SECTION 9 - NON-CONFORMING LOTS, USES, BUILDINGS, AND/OR STRUCTURES

9.0 Intent. It is the intent of these Regulations to reduce all non-conforming uses, lots, buildings, and structures to conformity as quickly as possible and in no way to allow the extension or enlargement of the non-conformity unless specifically authorized in these Regulations. It is also the intent of these Regulations, however, to minimize undue hardship for those whose purchase, ownership, or use of the property predated applicable provisions of these Regulations.

9.1 Existing Non-Conforming Lots.

9.1.1 No Increase in Non-Conformity. No lot or parcel shall hereafter be decreased in size, by sale, devise, descent, gift, or otherwise, so that it or any part of it, or so that any structure or building thereon, shall fail to comply with these Regulations or shall increase the extent of any non-conformity.

9.1.2 Use of Non-Conforming Lots, Merger. The construction of a permitted building or structure, or the establishment of a permitted use, on a non-conforming lot or parcel may be allowed by the Zoning Board of Appeals as a Special Exception in accordance with Section 13 of these Regulations and subject further to the requirements set forth in this Section 9.1.2; provided, however, that if title to a non-conforming parcel or lot, whether improved or not, was, at any time after the adoption of Zoning Regulations in the Town of [town] (effective), or is now, vested in any person(s) that own(s) any parcel or parcels of land contiguous to it, then so much of said contiguous land (including the non-conforming parcel) as is required to conform to these Regulations shall be deemed to be a single parcel for zoning purposes, and thereafter may not be divided, sold, transferred, or improved in any manner which would create or result in a non-conformity or in an increased or further non-conformity. In the event that all contiguous lands of said person(s) are together insufficient to meet the minimum requirements of these Regulations, than all said contiguous land shall be considered as a single non-conforming parcel for the purposes of this Section. The foregoing merger provisions shall not apply to any lot approved pursuant to the [town] Subdivision Regulations and Zoning Regulations as in force at the time of such approval, pursuant to Connecticut General Statutes Section 8-26a(b).

The construction of a permitted building or structure, or the establishment of a permitted use, on a non- conforming lot or parcel shall conform to all provisions of Section 8 (Area, Yard and Height Requirements) of these

Regulations, and also to all provisions of Section 4.4 (Buildable Area) of these Regulations, except as provided in Conn. Gen. Stats. §8-26a(b), and except as the same may be varied by the Zoning Board of Appeals pursuant to these Regulations and the Connecticut General Statutes.

9.1.4 Lots in Approved Subdivisions. In accordance with Conn. Gen. Stats. §8-26a(b), any lot located within a subdivision approved by the [Planning^/Planning and Zoning] Commission in accordance with the [^town] Subdivision Regulations shall be a legal nonconforming lot under these Regulations, and such lot shall not be required to conform the area, frontage, or other lot dimensional requirements of these Regulations. Construction of any improvement on any such lot shall conform to the Bulk requirements of these Regulations (yard, building coverage, etc.) as of the date that such lot becomes an improved lot. If such lot is vacant, the Bulk requirements to be applied to such vacant lot are those in effect as of the date of approval of the subdivision in which such lot is located. For purposes of this Section 9.1.4, a lot shall be deemed "vacant" until the date that a building permit is issued with respect to such lot and a foundation has been completed in accordance with such building permit, after which such lot shall be deemed "improved;" provided, however, that any lot which is improved shall not thereafter be deemed vacant if any structures on such lot are subsequently demolished.

9.2 Non-Conforming Uses.

9.2.1 No Extension or Enlargement. Any non-conforming use, as defined by these Regulations, shall be permitted to continue, notwithstanding any other provision of these Regulations or any amendment hereof, provided, however:

a. Such use was lawfully existing at the time of its establishment, and has not been abandoned, as defined herein.

b. Such use shall not be enlarged or extended (see Section 3, Definitions); provided, however, that a non-conforming use may be extended by not more than fifty (50%) percent of the non-conforming floor area or the non-conforming land area occupied upon the issuance of a Special Exception by the Zoning Board of Appeals pursuant to Section 13 of these Regulations.

c. Except as provided in the preceding paragraph, such use shall not be altered in such manner as to increase the non-conformity of such use (see Section 9.2.3 below concerning substitution).

d. Except as provided in paragraph (b), no non- conforming use shall be moved to any portion of a building, structure, or any part of a

parcel of land where such use did not previously exist.

e. A non-conforming use, if changed to a use in conformance with these Regulations, shall not thereafter be changed back to a non-conforming use.

9.2.2 Restoration and Repair of Buildings Containing Non- Conforming Use. A building or structure containing a non-conforming use may be altered or improved, but not extended or enlarged, and may be repaired or reconstructed as made necessary by normal wear and tear or deterioration. Any building or structure containing a non-conforming use, which has been destroyed or damaged by fire, explosion, flood, or any act of God or public enemy may be restored to the same dimensions, floor area and cubic volume lawfully existing immediately prior to such damage or destruction, provided such restoration is commenced within ( ) year, and completed within ( ) years of such damage or destruction.

9.2.3 Substitution. Any non-conforming use may be replaced with another non-conforming use, as a Special Exception before the Zoning Board of Appeals in accordance with Section 13 (Special Permit/Exception) of these Regulations, provided that such replacement use is consistent with the public health, safety and welfare; with the character of the neighborhood, adjacent properties and zones; with the appropriate and orderly development of the neighborhood, adjacent properties, and zones; and provided, further, that such replacement use creates no greater impact on the property, the neighborhood, adjacent properties and zones, in terms of parking, volumes and types of traffic, property values, hours of operation, exterior appearance of the building, structure or lot, or any other factors to be considered by the Board pursuant to Section 13 of these Regulations.

9.2.4 Abandonment by Non-Use or Change of Use. Any non- conforming use shall lose its non-conforming status and shall thereafter conform to these Regulations if said use is abandoned for a period of one (1) year or more, or if it is altered to a conforming use. For any non- conforming use which has ceased operation or existence for any period of time, the Zoning Enforcement Officer may require evidence that the use was in fact carried on within the said one-year period, or that there was no intent to abandon the use, prior to the issuance of a Certificate of Zoning Compliance or issuance of a Cease and Desist Order. Refusal or granting of such a Certificate, or issuance of a Cease and Desist Order, may be appealed by any aggrieved party to the Zoning Board of Appeals, as provided by State statutes.

9.2.5 Voluntary Abandonment. Any person who has the right of

re-establishment or reconstruction as provided in this Section 9 may elect voluntarily to abandon such right, in which case the right shall cease to exist. Such abandonment must be evidenced by a document filed in the Land Records of the Town of [town].

9.3 Non-Conforming Buildings and Structures.

9.3.1 No Enlargement or Alteration. Any non-conforming building or structure existing as of the effective date of these Regulations shall be permitted to continue notwithstanding any provision of these Regulations or any amendment hereof, provided, however, that such non-conforming building or structure shall not be enlarged or altered in such manner as to increase the non-conformity of such building or structure.

9.3.2 Restoration and Repair of Non-Conforming Buildings and Structures. Nothing in these Regulations shall be deemed to prohibit the repair and maintenance of a non-conforming building or structure, provided such repairs or maintenance do not increase the non- conformity of such building or structure. Likewise, any non-conforming building or structure may be enlarged, provided such enlargement is constructed within the applicable requirements of Section 8. Any non-conforming building or structure which has been destroyed or damaged by fire, explosion, flood, or any act of God or act of public enemy may be restored to the same dimensions, floor area, cubic volume, density, and site location as existing immediately prior to such damage or destruction, provided such restoration is commenced within ( ) year, and completed within ( ) years of such damage or destruction. The Commission may, for good cause shown, grant one or more extensions of the preceding time limits.

9.4 Illegal Use. Nothing in these Regulations, including the provisions of this Section 9, shall be interpreted as authorization for or approval of the continuation of the use of land, buildings or structures which are in violation of any Zoning Regulations in effect prior to the effective date of these Regulations.

9.5 Special Exceptions and Variances, Amendments to Regulations or Zones.

a. Applications Filed. In accordance with Connecticut General Statutes Section 8-2h, as amended, no application filed with the Commission which is in conformance with these Regulations as of the date of its filing shall be required to comply with, nor shall it be disapproved for the reason that it does not comply with any change in these Regulations or the boundaries of any zone taking effect after the filing of such application.

b. Approvals Granted. In accordance with Connecticut General Statutes Section 8-3(h), nothing in these Regulations or any amendment hereof, nor any change in zoning classification, shall be deemed to require any change in

the plans, construction, or designated use of any residential building, structure or property for which a Special Permit, Special Exception, or variance has been obtained and filed as required by these Regulations or the Connecticut General Statutes, as the case may be, prior to the effective date of these Regulations or such amendment or change in zoning classification, provided, however, that, for non-residential property, the applicant shall obtain a Zoning Permit and commence construction of any building or structure, or the establishment of any use, within ( ) months of the effective date of such approval; said construction or establishment shall be completed according to the approved plans by the applicant, and a Certificate of Zoning Compliance and Certificate of Occupancy, where required, shall be issued, within ( ) months of the effective date of such approval. Any such approval not completed within the time limits contained in this Section shall be void following a hearing before the Commission with notice to the property owner and the applicant. For residential property, all improvements required pursuant to the Special Permit, Special Exception, or variance, shall be completed within the time periods set forth in the General Statutes upon the effective date of such Special Permit, Special Exception or variance, or it shall be void and shall thereafter be required to conform to any amendment of these Regulations or zone change classification. No extension of the above time periods may be issued by the Zoning Board of Appeals or the Commission.

9.6 Expiration of Special Permits, Special Exceptions, and Variances. See, Section 20 (Enforcement and Administration).

Rev. December 1, 2008 to add Zoning Permit to 9.5(b); Rev. June 10, 2009 to reflect amendment to CGS 8-26a(b), Public Act 05-288.

SECTION X: OPEN SPACES AND RECREATION AREAS

INTRODUCTORY NOTE

This Section attempts to assemble all Open Space provisions (except those for cluster subdivision, often called "Open Space Subdivisions"), within one regulatory section. Many towns have Open Space provisions scattered throughout various parts of the regulations, and some even reference the zoning regulations. Strictly speaking, all Open Space provisions must be in the Subdivision Regulations; the only provision which can be in the Zoning Regulations is that relative to lot size/frontage reduction for cluster subdivisions.

One of the critical steps that a commission should undertake in using this model regulation is to check current definitions of relevant terms (such as "open space", "park", etc.) And to be sure that this regulation is compatible with other Sections of both the current Zoning and Subdivision Regulations. This model is not intended to constitute legal advice, and you are urged to consult your own land use counsel to determine the best way to integrate these provisions into your existing regulatory framework.

SECTION X.1 DEFINITIONS:

For the purposes of this Section X, the following terms shall be defined as follows:

a) Open Space: "Open Space" includes, but shall not be limited to: Land left in its natural, undisturbed state; agricultural land for which development rights have been assigned or otherwise alienated in perpetuity; land areas and facilities for non-commercial, non-profit recreation; and similar land areas for wildlife habitat, passive and active recreation, groundwater recharge, scenic preservation, and the like.

b) Improvement, or Public Improvement: Any change or alteration to the existing conditions of the subdivision site; (i) for the purpose of complying with these Regulations, or any approval granted hereunder, or (ii) depicted on any Final Subdivision Plan approved hereunder, or (iii) rendering the site more suitable for development and/or habitation. As used in these Regulations, Improvements include but are not limited to: Construction and installation of roadways, paved streets, curbs, gutters, utilities, street signs, monuments, shade trees and drainage facilities; erosion and sedimentation control measures; buildings; earth filling or removal, seeding and grading; the establishment or construction of parks, playgrounds, recreational buildings, equipment, structures, field, and similar facilities; and facilities designed to detain, redirect, store, or treat stormwater discharge.

c) Land: Real property, including improvements thereof and thereon, and all estates, interests, and rights therein of any kind or description, including, but not limited to, easements, rights-of-way and water and riparian rights, provided that these interests run in perpetuity with the subject real property.

d) Inland Wetland: Those areas designated and defined as inland wetlands by the {[name of town] Inland Wetlands and Watercourses Agency, pursuant to its Regulations} OR {the Connecticut General Statues}, as the same may be amended from time to time.

e) Watercourse: Those areas designated and defined as watercourses by the {[name of town] Inland Wetlands and Watercourses Agency, pursuant to its Regulations} OR {the Connecticut General Statutes}, as the same may be amended from time to time.

Comments:

The definition of "Open Space" deserves special consideration because it requires you to focus on what kinds of purposes you want Open space to serve: For some towns, it denotes passive, natural wildlife preserves or similar undisturbed areas. For others, active public recreation activities (ball and soccer fields, playgrounds, etc.) are acceptable. In still others, commercial recreational uses, which would normally be found supporting themselves, without the benefit of lot sales, are acceptable (golf courses, commercial riding stables, aircraft landing strips, polo grounds, swim clubs/pools, etc.). Another question is whether to allow agricultural uses for Open Space: On the one hand it is land which is open and not covered by impervious surfaces; on the other hand, it is a commercial activity which generates profits, it does involve disturbance of the land and the use of chemicals, and it is not available for public use or enhancement of the environment. The nature of the community and the needs for different kinds of Open Space must be weighed in determining what a commission would be willing to accept as constituting "Open Space".

The definition of "Improvement" is also important because you want to be sure that "improving" open space does not authorize a subdivider to log, excavate, or otherwise damage it to the extent required by its "improvement" into a ballfield, basketball court, picnic area, etc.

The definitions of "inland wetlands" and "watercourses" are important only because there are references to them in the formula approach to determining lot numbers. Note the two options: Many local inland wetlands regulations include so-called "buffers" within the definitions of a "wetland". Technically, this is incorrect, because the Statutes define wetlands and watercourses; what those towns should be doing is expanding their definition of a "regulated area" to include the so-called "buffer". Regardless, the important thing to determine is: Do you want "buffers" excluded from the density calculation, or only the wetlands and watercourse themselves? The latter seems to be the fairest approach, in which case it might be simpler to reference the Statutory definitions, rather than the local ones.

SECTION X.2 DISPOSITION FACTORS:

For any subdivision of land under these Regulations, the Commission may require of the subdivider the disposition and official dedication of appropriately located and sized Open Spaces areas. In determining the appropriateness of an Open space area disposition, the Commission shall consider the Plan of Development objectives and map designations and the subject site's

characteristics with respect to the following objectives: (i) The conservation and protection of wildlife and natural or scenic resources including lakes, ponds, rivers, streams, streambelts, inland wetlands, aquifers, significant woodlands, stands of unique or scenic trees, particular trees of special size or unusual type, ridges, ravines, stone fences and walls, ledge cutcroppings and other unusual physical features; the protection of historic or archaeological sites; (ii) the expansion of existing Open Space and areas; and (iii) the meeting of neighborhood and/or community-wide recreational needs. In determining the location of Open space, the Commission may consider potential for combination with existing or proposed Open Space on adjoining properties owned by any public or private institution.

Comments:

Every land use regulation must contain standards to guide each and every discretionary decision. You can't just say "the commission can require open space whenever and where it considers appropriate." Each town may have different objectives in requiring open space or recreational areas, so this list of criteria should be examined to make sure it comports with your values and goals. Be aware, however, that a reviewing court will probably hold you to whatever criteria you select, so be sure that they describe, with sufficient scope and detail, the situations in which you would want to require open space dedications.

SECTION X.3 SIZE:

Where Open Space disposition is deemed appropriate, the size of the required areas shall be determined by the Commission based on the site's value and importance in meeting the objectives cited in Section X.2 and the scope of the subdivision proposal. Required Open Space [shall be of such a size as bears a reasonable relationship to the anticipated burden imposed by the subdivision OR may be up to _____ (__%) percent of the property under consideration OR shall be fixed at _____ (__%) percent of the property under consideration]. In determining the total land to be reserved as Open Space or recreation land, the Commission may consider not only the tract or tracts of land to be immediately subdivided, but also any other adjacent tract or tracts owned, controlled or under agreement to buy or option to buy by the subdivider. Areas to be reserved as Open Space land shall be shown on the subdivision map. [Optional: This provision shall apply to subdivisions of more than _____ (__) lots or _____ (__) acres or more, irrespective of the number of lots.]

Comments:

The amount of Open Space to be required can be done by a flat or maximum percentage, or need not include a percentage at all. The highest flat percentage used is Simsbury, with twenty (20%) percent; ten to fifteen (10% to 15%) percent is common; no percentage is also not unusual. The important thing is to remember that, if a percentage is used, it should be predicated upon some rational standard: Recommendations from some published state or national study; recommendations in the local plan of development (with supporting data contained therein); extension of patterns existing in previously-developed areas of the town; or some combination of

these or other factors. An advantage of the flat percentage rate for all subdivisions (as opposed to the "up to" a certain percentage approach) is that it treats all subdividers equally and creates an incentive to them to utilize the Fees-in-Lieu of Open Space provisions below.

The consideration of all land owned by the developer is to prevent piece-meal submission of the land most desirable for Open Space preservation at the outset, leaving the less worthy parcels until later, when the better land is developed. The last optional sentence is a matter of local preference: Perhaps very small subdivisions should not have to bother with Open Space needs. Note, however, that even a 2-lot subdivision could include land which would form a vital part of an existing or proposed Open Space system; and that even small subdivisions could augment an Open Space acquisition fund via the Fees-in-Lieu of Open Space provisions discussed below.

SECTION X.4 SITES OF ARCHAEOLOGICAL SIGNIFICANCE:

In all subdivisions of _____ (___) acres or more, all applicants shall make written inquiry of the State Archaeologist to determine if there is evidence of sites of archaeological significance within the subdivision. Any significant sites shall, where possible, be left undisturbed and may be considered in meeting the minimum Open Space requirements of this Chapter.

Comments:

This Section is entirely optional. For some communities, sites of archaeological significance can be an important part of an Open space system. This section could also include other areas of special study, such as sites of historic significance, environmental assessments, habitats for threatened or endangered species, or detailed delineation of wetlands.

SECTION X.5 METHOD AND PROCEDURE OF DISPOSITION:

a) Method of Preservation, Entity Having Title: The Commission shall determine the most appropriate method of disposition after considering, among other things, the relationship of the subject area(s) and its specific characteristics to the Plan of Development and the objectives cited in Section X.2; the desirability and suitability of public access and use and the scope of the subdivision proposal. The following disposition options may be utilized by the Commission:

1) Conveyance in fee simple to the Town.

2) Conveyance in fee simple to the State of Connecticut.

3) Conveyance in fee simple to a land trust (with the concurrence of the subdivider).

4) Conveyance in fee simple to a homeowners' association (see, Section X.8).

5) Conveyance of conservation easement(s), with or without public access, to the Town.
OR
Conveyance of conservation or preservation restrictions, as defined in Connecticut General Statutes §47-42a, with or without public access, to the Town.

6) Conveyance of a recreation easement to the Town, the State, or a private, non-profit recreational entity.

7) Conveyance of an agricultural easement to the Town, the State, or a private, non-profit farm preservation entity.

8) Private ownership with the appropriate severance and conveyance of development rights.

9) Any combination of the above or any suitable alternative approved by the Commission.

The applicant shall designate in its application which of the foregoing entities is proposed to own the Open space, but, as part of the approval of such application, the Commission may modify such designation to require ownership by one of the public entities set forth above, provided, however, that the Commission may not require ownership by an entity described in Subsection (3), nor any conveyance to a private entity, which shall be approved only when consented to by the applicant. Furthermore, the Commission may modify any application so as to designate Open Space in locations other than those proposed. In determining whether the proposed entity is appropriate to own the proposed Open Space, or whether to require Open Space in locations different from those proposed, the Commission shall consider the following factors": (i) The ownership of any existing Open Space on adjacent properties, or the proximity to non-adjacent Open Space which might reasonably interconnect with the proposed Open space in the future; (ii) the proposed use of the Open Space for active or passive uses, and the extent of maintenance, supervision, or management required; (iii) the potential benefits which the Open Space might provide to residents of the Town or the State, if it were accessible to them; (iv) the size, shape, topography and character of the Open space; (v) the recommendations of the [name of town] Plan of Development; and (vi) the reports or recommendations of any State or Town agencies, including, but not limited to, the [board of selectmen/town council or comparable body], the Inland Wetlands and Watercourses Agency, the Recreation Commission, the Conservation Commission, the [name of county] Regional Planning Agency, and the Connecticut Department of Environmental Protection.

Comments:

These are all the possible methods of disposition, but one need not use all of them. Easements have the advantage, especially for small parcels, of allowing preservation of land while retaining it as private property (and thus maintained and policed by the private owner). Easements can

include public access along a particular trail or corridor; or can be completely private or completely public (w3hich would be rare). Note that easements must still be monitored for continuing compliance. The obvious advantage to owning the land in fee simple is that the town can use it for any Open Space or recreational purpose. Note that (3) requires the concurrence of the subdivider: A commission cannot require a developer to bestow a benefit on a private entity, even a non-profit or charitable one. Most towns have form conservation easements, agricultural easements, or whatever, so that the town attorney does have to review and negotiate each individual conveyance. Note the alternative language for conservation easements: The referenced Statutes may be suitable and provide some uniformity among towns, but the risk of using them is that a Statutory change can alter local regulations and the town might not even know about it. Also, reference to Statutes requires constant cross-referencing.

b) Alteration of Open Space: Any excavation, filling, regrading or other alteration of Open Space; any construction or expansion of any building, structure or other improvements thereon; or any paving or surfacing of Open Space subsequent to the date of approval of the Subdivision, other than work required by the plans as approved, shall require an amendment to the Subdivision approval granted in accordance with the applicable Sections of these Regulations.

Comments:

The Commission has a right to expect that land to be preserved will not be tampered with once approval has been granted.

c) Evidence of Acceptance: The application shall contain written evidence, satisfactory to the Commission, from the entity proposed to own the Open Space, stating that it is willing to accept ownership of and responsibility for the preservation and maintenance of the Open Space.

Comments:

The commission should have some indication that the intended agency is willing to accept the Open Space or easement. Even the State has been rejecting Open Space dedications of late. Unexpected rejection of the Open Space Cr3eates a legal tangle for the commission, the subdivider, and the general public.

d) Required Provisions: Regardless of the manner of ownership of the Open Space, the instrument of conveyance must include provisions satisfactory in form and substance to the Commission to ensure:

1) The Open Space is dedicated to its intended purpose in perpetuity;

2) The continuity of proper maintenance for those portions of the Open Space requiring maintenance;

3) When appropriate, the availability of funds required for such maintenance;

4) Adequate insurance protection; and

5) Recovery for loss sustained by casualty, condemnation or otherwise.

e) Recording: At the time the approved Subdivision Plan is filed, the applicant shall record on the [name of town] Land Records all legal documents required to ensure the aforesaid guarantees.

Comments:

One of the most serious potential problems occurs when Open space is to be conveyed to a homeowners' association which is either never created by the subdivider, or created without adequate assessment and enforcement powers to actually maintain and improve the Open Space. Submission of documentation complying with the Connecticut Common Interest Ownership Act (CIOA) is essential.

f) Boundary Lines: The boundary lines of all Open Space shall be set in the field and marked by permanent, readily-visible markers where such lines intersect any lot line, road or perimeter line within the proposed Subdivision and at such other points as may be required by the Commission to ensure identification in the field.

Comments:

A common problem is that contractors or homeowners disturb or use Open Space for their own purposes, either by accident or design. The town cannot monitor such encroachments without clear field marking of such Open Space areas.

SECTION X.6 REFERRALS:

The Commission may refer for review and comment any subdivision plan and proposal for the provision of Open Space land to the Conservation Commission, Recreation Commission, [name of county] County Soil and Water Conservation District, or any other appropriate agency. The Commission shall refer to the [board of selectmen, town council, or other comparable body] any proposal under which the Town would acquire a property interest in the Open Space.

Comments:

This is optional, but getting the widest possible input can never hurt. Just be sure that, where a public hearing is held, all such comments are made while the public hearing record is open. Comments received after the close of the public hearing may be acceptable in certain cases, but this practice is risky. Consult your land use counsel in such instances. Also note the referral to

the selectmen/council: This is an effort to avoid dedication of land which the town does not want and will not accept.

SECTION X.7 CONDITION OF OPEN SPACES AND/OR RECREATION LAND:

Open Space areas shall typically abut or have direct public access to a public street and, as appropriate, any existing park or public land. All such areas shall include access roadways to be graded and improved in a manner suitable for safe pedestrian and vehicular traffic. Access roadways shall have an adequate base, shall be adequately drained and shall typically be twenty (20') feet wide and have a slope no greater than twelve (12%) percent, except that the Commission may waive any of these requirements where access is less critical, such as in passive wildlife preserves or fragile ecosystems.

Land to be provided as Open Space for the purpose of conservation and protection of wildlife and natural or scenic resources shall typically be left in a natural state by the subdivider. Except for improvement or maintenance as may be expressly permitted or required by the Commission, Open Space areas shall not be graded, cleared, or used as a repository for brush, stumps, earth, building materials or debris. The Commission may require that any land to be dedicated for recreational use be cleared of brush, trees and debris; be graded to properly dispose of surface water; be covered with organic topsoil to a depth of four (4") inches; be seeded with low maintenance grass seed; and be otherwise improved so that the land is left in a condition appropriate to the intended use. [The Commission need not accept land composed entirely or substantially of inland wetlands in satisfaction of the requirements of this Chapter OR the ratio of the area of the proposed Open Space classified as inland wetlands to the total area of the Open Space shall not exceed the ratio of all inlands wetlands in the subdivision to the total area of the subdivision], unless it considers such areas to have special habitat or other environmental value. When site improvements are required, they shall be clearly shown on the final subdivision maps or alternatively on a separate site improvements plan and they shall be approved by the Commission prior to the filing of the subdivision plan.

Comments:

Public Open Space has little value if the public cannot reach it and municipal agencies cannot police and maintain it. Note the reiteration of non-disturbance, except as authorized/required. Note also the restriction on wetlands: The second version of the test is comparable to that used in Simsbury.

SECTION X.8 ENFORCEMENT BONDING:

To ensure proper construction of any required Improvements, the Commission shall require the subdivider to post a performance bond, letter of credit, or other suitable security in an amount and with terms acceptable to the Commission. Unless modified by the Commission in accordance with Chapter [modification section] of these Regulations, all required Improvements

of Open Space land shall be completed prior to the occupancy of fifty (50%) percent of the lots within the subdivision.

Comments:

Improvements to Open Space areas should be treated the same as any other subdivision improvements, and should be bonded. The completion requirement when fifty (50%) percent of the lots are occupied is optional, but prevents the subdivider from leaving Open Space improvements until last; it also reduces the potential for complaints by the first lot purchasers who may be waiting for years to see the developer's glowing promises become reality. The method of bonding should conform to that required for other subdivision improvements (such as roads, drainage, etc.)

SECTION X.9 PROPERTY OWNERS' ASSOCIATION:

The Commission may, upon the request of the subdivider, permit the ownership and maintenance of the Open Space to be transferred to an association of property owners. Such transfer shall be in accordance with standards established by the Commission to include, but not be limited to, the following:

1) Creation of the association or corporation prior to the sale of any lot.

2) Mandatory membership in the association by all original lot owners and any subsequent owner; Non-amendable bylaws or other restrictions which require the association to maintain the land reserved for Open Space, park and playground purposes, with power to assess all members for all necessary costs.

3) Provisions/restrictions which will be perpetual and binding on all future property owners, and will not be affected by any change in land use.

4) The association or corporation shall have the power to assess and collect from each lot owner a specified share of, and, where necessary, provide reserves for the costs associated with maintenance, repair, upkeep and insurance of the Open Space.

5) Any deed of conveyance shall contain language providing the association with the right to obtain reimbursement for all costs it reasonably incurs, including attorney'[s fees, in any action to enforce its rights against any lot owner, in which the association is the prevailing party.

6) Association documents shall provide that if maintenance or preservation of the dedication no longer complies with the provisions of the document, the Town may take all necessary action to assure compliance and assess against the association all costs incurred by the town for such purposes.

Any conservation easements or other Open Space covenants or restrictions shall be subject to the approval of the Commission in form and content. After approval by the [land use counsel] and the Commission, said document shall be filed by the subdivider in the Office of the Town Clerk.

Comments:

Note again the careful attention to homeowners' associations.

SECTION X.10 LEGAL TRANSFERS:

Properly executed legal documents, including warranty deeds for any title transfers, shall be prepared in accordance with the provisions of this Section and shall be submitted in triplicate with the final subdivision map to be endorsed and filed. All warranty deeds shall be accompanied by [owners title insurance, in the amount of the full value of the property interests conveyed, issued by a title insurance company licensed to do business in Connecticut] OR [a certificate of title, prepared by an attorney admitted to the bar of the State of Connecticut], certifying that such conveyance passes good title to the described property or property interest, and that it is free and clear of any defect or encumbrances, or that any such encumbrance has been subordinated to the conveyance. All documents must be acceptable to the Commission and its attorney, and shall refer to the subdivision maps by title. All warranty deeds for dedication of land to the Town shall be held in escrow by the Commission to be recorded on the Town Land Records upon acceptance by the [board of selectmen/town council or other body having the authority to accept property in the name of the municipality]. In the event that acceptance is rejected by the [board of selectmen/town council or other comparable body], the deed shall be returned and the subdivider shall return to the Commission for determination of an alternative means of preserving the Open Space. In no case, shall the acceptance of any deed by the Commission or an employee of the Town be deemed as acceptance of the Open Space by the Town. [All Open Space preserved by means of easements or restrictions shall comply with the requirements of Connecticut General Statutes §47-42(a) through §47-42(c).]

Comments:

Note that deeds must be filed prior to endorsement of the plans. It is unwise to allow maps to be filed unless everything is in place for management of the Open Space. Pay special attention to the requirements regarding good of title: In this economy, many conveyances of roads and Open Space have been the subject of foreclosure proceedings by banks, which can create avoidable confusion and risks to public property interests. The choice between title insurance and a certificate of title is one of preference: A certificate of title may cost the applicant less, but title insurance provides the municipality with perpetual protection for its legal interest. This Section also provides a procedure in the unlikely event that the Open Space is not accepted. One of the ways to prevent this embarrassment is to achieve a consensus with the legislative body in advance as to the general policy on Open Space dedications. Preparation of the local plan of development, or a specific Open Space and recreation plan, is a good vehicle for achieving that consensus. Note the optional Statutory reference: Here again, the reference incorporates some

helpful language, but creates the nuisance of cross-reference and the risk of inadvertent amendment.

SECTION X.II DEDICATION FOR OTHER MUNICIPAL PURPOSES:

In the event the subdivider desires to transfer to the Town land for other municipal purposes such as future schools, fire houses, etc., the dedication provisions of this Regulation shall be complied with. The Commission may consider such a municipal dedication as a credit toward any Open Space disposition requirements, but may not require such dedication.

Comments:

The Statutes are clear that land can only be required in a subdivision for parks, Open Space, and recreational uses. Although the definition of "Open space" may be broad, it cannot be construed to include land for fire houses, schools, senior centers, or the like. This optional paragraph permits the commission to credit such voluntary contributions against the Open Space requirement to provide some incentive for such contributions where they are appropriate.

SECTION X.12 PAYMENT OF FEE IN LIEU OF OPEN SPACE:

In accordance with Connecticut General Statutes §8-25, as amended by Public Act 90-239, Section 1, the Commission may authorize a subdivider to pay a fee and/or transfer land to the Town of [name of town] in lieu of the disposition of land by one of the methods set forth in Section X.5 hereinabove. Such authorization may be granted by the Commission if and when it determines, in its sole discretion, that there are inadequate areas on the subdivision which merit preservation by one of the methods set forth in Section X.5, or that there are other areas in the Town of [name of town] where preservation would be more beneficial to the public health, safety and welfare. In the event that such authorization is granted by the Commission, such payment or combination of payment and the fair market value of land transferred shall be equal to not more than ten (10%) percent of the fair market value of the land to be subdivided prior to the approval of the subdivision. The fair market value shall be determined by an appraiser jointly selected by the Commission and the subdivider. A fraction of such payment, the numerator of which is one and the denominator of which is the number of approved lots in the subdivision, shall be made at the time of the sale of each approved lot in the subdivision and placed in a fund. Such fund shall be used solely for the purpose of preserving Open Space, including the acquisition of land for Open Space [and the capital improvement of existing Open Space lands]. The said payment obligation shall be secured by a lien against each lot in the subdivision, and the lien shall be filed at the time that the final subdivision plans are filed in the Office of the Town Clerk, in accordance with Section III.3(i) of these regulations. The said lien shall be in a form approved by the Commission, and shall be unencumbered by any mortgage or encumbrance having priority over said lien, as evidenced by a Certificate of Title, in accordance with Section III.3(i) of these Regulations.

Comments:

This is drawn directly from the Statutory language, but there are still a number of questions and options which will probably be clarified by future court decisions. The language about "authorizing" Fees-in-Lieu of Open Space is one such ambiguity: Whether the commission could require a fee-in-lieu of Open Space; or may only permit the subdivider to substitute the fee for the Open Space; or must permit such substitution, is not clear from the Statutory language. Individual regulations could specify one of these options and await further clarification by the courts.

The vehicle of a lien as a means of securing the payment of the fee is not in the Statutes, but would be a reasonable method of implementing the Statutory scheme. Other methods would be some sort of mortgage or declaration, but a lien seems like the simplest approach. Note that this lien must be in "first place", senior to any mortgage or other encumbrance which could later be used to void it in a foreclosure proceeding.

Note the optional language concerning improvement to existing Open Space/recreation areas. This is another ambiguity in the Statutes. Less rural areas might find this option attractive, but only time will tell if it is legal.

Note also the language about a fund for Open Space acquisition: In order to demonstrate that the future subdivision residents will benefit in some direct way from the fees paid, geographically large towns may wish to set up regional funds to insure that the money is spent in proximity to those who have paid for it in the price of lot purchase. Although the Statutes do not specifically authorize such sub-town funds, it would implement the concept embodied in case law that the burden on the subdivider be matched by the burden on community services created by the subdivision.

SECTION X.13 EXEMPTIONS FROM OPEN SPACE DISPOSITION REQUIREMENTS:

In accordance with Public Act 90-239, Section 1, the provisions of this Chapter X shall not apply if:

a) The transfer of all land in a subdivision of less than five (5) lots is to a parent, child, brother, sister, grandparent, grandchild, aunt, uncle, or first cousin of the property owner for no consideration. Such intended transfer shall be evidenced by covenants, restrictions, contracts, or other legally binding documents as the Commission may approve, which documents shall be filed in the Land Records in accordance with the procedure and other requirements of Section [filing procedure] of these Regulations. If the Commission determines, based on events subsequent to the approval of such subdivision, that such transfers were intended to be temporary, and for the sole purpose of evading the requirements of this Chapter X, the Commission may, following a public hearing with notice by certified mail to the violator, void, in whole or in part, any such subdivision approval, and may cause notice thereof to be filed in the [name of town] Land

Records.

b) The subdivision is to contain affordable housing, as defined in Section 8-39a of the Connecticut General Statutes, equal to twenty (20%) percent or more of the total housing to be constructed in such subdivision. Such restrictions for affordable housing shall be evidenced by such documents as the Commission may require, and such restrictions shall run with the lots affected thereby in perpetuity. If, subsequent to approval of the Subdivision, the lots designated for affordable housing shall not be sold for that purpose, the Commission may, following a public hearing with notice by certified mail to the violator, void, in whole or in part, any such subdivision approval, and may cause notice thereof to be filed in the [name of town] Land Records.

Comments:

These exemptions are drawn directly from the Statutory language. The requirement for documentation to support the exemption is a logical and necessary provision for enforcement which would, in all probability, be supported by the courts. However, the provision for voiding subdivisions which are found to have used these exemptions fraudulently is likely to be controversial with many municipal attorneys. Only recently, the courts have recognized that there is an inherent authority for a permit, once issued, to be revoked under circumstances where it appears that the original issuance was illegal. However, such cases are quite new and the concept is not fully developed, nor is it clear how or if these cases might apply to this type of situation. The main purpose of this provision is to keep applicants honest: It is too easy to create "straw man" transfers to a dozen or so relatives to take advantage of the exemption, and then subsequently transfer all the lots back into a shell corporation to a developer-purchaser. Something is needed to make applicants hesitate with such schemes, and this provision should make them want to avoid even the risk of having a subdivision voided. This will be the case even if the commission's authority is unclear because no one wants the expense and delay of court action, especially when there is case law to support the commission's action. Note again the importance of filing the covenants and restrictions at the time of subdivision endorsement and filing, and of expressly conditioning the exemption from open space dedication on the existence of the exemption: Since such filings provide notice to potential lot buyers, they would tend to make a court more comfortable in upholding any sanction imposed, including voiding of the subdivision.

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MEMORANDUM

TO: Our Zoning Clients

FROM: Eric Knapp, Esq., Branse, Willis & Knapp

RE: MacKenzie v. Planning & Zoning Commission of Monroe, 146 Conn.App. 406 (2013)

DATE: December 20, 2013

As part of our firm's ongoing efforts to keep our clients updated on important changes in land use law, and how they might affect your commissions and your regulations, we are sending out this memo to address the recent (October 15, 2013) case, *MacKenzie v. Planning and Zoning Commission of Town of Monroe*, 146 Conn. App. 406 (2013), and possible ways to work around it.

The situation in the *MacKenzie* case was as follows: a McDonalds wanted to construct a new restaurant along Main Street in Monroe. This required a zone change, from Residential and Farming District (RC) to Design Business District a (DB1). Not surprisingly, it also required a special permit. The DB1 district contained a landscaping requirement: "a landscape buffer shall consist of no fewer than three (3) rows of suitable evergreen trees of one and one-half (1.5") caliper ..." The site had existing vegetation along one side where the buffer was required, and the applicant offered the local planning and zoning commission a choice: we can comply with the landscaping requirement, or we can leave the existing vegetation in place. You choose.

Pursuant to Section 117-1103 of the Monroe Zoning Regulations, "the (c)ommission may modify lot area, frontage, minimum square and yard requirements . . . so long as there is adequate provision for sewage disposal and water supply and so long as access to public streets will not create a traffic hazard . . . " Additionally, Section 117-900 contains the following provision: "Where deemed appropriate in the judgment of the (c)ommission in a specific application, a site plan of development in substantial compliance with the requirements herein may be approved with such minor variations from the strict application of the provisions of these regulations as will provide for the most appropriate use of land as will protect the public health and safety and preserve property values and as will provide for the most orderly development of land."

Many zoning regulations contain provisions of this sort. To be honest, Mark Branse probably drafted many of them and has used language of that sort in the past, given the broad discretion given to commissions in special permit situations. Under the circumstances, the Monroe Planning and Zoning Commission weighed the two alternatives for a buffer along the border of the property, decided it liked the natural vegetation option better and approved the application with that condition of approval. In

essence, it modified its own regulations under specific circumstances where it thought that was the best outcome.

The neighbors appealed, claiming that the power to vary regulations in this manner rests solely with a zoning board of appeals, pursuant to Conn. Gen. Stats. § 8-6. Tied into that was a claim that by varying its regulations, the zoning commission was not treating all properties within a zone uniformly under Conn. Gen. Stats. § 8-2. The Appellate Court agreed that "(t)he uniformity requirement thus precludes case-by-case variance fo regulatory requirements.[1] The Appellate Court discussed how special permits are not floating zones, which might allow for this sort of thing, by saying that floating zones are inherently *more* restrictive than special permits, because of the greater degree of discretion in deciding whether to adopt them or not. Finally, the Appellate Court discussed how the standard rule about special permits is that the proposes use must satisfy standards set forth in the regulations, and the ability to waive these standards frustrates this requirement.

The case is *not* being appealed to the Supreme Court. McDonalds just decided to construct the landscaped buffer, needed or not, rather than fight about it. So, for now, this decision is the law, and we have to live with it.

Because this decision threatens to wreck havoc on many town's zoning regulations which have provisions of this sort, various members of the land use bar have been kicking around possible ways to work around the effects of this decision. It turns out not to be so easy. One way is to require the same thing in *every case,* whether it makes sense or not, i.e., "one size fits all." This seems irrational. The other way is to omit fixed standards altogether and substitute (again, using buffering as an example), "the Commission may require buffering of such width and landscaping as it may deem appropriate under the circumstances." This gives the applicant no guidance as what level of buffering is "appropriate."

The best option anyone came up with is essentially providing the multiple choices right in the regulations themselves. To use the buffer example from the Monroe case, if the regulations had language which said "applicant shall either provide (1) a landscape buffer consisting of ... *or*, (2) in the event there is existing natural vegetation, demonstrate that the existing vegetation will provide equivalent screening to that contained in (1), above." Everyone seemed to think this would work, but it is not always so easy to know what the alternatives are. A different possibility is just to be extremely vague in the requirement. To use the landscaping example again, if the regulation simply said, "The commission shall require such landscaping or other buffering as may be required to adequately screen adjacent parcels." that might be enough to give the commission the flexibility it needs. However, in light of the language contained in

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[1] Note, this seems to apply only to bulk-type requirements. The sorts of regulations which say that a commission can waive certain application requirements are governed by a different set of cases, and do not appear to have been affected by this decision.

Section 117-900, you must be very certain not to couch this in terms of "minor variations" or "substantial compliance" with the regulations. The vague language must be considered as the actual requirement itself.

Each town must examine its zoning regulations for waiver provisions and address them so as to comply with the MacKenzie decision. Addressing those waiver provisions will be different for each one, depending on the objective. Attached is a list of provisions from each of our client towns that are problematic after the MacKenzie decision. Please note that the provisions included are only samples from each town, and the list is not a comprehensive list of the waiver provisions in each town's regulations. We are happy to assist you in reviewing your regulations or evaluating alternative language.

M:\Caleb\Correspondence\MacKenzie v Monroe municipal memo.wpd

LIST OF SAMPLE *MACKENZIE* ISSUES

Compiled by Caleb Hamel, Branse, Willis & Knapp, LLC

Barkhamsted

Section 193-27 of the regs sets out area and dimensional requirements for each zone and allows the Commission to vary the side and rear setbacks by Special Exception

Canterbury

Section 18.6d: Removal of material shall not result in a finished grade steeper than three to one (3':1'), except for areas of ledge outcrop. This requirement may be waived by a two-thirds majority where the ultimate re-use plan shows the necessity of a steeper slope, but shall not exceed 2:1. There shall be no excavation operations within fifty (50') feet of any property line or of a street line, except that the Commission may waive such buffer via a two-thirds majority where the re-use plan indicates that excavation closer to the property line would facilitate a valid ultimate use of the property, or where excavation on an adjacent parcel would match the finished grades on the subject parcel

East Haddam

9.7.2.3f: Those properties on Matthews Drive which do not have frontage on Route s 82 and 151 have already been developed in a pattern which does not reflect the more traditional and historic character of other properties in the District. Therefore, the Commission may permit greater design flexibility for new buildings or structures on those properties, and may allow more diversity and contemporary designs; provided, however, that design quality of these sites, buildings, and structures shall otherwise comply with the goals of Section 14A and 14B, and these Additional Standards

Franklin

9.9: No building shall exceed 35 feet in height, except that the Commission may permit a building higher than 35 feet if it determines that such building will not constitute a safety hazard or be visually inconsistent with the general character and appearance of the surrounding area.

Griswold/Jewett City

Griswold 10.4.2: Side yards may be reduced by vote of the Commission on a zoning permit or special exception site plan as applicable between commercial buildings on adjoining lots in C-1 and C-2 zones, provided the Commission determines that such reduction will not result in limiting access to all parts of the property by emergency vehicles and will enhance the attractiveness and economic welfare of the adjoining establishments.

Jewett City 13.6.2.9a: The Planning & Zoning Commission may, upon written request, modify or waive the location, number and/or type of plantings required for any front, parking or buffer landscape area where the existing natural topography, existing natural vegetation, and/or proposed alternative method such as a berm, mound, hedge, fence or wall at least five (5) feet in height can be reasonably shown to achieve the applicable landscape objectives as identified in this section.

Haddam

7A.5: In an effort to encourage denser development within the Village District consistent with a village center, and promote environmental development, historic preservation and the preservation of community character within this Village District, an applicant may seek a modification of certain regulatory requirements as provided by this subsection. In addition, to those minimum standards required by this Section, and those standards provided by the Administrative Review and Zoning Permit, Site Plan, and Special Permit review and approval processes, the applicant must demonstrate to the satisfaction of the Commission that such modification adds to and complements the character of the Village District, does not adversely impact upon adjacent property or properties in the Village District, and substantially satisfies the standards as provided in this subsection. This is not a variance procedure as permitted by Connecticut General Statutes 8-6 and the procedure is limited to the following regulatory requirements applicable to the Village District and if not expressly provided for herein no modification of any other requirement may be granted by the Commission nor may the Commission grant a modification or change in use...

Hebron

6.4.2b: The Minimum Buildable Land (MBL) Area shall be at least 3/4 acre (32,670 square feet), in size, having four sides with the shortest side being no less than 125 linear feet. The shape of such an area shall be a square or a rectangle and shall not be located within the front, side or rear yard setback areas as prescribed for the Zoning District in which it is located, however, in the case of a subdivision having an overall land area of 10 acres or less and where in the opinion of the Commission these requirements are seen as imposing an unfair burden on the usability of the parcel, and where the resulting lots would be a size and shape compatible to the surrounding neighborhood, the Commission, by a 2/3 vote of all the members, may allow the MBL area to be located within the side and rear yard setbacks.

Marlborough

Article 7A.F.1.c: Front Yard: Maximum 20 feet from the edge of sidewalk. The Commission may waive this requirement if architectural renderings or models of the existing and proposed streetscape for the project and surrounding properties are presented which clearly show a public benefit to the alternative building placement being proposed.

Middlefield

10.02A.3.17c: The Commission or other agency responsible for approval of a Site Plan Review may by resolution, upon request of the applicant, modify or adjust one or more of the requirements of this Paragraph for the purpose of recognizing the particular conditions of the site with respect to enhancement of growth potential of landscaping or assurance of safety of site utilization and the proper functioning of site improvements while maintaining the purpose and intent of this paragraph.

Montville

9A.1.13: Sidewalks shall be constructed along interior roads and the lot frontage in conformance with the Town of Montville Road Standards dated January, 1991, and the Town of Montville Improvement Details dated January, 1991, as the same may be amended from time to time, except that the Commission may, by a two-third majority vote, modify sidewalk requirements.

New Hartford

4.4E: In the NHCD, B, and C Districts minimum Front, Side, and Rear Yard Setbacks may be reduced by Special Exception, where the Commission finds that:

- Adjoining lots are being developed under a common plan with shared parking, driveways, or other supporting facilities; or
- Parking is being located to the side or rear of the building and the reduced Front Yard Setback is to be landscaped; or
- The Minimum Yard Setback of the adjoining lot or lots is such that the required Yard Setback is not required to achieve the purposes of these Regulations

North Stonington

1307.2.3: At the discretion of the Commission, where ground conditions permit, maximum height of structure in the CD District may be increased to sixty (60) feet with appropriate countermeasures to eliminate the impact of the extra height, such as more restrictive setback, buffer, or coverage requirements.

Old Lyme

5.13.8.8a: Unless waived under this paragraph, all new development or enlargement of existing development shall include the installation of a sidewalk meeting the design and construction requirements of the Town unless a conforming sidewalk exists. In considering any request for waiver, the Commission, with the advice of the Selectmen, shall determine when enlargement of an existing development or use does not require the installation of a sidewalk.

Old Saybrook

62.3.4: An applicant may submit in writing a waiver request to reduce the dimensions of the loading space for smaller truck deliveries or to eliminate the one (1) required loading space when the gross floor area of the building is less than 15,000 s.f. The Commission in its discretion may grant this waiver upon the applicant's demonstration that the loading space is unnecessary or impractical for the use and its reduction will not pose circulation or traffic congestion.

Scotland

5.2.C.7: Width and Vertical Clearance. The driveway width shall be a minimum of 14 feet, except that the width of the driveway may be adjusted by the Commission depending on environmental conditions such as wetlands or ledge. Vertical clearance shall be 14 feet for the entire width and length.

Sherman

371: Parking spaces other than for residential uses shall be placed behind or to the side of the principal structure on the lot, unless the applicant demonstrates to the satisfaction of the Commission that such location is not feasible due to topography or the nature of the permitted use or that an alternative location is acceptable because it is substantially obscured to view from the street and nearby residences.

Westbrook

4.65.05: Exception to Minimum Yard Requirements: On any lot used in whole or in part for a water dependent use, as defined in Section 22A-93 (16) of the Connecticut General Statues *[sic]*, an applicant for said use may request approval of the Commission to consider the high tide line as the property line and no setback from the high tide line would be required.

MEMORANDUM

TO: Our Zoning Clients

FROM: Caleb Hamel, Esq., Branse, Willis & Knapp, LLC

RE: Medical Marijuana Regulations

DATE: December 20, 2013

As part of our firm's ongoing efforts to keep our clients updated on important issues that may come before them and how to avoid them, we are sending out this memo to address the recent medical marijuana regulations promulgated by the Department of Consumer Protection and how they impact your zoning powers. This memo is meant to address a number of questions we have already received from various towns and to point out issues within the DCP regulations that may be of concern to municipal zoning authorities.

While Connecticut state law allows marijuana to be sold or grown for medical purposes in certain conditions, the possession, sale, and production of marijuana is still illegal under federal law. The information in this memo deals only with the regulations under Connecticut state law. Furthermore, the status of medical marijuana as legal under state law and illegal under federal law, coupled with a new state regulatory structure and a federal enforcement policy that sometimes seems to vary from day to day, makes medical marijuana a unique subject in American jurisprudence. Because of medical marijuana's unique position, we recommend that you involve legal counsel, whether our firm or another, at the earliest possible time when dealing with medical marijuana facilities.

The regulations deal with two types of facilities: dispensary facilities and production facilities. Dispensary facilities, which must be managed by a licensed pharmacist (the dispensary), are able to dispense medical marijuana to qualifying patients and their primary caregivers, both of whom must be registered with the State of Connecticut. As of November 18, 2013, there were 1,343 registered patients. Production facilities, on the other hand, grow marijuana and produce marijuana products (including edible products) to be sold to a dispensary. Production facilities *must* be an indoor facility, although greenhouses are technically acceptable as long as they meet the rest of the DCP requirements. The two facilities can be located in the same building, so long as each facility's security requirements are met.

A question we have already received from several of our client towns is whether these facilities "fit" under existing use definitions, such as whether a dispensary could be considered a pharmacy or retail use. Such a determination is properly

made by the town zoning enforcement officer and depends on the specific text of each town's regulations. However, even if the text of the regulations appears to include a facility within the definition of an existing use, there may be a reason to conclude that a medical marijuana facility is not included within that definition. Many towns treat some retail uses, such as alcohol or gasoline sales, as distinct from a more "general" retail use, such as a hardware or office supply store. Alcohol and gasoline sales, among others, are subject to intense state regulations that other types of retail are not, including location consideration. Medical marijuana facilities are also subject to intense state regulation, including location consideration, so towns may also wish to distinguish them from other, similar uses that are not so strictly regulated at the state level. Furthermore, until recently the growth and distribution of marijuana, even for medical purposes, was illegal under both federal and state law, so it is doubtful that *any* zoning authority intended to include and regulate those uses when promulgating zoning regulations.

Another common question from some of our client towns is whether towns have the power to prohibit medical marijuana facilities entirely. While Connecticut has a strong tradition of "home rule," under which towns typically have great authority over local matters, courts have been wary of attempts by municipalities to use their zoning powers to block statewide policy decisions by the General Assembly. The DCP's concern appears to be ensuring that patients have access to a supply of medical marijuana if prescribed by their doctor. Under the current DCP regulations, zoning authorities do have some control over these facilities, but the DCP has stated that if **no** town permits these facilities, they will take steps they believe "necessary and prudent" to ensure that patient needs are met. There's not much information, if any, on what those "necessary and prudent" steps could be, but it's doubtful that towns would enjoy the same control over these facilities that they have now. Several towns have enacted temporary moratoriums on zoning applications for medical marijuana facilities while they determine how to regulate these facilities, but a temporary moratorium is not a permanent prohibition. If a town does distinguish between medical marijuana facilities and other existing permitted use definitions, we recommend that the town begin a more thorough discussion of how these facilities should be regulated by their zoning.

Towns may be able to prohibit these facilities on the grounds that the sale and production of marijuana is not legal at the federal level, but this is a risky proposition at best; if the federal government does legalize medical marijuana, that prohibition falls by the wayside regardless of whether a town has in place zoning regulations for these facilities. Furthermore, while towns do have the power to prohibit the sale of alcohol, that power does not expressly include the power to prohibit the sale or production of medical marijuana. The power to prohibit the sale of alcohol comes from Conn. Gen. Stat. § 30-9, which allows towns to prohibit alcohol sales through a referendum procedure. No similar statute allows towns to prohibit the sale or production of medical marijuana,

whether by zoning regulation, ordinance, referendum, or otherwise. This compounds the ambiguity concerning local prohibition of the sale or production of medical marijuana.

For both dispensary and production facilities, applicants for a license from DCP must show that the requirements of local zoning (and other local requirements, such as building and fire codes) *will be* met, but not necessarily that they *have been* met, and the DCP is accepting license applications where zoning approval is still pending. For production facilities, this requirement can, by DCP regulation, be met simply by showing that pharmaceutical manufacturing is allowed in the zone in which the subject property is located. There is no similar provision for dispensary facilities, and therefore the expectations of DCP are much more ambiguous. Furthermore, while DCP does conduct its own investigation when reviewing license applications, there is no public hearing process and no requirement that they meet with or otherwise consult with potential neighbors or local officials when conducting that review.

If a town does decide to regulate medical marijuana facilities through their zoning powers, there are a number of points in the current DCP regulations that could impact parking requirements, operating hours, lighting, signs, aesthetic considerations, its location in relation to other uses, and other aspects of the facility that many towns regulate through zoning regulations. Regardless of the particular showing that a license applicant must make to DCP concerning zoning, some points that may be of interest to zoning authorities are as follows:

- While a dispensary *facility* is the entire building, a dispensary *department* is the part of the building in which marijuana products are actually dispensed. Only dispensary employees, qualifying patients, and their primary caretakers are allowed in the dispensary department, but other people are allowed in the rest of the dispensary facility.
- There are three main types of employees of dispensary facilities: dispensaries, dispensary technicians, and other employees such as janitors and maintenance personnel. No more than five dispensaries can be *employed* by the facility without special approval from DCP, and no more than three dispensary technicians can be in the dispensary department for each *on-duty* dispensary. Any proposed parking requirements should be considered in light of these requirements.
- A dispensary department must be open for at least 35 hours per week.
- DCP has the power to decide whether the location of either type of facility would be detrimental to a nearby place of worship, private or public school, convent, charitable institution, hospital, veteran's home, camp, or military establishment, but there aren't any standards provided on how close is "too close." DCP's power to enact that particular regulation comes from the statute, which points to the location criteria for permits for liquor sales in Conn. Gen. Stat. § 30-46, so it is possible that they review the two uses similarly. Zoning authorities could probably consider their

proximity to other specific uses, such as daycares, but should be careful that what purports to be a zoning regulation is not a *de facto* prohibition.

- License applicants must provide to DCP a narrative and graphical description of the exterior appearance of the facility and its compatibility with commercial and residential structures in the surrounding neighborhood, but again there is no standard for what that means. Many towns have design standards or other aesthetic review criteria in their zoning regulations, and in light of the DCP's ambiguity, they may wish to ensure that the facility will comply with those criteria.
- Both dispensary and production facilities must have a security system, and part of that requirement is that the outside perimeter of the premises must be well-lit.
- Physicians writing or intending to write prescriptions for medical marijuana cannot examine the patient at a location where marijuana or paraphernalia is dispensed or manufactured.
- Dispensary facilities cannot run delivery services for medical marijuana; registered patients or their registered primary caretakers must go to the dispensary facility to receive medical marijuana.
- Production facilities can only deliver marijuana to dispensary facilities; the delivery route and time must be randomized and the delivery vehicle cannot stop between the production facility and the dispensary facility.
- Dispensary facilities cannot have an external sign larger than 16" high by 18" wide, and they can only have one of those. No sign advertising a marijuana product can be illuminated. No graphics relating to marijuana or paraphernalia, regardless of whether they're on a sign or not, are permitted on the building exterior.
    - If a dispensary facility license is suspended, they have to put a sign in the front window or on the front door at least 8"x10" indicating the suspension and the reasons for it in lettering readable without difficulty from outside the facility.
    - There are no such sign restrictions for a production facility

As noted above, medical marijuana regulations and the powers of a town to regulate the facilities are a new frontier in Connecticut law. There are a number of aspects of these facilities in which towns may want to have a voice, but should be careful to avoid the appearance of trying to use their legitimate zoning powers to undercut the new statewide policy. We strongly advise that counsel be consulted and involved in any discussions a zoning authority may have on how to regulate these facilities, to avoid costly future litigation on uncertain legal ground.

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June 26, 2013

Marco Caminito, Project Manager
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336 Stamm Road
Newington, CT 06111

RE: Crescimano Zoning Compliance

Dear Mr. Caminito:

I first want to apologize for the delay in sending this letter to you; over the past couple weeks, a network server failure has caused some small chaos with our office practices. That said, at the request of the Town of Middlefield, I had my paralegal, Caleb Hamel, perform a basic zoning compliance review for the proposed development at 48 Meriden Road, Middlefield, CT. As noted at the June 12, 2013 meeting of the Middlefield Planning and Zoning Commission, the application materials provided as of that date were substantially incomplete; it's my understanding that your design team was aware of this and is (or will be) providing supplemental materials to complete the application. I deeply appreciate your understanding of our completeness concerns, and look forward to working with you as this project moves forward. Because of this incompleteness, the following zoning compliance review addresses only the materials provided as of that June 12 meeting, and we may have additional notes as you provide additional materials.

Although this application is for a special permit, Middlefield Zoning Regulations ("MZR") 10.02B.4.3 requires that special permit applications conform to the site plan requirements of MZR 10.02A. In the interests of clarity, the issues the application faces under MZR 10.02A are addressed on an issue-by-issue basis.

<u>Driveway Access</u>

MZR 10.02A.3.6 raises several serious issues with regards to the proposed parking access. This is a steep site, sloping down in the easterly direction, yet no measurements of grading or driveway width are shown in order to establish compliance with MZR 10.02A.3.6d and MZR

10.02A.3.6h. MZR 10.02A.3.6h also prohibits lots from having more than one driveway, although separate entrance and exit driveways are permitted to safeguard against hazards and prevent congestion, and additional driveways are permitted when they will facilitate the traffic flow on the street. However, MZR 05.06.06 explicitly limits lots on Route 66 to one driveway per lot and generally encourages limitations on access points between a lot and Route 66. Furthermore, there are no calculations or other analyses provided to show that the driveways will be of sufficient capacity to prevent queueing as required by MZR 10.02A.3.6c. Without any evidence of the necessity of multiple driveways on the site, removal of one of the driveways may be necessary to ensure compliance.

Handicapped Access

While your provision of handicapped parking spaces adjacent to the building is commendable, the sidewalk along the front of the building contains steps that cannot be used by a handicapped person. These steps prevent handicapped people from using the sidewalk to access Unit-1 and Unit-5 (as labeled on the site plan) from the handicapped parking spaces. Instead, it appears that handicapped people can access Unit-1 and Unit-5 only by parking in a standard space and climbing a steep slope to the building. Furthermore, there is no indication as to how handicapped people will be able to access the sidewalk from the handicapped parking spaces, whether through a small ramp, a sidewalk flush to the grade, or another method of access. All of these issues are in direct contravention of MZR 10.02A.3.8 and, if the site is constructed as currently shown, may give rise to a violation of the Americans with Disabilities Act.

Parking

MZR 10.02A.3.9 requires that off-street parking and loading spaces be provided pursuant to MZR 08.09; it is worth noting that off-street parking is governed by MZR 08.10, and the reference to MZR 08.09 is likely a typographical error. That said, MZR 08.10 requires 400 square feet of parking area for each vehicle; no measurements of the parking area are included that can be used to determine compliance with this regulation. Furthermore, while the provided parking calculations consider the front units of the building to total 4,000 square feet, Sheet A-4 shows that the front units total over 5,600 square feet. This discrepancy should be resolved to ensure that sufficient parking spaces are provided.

In addition, according to the operator, the existing use is licensed for used vehicle sales and is not a licensed auto body repair shop. The site plan, on the other hand lists the existing use as an auto body shop. This ambiguity should be clarified, as the parking requirements for used vehicle sales and the parking requirements for an auto body shop are substantially different. Furthermore, if the proposal is for used vehicle sales rather than an auto body shop, the site plan should indicate which portions of the lot are to be used for parking, which portions are to be used for vehicle

sales, and which portions are to be used for vehicle storage. A fenced-in area is shown near the eastern side yard; if this area is to be used for vehicle storage, it should be marked as such.

Only four parking aisles are measured; one of them is an aisle of varying width with only one measurement provided. Further measurements are necessary to properly describe the parking aisles so that a traffic study can be properly conducted. There are also several areas (adjacent to parking space 27, adjacent to parking space 1-H, and opposite parking spaces 8 and 9) that are not labeled as parking spaces but could be used as parking spaces either officially or unofficially. If they are parking spaces, they should be labeled as such; if they are not to be used for parking, there should be information showing how such use will be prevented.

Furthermore, MZR 05.06.05 allows parking in the rear and side yards on a parcel smaller than two acres, but is silent as to the front yard. A number of proposed parking spaces encroach on the front yard, and this lot is only 1.16 acres in area. These parking spaces should be moved or a variance sought, in order to ensure compliance.

Illumination

Under MZR 10.02A.3.10, outdoor illumination "shall be designed for safety, convenience, and security while minimizing sky glow[,]... discomfort glare[,]... disability veiling glare[,]... " and preventing ill lighting effects on adjacent properties. This is particularly important because two adjacent properties are residential, a hotel is located across the road from the site, and the fenced-in area near the eastern sideyard may attract higher levels of crime than normal, especially if it is intended to be used for vehicle storage. No lighting cut-sheets have been provided, nor is there an available analysis of illumination levels on and around the site. In addition, no lighting is specified on the northern and western faces of the building, which may attract crime or be unsafe in case of emergency.

Drainage and Stormwater Management

While the site plan states that "Driveways and drain outlets shall be designed and constructed to prevent icing conditions on the state highway" and "Foundation drains, sump pumps or roof leaders shall not discharge into the sanitary sewer system," these are the only two parts of the site plan that address drainage at all. This is a serious issue for this site; the site slopes steeply towards a watercourse, and the two known uses of the site (a Laundromat or dry cleaner and an auto body repair shop or used vehicle dealer) both utilize industrial chemicals that may present special drainage and filtration issues to protect the watercourse. Furthermore, MZR 10.10 requires a stormwater management plan if more than 60% of the site is covered in impervious surfaces which, according to MZR 02.09.01, includes gravel parking areas. While the site plan makes it hard to distinguish between gravel and paved parking areas, it certainly appears that more than 60% of the site is considered to be impervious under the MZR. Despite the

requirements of MZR 10.02A.3.12 and MZR 10.10, however, no drainage calculations, runoff analyses, drainage plans, or stormwater management plans are provided.

Utilities

The site plan shows that overhead wires are to be run from the utility pole on the central grass island to the front of the building. However, MZR 10.02A.3.13 requires that utility lines be installed underground unless determined by the Commission to be impractical. Nothing is provided that shows such installation to be impractical, and without that evidence, the lines must be installed underground. In addition, while a note on the site plan provides a contact number for determining the location of existing underground utilities, the site plan does not indicate even the approximate location of such utilities. Such utilities should be located on the site plan so that they will not interfere with construction.

Furthermore, neither the site plan nor the floor plans indicate the location of various utility services—transformers, chillers, heaters, etc. If located outside, these services must be located at the side or rear of the building and screened from view; rooftop units must be screened in a complementary architectural style. However, there is no information provided to determine whether such screening is necessary or, if necessary, appropriate.

Finally, there are no details available regarding the (proposed?) installation of the underground propane tank. It will be necessary to ensure that the propane tank is properly isolated so that leaks do not affect the surrounding area's environmental quality.

Emergency Access

MZR 10.02A.3.14 requires that suitable provision be made for access by emergency services, including water supply for fire trucks. While I understand that the site plan has not yet been reviewed for compliance with the fire code, the lane at the rear of the building has no marked width, and it would be difficult to determine whether that lane would be suitable for emergency access without knowing its width. Furthermore, the presence of temporary storage and parking in that lane may present additional issues. Finally, there does not appear to be a suitable water supply for fire trucks in case of emergency. If such a water supply is to be provided for, it should be indicated on the site plan.

Outdoor Storage

This regulation requires all outside storage areas to be screened, with a waiver by the Commission available for necessary and reasonable outside storage areas adjunct to retail sales. The temporary storage at the rear of the building is not screened, and there is no information on its use by which the Commission can grant a waiver. Furthermore, the proposed dumpster pad

and the enclosed area near the eastern side yard are substantially lower than the street level, and a 6' high fence may not be sufficient to screen these areas from view under MZR 10.02A.3.15.

Ground Coverage

No measurement or other information is available to determine the Total Ground Coverage of the site as required to show compliance with MZR 10.02A.3.16.

Landscaping

MZR 10.02A.3.17 sets out the requirements for the landscaping plan. It includes, among other things, a landscaped buffer along the street line and landscaped islands and walkways in parking lots larger than 20 spaces. Furthermore, all such landscaping must be suitably protected by curbs, fences, or the like as described in MZR 10.02A.3.17h. Even though 39 parking spaces are indicated, and more may be required as described above, no landscaping plan is provided.

Signs

The MZR extensively regulate signs under both this regulation and MZR 09.03. However, no description of the signs sufficient to determine compliance with these regulations is provided. Drawings should be submitted fully describing not only the attached signs for incoming tenants, but also the existing standalone sign on the central grass island, so these signs can be reviewed for compliance. There is the possibility of establishing a sign plan review program for the site, at the Commission's discretion, but such possibility has not been raised by the applicant.

Erosion and Sediment Control

According to this regulation, any development disturbing an area larger than half an acre must have an erosion and sediment control plan. While the disturbed area does not appear to meet this requirement, no calculations or measurements are provided to verify that.

Protection of Drinking Water

As mentioned above, this site drains towards a watercourse and two proposed uses both involve industrial chemicals that may present special environmental considerations. However, MZR 10.02A.3.22 provides for the protection of drinking water supplies and gives the Commission the discretion to deny an application in order to protect even potential drinking water supplies, and there is no information available to show whether drainage into the watercourse would affect water supplies.

Architectural Appearance

This regulation governs the architectural appearance of the building, which must fit the rural character of the town in terms of materials, colors, sizes, bulk, architectural styles, details, and other architectural issues. No information has been provided on coloring, and little information has been provided regarding materials to be used. More complete and detailed architectural renderings and specifications are necessary for the Commission to determine that the building preserves and enhances the historic and rural character of the town.

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In addition to the site plan requirements of MZR 10.02A, as a special permit application this development must also meet the requirements of MZR 10.02B. These regulations give the Commission greater discretion in regulating certain areas, and special care should be taken to ensure that these standards are met. For clarity these issues are addressed regulation-by-regulation, but are by necessity more general than the previous issues.

MZR 10.02B.4.10

This regulation gives the Commission significant discretion in protecting both the environment and public health and safety. It reiterates the issues of protecting the watercourse from drainage and runoff from the site, preventing glare and excessive lighting, ensuring proper emergency access and water supply for fires, and many of the other issues presented above. Because of this section, addressing those issues will require special care. It also demands provision of adequate utility capacity, an issue not clearly addressed in the application materials so far: almost no information is provided on the sizing of water, sewer, electrical, or other utilities provided to the site.

MZR 10.02B.4.13

Like MZR 10.02B.4.13, this regulation also requires special care be taken for certain issues addressed above. Because two lots adjacent to the property are residential, the Commission has greater discretion to consider traffic effects, address landscaping and screening, consider environmental effects on water *and air* in the area, and regulate outdoor storage. Further design of, and more information on, the subjects addressed by this regulation will only help your application.

MZR 10.02B.4.14

This regulation provides more specific requirements for special permit applications, and sets out a long list of considerations explicitly to assist the applicant. Addressing these issues will go a

long way towards making the application complete, although there will still be gaps as addressed above. Information addressing these issues should be added to the application materials in order to complete the application.

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Finally, there are several items that, while not explicitly addressed above, should be resolved early in order to prevent a bumpy permitting road later:

- The proposed addition encroaches on the front yard. While I understand that a variance exists for this encroachment, the variance has not yet, to my knowledge, been made available to the Commission. This variance should be submitted, in order to properly ensure zoning compliance.
- Likewise, the existing building encroaches on both the front and western side yards, but there is no available information on whether that encroachment is permitted as a preexisting nonconforming use or permitted by a variance. Clarification on this point will also be necessary to ensure compliance.
- The west fire exit, while shown on the floor plans, is not shown on the western elevation. Furthermore, that fire exit opens into a narrow aisle between the building and a retaining wall that, as addressed above, would be unlit. This area should be re-examined to ensure that it will be a useful exit in case of emergency.
- Furthermore, while the site plan indicates that water and sewer will be provided via utility lines run from the City of Middletown via an adjacent lot, it does not indicate whether those utilities are existing or proposed. Those lines also appear to be uphill from a wetland. The City of Middletown and the Town of Middlefield may both have to review this application to ensure protection of those wetlands from the effects of construction activities if the lines are not yet installed.
- The parking spaces along the front of the building are very close to the site entrance, and poses a potential safety hazard; cars parked there risk backing out into a high-traffic DOT right-of-way.
- While a note on the site plan indicates that the contractor will remove any leaching system found within 25 feet of the proposed addition, it does not indicate what will happen to any leaching system *outside* of that radius. A point addressing plans for a leaching system outside of that radius should be included.
- While the title block of the site plan states that the property owner is Linda Crescimano, a note on the site plan states that the owner/applicant is Anthony S. Crescimano. Meanwhile, a memorandum from Brian Curtis, P.E., of Nathan L. Jacobson & Associates, describes the site walk and lists Diane Crescimano as operator of the existing use. For clarity, this ambiguity should be resolved.

It should be reiterated that all of the above points are the result only of a preliminary review of an incomplete application, and are not a final zoning compliance review. Additional

information supplied by you may render some of these points moot, or it may exacerbate some of them. The representations of the applicant's authorized representative at the June 12 meeting indicated that further materials would be forthcoming, and those materials may have already negated some of these points. I look forward to going over them, and to working with you through this process.

Very truly yours,

Mark Branse

cc: Geoffrey Colgrove, Town Planner, Town of Middlefield
Allan Johanson, Zoning Enforcement Officer, Town of Middlefield
Robert Johnson, Chairman, Middlefield Planning and Zoning Commission
Matt Willis, Branse, Willis, and Knapp, LLC

MB

Supreme Court of Connecticut.
James VENTRES et al.
v.
GOODSPEED AIRPORT, LLC, et al.

No. 17280.
Argued April 14, 2005.
Decided Aug. 30, 2005.

Background: Town wetlands and watercourses commission brought action against airport and landowners for airport's failing to obtain a permit before cutting down trees and other vegetation on landowners' property. Landowners filed cross claim against airport. After a bench trial, the Superior Court, Judicial District of Tolland, Complex Litigation Docket, Sferrazza, J., entered judgment for town wetlands' commission and for landowners on their trespass cross claim. Airport appealed, and town wetland commission and landowners cross appealed.

Holdings: After transferring appeal, the Supreme Court, Sullivan, C.J., held that:
(1) airport had a prescriptive easement to enter the landowners' property for the purpose of maintaining an approach slope over property to runway;
(2) airport had no federal right, under prescriptive easement, to clear-cut landowners' property;
(3) evidence was sufficient to establish that vertical dimensions of airport's prescriptive easement could be defined with sufficient certainty to be enforceable;
(4) landowners had standing to bring claim that airport's clear-cutting constituted unreasonable pollution of wetland;
(5) airport's clear-cutting was a regulated activity under the Inland Wetlands and Watercourses Act such that airport was required to obtain a permit from town wetlands and watercourses commission;
(6) landowners did not state a claim under the Connecticut Unfair Trade Practices Act (CUTPA) against airport or its owner; and
(7) treble damages were not available for the reduction in the pecuniary value or for the replacement cost of landowners' trees.

Affirmed.

See also 275 Conn. 161, 881 A.2d 972.

West Headnotes

[1] Aviation 48B ⚷3

48B Aviation
48BI Control and Regulation in General
48BI(A) In General
48Bk3 k. Sovereignty in and ownership of airspace. Most Cited Cases

Airport had a prescriptive easement to enter the landowners' property for the purpose of maintaining an approach slope over property to runway, as airport's use of airspace above the property constituted a direct and immediate interference with landowners' use and enjoyment of their property and therefore use was adverse, airport's use of property was open, visible, continuous and uninterrupted for 15 years and made under a claim of right, and there was evidence that vertical dimensions of prescriptive easement could be defined with sufficient certainty to be enforceable.

[2] Aviation 48B ⚷231

48B Aviation
48BV Airports and Services
48Bk231 k. Obstructions and hazards. Most Cited Cases

Airport had no federal right, due to prescriptive easement it had over landowners' property for the purposes of maintaining an approach to a runway, to clear-cut landowners' property; though airport had a limited right under state law to enter property to trim vegetation, airport conceded that, in the absence of any state law property right to enter

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be duplicative and premature while such action was still pending. C.G.S.A. § 42–110b(a).

[40] Antitrust and Trade Regulation 29T ⚷198

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk198 k. Real property in general. Most Cited Cases
(Formerly 382k864 Trade Regulation)

Landowners whose property was used as a wildlife refuge and nature preserve did not state a claim against airport or its owner for violating the Connecticut Unfair Trade Practices Act (CUTPA) by clear-cutting their land to advance airport's and owner's business interests in expanding airport's runway; even if landowners were in the business of protecting natural resources, concluding that airport's trespass violated landowners' business would convert every trespass claim involving business property into a CUTPA claim, and relationship between landowners and airport was not competitive but was merely one of neighboring landowners. C.G.S.A. § 42–110b(a).

[41] Damages 115 ⚷112

115 Damages
115VI Measure of Damages
115VI(B) Injuries to Property
115k107 Injuries to Real Property
115k112 k. Growing crops, grass, shrubbery, or trees. Most Cited Cases

Replacement value is not a proper measure of damages in tree cutting cases because such a measure of damages would lead to unreasonable recoveries in excess of the market value of the land, would raise impossible issues in resolving the replacement values of healthy or partially damaged trees, and cannot be practically applied.

[42] Damages 115 ⚷227

115 Damages
115XII Double and Treble Damages
115k227 k. In general. Most Cited Cases

Statute regarding damages in tree cutting cases authorizes treble damages only for the value of the trees as commodities, not for the reduction in the pecuniary value or for the replacement cost of the trees. C.G.S.A. § 52–560.

[43] Constitutional Law 92 ⚷2489

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2485 Inquiry Into Legislative Judgment
92k2489 k. Wisdom. Most Cited Cases
(Formerly 92k70.3(4))

A court is precluded from substituting its own ideas of what might be a wise provision in place of a clear expression of legislative will.

John R. Bashaw, New Haven, for the appellants-appellees (named defendant et al.).

Michael J. Donnelly, Hartford, for the appellees-appellants (defendant the Nature Conservancy et al.).

Mark K. Branse, Glastonbury, with whom was John J. Radshaw III, Hartford, for the appellees-appellants (plaintiffs).

SULLIVAN, C.J., and BORDEN, NORCOTT, PALMER and ZARELLA, Js.

SULLIVAN, C.J.

****943 *109** This appeal arises out of a complaint filed by the plaintiffs, the inland wetlands and watercourses commission (commission) of the town of East Haddam (town) and its enforcement officer, James Ventres, against the defendants, Timothy Mellon, Goodspeed

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Airport, LLC (airport), Timothy Evans, the East Haddam Land Trust (land trust) and the Nature Conservancy (conservancy). The plaintiffs alleged that Mellon, Evans and the airport (collectively, airport defendants) violated the town's inland wetlands regulations by failing to obtain a permit before cutting down trees and other vegetation on two properties owned, respectively, by the land trust and the conservancy (collectively, land trust defendants).[FN1] The land trust defendants filed a cross claim against the airport defendants claiming, inter alia, that they had: (1) trespassed on their land and converted their trees; (2) violated General Statutes § 22a–16 of the Connecticut Environmental Protection Act;[FN2] and (3) violated the Connecticut Unfair ***110** Trade Practices Act (CUTPA), General Statutes § 42–110a et seq. On the motion of the airport defendants, the trial court struck the CUTPA cross claim. Thereafter, the matter was tried to the court,[FN3] which rendered judgment for the plaintiffs. With respect to the cross claims, the court concluded that the airport defendants had a prescriptive easement to enter the land in order to trim or cut trees that interfered with air traffic, but that the airport defendants' conduct had unreasonably expanded or intensified the easement. Accordingly, the trial court rendered judgment against ****944** the airport defendants on the trespass cross claim. The trial court rendered judgment for the airport defendants on the cross claim for conversion and for the land trust defendants on the cross claim pursuant to § 22a–16. The airport defendants appealed[FN4] from the trial court's judgment and the plaintiffs and the land trust defendants cross appealed. We affirm the judgment of the trial court.

FN1. The plaintiffs alleged in the second count of the complaint that the airport defendants wilfully had violated the town's inland wetlands regulations. The trial court subsequently dismissed the second count of the complaint and the plaintiffs have not challenged that ruling on appeal.

FN2. General Statutes § 22a–16 provides: "The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action shall be brought in the judicial district of Hartford, for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction provided no such action shall be maintained against the state for pollution of real property acquired by the state under subsection (e) of section 22a–133m, where the spill or discharge which caused the pollution occurred prior to the acquisition of the property by the state."

FN3. The case was tried jointly with an action brought by Arthur J. Rocque, the commissioner of environmental protection, against Mellon, the airport, the land trust and the conservancy. The trial court's ruling in that case is the subject of the airport defendants' appeal in the companion case of *Rocque v. Mellon,* at 275 Conn. 161, 881 A.2d 972 (2005).

FN4. The airport defendants appealed to the Appellate Court and we transferred the appeal to this court pursuant to General

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Statutes § 51–199(c) and Practice Book § 65–1.

The record reveals the following relevant facts and procedural history. The airport is located on Lumberyard Road in East Haddam. It is an "[a]irport available for public use" within the meaning of title 14 of the Code of Federal Regulations, § 77.2.[FN5] Mellon is the sole member of Goodspeed Airport, LLC. Evans is an independent contractor who has been the manager of the ***111** airport since November, 2003, and is responsible for managing its day-to-day activities.

FN5. Title 14 of the Code of Federal Regulations, § 77.2, defines an "[a]irport available for public use" as "an airport that is open to the general public with or without a prior request to use the airport."

The airport's southern boundary lies approximately along the centerline of a tidal creek that flows in a westerly direction into the Connecticut River. That boundary forms the northern boundary of property owned by the land trust, which extends for approximately 335 feet to the south, where it abuts property owned by the conservancy. The conservancy's property extends for another 100 feet to the south, at which point it abuts Chapman Pond. The airport has a 2100 foot runway that runs in a north-south direction. The southern end of the runway is approximately 630 feet north of the airport's southern boundary and 1100 feet north of Chapman Pond.

Between November 29 and December 5, 2000, Evans, at the direction of Mellon and without the permission of the land trust defendants, cut down all of the trees, bushes and woody vegetation on approximately 2.5 acres of land located between the southern boundary of the airport property and Chapman Pond. Approximately 340 trees were destroyed, including some that were 100 years old and seventy-two feet high. The airport defendants claim that the trees and vegetation posed a danger to aircraft landing at and taking off from the runway. The 2.5 acres were entirely within a regulated wetlands area as defined by General Statutes § 22a–38 (15)[FN6] and were part of a wildlife refuge and nature preserve that extends along the Connecticut River.

FN6. General Statutes § 22a–38 (15) defines " '[w]etlands' " as "land, including submerged land, not regulated pursuant to sections 22a–28 to 22a–35, inclusive, which consists of any of the soil types designated as poorly drained, very poorly drained, alluvial, and floodplain by the National Cooperative Soils Survey, as may be amended from time to time, of the Natural Resources Conservation Service of the United States Department of Agriculture ...."

Thereafter, the plaintiffs brought this action alleging that the airport defendants had failed to obtain from ***112** the commission a permit to conduct a regulated activity[FN7] within a wetlands area as required by General Statutes § 22a–42a(c)(1)[FN8] and the ****945** town's inland wetlands regulations.[FN9] The airport defendants raised numerous special defenses to the plaintiffs' complaint, including a claim that the federal aviation law preempts local wetlands regulations. The land trust defendants brought cross claims against the airport defendants alleging, inter alia, that they had violated CUTPA, trespassed on their land and converted their trees, and that they had caused "unreasonable pollution, impairment or destruction" of a natural resource of the state in violation of § 22a–16 by clear-cutting the trees. Upon the motion of the airport defendants, the trial court struck the CUTPA cross claim. After a trial to the court, the court rejected the airport defendants' special defense of preemption and rendered judgment for the plaintiffs. With respect to the land trust defendants' remaining cross claims, the court found that the airport defendants had a prescriptive easement to enter the land owned by the land trust defendants for the purpose of trimming or cutting

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trees that interfered with air traffic, but that clear-cutting the trees had unreasonably exceeded and intensified the easement. Accordingly, the court rendered judgment ***113** for the land trust defendants on their trespass claim and on their claim pursuant to § 22a–16. The court found the airport defendants jointly and severally responsible for paying a civil penalty of $17,500 pursuant to General Statutes § 22a–44 (b) [FN10] and ordered that they contribute $50,000 to an academic or government funded research project to be identified by the department of environmental protection pursuant to General Statutes § 22a–16a (3).[FN11] In addition, the court enjoined the airport defendants from "engaging in any regulated activity on the land ****946** south of the tidal brook without obtaining a [wetlands] permit" and from entering the land trust defendants' property without their consent, except in a manner consistent with the prescriptive easement. Finally, the court ordered the airport defendants to pay damages in the amount of $1 to the land trust defendants on the trespass claim and to pay attorney's fees to be determined by the court.

FN7. General Statutes § 22a–38 (13) defines " '[r]egulated activity' " as "any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses ...."

FN8. General Statutes § 22a–42a (c)(1) provides in relevant part: "On and after the effective date of the municipal regulations promulgated pursuant to subsection (b) of this section, no regulated activity shall be conducted upon any inland wetland or watercourse without a permit. Any person proposing to conduct or cause to be conducted a regulated activity upon an inland wetland or watercourse shall file an application with the inland wetlands agency of the town or towns wherein the wetland or watercourse in question is located...."

FN9. The town's inland wetlands regulations were prepared in accordance with the Inland Wetlands and Watercourses Act, General Statutes § 22a–28 et seq., and are substantially similar to the statutes that they are intended to implement. For convenience, we refer to the text of the statutes.

FN10. General Statutes § 22a–44 (b) provides in relevant part: "Any person who commits, takes part in, or assists in any violation of any provision of sections 22a–36 to 22a–45, inclusive, including regulations adopted by the commissioner and ordinances and regulations promulgated by municipalities or districts pursuant to the grant of authority herein contained, shall be assessed a civil penalty of not more than one thousand dollars for each offense...."

FN11. General Statutes § 22a–16a provides in relevant part: "In any action brought by the Attorney General under section 22a–16 or under any provision of this title which provides for a civil or criminal penalty for a violation of such provision, the court, in lieu of any other penalties, damages or costs awarded, or in addition to a reduced penalty, damages or costs awarded, may order the defendant (1) to provide for the restoration of any natural resource or the investigation, remediation or mitigation of any environmental pollution on or at any real property which resource or property are unrelated to such action, (2) to provide for any other project approved by the Commissioner of Environmental Protection for the enhancement of environmental protection or conservation of natural resources, (3) to make a financial contribution to an

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academic or government-funded research project related to environmental protection or conservation of natural resources, or (4) to make a financial contribution to the Special Contaminated Property Remediation and Insurance Fund established under section 22a–133t provided the total aggregate amount of all contributions to said fund under this section shall not exceed one million dollars per fiscal year...."

***114** On appeal, the airport defendants claim that the trial court improperly determined that: (1) federal aviation law does not preempt state and local wetlands regulations; (2) the failure to obtain a wetlands permit can give rise to an independent action under § 22a–16; (3) the removal of vegetation is a regulated activity under § 22a–38 (13); and (4) Mellon is personally liable for cutting the trees. The plaintiffs raise as an alternate ground for affirmance that the airport defendants have not established a factual record on which a claim of preemption can be predicated. They claim on cross appeal that the trial court improperly: (1) failed to order the airport defendants to restore the land to its original condition and imposed monetary penalties that were insufficient to restore it, thereby thwarting the remedial purpose of § 22a–16; and (2) calculated the per diem monetary penalties pursuant to § 22a–44 (b). The land trust defendants claim on cross appeal that the trial court improperly: (1) found a prescriptive easement in favor of the airport; (2) struck their cross claim pursuant to § 42–110a; and (3) determined that they were not entitled under General Statutes § 52–560 FN12 to damages measured by the cost of replacing the trees and precluded them from introducing evidence of the replacement value.

FN12. General Statutes § 52–560 provides: "Any person who cuts, destroys or carries away any trees, timber or shrubbery, standing or lying on the land of another or on public land, without license of the owner, and any person who aids therein, shall pay to the party injured five times the reasonable value of any tree intended for sale or use as a Christmas tree and three times the reasonable value of any other tree, timber or shrubbery; but, when the court is satisfied that the defendant was guilty through mistake and believed that the tree, timber or shrubbery was growing on his land, or on the land of the person for whom he cut the tree, timber or shrubbery, it shall render judgment for no more than its reasonable value."

We conclude that the trial court properly determined that the airport defendants had a prescriptive easement to maintain an approach slope over the land trust defendants'***115** property, but that they exceeded the scope of the easement by clear-cutting the land. FN13 We further conclude that, because the airport defendants had no right under state property law to clear-cut the land, they had no such right under federal law and, accordingly, we need not reach their claim that federal law preempts state and local land use law. With respect to the plaintiffs' claims on cross appeal, we conclude that the trial court properly determined that the airport defendants should not be required to restore the land to its original condition and properly determined the amount of monetary penalties pursuant to § 22a–16. We further conclude that the trial court properly determined the per diem monetary penalties pursuant to § 22a–44 (b). With respect to the land trust defendants' claims on cross appeal, we conclude that the trial court properly granted the airport defendants' motion to strike the CUTPA claim. We further conclude that the trial court properly determined that the replacement cost of the trees was not a proper measure of damages pursuant to ****947** § 52–560. Accordingly, we affirm the judgment of the trial court.

FN13. In this opinion, we use the phrase "clear-cut" to mean cutting close to the

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ground all trees and vegetation on a given property.

I

We first address the airport defendants' claim that the trial court improperly determined that federal aviation law does not preempt local wetlands regulations. We conclude that we need not reach this claim because we conclude that the airport defendants had no right under state property law to clear-cut the land belonging to the land trust defendants and because the airport defendants have conceded that, in the absence of a property right, federal law would not confer such a right.

The airport defendants claim that they removed the vegetation from the land trust defendants' properties ***116** pursuant to federal regulations and guidelines governing the maintenance of unobstructed "runway protection zones" FN14 and approach surfaces FN15 for airports like the one in the present case. They further argue that the regulations and guidelines are designed to protect navigable airspace, FN16 over which ****948** the United States has ***117** exclusive authority, and that, therefore, they preempt state laws that would give state or local authorities the power to prevent the removal of obstructions to air traffic in such areas. FN17 The airport defendants appear to argue in their brief that, because the federal government has exclusive jurisdiction over navigable airspace, they could remove obstructions within the navigable airspace without regard to either state property law or state and local land use regulations. At oral argument before this court, however, they clarified that they claim only that they had a right to remove obstructions within the navigable airspace over the land trust defendants' properties because they had acquired a prescriptive right to enter the properties for that purpose under state property law. They conceded that, in the absence of that prescriptive property right, federal law would not confer any such right. See *Westchester v. Greenwich,* 745 F.Supp. 951, 955 (S.D.N.Y.1990) ***118** federal law does not create private cause of action in favor of owner of airport to institute action against neighboring landowner whose trees are encroaching on navigable airspace); see also *Westchester v. Greenwich,* 756 F.Supp. 154, 156 (S.D.N.Y.1991) (owner of airport did not have power of eminent domain or express clearance easement and therefore could interfere with neighboring landowner's ability to grow trees only if it could establish easement by prescription or public nuisance). FN18 They claim that they have acquired a prescriptive clearance easement in the land trust defendants' properties under state property law and that federal law preempts any state and local laws that otherwise might limit their easement rights. FN19 The land trust defendants counter that the trial court improperly determined that the airport defendants had a prescriptive easement because: (1) the airport defendants failed to meet their burden of establishing the scope of the easement; and (2) the existence of a boundary ****949** line agreement between the predecessors in title to the airport and the land trust prevents the airport from obtaining a prescriptive easement pursuant to General Statutes § 47–38. FN20 They further***119** argue that, even if the airport defendants had a prescriptive easement, state and local land use law applies to the use of the easement.

FN14. The Federal Aviation Administration has issued an advisory circular setting forth federal standards and recommendations for airport design. See Federal Aviation Administration, Advisory Circular No. 150/5300–113 (September 29, 1989). The advisory circular states that "[t]he standards and recommendations contained in this advisory circular are recommended by the Federal Aviation Administration for use in the design of civil airports." The circular recommends that airports maintain a "[r]unway protection zone"; id., § 211(a)(7); from which "incompatible objects and activities" should be cleared. Id., §

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212(a)(1). The purpose of the runway protection zone "is to enhance the protection of people and property on the ground." Id., § 212. For runways like the one in the present case, the circular recommends that the runway protection zone extend 1000 feet beyond the end of the runway and increase in width from 250 feet at the end nearest the runway to 450 feet at the far end. Id., p. 19, table 2–4.

FN15. The Federal Aviation Administration has issued regulations establishing "standards for determining obstructions to air navigation" that "apply to the use of navigable airspace by aircraft ...." 14 C.F.R. § 77.21(a). Such obstructions include "existing and proposed manmade objects, objects of natural growth, and terrain." Id. Title 14 of the Code of Federal Regulations, § 77.23, provides that "(a) [a]n existing object ... is, and a future object would be, an obstruction to air navigation if it is of greater height than any of the following heights or surfaces ... (5) The surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.25 ...." Section 77.25(d) of title 14 of the Code of Federal Regulations defines the "[a]pproach surface" for the type of airport at issue in the present case as a surface that starts 200 feet from the end of the runway; 14 C.F.R. § 77.25(c) (primary surface ends 200 feet beyond end of runway); and expands uniformly from a width of 250 feet; 14 C.F.R. § 77.25(c)(1); to a width of 1250 feet at a horizontal distance of 5000 feet from the beginning of the approach surface. 14 C.F.R. § 77.25(d)(1)(i); 14 C.F.R. § 77.25(d)(2)(i). The approach surface also rises at a slope of twenty to one for a horizontal distance of 5000 feet. 14 C.F.R. § 77.25(d)(2)(i). In the present case, an approach surface with a twenty to one slope would have an elevation of approximately 21.5 feet at the point where the airport property abuts the land trust's property and approximately thirty-eight feet at the point where the land trust's property abuts the conservancy's property.

FN16. Section 40102(a)(30) of title 49 of the United States Code defines " 'navigable airspace' " as "airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft...."

Title 14 of the Code of Federal Regulations, § 91.119, provides in relevant part: "Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

"(a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

"(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

"(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure...."

FN17. The airport defendants point to two

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federal statutes that they claim preempt state and local environmental legislation as applied to their conduct in this case. Section 40103(a)(1) of title 49 of the United States Code provides: "The United States Government has exclusive sovereignty of airspace of the United States." Section 41713(b)(1) of title 49 of the United States Code provides in relevant part: "[A] State ... [or] political subdivision of a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."

FN18. The *Westchester* case had a long subsequent history and, as we discuss later in this opinion, eventually came before this court. See *Westchester v. Greenwich,* 227 Conn. 495, 629 A.2d 1084 (1993). The District Court's conclusions that there is no private cause of action under federal law in favor of an airport owner against neighboring landowners whose trees are encroaching on navigable airspace and that an airport may interfere with a neighboring landowner's ability to grow trees only if it has acquired a property right to do so, however, have never been disturbed.

FN19. Neither the trial court nor the parties characterized the easement at issue in the present case as a clearance easement. The trial court concluded, however, that the airport defendants had "acquired a prescriptive easement to go onto the 2.5 acre area, on occasion, and trim or cut trees which interfered with the safety of air traffic taking off or landing on the runway." As we discuss later in this opinion, this is essentially the definition of a clearance easement.

FN20. General Statutes § 47–38 provides:

"The owner of land over which a right-of-way or other easement is claimed or used may give notice in writing, to the person claiming or using the privilege, of his intention to dispute the right-of-way or other easement and to prevent the other party from acquiring the right; and the notice, being served and recorded as provided in sections 47–39 and 47–40, shall be deemed an interruption of the use and shall prevent the acquiring of a right thereto by the continuance of the use for any length of time thereafter."

[1][2] We conclude that the trial court properly determined that the airport defendants have acquired a prescriptive easement to enter the land trust defendants' property for the purpose of maintaining an approach slope to the runway. We also conclude that the trial court properly determined that the airport defendants had no right under the prescriptive easement to clear-cut the land trust defendants' property.

We first address the issue of whether the airport defendants have a prescriptive clearance easement in the land trust defendants' properties and, if so, the scope and purpose of the easement. We conclude that the trial court properly determined that the airport defendants have a prescriptive easement to maintain an approach slope over the land trust defendants' property.

[3][4][5] The distinction between an avigation easement and a clearance easement was discussed in *United States v. Brondum,* 272 F.2d 642 (5th Cir.1959). An avigation easement "permits free flights over the land in question. It provides not just for flights in the air as a public highway—in that sense no easement would be necessary; it provides for flights that may be so low and so frequent as to amount to a taking of the property." (Internal quotation marks omitted.) Id., at 645; see also *Griggs v. Allegheny County,* 369 U.S. 84, 88–89, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962) (definition of navigable airspace in 49 U.S.C. § 40102[a][30],

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formerly 49 U.S.C. § 1301 [24], includes airspace required for airplanes to ***120** land and takeoff safely, but interference with use and enjoyment of neighboring land due to low flights amounts to constitutional taking and entitles landowners to compensation). By contrast, a clearance easement provides the "right to cut trees and natural growth to a prescribed height and to remove man-made obstructions above a prescribed height." *United States v. Brondum,* supra, at 644. "The interest acquired has but one function ... and that is to serve as the ceiling over the land in question beyond which obstructions or structures may not be allowed to extend upward into the adjacent air space." (Internal quotation marks omitted.) Id., at 644–45 n. 5; see also *Melillo v. New Haven,* 249 Conn. 138, 143 n. 11, 732 A.2d 133 (1999).

The status of both prescriptive avigation easements and prescriptive clearance easements is unsettled under Connecticut law. See *Westchester v. Commissioner of Transportation,* 9 F.3d 242, 245 (2d Cir.1993), cert. denied, 511 U.S. 1107, 114 S.Ct. 2102, 128 L.Ed.2d 664 (1994). In *Westchester v. Greenwich,* 227 Conn. 495, 498–500, 629 A.2d 1084 (1993), the plaintiff, a New York municipal corporation that owned and operated the Westchester County Airport, had initiated an action in ****950** the United States District Court for the Southern District of New York against the defendants, the town of Greenwich and several residents of the town, claiming a prescriptive avigation easement in the airspace over the defendants' properties and seeking an injunction against the defendants authorizing the plaintiff to trim or cut down trees on the properties that had penetrated the airport's flight zone. The United States Court of Appeals for the Second Circuit certified the following questions to this court: "1. Can an avigation easement be acquired by prescription in the State of Connecticut?

"2. If under Connecticut law a clearance easement is distinct from an avigation easement, can a clearance ***121** easement be acquired by prescription in the State of Connecticut?

"3. Whether conceived as incident to an avigation easement or as constituting a separate clearance easement, would a clear zone include whatever air space is necessary to use the easement?" (Internal quotation marks omitted.) Id., at 497 n. 2, 629 A.2d 1084. Because we concluded that, under the facts and circumstances of the case, the plaintiff could not establish a prescriptive avigation easement, we declined to answer the certified questions. Id., at 502, 504, 629 A.2d 1084.

[6][7][8] In making that determination, we recognized that, in order to establish a prescriptive avigation or clearance easement, the party claiming the easement must meet the requirements of state law that "the use be adverse. It must be such as to give a right of action in favor of the party against whom it has been exercised.... In order to prove such adverse use, the party claiming to have acquired an easement by prescription must demonstrate that the use of the property has been open, visible, continuous and uninterrupted for fifteen years and made under a claim of right." (Citation omitted; internal quotation marks omitted.) Id., at 501, 629 A.2d 1084. "A use by express or implied permission or license cannot ripen into an easement by prescription." (Internal quotation marks omitted.) Id. We concluded that the plaintiff could not establish that its use of the airspace gave a right of action in favor of the defendants, thereby giving rise to a prescriptive easement, because: (1) "[t]he defendants ... had no right of action against the plaintiff to stop the overflights because federal law prohibits landowners from obtaining injunctive relief against aircraft using the navigable airspace of the United States"; id., at 502, 629 A.2d 1084; and (2) although the defendants had a right "to seek compensation from the plaintiff for aircraft flights so low and so frequent as to be a direct and immediate interference with the enjoyment ***122** and use of the land"; (internal quotation marks omitted) id., at 503, 629 A.2d 1084; there was no

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evidence of such interference in the case. Id., at 504, 629 A.2d 1084.

In the present case, unlike in *Westchester v. Greenwich,* supra, 227 Conn. 495, 629 A.2d 1084, it is clear that the conduct that the airport defendants claim gave rise to a prescriptive clearance easement constituted a "direct and immediate interference with the [land trust defendants'] enjoyment and use of the land" entitling them to seek compensation; (internal quotation marks omitted) id., at 503, 629 A.2d 1084; and, therefore, the use was adverse. Cf. id., at 504, 629 A.2d 1084 (plaintiff could not establish that it had prescriptive easement because it failed to establish that overflights had harmed defendants' trees); see also *Drennen v. Ventura,* 38 Cal.App.3d 84, 86–87 n. 2, 112 Cal.Rptr. 907 (1974) (that which may be acquired by exercise of power of eminent domain should be subject to acquisition by prescription). Accordingly, we conclude that ****951** the airport defendants' use of the land trust defendants' properties could give rise to a prescriptive clearance easement if the other requirements for a prescriptive easement are met.

There is no dispute in this case that the airport defendants' use of the land trust defendants' property was "open, visible, continuous and uninterrupted for fifteen years and made under a claim of right." (Internal quotation marks omitted.) *Westchester v. Greenwich,* supra, 227 Conn. at 501, 629 A.2d 1084. The land trust defendants claim, however, that the trial court improperly found that the airport defendants had a prescriptive easement because: (1) the airport defendants failed to meet their burden of establishing the scope of the easement; and (2) the existence of a boundary line agreement prevented the airport defendants from acquiring a prescriptive easement. We address each of those claims in turn.

***123** A

The following additional facts are relevant to the resolution of the land trust defendants' claim that the airport defendants failed to meet their burden of establishing the scope of the easement. Arthur D'Onofrio, a previous owner of the airport, testified at trial that, between 1979 and 1999, trees located within the 2.5 acres at issue in the present case were periodically trimmed or removed. The cuttings took place approximately every four or five years. The trees usually were trimmed or removed in response to complaints from pilots that the trees were protruding into the airspace and becoming a safety hazard. D'Onofrio testified that the procedure for trimming the trees was not "very scientific. Basically, [he] sent people in there with chainsaws and they cut down whatever ... trees they thought were in the way of the approach." Shrubs were also removed in order to provide access to the trees. The cutting area was approximately 100 to 150 feet wide and was centered on the center line of the runway. Landing area inspection reports showed that, in 1981, the runway operated with a fourteen to one approach slope; [FN21] in 1983, it operated with a thirteen to one approach slope; in 1984 and 1985, it operated with a nineteen to one approach slope with a displaced threshold of 340 feet; [FN22] in 1986, it operated with a twenty to one slope with a displaced threshold of 340 feet; in 1987 and 1988, it operated with a twenty to one slope with a displaced threshold of 150 feet; in 1993, it operated ***124** with a fourteen to one approach slope; and in 1997, it operated with a thirteen to one approach slope.

FN21. In other words, for every fourteen feet that the approach slope advanced horizontally, it rose one vertical foot.

FN22. When an approach slope is steeper than the twenty to one ratio required by Federal Aviation Administration regulations; see footnote 15 of this opinion; the permissible landing point is shifted from the end of the runway to a point where the twenty to one approach slope is achieved. This point is known as a "displaced threshold." In such cases, the approach slope is calculated with reference

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to the displaced threshold.

On the basis of this evidence, the trial court determined that the airport defendants had acquired a prescriptive easement to enter the land trust defendants' property to trim and cut trees growing in the 2.5 acres at issue for the purpose of removing obstacles in the runway takeoff and landing corridors. After the trial court issued its memorandum of decision, the land trust defendants filed a motion for articulation requesting that the trial court provide the precise boundaries of the easement. The trial court denied the motion, ****952** stating that "[t]he memorandum of decision specified the extent of the prescriptive easement as particularly as possible under the circumstances of this case."

The land trust defendants claim that the trial court improperly found that the airport defendants had established a prescriptive easement because the easement "must be defined in terms of height, in addition to the more traditional length and width of a pathway" and because the evidence showed that "there has been no uninterrupted fifteen year period in which the airport maintained anything resembling a consistent glide path." We disagree.

[9][10][11] "[A] prescriptive right extends only to the portion of the servient estate actually used ... and is circumscribed by the manner of its use .... A prescriptive right cannot be acquired unless the use defines its bounds with reasonable certainty." (Citations omitted.) *Kaiko v. Dolinger,* 184 Conn. 509, 510–11, 440 A.2d 198 (1981); see also *Schulz v. Syvertsen,* 219 Conn. 81, 92, 591 A.2d 804 (1991). The boundaries of a prescriptive easement need not be described by metes and bounds if the character of the land makes such precise description impossible. ***125***McCullough v. Waterfront Park Assn., Inc.,* 32 Conn.App. 746, 759, 630 A.2d 1372, cert. denied, 227 Conn. 933, 632 A.2d 707 (1993). FN23

FN23. See also *O'Brien v. Hamilton,* 15 Mass.App. 960, 962, 446 N.E.2d 730 (extent of easement gained by prescription for successive owners of dominant land must be measured by general pattern formed by adverse use), appeal denied, 389 Mass. 1102, 448 N.E.2d 767 (1983); *Alvin v. Johnson,* 245 Minn. 322, 323 n. 2, 71 N.W.2d 667 (1955) (court's description of prescriptive easement as " 'width for reasonable use' " was not "so devoid of description as to be totally unenforceable"); *Silverstein v. Byers,* 114 N.M. 745, 749, 845 P.2d 839 (1992) (one-quarter mile deviation in route of roadway did not defeat claim to prescriptive easement, especially when divergence was not voluntary act of person claiming right but was due to circumstances beyond his control), cert. denied, 115 N.M. 60, 846 P.2d 1069 (1993); *Concerned Citizens v. Holden Beach Enterprises, Inc.,* 329 N.C. 37, 47, 404 S.E.2d 677 (1991) (deviations in line of travel do not necessarily preclude finding of substantial identity of prescriptive easement if character of land prevents confinement of path to definite and specific line); *Community Feed Store, Inc. v. Northeastern Culvert Corp.,* 151 Vt. 152, 157, 559 A.2d 1068 (1989) ("the use under which a prescriptive easement arises determines the *general outlines* rather than the minute details of the interest" [emphasis in original; internal quotation marks omitted]), quoting 5 Restatement, Property § 477, comment b, (1944).

[12][13] The burden is on the party claiming a prescriptive easement to prove all of the elements by a preponderance of the evidence. *Schulz v. Syvertsen,* supra, 219 Conn. at 91, 591 A.2d 804. "Whether the requirements for such a right have been met in a particular case presents a question of fact for the trier of facts.... In such cases, the trier's determination of fact will be disturbed only in the clearest of circumstances, where its conclusion

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could not reasonably be reached." (Citations omitted; internal quotation marks omitted.) *Robert S. Weiss & Co. v. Mullins,* 196 Conn. 614, 618–19, 495 A.2d 1006 (1985).

The only issue in the present case is whether the vertical dimensions of the prescriptive easement claimed by the airport defendants were sufficiently defined. During the years that the approach slope was measured without a displaced threshold, it ranged from thirteen to one to fourteen to one. During the years ***126** that the approach slope was measured with reference to a displaced threshold of 340 feet, it ranged from nineteen to one to twenty to one. Our calculations show that these slopes are relatively consistent with the ****953** thirteen to one and fourteen to one approach slopes measured with reference to the end of the runway.[FN24]

FN24. If a 340 foot displaced threshold is used and a uniform slope of vegetation and the absence of obstacles south of the conservancy's property are assumed, a 14 to 1 approach slope becomes approximately an 18 to 1 approach slope (the distance from the end of the runway to Chapman Pond, 1100 feet, divided by 14 is 78.57 feet, the presumptive height of the approach slope at Chapman Pond; the distance from the displaced threshold to Chapman Pond, 1440 feet, divided by 78.57 is approximately 18); using the same form of calculation, a 13 to 1 approach slope becomes approximately a 17 to 1 approach slope; and a 20 to 1 approach slope with a 150 foot displaced threshold becomes approximately a 23 to 1 approach slope. Thus, over the course of 18 years, the approach slope ranged from approximately 17 to 1 with a 340 foot displaced threshold to 23 to 1 with a 340 foot displaced threshold. We recognize that this calculation is somewhat rough. It is reasonable to conclude, however, that, because the runway had an approach slope ranging from 14 to 1 to 13 to 1 both before and after the 10 years in which the approach slope was calculated in reference to a displaced threshold, the approach slope during those 10 years was not radically different.

[14] In light of the type of use at issue, we conclude that the variations in the angle of the approach slope maintained by the airport defendants did not prevent them from acquiring a prescriptive easement. First, trees grow. It is clear, therefore, that it would be virtually impossible to maintain an absolutely uniform slope over the course of time. Second, a very localized and relatively small change in the topography of the vegetation could cause a major change in the approach slope. For example, a sudden growth spurt in a single tree near the border between the land trust and airport properties could cause the approach slope to become much steeper in a short period of time. Third, although the angle of the approach slope changed from year to year, it appears to have stayed within a relatively narrow range centering around twenty to one with a 340 foot displaced threshold. See footnote 24 of this opinion. ***127** Finally, although D'Onofrio testified that he would both trim and cut down trees that protruded into the airspace, the *purpose* of the easement was to *maintain a maximum tree height* over the land, not to eliminate the trees altogether, and that was the actual result of the airport defendants' use of the property. See *United States v. Brondum,* supra, 272 F.2d at 644–45 n. 5. Accordingly, we conclude that the cutting of a tree when the trimming of the tree would have been sufficient to maintain the ceiling was a deviation from the easement and neither destroyed it nor created a prescriptive right to cut trees to the ground when trimming them would suffice. See footnote 23 of this opinion; cf. *Kuras v. Kope,* 205 Conn. 332, 341, 533 A.2d 1202 (1987) ("[t]he use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit" [internal

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quotation marks omitted]). In summary, we conclude that the trial court's determination that the dimensions of the easement were defined with sufficient certainty to be enforceable was not clearly erroneous, given the nature of the claimed prescriptive easement.

B

[15][16] We next address the land trust defendants' claims that the trial court improperly determined that the airport defendants had acquired a prescriptive easement in their properties because the existence of a boundary line agreement between the predecessors in title to the airport and the land trust prevented the airport from obtaining a prescriptive **954 easement pursuant to § 47–38. FN25 We disagree.

FN25. The land trust defendants also point to a letter dated June 7, 1978, from the airport operator at the time to the Connecticut bureau of aeronautics. The operator stated that he was in the process of obtaining permission to remove or trim trees on the land to the south of the airport property in order to reduce the approach slope. The land trust defendants argue that this letter defeats any claim that the airport defendants trimmed and removed trees from their property under a claim of right, but they point to no evidence that the airport or its predecessors actually obtained permission to enter the land. Accordingly, we reject this claim.

***128** The following additional facts are relevant to our resolution of this claim. On December 3, 1970, Edward Vynalek and Dorothy Vynalek (collectively, the Vynaleks), predecessor landowners to the land trust, and William H. Bradway and Ruth E. Bradway (collectively, the Bradways), predecessor landowners to the airport, entered into a boundary line agreement. The purpose of the agreement was to resolve a dispute over the location of the boundary between their properties by making the boundary the center of the tidal creek. The agreement provided that "the said BRADWAYS do hereby remise, release, and forever QUIT–CLAIM unto the said VYNALEKS, their heirs and assigns forever, all the right, title, interest, claim and demand whatsoever as the said BRADWAYS have or ought to have in or to the lands situated generally south of said division line between the lands of the parties herein TO HAVE AND TO HOLD the said premises unto the said VYNALEKS, their heirs and assigns forever, so that the said BRADWAYS, their heirs nor any other person shall hereafter have any claim, right or title in or to the said premises, or any part thereof and they are by these presents forever barred and excluded therefrom." The trial court concluded that the agreement did not prevent the airport defendants from acquiring a prescriptive easement in the land trust's property because, although "entering the [land trust defendants'] land may contravene the rights to exclusive possession conveyed by the boundary agreement, every prescriptive easement is similarly acquired."

The land trust defendants argue that the trial court improperly failed to recognize that the agreement constituted notice, under § 47–38, of the land trust's intention to prevent the airport defendants from acquiring a prescriptive easement. In support of this argument, ***129** they rely primarily on this court's decision in *Crandall v. Gould,* 244 Conn. 583, 711 A.2d 682 (1998). In that case, "[t]he plaintiffs ... [owned] property located at 283 River Road in the town of Stonington. The defendants ... [owned] property, including a [private way], that [abutted] the property owned by the plaintiffs.

"A fence was constructed along the [private way] in 1960. In 1960 ... the defendants' [predecessor] in title, obtained a permanent injunction ... against ... a plaintiff in [the] action, enjoining him, his servants and agents from interfering with [the predecessor's] use and enjoyment of said right-of-way ...." (Internal quotation marks omitted.) Id., at 585–86, 711 A.2d

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682.

"In 1964, the plaintiffs removed a section of the fence. The plaintiffs used the front portion of the [private way] to the opening of the fence as a means of gaining vehicular access to their property from River Road." (Internal quotation marks omitted.) Id., at 586, 711 A.2d 682. Thereafter, the plaintiffs commenced an action seeking to enjoin the defendants from interfering with their use of the private way. Id. The trial court concluded **955 that, because the plaintiffs had been permanently enjoined from using the private way, they did not have a claim of right to use it and, therefore, could not establish an easement by prescription. Id., at 585–86, 711 A.2d 682.

On appeal, this court agreed with the trial court that the plaintiffs had violated the permanent injunction issued by the trial court in 1960 by using the private way. Id., at 589, 711 A.2d 682. We further concluded that, although the plaintiffs' use of the private way was not permissive and was made without any recognition of the defendants' rights to prevent it and, therefore, ordinarily would have established that the plaintiffs had acted under a claim of right, the existence of the permanent injunction precluded the plaintiffs from acquiring a prescriptive easement. Id., at 591–93, 711 A.2d 682. In support of this conclusion,*130 we stated that, under § 47–38, when formal notice of intent to prevent another party from acquiring an easement has been provided, no such easement may be acquired. Id., at 593–94, 711 A.2d 682. We further stated that "a party that obtains a permanent injunction [against a particular use] necessarily will have served notice on the opposing party that will very nearly conform to the requirements of § 47–38 and, in fact, may be superior to that contemplated by § 47–38 ...." Id., at 594, 711 A.2d 682.

We conclude that the present case is distinguishable from *Crandall.* In *Crandall,* the injunction issued by the trial court in 1960 had been sought and was issued for the express purpose of prohibiting the plaintiffs from using the private way as an easement. In the present case, the purpose of the boundary line agreement was to resolve a property line dispute. The language of the agreement providing that neither the "BRADWAYS, their heirs nor any other person shall hereafter have any claim, right or title in or to the [Vynaleks'] premises, or any part thereof and they are by these presents forever barred and excluded therefrom" was intended merely to recognize that the Bradways had agreed to disavow any property interest in any formerly disputed land on the Vynaleks' side of the newly agreed upon property line and that their successors would have no such interest by virtue of anything that had occurred up to the date of the agreement. Nothing in the agreement suggests that the Vynaleks were aware of any past use or anticipated any future use, for any purpose, of the portion of their land that had not been in dispute or that they intended to forestall the acquisition of a prescriptive easement in the land. We conclude, therefore, that the trial court properly determined that the boundary line agreement did not constitute notice of intent to prevent the airport defendants from acquiring an easement under § 47–38 and, therefore, did not prevent *131 the airport defendants from acquiring a prescriptive easement in the land trust defendants' properties.

We next turn our attention to the trial court's determination that the airport defendants exceeded the scope of the prescriptive easement by clear-cutting the land trust defendants' properties. We note that the airport defendants do not challenge that determination on appeal.[FN26] **956 Rather, their position appears to be that once they have established *any* property right in the land trust defendants' lands, no matter how limited, federal law preempts *all* of the landowners' residual property rights and *all* state and local land use laws limiting *132 those rights. As we have indicated, however, the airport defendants conceded at oral argument before this court that, in the absence of any state law property right to enter the land trust defendants' properties for the purpose of trimming

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and cutting trees, federal law would confer no such right. We cannot perceive why, if federal law would confer *no* right to enter the land trust defendants' properties in the absence of a property right to do so, federal law would trump *all* residual private property rights of the landowner and state as well as state and local land use laws where the airport defendants established only a *limited* property right. If the airport defendants had no cause of action against the land trust defendants to require them to clear-cut the land under federal law; see *Westchester v. Greenwich,* supra, 745 F.Supp. at 955; they had no right under federal law to conduct such an activity themselves. Accordingly, we conclude that, under the airport defendants' own reasoning, they had no right under federal law to clear-cut the trees in the absence of a right to do so under state property law.[FN27] In light of the trial court's unchallenged determination that the airport defendants had no such property right, we conclude that we need not address their claim that, if they had **957 such a right, *133 federal law would preempt the application of local land use law.[FN28] We conclude, therefore, that in the absence of any right under state property law to clear-cut the trees, state and local laws regulating activity within wetlands and watercourses applied to the airport defendants' conduct.

FN26. As we have indicated, the vertical dimensions of the easement varied within a relatively narrow range centered around a twenty to one slope with a 340 foot displaced threshold. As we have also indicated, when the airport defendants clear-cut the land, some of the trees within the easement were up to seventy-two feet high. It is clear, therefore, that it was not reasonably necessary to clear-cut the trees to maintain an approach slope within the specified ranges. See *Gioielli v. Mallard Cove Condominium Assn., Inc.,* 37 Conn.App. 822, 831–32, 658 A.2d 134 (1995) ("[W]hen an easement is established by prescription, the common and ordinary use which establishes the right also limits and qualifies it.... The use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit."); see also *Zhang v. Omnipoint Communications Enterprises, Inc.,* 272 Conn. 627, 637, 866 A.2d 588 (2005) ("[s]ubject to the proviso that the servitude beneficiary is not entitled to cause unreasonable damages to the servient estate, or interfere unreasonably with its enjoyment ... the beneficiary of an easement [may] make any use of the servient estate that is reasonably necessary for the convenient enjoyment of the servitude for its intended purpose"). Moreover, if the clear-cutting had occurred during the prescriptive period, it presumably would have provoked the same reaction from the land trust defendants as it did in the present circumstances. See *McCullough v. Waterfront Park Assn., Inc.,* supra, 32 Conn.App. at 756, 630 A.2d 1372 ("[a]n unreasonable increase in burden is such a one as it is reasonable to assume would have provoked the owner of the land being used to interrupt the use had the increase occurred during the prescriptive period"). Accordingly, even if the airport defendants had challenged the trial court's determination that the clear-cutting exceeded the scope of the prescriptive easement, we would conclude that that determination was not clearly erroneous.

FN27. It seems somewhat counterintuitive that federal aviation law might preempt state and local law governing the use of real property even though it does not preempt state property law. There is some precedent for that proposition, however. See *National Aviation v. Hayward,* 418 F.Supp. 417, 424–25 (N.D.Cal.1976)

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(exercise of municipal police power to regulate aircraft noise is preempted by federal law but right of municipal proprietor of airport to determine permissible noise level is not preempted). It is implicit in *National Aviation* that, although neighboring landowners could seek compensation if airport noise interfered with the use and enjoyment of their property, if a municipal airport proprietor obtained noise easements from the landowners, state and local governments could not regulate noise levels. See id., at 421. As we have indicated, however, we need not consider in the present case the extent to which the principles cited in *National Aviation* apply to privately owned airports and prescriptive clearance easements because the airport defendants have not established that they have a property right to clear-cut the land trust defendants' trees.

FN28. We note that the plaintiffs do not claim that the type of activities allowed by the prescriptive easement would violate state or local land use regulations. Accordingly, we need not consider whether federal law would preempt local regulations with respect to those activities. Nor need we consider the plaintiffs' alternate ground for affirmance that, in the absence of any factual foundation that the airport defendants had initiated proceedings with the Federal Aviation Administration to identify and eliminate obstructions on the land trust defendants' property, there was no factual predicate for the airport defendants' claim of preemption.

II

[17] We next address the airport defendants' claim that, even if we conclude that federal law did not preempt the application of state and local wetlands regulations to their conduct, the trial court improperly rendered judgment for the land trust defendants on their cross claim that cutting the trees constituted unreasonable pollution under § 22a–16 because the claim was predicated on the airport defendants' failure to obtain a permit pursuant to the Inland Wetlands and Watercourses Act (act), General Statutes § 22a–28 et seq., and, therefore, could not form the basis for a claim under § 22a–16 . We disagree.

The following additional procedural history is relevant to our resolution of this claim. In the sixth count of their cross claim against the airport defendants, the land trust defendants claimed that the clear-cutting of their land had "removed a natural buffer that existed between Chapman Pond and any [a]irport disturbances, threaten[ed] the integrity of Chapman Pond and the lower Connecticut River Watershed, and involve[d] conduct which has, or is reasonably likely to have, the effect ***134** of unreasonably polluting, impairing or destroying the public trust in Chapman Pond by increasing noise pollution and other destruction and impairment of wetlands, watercourses and other environmentally sensitive habitats in breach of the public trust. For example, the stream that these trees helped to shade and retain has a documented population of wild brook trout and the removal of the shade trees will adversely affect the stream water quality, temperature, and habitat. The trees also served to buffer Chapman Pond's breeding waterfowl and wintering bald eagle habitat from the airport." (Internal quotation marks omitted.)

The trial court found that the "clear-cutting was unreasonable under all of the circumstances. In the past, only trimming and selective cutting of trees was employed to remove such obstacles to air navigation, which the growing trees created. There existed no sound reason to abandon that conservative practice. To sever every tree and woody-stemmed bush, regardless of height and species, destroyed important floodplain forest

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excessively and unnecessarily." Accordingly, the court rendered judgment for the land trust defendants on the sixth count of their cross claim.

The airport defendants argue that the sixth count of the land trust defendants' cross claim was duplicative of the first count of the commissioner of environmental protection's complaint in the companion case of *Rocque v. Mellon,* 275 Conn. at 161, 167–69, 881 A.2d 972 (2005), in which the commissioner alleged that the airport defendants had violated § 22a–16 by failing****958** to obtain a permit as required by § 22a–42a (c)(1). See footnote 3 of this opinion. The trial court concluded in that case that the commissioner could not prevail on its claim because, under this court's decision in *Connecticut Coalition Against Millstone v. Rocque,* 267 Conn. 116, 138–48, 836 A.2d 414 (2003), "the failure to obtain a license or permit to engage in conduct which impinges ***135** on the environment cannot form the basis for a ... claim under § 22a–16 ." The airport defendants argue that, in the present case, the trial court should have dismissed the land trust defendants' claim under § 22a–16 for the same reason. We note that, in the companion case, we reversed the trial court's dismissal of the first count of the commissioner's complaint and remanded the case with direction to render judgment in favor of the commissioner on that count. *Rocque v. Mellon,* supra, at 169–70, 881 A.2d 972. For similar reasons, we conclude in the present case that the trial court properly rendered judgment for the land trust defendants on the sixth count of their complaint.

[18][19] Because the airport defendants' claim implicates the standing of the land trust defendants to raise a claim under § 22a–16, it necessarily implicates the trial court's subject matter jurisdiction over the claim. See *Connecticut Coalition Against Millstone v. Rocque,* supra, 267 Conn. at 127–28, 836 A.2d 414. "A determination regarding a trial court's subject matter jurisdiction is a question of law. When ... the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) Id.

In *Connecticut Coalition Against Millstone v. Rocque,* supra, 267 Conn. 116–18, 134, 836 A.2d 414, the plaintiffs, environmental activists, claimed that the Millstone Nuclear Power Generating Station should be enjoined from operating because it was functioning under an improperly issued permit. We determined that "[a]llegations of improper decisions by the commissioner for failure to comply with the statutory requirements regarding permit renewal proceedings and emergency authorizations cannot be construed as anything other than a licensing claim under [General Statutes] § 22a–430." Id., at 134, 836 A.2d 414. Relying on a long series of cases in which ***136** we had held that § 22a–16 does not confer standing to litigate decisions regarding permits that are within the exclusive jurisdiction of a state agency, we concluded that the trial court properly had dismissed the plaintiffs' claims. Id., at 129–38, 836 A.2d 414. In doing so, we distinguished other cases in which we had determined that the plaintiffs had standing under § 22a–16 because, although the lack of an appropriate permit had been alleged, the plaintiffs had raised independent "claims of unreasonable pollution [that] were directed primarily to the polluting activity itself, and not ... to the validity of an existing permit or authorization ...." Id., at 139–40, 836 A.2d 414, citing *Keeney v. Old Saybrook,* 237 Conn. 135, 140–41, 676 A.2d 795 (1996) (alleging unreasonable pollution of state waters from town's failure to comply with pollution abatement orders); *Commissioner of Environmental Protection v. Connecticut Building Wrecking Co.,* 227 Conn. 175, 190, 629 A.2d 1116 (1993) (alleging unreasonable pollution from failure to obtain permit for operation of solid waste facility that generated leachate, which degraded groundwater); *Keeney v. L & S Construction,* 226 Conn. 205, 209, 626 A.2d 1299 (1993) (alleging unreasonable pollution from depositing

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construction debris in close proximity to area water supply without permit).

**959 In the present case, unlike in *Connecticut Coalition Against Millstone v. Rocque,* supra, 267 Conn. at 139, 836 A.2d 414, the land trust defendants make no claim that the clear-cutting of their properties constituted unreasonable pollution because the airport defendants had failed to obtain a wetlands permit. Indeed, their cross claim makes no reference to the need for a permit at all.[FN29] *137 Instead, their claim was "directed primarily to the polluting activity itself ...." Accordingly, we conclude that the trial court properly rejected the airport defendants' claim that the land trust defendants lacked standing to raise this cross claim.

FN29. We conclude elsewhere in this opinion that the clear-cutting constituted a regulated activity for which a permit was required. See part III of this opinion. In *Waterbury v. Washington,* 260 Conn. 506, 557, 800 A.2d 1102 (2002), we held that "when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under [§ 22a–16], whether the conduct is unreasonable under [§ 22a–16] will depend on whether it complies with that scheme." We need not consider, however, whether the plaintiffs would have issued a wetlands permit for clear-cutting the land if an application for a permit had been submitted because we have concluded in part I of this opinion that the airport defendants had no rights in the property that would have entitled them to submit such an application. In the absence of any such right, the airport defendants' conduct necessarily would not have been permitted. Accordingly, we conclude that the trial court properly determined that "[t]o sever every tree and woody-stemmed bush, regardless of height and species, destroyed important floodplain forest excessively and unnecessarily," and was, therefore, unreasonable.

III

[20] We next address the airport defendants' claim that the trial court improperly rendered judgment for the plaintiffs on their claim that the airport defendants violated the act by failing to obtain a permit to clear-cut the land trust defendants' properties. They argue that the removal of vegetation from the properties was not a regulated activity under the act because it did not disturb any wetlands soils. We disagree.

The trial court found that "[t]he floodplain forest which was clear-cut comprised diverse species of hardwood trees and woody shrubs.... [A]round 340 trees and tree sprouts were severed on land trust property and a few more on conservancy land. These trees acted as a flood brake, slowing the velocity of the occasional floodwaters of the Connecticut River which regularly spill into the floodplains and eventually into Chapman's Pond. The slower the flow of floodwater, the less erosion, scouring, and damage to the submerged land and water bodies is done. The taller and denser the floodplain forest, the greater the buffering capacity to slow floodwaters. Undoubtedly, the felling of all trees and *138 woody vegetation over 2.5 acres in the midst of a floodplain corridor between the Connecticut River and Chapman's Pond altered that wetlands and the abutting floodplains and wetlands." Accordingly, the trial court concluded that the airport defendants had violated § 22a–42a (c)(1) of the act and were liable for damages of $17,500 under § 22a–44 (b).

[21] We first address the standard of review. "Whether the trial court properly concluded that the commission had jurisdiction over the activities proposed by the plaintiff involves a legal question involving statutory interpretation, over which our review is plenary." *AvalonBay Communities, Inc. v. Inland Wetlands Commission,* 266 Conn. 150, 158,

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832 A.2d 1 (2003).

We begin with the language of the statute. General Statutes § 22a–38 (13) **960 defines " '[r]egulated activity' " as "any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses ...." Thus, the definition expressly includes operations "involving removal or deposition of material" in wetlands areas. In the present case, the airport defendants removed the living vegetation canopy growing over the wetlands and deposited the woody remains on the ground.[FN30] If the removal of all vegetation growing in a wetlands area was not intended to be a regulated activity, we would be hard pressed to imagine what type of material the legislature had in mind in enacting § 22a–38 (13). *139 Accordingly, we conclude that the clear-cutting was a regulated activity.

FN30. Brian Golembiewski, an environmental analyst with the inland water resources division of the bureau of water management and the department of environmental protection, appeared at trial as the plaintiffs' expert witness. He testified that, "[u]nfortunately, all of this woody material has been left in place, so even ... where you would have sunlight and you'd have ... herbaceous or soft-stemmed short plants that would now have sunlight that they didn't have prior ... [that] could grow and establish, that would even be somewhat limited by this blanket of woody materials left out there."

The airport defendants argue, however, that our opinion in *AvalonBay Communities, Inc. v. Inland Wetlands Commission,* supra, 266 Conn. 150, 832 A.2d 1, supports their claim that the clear-cutting of the land trust defendants' land was not a regulated activity. In that case, the plaintiff appealed to the trial court after the defendant inland wetlands commission had denied its application for an inland wetlands permit. Id., at 152, 832 A.2d 1. The trial court dismissed the appeal and the plaintiff appealed to this court, claiming that the denial was improper because its proposed construction activities would not take place within any wetlands, watercourses or wetlands buffer area. Id. The defendant argued that the act was intended not only to protect the wetlands from physical damage or intrusion, but to protect wildlife and biodiversity both within and outside the borders of the wetlands. Id., at 156–57, 832 A.2d 1. We noted that § 22a–38 (15) defined wetlands as " *land,* including submerged land ... which consists of any of the *soil types* designated as poorly drained, very poorly drained, alluvial, and floodplain ...." (Emphasis in original; internal quotation marks omitted.) Id., at 162, 832 A.2d 1. We determined that, although an "inland wetlands commission may regulate activities taking place outside the wetlands boundaries and upland review [buffer] areas if such activities are likely to have an impact or effect on the wetlands themselves"; id., at 161, 832 A.2d 1; "the act protects [only] the physical characteristics of wetlands and watercourses and not the wildlife, including wetland obligate species, or biodiversity." Id., at 163, 832 A.2d 1. Accordingly, we concluded that the plaintiff's proposed construction activities did not require the issuance of a regulated activity permit.[FN31] Id., at 171, 832 A.2d 1.

FN31. The legislature responded to our ruling in *AvalonBay Communities, Inc.,* by enacting No. 04–209 of the 2004 Public Acts, now codified at General Statutes § 22a–41 (c), which provides: "For purposes of this section, (1) 'wetlands or watercourses' includes aquatic, plant or animal life and habitats in wetlands or watercourses, and (2) 'habitats' means areas or environments in which an organism or biological population normally lives or occurs." The plaintiffs argue that this amendment is retroactive because it was intended to clarify that

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clear-cutting of vegetation within a wetlands is a regulated activity. We need not reach this claim because we conclude that the airport defendants conduct was a regulated activity under the version of the statute in place at the time that the activity took place.

****961 *140** We conclude that the airport defendants read *AvalonBay Communities, Inc.*, too broadly when they argue that activities that affect the vegetation growing *within* a wetlands but that do not disturb the soil cannot be regulated. Nothing in that case suggests that the act's definition of the term wetlands was intended to exclude vegetation growing within the wetlands, and we perceive no reason to conclude in the present case that the legislature had any such intention. In ordinary usage, the word "land" includes things growing on the land. See Black's Law Dictionary (4th Ed. Rev. 1968) (" '[l]and' includes not only the soil or earth, but also things of a permanent nature affixed thereto or found therein, [including] water, trees, grass, herbage, other natural or perennial products, growing crops or trees [and] mineral under the surface"). In any event, the trial court expressly concluded that the airport defendants' activities would result in damage to the soils themselves as a result of increased "erosion [and] scouring ... [of] the submerged land and water bodies ...." That factual finding was supported by the court's finding that the land was in a floodplain and that a taller and denser vegetation cover would prevent such damage by slowing floodwaters.[FN32] Accordingly, we reject this claim and affirm the trial court's determination that the clear-cutting was a regulated activity.

FN32. That finding was, in turn, supported by the trial testimony of Brian Golembiewski, the plaintiffs' expert witness.

IV

[22] We next address the airport defendants' claim that the trial court improperly determined that Mellon was ***141** personally liable for clear-cutting the trees on the land trust defendants' property. We disagree.

The following additional procedural history is relevant to our resolution of this claim. At trial, Evans testified that Mellon instructed him to cut "everything" within the 2.5 acres. Mellon testified that he directed Evans to cut all of the trees within the approach slope. Mellon did not specifically recall instructing Evans to cut shrubs, but stated that he took "responsibility for whatever [Evans] cut," and that everything that Evans did was under Mellon's authority.

During trial, the airport defendants filed a motion to dismiss the claims against Mellon personally on the ground that the plaintiffs and the land trust defendants had not established a prima facie case that he had acted in his individual capacity and not merely as a corporate officer of the airport. The trial court denied the motion. In its memorandum of decision, the court found that, "[b]etween November 29 and December 5, 2000, at the direction of Mellon, the owner of the airport, Evans, an independent contractor, clear-cut approximately 2.5 acres of floodplain forest located on land owned by the land trust and land owned by the conservancy." The court rendered judgment against the airport defendants on the plaintiffs' claims pursuant to § 22a–44 (a) and found the airport defendants jointly and severally liable for a civil penalty of $17,500 pursuant to § 22a–44 (b). The court also rendered judgment in favor of the land trust defendants on their claim pursuant to § 22a–16 and, pursuant to § 22a–16a, ordered the airport defendants to make a financial contribution of $50,000 to "an academic or government-funded research project related to environmental protection or conservation of natural resources, which recipient ****962** will be identified by the [department of environmental protection]."

[23][24] It is well established that "an officer of a corporation does not incur personal liability for its torts merely ***142** because of his official

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position. Where, however, an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby." *Scribner v. O'Brien, Inc.,* 169 Conn. 389, 404, 363 A.2d 160 (1975); see also *Kilduff v. Adams, Inc.,* 219 Conn. 314, 331–32, 593 A.2d 478 (1991) ("[i]t is black letter law that an officer of a corporation who commits a tort is personally liable to the victim regardless of whether the corporation itself is liable"). "Thus, a director or officer who commits the tort or who directs the tortious act done, or participates or operates therein, is liable to third persons injured thereby, even though liability may also attach to the corporation for the tort." 18B Am.Jur.2d 607, Corporations § 1629 (2004).

[25] Because the issue of whether a corporate officer has committed or participated in the wrongful conduct of a corporation is a question of fact, it is subject to the clearly erroneous standard of review. See *Sargent v. Smith,* 272 Conn. 722, 728, 865 A.2d 1129 (2005). "[A reviewing court] cannot retry the facts or pass upon the credibility of the witnesses.... 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.) Id., at 728–29, 865 A.2d 1129.

We conclude in the present case that the trial court's determination that Mellon personally directed Evans to clear-cut the trees is amply supported by the record. Accordingly, we conclude that the trial court properly determined that Mellon was personally liable for cutting the trees under §§ 22a–44 (b) and 22a–16a. See *Scribner v. O'Brien, Inc.,* supra, 169 Conn. at 404, 363 A.2d 160. It is immaterial ***143** whether Mellon was acting in his individual capacity or on behalf of the corporation. See id.

Mellon makes two arguments in support of his claim to the contrary. First, he argues that his conduct did not fall within the responsible corporate officer doctrine adopted by this court in *BEC Corp. v. Dept. of Environmental Protection,* 256 Conn. 602, 618, 775 A.2d 928 (2001). Second, he argues that the application of *Scribner v. O'Brien, Inc.,* supra, 169 Conn. 389, 363 A.2d 160, to limited liability companies has been superseded by General Statutes § 34–134.[FN33] We reject both arguments.

FN33. General Statutes § 34–134 provides: "A member or manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company, except where the object of the proceeding is to enforce a member's or manager's right against or liability to the limited liability company or as otherwise provided in an operating agreement."

In *BEC Corp. v. Dept. of Environmental Protection,* supra, 256 Conn. 602, 775 A.2d 928, this court considered whether officers of the plaintiff corporation could be held personally liable under the Connecticut Water Pollution Control Act, General Statutes § 22a–416 et seq., for pollution caused by the corporation. We concluded that because General Statutes § 22a–432 defined "person" under the act to include "any officer" of a corporation; (internal ****963** quotation marks omitted) id., at 617, 775 A.2d 928; and because the broad remedial purpose of the act is to "achieve clean water [despite] possible individual hardship"; (internal quotation marks omitted) id., at 622, 775 A.2d 928; a corporate officer could be held personally liable for the abatement of a violation of the act when: "(1) the officer is in a position of responsibility that allows that officer to influence corporate policies and activities; (2) there is a nexus between the officer's actions or inactions in that position and the violation of § 22a–432 such that the corporate officer influenced the corporate

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actions that constituted the violation; and (3) the corporate ***144** officer's actions or inactions resulted in the violation." Id., at 618, 775 A.2d 928. We emphasized, however, that we were "by no means establishing the responsibility of corporate officers in general with respect to corporate activity; we restrict the application of the responsible corporate officer doctrine solely to violations of the act." Id.

[26] In the present case, the airport defendants argue that, because § 22a–38 (2) FN34 does not define "person" to include corporate officers, and because we limited the application of the responsible corporate officer doctrine to § 22a–432 in *BEC Corp.,* Mellon cannot be held personally liable. We are not persuaded. Section 22a–432 is a strict liability statute; see *Cadlerock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection,* 253 Conn. 661, 670, 757 A.2d 1 (2000), cert. denied, 531 U.S. 1148, 121 S.Ct. 1089, 148 L.Ed.2d 963 (2001); and the responsible corporate officer doctrine that we adopted in *BEC Corp.* was based on a case imposing liability on corporate officers for strict liability public welfare offenses. See *BEC Corp. v. Dept. of Environmental Protection,* supra, 256 Conn. at 618, 775 A.2d 928, citing *Matter of Dougherty,* 482 N.W.2d 485, 490 (Minn.App.1992) . Moreover, the responsible corporate officer doctrine that we adopted in *BEC Corp.* did not require a finding that the officer had committed, directly participated in or directed the conduct that resulted in a violation before he could be held personally liable, but required only that the officer have a position of responsibility and influence from which he could have prevented the corporation from engaging in the conduct. We conclude, therefore, that the responsible corporate officer doctrine that we adopted in *BEC Corp.,* and any limitations on that doctrine, apply solely to a corporate officer's ***145** personal liability for strict liability public welfare offenses committed by the corporation. We did not intend to overrule or abrogate the black letter principle that a corporate officer may be held personally liable for *tortious* conduct in which the officer *directly* participated, regardless of whether the statutory basis for the claim expressly allows liability to be imposed on corporate officers.FN35

FN34. Genera Statutes § 22a–38 (2) defines " '[p]erson' " as "any person, firm, partnership, association, corporation, limited liability company, company, organization or legal entity of any kind, including municipal corporations, governmental agencies or subdivisions thereof ...."

FN35. The airport defendants make no claim that a violation of § 22a–16 or § 22a–42a does not constitute tortious conduct.

[27][28] We next address the airport defendants' claim with respect to § 34–134. That statute provides in relevant part: "A member or manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company****964** ...." General Statutes § 34–134. The airport defendants argue that this statute, which was enacted in 1993; see Public Acts 1993, No. 93–267, § 20; supersedes the principle that officers of corporations may be held personally liable for their conduct on behalf of a company in certain circumstances as that principle applies to limited liability companies. See *Scribner v. O'Brien, Inc.,* supra, 169 Conn. at 404, 363 A.2d 160. We disagree. "Although the legislature may eliminate a common law right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed." (Internal quotation marks omitted.) *Matthiessen v. Vanech,* 266 Conn. 822, 838–39, 836 A.2d 394 (2003). Section 34–134 evinces no legislative intent to eliminate the right to impose liability on a member or manager of a limited liability company who has engaged in or

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participated in the commission of tortious conduct. Rather, the statute merely codifies the well established principle that "an officer of a corporation does not incur personal liability for its torts *merely because of his official position.*" ***146** Emphasis added.) *Scribner v. O'Brien, Inc.,* supra, at 404, 363 A.2d 160. Accordingly, we reject the airport defendants' arguments that the principle that corporate officers are personally responsible for their own tortious conduct does not apply in this case.

V

[29] We next address the claim of the plaintiffs on cross appeal that the trial court improperly failed to exercise its jurisdiction to order the airport defendants to restore the land trust defendants' properties to their condition prior to the violation of § 22a–44 (a) or to impose a civil penalty sufficient to fund the restoration of the properties. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. Christopher Allan, a senior associate with Land Tech Consultants and an expert witness for the plaintiffs, testified that restoration of the properties would require planting new trees and shrubs and fencing each tree and shrub individually to protect them from deer. He estimated that the cost of the restoration would be $158,092. Sigrun Gadwa, the principal ecologist for REMA Ecological Services and an expert witness for the airport defendants, testified that Allan's plan could be implemented for a cost of at least 20 percent less.

The airport defendants began their clear-cutting operation on November 29, 2000. Thirty-five days later, on January 2, 2001, Ventres issued a cease and desist order prohibiting the airport defendants from engaging in any further regulated activity at the site.

General Statutes § 22a–44 (b) provides in relevant part that "[a]ny person who commits ... any violation of any provision of sections 22a–36 to 22a–45, inclusive, including regulations ... promulgated by municipalities or districts pursuant to the grant of authority herein ***147** contained, shall be assessed a civil penalty of not more than one thousand dollars for each offense. Each violation of said sections shall be a separate and distinct offense, and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense...." Pursuant to this statute, the trial court imposed a civil penalty of $500 per day for each of the thirty-five days between November 29, 2000, and January 2, 2001, for a total of $17,500. The court declined to order the airport defendants to perform any restorative work because "no party proposes a replication of the conditions which existed before the clear-cutting ****965** occurred," [FN36] because "the land upon which such action would occur is owned by others" and because the court addressed the issue of restoration in connection with the land trust defendants' claims pursuant to § 22a–16. As we have indicated, the trial court ordered the airport defendants to make a financial contribution of $50,000 pursuant to § 22a–16a, which provides that "under any provision of [title 22a] which provides for a civil or criminal penalty for a violation of such provision, the court, in lieu of any other penalties, damages or costs awarded, or in addition to a reduced penalty, damages or costs awarded, may order the defendant ... (3) to make a financial contribution to an academic or government-funded research project related to environmental protection or conservation of natural resources ...." The court stated that "[i]t is expected that the [department of environmental protection] will identify a recipient connected to the Chapman's Pond preserve, if possible."

FN36. The plaintiffs' experts did not propose returning the land to the condition that it was in before the clear-cutting because, as the trial court found, "invasive species, such as ailanthus trees, had already established themselves at this site for many years, and it is highly desirable

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ecologically to eradicate such invaders and replace them with native species."

The plaintiffs argue on appeal that trial court's decision to assess $17,500 in civil penalties and not to order ***148** the airport defendants to restore the properties was an abuse of discretion because "[t]here was simply no testimony from which the court could conclude that $17,500 was sufficient to restore" the land to the condition it was in before the clear-cutting, and because § 22a–44 (b) contemplates that penalties "shall be used ... (1) to restore the affected wetlands or watercourses to their condition prior to the violation, wherever possible ...." They further argue that, pursuant to General Statutes § 22a–20,[FN37] the $50,000 contribution ordered by the trial court pursuant to § 22a–16a (3) was supplemental to the civil penalty ordered pursuant to § 22a–44 (b), not in lieu of it, and, therefore, should not be considered in determining whether the penalty was sufficient. The airport defendants counter that the trial court reasonably found that the plaintiffs' proposed restoration plan was excessive because it did not contemplate restoring the land to its original condition, but to an improved condition. They further argue that the trial court intended the $50,000 contribution to be part of the penalty for violating § 22a–44.

FN37. General Statutes § 22a–20 provides in relevant part: " Sections 22a–14 to 22a–20, inclusive, shall be supplementary to existing administrative and regulatory procedures provided by law and in any action maintained under said sections, the court may remand the parties to such procedures...."

[30][31] "A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law.... A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion." (Internal quotation marks omitted.) *Pequonnock Yacht Club, Inc. v. Bridgeport,* 259 Conn. 592, 598, 790 A.2d 1178 (2002).

[32] This court has not previously had occasion to consider the scope of the trial court's discretion in ordering ***149** a civil penalty pursuant to § 22a–44 (b). Generally, in the absence of any specific guidance from the legislature,[FN38] a civil penalty provision****966** vests wide discretion in the court to determine a fair and proper penalty. See *Carothers v. Capozziello,* 215 Conn. 82, 103, 574 A.2d 1268 (1990).[FN39]

FN38. The plaintiffs argue that the trial court's discretion to impose civil penalties is limited by subdivision (1) of § 22a–44 (b), which provides that civil penalties imposed pursuant to that statute "shall be used solely ... to restore the affected wetlands or watercourses to their condition prior to the violation, wherever possible ...." We disagree. That language merely provides that any penalties that are assessed should be used to restore the wetlands. It does not require the court to impose a penalty that is sufficient to restore the wetlands.

FN39. We previously have held that, in assessing penalties under other civil penalty provisions of title 22a that provide no specific guidance to the court, the factors to be considered by the court "include, but are not limited to: (1) the size of the business involved; (2) the effect of the penalty or injunctive relief on its ability to continue operation; (3) the gravity of the violation; (4) the good faith efforts made by the business to comply with applicable statutory requirements; (5) any economic benefit gained by the violations; (6) deterrence of future violations; and (7) the fair and equitable treatment of the regulated community."

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Carothers v. Capozziello, supra, 215 Conn. at 103–104, 574 A.2d 1268 (listing factors to be considered in imposing civil penalty pursuant to General Statutes § 22a–226 pertaining to penalty for violation of solid waste management statutes); see also *Rocque v. Farricielli,* 269 Conn. 187, 210, 848 A.2d 1206 (2004) (factors listed in *Carothers* are to be considered in imposing civil penalties pursuant to General Statutes §§ 22a–226a [governing penalties for violation of selected solid waste management statutes] and 22a–438 [a] [governing penalties for violation of water pollution control statutes]). None of the parties argue that these factors should apply in the present case, however, and the trial court did not identify the factors that entered into its calculations.

As the airport defendants point out, the trial court determined that the restoration plan proposed by the plaintiffs' expert would not have restored the land to its prior condition, but would have improved the condition of the land. The plaintiffs have not disputed that finding. We conclude that the court was not required to create and impose on the airport defendants a plan of its own to restore the land to its condition prior to the violation. Nor was it required to issue a general ***150** order to the airport defendants that they restore the land to its prior condition, which almost certainly would have led to additional litigation. Accordingly, we conclude that the trial court did not abuse its discretion in declining to order the airport defendants to restore the land.

We also reject the plaintiffs' argument that the $50,000 contribution imposed pursuant to § 22a–16a (3) was supplemental to the $17,500 penalty imposed pursuant to § 22a–44 (b), not in lieu of it, and, therefore, should not be considered in determining whether the trial court abused its discretion. Section 22a–16a specifically provides that any financial contribution ordered pursuant to that statute is " *in lieu* of any other penalties, damages or costs awarded, or in addition to a *reduced* penalty, damages or costs awarded" under any other provision of title 22a that provides for a civil penalty. (Emphasis added.) Accordingly, we reasonably may conclude that, if the court had not ordered the financial contribution pursuant to § 22a–16a, the civil penalty pursuant to § 22a–44 (b) would have been greater. In addition, the court expressed its expectation that the entire $67,500 would be used to improve the condition of the land trust defendants' properties. The plaintiffs make no claim that the imposition of a civil penalty of $67,500 would have been an abuse of discretion. As we have indicated, the trial court reasonably could have concluded that the plaintiffs' expert's estimated cost of restoration was excessive because the plan would not have restored the land to its previous condition, but would have improved the condition. Accordingly, we ****967** conclude that the trial court did not abuse its discretion in imposing a civil penalty of $17,500 pursuant to § 22a–44 (b).

VI

[33] We next address the plaintiffs' claim on cross appeal that the trial court improperly suspended the calculation***151** of per diem civil penalties upon the commission's issuance of the cease and desist order. We disagree.

The following additional facts are relevant to our resolution of this issue. As we have indicated, on January 2, 2001. Ventres issued an order to the airport defendants ordering them to cease and desist from all regulated activity on the airport property and on the land trust defendants' properties. The order identified the prohibited regulated activity as "clear-cutting of a flood plain forest ... and disturbance of the flood plain soils around the tidal inlet at the end of the property ...." The order stated that "[s]atisfactory corrective measures are not to be done without a permit from the [c]ommission" and required the airport defendants to appear at a hearing on January 11, 2001, to show cause why the order should not remain in effect. Because

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several commission members had recused themselves from the matter, however—apparently because the airport defendants had alleged a conflict of interest—no quorum was available on the date of the hearing. At a June 11, 2001 commission meeting on a related matter, counsel for the airport defendants withdrew the conflict of interest claim as to two of the three commission members who had recused themselves.[FN40] The cease and desist hearing was never rescheduled, however, and the plaintiffs never issued any order to the airport defendants to correct the condition of the land trust defendants' land. See General Statutes § 22a–44 (a) (inland wetlands agency is authorized to issue order to correct condition created by violation of the act).

FN40. The airport defendants represent in their brief that the June 11, 2001 meeting concerned an application submitted by the airport to extend its runway. They argue that they did not intend to withdraw their motion to disqualify the commission members in proceedings on the pending cease and desist order. We need not decide whether the commission members were recused after June 11, 2001, however, because the issue is irrelevant to our analysis.

***152** As we have indicated, the trial court imposed a $500 per diem fine on the airport defendants for the thirty-five days between the day that they began cutting the trees on the land trust defendants' properties, November 29, 2000, and the day that the cease and desist order was issued, January 2, 2001. The court reasoned that, because the order was never lifted, it prevented "the airport defendants from implementing any corrective or remedial plan because such action would necessarily involve the removal and deposition of material at the site and would alter wetlands, albeit for environmentally beneficial purpose." The plaintiffs argue that the trial court improperly limited the per diem penalties to the thirty-five day period because the cease and desist order did not prevent the airport defendants from submitting a restoration plan to the commission. They further argue that, because they requested restoration of the land in their complaint, which listed a return date of May 8, 2001, and because the airport defendants made no effort to submit a restoration plan up to the date of the court's decision, May 21, 2004, the trial court should have imposed civil penalties for that entire period.

We conclude that the plaintiffs' argument is flawed in several respects. First, ****968** § 22a–44 (b) authorizes the imposition of civil penalties for violations of the act. In the present case, the violation consisted of clear-cutting the properties. The plaintiffs have provided no authority for the proposition that the statute authorizes the imposition of civil penalties for the failure to remediate such violations in the absence of any administrative or court order to do so. Moreover, whether the airport defendants were required to restore the properties and, if so, the nature and scope of any such work, were the very issues in dispute in the litigation initiated by the plaintiffs. The plaintiffs have provided no authority for the proposition that, during the pendency of the action, ***153** the airport had a duty under the act to submit a restoration plan. We conclude, therefore, that it was not an abuse of discretion for the trial court to limit the per diem penalties to the period during which the violation occurred and to decline to impose per diem penalties for the period during which the action was pending.

VII

We next address the land trust defendants' claim on cross appeal that the trial court improperly struck their cross claim under CUTPA. We disagree.

The following procedural history is relevant to our resolution of this issue. The land trust defendants alleged in the fifth count of their cross claim that: (1) the airport defendants had violated CUTPA by threatening expensive and protracted

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litigation "in an attempt to stifle the [land trust] and its individual volunteer members' participation in government process"; (2) Mellon had a history of using bad faith litigation to further his business interests and had initiated litigation against the members of the land trust board in an effort to "squelch opposition"; and (3) the trees were clear-cut to facilitate the expansion of the airport's runway, which otherwise would not have been permitted, and directly injured the land trust defendants' business interests of protecting and preserving property for public enjoyment. The airport defendants filed a motion to strike the CUTPA claim on the grounds that they were merely defending themselves against the action filed by the plaintiffs and that their defense against the action was not their "trade or business." They also argued that the airport defendants had not alleged any facts that would support a claim under CUTPA. The trial court granted the motion to strike on the ground that the land trust defendants were not competitors or customers of the airport defendants.

***154** The land trust defendants now claim that the trial court improperly determined that CUTPA imposes a requirement that the plaintiff be either the defendant's competitor or its customer. They argue that CUTPA protects businesspersons in general, not just consumers and competitors, and that the airport defendants' conduct interfered with their business of protecting natural resources. The airport defendants counter, essentially as an alternate ground for affirmance, that the land trust defendants' claims that the airport defendants were using litigation to intimidate and stifle the participation of the land trust and its volunteers in government process and that Mellon had a history of initiating baseless litigation to further his business interests are entirely without factual basis and, in any event, cannot support a CUTPA claim as a matter of law. The airport defendants do not address the claim that clear-cutting the land trust defendants' land to advance their own business interest in facilitating the expansion of the runway was a CUTPA violation.

[34][35][36] "The standard of review in an appeal challenging a trial court's granting ****969** of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary.... We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency.... Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Citations omitted; internal quotation marks omitted.) *Jewish Home for the Elderly of Fairfield County, Inc. v. Cantore,* 257 Conn. 531, 537–38, 778 A.2d 93 (2001).

[37][38] "[General Statutes §] 42–110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct ***155** of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons].... All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." (Internal quotation marks omitted.) *Hartford Electric Supply Co. v. Allen–Bradley Co.,* 250 Conn. 334, 367–68, 736 A.2d 824 (1999).

"[W]e previously have stated in no uncertain

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terms that CUTPA imposes no requirement of a consumer relationship. In *McLaughlin Ford, Inc. v. Ford Motor Co.,* 192 Conn. 558, [566–67], 473 A.2d 1185 (1984), we concluded that CUTPA is not limited to conduct involving consumer injury and that a competitor or other business person can maintain a CUTPA cause of action without showing consumer injury." (Internal quotation marks omitted.) *Macomber v. Travelers Property & Casualty Corp.,* 261 Conn. 620, 643, 804 A.2d 180 (2002).

[39] With respect to the land trust defendants' allegations that the airport defendants had threatened and actually engaged in oppressive litigation tactics, we conclude that the trial court properly determined that the allegations did not support a CUTPA claim. We note that the allegations are vague in that they do not indicate whether the land trust defendants are claiming that the ***156** airport defendants' litigation conduct in the present case was improper or that they had initiated a separate action against the members of the land trust board. To the extent that the land trust defendants claim that the conduct of the airport defendants in defending themselves from the claims against them in the present action was improper, they have not cited any authority for the proposition that a defendant's vigorous defense against a lawsuit may form the basis for a CUTPA claim in that very lawsuit. Although the land trust defendants make a passing reference in their brief to this court to an action filed by the airport defendants in federal court, they do not discuss the nature or status of that action. We recently have held that claims based on the improper litigation conduct of the defendant in another pending action ****970** were properly stricken as duplicative and premature.[FN41] See *Larobina v. McDonald,* 274 Conn. 394, 407–408, 876 A.2d 522 (2005). Likewise, the allegations in the present case would require the trial court to determine the validity of the airport defendants' claims in a separate action that apparently is still pending, thereby giving rise to duplicative litigation and potentially inconsistent verdicts. Accordingly, we conclude that the trial court properly struck these allegations.

FN41. The Appellate Court has suggested in dicta that "a party's use of its economic powers in an attempt to stifle individual citizens' use of valid governmental processes by threat of expensive litigation potentially constitutes a violation of CUTPA, which is expressly modeled on § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)." *Zeller v. Consolini,* 59 Conn.App. 545, 562 n. 7, 758 A.2d 376 (2000). In *Zeller,* the defendants *initiated* the sham litigation, in which the plaintiff ultimately prevailed. Id., at 547–48, 758 A.2d 376. The court, in *Zeller,* did not indicate that conduct in *defending* a lawsuit or conduct in a separate *pending* action could form the basis of a CUTPA claim.

[40] With respect to the land trust defendants' claim that the trial court improperly struck their allegation that the airport defendants' violated CUTPA by clear-cutting ***157** their land to advance their business interest in expanding the runway, the land trust defendants argue that this court expressly has held that CUTPA does not require the existence of a consumer relationship and implicitly has held that a competitor relationship is not necessary. See *Macomber v. Travelers Property & Casualty Corp.,* supra, 261 Conn. at 643, 804 A.2d 180 (upholding CUTPA claim where plaintiffs were neither consumers nor competitors of defendant). The land trust defendants argue that the cigarette rule "encompasses businesspersons in general," that they are in the business of protecting natural resources, and that they are "competing [with the airport defendants] for the airspace that the trees had occupied." We are not persuaded. Even if we assumed that the land trust defendants are in the business of protecting natural resources, we cannot conclude that the interference with that business by a trespasser constitutes an unfair trade practice.

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Such a conclusion would convert every trespass claim involving business property into a CUTPA claim. We also reject the land trust defendants' claim that they are "competing" with the airport defendants for the rights to the airspace over their properties. The relationship between the land trust defendants and the airport defendants cannot be characterized as competitive in any ordinary business sense. Rather, before the clear-cutting, the relationship was merely one of neighboring landowners. After the clear-cutting, the relationship was one of landowner and trespasser. Accordingly, we reject the land trust defendants' argument that they had a business relationship with the airport defendants.

The land trust defendants argue, alternatively, that a CUTPA plaintiff is not required to allege any business relationship with the defendant. They have provided no authority, however, for that proposition. Cf. *Macomber v. Travelers Property & Casualty Corp.*, supra, 261 Conn. at 626, 804 A.2d 180 (plaintiffs were not consumers or competitors ***158** of defendant, but had entered into settlement agreements with defendant). Accordingly, we reject this argument. We conclude that the trial court properly determined that the land trust defendants' allegation that the airport defendants violated CUTPA by clear-cutting their land to advance their business interest in expanding the runway is insufficient to support a CUTPA claim, and, therefore, that the court ****971** properly granted the motion to strike the CUTPA claim.

VIII

Finally, we address the claim of the land trust defendants on cross appeal that the trial court improperly determined that they were precluded from introducing evidence concerning the replacement value of the trees in support of their claim for damages pursuant to § 52–560. We disagree.

The following additional procedural history is relevant to our resolution of this claim. The land trust defendants claimed in the second count of their cross claim that the airport defendants had intentionally trespassed on their property and had intentionally destroyed their trees, entitling them to treble damages under § 52–560. At trial, the land trust defendants did not introduce any evidence as to the value of the trees as cut wood or as to the diminution of the value of their land as a result of the clear-cutting. Instead, they asked the trial court to award treble damages under § 52–560 based on the replacement value of the trees and submitted a report by Bruce Spaman, an arboriculture and forestry consultant with Forest Management Services, estimating that the cost of replacement would be between $203,400 and $220,350.

The trial court concluded that the claim was precluded by the Appellate Court's decision in *Stanley v. Lincoln,* 75 Conn.App. 781, 818 A.2d 783 (2003). In that case, the Appellate Court stated that "[t]here are three ***159** possible measure of damages for loss of a tree in Connecticut." (Internal quotation marks omitted.) Id., at 785, 818 A.2d 783. In an action for trespass that alleges the loss of trees, "[i]t is an appropriate remedy either for the recovery of damages for the mere unlawful entry upon the plaintiff's land; for the recovery of the value of the trees removed, considered separately from the land; or for the recovery of damages to the land resulting from the special value of the trees as shade or ornamental trees while standing on the land. For a mere unlawful entry upon land nominal damages only would be awarded. If the purpose of the action is only to recover the value of the trees as chattels, after severance from the soil, the rule of damages is the market value of the trees for timber or fuel. For the injury resulting to the land from the destruction of trees which, as a part of the land, have a peculiar value as shade or ornamental trees, a different rule of damages obtains, namely, the reduction in the pecuniary value of the land occasioned by the act complained of....

"This common-law rule has been embodied in § 52–560 .... That statute does not give a new and independent cause of action, but prescribes the

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measure of damages in cases where compensatory damages would, in the absence of the statute, be recoverable." (Citations omitted; internal quotation marks omitted.) Id., at 785–86, 818 A.2d 783.

[41] "[R]eplacement value is not a proper measure of damages in tree cutting cases because [s]uch a measure of damages ... would lead to unreasonable recoveries in excess of the market value of the land ... would raise impossible issues in resolving the replacement values of healthy or partially damaged trees ... [and] cannot be practically applied." (Internal quotation marks omitted.) Id., at 789 n. 7, 818 A.2d 783, quoting *Maldonado v. Connecticut Light & Power Co.*, 31 Conn.Supp. 536, 539, 328 A.2d 120 (1974). Although the court in *Maldonado* concluded that the cost of replacing the trees was not ***160** a proper measure of damages, it stated that "[i]t is ... well established that [the diminution in property value as a result****972** of cutting the trees] may be determined by the cost of repairing the damage, provided, of course, that that cost does not exceed the former value of the property and provided also that the repairs do not enhance the value of the property over what it was before it was damaged." (Internal quotation marks omitted.) *Maldonado v. Connecticut Light & Power Co.*, supra, at 539, 328 A.2d 120.

[42] In order to resolve this claim, it is necessary to clarify the Appellate Court's ruling in *Stanley*. The Appellate Court suggested in that case that the common-law rule that the diminution in property value is a proper measure of damages in tree cutting cases had been embodied in § 52–560. *Stanley v. Lincoln*, supra, 75 Conn.App. at 786, 818 A.2d 783. The court also suggested that, under the common law, the replacement value of the trees was not a proper measure of damages and, therefore, was not a proper measure of damages under § 52–560. See id., at 788–89, 818 A.2d 783. We do not entirely agree with this analysis. Rather, we conclude that, although damages for the reduction in pecuniary value of the land—determined by the replacement cost of the trees, if appropriate—were available under the common law, FN42 the plain language of § 52–560 authorizes treble damages only for the value of the trees as commodities, not for the reduction in the pecuniary value or for the replacement cost of the trees. "We are not permitted to supply statutory language that the legislature may have chosen to omit." (Internal quotation marks omitted.) *Connecticut Light & Power Co. v. Dept. of Public Utility Control*, 266 Conn. 108, 119, 830 A.2d 1121 (2003). Accordingly, we conclude that the trial court properly determined that replacement ***161** cost was not a proper measure of damages under § 52–560.

FN42. The land trust defendants made no such claim under the common law. Accordingly, there is no need to decide in this case whether the enactment of § 52–560 preempted a common-law cause of action.

[43] The land trust defendants argue, however, that this court should "recognize an exception to the limitation on damages set forth in [*Stanley*]" and permit damages to be calculated on the basis of the replacement cost of the trees when "the value of the property lies in its place within the environment, rather than as a potential building lot or a working woodlot." As we have indicated, however, the plain language of the statute precludes such a reading. "[This] court is precluded from substituting its own ideas of what might be a wise provision in place of a clear expression of legislative will." (Internal quotation marks omitted.) *Skindzier v. Commissioner of Social Services*, 258 Conn. 642, 661, 784 A.2d 323 (2001). Accordingly, we decline to read into § 52–560 the exception urged by the land trust defendants.

The judgment is affirmed.

In this opinion the other justices concurred.

Conn.,2005.

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NO. CV 10 6010604S LOUISE FORTIER v. MARLBOROUGH WATER POLLUTION CONTROL AUTHORITY	: : : : :	SUPERIOR COURT JUDICIAL DISTRICT OF NEW BRITAIN AUGUST 14, 2013
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SUPERIOR COURT

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AW

MEMORANDUM OF DECISION

The above-named plaintiffs are residents of the town of Marlborough (the town) and bring their actions on the propriety of sewer assessments dated November 18, 2010 by the town's water pollution control authority (WPCA).

The court conducted a trial de novo[1] on February 7 and March 13, 2013, pursuant to General Statutes § 7-250 and *Vaill* v. *Sewer Commission*, 168 Conn. 514, 519, 362 A.2d 885 (1975).

The evidence as presented at the trial by the parties may be summarized as follows:

1. The date of the assessment for each property, November 18, 2010, is the date of valuation for purposes of the sewer statutes.

2. The plaintiffs' appraiser, John Lo Monte testified at trial. He prepared five appraisal reports. See Exhibits 1-5.

3. The assessments were issued for the installation of sewers.

4. The assessment per plaintiff was approximately $12,000, paid over twenty years at $600/year.

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[1] The court concluded on the first trial date of these matters that the plaintiffs had established aggrievement. See 2/7/13 trial transcript, pp. 9-10. On May 24, 2012, *Graham, J.* consolidated the five appeals. All five plaintiffs contest the amount of their respective assessments. Plaintiffs Durel and High Hill Farm, LLC (High Hill Farm) also have a second count in their respective complaints contesting the town's order of November 23, 2010 to connect pursuant to § 7-257.

5. The assessment was based on a formula known as "Equivalent Dwelling Unit" or EDU.

6. Lo Monte concluded in Exhibit 1 that the Amodeo residential dwelling and lot had a value of $325,000 before the installation of sewers and $300,000 after installation. This was a diminution of value of $25,000. The use of the grinder pump[2] type of sewer was a major factor for Lo Monte in forming his after installation opinion of value. Lo Monte concluded that all the plaintiffs' properties had a diminution of value due to the type of sewer installed.

7. For the Francoline property, Lo Monte's before value was $257,000; the after value was $236,000. This was a diminution of value of $21,000. See Exhibit 2.

8. For the Fortier property, Lo Monte's before value was $250,000; the after value was $230,000. This was a diminution of value of $20,000. See Exhibit 3.

9. For the Durel property, Lo Monte's before value was $450,000; the after value was $420,000. This was a diminution of value of $30,000. See Exhibit 4.

10. For the High Hill Farm property, Lo Monte's before value was $370,000; the after value was $344,000. This was a diminution of value of $26,000. See Exhibit 5.

11. Lo Monte employed a comparable sales approach as set forth in his five appraisals to arrive at the values of the

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[2] Lo Monte described the grinder pump sewer system as follows: "[A] grinder pump is an eight (8) foot casing which is drilled into each of these homes' back yard or front yard. It grounds out waste and pushes the material into the main sewer line. The top of such pump is highly visible in the yard; in addition, two (2) panels are drilled into the side of each house affected; one panel is an alarm and the other panel is a red light that will flash if the pump fails." See, e.g., Exhibit 5, 2/6/11 letter, p. 2.

properties before the town placed the assessment. He did not establish the after values by consulting the market, but determined the after values by taking into account the injury to the realty caused by the installation of the grinder pump and the associated agreement.

12. Lo Monte adjusted the before values down due to the installation of the grinder pump sewers. He also off-set the benefits of sewers over septic systems against the cost of the installation of the sewers.

13. Lo Monte stated that the grinder pump sewers are not gravity-based; have more maintenance costs; require the town to have access to the property and affects yard work.

14. The homeowners need a back flow valve as a precaution. There are warning lights affixed to the house.

15. It is Lo Monte's position that the values of the houses with grinder pumps would be affected negatively.

16. Lo Monte stated that the homeowner must sign the maintenance agreement or have total responsibility for repair.

17. There is a usage fee of $375 adjusted annually. An additional cost is incurred to remove and crush the abandoned septic tank.

18. After twenty years, the town must again decide on its responsibility for the grinder pump. According to Lo Monte, the town might decline to install a new pump.

19. The five plaintiffs' septic systems are adequate according to Lo Monte and the plaintiffs. It is Lo Monte's opinion that a prospective buyer would not object to the septic systems.

20. The High Hill Farm property is adjacent to the Lake Terramuggus District.

21. It is the town's goal to insure that Lake Terramuggus is not polluted by a septic tank accident since there have been numerous septic failures in the past. See, e.g, Exhibit A, p. 22.

22. Homeowner Amodeo testified as follows: He objects to the disk in his yard and finds the warning lights unattractive. Amodeo did not sign the management agreement and has not installed a backflow valve. He believes that a prospective buyer would find the grinder pump sewer inferior to a working septic system. Amodeo worries about a power failure. He dislikes having to pay the yearly assessment as well as a user fee that will rise yearly. He is concerned that his ability to refinance will be affected, although he admitted on cross-examination that he has had no mortgage problem thus far. There is no further use for the septic field in the yard now that it is not needed for sewage disposal. No construction may be undertaken in this area. For example, a pool or house expansion is not permitted. Under the town's EDU calculation, adding a fourth bedroom will cause the assessment to rise.

23. Homeowner Francoline testified as to similar concerns; she has not signed the maintenance agreement. The outages due to Hurricanes Irene and Sandy resulted in a grinder pump malfunction and caused damages to the interior of her home. The town's appraiser inaccurately showed that she has a full basement in her home.

24. Homeowner Fortier testified that he has signed the management agreement, but has similar concerns to Amodeo and Francoline.

25. Homeowner Durel testified that he has not connected to the sewer system and opposes the connection order. He

considers the sewer regulations too rigid as they forbid the deposit of paper or blood in the toilet. Durel testified that the septic system is working well.

26. Septic systems installed in September 2004 or after were exempt from connecting. See 3/13/13 trial transcript, p. 95. The referendum approving the sewer installation did not consider the current system's effectiveness. Lake Terramuggus is clean. See Exhibit 10.

27. Ms. Yablonsky, the sole member of High Hill Farm, testified that she does not intend to develop her property through a subdivision, so the town's appraiser has made an inaccurate conclusion in his report regarding her intent to subdivide. She had the same concerns as the other homeowners and is also attempting to stop the connection order.

28. The town's appraiser, Richard Silverstein, testified that, under his approach, the value of sewers was measured by the market. He considers the question: would a buyer, all things being equal, pay more for a premises with sewers or not?

29. According to Silverstein, buyers react favorably to sewers over septic and are willing to pay more. This includes sewers with a grinder pump.

30. In Silverstein's opinion, the plaintiffs' appraiser erred in using a square foot model to determine value prior to the installation of sewers. Also the plaintiffs' appraiser should have looked to the market for both the before and after values and not merely to the reaction of the plaintiffs to the sewer project.

31. Under Silverstein's Exhibit A (Amodeo), the before value was $305, 000 and the after value was $317,000, for a gain of $12,000.

32. Under Silverstein's Exhibit B (Francoline), the before value was $240,000 and the after value was $252,000, for a gain of $12,000.

33. Under Silverstein's Exhibit C (Fortier), the before value was $214,000 and the after value was $226,000, for a gain of $12,000.

34. Under Silverstein's Exhibit D (Durel), the before value was $460,000 and the after value was $472,000, for a gain of $12,000.

35. Under Silverstein's Exhibit E (High Hill Farm), the adoption of sewers opened up an extra building lot. Therefore, the before value was $330,000 and the after value was $370,000, for a gain of $40,000.

36. According to Silverstein, the market justifies finding a benefit from the sewers of at least $12,000 for each of the plaintiffs.

37. Two Marlborough comparable sales are the basis for the $12,000 benefit conclusion. The MLS for these two properties mentioned in 2010 that sewers were to be installed with the grinder pump. The installation had not started, but was imminent.

38. All things being equal, the buyers paid more for these two properties because the properties had sewers.

39. There was no reduction in price due to the presence of the grinder pump sewers.

40. The hook-up charge had been paid on the two comparable properties by the seller, but this was a minimal amount and did not affect the interest of the buyers in obtaining a property with sewers.

41. Silverstein's comparables from Colchester and East Lyme supported the Marlborough comparable sales.

42. Silverstein concluded that the maintenance agreement was an advantage for the homeowner.

43. Peter Hughes, a town official involved in the sewer project, testified as to the assembly of state and federal funds to support the sewer project.

44. Hughes stated that the decision to use the grinder pump was partly due to cost as the gravity method was double the cost to install.

45. The map showing septic tank failures covers the entire area of the sewer project.

46. The town services all grinder pumps, even if the maintenance agreement is not signed. The agreement is only a formality to allow the town access to the homeowner's property.

47. The sewer regulations have been mischaracterized by the plaintiffs; the strictures on what material may be placed in the toilet is subject to reasonable interpretation.

48. The new sewers have functioned well to date, including during three power outages. The town contracted with a service provider to remove waste from the pump when there were electrical failures.

Each plaintiff has brought this action to contest their individual sewer assessment. The standard for evaluating the evidence in a sewer appeal is set forth in *Shoreline Care Ltd. Partnership* v. *North Branford*, 231 Conn. 344, 351-353, 650 A.2d 142 (1994):

"The benefit to a property owner is measured solely according to the amount by which the improvement causes the property to increase in market value. Under § 7-249, [t]he monetary value of the special benefit conferred upon a piece of property by the presence of a sewerage system must be calculated by the difference between the market value of the realty with and without the sewerage system . . . . Indeed, a property need not be connected to the system in order for it to receive a benefit. If the property has increased in market value merely by virtue of its access to town sewers, it has received a benefit for which an assessment may be levied. Section 7-249 expressly recognizes this fact by allowing assessments to be made even against property owners who do not abut the system.

"Accordingly, the cost that a town incurs in providing access to sewers is not dispositive in determining the amount of the benefit to the property. . . . [T]his may mean that the cost of the sewerage system cannot be fully recouped by the town. Similarly, the costs, if any, that a property owner may incur to connect to an existing sewer system are only relevant insofar as they may affect the *market* value of the property. . . .

"Therefore, in order to overcome the presumption of validity of the benefit assessment, a property owner must introduce competent evidence that the assessment is greater than the increase in market value to the property caused by the improvement. A determination of whether a benefit exists under § 7-249 and the amount of that benefit on

appeal is a question of fact for the trial court, which we will not disturb unless it is clearly erroneous." (Citations omitted; emphasis added; internal quotation marks omitted.)

See also *Gaynor-Stafford Industries, Inc.* v. *Water Pollution Control Authority*, 192 Conn. 638, 646, 474 A.2d 752, cert. denied, 469 U.S. 932, 105 S. Ct. 328, 83 L. Ed. 2d 265 (1984) ("where the formula adopted [by the town] bears a reasonable relationship to the benefits conferred[,] the method of assessment would be upheld").

Here the court makes findings of fact that the evidence as summarized above shows that the plaintiffs' appraiser failed to use the correct methodology. He did not find the "after-assessment" values for the properties in terms of the market. Instead, Lo Monte found the "before" values and to determine the "after" values, he took into account the costs of having the sewers over the septic systems.

Even if the plaintiffs' appraiser made use of the market for the "after" values[3], the court concludes as a matter of fact and law that this evidence was insufficient to overcome the presumption of validity that the town holds.

The town's appraiser Silverman made use of market values for both "before" and "after." In each instance, the appraiser used market values to conclude that the assessment was equal to the benefit incurred. For example, with regard to Amodeo

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[3] Each plaintiff testified in general that they suspected that the value of their realty would be affected by the installation of the sewers, but they provided no market data for their conclusions.

(Exhibit A), the appraiser established the before value of the property based on the sales comparison method at $305,000. With regard to the after value, the appraiser relied on two properties in Marlborough (Exhibit A, pp. 36-44) that sold with sewers at prices equal to the assessment, as well as two properties that sold without sewers at lower market values.[4] The appraiser concluded that purchasers preferred to acquire properties with sewers rather than septic disposal.

The town's appraiser Silverman made a similar analysis for the properties of each of the other residential plaintiffs. See Exhibits B-D.

With regard to High Hill Farm (Exhibit E), the town's appraiser Silverman found the after value to include not only the benefit from the sewer, but also the possibility that the owner might develop an additional building lot. The fact that the appraiser also used sales from other towns does not detract from his conclusions with regard to the market value. As Silverman stated in his appraisals, the sales data from other towns was used to support the two Marlborough sales where sewers were installed.

The fact that, in each case, the benefit of $12,000 was identical to the assessment figure of $12,000 has been raised by the plaintiffs as proof of an error by the town's appraiser. But the court concludes that the fact that the appraiser made this calculation is

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[4] Silverman noted that sales took place before the sewer assessment was effective, but that the buyers were aware that the assessment was to be issued.

insufficient to overcome the presumption of validity. The plaintiffs also object to the map showing septic tank failures that was utilized by the town and its appraiser in justifying the need for the conversion to sewers.

The plaintiffs contend that the numerous incidents recorded on the map are not further analyzed to indicate the severity of each incidents. On the other hand, the map was prepared by a consulting firm and shows a "failed or repaired system." See Exhibit E, p. 23. The court finds that the map was appropriately relied upon by the town and its appraiser. The court finds that High Hill Farm is sufficiently close to the lake area to justify the sewer installation. While High Hill Farm is not located directly on Lake Terramuggus, one of the objectives of the sewer installation project was to protect the lake environment.

Finally, as mentioned above, count two in the complaints of plaintiffs Durel and High Hill Farm are based upon §7-257, allowing an appeal from an order of the town to connect to the sewage treatment system. In *Simsbury* v. *McCue*, Superior Court, judicial district of New Britain, Docket No. CV 11-6012741-S (October 3, 2012), the court considered § 7-257 and noted that the town's WPCA was charged with preventing pollution "detrimental to the environment and dangerous to the public health." The court refused under the facts of the case to disallow the town's requirement of connection,

especially "in the context of a large and detailed regulatory scheme that affects numerous individuals simultaneously."

In the present case, Durel and High Hill Farm have not proved that there was a violation by the town that requires the court to block the town's project. The town properly balanced the existence of functioning septic tanks against the health and environmental concerns of the community to be satisfied by sewer installation. Durel and High Hill Farm advance only two objections: (1) Dislike of the sewers where the septic tanks are adequate and where there are some added costs and duties and (2) The language of the sewer regulations that appear overly strict. Dislike of the program is not a sufficient reason. Further the town planner explained that the operation of the regulations should be interpreted in a reasonable fashion.

Accordingly, for the foregoing reasons, judgment may enter in favor of the defendant, dismissing each of the plaintiff's appeals, without costs to any party.

Henry S. Cohn, Judge