DAVID SAMS ET AL. *v.* DEPARTMENT OF ENVIRONMENTAL PROTECTION
(SC 18438)

Rogers, C. J., and Palmer, Zarella, Eveleigh, Harper and Vertefeuille, Js.*

*Argued September 27, 2012—officially released April 30, 2013*

*Jeffrey J. Mirman*, for the appellants (plaintiffs).

*David H. Wrinn*, assistant attorney general, with whom, on the brief, were *Richard Blumenthal*, former attorney general, and *George Jepsen*, attorney general, for the appellee (defendant).

*Opinion*

EVELEIGH, J. The plaintiffs, David Sams and Betsy Sams, appeal[1] from the judgment of the trial court affirming the decision of the department of environmental protection hearing officer requiring the removal of a gabion seawall[2] that the plaintiffs had constructed on their property along the shoreline of the Connecticut River without having obtained approval from either the town of Old Saybrook (town) in accordance with General Statutes (Rev. to 2003) § 22a-109[3] or the defendant, the department of environmental protection (department),[4] in accordance with General Statutes (Rev. to 2003) § 22a-361.[5] On appeal, the plaintiffs claim that the trial court improperly concluded that: (1) the department properly asserted jurisdiction over the seawall under § 22a-361 because the department failed to prove that the seawall was located waterward of the high tide line; (2) the department properly asserted jurisdiction under the Coastal Management Act (act), General Statutes §§ 22a-90 through 22a-111, because there is no evidence in the record that the town had determined whether the plaintiffs needed coastal site plan approval prior to constructing the seawall; (3) substantial evidence supported the department's findings and conclusions that the factual predicates to the department's jurisdiction under § 22a-361—that the seawall is located in "tidal, coastal or navigable waters" of the state and that the bank on which the seawall is located is a "coastal bluff or escarpment"—had been met; and (4) the hearing officer's decision to order the removal of the entire seawall was not an abuse of discretion. We disagree with the plaintiffs and, accordingly, affirm the judgment of the trial court.

To provide context for the claims raised in the present case and the specific facts relevant to those claims, we begin as we did in our recent opinion in *Shanahan* v. *Dept. of Environmental Protection*, 305 Conn. 681, 47 A.3d 364 (2012), by outlining the statutory scheme in effect at the time of the proceedings in the present case; see footnote 8 of this opinion; governing activities along the Connecticut coastline in order to protect coastal resources. "[T]he 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);[6] 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. . . . Any violation of this provision is considered a public nuisance for which the department may issue a cease

and desist order.[7] 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).[8]

"In addition to the requirements of § 22a-361, coastal activity may also be subject to regulation under the [act], General Statutes § 22a-90 et seq. Among the act's goals is the management of coastal bluffs [and escarpments],[9] 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 [and escarpments] 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 [and escarpments] should be preserved and that activities altering the natural supply of sediment from bluffs [and escarpments] should be disapproved. General Statutes § 22a-92 (b) (2) (A). The act establishes a 'coastal boundary'; General Statutes § 22a-94 (b);[10] 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. General Statutes § 22a-109." (Citation omitted.) *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 687–89. The act permits a town to exempt, by regulation, certain activities and uses from the site plan process but does not permit towns to exempt "shoreline flood and erosion control structures . . . ." General Statutes (Rev. to 2003) § 22a-109 (b). The town may modify or deny any coastal site plan if it fails to comply with the town's zoning regulations or the act's requirements.[11]

Any activity that occurs within the coastal boundary not exempt from coastal site plan review, which occurs without having received lawful approval from the relevant town zoning board, or which violates the terms or conditions of such approval, is deemed a public nuisance. General Statutes § 22a-108.[12] When such unlawful

activity takes place, the municipality in which the activity has occurred has the authority to exercise all enforcement remedies legally available to it, such as issuing a cease and desist order. General Statutes § 22a-108. In addition, after notifying the relevant municipality, the commissioner may also take enforcement action against the unlawful activity. General Statutes § 22a-108. "[T]he commissioner may order that such a public nuisance be halted, abated, removed or modified and that the site of the violation be restored as nearly as reasonably possible to its condition prior to the violation . . . ." General Statutes § 22a-108. Thus, the statutory scheme provides for concurrent jurisdiction between the department and a coastal town over an activity that occurs within the coastal boundary without lawful approval from the relevant municipality.

With this regulatory framework in mind, we turn to the specific facts as found by the department hearing officer and revealed by the record, and procedural history, relevant to our resolution of this appeal. The plaintiffs' property is located on the Connecticut River, approximately four miles upstream from Long Island Sound in the town. The shoreline of the plaintiffs' property is a steep bank with a grade of approximately seventy degrees, and consists of gravel and loose sandy soils. During the summer of 2000, the plaintiffs began observing the effects of erosion along the shoreline of their property, causing it to become unstable. The erosion was caused by two concurrent forces: the erosion at the top of the bank was caused by weather related runoff, and the erosion at the bottom of the bank was caused by scouring from wake and wave activity. If left unchecked, the erosion would have eventually altered the bank to a point of equilibrium or stability. The trees located on the plaintiffs' property nearest to the bank, however, would have eventually broken away and fallen into the Connecticut River. The ongoing erosion also would have compromised the stability of the plaintiffs' patio.

After noticing the erosion, the plaintiffs consulted with Chris Lawrie, a landscape specialist, regarding possible erosion control solutions. After considering various means to mitigate the effects of the erosion, the plaintiffs decided to install a 261 foot long gabion seawall. The plaintiffs, in consultation with Lawrie, selected this option after concluding that the composition of the soil and the severity of the grade appeared to make a vegetative solution impossible, and a riprap system[13] would have required excavation of the bank beyond that required for the seawall. The seawall was constructed during August and September, 2004.

The plaintiffs did not seek approval from either the town or the department before constructing the seawall, nor did they conduct any surveys prior to construction. Rather, Gary Sharpe, a licensed engineer whom

the plaintiffs had hired, advised the plaintiffs that, based on his experience, no authorization would be required if the seawall was installed landward of the high tide line. Thus, the plaintiffs and Lawrie agreed that all construction of the seawall would occur landward of the high tide line as depicted on site plans that the plaintiffs previously had submitted when they applied to the department for permits for construction of a dock. The high tide line depicted on those earlier site plans listed an elevation of 4.1 feet.[14] Lawrie installed a silt fence in alignment with the most landward set of dock pilings—at what he believed to be the high tide line—and all construction occurred landward of that fence.

On September 29, 2004, Michael Grzywinski, a department staff member, conducted an investigation of the plaintiffs' property in response to a complaint received after the seawall had been virtually completed. In his inspection report, Grzywinski noted the location of the seawall and a silt fence, as well as a "body of water with evidence of tide" and a "wrack line," which is a line of debris indicating where the water level intersects with the land. Grzywinski also observed and photographed a wrack line to the north of the plaintiffs' dock, and debris and water in contact with the seawall to the south of the dock. On the basis of these factors, Grzywinski determined that the seawall was located waterward of the high tide line, and that, because the plaintiffs had not received a permit from the department prior to construction, the seawall had been constructed in violation of § 22a-361. The department then notified the town of the seawall's construction.

On October 1, 2004, Christina Costa, the town's zoning enforcement officer, inspected the plaintiffs' property. On the basis of her observations, she determined that the seawall had been built in violation of both the town's zoning regulations and the act. As a result, on December 8, 2004, the town issued a cease and desist order to the plaintiffs. The order noted that a zoning permit was required under the town's zoning regulations, and that coastal site plan approval was required under the act because the seawall was located in the coastal boundary and was a " 'shoreline flood and erosion control structure' " as defined in General Statutes (Rev. to 2003) § 22a-109 (c).

Following this action by the town, on March 16, 2005, the department issued a notice of violation to the plaintiffs and Lawrie. The notice stated that the seawall had been constructed along the shoreline of the plaintiffs' property waterward of the high tide line, without prior state authorization, in violation of § 22a-361. The violation notice required the plaintiffs to submit a plan for removal of the seawall and for restoration of the shoreline to its preexisting condition.

After issuing the notice of violation, department staff revisited the plaintiffs' property on at least two separate

occasions. On June 22, 2006, department officials took photographs of the plaintiffs' property during a period of predicted high tide, which showed water up to and overlapping the footing and in contact with the southern portion of the seawall. Additionally, photographs taken by department officials on September 12, 2006, showed the same water levels. The department officials did not report any instances of intense storm activity in the area during any of the site inspections.

In response to the notice of violation, the plaintiffs retained Sharpe to conduct an additional survey to determine whether the seawall was built waterward of the high tide line. Sharpe prepared a site plan showing the location of the seawall landward of what he believed to be the high tide line, based on actual on-site observations. Sharpe excluded from his consideration data obtained when the river was above flood stage, and when a weather factor may have influenced the tide. On May 13, 2005, Sharpe submitted the site plan and permit application to the department in support of the plaintiffs' attempt to obtain permission to retain the seawall. The permit application proposed to replace a portion of the seawall with shallower courses of green gabions that would be supplemented with vegetative plantings, but to retain the footing and first two courses of the existing stone gabions. After analyzing the plaintiffs' permit application, the department rejected the proposal because it considered the proposal to be inconsistent with the act, which stresses nonstructural solutions to mitigate the effects of erosion.

On March 17, 2006, after denying the plaintiffs' permit application, the department issued an order to the plaintiffs to remove the seawall and to restore the area to its previous condition. The removal order stated that it would take effect twenty-one days after the date of the commissioner's signature, unless the plaintiffs filed an answer or requested a hearing. On April 7, 2006, the plaintiffs filed an answering statement and requested a hearing. The Connecticut Gateway Commission and the town filed requests to intervene in the proceeding, to which the plaintiffs objected. The department denied those requests but permitted the town to submit a brief in support of its position that the plaintiffs had violated the act.[15]

In September, 2006, the department commenced an administrative hearing on the plaintiffs' challenge to the removal order. In her final decision, issued on November 2, 2007, the hearing officer determined, inter alia, that the department properly exercised jurisdiction under §§ 22a-108 and 22a-361. The hearing officer further concluded that, because the department's jurisdiction encompassed the entire seawall, the department had the authority to order it to be removed. The plaintiffs appealed from the decision of the hearing officer to the trial court on December 14, 2007. The trial court

affirmed the hearing officer's decision. This appeal followed. See footnote 1 of this opinion. Additional facts will be set forth as necessary.

I

DEPARTMENT JURISDICTION UNDER § 22a-361

The plaintiffs first claim that the trial court improperly rejected their claim that the department improperly had found that a portion of the seawall had been built waterward of the high tide line, thus implicating the department's jurisdiction under § 22a-361. Specifically, the plaintiffs claim that the trial court improperly: (1) concluded that, in light of the visual observations made by department staff, there was sufficient evidence to sustain the hearing officer's conclusion that a portion of the seawall was located waterward of the high tide line; and (2) failed to conclude that the department engaged in improper rule making by using the Army Corps of Engineers one year frequency tidal flood elevation data as a method to determine the location of the high tide line. In response, the department contends that the trial court properly: (1) determined that substantial evidence supports the hearing officer's finding that a portion of the seawall was located waterward of the high tide line; and (2) determined that use of the Army Corps of Engineers one year frequency tidal flood data was consistent with § 22a-359 (c). We agree with the department.

Before addressing the substance of the plaintiffs' claims, we reiterate the well established standards governing our highly deferential review of factual findings made by administrative agencies. "The substantial evidence rule governs judicial review of administrative fact-finding under [the Uniform Administrative Procedure Act (UAPA)]. 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 [plaintiffs] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record." (Internal quotation marks omitted.) *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 700, quoting *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 124–25, 830 A.2d 1121 (2003).

The following additional facts as found by the hearing

officer are relevant to the resolution of the plaintiffs' claims. After Grzywinski inspected the plaintiffs' property and determined that the seawall was in violation of § 22a-361, department officials reviewed the department's database for prior state authorizations issued for the plaintiffs' property, and found the two dock permits and associated site plans. As previously stated, those plans indicated a high tide line elevation at the plaintiffs' property of 4.1 feet, based on the Army Corps of Engineers one year frequency tidal flood elevation. This standard is based on the highest yearly occurring tidal flood and is based on observed, rather than predicted, tidal activity. Meteorological influences, such as storm events, are included in the tidal flood profiles; however, the data does not include hurricane events.

After receiving the department's notice of violation, in an attempt to retain the seawall, the plaintiffs retained Sharpe to prepare a site plan and permit application and to conduct a survey to determine the location of the high tide line. The site plan submitted to the department depicted a high tide line of 2.8 feet, rather than 4.1 feet as had been shown in the plaintiffs' earlier dock permit applications. Sharpe based the 2.8 foot high tide line measurement on his actual on-site observations, not the Army Corps of Engineers one year frequency tidal flood data. Sharpe excluded from his consideration data obtained on occasions when the river was above flood stage, or a weather factor might have influenced the tide.

After submitting the site plan to the department, Sharpe continued his survey. Sharpe took measurements of surface water heights at periods of predicted high tide over fifteen months, from April 11, 2005, to July 13, 2006. Sharpe also determined elevations for any wrack lines present, and recorded relevant weather conditions. The data collected during Sharpe's entire survey indicated water levels as high as 4.4 feet under light wind conditions and following rain. The survey indicated that, on January 3, 2006, water was in contact with the seawall under windy conditions. On January 18, 2006, Sharpe noted that water was at the seawall during a light breeze, and following a heavy rain. On February 1, 2006, Sharpe observed water at the base of the seawall during a light breeze of five to ten miles per hour. Furthermore, Sharpe reported wrack lines as high as 4 feet during a period of heavy rain, 3.8 feet under light wind conditions, and 3.7 feet under calm conditions.

After Sharpe concluded his survey, the plaintiffs hired Professor W. Frank Bohlen to review Sharpe's data and conclusions. Like Sharpe, Bohlen declined to use the one year frequency tidal flood elevation data in determining the location of the high tide line because it is influenced by storm events. In his review of Sharpe's data, Bohlen eliminated all data reflecting tidal and

stream flow anomalies and all storm events. Bohlen concluded that, in order to accurately determine the location of the high tide line, it is best to obtain direct measurements of water levels over a relatively long period of time, such as the measurements obtained by Sharpe in his survey. On the basis of his analysis of Sharpe's fifteen month survey, Bohlen concluded that the wrack line elevations varied from approximately 1.3 to 4 feet. He also noted that the wrack line comes into contact with the seawall at the higher elevations, preventing any additional shoreward movement of the wrack line. Bohlen ultimately concluded that the high tide line at the plaintiffs' property fell between elevations of 2.9 and 3.2 feet. At the hearing before the department, the plaintiffs pointed to the data obtained in Sharpe's study, and Bohlen's review of that data, as proof that the seawall is located landward of the high tide line, and as support of their claim that use of the Army Corps of Engineers one year frequency tidal flood elevation data is an improper method to determine the high tide line.

The administrative hearing officer concluded that the department's use of the Army Corps of Engineers one year frequency tidal flood elevation data as a method for determining the high tide line was consistent with § 22a-359 (c). Furthermore, the hearing officer found that the record showed that a portion of the seawall was located waterward of the high tide line. Accordingly, the hearing officer concluded that the department properly asserted jurisdiction over the seawall under § 22a-361.

A

The plaintiffs first claim that the trial court improperly concluded that substantial evidence supported the administrative hearing officer's finding that the seawall was located partially waterward of the high tide line. The plaintiffs contend that the department failed to meet its burden of establishing the exact location of the high tide line, which, the plaintiffs claim, is required before the department can assert jurisdiction under § 22a-361. The plaintiffs further contend that the visual observations of department staff, which were made at several discrete moments in time, are insufficient to prove that a portion of the plaintiffs' seawall was located waterward of the high tide line. In response, the department claims that its on-site observations of water coming into contact with the seawall are sufficient to support the finding that a portion of the seawall was located waterward of the high tide line. We agree with the department.

We first set forth our standard of review. "The issue in this case . . . raises a question of statutory construction, which is a [question] of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of

the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . [we] first . . . consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Marsh & McLennan Cos.*, 286 Conn. 454, 464–65, 944 A.2d 315 (2008).

We begin with the text of the relevant revision of § 22a-359 (c). The term " 'high tide line' " refers to "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*." (Emphasis added.) General Statutes (Rev. to 2003) § 22a-359 (c). Thus, we have previously held that, by its plain meaning, the term high tide line as used in § 22a-359 (c) 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 storm surges caused by a hurricane or other intense storm. *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 703. The explicit and limited exclusion of storm surges caused by a hurricane or other intense storm refutes any suggestion that normal meteorological events are also excluded. Id. The statutory definition, therefore, extends the high tide line to locations that may only come in contact with tidal waters once during the single highest tide of the year. Therefore, we have held 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)."[16] (Emphasis in original.) Id. It follows that, if the department officials observe tidal waters coming in contact with a structure, then the portion of the structure that is in contact with the water is presumptively waterward of the high tide line. The exact elevation of the high tide line is not needed in these instances.[17]

Therefore, "[the plaintiffs'] argument originates from a mistaken premise: the critical question in the present case is not, as the [plaintiffs suggest], 'where is the high tide line?' but, rather, 'was this seawall constructed waterward of the high tide line?' " Id., 706. In the present case, the hearing officer found, and the record shows,

that during his initial inspection of the plaintiffs' property on September 29, 2004, Grzywinski observed and, on subsequent visits, photographed a wrack line to the north of the plaintiffs' dock, and debris and tidal waters coming in contact with the plaintiffs' seawall. In addition, photographs taken on June 22, 2006, and September 12, 2006, show water in contact with the southern portion of the seawall. There is no evidence in the record indicating that the tide during any of the inspections was influenced by a hurricane or other intense storm; rather, the photographs depict clear days with calm seas.[18] Moreover, Sharpe's independent study notes that water was at the base of the seawall on numerous occasions throughout the fifteen month period during which Sharpe recorded data. In the area reserved for weather related observations, Sharpe noted that, on one of the days that water was at the base of the seawall, there was a light breeze of five to ten miles per hour. On yet another day where water was recorded as being in contact with the seawall, there was a light breeze that followed a heavy rain. There is no mention that the tides on those days were influenced by a hurricane or other intense storm.[19]

Although we have recognized that there are situations in which the exact location of the high tide line must be proven by the department by a preponderance of the evidence in order for the department to assert jurisdiction under § 22a-361, such as when the department is asserting jurisdiction over a structure under only § 22a-361; see id., 722–23; that circumstance is not implicated in the present case. In the present case, the department is asserting jurisdiction under both §§ 22a-361 and 22a-108. Thus, if the department properly exercises jurisdiction under both provisions, the exact location of the high tide line does not need to be established. Because we conclude in part II of this opinion that the department properly asserted jurisdiction under § 22a-108, the department did not have to prove the exact location of the high tide line in the present case. See id., 702–703. Thus, we conclude that the trial court properly determined that the hearing officer's finding that a portion of the seawall was located waterward of the high tide line was supported by substantial evidence, and that the department met its burden of proving that a portion of the seawall was located waterward of the high tide line. Accordingly, we conclude that the department lawfully asserted jurisdiction under § 22a-361.

B

The plaintiffs next claim that the trial court improperly rejected their claim that the department engaged in improper rule making when it used the Army Corps of Engineers one year frequency tidal flood elevation as a factor in determining the location of the high tide line. The plaintiffs contend that, because § 22a-359 (c)

does not explicitly authorize use of the one year frequency tidal flood elevation as a method to determine the location of the high tide line, the department's use of that measurement amounted to the enforcement of a regulation as to the proper method for measuring the high tide line without following the necessary procedures for adopting a regulation as required by the UAPA, General Statutes § 4-168. We also understand the plaintiffs' claim to be that the hearing officer abused her discretion in admitting evidence of the one year frequency tidal flood elevation. In response, the department contends that use of the one year frequency tidal flood elevation data is consistent with § 22a-359 and that the department's use of this data as evidence in the present case did not constitute improper rule making. We agree with the department.

The test for determining whether agency conduct or an agency ruling amounts to a regulation, and thus must comply with the UAPA, is whether such conduct or ruling has a "substantial impact on the rights and obligations of parties who may appear before the agency in the future . . . ." *Salmon Brook Convalescent Home, Inc.* v. *Commission on Hospitals & Health Care*, 177 Conn. 356, 362, 417 A.2d 358 (1979). "[T]he label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact." (Internal quotation marks omitted.) Id., quoting *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 481–82 (2d Cir. 1972). Thus, in order to determine whether use of the one year frequency tidal flood elevation amounted to the enforcement of a regulation, we look to the purpose for which the department used the measurement in the present case.

The record reveals that the department did not use the one year frequency tidal flood elevation as a rule of general applicability; see General Statutes § 4-166 (13) (defining "regulation"); nor did it use the measurements obtained by use of the one year frequency tidal flood elevation data as the conclusive location of the high tide line in the present case. Instead, the department supplemented on-site observations made during inspections of the plaintiffs' property with the measurements obtained by use of the one year frequency tidal flood elevation data. During those on-site observations, the department officials observed tidal waters coming in direct contact with the seawall. Similarly, Grzywinski concluded that the seawall was built in violation of § 22a-361 on the basis of the visual observations that he made during his initial inspection of the plaintiffs' property, at which time he was unaware of the one year frequency tidal flood elevation data as it pertained to the location of the high tide line at the plaintiffs' property.[20] Thus, it is clear that use of the one year frequency tidal flood elevation data was used by the department as a "rough approximation" of the high tide line to confirm

the department officials' visual observations of the site,[21] rather than as a binding regulation as to the proper method for determining the high tide line. Accordingly, we conclude that the trial court properly determined that the department did not engage in improper rule making.

To the extent that the plaintiffs claim that evidence of the one year frequency tidal flood elevation should not have been admitted into evidence, we set forth the relevant standard of review. "The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . The court's decision is not to be disturbed unless [its] discretion has been abused, or the error is clear and involves a misconception of the law." (Citations omitted; internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 634, 881 A.2d 1005 (2005).

We conclude that use of the one year frequency tidal flood elevation as a method to determine the location of the high tide line was entirely consistent with the statute. General Statutes (Rev. to 2003) § 22a-359 (c) provides that the high tide line 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.*" (Emphasis added.) The statute, therefore, does not provide an exhaustive list of permissible measurement methods. Rather, the plain language of § 22a-359 (c) allows for the use of different measurements or surveys by the department when determining the location of the high tide line. The only limitations stated in the statute as to permissible methods are that the method used must be "suitable" and that storm surges due to hurricanes or other intense storms may not be included when determining the high tide line. General Statutes (Rev. to 2003) § 22a-359 (c). Although the one year frequency tidal flood elevation data includes some meteorological influences, it does not include storm surges due to hurricanes. Its use, therefore, was consistent with § 22a-359 (c). Thus, we conclude that the department's use of the one year frequency tidal flood elevation was properly admitted into evidence.

It is also important to note that, although the plaintiffs now claim that the department's use of the one year frequency tidal flood elevation was unreasonable, in 1996 and 1999, the plaintiffs themselves used the one year frequency tidal flood elevation as a method to determine the location of the high tide line in their permit applications for a proposed dock, and subsequent modification of the dock.[22] Additionally, Sharpe testified that he customarily uses the one year frequency tidal flood elevation for high tide line determinations

in department permit applications because the measurements are conservative and because he believes that the department uses the data as a reasonable determination of the high tide line. Furthermore, Grzywinski testified that the one year frequency tidal flood elevation has been used by property owners on department permit applications as a method to determine the location of the high tide line since at least 1988. We conclude, therefore, that the trial court properly determined that the department's use of the one year frequency tidal flood elevation was a "suitable means" to aid the department in determining the location of the high tide line, and thereby complied with the requirements of § 22a-359 (c).

II

DEPARTMENT JURISDICTION UNDER THE ACT

In light of the department's finding that a portion of the seawall was waterward of the high tide line and thus within the department's jurisdiction under § 22a-361, we turn to the plaintiffs' claim that the trial court improperly concluded that the department also had jurisdiction under § 22a-108 of the act to order removal of the seawall as a "public nuisance." See *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 721–23 (concluding that, because department asserted jurisdiction under § 22a-361 but not § 22a-108, department only had jurisdiction over portion of seawall waterward of high tide line). The plaintiffs contend that only a municipality, not the department, has authority to determine whether a public nuisance exists—a predicate to an enforcement action under § 22a-108—because only a municipality can determine whether a coastal site plan is required for a structure in the coastal boundary, which in turn determines whether a structure for which no such approval has been sought is lawful or a public nuisance. The plaintiffs claim that the town made no such determination and, therefore, the department exceeded its authority in finding that the seawall is a public nuisance. Furthermore, the plaintiffs claim that the department is bound by a decision of the Superior Court rendered in their favor, *Costa* v. *Sams*, Superior Court, judicial district of Middlesex at Middletown, Docket No. CV-06-5000936-S (August 11, 2008) (46 Conn. L. Rptr. 186), in a subsequent action by the town's zoning enforcement officer to enforce its cease and desist order.

The department counters that it had enforcement authority under § 22a-108 because the seawall is a "shoreline flood and erosion control structure," and that although the act mandates that a site plan be approved for such structures, the plaintiffs did not receive such approval from the town. According to the department, such facts render the seawall unlawful and thus a public nuisance subject to the department's enforcement powers under § 22a-108. The department

further claims that it is not bound by *Costa* because it was not a party to that proceeding and because that case was decided on a separate factual record.

We conclude that the department properly exercised jurisdiction under § 22a-108 in its administrative proceeding. We further conclude that the department is not bound by *Costa* in the plaintiffs' administrative appeal.

A

The following additional facts are relevant to the plaintiffs' claims. After its initial September, 2004 inspection of the plaintiffs' property led the department to conclude that the seawall had been constructed without the requisite approvals, it notified the town. Costa, the town's zoning enforcement officer, thereafter inspected the plaintiffs' property, and on the basis of her observations, issued a cease and desist order to the plaintiffs on December 8, 2004. In addition to reciting zoning and wetlands violations, the order stated, inter alia, that the seawall violated the act because it appeared to be a "shoreline 'flood and erosion' control structure" in the coastal boundary for which the plaintiffs had failed to obtain site plan approval. At the bottom of the cease and desist order, in capital letters, the plaintiffs were notified that they could appeal the order to the town zoning board of appeals within thirty days of their receipt of that order, and that failure to appeal "may result in the loss of defenses to a subsequent legal action." The plaintiffs did not appeal from the order, nor did they submit a coastal site plan to the town in an attempt to comply with the act.[23]

On March 16, 2005, more than two months after the plaintiffs' time to appeal from the town's cease and desist order had expired, the department issued to the plaintiffs a notice of violation for constructing the seawall without prior state authorization under § 22a-361, which directed the plaintiffs to submit a plan for removing the wall. The plaintiffs thereafter submitted a plan to the department proposing structural changes to the wall in an effort to retain it. The department rejected the plaintiffs' plan and, on March 17, 2006, issued the removal order that is the subject of the present appeal, citing violations of both § 22a-361 and the act and the department's jurisdiction thereunder. The plaintiffs filed an answering statement, which denied the violations and challenged the department's jurisdiction, and requested a hearing.

The town thereafter unsuccessfully sought the department's permission to intervene as a party in those proceedings, but was permitted to submit a brief. The town's posthearing brief acknowledged the department's enforcement authority and stated its support for the department's position as to both the violations and the remedy of removal. The town summarily noted in its brief that it also was seeking removal of the wall in

an enforcement action. That action, in which the town sought a permanent injunction to enforce its cease and desist order for violations of town zoning ordinances and the act, as well as damages, had been filed on June 15, 2006, without notice to the department.

On November 2, 2007, while the town's action was pending before the Superior Court, the department hearing officer issued its decision determining that the removal order properly had been issued. The hearing officer concluded that the seawall constituted a " 'shoreline flood and erosion control structure' " as defined by § 22a-109 (c) because the record amply demonstrated that it had been constructed in part to prevent erosion from tidal, coastal or navigable waters. Because it was undisputed that the wall had been constructed in the coastal boundary, the officer concluded that the seawall was unlawful because such structures in the coastal boundary require site plan approval by the town and no such approval had been given. Accordingly, the hearing officer concluded that the department properly had deemed the seawall a public nuisance and properly had asserted jurisdiction to order its removal under § 22a-108.

While the plaintiffs' administrative appeal from that decision was pending, from May, 2008, to July, 2008, trial was held on the town's action against the plaintiffs in Superior Court to enforce its cease and desist order. *Costa* v. *Sams*, supra, 46 Conn. L. Rptr. 187. Although the town's principal claim related to a violation of its zoning regulations, it also asserted that the seawall was unlawful because the plaintiffs had violated the act by failing to obtain lawful approval from the town before constructing a "shoreline flood and erosion control structure" in the coastal boundary.[24] Id., 189. The town asserted that the plaintiffs were estopped from arguing the merits of the cease and desist order because they had failed to exhaust their administrative remedies by appealing that order to the town zoning board of appeals and asked the court to take judicial notice of the department's decision. In its August 11, 2008 memorandum of decision, the trial court in *Costa* rendered judgment in favor of the plaintiffs. Id. The court concluded that the exhaustion of remedies rule did not apply because the plaintiffs were defending against an action; the court made no mention of the department's decision. Instead, largely predicated on its determination that the seawall was not a "structure" under the town's zoning regulations, the court concluded, inter alia, that the seawall was not a "shoreline flood and erosion control structure . . . ." Id. The court based this determination in part on the "uncontradicted evidence" submitted at trial that the seawall was constructed only to control upland erosion, and not erosion from tidal or wave activity. Id. Thus, the court concluded that the plaintiffs were not required to submit a coastal site plan to the town's planning and zoning commission prior to construction

of the seawall. Id. The town did not appeal from *Costa*.

On March 29, 2009, the trial court dismissed the plaintiffs' appeal from the department's decision. Thus, a final judgment was rendered in *Costa* after the department issued its decision in the present case, but before the trial court dismissed the plaintiffs' appeal, the decision which is now before us on appeal. We first turn to the question of whether the department had jurisdiction at the time that it rendered its decision and then turn to the question of whether *Costa* subsequently bound the department.

B

The scope of the department's authority under § 22a-108 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).

As this court previously has explained, the act divides regulatory authority over activities landward of the high tide line between the department and coastal municipalities, but conferring primary authority on the latter. See *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 720–21. Specifically, "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' 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] 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. 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." (Emphasis added.) *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 720–21.

On the basis of the statutory scheme, we agree with the plaintiffs that coastal municipalities, and not the department, have the sole authority to approve, modify or deny a coastal site plan under § 22a-109 (a). The plaintiffs' claim, however, that the department's authority to exercise enforcement remedies under the act must be predicated on a formal decision by the town as to whether site plan approval is required for the activity at issue misreads the plain language of the act. Section 22a-108 provides that "[a]ny activity within the coastal boundary not exempt from coastal site plan review pursuant to subsection (b) of section 22a-109, *which occurs without having received a lawful approval from a municipal board or commission* under all of the applicable procedures and criteria listed in sections 22a-105 and 22a-106, or which violates the terms or conditions of such approval, shall be deemed a public nuisance. . . . *After notifying the municipality in which the activity is located*, the commissioner may order that such a public nuisance be halted, abated, removed or modified . . . ." (Emphasis added.) Thus, the plain language of the statute provides that, after notifying the municipality, the department can take action with respect to an activity within the coastal boundary if the activity required lawful approval but has not been approved by the relevant municipality. See *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 720–21 ("[i]f . . . 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"). Accordingly, the department need not await a formal determination by the municipality that the activity is, in fact, unlawful

before asserting jurisdiction.

Before taking any action against an activity, however, the department must notify the municipality of its intention to do so. General Statutes § 22a-108. By requiring such notice as a predicate to the department's enforcement action, the scheme ensures that the municipality's determinations are given the primacy required under the act. If the municipality informs the department that the municipality has given approval for the activity or deemed no such approval necessary, the department could not initiate an action because the predicate for the department's jurisdiction under § 22a-108—an unlawful activity—would not exist. At that point, the department's "sole source of relief is through an appeal to the courts" pursuant to § 22a-110. *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 720. Similarly, if the municipality informs the department that the activity is the subject of a pending site plan or an administrative appeal, the department's role is limited under the scheme to being a party to those proceedings. See General Statutes § 22a-110. If, however, upon notice from the department, the municipality confirms that the activity is one for which lawful approval is required but none has been obtained, or declines to express an opinion on that matter, there would be no statutory bar to the department's initiation of enforcement proceedings.

Under the plaintiffs' logic, if a municipality declined to bring an action to enforce a cease and desist order, perhaps due to lack of financial resources, the department would *never* have the authority to act under § 22a-108, despite the fact that a determination had been made that a violation of the act exists. Thus, the department would be stripped of any enforcement power and forced to sit by idly while a blatant violation of the act existed. Indeed, a property owner would have an incentive, under the plaintiffs' view of the law, not to comply with or contest a cease and desist order because, doing so would preclude the department, which is authorized under the act to seek more significant civil penalties than those afforded to a municipality, from imposing such penalties.[25] In light of the plain language of the act, which allows the department to take a direct regulatory role with respect to "shoreline flood and erosion control structures" that are constructed in the coastal boundary without lawful approval by the municipality; see *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 721; we conclude that the legislature simply did not intend such a result.

Turning to the facts in the present case, the department's notice to the town and the town's confirmation that the plaintiffs' seawall violated the act is evidenced by: the department's notice of violation, copied to the town; the town's cease and desist order, copied to the department; the undisputed fact that the seawall is

located in the coastal boundary and the town's participation in the department's proceedings in support of the department's position. As we explain further in part II C of this opinion, no municipal action was pending that would bear on the purported violation at the time the department commenced its enforcement action. Moreover, as we explain in part III B of this opinion, any use or structure within the coastal boundary is subject to coastal site plan review. Thus, the record is clear that, at the time the department initiated its action against the plaintiffs, the town had not given approval for the seawall and, therefore, the department properly could exercise enforcement remedies to abate the seawall as a public nuisance. Accordingly, the trial court properly concluded that the department had the authority to issue a removal order pursuant to § 22a-108.

C

We next turn to the plaintiffs' related claim that the department is bound by *Costa* insofar as the trial court held that the plaintiffs were not required to file a coastal site plan prior to constructing the seawall because the seawall is not a " 'shoreline flood and erosion control structure . . . .' " The plaintiffs' assertion appears premised on the notion that *Costa* determined the merits of the town's cease and desist order, which, in turn, conclusively determined that the seawall is not a public nuisance. The plaintiffs therefore claim that the department lacks jurisdiction under § 22a-108. We disagree with the plaintiffs.

Although § 22a-108 plainly confers enforcement authority on both the town and the department, it also is self-evident that the legislature could not have intended the result that occurred in the present case, in which enforcement actions were concurrently pursued to remedy the same public nuisance and conflicting findings were made. Indeed, under settled law and the terms of the act, it is clear that the law, properly applied, would not have yielded such a result.[26]

It is well established that, "[w]hen a party has a statutory right of appeal from the decision of an administrative officer or agency, he [or she] may not contest the validity of the order if [the administrative] officials seek its enforcement in the trial court after the alleged violator has failed to appeal." *Masayda* v. *Pedroncelli*, 43 Conn. App. 443, 447, 683 A.2d 23 (1996); see also *Gelinas* v. *West Hartford*, 225 Conn. 575, 595, 626 A.2d 259 (1993) ("We have held that the statutory scheme reflects the legislative intent that the issue of what constitutes a nonconforming use should be resolved in the first instance by local officials. . . . [W]hen a party has a statutory right of appeal from the decision of an administrative officer or agency, he may not, instead of appealing, bring an independent action to test the very issue which the appeal was designed to test. . . . Likewise, the validity of the order may not be contested if zoning

officials seek its enforcement after a violator has failed to appeal."[27] [Citations omitted; internal quotation marks omitted.]); *Greenwich* v. *Kristoff*, 180 Conn. 575, 578–79, 430 A.2d 1294 (1980) ("Clearly the defendant had a statutory right to appeal the cease and desist order to the zoning board of appeals. The zoning board [of appeals] would in that proceeding determine whether the defendant, in fact, had a nonconforming use. The statutory procedure reflects the legislative intent that such issues be handled in the first instance by local administrative officials in order to provide aggrieved persons with full and adequate administrative relief, and to give the reviewing court the benefit of the local board's judgment. . . . Instead of following this administrative process to establish the legality of his use after the receipt of the order to cease and desist, the defendant elected to await the institution of an action by the town to enforce the order. On the record of this case, we conclude that the trial court properly refused to resolve the issue of the defendant's special defense alleging a nonconforming use, since that issue was one properly for administrative determination in the first instance." [Citation omitted.]); *Inlands Wetlands & Watercourses Commission* v. *Andrews*, 139 Conn. App. 359, 364, 56 A.3d 717 (2012) ("The defendants next appear to claim that the court improperly determined that they could not challenge the cease and desist orders of the commission because they had failed to appeal from those orders. They argue that, despite their failure to appeal from the commission's orders, they may continue with their farming activity on their property because they legally do not need permission or a permit according to General Statutes §§ 22a-40, 22a-38, 22a-471b, 19a-341, 22a-349 and 1-1 [q]. We are not persuaded. The court properly determined that, in the circumstances of this case, the defendants could not challenge the orders of the commission in this action because the orders of the commission had become final. The defendants did not appeal from the commission's determination denying their request for an exemption from the act, nor did they appeal from either of the commission's cease and desist orders. The proper way to vindicate a legal position is not to disobey the orders, but rather to challenge them on appeal. See *Ammirata* v. *Zoning Board of Appeals*, 81 Conn. App. 193, 202, 838 A.2d 1047 [exclusive remedy to object to cease and desist order is to appeal], cert. denied, 268 Conn. 908, 845 A.2d 410 [2004]. Having failed to appeal from the commission's orders, the defendants rendered themselves unable to contest in the trial court the validity of the commission's orders.").

The dual authority under the act can be reconciled in light of this principle and the notice provision under § 22a-108. See *Considine* v. *Waterbury*, 279 Conn. 830, 844, 905 A.2d 70 (2006) ("the legislature is presumed to be aware of prior judicial decisions involving com-

mon-law rules" [internal quotation marks omitted]). At the time the department gave notice to the town of its enforcement action, the unappealed cease and desist order constituted a final decision by the town that the plaintiffs had violated the act by failing to obtain site plan approval for the seawall. There was no reason for the department to delay its enforcement action or even to seek to intervene in *Costa*, if we assume the department had sufficient notice, because there was no reason for it to believe that *Costa* would decide the underlying merits of the town's order.

Indeed, the absence of any requirement in the act for the department's participation in a municipality's action to enforce an unappealed cease and desist order underscores this conclusion. The act requires that the department be afforded an opportunity to participate in virtually every proceeding regarding the lawfulness of an activity occurring in the coastal boundary or that prescribes the contours of that lawfulness under municipal regulations or ordinances. General Statutes § 22a-110.[28] For instance, the commissioner may submit written testimony or appear *by right* as a party to any hearing before a municipal board or commission concerning any coastal site plan or any "municipal approval, permit or license for a building, use or structure affecting the area within the coastal boundary . . . ." General Statutes § 22a-110. The commissioner may also appeal from, or appear as a party in, any appeal of a municipal decision concerning such matters, regardless of whether the commissioner has appeared as a party before the municipal board. General Statutes § 22a-110. Additional notice and participation requirements arise when proceedings relate to shoreline flood and erosion control structures.[29] See General Statutes (Rev. to 2003) § 22a-109 (c). Thus, it is evident that the legislature intended the department to possess influence over decisions as to whether an activity violates the act. Had the legislature intended the merits of an unappealed cease and desist order regarding an activity within the coastal boundary be subject to challenge if a municipality sought to enforce that order or had intended the department to be bound by such an enforcement action, consistent with the foregoing provisions, it would have provided for the department's right to participate in such proceedings.

In light of the statutory scheme and the intent of the legislature, we conclude that, in the present case, the department is not bound by the trial court's decision in *Costa*.[30] Accordingly, because the department properly could initiate enforcement proceedings once it properly was determined that the seawall was a public nuisance, the department had jurisdiction over the seawall under § 22a-108.[31]

## III

## TIDAL, COASTAL OR NAVIGABLE WATERS/

COASTAL BLUFF OR ESCARPMENT

We now turn to the plaintiffs' claim that the trial court improperly concluded that substantial evidence supported the hearing officer's findings that: (1) the seawall was located in "tidal, coastal or navigable waters of the state," as required by General Statutes (Rev. to 2003) § 22a-361 (a); and (2) the bank on which the seawall was built was a " 'coastal [bluff] or [escarpment],' " as defined in General Statutes (Rev. to 2003) § 22a-93 (7) (A). We disagree with the plaintiffs as to both of these claims.

We once again employ our highly deferential standard of review in determining whether the hearing officer's findings are supported by substantial evidence. "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 [plaintiffs] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record." (Internal quotation marks omitted.) *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 700, quoting *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, supra, 266 Conn. 124–25.

A

The plaintiffs claim that, even if the seawall is located partially waterward of the high tide line, the trial court improperly concluded that substantial evidence supports the hearing officer's conclusion that the seawall was built in the "tidal, coastal or navigable waters" of the state, as required by General Statutes (Rev. to 2003) § 22a-361 (a). The department responds that the seawall is clearly located in tidal waters. We agree with the department.

General Statutes (Rev. to 2003) § 22a-361 (a) provides in relevant part: "No person . . . 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 obtains a permit from the commissioner. Thus, in order to assert jurisdiction under § 22a-361 over a structure located waterward of the high tide line, the department must also show that the structure is located in "tidal, coastal *or* navigable waters of the state . . . ." (Emphasis added.) Gen-

eral Statutes § 22a-361 (a) (1). We have held that the use of the word "or" in a statute "indicates a clear legislative intent of separability." *King* v. *Board of Education*, 203 Conn. 324, 336, 524 A.2d 1131 (1987). Thus, because § 22a-361 (a) is written in the disjunctive, the department can assert jurisdiction over a structure if it is located in either tidal, coastal or navigable waters, and waterward of the high tide line.[32]

The legislature has not provided a definition of "tidal waters" anywhere in the act. "When a statute does not provide a definition, words and phrases in a particular statute are to be construed according to their common usage. . . . To ascertain that usage, we look to the dictionary definition of the term." (Internal quotation marks omitted.) *Potvin* v. *Lincoln Service & Equipment Co.*, 298 Conn. 620, 633, 6 A.3d 60 (2010); see also General Statutes § 1-1 (a). Webster's Third New International Dictionary (2002) defines tidal as "of or relating to tides . . . caused by tides . . . or having tides," and defines tide as "the alternate rising and falling of the surface of the ocean and of gulfs, bays, estuaries, and other water bodies connected with the ocean that occurs twice a day over most of the earth and is caused by the gravitational attraction of the sun and moon occurring unequally on different parts of the earth . . . ."

In the present case, there is ample evidence in the record to support the hearing officer's finding that the plaintiffs' seawall is located within tidal waters. The plaintiffs' own expert, Sharpe, testified that the water level at the seawall varies and is influenced by the tide. Thus, the fact that the water level near the seawall changes due to tidal influences supports the hearing officer's conclusion that the seawall is located within tidal waters. Additionally, the parties consulted predicted high tide charts for the shoreline along the plaintiffs' property, including the Army Corps of Engineers one year frequency tidal flood elevations for areas along the Connecticut River, when attempting to determine the location of the high tide line at the seawall. The fact that these charts depict a high tide line at the plaintiffs' property supports the hearing officer's finding that the seawall is located in tidal waters. Finally, the plaintiffs' own expert, Bohlen, testified that the Connecticut River is subject to tidal influences as far inland as Hartford and beyond. Thus, we conclude that the administrative record affords a substantial basis of fact to support the hearing officer's conclusion that the seawall is located in tidal waters.

B

The plaintiffs next claim that the trial court improperly concluded that substantial evidence supports the hearing officer's conclusion that the seawall was built on a coastal bluff or escarpment as defined by § 22a-93 (7) (A). Thus, the plaintiffs claim that a coastal site

plan was not required because the seawall does not affect coastal resources, the protection of which is one of the purposes of the act. See General Statutes § 22a-106. The plaintiffs base their claim on the fact that the site of the seawall is not specifically identified on a 1979 department coastal resource map as a coastal bluff or escarpment. In response, the department claims that there is no provision in the act stating that the coastal resource map identifies all of the coastal resources in the state. Thus, the department claims that an activity can affect coastal resources even if the site of the activity is not identified as a coastal resource on the department coastal resource map. The department further claims that there is substantial evidence in the record that the seawall was built on a coastal bluff or escarpment. We agree with the department.

The inquiry into whether the plaintiffs' shoreline is a coastal bluff or escarpment is relevant because General Statutes §§ 22a-105 (e) and 22a-106 (b) direct municipalities, when reviewing a coastal site plan, to determine whether the potential adverse impacts of the proposed activity on coastal resources are acceptable. The term "coastal resources" is defined, generally, as the coastal waters of the state and their natural resources, and shoreline marine and wildlife habitats. General Statutes § 22a-93 (7). Included in the definition of coastal resources are " '[c]oastal bluffs and escarpments,' " which are defined as "naturally eroding shorelands marked by dynamic escarpments or sea cliffs which have slope angles that constitute an intricate adjustment between erosion, substrate, drainage and degree of plant cover . . . ." General Statutes § 22a-93 (7) (A). Thus, in reviewing a coastal site plan, a town may approve or deny the plan based on its potential adverse impacts to, inter alia, coastal bluffs and escarpments. See General Statutes §§ 22a-105 (e) and 22a-106 (b).

The plaintiffs fail to point out, and we cannot find, any authority indicating that, in order to be considered a coastal bluff or escarpment under the act, a bank or slope must be identified as such on the department coastal resources map.[33] Thus, the fact that the site of the seawall was not specifically identified as a coastal bluff or escarpment on the coastal resources map is not determinative. Therefore, as required by the substantial evidence standard, we look to the record as a whole to determine whether the hearing officer was justified in finding that the seawall is located on a coastal bluff or escarpment.

We conclude that there is sufficient evidence in the record to sustain the department's finding. The record shows that, prior to the construction of the seawall, the river bank was found to have an angle of approximately seventy degrees, and appears on maps to have an elevation between approximately seventeen and nineteen feet above sea level. The bank was described as a "bluff"

by Bohlen,[34] as well as by the department. Bohlen further testified that the bluff was "very steep." The plaintiffs also admit that the bank was undergoing a natural and ongoing process of erosion, which was the reason why the seawall was constructed. Accordingly, in light of the statutory definition, we conclude that there is substantial evidence in the record that the site of the seawall is a coastal bluff or escarpment.

We note, however, that even if the seawall were not located on a coastal bluff or escarpment, the plaintiffs would still have been required to submit a coastal site plan to the town prior to commencing construction.[35] Coastal site plan review is required for a "proposed building, use, structure, or shoreline flood and erosion control structure" located fully or partially within the coastal boundary. General Statutes (Rev. to 2003) § 22a-109 (a). A proposed use that does not impact coastal resources is not exempted from coastal site plan review. Rather, the determination of whether an activity impacts a coastal resource is left for the municipality as part of the coastal site plan review process. General Statutes § 22a-105 (e). Thus, the seawall would not have been exempt from coastal site plan review even if, ultimately, it was determined by the town that the seawall did not impact a coastal resource. Accordingly, due to the fact that the seawall is clearly located within the coastal boundary, the plaintiffs were required to file a coastal site plan with the town, regardless of their subjective belief that the seawall was located landward of the high tide line and did not adversely impact coastal resources.[36]

## IV

## DEPARTMENT AUTHORITY TO REMOVE THE SEAWALL

Finally, we turn to the plaintiffs' claim that the trial court improperly concluded that the department hearing officer did not abuse her discretion in requiring them to comply with the department's order to remove the entire seawall. The plaintiffs claim that, because the hearing officer, allegedly, incorrectly determined that a coastal site plan was required, and because only a portion of the seawall was found to be located waterward of the high tide line in violation of § 22a-361, the order to remove the entire seawall must be vacated.[37] We disagree with the plaintiffs and conclude that the trial court properly concluded that the hearing officer's decision ordering the removal of the entire seawall was proper.

"Our resolution of this issue is guided by the limited scope of judicial review afforded by the [UAPA]; General Statutes § 4-166 et seq.; to the determinations made by an administrative agency. [W]e must decide, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or

abused its discretion. . . . Even as to questions of law, [t]he court's ultimate duty is only to decide whether, *in light of the evidence*, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 164–65, 635 A.2d 783 (1993).

In the present case, we note that the department does not claim authority to act exclusively on either § 22a-361 or its authority under the act, but expressly relies on both collectively as the source of its jurisdiction. In *Shanahan*, we concluded that the department did not have the authority under § 22a-361 to order the removal of any portion of the plaintiff's seawall that was not located waterward of the high tide line. *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 722. We stated, however, that because the plaintiff failed to obtain local approval for the seawall, "the predicates for the department to exercise authority under § 22a-108 [over the portions of the seawall located landward of the high tide line] would appear to have been met." Id., 721. The department, however, expressly disavowed any reliance on § 22a-108 as the source of its authority. Id., 722. We therefore directed the trial court to remand the case to the department to determine which portions of the seawall were constructed waterward of the high tide line, and thus subject to the department's jurisdiction under § 22a-361. Id. Accordingly, we concluded that, in order for the department to exercise jurisdiction over portions of a structure located landward of the high tide line, the department would have to properly assert its authority under § 22a-108. Id.

In part I of this opinion, we concluded that substantial evidence supports the hearing officer's conclusion that a portion of the seawall was located waterward of the high tide line and had been constructed in violation of § 22a-361. Additionally, in part II of this opinion, we concluded that substantial evidence supports the hearing officer's conclusion that the plaintiffs were required to submit a coastal site plan to the town, and that, because the seawall was constructed without lawful approval from the town, it constituted a public nuisance under § 22a-108. Thus, by exercising jurisdiction under both §§ 22a-108 and 22a-361, the department has properly asserted jurisdiction over the entire seawall. See id. Accordingly, we conclude that the trial court properly concluded that the hearing officer did not abuse her discretion in ordering the removal of the entire seawall.

The judgment is affirmed.

In this opinion the other justices concurred.

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

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

[2] A gabion seawall consists of galvanized or plastic coated metal baskets that are filled with stones and typically are built in layers and angled back into the slope.

[3] General Statutes (Rev. to 2003) § 22a-109 (a) provides: "A coastal site plan shall be filed with the municipal zoning commission to aid in determining the conformity of a proposed building, use, structure, or shoreline flood and erosion control structure as defined in subsection (c), fully or partially within the coastal boundary, with the specific provisions of the zoning regulations of the municipality and the provisions of sections 22a-105 and 22a-106, and in the case of shoreline flood and erosion control structures, the provisions of sections 22a-359 to 22a-363, inclusive, and any regulations adopted thereunder. A coastal site plan required under this section may be modified or denied if it fails to comply with the requirements already set forth in the zoning regulations of the municipality and, in addition, the coastal site plan may be modified, conditioned or denied in accordance with the procedures and criteria listed in sections 22a-105 and 22a-106. A coastal site plan for a shoreline flood and erosion control structure may be modified, conditioned or denied if it fails to comply with the requirements, standards and criteria of sections 22a-359 to 22a-363, inclusive, and any regulations adopted thereunder. Review of a coastal site plan under the requirements of this section shall supersede any review required by the municipality under subsection (g) of section 8-3 and shall be in addition to any applicable zoning regulations of any special district exercising zoning authority under special act. The provisions of this section shall not be construed to limit the authority of the Commissioner of Environmental Protection under sections 22a-359 to 22a-363, inclusive."

General Statutes (Rev. to 2003) § 22a-109 (c) defines " 'shoreline flood and erosion control structure' " as "any structure the purpose or effect of which is to control flooding or erosion from tidal, coastal or navigable waters and includes breakwaters, bulkheads, groins, jetties, revetments, riprap, seawalls and the placement of concrete, rocks or other significant barriers to the flow of flood waters or the movement of sediments along the shoreline. The term shall not include any addition, reconstruction, change or adjustment to any walled and roofed building which is necessary for such building to comply with the requirements of the Code of Federal Regulations, Title 44, Part 50, and any municipal regulation adopted thereunder."

All references in this opinion to § 22a-109 are to the 2003 revision unless otherwise indicated.

[4] Subsequent to the events of this case, the department merged into a new agency, the department of energy and environmental protection. See Public Acts 2011, No. 11-80, §§ 1, 55.

[5] General Statutes (Rev. to 2003) § 22a-361 (a) 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 said Commissioner a certificate or permit for such work and has agreed to carry out any conditions necessary to the implementation of such certificate or permit. . . ."

We note that § 22a-361 (a) was amended several times between the effective date of the 2003 revision of the statute and the time of the construction of the seawall at issue here in 2004. Those changes, however, are not relevant to the present appeal. Therefore, for the purposes of clarity and convenience, all references in this opinion to § 22a-361 (a) are to the 2003 revision unless otherwise indicated.

[6] For the purpose of analyzing the issues presented in the present case, we refer to the 2003 revision of the statute. General Statutes (Rev. to 2003) § 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."

[7] 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, through the attorney general, bring proceedings to abate or enjoin the nuisance; General Statutes § 22a-362; and/or seek a $1000 per offense civil penalty. General Statutes §§ 22a-361a and 22a-362.

[8] The legislature recently enacted "An Act concerning the Coastal Management Act and Shoreline Flood and Erosion Control Structures," which, inter alia, amended General Statutes § 22a-359, and removed the statutory definition of and references to "high tide line" and replaced it with "coastal jurisdiction line." Public Acts 2012, No. 12-101, § 4. Effective October 12, 2012, the "coastal jurisdiction line" is defined as "the location of the topographical elevation of the highest predicted tide for the period beginning in 1983 and ending in 2001, referenced to the most recent National Tidal Datum Epoch as published by the National Oceanic and Atmospheric Administration and described in terms of feet of elevation above the North American Vertical Datum of 1988." Public Act 12-101, § 4. Thus, the exact extent of the department's jurisdiction under § 22a-359 et seq. is now marked by a fixed point, rather than by case-by-case determinations by the department.

[9] General Statutes § 22a-93 (7) provides in relevant part: " 'Coastal resources' means the coastal waters of the state, their natural resources, related marine and wildlife habitat and adjacent shorelands, both developed and undeveloped, that together form an integrated terrestrial and estuarine ecosystem; coastal resources include the following: (A) 'Coastal bluffs and escarpments' means naturally eroding shorelands marked by dynamic escarpments or sea cliffs which have slope angles that constitute an intricate adjustment between erosion, substrate, drainage and degree of plant cover . . . ."

[10] General Statutes § 22a-94 (b) provides: "Within the coastal area, there shall be a coastal boundary which shall be a continuous line delineated on the landward side by the interior contour elevation of the one hundred year frequency coastal flood zone, as defined and determined by the National Flood Insurance Act, as amended (USC 42 Section 4101, P.L. 93-234), or a one thousand foot linear setback measured from the mean high water mark in coastal waters, or a one thousand foot linear setback measured from the inland boundary of tidal wetlands mapped under section 22a-20, whichever is farthest inland; and shall be delineated on the seaward side by the seaward extent of the jurisdiction of the state."

[11] General Statutes § 22a-105 (e) provides, inter alia, that a town may condition or "deny the activity proposed in a coastal site plan on the basis of the criteria listed in section 22a-106 to ensure that the potential adverse impacts of the proposed activity on both coastal resources and future water-dependent development activities are acceptable. . . ." That statute goes on to provide that "the review of any coastal site plan pursuant to this chapter shall not be deemed complete and valid unless the board or commission having jurisdiction over such plan has rendered a final decision thereon. If such board or commission fails to render a decision within the time period provided by the general statutes or any special act for such a decision, the coastal site plan shall be deemed rejected." General Statutes § 22a-105 (f).

General Statutes § 22a-106 (a) provides, generally, that a town reviewing a proposed coastal site plan "shall determine whether or not the potential adverse impacts of the proposed activity on both coastal resources and future water-dependent development activities are acceptable."

In determining whether the proposed activity is acceptable, towns are directed to "follow all applicable goals and policies stated in [the act] and identify conflicts between the proposed activity and [the act's policies]." General Statutes § 22a-106 (b) (3).

Furthermore, the burden is on the party submitting the coastal site plan to demonstrate that the adverse impacts of the proposed activity are acceptable, and that the proposed activity is consistent with the general goals of the act. General Statutes § 22a-106 (c).

[12] General Statutes § 22a-108 provides: "Any activity within the coastal boundary not exempt from coastal site plan review pursuant to subsection (b) of section 22a-109, which occurs without having received a lawful approval from a municipal board or commission under all of the applicable procedures and criteria listed in sections 22a-105 and 22a-106, or which violates the terms or conditions of such approval, shall be deemed a public nuisance. Municipalities shall have the authority to exercise all enforcement remedies legally available to them for the abatement of such nuisances including, but not limited to, those under section 8-12. After notifying the municipality in which the activity is located, the commissioner may order that such a public nuisance be halted, abated, removed or modified and that the site of the violation be restored as nearly as reasonably possible to its condition prior to the violation, under the authority of sections 22a-6 and 22a-7. The commissioner may request the Attorney General to institute proceedings to enjoin or abate any such nuisance. Upon receipt of a petition signed by at least twenty-five residents of the municipality in which an activity is located the commissioner shall investigate to determine whether or not an activity described in the petition constitutes a public nuisance. Within ninety days of receipt of such petition, the commissioner shall make a written determination and provide the petitioning municipality with a copy of such determination."

[13] Riprap is "a foundation or sustaining wall of stones or chunks of concrete . . . ." Merriam-Webster's Collegiate Dictionary (10th Ed. 1993).

[14] The elevation figures appearing in this opinion are referenced to the national geodetic vertical datum, a fixed, standardized reference point against which elevation data in the United States is referenced.

[15] The petitions to intervene were denied on the ground that the Connecticut Gateway Commission and the town had failed to demonstrate that their legal rights, duties or privileges would be affected by the department's decision or that their participation was necessary to the proper disposition of the proceedings under § 22a-3a-6 (k) (1) (B) (i) and (ii) of the Regulations of Connecticut State Agencies.

Although it is not controlling on the issue of whether the town should have been granted permission to intervene, we note that in their objection, the plaintiffs stated, inter alia, that "the [t]own's request does not demonstrate that the [t]own will or may reasonably be expected to be affected by the [decision]. Assuming, arguendo, and as we expect the evidence to show, that the seawall was built landward of the high tide line, the [t]own will be able to exercise its jurisdiction in proceedings before the [t]own. If, on the other hand, the seawall was built waterward of the high tide line . . . [then] the [t]own is without jurisdiction or interest. The [t]own's participation, then, is not necessary to the proper disposition of the proceedings." The plaintiffs therefore willingly exposed themselves to defending two separate actions: the administrative hearing before the department, and, depending on the outcome of that proceeding, a proceeding before the town.

The better practice, in our view, would be to allow a municipality to intervene in a proceeding before the department when the issues involve whether an activity violates the act. Allowing a municipality to intervene will have the result of binding both the municipality and the department in the same action.

[16] Although we agree with the plaintiffs 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 (Rev. to 2003) § 22a-359 (c); the plaintiffs "[fail] to appreciate that the uncertainty operates in only 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." (Emphasis in original.) *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 702.

[17] A person challenging the department's determination that the structure is waterward of the high tide line could then attempt to rebut the department's conclusion by showing that the water level on that day was the product of intense storm activity, such as a hurricane.

[18] The plaintiffs claim, however, that the tide on September 12, 2006, was influenced by Hurricane Florence, which was passing off the coast of Bermuda at that time. Bohlen testified that, by his estimation, the hurricane was approximately 350 miles away from the plaintiffs' home on the day in which it allegedly influenced the tide. Thus, because storm surges caused by a hurricane cannot be included when determining the high tide line, the plaintiffs claim that the observations made by department officials on September 12, 2006, are insufficient to show that the seawall is located

waterward of the high tide line.

We decline to conclude that § 22a-361 requires the department to prove that the tide on any given day is not influenced, even to the slightest degree, by a storm occurring hundreds of miles away in the Atlantic Ocean. Taken to its logical conclusion, the plaintiffs' interpretation of the statute would force the department to prove that the observed tide on any given day was not influenced at all by a storm or strong winds occurring anywhere in the world. Clearly, the legislature did not intend such an absurd result. Rather, the purpose of § 22a-359 et seq. is to grant the department authority to regulate coastal activities occurring waterward of the high tide line. See *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 719–20. Imposing such an insurmountable burden on the department would unduly frustrate the purpose of the statute.

Furthermore, Grzywinski's testimony belies any suggestion that the tide on September 12, 2006, was influenced by a hurricane. When questioned about his observations on September 12, 2006, Grzywinski testified as follows:

"[The Department's Counsel]: Now, as far as you know, had there been any storms previous to [September 12, 2006]? . . .

"[Grzywinski]: No, not to my knowledge, no.

"[The Department's Counsel]: How about June 22?

"[Grzywinski]: No.

"[The Department's Counsel]: Did you observe any unusual weather conditions on either day?

"[Grzywinski]: I did not. The conditions of September 12 were very quiet. With the exception of a couple of boat wakes thrown off by a couple of vessels passing in the Connecticut River, the day was essentially very quiet with very little to no wind from the south."

In any event, the plaintiffs do not claim that a hurricane or other intense storm influenced the tide level observed during the initial inspection on September 29, 2004, when the plaintiffs' seawall was just recently completed. Water was observed coming in contact with the seawall on that date. That visual observation was enough, by itself, for the hearing officer to conclude that a portion of the seawall was located waterward of the high tide line. See *Shanahan* v. *Dept. of Environmental Protection*, supra, 305 Conn. 702–703.

[19] When asked how he arrived at his determination that the high tide line was 2.8 feet, Sharpe testified: "I took a look at the right-hand column [of the study] where our comments occurred, and if I saw that there was a weather factor that might have influenced the tide I disregarded that reading. For example, if we look on May 25, [2005], it says 'very windy, northeast,' and generally a northeast wind will build water into Long Island Sound and into the tributaries, so we felt that that reading was influenced by those weather conditions."

Because we conclude that, under § 22a-359 (c), normal meteorological influences may properly be taken into account when determining the location of the high tide line, we conclude that the department properly could conclude that Sharpe improperly had disregarded tidal measurements on days when the tide was influenced by normal meteorological events. Accordingly, although the determination of the exact location of the high tide line is not necessary in this case, we note that Sharpe's conclusion that the high tide line lies at 2.8 feet is likely incorrect.

[20] The references to a high tide line of 4.1 feet in the plaintiffs' earlier permit applications for their dock were based on the one year frequency tidal elevation data. It was not until after Grzywinski made his initial inspection of the plaintiffs' property, and determined that the seawall violated § 22a-361, that department staff discovered that the plaintiffs had applied for and received permits from the department in the past. Thus, any consideration of the high tide line of 4.1 feet at the plaintiffs' property based on that data occurred after Grzywinski had observed water touching the seawall, and after the department had determined that the seawall was in violation of § 22a-361.

[21] During the administrative hearing, Grzywinski testified:

"[The Department's Counsel]: Is there any government agency, federal or state, that maintains statistics concerning the high tide line as defined in § 22a-359?

"[Grzywinski]: The Army Corps of Engineers published a tidal flood profile elevation for the entire state of Connecticut, and that is based on an eighteen year tidal epoch that characterized the elevations of the high tide line, mean high water as well as mean low water. That tidal flood profile is used by the department in assessing the determination of the high tide line for a

specific area.

"[The Department's Counsel]: Now, is it used as an approximation or as the exact elevation of the high tide line?

"[Grzywinski]: Typically it is used as a rough approximation for the high tide line."

[22] Shortly after purchasing their property in 1995, the plaintiffs renovated their house and constructed a stone patio adjacent to stairs that led to a dock. The plaintiffs hired Sharpe to conduct a topographic survey of the property to aid in the preparation of site plans for the renovations. The survey indicated the contours and elevations of the property with respect to national geodetic vertical datum.

In 1996, following completion of the survey, the plaintiffs applied for and received a permit from the department to construct a dock. In 1999, using the same survey data, the plaintiffs applied for and received another permit from the department to extend the dock for better boat access. The site plans submitted with each permit application were based on Sharpe's topographic survey that was conducted for the renovation project. The site plans depicted a high tide line elevation at the plaintiffs' property of 4.1 feet, based on use of the Army Corps of Engineers one year frequency tidal flood elevation.

[23] The plaintiffs have not argued before this court that they actively were undertaking any other measures to address the cease and desist order in the period between the town's issuance of the order and the action by the department. There is some evidence in the record, however, that the plaintiffs represented in the proceedings before the department that they had undertaken some measures to rectify the violations of zoning and wetlands regulations cited in the cease and desist order. As we explain in footnote 30 of this opinion, the plaintiffs' posture before the department assumed that the town would initiate enforcement proceedings only if the plaintiffs prevailed in the proceedings before the department.

[24] The town also claimed that the plaintiffs violated the zoning regulations by failing to obtain a permit before building a "structure" as defined by § 9.1 of the Old Saybrook zoning regulations. The court in *Costa* concluded that the seawall was not a "structure" within the meaning of § 9.1. *Costa* v. *Sams*, supra, 46 Conn. L. Rptr. 186. The town's claim that the seawall was a "structure" under its zoning regulations, however, does not implicate the jurisdiction of the department. Thus, that issue is not relevant to this appeal.

[25] Section 22a-109 authorizes a municipality to utilize enforcement remedies provided under General Statutes § 8-12, which authorizes civil penalties, but in amounts significantly less than those that the commissioner may seek under the act. Compare General Statutes § 22a-106a (authorizing commissioner to seek penalty of up to $1000 for each offense, "and in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense") with General Statutes § 8-12 (authorizing fine of no more than $100, or not more than $250 if violation is wilful, for each day that such violation continues). We note, however, that § 8-12 also provides criminal sanctions for zoning violations that are wilful, and "expressly contemplates simultaneous criminal and civil proceedings, as it delineates the circumstances under which a defendant in a criminal prosecution brought under § 8-12 may plead in abatement on the ground that the zoning violation at issue is the subject of a pending civil action." *Bozrah* v. *Chmurynski*, 303 Conn. 676, 695 n.11, 36 A.3d 210 (2012).

[26] We note that, because the town did not appeal from *Costa*, it would be improper to collaterally attack that decision. The town is bound by that decision. Insofar, however, as that decision is inextricably linked to our construction of the act, it is appropriate to address the scope of that decision as it bears on the department's authority.

[27] This court has explained, however, that the trial court has discretion to determine whether the equities weigh in favor of granting the relief sought. *Gelinas* v. *West Hartford*, supra, 225 Conn. 595–96. Moreover, there is authority suggesting that an unappealed cease and desist order may be collaterally attacked in limited circumstances, such as when an appeal to the zoning board of appeals would be futile. See, e.g., *Beacon Falls* v. *Posick*, 212 Conn. 570, 575 n.4, 563 A.2d 285 (1989); see also *Stepney, LLC* v. *Fairfield*, 263 Conn. 558, 570, 821 A.2d 725 (2003) (constitutional challenge cannot be decided and therefore need not be raised in administrative proceeding).

[28] General Statutes § 22a-110 provides: "The commissioner or his designee may submit written testimony to any municipal board or commission and may appear by right as a party to any hearing before such municipal board

or commission concerning any proposed municipal plan of conservation and development or zoning regulations or changes thereto affecting the area within the coastal boundary or the review of a coastal site plan or a municipal approval, permit or license for a building, use or structure affecting the area within the coastal boundary and said commissioner may appeal, or appear as a party to any appeal of, a municipal decision concerning such matters whether or not he has appeared as a party before the municipal board or commission. If the decision of such board or commission is upheld by a court of competent jurisdiction, the state shall reimburse the municipality within three months for all costs incurred in defending the decision."

[29] Although the act requires a municipality to send a copy of each coastal site plan submitted for any "shoreline flood and erosion control structure" to the department for its review; General Statutes (Rev. to 2003) § 22a-109 (d); there is no provision requiring a municipality to notify the department if a cease and desist order is issued with respect to an activity that is violating the act. Thus, it is unclear how effective the act's protections are for ensuring the department's right to participate in decisions affecting the coastal boundary. We note that, in the present case, the town sent a copy of its order to the department. It is unclear whether this practice is uniformly followed.

[30] Although this court has recognized that res judicata principles can apply between state agencies; see, e.g., *State* v. *Fritz*, 204 Conn. 156, 173, 527 A.2d 1157 (1987) (noting that determinative issue is whether agencies share unity of interest by comparing their respective statutory mandates), overruled in part on other grounds, 257 Conn. 769, 778 A.2d 947 (2001); we have not yet considered whether a state agency could be precluded by a municipal agency's action. In light of our determination that the trial court in *Costa* improperly allowed the plaintiffs to challenge whether a violation had occurred, we need not resolve that issue in the present case.

We also note that res judicata is based on equitable principles and concerns of judicial economy. See, e.g., *Delahunty* v. *Massachusetts Mutual Life Ins. Co.*, 236 Conn. 582, 591–92, 674 A.2d 1290 (1996). In the present case, the plaintiffs took the position before the department that the wall was not waterward of the high tide line, and thus it was outside the department's jurisdiction under § 22a-361. They opposed the town's request to intervene in the department's proceedings on the ground that, if they were successful in those proceedings, the town would be able to pursue its own enforcement action. Thus, the plaintiffs cannot claim that they were prejudiced by having to defend against separate actions. Moreover, principles of judicial economy would weigh in favor of enforcing the department's proceeding, in which there was a determination as to both the violations of §§ 22a-108 and 22a-361 and in which an administrative agency with expertise over environmental matters, rather than a trial court, made the requisite findings. See *Cannata* v. *Dept. of Environmental Protection*, 215 Conn. 616, 627, 577 A.2d 1017 (1990) ("Whether the plaintiffs' proposed activity within the stream channel encroachment lines is a placement of an 'obstruction or encroachment' requiring them to obtain a permit pursuant to [General Statutes] § 22a-342 and whether the plaintiffs' proposed use of their land is an 'agricultural or farming' use within [General Statutes] § 22a-349 are factual determinations best left to the commissioner. This is precisely the type of situation that calls for agency expertise. Relegating these determinations to the commissioner in the first instance will provide a complete record containing the commissioner's interpretation of the relevant statutory provisions for judicial review.").

[31] We also disagree with the plaintiffs' claim that the trial court improperly determined that substantial evidence supports the hearing officer's conclusion that the seawall is a " 'shoreline flood and erosion control structure' " as defined in § 22a-109 (c). The town characterized the seawall as a "shoreline 'flood and erosion' control structure" in its cease and desist order. More importantly, there was testimony that the erosion of the bank was caused by two concurrent forces: erosion at the top of the bank was caused by weather related runoff; and erosion at the base of the bank was caused by scouring from wave and wake activity. The plaintiffs admitted in their answering statement to the department's removal order that the seawall had been built to prevent continuing erosion attributable to tidal and wake activity. They also conceded in that statement that the wall had been constructed in the coastal boundary. Accordingly, because "shoreline flood and erosion control structures" are never exempt from coastal site plan review, the plaintiffs were required to submit a coastal site plan prior to constructing the seawall. See General Statutes (Rev. to 2003) § 22a-109 (b).

[32] The plaintiffs claim that the seawall is neither in " '[c]oastal waters,' "

as that term is defined in § 22a-93 (5), nor in " '[n]avigable waters,' " as that term is defined in General Statutes § 15-3a (3). Even assuming, arguendo, that the plaintiffs' claims are correct, the department can still assert jurisdiction if the seawall is shown to be located within "tidal waters."

Furthermore, we note that the legislature recently amended § 22a-359 to include a definition of " 'navigable waters.' " Public Acts 2012, No. 12-101, § 4. General Statutes (Rev. to 2011) § 22a-359 (e), as amended by Public Act 12-101, § 4, now provides that, "[a]s used in this section and sections 22a-360 to 22a-363a, inclusive, 'navigable waters' means Long Island Sound, any cove, bay or inlet of Long Island Sound, and that portion of any tributary, river or stream that empties into Long Island Sound upstream to the first permanent obstruction to navigation for watercraft from Long Island Sound." This amendment became effective October 1, 2012. Thus, although the amendment does not apply to the present case, we note that the plaintiffs' seawall would be located in " 'navigable waters' " as that term is now defined by the statute.

[33] Sharpe testified that the coastal resource maps are "intended to depict, *in general terms*, coastal resources that might occur in various locations along the shore." (Emphasis added.) Thus, the plaintiffs' own expert admitted that, at best, the maps are used as a general indicator of coastal resources, rather than as a conclusive indication of the location of coastal resources that are to be considered by a municipality when determining whether a proposed activity should be allowed under the act.

[34] At the administrative hearing, Bohlen testified that "the removal of the wall has the potential to initiate continuing failure of that bluff, primarily because of its slope, together with its material. It's very steep."

[35] The examples of "coastal resources" given in § 22a-93 (7) are not intended to be an exhaustive list of possible coastal resources that may be impacted by a proposed building, use or structure. Rather, after stating a general definition for "coastal resources," the statute provides that "coastal resources *include* the following"; (emphasis added); and then lists numerous examples of "coastal resources . . . ." General Statutes § 22a-93 (7). Thus, a town may take into consideration other coastal resources not listed in § 22a-93 (7) when reviewing a coastal site plan. Furthermore, the statutory definition of the phrase " '[a]dverse impacts on coastal resources' " contains an illustrative list of possible adverse impacts. General Statutes § 22a-93 (15). It is clear, therefore, that the legislature intended for coastal towns to have broad latitude in determining whether a proposed use would adversely impact a coastal resource.

Accordingly, the effect of a proposed structure on a coastal bluff or escarpment is just one of a number of potential adverse impacts on coastal resources that a town must consider when determining whether to approve a coastal site plan. Thus, even assuming, arguendo, that the site of the seawall was not a coastal bluff or escarpment, the plaintiffs' claim that a coastal site plan was not required cannot hold water. If the required coastal site plan was submitted prior to construction, the town would have had the obligation to determine the seawall's potential adverse effects on a wide array of coastal resources. For example, the town could have denied the plaintiffs' site plan if it found that the seawall would degrade "natural erosion patterns through the significant alteration of littoral transport of sediments in terms of deposition or source reduction"; General Statutes § 22a-93 (15) (C); or degrade or destroy essential wildlife by significantly altering the natural components of the habitat. General Statutes § 22a-93 (15) (G).

[36] The plaintiffs seem to place some reliance on the fact that they did not wilfully violate the act or § 22a-361. The plaintiffs claim that they did not file a permit application with the department prior to construction of the seawall because Sharpe assured them that, if the seawall was constructed landward of the high tide line, no permits would be required. The plaintiffs also claim that they relied upon their landscaper, Lawrie, to construct the seawall landward of the high tide line.

We note, however, that neither the act nor § 22a-361 requires that a party wilfully violate the regulations in order for the town or the department to engage in enforcement action. Furthermore, the plaintiffs' reliance on Lawrie to build the seawall landward of the high tide line so as not to violate § 22a-361 does not explain why they did not file a coastal site plan with the town prior to construction. The record shows that the seawall was clearly located within the coastal boundary. Thus, a coastal site plan was required to be filed with the town under § 22a-109 (a). The town, and not the plaintiffs, had the authority to determine whether the seawall conformed to the specific provisions of §§ 22a-105 and 22a-106. Additionally, the town, and not the

plaintiffs, had the authority to determine whether the seawall was a "shoreline flood and erosion control structure" as defined in § 22a-109 (c). If the town had decided, after taking into account the comments and recommendations of the commissioner, to deny the plaintiffs' coastal site plan, the plaintiffs could have properly appealed that decision to a court of competent jurisdiction. The plaintiffs' actions in this case are simply not contemplated by the statute.

[37] During the administrative hearing, the plaintiffs also claimed that the seawall should not be removed because removal of the entire seawall would cause environmental harm to coastal resources in the area. The hearing officer concluded that the record indicated that such harm would only occur if the seawall were removed without adequate safeguards to the site. We conclude that the record supports the hearing officer's conclusion. We further note that, if the department properly exercises jurisdiction over an entire unlawful structure, rarely, if ever, will an order from the agency or court to remove the structure be an abuse of discretion due to the potential harm that such removal might cause to the environment. If a party could successfully defend against removal based on such a claim, property owners would be encouraged to erect structures without first seeking and receiving coastal site plan approval by claiming that removal of the existing structure would harm coastal resources.