Amending Repeals

By CHARLES D. RAY and MATTHEW A. WEINER

In *One Elmcroft Stamford, LLC v. Zoning Board of Appeals, S.C. 20393* (released Jan. 25, 2021), the Supreme Court, pulled back the curtain on some curious legislation in order to answer the basic question of whether the repeal of a statute counts as an "amendment" to that same statute. Not being big on suspense, we'll tell you up front that "no" is the answer to this simple question. The details, as is often the case, are much more complicated, and serve to prove the truth of the well-worn adage about not looking too closely at the making of either laws or sausages.

We begin in 2016, when Pisano Brothers Automotive applied to the Department of Motor Vehicles for a used car dealer license. General Statutes § 14-54 required that Pisano Brothers also obtain a "certificate of approval of the location" from the appropriate local authorities—in this case, the City of Stamford. Pasquale Pisano filed an application with the Stamford ZBA, which eventually approved it with conditions. One Elmcroft, an abutting neighbor, took an appeal to the superior court, arguing, in part, that the ZBA had failed to conduct the "suitability analysis" required by General Statutes § 14-55.

It may be best to pause here, so we can explain the source of the brouhaha that followed Pisano Brothers all the way to the Supreme Court. For that, we need to go back to 2003 and look at two public acts. The first, No. 03-184, repealed § 14-55, effective October 1, 2003. The second, No. 03-265, enacted just several days later, repealed and replaced § 14-55, with some changes, also effective October 1, 2003. Subsequent published editions of the General Statutes list § 14-55 as having been repealed. Can you see where this is headed?

The trial court held that § 14-55 was still in place and should have been adhered to, but that the ZBA had effectively complied with the statute by conducting what amounted to a suitability analysis of Pisano Brother's proposed location. In short, a classic example of no harm, no foul. One Elmcroft begged to differ and took the matter to the appellate court, where it, once again, argued that § 14-55 remained in effect and had not been complied with. The ZBA agreed that § 14-55 remained in place, but argued that it had substantially complied with the statute's mandate for a suitability analysis. Pisano Brothers took the position that § 14-55 had been repealed, but that even if that wasn't true, the ZBA had substantially complied with its requirements.

The appellate court—Judge Lavery, for a unanimous panel—reversed the trial court, concluding that § 14-55 remained in place and that the ZBA had not complied with the requirements of that statute. *One Elmcroft Stamford, LLC v. Zoning Board of Appeals*, 192 Conn. App. 275 (2019). Judge Lavery began by citing General Statutes § 1-2z, which requires courts, in the first instance, to discern the meaning of a statute "from the text of the statute itself and its relationship to other statutes." Next, in what should become a classic judicial statement, Judge Lavery noted that "[f]ollowing the apparent repeal of § 14-

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55, we are left with no text to consider." Accordingly, the court looked to the legislative history from 2003 in its effort to sort through what the legislature had in mind. In this endeavor, the court was aided by a 2011 superior court opinion that had looked at the same issue and concluded that § 14-55, as modified, remained in effect, notwithstanding its "repeal" by the legislature in 2003 and notwithstanding that subsequent editions of the General Statutes continued to list the statute as having been repealed.

At this point, we should once again interrupt our story, to tell you about the legislature's effort to deal with the fact that its left hand evidently does not always know what its right hand is doing. For that, we turn to General Statutes § 2-30b, which, with our emphasis added, provides, in subsection (a), that:

> When two or more acts passed at the same session of the General Assembly ***amend*** the same section of the general statutes, or the same section of a public or special act, and reference to the earlier adopted act is not made in the act passed later, each amendment shall be effective ***except*** in the case of ***irreconcilable conflict***, in which case the act which was passed last in the second house of the General Assembly shall be deemed to have repealed the irreconcilable provision contained in the earlier act, except as provided in subsection (b) of this section.

Applying § 2-30b, the appellate court concluded that, having been enacted last, Public Act 03-265—which repealed and replaced § 14-55—remained in effect and, thus, a suitability analysis was required. And on the money issue—whether the ZBA had substantially performed that analysis—the appellate court concluded that it had not, because it had not made any specific factual findings on the factors set forth in § 14-55.

But wait, you say, Public Act 03-184 did not amend § 14-55, it repealed it! The appellate court had an answer for that: *State v. Kozlowski*, 199 Conn. 667 (1986). *Kozlowski*, according to Judge Lavery, "held that the term 'amendment,' as used in § 2-30b, applies 'to all acts which expressly change existing legislation,' including public acts." But wait, you say again, what about the subsequent editions of the General Statutes, all of which list § 14-55 as having been repealed? Those compilations do not, according to a previous decision of the Appellate Court, "constitute the actual law of this state…." *Figueroa v. Commission of Correction*, 123 Conn. App. 862, 970 (2010), *cert. denied*, 299 Conn. 926 (2011).

Our guess is that the Pisano brothers were scratching their heads at this point, but on we go to the Supreme Court, which granted certification on the question: "Did the Appellate Court correctly conclude that General Statutes § 14-55 was not repealed in 2003?" *One Elmcroft Stamford, LLC v. Zoning Bd. of Appeals of City of Stamford*, 333 Conn. 936 (2019). You should already know the answer to this question, but let's take a look at how and why the Supreme Court resolved the issue differently than the appellate court.

Justice Kahn, for a unanimous court, first took on the notion that subsequent editions of the General Statutes were not really law. For this, she relied on General Statutes § 2-56(g), which requires the Legislative Commissioners' Office to: "[c]onsolidate and codify all the statutes and public acts of the state, and arrange and codify the same under chapter and sections with headnotes, annotations and references to original text and to any decisions of the Supreme Court interpreting the same, and revise such volumes thereof as have become obsolete by reason of the number of amendments thereto or related legislation subsequently enacted." In 2005, the Legislative Commissioners performed this function and noted that § 14-55 was "repealed." The legislature then "adopted, ratified, confirmed and enacted" the resulting codification in a public act. The fact that this procedure was repeated seven times in subsequent years—without any legislative effort to resuscitate § 14-55—did not help One Elmcroft's case with Justice Kahn.

If you thought this conclusion ended matters, you'd be wrong. Although the resulting product from the LCO and the legislature is "entitled to significant weight," the presumption of correctness can be overcome if the party seeking to do so, "bears the burden of proving its infirmity."

One Elmcroft failed this test because, according to Justice Kahn, "the Appellate Court improperly applied § 2-30b(a) to the present case." There were two primary reasons for this conclusion. First, the word "amend" as used in § 2-30b does not include the concept of "repeal," at least according to common usage and what appears to be every other court that has considered the question of whether a repealed statute can be amended. Second, the Supreme Court did not actually mean what it appears to have said in Kozlowski, because there it was dealing with a public act that repealed and replaced a portion of the General Statutes, as opposed to an act, like this one, that simply did a repeal.

So back the case goes to the Appellate Court to resolve claims raised by One Elmcroft unrelated to the amendment/repeal issue. We're thinking the Pisano Brothers should try to shake some attorneys' fees out of the legislature. ■

■ Any views expressed herein are the personal views of DASA Weiner and do not necessarily reflect the views of the Office of the Chief State's Attorney and/or the Division of Criminal Justice.

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