CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXI No. 19 November 5, 2019 237 Pages

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CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

RICHARD J. HEMENWAY, *Publications Director*

Published Weekly – Available at https://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
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Tel. (860) 757-2250

The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

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CONNECTICUT REPORTS

Vol. 333

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JESSICA BILBAO *v.* TIMOTHY R. GOODWIN
(SC 20078)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The defendant appealed from the judgment of the trial court dissolving his marriage to the plaintiff and awarding her certain pre-embryos that the parties had cryopreserved after having created them through in vitro fertilization during their marriage. The parties had entered into a storage agreement with the reproductive services center responsible for cryopreserving the pre-embryos. The storage agreement contained checkbox options that provided for disposition of the pre-embryos under certain circumstances. The parties checked the box indicating that they agreed to have the pre-embryos discarded in the event that they divorced, initialed their selection, and signed the agreement. The plaintiff asked the trial court to order that the pre-embryos be discarded in accordance with the storage agreement, whereas the defendant claimed that he had changed his mind, was no longer bound by that provision of the storage agreement, and wanted the pre-embryos preserved so that the parties could have children in the event that they reconciled or, in the alternative, wanted the pre-embryos to be donated. The trial court determined that the storage agreement was not enforceable because it lacked consideration. The court then awarded the pre-embryos to the plaintiff, concluding that the plaintiff's interest in them outweighed the defendant's interest. On appeal, the defendant claimed that the trial court incorrectly determined that a pre-embryo is property subject to distribution under the statute (§ 46b-81) governing distribution of the marital estate upon divorce and also claimed that, even if it is property, in the absence of an enforceable contractual agreement, the court failed to employ a legal presumption in his favor as the party seeking to preserve the pre-embryos because they are human beings. *Held*:

1. This court concluded that the contractual approach to determining the disposition of a pre-embryo upon divorce, pursuant to which an agreement between progenitors governing the disposition of a pre-embryo is presumed valid and enforceable in a dispute between them, is the appropriate first step in such a determination, reasoning that progenitors should be the primary decision makers regarding the disposition of their

pre-embryos, there are significant benefits to making such a decision in advance rather than at the moment of disposition, such an approach is consistent with Connecticut's public policy and the current practices of most state courts that have confronted the issue, and various professional associations focusing on the field of reproductive medicine recommend advance directives regarding the disposition of pre-embryos in the event of divorce; moreover, this court clarified that such an approach applies in cases in which an agreement, if enforced, will not result in procreation and declined to decide whether such an approach would apply to a scenario in which one party would be compelled to become a genetic parent against his or her wishes or what approach a court should take in the absence of an enforceable agreement.

2. The trial court incorrectly determined that the parties had not entered into an enforceable agreement to discard the pre-embryos upon divorce, and, accordingly, this court reversed the trial court's judgment insofar as that court determined that their agreement was not enforceable, vacated the trial court's order awarding the pre-embryos to the plaintiff, and remanded the case with direction to order the disposition of the pre-embryos in accordance with the agreement: there was an offer and an acceptance of definite terms, as each party offered the other the opportunity to create pre-embryos by contributing gametic material under the terms of the agreement, and each party accepted the other's offer by signing the agreement and contributing gametic material; moreover, the trial court's determination that the storage agreement lacked consideration was clearly erroneous, as the plaintiff and the defendant made mutual promises to contribute gametic material, and the reproductive services center promised to store the pre-embryos in exchange for the certainty provided by the parties' election of a disposition in the event of the parties' divorce; furthermore, the trial court's focus on the checkbox nature of the storage agreement to conclude that the agreement was unenforceable was misplaced, as agreements in which parties use checkboxes to indicate their rights and responsibilities are not insufficient for that reason alone, checkboxes, sometimes accompanied by the parties' initials, are routinely used in important and binding legal documents, and any suggestion that the checkboxes were evidence that the parties had not seriously considered the matter of disposition was contradicted by the storage agreement and the parties' testimony.

3. This court having determined that there was an enforceable agreement, the defendant could not prevail on his claims that, in the absence of a contractual agreement, a pre-embryo is not property within the meaning of § 46b-81 because it is a human life or, if it is deemed property, that the trial court should have applied a presumption in favor of preserving the pre-embryos, as those claims incorrectly presupposed that there was no enforceable contract between the parties; moreover, to the extent that the defendant claimed that an agreement that provides for the disposition of a pre-embryo is unenforceable on the ground that a pre-

embryo is a human life, this court declined to review that claim for lack of an adequate record, as the defendant did not raise such a claim at trial and did not even appear to make that argument on appeal.

Argued April 30—officially released November 5, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Nastri*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed. *Reversed in part*; *vacated in part*; *order directed.*

Joseph P. Secola, with whom, on the brief, was *Timothy R. Goodwin*, self-represented, for the appellant (defendant).

Scott T. Garosshen, with whom were *Brendon P. Levesque* and, on the brief, *Michael S. Taylor*, for the appellee (plaintiff).

Leslie I. Jennings-Lax and *Louise T. Truax* filed a brief for the Connecticut Chapter of the American Academy of Matrimonial Lawyers as amicus curiae.

Rita Louise Lowery Gitchell, pro hac vice, *Philip S. Walker* and *Joanne F. Davis* filed a brief for the American Association of Pro-Life Obstetricians and Gynecologists as amicus curiae.

Opinion

D'AURIA, J. In this appeal, we are called on to determine how pre-embryos created through in vitro fertilization should be distributed upon the divorce of their progenitors. The plaintiff, Jessica Bilbao, and the defendant, Timothy R. Goodwin, were married and underwent in vitro fertilization in an effort to have children. Several pre-embryos resulting from that treatment were

stored for implantation in the future.[1] As part of a storage agreement with the fertility clinic, the parties unequivocally stated that they wanted the pre-embryos discarded if they ever divorced. Their marriage has since been dissolved, and the plaintiff now seeks to have the pre-embryos discarded in accordance with the storage agreement. The defendant argues that the agreement is unenforceable, however, and wants the pre-embryos preserved or donated. The trial court concluded that the storage agreement was unenforceable but awarded the pre-embryos to the plaintiff. We conclude that the storage agreement is enforceable and, therefore, reverse the trial court's judgment insofar as the court determined that the agreement was not enforceable.

The record reveals the following undisputed facts as found by the trial court and contained in exhibits submitted by the parties. The parties were married in 2011. Soon after, they began efforts to have a child through in vitro fertilization with the assistance of the

[1] Although the parties did not introduce any scientific evidence at trial, like other courts, we take judicial notice of the following basic facts of in vitro fertilization: "Typically the [in vitro fertilization] procedure begins with hormonal stimulation of a woman's ovaries to produce multiple eggs. The eggs are then removed by laparoscopy or ultrasound-directed needle aspiration and placed in a glass dish, where sperm are introduced. Once a sperm cell fertilizes the egg, this fusion, or pre-zygote, divides until it reaches the four-to-eight cell stages, after which several pre-zygotes are transferred to the woman's uterus by a cervical catheter. If the procedure succeeds, an embryo will attach itself to the uterine wall, differentiate, and develop into a fetus. As an alternative to immediate implantation, pre-zygotes may be cryopreserved indefinitely in liquid nitrogen for later use. Pre-embryo is a medically accurate term for a zygote or fertilized egg that has not been implanted in a uterus. It refers to the approximately 14-day period of development from fertilization to the time when the embryo implants in the uterine wall and the primitive streak, the precursor to the nervous system, appears. An embryo proper develops only after implantation. The term frozen embryos is a term of art denoting cryogenically preserved pre-embryos." (Internal quotation marks omitted.) *McQueen* v. *Gadberry*, 507 S.W.3d 127, 134 n.4 (Mo. App. 2016).

University of Connecticut School of Medicine's Center for Advanced Reproductive Services (center). The treatment produced several pre-embryos, one of which was transferred to the plaintiff's uterus and resulted in the birth of a child. The center cryopreserved the remaining pre-embryos.[2]

Originally, the parties had planned to have another child using the remaining pre-embryos. But, together, they also planned for certain contingencies by entering into a storage agreement with the center: a four page form entitled "Consent for Cryopreservation and Storage of Embryos" that provided for the disposition of the pre-embryos upon death or divorce. Specifically, the agreement offered four checkbox options relative to divorce: leave the pre-embryos to the female party, to the male party, to a third-party designee of their choice, or have them "discarded according to American Society for Reproductive Medicine Ethical Guidelines." The parties opted to have the pre-embryos discarded, which they manifested by checking the appropriate box, initialing that selection, and signing the agreement in full on the next page. The parties also acknowledged in the agreement that they had discussed the agreement with a physician, and the agreement provided that the parties could modify their selection through written consent signed by both of them.

[2] The parties were aware that some of the pre-embryos resulting from the treatment might not be transferred to the plaintiff's uterus immediately and could require storage. The storage agreement with the center, which we will discuss in more detail, informed them: "If numerous eggs are retrieved during our (my) cycle, the number of eggs exposed to sperm will be decided by us (me) and our (my) doctor. If we (I) elect to expose most or all of our (my) eggs to sperm in order to develop as many embryos as possible, any viable embryos not transferred to the uterus will be frozen (cryopreserved). . . . [I]f we (I) have a miscarriage, or if a successful pregnancy does occur but we (I) subsequently desire another child, the frozen embryos will be available to us (me) for thawing and transfer during a subsequent menstrual cycle. This procedure may be repeated until all the frozen embryos have been utilized."

In September, 2016, the plaintiff filed this action for dissolution of marriage. With the assistance of counsel, the parties reached a settlement agreement that resolved all of their disputes except for the allocation of debt from a home loan and the disposition of the pre-embryos. The debt allocation is not part of this appeal. Regarding the pre-embryos, the plaintiff asked the trial court to order that they be discarded in accordance with the storage agreement. The defendant wanted the pre-embryos preserved so that the parties could try to have additional children in the event they reconciled or, alternatively, wanted the pre-embryos to be put up for adoption.[3]

The record also reveals the following procedural history. Although the parties each had counsel in drafting the settlement agreement, they represented themselves in this matter before the trial court. To resolve the disputes regarding the debt allocation and pre-embryos, the trial court held a brief proceeding at which both parties testified. The plaintiff submitted the settlement agreement and storage agreement as exhibits, but neither party filed a substantive motion, submitted a brief, or argued legal matters to the court.

The trial court issued a memorandum of decision in which it incorporated the settlement agreement and resolved the debt dispute. Regarding the pre-embryos, it determined that the storage agreement was not enforceable. In the absence of an enforceable agreement, the court proceeded as if the pre-embryos were "property" subject to distribution under General Stat-

[3] "[A]lternative methods to preembryo destruction that are currently available . . . include preembryo donation for procreation (essentially, a form or preembryo 'adoption') . . . ." O. Lin, "Bioethics and the Disposition of Cryopreserved Preembryos: Why Autonomy-Based Contract Theory Does Not Work," 34 Fam. Advoc. 38, 40 (2011).

utes § 46b-81,[4] concluded that the plaintiff's interest in the pre-embryos outweighed the defendant's interest and, therefore, awarded them to her.

The defendant appealed to the Appellate Court from the trial court's judgment awarding the pre-embryos to the plaintiff. The appeal was then transferred to this court. See General Statutes § 51-199 (c); Practice Book § 65-1.

On appeal, the defendant appears to make two claims of error, both of which presuppose that the trial court correctly determined that the parties lacked an enforceable agreement. The defendant agrees with this portion of the trial court's analysis but disagrees with the trial court's determination that the plaintiff's interest in the pre-embryos outweighed his interest. Specifically, both of the defendant's claims are rooted in his factual premise that a pre-embryo is a human being. First, he claims that the trial court incorrectly determined that a pre-embryo is "property" subject to distribution under § 46b-81. Specifically, he argues that a

[4] General Statutes § 46b-81 provides in relevant part: "(a) At the time of . . . dissolving a marriage . . . the Superior Court may assign to either spouse all or any part of the estate of the other spouse. . . .

"(c) In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the . . . dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

Although the trial court did not cite § 46b-81, we assume it applied this statute because it considered several of the factors enumerated in that statute and held that the pre-embryos were the "property" of the plaintiff. Regarding § 46b-81, we have stated: "[T]he trial court need not give each factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor . . . ." (Internal quotation marks omitted.) *Greco* v. *Greco*, 275 Conn. 348, 355, 880 A.2d 872 (2005).

pre-embryo is human life and, as such, must be awarded to the party seeking to preserve it. Second, he claims that, even if a pre-embryo is property under § 46b-81, the trial court improperly failed to employ a legal presumption in favor of the party seeking to preserve it because it is a human being.[5]

In response, the plaintiff argues that the trial court was incorrect that the parties had no enforceable agreement and, therefore, urges us to affirm the judgment on this alternative ground. See Practice Book §§ 63-4 and 84-11. We agree with the plaintiff that the parties' agreement providing for the disposition of their pre-

[5] We note that the defendant's precise concerns on appeal are not clear. He was not represented by counsel in proceedings before the trial court. On appeal, he submitted his principal brief without counsel, and his only request for relief was that this court "certify" his case to the United States Supreme Court as a vehicle for that court's reconsideration of *Roe* v. *Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). The defendant then retained counsel, who submitted a reply brief on his behalf (which made the claims set forth previously for reversal of the trial court's judgment) and represented him at oral argument before this court. At oral argument, the defendant's counsel also withdrew his client's original request to certify the case to the United States Supreme Court.

The appeal, construed strictly, could be considered moot because this court cannot grant the defendant his only claim for relief. See, e.g., *Seymour* v. *Region One Board of Education*, 261 Conn. 475, 481, 803 A.2d 318 (2002). This court is not capable of granting the defendant's original request for relief, as the United States Supreme Court does not accept certified cases or questions from state courts. Cf. U.S. Sup. Ct. R. 19 ("[a] United States court of appeals may certify to this [c]ourt a question or proposition of law on which it seeks instruction"). This request also was withdrawn. Further, it is well established that we are not obligated to review claims raised for the first time in a reply brief. E.g., *Reardon* v. *Zoning Board of Appeals*, 311 Conn. 356, 367 n.10, 87 A.3d 1070 (2014).

Mindful that we construe our rules of practice liberally, especially when a party is self-represented, we will, in this case, consider the claims that the defendant raised in his reply brief, but only to the extent that they do not prejudice the plaintiff and the record supports our review. See Practice Book § 60-1; *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 569, 877 A.2d 761 (2005) ("Connecticut courts [are] to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the pro se party" [internal quotation marks omitted]). The plaintiff has not asked us to do otherwise.

embryos upon divorce is enforceable. Our holding necessarily defeats the defendant's claims, which are premised on the prerequisite determination that the contract was unenforceable. To the extent that the defendant's claims include an argument that a contract requiring the destruction of pre-embryos is unenforceable as a matter of public policy because a pre-embryo is a human being, we find this issue unreviewable because he failed to present any evidence at trial to support the factual premise that a pre-embryo is a human being. See footnotes 5 and 8 of this opinion.

As a predicate to the defendant's claims, we first must determine whether the parties' storage agreement, which unambiguously provided that the pre-embryos should be discarded in the event of divorce, is enforceable between the plaintiff and the defendant. The trial court held that it was not enforceable because it lacked consideration and indicated the parties' disposition selection in the form of a checkbox. The defendant agrees with the trial court's analysis. The plaintiff argues that the agreement was supported by consideration and that the checkbox nature of the agreement did not render it insufficient. We agree with the plaintiff.

The following additional procedural history is relevant. At trial, the enforceability of the storage agreement was central to the dispute, and the parties' respective positions were clear. The plaintiff submitted the storage agreement as evidence and stated that she wanted its terms enforced, as the parties had originally agreed. The defendant admitted that he originally had agreed to discard the pre-embryos if the couple ever divorced but argued that he had since changed his mind and that this provision of the agreement no longer bound him.

In its memorandum of decision, the trial court noted the lack of Connecticut authority on this issue, consid-

ered the law in other jurisdictions, and adopted a two step approach to resolve the dispute. First, it would decide whether the parties had an enforceable agreement that provided for the disposition of the pre-embryos. Second, in the absence of an agreement, it would balance their respective interests in the pre-embryos. In conducting the first step, the trial court concluded that the consent form was not an enforceable agreement because it "was little more than a 'check the box questionnaire,' which had "neither consideration nor a promise." It then proceeded to the second step, determined that the plaintiff's interests in the pre-embryos outweighed the defendant's interests, and awarded them to her.

In the sections of this opinion that follow, we describe the current state of the law on pre-embryo disposition upon divorce and conclude that the trial court properly considered whether the parties had an enforceable agreement, but we also conclude that the trial court incorrectly determined that the storage agreement was unenforceable. We also clarify the narrow scope of our decision.

I

There are three leading approaches to determining the disposition of a pre-embryo upon divorce: (1) the contractual approach, (2) the balancing approach, and (3) the contemporaneous mutual consent approach. Each approach attempts to resolve disputes between progenitors by emphasizing different policies: the progenitors' autonomy in deciding the fate of pre-embryos created with their own gametic material, the reality that progenitors may change their minds as time passes, or both.

Under the contractual approach, an agreement between progenitors governing disposition of the pre-embryos is presumed valid and enforceable in a dispute

between them. E.g., *In re Marriage of Rooks*, 429 P.3d 579, 595 (Colo. 2018), cert. denied sub nom. *Rooks* v. *Rooks*, U.S. , 139 S. Ct. 1447, 203 L. Ed. 2d 681 (2019). These agreements often appear as consent forms or storage agreements between progenitors and a fertility clinic. E.g., id., 587.

Proponents of the contractual approach primarily argue that this approach allows "the progenitors—not the [s]tate and not the courts . . . [to] make this deeply personal life choice." *Kass* v. *Kass*, 91 N.Y.2d 554, 566, 696 N.E.2d 174, 673 N.Y.S. 2d 350 (1998). They also note that, by validating and enforcing a contract based rule, the approach promotes serious discussion between the progenitors in advance of divorce, gives progenitors and storage facilities a measure of certainty to plan for the future, and helps avoid costly and emotionally taxing litigation. See, e.g., *Terrell* v. *Torres*, 246 Ariz. 312, 318, 438 P.3d 681 (App. 2019), review granted, Arizona Supreme Court, Docket No. CV-19-0106-PR (August 27, 2019); *Szafranski* v. *Dunston*, 993 N.E.2d 502, 515 (Ill. App.), appeal denied, 996 N.E.2d 24 (Ill. 2013); *Kass* v. *Kass*, supra, 565–66.

Critics of this approach focus on the fact that preembryos can be stored indefinitely and that progenitors might change their minds about disposition as time passes. E.g., *Terrell* v. *Torres*, supra, 246 Ariz. 318 (contractual approach ignores "numerous uncertainties inherent in the [in vitro fertilization] process that extend . . . the viability of [embryos] indefinitely and allow . . . time for minds, and circumstances, to change" [internal quotation marks omitted]); *In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003) (contractual approach "binds individuals to previous obligations, even if their priorities or values change" [internal quotation marks omitted]). For some commentators, the failure to account for changed circumstances can be so great that dispositional agreements "smack of uncon-

scionability." E. Waldman, "Disputing Over Embryos: Of Contracts and Consents," 32 Ariz. St. L.J. 897, 926 (2000).

Under the balancing approach, a court weighs each progenitor's interest in the pre-embryos. Factors to consider include the intended use of the pre-embryos, the ability of each respective spouse to reproduce through other means, reasons for pursuing in vitro fertilization, emotional consequences, and bad faith. See, e.g., *In re Marriage of Rooks*, supra, 429 P.3d 588, 592–93.

New Jersey has adopted this approach as the first and only step in resolving disputes over the disposition of pre-embryos upon divorce. See *J.B.* v. *M.B.*, 170 N.J. 9, 29, 783 A.2d 707 (2001). The New Jersey Supreme Court has emphasized that it permits progenitors to reconsider their initial stances up to the point of disposition, which is consistent with that state's public policy of preserving parental rights "in all but statutorily approved circumstances." Id., 27. But most courts use the balancing approach as a second step, only to be employed after it is determined that no enforceable agreement between the progenitors exists and, thus, that the contractual approach does not resolve the issue. See, e.g., *In re Marriage of Rooks*, supra, 429 P.3d 593; *Reber* v. *Reiss*, 42 A.3d 1131, 1136 (Pa. Super.), appeal denied, 619 Pa. 680, 62 A.3d 380 (2012); *Davis* v. *Davis*, 842 S.W.2d 588, 604 (Tenn. 1992), cert. denied sub nom. *Stowe* v. *Davis*, 507 U.S. 911, 113 S. Ct. 1259, 122 L. Ed. 2d 657 (1993). This is because the balancing approach ultimately puts the disposition of a pre-embryo in the hands of a court and not in the hands of the progenitors.

Under the contemporaneous mutual consent approach, both progenitors must agree to a disposition at the time of the disposition. See *In re Marriage of Witten*, supra, 672 N.W.2d 783 ("no transfer, release,

disposition, or use of the embryos can occur without the signed authorization of both donors"). If the parties do not agree, the pre-embryos remain in storage indefinitely. See id.

This third approach attempts to accommodate the competing principles driving both the contractual approach—progenitors, not courts, should decide the disposition of their pre-embryos—and the balancing approach—progenitors should be allowed to change their minds at any point. Id., 782. Only Iowa has affirmatively adopted this approach, however. See id., 783; see also *McQueen* v. *Gadberry*, 507 S.W.3d 127, 157 (Mo. App. 2016) (upholding trial court decision that relied on contemporaneous mutual consent approach when parties had no enforceable agreement). Other courts have criticized the contemporaneous mutual consent approach as "totally unrealistic"; *Reber* v. *Reiss*, supra, 42 A.3d 1135 n.5; see also id. ("[i]f the parties could reach an agreement, they would not be in court"); and unfair because it "gives one party a de facto veto over the other party by avoiding any resolution until the issue is eventually mooted by the passage of time" and creates "incentives for one party to leverage his or her power . . . ." *In re Marriage of Rooks*, supra, 429 P.3d 589.

A majority of states that have addressed the issue employ the contractual approach as the first step in resolving a dispute over pre-embryos upon divorce. To date, courts in eight states have done so. See *Terrell* v. *Torres*, supra, 246 Ariz. 320; *In re Marriage of Rooks*, supra, 429 P.3d 592; *Szafranski* v. *Dunston*, supra, 993 N.E.2d 514; *Kass* v. *Kass*, supra, 91 N.Y.2d 564–66; *In re Marriage of Dahl*, 222 Or. App. 572, 583, 194 P.3d 834 (2008), review denied, 346 Or. 65, 204 P.3d 95 (2009); *Davis* v. *Davis*, supra, 842 S.W.2d 597; *Roman* v. *Roman*, 193 S.W.3d 40, 50 (Tex. App. 2006), review denied, Texas Supreme Court, Docket No. 06-554

(August 24, 1997), cert. denied, 552 U.S. 1258, 128 S. Ct. 1662, 170 L. Ed. 2d 356 (2008); *Litowitz* v. *Litowitz*, 146 Wn. 2d 514, 528, 48 P.3d 261 (2002), cert. denied, 537 U.S. 1191, 123 S. Ct. 1271, 154 L. Ed. 2d 1025 (2003). Courts in two states have expressly reserved decision on whether to adopt the contractual approach because an enforceable contract did not exist in the cases in which the question arose. See *McQueen* v. *Gadberry*, supra, 507 S.W.3d 156 n.32; id., 157 (upholding trial court decision relying on contemporaneous mutual consent approach); *Reber* v. *Reiss*, supra, 42 A.3d 1136 (applying balancing approach). One state court has expressly declined to enforce a contract that was to result in the implantation of pre-embryos but reserved decision on whether it would enforce a contract that would result in the discarding of pre-embryos. See *A.Z.* v. *B.Z.*, 431 Mass. 150, 159, 160 n.22, 725 N.E.2d 1051 (2000) (upholding trial court's decision relying on balancing approach). And, as we discussed previously, two state courts have expressly rejected the contractual approach in favor of either the balancing approach; see *J.B.* v. *M.B.*, supra, 170 N.J. 29–30; or the contemporaneous mutual consent approach. See *In re Marriage of Witten*, supra, 672 N.W.2d 783.

II

The standard of review applicable to the enforceability of dispositional agreements presents a question of law; therefore, our review is plenary. See, e.g., *Bedrick* v. *Bedrick*, 300 Conn. 691, 697, 17 A.3d 17 (2011). We conclude that the contractual approach is the appropriate first step in determining the disposition of pre-embryos upon divorce for several reasons.

First, we agree with courts adopting the contractual approach that, when possible, progenitors should be the primary decision makers regarding disposition of their pre-embryos. This "maximize[s] procreative lib-

erty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision." *Kass* v. *Kass*, supra, 91 N.Y.2d 565. It "is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the [pre-embryos], retain decision-making authority as to their disposition." *Davis* v. *Davis*, supra, 842 S.W.2d 597.

Second, there are significant benefits to making this decision in advance, rather than at the moment of disposition. Preexisting agreements "promote serious discussions between the parties prior to participating in in vitro fertilization"; *Szafranski* v. *Dunston*, supra, 993 N.E.2d 515; and manifest choices "made before disputes erupt . . . ." *Kass* v. *Kass*, supra, 91 N.Y.2d 566. This "minimize[s] misunderstandings" that might arise in the future, provides certainty for progenitors and fertility clinics, and decreases the likelihood of litigation. Id., 565; see also *Szafranski* v. *Dunston*, supra, 515.

Of course, as in the present case, progenitors might change their preferences for disposition as time passes. Although the contractual approach prioritizes progenitor autonomy and certainty over an absolute ability to change one's mind, as offered by the balancing and contemporaneous mutual consent approaches, advance directives that permit joint, written modifications address this concern by offering a measure of flexibility. See, e.g., *Terrell* v. *Torres*, supra, 246 Ariz. 319 ("[c]ourts have addressed these concerns by permitting parties to subsequently jointly modify their initial agreement"); *Kass* v. *Kass*, supra, 91 N.Y.2d 566 ("advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision"); *Davis* v. *Davis*, supra, 842 S.W.2d 597 ("[p]roviding that the ini-

tial agreements may later be modified by agreement will, we think, protect the parties against some of the risks they face in this regard''); *Roman* v. *Roman*, supra, 193 S.W.3d 50 (allowing parties voluntarily to decide disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves public policy and parties' interests). This seems particularly reasonable in light of the asymmetrical consequences, under the contemporaneous mutual consent approach, of changing one's mind. To the extent one party benefits from the option to change his or her dispositional preference, the other party is deprived of the agreement he or she originally bargained for and relied on in agreeing to create the pre-embryos.

Third, the contractual approach is consistent with Connecticut's public policy. By statute, a fertility clinic must provide a progenitor with ''timely, relevant and appropriate information sufficient to allow that person to make an informed and voluntary choice regarding the disposition of any embryos,'' including ''the option of storing, donating to another person, donating for research purposes, or otherwise disposing of any unused embryos . . . .'' General Statutes § 32-41jj (c) (1) and (2). Moreover, the contractual approach is consistent with the state's well settled policy of enforcing intimate partner agreements; see, e.g., General Statutes § 46b-66 (settlement agreement); General Statutes § 46b-36g (premarital agreement); *Bedrick* v. *Bedrick*, supra, 300 Conn. 698–99 (postnuptial agreement); *Boland* v. *Catalano*, 202 Conn. 333, 342, 521 A.2d 142 (1987) (agreement between unmarried cohabitants); and gestational agreements. See, e.g., General Statutes § 7-48a (permitting intended parents in gestational agreement to obtain birth certificate). In many cases, these agreements ''encourage the private resolution of family issues. In particular, they may allow couples to

eliminate a source of emotional turmoil . . . .'' *Bedrick* v. *Bedrick*, supra, 698.

Fourth, the contractual approach accords with the current practices of most state courts that have confronted the issue. As discussed previously, a substantial majority of state courts that have addressed the preembryo disposition issue have applied the contractual approach when an enforceable contract exists. See part I of this opinion. The contractual approach furthers this policy of informed consent regarding the disposition of pre-embryos. Moreover, at least one state legislature requires progenitors to enter into disposition agreements; Fla. Stat. Ann. § 742.17 (West 2016); and, as in Connecticut, at least three other state legislatures require that fertility clinics provide progenitors with options for disposition in the event of various contingencies. See Cal. Health & Safety Code § 125315 (Deering 2012); Mass. Gen. Laws Ann. c. 111L, § 4 (LexisNexis 2018); N.J. Stat. Ann. § 26:2Z-2 (West 2018). But see, e.g., Ariz. Rev. Stat. Ann. § 25-318.03 (A) (1) (2018) (in divorce proceeding, awarding pre-embryo ''to spouse who intends to allow the in vitro human pre-embryos to develop to birth,'' regardless of disposition agreement); La. Stat. Ann. § 9:129 (Supp. 2018) (''[a] viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed'').

Finally, various professional associations focusing on the field of reproductive medicine recommend that progenitors provide advance directives regarding disposition of their pre-embryos in various scenarios, including divorce. E.g., Ethics Committee of the American Society for Reproductive Medicine, ''Disposition of Abandoned Embryos: A Committee Opinion,'' 99 Fertility & Sterility 1848, 1848 (2013), available at https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/disposition_of_abandoned_embryos-pdfmembers.pdf

(last visited October 29, 2019); see also American Medical Association, Code of Medical Ethics (2017) Opinion 4.2.5, pp. 70–71. Advance directives provide practical certainty for storage facilities, reduce the likelihood of abandonment, and ensure that facilities will be able to satisfy their ethical obligations.

Therefore, we conclude that, in the absence of formal legislative guidance on the question, the contractual approach is the appropriate first step in determining the disposition of pre-embryos upon divorce. As set forth in part IV of this opinion, we do not decide how a court should determine the disposition of pre-embryos in the absence of an enforceable agreement.

III

Finally, we conclude that the trial court incorrectly determined that the parties had not entered into an enforceable agreement in this case.

As set forth previously, the trial court concluded that the storage agreement was not an enforceable contract because it "was little more than a 'check the box questionnaire,' " which had "neither consideration nor a promise." In support of this conclusion, it cited *Rucker* v. *Rucker*, Docket No. A16-0942, 2016 WL 7439094 (Minn. App. December 27, 2016).

Although a disposition agreement between progenitors is presumed enforceable between them; e.g., *In re Marriage of Rooks*, supra, 429 P.3d 592; there must be an offer and acceptance of definite terms. See, e.g., *Saint Bernard School of Montville, Inc.* v. *Bank of America*, 312 Conn. 811, 830, 95 A.3d 1063 (2014). Also, "a contract must be supported by valuable consideration." *Connecticut National Bank* v. *Voog*, 233 Conn. 352, 366, 659 A.2d 172 (1995). "Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." (Internal

quotation marks omitted.) *Viera* v. *Cohen*, 283 Conn. 412, 440–41, 927 A.2d 843 (2007). "[T]he exchange of promises is sufficient consideration . . . ." *Christophersen* v. *Blount*, 216 Conn. 509, 511 n.3, 582 A.2d 460 (1990). In the present case, the trial court found that there were no promises exchanged between the parties and no consideration. To the extent that the trial court found that there was no exchange of promises and, thus, no consideration, we review the trial court's findings for clear error. See, e.g., *Viera* v. *Cohen*, supra, 442; see also id. (whether agreement is supported by consideration is factual issue reviewed under clearly erroneous standard). To the extent that the trial court found that there was insufficient consideration, our review is plenary. See, e.g., *Milaneseo* v. *Calvanese*, 92 Conn. 641, 643, 103 A. 841 (1918) (adequacy of consideration is conclusion of law subject to plenary review).[6]

Neither party contests the existence of their offer and acceptance of definite terms. They each offered one another the opportunity to create pre-embryos by contributing gametic material under the terms spelled out in the agreement, including the unambiguous condition that the pre-embryos would be discarded if they ever divorced. Each party accepted this offer by signing the agreement, even specifically indicating their "understand[ing], agree[ment] and consent" that the pre-

[6] We also note that intimate partner contracts generally warrant "special scrutiny . . . ." *Bedrick* v. *Bedrick*, supra, 300 Conn. 703. This is justified by, among other things, the nature of these intimate relationships, in which partners tend to be less cautious in contracting with one another than they would be in contracting with others; id.; and by the recognition that events may occur before the dissolution of the relationship that go beyond their contemplation at the time they entered into the agreement. See *McHugh* v. *McHugh*, 181 Conn. 482, 485–86, 436 A.2d 8 (1980). Although we see no abuse of trust (the defendant concedes that he intelligently entered the agreement) or unforeseen circumstances (the parties' agreement expressly contemplates the very event at issue: divorce) in this case that would cause us to hold that the agreement is unenforceable, we recognize that these circumstances could arise in other cases.

embryos would be discarded upon divorce by initialing directly below that option in the agreement. If there was any doubt, they further indicated their assent by performing (i.e., their contribution of gametic material).

Moreover, the parties do not dispute that, to the extent that they entered into a contract, the contract is enforceable as against each other. We note that other jurisdictions have determined that a pre-embryo storage agreement, entered into by a fertility clinic and the progenitors, that provides for the disposition of the pre-embryos is presumed enforceable not only against the clinic but also as between the progenitors. See *Kass* v. *Kass*, supra, 91 N.Y.2d 565 ("[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them"); see also *In re Marriage of Rooks*, supra, 429 P.3d 592 (holding "that a court should look first to any existing agreement expressing the spouses' intent regarding disposition of the couple's remaining pre-embryos in the event of divorce"); *Roman* v. *Roman*, supra, 193 S.W.3d 48 (noting that case law evinces "emerging majority view that written embryo agreements between embryo donors and fertility clinics . . . are valid and enforceable").

The trial court's finding that the storage agreement lacked a mutual exchange of promises between the plaintiff and the defendant and, thus, lacked consideration was clearly erroneous for three reasons. First, the parties made mutual promises to contribute gametic material. Specifically, in exchange for the plaintiff's promise to contribute gametic material under the terms of the agreement, the defendant promised to contribute gametic material under the terms of the agreement, and vice versa. Moreover, in exchange for the certainty provided by the parties' election of a disposition in the event of divorce, the center promised to store the pre-

embryos. Thus, all parties to the agreement received consideration. Additionally, to the extent that the trial court found that this exchange of promises was inadequate consideration, as a matter of law, we disagree. Although no court has directly addressed the issue in the context of pre-embryo disposition agreements, courts and commentators have opined that this exchange of promises is sufficient. See, e.g., *Roman* v. *Roman*, supra, 193 S.W.3d 50 n.14 ("consideration in embryo agreements is the gamete donation process that both husband and wife experience"); D. Forman, "Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer," 24 J. Am. Acad. Matrim. Law. 57, 103 n.180 (2011) ("contracts also typically require consideration, which in this type of case may be provided by the gamete donation process undergone by both husband and wife"). Generally, though, it is well settled that "the exchange of promises is sufficient consideration . . . ." *Christophersen* v. *Blount*, supra, 216 Conn. 511 n.3.

Second, the trial court's focus on the checkbox nature of the storage agreement to conclude that the agreement was unenforceable was misplaced. An agreement in which parties indicate rights or responsibilities by checking a box is not insufficient for that reason alone. Checkboxes, sometimes accompanied by the parties' initials, are routinely used in a wide range of important and legally binding documents. Even Connecticut trial courts "routinely use" checkbox forms to issue legally binding orders. *In re Leah S.*, 284 Conn. 685, 687 n.2, 935 A.2d 1021 (2007). In the context of pre-embryo disposition agreements, several courts have held that the agreements were enforceable when progenitors indicated a disposition choice in some manner other than by writing it out in full. See, e.g., *Terrell* v. *Torres*, supra, 246 Ariz. 316 (progenitors "selected and initialed" next to disposition choice); *Kass* v. *Kass*, supra, 91

N.Y.2d 566–67 (progenitors signed consents indicating their dispositional intent). Moreover, any suggestion that the checkboxes were evidence that the parties had not seriously considered the issue is contradicted by the storage agreement itself and the testimony of both parties.[7]

Third, the trial court's reliance on *Rucker* v. *Rucker*, supra, 2016 WL 7439094, also was misplaced. That case involved a storage agreement between progenitors and a fertility clinic that included a checkbox term providing for " 'transfer' " of the pre-embryos upon divorce. Id., *9. The Minnesota Court of Appeals held that the trial court had misinterpreted the word "transfer." Id., *10. The appeals court then provided the correct interpretation and remanded the case to the trial court to decide how the pre-embryos should be distributed in light of this new interpretation. Id., *11. The court did not even remotely suggest that the checkbox nature of the agreement was relevant (much less significant), as the trial court did in this case. See id., *9–11.

[7] The storage agreement provided, just above the parties' selection for disposition upon divorce: "We (I) understand, agree and consent that if we divorce . . . ." (Emphasis omitted.) The plaintiff also testified that she and the defendant had expressly discussed the issue of disposition upon divorce: "When we talked about it, we said, in the event that one of us divorce[s] or we died or anything like that, that we would. And we talked about that. That's when we both signed the contract on the day we went to speak to the center.

* * *

So, then we spoke about them, and then we agreed that should—in case of divorce, you know, whichever party initiated it, that we would do this. So, also the understanding that we agreed upon, that's what we did. . . . We both spoke about—we both talked about it, and then we both signed off on it." The defendant did not expressly confirm that they had discussed disposition upon divorce but conceded that he had agreed to the disposition in the storage agreement because "at the time, I never thought we'd get divorced, number one; and number two, that's what my wife wanted, and I agreed, because I was trying to do as she wanted." His change of heart only occurred at some point after he had entered the agreement: "In hindsight, I realize it was the wrong thing to do, and I've changed my mind . . . ."

Therefore, we conclude that the parties had an enforceable agreement.

Because we determine that there was an enforceable contract, the defendant's claims that, *in the absence of a contractual agreement*, a pre-embryo is not "property" under § 46b-81 because it is a human life or, if it is "property," that a trial court should employ a presumption in favor of its preservation because it is a human life, necessarily fail. The defendant's claims presuppose that there was no enforceable contract. The defendant does not argue that if there is an enforceable contract, there should be a presumption in favor of preservation. Thus, because we determine that there was an enforceable contract, the defendant's claims that the trial court should have either awarded the pre-embryos to the party seeking to preserve them or applied a presumption in favor of preservation fail.

To the extent that the defendant responds that there is no enforceable contract because, as a general matter of law, any agreement providing for the disposition of a pre-embryo, which constitutes human life, is unenforceable, the claim is not reviewable because it was not preserved at trial, and, therefore, we lack an adequate record to address it. See footnotes 5 and 8 of this opinion. The defendant did not argue at trial that the agreement was unenforceable because it concerned a human life. Even if we generously construe his testimony as legal argument, we conclude that he did not broach this issue. Rather, his sole point was that he should be permitted to change his mind. Nor does he even appear to make this argument on appeal other than through his general contention that a pre-embryo is a human being.

Whether a pre-embryo is a human being is, at least in part, a question of fact. It is certainly not a question

an appellate court can determine without some measure of fact-finding.[8] The defendant concedes this. Nevertheless, he offered no evidence at trial to establish it. Further, to the extent that this claim might implicate constitutional rights, it would be reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third condition of *Golding*); only if it were supported by an adequate record. For the rea-

[8] In concluding that we lack an adequate record for review, we are aware of the abundance of information outside the record regarding the science behind in vitro fertilization and on every other aspect of the complex and difficult issues raised in cases in which it is implicated. We also recognize that courts occasionally and to varying degrees have taken judicial notice of this evidence. E.g., *McQueen* v. *Gadberry*, supra, 507 S.W.3d 134 n.4 (considering basic scientific evidence related to pre-embryos, even though "there was no evidence introduced at trial with respect to the science of [in vitro fertilization], related scientific terms, or the division or cell stages of the frozen pre-embryos at issue"). In this light, the defendant notes that "[s]ome argue [that] the question of when human life beings has been definitely answered by scientific knowledge," and his counsel at oral argument before this court suggested that we consider the medical literature referenced by the amicus as evidence of this point. See, e.g., R. Gitchell, "Should Legal Precedent Based on Old, Flawed, Scientific Analysis Regarding When Life Begins, Continue To Apply to Parental Disputes over the Fate of Frozen Embryos, When There Are Now Scientifically Known and Observed Facts Proving Life Begins at Fertilization?" 20 DePaul J. Health Care L. 1, 2 (2018) ("[o]bservable facts of human development can be seen in films of one cell human embryos that were cryopreserved"). But see, e.g., P. Peters, "The Ambiguous Meaning of Human Conception," 40 U.C. Davis L. Rev. 199, 201 (2006) ("[m]ost of the governmental commissions that have studied the propriety of scientific research using early embryos have concluded that embryos less than two weeks old are not moral persons").

We note, however, the fundamental difference between establishing the facts of fertilization and establishing that human life begins at fertilization. We cannot seriously consider the latter issue on a record devoid of any evidence whatsoever and with an argument aimed only at one facet of this "difficult question . . . ." *Roe* v. *Wade*, 410 U.S. 113, 159, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); see id. ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

sons just stated, however, it is not supported by an adequate record. Accordingly, we decline to review this claim.

IV

We make two additional points to clarify the scope of our holding. First, our decision applies to contracts that, if enforced, will not result in procreation. We do not decide whether the contractual approach applies in a scenario that would force one party to become a genetic parent against his or her wishes or, if the contractual approach does apply, whether such a contract would be unenforceable for other reasons, including public policy.

Second, because we conclude that the parties in this case had an enforceable agreement, we do not decide what a court must do in the absence of an enforceable agreement. For example, we leave for another day whether, in the absence of an enforceable agreement, balancing or contemporaneous mutual consent is the appropriate approach, and what the details of such an approach would entail.

The judgment is reversed insofar as the trial court determined that the parties' storage agreement is not enforceable, the trial court's order awarding the pre-embryos to the plaintiff is vacated, and the case is remanded with direction to order the disposition of the pre-embryos in accordance with the storage agreement; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

KARL MAYER-WITTMANN, EXECUTOR (ESTATE OF GERDA MAYER-WITTMANN) *v.* ZONING BOARD OF APPEALS OF THE CITY OF STAMFORD ET AL.
(SC 19972)

Robinson, C. J., and D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.*

Syllabus

Pursuant to the Stamford Zoning Regulations (article IV, § 10 [C]), when a legally nonconforming building has been damaged by a flood or other calamity, the building "may be reconstructed and used as before" if reconstruction is commenced within twelve months of the calamity.

The plaintiff appealed from the judgment of the trial court, which dismissed his appeal from the decision of the defendant zoning board of appeals granting the application of the defendant property owner, B, for variances in connection with the reconstruction of a cottage on his property after the cottage was severely damaged by a hurricane. The plaintiff owned real property adjacent to B's beachfront property. The cottage was nonconforming under the Stamford Zoning Regulations in several respects, including its location in relation to various setback requirements, its height of eighteen feet, ten inches, and its elevation of 8.7 feet. Pursuant to the zoning regulations, the maximum height for an accessory structure such as the cottage is fifteen feet and the minimum elevation standard for such a structure is sixteen feet, as its location makes it subject to certain zoning regulations applicable to flood prone areas. Nevertheless, because the cottage had been built before the zoning regulations at issue were adopted, it constituted a legally nonconforming structure. Following the hurricane, the cost to repair the cottage exceeded 50 percent of its value, and, in order for it to be reconstructed, the zoning board required that B conform the cottage to certain regulations governing flood prone areas, including the minimum elevation requirement. B applied for variances from the building height and setback requirements of the regulations because it would have been impossible for him to conform both to the fifteen foot maximum height allowed for the cottage and to the minimum flood elevation of sixteen feet, and because restoration of the cottage required that it be moved three feet north in order to be constructed on soils that could support the minimum flood elevation. The zoning board of appeals ultimately approved B's

* This appeal originally was argued before a panel of this court consisting of Chief Justice Robinson and Justices D'Auria, Mullins, Kahn and Ecker. Thereafter, Justice Vertefeuille was added to the panel and has read the briefs and appendices, and listened to a recording of oral argument prior to participating in this decision.

application for the variances, and the plaintiff appealed to the trial court. The trial court dismissed the plaintiff's appeal, concluding that the record supported the zoning board's determinations that the zoning regulations applicable to flood prone areas imposed a hardship on B that justified the granting of the variances and that the variances were the minimal relief required to alleviate the hardship. The plaintiff, on the granting of certification, appealed. *Held*:

1. The plaintiff could not prevail on his claim that B's failure to begin reconstruction of the cottage within twelve months of the hurricane caused its legally nonconforming status to be terminated under article IV, § 10 (C), of the zoning regulations: when, as in the present case, a legally nonconforming building subject to zoning regulations applicable to flood prone areas is damaged and the cost of repairs exceeds 50 percent of the value of the building, the minimum flood elevation requirement applies to the repair of the building, notwithstanding the fact that the building previously had a legally nonconforming status with respect to that requirement, and notwithstanding article IV, § 10 (C), which authorizes the reconstruction "as before" of buildings damaged in a calamity within twelve months of the calamity; accordingly, article IV, § 10 (C), did not apply to the cottage because it would have been impossible for B to reconstruct the cottage "as before" without either conforming to the minimum elevation requirement or seeking a variance from that requirement, as the purpose of the prohibition of the reconstruction of a building that is nonconforming with the minimum flood elevation requirement to its previous state if the cost of the repairs exceeds 50 percent of the value of the building was not to deprive the building entirely of its legally nonconforming status but to ensure the maximum possible compliance with the regulations applicable to flood prone areas; moreover, the fact that the building cannot be reconstructed without either complying with the minimum flood elevation requirement or obtaining a variance from that requirement or obtaining a variance from the height restriction did not mean that the reconstructed building must comply with all other regulations with which it was previously nonconforming, and, accordingly, the cottage retained its status as a legally nonconforming accessory structure with respect to the setback and building height requirements in the regulations.
2. The trial court correctly determined that the zoning board of appeals properly granted B's application for variances from the setback requirements and the height restrictions in the regulations, the zoning board having reasonably found that B established the existence of an unusual hardship warranting approval of his application because strict enforcement of the regulations would have deprived him of his constitutionally protected right to continue using the cottage, an existing, legally nonconforming accessory structure; moreover, this court rejected the plaintiff's claim that, when an applicant seeks a variance that will have the effect of reducing a nonconformity of an existing, legally nonconforming build-

ing, the variance may not be granted unless the applicant reduces all of the building's nonconformities to the maximum extent possible, as any reduction in nonconformity presumably could only benefit the zoning scheme.

(*Two justices concurring separately in one opinion*)

Argued January 15—officially released November 5, 2019

Procedural History

Appeal from the decision of the named defendant granting the application for variances filed by the defendant Paul E. Breunich, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Edward R. Karazin*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment dismissing the appeal, from which the plaintiff, on the granting of certification, appealed. *Affirmed.*

Scott T. Garosshen, with whom were *Brendon P. Levesque* and, on the brief, *William I. Haslun II*, for the appellant (plaintiff).

James V. Minor, special corporation counsel, with whom, on the brief, was *Kathryn Emmett*, director of legal affairs, for the appellee (named defendant).

Peter M. Nolin, with whom were *Jacqueline O. Kaufman* and, on the brief, *Timothy A. Smith*, for the appellee (defendant Paul E. Breunich).

Opinion

VERTEFEUILLE, J. The issue that we must decide in this appeal is whether the named defendant, the Zoning Board of Appeals of the City of Stamford (zoning board), properly granted the application of the defendant Paul E. Breunich for variances to reconstruct a legally nonconforming accessory structure on his property after it was severely damaged by a hurricane. Breunich sought variances from various setback requirements and height restrictions of the Stamford zoning regulations on the ground that, as applied to his prop-

erty, their strict enforcement would impose an unusual hardship because he could not comply both with those regulations and with the regulations applicable to flood prone areas, which required him to elevate the structure. The Planning Board of the City of Stamford (planning board) unanimously recommended approval of the application, and, after a hearing, the zoning board unanimously approved it. The plaintiff, Karl Mayer-Wittmann, executor of the estate of Gerda Mayer-Wittmann, who owns property adjacent to Breunich's property, appealed from the decision of the zoning board to the trial court, which, after a trial, dismissed the appeal. This appeal followed.[1] We affirm the judgment of the trial court.

The record reveals the following facts that were found by the trial court or that are undisputed. Breunich owns a 0.96 acre beachfront property located at 106 Carter Drive in Stamford. The property, which includes three dwelling structures with a total of five dwelling units, two sheds and a garage, is located within the R-10 single family district, low density zone. Breunich's property is nonconforming to the Zoning Regulations of the city of Stamford (regulations)[2] but, because the property's structures, including the structure the parties refer to as the "sea cottage," were built before the zoning regulations were adopted in 1951, they are legally authorized nonconforming structures under the regulations. See Stamford Zoning Regs., art. IV, § 10 (A) (2015); see also General Statutes § 8-2 (a)[3] (zoning

[1] 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.

[2] The regulations have been amended since the events underlying the present case. All references herein are to the regulations as adopted November 30, 1951, with subsequent amendments through December 31, 2015.

[3] Although § 8-2 has been amended by the legislature several times since the events underlying the present case; see, e.g., Public Acts 2017, No. 17-155, § 2; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

"regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations"). The sea cottage, the building at issue in the present case, is an accessory structure containing a single dwelling unit that is nonconforming in several respects. Specifically, the sea cottage is located twenty-three feet from the rear yard property line, in violation of the thirty foot minimum required by article III, § 4 (AA) (2.4) (e), of the regulations, and it is located four feet, six inches from the side yard property line, in violation of the ten foot minimum required by article III, § 4 (AA) (2.4) (e). In addition, the lowest horizontal structural member of the sea cottage has an elevation of 8.7 feet, although the minimum elevation standard for the structure is sixteen feet under the zoning regulations applicable to flood prone areas.[4] Finally, the sea cottage has a height of eighteen feet, ten inches, whereas article III, § 6 (D), of the regulations provides that detached accessory structures may not exceed fifteen feet in height.

The sea cottage was severely damaged by Hurricane Sandy in late October, 2012, and Breunich wishes to rebuild it. Because the cost of repairs exceeds 50 percent of the sea cottage's value, however, the zoning board and Breunich agree that the sea cottage must conform to certain current regulations governing flood prone areas, including the minimum elevation require-

[4] The structure is within the VE and AE Flood Zones under Federal Emergency Management Agency (FEMA) standards, which are incorporated into the regulations. See Stamford Zoning Regs., art. III, § 7.1 (B) (2) (2015) (defining base flood elevation); id., § 7.1 (B) (20) (referring to FEMA's flood insurance rate map, which delineates "special flood hazard areas"); id., § 7.1 (C) (1) (§ 7.1 of regulations, governing flood prone areas, applies to "all areas of special flood hazard" within city); id., § 7.1 (C) (2) (special flood hazard areas are based on base flood elevation data developed by FEMA). Under FEMA standards, the minimum elevation for structures in the VE Flood Zone is fifteen feet. Article III, § 7.1 (B) (32) of the Stamford Zoning Regulations defines "[m]inimum [e]levation [s]tandard" as the minimum required by the FEMA standards plus one foot.

ment, notwithstanding the fact that the sea cottage is a legally nonconforming structure. See Stamford Zoning Regs., art. III, § 7.1 (B) (43) (2015) (for purposes of zoning regulations governing flood prone areas, "[s]ubstantial [d]amage" is defined as "damage . . . sustained by a structure, whereby the cost of restoring the structure to its pre-damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred"); id., art. III, § 7.1 (B) (44) (defining "[s]ubstantial [i]mprovement" to include repairs "the cumulative cost of which equals or exceeds [50] percent . . . of the market value" of structure); id., art. III, § 7.1 (D) (1) (requiring substantial improvements to comply with certain regulations governing flood prone areas); id. (requiring all substantial improvements within special flood hazard area to have lowest floor elevated to minimum elevation standard).[5]

As we indicated, under the regulations applicable to flood prone areas, the minimum flood elevation requirement for the lowest horizontal structural member of the sea cottage is sixteen feet above the base flood elevation, whereas the maximum height allowed in the R-10 zone for accessory structures is fifteen feet. See id., art. III, §§ 6 (D) and 7.1. Because the lowest horizontal structural member of the sea cottage, which is at ground level, is currently 8.7 feet above base flood elevation, elevating the sea cottage by 7.3 feet to satisfy the mini-

[5] Breunich also makes a passing reference to article IV, § 10 (B), of the Stamford Zoning Regulations, which provides that "[t]he total structural repairs and alterations that may be made in a structure which is nonconforming in use only shall not exceed [50] percent . . . of its replacement value at the time of application for the first structural change, unless changed to a conforming use." The plaintiff also does not address this regulation at any length but merely notes in a footnote in his reply brief that, assuming that Breunich is correct that the regulation applies, he "did not request a variance on the basis that his total repairs would exceed 50 percent of the value of the cottage." We address the effect of this regulation in footnote 13 of this opinion.

mum flood elevation requirement would leave only 7.7 feet of buildable vertical space if the structure also were required to conform to the building height requirement. Accordingly, it would be impossible for the sea cottage to conform to both requirements. Moreover, because the soils on which the sea cottage is currently standing cannot support the foundation that would be required to elevate the sea cottage to the minimum flood elevation, restoration of the sea cottage requires moving it three feet to the north. Accordingly, Breunich applied for variances from the building height and setback requirements of the regulations.

The planning board unanimously recommended that the zoning board approve Breunich's application for variances. After a hearing at which both Breunich and a representative of the plaintiff appeared, the zoning board granted Breunich's application subject to certain restrictions that are not at issue in this appeal. The plaintiff then appealed to the trial court, claiming, inter alia, that the zoning board improperly granted the variances because Breunich had not established that, without them, he would be deprived of the reasonable use of his property, as is required to establish a hardship, or that the variances were the minimum relief necessary. In addition, the plaintiff claimed that any hardship was "personal and self-inflicted" because Breunich failed to rebuild the sea cottage within twelve months of the hurricane. Specifically, he contended that Breunich could have rebuilt the sea cottage pursuant to article IV, § 10 (C), of the regulations,[6] which authorizes the owner of a nonconforming building that has been damaged by flood or other calamity to reconstruct and use

[6] Article IV, § 10 (C), of the Stamford Zoning Regulations provides in relevant part: "Any non-conforming building . . . which has been or may be damaged by . . . flood . . . [or] act of God . . . may be reconstructed and used as before, if reconstruction is started with[in] twelve . . . months of such calamity . . . ."

the building as before within twelve months of the damage, and that his failure to do so terminated the legal nonconforming status of the sea cottage on October 29, 2013, one year after it was damaged in the hurricane.

The trial court concluded that the zoning board's determinations that the regulations applicable to flood prone areas imposed a hardship on Breunich that justified granting the variances and that the variances were the minimal relief required to alleviate the hardship were supported by the record. The court also agreed with Breunich's claim that the zoning board could have granted the variances on the ground that the variances reduced the sea cottage's nonconformities. Accordingly, the court dismissed the plaintiff's appeal.

On appeal to this court, the plaintiff renews his claims that the zoning board improperly granted the variances because Breunich had not established a hardship by showing that enforcement of the regulations would deprive him of all reasonable use of his property or render his lot completely unusable, and the variances were not the minimal relief required to alleviate any hardship. In addition, the plaintiff again contends that Breunich is barred by article IV, § 10 (C), of the regulations from rebuilding the sea cottage because its legally nonconforming status has terminated. We conclude that the sea cottage retains its status as a legally nonconforming accessory structure and that the zoning board properly granted the variances on the ground that the enforcement of the regulations would create a hardship.

I

Because the question of whether the sea cottage retains its status as a legally nonconforming structure has bearing on the question of whether the zoning board properly granted the variances, we first address the plaintiff's contention that that status terminated one year after the sea cottage was damaged by the hurricane

pursuant to article IV, § 10 (C), of the regulations. The defendants contend that that provision does not apply to the sea cottage because the "fundamental predicate" that it was possible, as a matter of law, for the sea cottage to be "reconstructed and used as before" it was damaged; see Stamford Zoning Regs., art. IV, § 10 (C) (2015); without any need to apply for variances, has not been met.[7] We agree with the defendants.

"Because the interpretation of the regulations presents a question of law, our review is plenary. . . . Additionally, zoning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes. . . . Moreover, regulations must be interpreted in accordance with the principle that a reasonable and rational result was intended . . . . The process of statutory interpretation involves the determination of the meaning of the statutory language [or the relevant zoning regulation] as applied to the facts of the case, including the question of whether the language does so apply." (Citations omitted; internal quotation marks omitted.) *Graff* v. *Zoning Board of Appeals*, 277 Conn. 645, 652, 894 A.2d 285 (2006).

We begin our analysis with the language of article IV, § 10 (C), of the Stamford Zoning Regulations: "Any non-conforming building . . . which has been or may be damaged by . . . flood . . . [or] act of God . . . may be reconstructed and used as before, if reconstruction is started [within] twelve . . . months of such calamity . . . ." Thus, the regulation provides that, when a building has been damaged in a "calamity" and the owner commences reconstruction within twelve

[7] For purposes of this analysis, we assume, without deciding, that the plaintiff is correct that, when article IV, § 10 (C), of the regulations applies to a legally nonconforming structure that has been damaged by flood or calamity, and the owner fails to start reconstruction within twelve months of the calamity, the building loses its legally nonconforming status.

months, the building retains its nonconforming status, and the owner is not required to conform the reconstructed building to current regulations or to seek variances from those regulations.

In the present case, the defendants contend that Breunich could not have reconstructed the sea cottage and used it "as before" because the cost of the repairs to the sea cottage exceeds 50 percent of its value and, therefore, the sea cottage is required to conform to the minimum flood elevation requirement of the regulations applicable to flood prone areas.[8] In other words, the defendants appear to contend that, notwithstanding article IV, § 10 (C), of the regulations, which authorizes landowners to reconstruct a damaged nonconforming building "as before" within twelve months of the calamity in which it was damaged, because the cost of repairs exceeds 50 percent of the sea cottage's value, the sea cottage is now categorically required to conform to the minimum flood elevation requirement. The plaintiff contends that, to the contrary, nothing in the regulations applicable to flood prone areas indicates that they are "preeminent among all the zoning regulations . . . ." Accordingly, the plaintiff contends, Breunich could have reconstructed the sea cottage "as before" pursuant to article IV, § 10 (C), of the regulations, if he had commenced construction within twelve months of the hurricane, and his failure to do so terminated the legally nonconforming status of the sea cottage in its entirety.

[8] See Stamford Zoning Regs., art. III, § 7.1 (B) (43) (2015) (for purposes of regulations governing flood prone areas, "[s]ubstantial [d]amage" is defined as "damage . . . sustained by a structure, whereby the cost of restoring the structure to its pre-damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred"); id., art. III, § 7.1 (B) (44) (defining "[s]ubstantial [i]mprovement" to include repairs "the cumulative cost of which equals or exceeds [50] percent . . . of the market value" of structure); id., art. III, § 7.1 (D) (1) (requiring substantial improvements to comply with certain regulations governing flood prone areas); id. (requiring all substantial improvements within special flood hazard area to have lowest floor elevated to minimum elevation standard).

With respect to the defendants' contention that an owner of a damaged, legally nonconforming building must comply with the minimum flood elevation requirement when the cost of reconstructing the building exceeds 50 percent of the building's value, we agree that, unlike other regulations, such as those governing building height and setbacks, the minimum flood elevation requirement applies to the reconstruction of the damaged building under these circumstances. In other words, the building's legally nonconforming status *with respect to that requirement* was lost because the cost of repairs exceeds 50 percent of the building's value. Indeed, the requirement that a damaged building must be repaired in conformance with the minimum elevation requirement if the cost of repairs exceeds 50 percent of the value of the building can apply *only* to buildings that were in existence before the regulations applicable to flood prone areas were adopted, because buildings that were built and damaged *after* their adoption would already conform to the regulations, unless the owner obtained a variance.

In this regard, it is important to recognize that, unlike regulations governing setbacks, building height and property use, which are designed to address concerns that are largely aesthetic in nature, the minimum flood elevation requirements are intended to "promote the health, safety and welfare of the general public, [to] limit public and private property losses and diminish expenditures of public money for costly flood protection projects and relief efforts, and [to] minimize prolonged governmental and business interruptions." Stamford Zoning Regs., art. III, § 7.1 (A) (2015).

The authors of a white paper published by the Center for Energy & Environmental Law at the University of Connecticut School of Law aptly describe the scope of the problems that the zoning regulations applicable to flood prone areas were designed to address and the

crucial role that such regulations play. The white paper states that "[c]oastal flooding represents a tremendous threat to Connecticut infrastructure. The Federal Emergency Management Administration . . . estimates that a '100 year flood' in the four Connecticut [s]horeline counties could cause a staggering $3,571,200,000 in damage to residential structures alone. To further exacerbate this problem, climate scientists estimate that by 2100 the inundation levels of this 100 year flood will revisit the Connecticut coast once every seventeen years if greenhouse gas emissions continue at current rates.

"The National Flood Insurance Program . . . offsets some of the financial risk that these floods pose to homeowners. This program, administered by the Federal Emergency Management Agency . . . makes federal flood insurance available to communities that impose a minimum standard of floodplain management regulation, generally imposed through zoning ordinances. Every Connecticut municipality participates in the [program].

"Under the [program], participating municipalities *must* create land use ordinances that *require* habitable portions of new *or substantially improved* residential structures within the Special Flood Hazard Area to be elevated to or above the Base Flood Elevation . . . shown on Flood Insurance Rate Maps . . . . This elevation requirement is intended to minimize flood damage by keeping buildings above anticipated flood levels." (Emphasis added; footnotes omitted.) W. Rath et al., "Height Restrictions on Elevated Residential Buildings in Connecticut Coastal Floodplains," Municipal Resilience Planning Assistance Project: Law & Policy White Paper Series (2018) p. 2, available at https://circa.uconn.edu/wp-content/uploads/sites/1618/2018/03/Height-Restrictions-on-Elevated-Buildings.pdf (last visited October 30, 2019). At oral argument before

this court, counsel for the zoning board represented that the failure of a municipality to create such ordinances or to enforce them in a uniform manner could render not only the particular nonconforming property ineligible to participate in the National Flood Insurance Program, but also could render properties located throughout the entire municipality ineligible for the program. Thus, municipalities have a compelling interest in ensuring uniform compliance with such regulations.

We conclude, therefore, that, when a legally nonconforming building subject to the regulations applicable to flood prone areas is damaged and the cost of repairs exceeds 50 percent of the value of the building, the minimum flood elevation requirement applies to the repair of the building, notwithstanding the fact that the building previously had a legally nonconforming status with respect to that requirement, and notwithstanding article IV, § 10 (C), of the regulations, which authorizes the reconstruction "as before" of buildings damaged in a "calamity" within twelve months of the calamity.

Contrary to Breunich's apparent contention, however, conformance with the minimum flood elevation requirement is not categorically required under these circumstances. Rather, article III, § 7.1 (F), of the regulations, expressly authorizes the zoning board to issue variances from the regulations applicable to flood zone areas. Thus, the plaintiff is correct that Breunich potentially could have restored the sea cottage to its former state. He could have done so, however, only if he obtained a variance from the minimum flood elevation requirement.[9]

[9] Indeed, the plaintiff makes no claim to the contrary. In response to the defendants' argument that article IV, § 10 (C), of the regulations does not apply to the sea cottage because the building was required to conform to current regulations governing minimum flood elevation, the plaintiff states that the defendants are "accurate as far as [they go]. It is true that [the regulations governing] substantial improvements [in flood prone areas] . . . apply where the work to be done exceeds 50 percent of the structure's value." The plaintiff then contends that the defendants fail to recognize that

As we have indicated, the purpose of article IV, § 10 (C), of the regulations is to allow landowners to rebuild legally nonconforming buildings that have been damaged in a calamity *without* the need either to conform the building to the regulations or to seek a variance authorizing the nonconformity. We conclude, therefore, that article IV, § 10 (C), of the regulations does not apply to the sea cottage because it would have been impossible for Breunich to reconstruct the building "as before" without either conforming to the minimum elevation requirement or seeking a variance from the regulation. Indeed, the relatively short time frame referenced in the regulation clearly contemplates the situation in which the landowner will *not* be required either to completely redesign the building to conform to new regulations or to go through the lengthy administrative process for obtaining a variance from those regulations in order to secure a building permit.[10] See W. Rath et al., supra, p. 3 ("the variance process is time consuming and can be expensive as it requires an individual analysis, a detailed application, and a formal public hearing").

The plaintiff suggests, however, that the continued existence of a legally nonconforming structure and the need for variances are mutually exclusive concepts. In other words, if variances are required to authorize the construction or repair of a building to its former state, the building cannot be legally nonconforming. Accordingly, he contends that, if Breunich was required either to conform the sea cottage to the minimum elevation requirement of the regulations applicable to flood

compliance with these regulations is not *categorically* required but may be subject to a variance.

[10] Indeed, to interpret article IV, §10 (C), of the regulations to apply to situations in which it would be virtually impossible for a landowner to begin repairs of a legally nonconforming building that was damaged in a calamity within twelve months of the damage would be of questionable constitutional validity because it would be confiscatory. See part II of this opinion.

prone areas or to seek a variance from that requirement, it necessarily follows that the sea cottage entirely lost its legally nonconforming status.

We disagree. As we explain in part II of this opinion, a regulation that entirely deprived a building of its legally nonconforming status might be confiscatory as applied and, as such, of questionable constitutionality.[11] It is well settled that "[t]his court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities . . . ." (Internal quotation marks omitted.) *Honulik* v. *Greenwich*, 293 Conn. 641, 647, 980 A.2d 845 (2009); see also *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 652 (interpretation of zoning regulations "is governed by the same principles that apply to the construction of statutes" [internal quotation marks omitted]). We conclude, therefore, that the purpose of the regulations prohibiting the reconstruction of a building that is nonconforming with the minimum flood elevation requirement to its previous state if the cost of repairs exceeds 50 percent of the value of the building was not to deprive legally nonconforming buildings entirely of their legally nonconforming status but to ensure the maximum possible compliance with the regulations applicable to flood prone areas. In other words, if a building is legally nonconforming with regulations such as setback requirements, and the building is damaged by flood or calamity, the fact that the building cannot be reconstructed without either complying with the minimum flood elevation requirement or obtaining a variance from that requirement or by obtaining a variance from the height restriction does not mean that the reconstructed building must also comply with all other regulations with which it was previously nonconforming. Accordingly, we conclude that the sea cottage retained its status as a legally nonconforming accessory

[11] But see footnote 13 of this opinion.

structure with respect to the setback and building height requirements of the regulations.

II

Having concluded that the legally nonconforming status of the sea cottage was not terminated by article IV, § 10 (C), of the regulations, we next address the plaintiff's claims that the zoning board improperly granted Breunich's application for variances because he did not establish a hardship and that, even if he did, the variances were not the minimum relief required to alleviate the hardship. We disagree.

"The standard of review on appeal from a zoning board's decision to grant or deny a variance is well established. We must determine whether the trial court correctly concluded that the board's act was not arbitrary, illegal or an abuse of discretion. . . . Courts are not to substitute their judgment for that of the board . . . and decisions of local boards will not be disturbed so long as honest judgment has been reasonably and fairly exercised after a full hearing. . . . Upon appeal, the trial court reviews the record before the board to determine whether it has acted fairly or with proper motives or upon valid reasons. . . . We, in turn, review the action of the trial court. . . . The burden of proof to demonstrate that the board acted improperly is upon the [plaintiff]." (Citations omitted; internal quotation marks omitted.) *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 205–206, 658 A.2d 559 (1995); see also *Richardson* v. *Zoning Commission*, 107 Conn. App. 36, 42, 944 A.2d 360 (2008) ("[t]rial courts defer to zoning boards and should not disturb their decisions so long as honest judgment has been reasonably and fairly exercised after a full hearing" [internal quotation marks omitted]). "Because the plaintiffs' appeal to the trial court is based solely on the record, the scope of the trial court's review of the board's decision and the scope of our review of that decision are the same." (Internal

quotation marks omitted.) *E & F Associates, LLC* v. *Zoning Board of Appeals*, 320 Conn. 9, 14, 127 A.3d 986 (2015).

"A variance constitutes permission to act in a manner that is otherwise prohibited under the zoning law of the town. . . . It is well established, however, that the granting of a variance must be reserved for unusual or exceptional circumstances. . . . An applicant for a variance must show that, because of some peculiar characteristic of his property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone. . . . Accordingly, we have [concluded that a zoning board of appeals may] grant a variance only when two basic requirements are satisfied: (1) the variance must be shown not to affect substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan. . . . Proof of exceptional difficulty or unusual hardship is absolutely necessary as a condition precedent to the granting of a zoning variance." (Internal quotation marks omitted.) Id., 15. Zoning boards of appeals are authorized to grant variances in cases in which enforcement of a regulation would cause unusual hardship in order to "[furnish] elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional . . . manner." *Florentine* v. *Darien*, 142 Conn. 415, 425, 115 A.2d 328 (1955).

In the present case, the plaintiff relies on our cases holding that "[d]isadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions, does not, ordinarily, warrant relaxation in his favor on the ground of . . . unnecessary hardship. . . . Financial considerations are relevant only in those exceptional situations

where a board could reasonably find that *the application of the regulations to the property greatly decreases or practically destroys its value for any of the uses to which it could reasonably be put* and where the regulations, as applied, bear so little relationship to the purposes of zoning that, as to particular premises, the regulations have a confiscatory or arbitrary effect. . . . Zoning regulations have such an effect in the extreme situation where the application of the regulations renders the property in question practically worthless." (Citation omitted; emphasis added; internal quotation marks omitted.) *Vine* v. *Zoning Board of Appeals*, 281 Conn. 553, 561–62, 916 A.2d 5 (2007); see also *E & F Associates, LLC* v. *Zoning Board of Appeals*, supra, 320 Conn. 20 ("when a property would have economic value even if the zoning regulations were strictly enforced, the fact that a peculiar characteristic of the property would make compliance with the zoning regulations exceptionally difficult if the property were put to a more valuable or desirable use does not constitute either an 'exceptional difficulty' or an unusual hardship"). The plaintiff contends that, if Breunich's application for variances is denied and he is unable to rebuild the sea cottage, he will still be able to use the four other dwelling units and various accessory structures that are located on the property, and, therefore, the strict enforcement of the setback and building height requirements of the zoning regulations would impose no unusual hardship.

In addressing the plaintiff's claim, however, it is important to keep in mind the legal principle underlying the general rule that enforcement of a regulation does not create an unusual hardship warranting a variance if the landowner retains a reasonable use of the property. That underlying principle is that land use regulation is constitutionally permissible as long as it does not amount to practical confiscation or inverse condemnation of a property, and a confiscation or inverse con-

demnation ordinarily does not occur unless the landowner is deprived of any reasonable use of the property. See *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 298, 947 A.2d 944 (2008) (" '[a]n ordinance which permanently restricts the use of land for any reasonable purpose . . . goes beyond permissible regulation and amounts to practical confiscation' "); id., 299 ("an inverse condemnation occurs when . . . application of the regulation amounted to a practical confiscation because the property cannot be used for any reasonable purpose"). Thus, the tests for unusual hardship and inverse condemnation are one and the same. See *Barton* v. *Norwalk*, 326 Conn. 139, 148 n.6, 161 A.3d 1264 (2017) ("[t]he unusual hardship test in zoning variance cases and the substantial destruction test in inverse condemnation cases require a showing that the property cannot be utilized for any reasonable purpose").[12]

Just as a landowner has a constitutionally protected right to use his property for *some* reasonable purpose,

[12] We do not suggest that establishing an inverse condemnation is the *only* way to establish an unusual hardship. Our cases indicate that an unusual hardship may also be established when the strict enforcement of a zoning regulation to a particular property would contribute so little to the goals that the regulation was intended to achieve that it would be arbitrary. See *Vine* v. *Zoning Board of Appeals*, supra, 281 Conn. 561 (hardship is established "where the regulations, as applied, *bear so little relationship to the purposes of zoning* that, as to particular premises, the regulations have a confiscatory *or arbitrary* effect" [emphasis added; internal quotation marks omitted]). It is clear, however, that an unusual hardship is established if an inverse condemnation is established.

Although all members of this court agree that the trial court correctly concluded that the variances were properly granted, there is disagreement regarding the reasoning supporting that conclusion. Specifically, relying heavily on treatises and cases from other jurisdictions, the concurrence disagrees that the test for unusual hardship and the test for a regulatory taking are the same, and contends that that is the case *only* when the landowner claims that he will suffer a financial hardship if the zoning regulation is strictly enforced. As we indicated, we would agree that a landowner is not required to establish a financial loss rising to the level of a regulatory taking in order to obtain a variance *if* the landowner can establish that the enforcement of the zoning regulation would be arbitrary in the sense that it would not contribute meaningfully to the goals that the regulation was

however; see *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 299; a landowner has a constitutionally protected property right to the *continued* use of an existing, legally nonconforming building. See *Petruzzi* v. *Zoning Board of Appeals*, 176 Conn. 479, 484, 408 A.2d 243 (1979) (" '[a] lawfully established nonconforming use is a vested right and is entitled to constitutional protection' "). Accordingly, the deprivation of that right by regulation would also constitute an inverse condemnation, notwithstanding the fact that the landowner could still use the property for some *other* permitted or legally nonconforming purpose.[13]

intended to achieve. That is not the case here, however. Increasing the height of the sea cottage to 27.9 feet, which is 12.9 feet above the maximum allowed height of fifteen feet, will block the views of neighboring properties, which is precisely what the maximum height regulation was intended to prevent. Moreover, if the concurrence were correct that the sea cottage lost its legally nonconforming status because it was more than 50 percent destroyed—which we conclude that it did not; see footnote 13 of this opinion; Breunich would be required to seek variances from *all* of the regulations with which the sea cottage was nonconforming before its destruction, not just those regulations with which the sea cottage is now even more nonconforming. Thus, Breunich would be required to obtain a variance from article III, § 4 (AA) (2.2), of the regulations, which permits only one single family detached dwelling per lot, so that he could maintain three dwelling structures with a total of five dwelling units on the property, as well as two sheds and a garage. Such a variance would clearly increase the population density of the zone, which is precisely what the regulation is intended to prevent.

To the extent that the concurrence suggests that there are considerations *other than* financial loss that can give rise to an unusual hardship warranting a variance, even when granting the variance would have a negative impact on the goals of the zoning scheme, it is entirely unclear to us what those considerations might be or why the concurrence believes that they justify the granting of the variance in the present case. Moreover, the concurrence has not cited any authority for the proposition that a property owner's loss of the right to use the property in a particular manner has ever been considered anything other than a reduction in the *value* of the property—in other words, a financial loss—for zoning purposes in this state.

[13] Although the plaintiff makes no claim that Breunich is prohibited from rebuilding the sea cottage pursuant to article IV, § 10 (B), of the Stamford Zoning Regulations, which provides that "[t]he total structural repairs and alterations that may be made in a structure which is nonconforming in use only shall not exceed [50] percent . . . of its replacement value at the time of application for the first structural change, unless changed to a conforming use"; see footnote 5 of this opinion; there is authority for the proposition that such regulations are constitutional because the destruction of more

than 50 percent of the value of a nonconforming building or a building with a nonconforming use can deprive the owner of his vested right to continue using the property for that purpose. See *State* v. *Hillman*, 110 Conn. 92, 107, 147 A. 294 (1929) (regulation that prohibited reconstruction of nonconforming building when more than 50 percent of building is destroyed was constitutional as applied). The court in *Hillman* observed that "[t]he police power has its limitations in the extent of the taking or the diminution of the value of property affected. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts." (Internal quotation marks omitted.) Id., 106; see also *Bobandal Realties, Inc.* v. *Worthington*, 21 App. Div. 2d 784, 785–86, 250 N.Y.S.2d 575 (1964) ("Ordinances using 50 [percent] of value or assessed value as a criterion in determining whether an owner shall be permitted to reconstruct a partly destroyed nonconforming building have been held not unreasonable on their face . . . . The question whether an ordinance using 50 [percent] of [value] as a criterion is unreasonable and confiscatory should not be decided in a vacuum, but only with relation to a specific case in which facts have been presented to show that *in that case* the application of such criterion would destroy so great a part of the value of the nonconforming property that it would be unreasonable and confiscatory . . . ." [Citations omitted; emphasis in original; internal quotation marks omitted.]), aff'd, 15 N.Y.2d 788, 205 N.E.2d 685, 257 N.Y.S.2d 588 (1965). We note that the court in *Hillman* concluded that enforcing the regulation at issue in that case did not have a confiscatory effect after noting that there was no evidence that there would be a significant "diminution in value of the property . . . ." *State* v. *Hillman*, supra, 107. Presumably, this was because the defendant landowner could construct a conforming building on the property. Contrary to the concurrence's suggestion, we do not conclude that *Hillman* did not involve the casualty doctrine. See footnote 5 of the concurring opinion. Rather, we conclude that, under the casualty doctrine, the courts must consider the specific facts of the case in determining whether a zoning regulation that prohibits the reconstruction of a nonconforming building that has been destroyed is constitutional as applied.

In the present case, we find the following circumstances to be relevant. First, article IV, § 10 (C), of the regulations expressly allows the owner of a nonconforming building that has been completely destroyed in a calamity to reconstruct the building and use it as before. The record supports the conclusion that Breunich would have taken advantage of that regulation but for the fact that the regulations applicable to flood prone areas prohibited him from doing so. Thus, if article IV, § 10 (B), of the regulations were applied to the sea cottage, the minimum flood elevation requirement would have the effect of depriving Breunich of the clear right to rebuild the sea cottage that he otherwise would have enjoyed. Cf. *Piccolo* v. *West Haven*, 120 Conn. 449, 453–54, 455–56, 181 A. 615 (1935) (when owners of nonconforming building that had been destroyed by fire sought variance to replace destroyed building with building that would have increased nonconformities, and owners could have reconstructed original building within one year under town regulations, variance was not warranted because any hardship was caused by owners' own failure to reconstruct original building within one year).

Second, the record supports the conclusion that, in light of the governing regulatory requirements, the need to redesign the sea cottage to conform to those requirements, and the need to obtain variances, Breunich proceeded as expeditiously as reasonably possible to take steps to rebuild the sea cottage. Finally, unlike in *Hillman*, there is no evidence in the present case that Breunich would be able to construct a conforming structure of some type on the property if the variances were denied, and he would therefore lose the *entire* value of the sea cottage. We recognize that there is authority for the proposition that, when a property contains multiple structures, and a nonconforming structure is more than 50 percent destroyed, prohibiting the rebuilding of the structure may not be confiscatory under certain circumstances because the landowner still has a reasonable use of the property. See *State ex rel. Covenant Harbor Bible Camp* v. *Steinke*, 7 Wis. 2d 275, 283, 96 N.W.2d 356 (1959) (as applied to destroyed nonconforming building on property containing multiple buildings, 50 percent rule may be reasonable if building contained separate use, but may not be reasonable if building was "used jointly with other buildings in a single [nonconforming] use upon one premises"). In our view, however, it would make no sense to conclude that it is confiscatory to prohibit the reconstruction of a destroyed nonconforming building when the building is the only building on the property and it cannot be replaced by a conforming building, but if an identical building on a property containing multiple buildings is destroyed and cannot be replaced, reconstruction can constitutionally be prohibited. The loss is the same in both cases. We conclude that, under these specific circumstances it would be confiscatory to prohibit Breunich from rebuilding the sea cottage pursuant to article IV, § 10 (B), of the regulations.

The concurrence disagrees with this analysis and, again relying on treatises and case law from another state, contends that this court should consider *only* the extent to which a nonconforming building has been destroyed in determining whether the owner continues to have the right to use the property for that purpose, and whether the landowner can replace the nonconforming building with a conforming building is irrelevant. *This* court expressly recognized in *Hillman*, however, that, when a nonconforming structure has been destroyed, whether the application of a zoning regulation that prevents the rebuilding of the structure would be constitutional "depends upon the particular facts" of the case. (Internal quotation marks omitted.) *State* v. *Hillman*, supra, 110 Conn. 106. This court in *Hillman* found it significant that there was no evidence in that case that prohibiting the defendant landowner from rebuilding the destroyed nonconforming buildings, which had been used in connection with the business of "storing, washing, repairing, burning, and steaming barrels of various kinds and descriptions which had contained commodities such as fish, lard, crisco, oil, cider, pork, etc."; id., 96–98 (preliminary statement of facts and procedural history); would cause a significant "diminution in value of the property"; id., 107; presumably because the defendant could replace the destroyed buildings with a conforming building or buildings of comparable value.

The concurrence also contends that prohibiting Breunich from rebuilding the sea cottage would not be unconstitutional because Breunich can still use his property for other purposes. In support of this contention, the

The decision of the Commonwealth Court of Pennsylvania in *Jenkintown Towing Service* v. *Zoning Hearing Board*, 67 Pa. Commw. 183, 446 A.2d 716 (1982), is instructive on this issue. The court in that case noted that, although "hardship clearly consists of the virtual unusability of the land in its entirety for any permitted use" if the regulations were strictly enforced and the applicant has sought a variance in order to *bring into being* a nonconforming use or building, in cases involving *existing legally nonconforming uses or structures*, "the land . . . *already has utility*." (Emphasis added.) Id., 192. The court then observed

concurrence cites *Murr* v. *Wisconsin*, U.S. , 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017), for the proposition that the "test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property . . . ." (Internal quotation marks omitted.) Id., 1943–44. The court in *Murr*, however, was not addressing the problem that is before this court, namely, whether prohibiting the rebuilding of a nonconforming building that has been destroyed violates the constitution when the landowner cannot replace the building with another structure that is conforming. Rather, the court was addressing the question of whether it should treat adjacent parcels of land that are owned by the same landowner as a single parcel or as distinct parcels in determining whether a taking has occurred. See id., 1941. The court declined to adopt a categorical answer to that question but repeatedly emphasized that "[a] central dynamic of the [c]ourt's regulatory takings jurisprudence . . . is its flexibility"; id., 1943; and that "courts must consider a number of factors" on a case-by-case basis when identifying the property that was taken by regulation and the property that remains. Id., 1945. Thus, *Murr* is not inconsistent with *Hillman*. We therefore conclude that, when a nonconforming structure has been destroyed and a regulation prohibits the rebuilding of the structure, the difference between the value that was taken from the property, i.e., the value of the destroyed nonconforming structure, and the value that remains, i.e., the value of the structure, if any, that the landowner can build to replace the destroyed structure, is a factor that the courts may consider in determining whether the strict enforcement of the regulation would have a confiscatory effect.

The concurrence insists that, in making the determination as to whether a taking has occurred, the only consideration is whether "the property," i.e., the legally defined parcel of land on which a structure stood, still has value. See footnote 5 of the concurring opinion. *Murr* makes clear, however, that, for purposes of takings jurisprudence, the meaning of the term "the property" is flexible. See *Murr* v. *Wisconsin*, supra, 137 S. Ct. 1943.

that, "because any zoning ordinance provision is subject to the grant of a variance in a proper case . . . such restrictions must bow if adhering to them *would threaten the continued existence of the* [*preexisting*] *use* [*or structure*] *itself*." (Emphasis added.) Id., 193. As we have explained, this is because such regulations would amount to an inverse condemnation of the landowner's vested property right in the existing, legally nonconforming use or structure, even if the landowner could use the property for some other reasonable purpose.

None of the cases that the plaintiff cites in support of his claim that Breunich was required to establish that he could not use his property for any reasonable purpose if the regulations were strictly enforced involves an application for a variance in order to allow the continuation of an existing, legally nonconforming use or structure. Rather, in each case that he cites in which a variance was found not to be warranted, the applicant sought either to construct a new nonconforming structure or to expand an existing nonconforming structure. *See E & F Associates, LLC* v. *Zoning Board of Appeals*, supra, 320 Conn. 12 (applicant sought to expand nonconforming building by adding second story); *Moon* v. *Zoning Board of Appeals*, 291 Conn. 16, 18, 966 A.2d 722 (2009) (applicants sought to add additional living space to second story of nonconforming building); *Francini v. Zoning Board of Appeals*, 228 Conn. 785, 787, 639 A.2d 519 (1994) (applicant sought to build residence on nonconforming lot); *Hyatt* v. *Zoning Board of Appeals*, 163 Conn. 379, 381, 311 A.2d 77 (1972) (applicant sought to build second nonconforming building); *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 664, 111 A.3d 473 (2015) (applicant sought to expand existing nonconforming building); *Horace* v. *Zoning Board of Appeals*, 85 Conn. App. 162, 164, 855 A.2d 1044 (2004) (applicant sought to expand existing

nonconforming use); *Munroe* v. *Zoning Board of Appeals*, 75 Conn. App. 796, 798, 818 A.2d 72 (2003) (applicant sought to add second story to existing nonconforming building). In the present case, although conforming the sea cottage to the minimum flood elevation requirement will increase its nonconformity with the regulations governing building height, in contrast to these cases, Breunich is not seeking to "expand" the nonconforming building for his own personal benefit or convenience but is seeking the variances in order to comply with the minimum flood elevation requirement of the regulations applicable to flood prone areas, which is intended to reduce the safety and financial hazards that nonconforming structures present both to landowners and to the general public in the event of a flood. As we explained, the sea cottage is required to conform to that requirement even though the building previously was legally nonconforming. In the absence of either a variance from the building height regulations or the minimum flood elevation requirement, the sea cottage cannot be rebuilt. Thus, the underlying purpose of the variances is not to "expand" the nonconformities of the sea cottage but merely to allow its continued use. Accordingly, we find the cases that the plaintiff cites to be inapposite.

On the basis of the foregoing, we conclude that the zoning board reasonably found that Breunich established the existence of an unusual hardship warranting approval of his application for variances because the strict enforcement of the regulations would have deprived him of his constitutionally protected right to continue using the sea cottage, which is an existing, legally nonconforming accessory structure. As we explained, without variances in some form, Breunich simply would be unable to reconstruct the sea cottage, resulting in an inverse condemnation of his existing, legally nonconforming use. In other words, it would

result in an unusual hardship. Such a result is precisely what the zoning board's authority to grant variances was designed to circumvent. See *Florentine* v. *Darien*, supra, 142 Conn. 425 (power to grant variances is intended to "[furnish] elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently unconstitutional . . . manner").

To the extent that the plaintiff contends that it was improper for the zoning board to have granted the variances from the regulations governing building height and setbacks because those variances would have been unnecessary if Breunich had sought a variance from the minimum flood elevation requirement, we disagree. First, considered in light of the compelling public interests that the minimum flood elevation requirement is intended to protect, nothing in the record indicates that conforming the sea cottage to that requirement would entail an unusual hardship, thereby warranting a variance.[14] Second, the plaintiff has cited no authority for

[14] To the extent that it might be claimed that the fact that the soils under the sea cottage would not support the elevated structure would constitute an unusual hardship justifying such a variance, the response to that claim is that that any such hardship could be alleviated merely by moving the sea cottage three feet north.

To the extent that the plaintiff contends that, by submitting a request to move the footprint of the sea cottage three feet north, thereby necessitating the variance from the setback requirements, Breunich lost his constitutionally protected right to continue to use the sea cottage as a legally nonconforming building, we disagree. It is well settled that a variance may be granted to continue a nonconforming use if the variance will reduce the nonconformity of the building or use. See *Vine* v. *Zoning Board of Appeals*, supra, 281 Conn. 562 ("the reduction of a nonconforming use to a less offensive prohibited use may constitute an independent ground for granting a variance"). The only effect of moving the sea cottage would be to reduce the rear yard setback nonconformity. Accordingly, we can see no reason why, if the zoning board would have been warranted in granting a variance to the regulation governing building height to accommodate the minimum flood elevation requirement if it had been possible to elevate the sea cottage in its current location, it was barred from granting the application for variances because the sea cottage had to be moved three feet, thereby *reducing* its nonconformity.

the proposition that a zoning board of appeals cannot grant a variance from one regulation if granting a variance from another regulation would make the variance from the first regulation unnecessary.

The plaintiff also claims that, to establish an unusual hardship, Breunich was required to show that the hardship arose from some unique or peculiar characteristic of his property. See, e.g., *Moon* v. *Zoning Board of Appeals*, supra, 291 Conn. 24 ("[a]n applicant for a variance must show that, *because of some peculiar characteristic of his property*, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone" [emphasis added; internal quotation marks omitted]); *Francini* v. *Zoning Board of Appeals*, supra, 228 Conn. 791 ("[i]t is well settled that the hardship must be different in kind from that generally affecting properties in the same zoning district" [internal quotation marks omitted]); *Plumb* v. *Board of Zoning Appeals*, 141 Conn. 595, 600, 108 A.2d 899 (1954) ("[t]he hardship must be one different in kind from that imposed upon properties in general by the ordinance"). The plaintiff contends that the sea cottage has no such unique or peculiar characteristic, but, to the contrary, its characteristics making full compliance with all zoning regulations difficult are shared by "numerous coastal properties in Stamford," many of which were also damaged by Hurricane Sandy.[15] Even

[15] The authors of the white paper prepared by the Center for Energy & Environmental Law at the University of Connecticut School of Law have observed that applicants seeking variances from zoning regulations governing building height in order to conform to the minimum flood elevation requirement must "demonstrate that the variance is required because of some peculiar characteristic of the property. [This] can be [a] difficult [requirement] to meet when the applicant is one of many similarly situated floodplain property owners." W. Rath et al., supra, p. 3. The authors also note that height restrictions on buildings have the effect of "squeezing [such] property owners between two different regulatory requirements." Id.

if we were to assume, however, that there is nothing unique or peculiar about Breunich's property that renders the strict application of the regulations unusually harsh, and that the problems that he faces in reconstructing the sea cottage are shared by many other owners of damaged buildings in flood prone areas, it would then follow that the strict enforcement of the regulations would also threaten to confiscate the other damaged buildings and structures that, before being damaged, were legally nonconforming with the minimum flood elevation requirements.[16] The plaintiff has cited no authority for the proposition that a variance from a regulation may not be granted to a particular landowner if the regulation has a confiscatory effect not only on his property, but also on other existing, legally nonconforming buildings and structures, because the hardship does not arise from a peculiar or unique characteristic of the landowner's property.[17] An

[16] The concurrence would conclude that the sea cottage is unique because it was "a nonconforming accessory structure located in a highly restrictive flood zone subject to the mandatory flood regulations." The plaintiff's point, however, is that many of the buildings that were destroyed by Hurricane Sandy cannot be rebuilt to conform to the flood regulations without obtaining a variance from building height restrictions. See W. Rath et al., supra, app. A, p. 7, quoting Stamford Zoning Regs., art. III, § 3 (A) (16) (b) (2016) (when primary residence is reconstructed to comply with minimum elevation standards, maximum height of new building may be only up to five feet higher than height allowed by zoning regulations). Accordingly, we fail to perceive how the sea cottage was unique. To the extent that the concurrence contends that the plaintiff's situation is different because the sea cottage was an *accessory structure*, and, therefore, in contrast to the application of a regulatory prohibition on rebuilding to primary residences that cannot be rebuilt without obtaining a variance, the application of such a regulation to the sea cottage does not constitute a taking; see footnote 13 of this opinion; the concurrence appears to admit through the back door what it refuses to admit through the front door, namely, the principle that a regulation that prohibits the reconstruction of a nonconforming building that has been destroyed creates a hardship if the building cannot be replaced with a conforming building, notwithstanding the fact that the parcel of property on which the structure was located still has value.

[17] We note parenthetically that we are somewhat puzzled by the line of cases holding that a variance is not warranted if the subject property does

unconstitutional confiscation of property by regulation does not become constitutional merely because the regulation affects other properties in the same way. Accordingly, we reject this claim.

Finally, we address the plaintiff's claim that the zoning board improperly granted Breunich's application for variances because the variances were not the minimum relief required to alleviate the hardship. See, e.g., *L & G Associates, Inc.* v. *Zoning Board of Appeals*, 40 Conn. App. 784, 788, 673 A.2d 1146 (1996) ("[b]ecause a variance affords relief from the literal enforcement of a zoning ordinance, it will be strictly construed to limit relief to the minimum variance which is sufficient to relieve the hardship" [internal quotation marks omitted]). The plaintiff contends that the setback variances that Breunich requested were not the minimum necessary to alleviate any hardship because he could conform the sea cottage to all of the setback requirements by moving it west five and one-half feet and north ten feet. In support of this claim, the plaintiff cites *Green Falls Associates, LLC* v. *Zoning Board of Appeals*, 138 Conn.

not have a unique or peculiar characteristic that renders the strict application of the zoning regulations unusually harsh. We have held that the fact that a property *does* have such a unique or peculiar characteristic, standing alone, does not justify the granting of a variance in the absence of proof that the regulation is confiscatory. See *E & F Associates, LLC* v. *Zoning Board of Appeals*, supra, 320 Conn. 20 ("when a property would have economic value even if the zoning regulations were strictly enforced, the fact that a peculiar characteristic of the property would make compliance with the zoning regulations exceptionally difficult if the property were put to a more valuable or desirable use does not constitute either an 'exceptional difficulty' or an unusual hardship"). On the other hand, it is clear to us that, if a regulation has a confiscatory effect on a property, it does not follow from the fact that that effect does *not* arise from a unique characteristic of the particular property that no hardship warranting a variance exists. Accordingly, it would appear to us that the question of whether the regulation has a confiscatory effect is dispositive, and it is unclear to us how the unique characteristics of a particular property come into play when determining whether an unusual hardship exists. Because this question is not before us, however, we leave it for another day.

App. 481, 484, 53 A.3d 273 (2012) (applicant sought to build new single-family residence on lot), *Jaser* v. *Zoning Board of Appeals*, 43 Conn. App. 545, 546, 684 A.2d 735 (1996) (applicants sought to construct new single-family residence on lot), and *L & G Associates, Inc.* v. *Zoning Board of Appeals*, supra, 786 (applicant sought to construct new office building on property). All of these cases, however, involved applications for variances to build new nonconforming buildings.[18] As

[18] The plaintiff also cites *Hescock* v. *Zoning Board of Appeals*, 112 Conn. App. 239, 962 A.2d 177 (2009), in support of the proposition that the requirement that a variance provide only the minimal relief required to alleviate the hardship also applies to variances that will reduce the nonconformity of an existing nonconforming building. His reliance on this case, however, is misplaced. In *Hescock*, the defendant landowners owned a legally nonconforming house that was damaged in a hurricane and that no longer complied with various building and habitability codes and requirements. See id., 252. The house was located 44 feet landward of the mean high tide, in legal nonconformance with a zoning regulation requiring a minimum distance of 100 feet. See id., 242. The landowners wanted to build a new house that would be located 47 feet landward of the mean high tide and sought a variance to authorize that nonconformity. See id. The Appellate Court rejected the plaintiffs' contention that the defendant zoning board of appeals had failed to consider a zoning regulation requiring that "the granted variance be minimal" on the ground that the board had considered the fact that "the new house would be as far from the water as possible" given the configuration of the lot when it granted the variance. Id., 255. In addressing the plaintiffs' contention that no hardship had been established, the Appellate Court observed that a reduction in nonconformity can also justify a variance, and concluded that the new house would reduce the existing nonconformities because it would be further from the water than the damaged house and it would eliminate nonconformance with all of the other flood zone regulations. See id., 260–61. In the present case, the plaintiff relies on the Appellate Court's conclusion that the variance was the minimum relief required because "the new house would be as far from the water as possible"; id., 255; to support his claim that the zoning board could not grant the variances unless Breunich established that he was reducing all of the sea cottage's nonconformities to the maximum extent possible. The Appellate Court in *Hescock*, however, did not clearly distinguish the variance principles that apply to *new construction* from the principles that apply to *legally nonconforming buildings*. Indeed, the court did not cite any cases at all in support of the proposition that the landowners were required to establish that the variance was the "minimum necessary" to relieve hardship. Rather, the court appears to have assumed in that portion of its decision that the

we indicated, the sea cottage is an *existing*, legally nonconforming building, and the setback variances that Breunich sought and that the zoning board granted will allow the building to be moved to a *less* nonconforming location. See footnote 14 of this opinion. The plaintiff has cited no authority that convincingly supports the proposition that, when an applicant seeks a variance that will have the effect of reducing a nonconformity of an *existing*, legally nonconforming building, the variance may not be granted unless the applicant reduces *all* of the building's nonconformities to the maximum extent possible. Indeed, it would make little sense to bar landowners from seeking a variance to reduce a nonconformity of an existing building unless they reduced that conformity—as well as all other nonconformities—to the maximum extent possible.[19] Presumably, *any* reduction in nonconformity could only benefit the zoning scheme. We therefore reject this claim.

For the foregoing reasons, we conclude that the trial court correctly determined that the zoning board properly granted Breunich's application for variances from the regulations and, therefore, properly dismissed the plaintiff's appeal.

The judgment is affirmed.

In this opinion D'AURIA, MULLINS and KAHN, Js., concurred.

application for a variance was for "new construction"; id., 254; and not for the repair or modification of an existing, legally nonconforming building. In contrast, in the portion of its decision addressing the plaintiffs' claim that no hardship existed, the court clearly assumed that the landowners were continuing the use of a legally nonconforming building. See id., 261 ("the new construction would reduce and eliminate existing nonconformities"). Accordingly, *Hescock* provides little guidance in the present case.

[19] We recognize, of course, that, if a landowner sought a variance to *increase* the nonconformity of an existing, legally nonconforming building, the landowner would be required to establish that the variance was the minimum relief necessary to alleviate the hardship.

ECKER, J., with whom ROBINSON, C. J., joins, concurring in the judgment. Although I agree with the disposition of this appeal, I write separately because I do not agree with substantial aspects of the legal analysis employed by the majority opinion to reach that result. More specifically, I disagree with the constitutional point raised in the final paragraph of part I of the majority opinion, and I further disagree with that portion of part II of the majority opinion suggesting that the issuance of the variances to the defendant Paul E. Breunich was in any way constitutionally compelled such that the denial of the application would have amounted to a practical confiscation or inverse condemnation of his property. I instead would affirm the judgment of the trial court dismissing the appeal of the plaintiff, Karl Mayer-Wittmann, executor of the estate of Gerda Mayer-Wittmann, on the ground that the named defendant, the Zoning Board of Appeals of the City of Stamford (zoning board), did not abuse its discretion when it granted the variances on the basis of its finding that the natural event that severely damaged Breunich's sea cottage, combined with the mandatory flood regulations imposed by the city of Stamford and the Federal Emergency Management Agency (FEMA), combined to create an unusual hardship. I therefore concur in the judgment.

I

My disagreement with the majority arises at two different points in its opinion. First, in the final portion of part I of its opinion, the majority refers to constitutional concerns that would arise were the court to hold that the sea cottage automatically lost its legally nonconforming status either by operation of article IV, § 10 (C), of the Zoning Regulations of the city of Stamford

(regulations),[1] or because Breunich was required to obtain variances before the zoning board could authorize reconstruction of the sea cottage.[2] Second, and more prominently, part II of the majority opinion holds that "Breunich established the existence of an unusual hardship warranting approval of his application for variances *because the strict enforcement of the regulations would have deprived him of his constitutionally protected right to continue using the sea cottage*, which is an existing, legally nonconforming accessory structure. . . . [*W*]*ithout variances in some form*, *Breunich simply would be unable to reconstruct the sea cottage*, *resulting in an inverse condemnation of his existing*, *legally nonconforming use*. In other words, it would result in an unusual hardship." (Emphasis added.)

I cannot agree with the majority's constitutional analysis. Indeed, I understand the applicable law, hereinafter referred to as the "casualty doctrine," to say exactly the opposite, namely, that a landowner generally has *no* constitutional right to rebuild a legally nonconforming structure that has been substantially destroyed by fire, flood, or some other comparable force majeure.[3] See generally D. Gross, annot., "Zoning:

[1] Article IV, § 10 (C), of the Stamford Zoning Regulations provides in relevant part that "[a]ny non-conforming building . . . which has been or may be damaged by . . . flood . . . [or] act of God . . . may be reconstructed and used as before, if reconstruction is started with[in] twelve . . . months of such calamity . . . ."

[2] Invoking the canon of constitutional avoidance in statutory construction, the majority rejects the plaintiff's absolutist construction of the applicable regulations on the ground that "a regulation that entirely deprived a building of its legally nonconforming status might be confiscatory as applied and, as such, of questionable constitutionality."

[3] It is undisputed in the present case that the sea cottage sustained damage exceeding 50 percent of its value, which triggers application of the relevant flood zone elevation requirements to restoration of the structure notwithstanding its legally nonconforming status. The majority also correctly notes that article IV, § 10 (B), of the Stamford Zoning Regulations states in relevant part: "The total structural repairs and alterations that may be made in a structure which is non-conforming in use only shall not exceed [50] percent

Right to Repair or Reconstruct Building Operating as Nonconforming Use, After Damage or Destruction by Fire or Other Casualty," 57 A.L.R.3d 419 (1974 and Supp. 2018) (collecting extensive case law from across the country, including Connecticut); 4 E. Ziegler, Rathkopf's The Law of Zoning and Planning (2011) § 74:11, pp. 74-38 through 74-42 (citing cases). The casualty doctrine is no stranger to Connecticut; one of the early cases articulating the doctrine, still cited in modern cases and treatises on the subject, was decided by this very court. See *State* v. *Hillman*, 110 Conn. 92, 107, 147 A. 294 (1929) (rejecting landowner's constitutional attack on zoning regulation that prohibited restoration of legally nonconforming building if more than 50 percent of its assessed value was destroyed by fire). Yet another Connecticut case lends indirect but significant support to the same point by affirming a zoning board's decision denying the landowners' petition for permission to rebuild a legally nonconforming structure that had been destroyed by fire. See *Piccolo* v. *West Haven*, 120 Conn. 449, 455, 181 A. 615 (1935).

This court's decision in *Hillman* provides an early but nonetheless representative illustration of the casualty doctrine at work. Indeed, it continues to be cited as a seminal case on the subject.[4] The defendant, Isaac Hillman, was a corporate officer of an industrial company that operated within the city of Bridgeport prior to the enactment of zoning regulations in 1925, and then continued to operate as a preexisting nonconforming use after the zoning regulations were adopted. *State* v. *Hillman*, supra, 110 Conn. 94–98 (preliminary statement of facts and procedural history). The next year,

. . . of its replacement value at the time of the application for the first structural change, unless changed to a conforming use. . . ."

[4] See, e.g., 6 N. Williams & J. Taylor, American Land Planning Law (Rev. Ed. 2019) § 122:2 (describing *Hillman* as "the first zoning case in Connecticut" and noting that "the opinion specifically approved a prohibition against rebuilding a nonconforming establishment" substantially destroyed by fire).

a fire destroyed numerous company buildings necessary for the operation of the business, and the company sought to rebuild. The company's application to reconstruct the damaged buildings was denied by the city, however, pursuant to a regulation prohibiting reconstruction of a nonconforming building that is damaged by fire in an amount exceeding 50 percent of the building's value. Id., 98–99 (preliminary statement of facts and procedural history). Hillman was convicted of violating the city's zoning laws after the company failed to relocate and instead continued to operate from its original location using temporarily repaired buildings. Id., 99 (preliminary statement of facts and procedural history). This court rejected the defendant's claim that the operative zoning regulations were unconstitutional "in that they purport to deprive this company and this defendant of his property without just compensation." Id., 105. The court's constitutional analysis concludes that "we are unable to hold that when over [50 percent] of [the company's] buildings are destroyed it was not a fair exercise of the police power to refuse to permit the company to restore the burned building and continue the nuisance in [the newly zoned district]." Id., 107.[5]

[5] The majority suggests that the casualty doctrine is not operative in *Hillman* and contends that the case instead supports the view that a municipality may prohibit the restoration of a preexisting nonconforming structure only if the landowner is able to replace the structure with a conforming building or buildings of comparable value. I read *Hillman* very differently, as do the treatises cited in part I of this concurring opinion. First and foremost, *Hillman* is a case about loss causation, and it remains an important precedent in that context because it is among the first judicial opinions in the country to articulate the rule that the government acts within constitutional limits when it refuses to permit the restoration of a nonconforming building substantially destroyed by fire. See W. Horton & B. Levesque, "The Wheeler Court," 24 Quinnipiac L. Rev. 301, 329 (2006) (stating that "Connecticut was leading the country" when *Hillman* "sustained a [zoning] regulation prohibiting the rebuilding of a nonconforming factory after a fire destroyed over half the value of the buildings"). Second, in *Hillman*, the constitutional analysis did not turn on the landowner's ability vel non to replace or rebuild the destroyed *buildings*. If the loss to the nonconforming

As previously noted, the case law from across the country is consistent with our decision in *Hillman* as it relates to the casualty doctrine. The Rathkopf treatise characterizes as "customary" zoning regulations terminating a legal nonconformity in the event of a casualty causing substantial destruction of the nonconforming structure, and describes the underlying logic of such regulations as follows: "In conformity with the philosophy that the spirit of zoning is to restrict, rather than increase, nonconforming uses and to eliminate such uses as speedily as possible, and in order to discourage the reestablishment of nonconforming uses, the investment value of which has been lost to the owner through accident and through no action on the part of the municipality, *it is customary to provide in zoning ordinances a prohibition against the replacement of a nonconforming structure or one employed in a nonconforming use in excess of a specified percentage, this percentage being fixed as equivalent to substantial destruction*." (Emphasis added.) 4 E. Ziegler, supra, § 74:11, p. 74-38.[6]

building is substantial enough to trigger application of the regulation prohibiting reconstruction, then the constitutional analysis examines the loss in value to the *property* to determine whether a taking has occurred. This point explains why the court in *Hillman* observed that "[t]here is nothing in the [trial court's] finding showing *the extent of the diminution in value of the property or the business*; it may be that these were small in extent." (Emphasis added.) *State* v. *Hillman*, supra, 110 Conn. 107. Applying this observation to the present case, it is clear that Breunich's *property* retains most of its value even without the sea cottage. *Hillman* thus demonstrates that Breunich would have no plausible constitutional claim if the municipal defendants had denied his application.

[6] There are cases to the contrary, but the Rathkopf treatise explains that the exceptions typically involve jurisdictions in which "the zoning enabling act specifies the extent to which municipalities may restrict the right of a nonconforming owner to repair or restore structures which have been accidentally destroyed. Where such a statutory provision protects the right of a nonconforming owner to repair a structure which has been partially destroyed, the provision has been construed to require termination of the nonconforming use only if the structure in which it has been operated is totally destroyed. Where this type of statutory provision exists, the issue in a case involving destruction of a structure housing a nonconforming use is

The Rathkopf treatise quotes at length from a case decided by the Colorado Supreme Court explaining why such regulations pass constitutional muster: " 'If a property owner has invested money in improvements in order to put his property to a particular use, which is lawful at that time, and if that use is subsequently outlawed by a zoning ordinance, he loses not only the potential use but also the value of his investment. To impose this additional loss upon him is unreasonable, and therefore he is entitled to continue to use his property as he did before. On the other hand, if the improvements are destroyed or abandoned, he has lost the value of his investment independently of the ordinance and there is no reason why his relationship to the zoning ordinance should be any different [than] that of his neighbor whose property was unimproved. . . . If the owner of a nonconforming use suffers the destruction of his improvements, he becomes the owner of unimproved property. The unimproved property may be restricted as to use without a denial of due process. The effect of the fire which substantially destroyed the service station was to sever the improvements from the real estate. Had the [plaintiff] been denied a building permit for a filling station on unimproved property, no one could contend that it was unreasonable or that it was a denial of due process.' " Id., pp. 74-39 through 74-40, quoting *Service Oil Co.* v. *Rhodus*, 179 Colo. 335, 347–48, 500 P.2d 807 (1972).

The majority contends that the casualty doctrine would not permit the zoning board to deny a variance in the present case because, in the absence of a variance, Breunich would "lose the *entire* value of the sea cottage"; (emphasis in original) footnote 13 of the majority

whether the extent of the destruction found is partial or is so extensive as to amount to total destruction." (Footnotes omitted.) 4 E. Ziegler, supra, § 74:11, p. 74-40. The relevant Connecticut statute contains no such provision. See General Statutes § 8-2.

opinion; whereas the cases finding no constitutional violation involve situations in which the landowner remains able to make some other use of the property despite the loss of a building to fire or other casualty. As I pointed out in my discussion of *Hillman*; see footnote 5 of this concurring opinion; the majority's point conflates two different calculations, the loss of value in *the nonconforming building* and the loss of value in *the property*. The former calculation is used in many zoning regulations, including Stamford's, to determine whether the landowner has the right, without a variance, to rebuild a nonconforming building after it has been damaged; the latter calculation is used to decide whether just compensation must be paid by a municipality that has prohibited restoration. The fact that the landowner may lose the entire value of the damaged structure is not the critical issue under either calculation. Indeed, the more severe the loss caused by the casualty to the building itself, the *stronger* the case becomes for application of the casualty doctrine because its applicability depends on the loss being caused by a force *other than the zoning regulation*. See, e.g., *Krul* v. *Board of Adjustment*, 122 N.J. Super. 18, 24–25, 298 A.2d 308 (Law. Div. 1972) ("The right to restore or repair thus is limited by the caveat that the structure be only partially destroyed. . . . Thus where the destruction of a building is only partial, restoration or repair is permitted to protect and maintain that investment in recognition of the right of the property owner to continued protection of his use free of the restriction imposed subsequent to the vesting of that use. If, however, a structure is destroyed totally rather than partially, the property owner in effect holds only vacant land and should be controlled by the existing zoning restrictions in the same manner as other owners of undeveloped land. Under such circumstances the dilemma of the property owner—the loss of his investment—is one created by the unfortunate casualty and

not by virtue of the power of government." [Citations omitted.]), aff'd, 126 N.J. Super. 150, 313 A.2d 220 (App. Div. 1973).[7]

II

That said, I nonetheless agree with the outcome reached by the majority because I do not believe that

[7] In a similar vein, the majority opinion states that the present case is distinguishable from *Hillman*, *Piccolo*, and the other casualty doctrine cases because, in contrast to those cases, the landowner here had no options: "[T]here is no evidence in the present case that Breunich would be able to construct a conforming structure of some type on the property if the variances were denied, and he would therefore lose the *entire* value of the sea cottage." (Emphasis in original.) Footnote 13 of the majority opinion. I see two interconnected problems with this contention. First, the idea underlying the casualty doctrine is not that the constitution allows local governments to adopt regulations prohibiting restoration of the nonconforming structure only if the owner is able to recover its loss by building a conforming structure. Instead, as I discussed in the text accompanying this footnote, the underlying idea is that, when the damage caused by the casualty is sufficiently severe, the government does not cause the loss and, therefore, need not permit restoration at all, especially in light of the background principle that nonconformities should be reduced or eliminated over time. See *Salerni* v. *Scheuy*, 140 Conn. 566, 570, 102 A.2d 528 (1954) ("[i]t is a general principle in zoning that nonconforming uses should be abolished or reduced to conformity as quickly as the fair interest of the parties will permit").

Second, even if I were to assume, as the majority does, that the refusal to permit reconstruction of the nonconforming sea cottage in this particular case resulted in Breunich being unable to replace it by building a conforming structure elsewhere on the property—meaning that he has lost "the *entire* value of the sea cottage"—there would still be no viable claim of a *constitutional* violation on this record. (Emphasis in original.) Footnote 13 of the majority opinion. As I noted previously, the takings analysis in this context looks to the diminished value to the entire property, not to the loss in value to the structure (or use) that cannot be restored. This approach is consistent with the treatment of takings more generally, where the constitutional analysis turns on the impact of the regulation on the *total* value of the property, not only the component of the property "confiscated" by the regulation. See *Murr* v. *Wisconsin*, U.S. , 137 S. Ct. 1933, 1943–44, 198 L. Ed. 2d 497 (2017) (holding that existence of regulatory taking is determined by comparing value that has been taken from property with value that remains in property viewed in its entirety). I have found nothing in the case law to support the majority's suggestion that the *constitutional* analysis is based on the loss of the destroyed building itself without reference to the value of the entire property.

our precedent, properly construed, requires a zoning board to deny a variance in all cases where the landowner fails to make the showing necessary to establish a constitutional violation, i.e, that enforcement of the zoning requirement has deprived the property of all reasonable use and value, thereby practically confiscating the property. That strict standard applies to claims based on *economic* hardship, but there are situations where a landowner may establish the necessary hardship without satisfying the constitutional standard, and this is such a case. The sea cottage, a legally nonconforming accessory structure, was severely damaged by a catastrophic natural event; the demands of public health and safety had caused both the local and federal governments to enact flood regulations of such importance that compliance was required, despite the special status accorded to nonconforming structures; "as before" restoration was flatly impossible due to the particular location of the property and related soil conditions; and Breunich, the landowner, had made good faith efforts to reduce the nonconformities to the maximum extent possible under the circumstances. In my view, the zoning board did not act unlawfully when it determined that this confluence of factors combined to subject the landowner, through no fault of his own, to an unusual hardship warranting issuance of the requested variances.

I observe at the outset that the standard of review is correctly summarized by the majority opinion, and must not be overlooked in our consideration of the merits. See *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 205–206, 658 A.2d 559 (1995) ("The standard of review on appeal from a zoning board's decision to grant or deny a variance is well established. We must determine whether the trial court correctly concluded that the board's act was not arbitrary, illegal or an abuse of discretion. . . . Courts are not to substitute their

judgment for that of the board . . . and decisions of local boards will not be disturbed so long as honest judgment has been reasonably and fairly exercised after a full hearing. . . . Upon appeal, the trial court reviews the record before the board to determine whether it has acted fairly or with proper motives or upon valid reasons. . . . We, in turn, review the action of the trial court. . . . The burden of proof to demonstrate that the board acted improperly is upon the plaintiffs." [Citations omitted; internal quotation marks omitted.]); see also *Caruso* v. *Zoning Board of Appeals*, 320 Conn. 315, 321, 130 A.3d 241 (2016) ("[a] zoning board of appeals is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal" [internal quotation marks omitted]).[8]

The path to affirmance, in my view, does not require us to ascend to constitutional heights. As the majority correctly points out in quoting *E & F Associates, LLC* v. *Zoning Board of Appeals*, 320 Conn. 9, 15, 127 A.3d 986 (2015), a variance may be granted upon a showing by the landowner that, " 'because of some peculiar characteristic of [the] property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone. . . . Accordingly, we have [concluded that a zoning board of appeals may] grant a variance only when two basic requirements are satisfied: (1) the variance must be shown not to affect

[8] This situation should not be confused with that in which the hardship claim is made on the basis of economic hardship and the underlying facts indisputably establish that the property retains some economically viable use, in which case the standard of review is plenary. *E & F Associates, LLC* v. *Zoning Board of Appeals*, 320 Conn. 9, 14–15, 127 A.3d 986 (2015) ("[T]he question of whether the board had authority to grant a variance pursuant to [General Statutes] § 8-6 (a) when the property would not lack economic value even if the variance were denied is a question of law. Accordingly, our review is plenary.").

substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan. . . . Proof of exceptional difficulty or unusual hardship is absolutely necessary as a condition precedent to the granting of a zoning variance.' " This legal standard is prescribed by statute; see General Statutes § 8-6 (a) (3);[9] and we must be careful not to change its meaning by judicial gloss.

Under the circumstances of this case, I do not agree with the majority that the statutory hardship standard is effectively "one and the same" as the legal standard establishing a constitutional violation under the takings clause. I certainly understand how the majority arrived at this conclusion, because our cases, especially recently, paint with the same broad brush in describing the hardship doctrine.[10] Unfortunately, some of these

[9] Section 8-6 (a) provides in relevant part: "The zoning board of appeals shall have the following powers and duties . . . (3) to determine and vary the application of the zoning bylaws, ordinances or regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual hardship so that substantial justice will be done and the public safety and welfare secured, provided that the zoning regulations may specify the extent to which uses shall not be permitted by variance in districts in which such uses are not otherwise allowed. . . ."

[10] See, e.g., *Barton* v. *Norwalk*, 326 Conn. 139, 148 n.6, 161 A.3d 1264 (2017) ("[t]he unusual hardship test in zoning variance cases and the substantial destruction test in inverse condemnation cases require a showing that the property cannot be utilized for any reasonable purpose"); *Caruso* v. *Zoning Board of Appeals*, supra, 320 Conn. 322–23 ("Unusual hardship may be shown by demonstrating that the zoning regulation has deprived the property of all reasonable use and value, thereby practically confiscating the property. This contention 'sits at the intersection of two related, yet distinct, areas of law: land use regulation and constitutional takings jurisprudence.' . . . In Connecticut, a taking occurs 'when a landowner is prevented from making any beneficial use of its land—as if the government had, in fact, confiscated

cases have overlooked an important doctrinal qualification when they observe that the zoning hardship standard is "the same" as the constitutional takings standard: the (very high) standard applied to adjudicate constitutional claims properly is used to decide variance applications *only when the landowner relies on a claim of economic or financial hardship to justify the variance.*

This critical doctrinal limitation can be discerned by a close reading of most of our zoning cases invoking the heightened standard, because those cases, which usually involve commercial landowners, indicate that the standard applies when the owner's hardship is based on the economic or financial impact of the zoning restriction at issue.[11] The qualification was more clearly

it.' . . . Accordingly, a zoning regulation 'permanently restricting the enjoyment of property to such an extent that it cannot be utilized for any reasonable purpose goes beyond valid regulation and constitutes a taking without due process.' . . . The same analysis is used in the variance context because, when the regulation 'practically destroys or greatly decreases [the property's] value for any permitted use to which it can reasonably be put' . . . the loss of value alone may rise to the level of a hardship." [Citations omitted.]).

[11] See, e.g., *E & F Associates, LLC* v. *Zoning Board of Appeals*, supra, 320 Conn. 16 ("considerations of financial disadvantage—or, rather, the denial of a financial advantage—do not constitute hardship, unless the zoning restriction greatly decreases or practically destroys [the property's] value for any of the uses to which it could reasonably be put" [internal quotation marks omitted]); *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 295, 947 A.2d 944 (2008) (same); *Vine* v. *Zoning Board of Appeals*, 281 Conn. 553, 561, 916 A.2d 5 (2007) ("Disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions, does not, ordinarily, warrant relaxation in his favor on the ground of . . . unnecessary hardship. . . . Financial considerations are relevant only in those exceptional situations where a board could reasonably find that the application of the regulations to the property greatly decreases or practically destroys its value for any of the uses to which it could reasonably be put and where the regulations, as applied, bear so little relationship to the purposes of zoning that, as to particular premises, the regulations have a confiscatory or arbitrary effect." [Internal quotation marks omitted.]); *Grillo* v. *Zoning Board of Appeals*, 206 Conn. 362, 369, 537 A.2d 1030 (1988) (same).

evident in some of our earlier cases.[12] I fear that if we are not careful, the qualification is at risk of being forgotten altogether.

The distinction between the constitutional standard and the zoning law standard has been noted by various courts and commentators. See *Belvoir Farms Homeowners Assn., Inc.* v. *North*, 355 Md. 259, 282, 734 A.2d 227 (1999) ("We reject the proposition that the unnecessary or unwarranted hardship standard is equal to an unconstitutional taking standard. If this were true, it would be a superfluous standard because the constitutional standard exists independent of variance standards."); *First North Corp.* v. *Board of Zoning Appeals*, 8 N.E.3d 971, 984 (Ohio 2014) ("[T]he unnecessary hardship standard for granting use variances is not the same as the constitutional taking standard. The 'hardship' standard necessarily admits that there is *some* use for land, but that use works an unnecessary hardship on the

[12] A good example is the following statement of the hardship doctrine authored by Chief Justice Maltbie in *Devaney* v. *Board of Zoning Appeals*, 132 Conn. 537, 542–43, 45 A.2d 828 (1946): "Disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions, does not, ordinarily, warrant relaxation in his favor on the ground of practical difficulty or unnecessary hardship. Financial considerations alone . . . cannot govern the action of the [zoning] board. . . . Otherwise, there would be no occasion for any zoning law. . . . There are, however, situations where the application of zoning to a particular property greatly decreases or practically destroys its value for any permitted use and the application of the ordinance bears so little relationship to the purposes of zoning that, as to that property, the regulation is in effect confiscatory or arbitrary. . . . Provisions authorizing variation in the application of the ordinance are designed to permit changes which will prevent such results. . . . *Where the only basis of the claim is economic loss from the application of the ordinance*, there rarely would be justification for a variation unless this test is met. *Where other considerations enter into the situation, the question necessarily must be left to the sound discretion of the board, acting within the limitations which we have pointed out, and always with regard to serving the general purposes to accomplish which a zoning ordinance is adopted and to the necessity that all property owners within a zone be treated fairly and equally*." (Citations omitted; emphasis added; internal quotation marks omitted.)

landowner. The taking standard . . . is one applying to 'a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land.' . . . The difference between the two standards explains why a variance from a zoning ordinance can be granted under conditions in which the application of that particular zoning ordinance would not result in an unconstitutional taking of property." [Citation omitted; emphasis in original.]); *State* v. *Board of Adjustment*, 244 Wis. 2d 613, 642, 628 N.W.2d 376 (2001) ("[t]he unnecessary hardship standard 'is *neither* the same nor as demanding as a takings analysis' " [emphasis in original]); 8 E. McQuillin, Municipal Corporations (3d Ed. Rev. 1991) § 25.167, p. 761 ("[a] condition of difficulty or hardship is not deemed equivalent to a taking of property, in the constitutional sense").[13]

Once the limitation is acknowledged, the legal analysis applicable to the present case becomes straightforward. As previously mentioned, the question is whether the plaintiff has carried his burden of proving that the zoning board abused its discretion when it found that (1) the variances do not substantially affect the comprehensive zoning plan, and (2) adherence to the strict letter of the relevant zoning ordinances causes Breunich to suffer an unusual hardship unnecessary to carrying out the general purpose of the zoning plan. See *E & F Associates, LLC* v. *Zoning Board of Appeals*, supra, 320 Conn. 15.

The variance application at issue in this case did not rely at all on a claim of financial deprivation. The basis

[13] Although, to the best of my knowledge, the distinction has not clearly been made in any holding of this court, Justice Shea articulated the point with precision in a dissenting opinion: "Such a finding was not essential in order to satisfy the requirement of 'unusual hardship' for a variance, because a zoning board of appeals is not restricted to providing relief only in situations where enforcement of the regulations would create a hardship sufficient to constitute an unconstitutional taking." *Adolphson* v. *Zoning Board of Appeals*, 205 Conn. 703, 720, 535 A.2d 799 (1988) (*Shea, J.*, dissenting).

for the requested variances was not that Breunich's property had lost value or his income would be diminished unless he was allowed to rebuild the sea cottage. His claim, rather, was predicated on the unusual nature of the hardship suffered as a result of the confluence of four factors: (1) the sea cottage is a century old nonconforming structure that will be gone forever if a variance is not granted;[14] (2) the sea cottage is located within the VE and AE Flood Zones under FEMA standards, which are incorporated into the zoning regulations; (3) "it would be impossible for [Breunich] to meet the more stringent flood zone restrictions without further increasing the height of the sea cottage"; and (4) although the zoning regulations had been amended to dispense with the need for variances for main houses, the sea cottage is an accessory structure for which a variance is required. Under these unusual factual circumstances, moreover, the zoning board concluded that the requested variances did not undermine the comprehensive zoning plan but, to the contrary, brought "the sea cottage into compliance with the current FEMA and city of Stamford flood regulations."

I would hold that the zoning board was entitled to determine, as it did, that Breunich satisfied the applica-

[14] Breunich's interest in preventing the complete loss of the nonconforming sea cottage is significant, not because it is entitled to constitutional protection under these circumstances, but because it represents something significantly different than a desire to expand a nonconformity or modernize a structure merely to satisfy the personal preferences of the owner. In combination with the other three factors identified here, this consideration distinguishes the present case from situations in which courts have concluded that a hardship has not been established. See *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 691, 111 A.3d 473 (2015) ("The case law is replete with instances in which an applicant predicated its claim of hardship on a desire to expand an existing nonconforming structure for what our appellate courts have characterized as personal considerations, such as the desire to obtain more space or to modernize an antiquated building. It long has been held that 'disappointment in the use of property can hardly constitute practical difficulty or unnecessary hardship within the meaning of a zoning law or regulation.' ").

ble legal standard required to establish an unusual hardship. The sea cottage was severely damaged by a hurricane. It could not be rebuilt exactly as before due to FEMA and city of Stamford flood regulations. These regulations not only relate directly to public health and safety,[15] but, as the majority emphasizes, the failure of a municipality to promulgate and enforce such regulations could render properties throughout the entire municipality ineligible for protection under the National Flood Insurance Program, a federal program making flood insurance available to those who would otherwise be unable to procure it.

This confluence of factors—a catastrophic natural event causing severe damage, property conditions and legal imperatives making "as before" restoration flatly impossible, and good faith efforts by the landowner to reduce the nonconformities to the maximum extent possible under the circumstances—are sufficient, in my view, to warrant the zoning board's finding that Breunich had established the existence of an unusual hardship, and I therefore would affirm the judgment of the trial court dismissing the appeal. I note that two other trial courts recently have reached similar conclusions in similar cases involving the reconstruction of storm damaged, nonconforming beachfront homes. See *Turek* v. *Zoning Board of Appeals*, Superior Court, judicial district of Hartford, Docket No. LND-CV-15-6063404-S

[15] The trial court recognized this point: "[T]he increased nonconformity does not have the singular purpose of enhancing [Breunich's] personal use of the sea cottage, but instead has the purpose of bringing the sea cottage into compliance with the current FEMA and city of Stamford flood regulations. The only way for [Breunich] to comply with both of these regulations is to increase the height of the structure by elevating the lowest horizontal point of the home an additional eight feet. . . . The record shows that the usable space of the sea cottage is not increasing, but the existing structure is simply moving upward and three feet north to meet flood requirements. . . . In addition, the livable space within the sea cottage is not changed as a result of the variance." (Citations omitted.)

(April 4, 2018) (66 Conn. L. Rptr. 363, 361); *Kwesell* v. *Zoning Board of Appeals*, Superior Court, judicial district of New Haven, Docket No. NNH-CV-15-6056545–S (May 25, 2017) (64 Conn. L. Rptr. 549, 552–54).

Little needs to be said in response to the plaintiff's argument that the zoning board erroneously concluded that the hardship suffered by Breunich was not different in kind from that generally affecting properties in the same zone. See, e.g., *Garibaldi* v. *Zoning Board of Appeals*, 163 Conn. 235, 238, 303 A.2d 743 (1972) ("[i]t is clear that for a hardship to justify the granting of a variance, the hardship must be different in kind from that affecting generally properties in the same zoning district") There is no reason to partake in the majority opinion's willingness to assume the truth in the plaintiff's contention on this point. The plaintiff misapprehends the issue by arguing that there are many other properties in the flood zone required to comply with the applicable flood regulations, there were many other buildings destroyed by Hurricane Sandy, and nothing makes Breunich's case special. The argument misses the fact that Breunich's contention was that his hardship consisted of the unusual confluence of factors and features making his situation different, namely, the hurricane's destruction of a nonconforming accessory structure located in a highly restrictive flood zone subject to the mandatory flood regulations. The plaintiff, for his part, offers nothing but speculative hypotheses to suggest that any significant number of other landowners were similarly affected. On the other hand, the transcript of the zoning board's meeting on Breunich's application reflects both that its members were fully aware of the legal standard requiring an unusual impact on the applicant, and that the board, upon consideration, found that this requirement had been met.[16] See

[16] At that meeting, a member of the zoning board observed that Breunich's situation was "differen[t]" because it involved an accessory building rather

Francini v. *Zoning Board of Appeals*, 228 Conn. 785, 791, 639 A.2d 519 (1994) (noting that zoning board members "are entitled to take into consideration whatever knowledge they acquire by personal observation" [internal quotation marks omitted]).

For these reasons, I agree with the majority's conclusion that "the trial court correctly determined that the zoning board properly granted Breunich's application for variances from the regulations and, therefore, properly dismissed the plaintiff's appeal." Accordingly, I concur in the judgment.

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than a "main house," which was subject to different regulations. While they expressed some uncertainty, the members of the zoning board opined that there are "a few," but "not many," such structures in Stamford.

ORDERS

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MANUEL MOUTINHO, TRUSTEE *v.* 500 NORTH AVENUE, LLC, ET AL.

MANUEL MOUTINHO, TRUSTEE *v.* 1794 BARNUM AVENUE, INC., ET AL.

MANUEL MOUTINHO, TRUSTEE *v.* RED BUFF RITA, INC., ET AL.

The petition by the defendant 500 North Avenue, LLC, for certification to appeal from the Appellate Court, 191 Conn. App. 608 (AC 36115), is denied.

Jonathan J. Klein and *Stephen R. Bellis*, in support of the petition.

James N. Nugent, in opposition.

Decided October 18, 2019

STATE OF CONNECTICUT *v.* KERLYN T.

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 476 (AC 40163), is granted, limited to the following issue:

"Did the Appellate Court correctly hold that the trial court properly found the defendant's waiver of his right to jury trial was constitutionally valid?"

James B. Streeto, senior assistant public defender, in support of the petition.

Melissa L. Streeto, senior assistant state's attorney, in opposition.

Decided October 18, 2019

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE
v. ELIZABETH P. CONRAD ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 189 Conn. App. 908 (AC 40688), is denied.

Elizabeth P. Conrad, self-represented, in support of the petition.

David M. Bizar, in opposition.

Decided October 22, 2019

ROGER B. *v.* COMMISSIONER
OF CORRECTION

The petitioner Roger B.'s petition for certification to appeal from the Appellate Court, 190 Conn. App. 817 (AC 39919), is denied.

Deren Manasevit, assigned counsel, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided October 22, 2019

ROGER B. *v.* COMMISSIONER
OF CORRECTION

The state's petition for certification to appeal from the Appellate Court, 190 Conn. App. 817 (AC 39919), is denied.

James M. Ralls, assistant state's attorney, in support of the petition.

Deren Manasevit, assigned counsel, in opposition.

Decided October 22, 2019

ANGELA DUDLEY *v.* COMMISSIONER OF TRANSPORTATION ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 628 (AC 40702), is denied.

Lorinda S. Coon, in support of the petition.

Thor Holth, in opposition.

Decided October 22, 2019

CONNECTICUT CENTER FOR ADVANCED TECHNOLOGY, INC. *v.* BOLTON WORKS, LLC

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 842 (AC 41225), is denied.

Joshua C. Shulman, in support of the petition.

Natalie J. Real, in opposition.

Decided October 22, 2019

STATE OF CONNECTICUT *v.* ANGEL CARRASQUILLO

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 665 (AC 41806), is denied.

Jennifer Bourn, supervisory assistant public defender, in support of the petition.

Robert J. Scheinblum, senior assistant state's attorney, in opposition.

Decided October 22, 2019

ANDRZEJ KUSY *v.* CITY OF NORWICH ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 192 Conn. App. 171 (AC 41721), is denied.

ECKER, J., would grant the petition.

Matthew T. Wax-Krell and *Andrew W. Krevolin*, in support of the petition.

Decided October 22, 2019

WELLS FARGO BANK, N.A., TRUSTEE *v.* SAUNDRA MAGANA ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 42840) is denied.

Saundra Magana, self-represented, in support of the petition.

Decided October 22, 2019

THE BANK OF NEW YORK MELLON, TRUSTEE *v.* WILLIAM J. RUTTKAMP ET AL.

The defendant Shlomit Ruttkamp's petition for certification to appeal from the Appellate Court (AC 42865) is denied.

Shlomit Ruttkamp, self-represented, in support of the petition.

Benjamin T. Staskiewicz, in opposition.

Decided October 22, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 194

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

MICHAEL ABEL ET AL. *v.* CELESTE M. JOHNSON
(AC 41058)

Keller, Moll and Beach, Js.

Syllabus

The plaintiffs, owners of property in a subdivision, sought to enjoin the defendant abutting property owner from violating certain restrictive covenants in connection with deeds to the parties' properties. The first deed restriction, which limited the land to residential use only, was contained in a 1956 deed, whereby the original grantors conveyed the land to a housing developer, E Co. In a 1961 declaration executed by E Co., restrictions regarding the keeping of chickens and the parking of commercial vehicles were added. At trial, the defendant admitted to operating a landscaping company from her property and keeping chickens on her property, and that several vehicles on her property were used in conjunction with her landscaping business. The trial court found that the plaintiffs had standing to enforce the restrictive covenants contained in the 1956 deed and the 1961 declaration on the grounds that the parties' properties were part of a common scheme of development and both parties' deeds contained the restrictive covenants at issue. The trial court rendered judgment in favor of the plaintiffs and

awarded the plaintiffs injunctive relief. On the defendant's appeal to this court, *held:*

1. The trial court improperly determined that the plaintiffs had standing to enforce the restrictive covenant in the 1956 deed that limited the use of the defendants' property for residential purposes, as there was no allegation or evidence that the plaintiffs were the original grantors of the 1956 deed or their successors in interest; the restrictive covenants set forth in the 1956 deed were expressly intended to inure to the benefit of the remaining land of the original grantors of the premises conveyed in the 1956 deed, which were subsequently conveyed to the parties, the plaintiffs had neither alleged nor proven that they were entitled to enforce the restrictive covenants at issue under a theory of mutuality of covenant and consideration, the original grantors, for their benefit, extracted covenants from the grantees of the 1956 deed, and there was no language in the deed that suggested that the restrictive covenants were intended to benefit the original or subsequent grantees of the 1956 deed, or that the original grantors were dividing their property into building lots, thereby imposing the restrictive covenants upon grantees as part of a general developments scheme, as the restrictive covenants at issue fell within the class of covenants exacted by a grantor from his grantee presumptively or actually for the benefit and protection of the adjoining land that he retained.

(*One judge dissenting*)

2. The trial court erred in awarding injunctive relief regarding the storage of the defendant's pickup truck as a commercial vehicle pursuant to a restrictive covenant contained in the 1961 declaration concerning the storage of commercial vehicles, as such relief was beyond the scope of the plaintiffs' operative complaint; although that court had denied the plaintiffs' request to amend the complaint to include a claim for relief pursuant to the restrictive covenant in the 1961 declaration concerning the storage of commercial vehicles, it expressly referred to that restrictive covenant in awarding injunctive relief, and the plaintiffs could not prevail on their claim that the relief awarded was proper because their complaint sought broad relief with respect to any type of commercial activity pursuant to the 1956 restrictive covenant limiting the use of the property for residential purposes only, this court having determined that the plaintiffs lacked standing to enforce that restriction in the 1956 deed.

3. The defendant could not prevail on her claim that the plaintiffs' action seeking injunctive relief concerning the keeping of chickens on the defendant's property was moot in light of the fact that she had removed the chickens from her property prior to the commencement of the action: although there was undisputed evidence that the chickens were no longer present on the defendant's property, the trial court had jurisdiction to consider the claim and to afford the plaintiffs practical relief, as the defendant still owned the chickens, the coops remained on her

property, the defendant previously attempted to get permission from her neighbors, as required by the restrictive covenant, to keep continue keeping the chickens on her property, and no evidence was presented to establish that she did not intend to resume the prohibited conduct in the future; moreover, the trial court erred in awarding injunctive relief that indefinitely prohibited chickens on the defendant's property, as the court's order constituted a blanket prohibition against the defendant and precluded her from availing herself of any permissible exceptions in the future, including the right, under the 1961 restrictive covenant, to periodically seek permission from her neighbors to keep chickens on her property, and, therefore, the court exceeded the scope of the restrictive covenant it purported to enforce.

Argued March 7—officially released November 5, 2019

Procedural History

Action for, inter alia, injunctive relief barring the defendant from violating restrictive covenants on certain of the defendant's real property, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee; judgment for the plaintiffs, from which the defendant appealed to this court. *Reversed in part; vacated in part; judgment directed.*

Heather M. Brown-Olsen, for the appellant (defendant).

John R. Harness, for the appellees (plaintiffs).

Opinion

KELLER, J. In this action to enforce restrictive covenants, the defendant, Celeste M. Johnson, appeals from the judgment of the trial court, rendered following a trial to the court, in favor of the plaintiffs, Michael Abel and Carol Abel. The defendant claims that the court erred (1) in its determination that the plaintiffs had standing to enforce a restrictive covenant that appears in a deed that was executed by the original grantors of

the parties' real properties[1] and (2) by granting the plaintiffs injunctive relief on the basis of two restrictive covenants that appeared in a declaration of restrictions that applied to the parties' real properties. We affirm in part and reverse in part the judgment of the trial court.

The record reveals the following procedural history. In their one count complaint, the plaintiffs alleged that they own real property located at 37 Mill Stream Road in Stamford and that the defendant owns real property located at 59 Mill Stream Road in Stamford. The plaintiffs alleged that their property abutted that of the defendant, and that both properties are located in a subdivision named the Saw Mill Association.

The plaintiffs alleged: "The plaintiffs' property and the defendant's property are subject to certain restrictive covenants recorded in volume 792 at page 118 of the Stamford land records which states that property shall be used for private residential purposes only." Also, the plaintiffs alleged: "The plaintiffs' property and the defendant's property are also subject to certain restrictive covenants recorded in volume 917 at page 114 of the Stamford land records which state in relevant part that no animals, poultry or water fowl, except usual pets quartered within the family dwelling at night shall be kept on a tract." The plaintiffs alleged that the restrictive covenants "are common to all tracts or parcels of land located within the area or subdivision known as the Saw Mill Association."

[1] We note that the defendant raised three distinct claims on appeal. The first claim that we analyze in this appeal, which concerns the issue of standing, encompasses the issues raised in the first two claims that are set forth in the defendant's brief. These claims are (1) whether the court properly concluded that the plaintiffs had "standing to enforce a private deed restriction that was expressly stated to inure to the benefit of the retained land of the grantor" and (2) whether, in determining that the plaintiffs had standing to enforce the restrictive covenants in the deed, the court properly concluded "that the deed restrictions at issue in this case were collectively part of a common plan of development . . . ."

The plaintiffs further alleged: "The defendant is violating the restrictive covenants by maintaining chickens and chicken coops upon the defendant's property and by conducting a landscaping business from the defendant's property." Also, the plaintiffs alleged: "The defendant has not obtained consent from the Saw Mill Association . . . the plaintiffs or any neighboring property owner to maintain chickens upon the defendant's property or to conduct a landscaping business from the defendant's property." The plaintiffs alleged that they had demanded that the defendant cease and desist the activities at issue, but the defendant had failed to comply with their demand. The plaintiffs alleged that they had suffered and would continue to suffer irreparable harm as a result of the activities at issue, and that they lacked an adequate remedy at law. The plaintiffs sought injunctive relief ordering the defendant to immediately cease and desist from violating the restrictive covenants and such other relief as the court deemed equitable and proper.

In her answer, the defendant admitted owning 59 Mill Stream Road, which abuts the plaintiffs' property, but she denied that she had violated any restrictive covenant by virtue of her keeping chickens or by virtue of her landscaping business, denied that she had failed to obtain consent to conduct her landscaping business, and denied that the plaintiffs had suffered harm or would continue to suffer harm as a result of her alleged violation of the restrictive covenants at issue. Otherwise, the defendant left the plaintiffs to their proof. The defendant raised four special defenses sounding in the following legal theories: (1) equitable estoppel and waiver; (2) unclean hands;[2] (3) ripeness, mootness, and frustration of purpose; and (4) a claim that the action was time barred pursuant to General Statutes § 52-575a in that the plaintiffs did not commence the action

[2] At trial, the defendant abandoned the special defense of unclean hands.

within three years from the time that they had actual or constructive knowledge of the alleged violations of the restrictive covenants. By way of a reply, the plaintiffs denied all of the special defenses.

The trial court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, held a trial in this matter on June 29 and 30, 2017. On August 24, 2017, the court rendered its judgment by way of a memorandum of decision that provides, in relevant part, as follows: "The defendant . . . resides with her husband, Eusevio Martinez, at 59 Mill Stream Road, Stamford . . . . The plaintiffs . . . reside at 37 Mill Stream Road, Stamford . . . . The plaintiffs' property abuts the defendant's property, and both parcels of land are located within a subdivision known as the Saw Mill Association.

"The court finds the [plaintiffs] aggrieved as being . . . adjoining property [owners].

"Both properties are subject to three deed restrictions. The first restriction, [as modified by an agreement] dated March 27, 1957, states that 'said premises shall be used for private residential purposes only (except that a residence may be used for professional purposes by a member of a profession occupying the same as his home to the extent that such use is permitted from time to time by the applicable zoning regulations of the city of Stamford).' The second restriction is dated March 15, 1961, and states that 'no animals, poultry or water fowl, except usual pets quartered within the family dwelling at night, shall be kept on a tract.' The third restriction is also dated March 15, 1961, and states that 'any commercial vehicle used by an occupant of a tract shall be kept within a garage with doors closed, except for brief periods required for loading or unloading.'

"At trial, the defendant testified that she operates a landscaping business from her property, that chickens

were on the property but have since been removed, and that various vehicles parked on her property are used in conjunction with her landscaping business. . . .

"The plaintiff[s] [argue] that the three deed restrictions listed above are part of a common development scheme and, therefore, they are able to bring this action to enforce the restrictions against the defendant. . . .

"The defendant argues that the deed restrictions on her property are the result of covenants exacted by the original landowner from the developer of the Saw Mill Association for the benefit and protection of his adjoining land which he retains and, as a result, the [plaintiffs] cannot enforce the deed restrictions. In addition, the defendant asserts four special defenses . . . ." (Footnotes omitted.)

After setting forth relevant legal principles, the court stated: "The plaintiffs submitted multiple deeds from various properties of the Saw Mill Association that contained the restrictive covenant[s] they seek to enforce. In addition, the deeds from both parties contain the deed restrictions at issue in this case. . . . The court is satisfied that both the [plaintiffs'] and defendant's properties are part of a common scheme of development. Therefore, the plaintiffs may enforce the deed restrictions against the defendant. Without a showing by the defendant that the enforcement of those deed restrictions would be inequitable or that a special defense applies, the court will enforce the restrictions."

The court then addressed the special defenses: "The defendant argues that the plaintiffs are estopped from enforcing the restrictive covenants regarding the operation of a home business because they previously utilized services from the landscaping business. . . .

"Even if the plaintiffs hired the defendant's company in its capacity as a landscaping company, no evidence

submitted at trial supports the proposition that the defendant changed her position in response to the [plaintiffs'] offer of work. Nor is there evidence that the defendant was prejudiced by accepting the work from the [plaintiffs]. . . . Therefore, the defendant has failed to prove the special defense of equitable estoppel.

"The defendant also argues that with respect to the covenant involving poultry, this action is moot and not justiciable because the chickens that were on the property have been removed prior to the start of trial. . . .

"Both parties agree that the chickens have been removed from the defendant's property. In addition, both parties agree that the chicken coops are still on the defendant's property. The defendant testified that she moved the chickens to another property she owns and does not have plans to return them to her property at 59 Mill Stream Road. Given that an injunction against the defendant regarding the enforcement of the 1961 covenant would provide practical relief to the [plaintiffs] and would resolve any ambiguity about whether the chickens could be returned to the property, this court does not find the issue moot. Therefore, the injunction regarding poultry and water fowl and the [plaintiffs'] request to order an injunction is not moot, and the defendant's special defense has not been proven.

"The defendant argues that the plaintiffs' action is barred by the three year statute of limitations provided in . . . § 52-575a. General Statutes § 52-575a provides in relevant part: 'No action or any other type of court proceedings shall be brought to enforce a private restriction recorded in the land records of the municipality [in which the property is located] . . . [unless such action or proceeding] shall be commenced within three years of the time that the person seeking to enforce such restriction had actual or constructive

knowledge of such violation.' 'Section 52-575a requires that a violation occur before the statute begins to run'. . . .

"The defendant submitted evidence and elicited testimony from [the] plaintiff Michael Abel at trial which indicated that the plaintiffs had actual knowledge of the defendant's landscaping business. The defendant submitted checks dated in 2007 that the [plaintiffs] used to pay for landscaping services from the defendant. In addition, [Michael Abel] testified that he knew the defendant and her husband were attempting to start a business and hired them in order to help them with [the] financial troubles he knew they were having. If this were the only evidence and testimony relevant to the defendant's breach of the restrictive covenant involving the operation of a home business, then perhaps the statute of limitations would apply and bar the [plaintiffs'] claim.

"Instead, the defendant has been continually expanding the operations of her home business. These expansions involve deliveries of mulch, chipping tree branches, maintenance of landscaping equipment, and the parking of several employee vehicles on her property or in front of her home. The defendant put forth arguments and testimony that some of these activities are for personal use as she operates a farm at a separate location. This testimony conflicts with other testimony provided by the defendant and other witnesses, which described the expansion of the landscaping business and the increasing number of clients the defendant serves with her business. In addition, the plaintiff[s] provided testimony and a letter addressed to a neighbor from the defendant that indicated [that] the defendant was in possession of a large delivery of mulch and that she could provide mulch in conjunction with other landscaping services. These violations have taken place in the three years before this suit was brought."

After the court referred to some of the photographic evidence submitted by the plaintiffs concerning the activities that took place and equipment that was present on the defendant's property, the court stated: "The exhibits and photographs clearly show that the premises are not being solely used for residential purposes, but rather a landscaping business. The only use for the property outside of residential is for professional use by a member of a profession.

"Within the past three years, the defendant's new and expanding uses of her property in relation to her home business continue to increase beyond the simple founding of a business and operation from the home. Since these new violations of the restrictive covenant have been occurring in pursuit of expanding her home business, and continue to increase since the time that the plaintiffs originally knew about the business, their action is not time barred by § 52-575a. It would not be in the interest of justice to find that once a person violates a restrictive covenant in a minor way, and the other party does not bring suit, they can continue violating it in progressively larger ways once the statute of limitations expires. For this reason, the court does not find that the defendant has [satisfied her] burden of showing that it would be inequitable to enforce the covenant against her. Therefore, the statute of limitations special defense has not been proven.

"The plaintiff[s] [argue] that the defendant's vehicles used in connection with the landscaping business are commercial vehicles and subject to the restrictive covenant prohibiting commercial [vehicles] from being parked outside of a closed garage. The defendant argues that the vehicles are her and her husband's private vehicles that are sometimes used in connection with the business and not a commercial vehicle for the purposes of any restrictive covenant or rules of the Saw Mill Association."

Thereafter, the court found in light of the evidence and relevant law that a Dodge pickup truck that the defendant admitted was used in conjunction with her landscaping business was a commercial vehicle for purposes of the restrictive covenants.

The court found that the plaintiffs had proven the allegations set forth in their complaint and that the defendant had failed to prove her special defenses. The court ordered the following injunctive relief:

"(1) An injunction ordering the defendant to immediately cease and desist from violating the restrictive covenants;

"(2) An injunction ordering the defendant from keeping any chickens or roosters upon the defendant's property; (the defendant is not ordered to remove the chicken coops);

"(3) An injunction ordering the [Dodge pickup truck] to be kept within a garage with the doors closed except for brief periods required for loading or unloading;

"(4) An injunction ordering the defendant not to receive and/or store supplies such as mulch and sod at the defendant's property for resale to customers of the landscaping business;

"(5) An injunction ordering the defendant not to allow parking of employees or independent contractor vehicles upon the defendant's property while the employee or independent contractor is working for the landscaping business;

"(6) An injunction ordering the defendant to stop performing chipping of tree branches from the landscaping business upon the defendant's property;

"(7) An injunction ordering the defendant to stop performing repairs of equipment used in connection

with the landscaping business upon the defendant's property."[3] This appeal followed.

I

First, we address the defendant's claim that the court erred in its determination that the plaintiffs had standing to enforce a restrictive covenant that appears in the 1956 deed that was executed by the original grantors of the parties' real properties. We agree with the defendant.

With respect to the restrictive covenants at issue in this appeal, the following relevant facts are not in dispute. In 1956, Horace Havemeyer and Harry Waldron Havemeyer (original grantors) conveyed to a housing developer, Empire Estates, Inc. (Empire Estates), 166.1229 acres of real property in Stamford. The deed related to this conveyance is recorded in volume 792, page 118, of the Stamford land records. In relevant part, the deed provides: "This deed is given and accepted upon the following express covenants and agreements which shall run with the land herein conveyed and shall be binding upon the grantee, its successors and assigns, and shall enure to the benefit of the remaining land of the grantors lying westerly of the premises herein conveyed:

"(1) Said premises shall be used for private residential purposes only (except that a doctor or dentist having a home on said premises may locate his office therein if such use is permitted by the applicable zoning regulations), and no buildings shall be erected or maintained upon said premises except single-family dwelling houses and appropriate outbuildings.

"(2) Said tract shall not be subdivided for building purposes into plots containing less than one (1) acre

[3] After it rendered judgment in the plaintiffs' favor, the court granted a motion to stay the judgment pending the outcome of the present appeal. Also, the court denied a motion to open the judgment filed by the defendants.

in area, and not more than one (1) such dwelling house shall be erected or maintained on any such plot."[4]

In 1961, Empire Estates, through its trustees, Harry E. Terhune and Gordon R. Paterson, executed a declaration of restrictions (declaration) that was recorded in volume 917, page 114, of the Stamford land records. The declaration, which included thirty-five articles and set forth a wide variety of restrictions, did not contain a provision restricting the applicable tracts to private residential use only. In relevant part, the declaration states: "Witnesseth, that said trustees hereby place upon the land records the following restrictions, covenants, agreements, reservations, easements and information which shall govern the use of any tract of land whenever imposed in a deed of conveyance, by reference to this declaration, from any person or corporation authorized by either of the said trustees or their successors, by instrument recorded in the land records, to impose the terms hereof on portions of land owned by such person or corporation and shall run with the land so conveyed and shall enure to the benefit of the owners of tracts of land affected by the terms hereof, to the person or corporation authorized to impose the terms hereof and, where applicable, to the municipality . . . ."

[4] In 1957, an agreement between the original grantors, Empire Estates, and Country Lands, Inc., to whom a portion of the land at issue had been conveyed by Empire Estates, was recorded in volume 808, page 355, of the Stamford land records. Although it does not affect our analysis of the present claim, we observe that the agreement modified the first restrictive covenant in the 1956 deed, set forth previously, as follows: "[T]hat portion of [the] restrictive covenant . . . which is contained within parentheses shall be of no further force and effect and there shall be substituted in lieu of the language contained within parentheses, effective from the date hereof, the following language: (except that a residence may be used for professional purposes by a member of a profession occupying the same as his home to the extent that such use is permitted from time to time by the applicable zoning regulations of the city of Stamford)."

Article 2 of the declaration provides: "No animals, poultry or water fowl, except usual pets quartered within the family dwelling at night, shall be kept on a Tract.[5] Exceptions to this provision may be made for not over two year periods if consented to in writing by the Purchaser[6] of each Tract within two hundred (200) feet of the Tract where the exception is proposed." (Footnotes added.)

Article 8 of the declaration provides: "Any commercial vehicle used by an occupant of a Tract shall be kept within a garage with doors closed, except for brief periods required for loading or unloading."

The final article of the declaration, Article 35, provides in relevant part: "The intent of this Declaration is to protect property values. Developer[7] intends to enforce the provisions of this Declaration whenever it feels its interest may be threatened. Enforcement action may be taken, with or without Developer's participation, by any aggrieved Purchaser of a Tract, or by any group of aggrieved Purchasers represented by a Property Owner's Association, or otherwise.

"Enforcement of this Declaration or any part thereof shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any right herein contained, and said proceedings may be either to restrain any violation thereof, to recover damages therefor, or to require corrective measures to

[5] The declaration defines a "Tract" as "[a] parcel of land shown and delineated on a map filed in the land records of the MUNICIPALITY which has been conveyed by the DEVELOPER to a PURCHASER."

[6] The declaration defines a "Purchaser" as "[a]ny Purchaser of a TRACT upon which this Declaration has been imposed, and his, her or its successors in title."

[7] The declaration defines a "Developer" as "[t]he person or corporation authorized by either of the trustees executing this Declaration or their successors to make subject to this Declaration any property conveyed by said person or corporation."

accomplish compliance with the intent of this Declaration." (Footnote added.)

The deed conveying the property known as 37 Mill Stream Road to the plaintiffs, which was recorded on September 26, 1977, in volume 1680, page 100, of the Stamford land records, provides in relevant part: "Said premises are conveyed subject to any restrictions or limitations imposed or to be imposed by governmental authority, including the zoning and planning and wetlands rules and regulations of the City of Stamford; restrictive covenants and agreements contained in a certain deed from Harry Waldron Havemeyer et al to Empire Estates, Incorporated dated August 14, 1956 and recorded in said records in Book 792 at Page 118, as modified by an Agreement dated March 27, 1957 and recorded in said records in Book 808 at Page 355; a declaration made by Harry E. Terhune and Gordon R. Paterson, as trustees, dated March 15, 1961 and recorded in said records in Book 917 at Page 114 . . . ."

Materially similar language appears in the defendant's chain of title, as well.[8] In a deed conveying the property known as 59 Mill Stream Road and recorded on September 30, 1983, in volume 2296, page 146, of the Stamford land records, the following language appears: "Said premises are conveyed subject to planning and zoning rules and regulations of the City of Stamford and any other Federal, State or local regulations, taxes and assessments of the City of Stamford becoming due and payable hereinafter, restrictive covenants and agreements as contained in a deed from Harry Waldron Havemeyer, et al to Empire Estates, Incorporated dated

[8] It does not appear to be in dispute that the parties' properties are located in the Saw Mill Association, a "neighborhood association" that encompasses 142 properties on eight contiguous streets in Stamford. The plaintiffs presented evidence that the restrictive covenants that appear in the chain of title of the parties' properties are found in the chain of title of several other property owners in the Saw Mill Association.

August 14, 1956 and recorded in the land records of said Stamford in book 792 at page 118, except as the same are modified by an agreement dated March 27, 1957 and recorded in said records in book 808 at page 355, the terms of a declaration made by Harry E. Terhune and Gordon R. Paterson, as Trustees, dated March 14, 1961 and recorded in said records in book 917 at page 114, the rights of others, including the City of Stamford, in and to any brook, river, stream or water flowage easement crossing and bounding said tract of land." This 1983 deed is referred to in the 2006 deed conveying the property to the defendant, which is recorded in volume 8602, page 54, of the Stamford land records.

Having set forth some relevant facts, we turn to the defendant's claim with respect to standing. As set forth previously in this opinion, the court concluded that the plaintiffs had standing to enforce the restrictive covenant in the 1956 deed related to commercial activity, as well as the restrictions set forth in the 1961 declaration concerning the keeping of chickens and the parking of commercial vehicles. The court ruled that the plaintiffs had standing to enforce all of these restrictions because the parties' properties were "part of a common scheme of development" and "the deeds from both parties contain the deed restrictions at issue in this case." The court rejected not only the defendant's special defenses, but her jurisdictional argument that the plaintiffs lacked standing to enforce the restriction in the 1956 deed from the original grantors to Empire Estates, the developer of the properties that are now owned by the plaintiffs and the defendant. As stated previously, the 1956 deed restriction at issue, as modified in 1957, limits the subject premises to "private residential purposes only . . . ."

Echoing the arguments she advanced before the trial court, the defendant claims that the court improperly

concluded that the plaintiffs had standing to enforce the restrictive covenant in the 1956 deed, as modified in 1957, which generally prohibits commercial activity on the property. The defendant argues that the restrictive covenant in the 1956 deed, by its terms, inured to the benefit of the *original grantors*, *Horace Havemeyer and Harry Waldron Havemeyer*, *and their successors*, not to the plaintiffs. Moreover, the defendant argues that the court erroneously determined that the plaintiffs could enforce the restrictive covenant in the 1956 deed because the parties' properties were part of a common scheme of development. We note that the defendant does not dispute that the plaintiffs had standing to enforce the restrictive covenants that appear in the 1961 declaration, which, thereafter, were imposed on the original grantees of the parties' properties when Empire Estates conveyed its interests in individual tracts to such grantees.

"If a party is found to lack standing, the court is without subject matter jurisdiction to hear the case. Because standing implicates the court's subject matter jurisdiction, the plaintiff ultimately bears the burden of establishing standing. A trial court's determination of whether a plaintiff lacks standing is a conclusion of law that is subject to plenary review on appeal. We conduct that plenary review, however, in light of the trial court's findings of fact, which we will not overturn unless they are clearly erroneous. . . . 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. . . . This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision;

where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Success, Inc.* v. *Curcio*, 160 Conn. App. 153, 162, 124 A.3d 563, cert. denied, 319 Conn. 952, 125 A.3d 531 (2015).

To the extent that the standing issue requires us to construe language found in deeds, we observe that "[t]he determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is . . . plenary. . . . Thus, when faced with a question regarding the construction of language in deeds, the reviewing court does not give the customary deference to the trial court's factual inferences." (Internal quotation marks omitted.) *Avery* v. *Medina*, 151 Conn. App. 433, 440–41, 94 A.3d 1241 (2014).

Generally, "restrictive covenants fall into three classes: (1) mutual covenants in deeds exchanged by adjoining landowners; (2) uniform covenants contained in deeds executed by the owner of property who is dividing his property into building lots under a general development scheme; and (3) covenants exacted by a grantor from his grantee presumptively or actually for the benefit and protection of his adjoining land which he retains." (Internal quotation marks omitted.) *Bueno* v. *Firgeleski*, 180 Conn. App. 384, 393–94, 183 A.3d 1176 (2018).

"In the first class [of restrictive covenants] either party or his assigns may enforce the restriction because there is a mutuality of covenant and the rights are reciprocal." *Stamford* v. *Vuono*, 108 Conn. 359, 364, 143 A.

245 (1928). There is no dispute that the restrictive covenant at issue in the 1956 deed, which is not a mutual covenant entered into by adjoining landowners, does not fall within the first class of restrictive covenants.

"With respect to the second class of covenants, any grantee under such a general or uniform development scheme may enforce the restrictions against any other grantee." (Internal quotation marks omitted.) *Cappo* v. *Suda*, 126 Conn. App. 1, 4, 10 A.3d 560 (2011). "In the second class [of restrictive covenants], upon the same theory of mutuality of covenant and consideration [that applies when there are mutual covenants between owners of adjoining lands], any grantee may enforce the restriction against any other grantee." *Stamford* v. *Vuolo*, supra, 108 Conn. 364. "The factors that help to establish the existence of an intent by a grantor to develop a common plan are: (1) a common grantor sells or expresses an intent to put an entire tract on the market subject to the plan; (2) a map of the entire tract exists at the time of the sale of one of the parcels; (3) actual development according to the plan has occurred; and (4) substantial uniformity exists in the restrictions imposed in the deeds executed by the grantor. . . .

"The factors that help to negate the presence of a development scheme are: (1) the grantor retains unrestricted adjoining land; (2) there is no plot of the entire tract with notice on it of the restrictions; and (3) the common grantor did not impose similar restrictions on other lots. . . .

"Early Connecticut case law acknowledges the power of property holders with substantially uniform restrictive covenants obtained by deeds in a chain of title from a common grantor to enforce the restrictions against other owners with similar restrictive covenants. When, under a general development scheme, the owner of property divides it into building lots to be sold by deeds

containing substantially uniform restrictions, any grantee may enforce the restrictions against any other grantee. . . .

"When making a finding as a matter of law that a common development scheme exists, courts look to four factors: (1) the common grantor's intent to sell all of the subdivided plots; (2) the existence of a map of the subdivision; (3) actual development of the subdivision in accordance with the general scheme; and (4) substantially uniform restrictions contained in the deeds of the subdivided plots." (Citations omitted; internal quotation marks omitted.) *DaSilva* v. *Barone*, 83 Conn. App. 365, 371–73, 849 A.2d 902, cert. denied, 271 Conn. 908, 859 A.2d 560 (2004).

"With respect to the third class of covenants, the original grantor, who is the owner of the property benefited, and his assigns may enforce [the covenant] against subsequent purchasers of the property burdened. If the restrictive covenant is for the benefit of the remaining land of the grantor, it is an easement running with the land and may be enforced by a subsequent purchaser of the remaining land against the prior grantee and his successors in title . . . ." (Internal quotation marks omitted.) *Bueno* v. *Firgeleski*, supra, 180 Conn. App. 394. "In the third class [of restrictive covenants], there is no mutuality between the grantees, if there are more than one, and therefore no right in one grantee to enforce the restrictions against another grantee upon [the theory of mutuality of covenant and consideration]." *Stamford* v. *Vuolo*, supra, 108 Conn. 365.

"[W]hen presented with a violation of a restrictive covenant, the court is obligated to enforce the covenant unless the defendant can show that enforcement would be inequitable." *Gino's Pizza of East Hartford, Inc.* v. *Kaplan*, 193 Conn. 135, 139, 475 A.2d 305 (1984); *Grady* v. *Schmitz*, 16 Conn. App. 292, 301–302, 547 A.2d 563

(same), cert. denied, 209 Conn. 822, 551 A.2d 755 (1988). Restrictive covenants, by their nature, are in derogation of the common-law right to use land for all lawful purposes that go with title and possession. See *Pulver* v. *Mascolo*, 155 Conn. 644, 649, 237 A.2d 97 (1967); *Neptune Park Assn* v. *Steinberg*, 138 Conn. 357, 361, 84 A.2d 687 (1951). Accordingly, "[a] restrictive covenant must be narrowly construed and ought not to be extended by implication. . . . Moreover, if the covenant's language is ambiguous, it should be construed against rather than in favor of the covenant." (Citation omitted; internal quotation marks omitted.) *Morgenbesser* v. *Aquarion Water Co. of Connecticut*, 276 Conn. 825, 829, 888 A.2d 1078 (2006); see also *Bueno* v. *Firgeleski*, supra, 180 Conn. App. 411 (same); *Alligood* v. *LaSaracina*, 122 Conn. App. 479, 482, 999 A.2d 833 (2010) (same).[9]

Having narrowed the nature of the claim before us and having set forth the relevant legal principles, we

[9] The dissenting opinion cites to *Contegni* v. *Payne*, 18 Conn. App. 47, 52, 557 A.2d 122, cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989), in support of the principle that property owners have an equitable right to enforce against other property owners restrictions that are imposed as part of a uniform development plan. According to the dissent, "[r]egardless of the genesis" of the restrictive covenant at issue in the present case, equity favors the plaintiffs' ability to enforce it. For several reasons, we disagree with this rationale. In light of the principles cited previously, we are mindful that courts must not extend restrictive covenants by implication. Regardless of Empire Estate's intent, it is undisputed that it failed to include the restriction at issue in its lengthy declaration that applied to the properties in the subdivision. Instead, in the deeds conveying tracts to the parties' predecessors in title, Empire Estates referred to the fact that the tracts were "subject to" the restrictive covenant that appeared in the deed from the original grantor. It is noteworthy that, in the parties' deeds, Empire Estates also referred to the fact that the tracts were "subject to" a variety of additional restrictions or limitations, including but not limited to those which could be imposed by governmental authority, zoning regulations, city regulations, taxes, and easements. Certainly, despite the fact that these additional restrictions or limitations might apply with equal force to the parties and others in their subdivision, it cannot reasonably be suggested that the plaintiffs have the right to enforce them.

turn to the restrictive covenant at issue in the 1956 deed. As we have explained previously, the 1956 deed, executed by the original grantors, set forth two restrictive covenants, one of which limited the land conveyed by the deed to private residential use. The following language precedes reference to the two restrictive covenants: "This deed is given and accepted upon the following express covenants and agreements which shall run with the land herein conveyed and shall be binding upon the grantee, its successors and assigns, *and shall enure to the benefit of the remaining land of the grantors lying westerly of the premises herein conveyed* . . . ." (Emphasis added.)

As the emphasized language reflects, the restrictive covenants set forth in the 1956 deed were expressly intended to inure to the benefit of the remaining land of the original grantors that lies west of the premises conveyed in the 1956 deed. The premises conveyed included tracts that were subsequently conveyed to the plaintiffs and the defendant. The plaintiffs have neither alleged nor proven that they are entitled to enforce the restrictive covenant at issue under a theory of mutuality of covenant and consideration. In the present case, the original grantors, for their benefit, extracted covenants from the grantees of the 1956 deed. Nothing in the unequivocal language of the deed either suggests that the restrictive covenant at issue was intended to benefit the original or subsequent *grantees* of the 1956 deed, or that the original grantors were dividing their property into building lots, thus imposing the restrictive covenant upon grantees as part of a general development scheme. Instead, the covenants unmistakably fall within the class of "covenants exacted by a grantor from his grantee presumptively or actually for the benefit and protection of his adjoining land which he retains." (Internal quotation marks omitted.) *Bueno* v. *Firgeleski*, supra, 180 Conn. App. 394.

Because there is no allegation or evidence that the plaintiffs are the original grantors of the 1956 deed, or their successors in interest, we conclude that they lacked standing to enforce the restrictive covenant in the deed that limited the use of the defendant's property to residential purposes.[10] Accordingly, we conclude that

[10] The dissenting opinion states that *Maganini* v. *Hodgson*, 138 Conn. 188, 192–93, 82 A.2d 801 (1951); *Mellitz* v. *Sunfield Co.*, 103 Conn. 177, 182, 129 A. 228 (1925); *Prime Locations of CT, LLC* v. *Rocky Hill Development, LLC*, 167 Conn. App. 786, 796 n.10, 145 A.3d 317, cert. denied, 323 Conn. 935, 150 A.3d 686 (2016); and *5011 Community Organization* v. *Harris*, 16 Conn. App. 537, 540, 548 A.2d 9 (1988); support the conclusion that because the covenant limiting the use of the property for residential purposes was part of a general development scheme, the plaintiffs had the right to enforce it against the defendant. Respectfully, we believe that the cases cited by the dissent broadly apply to restrictions that are imposed as a *uniform scheme of development*, the very fact that has not been established by the facts in the present case. Further, we believe that the cases cited differ materially from the facts at issue in the present case and, thus, do not support the conclusion that the covenant at issue in the present case is enforceable by the plaintiffs against the defendant.

In *Maganini*, the original grantor of property included a restrictive covenant limiting the use of the property for residential purposes in the deed conveying the property to a developer who subsequently conveyed it by deed to the parties in *Maganini*. *Maganini* v. *Hodgson*, supra, 138 Conn. 190. There is no indication, however, that the original grantor included this covenant for its benefit. The court explained: "The tract was originally deeded to the developer restricted to residential purposes. He put a map on record showing its subdivision. In his first deed [to one of the plaintiffs in *Maganini*], he expressly obligated himself to impose on his remaining land *and recited the restrictions which were repeated in later deeds, in many respects verbatim*. The [trial] court was fully justified in concluding that a uniform plan or scheme existed." (Emphasis added.) Id., 193. Our Supreme Court observed that, in a situation involving "a general development scheme, [in which] the owner of property divides it into building lots to be sold *by deeds containing substantially uniform restrictions*, any grantee may enforce the restrictions against any other grantee." (Emphasis added; internal quotation marks omitted.) Id., 192. In the present case, in deeds to subsequent tract owners, the developer referred to restrictions that expressly inured to the benefit of the original grantor, which restrictions appeared in the deed conveying the property from the original grantor to the developer.

In *Mellitz*, an original grantor conveyed property to a developer by means of a deed that contained a restrictive covenant that, by its terms, ran with the land and was "enforceable at law and equity by the grantor herein named *or by the owner at any time of any portion of said premises*." (Emphasis

the court lacked subject matter jurisdiction over this claim and should have dismissed the plaintiffs' cause of action to the extent that they sought to enforce this restrictive covenant.

II

Next, the defendant claims that the court erred by granting the plaintiffs injunctive relief on the basis of restrictive covenants that appear in the declaration of

added; internal quotation marks omitted.) *Mellitz* v. *Sunfield Co.*, supra, 103 Conn. 179. In light of this language in the deed, our Supreme Court relied on the fact that the restrictions that appeared in the deed between the original grantor and the developer "were for the common benefit of all subsequent lot owners in the tract conveyed." Id., 182. As we have discussed previously in this opinion, the restrictive covenant at issue in the present case expressly inured to the benefit of the original grantor and not to any grantee of the deeded property.

Although *5011 Community Organization* did not involve a claim that a party lacked standing to enforce a covenant in a deed, this court observed that the covenant at issue in that case was included in a majority of the deeds in a subdivision and was part of a common plan of development. *5011 Community Organization* v. *Harris*, supra, 16 Conn. App. 540. This court stated: "The trial court concluded, and we agree, that the restrictions on the subdivision were created to benefit the lot owners. Thirty-seven of the forty-four lots comprising the subdivision contained similar restrictions. Moreover, there was no evidence that [the original grantor] intended to retain ownership of any part of the tract. It is clear that there was a common scheme of development in the original subdivision." Id., 540. In the present case, the original grantor retained a portion of the tract of property conveyed to the developer and expressly stated that the restrictive covenant at issue benefitted the original grantor, not the lot owners. Moreover, unlike the present case, it appears that the covenants at issue in *5011 Community Organization* contained restrictions, not merely reference to restrictions that appeared in the deed conveying the property to the developer.

Finally, the relevant issue of standing in *Prime Locations of CT, LLC*, required this court to determine whether, under a declaration that was a common scheme of development, individual lot owners had standing to enforce restrictions against other lot owners. *Prime Locations of CT, LLC* v. *Rocky Hill Development, LLC*, supra, 167 Conn. App. 794. In the present case, the restriction sought to be enforced by the plaintiffs against the defendant *does not appear* in the declaration of restrictions that was expressly referred to and incorporated by reference in the parties' deeds from the developer.

restrictions that applies to the parties' real properties. We agree.

Having concluded in part I of this opinion that the plaintiffs lacked standing to enforce the restrictive covenant at issue in the 1956 deed, on which the plaintiffs expressly rely, we turn our analysis to the propriety of the relief afforded to the plaintiffs by the court in enforcing the restrictive covenant at issue contained in Article 2 and Article 8 of the 1961 declaration. As stated in part I of this opinion, the defendant acknowledges before this court that the plaintiffs have the right to enforce the restrictive covenants codified in the declaration. Indeed, in Article 35 of the declaration, that right is expressly conveyed on every aggrieved purchaser of a tract of land on which the declaration has been imposed, a class of persons that includes the plaintiffs.

A

Although the defendant acknowledges that the plaintiffs may enforce the restrictive covenants set forth in the declaration, the defendant argues that, in awarding the plaintiffs injunctive relief regarding the Dodge Ram pickup truck, the court improperly afforded the plaintiffs relief under Article 8 of the declaration because the operative complaint did not set forth a claim for relief under this portion of the declaration. The defendant correctly observes that, in their operative complaint, the plaintiffs relied, first, on the restriction in the 1956 deed limiting the use of the property to residential purposes and, second, the restriction in Article 2 of the declaration related to the presence of "animals, poultry, or water fowl," but not the restriction in the declaration, in Article 8, related to the presence of commercial vehicles. In both her principal and reply briefs before this court, the defendant argues that the court improperly relied on, and granted the plaintiffs relief under, Article 8 in light of the fact that the plaintiffs sought to amend

their complaint to include a claim for relief under Article 8 but were denied permission to do so.

The record further reflects that, on May 11, 2017, the plaintiffs filed a request for leave to file an amended complaint. Among the amendments sought by the plaintiffs, in count one, was to rely on and obtain relief with respect to the restrictive covenant in Article 8 of the declaration, which states "that any commercial vehicles used by an occupant of a tract shall be kept within a garage with doors closed except for brief periods for loading or unloading." Additionally, the plaintiffs sought to add a second count in which they sought injunctive relief to restrain the defendant from violating the Stamford zoning regulations by operating a landscaping business from her property. The court, *Povodator*, *J.*, sustained the defendant's written objections to the request for leave to amend.

Following the trial, the defendant filed proposed orders that were based on the complaint dated June 29, 2016, not the proposed revised complaint. In a motion for reconsideration of the court's denial of the defendant's motion to reargue and/or to reconsider its ruling, which the court denied, the defendant argued that the plaintiffs' attempt to enforce the restriction in the declaration related to commercial vehicles was time barred, yet also stated, in relevant part, that the court had denied the plaintiffs' "eleventh hour move" seeking to amend their complaint.

In this appeal, the plaintiffs have not filed a cross appeal to raise a claim of error related to the court's ruling denying their request to amend their complaint. Evidence concerning the Dodge Ram pickup truck was presented at trial by the plaintiffs and, in general terms, they attempted to demonstrate that because it was used in connection with the defendant's landscaping business, it was a commercial vehicle that needed to be

stored in a garage. Presently, the plaintiffs argue that the relief afforded to them with respect to the Dodge Ram pickup truck, however, is not necessarily related to the restrictive covenant in Article 8 of the declaration. They argue that the defendant interprets the operative complaint, which the plaintiffs were not permitted to amend, too narrowly. The plaintiffs further argue that it is of no consequence that they failed in their complaint to specifically allege that they sought to restrict the defendant's storage of commercial vehicles, including the Dodge Ram pickup truck that was the subject of injunctive relief granted to them, or that they did not therein refer explicitly to the restrictive covenant in Article 8 of the declaration. The plaintiffs reason that because they plainly sought in their complaint to enforce the restrictive covenant in the 1956 deed, which restricted the defendant to use her property for residential purposes only, the defendant had sufficient notice that the plaintiffs were seeking relief with respect to *any* type of commercial activity, including the keeping of commercial trucks used in connection with the defendant's landscaping business, such as the Dodge Ram pickup truck. As the plaintiffs argue, "[t]he complaint gave sufficient notice that the defendant would have to cease all commercial activity on the property and comply with the restrictive covenants. Therefore, it would be improper for this court to reverse the judgment based on some sort of late claimed surprise to the defendant or a hyper technicality as to the pleadings."

With respect to this issue, the plaintiffs seem to overlook the significance of the fact that, in its memorandum of decision, the court expressly referred to the restrictive covenant set forth in Article 8 of the declaration and found that "the Dodge pickup truck is a commercial vehicle under the restrictive covenant." We observe that "[t]he principle that a plaintiff may rely only upon what [it] has alleged is basic. . . . It is fundamental in our

law that the right of a plaintiff to recover is limited to the allegations of [its] complaint. . . . What is in issue is determined by the pleadings and these must be in writing. . . . Once the pleadings have been filed, the evidence proffered must be relevant to the issues raised therein. . . . In other words, [a] plaintiff may not allege one cause of action and recover upon another. . . . Indeed, [a] judgment upon an issue not pleaded would not merely be erroneous, but it would be void." (Citations omitted; internal quotation marks omitted.) *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, 187 Conn. App. 282, 298, 202 A.3d 1033 (2019).

To the extent that the court ordered injunctive relief pertaining to the Dodge Ram pickup truck that was, as the plaintiffs suggest, the result of the court's enforcement of a restrictive covenant in the 1956 deed, we conclude for the reasons set forth in part I of this opinion that the plaintiffs lacked standing to enforce such restrictive covenant and, thus, such relief was improper because it flowed from a claim over which the court lacked subject matter jurisdiction. To the extent that the court awarded injunctive relief pertaining to the pickup truck because it was enforcing the restrictive covenant set forth in Article 8 of the declaration, which specifically governs commercial vehicles, such relief was improper because it was premised on a claim that was not properly before the court.[11]

B

We next address the defendant's argument that the relief afforded to the plaintiffs with respect to the keeping of chickens was improper. We agree.

[11] Additionally, the defendant argues that the court failed to expressly resolve the issue of whether her special defense, based on the three year statute of limitations set forth in § 52-575a, defeated any claim related to the presence of the Dodge Ram pickup truck. According to the defendant, the evidence was uncontroverted that the truck was present on her property for more than three years prior to the time that the plaintiffs commenced the present action and, thus, the defense applied to defeat the plaintiffs'

The following facts are relevant to this claim. As set forth previously in this opinion, Article 2 of the declaration provides: "No animals, poultry or water fowl, except for usual pets quartered within the family dwelling at night, shall be kept on a Tract. Exceptions to this provision may be made for not over two year periods if consented to in writing by the Purchaser of each Tract within two hundred (200) feet of the Tract where the exception is proposed."

In its decision, the court observed that the defendant claimed, by way of special defense, that the plaintiffs' claim for enforcement of the restrictive covenant concerning chickens on her property was moot because, prior to trial, she removed the chickens from her property. The court stated: "Both parties agree that the chickens have been removed from the defendant's property. In addition, both parties agree that the chicken coops are still on the defendant's property. The defendant testified that she moved the chickens to another property she owns and does not have any plans to return them to her property at 59 Mill Stream Road. Given that an injunction against the defendant regarding the enforcement of the 1961 covenant would provide practical relief to the [plaintiffs] and would resolve any ambiguity about whether the chickens could be returned to the property, this court does not find the issue moot." Among its orders, the court set forth the following: "An injunction ordering the defendant from keeping any chickens or roosters upon the defendant's property; (the defendant is not ordered to remove the chicken coops) . . . ."

The defendant raises two distinct arguments with respect to the injunctive relief afforded the plaintiffs

claim. In light of our analysis and conclusion in parts I and II A of this opinion, however, it is unnecessary for us to reach the merits of this additional argument.

that applied to the defendant's keeping of chickens or roosters on her property. First, the defendant claims that the court improperly rejected her special defense that the cause of action, insofar as it was based on her keeping of chickens on her property, was rendered moot in light of the undisputed fact that she had removed the chickens from her property prior to the trial. Second, the defendant claims that, even if the issue was justiciable, the court lacked the authority to prohibit her from keeping chickens on her property *forever*, because such order exceeded the scope of the restrictive covenant set forth in Article 2 of the declaration. We address each argument in turn.

1

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . 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. . . . A case is considered moot if [the trial] court cannot grant . . . any practical relief through its disposition of the merits . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Valvo* v. *Freedom of Information Commission*, 294 Conn. 534, 540–41, 985 A.2d 1052 (2010); see also *Mendillo* v. *Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 523, 187 A.3d 1154 (2018) (discussing justiciability). "[I]t is not the province of [the] courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no

practical relief can follow. . . . When . . . events have occurred that preclude [the] court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Dutkiewicz* v. *Dutkiewicz*, 289 Conn. 362, 366, 957 A.2d 821 (2008). "[B]ecause an issue regarding justiciability raises a question of law, our appellate review is plenary." *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 569, 858 A.2d 709 (2004).

In a special defense, the defendant alleged in relevant part, as follows: "(1) On April 6, 2016, the Saw Mill [Association] Board of Directors sent a letter to the defendant signed by Julie Hollenberg, President of the Saw Mill Association.

"(2) The letter directed the defendant to obtain necessary consents from abutting neighbors within 200 feet [of her property] and, if unable to do so, to remove the 'chickens' from [the] defendant's property.

"(3) The defendant did not obtain consent from all neighbors within 200 feet.

"(4) In response to the letter [from] the Saw Mill Association, the defendant has relocated the chickens or any other fowl to another location in the state of Connecticut.

"(5) There are no 'chickens' or other fowl on the defendant's property. The restrictive covenant does not prohibit chicken coops from being on the defendant's property.

"(6) The plaintiffs may not claim that they are entitled to injunctive relief and allege irreparable harm when, in fact, the defendant removed the chickens or other fowl from her property as directed by the Saw Mill Association."

As the court observed in its memorandum of decision, it was not disputed at trial that, prior to the time of trial, the defendant had removed all chickens, but not the chicken coops, from her property at 59 Mill Stream Road. In relevant part, Hollenberg, one of the parties' neighbors and a member of the board of the Saw Mill Association, testified at trial that, in 2016, she became aware of complaints by some of the defendant's neighbors about the fact that the defendant was keeping chickens on her property. Hollenberg raised the issue before the board and spoke with the defendant, who indicated that she had been unaware of the prohibition in Article 2 of the declaration but, after learning of the complaints, had attempted to obtain the necessary permission from her neighbors to continue to keep the chickens on her property in accordance with Article 2. The defendant, however, was unable to obtain the consent of all neighbors. Hollenberg testified that, in her conversations with the defendant concerning the issue, the defendant did not resist her efforts to address the problem and that, after she sent the defendant an "official correspondence" from the board asking her to remove the chickens, the defendant was "very compliant" about doing so.

At trial, the defendant testified that, in either September or October of 2016, she removed the chickens,[12] which had been kept in chicken coops, from her property at 59 Mill Stream Road. She testified, however, that the coops, which were built by her husband, are still present on the property. The defendant testified, as well, that after she had discussed the matter with Hollenberg and was unable to secure permission to keep the chickens on her property in accordance with Article

[12] The defendant testified that, during the time that she kept chickens on the property, she kept a rooster and a hen on her property, in the garage, at 59 Mill Stream Road.

2 of the declaration, she took immediate action by building a new enclosure for the chickens and moving them to a separate farm that she owns in Connecticut.

At the time of trial, the defendant relied on the fact that the chickens were no longer present on the property. The plaintiffs argued that, although the chickens had been relocated by the defendant to her farm and the violation of the restrictive covenant was limited to the presence of the chickens, but not the presence of the chicken coops, the continued presence of the chicken coops on the defendant's property posed a "threat" that the defendant could bring the chicken coops back to her property at any time. The plaintiffs argued "[t]here's no other use for those chicken coops, there's been no testimony in that regard."

We observe that the plaintiffs did not bring a declaratory judgment action pursuant to Practice Book § 17-55 to seek resolution of an ongoing dispute between the parties related to the presence of chickens on the defendant's property. Rather, in their prayer for relief in this action to enforce restrictive covenants, the plaintiffs asked for "[a]n injunction ordering the defendant to immediately remove the chickens and chicken coops from the defendant's property . . . ." Article 35 of the declaration afforded the plaintiffs, as "aggrieved Purchaser[s] of a Tract," the right to enforce the declaration against "any person or persons violating or attempting to violate any right herein contained . . . ."

In its decision, the court acknowledged that the chickens were no longer present at 59 Mill Stream Road but reasoned that enforcing the restrictive covenant in Article 2 of the declaration "would provide practical relief to the [plaintiffs] and would resolve any ambiguity about whether the chickens could be returned to the property . . . ."[13] Thereafter, the court afforded the

[13] We note that the court also observed that "[t]he defendant testified that she . . . does not have any plans to return [the chickens] to her property

plaintiffs relief by prohibiting the defendant from keeping any "chickens or roosters" on her property.

Presently, the defendant argues that the court improperly failed to conclude that the issue concerning chickens was moot. She states: "[The defendant] removed the chickens from her property when she was not able to obtain written permission from her neighbors within 200 feet of her property to keep the chickens. [The defendant] began the process of relocating the chickens to her upstate farm before this action was commenced and finished the process [at] least six months before the trial commenced. [The defendant] kept the chicken coops but got rid of the chickens. Her husband built the chicken coops and [the defendant] believed that they could be put to other uses on her property." Additionally, the defendant argues that "[t]he trial court had no authority to grant injunctive relief against [her] when, in fact, there were no chickens to be removed from the property."

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice, because, [i]f it did, the courts would be compelled to leave [t]he defendant . . . free to return to his [or her] old ways. . . . The voluntary cessation exception to the mootness doctrine is founded on the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior. . . . Thus, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent, and a case becomes moot only if subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. . . . The heavy

at 59 Mill Stream Road." Our review of the defendant's testimony does not support this observation.

burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (Citations omitted; internal quotation marks omitted.) *Boisvert* v. *Gavis*, 332 Conn. 115, 139, A.3d (2019); see also *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 281, 933 A.2d 256 (2007) (relying on fact that defendant had "not alleged, much less established, that it does not intend to resume" activity at issue in concluding that voluntary cessation of activity did not render claim moot).

Although the court did not expressly consider whether the defendant, who asserted the issue of mootness, had satisfied her heavy burden of demonstrating that subsequent events made it *absolutely clear* that the conduct at issue could not reasonably be expected to recur, we readily conclude that evidence of such a nature was lacking. To be sure, there was evidence that the defendant relocated her chickens once she was informed that some of her fellow neighbors in the Saw Mill Association raised a complaint that her conduct violated Article 2 of the declaration. However, the defendant's testimony reflects that she still possesses chickens at her farm in Connecticut and that the coops in which the chickens were kept remain on her property at 59 Mill Stream Road. Furthermore, the evidence is not in dispute that, in response to the complaints of some of her neighbors, the defendant attempted to obtain the permission required by Article 2 to continue to keep the chickens at 59 Mill Stream Road. There is no evidence of subsequent events that make it unreasonable to expect the prohibited conduct to recur, and we observe that the defendant has neither alleged nor presented evidence to establish that she does not intend to resume the prohibited conduct in the future.

In light of the foregoing, we conclude that although there was undisputed evidence that the chickens were

no longer present on the defendant's property, the court had jurisdiction to consider the claim and afford the plaintiffs practical relief in connection with this aspect of their complaint.

2

Next, we address the defendant's argument that, in prohibiting the defendant "from keeping any chickens or roosters upon the defendant's property," the court exceeded the scope of the restrictive covenant it purported to enforce. We observe, once again, that, apart from arguing that the plaintiffs' claim for relief under Article 2 of the declaration was moot, the defendant does not argue that the court improperly enforced the restrictive covenant in Article 2 but, rather, that the court's order of injunctive relief was overbroad.

As we explained previously in part I of this opinion, this court's interpretation of the language of the declaration presents a question of law over which we exercise plenary review. *Avery* v. *Medina*, supra, 151 Conn. App. 440–41. Here, the plain language of Article 2 of the declaration unambiguously provides an exception to the prohibition for keeping animals, poultry, or water fowl that are not quartered within a family dwelling at night. The declaration provides: "*Exceptions to this provision may be made for not over two year periods if consented to in writing by the Purchaser of each Tract within two hundred* (*200*) *feet of the Tract where the exception is proposed.*" (Emphasis added). The court's order constituted a blanket prohibition against the defendant and, as she argues, precludes her from availing herself of any permissible exceptions in the future, as is her right. For this reason, we conclude that the court's broad award of injunctive relief with respect to the keeping of chickens on the defendant's property exceeds the plaintiffs' rights under the declaration, to

the defendant's detriment. Although we affirm the judgment of the trial court enforcing Article 2 of the declaration, the proper remedy for the error in the court's order of injunctive relief is to vacate the court's order of injunctive relief prohibiting the defendant from keeping *any* chickens or roosters on her property at 59 Mill Stream Road, and to direct the court to fashion an appropriate order that is consistent with Article 2 of the declaration, as interpreted in this opinion.

The judgment enforcing the restrictive covenants is reversed to the extent that the court enforced a restrictive covenant that appears in the 1956 deed and the restrictive covenant that appears in Article 8 of the declaration. The orders of injunctive relief related to these restrictive covenants (orders 1, 3, 4, 5, 6, and 7) are vacated. The judgment enforcing the restrictive covenant that appears in Article 2 of the declaration, relating to the keeping of "animals, poultry or water fowl," is affirmed, but the order of injunctive relief prohibiting the defendant from keeping any chickens or roosters on her property (order 2) is vacated and the case is remanded to the trial court with direction to order appropriate relief that is consistent with Article 2 of the declaration.

In this opinion MOLL, J., concurred.

BEACH, J., concurring in part and dissenting in part. I agree with the facts reported in the majority opinion and with most of the principles of law stated therein. I also agree with the analysis so far as it goes. The majority's analysis stops, however, with the conveyance from the original grantors, Horace Havemeyer and Harry Waldron Havemeyer, to Empire Estates, Inc. (Empire), reported in volume 792, page 118, of the Stamford land records.[1] The majority correctly concludes, in

[1] The restriction was amended in volume 808, page 355. The amendment is immaterial to the analysis of the issues in the present case.

my view, that the plaintiffs have no standing to enforce restrictive covenants in the capacity of successor to any party to the transaction between the original grantors and Empire; the covenant between the original grantors and Empire restricting the conveyed property to residential use was "exacted by a grantor from his grantee presumptively or actually for the benefit and protection of his adjoining land which he [retained]." (Internal quotation marks omitted.) *Contegni* v. *Payne*, 18 Conn. App. 47, 51, 557 A.2d 122, cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989).

Empire, however, later subdivided its property. Empire caused a map of the subdivision to be recorded and every newly created lot was subject to identical, or substantially identical, restrictions. The restrictions in the deeds provided that the lots were "conveyed subject to . . . restrictive covenants and agreements as contained in a deed from . . . [the original grantors] . . . to Empire Estates . . . and recorded in the land records . . . and the terms of a declaration [at volume 917, page 114]." The former set of restrictions are those referenced in the original grantors' deed, and recorded in volume 792, page 118 of the land records. They include the recitation that the "deed is given and accepted upon the following express covenants and agreements which shall run with the land herein conveyed and shall be binding upon the grantee, its successors and assigns, and shall enure to the benefit of the remaining land of the grantors. . . . 1. Said premises shall be used for private residential purposes only . . . and no buildings shall be erected or maintained upon said premises except single-family dwelling houses and appropriate outbuildings. 2. Said tract shall not be subdivided for building purposes into plots containing less than one (1) acre in area, and not more than one (1) such dwelling house shall be erected or maintained on any such plot."

The second set of restrictions referenced in the deeds to the lots comprising the subdivision are recited in a declaration recorded at volume 917, pages 114–18, of the land records. The parties agree that the second set of restrictions, imposed by Empire's trustees, were imposed pursuant to a common scheme of development and, thus, are enforceable by subsequent owners of lots within the subdivision. See *DaSilva* v. *Barone*, 83 Conn. App. 365, 371–73, 849 A.2d 902, cert. denied, 271 Conn. 908, 859 A.2d 560 (2004); *Contegni* v. *Payne*, supra, 18 Conn. App. 52–54.

The language in the deeds by which Empire conveyed the lots in the subdivision stated that the lots were all "subject to" two sets of restrictions. A dispositive issue presented is whether the language in the deeds stating that the conveyed lots were "subject to" the original grantors' restriction had the effect only of providing notice of the prior restrictions to grantees or whether the language also had the substantive effect of creating new obligations on the grantees and their successors. Or, stated differently, the issue may be phrased as whether Empire had the intent to impose the common restrictions referenced in the original grantors' deed.

"The owner's intent to develop the property under a common scheme is evidenced by the language in the deeds. . . . [T]he determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary." (Citation omitted; internal quotation marks omitted.) *Cappo* v. *Suda*, 126 Conn. App. 1, 8, 10 A.3d 560 (2011).

A useful discussion appears in 1 Restatement (Third), Property, § 2.2, comment (d), pp. 63–64 (2000): "The term 'subject to' can be used either to create a servitude or to disclose the fact that land conveyed is already burdened by a servitude. Since the term is ambiguous,

courts must look to the surrounding circumstances to determine whether the parties used it with intent to create a servitude. . . . If the land conveyed was already burdened by such a servitude, the 'subject to' language is often included to qualify the grantor's covenant against encumbrances, rather than to create a new servitude. However, the circumstances that the property was already burdened by a servitude of the type described is not determinative. Other circumstances, *such as the fact that the language is used in conveyances that effectuate a new subdivision of land*, may justify the inference that the parties intended to create new servitudes for the *benefit of the other lot owners in the subdivision*." (Emphasis added.)

Comment d, illustration 3, to § 2.2 of the Restatement provides further insight: "Developer acquired a 40-acre parcel 'subject to' a restriction to residential uses only. The parcel had been burdened with such a servitude restriction 10 years earlier. In the absence of circumstances indicating a different intent, the conclusion is justified that the conveyance to Developer was not intended to create a new servitude. Developer then subdivides the parcel into 40 lots, according to a recorded plot map, and conveys each lot 'subject to' a restriction to residential uses only. The circumstances justify the conclusion that the conveyances of the subdivided lots are intended to create new servitudes benefiting the other lot owners in the subdivision." Id., illustration (3), p. 64.

The conclusion that Empire intended to create a common scheme of development, maintaining the restriction that only residential uses were allowed, is justified. First, as noted in the Restatement, the recitation of the "subject to" restriction in the context of the creation of a subdivision itself supports the conclusion that the restriction is part of the common scheme of development. Second, the second set of restrictions in the

deeds, newly created by Empire, reinforces the conclusion. This second set contains thirty-five articles, most of which dictate requirements governing the construction and maintenance of "houses" and "house sites." Other articles refer to pets allowed in "the family dwelling," the length of "any dwelling," and surveys for "proposed dwellings." The scheme clearly contemplates residences; there are no articles regarding commercial use or regulation of businesses.

Additionally, equity favors the standing of lot owners to enforce the restrictive covenants. It is not disputed that the restrictions substantially were uniform as to the lots in the subdivision, and each lot was conveyed subject to the original grantors' restriction.[2] Where there is a uniform scheme of development, "any grantee may enforce the restrictions against any other grantee." (Internal quotation marks omitted.) *DaSilva* v. *Barone*, supra, 83 Conn. App. 373. "The doctrine of the enforceability of uniform restrictive covenants is of equitable origin. The equity springs from the presumption that each purchaser has paid a premium for the property in reliance upon the uniform development plan being carried out. While that purchaser is bound by and observes that covenant, it would be inequitable to allow any other landowner, who is also subject to the same

[2] The majority suggests that even though the restrictions emanating from the original grantors "might apply with equal force to the parties and others in their subdivision, it cannot reasonably be suggested that the plaintiffs have the right to enforce them." In my view, the majority overlooks the clear language in *DaSilva* v. *Barone*, supra, 83 Conn. App. 372, and *Contegni* v. *Payne*, supra, 18 Conn. App. 51: where there are "uniform covenants contained in deeds executed by the owner of property who is dividing his property into building lots under a general development scheme," covenants may be enforced by those mutually bound. All of the factors listed in *DaSilva* and *Contegni* suggesting the existence of a common scheme are satisfied, and none of the negative factors exist. The majority and I disagree as to whether the original grantors' covenants are contained in deeds exacted by Empire and whether equity favors the ability of those bound by common covenants to enforce those covenants.

restriction, to violate it." *Contegni* v. *Payne*, supra, 18 Conn. App. 52. Regardless of the genesis of the first restrictive covenant, all of the owners in the subdivision were obligated to abide by it, and equity favors their ability to enforce it.

Several cases in Connecticut jurisprudence are consistent with the conclusion that the restriction as to residential use only is enforceable by a lot owner within the subdivision. See *Maganini* v. *Hodgson*, 138 Conn. 188, 192–93, 82 A.2d 801 (1951) (land deeded to developer restricted to residential use; developer imposed further restrictions on deeds to lots within subdivision: "[w]hen, under a general development scheme, the owner of property divides it into building lots to be sold by deeds containing substantially uniform restrictions, any grantee may enforce the restrictions against any other grantee"); *Mellitz* v. *Sunfield Co.*, 103 Conn. 177, 182, 129 A. 228 (1925) (restrictions for common benefit of all subsequent lot owners "create a right or interest in them in the nature of an easement which will be enforced in equity against the grantee of one of the other lots"); *5011 Community Organization* v. *Harris*, 16 Conn. App. 537, 540, 548 A.2d 9 (1988) (restrictions in common scheme of development benefit lot owners); see also *Prime Locations of CT, LLC* v. *Rocky Hill Development, LLC*, 167 Conn. App. 786, 796 n.10, 145 A.3d 317, cert. denied, 323 Conn. 935, 150 A.3d 686 (2016).[3]

I would conclude, then, that the plaintiffs had standing to enforce the restriction regarding residential use, and I agree with the findings and conclusions of the trial court as to enforcement of the restriction, except as limited by the majority opinion in part II of its opinion. I, therefore, concur, in part, and respectfully dissent, in part.

[3] The majority goes to great lengths to distinguish the cases cited. I agree that the cases are not binding precedent but, rather, are only illustrative.

STATE OF CONNECTICUT *v.* GARYL ALEXIS (AC 40528)

Keller, Moll and Bishop, Js.

Syllabus

Convicted of the crimes of robbery in the first degree and threatening in the second degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which he displayed a semiautomatic pistol to the victims and stole marijuana from them, dropping his wallet as he fled. Upon receiving a text message from one of the victims, the defendant replied with a text message demanding his wallet and threatening to shoot the victims. On appeal, the defendant claimed, inter alia, that the trial court erred by admitting into evidence a photograph of guns that had been forensically extracted from his cell phone by the police. *Held*:

1. Even if it was improper for the trial court to admit the photograph into evidence and not give the jury a limiting instruction, the defendant failed to demonstrate that he was harmed thereby, as the alleged error did not substantially affect the verdict; the state's case against the defendant was supported by additional strong evidence, including identifications of the defendant by victims who knew him, and the state presented evidence of text messages that corroborated the victims' version of events, as well as evidence that the police had seized the defendant's wallet from the crime scene.
2. The defendant could not prevail, pursuant to *State* v. *Golding* (213 Conn. 233), on his unpreserved claim that the state violated his due process right to a fair trial by eliciting testimony during a witness examination and making a remark during closing arguments about his postarrest and post-*Miranda* silence; even if a constitutional violation existed, the state established that the alleged constitutional violation was harmless beyond a reasonable doubt, as the prosecutor did not focus on the defendant's post-*Miranda* silence or engage in repetitive references to the defendant's silence, the challenged testimony related to the efforts made by the police to locate the firearm, evidence introduced by the state that was unrelated to the defendant's silence, including the identification of the defendant by two witnesses who knew him, which corroborated text messages between the defendant and a victim, and the seizure of the defendant's wallet from the crime scene, proved his guilt beyond a reasonable doubt, and defense counsel failed to object to the testimony and prosecutor's remark during closing arguments.

Argued January 9—officially released November 5, 2019

Procedural History

Substitute information charging the defendant with the crimes of robbery in the first degree and threatening in the second degree, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Kahn*, *J.*; dict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Joseph J. Harry*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Garyl Alexis, appeals from the judgment of conviction, rendered following a jury trial, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4)[1] and threatening in the second degree in violation of General Statutes § 53a-62 (a) (1).[2] On appeal, the defendant claims that (1) the trial court erred by admitting into evidence an unduly prejudicial photograph of guns that had minimal, if any, probative

[1] General Statutes § 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. . . ."

[2] General Statutes § 53a-62 (a) provides in relevant part: "A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury . . . ."

value, and (2) pursuant to *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the state violated his due process right to a fair trial by eliciting testimony and making a remark during closing arguments about the defendant's silence following his arrest and the advisement of his constitutional rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We conclude that any error relating to the court's admission of the photograph was harmless and that any *Doyle* violation was harmless beyond a reasonable doubt. Accordingly, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In May, 2015, Jorge Perez and his girlfriend, Paige Whitley, lived with Whitley's parents in a first floor apartment of a multifamily home in Stratford (Whitley residence). The defendant lived several blocks away in Stratford. On May 21, 2015, Perez and Whitley were present at the Whitley residence. At 9:24 a.m., Perez sent a text message to the defendant and invited him to come over to purchase marijuana. The defendant went to the Whitley residence, entered through the back door, and joined Perez and Whitley in Whitley's bedroom. The defendant then began chatting with Perez and Whitley. During their conversation, Perez removed a bag of marijuana from the bedroom closet and handed it to the defendant to allow the defendant to inspect its contents. Shortly thereafter, the defendant displayed a black, semiautomatic pistol and ordered Perez and Whitley to get down on the floor, repeating the order multiple times. Perez and Whitley remained motionless, and the defendant grabbed the bag of marijuana, which had been placed on a table, and ran out of the apartment through the back door. At some point prior to fleeing the Whitley residence, the defendant dropped his wallet in Whitley's bedroom. At 10:21 a.m., after the defendant had left, Perez sent a text message to the defendant,

stating: "Dude cmon. For what? I thought we were chill." At 10:34 a.m., the defendant sent a text message to Perez in reply, stating: "Everybody is food and I want my wallet back boy unless you like shells I'm broke starving hate it had to be you I WANT MY WALLET BACK OR IMMA SEE U cuz." Thereafter, Perez and Whitley sought advice from Whitley's father, who, at the time, was outside in front of the apartment. After speaking with Whitley's father, Perez called the police to report the incident.

Shortly thereafter, Officer Brian McCarthy and other police officers of the Stratford Police Department arrived at the Whitley residence, and Perez and Whitley provided written statements regarding what had occurred. The police began searching for the defendant, and, approximately twenty minutes after receiving the call from Perez, they were able to locate and detain the defendant just a few blocks away from the Whitley residence. Meanwhile, the police drove along the main routes between the Whitley residence and the defendant's residence and conducted a general search of the area where the defendant was located, but they were not able to locate the gun or the bag of marijuana. The police were able to recover the defendant's wallet and his cell phone, and Officer Paul Fressola performed two forensic examinations of the cell phone. During the second forensic examination, Officer Fressola discovered, among other things, a deleted photograph in which five firearms were displayed next to one another (photograph).

On June 8, 2015, by long form information, the state charged the defendant with one count of robbery in the first degree in violation of § 53a-134 (a) (4) and one count of threatening in the second degree in violation of § 53a-62 (a) (1). On September 30, 2015, the state filed a substitute long form information containing the same charges. On January 30, 2017, following a jury

trial held on January 26, 27 and 30, 2017, the defendant was found guilty as to both counts. On March 13, 2017, the court imposed a total effective sentence of eight years of incarceration, execution suspended after three years, followed by five years of probation. This appeal followed. Additional facts and procedural history will be provided as necessary.

I

The defendant first claims that the trial court erred by admitting into evidence state exhibits 3, 4, and 7, which were three iterations of the photograph, in which five firearms were displayed, that had been extracted from the defendant's cell phone. Specifically, the defendant argues that the prejudicial effect of such evidence outweighed its probative value, if any, and that the unknown manner in which the photograph was created or saved on the defendant's cell phone further undermines the photograph's reliability. The defendant also makes the related claim that, having admitted the three iterations of the photograph, the trial court erred by failing to give, sua sponte, an appropriate limiting instruction to the jury. The state contends, in response, that the trial court properly admitted the photograph, that no limiting instruction was necessary, and that the defendant has failed to establish that any error was harmful. For the reasons that follow, we conclude that the defendant has failed to demonstrate that any error in the court's admission of the photograph and/or the lack of a limiting instruction relating thereto resulted in harm.

The following additional facts and procedural history are relevant to the defendant's claim. On January 26, 2017, just prior to the commencement of trial, the state provided defense counsel with additional evidence that had been recovered during the second forensic examination of the defendant's cell phone. This additional

evidence included, but was not limited to, the photograph and an accompanying extraction report, which showed that the photograph was created and accessed on May 16, 2015, five days before the robbery. Defense counsel orally moved to preclude the introduction of the photograph on the grounds that it lacked probative value, was unduly prejudicial, and was of unknown origin (i.e., an objection sounding in authentication). In response, the state argued that the probative value of the photograph outweighed its prejudicial impact because Perez and Whitley identified a gun in the photograph as being similar to the one the defendant displayed during the robbery. Thereafter, the court indicated that it would admit the photograph subject to a proper foundation being laid by the forensic examiner, reasoning that the prejudicial impact did not outweigh the photograph's highly probative value.[3] Trial commenced immediately thereafter.

The state first called Perez and then Whitley to testify. Perez and Whitley made in-court identifications of the defendant. Perez testified that he recalled the defendant, on the date in question, displaying a black,

[3] The court stated in relevant part: "The issue I need to address is whether . . . the prejudicial impact of this evidence outweighs the probative value. So, as far as the image of the guns on his phone given and what the state has indicated that the, at least one of the victims will identify one of the guns as being the one he believes the defendant pulled on him. I would allow this evidence to come in with a proper foundation from the forensic examiner because it is incredibly probative. The fact that . . . [there] was a picture of five weapons [on the defendant's phone], one of which was the weapon the victims claimed was pulled on them is highly probative.

"It is prejudicial, no question about it. Most probative evidence is prejudicial. By definition, if it's probative, it's prejudicial. But that's not the test. The test is . . . whether the prejudicial impact of it outweighs the probative value. And in the court's view, it doesn't because the fact that the defendant had images of weapons on him and one of which was similar to the one pulled, is incredibly probative. It is, for lack of a better word, a smoking gun. But that is—that's what makes it so probative. And it is prejudicial, but not unduly prejudicial and it doesn't outweigh, in the court's view, the prejudice doesn't outweigh the highly probative nature of this evidence."

semiautomatic pistol; Whitley testified similarly that the defendant had pulled out a gun. Using a pen to mark and initial separate copies of the photograph, Perez and Whitley identified the same gun in the photograph as being similar to the gun that the defendant displayed during the incident.[4] When questioned about the text message sent by the defendant to Perez shortly after the incident, Perez and Whitley testified that they interpreted the defendant's use of the term "shells" to mean that the defendant would shoot Perez if Perez did not return the defendant's wallet. Given that Perez and Whitley identified the same gun depicted in the photograph and in light of the fact that the photograph was found on the defendant's cell phone, the court explained, outside the presence of the jury, that "there's a direct connection between the photo[graph] and the incident here which makes it highly probative as I said earlier and it comes in because its probative value outweighs its prejudicial impact."

[4] The following exchange occurred between the prosecutor and Perez:

"Q. Okay. And can you tell us why you pointed to that weapon?

"A. Because it's the weapon that looks just like the one he pulled out when he robbed me.

* * *

"Q. Okay. So you're telling us that the photo that you have in front of you contains a weapon similar to one the defendant pulled on you and Paige that day?

"A. Yes."

The following exchange occurred between the prosecutor and Whitley:

"Q. Do you recognize any of the weapons in that picture?

"A. Yes.

"Q. And can you point to and sign—circle the weapon you recognize as—sign your name?

* * *

"Q. Now this is your testimony; how do you recognize that weapon?

"A. It was the one he had in his hand that day?

"Q. Are you sure that's the one he had?

"A. It looks very much like it.

* * *

"Q. So what you're saying that in Identification 7, you signed a weapon, you signed near the weapon that you believe the defendant had or similar to?

"A. Yes."

On January 27, 2017, the state called Officer Fressola to testify. Officer Fressola testified that, a few days after the defendant's cell phone was seized by the police, he performed an initial forensic examination of the cell phone, which involved the retrieval of readily available content, i.e., files that were not hidden or deleted. Officer Fressola also testified that, months later, he performed a second, more in-depth, forensic examination, which involved the recovery of deleted files, one of which was the photograph. He testified that he did not modify in any way the photograph or any other files retrieved. During the examination of Officer Fressola, the court admitted in full (1) an unmarked version of the photograph in color appended to the extraction report (state exhibit 3), (2) a black and white copy of the photograph (and extraction report) marked up by Perez during his testimony (state exhibit 4), and (3) a color copy of the photograph marked up by Whitley during her testimony (state exhibit 7). The court subsequently stated, outside the presence of the jury, that state exhibits 3, 4, and 7 had been admitted into evidence as full exhibits because the state established a connection between the gun allegedly displayed by the defendant during the incident and a gun depicted in the photograph. The court further explained: "Given that the image, which was found on the defendant's phone matches the description given by the alleged victims of the gun that they claim was pulled on them and they identified that as being the gun in this court's view made it highly probative and its probative value outweighed its prejudicial impact and that's why I allowed it."

Against this backdrop, we now turn to the defendant's contention that the court committed reversible error when it admitted into evidence state exhibits 3, 4, and 7. "We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the

law . . . for an abuse of discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . The trial court has wide discretion to determine the relevancy [and admissibility] of evidence . . . . In order to establish reversible error on an evidentiary impropriety . . . the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Internal quotation marks omitted.) *State* v. *Badaracco*, 156 Conn. App. 650, 665–66, 114 A.3d 507 (2015).

"When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Bouknight*, 323 Conn. 620, 626–27, 149 A.3d 975 (2016).

Even assuming arguendo that the court erred in admitting the photograph and not giving a limiting instruction relating thereto, and applying the principles described previously in this opinion, we have a fair

assurance that any error did not substantially affect the verdict. The state's case against the defendant without the photograph was remarkably strong. The witnesses, Perez and Whitley, both identified the defendant, whom they knew, as the perpetrator. Perez and Whitley testified consistently that, after chatting for a short while, the defendant suddenly threatened them with a gun, grabbed the bag of marijuana, and ran out of the apartment, accidentally leaving his wallet behind. Their version of events was consistent with the text messages between Perez and the defendant, which placed the defendant at the Whitley residence at the relevant time and which included the defendant's highly inculpatory statement (i.e., "Everybody is food and I want my wallet back boy unless you like shells I'm broke starving hate it had to be you I WANT MY WALLET BACK OR IMMA SEE U cuz"). Moreover, the state presented evidence that the defendant's wallet was seized from the Whitley residence, further corroborating Perez and Whitley's version of events. The strength of the foregoing evidence leads us to a fair assurance that the admission of the photograph did not substantially affect the verdict.

In light of the foregoing, we conclude that the defendant has not satisfied his burden to demonstrate that any error relating to the admission of the photograph was harmful. Therefore, the defendant's first claim fails.

II

The defendant next claims, relying on *Doyle* v. *Ohio*, supra, 426 U.S. 617–18, that the state violated his due process right to a fair trial by eliciting testimony during a witness examination and making a remark during closing arguments about his postarrest and post-*Miranda* silence.[5] The defendant argues that, although this claim

[5] The parties do not dispute that the defendant was taken into custody and given a *Miranda* warning prior to the questioning that forms the basis of the defendant's claim of a *Doyle* violation, namely, the police questioning him about the location of the gun.

was not preserved before the trial court, the claim is reviewable pursuant to (1) *State* v. *Evans*, 165 Conn. 61, 327 A.2d 576 (1973); see *State* v. *Morrill*, 197 Conn. 507, 536, 498 A.2d 76 (1985) ("*Doyle* violations . . . are properly reviewable under *State* v. *Evans*, [supra, 70] despite the failure to raise them in the trial court"); or (2) in the alternative, *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015).[6] The state argues, in response, that any alleged *Doyle* violation was harmless beyond a reasonable doubt and, therefore, the defendant's claim fails under the fourth prong of *Golding*. We agree with the state.

The following additional facts are relevant to the defendant's claim. Officer McCarthy testified as a state's witness. During the direct examination, he testified with respect to his observations upon arriving at the Whitley residence, his conversations with Perez and Whitley, the search for and the arrest of the defendant, the inability of the police to locate the gun and the bag of marijuana, the seizure of the defendant's wallet at the scene and the defendant's cell phone from his person, and the times at which the two forensic examinations of the cell phone were performed. On cross-examination, defense counsel examined Officer McCarthy about the inability of the police to recover the gun and the marijuana. On redirect examination, the state engaged in relevant part in the following line of questioning, which the defendant claims was improper:

"Q. Did your office take any other action to try to locate this weapon?

[6] We previously have recognized that "*State* v. *Evans*, supra, 165 Conn. 61, has since been superseded by *State* v. *Golding*, supra, 213 Conn. 239–40, and stands, generally, for the same proposition regarding the availability of appellate review of unpreserved claims." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 857 n.4, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016). Accordingly, we consider the defendant's claim pursuant to *Golding*.

"A. We had a detective that attempted to speak with [the defendant] and tried to get him to tell us where the weapon is, expressed concerns about child safety, things of that nature, but we got nowhere.

"Q. Okay. He didn't answer you?

"A. Excuse me?

"Q. He didn't answer you?

"A. He would not answer any questions, no."

During recross-examination, defense counsel and Officer McCarthy had the following exchange:

"Q. [W]ould you agree that an accused has a right to remain silent?

"A. Absolutely, sir."

The defendant also challenges on appeal the following statement made by the prosecutor during the state's closing argument: "[Officer McCarthy] stated that when he asked the defendant about the gun, the defendant didn't say anything." With respect to the foregoing testimony and remark during closing argument, defense counsel did not object, no curative instruction was requested, and none was given.

We now turn to our analysis of the defendant's claim. "Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these

conditions, the defendant's claim will fail." (Emphasis in original; internal quotation marks omitted.) *State* v. *Silva*, 166 Conn. App. 255, 280, 141 A.3d 916, cert. denied, 323 Conn. 913, 149 A.3d 495 (2016), cert. denied, U.S. , 137 S. Ct. 2118, 198 L. Ed. 2d 197 (2017). "The first two [*Golding*] requirements involve a determination of whether the claim is reviewable; the second two requirements involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Mitchell*, 170 Conn. App. 317, 322–23, 154 A.3d 528, cert. denied, 325 Conn. 902, 157 A.3d 1146 (2017). Whether *Golding* is satisfied presents a question of law over which this court exercises plenary review. See *State* v. *Cruz*, 269 Conn. 97, 104, 848 A.2d 445 (2004).

In the present case, the record is adequate to review the defendant's claim, and the defendant has asserted a claim of constitutional magnitude. Therefore, the first two prongs of *Golding* are satisfied, and the defendant is entitled to *Golding* review. Nevertheless, the defendant is unable to prevail on his claim of constitutional error because, assuming without deciding that a *Doyle* violation exists, the state has established that the alleged constitutional violation was harmless beyond a reasonable doubt. See *State* v. *Smith*, 180 Conn. App. 181, 196, 182 A.3d 1194 (2018) (concluding that defendant's claim failed under fourth prong of *Golding* because, assuming without deciding that *Doyle* violation occurred, it was harmless beyond reasonable doubt); see also id., 197–98 (collecting cases).

The following legal principles are relevant to our analysis under the fourth prong of *Golding*. "Pursuant to *Doyle*, evidence of a defendant's postarrest and post-*Miranda* silence is constitutionally impermissible under the due process clause of the fourteenth amendment. . . . The factual predicate of a claimed *Doyle* violation is the use by the state of a defendant's postarrest and post-*Miranda* silence either for impeachment

or as affirmative proof of his guilt. . . . The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. . . . Silence following *Miranda* warnings is insolubly ambiguous because it may be nothing more than a defendant's exercise of his or her *Miranda* rights. . . . Once the government assures a defendant through the issuance of *Miranda* warnings that his silence will not be used against him, it is fundamentally unfair for the state to break that promise by using his silence against him at trial. . . . Comments by the state on a defendant's silence following *Miranda* warnings are not only constitutionally impermissible, but also inadmissible under the principles of evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Pepper*, 79 Conn. App. 1, 14–15, 828 A.2d 1268 (2003), aff'd, 272 Conn. 10, 860 A.2d 1221 (2004).

"References to one's invocation of the right to remain silent [are] not always constitutionally impermissible, however. . . . Thus, we have allowed the use of evidence of a defendant's invocation of his fifth amendment right in certain limited and exceptional circumstances. . . . In particular, we have permitted the state some leeway in adducing evidence of the defendant's assertion of that right for purposes of demonstrating the investigative effort made by the police and the sequence of events as they unfolded . . . as long as the evidence is not offered to impeach the testimony of the defendant in any way." (Citations omitted; internal quotation marks omitted.) *State* v. *Cabral*, 275 Conn. 514, 524–25, 881 A.2d 247, cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005); see also *State* v. *Pepper*, supra, 79 Conn. App. 15 (concluding that particular question that merely referenced investigative efforts of police did not constitute *Doyle* violation).

"*Doyle* violations are, however, subject to harmless error analysis. . . . The harmless error doctrine is rooted in the fundamental purpose of the criminal justice system, namely, to convict the guilty and acquit the innocent. . . . Therefore, whether an error is harmful depends on its impact on the trier of fact and the result of the case. . . .

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. . . . The state bears the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt. . . . That determination must be made *in light of the entire record* [including the strength of the state's case without the evidence admitted in error]. . . .

"A *Doyle* violation may, in a particular case, be so insignificant that it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict without the impermissible question or comment upon a defendant's silence following a *Miranda* warning. Under such circumstances, the state's use of a defendant's [post-*Miranda*] silence does not constitute reversible error. . . . The [error] has similarly been [found to be harmless] where a prosecutor does not focus upon or highlight the defendant's silence in his cross-examination and closing remarks and where the prosecutor's comments do not strike at the jugular of the defendant's story. . . . The cases wherein the error has been found to be prejudicial disclose repetitive references to the defendant's silence, reemphasis of the fact on closing argument, and extensive, strongly-worded argument suggesting a connection between the defendant's silence and his guilt." (Emphasis added; internal quotation marks omitted.) *State* v. *Montgomery*, 254 Conn. 694, 717–18, 759 A.2d 995 (2000).

In light of the entire record, we conclude that the alleged *Doyle* violation in the present case was harmless beyond a reasonable doubt. First, the prosecutor did not focus on the defendant's silence and did not engage in repetitive references to the defendant's silence. The limited testimony, which occurred during the redirect examination of Officer McCarthy, and the isolated remark during the state's closing argument that the defendant challenges on appeal were not worded in such a manner to suggest a connection between the defendant's silence and his guilt. *State* v. *Smith*, supra, 180 Conn. App. 200. Rather, the statements related to the efforts made by the police to locate the gun.

Second, the evidence introduced by the state unrelated to the defendant's post-*Miranda* silence established the defendant's guilt beyond a reasonable doubt. By way of summary only, the two witnesses, Perez and Whitley, identified the defendant, with whom they were acquainted from high school, as the perpetrator. Their testimony was consistent with the text messages between Perez and the defendant, which placed the defendant at the Whitley residence and included the highly inculpatory response of the defendant (i.e., "Everybody is food and I want my wallet back boy unless you like shells I'm broke starving hate it had to be you I WANT MY WALLET BACK OR IMMA SEE U cuz"). Moreover, the defendant's wallet was seized from the Whitley residence.

Finally, we note that defense counsel failed to object to the now challenged testimony and remark during closing arguments. See *State* v. *Canty*, 223 Conn. 703, 712, 613 A.2d 1287 (1992) ("trial counsel's failure to object [in a timely manner] indicates that he did not consider [the testimony] to have prejudiced the defendant"). In light of the foregoing, we are satisfied that there is no reasonable possibility that the alleged *Doyle* violation affected the outcome of the defendant's trial.

Thus, we conclude that the defendant cannot prevail under *Golding* and, consequently, is not entitled to a new trial.

The judgment is affirmed.

In this opinion the other judges concurred.

LAWRENCE ANDREWS *v.* COMMISSIONER OF CORRECTION (AC 41689)

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

Syllabus

The petitioner, who previously had been convicted of felony murder in connection with the death of the victim, who died of asphyxia by manual strangulation and had been found in the basement of an apartment building, filed a second amended petition for a writ of habeas corpus, claiming, inter alia, that he received ineffective assistance from the counsel who had represented him with respect to his criminal trial. Specifically, he claimed that his trial counsel was ineffective in failing to investigate and call R as a witness at the criminal trial, and to present a defense predicated on R's testimony and a written statement R had provided to the police, in which R stated that S had confessed to killing the victim. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, as the petitioner failed to demonstrate that his claims of ineffective assistance of counsel were debatable among jurists of reason, that a court could have resolved the issues in a different manner, or that the questions raised were adequate to deserve encouragement to proceed further: the habeas court's findings that S's confession to R, which trial counsel did not present to the jury at the petitioner's criminal trial, did not exclude the presence of others in the basement at the time of the victim's murder and that R assumed that the petitioner was not with S when S murdered the victim were not clearly erroneous, as the evidence in the record did not indicate that S told R that the petitioner was not present when S murdered the victim, R's testimony and statement indicated only that S killed the victim, and the evidence supported the court's findings that S's confession did not exclude the presence of others at the crime scene when S murdered the victim and that R merely presumed that the petitioner was absent; moreover, the petitioner failed

to demonstrate that he was prejudiced by his trial counsel's alleged deficient performance because, even if S's confession to R had been presented to the jury at the petitioner's criminal trial, there was no reasonable probability that the outcome of the trial would have been different.

Argued September 9—officially released November 5, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Patrick S. White, assigned counsel, with whom, on the brief, was Christopher Y. Duby, assigned counsel, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

MOLL, J. The petitioner, Lawrence Andrews, appeals from the denial of his second amended petition for a writ of habeas corpus following the denial of his petition for certification to appeal. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) erroneously concluded that he failed to establish that his state and federal constitutional rights to the effective assistance of counsel were violated.[1] We conclude that the habeas court did not abuse its discretion

[1] We deem the petitioner's state constitutional claims abandoned because he has failed to provide an independent analysis under our state constitution. See *Ham* v. *Commissioner of Correction*, 187 Conn. App. 160, 173 n.3, 201 A.3d 1074, cert. denied, 331 Conn. 904, 202 A.3d 373 (2019).

in denying the petition for certification to appeal and, accordingly, dismiss the appeal.

The following facts, as set forth by our Supreme Court in the petitioner's direct appeal from his conviction and as recited by the habeas court in its memorandum of decision, and procedural history are relevant to our disposition of the appeal. "On March 21, 1999, a tenant at 17 Burton Street in the city of Waterbury went to the basement to retrieve his bicycle and discovered the partially clothed body of the victim, Michelle McMaster, lying on the floor. A police investigation subsequently determined that the cause of her death was asphyxia by manual strangulation and that the evidence also was consistent with a sexual assault.

"For nearly one decade, the police were unable to solve the crime. In 2008 and 2009, however, a purported eyewitness, Donna Russell, was interviewed on several occasions by detectives from the Waterbury Police Department and gave three increasingly detailed written statements regarding what she had seen. In her statements, Russell disclosed that, on the evening of March 20, 1999, she went to the basement of 17 Burton Street, a local drug hangout, for the purpose of using heroin. Upon her arrival, four other people already were there: the [petitioner], Barry Smith, a man she did not know but who later was identified from a photographic array as Orenthain Daniel, and the victim. As Russell proceeded to inject herself with heroin, she heard the [petitioner] and the victim arguing about money or drugs. The argument quickly escalated, and a struggle ensued, during which the victim was knocked down. Afraid that something 'horrible' was about to happen, Russell decided to flee. The last thing she saw upon escaping from the basement was the [petitioner] bending over the victim and choking her, Smith holding down her arms, and Daniel pulling down her pants. She also

heard the victim gasping for air and pleading for Russell's help, and the men saying they were going to have sex with her one way or another." *State* v. *Andrews*, 313 Conn. 266, 270–71, 96 A.3d 1199 (2014).

Our Supreme Court in *Andrews* also set forth the following additional facts. On March 6, 2009, the petitioner was arrested and charged with murder. Id., 271 and n.2. "On March 7, 2009, the day after the [petitioner] was arrested and charged with murder, he gave oral and written statements to the police regarding his involvement in the crime. In his statements, the [petitioner] explained that, in 1999, he was a 'runner' who referred drug purchasers to drug sellers and received drugs in exchange for the referrals. In March, 1999, he brought the victim to a drug seller for a $100 purchase of crack cocaine and received $30 worth of crack cocaine in return. He and the victim then went to the basement of a house on Burton Street 'where lots of people go to get high.' Smith, who also was in the basement, began to argue with the victim about giving him some of her crack cocaine. Smith then hit the victim in her face, which caused her to fall down. Believing that the crack cocaine was in one of the victim's hands, which was clenched, and knowing that she had a fairly large quantity of the substance, the [petitioner] explained in his signed, written statement: 'I thought to myself, why should [Smith] get all the crack? . . . I want to get some for myself, so I went at [the victim]. [The victim] was trying to wrestle out from under [Smith], so I went up to the top of her head and tried to control her head and get the crack. It was a frenzy. I grabbed her by the neck and, at one point to control her, I hit her in the head a couple [of] times. When I had her by the neck, I was squeezing her neck, trying to knock the wind out of her. After I had her by the neck, my hands were mostly on her chest and shoulders, but I did grab her neck a couple more times. Then

[Smith] started to choke her, and she started to go out, by that, I mean, pass out. Then another guy jumped [in], and he hit her in the stomach. At one point, [Smith] got a metal thing. It was like some frame of a table or chair and [he] started to swing at [the victim]. It hit both me and her. All the while, [Smith] was still choking her. I was trying to grab at her hand to get the crack, but she wouldn't let go. When this was all going on, I remember seeing [Russell] . . . . I'm not sure when [Russell] left. The third guy started to pull [the victim's] pants down and then [Smith] pulled up her shirt; this is when [the victim] let go of the crack, when she tried to hold her pants so they wouldn't get down. [Smith] started to choke her again, and, eventually, she went out. When I mean she went out, her eyes were closed, she wasn't fighting no more. I don't know if she was dead or not, but she wasn't moving. I don't even know if she was breathing. The third guy was still pulling her pants down. I knew this was bad, so I got up and got out of there. I don't know what happened to the crack. I'm sure someone tried to get it off the floor.' The [petitioner] later identified Smith and Daniel from photographic arrays as the other two participants in the incident." Id., 311–13.

By way of its operative substitute information filed on April 27, 2011, the state charged the petitioner with murder in violation of General Statutes §§ 53a-8 and 53a-54a (a), and felony murder, based on the predicate felony of attempted robbery, in violation of General Statutes § 53a-54c.[2] The case was tried to a jury over the course of approximately two weeks in May and June, 2011. The petitioner, who was represented by Attorney Eroll Skyers, testified at trial. The petitioner's theory of defense was that he was not present at the

[2] General Statutes § 53a-54c was amended by No. 15-211, § 3, of the 2015 Public Acts, which made changes to the statute that are not relevant to this appeal. For purposes of clarity, we refer to the current revision of the statute.

Burton Street residence on the night of the victim's murder, he had not seen the victim for a couple of years prior to 1999, and his statement to the police following his arrest had been the product of deception. Following trial, the jury acquitted the petitioner of murder, but convicted him of felony murder. Subsequently, the trial court sentenced the petitioner to thirty-five years of incarceration. The petitioner appealed to our Supreme Court, which affirmed the judgment of conviction. See *State* v. *Andrews*, supra, 313 Conn. 324.

On October 28, 2014, the petitioner, representing himself, filed a petition for a writ of habeas corpus. On April 20, 2017, after assigned habeas counsel had appeared on his behalf, the petitioner filed his operative three-count second amended petition for a writ of habeas corpus (second amended petition).[3] In counts one and two of the second amended petition, the petitioner alleged that, in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the state failed to disclose to him a purportedly exculpatory written statement given to the Waterbury Police Department in 2003 by an individual named Norman Reynolds. In count three of the second amended petition, the petitioner alleged that Skyers rendered ineffective assistance by failing (1) to conduct a reasonably diligent investigation and, thereby, failing to discover Reynolds as a defense witness, (2) to call Reynolds as a defense witness, and/or (3) otherwise to provide the petitioner with a reasonable defense. On June 6, 2017, the respondent, the Commissioner of Correction, filed a return, leaving the petitioner to his proof.

On December 14, 2017, the habeas court, *Sferrazza*, *J.*, held a one day trial. The court heard testimony from the petitioner, Reynolds, Skyers, and Frank Riccio, who

[3] On April 18, 2017, the petitioner filed his first amended petition for a writ of habeas corpus.

testified as an expert witness on behalf of the petitioner. On March 29, 2018, the parties filed posttrial briefs. On April 16, 2018, the court issued a memorandum of decision denying the second amended petition. Thereafter, the petitioner filed a petition for certification to appeal from the judgment denying the second amended petition, which the court denied. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first claims that the habeas court abused its discretion in denying his petition for certification to appeal from the judgment denying the second amended petition. We disagree.

We "begin by setting forth the procedural hurdles that the petitioner must surmount to obtain appellate review of the merits of a habeas court's denial of the [amended] habeas petition following denial of certification to appeal. In *Simms* v. *Warden*, 229 Conn. 178, 187, 640 A.2d 601 (1994), [our Supreme Court] concluded that . . . [General Statutes] § 52-470 (b) prevents a reviewing court from hearing the merits of a habeas appeal following the denial of certification to appeal unless the petitioner establishes that the denial of certification constituted an abuse of discretion by the habeas court. In *Simms* v. *Warden*, 230 Conn. 608, 615–16, 646 A.2d 126 (1994), [our Supreme Court] incorporated the factors adopted by the United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), as the appropriate standard for determining whether the habeas court abused its discretion in denying certification to appeal. This standard requires the petitioner to demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to

deserve encouragement to proceed further. . . . A petitioner who establishes an abuse of discretion through one of the factors listed above must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Emphasis in original; internal quotation marks omitted.) *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 811–12, 194 A.3d 316, cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018).

For the reasons set forth in part II of this opinion, we conclude that the petitioner has failed to demonstrate that (1) his claims are debatable among jurists of reason, (2) a court could resolve the issues in a different manner, or (3) the questions are adequate to deserve encouragement to proceed further. Thus, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

II

Turning to the petitioner's substantive claim on appeal, the petitioner asserts that the habeas court erroneously concluded that he did not sustain his burden of demonstrating that Skyers rendered ineffective assistance by failing to investigate and call Reynolds as a witness at the petitioner's criminal trial and to present a defense predicated on Reynolds' testimony and the written statement provided by Reynolds to the Waterbury Police Department in 2003. For the reasons set forth subsequently in this opinion, the petitioner's claim fails.

We begin by setting forth the relevant standard of review and legal principles that govern our review of

the petitioner's claim. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. . . . As enunciated in *Strickland* v. *Washington*, supra, 466 U.S. 687, this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: [1] a performance prong and [2] a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The [petitioner's] claim will succeed only if both prongs are satisfied." (Citation omitted; internal quotation marks omitted.) *Chance* v. *Commissioner of Correction*, 184 Conn. App. 524, 533–34, 195 A.3d 422, cert. denied, 330 Conn. 934, 194 A.3d 1196 (2018).

The following additional facts are relevant to our resolution of the petitioner's claim. At the habeas trial, the petitioner called Reynolds as a witness. Reynolds testified that, in 1999, while he was incarcerated at the Brooklyn Correctional Institution, Smith confessed to Reynolds that he had murdered the victim. Reynolds further testified that, after hearing Smith's confession, Reynolds contacted the Office of the State's Attorney, which ultimately led to a meeting between Reynolds and the Waterbury Police Department in 2003, during which Reynolds provided the police with a signed, sworn written statement (Reynolds' statement). Reynolds' statement, which was admitted into evidence at the habeas trial, provided, in pertinent part, the following regarding Smith's confession: "[Smith] said that he ha[d] something to get off his chest that['d] been eating him up inside. [Reynolds] asked him what it was and [Smith told Reynolds] he killed [the victim], he said that it was an accident, he did not mean to kill her. [Smith] said that one night he was up on Burton Street. He said that he was running [drug] sales for 'Boo-Boo' Slade. [The petitioner] was also running sales. At one point, [the victim] showed up and [the petitioner] brought her to a house on Burton Street to get high. [Smith] said that he also went to Burton Street with them to get high. Boo-Boo Slade also showed up at the house and all of them 'tricked' with [the victim], meaning that they had sex with her. [Smith] said that after this, he and Boo-Boo went back outside and he was running drug sales for [Boo-Boo] Slade. [Smith] said that he would go back to where [the victim] was on Burton Street, and get some money so he could [buy] some more base to smoke with [the victim]. At one time, [Smith] said that he went back to smoke some base with [the victim], he began to have sex with [the victim]. He said one leg was out of her pants. He said [the victim] began resisting him, and [Smith] said that he started hitting her and smacking her around. [Smith] said that [the victim] tried

pushing him off her, and he began choking her and smacking her because she was fighting back. [Smith] said that after that, he left Burton Street. [Smith] told [Reynolds] that it was an accident, he didn't mean to kill her."[4]

Reynolds also testified that in February, 2012, he provided testimony in a separate jury trial held in a criminal matter filed against Smith.[5] The transcripts of Reynolds' testimony at Smith's trial, which were admitted into evidence at the habeas trial, reflect that Reynolds provided the following testimony, in pertinent part, on direct examination concerning Smith's confession:

"Q. And what was it that [Smith] told you?

"A. [Smith] told me he killed [the victim].

"Q. Tell us in as much detail as you can remember what specifically [Smith] told you.

"A. He said there was him, [the petitioner] . . . [a]nd another guy named [Boo-Boo] Slade, they [were] running [narcotic] sales for them and they were getting high on Burton Street in the basement—I believe, the basement. And they brought [the victim] down there and they—they—had sex with [her] for drugs.[6]

[4] The evidence introduced at the habeas trial reflects that the petitioner was also known as "Pretty Rick" and that Smith was also known as "Smooth." For purposes of clarity, we refer to them as the petitioner and Smith, respectively, throughout this opinion.

[5] With respect to the victim's murder, Smith was charged with murder in violation of § 53a-54a (a) and felony murder in violation of § 53a-54c. Following trial, Smith was convicted of both counts and, subsequently, the trial court sentenced him to sixty years of incarceration. Our Supreme Court affirmed Smith's judgment of conviction on appeal. See *State* v. *Smith*, 313 Conn. 325, 360, 96 A.3d 1238 (2014).

[6] The transcript of Reynolds' testimony at Smith's trial reflects that Reynolds testified that "they brought *Boo-Boo* down there and they – they – had sex with *him* for drugs." (Emphasis added.) Reynolds' subsequent testimony suggests, however, that it was the victim, not "Boo-Boo," who was brought to the basement and with whom the petitioner, Smith, and "Boo-Boo" had sex.

"Q. And then what happened after that, what did [Smith] tell you?

"A. They—they left—back up—[Smith] said they went back up and started running more sales—

"Q. Who's *they* went back up?

"A. Him, [the petitioner], and [Boo-Boo].

* * *

"Q. And after they had had sex with [the victim] down in the basement what happened after that, what did they—what did [Smith] . . . tell you happened after that?

"A. [Smith] said they went upstairs, they went back up, them three, [the victim] was still downstairs I believe. Then [Smith] said he went back downstairs to get more money from [the victim], I believe, to get more money from her. . . .

"Q. [Smith] goes back down to [the victim] to get more money.

"A. Right.

"Q. Okay.

"A. And I guess they were starting to [get] high and said they'd been having sex again.

"Q. Who said they were having sex again?

"A. [Smith]. He described to me how—he had one pant—one—one—one of her pant legs off of her, one was on, one was off. He was having sex and she started resisting and he wouldn't stop and that's when he started just punching, strangling, choking her.

"Q. Who told you that [Smith] was choking her?

"A. [Smith] told me that.

"Q. Any doubt about that?

"A. That's what [Smith] said to me so, no.

"Q. How about the smacking around or punching her, who told you that?

"A. [Smith] did.

"Q. And what happened after that?

"A. [Smith] was choking her and he says it was an accident." (Emphasis in original; footnote added.)

Additionally, the petitioner's counsel elicited the following relevant testimony from Reynolds on direct examination at the habeas trial:

"Q. And just kind of with respect to [the petitioner's] involvement, did your testimony [at Smith's trial] kind of involve what [the petitioner] had to [do] with this whole case?

"A. Actually, I believe [the petitioner] had nothing to do with it at all because it was about [Smith].

"Q. So what did [Smith], his conversation with you, his—well, we'll call—

"A. The only thing that [Smith] mentioned about [the petitioner] is that [the petitioner] had bought a house, and that was just what he said to me. I don't know if that actually happened. [Smith] never implicated [the petitioner] in committing a crime with him. None of the sorts, and I never heard that [the petitioner] had anything to actually do with the crime.

"Q. So when [Smith] confided in you, when he confessed to you . . . his confession basically was that he was downstairs in a basement with [the petitioner] and with [the victim] and another individual. Correct?

"A. I don't—I can't recall who he said he, who he was down there with. It's been some time, but I can't recall what he said.

* * *

"Q. So you testified [at Smith's trial] that [the petitioner]—well, [Smith] told you that [the petitioner] was down in that basement at one point?

"A. Yes. Yes.

"Q. However, [the petitioner] left, and when he left [the victim] was still alive?

"A. Yes.

* * *

"Q. So that's [what Smith] confided in you that . . . he went back down to that basement alone without [the petitioner]?

"A. Right.

"Q. And he accidentally killed [the victim]?

"A. Yes.

"Q. And [the petitioner] was not present when that happened?

"A. Not at all. Never mentioned [the petitioner] being back down there at the time.

"Q. Are you aware that [the petitioner] also had a trial in the death of [the victim]?

"A. Yeah. Which I was kind of surprised at.

"Q. And why were you surprised?

"A. Because [the petitioner] wasn't there, wasn't present at the time when [the victim] was killed based on what [Smith] had said to me. . . .

"Q. And if you had been asked to testify in [the petitioner's] case, would you have testified?

"A. There would be nothing to testify to because I knew nothing of him being in the basement at the time of the murder.

"Q. Well, if they ask you about what [Smith] had told you and how he had confided in you, would you have testified to that?

"A. I would testify what [Smith] had said to me, yes."

On cross-examination, the respondent's counsel elicited the following relevant testimony from Reynolds:

"Q. And who sexually assaulted the victim according to your conversation with [Smith]?

"A. According to me, I believe [Smith] said him and someone else had sex with her. I guess a group of people. I don't know specifically who, but he said—I know he said they, and I don't know who's they are.

* * *

"Q. You had testified earlier, and I'll have the court reporter read it back for you if we need to. When I asked you whether or not [Smith] knew who sexually assaulted [the victim], did you or did you not say that there were other people there and you used the word they? Did you or did you not testify to that?

"A. Yes. I did say that.

"Q. Okay. So did [Smith] indicate in your conversation with him that there were other people present at the time of the murder?

"A. Yes.

"Q. Okay. Did [Smith] indicate who else was present at the time that [the victim] was murdered?

"A. I can't recall that if someone else was present or—

"Q. Did [Smith] indicate whether or not other people were present when [the victim] was sexually assaulted?

"A. Yes.

"Q. And who did [Smith] indicate was present while [the victim] was sexually assaulted?

"A. I can't recall."

On redirect examination, the petitioner's counsel then elicited the following relevant testimony from Reynolds:

"Q. And now I'm just going to try to clarify your testimony with respect to your statement. I think you might have gotten a little confused. So—

"A. Yeah.

"Q. You testified [o]n February 29 of 2012 [at Smith's trial,] that [Smith] told you the three individuals were downstairs tricking with [the victim]?

"A. Yes.

"Q. And then that those three individuals then went back upstairs?

"A. Um-hum.

"Q. And one of those individuals who left and went back upstairs was [the petitioner]?

"A. Yes.

"Q. And then [Smith] alone went back downstairs?

"A. Went back downstairs, yes. . . .

"Q. So what was your testimony with respect to after [the petitioner] had left being downstairs with [the victim]?

"A. Yeah. He went back downstairs.

"Q. Who's he?

"A. [Smith] . . . went back downstairs and began to have sex with [the victim].

"Q. And is that when [Smith] began sexually assaulting [the victim]?

"A. Yes.

"Q. And at that point in time, did [Smith] say that that is when he accidentally killed [the victim]?

"A. Right. [Smith] said it was an accident.

"Q. And he told you that at that point in time [the petitioner] was not present?

"A. [The petitioner] was not there. He left, went upstairs, and he went—[Smith] went back downstairs by himself.

"Q. So [the petitioner] was not present when—

"A. Was not present.

"Q. —[the victim] was killed by [Smith]?

"A. Correct."

In its memorandum of decision, after disposing of the petitioner's *Brady* claims,[7] the habeas court addressed the petitioner's ineffective assistance of counsel claim. The court summarized the petitioner's claim as follows: "Essentially, the petitioner faults [Skyers] for failing to obtain a copy of Reynolds' statement, to have Reynolds interviewed, and to call Reynolds as a witness at the petitioner's criminal trial. The putative utility of Reynolds' testimony would have been to inform the jury that Smith never implicated anyone else when he sought catharsis by painfully revealing to

[7] In counts one and two of the second amended petition, the petitioner alleged that the state violated *Brady* by failing to disclose Reynolds' statement to the petitioner. In its memorandum of decision, the habeas court rejected those claims, determining that Reynolds' statement, verbatim, was contained in an arrest warrant application, which Skyers had received and reviewed shortly after he had been assigned as the petitioner's criminal defense counsel. The petitioner does not challenge on appeal the portion of the judgment denying his *Brady* claims.

Reynolds that he 'accidentally' killed the victim when subduing her. The petitioner further submits that had Reynolds so testified, then it is reasonably probable that the jury would have acquitted the petitioner." The court proceeded to reject this claim.

First, the court concluded that the petitioner could not prevail on the ground that Skyers' poor investigation deprived the petitioner of the content of Reynolds' statement because, as it had found in denying the petitioner's *Brady* claims, Reynolds' statement was incorporated, verbatim, in an arrest warrant application, which Skyers had received and reviewed shortly after having been assigned as the petitioner's criminal defense counsel. Then, assuming, arguendo, that Skyers rendered deficient performance by failing to call Reynolds as a witness at the petitioner's criminal trial, the court concluded that the petitioner failed to demonstrate prejudice. The court found that Reynolds stated that "because Smith never mentioned coparticipants in the shake-down of the victim when he killed her, Reynolds *assumed* no one else was involved" in the victim's murder. (Emphasis in original.) The court determined that, although Reynolds would have been permitted to testify as to Smith's "expiation" at the petitioner's criminal trial, evidence regarding Reynolds' "assumption" that no one other than Smith was involved in the victim's murder would have been inadmissible as a lay opinion not based on personal knowledge. In addition, the court determined that, had evidence of Smith's confession to Reynolds been introduced at the petitioner's criminal trial, it was highly improbable that the jury would have drawn the inference that there were no other individuals present when Smith killed the victim because of the "other damning evidence" presented against the petitioner. Specifically, the court stated that (1) Russell testified at the petitioner's criminal trial that she was in the basement of the Burton

Street residence on the night of the victim's murder and (a) saw the victim with the petitioner, Smith, and Daniel, (b) heard the petitioner and the victim arguing about drugs, (c) observed the petitioner choke the victim while Smith pinned her arms down and Daniel removed her clothing, and (d) heard the three men threaten the victim that they were going to have sex with her "one way or the other," and (2) the petitioner's written statement following his arrest corroborated Russell's testimony and incriminated him, as he admitted that he grabbed the victim by her neck and hit her and that Smith subsequently began to choke the victim, at which point she "started to go out . . . ." The court found that both Smith's confession to Reynolds and the petitioner's written statement were consistent to the extent that Smith caused the victim's death, and that "Reynolds' memory of Smith's confession lacked reference to others, but it fail[ed] to exclude others, also." For these reasons, the court "retain[ed] high confidence in the jury's verdict despite the addition of Reynolds' recollection [of Smith's confession to Reynolds] to that mix."

On appeal, the petitioner claims that the habeas court erred in concluding that he failed to establish that Skyers' alleged deficient performance—namely, Skyers' failure to investigate and call Reynolds as a witness at the petitioner's criminal trial and to present a defense predicated on Reynolds' statement and testimony—prejudiced him.[8] Specifically, the petitioner contends that the evidence in the record establishes that Smith told Reynolds that the petitioner was not in the basement of the Burton Street residence with Smith when Smith murdered the victim and, thus, the court's factual

[8] The petitioner does not claim on appeal that the habeas court erred in rejecting his specific argument that Skyers rendered ineffective assistance by conducting an inadequate investigation that deprived the petitioner of the *content* of Reynolds' statement.

findings that Smith's confession to Reynolds did not exclude the presence of others at the time of the victim's death and that Reynolds merely assumed that the petitioner was not present when the victim was murdered were clearly erroneous. The petitioner further contends that Smith's confession would have exonerated the petitioner of felony murder by establishing that Smith, alone, murdered the victim and that the petitioner was not present when the murder was committed.[9] Therefore, the petitioner asserts, there is a reasonable probability that the outcome of his criminal trial would have been different had the jury been presented with Reynolds' statement and testimony from Reynolds regarding Smith's confession to Reynolds. The respondent argues that the court's findings are supported by the record and that the court correctly concluded that the petitioner failed to demonstrate prejudice, inter alia, because it was not reasonably probable that evidence regarding Smith's confession to Reynolds, even if it had been introduced at the petitioner's criminal trial, would have changed the outcome of the trial. We agree with the respondent.[10]

[9] General Statutes § 53a-54c provides: "A person is guilty of murder when, acting either alone or with one or more persons, such person commits or attempts to commit robbery, home invasion, burglary, kidnapping, sexual assault in the first degree, aggravated sexual assault in the first degree, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, such person, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (2) was not armed with a deadly weapon, or any dangerous instrument; and (3) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (4) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

[10] We observe that "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [peti-

A

We first turn to the petitioner's argument that the habeas court's factual findings that Smith's confession to Reynolds did not exclude the presence of others in the basement of the Burton Street residence when Smith killed the victim and that Reynolds only assumed that no one else was with Smith when Smith killed the victim are clearly erroneous. We are not persuaded.

"[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." (Internal quotation marks omitted.) *Ham* v. *Commissioner of Correction*, 187 Conn. App. 160, 173, 201 A.3d 1074, cert. denied, 331 Conn. 904, 202 A.3d 373 (2019).

Contrary to the petitioner's assertion, the evidence in the record does not indicate that Smith told Reynolds that the petitioner was not present when Smith murdered the victim. Both Reynolds' statement and Reynolds' testimony at Smith's trial indicate that Smith killed the victim, but neither suggests that Smith stated

tioner] as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffective claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Internal quotation marks omitted.) *Dupigney* v. *Commissioner of Correction*, 183 Conn. App. 852, 860, 193 A.3d 1274, cert. denied, 330 Conn. 942, 195 A.3d 1135 (2018). Here, as it was permitted to do, the habeas court assumed, arguendo, that Skyers' performance was deficient and proceeded to consider whether the petitioner had demonstrated prejudice. Thus, although the parties, in their respective appellate briefs, have analyzed whether Skyers' performance was deficient, we need not address the performance prong of *Strickland* on appeal. Id. We briefly note, however, that the petitioner's proposed theory of defense predicated on Reynolds' statement and testimony—that the petitioner, although present at the Burton Street residence on the night of the victim's murder, was not with Smith in the basement when Smith murdered the victim—would have wholly contradicted the theory of defense presented by the petitioner, based on his own testimony, that he was not at the Burton Street residence at all that night.

to Reynolds that the petitioner was not present at the time of the victim's death. At the habeas trial, Reynolds' testimony on direct examination, coupled with excerpts of Reynolds' testimony from Smith's trial, indicate that Reynolds "believe[d]" that the petitioner had nothing to do with the victim's murder, that Smith never implicated the petitioner in the victim's murder, that he had "never heard" of the petitioner being involved in the victim's murder, that Smith never "mentioned" the petitioner accompanying Smith when Smith murdered the victim, that the petitioner was not present when the victim was murdered "based on what [Smith] had said to [him]," and that Smith had returned to the basement alone after Smith, the petitioner, and a third individual had exited the basement at some point prior to the victim's death. None of the foregoing evidence reflects that Smith ever stated to Reynolds that the petitioner was not present at the time that Smith murdered the victim; instead, it supports the court's findings that Smith's confession did not exclude the presence of others at the crime scene when Smith murdered the victim and that Reynolds merely presumed that the petitioner was absent. On redirect examination, the petitioner's counsel asked Reynolds explicitly whether Smith had told him that the petitioner was not present when Smith murdered the victim. Reynolds testified in response: "[The petitioner] was not there. He left, went upstairs, and he went—[Smith] went back downstairs by himself." Reynolds then reiterated that the petitioner "[w]as not present" when Smith killed the victim. Notably, however, Reynolds did not testify that Smith *told* him that the petitioner was absent from the crime scene when the victim died; rather, he repeated his prior testimony, untethered to any particular statement by Smith, that the petitioner was not present when Smith murdered the victim.

Following our careful review of the record, we conclude that the court's findings that Smith's confession

to Reynolds did not exclude the presence of others in the basement of the Burton Street residence at the time of the victim's murder and that Reynolds assumed that the petitioner was not with Smith when Smith murdered the victim are amply supported by the evidence in the record, and we are not left with a definite and firm conviction that the court committed a mistake. Thus, the court's findings are not clearly erroneous.

B

Having concluded that the habeas court's findings contested by the petitioner are not clearly erroneous, we now address the petitioner's claim that the court erred in concluding that the petitioner failed to satisfy the second prong of *Strickland*. This claim is unavailing.

"When defense counsel's performance fails the [first prong of *Strickland*], a new trial is required if there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The question, therefore, is whether there is a reasonable probability that, absent the errors, the [fact finder] would have had a reasonable doubt respecting guilt. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable." (Citation omitted; internal quotation marks omitted.) *Dupigney* v. *Commissioner of Correction*, 183 Conn. App. 852, 859, 193 A.3d 1274, cert. denied, 330 Conn. 942, 195 A.3d 1135 (2018).

We agree with the habeas court that the petitioner failed to demonstrate that he was prejudiced by Skyers' alleged deficient performance because, even if Smith's confession to Reynolds had been presented to the jury at the petitioner's criminal trial, there is no reasonable probability that the outcome of the trial would have been different. Russell testified at the petitioner's criminal trial, inter alia, that she observed the petitioner choking the victim in the basement of the Burton Street residence alongside Smith and another individual. In addition, in a written statement to the police, the petitioner admitted to grabbing the victim by the neck and hitting her, and he observed Smith choke the victim until "she started to go out . . . ." As the court reasonably determined, Russell's testimony and the petitioner's written statement constituted "damning evidence" inculpating the petitioner for felony murder. Moreover, as we concluded in part II A of this opinion, the court found, without error, that Smith's confession to Reynolds did not exclude the presence of others, which would include the petitioner, at the time that Smith murdered the victim. As the court further found, Smith's confession corroborated the petitioner's account that Smith caused the victim's death. Given the totality of the incriminating evidence introduced at the petitioner's criminal trial, we are not convinced that Smith's confession to Reynolds would have affected the jury's verdict and, thus, the petitioner has failed to undermine our confidence in the outcome of his criminal trial.

In sum, we conclude that the habeas court properly determined that the petitioner failed to establish that he was prejudiced by Skyers' alleged deficient performance. Therefore, the court did not abuse its discretion in denying the petitioner's petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANTHONY CARTER (AC 41656)

DiPentima, C. J., and Alvord and Pellegrino, Js.

Syllabus

The defendant, who had been convicted of the crimes of assault in the first degree, attempt to commit assault in the first degree, risk of injury to a child and criminal possession of a firearm, appealed to this court from the judgment of the trial court dismissing his motion to set aside the judgment of conviction. The court dismissed the defendant's motion to set aside the judgment, filed in 2017, on the ground of collateral estoppel in that the defendant's claim of "after-discovered fraud" on the court had already been considered and rejected multiple times before, including, most recently, when the trial court denied a motion to open and set aside the judgment he had filed in 2010, which alleged, inter alia, fraud concerning ballistics evidence. Alternatively, the court concluded that it lacked subject matter jurisdiction over the 2017 motion to set aside the judgment and that, even if the defendant could make out a cognizable fraud claim, no fraud exception exists to the finality of criminal judgments. *Held* that the defendant could not prevail on his claim that the trial court erred in dismissing his 2017 motion to set aside the judgment of conviction, as the defendant's appeal was rendered moot because he failed to challenge all independent grounds for the court's adverse ruling: although the defendant claimed that it was error for the trial court to find that it lacked subject matter jurisdiction over the 2017 motion to set aside the judgment, he failed to challenge the court's independent ground for dismissing the 2017 motion to set aside the judgment, namely, that the defendant's claim was substantively the same as others he had made multiple times before, most recently in 2010, and, thus, was collaterally estopped, and, therefore, even if this court agreed with the defendant on the merits of his subject matter jurisdiction claim, there was no practical relief that could be afforded to him in light of the unchallenged collateral estoppel basis for the trial court's dismissal; accordingly, the defendant's claims were moot and this court was without subject matter jurisdiction over his appeal.

Argued September 11—officially released November 5, 2019

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree, attempt to commit assault in the first degree, risk of injury to a

child and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Mulcahy*, *J.*; verdict and judgment of guilty; thereafter, the court, *Schuman*, *J.*, granted the state's motion to dismiss the defendant's motion to set aside the judgment; subsequently, the court, *Schuman*, *J.*, denied the defendant's motion for reconsideration; thereafter, the court, *Schuman*, *J.*, dismissed the defendant's motion to set aside the judgment, and the defendant appealed to this court. *Appeal dismissed.*

Anthony Carter, self-represented, the appellant (defendant).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Richard J. Rubino*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The self-represented defendant, Anthony Carter, appeals from the trial court's dismissal of his motion to set aside a judgment of conviction imposed on August 2, 2002. On appeal, the defendant claims that (1) the prosecutor committed fraud by writing in the state's response to the defendant's motion for reconsideration, dated June 2, 2017, that it was not "[t]he appropriate mechanism" to secure relief and that a "motion for a new trial or a motion to set aside the judgment" would be; (2) the court's determination that it lacked subject matter jurisdiction over his motion to set aside his judgment of conviction was erroneous; and (3) even if the court did not err in its subject matter jurisdiction determination, the state "[submitted] to the jurisdiction of the court." The state argues, in part, that because the defendant fails to challenge all independent grounds for the court's adverse ruling, his appeal is rendered

moot. We agree with the state. Accordingly, we dismiss the defendant's appeal.[1]

The following relevant facts are set forth in our decision from one of the defendant's prior appeals. *State* v. *Carter*, 139 Conn. App. 91, 55 A.3d 771 (2012), cert. denied, 307 Conn. 954, 58 A.3d 974 (2013). "[T]he defendant's prosecution arose from the terrible consequences of a drug turf war, in which a stray bullet fired from the defendant's gun struck and seriously injured a seven year old girl. . . . Following a jury trial, the defendant was convicted of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (5), risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1), and the court rendered judgment accordingly. The court sentenced the defendant to a total effective term of twenty-seven years incarceration." (Internal quotation marks omitted.) Id., 92.

On June 20, 2017, the defendant filed a motion to set aside the judgment.[2] Therein, the defendant claimed "after-discovered fraud on the court." (Internal quotation marks omitted.) In his memorandum of law in support of the operative motion, the defendant expounded "that the prosecution altered, concealed and/or removed from the trial proceedings documents prepared by the Hartford Police Department with purpose to impair its verity and availability, and that the prosecution passed the altered document off to the defense, representing it to be '[simply] a distance' measurement, knowing it to be false." On August 3, 2017,

[1] Because we dismiss the defendant's claims as moot, we do not reach the merits of his claims.

[2] For ease of reference, the defendant's motion to set aside the judgment will hereinafter be referred to as the operative motion.

the state moved to dismiss the operative motion, arguing that the trial court lacked subject matter jurisdiction. The trial court, *Schuman*, *J.*, granted the state's motion on October 30, 2017.[3]

In the court's ruling, it detailed part of the defendant's "voluminous history" of postconviction litigation, including a motion to open and set aside the judgment of conviction filed in 2010. The defendant based his 2010 motion on "fraud concerning ballistics evidence and reports prepared by the Hartford Police Department about that evidence." (Internal quotation marks omitted.) That motion was denied by the court, *Gold*, *J.*, on two grounds: (1) "the motion was filed well beyond the four month period after the entry of the criminal conviction and judgment"; and (2) "the motion was barred by collateral estoppel in that Judge Nazzaro had rejected the same claim in the defendant's third habeas petition."[4] Applying this history to the operative motion, Judge Schuman concluded that the defendant's claim bore "only semantic differences from the defendant's claim . . . raised in [the 2010] motion to open." As that claim had already been considered and rejected multiple times before, most recently by Judge Gold and this court, the trial court concluded that it "necessarily must grant the state's motion to dismiss . . . ."

The court further concluded that, even if the defendant's claim were to be treated as distinct from the one he had raised in 2010, the operative motion still warranted dismissal. First, the court cited to *State* v. *Carrillo Palencia*, 162 Conn. App. 569, 580–82, 132 A.3d 1097, cert. denied, 320 Conn. 927, 133 A.3d 459 (2016), for the proposition that "absent a statute or rule to the contrary, the Superior Court loses jurisdiction over the

[3] The defendant filed a motion to reconsider the dismissal of the operative motion. That motion was denied by Judge Schuman on November 21, 2017.

[4] Judge Gold's decision was affirmed by this court. *State* v. *Carter*, supra, 139 Conn. App. 93.

defendant's conviction at the time of sentencing," a principle that "applies to a postconviction 'motion to open judgment.' " The court stated that the defendant's motion to set aside the judgment was substantively the same as a motion to open the judgment "and, therefore, falls under the same rule." Second, the court rejected the defendant's argument that, under Connecticut law, there is a fraud exception to the general finality rule for criminal judgments and that, even if such an exception existed, the defendant's claim was "too vague to label it definitively as one of fraud on the court."

The defendant filed the present appeal on May 17, 2018. In the defendant's preliminary statement of issues, he claimed that the trial court abused its discretion by dismissing the operative motion after determining "it did not have subject matter jurisdiction . . . ." In the defendant's appellate brief, he raises three claims, which are set forth in the opening paragraph of this decision. The defendant does not, however, claim that the court's collateral estoppel ruling was erroneous.[5]

The state argues that even if the court "incorrectly determined that it lacked jurisdiction to set aside the judgment," the court's ruling "dismissing the [operative] motion on the basis of collateral estoppel . . . stand[s] unchallenged." According to the state, the defendant's failure to challenge the court's collateral estoppel ruling renders moot his appeal under *State* v. *Lester*, 324 Conn. 519, 153 A.3d 647 (2017), leaving this court without subject matter jurisdiction.

[5] At oral argument before this court, the defendant argued that, because the trial court sua sponte raised the issue of collateral estoppel in its ruling on the operative motion, the defendant had no notice of that issue in order to make an adequate record. Because the defendant advanced this claim for the first time during oral argument, we decline to consider it. See *State* v. *Marcelino S.*, 118 Conn. App. 589, 592 n.4, 984 A.2d 1148 (2009) ("[a]ppellate courts generally do not consider claims raised for the first time at oral argument"), cert. denied, 295 Conn. 904, 988 A.2d 879 (2010).

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [an appellate] court's subject matter jurisdiction . . . ." (Internal quotation marks omitted.) Id., 526. "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 the judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) Id., citing *State* v. *Nardini*, 187 Conn. 109, 111–12, 445 A.2d 304 (1982). "[I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or [the] defendant in any way." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Holley*, 174 Conn. App. 488, 504, 167 A.3d 1000, cert. denied, 327 Conn. 907, 170 A.3d 3 (2017), cert. denied, U.S. , 138 S. Ct. 1012, 200 L. Ed. 2d 275 (2018).

In the present case, when the court dismissed the operative motion, it relied on two independent grounds. The court first concluded that the defendant's claim was substantively the same as others he made multiple times before—most recently in 2010—and, thus, was collaterally estopped. The court concluded, alternatively, that it lacked subject matter jurisdiction over the operative motion, and that, even if the defendant could make out a cognizable fraud claim, no fraud exception exists to the finality of criminal judgments.

On appeal, the defendant claims that it was error for the court to find it lacked subject matter jurisdiction over the operative motion because "a trial court, whether civil or criminal, never loses jurisdiction over a judgment obtained by fraud." The defendant did not, however, claim that the court's reliance on collateral estoppel was erroneous. Thus, even if we were to agree with the defendant on the merits of his subject matter jurisdiction claim, we would be incapable of providing him any practical relief in light of the unchallenged collateral estoppel basis for the court's dismissal. See *State* v. *Lester*, supra, 324 Conn. 527–28 (dismissing as moot defendant's appeal of trial court's granting of state's motion in limine because there were "independent bases for the trial court's exclusion of the evidence . . . that the defendant [had] not challenged in [his] appeal"); *State* v. *Holley*, supra, 174 Conn. App. 506–507 (dismissing defendant's appeal as moot with respect to suppression of evidence claim because defendant did not challenge independent, verbal consent basis for upholding trial court's decision). Therefore, the defendant's claims are moot, and we are without subject matter jurisdiction over his appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

ANTHONY CARTER *v.* STATE OF CONNECTICUT (AC 40914)

DiPentima, C. J., and Alvord and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of the crimes of assault in the first degree, attempt to commit assault in the first degree, risk of injury to a child and criminal possession of a firearm, filed a petition for a new trial, alleging that he had been convicted due to fraud by the prosecutor. The trial court granted the motion for summary judgment filed by the respondent, the state of Connecticut, on the ground that the petitioner had filed the petition for a new trial past the applicable three year statute

of limitations ([Rev. to 2001] § 52-582). The petitioner filed a motion for reconsideration in August, 2017, which the court denied in September, 2017, and the petitioner appealed to this court. In February, 2018, the petitioner filed a petition for certification to appeal from the denial of the petition for a new trial and a request for leave to file a late petition for certification, which the trial court denied. Subsequently, the petitioner filed a motion for reconsideration, which the court denied. On appeal, the petitioner claimed, inter alia, that the trial court abused its discretion by denying his late petition for certification to appeal. *Held* that the trial court properly denied the petitioner's request for permission to file a late petition for certification, as the petitioner failed to demonstrate how the court's ruling, based on the court's finding of a lack of good cause for the petitioner's delay, satisfied any of the criteria that constitutes an abuse of discretion; the record revealed that there was a delay of over four months from when the August, 2017 motion for reconsideration was denied and when the petitioner filed the petition for certification and the request for leave to file a late petition for certification, which was far beyond the statutory (§ 54-95 [a]) ten day time frame, and although the petitioner attributed the filing delay to errors by the office of the clerk, which incorrectly returned the petition to him, the trial court's order demonstrated that it properly considered the reasons for the petitioner's delay in filing the petition, and the petitioner did not explain how the alleged clerical error by the clerk's office led to an over four month delay in filing the petition.

Argued September 11—officially released November 5, 2019

Procedural History

Petition for a new trial following the petitioner's conviction of the crimes of assault in the first degree, attempt to commit assault in the first degree, risk of injury to a child and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, granted the respondent's motion for summary judgment and rendered judgment thereon; thereafter, the court denied the petitioner's motion for reconsideration, and the petitioner appealed to this court; subsequently, the court, *Noble*, *J.*, denied the petitioner's petition for certification to appeal and motion requesting leave to file a late petition for certification; thereafter, the court, *Noble*, *J.*, denied the petitioner's motion for reconsideration. *Appeal dismissed.*

Anthony Carter, self-represented, the appellant (petitioner).

Jo Anne Sulik, supervisory assistant state's attorney, with whom, on the brief, was *Gail P. Hardy*, state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The self-represented petitioner, Anthony Carter, appeals from the judgment of the trial court denying his petition for a new trial. The court granted the motion for summary judgment filed by the state of Connecticut on the ground that the petitioner had filed the petition for a new trial past the applicable statute of limitations. See General Statutes (Rev. to 2001) § 52-582. The petitioner then sought to appeal the trial court's decision. His petition for certification to appeal was untimely, however, and the trial court denied his petition. On appeal, the petitioner claims that the court abused its discretion by denying his late petition for certification to appeal. We disagree and, accordingly, dismiss this appeal.

The record reveals the following relevant facts and procedural history. In 2002, the petitioner was convicted, after trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (5), risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and criminal possession of a firearm in violation of General Statutes (Rev. to 2001) § 53a-217 (a) (1). He was sentenced to a twenty-seven year prison term. In 2004, this court affirmed the conviction. *State* v. *Carter*, 84 Conn. App. 263, 283, 853 A.2d 565, cert. denied, 271 Conn. 932, 859 A.2d 931 (2004), cert. denied, 544 U.S. 1066, 125 S. Ct. 2529, 161 L. Ed. 2d 1120 (2005). The petitioner has since filed unsuccessful actions in state and federal courts, including multiple petitions

seeking writs of habeas corpus and a writ of error coram nobis, motions to correct an illegal sentence and motions to set aside the judgment.[1]

In January, 2014, the petitioner commenced this action by filing a petition for a new trial pursuant to General Statutes § 52-270. The petitioner alleged that he had been convicted due to fraud by the prosecutor. Specifically, the petitioner claimed that the prosecutor made "false or misleading allegations calculated to deceive the court in order to obtain a ruling in the state's favor" regarding evidence of nine millimeter shell casings found by the Hartford Police Department.

In responding to the petition, the state asserted the special defense that the petitioner was not entitled to a new trial because the petition had been filed more than three years after judgment had been rendered and, thus, was barred by the applicable statute of limitations under General Statutes (Rev. to 2001) § 52-582. In his reply, the petitioner responded that the statute of limitations was not applicable because "judgments obtained by means of fraud may be attacked at any time and, therefore, toll the statute of limitations."

In October, 2016, the state filed a motion for summary judgment on the ground that the petition for a new trial was filed more than eight years after the statute of limitations had passed. Thereafter, the court granted the state's motion for summary judgment on August 15, 2017. In its memorandum of decision, the court, *Noble*, *J.*, determined that the petitioner had been sentenced on August 2, 2002, and, therefore, the period for filing

[1] The petitioner also brought another appeal that was argued the same day as the present matter. That appeal stems from the dismissal of a motion to set aside the petitioner's 2002 conviction. There the petitioner claimed that the judgment should be set aside due to fraud allegedly committed by the prosecutor during his trial. See *State* v. *Carter*, 194 Conn. App. 202, A.2d (2019).

a petition for a new trial ended on August 2, 2005. See General Statutes (Rev. to 2001) § 52-582.[2]

The court noted that the petitioner sought to establish fraud on the part of the prosecutor and argued that such fraud would toll the statute of limitations. The court found, however, that the petitioner had not proffered any evidence "that there was any fraudulent concealment on the part of the [prosecutor]. The [petitioner's] petition and arguments in opposition of the motion for summary judgment are devoid of any allegations that would speak to the elements necessary to establish a fraudulent concealment and are contrary to nearly every piece of evidence submitted by the [state]." The court then granted the state's motion for summary judgment. The petitioner filed a motion for reconsideration on August 23, 2017, which the trial court denied on September 7, 2017.

The petitioner filed his appeal to this court on October 3, 2017. On February 7, 2018, the petitioner filed both a petition for certification to appeal the denial of the petition for a new trial and a request for leave to file a late petition for certification, which the petitioner

[2] General Statutes (Rev. to 2001) § 52-582, the version of the statute that was in effect at the time the petitioner committed the crimes, which remained unchanged at the time the petitioner filed his petition for a new trial in 2014, provided: "No petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of, except that a petition based on DNA (deoxyribonucleic acid) evidence that was not discoverable or available at the time of the original trial may be brought at any time after the discovery or availability of such new evidence." General Statutes § 52-582 (a) currently provides in relevant part: "No petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of, except that a petition for a new trial in a criminal proceeding based on DNA (deoxyribonucleic acid) evidence or other newly discovered evidence . . . that was not discoverable or available at the time of the original trial . . . may be brought at any time after the discovery or availability of such new evidence . . . ." The revised language of the statute does not affect our analysis.

titled "Motion to Accept Late Filing of Petition for Certification," with the trial court. On February 9, 2018, the court denied the petitioner's request for leave to file a late petition for certification. The court also denied the petition for certification. In response to the court's orders, the petitioner filed a motion for reconsideration on March 2, 2018. The court denied the motion for reconsideration on March 26, 2018.

On appeal, the petitioner raises four issues in his brief. First, the petitioner argues that the court abused its discretion by denying his motion to reconsider his petition for a new trial because the court improperly based its decision on claims of fraudulent concealment. Second, the petitioner contends that the court's granting of the state's motion for summary judgment was improper because the petitioner's claims involved questions of motive and intent. Third, the petitioner argues that rendering summary judgment in favor of the state was improper because the court did, pursuant to § 52-270 (a), have jurisdiction to hear the petitioner's "fraud on the court claim" beyond the three year statute of limitations of General Statutes (Rev. to 2001) § 52-582. Lastly, the petitioner claims that the court abused its discretion by denying his motion to reconsider following the court's denial of his motion to file a late petition for certification.

In response, the state counters that the court did not abuse its discretion in denying the petitioner's request for leave to file a late petition for certification. Alternatively, the state argues that the court properly granted the state's motion for summary judgment. We need not address the court's granting of the motion for summary judgment, however, because we agree with the state's first argument that the court properly denied the petitioner's request for leave to file a late petition for certification. Therefore, we dismiss the appeal.

General Statutes § 54-95 (a) provides in relevant part: "No appeal may be taken from a judgment denying a petition for a new trial unless, within ten days after the judgment is rendered, the judge who heard the case . . . certifies that a question is involved in the decision which ought to be reviewed by the Supreme Court or by the Appellate Court . . . ." The petitioner here filed his motion for leave to file a late petition for certification over four months after the denial of the August 23, 2017 motion for reconsideration, far beyond the ten day time frame.[3]

In *Santiago* v. *State*, 261 Conn. 533, 540–44, 804 A.2d 801 (2002), our Supreme Court held that, even though the failure to comply with § 54-95 (a) is not a jurisdictional bar to an appeal from the denial of a petition for a new trial, the certification requirement is mandatory. Noting the statute's goals of conserving judicial resources by reducing frivolous appeals, the court further held that the petitioner in that case was not entitled to appellate review of the trial court's judgment until he satisfied the certification requirement. Id., 543, 545.

In that decision, our Supreme Court further noted that "the decision of whether to entertain an untimely request for certification to appeal . . . is within the sound discretion of the [trial] court. . . . In exercising that discretion, the court should consider the reasons for the delay." (Citation omitted.) Id., 544–45 n.17. Our Supreme Court explained that "[the trial] court will be

[3] The petitioner argues that the court abused its discretion in denying the petition for certification even though it was filed beyond the statutory time limit. In order to demonstrate abuse of discretion in the denial of the petition for certification, the petitioner must demonstrate "[1] that the issues are debatable among jurists of reason; [2] that a court could resolve the issues [in a different manner]; or [3] that the questions are adequate to deserve encouragement to proceed further." (Emphasis omitted; internal quotation marks omitted.) *Seebeck* v. *State*, 246 Conn. 514, 534, 717 A.2d 1161 (1998). We need not address this argument in light of our determination that the request for leave to file a late petition for certification to appeal was properly denied.

required to decide whether to excuse the petitioner's delay in filing his petition for certification to appeal . . . with due regard to the length of the delay, the reasons for the delay, and any other relevant factors." Id., 545 n.18.

In the present case, the record reveals that there was a delay of over four months from when the August 23, 2017 motion for reconsideration was denied and when the petitioner filed the petition for certification and the request for leave to file a late petition for certification. In his request for leave to file a late petition for certification, the petitioner attributed the filing delay to errors by the office of the clerk, which incorrectly returned the petition to him. In response, the court stated that it "is without authority to extend the time for filing the appeal to a date which is more than twenty days from the expiration date of the appeal period. . . . Moreover, the petitioner has failed to establish good cause for a delay of over four months after the expiration of the appeal period . . . ."[4] (Citation omitted.) The order demonstrates that the court considered the reasons for the petitioner's delay in filing the petition, as required by *Santiago* v. *State*, supra, 261 Conn. 544–45 nn.17 and 18. The petitioner does not explain how the alleged clerical error by the clerk's office led to an over four month delay in filing the petition. The determination by the court demonstrates that it considered the reasons the petitioner offered for his delay in filing the petition and, after doing so, denied the petitioner's petition.

[4] In the court's order denying the request for leave to file a late petition for certification, the court stated that it "is without authority to extend the time for filing the appeal to a date which is more than twenty days from the expiration date of the appeal period." Because, here, an appeal to this court had already been filed when the request for leave to file a late petition for certification was filed in February, 2018, the court's statement was not pertinent. The motion before the court was not a request to file a late appeal but a request to file a late petition for certification. Notwithstanding the court's misstatement alluding to its lack of authority, it properly considered the causes and the length of the delay in the petitioner's filing of the late petition for certification.

The petitioner has failed to demonstrate how the court's ruling, based on the court's finding of a lack of good cause for the petitioner's delay, satisfies any of the criteria that constitutes abuse of discretion. Accordingly, we conclude that the court's denial of the petitioner's request for permission to file a late petition for certification was proper.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RONALD RICKS (AC 41520)

Alvord, Moll and Norcott, Js.

Syllabus

The defendant, who had been convicted, on a plea of guilty, of felony murder, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant claimed that due process required that the state prove that he breached his initial plea agreement before it could enter into a second plea agreement with him. The defendant had agreed to plead guilty in exchange for his truthful testimony at the trial of his codefendant, or where, as here, the codefendant pleaded guilty without going to trial, the state would recommend a mandatory minimum sentence of twenty-five years of incarceration. After the trial court permitted the defendant to withdraw a motion he had filed to withdraw his initial guilty plea, the court vacated the defendant's initial plea. The defendant then pleaded guilty to felony murder, after which the court accepted the state's recommendation that it impose a sentence of thirty years of incarceration. *Held* that the judgment of the trial court denying the defendant's motion to correct an illegal sentence was affirmed; the trial court having fully addressed the arguments raised in this appeal, this court adopted the trial court's well reasoned decision as a proper statement of the relevant facts and applicable law on the issues.

Argued September 19—officially released November 5, 2019

Procedural History

Substitute information charging the defendant with the crimes of felony murder, robbery in the first degree and conspiracy to commit robbery in the first degree,

brought to the Superior Court in the judicial district of Fairfield, where the defendant was presented to the court, *Comerford*, *J.*, on a plea of guilty to felony murder; judgment in accordance with the plea; thereafter, the court, *Devlin*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed*.

Ronald Ricks, self-represented, the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *C. Robert Satti, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Ronald Ricks, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that the trial court improperly concluded that he had breached his initial plea agreement with the state and that his sentence was not illegally imposed. Specifically, the defendant asserts that due process requires the state to prove, by a preponderance of evidence, that he was in breach of the initial plea agreement before the state could enter a second plea agreement. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On April 9, 1999, the state offered, and the defendant accepted, a plea agreement in which the defendant agreed to plead guilty to the charge of felony murder in violation of General Statutes § 53a-54c, for crimes committed on December 12, 1997, and to testify truthfully in his codefendant's trial, or, in the alternative, if his codefendant pleaded guilty without

going to trial, the state would recommend the mandatory minimum sentence of twenty-five years of incarceration. The plea agreement also contained the stipulation that if the defendant refused to testify or did not testify truthfully, the state would recommend a more substantial sentence. The codefendant referred to in the plea agreement ultimately pleaded guilty, without going to trial, on April 15, 1999.

On or before May 25, 1999, the defendant filed a grievance against his original attorney for alleged misrepresentations and requested that a new attorney be assigned to his case. At about the same time, the defendant filed a motion to withdraw his guilty plea, as he believed he was induced, by his original attorney, to accept the initial plea agreement. When the defendant filed the motion to withdraw, the prosecutor forewarned the defendant that his sentence would likely be increased, stating in relevant part, "I'm quite confident that if [the defendant] is successful in anything, it's going to be successful in, by the end of July, having himself about [a] ten to fifteen more year sentence that he already has secured for himself." Thereafter, the court appointed a substitute assigned counsel for the remainder of the defendant's case.

On June 18, 1999, the court held a sentencing hearing for the defendant. At the hearing, the defendant, having had a "change of heart," orally moved to withdraw his motion to withdraw the guilty plea. The court permitted the withdrawal of such motion. Immediately thereafter, the court vacated the defendant's initial plea. Subsequently, the defendant pleaded guilty to felony murder. Accepting the state's recommendation, the court sentenced the defendant to thirty years of incarceration, twenty-five of which is the mandatory minimum.

On March 19, 2001, the defendant filed a petition for a writ of habeas corpus alleging ineffective assistance

of counsel, which was denied by the habeas court on June 28, 2004. Thereafter, the defendant filed a motion to correct an illegal sentence with the trial court. A hearing on the motion was held on December 13, 2017. Subsequently, the trial court, *Devlin*, *J.*, denied the motion on February 20, 2018. This appeal followed.

Our examination of the record on appeal and the briefs and arguments of the parties persuades us that the judgment of the trial court should be affirmed. The trial court's memorandum of decision fully addresses the arguments raised in the present appeal, and we adopt its concise and well reasoned decision as a proper statement of the relevant facts and applicable law on the issue. See *State* v. *Ricks*, Superior Court, judicial district of Fairfield, Docket No. CV-97-135273 (February 20, 2018) (reprinted at 194 Conn. App. 219, A.3d). It serves no useful purpose for us to repeat the discussion contained therein. See, e.g., *Furka* v. *Commissioner of Correction*, 21 Conn. App. 298, 299, 573 A.2d 358, cert. denied, 215 Conn. 810, 576 A.2d 539 (1990).

The judgment is affirmed.

APPENDIX

STATE OF CONNECTICUT *v.* RONALD RICKS*

Superior Court, Judicial District of Fairfield
File No. CR-97-135273

Memorandum filed February 20, 2018

Proceedings

Memorandum of decision on defendant's motion to correct illegal sentence. *Motion denied.*

Ronald Ricks, self-represented, the defendant.

C. Robert Satti, Jr., supervisory assistant state's attorney, for the state.

* Affirmed. *State* v. *Ricks*, 194 Conn. App. 216, A.3d (2019).

Opinion

DEVLIN, J. In the present motion, the defendant, Ronald Ricks, asserts that the thirty year sentence that he is presently serving is illegal because it is contrary to the plea agreement that he entered with the state. A hearing on the motion was held on December 13, 2017. For the reasons set forth below, the motion is denied.

BACKGROUND

On or about December 19, 1997, the defendant was arrested for felony murder and related charges arising out of his alleged participation in the December 12, 1997 robbery of a Bridgeport grocery store during which the proprietor was shot and killed. The two masked perpetrators took cash and a Smith and Wesson firearm from the store. Following his arrest, the defendant gave a statement to the police admitting his involvement and naming Timothy Griffin as the other person involved. The defendant identified Griffin as the shooter and claimed that, prior to the actual shooting, he had no knowledge that Griffin had a gun.

During the pendency of his case, the defendant was initially represented by Assistant Public Defender Jonathan J. Demirjian. Attorney Demirjian negotiated a plea agreement for the defendant, and on April 9, 1999, a change of plea hearing was conducted before the court, *Comerford*, *J*. At that hearing, the defendant entered an *Alford* plea[1] to felony murder. As stated by the prosecutor, the plea agreement was as follows: "The state's understanding here is that sentencing will be deferred until after the trial of Timothy Griffin. And, that if [the defendant] testifies truthfully based upon the state's attorney's understanding of what the truth is here, which is essentially what [the defendant] told the police

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

in giving his statement back in December of 1997, that if [the defendant] does, in fact, do that, in a Griffin trial, if a trial is held, or if Mr. Griffin pleads guilty without ever going through a trial, in either instance, the state will recommend that [the defendant] receive a sentence of twenty-five years.

"If Mr.—if we do, in fact, go through a Griffin trial and [the defendant] refuses to testify truthfully or does not testify truthfully, then he will have pled guilty, the state will not recommend a twenty-five year sentence, we will ask the court to impose a substantial sentence, and the sentence will be up to the sentencing judge."

Both Attorney Demirjian and the defendant acknowledged that the above was their understanding of the plea agreement. Before accepting the plea, the court emphasized to the defendant that if he did not live up to his part of the agreement, the court would be free to impose a sentence in excess of twenty-five years. The defendant acknowledged that he had to live up to the agreement.

Sometime after the April 9, 1999 change of plea hearing, the defendant made a motion to withdraw his guilty plea.[2] On May 14, 1999, the Office of the Public Defender moved for the appointment of a special public defender to represent the defendant. The reason for the motion was stated as follows: "the defendant has asserted that counsel misled him into his entry of a guilty plea." At his 2004 habeas corpus trial, the defendant testified that he asked to withdraw his plea because he did not understand that he was supposed to testify against Griffin.

[2] This motion and the date of the court hearing on the motion are not presently in the court file. The documents in the file clearly show that the motion was filed and heard. It was most likely filed between April 9, 1999, and May 14, 1999. On May 14, 1999, a motion to appoint a special public defender was filed. A hearing on the motion to withdraw the plea occurred prior to June 18, 1999.

On April 15, 1999, Griffin waived trial and pleaded guilty to felony murder. On May 25, 1999, Attorney Jason Gladstone was appointed as a special public defender for the defendant, replacing Attorney Demirjian. Sometime after that, a hearing was held on the defendant's motion to withdraw his guilty plea.[3]

On June 18, 1999, the defendant withdrew his motion to withdraw his guilty plea. Judge Comerford, however, vacated the plea, and the defendant was again put to plea on felony murder. He again entered an *Alford* guilty plea, but this time the agreed sentence was thirty years. Judge Comerford accepted the plea and, on that same date, imposed the agreed thirty year sentence. Earlier in the day, Judge Comerford had sentenced Griffin to an agreed sentence of forty years.

DISCUSSION

In the present motion, the defendant claims that he was legally entitled to receive the twenty-five year sentence that was initially agreed to by the state. He further claims that the subsequent thirty year sentence is illegal because it violates the initial plea agreement.

The general rule in Connecticut is that "[t]he jurisdiction of the sentencing court terminates when the sentence is put into effect, and that the court may no longer take any action affecting the sentence unless it has been expressly authorized to act." *State* v. *Tuszynski*, 23 Conn. App. 201, 206, 579 A.2d 1100 (1990). "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner . . . ." Practice Book § 43-22. Illegal sentences include those that are within the relevant statutory limits but imposed in a way that violates a defendant's right that the government keeps

[3] Again, the file does not reflect when the motion was heard, but the hearing is referred to by Judge Comerford in his remarks at the June 18, 1999 hearing.

its plea bargain promises. *State* v. *Pagan*, 75 Conn. App. 423, 429, 816 A.2d 635, cert. denied, 265 Conn. 901, 829 A.2d 420 (2003).

Plea agreements are subject to ordinary contract law principles. *State* v. *Nelson*, 23 Conn. App. 215, 219, 579 A.2d 1104, cert. denied, 216 Conn. 826, 582 A.2d 205 (1990), cert. denied, 499 U.S. 922, 111 S. Ct. 1315, 113 L. Ed. 2d 248 (1991). The ultimate goal in construing any plea agreement where there is a dispute as to its terms is the real intent of the parties. Id.

In the present case, it was the defendant, and not the state, who violated the plea agreement. As noted above, at the change of plea hearing on April 9, 1999, the defendant acknowledged that, in order to obtain the agreed sentence of twenty-five years, he had to live up to his end of the plea agreement. Plainly, he did not do that. He sought to change attorneys and withdraw his guilty plea based on his assertion that he did not understand that his plea agreement required him to testify against Griffin.

The defendant's present assertion that Griffin's guilty plea eliminated the need for his testimony, thus making irrelevant his efforts to get out of the original plea agreement, misses the point. The state had bargained for his continued availability as a cooperating witness. By seeking to withdraw his plea and reneging on his promise to testify, the defendant breached his original plea agreement contract. He then made another contract for an agreed sentence of thirty years. This sentence is not illegal.

Motion denied.

ALIREZA JAMALIPOUR *v.* FAIRWAY'S EDGE ASSOCIATION, INC., ET AL.
(AC 40866)

DiPentima, C. J., and Keller and Sheldon, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, a condominium association and its property manager, for, inter alia, negligence in connection with alleged faulty repairs to a deck attached to the plaintiff's condominium unit. The association managed a condominium community in which the plaintiff owned a unit. In 2009, the association hired a contractor to repair or replace decks throughout the community, including the plaintiff's deck. The property manager took over the management of the community before the contractor performed the repairs on the plaintiff's deck in 2011. Following a trial, the trial court determined that the repairs made to the plaintiff's deck by the contractor, under the supervision of the defendants, were deficient in several ways and that the contractor's negligence and the negligence of the defendants in subsequently failing to correct the results of the contractor's work proximately caused damage to the deck and to certain interior spaces of the plaintiff's adjoining condominium unit. The court awarded the plaintiff $31,900 in damages to make the necessary repairs to the deck and condominium unit. On the defendants' appeal to this court, *held*:

1. The defendants could not prevail on their claim that the evidence did not support the trial court's award of damages and that the award would unjustly enrich the plaintiff; the evidence and the rational inferences to be drawn therefrom provided a factual basis for the court's award of damages, and this court was not left with the definite and firm conviction that a mistake had been made, as certain testimony presented by the plaintiff from B, a licensed home improvement contractor who estimated the cost of repairing the claimed deficiencies, was particularly relevant to the precise amount of damages awarded by the court.

2. Contrary to the defendants' claim, the trial court did not fail to consider relevant association bylaws and the Common Interest Ownership Act (§ 47-200 et seq.) in rendering its judgment; that issue was not raised by the defendants at trial but, rather, was raised for the first time in their postjudgment motion to reargue, which the court denied on the ground that it was procedurally improper as an attempt to obtain a second bite of the apple by raising an issue that could have been presented at the time of trial, and, therefore, the record plainly reflected that, at the time that the issue was raised before the trial court, the court considered it and determined that it was not properly before it,

and the defendants did not appeal from the court's ruling denying their motion to reargue.

Argued September 19—officially released November 5, 2019

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the action was withdrawn as to the defendant Michael Moriarty; thereafter, White & Katzman Property Services was cited in as a defendant; subsequently, the mater was tried to the court, *Hon. Joseph M. Shortall*, judge trial referee; thereafter, the court granted in part the motion to dismiss filed by the named defendant et al.; subsequently, the court rendered judgment for the plaintiff, from which the named defendant et al. appealed to this court. *Affirmed.*

Anita M. Varunes, with whom was *Christopher S. Young*, for the appellants (named defendant et al.).

Opinion

KELLER, J. The plaintiff, Alireza Jamalipour, brought the underlying negligence action against the defendants Fairway's Edge Association, Inc. (association), and White & Katzman Property Services (property manager)[1] seeking economic damages that he alleged to have been caused by faulty repairs to a deck attached

[1] Michael Moriarity also was named as a defendant but is not involved in this appeal; see footnote 2 of this opinion; and, therefore, we refer in this opinion to the association and the property manager as the defendants. In addition, the plaintiff has not participated in the present appeal. Accordingly, we consider the appeal on the basis of the record, the defendants' brief, and the arguments advanced by the defendants at the time of oral argument before this court. We note that, on March 8, 2019, the defendants, relying on Practice Book § 63-4, filed a motion for permission to file a supplemental brief on the ground that they wished "to introduce new evidence to the court that was not available when [they] filed their original brief." On March 28, 2019, this court denied the motion and, later, denied the defendants' motion for reconsideration of that ruling.

to his condominium unit.[2] The defendants appeal from the judgment rendered by the trial court in the plaintiff's favor in the amount of $31,900. The defendants claim that (1) the evidence did not support the court's award of damages and that the award will unjustly enrich the plaintiff[3] and (2) the court erred in failing to consider relevant association bylaws and the Common Interest Ownership Act (act), General Statutes § 47-200 et seq. We affirm the judgment of the trial court.

Following a trial to the court on November 30, 2016, and March 29, 2017, the court found in relevant part that, in 2009, the plaintiff purchased a condominium unit in the Fairway's Edge condominium community. In December, 2009, the association, which managed the affairs of the condominium community at that time, hired a contractor[4] to repair or replace decks throughout the community, directed the contractor to perform work on the plaintiff's deck, and notified the plaintiff of the work to be performed. The property manager took over the management of the community before the contractor performed the repairs at issue in 2011.

The court determined that the repairs made to the plaintiff's deck by the contractor in 2011, under the

[2] In his operative third amended complaint, the plaintiff set forth five claims. The court considered counts one and five of the plaintiff's operative complaint to state a cause of action sounding in negligence against the association and the property manager, respectively, and rendered judgment on those counts. At the beginning of the trial, the plaintiff abandoned counts three and four of the complaint. At the conclusion of the plaintiff's case-in-chief, the court granted the defendants' motion to dismiss count two of the complaint. In an earlier complaint in this action, the plaintiff named Michael Moriarity, the president of the association, as a defendant. Later, the plaintiff withdrew the complaint against Moriarity.

[3] The defendants claim that the court erred in its award of damages because (1) the award was greater than the estimate provided by the association for the cost of necessary repairs to the plaintiff's deck and (2) the award will unjustly enrich the plaintiff because it exceeds the cost of demolishing and replacing the deck. Because these claims raise the same material issue, we consider them together.

[4] The contractor was not a party to the underlying action.

supervision of the defendants, were deficient in several ways and that the contractor's negligence and the negligence of the defendants in subsequently failing to correct the results of the contractor's work proximately caused damage to the deck and to certain interior spaces of the plaintiff's adjoining residential unit. By the time of trial, the deck and the unit were in a state of disrepair requiring remediation. As against both defendants, the court awarded the plaintiff $31,900 in damages to undertake necessary repairs. This appeal followed.

I

First, the defendants claim that the evidence did not support the court's award of damages and that the court's award will unjustly enrich the plaintiff. Essentially, the defendants argue that the evidence demonstrated that the cost to demolish and replace the deck was far less than $31,900. We disagree.

With respect to its damage award, the court stated: "This includes demolition and replacement of the entire deck, replacement of the ledger board that connects the deck to the house, the services of electricians needed to disconnect electrical service while work on the deck is done and reconnect service when work is completed, connection of a down spout to prevent water spillage and rental of dumpsters. It does not include the replacement of flashing . . . ."

The defendants acknowledge that we review challenges to the trial court's findings of fact under the clearly erroneous standard of review. "A finding of fact is clearly erroneous [if] there is no evidence in the record to support it . . . or [if] 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." (Internal quotation marks omitted.) *Lussier* v. *Spinnato*, 69 Conn. App.

136, 141, 794 A.2d 1008, cert. denied, 261 Conn. 910, 806 A.2d 49 (2002).

We have carefully reviewed the evidence presented at trial. The evidence and the rational inferences to be drawn therefrom provide a factual basis for the court's award of damages, and we are not left with the definite and firm conviction that a mistake has been made. In particular, we observe that the testimony presented by the plaintiff from David Balali, a licensed home improvement contractor who estimated the cost of repairing the claimed deficiencies, was particularly relevant to the precise amount of damages awarded by the court.

II

Next, the defendants claim that the court erred in failing to consider relevant association bylaws and the act.[5] Essentially, they argue that it was improper for the court to award the plaintiff economic damages to replace his deck because, under the association's bylaws, the deck is a limited common element of the association and, pursuant to General Statutes § 47-249, the association is solely responsible for the repair and replacement of common elements. Thus, the defendants argue that the court's judgment is contrary to the act. We disagree.

The defendants' appellate brief does not discuss the following procedural history, but it is highly relevant to our disposition of the present claim. Contrary to the defendants' arguments, the court did not fail to consider the bylaws and the act. During the trial, the defendants did not raise this issue. They raised the issue for the first time *following the trial*, in their postjudgment "motion to reargue/reconsider" (motion to reargue).

[5] The defendants frame their claim in terms of whether "[t]he trial court erred in failing to consider the bylaws and rules and regulations in deciding an action brought by a member of the association against the association."

The court denied the motion on the ground that it was procedurally improper as an attempt to obtain "a second bite of the apple" by raising an issue that could have been presented at the time of trial. The court observed that, "[w]hether it is the result of inattention or design, defense counsel's tardiness in raising [the issue] serves neither the interests of her clients nor the court."

In this appeal, the defendants do not raise a claim of error with respect to the court's denial of their motion to reargue. The defendants filed their appeal from the court's judgment in favor of the plaintiff on September 20, 2017. The court denied their motion to reargue on September 25, 2017, but the defendants did not amend their appeal to encompass the court's ruling on the motion. See Practice Book § 61-9 ("[s]hould the trial court, subsequent to the filing of a pending appeal, make a decision that the appellant desires to have reviewed, the appellant shall file an amended appeal within twenty days from the issuance of notice of the decision").

The claim raised by the defendants is meritless because it is belied by what transpired before the trial court. The issue raised in the present claim was not raised at the time of trial or decided by the trial court. Rather, the court expressly declined to consider the issue when it was raised in the defendants' postjudgment motion to reargue, and the defendants do not appeal from the court's decision to deny that motion. Accordingly, the record plainly reflects that, at the time that the issue was raised before the trial court, the court did not fail to consider it. The court considered the issue and determined that the issue was not properly before it.

The judgment is affirmed.

In this opinion the other judges concurred.

CHARLES FITCH ET AL. *v.* ERIC FORSTHOEFEL ET AL.
(AC 41846)

Lavine, Moll and Devlin, Js.

Syllabus

The plaintiffs brought this action seeking a declaratory judgment and to quiet title relating to the scope of an ingress and egress easement in favor of the defendants, which was located on a shared driveway on the plaintiffs' property. Following a trial to the court, the trial court rendered judgment in favor of the plaintiffs, from which the defendants appealed to this court. *Held:*

1. The defendants could not prevail on their claim that the declaratory judgment rendered by the trial court did not provide the plaintiffs with any practical relief and, thus, did not solve a justiciable controversy, which was based on their claim that because the parties agreed that the easement was limited to ingress and egress, the plaintiffs were in the same position they were in prior to the commencement of the action; the plaintiffs' action alleged the overburdening of an easement, specifically, that the scope of permissible uses of the easement by the dominant estate was limited to ingress and egress and that any other use would overburden the easement, the defendants claimed that there was no cause of action for minor, infrequent use of the easement unrelated to ingress and egress, and the court's judgment, which adjudicated the rights of the parties with respect to the scope of the easement, effectively adopted the plaintiffs' position, and, consequently, the plaintiffs were not in the same position as they were prior to the commencement of the action, and the claimed controversy was justiciable.
2. The defendants' claim that the trial court applied the wrong standard in determining that they had overburdened the easement was unavailing; although the defendants claimed that the court improperly proscribed, contrary to a reasonableness standard, trivial and infrequent conduct, such as the defendants' children writing with chalk on the easement area, given the clear and unequivocal language of the easement, the defendants' rights thereunder were expressly limited to ingress and egress, the defendants acknowledged that their rights under the easement were limited to ingress and egress, and because the record supported the court's finding that the defendants' children engaged in activities on the driveway unrelated to ingress and egress, the trial court properly evaluated the scope of the easement.

Argued September 10—officially released November 5, 2019

Procedural History

Action seeking, inter alia, a declaratory judgment with respect to certain real property, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Wahla*, *J.*; judgment for the plaintiffs, from which the defendants appealed to this court. *Affirmed.*

Peter J. Royer, for the appellants (defendants).

Charles S. Fitch, self-represented, with whom, on the brief, was *MaryAnn Fitch*, self-represented, the appellees (plaintiffs).

Opinion

MOLL, J. The defendants in this declaratory judgment and quiet title action, Eric Forsthoefel and Sarah Sweeney, appeal from the judgment of the trial court, rendered after a court trial in favor of the plaintiffs, Charles Fitch and MaryAnn Fitch. The parties' dispute relates to the scope of an ingress and egress easement located on the plaintiffs' property. The defendants claim that (1) the declaratory judgment rendered by the trial court provided the plaintiffs with no practical relief and, therefore, did not solve a justiciable controversy, and (2) the trial court applied the wrong standard in determining that the defendants had overburdened the easement. We disagree and, accordingly, affirm the judgment of the trial court.

The trial court found the following facts. The parties own adjoining parcels of residential property on Sarah Drive in Avon. The plaintiffs have resided at 45 Sarah Drive for approximately thirty years. The defendants and their three children moved to 49 Sarah Drive in June, 2015. Located on the plaintiffs' property, specifically, on a portion of an approximately twelve foot wide driveway, is an express easement appurtenant in favor of the defendants' property for the purposes of ingress

and egress.[1] The easement is described in relevant part as follows: "The unrestricted, permanent and irrevocable right to pass and repass, on foot and with motorized vehicles and equipment, over, upon and across a certain portion of [the plaintiffs' property] . . . for all uses and purposes necessary, convenient or incidental to the use of [the easement] as an access way for ingress and egress to and from [the defendants' property] to Sarah Drive . . . ."[2]

Shortly after the defendants moved into their home, Charles Fitch informed Sweeney that there was a problem, namely, that the defendants' children were playing on the easement area and that they were not permitted to do so because the easement was limited to ingress and egress. The defendants believed that they could use the easement area without restriction in a typical way that any family would use a driveway. Among other activities, MaryAnn Fitch observed the defendants' children playing with scooters, bicycles, and skateboards on the easement area, which encompasses a curve and so-called blind spots. As a result of the children's activities, the plaintiffs feared for the safety of the children and had concerns about their own liability should the children be injured on the easement area.

On July 11, 2016, the plaintiffs commenced this action by way of a two count complaint against the defendants relating to the scope and use of the easement. The plaintiffs alleged, inter alia, that after the defendants had purchased their property, the defendants allowed their children and guests to occupy and loiter in the easement area. That conduct, they alleged, unduly burdened the easement. The first count sought a declaratory judgment to determine "the existence, proper

[1] At trial, the parties filed a stipulated chain of title. There is no dispute as to the validity of the easement, which is recorded on the Avon land records at volume 173, page 796.

[2] Therefore, the defendants' property is considered the dominant estate and the plaintiffs' property the servient estate. See *Il Giardino, LLC* v. *Belle Haven Land Co.*, 254 Conn. 502, 512, 757 A.2d 1103 (2000).

location, and the extent of permissible uses and users of the [e]asement." The second count sought to quiet title by determining the rights of the parties under the easement pursuant to General Statutes § 47-31.[3] The matter was tried before the court on June 29 and October 26, 2017.

On June 22, 2018, the trial court issued its memorandum of decision, ruling in favor of the plaintiffs on both counts of their complaint. The court concluded that the "terms of the [e]asement [were] clear and unequivocal, allowing the owners of the dominant estate, the defendants, to use the [e]asement area solely for 'ingress and egress' to the defendants' property and to access the public road beyond." In addition, the court determined that although there was a substantial dispute in the evidence regarding the frequency with which the children had played on the easement area, it was "not disputed by [the parties] that the . . . children have, in fact, engaged in conduct other than ingress and egress in the [e]asement area, including loitering, leaving toys in the easement, and making chalk drawings, among other activities." Because such activities were not permitted by the easement, the court declined to "determine with finality the entire history of the children's activities" and concluded that the easement had been overburdened by the defendants' activities. This appeal followed. Additional facts and procedural history will be set forth as necessary.[4]

[3] General Statutes § 47-31 (a) provides in relevant part: "An action may be brought by any person claiming title to, or any interest in, real or personal property . . . against any person who may claim to own the property . . . or to have any interest in the property, or any lien or encumbrance on it, adverse to the plaintiff, or against any person in whom the land records disclose any interest, lien, claim or title conflicting with the plaintiff's claim, title or interest, for the purpose of determining such adverse estate, interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. . . . "

[4] The plaintiffs filed a motion for rectification on August 3, 2018, requesting the trial court to correct alleged errors in its memorandum of decision. The trial court issued an order on October 18, 2018, granting in part and denying

I

The defendants first claim that the declaratory judgment rendered in favor of the plaintiffs did not afford the plaintiffs with any practical relief, and therefore did not solve a justiciable controversy, because the parties agreed that the easement was limited to ingress and egress only.[5] The defendants contend that the plaintiffs are in the same position as they were in prior to the commencement of the action and, therefore, the judgment should be reversed and the complaint should be dismissed. We are not convinced.

"A court will not resolve a claimed controversy on the merits unless it is satisfied that the controversy is 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. . . . As we have recognized, justiciability comprises several related

in part the motion. No motion for review of that ruling was filed; see Practice Book § 66-7; and the correction made as a result thereof has no effect on our analysis.

[5] In response to the defendants' argument before the trial court that the action was moot because their children had ceased activity on the easement area, the trial court concluded that this action was not moot because there was a possibility that such activity could occur again in the future. In their posttrial brief, the defendants also argued that the rendering of a declaratory judgment would be "redundant" of the easement itself because the easement was express and unambiguous. Because the trial court did not specifically address this latter argument, we normally would decline to reach it. See *Inland Wetlands and Watercourses Commission* v. *Andrews*, 139 Conn. App. 359, 363, 56 A.3d 717 (2012). However, because justiciability implicates subject matter jurisdiction; *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 812, 967 A.2d 1 (2009); and we may "review the issue of subject matter jurisdiction at any time"; (internal quotation marks omitted) *Tirado* v. *Torrington*, 179 Conn. App. 95, 100, 179 A.3d 258 (2018); we proceed to review the defendants' claim.

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. . . . Finally, because an issue regarding justiciability raises a question of law, our appellate review is plenary." (Citation omitted; internal quotation marks omitted.) *Shenkman-Tyler* v. *Central Mutual Ins. Co.*, 126 Conn. App. 733, 738–39, 12 A.3d 613 (2011).

Our Supreme Court has recognized that the purpose of a declaratory judgment action is to "secure an adjudication of rights where there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties." *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell*, 199 Conn. 609, 613, 508 A.2d 743 (1986). "[A] declaratory judgment action must rest on some cause of action that would be cognizable in a nondeclaratory suit." *Wilson* v. *Kelley*, 224 Conn. 110, 116, 617 A.2d 433 (1992).

Mindful of the foregoing principles, we conclude that the claimed controversy in the present case is justiciable. As an initial matter, we observe that the plaintiffs' declaratory judgment action rests on a cause of action for the overburdening of an easement. See *Abington Ltd. Partnership* v. *Heublein*, 257 Conn. 570, 577, 778 A.2d 885 (2001). Contrary to the defendants' claim that the declaratory judgment rendered by the trial court provides no practical relief because the defendants agree that their rights under the easement are limited to ingress and egress, the record reveals an actual controversy among the parties. That is, the plaintiffs have maintained their view that the scope of permissible uses of the easement by the dominant estate is strictly limited to those relating to ingress and egress, and that any other use would overburden the easement. In contrast, the defendants have argued that there is no cause of action for "innocent," "trivial," "temporary," and/or

"inadvertent" use of the easement unrelated to ingress and egress. The declaratory judgment rendered by the trial court adjudicated the rights of the parties with respect to the scope of the easement, effectively adopting the plaintiffs' position. Consequently, the plaintiffs are not in the same position as they were prior to the commencement of the action. Therefore, we conclude that the declaratory judgment of the trial court afforded practical relief to the plaintiffs and resolved a justiciable controversy.

II

The defendants claim on the merits that the trial court erred in determining that "any activity beyond entry and exit of the defendants' property is unauthorized and would constitute an overburdening of the [e]asement." Specifically, they contend that the standard employed by the court in rendering judgment against them improperly proscribed, contrary to a reasonableness standard, trivial and infrequent conduct, such as the defendants' children writing with chalk on the easement area, despite it being unrelated to ingress and egress. For the reasons that follow, we disagree with the defendants.

We begin by setting forth the applicable standard of review. "For a determination of the character and extent of an easement created by deed we must look to the language of the deed, the situation of the property and the surrounding circumstances in order to ascertain the intention of the parties. . . . The language of the grant will be given its ordinary import in the absence of anything in the situation or surrounding circumstances which indicates a contrary intent. . . . [T]he determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary. . . . In determining the scope of an express easement, the language of the grant is paramount in

discerning the parties' intent. In order to resolve ambiguities in the language, however, the situation and circumstances existing at the time the easement was created may also be considered." (Citations omitted; internal quotation marks omitted). *Leposky* v. *Fenton*, 100 Conn. App. 774, 778, 919 A.2d 533 (2007).

Guided by these principles, we begin our analysis with the language of the easement, which gives the dominant estate holder the "right to pass . . . over, upon and across [the plaintiffs' property] . . . for all uses and purposes necessary, convenient or incidental . . . as an access way *for ingress and egress to and from [the defendants' property] to Sarah Drive* . . . ." (Emphasis added.) We agree with the trial court that, on the basis of the clear and unequivocal language of the easement, the defendants' rights thereunder are expressly limited to ingress and egress.

With this conclusion as our foundation, we find this court's decision in *Leposky* v. *Fenton*, supra, 100 Conn. App. 774, to be particularly instructive. In *Leposky*, the plaintiffs' property was benefitted by an express right-of-way easement over the defendants' property for purposes of ingress and egress. Id., 776. The plaintiffs not only used the easement for ingress and egress, but also to park their vehicles and to store a boat thereon. Id. Litigation ensued relating to the parties' respective rights under the easement. Id., 777. With respect to the plaintiffs' use of the right-of-way for parking and storage, the trial court held that such use "constitutes a reasonable use within the scope of the easement for ingress and egress." Id. This court reversed the judgment of the trial court, concluding, "on the basis of the clear language of the deed, that the plaintiffs' rights under the easement are limited to ingress and egress . . . ." Id. Thereupon, this court held that "[b]ecause the right-of-way is not granted in general terms, the [trial] court's reliance on the doctrine of reasonable use to expand the easement to include parking and storage

rights was misplaced." Id., 779; see also *Hall* v. *Altomari*, 19 Conn. App. 387, 390–91, 562 A.2d 574 (1989) (interpreting right-of-way granting defendant right to travel "to and from" the public road over plaintiff's property as limited to ingress and egress without right to park because right-of-way was not granted in general terms [internal quotation marks omitted]). As in *Leposky*, the rights conferred by the easement in the present case explicitly limit the defendants' activities to those that relate to ingress and egress.

Notably, the defendants acknowledge that their rights under the easement are limited to ingress and egress. They nonetheless contend that their children's minor, infrequent use of the easement, other than for ingress and egress purposes, does not constitute overburdening when considered under a standard of reasonableness. In support of this claim, they principally rely on *Lichteig* v. *Churinetz*, 9 Conn. App. 406, 409–10, 519 A.2d 99 (1986), in which this court explained that the reasonable use of an easement depends on "the amount of harm caused, its foreseeability, the purpose or motive with which the act was done, and the consideration of whether the utility of the use of the land outweighed the gravity of the harm resulting." (Internal quotation marks omitted.) The defendants' reliance on *Lichteig* is misplaced. The easement at issue in *Lichteig*, unlike here, granted a general right-of-way. See *Lichteig* v. *Churinetz*, supra, 9 Conn. App. 410 ("[the right-of-way] is one created in general terms and without any restrictions on its use"). In the context of an easement granted in general terms, we have applied the reasonable use factors to ascertain its proper scope because it is well settled that "a right-of-way *granted in general terms* may be used for any purpose *reasonably necessary* for the party entitled to use it." (Emphasis added.) *Hagist* v. *Washburn*, 16 Conn. App. 83, 86, 546 A.2d 947 (1988).

In sum, because the easement is expressly limited to ingress and egress, and the record supports the trial court's finding that the defendants' children engaged in *some* activity on the shared driveway unrelated to ingress and egress,[6] we conclude that the trial court properly evaluated the scope of the easement.

The judgment is affirmed.

In this opinion the other judges concurred.

LUIS PEREZ *v.* COMMISSIONER OF CORRECTION (AC 41160)

Prescott, Bright and Devlin, Js.

Syllabus

The petitioner, who previously had been convicted on a guilty plea of two counts of murder and one count of assault in the first degree, sought a writ of habeas corpus, claiming, inter alia, ineffective assistance of trial counsel. During the trial of the present case, the petitioner and A, the petitioner's grandmother, both testified that they met with the petitioner's trial counsel, who threatened the petitioner that A and the petitioner's cousin would go to prison if he did not plead guilty. The habeas court rendered judgment denying the amended habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not

[6] In their principal appellate brief, the defendants take issue with the trial court's finding that "what is not disputed by either party is that the defendants' children have, in fact, engaged in conduct other than ingress and egress in the [e]asement area, including loitering, leaving toys in the easement, and making chalk drawings, among other activities," and the court's determination that, because the children's actions were not permitted by the easement, the court did "not feel it necessary . . . to determine with finality the entire history of the children's activities . . . ." In light of our conclusion herein, the trial court did not need to determine the precise extent of the defendants' impermissible use of the easement. We pause, however, to comment on the trial court's use of the term "loitering." Because the trial court's decision does not explain what activity of the defendants' children is captured by its use of the undefined term "loitering," we do not adopt that finding. For purposes of our decision herein, it is sufficient that the trial court found, on the basis of evidence in the record, that the defendants' children had engaged in conduct unrelated to ingress and egress.

abuse its discretion in denying the petition for certification to appeal; the petitioner's claims essentially challenged the determination of the credibility of witnesses by the habeas court, which is the sole arbiter of witness credibility and expressly found that the testimony of the petitioner and A, alleging that the petitioner had been coerced into pleading guilty, was not credible, that was the only evidence offered to support the petitioner's claims that his plea had been coerced and that his trial counsel rendered ineffective assistance, and the credibility of trial testimony is not debatable among jurists of reason.

Argued September 13—officially released November 5, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Mark M. Rembish, assigned counsel, for the appellant (petitioner).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Luis Perez, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion by denying his petition for certification to appeal, (2) improperly concluded that his trial counsel did not provide ineffective assistance, and (3) improperly concluded that his plea was not coerced or involuntary. We disagree and dismiss the appeal.

The record discloses the following facts and procedural history. The petitioner was charged in a substitute

information with capital felony and related charges. A death qualified jury had been selected and trial was scheduled to begin on May 8, 2006. On May 5, 2006, the petitioner pleaded guilty to two counts of murder and one count of assault in the first degree. Subsequently, on July 21, 2006, the court sentenced the petitioner to sixty years of imprisonment.

On December 5, 2014, the petitioner filed his petition for writ of habeas corpus. His amended petition, submitted on May 31, 2017, alleged that his trial counsel, Attorneys Barry Butler and Miles Gerety, provided ineffective assistance of counsel in that they threatened him and coerced his guilty plea in violation of his right to due process of law. The habeas court, *Sferrazza*, *J.*, conducted a trial on November 9, 2017, during which it heard testimony from the petitioner; his grandmother, Ana Hernandez; Butler; and Gerety. The only evidence offered by the petitioner in support of his claim was his testimony and the testimony of Hernandez. The testimony indicated that, at some point prior to the petitioner's guilty plea, Hernandez and the petitioner's cousin were arrested for tampering with a witness in the petitioner's case. The petitioner and Hernandez both testified that they then met with Butler and Gerety on May 4, 2006, and, during that meeting, the attorneys threatened the petitioner that Hernandez and the petitioner's cousin would go to prison if he did not plead guilty. Butler and Gerety testified that they never used threats of imprisonment for the petitioner's relatives to coerce his guilty plea. Butler recalled that the petitioner already had decided to plead guilty by the time of the meeting, but had wanted to consult Hernandez before entering his plea and requested the May 4, 2006 meeting. Both attorneys further explained that they accommodated this request, hoping that Hernandez' presence would ease the petitioner's mind and "help him make his decisions rationally . . . ."

Following the habeas trial, the court issued a written memorandum of decision. It found that the testimony of Butler and Gerety was credible, while the testimony of the petitioner and Hernandez was not credible. Consequently, the court determined that the petitioner had failed to establish either of the claims raised in his petition. The court thereafter denied the amended petition for a writ of habeas corpus and the petitioner's request for certification to appeal. This appeal followed.

"When the habeas court denies certification to appeal, a petitioner faces a formidable challenge, as we will not consider the merits of a habeas appeal unless the petitioner establishes that the denial of certification to appeal amounts to an abuse of discretion." *Jefferson* v. *Commissioner of Correction*, 144 Conn. App. 767, 772, 73 A.3d 840 (2013), cert. denied, 310 Conn. 929, 78 A.3d 856 (2013). An abuse of discretion exists only when the petitioner can show "that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Emphasis omitted; internal quotation marks omitted.) *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994). "[For this task] we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 449, 936 A.2d 611 (2007).

On determinations of witness credibility, "[t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . Appellate courts do not second-guess the trier of fact with respect to credibility." (Citation omitted; internal quotation marks omitted.) *Necaise* v. *Commissioner of Correction*, 112 Conn. App.

817, 825–26, 964 A.2d 562, cert. denied, 292 Conn. 911, 973 A.2d 660 (2009). Accordingly, "[t]he issue of credibility is not debatable among jurists of reason" and, thus, cannot be used to overturn the decision of a habeas court. *Washington* v. *Commissioner of Correction*, 166 Conn. App. 331, 344–45, 141 A.3d 956, cert. denied, 323 Conn. 912, 149 A.3d 981 (2016).

The petitioner's claims essentially challenge the habeas court's determination of the credibility of the witnesses. The habeas court expressly found that the testimony of the petitioner and Hernandez, alleging that the petitioner was coerced into pleading guilty, was not credible. This was the only evidence offered to support the petitioner's claims that his plea was coerced and that his trial counsel were ineffective. Because the habeas court is the sole arbiter of witness credibility and the credibility of trial testimony is not debatable among jurists of reason, we cannot conclude that the habeas court abused its discretion by denying the petition for certification to appeal. *Washington* v. *Commissioner of Correction*, supra, 166 Conn. App. 344–45; *Necaise* v. *Commissioner of Correction*, supra, 112 Conn. App. 825–26.

The appeal is dismissed.

STATE OF CONNECTICUT *v.* JEROME RIDDICK (AC 41803)

DiPentima, C. J., and Keller and Prescott, Js.

Syllabus

The defendant, who had been convicted, on guilty pleas, of the crimes of attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree and sale of narcotics, appealed to this court from the judgment of the trial court denying his motion to correct a judgment mittimus. He claimed that the court improperly denied his motion on the ground that he was not entitled to the presentence confinement credit he claimed. *Held* that because a petition for a writ of habeas

corpus, rather than a motion directed at the sentencing court, is the proper method to challenge the Commissioner of Correction's application of presentence confinement credit, the trial court lacked jurisdiction over the defendant's motion and, therefore, should have dismissed it rather than denied it.

Argued October 7—officially released November 5, 2019

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of attempt to commit robbery in the first degree and conspiracy to commit robbery in the first degree, and substitute information, in the second case, charging the defendant with the crime of sale of narcotics, brought to the Superior Court in the judicial district of Waterbury, where the defendant was presented to the court, *Damiani*, *J.*, on pleas of guilty; judgments of guilty in accordance with the pleas; thereafter, the court, *Hon. Ronald D. Fasano*, judge trial referee, denied the defendant's motion to correct a judgment mittimus, and the defendant appealed to this court. *Improper form of judgment; judgment directed.*

Jerome Riddick, self-represented, the appellant (defendant) filed a brief.

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Patrick Griffin*, state's attorney, for the appellee (state).

Opinion

PER CURIAM. In this appeal from the denial of a motion to correct a judgment mittimus, the defendant, Jerome Riddick, claims that the trial court improperly denied his motion on the ground that he was not entitled to the presentence confinement credit he claimed. We conclude that the court should have dismissed the motion rather than denied it because, as we previously have determined, a petition for a writ of habeas corpus, rather than a motion directed at the sentencing court,

is the proper method to challenge the Commissioner of Correction's application of presentence confinement credit. See General Statutes § 18-98d; *State* v. *Montanez*, 149 Conn. App. 32, 41, 88 A.3d 575 (holding that court properly dismissed for lack of subject matter jurisdiction motion to revise judgment mittimus raising claim of misapplication of presentence confinement credit), cert. denied, 311 Conn. 955, 97 A.3d 985 (2014); *State* v. *Carmona*, 104 Conn. App. 828, 833, 936 A.2d 243 (2007) (habeas proceeding, rather than motion to correct illegal sentence, proper method to assert claim concerning presentence confinement credit), cert. denied, 286 Conn. 919, 946 A.2d 1249 (2008). Accordingly, the court lacked jurisdiction over the defendant's motion and should have dismissed it rather than denied it.

The form of the judgment is improper, the judgment denying the defendant's motion to correct a judgment mittimus is reversed and the case is remanded with direction to render judgment dismissing the defendant's motion.

MEMORANDUM DECISIONS

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MEMORANDUM DECISIONS

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* ANNA DEFRANCO ET AL.
(AC 40527)

Prescott, Bright and Sheldon, Js.

Argued October 17—officially released November 5, 2019

Named defendant's appeal from the Superior Court in the judicial district of New Britain, *Hon. Joseph M. Shortall*, judge trial referee.

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* PHYLLIS J. STEPHENSON
(AC 41334)

Keller, Moll and Eveleigh, Js.

Argued October 16—officially released November 5, 2019

Defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Randolph*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting a new law day. The defendant's claims on appeal are inadequately briefed and, thus, we decline to review them. See *Pryor* v. *Pryor*, 162 Conn. App. 451, 458, 133 A.3d 463 (2016).

THE BANK OF NEW YORK MELLON, TRUSTEE *v.* SCOTT S. MURDOCH ET AL.
(AC 41734)

Lavine, Prescott and Moll, Js.

Argued October 18—officially released November 5, 2019

Appeal by the named defendant et al. from the Superior Court in the judicial district of New Haven, *Hon. Anthony V. Avallone*, judge trial referee; *Spader*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

JOHN MAHONEY *v.* COMMISSIONER OF CORRECTION
(AC 42014)

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

Argued October 21—officially released November 5, 2019

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Kwak*, *J.*

Per Curiam. The judgment is affirmed.

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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

RICHARD LANGSTON *v.* COMMISSIONER OF CORRECTION, SC 20221
Judicial District of Tolland

Habeas; Summary Disposal of Habeas Case; Whether Appellate Court Properly Affirmed Habeas Court's Dismissal of Petitioner's Untimely Habeas Petition Pursuant to General Statutes § 52-470 on Ground That Petitioner Did Not Present "Good Cause" For Delay in Filing Petition. In 2002, the petitioner, who had been convicted of various crimes, filed a first petition for a writ of habeas corpus. Although the petition was granted by the habeas court, on appeal that judgment was reversed by the Appellate Court, and the Supreme Court denied certification to appeal on December 5, 2007. The petitioner filed a second habeas petition in May, 2012, but subsequently withdrew it. The petitioner thereafter brought this action by a third habeas petition on December 3, 2014. General Statutes § 52-470 (d) provides that there shall be a rebuttable presumption that a habeas petition has been delayed without "good cause" if the petition was filed two years or more after the date on which a final judgment was entered on a prior petition, or after October 1, 2014, whichever date is later. In a case in which the rebuttable presumption of delay applies, the petitioner must show "good cause" for the delay pursuant to § 52-470 (e). In the present case, because more than two years had elapsed between the time the judgment on the first habeas petition became final and the filing of the present habeas petition, October 1, 2014, was the latest date under § 52-470 (d) that the present habeas petition could have been filed in order to avoid the rebuttable presumption of delay. Because the present habeas petition was filed after October 1, 2014, the respondent Commissioner of Correction moved that the habeas court order the petitioner to show cause as to why the petition should not be dismissed as untimely pursuant to §§ 52-470 (d) and (e). After the show cause hearing, the habeas court dismissed the petition as untimely filed. The petitioner appealed, claiming that the habeas court improperly concluded that he failed to show good cause for the delay in filing his habeas petition. He claimed that (1) his untimely petition did not violate the spirit of § 52-470 because it concerned issues that had been litigated for several years, and (2) in withdrawing his prior petition, he was following the advice of his former attorney and did not understand the consequences of his deci-

sion. The Appellate Court (185 Conn. App. 528) rejected the petitioner's claims and affirmed the habeas court's judgment of dismissal. With respect to the petitioner's first claim, the Appellate Court concluded that the fact that the petitioner had litigated previous habeas claims did not excuse his tactic of voluntarily withdrawing his prior petition just days before a motion to dismiss was to be heard and less than one month before trial, nor did it explain his failure to refile his case before the October 1, 2014 statutory deadline. As to his second claim, the Appellate Court, noting that petitioner's prior counsel did not testify at the show cause hearing, ruled that the petitioner failed to adduce sufficient evidence in support of his claim that his prior counsel failed to advise him of the time constraints governing the present habeas petition. The petitioner was granted certification to appeal from the Appellate Court's decision, and the Supreme Court will decide whether the Appellate Court properly upheld the habeas court's dismissal of the petitioner's habeas petition on the ground that he did not present "good cause" for his delay in filing the petition, pursuant to § 54-470 (d).

TOWN OF REDDING et al. *v.* GEORGETOWN LAND DEVELOPMENT COMPANY, LLC, et al., SC 20322
Judicial District of Hartford

Foreclosure; Taxation; Whether Tax Liens of Town and Fire District have Priority over Those of Special Taxing District. The plaintiffs, the town of Redding and the Georgetown Fire District, brought this action seeking to foreclose municipal liens on approximately fifty-one acres of property owned almost entirely by the Georgetown Land Development Company, LLC (GLDC). GLDC, which did not appear in this action, commenced, but has not yet completed, a mixed-use development on the site. The defendant RJ Tax Lien Investments, LLC (RJ Tax) also has liens on the property by virtue of assignments from the Georgetown Special Taxing District (special taxing district). The special taxing district was established by special act to facilitate the acquisition and financing of the public infrastructure and other public facilities necessary for the development. The act granted the special taxing district "all the powers and privileges with respect to [the collection and enforcement of taxes] as districts organized pursuant to section 7-325 of the general statutes, and as held by municipal[ities]." While taxing districts created by § 7-325 have equal lien priorities to municipalities, the act creating the special taxing district provides that its liens "shall take precedence over all other liens or encumbrances except a lien for taxes of the town of Redding." The

trial court rendered summary judgment in favor of the plaintiffs on the issue of the priority of the parties' liens, finding that the plaintiff's liens enjoyed priority over those of the special taxing district. The court held that the plain and unambiguous language of the act subordinates the liens of the special taxing district to those of the town and that the special taxing district's liens are subordinate to those of the fire district because the fire district's liens are of equal priority to the town's liens. The trial court found unreasonable the defendants' argument that the provision of the act which states that the special taxing district's liens "shall take precedence over other liens except a lien for taxes of the town of Redding" means that the special taxing district's liens are equal in priority to the town's liens and not superior to those liens. The trial court noted that the provision uses the same language that the legislature typically uses to give town tax liens priority over other types of liens and that the defendants' interpretation would render the provision superfluous because § 7-325 already grants a taxing district's liens equal priority to those of a municipality. Finally, the court noted that the defendants' interpretation of the special act would lead to an absurd result in that it would both empower and incentivize GLDC, the district's sole taxpayer and voter, to render the town's taxes virtually unenforceable by levying, but not paying, a tax against itself. The trial court subsequently rendered a judgment of strict foreclosure, assigning the law days according to its previous ruling as to the lien priorities. Defendant RJ Tax appeals, claiming that the trial court erred in ruling that the special taxing district's liens were subordinate to those of the town and the fire district.

STATE *v.* FOTIS DULOS, SC 20363
Judicial District of Stamford-Norwalk at Stamford

Criminal; First Amendment; Whether Trial Court Properly Entered Gag Order Barring Defendant, Attorneys, Witnesses, and Law Enforcement from Making Public Statements "Posing Substantial Likelihood of Material Prejudice to This Case." The defendant was arrested and charged with tampering with or fabricating physical evidence and hindering prosecution in connection with the disappearance of his estranged wife, Jennifer Dulos, who remains missing. The couple has been involved in contentious divorce proceedings that are still pending in the trial court. This action has generated a high degree of pretrial publicity and media coverage, including statements by defense counsel regarding Jennifer Dulos' disappearance and "leaks" of information by "law enforcement sources." The state filed a motion for a gag order that would apply to counsel for both

sides under Rule 3.6 of the Rules of Professional Conduct, which prohibits an attorney from making public statements that have a substantial likelihood of materially prejudicing a pending action but excepts statements that an attorney believes are necessary to protect a client from adverse publicity initiated by another party. The trial court granted the state's motion and determined that the gag order should extend beyond the attorneys to also apply to the defendant, to trial witnesses, and to law enforcement agencies investigating the case. It ordered that those people and entities were prohibited from making public statements about certain aspects of the investigation and litigation of the case and about information that would be inadmissible as evidence at trial and that, if disclosed, would create a substantial risk of prejudicing an impartial trial. The trial court acknowledged that the gag order was a prior restraint on speech that infringed upon the first amendment rights of the affected parties, but it concluded that those rights had to be balanced with the defendant's sixth amendment right to a fair trial, which could be compromised by prejudicial media coverage. The trial court looked to federal cases involving gag orders for the appropriate legal standard to govern its order and settled on a three part test. First, the court considered whether there would be a substantial likelihood of material prejudice without a gag order and answered that question in the affirmative, noting the extensive pretrial publicity, the statements that defense counsel and law enforcement had already made to the press, and the potential effect of the media coverage on the jury. The trial court then considered whether the order was narrowly tailored so that it was no broader than necessary to protect the constitutional right to a fair trial. It noted that the order did not prohibit the affected parties from making *any* public comments about the case and that the order was consistent with the applicable rules of practice and Rule 3.6. Finally, the trial court considered whether the order was the least restrictive means of eliminating potential prejudice and answered that question in the affirmative, noting that the order was "the type of remedial measure that will prevent prejudice at its inception." The defendant appeals upon the granting of certification by the Chief Justice pursuant to General Statutes § 52-265a. The Supreme Court will decide whether the trial court properly granted the state's motion for a gag order where the defendant argues that the order violates his sixth amendment right to a fair trial and his free speech rights under the federal and state constitutions.

JANET FELICIANO *v.* STATE OF CONNECTICUT et al., SC 20373
Judicial District of Hartford

Sovereign Immunity; Workers' Compensation; Whether Trial Court Properly Dismissed Negligence Claim Brought Against State by State Employee under General Statutes § 52-556 on Ground that State Entitled to Sovereign Immunity Where Employee Had Received Workers' Compensation Benefits. The plaintiff was a state employee when she sustained injuries in a motor vehicle accident where she was a passenger in a vehicle owned and insured by the state and operated by another state employee. The plaintiff brought this action claiming negligence under General Statutes § 52-556, which provides in relevant part that "[a]ny person injured in person or property through the negligence of any state . . . employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury." The state moved that the action be dismissed as to the state and argued that it was entitled to sovereign immunity under *Sullivan* v. *State*, 189 Conn. 550, 555 n.7 (1983). In *Sullivan*, the plaintiff's decedent was a state employee who was killed when he was struck by a motor vehicle owned by the state and operated by another state employee. The plaintiff, the administratrix of the decedent's estate, brought a wrongful death action against the state, which the trial court dismissed. The Supreme Court affirmed the judgment of dismissal on the ground that the plaintiff failed to exhaust her administrative remedies, and it concluded in a footnote that the legislature did not intend § 52-556 to authorize state employees or their representatives who are eligible for workers' compensation to sue the state in negligence. The trial court here granted the state's motion to dismiss, noting that the plaintiff had received workers' compensation benefits and citing *Sullivan* in its dismissal order. The plaintiff appeals, and the Supreme Court will decide whether the trial court properly granted the state's motion to dismiss where the plaintiff argues that § 52-556 can be read to allow for her negligence claim against the state and that the trial court improperly relied on dicta in *Sullivan* that is not binding authority. The Supreme Court will also decide whether the trial court's judgment can be affirmed on the alternative ground that the plaintiff's negligence claim against the defendant is barred under General Statutes § 31-284 (a), the exclusive remedy provision of the Workers' Compensation Act.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues

raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

CONNECTICUT RETIREMENT SECURITY AUTHORITY

Notice of Intent to Adopt Procedures

In accordance with Section 1-121(a) of the Connecticut General Statutes, notice is hereby given that the Connecticut Retirement Security Authority (the ''Authority'') is proposing to adopt the operating procedures outlined below for the purpose of operating the Authority pursuant to Section 31-417(j) and Section 3-13j(b) of the Connecticut General Statutes. The procedures include: (a) Adoption of Annual Budget and Plan of Operations; (b) Compensation and Benefits; (c) Hiring and Promotion; Discipline and Termination; (d) Equal Employment Opportunity and Affirmative Action; (e) Using Surplus Funds; (f) Making Modifications to the Program; and (g) Disclosure of Third Party Fees by Persons or Entities Providing Investment Services.

Interested persons wishing to present their views on these procedures are invited to do so in writing within thirty (30) days following publication of this notice. Comments can be submitted electronically to the Authority at maryfaycrsa@gmail.com (please include ''Operating Procedures'' in the subject line). Comments can also be mailed to Connecticut Retirement Security Authority, Attn: Operating Procedures, P.O. Box 270684, West Hartford, CT 06127.

The proposed procedures are available by sending an email to the Authority at maryfaycrsa@gmail.com (please include ''Operating Procedures'' in the subject line).

NOTICES

Notice of Reprimand of Attorneys

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by reviewing committees of the Statewide Grievance Committee:

Reviewing Committee Reprimands

July 19, 2019: Tony Anthony, New Britain, Connecticut - 428954

Copies of the full text of the decision of the Statewide Grievance Committee is available through the Committee's offices at Second Floor, Suite Two, 287 Main Street, East Hartford, Connecticut 06118-1885. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Michael P. Bowler
Statewide Bar Counsel

Notice of Inactive Status of Attorney

Pursuant to Practice Book Section 2-54, notice is hereby given that on October 2, 2019, in Docket Number HHD-CV19-6116057, Richard Mark Blank (Juris# 410253) of Milwood, NY was placed on inactive status from the practice of law, effective immediately, commensurate with the order of the Supreme Court of the State of New York Appellate Division: Second Judicial District.

Upon suspension, the Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

Should respondent seek reinstatement to the Connecticut bar he must do so puruant to Practice Book Section 2-53 but shall not be eligible to do so until he is eligible for reinstatement in the Supreme Court of the State of New York Appellate Division: Second Judicial Department.

Prior to reinstatement in Connecticut, Respondent will satisfy any Connecticut bar requirements and will be otherwise in good standing.

A trustee will not be appointed as Respondent has not recently practiced law in Connecticut and has no clients nor an IOLTA Account in the State of Connecticut.

David Sheridan
Presiding Judge

DIVISION OF CRIMINAL JUSTICE

(Affirmative Action/Equal Opportunity Employer)

CHIEF STATE'S ATTORNEY

STATE OF CONNECTICUT

Applications are being accepted for the full-time position of Chief State's Attorney for the Division of Criminal Justice, State of Connecticut (PCN 4853).

Pursuant to Article XXIII of the Connecticut Constitution, the Chief State's Attorney shall be the administrative head of the Division of Criminal Justice, and with the thirteen State's Attorneys, shall be in charge of the investigation and prosecution of all criminal matters within the State of Connecticut. For a full job description, follow this link: https://portal.ct.gov/DCJ/Employment/Job-Descriptions/Chief-States-Attorney

Appointment shall be made by the Criminal Justice Commission in accordance with Sec. 51-278 of the Connecticut General Statute. The successful applicant shall hold office from the date of appointment through June 30, 2021, and thereafter be subject to re-appointment to a five (5) year term. The annual salary is $177,822.00.

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three (3) years; residency in the State of Connecticut is a prerequisite to appointment. Applicants must be admitted to practice law in the State of Connecticut at the time of appointment. Division of Criminal Justice application forms must be completed by all applicants. These forms may be downloaded from the Division website at https://portal.ct.gov/-/media/DCJ/EmploymentApplicationFillablepdf.pdf?la=en. A job description for this position may also be viewed on this website.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to: The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: Chief State's Attorney (PCN 4853) and must be postmarked no later than December 6th, 2019. In addition, an electronic copy (pdf) of application materials should be sent to DCJ.HR@ct.gov. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of October 25, 2019:

Gabriel D. Grossman	Silver Point Capital

Hon. Patrick L. Carroll III
Chief Court Administrator