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9 PETTIPAUG, LLC, ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE BOROUGH OF FENWICK
(AC 45200)

Prescott, Cradle and DiPentima, Js.

Syllabus

The plaintiffs, two entities that own real property in the borough of Fenwick, appealed to the Superior Court from the decision of the defendant planning and zoning commission approving an amendment to Fenwick's zoning regulations that would allow property owners in Fenwick to rent their premises subject to certain conditions. The defendant filed a motion to dismiss, arguing that the complaint should be dismissed for lack of subject matter jurisdiction because, inter alia, the appeal was untimely, as it had not been filed in accordance with the statute (§ 8-8 (b)) that requires that an appeal from a decision of a zoning board or commission be commenced within fifteen days from the date that notice of the decision was published. The plaintiffs objected, claiming that, because the notice was defective in that it failed to comply with the substantial circulation requirement in the notice statute (§ 8-3 (d)), the fifteen day time period in § 8-8 (b) did not apply and, instead, § 8-8 (r) applied, which provides for a one year appeal period when a defendant fails to comply with certain statutory requirements regarding notice. The trial court denied the motion to dismiss, finding that the newspaper in which notice was published, The Middletown Press, did not have "substantial circulation" in Fenwick and, accordingly, the plaintiffs' appeal to the Superior Court was timely pursuant to § 8-8 (r). Thereafter, the plaintiffs filed a motion for summary judgment arguing that, because the court, in its decision denying the motion to dismiss, determined that notice of the adoption of the zoning amendment was not published in accordance with the requirements of § 8-3 (d), they were entitled to a declaration that the zoning amendment was unlawfully enacted and was never in effect. In its objection to the motion for summary judgment, the defendant acknowledged that the court's denial of the motion to dismiss disposed of the same substantive issue raised by the plaintiffs in their motion for summary judgment but contended that the court could reconsider its determination of that issue. The defendant further contended that the plaintiffs failed to prove that The Middletown Press lacked substantial circulation in Fenwick. The trial court, having found that, because the defendant essentially set forth the same arguments advanced in its motion to dismiss, the defendant's objection to the motion for summary judgment was akin to a motion for reconsideration of the court's decision on the motion to dismiss, granted the plaintiffs' motion for summary judgment. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on its claim that the trial court improperly granted the plaintiffs' motion for summary judgment because the defendant's publication of the amendment to Fenwick's zoning regulations in The Middletown Press satisfied the "substantial circulation" requirement of § 8-3 (d): the phrase "substantial circulation" is not ambiguous, it requires that there be considerable or ample dissemination of a publication to readers, there was evidence that no Fenwick resident subscribed to The Middletown Press, and the online availability of The Middletown Press did not constitute substantial circulation because, according to common usage, substantial circulation requires more than general online availability, it requires, inter alia, substantial dissemination or distribution of printed material among readers and/or substantial distribution of online information to readers, and the defendant failed to present any evidence of online viewing numbers for The Middletown Press; furthermore, there was nothing in § 8-3 (d) or our case law interpreting it to suggest that the fact that The Middletown Press had been used by Fenwick officials in the past to publish notices and that some Fenwick residents may be aware of such past use satisfied the notice requirement; additionally, although compliance with the substantial circulation

requirement in § 8-3 (d) by commissions in small boroughs may be difficult, this court could not conclude that it necessarily led to an absurd result or was unworkable.

2. The defendant could not prevail on its claim that the trial court improperly shifted the burden of proof to the defendant with regard to whether The Middletown Press had a substantial circulation in Fenwick: the trial court considered the evidence presented by the plaintiffs that there were no subscribers to The Middletown Press in Fenwick to be sufficient to demonstrate a lack of substantial circulation, the burden was on the defendant to create a genuine issue of material fact regarding the issue by offering facts to challenge those offered by the plaintiffs, and the evidence presented by the defendant regarding, inter alia, the online availability of The Middletown Press did not change the trial court's determination by raising a genuine issue of material fact so as to preclude summary judgment.

Argued November 10, 2022—officially released February 28, 2023

Procedural History

Appeal from the decision of the defendant approving an amendment to its zoning regulations, and for other relief, brought to the Superior Court in the judicial district of Middlesex and transferred to the judicial district of Hartford, Land Use Litigation Docket, where the court, *Baio*, *J.*, denied the defendant's motion to dismiss; thereafter, the court, *Baio*, *J.*, granted the plaintiffs' motion for summary judgment and rendered judgment thereon, from which the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Michael A. Zizka, for the appellant (defendant).

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellees (plaintiffs).

Opinion

DiPENTIMA, J. In this certified zoning appeal, we consider whether a zoning body has complied with the statutory notice requirement in General Statutes § 8-3 (d)[1] if it published notice in a newspaper that had no subscribers in the relevant municipality but was available on the Internet. The defendant, the Planning and Zoning Commission of the Borough of Fenwick, appeals from the summary judgment of the Superior Court rendered in favor of the plaintiffs, 9 Pettipaug, LLC, and Eniotna, LLP,[2] holding that the defendant's zoning amendment was invalid because the defendant failed to comply with the applicable statutory notice requirement. On appeal, the defendant claims that the court improperly (1) determined that the defendant failed to satisfy the "substantial circulation" component of the notice requirement in § 8-3 (d), and (2) shifted the burden of proof to the defendant. We affirm the judgment of the Superior Court.

The following stipulated facts, as recounted by the court in its memorandum of decision on the plaintiffs' motion for summary judgment, and procedural history are relevant.[3] Fenwick is a legally established borough of the town of Old Saybrook; it has its own planning and zoning commission and zoning regulations. By way of a July 20, 2019 decision, the defendant approved an amendment to Fenwick's zoning regulations, which became effective October 1, 2019. The amendment permits property owners in Fenwick to rent their premises for up to ten times per year for a minimum of two week intervals. Notice of the July 20, 2019 decision was published in The Middletown Press on July 25, 2019.

On October 25, 2019, the plaintiffs filed a two count complaint in the Superior Court appealing the July 20, 2019 decision of the defendant. Count one, which challenged the adoption of the zoning amendment, was withdrawn prior to judgment. Count two alleged that the amendment had not been enacted lawfully because the defendant's publication of notice of the zoning amendment failed to comply with § 8-3 (d), which requires that notice of zoning amendments be published in a newspaper having "substantial circulation" in Fenwick. The plaintiffs sought a declaratory judgment that the short-term rental amendment to Fenwick's zoning regulations was enacted unlawfully and therefore was not in effect. On February 3, 2020, the defendant filed a motion to dismiss and an accompanying memorandum of law, arguing that the complaint should be dismissed for lack of subject matter jurisdiction because, inter alia, the appeal was untimely, as it had not been filed in accordance with General Statutes § 8-8 (b), which requires that an appeal from a decision of a zoning board or commission be commenced within fifteen days from the date that notice of the decision was published as required by the General Statutes.[4] In their

objection to the motion to dismiss, the plaintiffs argued that the appeal was timely. Specifically, they claimed that, because the notice was defective in that it failed to comply with the substantial circulation requirement in § 8-3 (d), the fifteen day time period in § 8-8 (b) did not apply but, rather, § 8-8 (r) applied, which provides for a one year appeal period when a defendant fails to comply with certain statutory requirements regarding notice.

On February 16, 2021, the court, *Baio*, *J.*, issued a memorandum of decision denying the motion to dismiss. The court stated that the key issue in determining whether the appeal was untimely was whether the defendant's publication of notice complied with the requirement in § 8-3 (d) that the newspaper in which notice was published, The Middletown Press, has "substantial circulation" in Fenwick. The court noted that, in his affidavit, Michael DeLuca,[5] the president and publisher of Hearst Connecticut Media Group, which publishes The Middletown Press, averred that there are nine locations in Old Saybrook where individual copies of The Middletown Press are available for purchase and the circulation of The Middletown Press in Old Saybrook is 0.53 percent, but no households in Fenwick subscribe to The Middletown Press. The court noted that, "[c]ompared to Fenwick's eighty-three households, there are 4354 households in Old Saybrook" and that "[t]here were no facts presented to support whether any of the single copy sales in Old Saybrook were made to Fenwick residents." The court concluded that publication did not comply with the plain language of § 8-3 (d), and, accordingly, the plaintiffs' appeal to the Superior Court was timely pursuant to § 8-8 (r).

In their single count amended complaint, filed on March 4, 2021, the plaintiffs continued to maintain, as they had done in count two of the original complaint, that notice by publication in The Middletown Press did not satisfy the "substantial circulation" requirement in § 8-3 (d). The plaintiffs filed a motion for summary judgment arguing that, because the court in its decision denying the motion to dismiss determined that notice of the adoption of the zoning amendment was not published in accordance with the requirements of § 8-3 (d), they were entitled to a declaration that the zoning amendment was unlawfully enacted and was never in effect. In its objection to the motion for summary judgment, the defendant, while acknowledging that the court's denial of the motion to dismiss disposed of the same substantive issue raised by the plaintiffs in their motion for summary judgment, contended that the court could reconsider its determination of that issue. The defendant further contended that the plaintiffs failed to prove that The Middletown Press lacked substantial circulation in Fenwick.

In a July 30, 2021 memorandum of decision, the court,

Baio, *J.*, granted the plaintiffs' motion for summary judgment. In its decision, the court stated: "Here, the plaintiffs argue that because the motion to dismiss, addressing the same issue of the validity of the notice, was denied, there is no longer an issue of fact, as it has been determined that the amendment was not published in a proper publication having substantial circulation. Having not been published properly and in compliance with the statute, the plaintiffs argue [that] the amendment is not valid. The defendant, in opposition, acknowledges [that] the decision on the motion to dismiss is contrary to its position but submits that the court can reconsider its decision. . . . The defendant essentially sets forth the same arguments advanced in its motion to dismiss. Hence, as the plaintiffs correctly point out, the defendant's objection to the motion for summary judgment is akin to a motion for reconsideration of the court's decision on the motion to dismiss (the actual motion for reconsideration having been withdrawn).

"The defendant is correct that the court has already addressed this issue in deciding the motion to dismiss. In addressing that motion, the court set forth the rationale, facts and law upon which the decision was based. The defendant submits that the court could 'choose to reach a contrary conclusion on an issue of law previously decided if the judge is convinced that the prior ruling was wrong or following it would work an injustice.' . . . Such is not the case here. The court's decision on the motion to dismiss, decided just months ago and which is still the decision of this court, is the law of the case." (Citations omitted.) The court, in referencing the law of the case doctrine,[6] based its decision granting the plaintiffs' motion for summary judgment on its prior determination that notice was defective, which was made in connection with its denial of the defendant's motion to dismiss. The defendant filed a petition for certification to appeal to this court. The petition was granted, and this appeal followed.

At the outset, we note that our analysis of the claims presented on appeal is complicated by the unusual procedural history of the present case and the fact that the court, in granting the plaintiffs' motion for summary judgment, relied on its decision on the motion to dismiss. "A trial court applies different principles and a different analysis when ruling on a motion to dismiss as opposed to a motion for summary judgment." *Henderson* v. *Lagoudis*, 148 Conn. App. 330, 339, 85 A.3d 53 (2014). Nevertheless, in the present case, the court had before it the same evidence when ruling on both motions. Specifically, in connection with the motion to dismiss, the parties had submitted a stipulation of facts as well as affidavits concerning, inter alia, the defendant's jurisdictional argument that the appeal was untimely and the plaintiffs' counterargument that the appeal was timely because the defendant's publication

of notice was defective. Moreover, the affidavits submitted did not contain conflicting facts, and the court had before it one set of facts regarding the number of subscribers to The Middletown Press in Fenwick, as well as undisputed information about online access to notices in that newspaper. Accordingly, despite the differing standards that apply to motions to dismiss and motions for summary judgment, because the court had before it the same evidence when deciding both motions, its reliance on its prior determination made in connection with the motion to dismiss in granting the motion for summary judgment, although adding an additional layer of complexity to our analysis of the defendant's claims on appeal, does not change the outcome.

On appeal from a court's decision granting a motion for summary judgment, "we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant [a moving party's] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Williams* v. *Housing Authority*, 159 Conn. App. 679, 689, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017); see also Practice Book § 17-49. Against this backdrop, we turn to the defendant's claims.

I

The defendant claims that the court improperly granted the plaintiffs' motion for summary judgment because the defendant's publication of the amendment to Fenwick's zoning regulations in The Middletown Press satisfied the "substantial circulation" requirement of § 8-3 (d). The defendant makes a number of arguments, some of which are in the alternative, in support of its claim. It contends that (1) the meaning of "substantial circulation" in § 8-3 (d) is not plain and unambiguous and thus other evidence of legislative intent must be considered, (2) the legislative intent of notice statutes is for constructive notice, not actual notice, (3) the publication of Fenwick's legal notices in The Middletown Press provided adequate constructive notice of Fenwick's legal actions, (4) dictionaries and law from other states support the idea that a newspaper that is readily available for purchase or review in an area is one of "general circulation" in that area, (5) the phrase "substantial circulation" should not be deemed to require a greater level of distribution than the phrase "general circulation," (6) evidence of subscriptions was unnecessary to prove "substantial circulation," (7) publication in The Middletown Press satisfied the statutory purpose of the "substantial circulation" requirement in § 8-3 (d), to provide constructive notice to as much of the populace as possible, and (8) the trial court's interpretation of "substantial circulation" creates impracti-

cal and unworkable results.

We begin by addressing the defendant's first argument, namely, that the phrase "substantial circulation" is ambiguous. The meaning of the term "substantial circulation" in § 8-3 (d) is a question of statutory interpretation and, therefore, is a question of law over which we exercise plenary review. See, e.g., *Athena Holdings, LLC* v. *Marcus*, 160 Conn. App. 470, 475, 125 A.3d 290, cert. denied, 320 Conn. 908, 128 A.3d 952 (2015) (proper construction and meaning to be afforded to statutory language is question of law over which we exercise plenary review). "Whether a newspaper's circulation is substantial is a factual determination . . . ." *Fisette* v. *DiPietro*, 28 Conn. App. 379, 383, 611 A.2d 417 (1992). The relevant inquiry regarding the motion for summary judgment, then, is what constitutes "substantial circulation" and whether a genuine issue of material fact exists as to whether The Middletown Press had substantial circulation in Fenwick.

Section 8-3 (d) provides in relevant part: "Zoning regulations . . . or changes therein shall become effective at such time as is fixed by the zoning commission, provided a copy of such regulation . . . or change shall be filed in the office of the . . . borough clerk . . . and notice of the decision of such commission shall have been published in a newspaper having a substantial circulation in the municipality before such effective date. . . ."[7] The question presented concerns the requirement in § 8-3 (d) of publication "in a newspaper having a substantial circulation in the municipality . . . ." Section 8-3 (d) does not define "substantial circulation" and, "[i]n the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Meriden* v. *Freedom of Information Commission*, 338 Conn. 310, 322, 258 A.3d 1 (2021); see *Fisette* v. *DiPietro*, supra, 28 Conn. App. 384–85 (relying on dictionary definitions to define "substantial circulation," noting that, "[b]ecause our courts have not determined what constitutes substantial circulation, we look to decisions of other courts as well as to dictionaries in order to determine commonly accepted usage"); see also General Statutes §§ 1-1 (a) and 1-2z.[8]

In *Fisette*, this court analyzed the ordinary dictionary meaning of "substantial circulation" in the context of a prior revision of § 8-3 (d). The court examined the provision of notice regarding changes in zoning districts and regulations in the 1991 revision of § 8-3 (a), "which authorizes notice by publication in a newspaper having a substantial circulation in the municipality." *Fisette* v. *DiPietro*, supra, 28 Conn. App. 383. In determining

commonly accepted usage, this court stated that "Webster New World Dictionary (2d College Ed.) gives as one definition of 'substantial' that it is something 'considerable' or 'ample.' Webster, Third New International Dictionary defines it as 'considerable in amount, value, or worth.' Similarly, in common legal usage, the term 'substantial' has been defined as 'of real worth and importance.' Black's Law Dictionary (6th Ed.). In any event, the term 'substantial circulation' is relative. See *In re Carson Bulletin*, [85 Cal. App. 3d 785, 795, 149 Cal. Rptr. 764 (1978)] (paid circulation to 12 people in a city of 79,000 not 'substantial')." *Fisette* v. *DiPietro*, supra, 384; see id., 384–85 (affirming trial court's finding that New Britain Herald had substantial circulation in Rocky Hill because it circulated to 16 percent of occupied households in Rocky Hill, indexed Rocky Hill news on its front page, reported news of town government meetings in Rocky Hill news sections, and printed public notices on same page).

The defendant's argument focuses on the word "circulation," which is neither defined in the statute nor specifically addressed in *Fisette*, and so we look to dictionary definitions to ascertain its common usage. See *Meriden* v. *Freedom of Information Commission*, supra, 338 Conn. 322; see also General Statutes § 1-1 (a). Merriam-Webster defines "circulation" as "the extent of dissemination: such as . . . the average number of copies of a publication sold over a given period . . . ." Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/circulation (last visited February 9, 2023). The Free Dictionary defines "circulation" as "[d]issemination of printed material, especially copies of newspapers or magazines, among readers. . . . The number of copies of a publication sold or distributed." The Free Dictionary, available at http://www.thefreedictionary.com/circulation (last visited February 9, 2023). The American Heritage Dictionary, Second College Edition, defines "circulation" as "[t]he distribution of printed material, esp. copies of newspapers or magazines, among readers. . . . The number of copies of a publication sold or distributed." American Heritage Dictionary (2d College Ed. 1985) p. 275. Cambridge Dictionary defines "circulation" as "the number of people that a newspaper or magazine is regularly sold to" and states, "[i]f something is in circulation, it is available . . . . If something is out of circulation, it is not available . . . ." Cambridge Dictionary, available at https://dictionary.cambridge.org/us/dictionary/english/circulation (last visited February 9, 2023). In sum, the definitions of "circulation" that relate to newspapers cite, as examples of circulation, the number of subscriptions or copies sold. The overriding consideration is the extent of dissemination of the publication to readers. We conclude, on the basis of *Fisette* and the common usage of the term "circulation," that the phrase "substantial circulation" in § 8-3 (d) is unambiguous

and evidence of legislative intent need not be considered. The term "substantial circulation" in § 8-3 (d) requires considerable or ample dissemination of the publication to readers. As stated in *Fisette* v. *DiPietro*, supra, 28 Conn. App. 384, the term is relative.

Regarding the defendant's second and third arguments, which pertain to constructive notice, we note that the defendant is correct that constructive notice, rather than actual notice received by the plaintiffs, is required. See id., 383. The fact that constructive notice is required, however, does not alter the language of § 8-3 (d).

Concerning its fourth and fifth arguments, the defendant contends that a newspaper that is readily available for purchase or review in an area is one of "general circulation" in that area and that "substantial circulation" does not require a greater level of distribution than "general circulation" because nothing in the General Statutes indicates that the legislature intended the two phrases to be treated differently.

We disagree. If the legislature meant to say "general circulation" in § 8-3 (d) it would have done so, as it did in § 8-3 (g) (1) ("commission shall publish notice of the approval or denial of site plans in a newspaper having a general circulation in the municipality"). The legislature's use of both "general circulation" and "substantial circulation" in the same statute indicates an intent for the terms to have different meanings. See General Statutes § 8-3 (d) and (g) (1). "[T]he use of . . . different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings . . . ." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850, 937 A.2d 39 (2008).

As to the defendant's sixth argument, that evidence of subscriptions was unnecessary to prove "substantial circulation," the court in the present case stated that it took "into account evidence submitted as it relates to 'circulation,' albeit limited, including not just subscriptions, but individual online sales and access. Having done so, the court [found] that publication did not take place, as required, in a newspaper of substantial circulation."[9]

At oral argument before this court, the defendant clarified that "substantial circulation" should be analyzed not under a "subscription standard," which solely focuses on the number of subscriptions but, rather, according to an "availability standard" in which circulation is defined as "availability." The law does not, however, preclude the court from considering evidence pertaining to subscriptions. See *Fisette* v. *DiPietro*, supra, 28 Conn. App. 383–85 (affirming trial court's reliance

on number of subscriptions to determine whether newspaper had substantial circulation). The defendant further contends that, "[i]n the trial court, the plaintiffs posed only one basic claim regarding The Middletown Press: if there are no subscribers in Fenwick, the paper cannot be one having a substantial circulation in the borough. The plaintiffs' argument is based on the following non sequitur: (1) several Connecticut cases involving 'substantial circulation' were resolved by counting subscriptions; therefore (2) at least some subscriptions must be required. However, a court's finding that subscription data was sufficient does not mean that it was necessary to prove substantial circulation." (Emphasis omitted.) The defendant further argues that "a newspaper that is readily available to residents of a municipality and is well known for its use for public notices provides constructive notice of its contents and thereby fully satisfies the statutory goal. Whether or not residents choose to subscribe should not be a factor in the analysis." The plaintiffs counter that "[t]here can be no dispute that, based on the evidence submitted by the parties, there are no subscribers in Fenwick to The Middletown Press. Under such circumstances, The Middletown Press cannot be a newspaper having a substantial circulation in Fenwick pursuant to the plain language of the statute."

Regarding the issue of "substantial circulation," the court had before it: (1) DeLuca's affidavit in which he stated that The Middletown Press has zero subscribers in Fenwick; (2) an affidavit of Charles Chadwick, the chairman of the defendant, in which he stated that it was his belief that a substantial portion of Fenwick residents are aware that Fenwick agencies use The Middletown Press for public notices and that such notices are available online without a subscription;[10] and (3) an affidavit of Marilyn Ozols,[11] the zoning enforcement officer of Fenwick, who stated that the legal notices of the defendant's public hearings and decisions historically have been published in The Middletown Press.[12]

The defendant contends that a newspaper may be distributed or disseminated through online availability and that such online availability of The Middletown Press in the present case constitutes substantial circulation. This argument discounts that virtually every newspaper with an accessible online presence could be considered generally available in any municipality with Internet access. "Substantial circulation," according to common usage, requires more than general online availability: it requires, for example, substantial dissemination or distribution of printed material among readers and/or substantial distribution of online information to readers. The court noted that the defendant did not present any evidence of online viewing numbers of The Middletown Press.

As we previously stated, the phrase "substantial circulation" in § 8-3 (d) requires considerable or ample dissemination of the publication to readers. In denying the motion to dismiss, the court noted that it took into account the limited evidence relating to circulation, including subscriptions, and individual online sales and access, and concluded that publication did not take place, as required, in a newspaper of substantial circulation. The court further stated that the defendant did not present any evidence of online viewing numbers of The Middletown Press. As noted previously, the court had before it the same evidence in denying the motion to dismiss as it did in granting the plaintiffs' motion for summary judgment. The stipulated facts and affidavits presented by the parties did not create any genuine issues of material fact. In his affidavit, DeLuca stated that "[n]o households in the Borough of Fenwick, which I understand to be a community within Old Saybrook that serves as a summer home for many and has a population of approximately 52 persons, subscribe to The Middletown Press." The defendant offered no evidence to contradict this. Although the term "substantial circulation" in § 8-3 (d) is relative; see *Fisette* v. *DiPietro*, supra, 28 Conn. App. 384; we agree with the court that there was no genuine issue of material fact that the publication of notice in The Middletown Press did not satisfy that requirement because no Fenwick residents subscribed to The Middletown Press, and evidence of online availability did not alter that determination.

In its seventh argument, the defendant contends that Fenwick's "consistent, well-known use of a readily available newspaper that also allows free online access to its legal notices is the best way 'to notify *constructively* as much of [Fenwick's citizenry] as possible.' The widespread knowledge of Fenwick's choice for legal notices is particularly significant because the great majority of Fenwick's property owners do not live in the borough on a full-time basis . . . and, therefore, have less reason to maintain an annual subscription to *any* local newspaper." (Citation omitted; emphasis in original.) We are not persuaded that this satisfies the requirements under § 8-3 (d).

As we noted in addressing the defendant's second and third arguments, § 8-3 (d) contains express requirements for providing constructive notice. There is nothing in the statute or our case law interpreting it to suggest that the fact that The Middletown Press had been used by Fenwick officials in the past to publish notices and that some Fenwick residents may be aware of such past use satisfies the notice requirement; rather, the requirement is publication in a newspaper having "substantial circulation" within the municipality, or, in other words, a newspaper having a sufficient level of distribution or dissemination to readers throughout a

specified area. The law is well established that there must be strict compliance with this statutory requirement. See *Lauver* v. *Planning & Zoning Commission*, 60 Conn. App. 504, 509, 760 A.2d 513 (2000) ("[s]trict compliance with statutory mandates regarding notice to the public is necessary" (internal quotation marks omitted)); see also *Wilson* v. *Planning & Zoning Commission*, 260 Conn. 399, 400–401, 796 A.2d 1187 (2002) (publication of notice requirement in § 8-3 (d) is mandatory and failure to comply renders zone change void).

In its eighth argument, the defendant highlights some of the potential difficulties[13] with a statutory notice requirement of a specific type of circulation, particularly in the digital age, as it relates to smaller boroughs such as Fenwick. The defendant contends that, "[i]f the trial court's decision were correct, there would be no practical way for Fenwick or other municipalities to safely determine which newspaper it could use for public notices. A municipality cannot compel anyone to purchase or subscribe to a particular newspaper or even to disclose which newspapers they may be reading. In addition, subscribers may come and go, readership statistics may vary widely throughout the year." The defendant notes that the trial court's result is "particularly unworkable for tiny municipalities such as Fenwick, which are entirely residential and have no newspaper sales outlets within their borders."[14]

Such practical difficulties encountered by the defendant in meeting its obligation to publish notice in a newspaper having substantial circulation in Fenwick, however, do not absolve it from complying with the language of the statute. Although compliance with the "substantial circulation" requirement by commissions in small boroughs may be difficult, we cannot conclude that it necessarily leads to an absurd result or is unworkable. See *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 21, 12 A.3d 865 (2011) (harsh outcomes of strict adherence to statute not necessarily absurd or unworkable). First, we note that circulation to Fenwick residents may not be entirely impractical. Exhibit 2 to the plaintiffs' surreply to the defendant's motion to dismiss consists of a letter dated February 25, 2020, addressed to the plaintiffs' counsel from Nadine D. McBride, chief financial officer and treasurer of The Day Publishing Company. Notably, McBride wrote that she was in receipt of a subpoena from the plaintiffs' attorney issued to The Day regarding subscription information and that a search of the subscription database reveals that a paper published by Shore Publishing, LLC, of which The Day Publishing Co. is the sole member, reflects distribution to sixteen households in Fenwick.[15] Although we need not decide whether the publication of notice in the paper published by Shore Publishing, LLC, would have met the defendant's statutory obligation, we simply note that The Middletown Press may not be the only option for the defendant.

Second, we recognize that the newspaper industry has undergone significant changes since the legislature first imposed the obligation on municipalities to publish notice in a newspaper with "substantial circulation" in the municipality. We also are mindful, of course, that the widespread availability of access to the Internet may justify, from a public policy perspective, permitting a municipality to publish legal notices on its website. Nonetheless, it is within the province of the legislature, and not this court, to make such determinations and to amend § 8-3 (d) if it deems that such changes are necessary or warranted. This court must apply the statute as it is written.

For the foregoing reasons, including the undisputed fact that no Fenwick resident subscribes to The Middletown Press, the trial court properly determined that publication of the amendment to Fenwick's zoning regulations in The Middletown Press failed to satisfy the "substantial circulation" requirement of § 8-3 (d). See, e.g., *Dugan* v. *Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 830 A.2d 752 (2003) ("summary judgment is appropriate only if a fair and reasonable person could conclude only one way" (internal quotation marks omitted)). We, therefore, conclude that the court properly granted the motion for summary judgment as a matter of law.

II

The defendant also claims that, in concluding "that there was not enough other evidence of actual sales to warrant a finding of 'substantial circulation' . . . the trial court effectively reversed the burden of proof." (Citation omitted.) We disagree.

"When a party contests the burden of proof applied by the court, the standard of review is de novo because the matter is a question of law." (Internal quotation marks omitted.) *Wieselman* v. *Hoeniger*, 103 Conn. App. 591, 595–96, 930 A.2d 768, cert. denied, 284 Conn. 930, 934 A.2d 245 (2007).

The defendant contends that, although DeLuca's affidavit "presumably" demonstrates that there were no subscribers to The Middletown Press in Fenwick as of April 1, 2020, it was not sufficient to prove that there were no such subscribers seven months earlier, on July 25, 2019, when notice was published in The Middletown Press, particularly because most of the houses in Fenwick are owner-occupied only in the summer months.[16] Regardless of what standard is applied, that of a motion to dismiss or that of summary judgment, we conclude that the court did not improperly place the burden of proof on the defendant. Under a motion to dismiss standard, the plaintiffs would need to prove that the court did not lack subject matter jurisdiction over their appeal, or, in other words, that their appeal, which was filed more than fifteen days after the publication of

notice in The Middletown Press; see General Statutes § 8-8 (b); was not untimely because the defendant's notice was defective. See General Statutes § 8-8 (r);[17] see, e.g., General Statutes § 8-8 (j) ("Any defendant may, at any time after the return date of appeal, make a motion to dismiss the appeal. If the basis of the motion is a claim that the appellant lacks standing to appeal, the appellant shall have the burden of proving standing."). Under a summary judgment standard, the plaintiffs, as the moving parties, have the burden of showing an absence of a genuine issue of material fact and entitlement to judgment as a matter of law, and the defendant, as the nonmovant, has the burden of establishing a genuine issue of material fact by, in this case, reciting specific facts to contradict those stated in DeLuca's affidavit that was submitted by the plaintiffs. See *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 645–46, 127 A.3d 257 (2015).

The court did not require the defendant to prove substantial circulation. Rather, it considered the evidence presented by the plaintiffs, by way of DeLuca's affidavit, that there were no subscribers to The Middletown Press in Fenwick to be sufficient to demonstrate a lack of substantial circulation. It then determined that the evidence presented by the defendant regarding, inter alia, the online availability of The Middletown Press did not change that determination by raising a genuine issue of material fact.[18] Additionally, it is too speculative to assume that, because DeLuca's affidavit was signed and dated April 1, 2020, his statement that no Fenwick residents subscribe to The Middletown Press could reasonably be interpreted to mean that some residents of Fenwick may have subscribed to The Middletown Press in July, 2019. See, e.g., *Tuccio Development, Inc.* v. *Neumann*, 111 Conn. App. 588, 594, 960 A.2d 1071 (2008) ("a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment" (internal quotation marks omitted)).

The defendant further argues that nothing in DeLuca's affidavit addresses the issue "that at least some Fenwick property owners were subscribing [to The Middletown Press] with a non-Fenwick address," and the plaintiffs "made no apparent effort to contact the nearest local newspaper sales outlets to determine whether Fenwick residents or homeowners may regularly purchase The Middletown Press at those outlets." The burden was on the defendant to create a genuine issue of material fact by offering facts to challenge those in DeLuca's affidavit. The court properly determined that the plaintiffs satisfied their burden by virtue of DeLuca's affidavit, and the defendant did not provide affidavits or other evidence in opposing the motion for summary judgment to create a genuine issue of material fact. The defendant's claim that the court improperly shifted the burden of proof fails.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] General Statutes § 8-3 (d) provides in relevant part: "Zoning regulations . . . or changes therein shall become effective at such time as is fixed by the zoning commission, provided a copy of such regulation . . . or change shall be filed in the office of the . . . borough clerk . . . and notice of the decision of such commission shall have been published in a newspaper having a substantial circulation in the municipality before such effective date. . . ."

[2] 9 Pettipaug, LLC, and Eniotna, LLP, are business entities that own houses in the borough of Fenwick.

[3] On September 24, 2020, the parties filed a signed joint stipulation of facts.

[4] General Statutes § 8-8 (b) provides in relevant part: "[A]ny person aggrieved by any decision of a board . . . may take an appeal . . . . The appeal shall be commenced by service of process . . . within fifteen days from the date that notice of the decision was published as required by the general statutes. . . ."

[5] The plaintiffs attached DeLuca's affidavit to their memorandum in opposition to the defendant's motion to dismiss. The Hearst Connecticut Media Group is the operating unit of newspapers that are published by Hearst Media Services Connecticut, LLC (Hearst Connecticut), which is a wholly owned indirect subsidiary of the Hearst Corporation. Hearst Connecticut publishes eight daily newspapers, including The Middletown Press.

[6] "The law of the case doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . [O]ne judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the same case, upon a question of law." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Henderson* v. *Lagoudis*, 148 Conn. App. 330, 338–39, 85 A.3d 53 (2014).

[7] The parties stipulated that Fenwick has been a legally established borough since the 1800s. There is no dispute that Fenwick is a distinct municipality from Old Saybrook.

[8] General Statutes § 1-1 (a) provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly."

General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

[9] The defendant submitted affidavits from Charles Chadwick, the chairman of the defendant, and Marilyn Ozols, the zoning enforcement officer of Fenwick, averring that The Middletown Press was available online. As stated by the court regarding online access to notices in The Middletown Press, "[n]o evidence relating to the viewing numbers was provided."

[10] The defendant attached to its reply memorandum to the plaintiffs' objection to its motion to dismiss the affidavit of Chadwick, in which he stated that, because the residents of "56.8 percent of the homes within [Fenwick]" have served on Fenwick agencies and because the legal notices of all [Fenwick] agencies have been published in The Middletown Press, it was his "belief that a substantial portion of the population of [Fenwick] is aware that The Middletown Press is the newspaper [Fenwick] uses for public notices."

[11] Ozols' affidavit was attached to the defendant's reply to the plaintiffs' objection to its motion to dismiss.

[12] The court also had before it the parties' stipulation of facts, affidavits of members of the plaintiffs regarding ownership of property in Fenwick, an affidavit concerning the circulation of the Hartford Courant, and a letter regarding the circulation in Fenwick of, inter alia, Shore Publishing, LLC.

[13] See L. Rieders, note, "Old Principles, New Technology, and the Future of Notice in Newspapers," 38 Hofstra L. Rev. 1009, 1035–36 (2010) (discussing

difficulties encountered by online newspapers in attempting to satisfy statutory notice requirements of specific circulation).

[14] Ozols stated in her affidavit that Fenwick is entirely residential, that there are no places within Fenwick at which any newspaper is sold, that "[m]ost of the homes within the Borough of Fenwick are second homes, and [that] few of the Borough's residents occupy their homes on a year-round basis." Chadwick stated in his affidavit that there are sixty-seven seasonal homes in Fenwick and that fourteen homes are occupied year-round.

[15] The evidence of the existence of the paper published by Shore Publishing, LLC, does not affect our analysis. We mention this evidence simply to show that the requirement of publication in a newspaper of substantial circulation, although perhaps difficult in small boroughs, does not necessarily lead to an absurd or unworkable result.

[16] In their memorandum of law in support of their motion for summary judgment, the plaintiffs incorporated, among other things, their objection to the motion to dismiss "and supporting documents." One such supporting document was the affidavit of DeLuca, which was signed and dated April 1, 2020, in which DeLuca stated that no households in Fenwick subscribe to The Middletown Press.

[17] "Jurisdiction over appeals from the decisions of zoning entities is conferred on the Superior Court by statute. . . . [I]f the appeal period has expired when an appeal is filed the trial court lacks jurisdiction over the appeal." (Citations omitted; internal quotation marks omitted.) *Windsor Locks Associates* v. *Planning & Zoning Commission*, 90 Conn. App. 242, 248, 876 A.2d 614 (2005). "A statutory right to appeal may be taken advantage of only by strict compliance with the statutory provisions by which it is created. . . . If the appeal period has expired when an appeal is filed the trial court lacks jurisdiction over the appeal." (Citation omitted; internal quotation marks omitted.) *Cardoza* v. *Zoning Commission*, 211 Conn. 78, 82, 557 A.2d 545 (1989).

[18] The parties stated in their stipulation that the court could consider the affidavits submitted by both parties.