DOCKET NO. HHB-CV-17-6038816-S : JUDICIAL DISTRICT

CONNECTICUT TREES OF HONOR MEMORIAL, INC. : OF NEW BRITAIN

VS. :

CONNECTICUT FREEDOM OF INFORMATION COMMISSION : JUNE 10, 2019

MEMORANDUM OF DECISION

The plaintiff, Connecticut Trees of Honor Memorial, Inc. (CTHM), is a private charity founded to create a living trees memorial to honor Connecticut members of the armed forces who died in Iraq and Afghanistan and all other veterans. CTHM appeals from the final decision of the defendant Freedom of Information Commission (commission), which held that CTHM is the "functional equivalent of a public agency" and is therefore subject to the Freedom of Information Act. The commission ordered CTHM to provide certain documents in response to requests for records by the intervening defendant, Douglas Fleming. On appeal, CTHM contends that the commission misapplied the functional equivalence test as it has been developed by the courts. The commission and Fleming argue that the substantial governmental funding received by CTHM and the terms of its lease of public property render it the functional equivalent of a public agency. The court agrees with the plaintiff that the commission misapplied the functional equivalence test. For the reasons stated herein, the plaintiff's appeal is sustained.

Electronic notice sent to counsel of record.
Mailed to Douglas Fleming.
Mailed to Official Reporter of Judicial Decisions.
A. Jordan-Ponton, Clerk Officer 6-10-19

THE COMMISSION'S FINDINGS AND CONCLUSIONS

In the final decision at issue in this administrative appeal, the commission found that on July 1, 2016, and July 5, 2016, Douglas Fleming requested financial records and minutes of executive sessions from CTHM. By letter dated July 12, 2016, CTHM's board of directors[1] denied the requests on the ground that CTHM is not a public agency or the functional equivalent of a public agency under the Freedom of Information Act.

Fleming complained to the commission, naming CTHM's president and board of directors as respondents. The commission heard the complaint as a contested case on October 14, 2016, December 14, 2016, and January 23, 2017. The complainants[2] and the respondents appeared and offered testimony, exhibits, and argument on the issues. On April 26, 2017, the commission issued its final decision.

In that decision, the commission observed that General Statutes § 1-200 (1) defines "public agency" as follows:

> (A) Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district

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[1] CTHM's letter to Fleming identified the members of its board of directors as Sue Martucci, Diane DeLuzio, Mark DeLuzio, Angelo Martucci, Cheryl LaFlamme-Miller, Elaine Poplawski, and Roger Beliveau. Susan Martucci is CTHM's president.

[2] The commission named Douglas Fleming and Kevin Brolin as complainants. Both Fleming and Brolin were served with a copy of this appeal as required by General Statutes § 4-183 (c), but only Fleming moved to intervene as a defendant.

or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and also includes any judicial office, official, or body or committee thereof but only with respect to its or their administrative functions, and for purposes of this subparagraph, "judicial office" includes, but is not limited to, the Division of Public Defender Services;

(B) Any person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law; or

(C) Any "implementing agency," as defined in section 32-222.

The commission concluded that CTHM is not a public agency as that term is defined by §§ 1-200 (1) (A) or 1-200 (1) (C). It then considered whether CTHM is the functional equivalent of a public agency under the standard articulated in *Board of Trustees* v. *Freedom of Information Commission*, 181 Conn. 544, 554, 436 A.2d 266 (1980). The *Board of Trustees* decision identified four factors to be considered: "(1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government." Id. "All relevant factors are to be considered cumulatively, with no single factor being essential or conclusive." *Connecticut Humane Society* v. *Freedom of Information Commission*, 281 Conn. 757, 761, 591 A.2d 395 (1991).

In applying this standard, the commission found and considered the following relevant

facts. CTHM was created by Susan Martucci, a private individual and a "Blue Star Mother,"[3] as a tax exempt § 501 (c) (3) charitable organization for the purpose of constructing a living trees memorial to honor both "fallen heroes" from Connecticut who served in the wars in Iraq and Afghanistan and all other veterans.

CTHM created its memorial in Veterans Memorial Park, a public park in the city of Middletown, Connecticut (city). The city leased the parcel of land on which the memorial is located to CTHM for the sum of one dollar a year, for a term of thirty years, renewable at CTHM's option for another thirty years. The lease agreement states that the lease is intended as a partnership for the benefit of the public and entitles the city to certain continuing rights in order to meet its continuing obligation to protect and preserve the premises as a public asset.

The commission found that the design of the memorial was subject to approval by the city. The lease required the city's approval of the tree selection and required wetlands commission and planning and zoning approval. The lease required CTHM to move earth to dig out a water feature area and to build up other areas for a path and for the trees. The lease required CTHM to begin the earth work on April 15, 2014, weather permitting, and to install the main path, hero's plaques and trees within two years after the earth work was completed.

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[3] The commission took administrative notice of the website of The Blue Star Mothers of America, Inc., which states that it is a non-partisan, non-political, non-sectarian organization of mothers, stepmothers, grandmothers, foster mothers, and female legal guardians who have children serving in the military, guard or reserves, or children who are veterans. Martucci attested that she founded CTHM in 2011 after her daughter's safe return from combat in Iraq.

The city retained the right to enter and inspect the premises and required CTHM to keep the premises in a neat and clutter free condition at all times and to remove equipment and materials when requested by the city. The lease provided that CTHM could not assign the lease or sublet the premises. It further provided that all permanent plantings will belong to the city at the end of the lease. The lease required CTHM to maintain a fund to cover the routine annual maintenance of the tree and memorial elements and specified the amount to be maintained in the fund for each year of the lease. It also required CTHM to provide the funding, materials, and in-kind donations for the installation and routine maintenance of the memorial trees, plaques, flowers, monuments, and other memorial elements in the project. The city agreed to install and maintain, at no cost to CTHM, a water line to the water feature and an electrical system to the ceremonial plaza connecting the city's utilities in the park. The city also agreed to provide, at no cost to CTHM, upgrades to park roads and parking areas at the park, including the area around the memorial site. The city also agreed to install and maintain storm drains as needed in and around the memorial site and to maintain the grass areas in and around the memorial site at no cost to CTHM.

The commission found that the majority of the remaining site work was performed by volunteers and that CTHM receives cash donations from private individuals and businesses. CTHM also applied and received funds for construction of the memorial from the state's Department of Energy and Environmental Protection (DEEP) under a "grant-in-aid, on a

reimbursement basis," up to a maximum of $500,000. As of December, 2016, CTHM had received approximately $500,000 pursuant to the grant.

After finding the foregoing facts, the commission further took administrative notice of the facts that most municipal governments in Connecticut have a parks department responsible for maintaining local public parks; parks on state property are maintained by the state under the auspices of DEEP; and the National Parks Service establishes and maintains national parks, monuments, battlefields, military parks, historical parts, historical sites, seashores, rivers and trails in every state and in the federal territories. From these administratively noticed facts, the commission concluded that "establishing and maintaining parks is a governmental function," and that the first factor of the *Board of Trustees* functional equivalence test was therefore satisfied.

As to the remaining factors set out in *Board of Trustees*, the commission concluded that CTHM received significant funding from the government, in the forms of cash from DEEP and in-kind contributions from the city, estimated by the complainants to be approximately 50 percent of CTHM's funding; the level of governmental involvement and regulation in CTHM is substantial; and CTHM was not created by the government. Taking all four factors into consideration, the commission concluded that CTHM is the functional equivalent of a public agency within the meaning of General Statutes § 1-200 (1) (B).

The commission further concluded that the requested records are public records. As ordered by the hearing officer, CTHM submitted certain financial records for in camera review.

The records included lists of in-kind contributions, Schedule O of CTHM's tax returns, balance sheets, checking reconciliations, PayPal transaction details, cash flow statements, and records of deposits and withdrawals. Although CTHM asserted that the records were exempt under General Statutes §§ 1-210 (b) (5) and 1-210 (b) (10), the commission concluded that CTHM had failed to offer sufficient evidence to support the claimed exemptions. The commission found that CTHM violated General Statutes §§ 1-210 (a) and 1-212 (a) by withholding those records from the complainants. The commission ordered CTHM to provide a copy of the in camera records to the complainants, except that, with the complainants' consent, CTHM could redact the names of individuals identified in the records of PayPal transactions. CTHM filed a timely appeal.

In its appeal, CTHM challenges only the commission's conclusion that CTHM is the functional equivalent of a public agency and therefore subject to the Freedom of Information Act. It does not challenge specific findings of fact, but argues that the commission's conclusion of law is not supported by those findings. It also argues that the commission failed to consider other extensive evidence in the record.

Complainant Fleming moved for and was granted permission to intervene in this appeal. In his appellate brief and at oral argument, Fleming made a number of claims that are not supported by the findings of the commission or the record of the administrative proceeding. The court has considered all of Fleming's arguments and concludes that, to the extent that they rely on alleged facts not found by the commission or claims outside the administrative record, those

arguments are not properly before the court.

For the reasons set forth below, the court agrees that the commission's findings of fact do not support its conclusion that CTHM is the functional equivalent of a public agency. The commission's conclusion is also clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

APPLICABLE LAW

This administrative appeal is reviewed pursuant to General Statutes § 4-183 of the Uniform Administrative Procedure Act.[4] Under § 4-183, the appeal is confined to the record, and "it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*,

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[4] General Statutes § 4-183 (i) provides in relevant part: "The appeal shall be conducted by the court without a jury and shall be confined to the record."

General Statutes § 4-183 (j) establishes the scope of review, providing in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

310 Conn. 276, 281, 77 A.3d 121 (2013).

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes, "[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

The commission's determination of whether a private entity is a "public agency" for purposes of the Freedom of Information Act requires an interpretation of General Statutes § 1-200, and that determination is a matter of law. See *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, 47 Conn. App. 466, 471, 704 A.2d 827 (1998). "The interpretation of statutes presents a question of law. . . . Although the factual and discretionary determinations of administrative agencies are to be given considerable weight by the courts . . . it is for the courts, and not for administrative agencies, to expound and apply governing principles of law." (Citations omitted; internal quotation marks omitted.) *Connecticut Humane Society* v. *Freedom of Information Commission*, 218 Conn. 757, 761-62, 591 A.2d 395 (1991).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes

§ 1–2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission,* 301 Conn. 323, 338, 21 A.3d 737 (2011).

The Supreme Court first considered whether the term "public agency" as used in the Freedom of Information Act could be construed to include a private entity in a case involving Woodstock Academy, a state chartered private school that served the secondary school students in the town of Woodstock pursuant to a statute.[5] Drawing upon federal decisions construing the

[5] The legislature established Woodstock Academy, located in the town of Woodstock, by special corporate charter in 1802. As amended in 1933, the charter provides that the academy's sole purpose is to operate a school for the town's and vicinity's inhabitants. Woodstock does not maintain a public high school. General Statutes § 10-33 requires any local board of education that does not maintain a secondary school to designate a school approved by the state board of education as the secondary school for the town's students and to pay their tuition to the designated school. *Board of Trustees* v. *Freedom of Information Commission*, supra, 181 Conn. 546-47. Woodstock Academy was required by § 10-33 and its own charter to provide educational services for Woodstock's secondary school students.

federal Freedom of Information Act, our Supreme Court articulated the functional equivalency test quoted in the commission's final decision. The test considers: "(1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government." Id., 554. The court recognized, as federal courts had stated, that "[a]ny general definition [of any agency] can be of only limited utility to a court confronted with one of the myriad arrangements for getting the business of government done. . . . The unavoidable fact is that each new arrangement must be examined anew and in its own context." Id., 554, quoting *Washington Research Project, Inc.* v. *Department of Health, Education & Welfare,* 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963, 95 S. Ct. 1951, 44 L. Ed. 2d 450 (1975).

Subsequent decisions have developed the contours of the functional equivalence test. As to the first factor – whether an entity performs a governmental function – courts have concluded that merely "[p]erforming a government service pursuant to contract does not make an entity a public agency subject to the act." *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 474-75. Nor is the first factor satisfied if the private entity is not imbued with some governmental authority. "Courts have held that entities that are the functional equivalent of a public agency have the power to govern or to regulate or to make decisions [affecting government]." Id., 475. As to the second factor – the level of government funding – courts have held that the amount of government money an entity

receives is "not solely determinative of whether the entity is the functional equivalent of government." Id., 475. If the government funds received are consideration for providing services pursuant to a contract, the second factor in the functional equivalence test is not satisfied. Id., 476. The third factor – the extent of government involvement or regulation – is not satisfied if the entity is merely subject to professional standards or governmental audits, in the absence of day-to-day governmental involvement in the entity's ongoing activities. See id., 478.

"A case by case application of the factors . . . is best suited to ensure that the general rule of disclosure underlying this state's [Freedom of Information Act] is not undermined by nominal appellations which obscure functional realities." *Board of Trustees* v. *Freedom of Information Commission*, supra, 555-56. "All relevant factors are to be considered cumulatively, with no single factor being essential or conclusive." (Internal quotation marks omitted.) *Connecticut Humane Society* v. *Freedom of Information Commission*, supra, 218 Conn. 761.

DISCUSSION

The first prong of the functional equivalence test is whether the private entity in question performs a governmental function. "Traditionally, state and local governments have provided fire prevention, police protection, sanitation, public health, and parks and recreation in discharging their dual functions of administering the public law and furnishing public services." (Internal quotation marks omitted.) *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 474. Before 2001, the definition of

"public agency" in § 1-200 of the Freedom of Information Act did not include a reference to entities that are the "functional equivalent" of a public agency, nor did the act include a definition of "governmental function."[6] Until 2001, the functional equivalence doctrine had evolved in judicial decisions construing § 1-200 (previously codified as § 1-18a).

In 2001, the legislature enacted Public Acts 2001, No. 01-169 (P.A. 01-169). This public act codified the functional equivalence test in § 1-200 (1) (B), added a definition of "governmental function" in § 1-200 (11), and added a new provision, § 1-218, that governs certain large public contracts. General Statutes § 1-200 (11) defines "governmental function" to mean "the administration or management of a program of a public agency, which program has been authorized by law to be administered or managed by a person, where (A) the person receives funding from the public agency for administering or managing the program, (B) the public agency is involved in or regulates to a significant extent such person's administration or management of the program, whether or not such involvement or regulation is direct, pervasive, continuous or day-to-day, and (C) the person participates in the formulation of governmental policies or decisions in connection with the administration or management of the program and

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[6] In 1980, when the Supreme Court first considered whether a private entity could be deemed to be a public agency, General Statutes § 1-18a (a) defined "public agency" for purposes of the Freedom of Information Act as "any executive, administrative or legislative office of the state . . . and any state or town agency, any department, institution, bureau, board, commission or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, and also includes any judicial office, official or body but only in respect to its or their administrative functions." *Board of Trustees* v. *Freedom of Information Commission*, supra, 181 Conn. 549, quoting § 1-18a (a).

such policies or decisions bind the public agency. 'Governmental function' shall not include the mere provision of goods or services to a public agency without the delegated responsibility to administer or manage a program of a public agency." General Statutes § 1-218, in turn, governs "[e]ach contract in excess of two million five hundred thousand dollars . . . for the performance of a governmental function."[7]

In this case, the commission concluded that CTHM performed a governmental function because "establishing and maintaining parks is a governmental function." CTHM argues that the commission erred because it applied its own definition of "governmental function" rather than the definition provided in § 1-200 (11). The commission argues, in response, that § 1-200 (11) does not apply to the functional equivalence test because the introductory language of § 1-200 provides: "As used in this chapter, the following words and phrases shall have the following meanings . . . ." The commission contends that the phrase "as used in this chapter" limits the use of § 1-200 (11), so that it applies only when the term "governmental function" is used in § 1-218. The commission argues that the definition in § 1-200 (11) cannot be used to limit the

[7] General Statutes § 1-218 provides: "Each contract in excess of two million five hundred thousand dollars between a public agency and a person for the performance of a governmental function shall (1) provide that the public agency is entitled to receive a copy of records and files related to the performance of the governmental function, and (2) indicate that such records and files are subject to the Freedom of Information Act and may be disclosed by the public agency pursuant to the Freedom of Information Act. No request to inspect or copy such records or files shall be valid unless the request is made to the public agency in accordance with the Freedom of Information Act. Any complaint by a person who is denied the right to inspect or copy such records or files shall be brought to the Freedom of Information Commission in accordance with the provisions of sections 1-205 and 1-206."

term "governmental function" in the functional equivalence test developed by the courts. CTHM responds that both the commission and the Appellate Court applied the definition in § 1-200 (11) to the "governmental function" prong of the functional equivalence test in *Fromer* v. *Freedom of Information Commission*, 90 Conn App. 101, 105-06, 875 A.2d 590 (2005), a case that did *not* involve a contract within the scope of § 1-218.

In *Fromer*, the requester sought digital copies of PowerPoint presentations given by various instructors in the University of Connecticut extension program for master gardeners. The requester contended that the instructors were public agencies within the meaning of § 1-200 (1). The commission found that the instructors did not "administer or manage" the extension program, but "merely provide[d] a service to the respondent university without the delegated responsibility to administer or manage the program of the respondent university." *Fromer* v. *Adams*, Freedom of Information Commission Docket No. #FIC 2002-244, paragraphs 16-17. The commission then found that the instructors "do not constitute public agencies or the equivalent thereof, within the meaning of § 1-200 (1) . . . because they do not perform a 'government function' within the meaning of § 1-200 (11) . . . ." Id., paragraph 19. On appeal, the Appellate Court affirmed. *Fromer* v. *Freedom of Information Commission*, supra, 90 Conn. App. 105-06.

Whether the definition of "governmental function" in § 1-200 (11) applies only to the use of that term in § 1-218, as the commission now contends, or whether it also applies to the

judicially developed functional equivalence test codified in § 1-200 (1) (B), as CTHM contends, is a question that has not previously been addressed. In *Fromer,* the commission and the court used the § 1-200 (11) definition without analysis of its history or consideration of the limiting phrase "as used in this chapter." The text of § 1-200 (11) is not conclusive. The legislative history provides some support for the commission's position, but because several different drafts of the 2001 amendment were considered, the legislative history must be reviewed with caution; some remarks concerned provisions that were eventually deleted or substantially reframed.[8]

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[8] Public Acts 2001, No. 01-169 was enacted in response to *Envirotest Systems Corp.* v. *Freedom of Information Commission,* 59 Conn. App. 753, 757 A.2d 1201 (2000). In *Envirotest,* the court concluded that the plaintiff was not the functional equivalent of a public agency despite its $25 million contract to administer the state's automobile emissions program. The court held that the corporation was merely providing services pursuant to a contract, without any statutory obligation to do so, and the money paid to it was consideration for the services it provided. Id., 758-60.

In response, Raised Bill No. 6530 was proposed to "set up what amounted to a parallel FOI act to deal with these privatized functions." 44 H.R. Proc., Pt. 9, 2001 Sess., p. 2930. Finding that approach unsatisfactory, legislators instead developed "a narrowly drawn provision designed to get at those few contracts like Envirotest . . . ." 44 H.R. Proc., Pt. 9, 2001 Sess., p. 2931. Raised Bill No. 6530 was merged into House Bill No. 6636. Several amendments of House Bill No. 6636 were then proposed and discussed at length. On May 17, 2001, the House debated House Amendment A, LCO No. 6087; see 44 H.R. Proc., Pt. 9, 2001 Sess., pp. 2932-2967. The bill's proponent then withdrew House "A" and offered House Amendment B, LCO 7010. House "B" limited the scope to entities that contracted with state agencies. See 44 H.R. Proc., Pt. 10, 2001 Sess., pp. 3112-3134. The vote was postponed. On May 23, 2001, the House adopted the bill as amended by House Amendment C, LCO 7402, which substantially recast the bill. See 44 H.R. Proc., Pt. 11, pp. 3649-3684. The Senate took up the bill on June 4, 2001, and adopted a different version, set forth in Senate Amendment A, LCO 8578. 44 Sen. Proc., Pt. 11, 2001 Sess., pp. 3264-3284. The Senate's version differed in several ways from the version passed by the House; it engendered considerable debate when it was taken up by the House on June 5, 2001. See 44 H.R. Proc., Pt. 20, 2001 Sess., pp. 6548-6608. The Senate's version ultimately became P.A. 01-169.

In a general sense, P.A. 01-169 was intended to ensure that the records and files of private contractors holding contracts to take over the administration of a government program were available to the contracting public agency and, through the agency, to the public. But to analyze legislative intent with regard to any specific provision of P.A. 01-169, careful exegesis is required to ensure that any cited comments are considered in light of the draft then under consideration.

However interesting the question is, it need not be answered in this case. If, as the plaintiff contends, §1-200 (11) applies to an analysis of "governmental function" in the functional equivalence test, it is clear that CTHM does not perform such a governmental function, and the commission does not claim otherwise. But if, as the commission contends, the commission correctly considered the term "governmental function" as it had previously been used in the functional equivalence line of cases, the commission nevertheless clearly erred in concluding that CTHM is the functional equivalent of a public agency.

In applying the first prong of the functional equivalence test, the commission found that "establishing and maintaining parks" is a governmental function, but it did not expressly find that CTHM established and maintained a park. To the extent that such a finding may be implied in the commission's decision, the finding is not supported by substantial evidence in the record. To the contrary, substantial evidence in the record establishes that, to the extent that CTHM's living trees memorial can be considered a governmental function, it was installed in the city's park pursuant to contract, and CTHM was under no statutory obligation to place it there. Moreover, the record is devoid of evidence that CTHM has any power to govern or to regulate or to make decisions affecting government.

The evidence principally relied upon by the commission for the first three prongs of the functional equivalence test is the lease between the city and CTHM. The commission misapplied the functional equivalence test largely because it misconstrued the lease, the terms of which will

be discussed in more detail below. It overlooked, moreover, other substantial documentary and testimonial evidence that provides the context for the lease. The court will briefly summarize that evidence before turning to a consideration of the lease.

As the record establishes, CTHM is an organization composed of private volunteers. It has no paid staff. Its board members serve without compensation. In addition to its president, Martucci, who is the mother of a veteran, its board members include Gold Star parents whose son was posthumously awarded a Bronze Star for heroism, veterans, and other citizens. It receives cash donations and in-kind donations of goods and services to carry out its charitable purpose.

When CTHM was incorporated in 2011, Martucci and CTHM's other board members had a vision for a living trees memorial but no specific location in mind. They approached about two dozen towns and cities in Connecticut, several of which expressed interest. They explored various locations and met with town councils in various towns.

In 2012, CTHM chose Middletown's Veterans Memorial Park as the site of its memorial because the city was enthusiastic about the project and offered favorable lease terms. A landscape architect volunteered his time to help CTHM identify and secure a location for the memorial and to help obtain permits needed for the memorial. The CTHM memorial would occupy a relatively small area in a large park.

Between April and November, 2013, while CTHM's planning for the living trees memorial was in process, a committee appointed by the city held public hearings and worked

with a design firm to develop a master plan for the overall renovation of Veterans Memorial Park, to include CTHM's memorial, a military museum proposed by another private organization, a swimming pool, and other picnic and recreational facilities. The committee's recommendations were approved in November, 2013, with the addition of a plan for a dog park within Veterans Memorial Park. The committee was dissolved after its report was approved.

In January 2014, more than two years after CTHM was founded, it entered into a lease agreement with the city for a parcel of land in Veterans Memorial Park. It began earthwork for the memorial later in 2014, using volunteer labor and donated equipment. CTHM also applied for and was awarded a grant of up to $500,000 from DEEP, to be disbursed on a reimbursement basis, for the second phase of construction. That phase included completing the site work, excavating a pond area, purchasing materials for and installing walkways,[9] contracting for sixty-five etched granite plaques, purchasing and installing sixty-five flowering trees to be planted corresponding to the granite plaques, purchasing and installing amenities such as granite benches, flagpoles, lighting, and two feature statues, installing siltation controls, and landscaping. The grant also included the required surveying, design, engineering, architectural, and landscaping services. CTHM submitted receipts to the department as work was done. By December, 2016, CTHM had received approximately $500,000 pursuant to the grant.

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[9] Although most of the work was done by volunteer labor, a construction firm owned by intervenor Fleming was engaged to install pavers. A dispute arose between Fleming and CTHM, which went to arbitration in accordance with their agreement.

The lease on which the commission relies was negotiated between the city as lessor and CTHM as lessee. It recited that the parties covenanted and agreed "for the consideration hereinafter mentioned." Section 1 of the recitals stated that the lessor leased to the lessee a certain parcel of land in Veterans Memorial Park, described as the premises, for the sole purpose of constructing a living trees memorial as shown on the master plan map. It stipulated that the premises are owned by the lessor, that the memorial would be funded and built by the lessee, and the lessor and lessee would have "collaborative use" of the premises. Section 2 of the recitals, on which the commission heavily relied in its decision, provided: "LESSEE hereby acknowledges that the premises are and will continue to be a public park, and as such, this lease, which is intended as a partnership for the benefit of the public, entitles the LESSOR to certain continuing rights in order to meet its continuing obligation to protect and preserve the PREMISES as a public asset." Section 3 of the recitals sets the rent at one dollar per year and the term of the lease at thirty years. It also gave the lessor certain rights to cancel the lease and provided for reversion of the premises to the lessor if the lessee ceased to exist. Section 4 of the recitals gave the lessee the option of extending the lease for a second period of thirty years, and section 5 provided that the lessee would vacate the premises at the end of the lease.

The lease then set forth the lessee's obligations. Among other things, CTHM as lessee agreed to the following:

- to use the premises only for a not for profit living trees memorial and not to assign the lease or sublet the premises;

- to provide the funding, materials, and in-kind donation for the installation and routine maintenance of memorial trees, plaques, flowers, monuments, and other memorial elements;
- to provide basic plans and general information required for the lessor's permits and approvals;
- to install the main path, hero's plaques, and trees within two years of completion of the initial earthwork;
- to dig out the water feature area and build up other areas for paths and tree planting;
- to install the remaining portions of the project, including an entrance plaza, ceremonial plaza, gardens, memorials, and statues as funding and material were secured;
- to secure an annual fund balance to cover routine maintenance of the trees and memorial elements, with a minimum balance of $5,000 in years 1-3, $10,000 in years 3-6; $15,000 in years 6-9, and $20,000 for years 10 through the end of the lease;
- to notify lessor's officials of upcoming ceremonial events;
- to indemnify the lessor for any damage caused by the lessee or the lessee's invitees;
- to obtain general liability and workers compensation insurance, and to require all contractors and subcontractors to obtain insurance;
- to keep the premises in a neat and clutter free condition;
- to use the premises in conformity with existing laws, and
- to leave the premises, at the end of the lease, in a state to avoid any harm to the premises.

In addition, CTHM as lessee acknowledged that the lease was subject to various appropriations and approvals, including approvals for the earthwork, wetlands approval, planning and zoning approval, approval of the tree selection by the appropriate commission, and approval, if needed, for the individual plaques to be erected. The lease specified that "[t]he costs for

LESSEE's goods/services shall be funded by the LESSEE unless otherwise expressly provided herein."

The lease specified that the lessor did not have any obligations not stated in the lease. The city as lessor agreed to the following obligations:

- to provide and maintain a water line to the water feature and electrical service connecting the ceremonial plaza to the lessor's utilities in the park;
- to upgrade park roads and parking areas as part of the "proposed overall park improvements";
- to provide and pay for water and electricity at the memorial site;
- to install and maintain storm drainage systems as part of the "proposed overall park improvements";
- to install and maintain a water feature inside the memorial site area; and
- to maintain the grass areas in and around the memorial site.

Based on the terms of the lease, the commission found that the first three prongs of the functional equivalence test were satisfied because (1) the establishment and maintenance of a park was a governmental function; (2) CTHM received significant funding from the government, in the form of cash from the state and "in-kind contributions" from the city, including the dollar annual rent, the water and electricity provided to the site, and the upgrades to the park roads and storm drainage; and (3) the level of government involvement and regulation of CTHM was substantial. The commission acknowledged that the fourth prong – whether the entity was created by government – was not satisfied.

Based on the substantial evidence in the record, the commission could not reasonably

conclude that CTHM "established and maintained a park." Veterans Memorial Park is a city-owned park that had existed long enough to be in need of upgrades and renovation, and CTHM did not "establish" it. The lease made it clear that maintenance of the park was the city's responsibility. Indeed, in the lease recitals, both parties acknowledged the city's "continuing obligation to protect and preserve the premises as a public asset."

Even if the creation of the memorial could be considered the establishment of a "park within a park," or if the establishment of a "war memorial" is itself a governmental function, as the commission suggested at oral argument, it would not compel a conclusion that CTHM is the functional equivalent of a public agency. In several cases, our courts have concluded that the performance of a governmental function pursuant to contract, with no statutory obligation to perform such a function, does not make the contracting entity the functional equivalent of a public agency. See *Connecticut Humane Society* v. *Freedom of Information Commission*, supra, 218 Conn. 764-66 (society that performed governmental functions, including law enforcement and protection of animals, was not functional equivalent of a public agency because it was not required to take any activities authorized by statute); *Envirotest Systems Corp.* v. *Freedom of Information Commission,* 59 Conn. App. 753, 758-59, 757 A.2d 1202 (2000) (corporation that performed governmental function of administering automobile emissions program pursuant to contract, without any other obligation to do so, was not functional equivalent of public agency); *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*,

supra, 47 Conn. App. 474-75 (domestic violence services organization performed governmental function pursuant to contract but was not required to perform such services in absence of contract). "Performing a government service pursuant to a contract does not make an entity a public agency subject to the act." Id. Even if CTHM could be deemed to be performing a governmental function by creating a memorial to veterans, it had no statutory obligation to do so.

The commission's decision did not address whether CTHM had any power to govern, to regulate, or to make decisions affecting government, as required by the first prong of the "governmental function" analysis in *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 475. There is no evidence in the record suggesting that CTHM had any such power, and the commission made no finding that it did.

The second prong of the functional equivalence test considers the level of government funding. Where goods or services are provided pursuant to a contract, however, "[t]he amount of money the plaintiff receives reflects the amount of business it does with the government." *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 59 Conn. App. 475-76; see also *Lombardo* v. *Handler*, 397 F. Supp. 792, 796 (D.D.C. 1975), affirmed, 546 F.2d 1043 (D.C. Cir. 1976), cert. denied, 431 U.S. 932, 97 S. Ct. 2639, 53 L. Ed. 2d248 (1977). The commission concluded that CTHM received substantial government funding both because it deemed the city's obligations under the lease to be "in-kind donations"

and because of the state's $500,000 grant.

The commission clearly erred in considering the nominal rent or the city's obligations under the lease to be "in-kind donations" rather than consideration for goods or services provided by CTHM. The lease itself expressly states that the parties' mutual obligations were made "for the consideration hereinafter mentioned." The consideration that the city received included the design, installation, and maintenance of valuable permanent features, including but not limited to trees, memorial plaques, walkways, a water feature, gardens, monuments, and statues. Although the rent was only a dollar per year, the lease was nonexclusive; the premises continued to be a public park, with public access unlimited by the terms of the lease. The consideration that CTHM received under the lease was the use of the premises for a living trees memorial, the supply of water and electric utilities to the site, and upgraded road, parking areas, and drainage systems in areas outside or below the leased premises, and grass mowing on the premises. The lease expressly stated that the upgrades to roads, parking areas, and the drainage system were part of the city's "proposed overall park improvements." The city's obligation to mow the grass was consistent with the city's acknowledged duty to maintain the park as a "public asset." In short, the lease, like any lease, imposed certain obligations on the landlord and certain obligations on the tenant. The city's obligations as landlord were not "in-kind donations," but were consideration for the valuable memorial contributed by CTHM.

The commission also concluded that the government funding prong of the functional

equivalence test was met by the $500,000 DEEP grant. It argued that a grant could not be deemed to be consideration for goods or services. To the contrary, grants have clearly been treated as the equivalent of contracts in other cases examining the functional equivalence of a private entity to a public agency. Several courts have held that a private entity's receipt of a governmental grant does not make that entity the functional equivalent of a government agency. See *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 476 ("Although the plaintiff receives a significant amount of funding from various government sources, the funds are consideration for providing certain services . . . as set forth in *grants* and contracts" [emphasis added]); *Forsham* v. *Harris*, 445 U.S. 169, 179-181, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980) (federal grants generally do not "convert the acts of the private recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision"); *Irwin Memorial Blood Bank of San Francisco Medical Society v. American National Red Cross*, 640 F.2d 1051, 1056 (9th Cir. 1981) (receipt of federal money from government contracts and specific purpose grants did not make Red Cross a public agency).

Like a contract, a governmental grant of money may require specific activity by the grantee. The grant at issue in this case was captioned "Personal Service Agreement / Grant / Contract," contained a "contract period" of five years from its execution, and referred to CTHM throughout as "Contractor." It contained a "complete description of service" required of the

contractor and a "scope of work" provision that required CTHM to perform certain specific tasks. It described the general purpose as the construction of a venue "that will serve primarily as a memorial to Connecticut military men and women who served and died in Iraq or Afghanistan." The grant did not fully fund the memorial; it was undisputed, and the commission found, that CTHM solicited and received cash donations from private individuals and businesses and that the majority of the site work was done by volunteers. The commission has not articulated any reason that goods and services provided in accordance with the requirements of a specific purpose grant should not be deemed consideration for that grant. In this case, the state obtained, in exchange for its grant, a living trees memorial that honors military men and women from the state of Connecticut.

The commission accepted the complainants' estimate that approximately 50 percent of CTHM's total funding came from governmental sources. The amount of the grant was highly significant to the hearing officer. At the commission hearing where the proposed decision was considered, she addressed the issue of government funding as follows: "I think $500,000 is lot of money. That's a lot of state money to take and then say, 'Oh, well. We're not a public agency.' That's . . . the taxpayers' money. I think that the taxpayers have a right to know what happened with that money."

The *amount* of governmental funding, however, is not dispositive of the functional equivalence test. In *Envirotest,* the court concluded that the plaintiff corporation was not the

functional equivalent of a public agency even though it received nearly $25 million a year pursuant to its contract for conducting automobile emissions tests for the state. See *Envirotest Systems Corp.* v. *Freedom of Information Commission*, supra, 59 Conn. App. 759. In *Domestic Violence Services*, the trial court accepted the commission's finding that governmental funding accounted for approximately 66 percent of the service provider's budget. See *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, Superior Court, Judicial District of New Haven, Docket No. 14892 (January 20, 1998, Booth, J.), 14 Conn. L. Rptr. 343. The Appellate Court acknowledged this finding but concluded that "[t]he amount of money an entity receives from government . . . is not solely determinative of whether the entity is the functional equivalent of government. . . . The amount of government money the plaintiff receives reflects the amount of business it does with the government. . . . Although the plaintiff receives a significant amount of funding from various government sources, the funds are consideration for providing certain services to victims of family violence as set forth in grants and contracts. Therefore, the second prong is not met." *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 475-76. Here, the grant funds were consideration for the goods and services CTHM provided in designing and building a memorial to Connecticut's fallen soldiers; the city's "in-kind donations" were not "donations" but consideration for the value of CTHM's memorial. Consequently, the second prong of the functional equivalence test is not met here.

The commission's concern about accountability for taxpayer funds in the absence of a finding of functional equivalence is misplaced. When the legislature sought to ensure accountability after the *Envirotest* decision, it did not do so by making all government contractors the functional equivalent of public agencies; it did so by requiring covered contractors (those performing contracts in excess of $2.5 million for the performance of a governmental function) to provide records related to the governmental function to the public agency involved. See General Statutes § 1-218. Even though CTHM is not subject to § 1-218 because its grant was far less than $2.5 million, it is nevertheless accountable to the public agencies with which it contracts. Its communications with the city and with DEEP, and any documents it provides to the city or to DEEP, are public records, subject to disclosure through requests to the public agency.[10]

The third prong of the functional equivalence test concerns the extent of governmental involvement and regulation. The commission concluded that the third prong was met because the lease was intended as a "partnership" between CTHM and the city for the benefit of the public. It cited the city's various rights under the lease and CTHM's obligations under the lease

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[10] General Statutes § 1-200 (5) defines "public records" in relevant part as "any recorded data or information relating to the conduct of the government's business . . . received . . . by a public agency . . . ." General Statutes § 1-210 (a) provides in relevant part: "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. . . ."

as evidence supporting a conclusion that the third prong was met. That conclusion is not supported by the law or by the evidence.

The governmental involvement or regulation prong of the functional equivalence test is not satisfied unless the private entity operates under "direct, pervasive or continuous regulatory control." *Hallas* v. *Freedom of Information Commission*, 18 Conn. App. 291, 295, 557 A.2d 568 (1989), citing *Public Citizens Health Research Group* v. *Department of Health, Education & Welfare,* 449 F. Supp. 937, 941 (D.D.C. 1978), and *Forsham* v. *Harris*, supra, 445 U.S. 170-80. In *Forsham*, the United States Supreme Court held that federal grants do not "serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision." The court noted that "[b]efore characterizing an entity as 'federal' for some purpose, this Court has required a threshold showing of substantial federal supervision of the private activities, and not just the exercise of regulatory authority necessary to assure compliance with the goals of the federal grant." *Forsham* v. *Harris*, supra, 445 U.S. 180 n.11.

In this case, neither the provisions of the lease nor the requirements of the grant involve more supervision than is necessary to assure compliance with the terms of the agreement. CTHM presented affidavits and testimony from its president, Susan Martucci; from Roger Beliveau, a city employee who joined CTHM's board in 2015, and from Joseph Samolis, the mayor's chief of staff and the acting director of planning, conservation, and development for the

city. All of these witnesses attested that the city was not involved with day-to-day supervision of CTHM's activities. The lease gives the city certain rights to inspect the premises and requires CTHM to get approvals, as needed, from planning and zoning, from inland wetlands, and other relevant commissions as needed for its activities, but such general requirements do not prove extensive, detailed, and virtually day-to-day supervision.

Municipalities in Connecticut have been given statutory authority to regulate such matters as zoning (General Statutes § 8-1 et seq.), inland wetlands (General Statutes § 22a-42), and municipal forests and shade trees (General Statutes § 7-131 (d)). In this case, the commission failed to consider that the lease provisions relating to approvals for the construction of the memorial simply acknowledged the city's general responsibilities for oversight of any construction project in the city. The lease notably did *not* give the city the right to appoint any members of CTHM's board[11] or to concern itself with CTHM's other activities, such as fundraising. Moreover, the elements that did require city approval related to the memorial's construction, which was essentially completed in the first two to three years of the lease. For the

[11] In the contested case hearing, Fleming contended that the city appointed Beliveau to CTHM's board to monitor its activities on behalf of the city. All witnesses with direct knowledge of Beliveau's involvement with CTHM testified to the contrary. Joseph Samolis, the mayor's chief of staff who was involved in the negotiations with CTHM, testified that Beliveau was an employee in the city's parking enforcement department and was not involved with CTHM on behalf of the city. Beliveau himself testified that he was a veteran who became aware of CTHM's work and volunteered, on his personal time, to help with CTHM's project. Martucci testified that CTHM invited Beliveau to join the board in 2015 because he had been an active volunteer. Contrary to Fleming's arguments, the commission did *not* find that the city appointed any member of CTHM's board. It relied instead on the terms of the lease for its conclusion concerning the third prong of the functional equivalence test.

balance of the thirty year lease, the city's involvement with CTHM is minimal. As lessor, it has the right to make sure that the memorial elements are kept up and that CTHM generally complies with the terms of its lease. CTHM has the right, as lessee, to the use of the premises for its memorial and to the city's provision of water and electricity. Such contractual rights do not so involve the city with CTHM's operations as to make CTHM the functional equivalent of a public agency.

The commission also relied on a recital in the lease which states that the lease "is intended as a partnership for the benefit of the public." In the context of the lease as a whole, however, the word "partnership" is most reasonably construed to reflect that the city and CTHM share a common purpose of having a living trees memorial constructed in a public park for the benefit of the public. It is not surprising that a charitable organization has the objective of benefitting the public.

With respect to this "partnership," a federal decision is instructive. In *Irwin Memorial Blood Bank of the San Francisco Medical Society* v. *American National Red Cross*, supra, 640 F.2d 1051, the plaintiff contended that the defendant Red Cross was an agency within the meaning of the federal Freedom of Information Act. The court rejected this argument even though the Red Cross received federal grants and was statutorily authorized to occupy certain federally owned buildings. The court observed that the buildings remained the property of the United States, the Red Cross was charged with the maintenance of the buildings and was

required to submit reports about their maintenance to the Department of Defense, and the Red Cross was required to reimburse the Department of Defense for the cost of auditing the reports. Nevertheless, the Red Cross was primarily a volunteer organization and had general supervision of its own affairs. The court concluded that "[t]he Red Cross is undoubtedly a close ally of the United States government, but its operations are not subject to substantial federal control or supervision." Id. As a result, it concluded that the Red Cross was not a federal agency for purposes of the federal Freedom of Information Act.

The same analysis applies here. CTHM was created by private individuals and has been sustained by voluntary donations of money, materials, and labor. Both its president and the city's representative testified that CTHM manages its own affairs. The city and CTHM clearly share a common purpose, which the lease reflects, of providing a memorial to fallen soldiers within the city's existing Veterans Memorial Park. But the fact that CTHM may be a close ally of the city does not make it the functional equivalent of a public agency.

CONCLUSION

In sum, the commission misapplied the functional equivalence test when it concluded that CTHM is the functional equivalent of a public agency based on its lease of municipal property and its receipt of a DEEP grant. The commission's findings and conclusions were affected by errors of law and are clearly erroneous in view of the reliable, probative, and substantial evidence

on the whole record. The plaintiff was prejudiced thereby, and its appeal is accordingly sustained.

Judgment shall enter for the plaintiff.

BY THE COURT,

Sheila A. Huddleston, Judge