comparison approach based on current bona fide sales of comparable property. . . ." Only the income capitalization approach is at issue in this appeal.

Section 12-63b (b) explains the meaning of "market rent" as it is used in the income capitalization approach. Specifically, § 12-63b (b) provides: "For purposes of subdivision (2) of subsection (a) of this section and, generally, in its use as a factor in any appraisal with respect to real property used primarily for the purpose of producing rental income, the term 'market rent' means the rental income that such property would most probably command on the open market as indicated by present rentals being paid for comparable space. In determining market rent the assessor *shall consider the actual rental income applicable with respect to such real property under the terms of an existing contract of lease at the time of such determination*." (Emphasis added.)

Notwithstanding this statutory language, the plaintiff asserts that § 12-63b (b) does not require that contract

rents be considered by an appraiser. In particular, the plaintiff argues that if the contract is a long-term contract, as it is in this case, it does not reflect the current market rent for the property. We disagree.

In *First Bethel Associates* v. *Bethel*, supra, 231 Conn. 731, this court considered and rejected a claim similar to the one raised in the present appeal. In that case, the defendant, the town of Bethel, claimed that the assessor must consider contract rent, but only if it is equivalent to the market rent, whereas, the plaintiff, First Bethel Associates, claimed that the trial court should have considered contract rent only, and not market rent, in its determination of the market value utilizing the income capitalization approach. Id., 737–38.

This court rejected both of these contentions and, instead, concluded that "the statute requires that, in determining a property's 'market rent,' the assessor and, therefore, the court, in determining the fair market value of the property, must consider *both* (1) net rent for comparable properties, and (2) the net rent derived from any existing leases on the property. This legislative approach makes sense because it reflects the reality that a willing seller and a willing buyer—whose ultimate judgments are what we mean by 'fair market value'—would themselves consider in arriving at a price for the property that is subject to leases that do not closely approximate current rentals for similar properties." (Emphasis in original; footnote omitted.) Id., 740.

This court further explained: "The town [of Bethel] argues that contract rent should not factor into the valuation process unless it is equivalent to the rent that the property would command on the open market. Such a construction, however, would mean that contract rent would factor into the analysis only if it had no effect on the overall valuation, rendering meaningless the direction of § 12-63b (b) to consider actual rental

income. Similarly, [First Bethel] Associates' argument that only contract rent should be considered ignores the statute's direction to take into account what the property would most probably command on the open market . . . . It is a well established rule of statutory construction that we will not read a statute in such a way as to render a portion of it superfluous. . . . Therefore, we reject the parties' proposed constructions because they each would render a portion of the statute mere surplusage." (Citations omitted; internal quotation marks omitted.) Id., 740–41; see also *Sheridan* v. *Killingly*, supra, 278 Conn. 261–64 (recognizing that § 12-63b contemplates that actual rental income be included in income capitalization approach to valuation). Accordingly, we conclude that the trial court's conclusion that an appraisal method based on the income capitalization approach in the present case must consider both market and contract rent is in accordance with *First Bethel Associates*.

The plaintiff asserts, however, that this court subsequently has, sub silentio, overruled or modified its conclusion in *First Bethel Associates*, and, as result, the trial court in the present case incorrectly considered the contract rent of the subject property. In support of its claim, the plaintiff cites to *PJM & Associates, LC* v. *Bridgeport*, 292 Conn. 125, 971 A.2d 24 (2009), and *J.E. Robert Co.* v. *Signature Properties, LLC*, 320 Conn. 91, 128 A.3d 471 (2016). Specifically, the plaintiff asserts that, in *PJM & Associates, LC*, and *J.E. Robert Co.*, this court held that contract rent should be considered only if it is similar to market rent. We disagree and conclude that *First Bethel Associates* has not been modified or overruled by these cases and remains good law.

In *PJM & Associates, LC*, the parties did not raise, and this court did not consider, the question of whether contract rent should be considered when using the income capitalization approach to valuing property. The

question in *PJM & Associates, LC*, involved only whether actual rents and income from nonvaluation years should be considered under § 12-63b (b). See *PJM & Associates, LC* v. *Bridgeport*, 292 Conn. 128–29. Indeed, this court's decision in that case cited to *First Bethel Associates* favorably for the proposition that " '[m]arket rent' under § 12-63b (b) thus is calculated by examining the '(1) net rent for comparable properties, and (2) the net rent derived from existing leases on the property.' " Id., 140, quoting *First Bethel Associates* v. *Bethel*, supra, 231 Conn. 740.

Similarly, our review of *J.E. Robert Co.* also demonstrates that this court did not overrule or modify *First Bethel Associates*. In fact, *J.E. Robert Co.* does not even involve § 12-63b (b), but, rather, is an appeal from a foreclosure action. *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 320 Conn. 93. In *J.E. Robert Co.*, this court examined whether the trial court in a mortgage foreclosure action properly relied on an appraisal that valued the leased fee interest in a property, instead of the fee simple interest. Id. Ultimately, this court concluded that it did not need to decide whether it was improper for the trial court to rely on an appraisal that valued the leased fee interest in the property because if contract rents are at market rates as they were in that case, the value of the leased fee and fee simple interests of mortgaged property is equivalent. Id., 97. Not only did *J.E. Robert Co.* not overrule *First Bethel Associates*, but this court again cited *First Bethel Associates* approvingly. Id., 99–100. Therefore, we are not persuaded that *First Bethel Associates* has been modified or overruled.

The plaintiff also asserts that the trial court was incorrect to consider contract rents in the present case because the lease under which these contract rents are due is a seventy-five year lease that was negotiated in 2003. The plaintiff claims that a long-term lease negoti-

ated eight years prior to the revaluation is irrelevant. We disagree. Neither the amount of time that has passed since the lease was negotiated nor the length of the lease is a factor contemplated in § 12-63b (b). To the contrary, § 12-63b (b) requires the consideration of "the actual rental income applicable with respect to such real property under the terms of an existing contract of lease at the time of such determination." In the present case, the trial court relied on an expert who considered the contract rent due under a lease that existed in 2011. The plaintiff does not claim that the lease was not in effect in 2011, or that the amount Kerin used as the contract rent was incorrect. Therefore, in considering contract rent, the trial court complied with § 12-63b (b).

In sum, the trial court correctly concluded that § 12-63b (b) requires that a valuation based on the income capitalization approach consider both contract rents and market rents. Accordingly, we conclude that the trial court correctly rejected the income capitalization analyses presented by the plaintiff's experts, who did not comply with § 12-63b (b).

B

The plaintiff also claims that the trial court improperly valued the leased fee interest in the subject property, rather than the fee simple interest. Specifically, the plaintiff asserts that the trial court "erred as a matter of law by incorrectly characterizing the 'fee simple' interest [by] conflating the definitions of 'fee simple' and 'leased fee.' " It contends that the trial court did not value the proper interest. The town asserts that the trial court did not value the leased fee interest of the subject property, but instead correctly applied the law to determine the "true and actual value" of the property. We agree with the town.

We begin with the appropriate standard of review. As we have explained previously in this opinion, "when a tax appeal, like the present one, raises a claim that challenges the propriety of a particular appraisal method in light of a generally applicable rule of law, our review of the trial court's determination whether to apply the rule is plenary." *Breezy Knoll Assn., Inc.* v. *Morris*, supra, 286 Conn. 776.

The trial court explained that "[t]he General Statutes do not specifically address the nature of the property interest that the town should assess, but instead only require an assessment of the 'true and actual value of real property . . . .' " The trial court further explained that "[b]oth parties to this case actually agree that the town should assess the fee simple interest in real property. They disagree, however, on the meaning of a fee simple interest." Ultimately, the trial court reasoned that "what the town really seeks to tax is not the actual value of the lease in place but rather the capacity or potential of the real property to be leased. That characteristic is not contractual or transitory but rather inheres in the property." Thereafter, the trial court engaged in an analysis of § 12-63b (b), which we discussed in part I A of this opinion, and concluded that both contract rents and market rents must be considered to determine the true and actual value of the subject property.

The plaintiff does not clearly explain its claim that trial court improperly valued the leased fee interest. Nevertheless, after considering the plaintiff's brief in combination with its oral argument before this court, we construe the plaintiff's claim to be that the trial court's consideration of the actual rents when determining the true and actual value of the subject property led to an improper valuing of the leased fee interest, rather than the fee simple interest. We disagree.

Before analyzing this claim, it is helpful to identify the distinctions between the fee simple interest, the leasehold interest and the leased fee interest. The Dictionary of Real Estate Appraisal defines "fee simple interest" as "[a]bsolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat." Dictionary of Real Estate Appraisal (6th Ed. 2015) p. 90.[9] "Leasehold interest" is defined as "[t]he right held by the lessee to use and occupy real estate for a stated term and under the conditions specified in the lease." Id., p. 128. "Leased fee interest" is defined as "[t]he ownership interest held by the lessor, which includes the right to receive the contract rent specified in the lease plus the reversionary right when the lease expires." Id.

As we have explained previously in this opinion, General Statutes § 12-62a (b) requires the assessment to be based on the "true and actual value" of the plaintiff's property. The "true and actual value" is further defined as the "fair market value." General Statutes § 12-63 (a). As we explained in part I A of this opinion, § 12-63b (b) requires the consideration of both contract rents and market rents to determine the fair market value under the income capitalization approach.

The plaintiff's claim in the present case is similar to the issue addressed by this court in *Sheridan* v. *Killingly*, supra, 278 Conn. 252. In *Sheridan*, the town of Killingly appealed from the judgment of the trial court, which had determined that its assessment was excessive because the valuation of the property using the income capitalization approach should not have consid-

[9] The Dictionary of Real Estate Appraisal uses "fee simple interest" interchangeably with "fee simple estate," and "leased fee interest" interchangeably with "leased fee estate." The Dictionary of Real Estate Appraisal, supra, pp. 90, 128. For the purposes of clarity, we use the terms "fee simple interest" and "leased fee interest."

ered the value of the leasehold interest, but should have considered only the actual rental income. Id., 254. This court reversed the judgment of the trial court. Id. We concluded that the trial court improperly ruled, as a matter of law, that the town of Killingly could not consider the value of the leasehold interest in its valuation of a leased property for tax assessment purposes. Id.

In doing so, this court explained that "we recognized in *First Bethel Associates* that § 12-63b clearly contemplated that an income capitalization analysis based solely on actual rental income from a long-term lease might not reflect the true and actual value of the property for purposes of General Statutes § 12-64, if the actual rents did not reflect fair market value. In other words, we recognized that a leased property might have a fair market value that exceeds the capitalized value of the actual rental income and that excess value may be taken into account in assessing the true and actual value of the property for purposes of taxing the owner, even though the tenant receives the economic benefit of that excess value. In taking that excess value into account, the town [of Killingly] does not thereby tax the property owner for a property interest that belongs to the lessee. Rather, [it] uses the excess value as an *indicator* of the true and actual value of the owner's interest." (Emphasis in original; footnote omitted.) Id., 262–63.

This court further explained that "if [a town] cannot assess a tax on the owner of leased property for the market value of the leasehold interest, it will be unable to tax the true and actual value of the property as required by General Statutes § 12-62a (b)." Id., 263–64. This court concluded that "considering the value of the lessee's interest does not require the plaintiff to pay a tax on property that belongs to the lessee, but only to pay a tax on the true and actual value of his own prop-

erty as measured, in part, by the value of the lessee's interest."[10] (Emphasis omitted.) Id., 265.

In the present case, as we explained in part I A of this opinion, the trial court correctly concluded that § 12-63b (b) requires that a valuation under the income capitalization approach must consider both contract and market rent. Therefore, the trial court's consideration of the value of the leasehold interest as one factor utilized to arrive at the true and actual value of the plaintiff's property is authorized and required by the statutory scheme. Furthermore, the trial court was able to consider the value of the leasehold interest in connection with the other substantial evidence regarding the true and actual value of the subject property. On the basis of all of the testimony and evidence presented at trial, the trial court determined the true and actual value of the subject property consistent with the statutory scheme.

Thus, on the basis of the foregoing, we conclude that the trial court properly considered the leasehold interest as one indicator of the true and actual value of the owner's interest in the subject property.

C

The plaintiff asserts that the trial court incorrectly selected too narrow a highest and best use of the subject property. In support of its claim, the plaintiff cites *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 26 n.22, 807 A.2d 955 (2002), in which this court explained that "an extremely narrow highest and best

[10] The plaintiff seems to assert that the market and contract rents in *Sheridan* v. *Killingly*, supra, 278 Conn. 252, were considered because the contract rents were below market value and its holding does not extend to contract rents that are above market value. We disagree. In *First Bethel Associates* and *Sheridan*, this court concluded that both contract and market rents should be considered when determining the fair market value of a rental property and placed no such limitation on the consideration of contract rents only when they are below market rents.

use conclusion might result in a very small or even nonexistent market, thereby eliminating the availability of market sales analysis as a useful valuation tool."[11] The town responds that the trial court's determination that continuing as a retail pharmacy is the highest and best use of the subject property is not clearly erroneous based on the evidence presented at trial, and that *United Technologies Corp.* supports the trial court's determination. We agree with the town.

The following legal principles are relevant to our analysis. "A property's highest and best use is commonly accepted by real estate appraisers as the starting point for the analysis of its true and actual value. . . . [U]nder the general rule of property valuation, fair [market] value, of necessity, regardless of the method of valuation, takes into account the highest and best value

[11] The plaintiff cites *Walgreen Co.* v. *Oshkosh*, Docket No. AP2818, 2014 WL 7151754, *3 (Wis. App. December 17, 2014), in which the Wisconsin Court of Appeals rejected the defendant city's assessment and its conclusion that the highest and best use of the plaintiff's properties was "continued use as [first] generation freestanding drug stores . . . ." (Emphasis omitted; internal quotation marks omitted.) A review of the court's analysis demonstrates that it rejected the city's highest and best use determination because that determination allowed the city to violate a previous decision of the Wisconsin Supreme Court, which had concluded in a previous case that " 'the assessor must use the market rent, not the contract rent' " to value retail property leased at above market rents. Id., quoting *Walgreen Co.* v. *Madison*, 311 Wis. 2d 158, 198, 752 N.W.2d 687 (2008). Specifically, the Wisconsin Court of Appeals determined "that where contractual rights inflate the value of leased retail property, assessors must look to the market to reach their valuations. '[A]n assessor's task is to value the real estate, not the business concern which may be using the property.' " *Walgreen Co.* v. *Oshkosh*, supra, *1, quoting *Walgreen Co.* v. *Madison*, supra, 197. The plaintiff also cites to a similar case from Indiana, *Shelby County Assessor* v. *CVS Pharmacy, Inc.*, 994 N.E.2d 350 (Ind. Tax 2013). In that case, the Indiana Tax Court concluded that the Indiana Board of Tax Review correctly rejected an assessor's conclusion that the contractual rent of a stand-alone drugstore should be used in the income approach under Indiana law. Because Connecticut law requires the consideration of both market and contract rent for valuations pursuant to § 12-63b (b), we conclude that *Oshkosh* and *Shelby County Assessor* are inapplicable to the present case.

of the land. . . . A property's highest and best use is commonly defined as the *use that will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real estate*. . . . The highest and best use determination is inextricably intertwined with the marketplace because fair market value is defined as the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use. . . . The highest and best use conclusion necessarily affects the rest of the valuation process because, as the major factor in determining the scope of the market for the property, it dictates which methods of valuation are applicable. Finally, a trier's determination of a property's highest and best use is a question of fact that we will not disturb unless it is clearly erroneous."[12] (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, supra, 262 Conn. 25–26.

"Under this deferential standard, [w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached.

[12] The plaintiff asserts that a plenary standard of review should apply to the trial court's highest and best use determination because the trial court improperly valued the leased fee interest rather than the fee simple interest and this incorrect legal conclusion impacted its determination of the highest and best use. We disagree. It is well established that a trial court's determination of the highest and best use of property is a factual determination subject to a clearly erroneous standard of review. Furthermore, we conclude in part I B of this opinion that the trial court did not value the incorrect interest in the property. Instead, consistent with this court's analysis in *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 102, we conclude that "the trial court reached its decision [on the highest and best use of the subject property] through . . . the exercise of its discretion in crediting evidence and expert witness testimony . . . ." Accordingly, we conclude that the clearly erroneous standard of review is applicable to the plaintiff's claim regarding the highest and best use of the subject property.

Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) Id., 23.

At trial, the plaintiff's appraiser, the town's appraisers, and the court utilized substantially the same standard[13] for determining the highest and best use of the subject property as improved real estate. Kerin was of the opinion that "the highest and best use of the subject property as improved real estate is for continued present use of the subject property as a retail pharmacy." Kerin based that conclusion on the following: the fact that the property's improvements were designed and constructed to the plaintiff's specifications; the continued legal feasibility of the present use under West Hartford zoning laws; the continued physical feasibility of the present use because the subject improvements were in good condition; the continued financial feasibility of the present use; and the fact that their highest and best

[13] Michaud's appraisal, citing a treatise authored by the Appraisal Institute, defined "highest and best use" as follows: "The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported and financially feasible and that results in the highest value." See Appraisal Institute, The Appraisal of Real Estate (13th Ed. 2008). Barna provided the exact same definition, but cited to a more recent edition of the same source. See Appraisal Institute, The Appraisal of Real Estate (14th Ed. 2013). Kerin, citing the Dictionary of Real Estate Appraisal (5th Ed. 2010), used the following substantially similar definition: "[T]he use that should be made of a property as it exists. An existing improvement should be renovated or retained as is so long as it continues to contribute to the total market value of the property, or until the return from a new improvement would more than offset the cost of demolishing the existing building and constructing a new one."

use determination reflects that "[t]here is no alternative use to which the subject property could be put [that] would yield a higher present value indication."

By contrast, the plaintiff's appraisers, Michaud and Barna, reached a more generalized conclusion. Specifically, Michaud found that "[t]he highest and best use of the site as improved [real estate] is for continued retail/commercial use." In arriving at this more general conclusion, Michaud explained that "[g]iven the site's zoning, its physical characteristics, market conditions and the characteristics of the area, it appears the most productive use of the land is for retail or commercial development." Barna reached that same conclusion, stating that "the current use as a retail building represents the highest and best use of the property, as improved."

The town also introduced testimony and a report written by its expert, Leary, who had performed work for the town's revaluation of the subject property. The report contained "an analysis of the appropriate methodology for the valuation of national chain pharmacy property with particular emphasis on valuation for ad valorem property assessment purposes in Connecticut." Also in his report, Leary explained that "the national chain pharmacy submarket is a subset of the [single tenant] building submarket in the retail market sector. This submarket has developed significantly since the turn of the century when the major national pharmacy chains began to leave tenant spaces in strip centers for [freestanding], preferably corner locations."

In its written memorandum of decision, the trial court explained that "the testimony and reports of Kerin and Leary . . . identify the existence of a national chain pharmacy submarket, which is a subset of the single tenant building submarket in the retail market sector." The trial court then explained that property in this

submarket is marketable to investors because they can receive rental income; the properties support a single tenant with a triple net lease who "is willing to pay above market rents because its focus is on location, sales, and customer convenience rather than real estate costs and immediate profit." The trial court ultimately determined that, "[a]s a result of all of these factors, there is an active market for these properties. . . . Therefore, it is fully appropriate to consider the highest and best use of the subject property to be as a retail pharmacy."[14] (Citation omitted.)

Although this court expressed a concern in *United Technologies Corp.* v. *East Windsor*, supra, 262 Conn. 26 n.22, that too narrow a highest and best use market might be problematic, a review of the entirety of this court's decision in that case supports the trial court's decision in the present case. In *United Technologies*

[14] In determining the highest and best use of the subject property, the trial court also explained that "[p]roperties of this type tend to attract investors in 'like kind' exchanges. See 28 U.S.C. § 1031 [2011]." The plaintiff asserts that it was clear error for the trial court to rely on § 1031, which prevents the recognition of certain gains or losses on real property for the purpose of federal income taxation, to support the valuation of the subject property. We disagree with the plaintiff's contention. The trial court merely mentioned § 1031 as one factor in deciding the highest and best use of the subject property. The trial court's consideration of the attractiveness of the existing triple net lease arrangement of the subject property was not clear error. To the contrary, there was ample evidence in the record to support the trial court's finding regarding the marketability of these properties. Specifically, Kerin testified: "The single tenant triple net property is very attractive to people who are doing § 1031 like kind exchanges. It's easy to identify properties. It's simple to understand . . . there's not a lot of due diligence [that is] required, that may be required in a multi-tenant property. In a multi-tenant property, you've got to go through the whole shopping center to . . . see what needs to be fixed up. On the single tenant [triple] net leased property, the tenant is responsible for the property. And, again, it's very simple to understand. You find a lot of § 1031 exchange buyers active in this national market." Accordingly, it was not clear error for the trial court to consider this evidence when determining the highest and best use of the subject property because it demonstrates what a willing buyer would pay a willing seller.

Corp., the plaintiff property owner asserted, inter alia, that the trial court had arrived at an improperly restrictive conclusion regarding the highest and best use for the property. The trial court had concluded that "the highest and best use of the subject premises as improved would be . . . its continued use as an industrial facility as presently used by [the plaintiff]." (Internal quotation marks omitted.) Id., 25. This court affirmed the judgment of the trial court, explaining that "the trial court gave careful consideration to the expert testimony and reports, and its findings are amply supported in the record, its highest and best use determination is not clearly erroneous and will therefore not be disturbed on appeal." Id., 28.

In the present case, after the trial court carefully considered the testimony of four experts in the field of real estate appraisal, it chose to credit the town's experts. "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony he reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Citations omitted; internal quotation marks omitted.) *Newbury Commons Ltd. Partnership* v. *Stamford*, 226 Conn. 92, 99, 626 A.2d 1292 (1993).

As the trial court explained, it was convinced by the town's experts, both Kerin and Leary, that a national chain pharmacy submarket exists and that the highest and best use of the subject property is within this submarket. The trial court's findings as to the property's special features for a national retail pharmacy—namely, that it is a freestanding building located at a corner with a traffic signal at the intersection, which has been remodeled and is under a triple net lease—have strong

support in the record. Therefore, we cannot conclude that the trial court's finding that the highest and best use of the subject property as a retail pharmacy is clearly erroneous.

The trial court's finding of the existence of a national chain pharmacy submarket also is supported by our sister state, New York, where this issue recently has been addressed. For instance, the Appellate Division of the Supreme Court of New York has determined that "there is no serious dispute" that a "national submarket for the sale and purchase of built-to-suit net lease national chain drugstores" exists, noting that "sales and rental data for that submarket [are] readily available . . . ." *Rite Aid Corp.* v. *Huseby*, 130 App. Div. 3d 1518, 1521–22, 13 N.Y.S.3d 753 (2015), appeal denied, 26 N.Y.3d 916, 47 N.E.3d 90, 26 N.Y.S.3d 760, cert. denied, U.S. , 137 S. Ct. 174, 196 L. Ed. 2d 124 (2016); see also *Rite Aid Corp.* v. *Haywood*, 130 App. Div. 3d 1510, 1513, 15 N.Y.S.3d 523 (2015) (same), appeal denied, 26 N.Y.3d 915, 47 N.E.3d 90, 26 N.Y.S.3d 760, cert. denied, U.S. , 137 S. Ct. 174, 196 L. Ed. 2d 124 (2016); *Rite Aid of New York No. 4928* v. *Assessor of Town of Colonie*, 58 App. Div. 3d 963, 965–66, 870 N.Y.S.2d 642 (rejecting claim that it was incorrect to consider evidence of net lease drugstore submarket as method of valuation), appeal denied, 12 N.Y.3d 709, 908 N.E.2d 925, 881 N.Y.S.2d 17 (2009). Accordingly, we conclude that the trial court's determination of the highest and best use of the subject property as a retail pharmacy is not clearly erroneous.

In conclusion, we reject the plaintiff's claim that, although the trial court properly found that it had established aggrievement under § 12-117a, the trial court's order of relief was insufficient. Instead, we conclude that the trial court's award of relief in the present case was proper because the trial court properly determined the true and actual value of the plaintiff's property.

II

The plaintiff next claims that the trial court incorrectly concluded that the plaintiff failed to establish a manifestly excessive valuation of the property under § 12-119. As grounds for its claim, the plaintiff asserts that the valuation of the subject property was excessive when compared to other properties in town. The town responds that the trial court correctly concluded that the plaintiff failed to meet its high burden pursuant to § 12-119. We agree with the town.

"In a tax appeal taken pursuant to § 12-119, the plaintiff must prove that the assessment was (a) manifestly excessive *and* (b) . . . could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of the property. . . . [The plaintiff] must [set forth] allegations beyond the mere claim that the assessor overvalued the property. [The] plaintiff . . . must satisfy the trier that [a] far more exacting test has been met: either there was misfeasance or nonfeasance by the taxing authorities, or the assessment was arbitrary or so excessive or discriminatory as in itself to show a disregard of duty on their part. . . . Only if the plaintiff is able to meet this exacting test by establishing that the action of the assessors would result in illegality can the plaintiff prevail in an action under § 12-119. The focus of § 12-119 is whether the assessment is illegal. . . . The statute applies *only* to an assessment that establishes a disregard of duty by the assessors. . . .

"While an insufficiency of data or the selection of an inappropriate method of appraisal could serve as the basis for not crediting the appraisal report that resulted, it could not, *absent evidence of misfeasance or malfeasance*, serve as the basis for an application for relief from a wrongful assessment under § 12-119. . . . In short, when reviewing a claim raised under § 12-119, a

court must determine whether the plaintiff has proven that the assessment was the result of illegal conduct." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 105–106.

Here, the plaintiff's sole claim of error under § 12-119 is that the valuation of the subject property was excessive when viewed in comparison to other properties in town. The testimony at trial demonstrated that the town applied the same process to valuing the other properties that it applied to the subject property, and Leary testified as to why the other properties were dissimilar to the subject property—namely, because they were smaller, less recently remodeled, and not stand alone buildings at a corner with a traffic signal.

Furthermore, even though the plaintiff has established that its property was overvalued, "[m]ere overvaluation, without more, in an assessment of property is not enough to make out a case under § 12-119 . . . ." *E. Ingraham Co.* v. *Bristol*, 146 Conn. 403, 408–409, 151 A.2d 700 (1959), cert. denied, 361 U.S. 929, 80 S. Ct. 367, 4 L. Ed. 2d 352 (1960). Moreover, because we concluded in part I of this opinion that the trial court correctly determined the true and actual value of the plaintiff's property as $4,900,000, and the town originally valued the property at $5,020,000, "we conclude that the circumstances presented here do not rise to the level of the extraordinary situation that would warrant tax relief under the provisions of § 12-119." *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, 220 Conn. 335, 343, 597 A.2d 326 (1991); see also id. ("[b]ecause we are not faced with a situation involving the absolute nontaxability of the property and because the selection of an inappropriate method of appraisal or a paucity of the underlying data in connection with an appraisal, without more, is not manifestly illegal under our statutes, we conclude that the circumstances presented

here do not rise to the level of the extraordinary situation that would warrant tax relief under the provisions of § 12-119").

Accordingly, we conclude that the trial court properly determined that the plaintiff did not meet its burden to establish a claim under § 12-119.

The judgment is affirmed.

In this opinion the other justices concurred.

GEORGE E. MENDILLO *v.* TINLEY, RENEHAN & DOST, LLP, ET AL.
(SC 19923)

Palmer, McDonald, Robinson, Mullins and Kahn, Js.*

Syllabus

The plaintiff, an attorney who previously had represented a party in a wrongful discharge action, brought the present action, seeking a judgment declaring, inter alia, that the defendant Appellate Court violated his constitutional rights by upholding, in *Sowell* v. *DiCara* (161 Conn. App. 102), a trial court's determination that he had violated rule 4.2 of the Rules of Professional Conduct, which proscribes certain direct communications with parties represented by counsel. The basis of the violation stemmed from the plaintiff's direct communication with certain members of the board of directors of Y Co., which was represented by the defendant law firm in the wrongful discharge action. The trial court granted the defendants' motion to dismiss the present action, concluding that it lacked jurisdiction because the Appellate Court's decision in *Sowell* constituted binding precedent and that a collateral challenge to that decision in the present case was precluded by the statute (§ 51-197f) governing the review of Appellate Court judgments. On the plaintiff's appeal from the trial court's judgment dismissing the present action, *held* that the trial court properly granted the defendants' motion to

* This case originally was scheduled to be argued before a panel of this court consisting of Justices Palmer, McDonald, Robinson, Mullins and Kahn. Although Justice Robinson was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision. The listing of justices reflects their seniority status on this court as of the date of oral argument.

dismiss, this court having concluded that the plaintiff's declaratory judgment action was nonjusticiable because the trial court could not afford the plaintiff any practical relief: the allegations in the plaintiff's complaint indicating that a declaratory judgment would provide guidance to members of the bar with respect to future conduct amounted to a request for an advisory opinion, and, in the absence of a dispute beyond that considered by the Appellate Court in its decision in *Sowell*, the present action amounted to nothing more than a impermissible collateral attack on that decision; moreover, entertaining the present action would violate § 51-197f, which rendered the Appellate Court's decision in *Sowell* final, as the plaintiff was afforded the opportunity to seek review of that decision by filing a petition for certification to appeal with this court.

Argued May 3—officially released July 24, 2018

Procedural History

Action for a judgment declaring, inter alia, that the plaintiff had been deprived of certain constitutional rights, brought to the Superior Court in the judicial district of Litchfield, where the court, *Schuman, J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed. *Affirmed.*

George E. Mendillo, self-represented, with whom was *John G. Manning*, for the appellant (plaintiff).

Jeffrey J. Tinley, for the appellee (named defendant).

Jane R. Rosenberg, solicitor general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellees (defendant Connecticut Appellate Court et al.).

Opinion

ROBINSON, J. In this appeal, we consider whether the Superior Court has subject matter jurisdiction over a declaratory judgment action brought as a collateral attack on a judgment of the Appellate Court concerning the plaintiff, George E. Mendillo. The plaintiff appeals[1]

[1] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

from the judgment of the trial court dismissing his declaratory judgment action against the defendants, the law firm of Tinley, Renehan & Dost, LLP (law firm), and the Connecticut Appellate Court.[2] On appeal, the plaintiff, who is an attorney, claims that the trial court improperly concluded that his challenge to the Appellate Court's interpretation of rule 4.2 of the Rules of Professional Conduct[3] in *Sowell* v. *DiCara*, 161 Conn. App. 102, 127 A.3d 356, cert. denied, 320 Conn. 909, 128 A.3d 953 (2015), was barred by the doctrine of sovereign immunity. We, however, do not reach the sovereign immunity issues raised by the plaintiff because we agree with the defendants' alternative jurisdictional argu-

[2] The plaintiff also named as defendants three judges of the Appellate Court acting in their official capacities, specifically, Douglas S. Lavine, Eliot D. Prescott, and Nina F. Elgo. We also note that the law firm has adopted the brief of the Appellate Court in the present appeal. Accordingly, we refer to the defendants collectively where appropriate and individually by name.

[3] Rule 4.2 of the Rules of Professional Conduct provides in relevant part: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. . . ."

The Commentary to rule 4.2 provides in relevant part: "This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

"In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. . . ."

ment, and conclude that the plaintiff's collateral attack on *Sowell* in this declaratory judgment action is nonjusticiable under *Valvo* v. *Freedom of Information Commission*, 294 Conn. 534, 985 A.2d 1052 (2010). Accordingly, we affirm the judgment of the trial court.

The record reveals the following undisputed relevant facts and procedural history. The plaintiff represents Julie M. Sowell, the plaintiff in a wrongful discharge action pending in the Superior Court against her former employer, Southbury-Middlebury Youth and Family Services, Inc. (Youth Services), a Connecticut nonstock, nonprofit corporation that had been dissolved, Deirdre H. DiCara, its executive director, and Mary Jane McClay, the chairperson of its board of directors. See *Sowell* v. *DiCara*, Superior Court, judicial district of Waterbury, Docket No. CV-12-6016087-S (Sowell action). On September 6, 2012, the law firm filed an appearance in the Sowell action on behalf of Youth Services, McClay, and DiCara. At a hearing held on December 12, 2013, the trial court, *Hon. Barbara J. Sheedy*, judge trial referee, granted Youth Services' motion for an emergency protective order (protective order) on the basis of the court's finding that the plaintiff had violated rule 4.2 of the Rules of Professional Conduct by communicating directly with certain "putative" members of Youth Services' board of directors regarding the merits of a counterclaim that counsel for Youth Services had filed against Sowell at McClay's direction.[4] Although Judge Sheedy did not order any sanctions against the plaintiff, the protective order enjoined him from further contact of any kind with members of Youth Services' board of directors without prior permission from the law firm. See *Sowell* v. *DiCara*, supra, 161 Conn. App. 107, 118.

[4] A detailed rendition of the facts and procedural history underlying Judge Sheedy's finding is set forth in *Sowell* v. *DiCara*, supra, 161 Conn. App. 105–18.

The plaintiff filed a writ of error in this court challenging the basis for the protective order (first writ), which was subsequently transferred to the Appellate Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Id., 119. In the first writ, the plaintiff claimed that Judge Sheedy had (1) improperly found clear and convincing evidence that he had violated rule 4.2 of the Rules of Professional Conduct, and (2) violated his state and federal constitutional rights to due process and abused its discretion by refusing to permit him to present evidence at the hearing on the motion for a protective order. Id. The Appellate Court issued a comprehensive opinion rejecting the plaintiff's challenges to the basis for the protective order, namely, the finding that he had violated rule 4.2, and rendered judgment dismissing the first writ.[5] Id., 133. This court subsequently denied the plaintiff's petition for certification to appeal in an order dated December 16, 2015; see *Sowell* v. *DiCara*, 320 Conn. 909, 128 A.3d 953

[5] With respect to the specific claims presented in the first writ, the Appellate Court relied on the letters attached to Youth Services' motion for a protective order and the plaintiff's "admission before the court that he sent the claim letter to the board of directors, and [Judge Sheedy's] articulation," and "conclude[d] that there was clear and convincing evidence before the court that [the plaintiff] violated rule 4.2 [of the Rules of Professional Conduct] by communicating with [the law firm's] clients without [its] permission." *Sowell* v. *DiCara*, supra, 161 Conn. App. 126; see id., 126–29 (noting that claim presented "legal question" concerning whether "the members of [Youth Services'] board of directors were [the law firm's] clients," as contemplated by rule 1.13 [a] of the Rules of Professional Conduct, given fact that "agency had been dissolved and was in the process of winding up" pursuant to General Statutes § 33-884 [a]). The Appellate Court next concluded that due process did not require an evidentiary hearing at which McClay would testify or her deposition testimony would be admitted into evidence, insofar as "an evidentiary hearing would serve no purpose because the issue before [the Appellate Court] was not a question of fact, but an issue of law. In essence, therefore, [the plaintiff] had a hearing at which he was able to create a record and tell his side of the story." Id., 131. Finally, citing judicial economy and the lack of disputed facts, the Appellate Court rejected the plaintiff's claim "that the court abused its discretion as to the admission of evidence by failing to let him present testimony and place a document into evidence." Id., 131–33.

(2015); and later denied the plaintiff's motion for reconsideration of that denial.

Subsequently, on February 4, 2016, the plaintiff filed a writ of error in this court challenging the Appellate Court's actions (second writ). This court dismissed the second writ on May 25, 2016, and denied the plaintiff's motion for reconsideration en banc of that dismissal on June 27, 2016.

On October 3, 2016, the plaintiff filed the present action in the Superior Court seeking a declaratory judgment pursuant to General Statutes § 52-29 and 42 U.S.C. § 1983 (2012). In the first count of the declaratory judgment complaint, the plaintiff claimed that there is substantial uncertainty with respect to the scope, meaning, and applicability of rule 4.2 of the Rules of Professional Conduct affecting his legal rights and relations with other parties. In the second count, the plaintiff claimed that the Appellate Court exceeded its constitutional authority and violated his constitutional rights by finding facts from evidence beyond the trial court record, namely, the existence of an attorney-client relationship between the law firm and Youth Services, which he was not given the opportunity to rebut or explain. In the third count, the plaintiff sought a declaration pursuant to 42 U.S.C. § 1983 that rule 4.2 is unconstitutional under the due process and equal protection clauses as applied to the facts of this case. In the fourth count, the plaintiff claimed that the Appellate Court had violated his free speech rights under the state and federal constitutions because his speech was a reasonable remedial measure under rule 3.3 (b) of the Rules of Professional Conduct to address fraud and a matter of public importance. In the fifth count, the plaintiff claimed that the Appellate Court's construction of rule 4.2 was a due process violation because it amounted to an ex post facto law. In the sixth count, the plaintiff claimed a violation of his right to equal protection of the laws.

The defendants moved to dismiss the declaratory judgment complaint, claiming that the plaintiff's claims are nonjusticiable and barred by the doctrine of sovereign immunity. The trial court, *Schuman, J.*,[6] granted the motion to dismiss, concluding that General Statutes § 51-197f[7] precluded further review of the Appellate Court's decision in *Sowell* v. *DiCara*, supra, 161 Conn. App. 102, except by this court following a petition for certification. The trial court further concluded that the claims against the Appellate Court were barred by sovereign immunity. Concluding that it lacked subject matter jurisdiction, the trial court granted the defendants' motion to dismiss and rendered judgment accordingly. This appeal followed.

On appeal, the plaintiff claims that the trial court improperly concluded that the existence of binding precedent, namely, the decision of the Appellate Court in *Sowell* v. *DiCara*, supra, 161 Conn. App. 102, operated to deprive the trial court of jurisdiction because the constitutional issues did not arise until after the Appellate Court rendered that decision. The plaintiff also argues that he has standing to seek a declaratory judgment under § 52-29 because the Appellate Court's decision in *Sowell* "has caused a continuing injury to his reputation and professional standing and the unconstitutional application of rule 4.2 [of the Rules of Professional Conduct] by the Appellate Court poses an immediate threat of further injury in the future." The plaintiff then contends in detail that the trial court improperly determined that sovereign immunity and

[6] Unless otherwise noted, all references to the trial court hereinafter are to Judge Schuman.

[7] General Statutes § 51-197f provides in relevant part: "Upon final determination of any appeal by the Appellate Court, there shall be no right to further review except the Supreme Court shall have the power to certify cases for its review upon petition by an aggrieved party or by the appellate panel which heard the matter. . . ."

judicial immunity barred his claim for declaratory relief under § 52-29 and 42 U.S.C. § 1983.[8]

In response, the defendants contend, inter alia, that the trial court properly dismissed the plaintiff's claims because they are not justiciable, relying specifically on *Valvo* v. *Freedom of Information Commission*, supra, 294 Conn. 534, to argue that no practical relief is available because a trial court lacks the authority to reverse the rulings of another court in a separate case, and particularly those of the Appellate Court, which are binding precedent. The defendants contend that the sole avenue of relief available to the plaintiff was his petition for certification to appeal from the judgment of the Appellate Court to this court pursuant to § 51-197f. The defendants emphasize that the plaintiff's complaint did not allege any facts to establish the existence of a "dispute separate and distinct from his desire to overturn *Sowell*," such as a new threat of discipline under rule 4.2 of the Rules of Professional Conduct or a new situation in which he might commit a similar violation of rule 4.2. We agree with the defendants and conclude that the trial court lacked subject matter jurisdiction over this declaratory judgment action because the plaintiff's claims are not justiciable.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . In ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court must consider the allegations of the complaint in their most favorable light . . . including those facts necessarily implied from the allegations . . . ." (Citations omitted; internal quotation marks

[8] Given our conclusion with respect to justiciability, we need not address in detail the plaintiff's comprehensive arguments with respect to sovereign and judicial immunity, and the defendants' equally comprehensive responses thereto.

omitted.) *Giannoni* v. *Commissioner of Transportation*, 322 Conn. 344, 349, 141 A.3d 784 (2016); see id., 349–50 (discussing "different situations" with respect to motion to dismiss "depending on the status of the record in the case," which might require consideration of "supplementary undisputed facts" or evidentiary hearing to resolve "critical factual dispute" [internal quotation marks omitted]).

We engage in plenary review of a trial court's grant of a motion to dismiss for lack of subject matter jurisdiction. See, e.g., *Chief Information Officer* v. *Computers Plus Center, Inc.*, 310 Conn. 60, 79, 74 A.3d 1242 (2013); *Valvo* v. *Freedom of Information Commission*, supra, 294 Conn. 541. "In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 350.

"Justiciability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 305 Conn. 523, 537–38, 46 A.3d 102 (2012). "Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) *Glastonbury* v. *Metropolitan*

District Commission, 328 Conn. 326, 333, 179 A.3d 201 (2018).

The declaratory judgment procedure, governed by § 52-29 and Practice Book § 17-54 et seq., does not relieve the plaintiff from justiciability requirements. A "declaratory judgment action pursuant to § 52-29 . . . provides a valuable tool by which litigants may resolve uncertainty of legal obligations. . . . The [declaratory judgment] procedure has the distinct advantage of affording to the court in granting any relief consequential to its determination of rights the opportunity of tailoring that relief to the particular circumstances. . . . A declaratory judgment action is not, however, a procedural panacea for use on all occasions, but, rather, is limited to solving justiciable controversies. . . . Invoking § 52-29 does not create jurisdiction where it would not otherwise exist." (Citations omitted; internal quotation marks omitted.) *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 625, 822 A.2d 196 (2003).

"As we noted in *Pamela B.* v. *Ment*, 244 Conn. 296, 323–24, 709 A.2d 1089 (1998), [w]hile the declaratory judgment procedure may not be utilized merely to secure advice on the law . . . or to establish abstract principles of law . . . or to secure the construction of a statute if the effect of that construction will not affect a plaintiff's personal rights . . . it may be employed in a justiciable controversy where the interests are adverse, where there is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement, and where all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof. . . . Finally, the determination of the controversy must be capable of resulting in practical relief to the complainant. . . .

"In deciding whether the plaintiff's complaint presents a justiciable claim, we make no determination regarding its merits. Rather, we consider only whether the matter in controversy [is] capable of being adjudicated by judicial power according to the aforestated well established principles." (Citations omitted; internal quotation marks omitted.) *Milford Power Co., LLC* v. *Alstom Power, Inc.*, supra, 263 Conn. 625–26; see also *Wilson* v. *Kelley*, 224 Conn. 110, 116, 617 A.2d 433 (1992) ("Implicit in these principles is the notion that a declaratory judgment must rest on some cause of action that would be cognizable in a nondeclaratory suit. . . . To hold otherwise would convert our declaratory judgment statute and rules into a convenient route for procuring an advisory opinion on moot or abstract questions . . . and would mean that the declaratory judgment statute and rules created substantive rights that did not otherwise exist." [Citations omitted.]).

In determining whether the present case is justiciable, we find instructive *Valvo* v. *Freedom of Information Commission*, supra, 294 Conn. 543, in which this court concluded that the plaintiff's claim, brought through an administrative appeal, was nonjusticiable when he sought to have the trial court "overturn sealing orders issued by another trial court in a separate case." See also id. ("[w]e are aware of no authority for the proposition that a trial court presiding over an administrative appeal may overturn a ruling by another trial court in an entirely unrelated case involving different parties—a proposition that the plaintiffs themselves have characterized as novel" [emphasis omitted]). Rejecting the proposed collateral attack as "completely unworkable," we observed that "[o]ur jurisprudence concerning the trial court's authority to overturn or to modify a ruling in a particular case assumes, as a proposition so basic that it requires no citation of authority, that any such action will be taken only by

the trial court with continuing jurisdiction over the case, and that the only court with continuing jurisdiction is the court that originally rendered the ruling." Id., 543–44. We emphasized that "[t]his assumption is well justified in light of the public policies favoring consistency and stability of judgments and the orderly administration of justice. . . . It would wreak havoc on the judicial system to allow a trial court in an administrative appeal to second-guess the judgment of another trial court in a separate proceeding involving different parties, and possibly to render an inconsistent ruling." (Citations omitted.) Id., 545; see also id., 548 ("We reject the plaintiffs' claims that they may mount a collateral attack on the sealing orders in this administrative appeal. We conclude, therefore, that the plaintiffs' claim that the remaining five sealed docket sheets are administrative records subject to the act is nonjusticiable because no practical relief is available . . . .").

Similarly, in *ASL Associates* v. *Zoning Commission*, 18 Conn. App. 542, 559 A.2d 236 (1989), the Appellate Court concluded that it lacked subject matter jurisdiction over a reservation arising from a declaratory judgment action brought to settle the interpretation of a zoning regulation because "the plaintiff's complaint fails to allege an actual controversy. The plaintiff obtained a building permit issued pursuant to the special permit and began the site work for the condominium project in the fall of 1986. There is no allegation that the defendant has taken, or even has threatened to take, action to declare the special permit void or to rescind the building permit." Id., 546. Significantly, the Appellate Court further emphasized that, "[*w*]*here the parties in a case were parties to an earlier action in which the same issue was the subject of a final judgment, it is difficult to understand how there could remain a justiciable or real controversy between the parties.* . . . The question presented in the prior

action, as well as in this action, was whether the town could issue a building permit to the plaintiff. The plaintiff and the defendant were parties to that action, and cannot impose their wish upon this court to have the same issue determined once again by way of this declaratory judgment action." (Citation omitted; emphasis added.) Id., 548.

On the basis of these authorities, we agree with the defendants that the present case is nonjusticiable because no practical relief is available to the plaintiff insofar as the allegations in the declaratory judgment complaint demonstrate that it is nothing more than a collateral attack on the protective order imposed by the trial court, *Sheedy, J.*, in the Sowell action, and upheld by the Appellate Court in *Sowell* v. *DiCara*, supra, 161 Conn. App. 102. Although the plaintiff alleges in his declaratory judgment complaint that a court decision would provide guidance to members of the bar with respect to their "future conduct," that allegation is nothing more than a request for an advisory opinion, insofar as none of the allegations therein identifies a dispute beyond that considered by the Appellate Court in *Sowell*. Put differently, the remainder of the allegations in the complaint unmistakably indicate that this case is a collateral challenge to the prior Appellate Court decision in *Sowell* concerning the plaintiff's previous violation of rule 4.2 of the Rules of Professional Conduct, rather than an action seeking guidance as to the application or vitality of principles from that decision with respect to a different set of facts. Thus, to entertain this declaratory judgment action would violate § 51-197f, which renders the Appellate Court's decision final insofar as the plaintiff has had his opportunity to seek review by a petition for certification to appeal. Cf. *Presnick* v. *Santoro*, 832 F. Supp. 521, 529–30 (D. Conn. 1993) (dismissing claim seeking to enjoin Superior Court chief clerk from enforcing judgment or to

force Appellate Court to hear dismissed appeal because, in addition to *Rooker-Feldman*[9] abstention, "[n]othing has been alleged here that would prevent the plaintiff from appealing the order dismissing his appeal by certification to the Connecticut Supreme Court pursuant to . . . § 51-197f, or, thereafter, to the United States Supreme Court itself"). Given the finality of the Appellate Court's judgment in *Sowell*, the trial court simply had no authority to afford the plaintiff relief by disturbing it in this collateral proceeding, rendering the present case nonjusticiable.

The plaintiff contends, however, that, "taken to its logical [end], this [conclusion] leads to the proposition that a court is deprived of subject matter jurisdiction whenever the outcome on the merits of any plaintiff's claim is determined unfavorably by a prior binding precedent or series of such precedents." We disagree. We emphasize that, consistent with the purpose of the declaratory judgment procedure, nothing would preclude a different attorney—or even this plaintiff himself—from asking a court to overrule the precedent set by *Sowell* v. *DiCara*, supra, 161 Conn. App. 102, in connection with a different dispute concerning the application of rule 4.2 of the Rules of Professional Conduct.[10] In the absence of such allegations establishing

[9] See *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S. Ct. 149, 68 L. Ed. 362 (1923).

[10] We acknowledge, as a practical matter, that a trial court considering such a claim in the first instance would be bound by *Sowell* v. *DiCara*, supra, 161 Conn. App. 102, because, "[a]lthough the doctrine of stare decisis permits a court to overturn *its own* prior cases in limited circumstances, the concept of binding precedent prohibits a trial court from overturning a prior decision of an appellate court. This prohibition is necessary to accomplish the purpose of a hierarchical judicial system. A trial court is required to follow the prior decisions of an appellate court to the extent that they are applicable to facts and issues in the case before it, and the trial court may not overturn or disregard binding precedent." (Emphasis in original.) *Potvin* v. *Lincoln Service & Equipment Co.*, 298 Conn. 620, 650, 6 A.3d 60 (2010). Moreover, given the Appellate Court's well established policy with respect to panel decisions, the party challenging the vitality of *Sowell* would

the bona fide existence of a dispute, the plaintiff's declaratory judgment action is purely a hypothetical request for an advisory opinion that second-guesses an existing final judgment, over which jurisdiction will not lie under § 52-29. See *Costantino* v. *Skolnick*, 294 Conn. 719, 737–38, 988 A.2d 257 (2010) (no jurisdiction over declaratory judgment action concerning insurance coverage for prejudgment interest when "predicates for an award of offer of judgment interest under [General Statutes] § 52-192a had not been met"); *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 814–15, 967 A.2d 1 (2009) (for purposes of jurisdiction over declaratory judgment action concerning excess insurance policy, court remanded case for factual determination as to whether it is "reasonably likely that the insured's potential liability will reach into the excess coverage"); *Milford Power Co., LLC* v. *Alstom Power, Inc.*, supra, 263 Conn. 626–27 (no jurisdiction over declaratory judgment action concerning meaning of contract's force majeure clause when defendant had not yet asserted claim of entitlement under contract). Accordingly, we conclude that the present case is not justiciable, and the trial court, therefore, properly granted the defendants' motion to dismiss.

The judgment is affirmed.

In this opinion the other justices concurred.

need to secure transfer to this court or review by the Appellate Court en banc to obtain relief. See, e.g., *Hylton* v. *Gunter*, 313 Conn. 472, 488 n.16, 97 A.3d 970 (2014); *State* v. *Tucker*, 179 Conn. App. 270, 278 n.4, 178 A.3d 1103, cert. denied, 328 Conn. 917, 180 A.3d 963 (2018). Finally, although the parties to such a declaratory judgment action might use a reservation to advance the legal issue concerning the vitality of *Sowell* into the Appellate Court or this court more expeditiously; see Practice Book § 73-1 (a); the use of that reservation procedure would not relieve the Appellate Court of its obligation to ensure that jurisdiction lies over the underlying declaratory judgment action. See *ASL Associates* v. *Zoning Commission*, supra, 18 Conn. App. 546–49.

KATHLEEN KUCHTA *v.* EILEEN R. ARISIAN (SC 19730)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

The plaintiff, the zoning enforcement officer for the city of Milford, brought an action against the defendant homeowner, seeking permanent injunctions ordering the defendant to remove three signs erected on her property and precluding her from occupying her residence until she obtained the certificate of occupancy required by the city's zoning regulations after renovations were made to her residence. The three signs expressed the defendant's dissatisfaction with her home improvement contractor and listed the lawsuits to which that contractor was purportedly a party. The defendant asserted as a special defense that the city lacked authority to regulate her signs pursuant to the statute (§ 8-2) authorizing a municipality to regulate the height, size, and location of "advertising signs" and billboards. During the pendency of the action, the defendant provided the necessary documentation to obtain the certificate of occupancy. Although the plaintiff determined that the documentation revealed that the renovations to the defendant's residence, as completed, violated city zoning regulations for maximum lot coverage, the plaintiff did not amend the complaint to include an allegation regarding that violation. The trial court concluded that, even though the defendant's signs violated the restrictions in the city's zoning regulations on height, size, and the number of signs, those signs were not advertising signs under § 8-2, as that term had been previously defined by this court, because they did not promote the sale of goods or services. Accordingly, the trial court determined that the city lacked the authority under § 8-2 to regulate them. In addition, the trial court denied the plaintiff's request to enjoin the defendant from occupying her residence until she obtained the required certificate of occupancy but determined that, due to the defendant's extreme delay in submitting the necessary documentation for that certificate, a civil penalty was justified. On the plaintiff's appeal from the trial court's judgment, *held*:

1. The trial court correctly determined that the city lacked authority to regulate the defendant's signs as advertising signs pursuant to § 8-2; this court, after undertaking a textual and historical examination of the meaning of the term "advertising signs" under the applicable rules of statutory construction, and after concluding that the relevant, contemporaneous definition of that term as used in § 8-2 was any form of public announcement intended to aid directly or indirectly in the sale of goods

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

or services, in the promulgation of a doctrine or idea, in securing attendance, or the like, determined that the defendant's signs were not advertising signs within the meaning of § 8-2, as the defendant's message in her signs was not aimed at those types of public announcements, and no activity or enterprise of the defendant benefited by any action of the recipient of the signs' messages.

2. The trial court did not abuse its discretion in denying the plaintiff's request to enjoin the defendant from occupying her residence, even though she was in violation of the city's zoning regulations, on the ground that she did not secure a certificate of occupancy following the renovations to her residence; the trial court found that the factual circumstances did not support the extraordinary equitable remedy of a permanent injunction, as the defendant could do nothing more to secure that certificate because she had submitted the necessary documentation, the plaintiff's failure to follow the normal procedure for a zoning violation deprived the defendant of administrative remedies related to the ground on which the plaintiff had declined to issue the certificate, and, if the proper procedure had been followed, the plaintiff would have provided the defendant with notice of the violation as well as a cease and desist order, which, in turn, would have allowed the defendant to seek review by the city's zoning board of appeals.

Argued November 7, 2017—officially released July 24, 2018

Procedural History

Action to enjoin the defendant from violating certain zoning regulations of the city of Milford regulating, inter alia, the posting of signs, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where Stephen H. Harris was substituted as the plaintiff; thereafter, the case was tried to the court, *Stevens, J.*; judgment in part for the plaintiff, from which the plaintiff appealed. *Affirmed.*

Scott T. Garosshen, with whom was *Karen L. Dowd*, for the appellant (plaintiff).

Eileen R. Becker, for the appellee (defendant).

Opinion

McDONALD, J. "The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas." (Internal quotation marks omitted.) *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 501, 101

S. Ct. 2882, 69 L. Ed. 2d 800 (1981). The primary issue we must resolve in this case is whether General Statutes § 8-2,[1] which authorizes a municipality's zoning commission to regulate the height, size, and location of "advertising signs and billboards," permits a municipality to regulate signs erected on residential property that disparage a commercial vendor.

The plaintiff, the zoning enforcement officer for the city of Milford,[2] appeals from the judgment of the trial court denying the plaintiff's request for permanent injunctions ordering the defendant homeowner, Eileen R. Arisian, to remove signs on her property that were not in compliance with city zoning regulations and precluding the defendant from occupying the property until she obtained certain certificates required after home improvements had been made to her residence.[3] We conclude that the defendant's signs are not "advertising signs," and, accordingly, the trial court properly concluded that municipal regulation of such signs is outside the scope of the authority granted under § 8-2. We further conclude that the trial court properly exercised its discretion when it declined to issue an injunction precluding the defendant from occupying the subject premises.

I

We first address the plaintiff's challenge to the trial court's conclusion that the city's zoning commission

[1] Although § 8-2 has been amended by the legislature several times since the events underlying the present case; see, e.g., Public Acts 2015, No. 15-227, § 25; those amendments have no bearing on the merits of this appeal.

[2] Kathleen Kutcha, the named plaintiff, was the Milford zoning enforcement officer when this case was commenced. While the case was pending before the trial court, Kutcha retired, and her successor, Stephen H. Harris, was substituted as the plaintiff.

[3] The plaintiff appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

lacked authority to regulate the defendant's signs as "advertising signs" under § 8-2. The following undisputed facts and procedural history are relevant to this issue.

The defendant contracted with Baybrook Remodelers, Inc., for certain home improvements. Evidently dissatisfied with Baybrook's performance, the defendant erected three signs on her property. One sign stated: "I Do Not Recommend BAYBROOK REMODELERS." Two signs contained the caption: "BAYBROOK REMODELERS' TOTAL LAWSUITS," with bar graphs underneath the caption reflecting the number of lawsuits to which the contractor purportedly was a party.

Thereafter, the plaintiff issued an order notifying the defendant that her signs violated city zoning regulations limiting the size, height, and number of signs per street line and ordering her to remove them.[4] See Milford Zoning Regs., art. V, §§ 5.3.3.3 (2) and 5.3.4.1. When the defendant still had not complied months later, the plaintiff commenced the present action, which sought to enjoin the defendant from maintaining the signs that did not comply with the zoning regulations. The defendant asserted a special defense that the city lacked authority to regulate her signs under § 8-2.

The trial court denied the request for the injunction. The court found that the defendant's signs violated the restrictions on the size, height, and number of signs in the city's zoning regulations. The court nonetheless concluded that the city lacked authority to regulate the signs under § 8-2. It reasoned that the defendant's signs were not "advertising signs" as previously defined by

[4] Milford regulations place additional limitations on temporary signs that differ based on their content, including political signs, commercial advertising signs, and signs advertising cultural and civic events. See Milford Zoning Regs., art. V, § 5.3.3.4. These content based distinctions are not at issue in the present case.

this court because they did not promote the sale of goods or services. This appeal followed.

On appeal, the plaintiff asserts that an "advertising" sign, as that term is used in § 8-2 and as that term is commonly defined, means any sign that makes a public announcement. According to the plaintiff, this broad definition is proper because it more fully aligns with the stated purposes of the zoning enabling statute than the narrower one adopted by the trial court. The plaintiff further asserts that this broader definition is proper because a narrower definition may constitute content based regulation in violation of the first amendment to the United States constitution. We disagree.[5]

The meaning of the term "advertising signs" is a matter of statutory construction, to which well settled principles and plenary review apply. *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 48, 161 A.3d 537 (2017). "In seeking to determine that meaning, General Statutes § 1-2z directs us to first 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 a 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

[5] In addition to rebutting the plaintiff's argument directly, the defendant asserts that (1) even if the court were to adopt the plaintiff's broad definition of advertising signs, the city's regulations would exceed the city's authority because § 8-2 does not permit regulation of the number of signs and, (2) as an alternative ground for affirmance, application of the zoning regulations to the defendant would violate her first amendment rights. Because we conclude that § 8-2 does not authorize the city to regulate the defendant's signs, we do not reach these issues.

and common law principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Gilmore* v. *Pawn King, Inc.*, 313 Conn. 535, 542–43, 98 A.3d 808 (2014).

In addition to these general principles, we must be mindful when construing § 8-2 that the grant of municipal authority to enact zoning regulations is in derogation of the common law. See *City Council* v. *Hall*, 180 Conn. 243, 248, 429 A.2d 481 (1980) (''as a creation of the state, a municipality has no inherent power of its own. . . [and] the only powers a municipal corporation has are those which are expressly granted to it by the state'' [citations omitted]); see also *Schwartz* v. *Planning & Zoning Commission*, 208 Conn. 146, 153, 543 A.2d 1339 (1988) (zoning regulations and ordinances are in derogation of common law). As such, this grant of authority ''should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of [statutory] construction.'' (Internal quotation marks omitted.) *Ugrin* v. *Cheshire*, 307 Conn. 364, 380, 54 A.3d 532 (2012).

We begin our analysis with the observation that there is no definition of ''advertising signs'' or ''advertise'' anywhere in the General Statutes that provides guidance in the present case. But see General Statutes § 20-206g (a) (defining '' 'advertise' '' for purposes of provision limiting advertisements by massage therapists by reference to inclusion of certain terms). However, as the trial court's decision in the present case reflects, this court has previously considered the meaning of this term.

In *Schwartz* v. *Planning & Zoning Commission*, supra, 208 Conn. 153–54, the defendant commission was attempting to apply its zoning regulations to preclude the display of an artistic, cylindrical metal sculpture erected in front of a shopping plaza. We concluded

that the sculpture was not a "sign" as defined under the town of Hamden's zoning regulations, because, although it would attract the attention of passersby, it did not attract attention to a " 'use, product, service, or activity' " as provided under the regulation's definition. Id., 154. We also noted, however, that the defendant commission's expansive interpretation was not consistent with the authority granted to it under § 8-2 to regulate "advertising signs and billboards." Id., 154–55. The court first referenced dictionary definitions of "advertise" that it deemed most relevant: "to announce publicly esp[ecially] by a printed notice or a broadcast; [and] *to call public attention to esp*[*ecially*] *by emphasizing desirable qualities so as to arouse a desire to buy or patronize*." (Emphasis added; internal quotation marks omitted.) Id., 155. The court then noted the lack of evidence to establish that the presence of the sculpture would "arouse the desire of passersby to patronize the merchants and services available there." Id.

Putting aside the question of whether this discussion of § 8-2 is dictum, as the plaintiff contends, we are not persuaded that the definition applied in *Schwartz* is dispositive of the issue in the present case because the court failed to engage in a comprehensive statutory analysis and overlooked governing rules of construction.[6] Accordingly, we now undertake the requisite analysis. See *State* v. *Patel*, 327 Conn. 932, 939, 171 A.3d 1037 (2017) (The court acknowledged prior case law addressing the matter before the court but concluded: "[W]e have never undertaken the necessary textual and historical examination to reach an informed conclusion. . . . Therefore, we now undertake such an examina-

[6] We also observe that, in *Schwartz*, the court quoted two definitions, each of which conforms to one proposed by a party in the present case. See *Schwartz* v. *Planning & Zoning Commission*, supra, 208 Conn. 155. It appears that the court in *Schwartz* applied the narrower definition because its use of the phrase "arouse the desire"; id.; more closely hewed to the use of the phrase "attracting attention" in the town's zoning regulation. Id., 153.

tion, informed by settled factors that guide this process." [Citations omitted; footnote omitted.]).

In the absence of a statutory definition of "advertising signs," our starting point must be the common meaning of the term, as reflected in the dictionary. See General Statutes § 1-1 (a) ("[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language"); *Maturo* v. *State Employees Retirement Commission*, 326 Conn. 160, 176, 162 A.3d 706 (2017) (relying on dictionary definitions). However, the definition applied in *Schwartz*, as well as those relied on by both parties to the present case, suffers from two flaws. First, those definitions are not contemporaneous with the time when the grant of authority to regulate "advertising signs and billboards" was added to the zoning enabling statute. See *Maturo* v. *State Employees Retirement Commission*, supra, 176 ("[w]hen a term is not defined in a statute, we begin with the assumption that the legislature intended the word to carry its ordinary meaning, as evidenced in dictionaries in print at the time the statute was enacted"); see also *Sandifer* v. *U.S. Steel Corp.*, U.S. , 134 S. Ct. 870, 876, 187 L. Ed. 2d 729 (2014) ("[i]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, *contemporary*, common meaning" [emphasis added; internal quotation marks omitted]); see, e.g., id. (looking to dictionary definition at time of statute's enactment). Second, the parties rely exclusively on definitions of the verb "advertise," not the adjective "advertising," which is the operative form of the word used in the statute and which could have a different meaning.

The grant of municipal zoning authority to regulate "advertising signs and billboards" was added to the zoning enabling statute in 1931. Public Acts 1931, c. 29, § 42a; General Statutes (Cum. Supp. 1931) § 88c.

Contemporaneous dictionaries provide a relevant definition of "advertise" that is consistent with the broad meaning advocated by the plaintiff. See Webster's New International Dictionary (2d Ed. 1934) p. 39 ("[t]o give notice to; to inform; to notify; to make known to; hence, to warn;—often with *of* before the subject of information; as, to *advertise* a man of his loss" and "[t]o give public notice of; to announce publicly, esp[ecially] by a printed notice; as, to *advertise* a sale; hence, to call public attention to, esp[ecially] by emphasizing desirable qualities, in order to arouse a desire to purchase, invest, patronize, or the like" [emphasis in original]); Funk & Wagnalls New Standard Dictionary of the English Language (1928) p. 42 ("[t]o give public notice or information, as of some thing desired, an entertainment, a place of business, etc.; publish; as, to *advertise* for a servant; to *advertise* extensively" [emphasis in original]). These definitions indicate that commercial advertising is perhaps the most common form of such expression, but not the only form under this broad meaning.[7]

The definition of "advertising," however, reflects a more specific meaning aimed at the purpose of this form of expression. Webster's New International Dictionary,

[7] Consistent with the discussion in *Schwartz*; see footnote 6 of this opinion; modern dictionaries include a broad definition of "advertise," as well as a narrower one focused on the promotion of goods or services. See Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 59 ("to make something known to," "to make publicly and generally known," "to announce publicly esp[ecially] by a printed notice or a broadcast," and "to call public attention to esp[ecially] by emphasizing desirable qualities so as to arouse a desire to buy or patronize"); The Random House Dictionary of the English Language (2d Ed. 1987) p. 29 ("advertising" means "the act or practice of calling public attention to one's product, service, need, etc., esp[ecially] by paid announcements in newspapers and magazines, over radio or television, on billboards, etc."); The American Heritage Dictionary of the English Language (1978) p. 19 ("[t]o make public announcement of; especially, to proclaim the qualities or advantages of [a product or business] so as to increase sales"; "[t]o call the attention of the public to a product or business").

supra, p. 39, defines "advertising" as "[a]ny form of public announcement intended to aid directly or indirectly in the sale of a commodity, etc., in the promulgation of a doctrine or idea, in securing attendance, as at a meeting, or the like." See also Funk & Wagnalls New Standard Dictionary of the English Language (1946) p. 42 (defining "advertising" as "[t]he act of making known by public notice; by extension, the art of announcing or offering for sale in such a manner as to induce purchase"). These dictionaries reflect that, around 1931, "advertising" referred to the *promotion* of many subjects, of which commercial goods and services were perhaps the most common. Because the announcement is "intended to aid" the proponent, the definition implies that some benefit inures to the proponent through such promotion.[8] See, e.g., *People* v. *Hopkins*, 147 Misc. 12, 13–15, 263 N.Y.S. 290 (Spec. Sess. App. Pt. 1933) (The court concluded that a municipal ordinance prohibiting "advertising" trucks in the streets had been violated by a truck bearing messages offering a reward for the arrest of persons who had bombed a labor union's headquarters, and the following statements: "Please do not patronize Patio Albermarle Farragut Rialto. They employ a scab group." "We stand for decency in unionism . . . .").

When the meaning of "advertising" is linked with the meaning of "sign," there is further evidence that the

[8] When this meaning is ascribed to "advertising signs," it results in a meaning consistent with its companion term—"billboards." Although billboards predominantly display commercial messages, they also have been used to promote noncommercial messages, including political and religious messages. Indeed, although not common around the time period when the zoning statute was amended to add this authority, there is evidence that billboards were used to promote noncommercial causes at that time. See E. Berry, "The Call of the Billboard," The Atlantic, July 7, 2016, available at http://www.theatlantic.com/technology/archive/2016/07/the-call-of-the-billboard/490316/ (last visited July 13, 2018) (discussing existence of an "advertising agency of religious work" in 1908, which encouraged churches to erect religious signs to "meet the people [half way] with the Gospel message" [internal quotation marks omitted]).

broadest meaning of "advertise"—any public announcement —was not intended when this zoning authority was granted in 1931. The relevant contemporaneous definition of "sign" was "[a] lettered board, or other conspicuous notice, placed on or before a building, room, shop, or office to advertise the business there transacted, or the name of the person or firm conducting it; a publicly displayed token or notice." Webster's New International Dictionary, supra, p. 2334. As such, the definition distinguishes a sign as a means to advertise from a means to simply convey information to the public.[9]

By interpreting "advertising" consistently with its contemporaneous definition, we afford independent meaning to that term as well as to "sign." By contrast, the plaintiff's interpretation of advertising sign to mean any sign that makes a public announcement largely renders the term "advertising" superfluous.[10] It is a cardinal rule of construction that no word or phrase of a statute should be rendered superfluous. See, e.g., *Marchesi* v. *Board of Selectmen*, 309 Conn. 608, 615, 72

[9] Modern definitions of "sign" reflect a similar distinction. See Webster's II New World College Dictionary (3d Ed. 2005) p. 1051 ("board, poster, or placard displayed in a public place to advertise, impart information, or give directions); Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) pp. 1158–59 ("a display . . . used to identify or advertise a place of business or a product," "a posted command, warning, or direction," and "signboard"); Webster's Third New International Dictionary (2002) p. 2115 (a lettered board or other public display placed on or before a building . . . to advertise the business there transacted" and "a conspicuously placed word or legend [as on a board or placard] of warning . . . or other information of general concern"); see also Regs., Conn. State Agencies § 13a-123-2 (h) (defining " '[s]ign' " for purposes of Department of Transportation regulations as including "any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard or other thing which is designed, intended or used to advertise or inform").

[10] Insofar as the plaintiff contends that construing "advertising" to mean making the expression visible to the public would avoid rendering the term superfluous, we also observe that numerous dictionaries define "sign" in a manner to mean a public display. See footnote 9 of this opinion

A.3d 394 (2013); *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 955 (2010). Had the legislature intended to cast such a broad net, presumably it would have simply granted a municipality the authority to regulate "signs," as it has in other provisions of the General Statutes. See, e.g., General Statutes § 7-148 (c) (7) (vi) (granting municipality power to "[r]egulate and prohibit the placing, erecting or keeping of signs . . . upon or over the sidewalks, streets and other public places of the municipality").

We also observe that the contemporaneous, narrower meaning of advertising better comports with related statutes and the history of the grant of regulatory authority. "Advertising signs" are the subject of several other statutes, some adopted prior to the amendment to the zoning statute in 1931, and some afterward. Prior to 1931, the legislature enacted a licensing (permit and fee) requirement for advertising signs, which was codified in a chapter of the General Statutes entitled "ADVERTISING SIGNS." Public Acts 1915, c. 314; General Statutes (1918 Rev.) tit. 25, c. 168. That scheme is currently codified at chapter 411 and is identically entitled. See General Statutes §§ 21-50 through 21-63. According to historical evidence, this requirement was aimed at controlling the proliferation of commercial advertising.[11] See J. Loshin, "Property in the Horizon:

[11] Contemporaneous case law from other jurisdictions is replete with evidence that the proliferation of commercial signs, especially billboards, raised significant aesthetic, as well as safety and health, concerns across the country, leading many jurisdictions to adopt similar legislation allowing for the regulation of advertising signs and billboards. See *Murphy, Inc.* v. *Westport*, 131 Conn. 292, 295–98, 40 A.2d 177 (1944) (comparing cases from other jurisdictions where regulation of advertising signs solely on basis of aesthetic concerns was deemed improper with those cases where regulations also based on public health or safety concerns were deemed proper); *General Outdoor Advertising, Co.* v. *Dept. of Public Works*, 289 Mass. 149, 171, 176, 182, 193 N.E. 799 (1935) (noting that, in addition to aesthetic concerns, advertising signs and billboards impact public safety because they can be dangerous to passersby if they fall into disrepair and are distracting, may negatively impact property values, and intrude upon passersby who would

The Theory and Practice of Sign and Billboard Regulation," 30 Environs: Envtl. L. & Policy J. 101, 125–26 (2006) (case study of New Haven's treatment of signs and billboards); see also General Statutes (Cum. Supp. 1931) §§ 89c and 90c (prescribing conditions for erecting advertising signs and treating such signs as type of commercial or business structure).[12] However, exemptions to the licensing requirement reveal that the signs subject to the licensing requirements extended beyond purely commercial advertising to signs promoting other types of enterprises. See General Statutes § 21-55 (providing exemption for "advertising sign containing six square feet or less, from any town, city, borough, fire district or incorporated fire company, service club or church or ecclesiastical society in this state for any advertisement owned by it and advertising its industries

otherwise be able to avoid advertising in other mediums), appeal dismissed sub nom. *General Outdoor Advertising Co.* v. *Hoar*, 297 U.S. 725, 56 S. Ct. 495, 60 L. Ed. 1008 (1936); see also *Haller Sign Works* v. *Physical Culture Training School*, 249 Ill. 436, 443–46, 94 N.E. 920 (1911) (discussing cases from numerous jurisdictions where municipalities attempted to regulate advertising signs for purely aesthetic reasons). Scholars have traced the impetus for such regulation to the intrusion of unsightly commercial advertising, both from on premises signs and off premises billboards, after the turn of the twentieth century, as a result of the development of a national system of roads, the popular availability of automobiles, and industrial advances. See note, "Judging the Aesthetics of Billboards," 23 J.L. & Pol. 171 (2007) (collecting extensive scholarly and legal citations discussing rise of outdoor advertising and regulation thereof); see also J. Loshin, "Property in the Horizon: The Theory and Practice of Sign and Billboard Regulation," 30 Environs: Envtl. L. & Policy J. 101 (2006) (case study of New Haven's treatment of signs and billboards); see also J. Houck, Outdoor Advertising: History and Regulation (1969).

[12] See General Statutes (Cum. Supp. 1931) §§ 89c and 90c (authorizing appropriate town board, commission or official to establish "districts or zones within which no commercial or business structure or building, including advertising signs, may be erected" unless person, firm or corporation obtains license to erect "such a structure, building or sign, or any or all of them, within such zone"); General Statutes (Cum. Supp. 1931) § 92c (providing that these statutes did not "prevent any owner of land from advertising on his land any business conducted or any products manufactured, produced or raised by him thereon").

or attractions and maintained at either public or private expense"); see also General Statutes (1918 Rev.) § 3024 (excluding signs less than four square feet); General Statutes (1918 Rev.) § 3029 (providing exception for "any town, city or borough for any advertisement owned by it and advertising its industries and maintained at either public or private expense"). Consistent with the contemporaneous meaning of "advertising," this exemption implies that advertising promotes something for the benefit of the proponent.

This meaning is also consistent with the interpretation given to a statute regulating advertising signs that was subsequently enacted. The legislature enacted a statute limiting placement of advertising signs and structures within a certain distance of highways. See General Statutes § 13a-123. This statute was originally enacted in 1959 and subsequently was amended in 1967 to ensure compliance with the federal Highway Beautification Act of 1965. See Public Acts 1959, No. 526, §§ 1–7, 9–11; Public Acts 1967, No. 632, § 1. Notably, the statute exempts signs bearing certain subject matter; all of the specific examples cited conform to the promotional, beneficial definition of advertising previously cited, i.e., signs "pertaining to natural wonders and scenic and historical attractions," "advertising the sale or lease of the property," or advertising "activities conducted on the property on which they are located . . . ." General Statutes § 13a-123 (e) (1), (2) and (3). In *Burns* v. *Barrett*, 212 Conn. 176, 189, 561 A.2d 1378, cert. denied, 493 U.S. 1003, 110 S. Ct. 563. 107 L. Ed. 2d 558 (1989), this court considered the application of a regulation promulgated under § 13a-123, which elaborated on the exemption for signs advertising activities conducted on the premises where the sign is located. In rejecting a claim that the regulation applied to commercial speech only, the court addressed noncommercial advertising in a manner consistent with the promotional, beneficial

definition set forth in the 1934 Webster's New International Dictionary: "We construe the regulation . . . to include . . . those [signs] relating to noncommercial as well as commercial activities located on the premises, such as those of a hospital, church, club, political organization or other noncommercial institution. For example, if some organization of veterans were located on the premises where the defendant has placed his sign concerning Vietnam veterans, the requisite relationship between the sign and activities conducted on the premises would exist. Such a noncommercial message could . . . be sponsored by a business conducted on the site of the sign for the purpose of advertising the business, since many advertisements contain statements of public interest not directly related to the wares sold by the sponsor but intended to attract attention or create good will for its benefit." Id.

Finally, we are mindful that, at the time the legislature added authority to regulate advertising signs and billboards and to this day, the zoning scheme sets forth broad purposes for zoning regulations. It provides in relevant part that such regulations "shall be designed to lessen congestion in the streets; to secure safety from fire, panic, flood and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements. . . ."[13] General Statutes § 8-2 (a); accord General Statutes (1930 Rev.) § 424. These purposes reflect safety and aesthetic concerns. The aforementioned

[13] This statement of purpose predated the grant of zoning authority to regulate advertising signs and billboards, and was not originally included in the predecessor to § 8-2. See Public Acts 1925, c. 242, §§ 2 and 3. In 1947, the legislature moved this statement of purpose into the predecessor to § 8-2. See Public Acts 1947, No. 418, § 2.

interpretation of advertising undoubtedly advances these purposes. The mere fact that a broader interpretation of advertising might more fully accomplish these purposes does not permit us to ignore the meaning of the term compelled under the applicable rules of construction. We are obliged to construe the grant of authority narrowly, as it is in derogation of common-law property rights. See *Ugrin* v. *Cheshire*, supra, 307 Conn. 380; see also *Schwartz* v. *Planning & Zoning Commission*, supra, 208 Conn. 153 (zoning regulations and ordinances are in derogation of common law); *City Council* v. *Hall*, supra, 180 Conn. 248 (municipality limited to power granted by state). Such a narrow construction does not create an absurd result, as claimed by the plaintiff. The legislature rationally could choose to target the predominant source of the concern. See *Burns* v. *Barrett*, supra, 212 Conn. 184–85 (exception to prohibition on advertising signs within certain proximity of off-ramp to highway on basis of population density did not refute conclusion that regulation enhanced highway safety); see also *Metromedia, Inc.* v. *San Diego*, supra, 453 U.S. 511–12 (exclusion of on premises advertising from regulation does not undermine state's safety and aesthetic objectives; state could believe off premises advertising is more acute problem or on premises advertising is of greater value to public).

We agree with the plaintiff that any individual sign—regardless of the nature of the message it conveys—potentially could be a distraction to drivers and could raise safety concerns if it is too big, too tall, or placed in certain locations. Cf. *Burns* v. *Barrett*, supra, 212 Conn. 187 ("[B]illboard advertisements, both commercial and noncommercial, are distracting to motorists and threaten public safety in areas where vehicles travel at very high speeds. Indeed, noncommercial messages may be more distracting because they are usually more interesting."); see generally, e.g., *Kroll* v. *Steere*, 60

Conn. App. 376, 379, 759 A.2d 541 (considering regulation of twenty square foot piece of plywood with painting portraying two deer and captioned "Who Asked the Deer?"), cert. denied, 255 Conn. 909, 763 A.2d 1035 (2000). However, the plaintiff's construction would allow for the regulation of signs that plainly were not of the sort envisioned when the legislature added this grant of authority in 1931.

Undoubtedly, since the 1930s, signs reflecting purely personal expressions have gained popularity. It is not uncommon to pass a residence bearing a sign announcing a celebratory event (e.g., the birth of a child—"It's a Boy," the return of a loved one—"Welcome Home, Soldier"), a warning ("Drive Slowly—Children at Play"), or an expression of personal opinion. Although such signs may make a public announcement, we are hard pressed to characterize such expressions as advertising. To the extent that such signs may give rise to similar aesthetic and safety concerns as advertising signs, it is not up to this court to give the statute a broader meaning than the contemporaneous, common meaning intended by the enacting legislature. Cf. *Harris* v. *United States*, 536 U.S. 545, 556, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002) (recognizing that court examines legislative intent in view of contemporaneous law, not subsequent developments in law that legislature could not have contemplated), overruled on other grounds by *Alleyne* v. *United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). Subsequent legislatures could have adopted a definition to expand the scope of the statute to address modern developments and practices. They failed to do so, leaving us to apply settled rules of construction. Under those rules of construction, we are bound to apply the narrower definition, consistent with the contemporaneous definition.[14]

[14] Our research has revealed only cases of recent vintage in which one jurisdiction adopted an expansive meaning of advertising signs for purposes of zoning regulations, consistent with the plaintiff's view. See *Lone Star*

The plaintiff nonetheless asserts that the principle of legislative acquiescence supports the broad definition of public pronouncement. The plaintiff contends that the legislature should be presumed to know that many municipalities have promulgated zoning regulations that are broader than the narrow definition of "advertising signs" adopted by the trial court, and thus its failure to amend the statute evidences legislative support for these broader interpretations. The plaintiff cites no authority, however, and we are aware of none, that extends the principle of legislative acquiescence to presume the legislature's awareness of municipal legislation that has not been subjected to judicial scrutiny and that may vary in form among municipalities. Moreover, in light of our prior construction of § 8-2 in *Schwartz*, there would be no reason for the legislature to presume that any contrary municipal construction would withstand such scrutiny.

As a fallback position, the plaintiff asserts that we should adopt the broader public announcement definition because limiting "advertising signs" to those that promote goods, services, or activities might constitute improper content based speech discrimination in violation of the first amendment to the United States constitution.[15] See *Reed* v. *Gilbert*, U.S. , 135 S. Ct. 2218,

Security & Video, Inc. v. *Los Angeles*, 827 F.3d 1192, 1198–1200 (9th Cir. 2016) (adopting broad definition of "advertising" in context of mobile billboards in accordance with California law); *Showing Animals Respect & Kindness* v. *West Hollywood*, 166 Cal. App. 4th 815, 819–20, 83 Cal. Rptr. 3d 134 (2008) (same). There is no indication in these cases that the statutory provision was enacted during the 1930s or any indication that the courts considered any rule of construction requiring strict construction.

[15] The plaintiff appears to base his argument, in part, on the assumption that whether the expression is advertising under the narrower definition would depend on whether it expresses a positive or negative view of the subject. This assumption is flawed. A negative message could be advertising if it is intended to aid indirectly in the sale of a commodity or to advance another interest to the benefit of the proponent (e.g., a business disparaging or demeaning a competitor).

2231, 192 L. Ed. 2d 236 (2015) (restrictions on temporary signs on basis of classification of content are violation of first amendment). Admittedly, "[i]t is well established that this court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities . . . ." (Internal quotation marks omitted.) *James* v. *Commissioner of Correction*, 327 Conn. 24, 42, 170 A.3d 662 (2017). However, "it is appropriate to place a judicial gloss on a statutory provision only if that gloss comports with the legislature's underlying intent. . . . When, as in the present case, however, such a gloss is not consistent with the intent of the legislature as expressed in the clear statutory language, we will not rewrite the statute so as to render it constitutional." (Citation omitted.) *State* v. *DeCiccio*, 315 Conn. 79, 150, 105 A.3d 165 (2014); accord *Clark* v. *Martinez*, 543 U.S. 371, 381–82, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005). Here, the evidence compels the conclusion that the legislature intended a narrower definition than the one advanced by the plaintiff. Moreover, the plaintiff's constitutional arguments rest on first amendment case law that developed decades after the statute was enacted.[16] See, e.g., *Metromedia, Inc.* v. *San Diego*, supra, 453 U.S. 505 ("[p]rior to 1975, purely commercial advertisements of services or goods for sale were considered to be outside the protection of the [f]irst [a]mendment"). As the United States Supreme Court has noted, interpreting a statute to conform to subsequent developments in the law would improperly "embrace a dynamic view of statutory interpretation, under which the text might mean one thing when enacted and yet another if the prevailing view of the [c]onstitution later changed." *Harris* v. *United States*, supra, 536 U.S. 556.

[16] Under the facts of the present case, we need not reach the question of whether certain types of political speech would be "advertising" or whether application of specific zoning regulations to that speech would violate the first amendment. In the interim, the legislature may wish to adopt a definition of "advertising signs" to make its views clear on this matter.

Insofar as the plaintiff's argument can be construed as a direct constitutional challenge to a narrow construction of the statute, the relief that would be afforded to a proper party to make this claim—a person whose speech was restricted by the zoning regulations[17]—would be to strike down, limit, or refuse to apply the offending grant of authority, not to expand the reach of the statute to other forms of expression. See *State* v. *Williams*, 205 Conn. 456, 473, 534 A.2d 230 (1987) ("this court has the power to construe state statutes narrowly to comport with the constitutional right of free speech" and "[t]o avoid the risk of constitutional infirmity"); see also *Metromedia, Inc.* v. *San Diego*, supra, 453 U.S. 503, 513, 521 (striking down ordinance that permitted on premises commercial advertising but did not permit noncommercial messages).

For the foregoing reasons, we conclude that the phrase "advertising signs" under § 8-2 means any form of public announcement intended to aid directly or indirectly in the sale of goods or services, in the promulgation of a doctrine or idea, in securing attendance, or the like.

In light of that conclusion, it is apparent that the defendant's signs in the present case are not advertising signs. The defendant's message is not aimed at the sale of goods, the promulgation of a doctrine or idea, securing attendance, or the like. Nor is any activity or enterprise of the defendant benefited by any action of the recipient of the message. Rather, the defendant is expressing her personal, derogatory opinion of her home improvement contractor and citing prior lawsuits allegedly brought against the contractor to show that her unfavorable opinion is shared by others. Although

[17] The city is not being deprived of any constitutional right. See *Shaskan* v. *Waltham Industries Corp.*, 168 Conn. 43, 49, 357 A.2d 472 (1975) ("[t]he general rule is that a litigant may only assert his own constitutional rights or immunities").

she might obtain personal satisfaction if her sign deters other homeowners from hiring the named contractor, it is not the sort of benefit fostered by advertising as we have interpreted the term. Therefore, the trial court properly concluded that the city lacked authority to regulate the defendant's signs.

II

We next turn to the plaintiff's challenge to the trial court's decision denying the plaintiff's request for an injunction precluding the defendant from occupying her residence until she obtained a new certificate of occupancy following the modifications to her residence. The plaintiff contends that the court improperly focused on why the defendant did not have a certificate of occupancy rather than whether she had the certificate required by the zoning regulations. We conclude that the trial court did not abuse its discretion in denying this request.

The record reflects the following additional undisputed facts and procedural history. City zoning regulations impose several obligations on a property owner having home renovations performed. The owner must submit an application and plot plan, reflecting the proposed changes to the property, to procure a zoning permit from the zoning enforcement officer. Milford Zoning Regs., art. VIII, § 8.5. Once renovations have been completed, the owner must submit an " 'as built' " certified plot plan, reflecting the actual work performed, to the zoning enforcement officer. Id., § 8.8. Only after doing so may the owner apply for a certificate of zoning compliance from the zoning enforcement officer and a certificate of occupancy from the building inspector. Id. A certificate of zoning compliance is a necessary prerequisite to a certificate of occupancy, and the zoning regulations prohibit occupation of a residence without a certificate of occupancy. Id., § 8.9.

In the present case, after the plaintiff received complaints concerning the defendant's signs about her home improvement contractor, the plaintiff reviewed the file pertaining to the defendant's property. That review revealed that the defendant had obtained two building permits for renovations to her residence, but had not subsequently filed the submissions to obtain a new certificate of occupancy. The plaintiff sent a letter to the defendant notifying her that she had not "turn[ed] in as-builts for the two permits that have not been inspected and ha[d] not yet received [c]ertificates of [z]oning [c]ompliance or [c]ertificates of [o]ccupancy," and ordering her to do so. Several months later, the plaintiff sent a second letter to the defendant, ordering her to "obtain [c]ertificates of [z]oning [c]ompliance and [c]ertificates of [o]ccupancy within ten . . . days of the date of this order or vacate the premises." When the defendant still did not comply with the orders, the plaintiff brought the present action, seeking an injunction precluding the defendant from occupying the premises and ordering her to immediately obtain a certificate of zoning compliance and a certificate of occupancy. The plaintiff also sought civil penalties under General Statutes § 8-12 for the defendant's failure to comply with the order to remedy the stated violations. The complaint simply alleged that the defendant was occupying the premises without a certificate of zoning compliance or certificate of occupancy and had failed to comply with orders to comply with city regulations, and the two orders were attached as exhibits.

Trial on the action did not take place until almost four years after the complaint was filed. The following events ensued during the intervening period. Three years after the plaintiff commenced the present action, the defendant provided an as built plot plan to the plaintiff. Both the initial plot plan and a subsequent one submitted by the defendant contained substantive

errors. Nearly four years after the commencement of the action, the defendant submitted an adequate plot plan. The plaintiff reviewed the plot plan and determined that the renovations, as completed, violated city zoning regulations for maximum lot coverage. As a consequence, the plaintiff declined to issue a certificate of zoning compliance, and, in turn, the building inspector refused to issue a certificate of occupancy. The plaintiff did not amend the complaint to include an allegation regarding the zoning violation for lot coverage.

The trial court found that the defendant had violated the zoning regulations because she did not have the requisite certificate of occupancy, but it nonetheless declined to grant the plaintiff's request for injunctive relief. The court found that the defendant could do nothing more to secure the certificate. The trial court credited the defendant's testimony that she had relied on her contractor to submit the necessary paperwork. Although extremely tardy, the defendant had submitted the required as built plot plan. The court further noted that, because the plaintiff had not followed the normal procedure for a zoning violation, the defendant had been deprived of administrative remedies related to the ground on which the plaintiff had refused to issue the certificate, namely, noncompliance with maximum lot coverage. Had the proper procedure been followed, the plaintiff would have provided notice to the defendant of that violation as well as a cease and desist order, which in turn would have entitled the defendant to review by the zoning board of appeals. Although the trial court concluded that injunctive relief should not issue, it ordered the defendant to pay a civil penalty of $1000 due to the fact that it had taken her more than four years to submit a proper as built plot plan.

It is well settled that we review a decision of the trial court to deny injunctive relief for an abuse of discretion. *Waterford* v. *Grabner*, 155 Conn. 431, 434–35, 232 A.2d

481 (1967). "A decision to grant or deny an injunction must be compatible with the equities in the case, which should take into account the gravity and willfulness of the violation, as well as the potential harm to the defendant." *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 527, 686 A.2d 481 (1996).

"In seeking an injunction pursuant to [General Statutes] § 8-12, the town is relieved of the normal burden of proving irreparable harm and the lack of an adequate remedy at law because § 8-12 by implication assumes that no adequate alternative remedy exists and that the injury was irreparable. . . . The town need prove only that the statutes or ordinances were violated. . . . *The proof of violations does not, however, deprive the court of discretion and does not obligate the court mechanically to grant the requested injunction for every violation.*" (Citations omitted; emphasis added.) *Gelinas* v. *West Hartford*, 225 Conn. 575, 588, 626 A.2d 259 (1993).

In the present case, the trial court found that, even though the fact that the defendant was in violation of the zoning regulations because she did not have a certificate of occupancy, the factual circumstances did not support the "extraordinary equitable remedy" of a permanent injunction prohibiting the defendant from occupying her premises. In light of the reasons stated by the trial court, we cannot conclude that it abused its discretion by denying the requested injunctive relief.

The judgment is affirmed.

In this opinion the other justices concurred.