CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

GINA CIMINO *v.* JOSEPH CIMINO
(AC 38705)

DiPentima, C. J., and Prescott and Beach, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the trial court's denial of her motion to open and vacate the dissolution judgment. In that motion, the plaintiff claimed, inter alia, that the defendant had provided only the value of his contributions to his pension, approximately $147,000, instead of its higher actual value, and that the defendant had failed to disclose approximately $50,000 in gifts from his family. The plaintiff sought to conduct postjudgment discovery, and further sought, inter alia, an order vacating the judgment of the dissolution court on the basis of either fraud or mutual mistake. On appeal, the plaintiff claimed that the dissolution court committed plain error in its valuation of the defendant's pension, and that the trial court abused its discretion in denying her motion to open the judgment. *Held*:

1. This court declined to review the plaintiff's claim that the dissolution court committed plain error in its valuation of the defendant's pension because the claim was an untimely and impermissible collateral attack on the judgment of the dissolution court and, thus, it was outside the purview of this appeal taken from the denial of the motion to open the judgment: because the plaintiff failed to challenge the propriety of the findings and determinations of the dissolution court within twenty days of the dissolution judgment, this appeal was limited to a determination of whether the trial court acted unreasonably or in a clear abuse of its discretion in denying the plaintiff's motion to open the judgment on the basis of fraud.

2. The trial court did not abuse its discretion in denying the plaintiff's motion to open, on the basis of fraud, intentional misrepresentation or mutual mistake, with respect to the issue of the defendant's pension, the trial court properly having determined that there was no probable cause to justify the opening of the judgment for the limited purpose of discovery: on the basis of the credible evidence before it, the trial court found, inter alia, that the defendant had disclosed all of the information that he had about his pension on his financial affidavits during the dissolution proceedings and that the defendant lacked any knowledge of the actual value of the pension aside from the monthly annuities for different retirement ages, and those findings did not support the plaintiff's claim that the defendant either knew the true value of the pension or knew of the existence of a pension booklet that contained the details necessary to calculate the actual value, and that he intentionally failed to provide this information in violation of the obligation of full and frank disclosure, and aside from speculation and conjecture, there was no basis to conclude that the trial court's findings were improper.

3. The trial court did not abuse its discretion in denying the plaintiff's motion to open the judgment, on the basis of fraud, with respect to the monetary gifts from the defendant's family: although the trial court found that it was customary for the defendant's parents to give their children monetary gifts each year, the trial court credited the testimony of the defendant and his brother that the defendant was not promised any money, that his parents did not want to give him a gift during the pendency of the dissolution action, and that a gift of money that the defendant's brother gave to the defendant after the dissolution judgment was from the brother, and not from the defendant's parents; furthermore, the trial court's conclusions that the defendant had no present interest in the postjudgment gifts from his brother, and that any hope that the defendant may have had to receive those gifts was merely speculative, defeated the plaintiff's claim that the defendant knew that two annual monetary gifts from his parents had been given to the defendant's brother to hold until the dissolution judgment had been rendered.

Argued January 6—officially released June 20, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Gould*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court, which affirmed the judgment of the trial court;

subsequently, the court, *Goodrow*, *J.*, denied the plaintiff's motion to open, and the plaintiff appealed to this court. *Affirmed*.

Gina Cimino, self-represented, the appellant (plaintiff).

Christopher T. Goulden, with whom, on the brief, were *Janis M. Laliberte* and *Margaret Sullivan*, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. The plaintiff, Gina Cimino, appeals from the judgment of the trial court denying her motion to open and vacate the judgment dissolving her marriage to the defendant, Joseph Cimino. On appeal, she argues that (1) the dissolution court committed plain error in its valuation of the defendant's pension and (2) the trial court abused its discretion in denying her motion to open the judgment. We decline to address the claim that the dissolution court committed plain error and affirm the judgment of the trial court.

In a previous decision of this court, we set forth the following facts. "In a memorandum of decision dated July 25, 2013, the [dissolution] court found [that] . . . [t]he parties' twenty-nine year marriage had broken down irretrievably and neither party was more at fault than the other for the breakdown. The plaintiff was fifty-four years old, in reasonably good health, and a college graduate with a Master's degree in business administration. The parties stipulated the plaintiff's earning capacity to be $37,000 per year. Although she had not worked outside of the home since 1990, the plaintiff had a business making wreaths and ornaments.

"The defendant has been employed by the Internal Revenue Service for thirty years and, at the time of trial, earned $119,548 per year. At the time of the memorandum of decision, the defendant had a thrift savings

plan with a balance of $124,377.16 and a [pension], in lieu of social security, in the amount of $147,000. . . .

"The court . . . ordered the defendant to pay alimony in the amount of $600 per week for a period of ten years to the plaintiff. The plaintiff was awarded the thrift savings plan valued at approximately $124,000 and an individual retirement account valued at $11,216. The defendant was awarded the [pension] fund." *Cimino* v. *Cimino*, 155 Conn. App. 298, 299–300, 109 A.3d 546, cert. denied, 316 Conn. 912, 111 A.3d 886 (2015).

On August 3, 2015, the plaintiff filed a motion to open and vacate the July 25, 2013 dissolution judgment on the bases of fraud, intentional misrepresentation and/or mutual mistake.[1] She argued, inter alia, that the defendant had provided only the value of his contributions to the pension, approximately $147,000, rather than its actual value, which was substantially higher,[2] and that the defendant had failed to disclose approximately $50,000 in gifts from his family. The plaintiff sought to conduct postjudgment discovery pursuant to our decision in *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 540 A.2d 713 (1988), and sought an order vacating the judgment on the basis of either fraud or mutual mistake, and any other equitable relief.[3] The defendant filed an opposition to the motion to open on September 16, 2015.

[1] The plaintiff entitled her motion a "Motion to Reopen," which was not technically correct because the judgment had not been opened previously. "Although the motion was entitled a motion to reopen, we note that because the motion had not been opened previously, the use of that term is both improper and misleading. . . . The appropriate phrase is motion to open, and we reference it in this opinion accordingly." (Internal quotation marks omitted.) *State* v. *Wahab*, 122 Conn. App. 537, 539 n.2, 2 A.3d 7, cert. denied, 298 Conn. 918, 4 A.3d 1230 (2010).

[2] In the motion to open, the plaintiff argued that the pension had a value of $1,269,888.

[3] We have stated that "[u]ntil a motion to open has been granted, the earlier judgment is unaffected, which means that there is no active civil matter. See *Oneglia* v. *Oneglia*, supra, 14 Conn. App. 269. In this postjudgment posture, discovery is not available to the moving party for the simple reason that discovery is permitted only when a cause of action is pending.

The trial court held a hearing on November 20, 2015. Approximately three weeks later, the court issued a memorandum of decision denying the plaintiff's motion to open. This appeal followed.[4] Additional facts will be set forth as necessary.

Before addressing the specific claims of the plaintiff, we set forth our standard of review and the relevant legal principles. "Our review of a court's denial of a motion to open [based on fraud] is well settled. We do not undertake a plenary review of the merits of a decision of the trial court . . . to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did. . . .

See id., 270 n.2 (For us to say that [the discovery] provisions [of General Statutes § 52-197 [a] and Practice Book § 13-2] apply only when there is a cause of action currently pending is to state the obvious. Until and unless the trial court opened the previous judgment, there would be no civil action within the meaning of General Statutes § 52-197 or Practice Book § [13-2].). In short, there is no such thing as postjudgment discovery in a vacuum. . . .

"In considering a motion to open the judgment on the basis of fraud, then, the trial court must first determine whether there is probable cause to open the judgment for the limited purpose of proceeding with discovery related to the fraud claim. . . . This preliminary hearing is not intended to be a full scale trial on the merits of the [moving party's] claim. The [moving party] does not have to establish that he will prevail, only that there is probable cause to sustain the validity of the claim. . . . If the moving party demonstrates to the court that there is probable cause to believe that the judgment was obtained by fraud, the court may permit discovery." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Bruno* v. *Bruno*, 146 Conn. App. 214, 230–31, 76 A.3d 725 (2013).

[4] "The denial of a motion to open is an appealable final judgment." (Internal quotation marks omitted.) *Worth* v. *Korta*, 132 Conn. App. 154, 158, 31 A.3d 804 (2011), cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012).

"In considering a motion to open the judgment on the basis of fraud, then, the trial court must first determine whether there is probable cause to open the judgment for the limited purpose of proceeding with discovery related to the fraud claim. . . . This preliminary hearing is not intended to be a full scale trial on the merits of the [moving party's] claim. The [moving party] does not have to establish that he will prevail, only that there is probable cause to sustain the validity of the claim. . . . If the moving party demonstrates to the court that there is probable cause to believe that the judgment was obtained by fraud, the court may permit discovery." (Internal quotation marks omitted.) *Gaary* v. *Gillis*, 162 Conn. App. 251, 255–57, 131 A.3d 765 (2016); see also *Spilke* v. *Spilke*, 116 Conn. App. 590, 594–95, 976 A.2d 69, cert. denied, 294 Conn. 918, 984 A.2d 68 (2009).

I

The plaintiff first claims that the dissolution court committed plain error in its valuation of the defendant's pension. Specifically, she argues that the dissolution court valued the pension by using the defendant's contributions of $147,000, and that it should have used a different method to determine its actual value, which, she claims, exceeds $1 million. We decline to consider this claim because it is an untimely collateral attack on the judgment of the dissolution court and, therefore, outside the purview of this appeal taken from the denial of the motion to open the judgment.

The plaintiff failed to challenge the valuation of the pension in her prior appeal. See *Cimino* v. *Cimino*, supra, 155 Conn. App. 299. A challenge to the propriety of findings and determinations of the dissolution court should have been made within twenty days of the dissolution judgment, and not nearly two years later via a motion to open. See, e.g., *Berzins* v. *Berzins*, 105 Conn. App. 648, 649 n.1, 938 A.2d 1281, cert. denied, 289 Conn.

932, 958 A.2d 156 (2008). The present appeal is thus limited to whether the trial court acted unreasonably or in a clear abuse of its discretion in denying the plaintiff's motion to open the judgment on the basis of fraud. *Gaary* v. *Gillis*, supra, 162 Conn. App. 255–56; see also *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 94–95, 952 A.2d 1 (2008); *Farren* v. *Farren*, 142 Conn. App. 145, 152, 64 A.3d 352, cert. denied, 309 Conn. 903, 68 A.3d 658 (2013). Simply stated, the plaintiff's claim of plain error by the dissolution court is an untimely and impermissible collateral attack of that judgment. See *CUDA & Associates, LLC* v. *Smith*, 144 Conn. App. 763, 766, 73 A.3d 848 (2013). The plaintiff's claim regarding the valuation of the pension by the dissolution court is not properly before us in this appeal and, therefore, we are unable to consider the propriety of the court's valuation.

II

The plaintiff next claims that the trial court abused its discretion in denying her motion to open the judgment on the basis of fraud. Specifically, she argues that the defendant misrepresented the value of his pension and failed to include monetary gifts from his family in his financial affidavits. We conclude that the court did not abuse its discretion in denying the plaintiff's motion.

A

We first consider the plaintiff's argument that the defendant misrepresented the value of his pension in his financial affidavit. Specifically, she contends that he failed to disclose the actual value of his pension, or to provide her with a "pension booklet" that contained the information necessary to calculate its actual value. With respect to this issue of the pension, the court found that "[a]t the time of the dissolution trial, the defendant disclosed on his financial affidavit the details

[that] he knew [regarding] his pension." The court further noted that the plaintiff had obtained a copy of the pension benefits statement dated January 2, 2011. This statement, which was admitted into evidence at both the dissolution trial and the hearing on the motion to open, listed the defendant's expected monthly annuity if he retired at age fifty-five, sixty or sixty-two. The statement also provided the estimated monthly annuity for the defendant's thrift savings plan.

The court further found that the defendant credibly had testified at both the dissolution trial and the hearing on the motion to open that "he had no knowledge of the value of the pension. He relied instead on [the statement] for the anticipated monthly payout under the [pension]. . . . The defendant also credibly testified at the hearing that he complied with all discovery requests. Neither of the plaintiff's two trial attorneys made any request for the pension booklet, nor did either request an opportunity to obtain the value of the pension prior to the completion of the dissolution trial. This court infers that said nonaction by [the] plaintiff's attorneys was a tactical decision. Further, there is no credible evidence that the plaintiff relied to her detriment on any alleged failure to disclose. The defendant met his obligation of disclosing what he understood about his pension. There was no fraud, intentional misrepresentation or mutual mistake regarding the value of the pension or the pension booklet." (Citation omitted.)

The plaintiff claims that the court improperly denied her motion to open with respect to her claim that the defendant committed fraud and/or intentionally misrepresented the value of his pension. Specifically, she argues that the defendant failed to provide documents regarding the "salient details" or the "total worth" of the pension, that she was unable to obtain a copy of the pension booklet on her own, and that information

regarding the pension was readily available and accessible by the defendant. The plaintiff also claims that the defendant's failure to provide her the information regarding his pension runs counter to the requirement set forth in several decisions from our Supreme Court of a "full and frank" disclosure of financial information. Finally, she argues that several of the court's findings were clearly erroneous. We are not persuaded by these contentions.

We first identify the applicable legal principles. In *Reville* v. *Reville*, 312 Conn. 428, 441, 93 A.3d 1076 (2014), our Supreme Court discussed the elements of an action for fraud, as well as the principles related to fraud by nondisclosure. "Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment. . . . A marital judgment based upon a stipulation may be opened if the stipulation, and thus the judgment, was obtained by fraud. . . .

"Fraud by nondisclosure, which expands on the first three of [the] four elements [of fraud], involves the failure to make a full and fair disclosure of known facts connected with a matter about which a party has assumed to speak, under circumstances in which there is a duty to speak. . . . A lack of full and fair disclosure of such facts must be accompanied by an intent or expectation that the other party will make or will continue in a mistake, in order to induce that other party to act to her detriment. . . . In a marital dissolution case, the requirement of a duty to speak is imposed by Practice Book § [25-30], requiring the exchange and

filing of financial affidavits . . . and by the nature of the marital relationship." (Citation omitted; internal quotation marks omitted.) Id.

Additionally, our Supreme Court has noted the importance of the disclosure of financial information between the parties in a dissolution proceeding. "Our [rules of practice have] long required that at the time a dissolution of marriage, legal separation or annulment action is claimed for a hearing, the moving party shall file a sworn statement . . . of current income, expenses, assets and liabilities, and pertinent records of employment, gross earnings, gross wages and all other income. . . . The opposing party is required to file a similar affidavit at least three days before the date of the hearing . . . .

"Our cases have uniformly emphasized the need for full and frank disclosure in that affidavit. A court is entitled to rely upon the truth and accuracy of sworn statements required by . . . the [rules of practice], and a misrepresentation of assets and income is a serious and intolerable dereliction on the part of the affiant which goes to the very heart of the judicial proceeding. . . . These sworn statements have great significance in domestic disputes in that they serve to facilitate the process and avoid the necessity of testimony in public by persons still married to each other regarding the circumstances of their formerly private existence. . . .

"Moreover . . . [l]awyers who represent clients in matrimonial dissolutions have a special responsibility for full and fair disclosure, for a searching dialogue, about all of the facts that materially affect the client's rights and interests." (Citation omitted; internal quotation marks omitted.) *Weinstein* v. *Weinstein*, 275 Conn. 671, 686–87, 882 A.2d 53 (2005); see also *Ramin* v. *Ramin*, 281 Conn. 324, 353–54, 915 A.2d 790 (2007); *Billington* v. *Billington*, 220 Conn. 212, 219–20, 595

A.2d 1377 (1991). Our Supreme Court also compared the duty of full disclosure between parties seeking to terminate their marriage to that owed to a beneficiary by a fiduciary. *Weinstein* v. *Weinstein*, supra, 687.

In the present case, the court found that the defendant credibly testified that he had disclosed all of the information that he had about his pension in his financial affidavits during the dissolution proceedings. "[A]s a general rule, appellate courts do not make credibility determinations. [I]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences from them." (Internal quotation marks omitted.) *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 487–88, 144 A.3d 447 (2016); see also *McTiernan* v. *McTiernan*, 164 Conn. App. 805, 829, 138 A.3d 935 (2016) (not province of appellate court to find facts or make credibility determinations); *Hendricks* v. *Haydu*, 160 Conn. App. 103, 109 n.7, 124 A.3d 554 (2015) (exclusive function of trier of fact to determine credibility of witnesses).

The court also found, based on the defendant's testimony during both the dissolution trial and the hearing on the motion to open, that he lacked any knowledge of the actual value of the pension aside from the monthly annuities for three different retirement ages. Finally, the court found that the plaintiff never requested the pension booklet nor sought a valuation of the pension during the dissolution proceedings.

The plaintiff bases her claims regarding the pension on her interpretation of the facts. In her view, the defendant either knew the true value of the pension or knew of the existence of the pension booklet, which contained the essential details necessary to calculate the actual value, and that he intentionally failed to furnish this information in violation of the obligation of full and frank disclosure.

The factual findings made by the court with respect to the defendant's conduct do not support the plaintiff's "interpretation of the facts." We have no basis to conclude that the court's findings were improper. Aside from speculation and conjecture, there is no evidence that the defendant had knowledge of either the total value of the pension or the details in the pension booklet that would allow for a calculation of said value. Additionally, the plaintiff failed to demonstrate that the defendant should have known that the information contained in the pension booklet was something that he should have disclosed. Furthermore, we disagree with the plaintiff's supposition that the defendant engaged in "gamesmanship" to deceive both the trial court and the plaintiff with respect to this financial information. On the basis of its subordinate factual findings regarding the conduct of the defendant,[5] the court properly determined that there was no probable cause to justify opening the judgment for the limited purpose of discovery. See, e.g., *Sousa* v. *Sousa*, 173 Conn. App. 755, A.3d (2017). We cannot conclude that the court abused its discretion in denying the plaintiff's motion to open with respect to the issue of the defendant's pension.

[5] We iterate that the court credited the testimony of the defendant and expressly found that "he had no knowledge of the value of the pension . . . that he complied with all discovery requests . . . [and] met his obligation of disclosing what he understood about his pension. There was no fraud, intentional misrepresentation or mutual mistake regarding the value of the pension or the pension booklet."

B

The plaintiff also argues that the court improperly denied her motion to open with respect to the claim that the defendant fraudulently failed to list $50,000 in gifts from his family in his financial affidavit. Specifically, she claims that the defendant's father gave $25,000 to the defendant's brother in both 2011 and 2012, during the pendency of the dissolution proceeding, and the brother then distributed that $50,000 to the defendant after the judgment of dissolution had been rendered. In other words, the manner in which the gifts were made was done for a fraudulent purpose, i.e., to avoid inclusion in the defendant's financial affidavits and division as marital property. We disagree.

The court found that it had been customary for the defendant's parents to give their children and their children's spouses significant monetary gifts each December. It credited the defendant's testimony that he was not promised this money and that his parents did not want to give him a gift during the pendency of the dissolution action. Additionally, the court credited the testimony of the defendant's brother that the $50,000 he gave to the defendant after the dissolution judgment was from him and not their parents.

The plaintiff makes several arguments in support of her contention that the defendant knew that his parents had given his annual gift in 2011 and 2012 to his brother to hold until the judgment had been rendered in the dissolution action. These arguments, however, must fail in light of the court's finding that "[a]t the time of the dissolution, the defendant had no present interest in the postjudgment gifts from his brother. Any hope that the defendant may have had that he would receive gifts of money from the defendant's family was merely speculative." This finding, based on the court's credibility determinations of the defendant's brother and the

defendant, defeats the plaintiff's claims regarding the fraudulent nature of the $50,000 gift. As we previously noted, it is the province of the trial court to act as the finder of fact and to make determinations regarding the credibility of the witnesses. See *Zilkha* v. *Zilkha*, supra, 167 Conn. App. 487–88; see also *McTiernan* v. *McTiernan*, supra, 164 Conn. App. 829; *Hendricks* v. *Haydu*, supra, 160 Conn. App. 109 n.7. We conclude, therefore, that the court did not abuse its discretion in denying the motion to open the judgment on the basis of fraud with respect to the family gifts.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RICKY ELLIS
(AC 39309)

Lavine, Prescott and Bishop, Js.

Syllabus

The defendant, who was sentenced to eighteen years incarceration following his conviction of accessory to manslaughter in the first degree with a firearm stemming from his role in a drive-by shooting when he was sixteen years old, appealed to this court claiming that the trial court improperly dismissed his motion to correct an illegal sentence. The defendant claimed on appeal that the sentencing court had violated his right under the eighth amendment to the federal constitutional to be free from cruel and unusual punishment pursuant to *Miller* v. *Alabama* (567 U.S. 460), which requires a sentencing court to consider the defendant's chronological age and its hallmark features as a mitigating factor prior to sentencing a juvenile offender to life without the possibility of parole, or its functional equivalent. The defendant also claimed that, pursuant to a 2015 Public Act (P.A. 15-84) providing that certain juvenile offenders shall be eligible for parole, the trial court should hold a new sentencing hearing to retroactively review his sentence and determine whether he is eligible for parole. *Held* that the trial court properly dismissed the defendant's motion to correct an illegal sentence, as he could no longer claim that he was serving a sentence of life imprisonment

or its equivalent because he was eligible for parole following the enactment of P.A. 15-84, and the eighth amendment, as interpreted by *Miller*, did not prohibit the sentencing court from imposing on a juvenile offender a sentence of life imprisonment with the opportunity for parole or require that it consider the mitigating factors of youth with respect to such a sentence.

Argued February 16—officially released June 20, 2017

Procedural History

Substitute information charging the defendant with the crime manslaughter in the first degree with a firearm, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Gold*, *J.*, on a plea of guilty; judgment of guilty in accordance with the plea; thereafter, the court, *C. Taylor*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Deborah G. Stevenson, assigned counsel, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Anthony Bochicchio*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Ricky Ellis, appeals from the judgment of the trial court, claiming that the court improperly dismissed his motion to correct an illegal sentence.[1] We affirm the judgment of the trial court.

[1] The defendant claims that the court abused its discretion by dismissing his motion to correct. Whether the court properly dismissed the motion to correct presents a question of law subject to plenary review. See *State* v. *Robles*, 169 Conn. App. 127, 131, 150 A.3d 687 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017); see also *Young* v. *Commissioner of Correction*, 104 Conn. App. 188, 193, 932 A.2d 467 (2007) (whether legal conclusions of trial court are legally and logically correct subject to plenary review), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008).

On June 17, 2007, the defendant and an accomplice participated in a drive-by shooting that resulted in the death of Mark Morgan. The defendant was sixteen years old at the time he was arrested and charged with murder and conspiracy to commit murder. The defendant was on probation for a conviction of larceny in the third degree at the time he committed the underlying crimes.[2] On December 18, 2008, when he was eighteen years old, the defendant, with the assistance of counsel, entered into a plea agreement with the state. The defendant agreed to plead guilty under the *Alford* doctrine[3] to the crime of accessory to manslaughter in the first degree with a firearm in violation of General Statutes §§ 53a-55a and 53a-8 in exchange for a sentence of eighteen years incarceration. On March 11, 2009, the court sentenced the defendant in accordance with the plea agreement.

On June 15, 2015, the defendant filed an amended motion to correct an illegal sentence, wherein he claimed that the sentencing court did not take into consideration his age at the time he committed the offense and therefore violated his eighth amendment right against cruel and unusual punishment. He also claimed that, pursuant to No. 15-84, § 2, of the 2015 Public Acts (P.A. 15-84),[4] the court retroactively must review the sentence to determine his parole eligibility. The defendant argued that P.A. 15-84, *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012),[5] and *Graham* v. *Florida*, 560 U.S. 48, 130 S. Ct.

[2] On the basis of the original charges, the defendant faced the possibility of eighty-one and one-half years incarceration with a mandatory minimum sentence of twenty-five years.

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

[4] P.A. 15-84 is codified at General Statutes § 54-124a (f).

[5] *Miller* requires "that a sentencing court consider the defendant's chronological age and its hallmark features as a mitigating factor prior to sentencing a juvenile offender to life without parole or its functional equivalent." (Internal quotation marks omitted.) *State* v. *Williams-Bey*, 167 Conn. App. 744, 751 n.3, 144 A.3d 467 (2016), modified in part after reconsideration, 173

2011, 176 L. Ed. 2d 825 (2010),[6] permit him to have a new sentencing hearing. The trial court concluded that the sentencing court was not required to consider the *Miller* factors when sentencing the defendant because the sentence he received was not the equivalent of life in prison without the possibility of parole, and the sentencing court had no authority to resentence the defendant's future parole under P.A. 15-84. The court therefore dismissed the motion to correct an illegal sentence. The defendant appealed.

On appeal, the defendant claims that the court improperly dismissed his motion to correct an illegal sentence by failing to apply *Miller* and *Graham* retroactively and by failing to apply P.A. 15-84 so as to grant him a new sentencing hearing. The defendant's claims are controlled by our Supreme Court's decision in *State* v. *Delgado*, 323 Conn. 801, 151 A.3d 345 (2016). "Following the enactment of P.A. 15-84 . . . the defendant is now eligible for parole and can no longer claim that he is serving a sentence of life imprisonment, or its equivalent, without parole. The eighth amendment, as interpreted by *Miller*, does not prohibit a court from imposing a sentence of life imprisonment *with* the opportunity for parole for a juvenile homicide offender, nor does it require the court to consider the mitigating factors of youth before imposing such a sentence. See *Miller* v. *Alabama*, supra, 567 U.S. ." (Emphasis in

Conn. App. 64, A.3d , *petition for cert. filed* (Conn. May 30, 2017) (No. 160479). The defendant was not given a life sentence without parole or its functional equivalent. See id., 751–52.

[6] *Graham* requires that "a juvenile offender serving a life sentence or its functional equivalent is entitled to some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (Internal quotation marks omitted.) *State* v. *Williams-Bey*, 167 Conn. App. 744, 751 n.3, 144 A.3d 467 (2016), modified in part after reconsideration, 173 Conn. App. 64, A.3d , *petition for cert. filed* (Conn. May 30, 2017) (No. 160479). The defendant was not sentenced to life in prison without the opportunity to obtain release on the basis of demonstrated maturity and rehabilitation.

original.) *State* v. *Delgado*, supra, 810–11. We therefore conclude that the court properly dismissed the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.

DUANE GROVENBURG ET AL. *v.* RUSTLE MEADOW ASSOCIATES, LLC, ET AL.
(AC 37719)

DiPentima, C. J., and Prescott and Gold, Js.

Syllabus

The plaintiffs, the owners of a unit of property in a planned community, sought to enjoin the defendants, the planned community's declarant, and the homeowners association and its president, from precluding the plaintiffs' construction of a fence around a swimming pool on their lot. The defendants previously had approved the plaintiffs' installation of the swimming pool. After the pool was installed, the plaintiffs learned that it was in violation of the state Building Code because it was not fenced properly. In response, the plaintiffs submitted to the defendants a proposal to install a fence around the pool, after which the defendants requested additional information from the plaintiffs, including a drawing that showed the proximity of the proposed fence in relation to a designated green zone, a fifteen foot visual buffer zone between lots that the defendants sought to preserve. After the plaintiffs sought more information regarding the green zone, the defendants explained that the homeowners association had established the green zone and that it had been discussed with the plaintiffs prior to their purchase of their lot. The plaintiffs then provided the defendants with a revised fence proposal and contended that the green zone and the fifteen foot requirement were irrelevant to the defendants' approval of the proposed fence because the planned community's declaration and all of the documents that pertained to the plaintiffs' purchase of their lot did not mention the green zone or the fifteen foot requirement. The defendants denied the plaintiffs' revised fence proposal, concluding, inter alia, that the proposed fence appeared to fall within the green zone. After further discussions between the parties continued but no resolution was reached, the plaintiffs commenced the present action. The trial court granted the plaintiffs' motion to preclude the defendants from introducing evidence at trial pertaining to the green zone. The court thereafter rendered judgment in part for the plaintiffs, concluding, inter alia, that it was illegal and inequitable

for the defendants to deny the plaintiffs' proposals to erect the fence because there was nothing in the planned community's declaration, the defendants' bylaws, or in any relevant documents recorded in the town land records to indicate that a green zone existed. The court also ruled for the plaintiffs on the defendants' counterclaim, which sought the recovery of certain fines and unpaid assessments that the defendants had levied against the plaintiffs, and set aside certain fines that the defendants had levied against the plaintiffs for alleged landscaping violations and the removal of a certain boundary marker from the plaintiffs' lot. The trial court further awarded the plaintiffs attorney's fees and invalidated a special assessment that the defendants had levied against the plaintiffs to cover the legal fees that the defendants incurred during the controversy. On appeal, the defendants claimed, inter alia, that the trial court improperly granted the plaintiffs' motion to preclude them from introducing evidence pertaining to the green zone and applied an improper legal standard in evaluating the defendants' exercise of their design control authority under certain provisions in the planned community's declaration (§§ 10.1 [k] and 13.1 [a]) in denying the plaintiffs' proposals to erect the fence. *Held*:

1. The trial court improperly precluded the defendants from presenting evidence regarding the green zone, as that ruling was harmful because it likely affected the result of the case: evidence about the green zone was relevant to a determination of whether the defendants reasonably exercised their discretionary authority over design control matters under §§ 10.1 (k) and 13.1 (a) of the declaration in denying the plaintiffs' proposals to erect a fence around their swimming pool, and the court's ruling impaired its ability to determine whether the defendants' decision was based on legitimate interests of the common interest community, whether the plaintiffs had notice of the green zone prior to the construction of the pool, and whether the defendants previously permitted activity in the green zone area of the plaintiffs' unit; moreover, the record contained ample evidence that the green zone was a criterion that the defendants considered under §§ 10.1 (k) and 13.1 (a) in the exercise of their discretionary design control authority, and, although the declaration and other documents pertaining to the planned community made no reference to the green zone or a visual buffer area, such a restrictive covenant did not need to specifically state the criteria to be considered in the exercise of that authority.
2. Because the trial court applied an improper legal standard in evaluating the defendants' exercise of their discretionary design control authority by failing to analyze the reasonableness of the defendants' determination regarding the plaintiffs' fence proposals, this court remanded the case for a new trial and directed the trial court to make factual findings as to whether the defendants' determination was reasonable under the circumstances; the trial court having failed to make findings as to the substance of the plaintiffs' proposals to erect the fence and as to whether

maintaining privacy between the units and preserving the wooded character of the planned community were legitimate interests of that community, having failed to examine the governing instruments of the community to ascertain the collective purposes of the homeowners association, having failed to weigh the intent and purpose of the relevant provisions of the declaration, and having foreclosed the introduction of evidence concerning whether the plaintiffs had actual notice of the green zone, the court could not properly determine whether any legitimate interests of the community justified the denial of the plaintiffs' proposals and, therefore, could not properly determine whether the defendants' exercise of their discretionary authority was reasonable.

3. The trial court having erroneously granted the plaintiffs' motion in limine and thus precluded the defendants from presenting relevant, probative evidence as to the nature of the green zone, how it previously had been implemented, and whether the plaintiffs had notice of it prior to having made their fence proposals, this court, in the absence of factual findings by the trial court, could not review the plaintiffs' alternative ground for affirmance that the green zone was invalid as a matter of law because it was not adopted through the defendants' rule making process.
4. The trial court improperly set aside the fines that the defendants had assessed against the plaintiffs for unauthorized landscaping activity on their unit property, as the court made no findings as to whether that activity transpired, whether the defendants' decision to take enforcement action against the plaintiffs was arbitrary, and whether the fines were excessive in contravention of the defendants' bylaws.
5. The defendants could not prevail on their claim that the trial court improperly set aside fines that they had imposed on the plaintiffs in connection with the plaintiffs' alleged removal of a boundary marker from their unit, as the court properly determined that the defendants failed to prove that the plaintiffs removed or altered the boundary marker, and, because the defendants failed to establish the validity of those fines, they were not entitled to attorney's fees for that portion of their counterclaim.
6. The trial court improperly declared null and void a special assessment that the defendants levied against the plaintiffs to cover legal expenses that the defendants incurred during the parties' controversy, that determination having been based on the court's erroneous statement of law that the visual buffer zone was illegal because it was not memorialized in writing.
7. This court having remanded the case for a new trial, it concluded that the award of attorney's fees to the plaintiffs could not stand, as the factual predicate to that award was lacking in light of the court's resolution of the principal issue in this appeal; accordingly, the trial court, on remand, was directed to determine whether such an award is warranted following its resolution of the underlying issues.

Argued January 18—officially released June 20, 2017

Procedural History

Action, inter alia, to enjoin the defendants from precluding the construction of a certain fence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendants filed a counterclaim; thereafter, the court, *Hon. Richard M. Rittenband*, judge trial referee, granted the plaintiffs' motion to preclude certain evidence; subsequently, the matter was tried to the court; judgment in part for the plaintiffs on the complaint and for the plaintiffs on the counterclaim; thereafter, the court denied the defendants' motions for reargument and articulation, and the defendants appealed to this court; subsequently, the court, *Hon. Richard M. Rittenband*, judge trial referee, denied the defendants' motion to stay certain orders of the court and granted the plaintiffs' application for a prejudgment remedy, and the defendants filed an amended appeal; thereafter, the court, *Hon. Richard M. Rittenband*, judge trial referee, denied the plaintiffs' motion for contempt and issued certain orders, and the defendants filed a second amended appeal; subsequently, this court vacated the denial of the defendants' motion to stay and remanded the matter for further proceedings on that motion; thereafter, the court, *Hon. Richard M. Rittenband*, judge trial referee, granted in part the defendants' motion to stay certain orders of the court. *Reversed in part; new trial.*

Barbara M. Schellenberg, with whom was *Ari J. Hoffman*, for the appellants (defendants).

Jared M. Alfin, for the appellees (plaintiffs).

Opinion

DiPENTIMA, C. J. In this appeal, we address the contours of judicial review in cases in which a discretionary determination of a common interest ownership association is challenged. The defendants, Rustle

Meadow Associates, LLC (company), Rustle Meadow Homeowners Association, Inc. (association), and its president, Jeffrey D. Miller, appeal from the judgment of the trial court in favor of the plaintiffs, Duane Grovenburg and Kristine Grovenburg. The defendants' principal contention is that the court improperly set aside the association's discretionary determination regarding the plaintiffs' request to erect a fence on their property. Specifically, they claim that the court failed to apply the proper legal standard governing review of such determinations, as established by our Supreme Court in *Weldy* v. *Northbrook Condominium Assn., Inc.*, 279 Conn. 728, 904 A.2d 188 (2006). The defendants also claim that the court improperly rejected the substance of their counterclaim, that it improperly invalidated a special assessment levied by the association, and that it abused its discretion in awarding the plaintiffs $72,718.25 in attorney's fees. We affirm in part and reverse in part the judgment of the trial court.

The relevant facts are gleaned from the court's memorandum of decision and the undisputed evidence in the record before us. Rustle Meadow is a planned community[1] created pursuant to the Common Interest Ownership Act (act), General Statutes § 47-200 et seq.[2]

[1] General Statutes § 47-202 (25) defines a "planned community" as "a common interest community that is not a condominium or a cooperative. A condominium or cooperative may be part of a planned community."

Section 47-202 (9) defines a "common interest community" in relevant part as "real property described in a declaration with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for a share of (A) real property taxes on, (B) insurance premiums on, (C) maintenance of, (D) improvement of, or (E) services or other expenses related to, common elements, other units or any other real property other than that unit described in the declaration. . . ."

Section 2.1 of Article II of the Declaration of Rustle Meadow states that "Rustle Meadow is a planned community."

[2] "The act is a comprehensive legislative scheme regulating all forms of common interest ownership that is largely modeled on the Uniform Common Interest Ownership Act. . . . The act addresses the creation, organization and management of common interest communities and contemplates the voluntary participation of the owners. It entails the drafting and filing of a

Consistent with the strictures of that act, the Declaration of Rustle Meadow (declaration) was recorded on the Canton land records in January, 2006. See General Statutes § 47-220 (a) (common interest community may be created "only by recording a declaration executed in the same manner as a deed"); *Peck* v. *Milford Hunt Homeowners Assn., Inc.*, 110 Conn. App. 88, 95, 953 A.2d 951 (2008) ("a common interest community does not come into existence until the declaration is filed in the land records"). The company is identified as the declarant in that document.

Approval of the development of Rustle Meadow by the Canton Planning Commission was conditioned on, inter alia, the dedication of an eight acre portion of the property to "open space." In accordance therewith, the company granted "a perpetual conservation restriction and easement" (conservation easement) to the town of Canton. Among the covenants agreed to by the company were that "the [c]onservation [a]rea shall be maintained in its present condition, and no topographic changes shall be made," and that "there shall be no removal, destruction or cutting of trees, shrubs or plants" in the conservation area. That conservation easement is memorialized in both the "Description of Land Being

declaration describing the location and configuration of the real property, development rights, and restrictions on its use, occupancy and alienation . . . the enactment of bylaws . . . the establishment of a unit owners' association . . . and an executive board to act on . . . behalf [of the association]. . . . It anticipates group decision-making relating to the development of a budget, the maintenance and repair of the common elements, the placement of insurance, and the provision for common expenses and common liabilities." (Citations omitted; internal quotation marks omitted.) *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 735. As one commentator observed, "[t]he common interest community closely approximates in many ways a small municipal government as it maintains private streets and parks, provides homeowner security, and collects homeowner assessments for the purpose of financing the aforesaid activities." D. Callies, "Common Interest Communities: An Introduction," 37 Urb. Law. 325, 326 (2005).

Declared" and an A-2 survey appended to the declaration (declaration survey).[3]

Rustle Meadow is described in the public offering statement[4] admitted into evidence as a "common interest equestrian community" that features "the use of a premier barn, outdoor arena, indoor arena (if built), acres of pasture, acres of open space, a gorgeous stream, and walking and riding trails . . . ." Miller is the sole member of the company, which developed Rustle Meadow, and has remained the owner of five of its seven units. Rustle Meadow is governed by the association, upon which the declaration confers various powers and responsibilities.[5] The association, in turn, acts through its executive board (board), as recognized in both the declaration and the association's bylaws. At all relevant times, the board was comprised of Miller, his wife, Linda Welles, and his sister, Pam Claywell.[6]

[3] The declaration survey was admitted into evidence as exhibit TTT. A copy of that document is included in the declaration as Schedule A-1 (i).

[4] See General Statutes § 47-264 et seq.

[5] Pursuant to § 8.10 of Article VIII of the declaration, the company was vested with exclusive control of the association for a preliminary period of Rustle Meadow's existence. Section 8.10 (a) provides in relevant part that "[t]he period of Declarant control shall terminate no later than the earlier of: (i) Sixty (60) days after conveyance of sixty percent (60%) of the Units that may be created to Unit Owners other than a Declarant; (ii) Two (2) years after all Declarants have ceased to offer Units for sale in the ordinary course of business; or (iii) Two (2) years after any right to add new Units was last exercised."

The first criterion was not satisfied, as the court found that only two of the seven units had been conveyed at the time of trial. At trial, the court made no findings with respect to the latter two criteria, though it did note that "[t]he remaining lots of the development have not yet been sold or transferred . . . ." Precisely when the company's control of the association under § 8.10 terminated is a factual issue that was not resolved by the trier of fact. Nonetheless, the court in its memorandum of decision found that it was the association that denied the plaintiffs' fence proposal and imposed fines on the plaintiffs for certain activities. Neither party disputes that determination in this appeal.

[6] Article VI of the association's bylaws provides for the indemnification of its directors and officers.

Welles owns one unit in Rustle Meadow, known as "Unit 4," where she and Miller reside. On August 11, 2006, the plaintiffs purchased an abutting property, which the statutory warranty deed (deed) describes as "Unit No. 3 of Rustle Meadow." That deed provides in relevant part that "[s]aid real property is conveyed together with and subject to the terms, conditions, agreements, obligations and easements contained in the [d]eclaration . . . . The [g]rantee, by acceptance of this deed, agrees to become a member of [the association] and to abide by the Certificate of Incorporation, Bylaws, Rules and other regulations of the [a]ssociation." Section 21.1 of Article XXI of the declaration likewise provides that "[t]he acceptance of a deed or the exercise of any incident of ownership . . . of a Unit constitutes agreement that the provisions of the Documents are accepted and ratified by such Unit Owner . . . and all such provisions recorded on the Land Records of the Town of Canton are covenants running with the land and shall bind any Persons having at any time any interest or estate in such Unit." At trial, the plaintiffs testified that they reviewed the declaration individually and with their attorney prior to purchasing the property, and were aware of the restrictive covenants contained therein.[7]

Various exhibits admitted into evidence, including the declaration survey, indicate that the plaintiffs' unit is 1.76 acres in size and narrow in shape.[8] Their unit is

[7] "A restrictive covenant is a servitude, commonly referred to as a negative easement . . . ." (Citations omitted.) *Hawthorne* v. *Realty Syndicate, Inc.*, 43 N.C. App. 436, 440, 259 S.E.2d 591 (1979), aff'd, 300 N.C. 660, 268 S.E.2d 494 (1980). "A servitude is a legal device that creates a right or an obligation that runs with the land or an interest in land." 1 Restatement (Third), Property, Servitudes § 1.1 (1), p. 8 (2000).

[8] The plaintiffs' parcel measures 134.92 feet in width at its westerly border; its northeasterly border contains approximately 150 feet of frontage on Rustle Meadow Lane. The parcel's northwesterly side border is 500.81 feet, while its southeasterly side border is 665.42 feet. That parcel is the narrowest one in Rustle Meadow.

bordered to the west by land designated as "Open Space" and subject to the conservation easement. Those exhibits also indicate that a northeasterly portion of the plaintiffs' parcel is subject to a "pasture easement"[9] for which development rights to create common elements of Rustle Meadow were reserved by the company.[10]

Article X of the declaration sets forth various restrictions on the units in Rustle Meadow. Pertinent to this appeal is § 10.1 (k). Titled "Approval of Building and Landscaping Plans," it provides in relevant part: "No building, shed, swimming pool, pavement, fence, wall or other structure or improvement of any nature shall be erected upon any Unit in the Common Interest Community without the prior written consent of the Declarant . . . . No Unit Owner shall make any exterior addition, change or alteration to a Unit or any residence located therein . . . or substantially change the topography of a Unit including the removal of any trees without the prior written consent of the Declarant which consent shall not be unreasonably withheld. Detailed plans of any such construction or landscaping or any addition, change or alteration thereto shall be submitted to the Declarant . . . . The Unit Owner must receive written approval from the Declarant prior to commencing such construction, landscaping or making any additions, changes or alterations. Any unauthorized

[9] The declaration survey indicates that approximately one-third of the plaintiffs' parcel is subject to the pasture easement. At trial, Miller described the pasture easement as "an area . . . to pasture horses."

[10] The reservation of such developmental rights is recognized in § 8.1 of Article VIII of the declaration. Pursuant to § 8.1 (a), the company reserved "[t]he right to create Units . . . Common Elements, and Limited Common Elements within the Common Interest Community . . . . Any real property within which the Declarant may create Units, Common Elements and Limited Common Elements shall be designated 'Development Rights Reserved in this Area' on the Survey." The area on the declaration survey depicting the pasture easement bears that designation. The deed expressly indicates that the plaintiffs acquired Unit 3 subject to "[t]hose matters shown on Schedule A-1" of the declaration.

construction or changes must be restored to its previous condition at such Unit Owner's expense." Section 13.1 (a) (ii) of Article XIII, which addresses "Additions, Alterations and Improvements by Unit Owners," similarly provides in relevant part that a unit owner "[m]ay not make any changes, additions, alterations, or improvements to any structure in or on any Unit . . . or make any substantial change to the topography of a Unit . . . including the removal of trees, without the prior written approval . . . as provided in Section 10.1 (k) of this Declaration . . . . Such approval by . . . the [a]ssociation shall not be unreasonably withheld."

During construction of their residence, the plaintiffs requested approval to install an in-ground swimming pool on their property.[11] The declarant granted that request, and the pool was completed in the fall of 2008. An "as-built" survey, which was admitted into evidence, indicates that the pool is located behind the plaintiffs' residence to the south. At its closest point, the pool measures 24.2 feet from the southeasterly side yard property line.

In December, 2009, the plaintiffs received written notice from the Canton building official that "[t]he pool is in violation because it is not properly fenced as required by [the] Connecticut State Building Code." The plaintiffs thereafter submitted to Miller a written proposal to install a fence around the pool.[12] The fencing

[11] There is no indication in the record that the plaintiffs requested permission to install a fence at that time. Rather, Kristine Grovenburg testified at trial that they did so sometime after the pool was constructed.

[12] That proposal stated in relevant part: "Details are as follows: [1] Installed by Cape Code Fence Company . . . [2] Color for three sides of the fence is black aluminum . . . [3] The side of the fence along the woods [adjacent to the southeasterly property line] is to be wood post and black pool wire required for code. The wood post[s] are natural wood. This is done so that this side of the fence blends in more naturally with the landscaping and existing trees . . . [4] A sample section of the Echelon fence product can be seen at Cape Code Fence."

proposed by the plaintiffs would border "Unit 2" to the southeast, and not Welles' "Unit 4" property to the northwest. In that June 23, 2010 e-mail, the plaintiffs invoked §§ 10.1 (k) and 13.1 (a) (ii), stating that "[a]pproval is expected as soon as possible and per the [declaration] 'shall not be unreasonably withheld.' " They further advised that "any problems, issues, etc. should be submitted to our attorney with a copy to us. He will then contact your legal counsel to resolve." Miller responded two days later on behalf of the association and requested further information on the proposal.[13] Hours later, the plaintiffs sent Miller another e-mail, in which they largely disagreed with the need for further information. In that communication, the plaintiffs also asked Miller to "provide us with the appropriate sections in the declaration, [association] rules, or our lot purchase agreement [and] the exact sections that define the green zone." See footnote 13 of this opinion.

On July 2, 2010, Miller again responded to the plaintiffs via e-mail and elaborated on his request for further information. In particular, he stated that "[t]he reason for the scale drawing is to ascertain where the fence

[13] Miller's June 25, 2010 e-mail to the plaintiffs stated: "The board received your request for approval of a pool fence, and needs the following materials to render an approval: [1] Photographs or brochures of the proposed materials for review. [2] A drawing that is to scale. This drawing should show the patio, fence, green zone and property lines, [and] distance of the proposed fence from the patio and from the [fifteen] foot green zone line. [3] A description of the equipment used to install the posts, and a construction plan describing how all equipment will be used to access the site and where materials will be stored, and all workmen be kept out of the green zone. The area between the green zone and the [e]ast side of the pool is narrow and has many obstructions, consequently careful planning is important. [4] A post construction review to determine that construction was as approved. Thank you for submitting the request. I have copied your attorney on this as you requested. There is no need or authorization at this time to engage any of our attorneys on this matter, or any other matter of the [association]. This is a normal function of the association, and our attorneys have been directed to forward any such communications back to the association."

is on the property, most importantly in relation to the green zone. Markings on the ground are not sufficient as they can be erased or damaged in the construction process. Then there is no way to agree post construction on where the fence should have been installed. Accurate measurements from known immovable points are needed, and then the approved location is well known and reproducible." With respect to the plaintiffs' query about the "green zone," Miller stated that "[§] 10.1 (k) of the declaration is very clear on landscaping changes requiring approval. The green zone has been established by the association, and was discussed with you prior to purchasing [Unit 3] and clearing the lot. All of the trees cut on both sides of the house . . . are those that were outside of the green zone, all the trees and shrubs inside the green zone were not cut. Numerous discussions took place where you acknowledged the green zone. The green zone falls within the authority of the board in approving landscape changes after construction. The 'green zone' is simply a term which names a section of the land adjacent to the wooded property lines where the association will tightly regulate any landscape changes to maximize the visual buffer between adjacent lots. You have already done unapproved landscaping on your unit that affects this visual buffer. Any landscaping approval by the board will include consideration of maintaining the integrity of the green zone." In a subsequent e-mail sent ten days later, Miller advised the plaintiffs that "[t]he pool fence will most likely not be approved any closer than fifteen feet to the property line. Maintaining a visual buffer between lots in this community is a reasonable criteri[on] from which to make a decision . . . . The language in [§] 10.1 [k] says 'consent shall not be unreasonably withheld'. A visual buffer is a common community practice, is seen as an asset to a community, and is widely used by both town planning commissions

and common interest communities. The board feels this is an entirely reasonable criteri[on] on which to base landscaping decisions."

Days later, the plaintiffs submitted certain revisions to their fence proposal that included a brochure of the proposed fence material and a drawing with what they termed "clear permanent points of measurement" for the fence's proposed location. That drawing indicated that the fence would be 8.5 feet from the southeasterly property line, which borders "Unit 2" of Rustle Meadow. In their correspondence, the plaintiffs also stated that "[t]he [d]eclaration, lot purchase agreement, construction contract, all of the written agreements we have for our home do not mention or stipulate a 'green zone' or a '[fifteen] foot' requirement or any other foot requirement. Therefore they are not relevant to the approval of the type of fence we have requested to install. We have a property line which is noted on the drawing. Any requirement to a 'green zone' that does not exist in the lot plans or declaration is inappropriate and unreasonable." They further indicated that the proposed fence complied with town regulations. The plaintiffs then requested a decision on their proposal in writing by the board.

Miller furnished the decision of the board in a July 23, 2010 e-mail to the plaintiffs. In that decision, Miller reiterated that "a proper scale drawing is needed." He then stated that "[a]s the proposed fence appears to fall well within the [fifteen] foot visual buffer we call the green zone . . . the fence as drawn is not approved. . . . The board would likely approve a black Echelon fence that is on or adjacent to the patio edge (on the east side), and encourages you to submit a drawing proposing that. . . . If you prefer to locate the fence as close to the [g]reen [z]one line as possible, the board will require a fence maintenance plan for any section of fence that lies within [three] feet of the green zone,

or within [eighteen] feet of the property line. . . . In addition, if the proposed fence is within 1.5 feet of the green zone the board will require that the line be surveyed, as the flagging currently in use is only an approximation. Whether or not you can find the term 'green zone' in the declaration does not affect the authority of the board to determine what are acceptable landscaping changes to take place in the community. Authority comes from [§] 10.1 (k) of the declaration that outlines the landscape review process. . . . The [fifteen] foot visual buffer green zone is something that is already in place, and was previously acknowledged by you. The board has every intention of keeping it in place. Continuing to state that the board's landscaping review criteria are inappropriate and quoting town zoning [requirements are] not responsive to the board's request. The town's requirements are in addition to, but are not the only requirements in a planned community like Rustle Meadow. Please submit a pool fence construction plan and an accurate scale drawing that adequately respects the [fifteen] foot visual buffer green zone if you would like it to be considered."

Sixteen months later, Miller sent the plaintiffs an e-mail dated December 2, 2011, in which he noted that it had "been months since we heard from [you] on submitting a suitable location for the pool fence" and cautioned that "[t]he association can no longer tolerate this safety risk, and will be writing a letter to the town asking for enforcement." Miller subsequently contacted the Canton building department and informed it that "[t]here has been no pool fence" on the plaintiffs' property "since the pool was completed in 2008." Miller also stated that fencing previously proposed to the association by the plaintiffs "placed the fence unnecessarily within a [fifteen] foot visual buffer zone along the property line. The board denied the fence location on that basis, and encouraged a fence proposal that was outside

of the [fifteen] foot buffer. . . . The entire summer and fall of 2011 has passed with no new proposal. . . . [A] temporary garden wire type fence has been put up. While this is better than nothing, the board is concerned that this dangerous situation is not being rectified . . . . While we understand winter weather might not allow an immediate correction, we would hope that an acceptable plan could be submitted to this board before spring, and construction could begin when weather allows." The building department thereafter sent the plaintiffs a certified letter that requested "[y]our compliance in addressing this serious violation . . . ."

In the spring of 2012, Attorney Louis N. George submitted a revised fence proposal on behalf of the plaintiffs. That submission states in relevant part: "Attached are the plans for the fence and where it will be located. Town regulations allow the fence to be placed at the boundary line. There are no [a]ssociation regulations limiting the location of the fence. Our clients are, however, intending to place the fence approximately eight feet from the boundary. Hopefully you will embrace this compromise. The fence design is one that you had already stated would be fine. Please let us know if this is acceptable." Included in that submission was an updated depiction of the proposed fence location, which the plaintiffs sketched onto a copy of the "as-built" survey of the pool. In the eight foot section between the proposed fence and the southeasterly property line, the plaintiffs indicated that "[b]amboo type shrubs to be placed every [six-eight] feet . . . . Nursery indicated this type of shrub would grow in this wet, shaded area. These shrubs along with existing vegetation on side yard will provide more than sufficient coverage." In response, the board requested "details regarding the species and mature height of the bamboo and a scale drawing of the plan . . . ." Several months passed as discussions continued between the parties.

At the time of the association's June 21, 2013 annual meeting, both the plaintiffs and the association were represented by legal counsel. The minutes of that meeting state in relevant part that "[d]iscussion was held regarding the visual buffer area between units that the board calls the green zone. The [plaintiffs] stated that there is no specific boundary in the documents to restrict activity. [Miller] stated that the [plaintiffs] had acknowledged in writing the need to maintain a visual green zone buffer between units for privacy and to maintain the wooded character of the community. The board noted that the standard buffer is [twenty feet] but that the [plaintiffs] were given a concession for [fifteen feet] because they have the narrowest lot." The minutes reflect that the plaintiffs had submitted a revised pool fence proposal, but had not yet responded to the board's request for additional information. The minutes further indicate that the plaintiffs "agreed to provide the details on the pool fence plantings requested by the board and to submit a proposal for creation of an undisturbed visual buffer area," which the board "agreed to review . . . when provided and respond within [two] weeks."

By letter dated July 9, 2013, George responded to the board's request for further information on behalf of the plaintiffs. With respect to the proposed plantings, George stated that "Scabrida Clumping Bamboo" would be installed "between the side yard fencing and the property line on the [southwesterly] side of the house with the vacant lot, as noted on the drawing." He also explained that "[t]he bamboo grows [twelve-fourteen feet] tall by [three feet] wide for each bush" and that this species "is non-invasive, vigorous and easy to grow . . . ." As to the buffer area between Units 3 and 4, George indicated that the plaintiffs "would be glad to agree to continue adding shrubs and ground cover to this area in the future." Months passed without any

formal response or action by the board. Nevertheless, discussions between the parties' respective attorneys continued in an attempt to reach an agreement. It is undisputed that, at some point in the fall of 2013, counsel for the association withdrew his representation due to a personal matter.

The plaintiffs commenced this civil action in December, 2013. At that time, the association had not rendered a decision on the plaintiffs' pending proposal.[14] The operative complaint dated April 17, 2014, contains three counts. The first count set forth a cause of action under the act; see General Statutes § 47-278 (a);[15] and alleged, inter alia, that the defendants "failed to approve [the fence proposal] even though all the requirements were met" and "unreasonably" denied that proposal and "conditioned the Association's approval of the fence on . . . compliance with the fictional Green Zone." The first count also alleged that the defendants improperly issued certain fines against the plaintiffs "for violating a fifteen (15) foot visual buffer area between [their] property and Miller's home (the 'Green Zone')." The second count alleged a breach of fiduciary duty on the part of the defendants. The third and final count sought the appointment of a receiver for the association pursuant to General Statutes § 52-504.[16]

[14] Although § 13.1 (b) of Article XIII of the declaration directs the board to act on requests for approval made pursuant to §§ 10.1 (k) and 13.1 (a) (ii) within sixty days, it further provides that the "[f]ailure to do [so] within such time shall not constitute consent by the [board] to the proposed action."

[15] General Statutes § 47-278 (a) provides: "A declarant, association, unit owner or any other person subject to this chapter may bring an action to enforce a right granted or obligation imposed by this chapter, the declaration or the bylaws. The court may award reasonable attorney's fees and costs."

[16] General Statutes § 52-504 provides: "When any action is brought to or pending in the superior court in which an application is made for the appointment of a receiver, any judge of the superior court, when such court is not in session, after due notice given, may make such order in the action as the exigencies of the case may require, and may, from time to time, rescind and modify any such order. The judge shall cause his proceedings to be certified to the court in which the action may be pending, at its next session."

In their prayer for relief, the plaintiffs sought "[1] monetary damages; [2] interest; [3] costs of suit; [4] appointment of a receiver to manage and operate the [a]ssociation as a matter of equity pursuant to [§] 52-504; [5] an injunction prohibiting [Miller] from assigning his rights or powers as the owner of [the company] or as the president of the association to his wife, heirs, successors, assigns and/or family members [from] holding a position on the [board] or participating in any voting concerning the association, as well as any and all relief requested in [the plaintiffs'] application for an injunction, which is incorporated herein by reference;[17] [6] an injunction ordering the association to permit the plaintiffs to erect a fence around their swimming pool in accordance with the Town of Canton's rules and/or regulations; [7] an order that there is no 'Green Zone' as defined by [the defendants] at [Rustle Meadow] and/or that applies to the plaintiffs' property at [Rustle Meadow]; [8] an order that all statutory liens arising from fines and/or penalties assessed against the plaintiffs by the association from the beginning of time to date are removed, discharged and declared null and void; [9] attorney's fees and costs pursuant to [§] 47-278 (a); and [10] any and all other relief, legal or equitable, that the court deems just and proper." (Footnote added.)

The defendants thereafter filed both an answer and a counterclaim. In that counterclaim, the defendants sought recourse related to (1) certain unpaid assessments levied against units in Rustle Meadow; (2) fines imposed by the association for unauthorized landscaping allegedly performed by the plaintiffs; and (3) fines

[17] When the plaintiffs commenced this action in 2013, they also filed an application for a temporary injunction, which largely mirrors the prayer for relief contained in their complaint. There is no indication in the record that this application was acted upon, nor is there any mention of that application by the parties in their respective appellate briefs.

imposed by the association against the plaintiffs due to their alleged interference with a boundary marker. In answering that counterclaim, the plaintiffs either denied its allegations or claimed that they lacked sufficient knowledge and therefore left the defendants to their burden of proof.

During a pretrial deposition, portions of which were admitted into evidence at trial, the plaintiffs' counsel asked Miller to define the "green zone." Miller stated that "[i]t's a visual buffer that is one of the standards that the association uses to evaluate changes to landscaping . . . in the conduct of its business of the subdivision." When counsel requested a more detailed explanation of that "buffer," Miller stated that "[i]t's an area where natural vegetation would be protected and not removed, destroyed, cut, or in other ways inhibited so as to provide a visual buffer between adjoining building lots." Miller further confirmed that "[t]here are no documents recorded at the [Canton] town hall that contain the phrase, the Green Zone."

A court trial was held in November, 2014. One day before trial was to begin, the plaintiffs filed a motion in limine seeking to preclude any testimony or documentation relating to the green zone, arguing that because the term "green zone" is not contained in either the declaration or any other material recorded on the Canton land records, it is "is clearly unenforceable" under the act. The trial court agreed, stating that "it doesn't seem . . . that it's reasonable if it is not in writing. . . . I'm granting the motion in limine because I don't think that the so-called green zone, being unwritten, is . . . sufficient notice to the prospective buyer."

Trial proceeded over three days, during which the court heard testimony from the plaintiffs, Miller, and Welles. Following the close of evidence, the court held a hearing on the issue of attorney's fees, at which the

plaintiffs represented that they had incurred $47,420.33 in such expenses.

In its January 14, 2015 memorandum of decision, the court reiterated its previous finding, made while ruling on the motion in limine, that the "green zone is not reasonable because it was not in writing . . . . [T]here is nothing in writing in the declaration or bylaws to indicate to anyone, including the plaintiffs, that there is a green zone . . . . Accordingly, this court finds that it was illegal and inequitable for the association to deny the applications for a fence around the pool in the [green zone]." (Citation omitted.) The court then proceeded to rule in favor of the plaintiffs on all counts of the defendants' counterclaim. At the same time, the court ruled in favor of the defendants on the plaintiffs' request for the appointment of a receiver for the association.

The court then issued six specific orders. First, it ordered "[a] temporary injunction . . . that the association permit the plaintiffs to erect a fence around their swimming pool in accordance with the town of Canton's rules and/or regulations, whether in the green zone or not. Further, the defendants are prohibited from interfering with the plaintiffs' use of the 'green zone,' whether the plaintiffs remove, replace, alter or add trees and foliage. The green zone is, after all, the plaintiffs' property. The defendants are ordered to cooperate with the plaintiffs in case a variance is needed or any other action is needed by them to accomplish the erection of the fence around the swimming pool as desired by the plaintiffs. [Second] the defendants are ordered to remove, immediately, any liens that have been placed against the plaintiffs' property for fines/assessments. [Third] a temporary injunction is issued prohibiting Miller from assigning his rights or powers as the owner of the subdivision or as the president of the association to his wife, heirs, successors, assigns and/or family members [from] holding a position on the board of the

association as well as any and all relief requested in [the] plaintiffs' application for an injunction except for arms-length sales of individual lots, and their request for a receiver. [Fourth] the green zone as defined by the defendants as it applies to the plaintiffs' property at the development is hereby declared null and void. [Fifth] all parties are prohibited from disparaging or criticizing each other to others, including, but not limited to, possible buyers of lots in the subdivision. [Sixth, the defendants'] counterclaim [is] hereby rejected. The defendants' request for attorney's fees is denied."

Last, the court rendered an award of attorney's fees in favor of the plaintiffs in the amount of $57,718.25. The defendants subsequently filed a "motion to reargue and reconsider memorandum of decision" and a "motion for articulation and rectification," both of which the court summarily denied. The defendants commenced this appeal on February 23, 2015.

Days later, the defendants filed a motion requesting a stay of the injunctive relief ordered by the court pending resolution of this appeal. On March 27, 2015, the trial court issued the following order: "Denied. With the exception that, for clarification purposes, Jeffrey Miller, Linda Welles, Pam Claywell and unit owners may serve on the board of directors of the association. The court finds that the balance of the equities is in favor of the plaintiffs. Under [Practice Book §] 61-12, there is little likelihood that the [defendants] will prevail because it is well settled law that temporary injunctions are not appealable.[18] There is no irreparable harm to be suffered

[18] Although the court repeatedly branded the injunction as "temporary" in nature, this court has held that "[m]erely calling an order a temporary injunction, however, does not determine its appealability. Our function is to examine the trial court's order and determine whether, because of its form or content, it is in fact a permanent injunction and thus appealable." *Stamford* v. *Kovac*, 29 Conn. App. 105, 109, 612 A.2d 1229 (1992), rev'd on other grounds, 228 Conn. 95, 634 A.2d 897 (1993).

by the defendants upon immediate implementation of the judgment. As for the automatic stay provided during an appeal, this court, sua sponte, hereby terminates that stay." (Footnote added.) That same day, the court granted the plaintiffs' application for a prejudgment remedy in the amount of $72,718.25.[19]

On March 24, 2015, the plaintiffs filed in the trial court a motion for contempt, claiming, inter alia, that the defendants had continued to impose assessments on the plaintiffs' unit. In its April 6, 2015 order, the court stated that "[t]he motion for contempt is denied on the basis that [the defendants' counsel] has represented that no liens have been filed . . . ." The court nonetheless ordered that "[t]he association is to remove any assessment against the plaintiffs for legal fees related to this case and any legal fees from here on in related to this case, which the court declares said fees to be null and void. . . . The termination of the automatic stay remains in place, except that the plaintiffs may not execute on the prejudgment remedy or its substitution while the appeal is pending." On April 24, 2015, the defendants filed an amended appeal with this court to encompass those additional rulings.

On May 13, 2015, this court granted a motion for review filed by the defendants with respect to the trial court's denial of a stay of injunctive relief and sua sponte termination of the automatic stay. This court vacated those orders, specifically determining that the trial court's judgment awarding injunctive relief was permanent in nature and, thus, appealable. This court therefore remanded the matter to the trial court with direction to (1) consider whether a stay of such relief should be imposed in this case under General Statutes

[19] The $72,718.25 figure represented the $57,718.25 award of attorney's fees to the plaintiffs, which the court augmented by an additional $15,000 at the behest of the plaintiffs for costs that they anticipated incurring in this appeal.

§ 52-477[20] and (2) to reconsider whether the automatic stay should be terminated pursuant to Practice Book § 61-11.

On June 25, 2015, the trial court issued an order in response thereto. In that order, the court reiterated that the "green zone" was not in writing. It then found that "the due administration of justice requires an order that the stay be terminated because it is unlikely that the [defendants] will prevail in view of the fact that the 'green zone' is illegal." The court thus terminated the stay "to the extent that the plaintiffs may install a permanent fence surrounding the swimming pool within the 'green zone,' but shall use their best efforts not to interfere with shrubbery and trees. . . . For the same reasons, the 'green zone' being illegal, the stay is terminated as to the fines imposed by the defendants because of alleged violation of said 'green zone.' The court granted a prejudgment remedy on behalf of the plaintiffs, but no attachment or garnishment should be made because the parties have agreed to a certificate of deposit to be held in escrow, which will cover the prejudgment remedy." The defendants then filed a further motion for review with this court regarding that order. This court granted review of that motion, but denied the relief requested.

I

The principal issue in this appeal is whether the trial court applied the proper legal standard governing judicial review of the discretionary determinations of an association in a common interest community, or

[20] General Statutes § 52-477 provides: "When judgment has been rendered for a permanent injunction ordering either party to perform any act, the court, upon an application similar to that mentioned in section 52-476, shall stay the operation of such injunction until a final decision in the court having jurisdiction, unless the court is of the opinion that great and irreparable injury will be done by such stay or that such application was made only for delay and not in good faith."

whether, as the defendants contend, its decision constituted a "gross departure" from that standard. In answering that question, we note that this is an emerging area of the law that has received relatively little treatment by the appellate courts of this state. We begin, therefore, with an overview of the development of common interest community jurisprudence.

A

Background

"Although common-interest communities date back into the 19th century, they have become a widely available form of housing only since the 1960s." 2 Restatement (Third), Property, Servitudes § 6.13, comment (b), p. 239 (2000); accord *Cape May Harbor Village & Yacht Club Assn., Inc.* v. *Sbraga*, 421 N.J. Super. 56, 69, 22 A.3d 158 (App. 2011) ("[c]ommon interest developments are a relatively recent phenomenon, but . . . have rapidly grown in the United States"). As noted by many commentators, "[a] large and growing portion of the housing stock of America is located in common interest communities governed by owner associations." (Footnote omitted.) S. French, "Making Common Interest Communities Work: The Next Step," 37 Urb. Law. 359, 359 (2005); see also E. Lombardo, "A Better *Twin Rivers*: A Revised Approach to State Action by Common-Interest Communities," 57 Cath. U. L. Rev. 1151, 1151 (2008) ("[n]early fifty-nine million Americans live in private common-interest communities, governed by member-elected governing boards or associations"); A. Arabian, "Condos, Cats, and CC&Rs: Invasion of the Castle Common," 23 Pepp. L. Rev. 1, 24 (1995) ("[c]ommon interest developments are the fastest growing form of housing in the United States").

As our Supreme Court has explained, the act "contemplates the voluntary participation of the owners" within a common interest community. *Wilcox* v. *Willard*

Shopping Center Associates, 208 Conn. 318, 326, 544 A.2d 1207 (1988). In purchasing units in a common interest community, owners forfeit certain liberties with respect to the use of their property by voluntarily consenting to restrictions imposed thereon, as specified in the declaration of the community. See, e.g., *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 738 (unit owners in common interest community give up degree of freedom they otherwise would enjoy in separate privately owned property); *Villas West II of Willowridge Homeowners Assn., Inc.* v. *McGlothin*, 885 N.E.2d 1274, 1278–79 (Ind. 2008) ("Restrictive covenants are used to maintain or enhance the value of land by reciprocal undertakings that restrain or regulate groups of properties. . . . Property owners who purchase their properties subject to such restrictions give up a certain degree of individual freedom in exchange for the protections from living in a community of reciprocal undertakings." [Citation omitted.]), cert. denied sub nom. *Ashcraft* v. *Villas West II of Willowridge Homeowners Assn., Inc.*, 555 U.S. 1213, 129 S. Ct. 1527, 173 L. Ed. 2d 657 (2009); *Levandusky* v. *One Fifth Avenue Apartment Corp.*, 75 N.Y.2d 530, 536, 553 N.E.2d 1317, 554 N.Y.S.2d 807 (1990) (purchase of unit in common interest community "represents a voluntary choice to cede certain of the privileges of single ownership to a governing body"); 1 Restatement (Third), Property, Servitudes § 3.1, comment (i), p. 364 (2000) ("policies favoring freedom of contract, freedom to dispose of one's property, and protection of legitimate-expectation interests nearly always weigh in favor of the validity of voluntarily created servitudes").

"Historically, restrictive covenants have been used to assure uniformity of development and use of a residential area to give the owners of lots within such an area some degree of environmental stability." *Montoya* v. *Barreras*, 81 N.M. 749, 751, 473 P.2d 363 (1970). As

the Supreme Court of California noted, "[u]se restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement. . . . [S]ubordination of individual property rights to the collective judgment of the owners association together with restrictions on the use of real property comprise the chief attributes of owning property in a common interest development." (Citations omitted.) *Nahrstedt* v. *Lakeside Village Condominium Assn.*, 8 Cal. 4th 361, 372–74, 878 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994).

Owners of units in a common interest community, in turn, secure the right to enforce those restrictions against others.[21] See General Statutes § 47-278; *Bella Vista Condominium Assn., Inc.* v. *Byars*, 102 Conn. App. 245, 254, 925 A.2d 365 (2007) (owner has "a cause of action against the declarant or others who are subject to the provisions of the act when such parties violate the terms of either the act or the particular association's declaration or bylaws"); cf. *Mannweiler* v. *LaFlamme*, 46 Conn. App. 525, 535–36, 700 A.2d 57 (discussing right of owners to enforce restrictions in light of presumption that "each purchaser has paid a premium for the property in reliance on the uniform development plan being carried out"), cert. denied, 243 Conn. 934, 702 A.2d 641 (1997); *Rhue* v. *Cheyenne Homes, Inc.*, 168 Colo. 6, 8, 449 P.2d 361 (1969) ("[i]t is no secret that housing today is developed by subdividers who, through the use of restrictive covenants, guarantee to the purchaser that his house will be protected against adjacent construction which will impair its value, and that a general plan of construction will be followed"); *Lake at Twelve Oaks Homes Assn., Inc.* v. *Hausman*, 488 S.W.3d 190, 198 (Mo. App. 2016) (restrictions in "the [a]ssociation's

[21] Owners, of course, also obtain the benefit of the community's common elements. *Wilcox* v. *Willard Shopping Center Associates*, supra, 208 Conn. 326.

[d]eclarations were adopted for the purposes of enhancing and protecting the value, desirability, and attractiveness of the subdivision").

At first blush, the inherently restrictive nature of a common interest community may appear to conflict with public policy favoring the free and unrestricted use of real property, which "was dominant in the United States throughout the nineteenth century . . . ." *Pertzsch* v. *Upper Oconomowoc Lake Assn.*, 248 Wis. 2d 219, 232, 635 N.W.2d 829 (App. 2001) (Anderson, J., concurring); cf. *Easterbrook* v. *Hebrew Ladies Orphan Society*, 85 Conn. 289, 296, 82 A. 561 (1912) (restrictive covenants narrowly construed "being in derogation of the common-law right to use land for all lawful purposes"). Nevertheless, the proliferation of common interest communities in the past half century has led courts to reconsider certain presumptions regarding covenants utilized therein. As the Supreme Court of New Hampshire noted four decades ago, "[t]he former prejudice against restrictive covenants which led courts to strictly construe them is yielding to a gradual recognition that they are valuable land use planning devices." *Joslin* v. *Pine River Development Corp.*, 116 N.H. 814, 816, 367 A.2d 599 (1976). That court further stated that "private land use restrictions have been particularly important in the twentieth century when the value of property often depends in large measure upon maintaining the character of the neighborhood in which it is situated." (Internal quotation marks omitted.) Id., 817. As the Supreme Court of Washington put it, "[t]he premise that protective covenants restrict the alienation of land and, therefore, should be strictly construed may not be correct. Subdivision covenants tend to enhance, not inhibit, the efficient use of land. . . . In the subdivision context, the premise [that covenants prevent land from moving to its most efficient use] generally is not valid." (Emphasis omitted; internal quotation marks

omitted.) *Riss* v. *Angel*, 131 Wn. 2d 612, 622, 934 P.2d 669 (1997). That court thus concluded that, in cases involving a dispute "among homeowners in a [common interest community] governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable." Id., 623; see also *Lake at Twelve Oaks Homes Assn., Inc.* v. *Hausman*, supra, 488 S.W.3d 195 ("the right of one property owner to the protection of a restrictive covenant is a property right just as inviolable as is the right of others to the free use of their property when unrestricted"). Likewise, the Restatement (Third) of Property, Servitudes, promulgated in 1998, expressly eschews the public policy favoring the free use of land in this context.[22]

In reviewing the determinations of an association in a common interest community, Connecticut, like most jurisdictions, draws a crucial distinction between the *authority* to exercise the rights and responsibilities delineated in a declaration; see *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, 273 Conn. 724, 734, 873 A.2d 898 (2005); and the *propriety* of an association's exercise thereof. See *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra,

[22] That treatise states in relevant part: "The general principles governing servitude interpretation . . . adopt the model of interpretation used in contract law and displace the older interpretive model used in servitudes law that emphasized the free use of land, sometimes at the expense of frustrating intent. In adopting this model, this Restatement follows the lead of courts that have recognized the important and useful role servitudes play in modern real-estate development. To the extent that the old canon favoring free use of land remains useful, its function is served in cautioning against finding that a servitude has been created where the parties' intent is unclear . . . and in construing servitudes to avoid violating public policy . . . . It also may play a role in limiting the creation of servitudes that burden fundamental rights . . . and limiting the rulemaking powers of community associations . . . . Aside from those situations, construing in favor of free use of land should play no role in interpreting modern servitudes." 1 Restatement (Third), Property, Servitudes c. 4, introductory note, pp. 494–95 (2000).

279 Conn. 734; accord *Tierra Ranchos Homeowners Assn.* v. *Kitchukov*, 216 Ariz. 195, 199, 165 P.3d 173 (App. 2007) (distinguishing between "a case involving the interpretation of restrictive covenants" and "a case involving a challenge to [a] discretionary decision" [emphasis omitted]); *Felix Felicis, LLC* v. *Riva Ridge Owners Assn.*, 375 P.3d 769, 775 (Wyo. 2016) (distinguishing between questions "about the meaning of the covenants" and "the question [of] whether the associations reasonably applied them" [emphasis omitted]).

With respect to the former, principles of contract interpretation control. It is well established that the declaration is the constitution of a community organized pursuant to the act. *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 737; see also 2 Restatement (Third), Property, Servitudes § 6.12, comment (a), p. 226 (2000) (declaration is "the foundational document setting the parameters of the community's authority"); 8 Powell on Real Property (M. Wolf ed., 2000) § 54A.01 [11] [a], p. 47 ("[t]he declaration is the constitution for the community"). A declaration "operates in the nature of a contract, in that it establishes the parties' rights and obligations . . . ." *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, supra, 273 Conn. 734; see also *Harbour Pointe, LLC* v. *Harbour Landing Condominium Assn., Inc.*, 300 Conn. 254, 259, 14 A.3d 284 (2011). Accordingly, rules of contract construction govern the interpretation of declaration provisions. *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, supra, 734–35. No deference to the association, therefore, is warranted on the issue of association authority under a declaration. See *Southeastern Connecticut Regional Resources Recovery Authority* v. *Dept. of Public Utility Control*, 244 Conn. 280, 289–90, 709 A.2d 549 (1998).

On the other hand, as to the exercise of an association's discretionary authority under a declaration, courts across the country agree that a degree of deference is warranted. As the Supreme Court of California recognized decades ago, "[g]enerally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." *Nahrstedt* v. *Lakeside Village Condominium Assn.*, supra, 8 Cal. 4th 374; see also *McNamee* v. *Bishop Trust Co., Ltd.*, 62 Haw. 397, 407, 616 P.2d 205 (1980) ("[a]s long as the [association's] decision was reasonable and in good faith it will be upheld"); *Melson* v. *Guilfoy*, 595 S.W.2d 404, 407 (Mo. App. 1980) (finding "no abuse of discretion" in discretionary determination to "approve or disapprove a fence"); *Levandusky* v. *One Fifth Avenue Apartment Corp.*, supra, 75 N.Y.2d 538 ("[s]o long as the board acts for the purposes of the [common interest community], within the scope of its authority and in good faith, courts will not substitute their judgment for the board's"); 2 Restatement (Third), Property, Servitudes § 6.9, comment (d), pp. 173–74 (2000) ("[a]s the legitimacy and utility of design controls have become more widely accepted, courts have tended to increase the amount of deference they give to decisions reached by architectural-control committees or other design control authorities").

There are innumerable cases like the one now before us, in which a dispute arose over restrictive covenants that required association approval prior to construction on, or the alteration of, a unit in a common interest community. As the Supreme Court of Hawaii observed, "[c]ovenants requiring submission of plans and prior consent before construction . . . are commonly found in leases and deeds around the country. Most courts

have found these approval clauses to be valid and enforceable as long as the authority to consent or approve is exercised reasonably and in good faith." *McNamee* v. *Bishop Trust Co., Ltd.*, supra, 62 Haw. 402–403; see also *Gleneagle Civic Assn.* v. *Hardin*, 205 P.3d 462, 469 (Colo. App. 2008) ("[t]he majority view with respect to covenants requiring submission of plans and prior consent to construction by the developer . . . is that such clauses, even if vesting the approving authority with broad discretionary powers, are valid and enforceable so long as the authority to consent is exercised reasonably and in good faith" [internal quotation marks omitted]).[23]

More specifically, "[m]ost jurisdictions . . . recognize the validity and, in a proper case, the enforceability of covenants requiring consent to construction or approval of plans even if those covenants do not contain explicit standards for approval." *Cypress Gardens, Ltd.* v. *Platt*, 124 N.M. 472, 477, 952 P.2d 467 (App. 1997); accord *Dodge* v. *Carauna*, 127 Wis. 2d 62, 66, 377 N.W.2d 208 (App. 1985) ("[t]he result in jurisdictions that have considered covenants lacking objective standards of approval is generally consistent"). An association's exercise of its "broad latitude in making aesthetic decisions with respect to every type of improvement on the property"; *Buick* v. *Highland Meadow Estates at Castle Peak Ranch, Inc.*, 21 P.3d 860, 863 (Colo. 2001) (en banc); nevertheless remains subject to a general standard of reasonableness. See, e.g., *Rhue* v. *Cheyenne Homes, Inc.*, supra, 168 Colo. 9 ("a refusal to approve plans must be reasonable and made in good faith and must not be arbitrary or capricious"); *Kirkley* v. *Seipelt*, 212 Md. 127, 133, 128 A.2d 430 (App. 1957) ("any refusal to approve the external design or location . . . would

[23] A minority of jurisdictions have adopted the business judgment rule with respect to the exercise of discretionary association determinations. See footnote 24 of this opinion.

have to be . . . a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner"); *LeBlanc* v. *Webster*, 483 S.W.2d 647, 650 (Mo. App. 1972) ("we accept the validity of restrictions requiring prior approval or consent . . . but . . . such restrictions must be reasonably exercised"); *Cypress Gardens, Ltd.* v. *Platt*, supra, 124 N.M. 478 (plaintiff may "exercise its reserved authority to approve or reject" mobile homes "as long as it does so reasonably which includes in good faith").

The Restatement (Third) of Property, Servitudes, adopts such an approach. As the reporter's note states, it "follows the trend of modern statutes in taking an expansive view of the powers of a property-owners association with respect to . . . protection of property values in the community through covenant enforcement and other actions to advance the collective interests of the common-interest community." 2 Restatement (Third), Property, Servitudes § 6.4, reporter's note, p. 92 (2000). Although it disavows the existence of an implied design control power; see id., § 6.9 and comment (b), p. 171; the Restatement recognizes that the exercise of an explicit design control power is "likely to increase property values by preventing aesthetic nuisances"; id., § 6.9, comment (d), p. 173; as such power is "intended to protect the legitimate expectations of members of common-interest communities." Id., § 6.13, comment (a), p. 234; accord *Nahrstedt* v. *Lakeside Village Condominium Assn.*, supra, 8 Cal. 4th 381 ("[w]hen landowners express the intention to limit land use, that intention should be carried out" [internal quotation marks omitted]).

With respect to design control powers that vest discretion in an association to approve a proposed activity, the Restatement notes "two kinds of risks for property owners. [First, owners] may not be able to develop in

accordance with their expectations because they cannot predict how [that discretion] will be applied. Second, property owners may be subject to arbitrary or discriminatory treatment because there are no standards against which the appropriateness of the power's exercise can be measured." 2 Restatement (Third), Property, Servitudes § 6.9, comment (d), p. 173 (2000). To alleviate those risks, the Restatement imposes a reasonableness standard on the exercise of discretionary design control powers. Section 6.13 (1) provides in relevant part that an association has the duty "to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers . . . ."[24] Id., § 6.13 (1) (c), p. 233. The reasonableness standard "at its core, allows for an adjudicative

[24] A minority of jurisdictions have adopted the business judgment rule to govern review of discretionary association action. See, e.g., *Reiner* v. *Ehrlich*, 212 Md. App. 142, 155, 66 A.3d 1132, cert. denied, 433 Md. 514, 72 A.3d 173 (2013); *Levandusky* v. *One Fifth Avenue Apartment Corp.*, supra, 75 N.Y.2d 537; *Lyman* v. *Boonin*, 535 Pa. 397, 402–404, 635 A.2d 1029 (1993). The business judgment rule is even *more* deferential to association action than the reasonableness standard, which itself is a deferential one; see *Cape May Harbor Village & Yacht Club Assn., Inc.* v. *Sbraga*, supra, 421 N.J. Super. 65 (contrasting business judgment rule with "the less deferential reasonableness standard"); as the business judgment rule requires proof of "the presence of fraud or lack of good faith in the conduct of a corporation's internal affairs before the decisions of a board of directors can be questioned." *Papalexiou* v. *Tower West Condominium*, 167 N.J. Super. 516, 527, 401 A.2d 280 (1979). For that reason, the Restatement declined to adopt that lax standard. The commentary to § 6.13 explains that "[t]he business-judgment rule [was] not adopted because the fit between community associations and other types of corporations is not very close, and it provides too little protection against careless or risky management of community property and financial affairs." 2 Restatement (Third), Property, Servitudes § 6.13, comment (b), pp. 236–37 (2000).

We note that, under the act, association rule making in Connecticut expressly is governed by a reasonableness standard. See General Statutes § 47-261b (h). In addition, our Supreme Court in *Weldy*, as discussed in part I B of this opinion, set forth a two part test that entails consideration of whether an association's exercise of discretionary authority under a declaration was reasonable. *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 734. In light of the foregoing, we agree with the Restatement that the business judgment rule is not the preferable standard to govern

posture that honors the fundamental underpinnings of association functioning and structure, is responsive to association aims, takes into account investment-backed owner expectations, and appreciates the potential for abuse." P. Franzese, "Common Interest Communities: Standards of Review and Review of Standards," 3 Wash. U. J.L. & Policy 663, 669 (2000).

B

Weldy

In *Weldy*, our Supreme Court, in accordance with courts throughout the country, recognized that a degree of deference is warranted to an association exercising its powers under a declaration. Relying on the Restatement (Third) of Property, Servitudes, the court observed that "declarations and other governing documents contain broad statements of general policy with due notice that the board of directors is empowered to implement these policies and address day-to-day problems in the [association's] operation. . . . Thus, the declaration should not be so narrowly construed so as to eviscerate the association's intended role as the governing body of the community. Rather, a broad view of the powers delegated to the association is justified by the important role these communities play in maintaining property values and providing municipal-like services." (Internal quotation marks omitted.) *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 737. The court continued: "Because an association's power should be interpreted broadly, the association, through its appropriate governing body, is entitled to exercise all powers of the community except those

judicial review of discretionary association decisionmaking in common interest communities in Connecticut. Rather, for the reasons discussed throughout part I of this opinion, we conclude that the reasonableness standard better protects the interests of both the unit owner and the common interest community.

reserved to the members. . . . This broad view of the powers delegated to the [common interest community's] board of directors is consistent with the principle inherent in the [common interest ownership] concept . . . that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. . . . [U]nit owners comprise a little democratic sub society of necessity more restrictive as it pertains to [the] use of [common interest] property than may be existent outside" the common interest community. (Citations omitted; internal quotation marks omitted.) Id., 738.

In so noting, our Supreme Court expressly relied on *Hidden Harbour Estates, Inc.* v. *Norman*, 309 So. 2d 180 (Fla. App. 1975), an early case that employed a reasonableness standard of review to discretionary association action. In that case, the court held that "the association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners. On the contrary, we believe the test is reasonableness." Id., 182. In another early decision addressing the exercise of such discretion, the Court of Appeals of Maryland similarly reasoned that "[t]he language used in the covenants . . . makes plain the desire to regulate the construction of the dwellings in such a manner as to create an attractive and desirable neighborhood. We think the parties had a right voluntarily to make this kind of a contract between themselves; and the covenant does not create any interference with the fee of the property that would require it to be stricken down as against public policy. It does not prevent the owner from conveying the property or impose any unlawful restraint of trade, but affects only its

method of use. We hold that any refusal to approve the [proposed alterations] would have to be based upon a reason that bears some relation to the other buildings or the general plan of development; and this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner." *Kirkley* v. *Seipelt*, supra, 212 Md. 133.

In *Weldy*, our Supreme Court instructed that review of an association's discretionary determinations requires a two part inquiry. "When a court is called upon to assess the validity of [an action taken] by [an association], it first determines whether the [association] acted within its scope of authority and, second, whether the [action] reflects *reasoned* or arbitrary and capricious decision making." (Emphasis added; internal quotation marks omitted.) *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 734. The first part of that inquiry is consonant with prior precedent indicating that the question of an association's authority to exercise certain rights under a declaration is governed by principles of contract interpretation. See *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, supra, 273 Conn. 734. The second part of that inquiry entails application of a reasonableness standard. Indeed, in its very next sentence, the court in *Weldy* noted that only the first part of the two part inquiry was at issue "[b]ecause the plaintiffs do not contend that the [association's discretionary determination] is unreasonable . . . ."[25] *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 734.

[25] On many occasions, our Supreme Court has distinguished matters that are " 'reasonable, rather than arbitrary or capricious' "; *State* v. *Jason B.*, 248 Conn. 543, 560, 729 A.2d 760, cert. denied, 528 U.S. 967, 120 S. Ct. 406, 145 L. Ed. 2d 316 (1999); *State* v. *Matos*, 240 Conn. 743, 749, 694 A.2d 775 (1997); cf. *State* v. *Hodge*, 153 Conn. 564, 570, 219 A.2d 367 (1966) (contrasting "reasonable" delays in right to speedy trial with ones that are arbitrary or capricious); *Barr* v. *First Taxing District*, 151 Conn. 53, 59, 192 A.2d 872

Weldy was decided by our Supreme Court in 2006. The two part test articulated therein has therefore governed review of determinations by common interest community associations in Connecticut for more than one decade. See, e.g., *Gugliemi* v. *Willowbrook Condominium Assn., Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-11-6018687, 2013 Conn. Super. LEXIS 700 (March 28, 2013) (applying *Weldy*'s two part test), aff'd, 151 Conn. App. 806, 96 A.3d 634 (2014); *Weinstein* v. *Conyers Farm Corp.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-X08-106006978-S, 2012 Conn. Super. LEXIS 2683, *19 (October 31, 2012) (reciting *Weldy*'s two part test and concluding that association's imposition of condition on construction approval was "reasonable"); *Bosco* v. *Arrowhead by the Lake Assn., Inc.*, Superior Court, judicial district of Waterbury, Docket No. CV-05-4007579-S, 2008 Conn. Super. LEXIS 1106 (May 8, 2008) (applying *Weldy*'s two part test).

C

Reasonableness

As courts across this state have recognized, *Weldy* articulated a two part test that governs review of discretionary association determinations. At the same time,

(1963) (contrasting "reasonable" exercise of discretion from that which is "arbitrary"); accord *Leonard* v. *Stoebling*, 102 Nev. 543, 549, 728 P.2d 1358 (1986) (determinations of architectural control committee "not arbitrary if they were reasonable and were in good faith").

We also note that the two part test memorialized in *Weldy* was applied in our Superior Court one decade earlier. In *Townhouse III Condominium Assn., Inc.* v. *Mulligan*, Superior Court, judicial district of Tolland, Docket No. CV-92-50183-S (March 13, 1995) (*Klaczak, J.*) (14 Conn. L. Rptr. 112, 113), the court noted that "[i]n determining the validity of condominium rules and regulations, courts have developed a 'reasonableness' test. The first prong of the test is whether the board acted within the scope of its authority. The second prong is whether the rule reflects reasoned or arbitrary and capricious decision making."

that case involved no claim as to whether the association's determination was reasonable, a distinction underscored by our Supreme Court. Rather, "the only issue before the court" was the authority of the association. *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 734. The present case, by contrast, plainly involves a matter—specifically, the erection of fencing on the plaintiffs' unit—over which the association is vested with discretionary design control authority under the declaration. See Declaration of Rustle Meadow, §§ 10.1 (k) and 13.1 (a) (ii).[26] The plaintiffs recognized that authority in submitting written proposals that invoked those provisions of the declaration and requested the approval of the association thereunder.[27] Furthermore, we note that the declaration provisions

[26] Section 10.1 (k) of Article X of the declaration provides in relevant part: "No building, shed, swimming pool, pavement, *fence*, wall or other structure or improvement of any nature shall be erected upon any Unit in the Common Interest Community without the prior written consent of the Declarant . . . . No Unit Owner shall make any exterior addition, change or alteration to a Unit or any residence located therein . . . or substantially change the topography of a Unit including the removal of any trees without the prior written consent of the Declarant which consent shall not be unreasonably withheld. Detailed plans of any such construction or landscaping or any addition, change or alteration thereto shall be submitted to the Declarant . . . . The Unit Owner must receive written approval from the Declarant prior to commencing such construction, landscaping or making any additions, changes or alterations. Any unauthorized construction or changes must be restored to its previous condition at such Unit Owner's expense." (Emphasis added.)

Section 13.1 (a) (ii) of Article XIII of the declaration similarly provides that a unit owner "[m]ay not make any changes, additions, alterations, or improvements to any structure in or on any Unit or to the Common Elements or make any substantial change to the topography of a Unit or the Common Elements including the removal of trees, without the prior written approval of the Declarant as provided in Section 10.1 (k) of this Declaration or of the [a]ssociation as provided therein, as well as receiving all necessary governmental permits and approvals. Such approval by the Declarant or the [a]ssociation shall not be unreasonably withheld."

[27] At trial, Kristine Grovenburg acknowledged that the association had discretion to approve all exterior changes to her unit pursuant to the declaration and that she was required to obtain its permission prior to making any such alterations or improvements.

in question themselves impart a reasonableness standard on the conduct of the association in exercising its design control powers. See footnote 26 of this opinion. Unlike *Weldy*, then, the issue before the court in this case is the reasonableness of the association's discretionary determination.

A criticism of some decisions that apply a reasonableness standard in this context is that they do so "without defining what reasonable means." W. Hyatt, "Common Interest Communities: Evolution and Reinvention," 31 J. Marshall L. Rev. 303, 354 (1998). For example, in *Hidden Harbour Estates, Inc.* v. *Norman*, supra, 309 So. 2d 182, the court stated simply that "we believe the test is reasonableness. If a rule is reasonable the association can adopt it; if not, it cannot." Given the near universal recognition that a degree of deference to discretionary association determinations is appropriate, courts in recent years have noted the need for "a more objective 'reasonableness' standard by which to judge the discretionary actions of community associations." *Tierra Ranchos Homeowners Assn.* v. *Kitchukov*, supra, 216 Ariz. 200. An objective standard serves to minimize the potential that trial judges will substitute their subjective judgment for that of the entity explicitly and contractually entrusted with discretionary authority under the declaration.[28] As the Restatement notes,

[28] See, e.g., *Rymer* v. *Polo Golf & Country Club Homeowners Assn., Inc.*, 335 Ga. App. 167, 175, 780 S.E.2d 95 (2015) (trial court cannot substitute own judgment for that of association when restrictive covenants confer discretion on association); *Noble* v. *Murphy*, 34 Mass. App. 452, 456, 612 N.E.2d 266 (1993) ("[c]lose judicial scrutiny and possible invalidation or limitation of fundamentally proper but broadly drawn use restrictions . . . would deny to developers and unit owners the 'planning flexibility' inherent in" statutory scheme); *Griffin* v. *Tall Timbers Development, Inc.*, 681 So. 2d 546, 553–54 (Miss. 1996) (trial court may not substitute own judgment for association in applying reasonableness standard); *Preserve Homeowners' Assn., Inc.* v. *Zhan*, 117 App. Div. 3d 1398, 1399, 984 N.Y.S.2d 743 (courts will not substitute judgment so long as association board acts for purpose of common interest community, within scope of its authority and in good faith), appeal dismissed, 24 N.Y.3d 932, 17 N.E.3d 1140, 993 N.Y.S.2d 543

the proper application of the reasonableness standard must "protect the collective decisionmaking processes of common-interest communities from second-guessing by the judiciary . . . ." 2 Restatement (Third), Property, Servitudes § 6.13, comment (a), p. 235 (2000). A standard that is objective in nature and deferential to the exercise of association discretion nonetheless affords meaningful review. See *Lamden* v. *La Jolla Shores Clubdominium Homeowners Assn.*, 21 Cal. 4th 249, 269, 980 P.2d 940, 87 Cal. Rptr. 2d 237 (1999) (rejecting claim that "a rule of judicial deference will insulate community association boards' decisions from judicial review" and stating that the "judicial oversight" provided under deferential standard "affords significant protection against overreaching by such boards").

No Connecticut appellate court has addressed the contours of the reasonableness metric in the context of common interest ownership communities. It is appropriate, therefore, to look to other jurisdictions for guidance. *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 737.

Mindful of the deference accorded to associations vested with discretionary authority, many courts have held that a reasonableness analysis properly begins with consideration of the rationale and stated bases for the association's determination. See *Laguna Royale Owners Assn.* v. *Darger*, 119 Cal. App. 3d 670, 684, 174 Cal. Rptr. 136 (1981) ("[t]o determine whether or not [an] [a]ssociation's disapproval of [the proposed activity] was reasonable it is necessary to isolate the reason or reasons approval was withheld"); *McNamee* v. *Bishop Trust Co., Ltd.*, supra, 62 Haw. 406 (reasonableness

(2014); *Palmetto Dunes Resort* v. *Brown*, 287 S.C. 1, 7, 336 S.E.2d 15 (App. 1985) ("although people may reasonably differ as to [a discretionary design control determination], the covenant is unambiguous in leaving this solitary judgment to" the association).

analysis focuses on association's "reasons for disapproving the [plaintiffs'] application"); *Cypress Gardens, Ltd.* v. *Platt*, supra, 124 N.M. 478 ("[i]n determining what is reasonable in such cases, the trial court should consider the facts and circumstances surrounding" the exercise of discretionary authority). In considering the rationale underlying the association's exercise of discretionary authority, a reviewing court should make "findings as to [the association's] intent and objectives [and] what substantial and reasonable interests would be protected by enforcing the restriction," as well as "findings as to the relation of the [proposed activity] to its surroundings and other buildings and structures in the subdivision." *Dodge* v. *Carauna*, supra, 127 Wis. 2d 67. Such findings are "crucial to a determination of the reasonableness" of an association's discretionary determination. Id.

Courts also give considerable weight to the purposes underlying a common interest community. As one stated, "[w]e hold that in exercising its [discretionary] power . . . [the] [a]ssociation must act reasonably, exercising its power in a fair and nondiscriminatory manner and withholding approval only for a reason or reasons rationally related to the protection, preservation and proper operation of the property and the purposes of [the] [a]ssociation as set forth in its governing instruments." *Laguna Royale Owners Assn.* v. *Darger*, supra, 119 Cal. App. 3d 680; see also *Perry* v. *Bridgetown Community Assn., Inc.*, 486 So. 2d 1230, 1234 (Miss. 1986) ("[r]eview by the court must be guided by the intent stated in the declaration"); *Lake at Twelve Oaks Homes Assn., Inc.* v. *Hausman*, supra, 488 S.W.3d 197 (focusing on "[t]he plain and obvious intent of the [d]eclarations" and its "purposes" in reviewing association exercise of design control discretion). Several commentators have suggested that this is an integral, if not

predominant, consideration in evaluating the reasonableness of discretionary association action. See, e.g., P. Franzese, supra, 3 Wash. U. J.L. & Policy 687 ("courts ought to apply a reasonableness standard rooted in consideration of the association's legitimate objectives and an assessment of the rational relationship of the given action to those objectives"); R. Ellickson, "Cities and Homeowners Associations," 130 U. Pa. L. Rev. 1519, 1530 (1982) ("respect for private ordering requires a court applying the reasonableness standard to comb the association's original documents to find the association's collective purposes, and then to determine whether the association's actions have been consonant with those purposes"). We agree that consideration of the collective purposes of an association, as reflected in its governing instruments, is essential to the proper application of the reasonableness standard.

Accordingly, application of the reasonableness standard in the context of a challenge to discretionary association action cannot focus exclusively on the interests of the disgruntled unit owner or the executive board of an association. Rather, courts must remain cognizant of the larger interest of the common interest community. See *Nahrstedt* v. *Lakeside Village Condominium Assn.*, supra, 8 Cal. 4th 386 (reasonableness "to be determined not by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole" [emphasis omitted]); P. Franzese, supra, 3 Wash. U. J.L. & Policy 684 (noting cases that "nicely advance a fact-specific approach rooted not in the circumstances peculiar to the individual unit owner but instead in consideration of the given community's unique character and purposes when viewed as a whole"). As the Restatement recognizes, restrictive covenants that vest discretionary authority in an association are "intended to protect the legitimate

expectations of members of common-interest communities." 2 Restatement (Third), Property, Servitudes § 6.13, comment (a), p. 234 (2000); see also *Nahrstedt* v. *Lakeside Village Condominium Assn.*, supra, 372 ("[u]se restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement"); *Rhue* v. *Cheyenne Homes, Inc.*, supra, 168 Colo. 8 ("restrictive covenants . . . guarantee to the purchaser that his house will be protected against adjacent construction which will impair its value, and that a general plan of construction will be followed"); *Riss* v. *Angel*, supra, 131 Wn. 2d 623–24 (urging "special emphasis on [protecting] the homeowners' collective interests" [internal quotation marks omitted]). The interests of that constituency must be considered in applying the reasonableness standard.

At the same time, an association cannot exercise its discretionary authority in an arbitrary or capricious manner. *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 734; see also *Worthinglen Condominium Unit Owners' Assn.* v. *Brown*, 57 Ohio App. 3d 73, 76, 566 N.E.2d 1275 (1989) (determination of "whether the decision or rule was arbitrary or capricious" entails consideration of whether "there be some rational relationship of the decision or rule to the safety and enjoyment of the [common interest community]" [emphasis omitted]). That authority must be exercised in good faith and not in a discriminatory manner. See *Worthinglen Condominium Unit Owners' Assn.* v. *Brown*, supra, 76. Examples of conduct that substantiated a finding that an association's determination was unreasonable include a case in which "there is no evidence that the [association's executive board] reasonably assessed the impact of" the proposed activity or that it "visited the site, much less with an eye to neighbors' views or privacy"; *Riss* v. *Angel*, supra, 131 Wn.

2d 628; and one in which the architectural control committee failed to "undertake . . . a minimum effort" to visit "the proposed construction site" and failed to ascertain "its impact on [neighboring] properties." *Leonard* v. *Stoebling*, 102 Nev. 543, 549, 728 P.2d 1358 (1986). The selective enforcement of a restriction against a unit owner likewise has been deemed arbitrary and unreasonable in certain circumstances. See *White Egret Condominium, Inc.* v. *Franklin*, 379 So. 2d 346, 352 (Fla. 1979) (holding that use restriction in declaration "was reasonably related to a lawful objective" but association nonetheless "is estopped from selectively enforcing [that] restriction"). An association's discretionary design control determination also was deemed arbitrary when "the record is devoid of an objective showing that [the proposed activity is] aesthetically disharmonious with the character of, or that [it] detract[s] from, the quality of the neighborhood." *Kies* v. *Hollub*, 450 So. 2d 251, 256 (Fla. App. 1984). Similarly, an association's denial of permission for a unit owner "to proceed with [a] heating and air conditioning upgrade"; *Billig* v. *Buckingham Towers Condominium Assn. I, Inc.*, 287 N.J. Super. 551, 555, 671 A.2d 623 (App. 1996); was "not reasonable because the change did not materially or appreciably affect the [common interest community] property, the common elements, the limited common elements, the collective interests of the unit owners, or the interests of any individual unit owner." Id., 564. In all such cases, the specific nature of the proposed activity was weighed against the interests of the common interest community.

Before turning our attention to the decision of the trial court, two additional aspects of the reasonableness standard merit discussion. The first pertains to the allocation of the burden of proof in an action in which a unit owner in a common interest community challenges an association's discretionary decisionmaking.

Although our appellate courts have not addressed this issue, we note that our Supreme Court in *Weldy* expressly relied on the Restatement (Third) of Property, Servitudes, in recognizing a broad view of the powers delegated to the association and the corresponding deference accorded thereto. See *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 737–38. Addressing the duty of an association to act reasonably in exercising discretionary powers, the Restatement places the "burden of proving a breach of duty by the association" on a unit owner "challenging an action of the association under this section . . . ."[29] 2 Restatement (Third), Property, Servitudes § 6.13 (2), p. 233 (2000). As the commentary explains, "the purpose of this subsection is to protect the collective decisionmaking processes of common-interest communities from second-guessing by the judiciary and to protect the community from the expenses of too-ready resort to litigation by disgruntled community members, while at the same time protecting individual members from improper management and imposition by those in control of the association." Id., § 6.13, comment (a), p. 235. We believe that this allocation best comports with the presumption, reflected in the act, of voluntary participation of owners within a common interest ownership community; *Wilcox* v. *Willard Shopping Center Associates*, supra, 208 Conn. 326; and the community's substantial interest in safeguarding the rights of all unit

[29] Accord, e.g., *Tierra Ranchos Homeowners Assn.* v. *Kitchukov*, supra, 216 Ariz. 202 (property owner challenging association determination bears burden of establishing "that its actions were unreasonable"); *Dolan-King* v. *Rancho Santa Fe Assn.*, 81 Cal. App. 4th 965, 979, 97 Cal. Rptr. 2d 280 (2000) ("[h]aving sought a declaration that the [association's review board] imposed restrictions unreasonably and arbitrarily, it was [the plaintiff property owner's] burden at trial to make that showing before the trial court"), review denied, 2000 Cal. LEXIS 7972 (Cal. October 3, 2000); *Uptegraph* v. *Sandalwood Civic Club*, 312 S.W.3d 918, 933 (Tex. App. 2010) (property owner had "burden at trial to prove that [the association's] exercise of its discretionary authority was arbitrary, capricious, or discriminatory").

owners; *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 738; who rely on the plan of development set forth in the declaration being carried out. *Mannweiler* v. *LaFlamme*, supra, 46 Conn. App. 536 (noting unit owners' interest in "the uniform development plan being carried out").

Furthermore, a contrary result strikes us as illogical in light of the deference accorded to associations in matters involving discretionary determinations under a declaration, as well as our Supreme Court's "broad view of the powers" delegated to an association in a common interest community. *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 738. It would be truly bizarre if—in a civil action commenced by a unit owner contesting an association's discretionary decision-making—the association, and not the party challenging the determination, bore the burden to demonstrate that it properly exercised that discretion.[30] We concur with the approach avowed in the Restatement and other jurisdictions that places the burden on the challenging

[30] See, e.g., *Statewide Grievance Committee* v. *Ganim*, 311 Conn. 430, 451, 87 A.3d 1078 (2014) (burden is on applicant in reinstatement proceeding to establish that standing committee acted arbitrarily or in abuse of its discretion in approving or withholding its approval); *Moraski* v. *Connecticut Board of Examiners of Embalmers & Funeral Directors*, 291 Conn. 242, 258–60, 967 A.2d 1199 (2009) (applying abuse of discretion standard to administrative agency's decision to permit Department of Public Health to amend its statement of charges filed against licensed embalmer and funeral home and holding that plaintiff challenging agency determination bore burden of proof); *Conley* v. *Board of Education*, 143 Conn. 488, 498, 123 A.2d 747 (1956) (plaintiff challenging board's determination bears burden of proof when "[t]he question for the court . . . is whether the board, in reaching its conclusions and taking the action challenged, acted illegally or in abuse of the discretion"); *Mallory* v. *West Hartford*, 138 Conn. 497, 505, 86 A.2d 668 (1952) ("[t]he burden of proof was on the plaintiffs" because "[t]he basic allegation of the plaintiffs was that the council acted arbitrarily, illegally, unreasonably, without authority and in abuse of its discretion"); *Gevers* v. *Planning & Zoning Commission*, 94 Conn. App. 478, 483, 892 A.2d 979 (2006) (in light of deferential standard of review, "[t]he plaintiffs shoulder the burden of demonstrating that the commission acted improperly").

party to demonstrate that an association or its executive board improperly exercised the discretionary decisionmaking authority accorded to it by the declaration of a common interest community.

A second noteworthy aspect of the reasonableness standard pertains to its inherent nature. As many courts have recognized, the determination of whether an association reasonably exercised its discretion is a question of fact.[31] Connecticut law likewise recognizes that the question of reasonableness presents an issue of fact. See, e.g., *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 759 n.15, 905 A.2d 623 (2006) ("whether a covenant is reasonable is a question of fact"); *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 580, 657 A.2d 212 (1995) ("[w]e have consistently held that reasonableness is a question of fact for the trier to determine based on all of the circumstances"); *National Groups, LLC* v. *Nardi*, 145 Conn. App. 189, 199, 75 A.3d 68 (2013) (reasonableness a question of fact for trier to determine).

In *Peterson* v. *Oxford*, 189 Conn. 740, 745–46, 459 A.2d 100 (1983), our Supreme Court described the application of a reasonableness standard as "a weighing analysis" that entails consideration of "all the relevant circumstances" and factors. Cf. *Cypress Gardens, Ltd.* v. *Platt*, supra, 124 N.M. 478 ("[i]n determining what is reasonable . . . the trial court should consider the facts and circumstances surrounding" the exercise of discretionary design control authority); *Shipler* v. *Van Raden*, 41 Or. App. 425, 429, 599 P.2d 1141 (1979)

[31] See, e.g., *Tierra Ranchos Homeowners Assn.* v. *Kitchukov*, supra, 216 Ariz. 202; *Gleneagle Civic Assn.* v. *Hardin*, supra, 205 P.3d 470; *Trieweiler* v. *Spicher*, 254 Mont. 321, 327, 838 P.2d 382 (1992); *Cypress Gardens, Ltd.* v. *Platt*, supra, 124 N.M. 478; 2 Restatement (Third), Property, Servitudes § 6.9, comment (d), p. 174 (2000) ("[d]etermining whether design-control powers have been unreasonably exercised requires a fact-specific, case-by-case inquiry").

("[r]estrictive covenants are to be construed in the light of reasonableness under the circumstances"). The present case likewise calls for such a weighing analysis by the trier of fact. With that standard in mind, we turn to the decision of the trial court.

D

Trial Court Decision

On January 14, 2015, the court issued its memorandum of decision. In that decision, the court specifically addressed the propriety of the green zone and the association's failure to approve the plaintiffs' fence proposal. It stated: "Is there a green zone? The short answer is no. At the start of this trial, this court granted the plaintiffs' motion in limine prohibiting the defendants from introducing any unrecorded maps or unrecorded documents that show a green zone. The court found that the green zone is not reasonable because it was not in writing, that the green zone, being unwritten, is not sufficient notice to a prospective buyer. . . . The green zone as hereinbefore described is in the mind of Miller, and there is nothing in writing in the declaration or bylaws to indicate to anyone, including the plaintiffs, that there is a green zone, namely, a fifteen foot wide piece of land claimed by Miller from the boundary of the plaintiffs' in toward the rest of their property, a distance of fifteen feet, surrounding the entire property of the plaintiffs. Accordingly, this court finds that it was illegal and inequitable for the association to deny the applications for a fence around the pool in the green zone hereinbefore described." (Citation omitted.) In a later portion of the decision concerning "the defendants' actions in restricting landscaping by the plaintiffs," the court likewise noted that the conduct of the association in "withholding . . . the approval for a fence" was unreasonable because the "green zone . . .

did not exist in writing . . . .'' On appeal, the defendants contest the propriety of those determinations.

1

Motion in Limine

We begin with the defendants' contention that the court improperly granted the motion in limine to preclude evidence relating to the green zone. The following additional facts are relevant to that issue. One day prior to trial, the plaintiffs filed a motion in limine seeking to preclude any testimony or documentation ''that relates to the green zone.'' The plaintiffs emphasized that all restrictions on the use of property within a common interest community are required to be included in the declaration thereof. Because Miller admitted in his deposition testimony that the term ''green zone'' is not contained in either the declaration or any other material recorded on the Canton land records, the plaintiffs argued that ''the green zone is clearly unenforceable'' under the act.

When the court heard argument on the motion on the first day of trial, the defendants' counsel responded by stating, ''Your Honor, this motion in limine is a wonderful way to start this case because it identifies where the issues are, where the conflicts are'' between the parties. He emphasized that the declaration expressly vests discretionary authority in the association to approve or deny all exterior development and landscaping within Rustle Meadow.[32] At that time, counsel brought *Weldy* to the court's attention, which he described as ''the only . . . Supreme Court case on point,'' and furnished a copy of that decision to the court. He stated that, in *Weldy*, ''the [Supreme Court] was called upon for the first time . . . to decide how [to] deal with'' the discretion of an association in a

[32] See footnote 26 of this opinion.

common interest community. Noting the two part test articulated therein, counsel explained that "the second part of the test [asks whether] the homeowners' association acted reasonably or did it act arbitrarily and capriciously." The ultimate issue before the court, he continued, was the determination of whether the association reasonably exercised its discretionary authority. Accordingly, he argued that evidence of the "green zone" was both relevant and necessary to resolving that issue.

The trial court did not agree with the defendants. It stated: "The motion in limine is granted. . . . Apparently [Miller] decided what the green zone is, and . . . it doesn't seem to me that it's reasonable if it is not in writing. If he wants to testify as to why he did what he did, I don't have a problem with that. I'll evaluate that as I will any other witness, but I'm . . . granting the motion in limine because I don't think that the so-called green zone, being unwritten, is . . . sufficient notice to the prospective buyer. I mean, [Miller] says in his deposition that if you want to know what the green zone is, ask me. I don't think that's sufficient. . . . [I]f we're talking about discretion, at this point I think that is . . . beyond discretion."

The court thereafter excluded or redacted certain evidence and testimony throughout the course of trial. For example, the court redacted Miller's statement that "[t]he [fifteen] foot green zone needs to be respected" from his July 22, 2008 e-mail to the plaintiffs, which was sent *prior* to the construction of the swimming pool. The court likewise redacted the plaintiffs' July 23, 2008 response to that communication, in which they stated that they were "confident that when the pool and grading is done, the green zone will be at least the [fifteen] feet. Looking at the [southeasterly] side yard, it looks like the only area the dirt is encroaching is by the side of the deck. Once [the] patio is in and we do

landscaping I am sure you will be pleased with the amount of green we add or maintain."

On appeal, the defendants claim that the court improperly excluded such evidence regarding the green zone. "The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court." (Internal quotation marks omitted.) *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 156, 757 A.2d 14 (2000). Evidentiary claims ordinarily are governed by the abuse of discretion standard. See, e.g., *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 250 n.9, 9 A.3d 364 (2010). That deferential standard, however, does not apply when "the trial court's ruling on the motion in limine . . . was based on [a] legal determination . . . ." *Duffy* v. *Flagg*, 279 Conn. 682, 688–89, 905 A.2d 15 (2006). As the court indicated in its memorandum of decision, its ruling on the motion in limine was based on its legal determination that the green zone needed to be in writing.[33] Accordingly, the applicable standard of review requires this court to determine "whether the trial court was legally and logically correct when it decided, under the facts of the case, to exclude evidence" of the green zone. Id., 689. Our review, therefore, is plenary. See *Robinson* v. *Cianfarani*, 314 Conn. 521, 525, 107 A.3d 375 (2014) (when trial court draws conclusions of law, review is plenary as to whether conclusions are legally and logically correct and find support in facts that appear in record).

On appeal, the plaintiffs submit that the court properly determined that the green zone had to be in writing. In so doing, however, they rely on decisional law arising outside the context of common interest communities.

[33] Although they argue in their appellate brief that the court properly "determined that the green zone was unlawful because it was not in writing," the plaintiffs acknowledge that the court did not "articulate the legal basis for the green zone having to be in writing . . . ."

See, e.g., *Wykeham Rise, LLC* v. *Federer*, 305 Conn. 448, 52 A.3d 702 (2012); *Katsoff* v. *Lucertini*, 141 Conn. 74, 103 A.2d 812 (1954); *Hooker* v. *Alexander*, 129 Conn. 433, 29 A.2d 308 (1942); *Kepple* v. *Dohrmann*, 141 Conn. App. 238, 60 A.3d 1031 (2013); *DaSilva* v. *Barone*, 83 Conn. App. 365, 849 A.2d 902, cert. denied, 271 Conn. 908, 859 A.2d 560 (2004); *Grady* v. *Schmitz*, 16 Conn. App. 292, 547 A.2d 563, cert. denied, 209 Conn. 822, 551 A.2d 755 (1988); *Marion Road Assn.* v. *Harlow*, 1 Conn. App. 329, 472 A.2d 785 (1984); *Thompson* v. *Fairfield Country Day School Corp.*, Superior Court, judicial district of Fairfield, Docket No. CV-02-0396513 (November 20, 2003) (36 Conn. L. Rptr. 45); *Witter* v. *Taggart*, 78 N.Y.2d 234, 577 N.E.2d 338, 573 N.Y.S.2d 146 (1991); *Nature Conservancy* v. *Congel*, 296 App. Div. 2d 840, 744 N.Y.S.2d 281, leave to appeal denied, 99 N.Y.2d 502, 782 N.E.2d 567, 752 N.Y.S.2d 589 (2002). There is no indication in any of those cases that the restriction at issue pertained to a common interest community or involved a declaration of restrictive covenants that conferred discretionary design control authority on an association thereof. Those decisions, therefore, are inapposite to the present case.

The plaintiffs' reliance on the statute of frauds likewise is untenable. Under Connecticut law, the statute of frauds operates as a special defense to a civil action. See, e.g., *Suffield Development Associates Ltd. Partnership* v. *Society for Savings*, 243 Conn. 832, 835 n.5, 708 A.2d 1361 (1998) (noting that defendant raised "the special defense of the statute of frauds"); *Levesque Builders, Inc.* v. *Hoerle*, 49 Conn. App. 751, 754, 717 A.2d 252 (1998) ("[t]he defendant filed a special defense, claiming that the contract was unenforceable because it failed to comply with . . . the statute of frauds"). The statute of frauds provides in relevant part that "[*n*]*o civil action may be maintained* in the following cases unless the agreement, or a memorandum of the

agreement, is made in writing and signed by the party, or the agent of the party, to be charged . . . (4) upon any agreement for the sale of real property or any interest in or concerning real property . . . .'' (Emphasis added.) General Statutes § 52-550 (a). In this case, however, it is the plaintiffs who have maintained the civil action challenging the discretionary determination of the association. Because ''a special defense operates as a shield, to defeat a cause of action, and not as a sword, to seek a judicial remedy for a wrong''; *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 374, 143 A.3d 638 (2016); the plaintiffs' resort to the statute of frauds in this case is unavailing.

More significantly, this is not a case that lacks a written agreement. Under Connecticut law, restrictive covenants in a common interest community must be included in the declaration thereof; General Statutes § 47-224 (a) (12); which, in turn, must be filed on the land records. General Statutes § 47-220 (a). Consistent with that statutory imperative, the Declaration of Rustle Meadow was recorded on the Canton land records prior to the plaintiffs' purchase of their unit in the common interest community. That declaration contains numerous restrictive covenants. At trial, the plaintiffs testified that they reviewed the declaration prior to purchasing their unit and were aware of the restrictive covenants contained therein. See *Dolan-King* v. *Rancho Santa Fe Assn.*, 81 Cal. App. 4th 965, 971, 97 Cal. Rptr. 2d 280 (plaintiff ''was aware of the [c]ovenant's existence and had 'read over it' before she agreed to purchase the house''), review denied, 2000 Cal. LEXIS 7972 (Cal. October 3, 2000).

The declaration contains reciprocal provisions regarding the association's discretionary authority over design control matters. See footnote 26 of this opinion. Section 10.1 (k) of Article X vests sweeping design control powers in the association, which, like those at

issue in *Buick* v. *Highland Meadow Estates at Castle Peak Ranch, Inc.*, supra, 21 P.3d 863, "grant the [association] broad latitude in making aesthetic decisions with respect to every type of improvement on the property . . . ." The exercise of that broad discretion, however, remains subject to a reasonableness standard, as § 10.1 (k) provides that approval thereunder "shall not be unreasonably withheld." Section 13.1 (a) (ii) of Article XIII, in turn, expressly prohibits unit owners from making "any changes, additions, alterations, or improvements . . . in or on any Unit" without prior written approval from the association in accordance with § 10.1 (k). At trial, Kristine Grovenburg acknowledged that the association had discretion to approve all exterior changes to her unit pursuant to the declaration and that she was required to obtain its permission prior to making any such alterations or improvements.

The record before us contains ample documentary evidence indicating that the so-called "green zone" was a criterion considered by the association in the exercise of its discretionary design control authority under §§ 10.1 (k) and 13.1 (a) of the declaration.[34] In a portion of deposition testimony that was admitted into evidence, the plaintiffs' counsel inquired as to Miller's use of the term "green zone" in communications with the plaintiffs. The following colloquy transpired:

"[The Plaintiffs' Attorney]: Why did you use the word Green Zone in your e-mail? . . .

[34] In the zoning context, our Supreme Court has observed that "[i]t must be borne in mind . . . that we are dealing with a group of [lay people] who may not always express themselves with the nicety of a Philadelphia lawyer. Courts must be scrupulous not to hamper the legitimate activities of civic administrative boards . . . ." *Couch* v. *Zoning Commission*, 141 Conn. 349, 358, 106 A.2d 173 (1954). That logic applies equally to members of common interest associations. When considering the reasonableness of its discretionary determination, the focus properly is on the action of the association and the rationale therefor, rather than the particular nomenclature employed by that body of lay people.

"[Miller]: Because—I used the phrase, fifteen foot Green Zone, because I had discussed with the [plaintiffs] previously the fifteen foot Green Zone, and that's why I said it needed to be respected.

"[The Plaintiffs' Attorney]: Can you define the fifteen foot Green Zone, please?

"[Miller]: It's a visual buffer that is one of the standards that the association uses to evaluate changes to landscaping and—evaluate changes to landscaping and the—in the conduct of its business of the subdivision.

"[The Plaintiffs' Attorney]: And it is sort of unclear. When you were describing the Green Zone as a buffer, can you just articulate what, in your definition, a fifteen foot Green Zone is as it relates to the plaintiffs' property?

"[Miller]: "It's an area where natural vegetation would be protected and not removed, destroyed, cut, or in other ways inhibited so as to provide a visual buffer between adjoining building lots."

In his July 2, 2010 e-mail to the plaintiffs, Miller similarly stated that "[t]he green zone falls within the authority of the board in approving landscape changes after construction. The 'green zone' is simply a term which names a section of the land adjacent to the wooded property lines where the association will tightly regulate any landscape changes to maximize the visual buffer between adjacent lots." In a subsequent e-mail sent days later, Miller informed the plaintiffs that "[m]aintaining a visual buffer between lots in this community is a . . . criteri[on] from which to make a decision . . . ." The minutes of the association's June 21, 2013 annual meeting likewise reflect that discussion transpired on "the need to maintain a visual green zone buffer between units for privacy and to maintain the wooded character of the community." Similarly, when Miller contacted

the Canton building department in 2011, he made no mention of any "green zone," but rather indicated that the plaintiffs had proposed a fence within a "visual buffer zone." That correspondence further indicated that the plaintiffs' proposal had been denied because it "placed the fence *unnecessarily* within" that visual buffer zone. (Emphasis added.)

Throughout this litigation, the defendants have conceded that there is no reference to either the "green zone" or that visual buffer area in the declaration or other documents of Rustle Meadow. Courts across the country nevertheless have rejected similar claims regarding the lack of written, objective standards to guide the exercise of broadly drawn design control powers.[35] At the same time, the exercise of discretionary

[35] See, e.g., *Dolan-King* v. *Rancho Santa Fe Assn.*, supra, 81 Cal. App. 4th 977 ("California and many other jurisdictions have long upheld such general covenants vesting broad discretion in homeowners associations or boards to grant or withhold consent to construction. . . . This is so even when the covenants contain such broad, general approval standards . . . ." [citations omitted]); *Rhue* v. *Cheyenne Homes, Inc.*, supra, 168 Colo. 8 (rejecting claim that restrictive covenant "is not enforceable because no specific standards are contained therein to guide the committee in determining the approval or disapproval of plans when submitted"); *Donoghue* v. *Prynnwood Corp.*, 356 Mass. 703, 707, 255 N.E.2d 326 (1970) (restriction requiring approval of plans that lack explicit standards of approval "may be enforced if the power to do so is exercised reasonably"); *LeBlanc* v. *Webster*, supra, 483 S.W.2d 649 (rejecting claim that "unless an external standard for the exercise of the right of approval is provided such a right of approval is vague, indefinite and unenforceable"); *Syrian Antiochian Orthodox Archdiocese of New York & All North America* v. *Palisades Associates*, 110 N.J. Super. 34, 40–41, 264 A.2d 257 (Ch. Div. 1970) (noting that "[t]he most commonly voiced criticism of such [a restrictive covenant] is that it is vague, fixes no standards and hence affords the grantor an opportunity to be capricious, unfair and arbitrary" and recognizing that "such covenants have been very generally sustained" although subject to requirement that "any disapproval must be reasonable and made in good faith"); *Smith* v. *Butler Mountain Estates Property Owners Assn., Inc.*, 90 N.C. App. 40, 48, 367 S.E.2d 401 (1988) (covenants requiring prior approval of plans valid "even if vesting the approving authority with broad discretionary power" and "even in the absence of specific approval standards in the covenants . . . so long as the authority to consent is exercised reasonably and in good faith"), aff'd, 324 N.C. 80, 375 S.E.2d 905 (1989); *Dodge* v. *Carauna*, supra, 127 Wis. 2d 65–66 (lack of

design control powers that do not contain explicit standards remains subject to a reasonableness standard.[36] The Restatement (Third) of Property, Servitudes, likewise provides that a common interest associations has a duty "to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers . . . ." 2 Restatement (Third), Property, Servitudes § 6.13 (1), p. 233 (2000). That standard is consistent with the broad view of powers delegated to common interest associations espoused by our Supreme Court in *Weldy*, as well as the precept that restrictive covenants vesting broad discretionary authority in an association are "intended to protect the legitimate expectations of members of common-interest communities." Id., § 6.13, comment (a), p. 234.

Furthermore, we perceive a practical problem with the position urged by the plaintiffs. If the discretionary criteria to be considered by an association in exercising its design control powers must be specifically enumerated and explicated in writing, the size and complexity of such covenants increases exponentially. Section 10.1 (k) of the declaration plainly confers on the association the authority to evaluate aesthetic considerations. Yet, as one court aptly observed, "[t]he covenant, by making no attempt to set forth objective 'aesthetic considerations,' implicitly recognizes, as do we, that it is impossible to establish absolute standards to guide a judgment of taste." *Palmetto Dunes Resort* v. *Brown*, 287 S.C. 1, 6–7, 336 S.E.2d 15 (App. 1985). "Great minds have struggled for centuries to define aesthetic considerations. . . . The law, in all its majesty, cannot compel the definition of the indefinable." (Citations omitted;

"express standards for approval" in restrictive covenant does not render it unclear, ambiguous, or unenforceable).

[36] See, e.g., *Rhue* v. *Cheyenne Homes, Inc.*, supra, 168 Colo. 9; *McNamee* v. *Bishop Trust Co., Ltd.*, supra, 62 Haw. 407; *LeBlanc* v. *Webster*, supra, 483 S.W.2d 650; *Cypress Gardens, Ltd.* v. *Platt*, supra, 124 N.M. 478.

internal quotation marks omitted.) Id., 7 n.2; accord *Dolan-King* v. *Rancho Santa Fe Assn.*, supra, 81 Cal. App. 4th 976 (restrictive covenant conferring discretionary design control authority "expressly grants the [a]ssociation . . . broad authority to apply standards that are inherently subjective and by their nature cannot be measured or quantified"). As our precedent instructs, determining what is reasonable necessarily entails consideration of the specific circumstances and factors at play in a given instance.[37] *Williams Ford, Inc.* v. *Hartford Courant Co.*, supra, 232 Conn. 580; *Peterson* v. *Oxford*, supra, 189 Conn. 745. The task of preparing a compendium of all potentially relevant considerations would be Sisyphean.

In *Weldy*, our Supreme Court adopted a "broad view" of the discretionary authority contractually accorded to associations in common interest communities; *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 738; and set forth a reasonableness standard to govern review thereof. In accordance with that precedent, as well as the authority of sibling jurisdictions discussed in this opinion and the Restatement (Third) of Property, Servitudes, we conclude that a restrictive covenant in a declaration of a common interest community that confers broad design control authority on an association need not specifically state the criteria to be considered in the exercise of that authority. That authority must be exercised reasonably, and not in an arbitrary or capricious manner. Id., 734.

Whether termed a "green zone," a "visual buffer," or a "visual green zone buffer," evidence regarding that criterion was highly relevant to the question of whether

[37] We note that, at oral argument before this court, the plaintiffs were asked what would constitute a proper basis for the association to exercise its discretion under § 10.1 (k) of the declaration to deny a proposed activity. In response, the plaintiffs' counsel stated that "safety concerns" could be a proper basis. There is no mention of safety concerns in § 10.1 (k).

the association reasonably exercised its discretionary design control authority. In granting the motion in limine, the court prohibited the defendants from introducing, inter alia, evidence (1) of the rationale for that criterion, which impaired the court's ability to determine whether the association's exercise of discretionary authority was based on legitimate interests of the common interest community, (2) that the plaintiffs had actual notice of that criterion prior to the construction of their swimming pool, and (3) that the association previously had permitted activity in the green zone area of the plaintiffs' unit when a septic system was installed. The preclusion of such evidence was harmful, as it likely affected the result in the present case. See *Danko* v. *Redway Enterprises, Inc.*, 254 Conn. 369, 383, 757 A.2d 1064 (2000). We, therefore, conclude that the court improperly granted the motion in limine to preclude evidence regarding the green zone.

2

Application of Reasonableness Standard

We next consider the defendants' contention that the trial court applied an improper legal standard in evaluating the association's exercise of its discretionary design control authority regarding the plaintiffs' fence proposal. The defendants claim that the court's analysis departed from the mandate of *Weldy*, which espoused a deferential view of discretionary association authority, the exercise of which is governed by a standard of reasonableness. At its essence, their claim is that the court departed from that deferential posture and failed to engage in a proper reasonableness analysis in the context of common interest communities. We agree.

The court's decision contains no reference to the act, *Weldy*,[38] or any authority from Connecticut or elsewhere

[38] We note that, in addition to providing the court with a copy of the *Weldy* decision at the outset of trial, counsel for the defendants argued that *Weldy* was "the only . . . Supreme Court case on point." Throughout trial, counsel

pertaining to common interest communities. Its sole legal citation is to *Busker* v. *United Illuminating Co.*, 156 Conn. 456, 458, 242 A.2d 708 (1968), a case regarding a real estate commission a half century ago that recites the preponderance of the evidence standard generally applicable to civil proceedings. Nothing in the court's decision acknowledges the considerable discretion accorded the association under the applicable provisions of the declaration; see footnote 26 of this opinion; and the precedent of this state's highest court, which recognizes a "broad view of the powers delegated to" common interest associations under a declaration. *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 738; accord *Dolan-King* v. *Rancho Santa Fe Assn.*, supra, 81 Cal. App. 4th 978–79 (holding that trial court "failed to apply the proper deferential standard to test the [b]oard's exercise of discretion" and instead substituted "its own judgment based upon its own evaluation of [the plaintiff's] applications").

The legal basis articulated in the court's memorandum of decision was its determination that the visual buffer area known as the green zone was illegal and unreasonable because it was not in writing. In part I D

repeatedly relied on *Weldy* as binding authority on the ultimate issue before the court. As but one example, during his cross-examination of Kristine Grovenburg, counsel inquired as to "one of . . . the features along the [southeasterly] side between . . . your house and the [abutting] neighbors was to have a forested area that would provide some privacy between the homes." At that time, the plaintiffs' counsel objected, and discussion ensued as to whether that line of questioning was improper in light of the court's granting of the motion in limine. Counsel for the defendants argued in relevant part that "the declaration is an agreement, Your Honor, and . . . ultimately the Supreme Court says the [trial] court has to decide whether the decisions are arbitrary or reasonable, and that whole issue of reasonableness goes to the landscaping from the beginning [of the common interest community] to the present time . . . ." The court sustained the plaintiffs' objection and precluded such testimony on the privacy provided by the wooded area between the units, stating that "[i]f it's in the green zone, then it is irrelevant, as far as I'm concerned."

1 of this opinion, we have explained why that determination is untenable. The critical inquiry, then, is whether the association's exercise of its design control authority "reflects reasoned or arbitrary and capricious decision making." (Internal quotation marks omitted.) *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 734.

Application of the reasonableness standard properly begins with consideration of the association's discretionary determination and the reasons therefor. Regrettably, the court's decision contains no discussion of that essential component of a reasonableness analysis. The record indicates that the association's exercise of its design control authority over the proposed fencing on the plaintiffs' unit was animated by two related interests—the desire to maintain a visual buffer to preserve privacy within the common interest community, and the desire to maintain the wooded character of that community. In various correspondence with the plaintiffs, Miller, on behalf of the association, stated that "[t]he 'green zone' is simply a term which names a section of the land adjacent to the wooded property lines where the association will tightly regulate any landscape changes to maximize the visual buffer between adjacent lots." The minutes of the association's June 21, 2013 annual meeting likewise reflect that "[d]iscussion was held regarding the visual buffer area between units that the board calls the green zone," and, specifically, "the need to maintain a visual green zone buffer between units for privacy and to maintain the wooded character of the community."[39] The trial court,

[39] Cases such as *Leonard* v. *Stoebling*, supra, 102 Nev. 543, are illustrative in this regard. In finding the exercise of discretionary design control power unreasonable, the Supreme Court of Nevada held that the committee responsible for exercising such authority "gave no heed to the impact" of the proposed activity on neighboring properties. Id., 549. The Supreme Court of Washington similarly found unreasonable the actions of a board that failed to "reasonably assess the impact" of a proposed activity, "much less with an eye to neighbors' views or privacy." *Riss* v. *Angel*, supra, 131 Wn.

however, furnished no findings as to whether maintaining privacy between units and preserving the wooded character of the community were legitimate interests of the common interest community.

There also is no indication that the trial court examined the governing instruments of the community to ascertain the collective purposes of the association. We note in this respect that although §§ 10.1 (k) and 13.1 (a) confer broad design control authority on the association; see footnote 26 of this opinion; one aspect of that authority is identified with particular specificity. Section 13.1 (a) (ii) provides in relevant part that a unit owner "[m]ay not make any changes, additions, alterations, or improvements to any structure in or on any Unit or to the Common Elements or make any substantial change to the topography of a Unit or to the Common Elements *including the removal of trees*, without the prior written approval" of the association.

2d 628; see also *Dolan-King* v. *Rancho Santa Fe Assn.*, supra, 81 Cal. App. 4th 976, 982 (noting that "[m]aintaining a consistent and harmonious neighborhood character . . . confers a benefit on the homeowners by maintaining the value of their properties" and holding that the trial court improperly "made no finding as to the 'rural character' [of the] neighborhood"); *McNamee* v. *Bishop Trust Co., Ltd.*, supra, 62 Haw. 408 (privacy among unit owners "was a reasonable consideration" in exercising design control discretion); *Melson* v. *Guilfoy*, supra, 595 S.W.2d 407 (finding "no abuse of discretion" in discretionary determination to disapprove pool fence even when no " 'external standard' " set forth in declaration and noting that restrictive covenants in question were upheld "to maintain a park-like residential community"); *Gosnay* v. *Big Sky Owners Assn.*, 205 Mont. 221, 227, 666 P.2d 1247 (1983) (association board "did not abuse its discretion when it refused . . . permission to build [a proposed] fence" because proposal "is contrary to [the common interest community's] overall plan for 'openness' "); *River Hills Property Owners Assn., Inc.* v. *Amato*, 326 S.C. 255, 260, 487 S.E.2d 179 (1997) (association board acted reasonably and in good faith in denying approval for pool fence that "would reduce the view" of abutting property). At the very least, such cases shed light on the rationale proffered by the association in the present case. Nevertheless, we repeat that the factual issue of reasonableness involves a weighing analysis that entails consideration of "all the relevant circumstances" and factors in a given case. *Peterson* v. *Oxford*, supra, 189 Conn. 745.

(Emphasis added.) Section 10.1 (k) likewise proscribes the "removal of any trees without the prior written consent" of the association. The court's factual determination as to whether the association's discretionary action was reasonable must weigh the intent and purpose of those explicit contractual provisions set forth in the declaration. *Lake at Twelve Oaks Homes Assn., Inc.* v. *Hausman*, supra, 488 S.W.3d 197; see also *Laguna Royale Owners Assn.* v. *Darger*, supra, 119 Cal. App. 3d 680 (courts must consider "the purposes of [the] [a]ssociation as set forth in its governing instruments"); *Perry* v. *Bridgetown Community Assn., Inc.*, supra, 486 So. 2d 1234 ("[r]eview by the court must be guided by the intent stated in the declaration").

Had the court found that the interests proffered by the association were legitimate ones, it next would have to determine whether the association's exercise of its discretionary design control authority was rationally related thereto. See, e.g., *Laguna Royale Owners Assn.* v. *Darger*, supra, 119 Cal. App. 3d 680 (exercise of discretionary authority must be "rationally related to the protection, preservation and proper operation of the property and the purposes of [the] [a]ssociation as set forth in its governing instruments"); *Kirkley* v. *Seipelt*, supra, 212 Md. 133 (exercise of discretion must be "based upon a reason that bears some relation to the other [units] or the general plan of development"); *Worthinglen Condominium Unit Owners' Assn.* v. *Brown*, supra, 57 Ohio App. 3d 76 (determination of "whether the decision or rule was arbitrary or capricious" entails consideration of whether "there be some rational relationship of the decision or rule to the safety and enjoyment of the [common interest community]" [emphasis omitted]).

The record is hampered by the fact that the court did not make any findings as to the substance of the

proposal that the plaintiffs submitted to the association.[40] The undisputed documentary evidence in the record indicates that, under the plaintiffs' revised proposal, fencing would be erected approximately eight feet from the southeasterly properly line, with "Scabrida Clumping Bamboo" to be planted "every [six-eight] feet" between the fence and the property line. At the behest of the association, the plaintiffs also submitted written documentation indicating that "[t]he bamboo grows [twelve-fourteen feet] tall by [three feet] wide for each bush" and that this species "is non-invasive, vigorous and easy to grow . . . ." Essential to any determination of whether the association's exercise of its discretionary authority was reasonable are factual findings as to the specifics of the plaintiffs' proposal and their relationship to the association's stated interests in maintaining privacy between units and preserving the wooded character of the community.[41] No such findings are present in the court's decision. Absent such factual findings, a court reviewing the discretionary determination of an association cannot properly ascertain whether any legitimate interests of the common interest community justify the denial of a proposed activity. See, e.g., *Dodge* v. *Carauna*, supra, 127 Wis. 2d 67 (findings as to "what substantial and reasonable interests would be protected by enforcing the restriction" are "crucial to a determination of the reasonableness" standard).

[40] The only reference to the plaintiffs' proposal in the memorandum of decision is the court's finding that the plaintiffs sought "permission from the association to put a fence around the swimming pool, as required by the town of Canton . . . ."

[41] In their February 3, 2015 motion for reconsideration, the defendants requested reargument and reconsideration due to the fact that the plaintiffs at trial "never articulated a reason for their preferred placement of the fence to either [the] defendants or the court, some need that the [a]ssociation could balance against its privacy concerns. . . . The [a]ssociation could never balance the needs of the community against the [plaintiffs'] needs because they never specified the reasons for their plans." (Citations omitted.) The court denied that motion.

The record is further impaired by the court's erroneous granting of the motion in limine, which we discussed in part I D 1 of this opinion. As a result, the defendants were precluded from presenting relevant and probative evidence regarding the visual buffer area known as the green zone. For example, the defendants at trial attempted to introduce into evidence documentation of the location of a septic system that was installed on the plaintiffs' property. When the court inquired as to "the purpose" of such evidence, their counsel noted that the septic system was shown on that document to be "well within" the green zone area. Counsel thus argued that the document undermined any claim "of the green zone being this absolute, incontrovertible thing . . . ." After Miller confirmed that the document was on file with the town health department, the defendants' counsel stated that "what it goes to is the idea that there's this inviolate green zone that cannot be touched, and . . . this simply shows the location of the septic system within that area . . . much closer to the lot line." The plaintiffs' attorney objected on the basis of the court's prior ruling on the motion in limine. The court sustained that objection, stating, "I don't see the relevance of this at all," and thus precluded evidence of that intrusion into the green zone.[42]

In granting the motion in limine, the court also foreclosed the introduction of evidence as to whether the plaintiffs had actual notice of the green zone, as the defendants steadfastly maintained. As this court has observed, "[t]he concept of notice concerns notions of fundamental fairness, affording parties the opportunity

[42] In the "Reply to Defendants' Posttrial Memorandum" that the plaintiffs submitted to the court, the plaintiffs appear to concede the location of that septic system, stating in relevant part that "the fact that a septic system is in the green zone is irrelevant . . . ." When questioned on this point at oral argument before this court, the plaintiffs' counsel likewise acknowledged that the septic system was located in the green zone, but argued that "the septic system is different."

to be apprised when their interests are implicated in a given matter. . . . [T]he modern approach to notice-giving attaches primary importance to actual notice and treats technical compliance with notice procedures as a secondary consideration." (Citations omitted; internal quotation marks omitted.) *Twenty-Four Merrill Street Condominium Assn., Inc.* v. *Murray*, 96 Conn. App. 616, 622–23, 902 A.2d 24 (2006); cf. *O'Connor* v. *Larocque*, 302 Conn. 562, 611 n.5, 31 A.3d 1 (2011) (notice is question of fact to be resolved by trier of fact). At trial, the defendants attempted to admit into evidence multiple written correspondences in which the plaintiffs affirmatively discussed the green zone. For example, the court declined to admit the plaintiffs' statement in their July 27, 2008 e-mail to Miller—sent prior to the construction of the swimming pool—that the plaintiffs were "confident that when the pool and grading is done, the green zone will be at least the [fifteen] feet. . . . Once [the] patio is in and we do landscaping I am sure you will be pleased with the amount of green we add or maintain."[43] The issue of the plaintiffs' notice of the green zone is yet another unresolved factual matter that a reviewing court must consider in weighing "all the relevant circumstances"; *Peterson* v. *Oxford*, supra, 189 Conn. 745; to determine whether the association's exercise of discretionary authority was reasonable in the present case.

The court appears to have deemed the "green zone" visual buffer area to be a blanket restriction barring all use of that portion of the plaintiffs' unit. Such a determination is problematic for a number of reasons. First, the court's granting of the motion in limine precluded the defendants from offering documentary and

[43] In their appellate brief, the plaintiffs do not acknowledge their July 27, 2008 written statement to Miller. Rather, they argue that when the association denied their fencing proposal in 2010, "[i]t is obvious that Miller blindsided the plaintiffs with the green zone, in bad faith . . . because he never previously informed the plaintiffs of the restriction . . . ."

testimonial evidence as to the nature of the green zone and how it had been implemented by the association over the years, such as evidence that a septic system was permitted in that area. Second, it is contrary to undisputed evidence in the record indicating that the association entertained proposed intrusions into that area. The record includes Miller's e-mail response to the plaintiffs' initial fence proposal, in which he informed them that the proposed fence "will *most likely* not be approved any closer than [fifteen] feet to the property line." (Emphasis added.) The record also reflects that the association never denied the plaintiffs' revised proposal for a fence "approximately eight feet" from the southeasterly side yard property line. Rather, the association requested additional information on the nature of certain plantings that were proposed along the property line, and their "mature height" specifically. Furthermore, it is undisputed that the parties thereafter engaged in negotiations over the course of several months—well before the commencement of this litigation—in an attempt to work "out [the] details of a settlement."[44] The association's willingness to engage in such negotiations and to consider the revised proposal with specific plantings cannot be reconciled with a determination that the green zone was a blanket prohibition applied by the association. See, e.g., *Chateau Village North Condominium Assn.* v. *Jordan*, 643 P.2d 791, 792–93 (Colo. App. 1982) (association board improperly

[44] The record also indicates that those settlement discussions continued after the commencement of this appeal. Months after the defendants filed their appeal, the plaintiffs filed a motion for an extension of time to file their appellate brief. In that pleading, they represented to this court that "the parties are continuing substantive settlement discussion relating to the heart of the legal and factual issues in this case . . . . [A] settlement agreement in this case will involve the preparation of a detailed landscaping plan, with specified plantings in designated areas of the [plaintiffs'] property, among other things. The parties have been working together to formulate the landscaping plan for months, with the assistance of a professional landscaper."

applied blanket policy against unit owner by failing to even consider "the facts of [the owner's] individual application"). Here, the record plainly indicates that the association did not summarily deny the plaintiffs' proposal, as that proposal remained pending at the time that the plaintiffs commenced this action.[45] The manner and extent to which the association considered the particular facts of the plaintiffs' proposal is but another unresolved factual issue relevant to the court's weighing analysis.

As we have observed, the reasonableness of the association's exercise of discretionary design control authority involves a question of fact. Resolution of that factual question necessarily is beyond the purview of an appellate court, as "it is axiomatic that this appellate body does not engage in fact-finding."[46] *Hogan* v. *Lagosz*, 124 Conn. App. 602, 618, 6 A.3d 112 (2010), cert. denied, 299 Conn. 923, 11 A.3d 151 (2011). Connecticut's appellate courts "cannot find facts; that function is, according to our constitution, our statute, and our cases, exclusively assigned to the trial courts." *Weil* v. *Miller*, 185 Conn. 495, 502, 441 A.2d 142 (1981). Accordingly, a remand to the trial court for a new trial is necessary. As the Colorado Court of Appeals noted in a similar appeal, "[t]he determination of whether a homeowners association has acted reasonably or arbitrarily is a question of fact. . . . Therefore, we conclude that . . . we must remand this case to the trial court for a determination . . . of the question of fact

[45] Moreover, we note that, in his December 28, 2011 letter to the Canton building department, Miller did not state that the plaintiffs' original fence proposal was denied because it was located in the green zone. Rather, he indicated that it was denied because "the plan that was submitted placed the fence unnecessarily within a [fifteen] foot visual buffer zone," suggesting that a showing of necessity may have yielded a different result.

[46] For that reason, this court cannot, as the defendants urged at oral argument, decide the question of reasonableness and direct the trial court to render judgment in their favor.

of whether the association acted reasonably when it denied the homeowners' plan." (Citation omitted.) *Gleneagle Civic Assn.* v. *Hardin*, supra, 205 P.3d 470; accord *Cypress Gardens, Ltd.* v. *Platt*, supra, 124 N.M. 478 (remanding to trial court for factual determination and noting that "[i]n determining what is reasonable in such cases, the trial court should consider the facts and circumstances surrounding the application of" discretionary design control authority); *Worthinglen Condominium Unit Owners' Assn.* v. *Brown*, supra, 57 Ohio App. 3d 78 (remanding to trial court "for consideration of the reasonableness" of association's discretionary determination); *Dodge* v. *Carauna*, supra, 127 Wis. 2d 67 (noting that "[a] number of findings crucial to a determination of the reasonableness" of discretionary determination "are missing" and remanding matter to trial court for further proceedings).

3

Conclusion

In light of the foregoing, we agree with the defendants that the court failed to properly apply the legal standard governing review of discretionary decisionmaking authority by the association. Such review is not governed by the preponderance of the evidence standard generally applicable to civil proceedings.[47] Rather, *Weldy* directs a court reviewing the exercise of discretionary association action to engage in a two part analysis, the latter of which requires a finding as to whether the association's determination was reasonable. *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 734. Proper application of that reasonableness standard, in turn, requires certain predicate findings that are lacking in the present case. We therefore

[47] In their respective appellate briefs, neither party has suggested that the general preponderance of the evidence standard applies in this case.

remand the matter to the trial court for a new trial with direction to apply that legal standard.

On remand, in rendering a factual finding on the issue of reasonableness, the trial court must objectively weigh the relevant circumstances and factors. *Williams Ford, Inc.* v. *Hartford Courant Co.*, supra, 232 Conn. 580; *Peterson* v. *Oxford*, supra, 189 Conn. 745–46. Included among those are the rationales proffered by the association for its exercise of discretionary authority; the specific nature of the activity proposed by the plaintiffs; the relationship between any legitimate interests of the association and its exercise of discretionary authority; the purposes of the association and the general plan of development for the common interest community, as reflected in its governing instruments; and the extent to which discretionary authority was exercised in good faith or in an arbitrary manner.[48] In so

[48] With respect to this last consideration, we note that the court stated, in a subsequent part of its memorandum of decision addressing landscaping restrictions, that "Miller trimmed trees in front of his house and removed trees in the so-called green zone, and did not ask permission from the association. He set one standard for himself and another standard for the plaintiffs." The court made no further findings in this regard.

Those findings are troublesome for two distinct reasons. First, there is no evidence in the record to substantiate the court's finding that Miller "removed trees in the so-called green zone . . . ." On cross-examination, he was asked if he had "ever cut or trimmed any branches in your yard?" Miller answered that he "did trim some of the ash trees in the center of the front yard." No question was asked, and no testimony was elicited, on whether those ash trees were located in the green zone. That finding, therefore, is clearly erroneous. See *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, 320 Conn. 332, 364, 133 A.3d 402 (2016).

Furthermore, even assuming that the ash trees were located in the green zone, the court's suggestion that Miller failed to follow association protocols ignores the fact that, under the plain language of § 8.10 of Article VIII of the declaration, the company was vested with exclusive control of the association for a preliminary period of Rustle Meadow's existence, which obviated the need for Miller, the sole member of the company, to seek approval to conduct such activity. As we already have noted, the trial court failed to make any factual findings as to when the company's control under § 8.10 terminated. See footnote 5 of this opinion. Without any findings as to precisely where the trees in question were located, when Miller trimmed

doing, the trial court must heed our Supreme Court's "broad view of the powers delegated" to the association of a common interest community; *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 738; and remain ever cognizant of the collective interest of the common interest community. See *Dolan-King* v. *Rancho Santa Fe Assn.*, supra, 81 Cal. App. 4th 975 ("courts do not conduct a case-by-case analysis of the restrictions to determine the effect on an individual homeowner [but rather] must consider the reasonableness of the restrictions by looking at the goals and concerns of the entire development"). The court should "carefully and overtly balance the competing interests at stake, being sensitive to the purposes and fabric of the given community when taken as a whole." P. Franzese, supra, 3 Wash. U. J.L. & Policy 671.

E

Alternative Ground of Affirmance

In their appellate brief, the plaintiffs address an alternative ground of affirmance—namely, that "the green zone is a rule that was required to be adopted through the association's rule making process. . . . Because

those trees, and when the company's control under the declaration terminated, such evidence was not relevant to the reasonableness analysis.

At the same time, the trial court's findings suggest that the court was concerned about whether Miller and the association acted in good faith in regulating landscaping activity within the green zone area. On remand, if evidence is adduced at the new trial indicating that landscaping activity was conducted within the green zone area on any other unit within Rustle Meadow—including that belonging to Welles—the finder of fact could conclude that the association's discretionary determinations with respect to such activity on the plaintiffs' unit were arbitrary and made in bad faith. See, e.g., *White Egret Condominium, Inc.* v. *Franklin*, supra, 379 So. 2d 352 (finding that use restriction in common interest association "was reasonably related to a lawful objective" but nonetheless "was selectively and arbitrarily applied").

the green zone was not properly adopted by the [a]ssociation, it is invalid as a matter of law."[49] We perceive multiple problems with that contention.

It is undisputed that the plaintiffs' alternative ground never was raised before, or decided by, the trial court. See *Connecticut Ins. Guaranty Assn.* v. *Fontaine*, 278 Conn. 779, 784 n.4, 900 A.2d 18 (2006) (alternative grounds for affirmance must be raised before trial court); *New Haven* v. *Bonner*, 272 Conn. 489, 497–99, 863 A.2d 680 (2005) (declining to consider alternative ground for affirmance that was not raised before trial court). "It is fundamental that claims of error must be distinctly raised and decided in the trial court." *State* v. *Faison*, 112 Conn. App. 373, 379, 962 A.2d 860, cert. denied, 291 Conn. 903, 967 A.2d 507 (2009). Our rules of practice require a party, as a prerequisite to appellate review, to distinctly raise such claims before the trial court. See Practice Book § 5-2 ("[a]ny party intending to raise any question of law which may be the subject of an appeal must . . . state the question distinctly to the judicial authority"); see also *Remillard* v. *Remillard*, 297 Conn. 345, 351, 999 A.2d 713 (2010) (raised distinctly means party must bring to attention of trial court precise matter on which decision is being asked). As our Supreme Court has explained, "[t]he reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.)

[49] We note that, under our rules of practice, an appellee who wants to present an alternative ground on which to affirm a trial court's judgment is required to file a preliminary statement of issues intended for presentation on appeal. Practice Book § 63-4 (a) (1) (A). Our rules further require that such a filing must be filed "within twenty days from the filing of the appellant's preliminary statement of the issues." Practice Book § 63-4 (a) (1) (C). The plaintiffs have not complied with those requirements in this case.

Travelers Casualty & Surety Co. of America v. *Netherlands Ins. Co.*, 312 Conn. 714, 761–62, 95 A.3d 1031 (2014). For that reason, Connecticut appellate courts generally "will not address issues not decided by the trial court." *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 245 Conn. 1, 52, 717 A.2d 77 (1998); see also *Crest Pontiac Cadillac, Inc.* v. *Hadley*, 239 Conn. 437, 444 n.10, 685 A.2d 670 (1996) (claims "neither addressed nor decided" by trial court are not properly before appellate tribunal).

Furthermore, the factual predicate of the plaintiffs' claim is lacking, as the record before us contains no detailed findings as to the nature of the visual buffer area referred to as the green zone and how it was adopted and implemented in Rustle Meadow. In that respect, we note that the court, in granting the plaintiffs' motion in limine, severely curtailed the defendants' ability to introduce evidence relevant to that issue. Indeed, the defendants were precluded from presenting evidence that the plaintiffs "had acknowledged in writing the need to maintain a visual green zone buffer between units for privacy and to maintain the wooded character of the community," as the minutes of the association's July 21, 2013 meeting reflect. See *New Haven* v. *Bonner*, supra, 272 Conn. 499 (declining to review alternative ground of affirmance because "factual predicate" of whether defendant received notice "is not part of this record"); cf. *McNamee* v. *Bishop Trust Co., Ltd.*, supra, 62 Haw. 407 (plaintiff unit owners "had actual notice" of association's unwritten design control criteria). Without the requisite factual findings, this court cannot engage in a meaningful review of the plaintiffs' contention. See *New Haven* v. *Bonner*, supra, 499.

We note that, in resolving the principal issue in this appeal, we have concluded that a remand to the trial court for a new trial is necessary. See parts I D 2 and 3 of this opinion. On remand, the plaintiffs are free to

pursue the claim underlying their alternative ground of affirmance, at which time the parties will have an opportunity to present evidence on that issue.

II

The defendants next contend that the court improperly ruled in favor of the plaintiffs on the defendants' counterclaim, in which they sought to recover unpaid fines issued against the plaintiffs. The defendants maintain that the court (1) improperly set aside fines imposed by the association for (a) certain landscaping violations by the plaintiffs and (b) the removal of a metal boundary marker from the corner of the plaintiffs' unit, and (2) improperly declined to render an award of attorney's fees in their favor. We address each claim in turn.

A

We first consider the propriety of the fines levied by the association against the plaintiffs. Pursuant to General Statutes § 47-244 (a) (11), a common interest association "[m]ay impose charges or interest or both for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules and regulations of the association . . . ." Section 25.2 (m) of Article XXV of the declaration likewise provides that the board may "[i]mpose charges or interest or both for late payment of assessments and, after [n]otice and [h]earing, levy reasonable fines for violations of this [d]eclaration, and the [b]ylaws, [r]ules and regulations of the [a]ssociation."[50] Section 2.2 (m) of the association

[50] There is no claim in the present case that the association failed to comply with the notice and hearing requirements of the declaration and General Statutes § 47-244 (d) (2). Contra *Congress Street Condominium Assn., Inc.* v. *Anderson*, 156 Conn. App. 117, 112 A.3d 196 (2015); *Stamford Landing Condominium Assn., Inc.* v. *Lerman*, 109 Conn. App. 261, 951 A.2d 642, cert. denied, 289 Conn. 938, 958 A.2d 1246 (2008).

bylaws repeats verbatim that provision of the declaration. Section 5.2 of the bylaws further provides that "following [n]otice and [h]earing, the [board] may levy a fine of up to $50 for a violation of the [d]ocuments or [r]ules and $10 per day thereafter for each day that a violation . . . persists after such [n]otice and [h]earing, but such amount shall not exceed the amount necessary to insure compliance with the rule or order of the [board]."

"To protect the financial integrity of common interest communities"; *Coach Run Condominium, Inc.* v. *Furniss*, 136 Conn. App. 698, 704, 47 A.3d 413 (2012); the act provides that an "association has a statutory lien on a unit for any assessment attributable to that unit or fines imposed against its unit owner . . . ." General Statutes § 47-258 (a). As one Connecticut court has noted, in an action maintained by a common interest association to recover fines imposed on a unit owner, "the plaintiff has the burden of proving that the fines . . . were validly imposed . . . ." *Brookside Condominium Assn., Inc.* v. *Hargrove*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-13-6017151-S, 2013 Conn. Super. LEXIS 2706, *16 (November 26, 2013).

1

Landscaping Fines

In their counterclaim, the defendants alleged that the plaintiffs violated the declaration "by removing or cutting trees, plants and shrubs, installing weed fabric and grass in the green zone and applying defoliant in that area . . . without permission of the association." The association thus assessed fines "in the amount of $10 per day," which totaled $15,530 at the time that the counterclaim was filed. In its memorandum of decision, the court analyzed the propriety of those fines as follows: "The court finds that there was no green zone by

which the plaintiffs were bound and, therefore, [those] fines were illegal and inequitable." The court also found that approval for such activities "was unreasonably withheld" by the association.

Contrary to that latter finding, it is undisputed that the plaintiffs never requested permission from the association to conduct landscaping activity on their unit, as required by §§ 10.1 (k) and 13.1 (a) of the declaration. There thus is no evidence in the record to support a finding that the association withheld approval therefor.

The court predicated its decision on the notion that the green zone was illegal, which we dispelled in part I D 1 of this opinion. The court also remarked, in a one sentence footnote to its analysis, that "[m]oreover, there is insufficient evidence that it is the plaintiffs who cut trees, altered or removed foliage" on their unit. Yet the plaintiffs at trial did not disavow their involvement in that landscaping activity,[51] nor have they done so on appeal.[52] Furthermore, in accordance with its ruling on the motion in limine, the court precluded the defendants from cross-examining the plaintiffs on landscaping conducted within the green zone, stating in relevant part

[51] The plaintiffs did not deny their involvement during their direct examination testimony. To the contrary, their attorney at trial maintained that the plaintiffs had "been fined *because they intruded on and they did things* in an area that they were not supposed to even touch because there's a restriction, as Mr. Miller claims, that this area, this buffer zone, can't be touched, can't be used." (Emphasis added.)

[52] Rather than disavowing their involvement in the landscaping activity in question, the plaintiffs in their appellate brief submit that, because the trial court correctly determined that the green zone was invalid, it properly set aside the association's fines for unauthorized landscaping activity. Their briefing of this issue states: "Miller testified that all the fines for landscaping violations were assessed because of landscaping performed by the plaintiffs in the green zone, without permission. However, it would have been futile for the plaintiffs to request permission to perform landscaping activity in the green zone as the request would have been denied since that area is completely off limits. . . . [T]he trial court properly concluded that the green zone was invalid, and therefore the fines cannot stand." (Citation omitted.)

that "[i]f it's in the green zone, then it is irrelevant, as far as I'm concerned. . . . If you want to get into landscaping outside that fifteen foot buffer, you're free to do so, but not within the fifteen foot buffer."

The court's focus on the identity of the actors who performed the landscaping work on the plaintiffs' unit also obscures the more elemental factual issue of whether such unauthorized activity took place. Section 10.1 (k) declaration expressly requires the written consent of the association prior to the commencement of such landscaping activity on units within Rustle Meadow. The record contains testimonial and documentary evidence depicting specific landscaping activity on the plaintiffs' unit, including photographs thereof. Consideration of that evidence is essential to a proper determination of whether the association's exercise of its authority to impose fines was warranted. Yet the court made no findings as to whether such landscaping activity transpired on the plaintiffs' unit or whether the association's decision to take enforcement action against the plaintiffs was arbitrary. See General Statutes § 47-244 (h). The court likewise did not determine whether the fines imposed by the association exceeded "the amount necessary to insure compliance with" the rules at issue, in contravention of § 5.2 of the association's bylaws. We therefore conclude that the court improperly set aside the fines assessed against the plaintiffs for unauthorized landscaping activity. The case, therefore, must be remanded for a new trial, at which the trial court shall properly consider the fines imposed by the association for any unauthorized landscaping activity in accordance with the foregoing.

2

Boundary Marker Fines

The defendants also imposed fines in the amount of $9180 for the plaintiffs' alleged removal of a metal

boundary marker from a corner of their unit. In its decision, the court concluded that the defendants failed to prove that the plaintiffs removed or altered the boundary marker. It therefore concluded that those fines were improper.

The record before us substantiates that determination. At an association hearing convened to address the matter, the plaintiffs denied any involvement in the removal of the marker in question. As Duane Grovenburg testified at trial, they indicated at that hearing "that we were never aware that there was a metal stake."[53] Kristine Grovenburg similarly was asked whether she agreed with the accusation that they had removed the stake in question. She testified: "No, I do not agree with that. I—we don't even know what he's talking about. We've never seen a stake in [that] location . . . ." The court, as arbiter of credibility, was free to credit that testimony. See *Brett Stone Painting & Maintenance, LLC* v. *New England Bank*, 143 Conn. App. 671, 683, 72 A.3d 1121 (2013).

In addition, Miller acknowledged in his testimony that the association had no video, electronic, or photographic evidence of the plaintiffs interfering with or removing the marker in question. He further conceded that there was no eyewitness evidence thereof. In light of the foregoing, we agree with the trial court that the defendants failed to meet their burden of demonstrating that the fines for removing the metal boundary marker were properly imposed.

[53] On cross-examination, the following exchange ensued:

"[The Defendants' Attorney]: It's just a complete mystery to you. Is that what you're telling the court, Mr. Grovenburg?

"[Duane Grovenburg]: I'm saying I'm not aware of a metal stake.

"[The Defendants' Attorney]: You're not aware of a metal stake.

"[Duane Grovenburg]: No.

"[The Defendants' Attorney]: You're not aware of a metal stake being pulled out of the ground?

"[Duane Grovenburg]: No, I'm not."

B

We next address the court's denial of the defendants' claim for attorney's fees on the counterclaim. The defendants contend that, to the extent that they prevail on their counterclaim, such an award is warranted pursuant to General Statutes § 47-278 (a).

Section 47-278 (a) provides that "[a] declarant, association, unit owner or any other person subject to this chapter may bring an action to enforce a right granted or obligation imposed by this chapter, the declaration or the bylaws. The court may award reasonable attorney's fees and costs." Whether to award attorney's fees is a quintessential example of a matter entrusted to the sound discretion of the trial court. See, e.g., *Fairchild Heights Residents Assn., Inc.* v. *Fairchild Heights, Inc.*, 310 Conn. 797, 825, 82 A.3d 602 (2014) ("attorney's fees . . . are awarded at the discretion of the court"); *Grimm* v. *Grimm*, 276 Conn. 377, 397, 886 A.2d 391 (2005) ("[w]hether to allow counsel fees . . . and if so in what amount, calls for the exercise of judicial discretion" [internal quotation marks omitted]), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006); *Unkelbach* v. *McNary*, 244 Conn. 350, 374, 710 A.2d 717 (1998) ("[a]n abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did" [internal quotation marks omitted]); *McHugh* v. *Niantic Dockominium Assn., Inc.*, Superior Court, judicial district of New London, Docket No. CV-04-0568170, 2005 Conn. Super. LEXIS 958, *5 (April 4, 2005) ("it is entirely within the court's discretion to award [attorney's] fees or costs" under § 47-278 [a]). The defendants in this appeal have not suggested otherwise.

In part II A 2 of this opinion, we concluded that the trial court properly determined that the defendants did

not meet their burden to establish the validity of fines related to the boundary marker. They therefore cannot recover attorney's fees on that portion of the counterclaim. In part II A 1, however, we concluded that a new trial is necessary on the issue of the imposition of fines by the association for the allegedly unauthorized landscaping activity. On remand, the trial court shall first determine the propriety of those landscaping fines. Should the court rule in the defendants' favor, it then shall determine whether an award of attorney's fees on that count of the counterclaim is appropriate.

III

The defendants also maintain that the court improperly invalidated a special assessment of the association. The following additional facts are relevant to that claim. After retaining legal counsel, the association levied a special assessment against all unit owners beginning in January, 2013. Miller testified that the special assessment was issued "[t]o cover the association's legal expenses" stemming from the present controversy with the plaintiffs. At trial, the court opined that the association's decision to retain counsel at that time was "prudent." In addition, the plaintiffs introduced into evidence a document detailing their monthly payments to the association for the special assessment.

In its memorandum of decision, the court did not mention that special assessment. Although the court ruled in favor of the plaintiffs in several respects, the only relief that related to assessments of any kind was the order requiring the defendants to remove "any liens" that had been filed against the plaintiffs' unit.

Following the commencement of this appeal, the plaintiffs filed a motion for contempt with the trial court, claiming, inter alia, that the defendants had "continu[ed] to impose an assessment (i.e., a lien) on the [plaintiffs' unit] . . . ." In response, the defendants

filed an objection, in which they averred that "[n]o liens had been filed. There was no evidence of any liens on [the] plaintiffs' property. No action was required by the association to comply with this directive: there was no lien to remove." In its April 6, 2015 order, the court denied the plaintiffs' motion for contempt, specifically crediting the representation of the defendants' counsel that no liens have been filed against the plaintiffs' unit. The court nonetheless ordered that "[t]he association is to remove any assessment against the plaintiffs for legal fees related to this case and any legal fees from here on in related to this case, which the court declares said fees to be null and void." The defendants thereafter filed an amended appeal with this court to encompass that additional ruling.

As a preliminary matter, we note that the act specifically addresses the allocation of common expenses[54] within a common interest community. General Statutes § 47-226 (b) requires a declaration thereof to "state the formulas used to establish allocations of interests. . . ." General Statutes § 47-257 (b), in turn, provides, with limited exceptions not germane to this appeal, that "all common expenses shall be assessed against *all the units* in accordance with the allocations set forth in the declaration . . . ." (Emphasis added.)

Article XIX of the declaration concerns the assessment and collection of common expenses. Reflecting the rather unique nature of Rustle Meadow as a common interest equine community, § 19.2 divides such expenses into three categories: (1) equestrian facility common expenses; (2) horse stall common expenses; and (3) general association common expenses. The third category is relevant to this appeal, as it includes

[54] "Common expenses" are defined in the act as "expenditures made by, or financial liabilities of, the association, together with any allocations to reserves." General Statutes § 47-202 (7).

"[a]ll other Common Expenses which are not Equestrian Facility Common Expenses or Horse Stall Common Expenses." The special assessment for legal expenses falls under that third category.

Mirroring the language of General Statutes § 47-257 (b), § 19.3 of the declaration provides that common expenses "shall be assessed against all Units in accordance with their percentage interest in such Common Expenses as shown on Schedule A-2 to this [d]eclaration." Under both the declaration and the act, then, assessments for common expenses must be apportioned equally among unit owners in accordance with their respective allocations. Furthermore, § 25.2 (c) of the declaration and § 2.2 (c) of the bylaws confer on the board the authority to "[c]ollect assessments for Common Expenses from Unit Owners . . . ." We reiterate that, in *Weldy*, our Supreme Court adopted a "broad view of the powers delegated" to a common interest association under a declaration. *Weldy* v. *Northbrook Condominium Assn., Inc.*, supra, 279 Conn. 738.

Significantly, the plaintiffs never have claimed that the association improperly imposed the special assessment or that it was apportioned in a manner contrary to the dictates of the act or the declaration. It also is undisputed that the plaintiffs paid their portion of that special assessment on a monthly basis for approximately two years, as documented in the written accounting that they introduced into evidence at trial. Moreover, the plaintiffs raised no claim regarding that special assessment in their operative complaint. Although their prayer for relief sought "[a]n order that all statutory liens arising from fines and/or penalties assessed against the plaintiffs by the association from the beginning of time to date are removed, discharged and declared null and void," the special assessment arose neither from a fine nor a penalty assessed against the plaintiffs, but rather was a common expense

assessed against all unit owners in accordance with the requirements of the declaration and the act. There also is no evidence in the record before us that the association filed a statutory lien against the plaintiffs regarding that special assessment.

In its order on the plaintiffs' postjudgment motion for contempt, the court declared the special assessment "null and void" with respect to the plaintiffs. The court provided no authority to support that ruling. The plaintiffs on appeal likewise have provided this court with no authority for that action, apart from reciting the general proposition that our courts are vested with broad latitude in fashioning equitable relief. See, e.g., *Broadnax* v. *New Haven*, 270 Conn. 133, 170, 851 A.2d 1113 (2004). Even under that liberal standard, the ruling of the court cannot stand.

When a court grants equitable relief, its "ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion." (Internal quotation marks omitted.) Id. We conclude that the court's declaration that the special assessment was "null and void" was based on an erroneous statement of law—specifically, its determination that the visual buffer zone was "illegal" because it was not memorialized in writing. See part I D 1 of this opinion. We further have concluded that the court failed to apply the proper legal standard to review the discretionary design control determinations of a common interest association, which necessitates a remand to the trial court for the proper application of that standard.[55] See parts I D 2 and 3 of this opinion. The predicate to the court's exercise of equitable relief, therefore, is lacking. Accordingly, we

[55] On remand, the trier of fact may conclude that the association's failure to approve the plaintiffs' revised fencing proposal was reasonable and appropriate under the particular circumstances of this case.

agree with the defendants that the court improperly declared the special assessment null and void in this case.

IV

In light of our remand for a new trial, the court's award of $72,718.25 in attorney's fees to the plaintiffs also cannot stand. As with the prior claim, the factual predicate to that award is lacking in light of our resolution of the principal issue in this appeal. See, e.g., *Absolute Plumbing & Heating, LLC* v. *Edelman*, 146 Conn. App. 383, 405, 77 A.3d 889 (noting that award of attorney's fees "must be based on findings made by the trial court" and remanding for further proceedings "to determine whether attorney's fees should be awarded and, if so, the amount of those fees"), cert. denied, 310 Conn. 960, 82 A.3d 628 (2013); *O'Brien* v. *O'Brien*, 138 Conn. App. 544, 557, 53 A.3d 1039 (2012) (award of attorney's fees "must also be remanded for reconsideration" in light of reversal and remand of underlying issues), cert. denied, 308 Conn. 937, 66 A.3d 500 (2013); *Dolan-King* v. *Rancho Santa Fe Assn.*, supra, 81 Cal. App. 4th 983–84 (concluding that association's exercise of design control power was reasonable and remanding to trial court to "determine entitlement to attorney fees"); *Gleneagle Civic Assn.* v. *Hardin*, supra, 205 P.3d 471 (remanding to trial court for determination of reasonableness of association's exercise of discretionary design control authority and holding that "the trial court's decision to award the homeowners attorney fees must also be reversed"). On remand, the trial court, in its discretion, shall determine whether an award of attorney's fees to either party is warranted following its resolution of the underlying issues. See *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 333, 63 A.3d 896 (2013) (remanding to trial court to "determine the

appropriate award of attorney's fees to which the defendant is entitled"); *Woronecki* v. *Trappe*, 228 Conn. 574, 582, 637 A.2d 783 (1994) ("[a] remand . . . is necessary in order to allow the trial court the opportunity properly to exercise its discretion regarding the award of . . . attorney's fees").

The judgment is affirmed only with respect to the portion of the counterclaim pertaining to the imposition of boundary marker fines. The judgment is otherwise reversed and the case is remanded for a new trial on the remaining issues consistent with this opinion.

In this opinion the other judges concurred.

WELLS FARGO BANK, N.A. *v.* MARLENE E. OWEN ET AL.
(AC 38239)

Lavine, Prescott and Flynn, Js.

Syllabus

The defendant homeowners sought to open a judgment of strict foreclosure that had been rendered against them, alleging that the plaintiff bank knowingly misled them into applying for and executing certain mortgage loans, and had altered certain income information on their loan application without their knowledge. The parties had unsuccessfully engaged in mediation for more than one year in an attempt to resolve the matter. The mediator's reports did not state that the defendants claimed that the loan application contained inaccurate information or that they had been misled when they applied for and executed the mortgage loans. The defendants were thereafter defaulted for failure to plead and did not obtain counsel until approximately one month before the court rendered the strict foreclosure judgment. The defendants' counsel did not contest the entry of default, did not file an answer or special defenses to the plaintiff's complaint, and neither the defendants nor their counsel appeared at the hearing on the plaintiff's motion for a judgment of strict foreclosure or requested a continuance to gather evidence of alleged fraud. The defendants thereafter filed a motion to open the judgment more than twenty days after the trial court rendered the foreclosure judgment. In support of their motion, they submitted a sworn affidavit, tax returns and the loan application, claiming that they should be given the opportunity to assert the special defenses of unclean hands and

fraud in the inducement. The trial court denied the motion to open, and the defendants appealed to this court. They claimed, inter alia, that the trial court abused its discretion in denying their motion to open because they had shown good cause, pursuant to statute (§ 49-15), to warrant opening the foreclosure judgment. *Held* that, under the circumstances here, the trial court did not abuse its discretion in denying the defendants' motion to open the judgment of strict foreclosure pursuant to § 49-15, as the court reasonably could have determined that the defendants did not meet their burden of showing clear proof that the plaintiff had engaged in fraud; the defendants waited to assert their defenses until after the foreclosure judgment had been rendered, the affidavit that they submitted in support of the motion to open contained only bare allegations of fraudulent inducement by the plaintiff, the tax return and loan application that the defendants submitted in support of their motion to open gave no indication that the loan application was altered without their knowledge or that the plaintiff had engaged in any other fraudulent activity, and the court reasonably could have found that the discrepancy in the income amounts listed on the tax return and the loan application, which the defendants had the obligation to review to ensure its accuracy, was not the product of fraudulent behavior by the plaintiff; furthermore, the defendants could not justify their delay in failing to assert their defenses by claiming that they were unaware of any available defenses until they obtained counsel, as the defendants were represented by counsel more than one month before the hearing on the plaintiff's motion for a judgment of strict foreclosure, and neither the defendants nor their counsel appeared at that hearing or requested a continuance in order to gather evidence in support of their defenses.

(*One judge dissenting*)

Argued March 21—officially released June 20, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of New London, where the defendant Mortgage Electronic Registration Systems, Inc., was defaulted for failure to appear and the named defendant et al. were defaulted for failure to plead; thereafter, the court, *Cosgrove*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; subsequently, the court denied the motion to open the judgment filed by the named defendant et al., and the named defendant et al. appealed to this court; thereafter, the court, *Cosgrove*,

J., issued an articulation of its decision. *Affirmed; further proceedings.*

Kenneth A. Leary, for the appellants (named defendant et al.).

Jonathan A. Adamec, with whom, on the brief, was *Christopher S. Groleau*, for the appellee (plaintiff).

Opinion

LAVINE, J. The defendants Marlene E. Owen and William S. Owen[1] appeal from the denial of their motion to open the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Wells Fargo Bank, N.A. The defendants claim that the court abused its discretion in denying their motion because they showed good cause to warrant opening the judgment pursuant to General Statutes § 49-15. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendants' claim. On April 23, 2013, the plaintiff, as trustee for the holders of the Merrill Lynch Mortgage Investors Trust, served a complaint on the defendants, a married couple, seeking to foreclose on their property at 22–24 Bayberry Hill Road in Norwich.[2] The defendants, self-represented, entered their appearances but never filed an answer or any special defenses to the plaintiff's complaint. For more than one year, from May 14, 2013, to June 3, 2014, the parties engaged in at least six mediation sessions to resolve the case but were ultimately unsuccessful. None

[1] Mortgage Electronic Registration Systems, Inc., also was named as a defendant but is not a party to this appeal. We therefore refer in this opinion to the Owens as the defendants.

[2] According to the plaintiff's complaint, the defendants, "to secure [the] note, mortgaged to Mortgage Electronic Registration Systems, Inc., as nominee for WMC Mortgage Corp., the premises known as 22 Bayberry Hill Road a/k/a 22–24 Bayberry Hill Road, Norwich," and that WMC Mortgage Corporation later assigned the mortgage to the plaintiff.

of the mediator reports stated that the defendants claimed that the loan application contained inaccurate information regarding Marlene Owen's income or that the plaintiff's predecessor in interest, WMC Mortgage Corporation, misled the defendants when they applied for and executed the mortgage.[3] Instead, the defendants sought to modify the loan because "[t]he mortgagor was laid off from his job."

On March 20, 2015, approximately nine months after the mediation period ended, the plaintiff filed a motion to default the defendants for failure to plead, which was granted on April 1, 2015. On April 1, 2015, the plaintiff filed a motion for a judgment of strict foreclosure. On April 13, 2015, counsel for the defendants entered his appearance but failed to file an answer or any special defenses to the plaintiff's complaint or to contest the entry of the default in any way. See Practice Book §§ 10-46 and 10-50. The defendants also failed to file a motion for a continuance to obtain additional time to collect evidence to support a claim of fraud. On May 18, 2015, the court heard the plaintiff's motion for a judgment of strict foreclosure, but neither the defendants nor counsel for the defendants appeared at the hearing to contest the motion or to ask for a continuance. The court granted the plaintiff's unopposed motion for a judgment of strict foreclosure and set the law days to begin July 21, 2015.

On July 8, 2015, the defendants filed a motion to open the judgment of strict foreclosure pursuant to § 49-15.[4]

[3] The mediator's final report stated that the reason why the issue was not resolved was because the "[d]efendants [do] not qualify for any retention options due to insufficient income. The court granted one more mediation session, which was held on [June 2, 2014]. [The] defendants recently submitted an application [for assistance] to [the Connecticut Housing Finance Authority pursuant to the Emergency Mortgage Assistance Program, General Statutes § 8-265cc et seq.]."

[4] General Statutes § 49-15 (a) (1) provides: "Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an

In the motion, they requested oral argument but specifically indicated that "testimony is not required." The court heard oral argument on the motion during a short calendar hearing on July 20, 2015.[5] The defendants asserted that they had good cause to open the judgment because they had proof that an agent of the plaintiff's predecessor in interest knowingly misled them into applying for and executing the mortgage by assuring them that they could afford the mortgage. They also claimed that the plaintiff's predecessor in interest altered the income information on the loan application without the defendants' knowledge. The evidence the defendants submitted in support of their argument included a sworn affidavit from William Owen, who attested that he had applied for and executed the mortgage "based on false representations . . . by [the] [p]laintiff's predecessor's agent that [he] could afford the mortgage in question" and that Marlene Owen's "income was fraudulently put down by [the] [p]laintiff's predecessor's said agent as $5000 per month without [her] knowledge or [his], when it was in fact $2100 per month." They also provided a copy of Marlene Owen's 2004 tax returns and the loan application, which showed that the income listed in the tax returns did not match the income listed in the loan application. Thus, they argued that they should be given an opportunity to assert the special defenses of unclean hands and fraud in the inducement in the foreclosure action.

The plaintiff argued that the defendants failed to show good cause to open the judgment of strict foreclosure. Contrary to the defendants' assertion, the plaintiff

interest in the judgment *and for cause shown*, be opened and modified, nothwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such judgment shall be opened after the title has become absolute in any encumbrancer except as provided in subsection (2) of this subsection." (Emphasis added.)

[5] Before the court heard the merits of the defendants' claim, it ordered that the motion be sealed because their counsel failed to redact the defendants' personal and identifying information.

contended that if any party was defrauded or misled, it was the plaintiff because it unknowingly relied on the loan application that contained incorrect information. It also argued that the defendants could not claim that their income was altered without their knowledge because they had an opportunity to review the loan application and correct any inaccurate information before they had signed it.

The same day, the court denied the defendants' motion to open the judgment of strict foreclosure.[6] The defendants filed a motion for articulation, and the court granted the motion and referred the parties to the transcript of the July 20, 2015 hearing. The defendants filed another motion for articulation, which the court denied. The defendants appealed to this court on August 7, 2015. Thereafter, the defendants never sought an articulation in accordance with Practice Book § 66-5.

On appeal, the defendants claim that the court abused its discretion in denying their motion to open the judgment of strict foreclosure. They argue that, pursuant to § 49-15, they showed good cause to open the judgment by providing proof that the plaintiff engaged in fraud. They contend that they did not assert their defenses prior to the court's rendering its decision on the plaintiff's motion for a judgment of strict foreclosure because they were not aware of any relevant defenses to foreclosure until after they had hired an attorney, and, thus, "[i]t would be unjust to bar their defenses under these circumstances . . . ." We disagree.[7]

[6] The court initially ruled that it would extend the law days and reserve its decision on whether it was going to grant or deny the motion after reviewing the evidence. The plaintiff pointed out, however, and the court agreed, that the court was precluded from doing so because, procedurally, it was required to grant the motion before it could extend the law days. Thus, the court was forced to make a decision on the motion that day, as the law day were set to begin the following day, July 21, 2015.

[7] "The denial of a motion to open a judgment of strict foreclosure is an appealable final judgment itself and distinctly appealable from the underlying judgment." *Connecticut National Mortgage Co.* v. *Knudsen*, 323 Conn. 684, 687 n.8, 150 A.3d 675 (2016).

"Generally, an appeal must be filed within twenty days of the date notice of the judgment or decision is given. . . . In the context of an appeal from the denial of a motion to open judgment, [i]t is well established in our jurisprudence that [w]here an appeal has been taken from the denial of a motion to open, but the appeal period has run with respect to the underlying judgment, [this court] ha[s] refused to entertain issues relating to the merits of the underlying case and ha[s] limited our consideration to whether the denial of the motion to open was proper. . . . When a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment." (Citation omitted; internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Ruggiri*, 164 Conn. App. 479, 484, 137 A.3d 878 (2016).

In the present case, there is no dispute that the defendants did not file their motion to open within twenty days of the court's rendering the judgment of strict foreclosure. Therefore, we will review the defendants' claim under an abuse of discretion standard and will not address the merits of the judgment of strict foreclosure.

"This court must make every reasonable presumption in favor of the trial court's decision when reviewing a claim of abuse of discretion. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, 112 Conn. App. 750, 761, 966 A.2d 239 (2009).

"When a party seeks to open and vacate a judgment based on new evidence allegedly showing the judgment

is tainted by fraud, he must show, inter alia, that he was diligent during trial in trying to discover and expose the fraud, and that there is *clear proof of that fraud*." (Emphasis added.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 107, 952 A.2d 1 (2008). "Some evidence suggesting actual wrongdoing . . . and not merely the specter of such, is necessary in order to set aside a final adjudication." *Bank of America, N.A.* v. *Thomas*, 151 Conn. App. 790, 806 n.7, 96 A.3d 624, 634 (2014).

We conclude that the court did not abuse its discretion in denying the defendants' motion to open the judgment of strict foreclosure because it reasonably could have decided that the defendants did not meet their burden of showing clear proof that the plaintiff engaged in fraud. The affidavit submitted by the defendants was made by William Owen himself, and contained only bare allegations that the plaintiff's predecessor fraudulently induced the defendants into applying for and executing the mortgage. The supporting documents gave no indication that the plaintiff altered the loan application without the defendants' knowledge or engaged in any other fraudulent activity. The tax return and the loan application listed two different incomes, but it was the responsibility of the defendants to review the loan application to ensure its accuracy before they signed it, and the court reasonably could have found that the discrepancy was not the product of fraudulent behavior. See *Ocwen Federal Bank, FSB* v. *Thacker*, 73 Conn. App. 616, 618–19, 810 A.2d 279 (2002) (no abuse of discretion when only evidence in support of opening judgment was defendant's unsubstantiated claim in affidavit).

Additionally, "[t]he denial of such relief to a party who has suffered a default judgment by his failure to defend properly should not be held an abuse of discretion where the failure to assert a defense was the result

of the moving party's own negligence." (Internal quotation marks omitted.) *Hartford Federal Savings & Loan Assn.* v. *Stage Harbor Corp.*, 181 Conn. 141, 143–44, 434 A.2d 341 (1980). The fact that the defendants sat on their equitable rights and waited to assert their defenses until after the court rendered the judgment of strict foreclosure further supports our conclusion that the court did not abuse its discretion. See *Countrywide Home Loans Servicing L.P.* v. *Peterson*, 171 Conn. App. 842, 850, A.3d (2017) (no abuse of discretion because "the defendant waited until after the judgment of strict foreclosure had been rendered and the law days were about to run to challenge the finding of debt on the basis of the existence of private mortgage insurance"); *Connecticut National Bank* v. *N. E. Owen II, Inc.*, 22 Conn. App. 468, 475, 578 A.2d 655 (1990) (The trial court did not abuse its discretion because "[t]he defendants never asserted a defense with regard to the debt prior to the rendering of the judgment of strict foreclosure. Therefore, any claim that they had a good defense to open that judgment and challenge the amount of the debt is equally without merit.").

The defendants attempt to justify their delay in asserting their defenses by arguing that they were unaware of any defenses available to them until they obtained counsel. "[A]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Lewis* v. *Bowden*, 166 Conn. App. 400, 403, 141 A.3d 998 (2016). The defendants' failure to assert their defenses because they were not represented by counsel is not a persuasive justification for failing to timely plead as required by court rules.

In any event, the defendants were represented by counsel on April 13, 2015, which was more than one month before the court rendered the judgment of strict

foreclosure on May 18, 2015. Not only did the defendants' counsel fail to respond to the plaintiff's complaint or assert any defenses prior to May 18, 2015, neither the defendants nor their counsel appeared at the hearing on the motion for a judgment of strict foreclosure to request a continuance in order to gather evidence to support their defenses. It is also notable that in the defendants' motion to open the judgment of strict foreclosure, the defendants' counsel only requested oral argument and specifically indicated that testimony was not required. See *USA Bank* v. *Schulz*, 143 Conn. App. 412, 419, 70 A.3d 164 (2013) ("the defendant has no basis for claiming an abuse of discretion by the trial court in denying him relief that he could readily have sought, had he wished to, at a time when he was represented by competent counsel"). Perhaps another judge might have ordered an evidentiary hearing under the circumstances; however, we are unwilling to conclude that the failure to do so was an abuse of discretion.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion PRESCOTT, J., concurred.

FLYNN, J., dissenting. Those who have sat in the busy trial courts engaged in the challenging business of what Whittier once described as the "doubtful balance of rights and wrongs," know that some cases merit a second look on appeal. In my view, this case requires such a second look. In late 2005, the defendants Marlene E. Owen and William S. Owen executed two mortgages on their 22 Bayberry Hill Road property, including the mortgage that is the subject of this foreclosure action, in favor of Mortgage Electronic Registration Systems, Inc., as nominee for WMC Mortgage Corporation

(WMC).[1] The subject mortgage later was assigned to the plaintiff, Wells Fargo Bank, N.A., as Trustee for the Holders of the Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-WMCI, in September, 2012. After the mortgage payments proved unsustainable for the defendants, the plaintiff commenced this action and ultimately obtained a judgment of strict foreclosure on May 18, 2015. A few months later, after retaining a lawyer, the defendants moved to open the judgment of strict foreclosure pursuant to General Statutes § 49-15[2] in an attempt to save their home. In support of their motion, the defendants submitted a sworn affidavit—along with a federal tax return and their original mortgage loan application—averring that they were fraudulently induced into executing the two mortgages; see footnote 1 of this dissenting opinion; by an agent of the plaintiff's predecessor in interest, WMC. After hearing arguments, the trial court denied the defendants' motion to open on the papers. In my view, this was a mistake. The affidavit, together with the attachments, set forth more than mere unsupported allegations of fraud. Arguably, these submissions were sufficient to warrant opening the judgment. In any event, the defendants certainly satisfied their threshold burden of presenting more than unsubstantiated speculation. Therefore, the court reasonably should have set the motion down for an evidentiary hearing. Accordingly, I would reverse the court's judgment and remand the case for further proceedings.

[1] William Owen's affidavit, which he filed in support of his motion to open the judgment of strict foreclosure, avers that he executed a mortgage in favor of WMC for $215,920—the mortgage at issue in this foreclosure action—and a second, back-to-back mortgage for $53,980. That the deal was structured in this manner appears to be undisputed.

[2] General Statutes § 49-15 provides in relevant part: "(a) (1) Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such

I acknowledge that where, as in the present case, "a party seeks to open and vacate a judgment based on new evidence allegedly showing the judgment is tainted by fraud, he must show, inter alia, that he was diligent during trial in trying to discover and expose the fraud, and that there is clear proof of that fraud."[3] (Internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 107, 952 A.2d 1 (2008). Our case law recognizes, however, that parties seeking to open a judgment on the basis of fraud need only make a threshold showing substantiating their claim beyond mere speculation or suspicion; upon making that showing, they become entitled to an evidentiary hearing to determine whether clear proof of the fraud exists. In *Tyler E. Lyman, Inc.* v. *Lodrini*, 78 Conn. App. 684, 690, 828 A.2d 681, cert. denied, 266 Conn. 917, 833 A.2d 468 (2003), this court held that "[b]ecause the [trial] court's exercise of discretion in ruling on the motion to open [the judgment] was dependent on the disputed factual issue of fraud, due process required that the [trial] court hold an evidentiary hearing on that issue. . . . The [trial] court, therefore, abused its discretion in ruling on the matter without affording the parties the opportunity to present evidence with regard to the defendant's fraud claim." (Citation omitted.) In *Chapman Lumber, Inc.* v. *Tager*, supra, 69, our Supreme Court rejected the defendant's claim that the trial court abused its discretion by denying his motion to open without first conducting an evidentiary hearing because it was "obvious . . . that the defendant had no evidence in support of his allegations [of fraud], but rather,

judgment shall be opened after the title has become absolute in any encumbrancer . . . ."

[3] As the majority correctly notes, the defendants brought this appeal more than twenty days after the entry of the judgment of strict foreclosure. Thus, our review is limited to whether the trial court abused its discretion in denying the motion to open; we cannot entertain issues relating to the *merits* of the underlying judgment. See *Wells Fargo Bank, N.A.* v. *Ruggiri*, 164 Conn. App. 479, 484, 137 A.3d 878 (2016).

sought to go on a fishing expedition in the hope of discovering some." Id., 108. Significantly, however, the court did not foreclose the proposition that a party could be entitled to a hearing under other circumstances, observing that "[*t*]*o be entitled to a hearing, the defendant needed to make some threshold showing that his claims had substance*, which he failed to do." (Emphasis added.) Id. Indeed, this court previously has approved a trial court's position that "[i]f the plaintiff was able to substantiate her allegations of fraud beyond mere suspicion, then the court would open the judgment for the limited purpose of discovery, and would later issue an ultimate decision on the motion to open after discovery had been completed and another hearing held." *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 270, 540 A.2d 713 (1988).[4]

This rule entitling parties to an evidentiary hearing after making the requisite threshold showing makes good sense—requiring parties to demonstrate "clear proof" of the fraud based solely on affidavits and the paper record, without an evidentiary hearing, will in many cases be an insurmountable burden. This is because fraud claims inevitably involve "questions of

[4] This court's decision in *Bank of America, N.A.* v. *Thomas*, 151 Conn. App. 790, 96 A.3d 624 (2014), is not to the contrary. In that case, the defendant moved to open the judgment of strict foreclosure asserting that newly discovered evidence showed that the plaintiff obtained the judgment through fraud. Id., 804. Although this court began by stating that the defendant failed to present clear proof of the fraud at the initial hearing; id., 805; it later cited *Bruno* v. *Bruno*, 146 Conn. App. 214, 76 A.3d 725 (2013), for the proposition that the "the defendant was not able to substantiate her allegation of fraud beyond the realm of speculation and mere suspicion." *Bank of America, N.A.* v. *Thomas*, supra, 805. In *Bruno*, this court observed that "the trial court must first determine whether there is probable cause to open the judgment for the limited purpose of proceeding with discovery related to the fraud claim. . . . If the moving party demonstrates to the court that there is probable cause to believe that the judgment was obtained by fraud, the court may permit discovery." (Citations omitted.) *Bruno* v. *Bruno*, supra, 231.

motive, intent and subjective feelings and reactions"; (internal quotation marks omitted) *Barasso* v. *Rear Still Hill Road, LLC*, 81 Conn. App. 798, 806, 842 A.2d 1134 (2004); and affidavits setting forth only one party's version of the facts can sometimes be deemed inadequate to prove such issues. See id. Our Supreme Court has observed that the "summary judgment procedure is particularly inappropriate" for resolving questions of fraudulent intent. *Town Bank & Trust Co.* v. *Benson*, 176 Conn. 304, 309, 407 A.2d 971 (1978). Rather, "[i]t is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised." (Internal quotation marks omitted.) *Barasso* v. *Rear Still Hill Road, LLC*, supra, 806. In light of this practical reality, in-court testimony is sometimes necessary to determine whether "clear proof" of the fraud exists.

Applying these principles, even if the court concluded that the affidavit and its supporting documents were not enough, standing alone, to warrant opening the judgment, I do not believe that the court reasonably could have concluded that the defendants had not met the threshold for entitlement to a further evidentiary hearing on their motion to open. In his sworn affidavit, William attested to the following facts concerning the making of the mortgages: (1) that before executing the two mortgages, he expressed concerns about his ability to afford them, particularly because they represented 100 percent financing on the property, required greater monthly payments than he was used to, and carried a substantial $45,457.89 balloon payment;[5] (2) that an agent of WMC convinced him to ignore such concerns by falsely claiming that similarly structured mortgages "were common and usual" and that, "based on the value

[5] The term "balloon payment" refers to an unamortized lump sum principal payment due at the end of the term of the loan according to the payment schedule set forth in the promissory note.

of the property," he could "certainly" refinance the mortgages to avoid the balloon payment; (3) that he would not have agreed to the mortgage loans, given their "substantial initial costs and unaffordable burdens," but for these misrepresentations; and (4) that WMC falsely listed Marlene's monthly income as $5000 in the loan application when in fact it was only $2100. The defendants also submitted copies of their loan application and Marlene's 2004 tax returns, showing that she earned just over $2100 per month that year, and that her income was listed as $5000 on the application. The plaintiff never filed a counteraffidavit rebutting any of the defendants' assertions, nor did it offer any rebuttal testimony or documentary evidence. Arguments by the plaintiff's counsel in opposition are not sworn, and are not evidence.

The defendants' submissions raised a substantial question about whether the defendants were fraudulently induced into entering the two mortgages. Indeed, this court recently has held that knowingly false statements to a borrower about the affordability of a loan can form the basis for a claim of fraud in the inducement. See *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 382–83, 143 A.3d 638 (2016). That the defendants presented documentary evidence suggesting that Marlene's income was improperly inflated—by almost 140 percent—bolsters their claim that the ultimate judgment of strict foreclosure was tainted by fraud. I also do not agree with the majority's characterization of William's affidavit as mere "allegations" of fraud. Sworn statements of fact set forth in an affidavit, concerning matters about which the affiant has personal knowledge, are not mere allegations entitled to no weight; they are actual evidence of the truth of those facts. That our judicial system accords affidavits the weight of evidence in a variety of contexts bears that out. Indeed, the plaintiff in the present case proved the

underlying mortgage debt by submitting an affidavit of debt. In the marital dissolution context, this court held that a defendant's child support guidelines worksheet was sufficiently "based on underlying evidence," including, inter alia, a financial affidavit. *McKeon* v. *Lennon*, 155 Conn. App. 423, 444, 109 A.3d 986 (2015), rev'd in part on other grounds, 321 Conn. 323, 138 A.3d 242 (2016). Affidavits also suffice in prejudgment remedy proceedings to establish probable cause that the moving party will prevail on the merits. See General Statutes § 52-278c (a) (2).

Additionally, the transcript of the July 20, 2015 short calendar hearing, at which the defendants' motion was heard, does not reflect that the trial court applied any of the previously discussed principles.[6] Instead, although the precise basis for the court's decision is not entirely clear, the court expressed skepticism about the merits of the defendants' fraud claim because they had an opportunity to review the allegedly inflated income statement during the closing, and because they executed the mortgage to consolidate their credit card debt. There is no evidence in the record, however, to suggest that the defendants had an opportunity to review the loan application at the loan closing or that the proceeds from the mortgage being foreclosed satisfied their credit card debt. Indeed, William Owen explicitly disputed the proposition that the mortgage, in any manner, was related to their credit card debt. Thus, the stated basis for the court's decision only underscores the need for an evidentiary hearing if the court was not satisfied that the affidavit and attached documents established clear proof of the fraud.

[6] The court denied the defendants' motion to open in an order dated July 20, 2015, without issuing a written decision. The court then granted the defendants' motion for articulation but, rather than issuing a written decision, attached a signed copy of the transcript from the short calendar hearing. The defendants filed a second motion for articulation, which the court denied.

In sum, this is not a case in which the defendants were "not able to substantiate [their] allegation of fraud beyond the realm of speculation and mere suspicion." *Bank of America, N.A.* v. *Thomas*, 151 Conn. App. 790, 805, 96 A.3d 624 (2014). Accordingly, if the court deemed it needed more than the unrebutted affidavit and attachments, an evidentiary hearing at which the plaintiff and the defendants would present relevant evidence was necessary for the court to reasonably and properly exercise its discretion in ruling on the defendants' motion to open. See *Tyler E. Lyman, Inc.* v. *Lodrini*, supra, 78 Conn. App. 690. A short calendar, like the calendar proceeding on the defendants' motion to open, is generally not the time or place to take extended witness testimony. The court nonetheless could have scheduled the case for a hearing at a later date.[7] The court's failure to do so despite the genuine and critically important issues raised by the defendants' motion to open and supporting evidence, in my judgment, was a mistake, and its denial of the defendants' motion an abuse of discretion.

Finally, I do not fault the defendants for their delay in identifying and raising their claim of fraud in the inducement until after the judgment of foreclosure was rendered. The defendants, who generally were unsophisticated in financial transactions and thus in a poor position to recognize the factual basis for a claim of

[7] The law days were set to run the day after the defendants' motion to open was heard at the July 20, 2015 short calendar, but that was no impediment to the court's ability to schedule a hearing at a later date. Indeed, the court's denial of the defendants' motion to open without a hearing itself triggered an automatic stay of the running of the law days until the expiration of the twenty day period in which to appeal from that denial. See *Citigroup Global Markets Realty Corp.* v. *Christiansen*, 163 Conn. App. 635, 639–40, 137 A.3d 76 (2016); *Brooklyn Savings Bank* v. *Frimberger*, 29 Conn. App. 628, 630–32, 617 A.2d 462 (1992). It follows that, if the court opened the judgment for the limited purpose of holding an evidentiary hearing on the motion, then the court could reset the law days to accommodate that hearing.

fraud, remained self-represented until April 13, 2015, by which point the plaintiff already had moved for the judgment of strict foreclosure. After the defendants obtained the benefit of counsel, it then took time for their lawyer to obtain and review the evidence and formulate their fraud claim. Indeed, the defendants obtained Marlene's 2004 tax returns from a decade before this foreclosure action was commenced to substantiate their claim before filing their motion.

Like claims of bias, claims of fraud are easily alleged. However, because the mere making of such claims against another carries a certain taint, they should not be made unless there is some substance to them. The defendants' counsel properly waited to make the claim of fraud until he had gathered and reviewed the evidence, including Marlene's tax returns, to make the required threshold showing that the claim had substance. Attorneys each take an oath swearing to "not knowingly maintain or assist in maintaining any cause of action that is false or unlawful . . . ." General Statutes § 1-25. Rule 3.1 of the Rules of Professional Conduct provides in relevant part that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ." Maintaining fidelity to these principles can take time. Penalizing the defendants for taking the time to obtain evidentiary support for their claims before moving to open the judgment would serve no useful policy consideration embodied in the attorneys' oath or Rules of Professional Conduct.

Accordingly, I would reverse the court's judgment denying the motion to open and remand the case for further proceedings.

ANTHONY ROGERS *v.* COMMISSIONER OF CORRECTION (AC 38505)

Prescott, Beach and Bishop, Js.

Syllabus

The petitioner, who had been convicted of various crimes, including murder and conspiracy to commit murder, sought a writ of habeas corpus. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. On appeal, the petitioner claimed that the habeas court erred in concluding that the state did not violate his right to due process when it withheld third-party culpability evidence from the defense in the petitioner's criminal trial, and that he was not denied effective assistance of counsel. *Held* that, after oral argument and a careful review of the record and briefs, this court determined that the habeas court thoroughly addressed the claims raised in this appeal and that it properly denied the petition for a writ of habeas corpus.

Argued March 7—officially released June 20, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Michael W. Brown, with whom, on the brief, was *Vishal K. Garg*, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Anthony Rogers, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the

petitioner claims that the court erred in concluding that (1) the state did not violate his right to due process when it withheld third-party culpability evidence from the petitioner in his criminal trial, and (2) he was not denied effective assistance of counsel. We affirm the judgment of the habeas court.

Following a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a, conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 and 53a-59 (a) (5), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). The underlying facts are set forth in *State* v. *Rogers*, 123 Conn. App. 848, 850–56, 3 A.3d 194, cert. denied, 299 Conn. 906, 10 A.3d 524 (2010), in which we affirmed the judgments of the trial court. In December, 2014, the petitioner filed a third amended petition for a writ of habeas corpus. On September 29, 2015, the habeas court issued a memorandum of decision denying the petition for a writ of habeas corpus. The petitioner filed a petition for certification to appeal, which the court granted. This appeal followed.

After a careful review of the record, briefs, and oral argument before this court, we are satisfied that the habeas court thoroughly addressed the arguments raised in this appeal and that it properly denied the petition for a writ of habeas corpus.

The judgment is affirmed.

MICHAEL PIRES, SR. *v.* COMMISSIONER OF CORRECTION
(AC 37693)

Sheldon, Beach and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of murder, sought a writ of habeas corpus, claiming that his trial counsel rendered ineffective assistance

because they failed to adequately convey to the trial court his desire to represent himself. The petitioner's original trial counsel, S, had informed the court that the petitioner indicated that he wanted to represent himself at trial, but that he had made the request in an offhand manner and that she was unsure if it was genuine because the petitioner refused to talk with her further. The court thereafter granted S's motion to withdraw as counsel and appointed two other attorneys, B and K, to represent the petitioner. Those attorneys testified at the habeas trial that the petitioner never expressed a desire to represent himself and that they did not construe any of his pro se motions to the trial court as requests to represent himself. The habeas court rendered judgment denying the petition, concluding that, other than at the time of sentencing, there was no clear and unequivocal invocation of the petitioner's right to self-representation for counsel to have conveyed to the trial court. The habeas court reasoned that the record demonstrated that the petitioner was concerned not with representing himself, but with, inter alia, being assigned counsel of his choice. Thereafter, on the granting of certification, the petitioner appealed to this court. *Held* that habeas court correctly found that the petitioner did not demonstrate that his trial counsel rendered ineffective assistance by failing to adequately convey to the trial court his desire to represent himself; the record established only that the petitioner made to S a single offhand reference to self-representation, which she promptly conveyed to the trial court, and her performance was not deficient merely because her characterization of the petitioner's request did not prove favorable to him, and further, there was no evidence on the record that B and K, who both testified that the petitioner had never expressed a desire to represent himself, had performed deficiently.

Argued January 17—officially released June 20, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Peter Tsimbidaros, for the appellant (petitioner).

Paul J. Narducci, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (respondent).

Opinion

BEACH, J. The petitioner, Michael Pires, Sr., appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. He claims that the habeas court erred in failing to conclude that his trial lawyers provided ineffective assistance by failing to adequately convey to the trial court his desire to represent himself.[1] We affirm the judgment of the habeas court.[2]

[1] The petitioner makes a number of other claims in his appellate brief that we need not address in this appeal—specifically, that his attorneys (1) provided him with incorrect advice as to whether the trial court would permit him to represent himself, (2) failed to advise him to invoke his right to self-representation more clearly and more unequivocally than he did, (3) failed further to pursue his right to self-representation, (4) failed to advise him that the trial court would not consider his statements on the record to be a clear and unequivocal invocation of the right, and (5) failed to advise him that accepting replacement counsel could be perceived as a waiver of his right to self-representation. Although the petitioner presented testimony and argument on these claims at the habeas trial, he did not allege them in his amended petition for a writ of habeas corpus, nor did the habeas court address them in its memorandum of decision.

"This court is not bound to consider claimed errors unless it appears on the record that the question was distinctly raised . . . *and* was ruled upon and decided by the court adversely to the appellant's claim. . . . To review [claimed errors] now would amount to an ambuscade of the [habeas] judge. . . . This court is not compelled to consider issues neither alleged in the habeas petition nor considered at the habeas proceeding . . . ." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 98 Conn. App. 690, 693, 910 A.2d 999 (2006), cert. denied, 281 Conn. 910, 916 A.2d 52 (2007).

We instead confine our review to the single claim of ineffective assistance that was distinctly alleged and ruled upon by the habeas court—namely, that the petitioner's trial counsel "failed to adequately convey to the [trial] court that the petitioner wished to represent himself."

[2] As an alternative ground for affirmance, the respondent, the Commissioner of Correction, contends that the habeas court properly concluded that the petitioner's ineffective assistance claim was collaterally estopped by our Supreme Court's determination in the petitioner's direct appeal that the petitioner never clearly and unequivocally invoked his right to self-representation. See *State* v. *Pires*, 310 Conn. 222, 238–44, 77 A.3d 87 (2013). Because we agree with the habeas court's determination that the petitioner did not receive ineffective assistance, we need not address collateral estoppel.

The following facts and procedural history, drawn from the Supreme Court's opinion in the petitioner's direct appeal; see *State* v. *Pires*, 310 Conn. 222, 77 A.3d 87 (2013); are relevant to this appeal. The petitioner was charged with murder in connection with a 2004 drug related homicide. Id., 225. After several unsuccessful attempts to dismiss his trial counsel, Special Public Defender Linda Sullivan, the petitioner and Sullivan attended a hearing on December 20, 2005, before the trial court, *Handy*, *J.* Id., 225–26. During the hearing, Sullivan informed Judge Handy that the petitioner had refused to discuss the case with her. Id., 233. The petitioner then indicated that he wanted to " 'fire' " Sullivan. Id., 233–34. After explaining to the petitioner that he was entitled to an attorney but not necessarily to an attorney of his choice, Judge Handy instructed the petitioner and Sullivan to convene privately, work things out, and then return to the courtroom. Id., 234–35. When they returned, Sullivan told Judge Handy: "Well, I did go downstairs and attempt to talk to [the petitioner]. He did want to discuss strategy with me. *He indicated now that he wishes to represent himself in this matter. I informed him that I didn't think Your Honor was going to allow him to represent himself on a murder charge simply because that would be much too dangerous and it would not be in his best interest.* And that's about where we stand, Your Honor." (Emphasis altered; internal quotation marks omitted.) Id., 235. The petitioner did not reiterate to the court a desire to represent himself, nor did Judge Handy inquire further into the matter. Id.

Sullivan subsequently filed a motion to withdraw as counsel and, on March 8, 2006, Judge Handy granted her motion. Judge Handy appointed attorneys Bruce Sturman and Kevin Barrs to represent the petitioner. Id., 235. The petitioner filed a pro se motion to dismiss Sturman and Barrs at the start of trial on August 2,

2006, but withdrew the motion the following day. Id., 226. Following a jury trial, the petitioner was convicted of murder.

Prior to sentencing, the petitioner filed a handwritten "motion to dismiss," which the trial court, *Schimelman*, *J.*, addressed at the October 13, 2006 sentencing hearing. Id., 250. During argument on the motion, the petitioner levied complaints about the evidence and facts of the case and indicated that he wanted to "dismiss" Barrs and Sturman prior to the sentencing portion of the hearing. Id. Judge Schimelman, interpreting the petitioner's motion as a request for self-representation, denied the motion[3] and sentenced the petitioner to sixty years imprisonment. Id., 225, 250–51. The Supreme Court upheld the petitioner's conviction on direct appeal.[4] Id., 255.

[3] In denying the petitioner's motion, Judge Schimelman stated: "There is nothing that you said to me that leads me to believe that I [should dismiss] them at this time. In fact, it would be to your disadvantage, in my mind, to dismiss them because they have the ability to explain to the court in a way that perhaps you, as a layperson, [do] not have, those matters that need to be discussed during this sentencing. And it would be counterproductive, in my mind, to dismiss them and to leave you without representation or to make the determination that this sentencing should be delayed. I think neither is necessary, nor neither would be beneficial to you and, or, to the family of the victims in this case and, or, to the judicial process. Accordingly, your motion to dismiss your attorneys is denied." (Internal quotation marks omitted.) *State* v. *Pires*, supra, 310 Conn. 251.

[4] On direct appeal, the petitioner claimed that the trial court violated his constitutional right of self-representation because he clearly and unequivocally invoked the right both at the December 20, 2005 hearing through Sullivan's comments to Judge Handy, and at the sentencing hearing through his written motion to dismiss and oral argument on that motion. *State* v. *Pires*, supra, 310 Conn. 229–30. With respect to the December 20, 2005 hearing, the Supreme Court held that Sullivan's statements did not amount to a clear and unequivocal invocation of the right to self-representation; id., 238; and that even if they had, the petitioner subsequently waived the right when he accepted the appointment of Sturman and Barrs as new counsel. Id., 244–45. The Supreme Court further concluded that, assuming the petitioner had made a clear and unequivocal request to represent himself at the sentencing hearing, Judge Schimelman did not abuse his discretion in denying the request. Id., 249–50.

Thereafter, the petitioner filed an amended petition for a writ of habeas corpus, alleging a single claim of ineffective assistance of counsel. The petitioner alleged that he was represented at trial by Sullivan, Sturman, and Barrs, and that their "performance was deficient because they failed to adequately convey to the court that the petitioner wished to represent himself." The petition further alleged that there is a reasonable probability that, "but for the petitioner's trial counsel's deficient performance," the result of the criminal proceedings would have been different.

The habeas court held a trial on October 31, 2014, at which Sullivan, Sturman, and Barrs testified. The petitioner did not testify. The habeas court denied the petition in a memorandum of decision filed January 16, 2015. After concluding that the petitioner's ineffective assistance claim was collaterally estopped by the Supreme Court's decision on direct appeal; see footnote 2 of this opinion; the habeas court also rejected the claim on the merits. Applying the two-pronged test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the habeas court found that the petitioner's trial counsel did not perform deficiently by failing adequately to inform the trial court of his desire for self-representation.[5] The habeas court reasoned that the record reflected that the petitioner was concerned not with representing himself, but, rather, with being assigned counsel of his choosing, obtaining discovery, meeting with his attorneys, addressing the court, and claiming that various court

[5] The habeas court also found that the petitioner failed to establish that any deficient performance on the part of his trial counsel prejudiced him. Because we agree with the habeas court that the petitioner's trial counsel did not perform deficiently, we need not reach the issue of prejudice. See *Ouellette* v. *Commissioner of Correction*, 154 Conn. App. 433, 448 n.9, 107 A.3d 480 (2014) ("[a] court evaluating an ineffective assistance claim need not address both components of the *Strickland* test if the [claimant] makes an insufficient showing on one" [internal quotation marks omitted]).

personnel were conspiring against him. Thus, the habeas court concluded that trial counsel did not perform deficiently because, other than at sentencing, "there was no clear and unequivocal invocation for them to convey to the court . . . ." Following a grant of certification to appeal, this appeal followed.

The petitioner claims that the habeas court erred in concluding that he did not receive ineffective assistance of counsel. We disagree.

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 678, 51 A.3d 948 (2012).

Pursuant to *Strickland*, "[a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are

satisfied." (Internal quotation marks omitted.) *Fernandez* v. *Commissioner of Correction*, 291 Conn. 830, 835, 970 A.2d 721 (2009).

We agree with the habeas court that the petitioner failed to demonstrate that Sullivan, Sturman or Barrs performed deficiently by failing to adequately convey to the trial court his desire for self-representation. We note that, as a matter of law, the petitioner's ineffective assistance claim fails in the absence of evidence establishing that he made a clear and unequivocal request for self-representation, and that his trial counsel either failed to inform the trial court of the request or did so in a manner that did not capture the unequivocal nature of the request. In other words, the mere fact that trial counsel did not inform the trial court that the petitioner made a clear and unequivocal request for self-representation does not form the basis for an ineffective assistance claim. The petitioner must demonstrate that he actually made such a request and that his attorneys failed to properly relay it.

The habeas court correctly found that the petitioner failed to carry his burden of showing that his trial counsel failed to inform the trial court of a clear, unequivocal request for self-representation. With regard to Sullivan, the record reflects that, after convening with the petitioner at the December 20, 2005 hearing, she informed Judge Handy that the petitioner "indicate[s] now that he wishes to represent himself in this matter. I informed him that I didn't think Your Honor was going to allow him to represent himself on a murder charge simply because that would be much too dangerous and it would not be in his best interest."[6] (Emphasis omitted; internal quotation marks omitted.) *State* v. *Pires*, supra, 310

[6] We note that the merits of the trial court's response to Sullivan's representation were addressed in *State* v. *Pires*, supra, 310 Conn. 246–49, and we need not discuss the merits further here.

Conn. 235. There was no evidence in the habeas record that this representation was inaccurate. The petitioner did not testify at the habeas trial. Sullivan testified that the petitioner mentioned self-representation at the end of their conversation in an offhand manner, that she was unsure whether the request was genuine because the petitioner was angry and irrational at the time, and that she could not explore the issue because the petitioner refused to speak with her further. Sullivan further testified that, although the petitioner repeatedly had tried to fire her, the only time he expressed a desire to represent himself was during that December 20, 2005 meeting. Therefore, the record establishes only that the petitioner made a single offhand reference to self-representation, which Sullivan promptly conveyed to the trial court. She did not perform deficiently simply because she characterized the petitioner's request in a manner that did not prove favorable to the petitioner's subsequent claim that he had clearly and unequivocally invoked his right to self-representation.

There was also no evidence that Barrs or Sturman performed deficiently. They both testified at the habeas trial that the petitioner never expressed a desire to represent himself. They further testified that they did not construe any of the petitioner's pro se motions to be requests for self-representation. Even if they had, however, it would not matter because those written motions had already been filed with the court. Accordingly, the habeas court properly denied the petitioner's amended petition for a writ of habeas corpus on the ground that he failed to satisfy the performance prong of *Strickland*.

The judgment is affirmed.

In this opinion the other judges concurred.

THE RESERVE REALTY, LLC, ET AL. *v.* WINDEMERE RESERVE, LLC, ET AL.
(AC 38167)

Alvord, Sheldon and Schaller, Js.

Syllabus

The plaintiffs, R Co., a real estate marketing company, and H, the executor of the estate of J, who was a real estate broker and founding member of R Co., commenced a breach of contract action against the defendant real estate developers, W Co. and B Co., seeking to enforce the provisions of certain listing agreements that allegedly would have entitled the plaintiffs to certain real estate brokerage fees. In 2002, prior to J's death, a group of real estate developers, D Co., engaged the services of J and another real estate brokerage firm, S Co., to negotiate the purchase of a large parcel of undeveloped land. D Co. thereafter entered into an agreement which, inter alia, gave J and S Co. the exclusive right to sell and/or lease any property that was to be developed on that land, and also required the D Co. to inform any subsequent purchaser of any part or individual lots on the land that the exclusivity provision applied to them. Following D Co.'s purchase of the land, it sold two separate parcels of the land to W Co. and B Co., who, pursuant to their respective purchase agreements, executed listing agreements with J and S Co., who had formed R Co. for the purpose of marketing the properties. Thereafter, B Co. constructed a rental apartment complex on its parcel and W Co. planned to develop a commercial office building on its parcel. Neither B Co. nor W Co. used R Co. as the listing agent for their respective projects, and the plaintiffs brought this action alleging breach of the listing agreements. The trial court concluded, inter alia, that the purchase and sale agreements containing the exclusivity provision on which the plaintiffs based their claim for commissions under the listing agreements constituted part of an illegal tying arrangement in violation of the Connecticut antitrust statute (§ 35-29), and rendered judgment for the defendants. On appeal to this court, *held*:

1. Contrary to the plaintiffs' claim, the trial court and this court are bound by existing precedent from our Supreme Court interpreting § 35-29, notwithstanding certain federal case law that allegedly changed the interpretation of the federal statute on which § 35-29 was modeled.
2. The trial court properly determined that the agreements on which the plaintiffs relied were the product of an illegal tying arrangement: a tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different tied product, or, alternatively, not purchase that different product from another supplier, and such arrangements are illegal per se under § 35-29 whenever

the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition or whenever a "not insubstantial" amount of interstate commerce is affected, and here, the trial court properly found both conditions were met.

a. The trial court logically could have inferred that D Co. restrained free competition with respect to brokerage services as D Co. had sufficient economic power with respect to the large plot of undeveloped land that its agreement to tie the sale of any parcel of that land to the purchase of real estate broker services offered by J and S Co. compelled purchasers of the land to use a brokerage service that they otherwise would not have used; moreover, contrary to the plaintiffs' claims, the defendants did not have to prove the existence of a relevant market in order to prevail on their claim that D Co. had sufficient economic power to restrain competition because the large tracts of undeveloped land with flexible zoning allowances was sufficiently unique that the tying arrangement was illegal in and of itself, and no specific showing of unreasonable competitive effect was required.

b. The trial court logically concluded that by restricting the pool of brokers for the sale and/or lease of the land here to J and S Co., D Co. restricted a "not insubstantial" amount of commerce, as more than $1.5 million in brokerage fees were foreclosed, which is not a de minimis amount.

Argued January 4—officially released June 20, 2017

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Doherty, J.*, granted the plaintiffs' motion to cite in Century 21 Scalzo Realty, Inc., as a defendant; thereafter, the plaintiffs withdrew the action as to the defendant Century 21 Scalzo Realty, Inc.; subsequently, the matter was tried to the court, *Truglia, J.*; judgment for the named defendant et al., from which the plaintiffs appealed to this court. *Affirmed.*

Daniel E. Casagrande, with whom was *Lisa M. Rivas*, for the appellants (plaintiffs).

Christopher Rooney, with whom was *Brian A. Daley*, for the appellees (named defendant et al.).

Opinion

SCHALLER, J. This appeal arises from a breach of contract action in which the plaintiffs, The Reserve Realty, LLC (Reserve Realty), and Theodore Haddad, Sr., as executor of the estate of Jeanette Haddad, sought to recover real estate brokerage fees in connection with the sale and/or lease of units in an apartment complex constructed and leased by the defendant BLT Reserve, LLC (BLT), and of commercial office space not yet constructed by the defendant Windemere Reserve, LLC (Windemere). After a trial to the court, judgment was rendered in favor of the defendants. The plaintiffs appeal from that judgment, claiming that the trial court improperly determined that (1) the purchase and sale agreements upon which they based their claims for brokerage fees constituted part of an illegal tying arrangement in violation of the Connecticut Antitrust Act, General Statutes § 35-24 et seq. (antitrust act), (2) the listing agreements entered into pursuant to such purchase and sale agreements did not comply with General Statutes § 20-325a, and (3) such listing agreements were unenforceable by the plaintiffs because they were personal to Jeanette Haddad. We affirm the judgment of the trial court.

The following facts, as found by the trial court in its memorandum of decision, are pertinent to our review. The plaintiff, Theodore Haddad, Sr., is the duly appointed executor of the estate of his wife, Jeanette Haddad. Prior to her death in January, 2013, Jeanette Haddad was a successful and highly regarded real estate broker in the Danbury real estate market, performing brokerage services under the business name, "Jeanette Haddad, Broker."[1] She employed several licensed salespersons, including Theodore Haddad, Sr., and she

[1] To the extent that "Jeanette Haddad, Broker" is distinct from Jeanette Haddad, those distinctions are not material to our resolution of the claims on appeal.

engaged the services of her son, Theodore Haddad, Jr., who was a licensed real estate broker with his own broker's license and business. The plaintiff, Reserve Realty, a limited liability company organized and existing pursuant to the laws of Connecticut, was founded by Jeanette Haddad and Paul Scalzo on September 15, 2003.[2] The defendants, BLT and Windemere, are limited liability companies, the principals and owners of which include Carl Kuehner, Jr., and Paul Kuehner.[3]

In early 2002, a group of real estate developers, later known as Woodland Group II, LLC (Woodland), contacted Jeanette Haddad and Century 21 Scalzo Realty, Inc. (Scalzo Realty), a real estate franchise owned by Scalzo,[4] to engage their brokerage services in connection with the negotiations for the purchase of a 546 acre parcel known as the Reserve. As part of the broker/client relationship, the "Exclusive Right to Sell–Listing Agreement" (Woodland agreement) was executed by and between Jeanette Haddad and Scalzo, and two of the Woodland real estate developers. Pursuant to the Woodland agreement, Jeanette Haddad and Scalzo Realty had the exclusive right to sell and/or lease property in the Reserve, and the real estate developers were required to "make aware to the new purchaser of any part, or of individual lots, or of land, that this Agreement shall apply to that new purchaser and [Jeanette Haddad and Scalzo Realty]."

[2] When formed, Reserve Realty was named UC Properties, LLC (UC Properties). On July 22, 2004, Scalzo filed articles of amendment, changing the name of the company from UC Properties to Reserve Realty.

[3] The Kuehner and Haddad families have been personal friends and business associates since the late 1970s.

[4] The plaintiffs moved to add Scalzo Realty as a necessary party to the action. The trial court granted the motion, ordering that the complaint be amended to state facts showing the interest of Scalzo Realty in the action and that Scalzo Realty appear as a defendant. Thereafter, Scalzo Realty was defaulted for failure to plead. Subsequently, the plaintiffs withdrew this action as to Scalzo Realty.

On or about June 28, 2002, Woodland purchased the Reserve. Woodland, which wished to develop the Reserve, continued to use the services of Jeanette Haddad and Scalzo thereafter to market the property.[5] Woodland also proposed a master plan for the entire 546 acres, which the Danbury Zoning Commission approved on or about November 26, 2002. Shortly thereafter, Windemere filed an administrative appeal of the plan's approval in the Superior Court, which effectively stayed the approval of the master plan and prevented Woodland from moving forward with the development and sale of the Reserve. Thereafter, representatives of Woodland, Windemere, and BLT met to negotiate the sale of two tracts of land, later known as parcel 13 and parcel 15. Part of the negotiation resulted in Windemere's withdrawal of the administrative appeal.

On July 17, 2004, Woodland entered into the purchase and sale agreement with BLT for the purchase of parcel 13 and the purchase and sale agreement with Windemere for the purchase of parcel 15 (purchase and sale agreements). Paragraph eight of the purchase and sale agreement for parcel 13 obligated BLT to enter into a listing agreement with Jeanette Haddad and Scalzo Realty, pursuant to which Jeanette Haddad and Scalzo Realty would receive a 3 percent commission on any subsequent sale and/or lease of parcel 13, either as a whole or as individual lots. Similarly, paragraph eight of the purchase and sale agreement for parcel 15 obligated Windemere to enter into a listing agreement with Jeanette Haddad and Scalzo Realty, pursuant to which Jeanette Haddad and Scalzo Realty would receive a $1 million commission for their efforts in the leasing of office space that Windemere intended to develop on the parcel.[6]

[5] Reserve Realty was formed by Jeanette Haddad and Scalzo to market and sell the Reserve as it became subdivided.

[6] Pursuant to paragraph twelve of the purchase and sale agreement for parcel 15, titled conditions of purchase, Woodland was required to obtain

Woodland, BLT, and Windemere also executed an escrow agreement, pursuant to which the purchase and sale agreements would be held in escrow by Woodland's counsel for ninety days until several conditions were met. One of the conditions was the execution of listing agreements and consent to sell the property agreements, to be executed by Jeanette Haddad and Scalzo Realty. This condition was included to satisfy the requirement in the Woodland agreement between Woodland, Jeanette Haddad, and Scalzo Realty that Woodland "make aware to the new purchaser of any part, or of individual lots, or of land, that this Agreement shall apply to that new purchaser and [Jeanette Haddad and Scalzo Realty]."

Between July 17 and September 10, 2003, representatives of Woodland, BLT, Windemere, and Jeanette Haddad[7] negotiated the terms of the listing agreements. On September 10, 2003, a meeting was held, at which several documents were executed,[8] including the exclusive right to represent buyer/tenant (buyer's agreement);[9] the consent agreements;[10] and the exclusive right to

government approval for the development of a conference center and to provide Windemere with a site plan sketch for an office building so that Windemere could petition for a change in the master plan to allow for the construction of a large office space.

[7] Theodore Haddad, Jr., acted on behalf of Jeanette Haddad.

[8] The trial court determined that it was not clear precisely how the final, fully-executed hard copies of the agreements came to be executed by Jeanette Haddad. Although Theodore Haddad, Jr., testified that Jeanette Haddad was faxed the agreements on September 10, 2003, and she subsequently returned them with her signature via fax on the same day, the trial court did not find his testimony entirely credible. The trial court found, however, that Carl Kuehner, Jr., executed the agreements on behalf of both BLT and Windemere with the intent that the defendants be legally bound.

[9] In the buyer's agreement, the defendants appointed Scalzo Realty, UC Properties, and Jeanette Haddad as their exclusive agents to assist in the purchase of parcel 13 and parcel 15.

[10] The consent agreements did not address the defendants' obligation to use the plaintiffs' brokerage services.

sell–listing agreement for parcel 13,[11] the exclusive right to sell/lease–listing agreement for parcel 13,[12] the exclusive right to sell/lease–listing agreement for parcel 15,[13] and the exclusive right to sell–listing agreement for parcel 15[14] (listing agreements).

Despite having executed the listing agreements, the defendants at no time desired to retain Jeanette Haddad as the broker for the sale and/or lease of units to be built on parcel 13 and parcel 15. Rather, the defendants entered into the listing agreements only to satisfy the requirements of paragraph eight of the purchase and sale agreements, and the only reason that the parties included paragraph eight in the purchase and sale agreements was to allow Woodland to comply with its contractual obligation under the Woodland agreement to require subsequent purchasers of the Reserve to retain Jeanette Haddad and Scalzo Realty as their brokers.

Beginning in early 2006, representatives of Jeanette Haddad and Scalzo Realty, including Theodore Haddad, Sr., and Theodore Haddad, Jr., diligently marketed and contacted possible buyers and lessees for the Reserve. At some point, however, the defendants decided that the listing agreements were a " 'bad marriage,' " and, in January, 2007, Paul Kuehner and Theodore Haddad,

[11] In the exclusive right to sell–listing agreement for parcel 13, BLT granted Jeanette Haddad and Scalzo Realty the exclusive right to sell and/or lease parcel 13.

[12] In the exclusive right to sell/lease–listing agreement for parcel 13, BLT granted UC Properties, Scalzo Realty, and Jeanette Haddad the exclusive right to sell and/or lease parcel 13 or any portion of parcel 13.

[13] In the exclusive right to sell/lease listing agreement for parcel 15, Windemere granted UC Properties, Scalzo Realty, and Jeanette Haddad the exclusive right to sell and/or lease parcel 15 or any portion of parcel 15.

[14] In the exclusive right to sell–listing agreement for parcel 15, Windemere granted Jeanette Haddad and Scalzo Realty the exclusive right to sell and/or lease parcel 15.

Jr., met to discuss terminating the broker/client relationship. A buy-out figure was offered to Jeanette Haddad and Scalzo, which they both refused. From early to mid-2007, Jeanette Haddad and Scalzo Realty continued to make best efforts to find prospective buyers or lessees for parcel 13 and parcel 15, but ultimately were unsuccessful. The defendants began to explore other available options, including the development of parcel 13 into a luxury apartment rental complex.

On or about April 18, 2011, the Danbury Planning and Zoning Department issued a site plan approval to BLT for the construction of a rental apartment complex on parcel 13, which would later be known as Abbey Woods. Shortly thereafter, the defendants began construction. BLT subsequently leased the apartment units in Abbey Woods through its own on-site leasing agent, with the first lease being entered into in March, 2013. Theodore Haddad, Jr., upon learning about Abbey Woods, contacted Carl Kuehner, Jr., and asked him if the defendants intended to honor the listing agreements by allowing Reserve Realty to act as broker and by paying commissions on those units already leased. Carl Kuehner, Jr., refused to discuss the issue with Theodore Haddad, Jr., claiming that the listing agreements for parcel 13 were personal service agreements between BLT and Jeanette Haddad.

In July, 2013, the plaintiffs brought this action against the defendants, claiming compensatory damages for breach of the listing agreements.[15] Specifically, the

[15] Subsequently, on May 6, 2014, the plaintiffs commenced two actions seeking to foreclose liens that they had recorded as to parcel 13 and parcel 15 (foreclosure actions). On September 28, 2015, the parties filed a stipulation in each of the foreclosure actions, stipulating that the memorandum of decision in the present action required the conclusion that the plaintiffs could not establish probable cause to sustain the validity of the liens, as required by General Statutes § 20-325e. The parties, therefore, stipulated that judgment be rendered against the plaintiffs in the foreclosure actions, but that all appellate rights be reserved. The plaintiffs also have appealed from the judgments ordering the discharge of the liens. See *Reserve Realty*,

plaintiffs sought the commissions for the leasing of apartments in the Abbey Woods complex built on parcel 13 and for the lease and/or sale of a commercial office building not yet constructed on parcel 15. The defendants raised five special defenses: (1) the listing agreements were entered into pursuant to an illegal tying arrangement; (2) there was a lack of consideration in that the plaintiffs had failed to perform brokerage services entitling them to compensation; (3) the listing agreements were personal service contracts; (4) the listing agreements, by their express terms, expired on September 10, 2010; and (5) the listing agreements were unenforceable because the necessary conditions precedent had not been satisfied. After hearing twelve days of evidence, the trial court rendered judgment in favor of the defendants, concluding that the purchase and sale agreements created an illegal tying arrangement, the listing agreements did not satisfy the requirements of § 20-325a, and the listing agreements were personal service contracts with Jeanette Haddad. The plaintiffs then filed this appeal. Additional facts will be set forth as necessary.

On appeal, the plaintiffs claim that the trial court improperly concluded that (1) the purchase and sale agreements constituted part of an illegal tying arrangement, (2) the listing agreements did not comply with § 20-325a, and (3) the listing agreements were personal to Jeanette Haddad. In order for the plaintiffs to succeed on appeal, they must prevail on all three of these claims. Because we conclude that the trial court properly determined that the purchase and sale agreements constituted part of an illegal tying arrangement, we need only address this antitrust issue in order to affirm the judgment of the trial court.

LLC v. *BLT Reserve, LLC*, 174 Conn. App. 150, A.3d (2017); *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 174 Conn. App. 153, A.3d (2017).

The plaintiffs claim that the defendants' agreement in the purchase and sale agreements to execute the listing agreements as a condition for purchasing parcel 13 and parcel 15 did not constitute an illegal tying arrangement in violation of the antitrust act. Specifically, the plaintiffs contend that the interpretation of illegal tying arrangements in *State* v. *Hossan-Maxwell, Inc.*, 181 Conn. 655, 436 A.2d 284 (1980), upon which the trial court relied, no longer applies because the rule of that case has been abrogated by recent federal case law. In addition, the plaintiffs contend that the defendants failed to plead or prove the existence of a relevant market, which they claim to be crucial to proving an illegal tying arrangement claim. Moreover, the plaintiffs contend that the defendants did not prove that the listing agreements' requirement that BLT use Jeanette Haddad and Scalzo Realty to market Abbey Woods foreclosed competition in the market for brokerage services.[16] We disagree.

I

At the outset, we must determine the correct legal standards to apply to the facts as found by the trial court, particularly with regard to the alleged invalidity of *Hossan-Maxwell, Inc.* Indeed, the plaintiffs argue that recent federal case law has abrogated the rule of *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 655, the controlling authority for evaluating a tying arrangement claim under Connecticut antitrust law, specifically General Statutes § 35-29.[17] Furthermore, the plaintiffs con-

[16] The plaintiffs further argued that the defendants' illegal tying arrangement claim must fail because it did not pass the rule of reason test. As subsequently discussed in this opinion, tying arrangements, due to their manifestly anticompetitive nature, fall under the per se test, not the rule of reason test.

[17] General Statutes § 35-29 provides in relevant part: "Every lease, sale or contract for the furnishing of services or for the sale of commodities . . . on the condition or understanding that the lessee or purchaser shall not deal in the services or the commodities of a competitor or competitors of the lessor or seller, shall be unlawful where the effect of such lease or

tend that General Statutes § 35-44b[18] grants this court the authority to analyze the validity of *Hossan-Maxwell, Inc.*, in light of recent federal case law, particularly *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984);[19] *Concord Associates, L.P.* v. *Entertainment Properties Trust*, 817 F.3d 46 (2d Cir. 2016; and *Smugglers Notch Homeowners' Assn., Inc.* v. *Smugglers' Notch Management Co.*, 414 Fed. Appx. 372 (2d Cir. 2011).

As an intermediate appellate court, we must follow the precedent established by our Supreme Court. As we have previously noted, "[o]ur duty is to follow controlling judicial precedent rather than base our decision on our own view or the popular view of what the law ought to be." *State* v. *Thurman*, 10 Conn. App. 302, 316, 523 A.2d 891, cert. denied, 204 Conn. 805, 528 A.2d 1152 (1987). Moreover, in interpreting § 35-44b, our Supreme Court has concluded that "[o]ur construction of the [antitrust act] is aided by reference to judicial opinions interpreting the federal antitrust statutes. . . . Accordingly, we follow federal precedent when we interpret the act *unless the text of our antitrust statutes, or other pertinent state law, requires us to interpret it differently*." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Westport Taxi Service, Inc.* v. *Westport Transit District*, 235 Conn. 1, 15–16, 664 A.2d 719 (1995). Our Supreme

sale or contract for sale or such condition or understanding may be to substantially lessen competition or tend to create a monopoly in any part of trade or commerce and where such goods or services are for the use, consumption or resale in this state."

[18] General Statutes § 35-44b provides: "It is the intent of the General Assembly that in construing sections 35-24 to 35-46, inclusive, the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes."

[19] But see *Illinois Tool Works, Inc.* v. *Independent Ink, Inc.*, 547 U.S. 28, 31, 43–45, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006) (rejecting dicta from *Jefferson Parish Hospital District No. 2* regarding presumption that patents afforded sufficient market power to restrain competition in tied market).

Court has further stated that "§ 35-44b merely gave legislative imprimatur to what this court had been doing long before its enactment, namely, looking to case law construing relevant federal statutes as persuasive authority." *Miller's Pond Co., LLC* v. *New London*, 273 Conn. 786, 809–810, 873 A.2d 965 (2005). Accordingly, we are bound by the decision of our Supreme Court in *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 655. We, therefore, apply *Hossan-Maxwell, Inc.*, as a controlling interpretation of § 35-29.

II

Having concluded that § 35-29, as explained and applied in *Hossan-Maxwell, Inc.*, provides the governing standard to apply in the present action, we now consider whether the trial court applied it properly to the facts. We first set forth the standard of review that guides our interpretation of the antitrust act. "The scope of our appellate review depends on the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings are clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . . This court cannot retry the facts or pass upon the credibility of witnesses. . . . Furthermore, [o]ur function is not to examine the record to see if the trier of fact could have reached a contrary conclusion. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings."

(Citations omitted; internal quotation marks omitted.) *Westport Taxi Service, Inc.* v. *Westport Transit District*, supra, 235 Conn. 14–15.

Tying arrangements were made illegal by § 3 of the Clayton Act, which was enacted October 15, 1914; see 15 U.S.C. § 14 (2012);[20] after which General Statutes § 35-29 was patterned. "A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (tied) product, or at least agree that he will not purchase that product from another supplier. *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 [(1958)]." *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 659. "Tying arrangements are among the small group of practices which courts have found to be unlawful in and of themselves; *Northern Pacific Ry. Co.* v. *United States*, supra, 5; *International Salt Co.* v. *United States*, 332 U.S. 392, 396, 68 S. Ct. 12, 92 L. Ed. 20 [1947]; *Elida, Inc.* v. *Harmor Realty Corp.*, [177 Conn. 218, 227–28, 413 A.2d 1226 (1979)]. The justification for the per se approach is that [t]ying agreements serve hardly any purpose beyond the suppression of competition. *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305, 69 S. Ct. 1051, 93 L. Ed. 1371 [(1949)]. Nonetheless, [it is only] when certain prerequisites are met, [that] arrangements of this kind are illegal in and of themselves, and no specific showing of unreasonable competitive effect is required. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495,

[20] Section 3 of the Clayton Act, 15 U.S.C. § 14 (2012), provides in relevant part: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for the sale of . . . commodities . . . for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the . . . commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

498, 89 S. Ct. 1252, 22 L. Ed. 2d 495 [(1969)]. . . . [T]ying arrangements [are] deemed per se illegal, whenever the party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected. *Northern Pacific Ry. Co.* v. *United States*, supra, 6." (Internal quotation marks omitted.) *State* v. *Hossan-Maxwell, Inc.*, supra, 660–61. Because § 35-29 is based on § 3 of the Clayton Act, and § 3 of the Clayton Act only requires the party to prove either sufficient economic power or a " 'not insubstantial' " effect on commerce, a tying arrangement is illegal if either condition is met.[21] Id., 661–62.

A

An illegal tying arrangement may be found if the tying party "has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 661. Market power

[21] "Although both tests must be met to constitute a violation of § 1 of the Sherman [Antitrust Act 15 U.S.C § 1], under § 3 of the Clayton Antitrust Act; 15 U.S.C. § 14; a [tying arrangement] is per se illegal if either condition is met. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 608, 609, 73 S. Ct. 872, 97 L. Ed. 1277 [(1953)]; *Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207, 1214 (9th Cir. [1977]); *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 415 F.2d 55, 61–62 (4th Cir. [1969]), cert. denied, 397 U.S. 920, 90 S. Ct. 928, 25 L. Ed. 2d 101 [(1970)]; *ILC Peripherals Leasing Corp.* v. *International Business Machines Corp.*, 448 F. Supp. 228, 230 (N.D. Cal. [1978]). Since General Statutes § 35-29 is patterned after § 3 of the Clayton [Antitrust] [A]ct; 14 H.R. Proc., Pt. 9, 1971 Sess., p. 4182 (remarks of Rep. David H. Neiditz); Brodigan, 'The Connecticut Antitrust Act,' 47 Conn. B.J. 12, 15 (1973); and specifically includes the provision of services within its ambit, we believe that it is appropriate to adopt the Clayton [Antitrust] [A]ct test in determining whether a violation of § 35-29 has occurred. Thus, the declaration of covenants and restrictions is unlawful per se if either condition under *Northern Pacific Ry. Co.* v. *United States*, supra, [356 U.S.] 6, is met; that is, if (1) the party has sufficient economic power in the tying product, or (2) a not insubstantial amount of commerce is affected." (Footnotes omitted.) *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 661–62.

exists when "the seller has some special ability . . . to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hospital District No. 2* v. *Hyde*, supra, 466 U.S. 13–14. The United States Supreme Court has made clear that "the standard of sufficient economic power does not . . . require that the [seller] have a monopoly or even a dominant position throughout the market for the tying product." (Internal quotation marks omitted.) *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, supra, 394 U.S. 502; see *State* v. *Hossan-Maxwell, Inc.*, supra, 664. Moreover, "[e]ven absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." (Internal quotation marks omitted.) *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, supra, 503; see *State* v. *Hossan-Maxwell, Inc.*, supra, 664. "[T]he proper focus of concern is whether the seller has the power to raise prices, or to require other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." *State* v. *Hossan-Maxwell, Inc.*, supra, 664.

In the present case, Woodland, the tying party, has imposed a tying arrangement upon all of the parcels that formed the Reserve, the tying product, by tying the purchase of any of the parcels to the purchase of Jeanette Haddad's and Scalzo Realty's brokerage services. This situation is similar to that in *Hossan-Maxwell, Inc.*, where sixty-four subdivision housing lots had restrictive covenants requiring all purchasers to give exclusive sales and leasing rights to the named brokerage services for three months.[22] *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 657–58. In *Hossan-Maxwell*,

[22] The plaintiffs claim that, even if this court is bound by *Hossan-Maxwell, Inc.*, the present action is distinguishable. Specifically, the plaintiffs argue

Inc., our Supreme Court found that, based on federal precedent and Connecticut case law on property characteristics,[23] the tying arrangement met the sufficient economic power test because the residential property was sufficiently unique that the tying party had some advantage in the market not shared by his competitors. Id., 665. Likewise, the record before this court supports the conclusion that the Reserve was sufficiently unique to infer that Woodland held sufficient economic power. The present action involves a substantially larger area of land than *Hossan-Maxwell*, *Inc.*, with the Reserve being comprised of 546 undeveloped acres. Such a large area of undeveloped land is rarely available in the densely populated Northeast. Moreover, the Danbury Planning and Zoning Department granted flexible zoning for the Reserve, so that both residential and commercial buildings could be constructed. Thus, parcel 13 was zoned for residential development, and parcel 15 was zoned for commercial development. According to the proposed master plan, the "plan seeks to achieve a balance between residential, commercial and other uses, recognizing that the site is sufficiently large and physically diverse to accommodate a development of a new, cohesive residential community . . . ." This

that: (1) the covenants in *Hossan-Maxwell*, *Inc.*, bound all subsequent purchasers, whereas in the present case only Windemere and the first purchasers after BLT are bound; (2) the owner in *Hossan-Maxwell*, *Inc.*, was also the broker, and therefore had an economic interest in both the tying product and the tied product; (3) the purchasers in *Hossan-Maxwell*, *Inc.*, had no power to negotiate, whereas in the present case the defendants freely entered into the listing agreements after negotiations; and (4) the illegal clauses in the present case are part of otherwise valid agreements, and therefore the rule of reason test, not the per se test, should apply. For the reasons discussed subsequently in this opinion, we conclude that *Hossan-Maxwell*, *Inc.*, is analogous to the present case and, therefore, we are not persuaded by the plaintiffs' argument.

[23] "In Connecticut, the uniqueness and special characteristics of a particular plot of land have long been recognized." *State* v. *Hossan-Maxwell*, *Inc.*, supra, 181 Conn. 665, citing *Anderson* v. *Yaworksi*, 120 Conn. 390, 395, 399, 181 A. 205 (1935).

flexibility was intended to create a unique community where people both could live and work within a short distance.

Consequently, we conclude that the Reserve is sufficiently unique that the trial court logically could have inferred that Woodland restrained free competition when it required subsequent purchasers of property in the Reserve to use the brokerage services of Jeanette Haddad and Scalzo Realty, because that requirement forced such purchasers to use a brokerage service that they would not have used otherwise. In fact, representatives of the defendants testified, and the trial court found credible, that they did not want to use Jeanette Haddad and Scalzo Realty, and that the only reason they did use their brokerage services was that the tying arrangement compelled them to do so, for the defendants otherwise would have lost the opportunity to purchase parcel 13 and parcel 15. Accordingly, we conclude that the trial court logically determined that Woodland possessed sufficient market power over the Reserve, and, therefore, an illegal tying arrangement existed.

The plaintiffs contend that the defendants did not successfully prove that Woodland had sufficient economic power with respect to the Reserve because they did not establish the relevant market for the Reserve. According to the plaintiffs, the establishment of a relevant market is a critical component to an antitrust claim because it is required to evaluate the extent to which the plaintiffs exercised power. In *Hossan-Maxwell, Inc.*, our Supreme Court did not find it necessary to identify the relevant market in which a unique property was situated when it determined that "the uniqueness of residential property is . . . sufficient evidence of the market power possessed by the [tying party]." *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 665. Moreover, in reaching its conclusion, our Supreme Court

cited to *United State* v. *Loew's, Inc.*, 371 U.S. 38, 45 n.4, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962), in which the United States Supreme Court, when discussing the appropriateness of inferring economic power from uniqueness, noted that "[s]ince the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since the market dominance in the present context does not necessitate a demonstration of market power in the sense of § 2 of the Sherman Act, it should seldom be necessary in a [tying arrangement] case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market."

Furthermore, in *Jefferson Parish Hospital District No. 2*, the United States Supreme Court made it clear that the establishment of a relevant market is not required when economic power is proven through a product's uniqueness. Specifically, it stated that "[w]hen the seller's share of the market is high . . . or when the seller offers a unique product that competitors are not able to offer . . . the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate. . . . Thus, in *Northern Pacific R. Co.* v. *United States*, [supra, 356 U.S. 8], we held that the railroad's control over vast tracts of western real estate, although not itself unlawful, gave the railroad a unique kind of bargaining power that enabled it to tie the sales of that land to exclusive, long term commitments that fenced out competition in the transportation market over a protracted period." (Citations omitted.) *Jefferson Parish Hospital District No. 2* v. *Hyde*, supra, 466 U.S. 17. Consequently, we conclude that the defendants did not have to prove a relevant market to succeed on their claim that the

Reserve was sufficiently unique to meet the sufficient economic power test.

B

Alternatively, an illegal tying arrangement may be present when a "not insubstantial" amount of commerce in the tied product is restrained.[24] "The tying of brokerage services to the sale of residential development of real estate is automatically illegal under § 35-29 whenever a substantial volume of commerce in the tied product is restrained. . . . The amount of commerce affected is not measured by reference to the size of the tied product market. . . . [N]ormally, the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as to not be merely de minimis, is foreclosed to competitors by the tie, for as [the United States Supreme Court] said in *International Salt* [*Co.* v. *United States*, supra, 332 U.S. 396], it is unreasonable, per se, to foreclose competitors from any substantial market through use of a tying arrangement." (Citations omitted; internal quotation marks omitted.) *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 662–63.

In the present case, the trial court found that "the market values of parcel 13 and parcel 15, and the commissions that would have been due to the plaintiffs upon resale or lease of the developed parcels, concerned a substantial amount of commerce in the tied market." The record before this court supports the trial court's

[24] The plaintiffs failed to raise the issue as to a "not insubstantial" amount of commerce test in their main brief. Because this is an alternative test to finding a tying arrangement and it was a means by which the trial court found an illegal tying arrangement, however, we still address whether a "not insubstantial" amount of commerce was affected. In addition, the defendants argued in their briefs that a "not insubstantial" amount of commerce was foreclosed in the tied market for brokerage services, and the plaintiffs addressed the issue in their reply brief.

finding. BLT paid $15 million for parcel 13, and, pursuant to the Woodland agreement between Woodland, Jeanette Haddad, and Scalzo Realty, Jeanette Haddad and Scalzo Realty were owed a 3 percent commission from the transaction. This calculates to a $450,000 commission. Moreover, paragraph eight of the purchase and sale agreement for parcel 13 includes language obligating BLT to enter into a listing agreement with Jeanette Haddad and Scalzo Realty, pursuant to which the two brokers would receive a 3 percent commission on any subsequent sale or lease of all or any portion of the parcel. After purchasing parcel 13, BLT received the approval of the Danbury Planning and Zoning Department to construct a rental apartment complex containing 470 units. With the units being rented for $1515 to $1910 a month, the total potential commerce involved for the first month of the initial lease of each unit is between $712,050 and $897,700, and the real estate commission foreclosed is between $21,361.50 and $26,931.

Moreover, Windemere paid $7 million for parcel 15, and, also pursuant to the Woodland agreement, Jeanette Haddad and Scalzo Realty were owed a 3 percent commission from the transaction. This calculates to a $210,000 commission for Jeanette Haddad and Scalzo Realty. Furthermore, paragraph eight of the purchase and sale agreement for parcel 15 included language obligating Windemere to enter into a listing agreement with Jeanette Haddad and Scalzo Realty, pursuant to which the brokers would receive a $1 million commission for their efforts to sell and/or lease the commercial office space that Windemere was intending to build on parcel 15. Thus, between parcel 13 and parcel 15, more than $1.5 million in brokerage fees was foreclosed, which is not a de minimis amount. See *State* v. *Hossan-Maxwell, Inc.*, supra, 181 Conn. 663–64 ($60,800 was sufficient amount of money to meet "not insubstantial"

test).[25] Accordingly, we conclude that the trial court logically determined that, by restricting the pool of brokers for the sale and/or lease of the Reserve, the arrangement between Woodland, Jeanette Haddad, and Scalzo Realty restricted a "not insubstantial" volume of commerce in the Reserve.

The judgment is affirmed.

In this opinion the other judges concurred.

THE RESERVE REALTY, LLC, ET AL. *v.* BLT RESERVE, LLC, ET AL.
(AC 38440)

Alvord, Sheldon and Schaller, Js.

Syllabus

The plaintiffs, R Co., a real estate marketing company, and H, the executor of the estate of J, who was a real estate broker and founding member of R Co., commenced a separate breach of contract action against the defendant B Co. seeking to enforce the provisions of certain listing agreements that purportedly would have entitled the plaintiffs to certain real estate brokerage fees for the sale of certain real property to B Co. The plaintiffs also recorded a broker's lien on that real property owned by B Co. and subsequently commenced the present action to foreclose on that lien. The trial court rendered judgment in favor of B Co. in the breach of contract action, concluding that the listing agreement on which the lien here was based was unenforceable, and thereafter, the parties stipulated that the trial court could render judgment discharging the broker's lien in the present action, but that the plaintiffs retained

[25] The total amount foreclosed is only a portion of the property of the Reserve being sold by Woodland with the tied brokerage services. See *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, supra, 394 U.S. 502 ("[f]or purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice . . . the relevant figure is the total volume of sales held by the sales policy under challenge, not the portion of [the] total accounted for by the particular plaintiff who brings suit"). The record indicates that additional buyers of the Reserve parcels included White Peterman for $13,931,000, with Jeanette Haddad and Scalzo Realty receiving a 3 percent commission, and WCI for approximately $44 million, with Jeanette Haddad and Scalzo Realty receiving a 3 percent commission.

the right to appeal. On appeal to this court, *held* that in light of this court's decision released today in *Reserve Realty, LLC* v. *Windemere Reserve, LLC* (174 Conn. App. 130), which affirmed the trial court's judgment in favor of B Co. in the breach of contract action, the plaintiffs could not establish probable cause to sustain the validity of their broker's lien as required by statute (§ 20-325e) and, accordingly, the judgment discharging that lien was affirmed.

Submitted on briefs January 4—officially released June 20, 2017

Procedural History

Action to foreclose a broker's lien on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the plaintiffs withdrew the action as to the defendant The Reserve Master Association, Inc., et al.; thereafter, the court, *Truglia, J.*; rendered judgment discharging the lien in accordance with the parties' stipulation, from which the plaintiffs appealed to this court. *Affirmed.*

Daniel E. Casagrande and *Lisa M. Rivas* filed a brief for the appellants (plaintiffs).

Christopher Rooney and *Brian A. Daley* filed a brief for the appellee (named defendant).

David F. Bennett filed a brief for the appellee (defendant Century 21 Scalzo Realty, Inc.)

Opinion

PER CURIAM. In this action to foreclose a real estate broker's lien, the plaintiffs, The Reserve Realty, LLC (Reserve Realty) and Theodore Haddad, Sr., as executor of the estate of Jeanette Haddad, appeal from the judgment rendered by the trial court in favor of the defendant BLT Reserve, LLC (BLT).[1] On appeal, the plaintiffs claim that the court improperly determined that (1) the

[1] Century 21 Scalzo Realty, Inc. (Scalzo Realty) and The Reserve Master Association, Inc., also were named as defendants. The action was withdrawn as to the latter. Scalzo Realty filed a brief adopting BLT's position in this appeal.

purchase and sale agreement upon which they based their claim for brokerage fees constituted part of an illegal tying arrangement in violation of the Connecticut Antitrust Act, (2) the listing agreements entered into pursuant to such purchase and sale agreement did not comply with General Statutes § 20-325a, and (3) such listing agreements were unenforceable by the plaintiffs because they were personal to Jeanette Haddad. We affirm the judgment of the trial court.

The record discloses the following facts. In July, 2013, the plaintiffs brought a breach of contract action in which BLT was a defendant. See *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 174 Conn. App. 130, A.3d (2017). That action concerned the purchase and sale agreement for a parcel of land purchased by BLT, known as parcel 13, and listing agreements through which BLT granted Jeanette Haddad and Scalzo Realty; see footnote 1 of this opinion; the exclusive right to sell and/or lease parcel 13 and a 3 percent commission on any sale and/or lease of the property. On May 10, 2013, the plaintiffs executed a broker's lien on parcel 13 in favor of Reserve Realty and the estate of Jeanette Haddad in the amount of a 3 percent commission on the gross selling price or gross rental price of any portion of the parcel. Subsequently, on May 8, 2014, the plaintiffs brought the present action seeking to foreclose on the broker's lien.

On July 1, 2015, the trial court in the breach of contract action held that the listing agreements between the plaintiffs and BLT on which the lien in the present action is based were invalid and unenforceable. See *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, supra, 174 Conn. App. 130. Consequently, on September 28, 2015, the parties filed a stipulation in the present action that the memorandum of decision in the breach of contract action required the conclusion that the plaintiffs

could not establish probable cause to sustain the validity of the lien, as required by General Statutes § 20-325e.[2] The plaintiffs, however, reserved all rights to appeal. The trial court rendered judgment discharging the lien in accordance with the stipulation. The plaintiffs then filed this appeal.[3]

On appeal, the plaintiffs make three claims identical to those made in the appeal from the judgment in their breach of contract action. As the disposition of the claims in the present appeal must be governed by the disposition of the claims in *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, supra, 174 Conn. App. 130, we conclude that the judgment discharging the lien must be affirmed.

The judgment is affirmed.

THE RESERVE REALTY, LLC, ET AL. *v.* WINDEMERE RESERVE, LLC, ET AL.
(AC 38442)

Alvord, Sheldon and Schaller, Js.

Syllabus

The plaintiffs, R Co., a real estate marketing company, and H, the executor of the estate of J, who was a real estate broker and member of R Co.,

[2] General Statutes § 20-325e (a) provides in relevant part: "Whenever one or more real property claims for liens are placed upon any real estate pursuant to section 20-325a, the owner of the real estate, if no action to foreclose the claim is then pending before any court, may make application, together with a proposed order and summons, to the superior court for the judicial district in which the lien may be foreclosed under the provisions of section 20-325a or to any judge thereof, that a hearing or hearings to be held to determine whether the claim for lien or liens should be discharged . . . ."

[3] On October 5, 2016, BLT, pending the appeal, filed a motion in the trial court to substitute bond for the broker's lien. The trial court granted the motion on December 6, 2016. A hearing was scheduled for January 23, 2016 to establish the amount of bond required. On January 23, 2016, BLT withdrew the motion to substitute bond. These actions have no bearing on the disposition of the present appeal.

commenced a separate breach of contract action against the defendant W Co. seeking to enforce the provisions of certain listing agreements that purportedly would have entitled the plaintiffs to certain real estate brokerage fees for the sale of certain real property to W Co. The plaintiffs also recorded a broker's lien on that real property owned by W Co. and subsequently commenced the present action to foreclose on that lien. The trial court rendered judgment in favor of W Co. in the breach of contract action, concluding that the listing agreements on which the lien here is based were invalid and unenforceable, and thereafter, the parties stipulated that the trial court could render judgment discharging the broker's lien in the present action, but that the plaintiffs retained the right to appeal. On appeal to this court, *held* that in light of this court's decision in *Reserve Realty, LLC* v. *Windemere Reserve, LLC* (174 Conn. App. 130), which affirmed the trial court's judgment in favor of W Co. in the breach of contract action, the plaintiffs could not establish probable cause to sustain the validity of their broker's lien as required by statute (§ 20-325e) and, accordingly, the judgment discharging that lien was affirmed.

Submitted on briefs January 4—officially released June 20, 2017

Procedural History

Action to foreclose a broker's lien on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Truglia, J.*, rendered judgment discharging the lien in accordance with the parties' stipulation, from which the plaintiffs appealed to this court. *Affirmed.*

Daniel E. Casagrande and *Lisa M. Rivas* filed a brief for the appellants (plaintiffs).

Christopher Rooney and *Brian A. Daley* filed a brief for the appellee (named defendant).

David F. Bennett filed a brief for the appellee (defendant Century 21 Scalzo Realty, Inc.)

Opinion

PER CURIAM. In this action to foreclose a real estate broker's lien, the plaintiffs, The Reserve Realty, LLC (Reserve Realty) and Theodore Haddad, Sr., as executor

of the estate of Jeanette Haddad, appeal from the judgment rendered by the trial court in favor of the defendant, Windemere Reserve, LLC (Windemere).[1] On appeal, the plaintiffs claim that the court improperly determined that (1) the purchase and sale agreement upon which they base their claim for brokerage fees constituted an illegal tying arrangement in violation of the Connecticut Antitrust Act, (2) the listing agreements entered into pursuant to such purchase and sale agreement did not comply with General Statutes § 20-325a, and (3) such listing agreements were unenforceable by the plaintiffs because they were personal to Jeanette Haddad. We affirm the judgment of the trial court.

The record discloses the following facts. In July, 2013, the plaintiffs brought a breach of contract action in which Windemere was a defendant. See *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 174 Conn. App. 130, A.3d (2017). That action concerned the purchase and sale agreement for a parcel of land purchased by Windemere, known as parcel 15, and listing agreements through which Windemere granted Jeanette Haddad and Scalzo Realty; see footnote 1 of this opinion; the exclusive right to sell and/or lease parcel 15 and a $1 million commission for the services performed. On May 10, 2013, the plaintiffs executed a broker's lien on parcel 15 in favor of Reserve Realty and the estate of Jeanette Haddad in the amount of a $1 million commission. Subsequently, on May 8, 2014, the plaintiffs brought the present action seeking to foreclose on the broker's lien.

On July 1, 2015, the trial court in the breach of contract action held that the agreements between the plaintiffs and Windemere on which the lien in the present

[1] Century 21 Scalzo Realty, Inc. (Scalzo Realty) was named as a defendant in this action. It filed a brief adopting Windemere's position in the present appeal.

action is based were invalid and unenforceable. See *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, supra, 174 Conn. App. 130. Consequently, on September 28, 2015, the parties filed a stipulation in the present action that the memorandum of decision in the breach of contract action required the conclusion that the plaintiffs could not establish probable cause to sustain the validity of the lien, as required by General Statutes § 20-325e.[2] The trial court rendered judgment discharging the lien in accordance with the stipulation. The plaintiffs, however, reserved all rights to appeal. The plaintiffs then filed this appeal.[3]

On appeal, the plaintiffs make three claims identical to those made in their appeal from the judgment in their breach of contract action. As the disposition of the claims in the present action must be governed by the disposition of the claims in *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, supra, 174 Conn. App. 130, we conclude that the judgment discharging the lien must be affirmed.

The judgment is affirmed.

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[2] General Statutes § 20-325e (a) provides in relevant part: "Whenever one or more real property claims for liens are placed upon any real estate pursuant to section 20-325a, the owner of the real estate, if no action to foreclose the claim is then pending before any court, may make application, together with a proposed order and summons, to the superior court for the judicial district in which the lien may be foreclosed under the provisions of section 20-325a or to any judge thereof, that a hearing or hearings to be held to determine whether the claim for lien or liens should be discharged . . . ."

[3] On October 5, 2016, Windemere moved to substitute bond for the broker's lien. The trial court granted the motion on December 6, 2016. A hearing was scheduled for January 23, 2106, to establish the amount of bond required. On January 27, 2016, the broker's lien was substituted with a surety bond. This substitution has no bearing on the outcome of the present appeal.