CARL SHANAHAN *v.* DEPARTMENT OF ENVIRONMENTAL PROTECTION ET AL.
(SC 18575)

Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Argued January 5—officially released July 24, 2012

James A. Wade, with whom was *John P. Casey*, for the appellant (plaintiff).

Mary K. Lenehan, assistant attorney general, with whom were *David Wrinn*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, and *Carmel Motherway*, assistant attorney general, for the appellees (defendants).

Opinion

HARPER, J. This appeal raises several issues regarding the scope of the jurisdiction of the named defendant, the department of environmental protection (department),[1] to regulate activity "in the tidal, coastal or navigable waters of the state waterward of the high tide line." General Statutes § 22a-359 (a);[2] see General Statutes § 22a-361 (a) (1).[3] The plaintiff, Carl Shanahan, appeals[4] from the trial court's judgment denying his administrative appeal contesting the department's order directing the plaintiff to remove a seawall that he had constructed on his property along Long Island Sound without having obtained a permit in accordance with § 22a-361. The plaintiff specifically contends that: (1) the trial court improperly concluded that substantial evidence supported the department's determination that the seawall lies "waterward of the high tide line" and is thus within the jurisdiction of the department; (2) the trial court improperly concluded that "high tide line," as defined in § 22a-359, is not unconstitutionally vague; (3) the trial court improperly denied the plaintiff's motion to obtain discovery with respect to his claim of unconstitutional vagueness; and (4) even if substantial evidence shows that portions of the seawall were built waterward of the high tide line, the trial court improperly failed to consider whether the department's jurisdiction to order the plaintiff to remove the seawall extends to portions of the seawall that have not been shown to be "waterward of the high tide line." We conclude that the trial court properly concluded that substantial evidence shows at least part of the plaintiff's seawall was constructed waterward of the high tide line, properly concluded that § 22a-359 is not unconstitutionally vague as applied to the plaintiff's seawall, and properly denied the plaintiff's discovery request. We further conclude that, in the absence of a finding by the department that the entire seawall was constructed waterward of the high tide line, the trial court improperly determined that the department had jurisdiction under § 22a-361 to order removal of the entire seawall. Accordingly, we affirm in part and reverse in part the trial court's judgment with direction to remand the case to the department for further proceedings.

To provide context for the claims raised in the present case and the specific facts relevant to those claims, we begin by briefly outlining the contours of the statutory scheme governing activities along the Connecticut coastline in order to protect coastal resources. First, the legislature has enumerated several activities that are subject to regulation by the department if conducted "waterward of the high tide line." General Statutes § 22a-359 (a); see General Statutes § 22a-361 (a) (1). Specifically, § 22a-361 (a) (1) directs a property owner seeking, inter alia, to "erect any structure," "maintain any structure" or "carry out any work incidental

thereto" along the Connecticut coast "waterward of the high tide line" to obtain a permit from the commissioner of environmental protection (commissioner) and agree to carry out any conditions deemed necessary to the implementation of that permit. See footnote 3 of this opinion. Any violation of this provision is considered a public nuisance for which the department may issue a cease and desist order.[5] General Statutes §§ 22a-362 and 22a-363f. The term "high tide line" as used in § 22a-361 (a) is statutorily defined as "a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide. The mark may be determined by (1) a line of oil or scum along shore objects, (2) a more or less continuous deposit of fine shell or debris on the foreshore or berm, (3) physical markings or characteristics, vegetation lines, tidal gauge, or (4) by any other suitable means delineating the general height reached by a rising tide. The term includes spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm." General Statutes § 22a-359 (c).

In addition to the requirements of § 22a-361, coastal activity may also be subject to regulation under the Coastal Management Act (act), General Statutes § 22a-90 et seq. Among the act's goals is the management of coastal bluffs, which play an integral role in maintaining a balanced pattern of erosion and sedimentation along the coastline. General Statutes § 22a-92 (b) (2) (A). In addition to providing a significant source of sediment for other coastal features, bluffs also support unique plant communities, provide wildlife habitats, and protect against coastal flooding. The act's policies specifically declare that the natural contours of bluffs should be preserved and that activities altering the natural supply of sediment from bluffs should be disapproved. General Statutes § 22a-92 (b) (2) (A). The act establishes a "coastal boundary"; General Statutes § 22a-94 (b); and requires property owners wishing to construct, inter alia, any shoreline flood and erosion control structure that is within the coastal boundary to submit a coastal site plan for approval by the local zoning authority.[6] General Statutes § 22a-109.

With this regulatory framework in mind, we turn to the specific facts as found by the department or revealed by the record and the procedural history relevant to this appeal. The plaintiff's residence property, which lies along Long Island Sound in the city of Stamford (city), sits on top of a prominent bluff that rises approximately forty feet from sea level. In 1995, at the plaintiff's request, a department analyst visited the property and informed the plaintiff that his land, which

at the time was partially protected by an existing seawall running along approximately 125 of its 290 feet of waterfront, had been subject to significant erosion over the past several decades. The department analyst further indicated that, although the plaintiff's house was not presently in danger and the policies articulated in the act discouraged structural erosion control measures under such circumstances, a structural solution may be appropriate in the plaintiff's case. The analyst recommended that the plaintiff hire a consulting engineer to further analyze the conditions at the site in preparation for a preapplication meeting with the department regarding potential solutions to the erosion problem.

In 2004, the plaintiff hired Rocco V. D'Andrea, Inc. (D'Andrea), and Ocean and Coastal Consultants, Inc. (Coastal Consultants), to survey the property and to design an erosion control plan, respectively. The first aspect of the resulting plan was to seek a permit from the department to repair the existing seawall, situated at the north end of the plaintiff's property, which undisputedly lies waterward of the high tide line. A survey accompanying the permit application depicted a "high tide line" at an elevation of 5.7 feet;[7] the survey further reflected this line meeting the existing seawall at its southern edge and following an irregular course southward.[8] The 5.7 foot elevation number, drawn from data published by the United States Army Corps of Engineers, reflected the predicted height of the highest yearly occurring tidal flood. The department approved the proposed repairs and included a copy of the survey in its certificate of permission.

Following the approval of repairs to the existing seawall, the plaintiff, representatives from D'Andrea and Coastal Consultants, a department liaison, and a member of the city's zoning board (board) met on the plaintiff's property to discuss further erosion control measures. After the meeting, the department liaison informed the plaintiff that the erosion control measure proposed by Coastal Consultants, which involved armoring the bluff with large rocks arranged in tiers to form a slope, was inconsistent with the requirements of the act because it would not preserve the existing contours of the bluff and would significantly reduce the natural rate of erosion, thereby failing to maintain the natural relationship between erosion and deposit of material.

Subsequent to this exchange, the plaintiff, again aided by D'Andrea and Coastal Consultants, developed an erosion control plan that did not revise the structure to remedy the defects identified by the department liaison but instead was intended to strategically position the stone structure *landward* of the high tide line and thus outside of the department's jurisdiction. In developing this plan, D'Andrea conducted an additional survey of the plaintiff's property, which reflected a high

tide line consistent with the 5.7 foot elevation figure on which the plaintiff previously had relied.[9] According to D'Andrea, this high tide line reflected the "predicted" or "mathematical tides, which under average weather conditions we should expect to see" as extrapolated from nineteen years of observed tidal data provided by the National Oceanic and Atmospheric Administration. D'Andrea concluded that the level of atmospheric pressure could cause actual water levels to depart several inches above or below the predicted tidal level, such that a shift from low to high atmospheric pressure could result in a swing in water levels of up to one foot. The nineteen years of data taken from the National Oceanic and Atmospheric Administration, however, effectively "smoothes out" these meteorological variances, which, according to D'Andrea, are treated as "storm surge" that should not be factored into the definition of the high tide line. In accordance with this view that all departures from the predicted tide level represent disqualified storm surge, D'Andrea characterized the observation based means of measuring the high tide line contemplated by § 22a-359—including observation of debris lines, marks on rocks and direct observation of water levels—as disfavored determinants of last resort.

Relying on D'Andrea's survey, Coastal Consultants developed a plan that called for building a new seawall directly south of the existing seawall, but set back ten feet landward from the waterward edge of the existing seawall, at an elevation of 6.8 feet. Because the southern end of the existing seawall was situated at an elevation of 5.7 feet, the plan called for the two seawalls to be joined by an additional wall running landward from the southern edge of the existing seawall to the northern edge of the new seawall.

The plaintiff thereafter filed Coastal Consultants' coastal site plan with the board for its approval. In accordance with General Statutes § 22a-109 (d), a copy of the site plan was referred to the department for its comments and recommendations. In response, the department liaison sent a letter to the board, copied to Coastal Consultants, urging the board to reject the proposed plan due to its numerous inconsistencies with the act. The letter also disputed the high tide line reflected on the plan, citing tide gauge records showing that high tides in the area of the plaintiff's property rose to a much higher elevation than indicated on the plaintiff's plans and contended that the high tide line would have to be reevaluated on the basis of actual conditions at the site. At a subsequent meeting of the board, the department liaison spoke against the plan, again expressing a view that the plaintiff's plans underestimated the location of the high tide line, which, according to the department's data and observations, was likely actually to lie at an elevation of 6.5 or 7 feet rather than 5.7 feet as reflected in the plaintiff's plans.

Following this meeting, the plaintiff had conversations with certain members of the board that led him to believe the board would approve the site plan. The board in fact drafted a motion approving the plaintiff's plan, but that approval was to be subject to a number of conditions, including that the plaintiff submit revised plans placing the structure at an elevation of at least 6.8 feet, that the plaintiff's design engineer certify that the plans meet certain criteria, that the design engineer supervise the construction and certify that it conforms to the approved plan, and that the plaintiff reimburse the city for a peer review of the final plans by an independent consulting engineer. Although the plaintiff claimed to have seen the motion shortly after it was produced, the board never approved the motion or sent notice to the plaintiff of a decision on his site plan.[10]

Approximately one month after the board meeting, apparently in anticipation of the board's approval of the site plan, the plaintiff commissioned D'Andrea to place a line of stakes at an elevation of 6.8 feet in the southern part of his property where the plan called for the new seawall to be built and to produce a survey reflecting this line.[11] Shortly thereafter, despite the fact that he had not yet received written notice of the board's decision, the plaintiff authorized a construction contractor, E.T. Kennedy Coastal Construction (Kennedy), to begin construction of the seawall. In constructing the seawall, Kennedy plainly disregarded Coastal Consultants' site plan for which the plaintiff anticipated receiving approval. Kennedy had refused to build the seawall to the plan's specifications partially on the ground that, in its view, the ten foot setback from the existing seawall called for would have created sharp angles that would have been vulnerable to a strong storm surge. According to Kennedy, the seawall it constructed waterward of that depicted in Coastal Consultants' plan, with the plaintiff's permission, was structurally superior because it curved gradually seaward to meet the existing wall at its southern seaward edge. The new seawall also differed from Coastal Consultants' plan of armoring the bluff with large rocks arranged in tiers to form a slope in that it is composed of interlocking boulders weighing five to eight tons, and is steeply pitched, but not vertical. For additional protection, large boulders also were placed on the waterfront side of the seawall. Kennedy recognized that it had built the seawall at, or landward of, the stakes placed by D'Andrea at an elevation of 6.8 feet. Kennedy did not have finalized drawings from which it built the seawall, it did not have an engineer at the site during construction,[12] and it did not utilize any survey while building the seawall.

Several months after the board meeting—and after the plaintiff had begun the unauthorized construction of the new seawall—an independent consulting engineer

hired by the board issued its peer review report of the coastal site plan submitted by the plaintiff for the board's approval. The report concluded, inter alia, that the high tide line at the plaintiff's property lies at a much higher elevation than the 5.7 feet indicated in the plaintiff's site plan and that historic tidal records indicate that tide heights exceeded 5.7 feet approximately twenty-two times during the previous year. According to the report, this historic data, coupled with observation of shoreline debris, indicated that the high tide line would be more appropriately placed at an elevation of approximately 6.8 feet.[13] Soon after issuing this report to the board, a member of the independent consulting firm alerted the department that the plaintiff had begun construction work on the seawall.

In response to this information, a department liaison visited the plaintiff's property and observed that substantial portions of the seawall had already been completed, that the seawall being built was waterward of the location indicated in the coastal site plan submitted to the board and that water could be seen up against the seawall. The department liaison took a number of photographs, some of which show pools of water touching the part of the seawall depicted or seaweed at the base of the part of the seawall depicted. Approximately one week later, a second department official visited the plaintiff's property and determined, based on the water level and the presence of a line of debris against the seawall and tidally influenced vegetation on either side of the property, that the seawall had been constructed waterward of the high tide line. Photographs taken by the department at this time also show water touching the part of the seawall depicted and the presence of plant matter lodged in the seawall.

Following these events, the department official issued a notice of violation instructing the plaintiff to submit "a plan for review and approval to remove the unauthorized stone seawall and restore the pre-existing vegetated bluff . . . ." In response, the plaintiff submitted two surveys of the newly constructed seawall, asserting that these surveys were evidence that the wall had been constructed at an elevation of 6.8 feet, landward of the high tide line, and was therefore outside of the department's jurisdiction. Despite this assertion, both surveys plainly depict a portion of the new seawall lying waterward of the marked high tide line of 5.7 feet; one of the surveys, conducted two months after the first, depicts a significant portion of the seawall—approximately 90 of the 160 feet—as lying waterward of the marked high tide line.[14] Department officers also conducted several site visits subsequent to the issuance of the notice of violation; photographs taken on these occasions depict water touching the seawall for much of its length, which, in the department's view, confirmed that the seawall lay waterward of the high tide line. On one occasion, a department official observed water,

approximately 1 foot deep, along 80 to 100 feet of the seawall. Correspondence from the plaintiff's counsel following the department's issuance of the notice of violation contended that any portions of the seawall then below an elevation of 6.8 feet had been built outside of the department's jurisdiction but that the elevation of portions of the property in front of the seawall had been altered postconstruction by changes in the contours of the shoreline and by certain actions the plaintiff had undertaken following visits by the department officials.[15]

Approximately one month after the issuance of the notice of violation, the department issued an order directing the plaintiff to submit for review and approval a written plan for removal of the seawall and restoration of the site. As the source of its jurisdiction and authority, the order cited General Statutes §§ 22a-6[16] and 22a-361 (a) (1).[17] The plaintiff appealed from the removal order, and an administrative hearing ensued. At the hearing, the plaintiff asserted that the seawall was built landward of the high tide line and thus outside of the department's jurisdiction, that the definition of high tide line in § 22a-359 conferred an unreasonable degree of discretion on the department, that the department had acted arbitrarily and capriciously in determining that the seawall was located waterward of the high tide line, and that, even if part of the seawall does lie waterward of the high tide line, the department's jurisdiction does not extend to portions of the seawall that are not waterward of the high tide line.

The department hearing officer sustained the order. In concluding that the department had jurisdiction to issue the order, the officer first found that the seawall had been built substantially waterward of the high tide line, citing testimony by department officials and photographic evidence credibly establishing that "water comes in contact with almost the entire wall on a regular basis," as well as the plaintiff's own surveys demonstrating that 70 to 92 feet of the 120 foot seawall lies waterward of the high tide line. The hearing officer did not credit either the plaintiff's testimony that the seawall had been built at the planned elevation of 6.8 feet or that topographical shifts after construction were responsible for causing water to reach the seawall. The hearing officer declined to consider the plaintiff's constitutional challenge to the statute; see *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 64, 808 A.2d 1107 (2002) (citing "well established common-law principle that administrative agencies lack the authority to determine constitutional questions"); and further concluded that the department did not act arbitrarily. Finally, the hearing officer concluded that the department's jurisdiction was not limited to only those portions of the seawall waterward of the high tide line on the ground that, in light of work performed during construction of the entire wall waterward of the high tide, the depart-

ment can exercise jurisdiction pursuant to the "work incidental thereto" part of § 22a-361 (a) (1).

The plaintiff then appealed from the department's decision to the Superior Court, naming the department and the attorney general as defendants and claiming that: in light of evidence that properly could be deemed probative, substantial evidence did not support the department's determination; the "high tide line" standard under § 22a-359 is unconstitutionally vague, as evidenced, inter alia, by the more concretely objective standard under its federal counterpart; and the removal order should be held in abeyance pending a determination of what parts of the seawall are waterward of the high tide line because the department lacks jurisdiction over those parts of the seawall that are landward of the high tide line. While that appeal was pending, the plaintiff moved for permission to take a deposition of certain department employees in order to supplement the record and to develop a factual background for his claim that § 22a-359 is unconstitutionally vague. The court denied the motion on the ground that the record already contained sufficient testimony and documentary evidence with respect to the relevant statutes.

On appeal to the Superior Court pursuant to General Statutes § 4-183 (a), the court concluded that the department had produced substantial evidence supporting its jurisdiction. In so concluding, the court rejected the plaintiff's contention that determination of the location of the high tide line required expert testimony and that the department was estopped from claiming that the high tide line lies above 5.7 feet because the department had accepted this figure in an earlier application submitted by the plaintiff relating to the existing seawall. The court further concluded that § 22a-359 is not unconstitutionally vague because a person of ordinary intelligence would know, based on the objectively obvious indicia referred to in the statute, where the high tide line hit and that the department's requisite site visits would provide concrete confirmation of that fact. With respect to the issue of the department's jurisdiction over those portions of the seawall that are landward of the high tide line, the court concluded that the plaintiff's claim that proceedings could not continue until the department determined which portions of the seawall lie waterward of the high tide line was premature because the plaintiff had not yet submitted a plan to the department that would determine the extent of the removal of the wall required. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the trial court improperly concluded that substantial evidence supported the department's determination that the plaintiff's seawall was constructed waterward of the high tide line and therefore falls within the department's jurisdiction. The

plaintiff specifically contends that: (1) substantial evidence shows the seawall was not constructed waterward of the high tide line and evidence to the contrary is not reliable; (2) the department improperly rejected expert testimony presented by the plaintiff; and (3) the department should be estopped from asserting that the high tide line lies anywhere other than an elevation of 5.7 feet in light of its approval of the plaintiff's application to repair the preexisting seawall that reflected that high tide line elevation. We disagree with the plaintiff.

Before addressing the substance of the plaintiff's claims, we reiterate the well established standards governing our highly deferential review of administrative agency decisions regarding questions of fact. "The substantial evidence rule governs judicial review of administrative fact-finding under [the Uniform Administrative Procedure Act]. General Statutes § 4-183 (j) (5) and (6). Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . . The burden is on the [plaintiff] to demonstrate that the [department's] factual conclusions were not supported by the weight of substantial evidence on the whole record. (Citations omitted; internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 124–25, 830 A.2d 1121 (2003).

A

The plaintiff's primary contention on appeal is that the newly constructed seawall on his property was not built waterward of the " 'high tide line' " as defined by § 22a-359 (c). At the outset, we note that, even if we were to assume that all of the plaintiff's contentions regarding the location of the high tide line and the location of his seawall are correct, this very evidence appears to place a portion of the seawall waterward of the high tide line. In his application to repair the existing seawall, work that he acknowledged would occur waterward of the high tide line, the plaintiff indicated that the southern edge of the existing seawall met the high tide line of 5.7 feet. The new seawall constructed by the plaintiff, as indicated by the plaintiff's subsequent surveys and his contractor's testimony, also meets the existing seawall at its southern edge and slopes landward more gradually than the high tide line depicted in the surveys. Thus, as *all* of the "as-built" surveys presented by the plaintiff indicate, a length of seawall

of *at least* approximately twenty feet lies seaward of the high tide line claimed by the plaintiff.[18] We therefore find substantial evidence, even in the plaintiff's own submissions, that a portion of the seawall was constructed waterward of the high tide line.

Further demonstrating that at least portions of the seawall lie waterward of the high tide line, the department has provided testimony and photographic and video evidence, obtained from multiple site visits, not only of debris and plant matter lodged in the seawall, but also of seawater coming into direct contact with the seawall. Because these facts are consistent with the criteria deemed relevant under § 22a-359, these facts objectively demonstrate that portions of the new seawall are waterward of the high tide line. See General Statutes § 22a-359 (c) ("'[H]igh tide line' means a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide. The mark may be determined by [1] a line of oil or scum along shore objects, [2] a more or less continuous deposit of fine shell or debris on the foreshore or berm, [3] physical markings or characteristics, vegetation lines, tidal gauge, or [4] by any other suitable means delineating the general height reached by a rising tide.").

In response to this evidence, the plaintiff makes two objections, which we consider in turn. First, the plaintiff claims that the visual observations of department officials, which were made at several discrete moments in time, lack sufficient context to provide substantial evidence of the location of the high tide line, particularly in the face of competing long-term statistical data presented by the plaintiff. We agree with the plaintiff that the observed height of the water at any given moment is not sufficient to determine "the maximum height reached by a rising tide"; General Statutes § 22a-359 (c); but the plaintiff fails to appreciate that the uncertainty operates only in one direction: the maximum height of the water might always be higher than what is observed, but it must be *at least* as high as what is observed under nonextreme weather conditions.[19]

By its plain meaning, the term "high tide line" as used in § 22a-359 refers to the highest point at which the water's surface intersects with the land over the course of the entire yearly tidal cycle, excluding only the extraordinary conditions created by a hurricane or other intense storm. The definition expressly extends the line landward to include locations that come into contact with the ocean *only* during the single highest tide of the year. Further, the provision's explicit exclusion of intense storms from the calculation belies any suggestion that water heights associated with more ordinary meteorologically influenced variability are also implicitly excluded. From this definition we draw

the inescapable inference that if, absent intense storm activity, the water level at high tide *ever* reaches a given location, that location is *necessarily* waterward of the high tide line as defined by § 22a-359 (c). The photographic and video evidence presented by the department provides sufficient context to show that no hurricane or other intense storm was responsible for the water levels observed on those site visits. Because the plaintiff's argument is predicated on the improper assumption that ordinary meteorological variations that affect water level are not excluded from the statutory definition of the high tide line, his argument that the department's observations cannot constitute substantial evidence similarly fails.

Second, the plaintiff asserts that changes over time have altered the elevation of the land at which the seawall was built and that these changes call into question the probative value of the department's observations of water coming into contact with the seawall. Although the plaintiff's own submissions similarly indicate that seawater comes into contact with the seawall—indeed, as-built surveys submitted by the plaintiff show approximately seventy to ninety feet of the seawall waterward of even the high tide line claimed by the plaintiff—he contends that the seawall was in fact built *outside* of the department's jurisdiction and that it was not until the plaintiff undertook action at the direction of the department that water ever reached the seawall.

The record reveals the following evidence proffered by the plaintiff with respect to this issue. According to testimony by the plaintiff, Jeff Westermeyer, a department official, visited the plaintiff's property approximately one month prior to his issuance of the notice of violation. Westermeyer called the plaintiff following that visit and informed him that some large boulders that had been placed in front of the seawall were clearly waterward of the high tide line and would have to be removed. The plaintiff then instructed his contractor to remove the boulders. Following this removal of material and some storm activity, the plaintiff claims, the topography of the land in front of the seawall shifted, allowing water to come into contact with the seawall. This contention is supported by the testimony of the plaintiff's contractor that water did not ever touch the seawall during construction, but that, after the removal of the boulders and the subsequent storm activity, water did begin to touch the seawall when the project was nearly complete. The plaintiff's surveyor, D'Andrea, also submitted surveys purporting to show that shifting topography waterward of the seawall was responsible for the elevation changes claimed by the plaintiff.

We agree with the plaintiff that a structure originally built outside of the department's jurisdiction would not become subject to a removal order simply because shift-

ing topography brought the structure waterward of the high tide line;[20] however, the hearing officer was free to properly conclude that such is not the case here. Photographic evidence presented by the department demonstrates that water and debris could be seen up against the seawall even during the relatively early stages of its construction, prior to the claimed disruption of the land in front of the seawall. This photographic evidence is consistent with the plaintiff's survey, taken while the seawall was being constructed, that shows a portion of the seawall waterward even of the high tide line marked on that survey. These facts alone are sufficient to render the plaintiff's theory regarding the shifting topography in front of the seawall irrelevant to the question of whether a portion of the seawall was built waterward of the high tide line. Moreover, in light of the evidence provided by the department consistently showing water touching the seawall, the hearing officer was free to—and did—reject the plaintiff's evidence of topographic shifts as unconvincing.

To the extent that the developments surrounding the plaintiff's placement and subsequent removal of boulders waterward of the high tide line are relevant, they are only to exemplify why a regulatory permitting process provides necessary environmental safeguards. As the plaintiff's contractor acknowledged, in removing the offending boulders with an excavator bucket, which he described as "not dentistry," he displaced preexisting material on the shoreline. When asked whether he could state with precision how much shoreline material was moved, he replied, "[n]o precision, I can't tell you." By contrast, the notice of violation, issued several weeks after the plaintiff claimed he had the boulders removed, specifically instructed the plaintiff to submit "a plan for review and approval to remove the unauthorized stone seawall and restore the pre-existing vegetated bluff . . . ." Had the plaintiff's project complied with planning and review requirements at any point, he would not have proceeded in such a destructive and incautious manner.

B

The plaintiff also claims that the administrative hearing officer improperly rejected the expert testimony he presented regarding the location of the high tide line, when the department presented no expert testimony to conclusively establish that fact. The plaintiff specifically contends that, in order to determine the department's jurisdiction, there first must be a determination of the high tide line, which is a technically complex matter requiring expert evidence, and then that line must be related to the location of the seawall. Only when supported by such technical determinations, according to the plaintiff, would visual observations of physical evidence, such as pools of water and tidal

vegetation on the seawall, be relevant. We disagree.

The plaintiff's argument originates from a mistaken premise: the critical question in the present case is not, as the plaintiff suggests, "where is the high tide line?" but, rather, "was this seawall constructed waterward of the high tide line?" In this case, the numerous photographs showing direct evidence of water coming into contact with the seawall and the multitude of surveys of the plaintiff's property consistently showing at least part of the seawall waterward of even the 5.7 foot elevation claimed by the plaintiff to be the high tide line provide more than sufficient nontechnical evidence to determine that the seawall lies waterward of the high tide line.

We recognize that, although the statutorily approved indicators of the high tide line—including oil or scum along shore objects, more or less continuous deposits of fine shell or debris, physical markings or characteristics, vegetation lines and tidal gauge—do not necessarily require specialized expertise for determination, in some cases technical sophistication may be required to evaluate conflicting evidence regarding the ambiguous implications of these indicators, particularly when it is not possible directly to observe that water comes into contact with a given spot. Had the plaintiff's seawall been constructed ten feet landward of the existing seawall, as proposed in the plans submitted to the board, we would perhaps be faced with such a hard case. In the case of the seawall as actually built, we plainly are not. Thus, although the parties in this case presented conflicting evidence, some of which was technical in nature, regarding the presence of tidal vegetation at the location where the seawall was built and regarding the reliability of several tidal measurements offered by the department indicating a high tide line well above 5.7 feet, the hearing officer did not need to rely on such evidence to reliably determine that the plaintiff's seawall was constructed waterward of the high tide line.

C

The plaintiff next claims that, because the department approved the plaintiff's earlier application to repair the existing seawall, which included a survey situating the high tide line at 5.7 feet, the department is now estopped from claiming that the high tide line lies landward of that elevation. We disagree.

"There are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done. . . . In addition, estoppel against a public agency is limited and may be invoked: (1) only with great caution; (2) only when the

action in question has been induced by an agent having authority in such matters; and (3) only when special circumstances make it highly inequitable or oppressive not to estop the agency. . . . As noted, this exception applies where the party claiming estoppel would be subjected to substantial loss if the public agency were permitted to negate the acts of its agents." (Citation omitted; internal quotation marks omitted.) *Fadner* v. *Commissioner of Revenue Services*, 281 Conn. 719, 726, 917 A.2d 540 (2007). The plaintiff plainly fails to satisfy these elements.

First, there is no evidence that the department intended to induce the plaintiff to believe that the high tide line on his property lies at 5.7 feet. As evidence of such intent, the plaintiff points only to the fact that the department incorporated into a permit to repair the existing seawall a site plan, provided by the plaintiff, on which the high tide line is marked as 5.7 feet. The location of the high tide line, however, was not at issue in the plaintiff's prior application because the plaintiff acknowledged that the work was to be performed waterward of the high tide line. It is therefore far from certain that the department evaluated, let alone affirmatively declared, the precise location of the claimed high tide line in approving the project.

Second, the record makes quite clear that the department did not intend to induce, or even allow, the plaintiff to act, for purposes of constructing a new seawall, in reliance upon the claimed 5.7 foot high tide line. Well before construction on the plaintiff's seawall began, the department expressed its disapproval of the proposed project and contested the plaintiff's assertion that the high tide line lies at 5.7 feet. Most notably, in opposing the project's approval by the board at its meeting, the department explicitly contended that the high tide line lies at a far higher elevation. The plaintiff was therefore on notice, before beginning his unpermitted construction, that the department did not agree that the high tide line at the plaintiff's property fell at an elevation of 5.7 feet. Rather than attempting in good faith to resolve this clear discrepancy between the department's asserted high tide line and his own, the plaintiff proceeded not only to disregard the department's claimed authority under § 22a-359, but also to jettison any pretense of complying with clearly applicable permitting requirements of the act, or, for that matter, to abide by the conditions set forth in the permit he erroneously anticipated receiving from the board. The plaintiff thus not only has failed to satisfy the technical requirements of estoppel, but also has failed to show that application of estoppel would be even remotely appropriate as a matter of equity.

II

Having concluded that substantial evidence supported the hearing officer's determination that the plain-

tiff's seawall was constructed waterward of the high tide line, and thus within the department's jurisdiction, we now consider his claim that the definition of "high tide line" provided in § 22a-359 is unconstitutionally vague. "A statute . . . [that] forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. . . . Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. . . . A statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to [him], the [plaintiff] therefore must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . Unless a vagueness claim implicates the first amendment right to free speech, [a] defendant whose conduct clearly comes within a statute's unmistakable core of prohibited conduct may not challenge the statute because it is vague as applied to some hypothetical situation . . . ." (Citation omitted; internal quotation marks omitted.) *State ex rel. Gregan* v. *Koczur*, 287 Conn. 145, 156–57, 947 A.2d 282 (2008).

The plaintiff cannot show beyond a reasonable doubt that he lacked notice that he was constructing a seawall at least partially waterward of the "high tide line" as defined by § 22a-359 (c) or that he was the victim of arbitrary and discriminatory enforcement of that statutory term. Indeed, it is clear from the facts of this case that the plaintiff took a calculated risk that, notwithstanding his failure to abide by any of the relevant regulatory requirements, he would not suffer negative repercussions.

Turning first to the issue of notice, we reiterate that our inquiry does not primarily contemplate whether, as a general matter, it is difficult to discern the precise location of the high tide line; rather, we must consider whether the plaintiff had adequate notice that § 22a-361 prohibited his building the seawall where he did. "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently

specific to provide fair warning that certain kinds of conduct are prohibited." (Internal quotation marks omitted.) *State* v. *Winot*, 294 Conn. 753, 760, 988 A.2d 188 (2010), quoting *Colten* v. *Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972). Moreover, this constitutional allowance for imprecision even in criminal statutes countenances "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe . . . . Therefore, [c]ivil statutes . . . may survive a vagueness challenge by a lesser degree of specificity than in criminal statutes." (Citation omitted; internal quotation marks omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 575, 964 A.2d 1213 (2009).

In the present case, it is unmistakable that at least part of the plaintiff's seawall was constructed at a location waterward of the high tide line. Specifically, as discussed in part I A of this opinion, it is abundantly clear that a portion of the new seawall was built well waterward of even the conservative high tide line claimed by the plaintiff, and § 22a-361 thus plainly alerted the plaintiff that a permit was required for the work he was conducting. Although he has identified several imprecisions in the statutory definition of the high tide line,[21] because the plaintiff's conduct clearly comes within the unmistakable core of § 22a-361, he may not challenge the statute because it may be vague as applied to some other hypothetical situation. *State ex rel. Gregan* v. *Koczur*, supra, 287 Conn. 156–57.

In addition to the plain applicability of § 22a-361 to at least some of the plaintiff's activities, the facts of this case make clear that the plaintiff has violated the terms of § 22a-361 not because of innocent ignorance or lack of notice, but, rather, because his deliberate efforts to evade the permitting requirements under § 22a-361 were executed ineptly. The plaintiff initially sought to avoid the permitting requirement by constructing a seawall set back approximately ten feet from the 5.7 foot high tide line he believed to mark the limit of the department's jurisdiction. When the department, in opposing the plaintiff's coastal site plan application to the board, asserted that the high tide line lies at an elevation higher than he supposed, the plaintiff—now plainly aware that his proposed behavior was possibly prohibited—did not respond by seeking to clarify the location of the high tide line or by moving his proposed wall even further landward. Instead, defying all reasonable prudence, he jettisoned the plans submitted to the board and proceeded to construct a different, wholly unapproved seawall markedly waterward of the proposed seawall. The "rough idea of fairness" underlying the void for vagueness doctrine; *State* v. *Winot*, supra, 294 Conn. 760; cannot be relied upon to provide warrant for the plaintiff's knowing and egregious disregard of environmental regulations.

Under the second prong of the void for vagueness inquiry, which concerns arbitrary and discriminatory enforcement, the plaintiff contends only that the department improperly changed its position regarding the location of the high tide line by challenging the 5.7 foot high tide line figure it had previously accepted without comment in the plaintiff's previous application for permission to repair his existing seawall. As discussed at greater length in part I C of this opinion addressing the plaintiff's estoppel claim, the plaintiff has not demonstrated that the department ever adopted the 5.7 foot figure. His assertion that the department has arbitrarily enforced the permitting requirement of § 22a-361 is therefore without merit.

The plaintiff also contends that the trial court abused its discretion in denying his motion to supplement the record by presenting additional evidence related to his vagueness challenge. Specifically, the plaintiff contends that, pursuant to § 4-183 (h), the trial court should have permitted him to obtain deposition testimony from department officials relating to discrepancies between the definition of "high tide line" in § 22a-359 and the analogous federal definition. Upon review of the record, it is clear that the plaintiff's claim lacks merit.

Under § 4-183 (h), if "it is shown to the satisfaction of the court that the additional evidence is material . . . the court may order that the additional evidence be taken . . . ." We review the trial court's decision to deny the plaintiff's request to supplement the record for abuse of discretion. *Adriani* v. *Commission on Human Rights & Opportunities*, 220 Conn. 307, 326, 596 A.2d 426 (1991), on appeal after remand, 228 Conn. 545, 636 A.2d 1360 (1994).

The plaintiff asserts on appeal that the excluded deposition testimony was material "because it directly related to [his] constitutional claim." This argument, however, is circular. Moreover, the plaintiff fails to address the trial court's findings that the text of the federal regulation at issue had already been placed in the record, that department officials had already provided testimony with respect to the federal regulation and, most important, that department officials were not required or even capable of asserting binding opinions with respect to federal law. In light of these uncontested determinations, it is clear that the trial court did not abuse its discretion in denying the plaintiff's motion to supplement the record.

III

Having concluded that the department properly found that the plaintiff had violated § 22a-361, we turn finally to the plaintiff's challenge to the scope of the department's order to remedy that violation. The department, relying on §§ 22a-6 and 22a-361, had ordered the plaintiff to submit "a plan to restore the

filled area, which plan shall include provisions for removal of the [sea]wall and restoration of the site."[22] In rejecting the plaintiff's argument that the department may pursue only an enforcement order over that portion of the seawall that is at or below the high tide line, the department hearing officer had noted that § 22a-361 vests the department with jurisdiction over not only structures erected waterward of the high tide line but also "work incidental thereto . . . ." General Statutes § 22a-361 (a) (1). The hearing officer pointed to evidence showing that the tide had interfered with work on the seawall, that the plaintiff had placed boulders along the front of the seawall waterward of the high tide line, and that portions of the beach were removed due to construction of the seawall, and concluded that "this incidental work places the entire [sea]wall within the jurisdiction of the [department]."

On appeal, the plaintiff renews his claims that, because § 22a-361 applies only to activities "waterward of the high tide line," the department's findings of unpermitted activity waterward of the high tide line, even if supported, do not provide a jurisdictional basis for the department to order removal of any portions of the seawall erected landward of that line. The plaintiff claims that ordering such a remedy is therefore an abuse of discretion and contends that further fact finding is required to determine what portions of the seawall are waterward of the high tide line and thus subject to the department's remedial authority. In response, the department asserts that evidence shows that the entire seawall was constructed waterward of the high tide line and that, alternatively, work performed waterward of the high tide line "incidental to" the construction places the entire seawall, including any portions of it that are not themselves waterward of the high tide line, within the department's jurisdiction. We conclude that, in light of the absence of a finding by the department hearing officer that the entire seawall was erected waterward of the high tide line[23] and the department's express and sole reliance on § 22a-361 as the source of its jurisdiction to issue the order, we are compelled to agree with the plaintiff.

Before analyzing the matter at hand, we briefly clarify what is and is not at issue. The department does not claim that the seawall must be viewed as a single structure such that, so long as a substantial part of the seawall is waterward of the high tide line, the entire structure must be viewed as falling within its jurisdiction. Nor does the department contend that the boulders placed in front of the seawall should be deemed integral to the seawall itself such that the location of the boulders should determine whether the seawall is waterward of the high tide line. Rather, the department's claim of jurisdiction rests on a construction of § 22a-361 (a) (1) under which, if in the course of erecting a structure landward of the high tide line, "work inciden-

tal thereto" is performed waterward of the high tide line, both the work conducted and the structure necessarily fall within its jurisdiction under that statute.

The scope of the department's jurisdiction under § 22a-361 (a) presents a question of law. "Cases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010). "[W]e do not afford deference to an agency's interpretation of a statute when, as in the present case, the construction of a statute previously has not been subjected to judicial scrutiny or to a governmental agency's time-tested interpretation . . . . Accordingly, in the present case, we exercise plenary review in accordance with our well established rules of statutory construction." (Citations omitted; internal quotation marks omitted.) *Donahue* v. *Veridiem, Inc.*, 291 Conn. 537, 547, 970 A.2d 630 (2009).[24]

We begin by examining the text of the statutes on which the department's claim of authority rests. As we previously have noted, the department's order relied on §§ 22a-6 and 22a-361 as the source of its authority. Section 22a-6 (a) (3) authorizes the department to, inter alia, "initiate and receive complaints as to any actual or suspected violation of any statute [and] . . . enter orders and institute legal proceedings including, but not limited to, suits for injunctions, for the enforcement of any statute . . . ." The department's authority in this respect arises from—and is therefore limited by—the specific regulatory statute it claims has been violated. The sole statute invoked in the present case, § 22a-361 (a) (1), provides in relevant part: "No person, firm or corporation, public, municipal or private, shall dredge, erect any structure, place any fill, obstruction or encroachment or carry out any work incidental thereto or retain or maintain any structure, dredging or fill, in the tidal, coastal or navigable waters of the state waterward of the high tide line until such person, firm or corporation has submitted an application and has secured from the Commissioner of Environmental Protection a certificate or permit for such work and has agreed to carry out any conditions necessary to the implementation of such certificate or permit. . . ." This statute thus requires a permit or certificate for engaging in any of the specified activities if such activities are undertaken in the designated sites.

Although the phrase "work incidental *thereto*"; (emphasis added); contained in § 22a-361 (a) (1) necessarily refers to one of the enumerated activities that precede that phrase, it is clear from the structure of this provision that the qualification "waterward of the

high tide line" applies equally and independently to each of the regulated activities. Erecting any structure and carrying out any work incidental thereto each represent a distinct violation of the statute, provided that the work in each case is conducted without a permit and is "waterward of the high tide line . . . ." General Statutes § 22a-361 (a) (1). Nothing in the statutory text suggests that engaging in one activity in violation of the permitting requirement automatically demonstrates that engaging in another activity, even if not conducted waterward of the high tide line, constitutes an additional violation of the statute. That is, the textual framework of the statute does not support the proposition that simply because work incidental to erecting the seawall has been conducted waterward of the high tide line in violation of § 22a-361 (a) (1), it is also true that the structure to which the violating work is incidental should itself be effectively treated as having been constructed waterward of the high tide line even if it is not so located.

The statute's use of the term "incidental" further indicates that the legislature did not intend that a violation of this aspect of the statute would permit the department to regulate the erection of structures landward of the high tide line. An incidental activity is one that is, by definition "subordinate, nonessential, or attendant in position or significance . . . occurring as a minor concomitant . . . ." Webster's Third New International Dictionary (2002). Similarly, as this court has noted in the context of zoning regulations, "[t]he word 'incidental' as employed in a definition of 'accessory use' incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. . . . But 'incidental,' when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant." *Lawrence* v. *Zoning Board of Appeals*, 158 Conn. 509, 512, 264 A.2d 552 (1969). Consistent with both its dictionary definition and this court's prior usage, we read the term "incidental" in § 22a-361 (a) (1) as referring to subordinate or nonessential work conducted in the course of erecting a structure or performing any other activity specified in that statute. To conclude that jurisdiction over such subordinate and attendant work implies jurisdiction over a structure otherwise outside the scope of § 22a-361 would require either resorting to the perverse logic that the lesser necessarily includes the greater or effectively substituting the term "integral" for "incidental."[25]

In addition to the fact that § 22a-361 (a) (1) is, by its own terms, applicable only to a discrete set of activities all of which must be "waterward of the high tide line," the scope of the statute also must be viewed in connection with the general statutory scheme through which

the legislature has provided for regulation of activities affecting the Connecticut coastline. Although the legislature has conferred on the department expansive and exclusive authority to regulate coastal activities waterward of the high tide line, landward of that line the legislature has divided regulatory authority between the department and coastal municipalities. Specifically, as we previously have noted in the introduction to this opinion, the act creates a coastal boundary; that boundary is measured on its landward side at least 1000 feet inland from the "mean high water mark"[26] and on its seaward side to the extent of the state's jurisdiction. General Statutes § 22a-94 (b). The legislature has delegated to municipalities the authority to oversee activities, such as the erection of "shoreline flood and erosion control structures," within the portion of this coastal boundary inland of the mean high water mark by requiring property owners to submit coastal site plans for approval by the local zoning authority. General Statutes § 22a-109 (a). Although the department is directed to provide support for the municipalities' oversight; General Statutes § 22a-95; and may offer testimony by the commissioner of environmental protection as of right at the zoning board's hearings on site plan applications; General Statutes § 22a-110; it may not dictate whether a municipality approves a coastal site plan in any given case. Should the department disagree with a municipality's decision, its sole source of relief is through an appeal to the courts.[27] General Statutes § 22a-110. If, however, an activity or project is one for which municipal approval was required and no such permission was received, the department's remedial authority is essentially the same as it is for violations of the permitting requirement for structures waterward of the high tide line. General Statutes § 22a-108.

Considering § 22a-361 alongside the act, it is clear that the legislature has in effect drawn a line in the sand, delegating plenary regulatory authority to the department over seawalls and similar erosion control structures built "waterward of the high tide line"; General Statutes § 22a-361 (a) (1); but assigning to municipalities the primary regulation of structures landward of that line. The legislature, moreover, has made it clear that it envisions the department taking a direct regulatory role with respect to erosion control structures landward of the high tide line only when the conditions set forth in § 22a-108 have been met.

In the present case, the plaintiff failed to obtain local approval for his seawall, and in fact he constructed a seawall substantially different from the one contained in the plan he submitted to the municipality for approval. As the department found in the administrative proceedings, "[t]his is not a case of the [plaintiff] being led to believe there were no environmental concerns about his [sea]wall or consequences if it was not placed above the reach of the high tide. . . . [T]he [plaintiff]

acted willfully and before he had local approval and with a full understanding and appreciation of what could happen if a completed [sea]wall was within the jurisdiction of the [department]. The [plaintiff] knew the law and did not do what the law required." In light of these findings, the predicates for the department to exercise authority under § 22a-108 would appear to have been met. The department, however, has never invoked its authority under § 22a-108. Indeed, in response to this court's request for supplemental briefing on the subject,[28] the department expressly disavowed any reliance on § 22a-108 as the source of its authority. We therefore do not consider whether the department's order may be upheld as a proper exercise of its authority under § 22a-361 in conjunction with § 22a-108.

In light of the plain language of § 22a-361 and the legislature's clear intention to regulate structures landward and waterward of the high tide line through distinct mechanisms,[29] we conclude that the department has not demonstrated its authority under § 22a-361 to order removal of any portion of the plaintiff's seawall that is not waterward of the high tide line. Therefore, the department abused its discretion in issuing an order requiring the plaintiff to submit a plan for the removal of the entire seawall.[30] As we previously have noted, the department found it unnecessary to determine the precise extent to which the plaintiff's seawall is waterward of the high tide line. Accordingly, we must reverse in part the judgment of the trial court denying the plaintiff's administrative appeal from the department's removal order insofar as that order pertained to the portion of the seawall not waterward of the high tide line and direct the trial court to remand the case to the department for further proceedings to determine which portions of the seawall were constructed "waterward of the high tide line" and thus were subject to the department's jurisdiction pursuant to § 22a-361.

The judgment is reversed in part and the case is remanded to the trial court with direction to remand the case to the department for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

[1] Subsequent to the events of this case, the department of environmental protection merged into a new agency, the department of energy and environmental protection. See Public Acts 2011, No. 11-80, §§ 1, 55. In addition to the department, the state attorney general is named as a defendant, pursuant to Practice Book § 17-56 (b), because the constitutionality of a state statute is at issue in the case.

[2] General Statutes § 22a-359 (a) provides: "The Commissioner of Environmental Protection shall regulate dredging and the erection of structures and the placement of fill, and work incidental thereto, in the tidal, coastal or navigable waters of the state waterward of the high tide line. Any decisions made by the commissioner pursuant to this section shall be made with due regard for indigenous aquatic life, fish and wildlife, the prevention or alleviation of shore erosion and coastal flooding, the use and development of adjoining uplands, the improvement of coastal and inland navigation for all vessels, including small craft for recreational purposes, the use and

development of adjacent lands and properties and the interests of the state, including pollution control, water quality, recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned."

[3] General Statutes § 22a-361 (a) (1) provides in relevant part: "No person, firm or corporation, public, municipal or private, shall dredge, erect any structure, place any fill, obstruction or encroachment or carry out any work incidental thereto or retain or maintain any structure, dredging or fill, in the tidal, coastal or navigable waters of the state waterward of the high tide line until such person, firm or corporation has submitted an application and has secured from the Commissioner of Environmental Protection a certificate or permit for such work and has agreed to carry out any conditions necessary to the implementation of such certificate or permit. . . ."

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

[5] Should any person fail to comply with a department order to remove, abate or alleviate a condition that the commissioner finds is likely to cause imminent and substantial harm to the environment, the department "shall have authority to remove, abate or alleviate any such condition" through its own action. General Statutes § 22a-363e. Otherwise, the department may, though the attorney general, bring proceedings to abate or enjoin the nuisance and/or seek a $1000 per day civil penalty. General Statutes §§ 22a-361a and 22a-362.

[6] In part III of this opinion, we address in more detail the relationship between the coastal boundary and the high tide line as it pertains to regulatory authority.

[7] The elevation figures appearing in this opinion are referenced to the National Geodetic Vertical Datum of 1929, a fixed, standardized reference point against which elevation data in the United States is referenced.

[8] The 5.7 foot line shown in the survey meets the existing seawall at its outermost southern edge, curves landward for approximately twenty-five feet before gradually curving seaward for approximately forty feet, at which point it follows a roughly straight course for the remainder of the property.

[9] The high tide line calculated in the new survey was at an elevation of 5.8 feet. The minor difference between the 5.7 feet and 5.8 feet measurements does not affect our analysis of this case. For purposes of consistency and clarity, we refer to the elevation of the high tide line asserted by the plaintiff as 5.7 feet.

[10] Under § 22a-109 (f), once a municipal zoning commission has rendered a final decision on a coastal site plan, within fifteen days it must send a copy of its decision by certified mail to the person who submitted the plan and must publish within that time period notice of the approval or denial of the plan in a newspaper having a general circulation in the municipality. There is no time period mandated by statute for the board to render its decision.

[11] Although the survey indicates that the line of stakes are situated at an elevation of 6.8 feet, a portion of the line as drawn is, inexplicably, clearly waterward of the 5.7 foot elevation high tide line reflected on the survey.

[12] At some point following the board meeting, the plaintiff's relationship with Coastal Consultants turned adversarial as a result of a dispute over cost and design issues.

[13] Specifically, the report, which used elevation figures referenced to the National Geodetic Vertical Datum of 1929; see footnote 7 of this opinion; concluded: "It appears at this site, based upon the observed wrack line displacement, that the [high tide line] extends beyond the noted [+5.7 feet] . . . . It is clear that this site is characterized by a [high tide line] which is higher than the referenced [elevation of +5.7 feet] . . . .

"No detailed statistical analysis of historic tidal records was performed as part of this assessment. However, a cursory review of [National Oceanic and Atmospheric Administration] historic tidal records for the Bridgeport Tide Station . . . indicates that water surface levels, i.e. tide heights, exceeded [+5.7 feet] . . . on approximately twenty-two (22) occasions during the calendar year June 1, 2005 and June 1, 2006. This historic data, coupled with the observed wrack line, indicates that the traditional [high tide line] elevation of [+5.7 feet] . . . should be re-evaluated. A more appropriate jurisdictional limit would be approximately [+6.8 feet] . . . though a detailed analysis of the historic tidal data would be required to firmly establish this critical elevation."

[14] Although the first survey reflects approximately twenty feet of the 160

foot seawall lying waterward of the marked high tide line, a third survey that the plaintiff later submitted to the department, which was conducted ten months after the second survey, also depicts a substantial portion of the seawall—approximately seventy feet—as lying waterward of the high tide line.

[15] The parties dispute whether the plaintiff's removal of boulders and other material placed on the waterward side of the wall was at the department's behest.

[16] General Statutes § 22a-6 (a) provides in relevant part: "The commissioner may . . . (3) initiate and receive complaints as to any actual or suspected violation of any statute, regulation, permit or order administered, adopted or issued by him. The commissioner shall have the power to hold hearings, administer oaths, take testimony and subpoena witnesses and evidence, enter orders and institute legal proceedings including, but not limited to, suits for injunctions, for the enforcement of any statute, regulation, order or permit administered, adopted or issued by him . . . ."

[17] See footnote 3 of this opinion for the text of § 22a-361 (a) (1).

[18] Surveys presented by the plaintiff also make clear that this portion of the seawall was constructed well seaward of the "line of stakes" that the plaintiff claims was placed at an elevation of 6.8 feet and landward of which the plaintiff's contractor claims to have constructed the seawall.

[19] Section 22a-359 (c) excludes from the definition of high tide line water levels reflecting "storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm."

[20] We reject the department's contention at oral argument in this court that § 22a-361 (a) (1) requires a property owner to apply for a permit sanctioning the continued existence of a structure that was built above the high tide line but after a time falls below that line due to natural processes such as erosion. The department specifically asserts that under this scenario, the property owner would be "maintaining" a structure waterward of the high tide line pursuant to § 22a-361. Section 22a-361 (a) (1) provides in relevant part that "[n]o person . . . shall . . . retain or maintain any structure, dredging or fill, in the tidal, coastal or navigable waters of the state waterward of the high tide line until such person, firm or corporation has submitted an application and has secured from the Commissioner of Environmental Protection a certificate or permit for such work . . . ." Although we recognize that the term "maintain" can sometimes mean simply "[t]o continue to be in possession of"; Black's Law Dictionary (9th Ed. 2009); in the context of § 22a-361, the term clearly means "[t]o care for (property) for purposes of operational productivity or appearance; to engage in general repair and upkeep." Id. Notably, the statute refers to permits being issued "for such work"; General Statutes § 22a-361 (a) (1); this reference to work cannot be reconciled with the department's overbroad proposed definition. The department does not advance a similar claim with respect to the term "retain," but we note that this term must also be interpreted consistently with a permit being required only for "work."

[21] The plaintiff identifies three flaws in § 22a-359: that the statute permits using multiple, possibly conflicting methods to determine the location of the high tide line; that the statute is internally inconsistent because it refers variously to the "maximum height" and the "general height" of a rising tide; and that the statute does not call for the use of "actual data" as does the analogous United States Army Corps of Engineers regulation. Except for noting that the department now challenges the 5.7 foot high tide line it accepted in a prior permit application submitted by the plaintiff, the plaintiff does not explain how these alleged flaws relate to the facts of this particular case, in which a portion of the plaintiff's seawall was constructed waterward even of the high tide line he has identified.

[22] The trial court concluded that the issue of the scope of the department's order was not ripe for adjudication because the plaintiff had not yet submitted a plan to the department and therefore it was not certain that the entire seawall would in fact have to be removed. Although the department, in a footnote of its decision addressing a question about the cost of removal, did express uncertainty with respect to the scope of the ultimate removal plan, both the removal order itself and the department's conclusion that the restoration plan to be submitted by the plaintiff "shall include provisions for removal of the [sea]wall" make clear that the department has exercised jurisdiction over the entire seawall. Consistent with the presentation of this issue by both parties, we conclude that this issue is ripe for review and we

address the merits of the plaintiff's claim.

[23] The department's claim that the entire seawall was constructed waterward of the high tide line essentially asks this court to determine that the evidence would support a factual finding that was not made by the department or by the trial court. Although the hearing officer's decision often referred to evidence showing that a substantial portion of the seawall is waterward of the high tide line, the hearing officer made no ultimate determination as to whether the entire seawall was constructed waterward of the high tide line. "It is well settled that [an appellate] court cannot find facts, nor, in the first instance, draw conclusions of facts from primary facts found, but can only review such findings to see whether they might legally, logically and reasonably be found." (Internal quotation marks omitted.) *In re Jorden R.*, 293 Conn. 539, 559 n.17, 979 A.2d 469 (2009).

[24] "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes." (Internal quotation marks omitted.) *Donahue* v. *Veridiem, Inc.*, supra, 291 Conn. 547.

[25] We recognize, however, that in the present case the claimed "incidental" work—which included placing and removing boulders along the wall, resulting in substantial disturbance of the seabed—was not insignificant.

[26] See Office of the Long Island Sound Programs, "Fact Sheet for State and Municipal Regulatory Jurisdictions," p. 2 n.3 ("[t]he 'mean high water' line is a line on the shore established by the *average* of all high tides and the boundary of the public trust area based on the common law public trust doctrine" [emphasis added]), reprinted in Connecticut Dept. of Environmental Protection, Connecticut Coastal Management Manual (September, 2000) § 1, available at http://www.ct.gov/dep/lib/dep/long_island_sound/coastal_management_manual/manual_section_1_08.pdf (last visited July 5, 2012); see *Rapoport* v. *Zoning Board of Appeals*, 301 Conn. 22, 25 n.4, 19 A.3d 622 (2011).

[27] Similar rights and limitations apply to municipalities with respect to a decision by the department to grant or to deny a permit within a portion of the coastal boundary that is within the department's exclusive jurisdiction. See General Statutes § 22a-99.

[28] The parties were invited to submit supplemental briefs in response to the following question: "What effect, if any, does . . . § 22a-108 have on the [department's] authority in the present case to order removal of portions of the plaintiff's seawall that have not been shown to be waterward of the high tide line?"

[29] We note that the present opinion does not address the department's authority to order remedies landward of the high tide line where the activity triggering a violation of § 22a-361 is not subject to municipal regulation under the act.

[30] We do not foreclose the possibility that a proper order of the department to alleviate the consequences of activity waterward of the high tide line may, as a practical matter, require remedial action landward of the high tide line. For example, if an unpermitted seawall twelve inches thick were constructed six inches over the high tide line, such that the seawall straddled the line, the department could properly order that the construction waterward of the high tide line be remedied, and that order would, in all likelihood, require moving or removing the entire seawall, including the portion of the seawall built landward of the high tide line. Nothing in this opinion is intended to limit the department's authority to remedy a violation of § 22a-361 simply because the sole reasonable remedy requires the party subject to the enforcement action to take action landward of the high tide line.