ZARELLA, J., concurring in part and dissenting in part. Although I agree with the conclusion of the majority in part I of its opinion that governmental immunity does not shield the defendant, the city of Waterbury, from liability, two reasons compel me to dissent from the majority's conclusion in part II of its opinion that the plaintiff, Edward Considine, offered sufficient evidence to make out a prima facie case of negligence. First, the majority inappropriately affirms the use of an inapplicable building code as evidence of the standard of care owed by the defendant to the plaintiff. Second, even if it assumed that the use of the inapplicable building code as evidence of the standard of care was appropriate, the plaintiff failed to offer any evidence that the defendant had actual or constructive notice of any defect in the premises.

I

I generally agree with the facts set forth in the majority opinion and will not repeat them in this opinion. I disagree, however, with the majority's holding that the state building code is relevant evidence of the standard of care owed by the defendant to the plaintiff. I instead believe that a nonretroactive provision of a building code is not relevant evidence of the standard of care owed to an invitee by the owner of exempted, preexisting premises.

Evidence is relevant if it has "any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1; see also *Jewett* v. *Jewett*, 265 Conn. 669, 679, 830 A.2d 193 (2003) ("[r]elevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue" [internal quotation marks omitted]). In the present case, the defendant owed the plaintiff "a duty . . . to reasonably inspect and maintain the premises in order to render them reasonably safe" and to "warn [the plaintiff] of dangers that [he] could not reasonably [have been] expected to discover." *Morin* v. *Bell Court Condominium Assn., Inc.*, 223 Conn. 323, 327, 612 A.2d 1197 (1992). The primary issue is whether "maintain[ing] the premises in order to render them reasonably safe"; id.; required the defendant to replace the annealed glass of the sidelite with a safer type of glass.

The plaintiff introduced evidence that the state building code forbids the use of annealed glass in entryway sidelites in new construction. A necessary premise for deeming this evidence relevant to the issue of whether the defendant had a duty to replace the glass is that the state building code represents an official declaration

of what is, and what is not, reasonably safe. Cf. *Curtis* v. *District of Columbia*, 363 F.2d 973, 977–78 (D.C. Cir. 1966) (Prettyman, J., dissenting). This premise, however, does not exist in the present case. As the plaintiff's expert, Michael E. Shanok, testified at trial, the state building code sets forth two distinct safety standards, one that is applicable to regulated premises and one that is applicable to exempted premises, such as the premises at issue in this case.[1] By holding that the state building code's prohibition on the use of annealed glass in new construction is relevant evidence of what is, and what is not, "reasonably safe," the majority unwarrantedly cherry-picks the standard that *does not* apply to the defendant's premises to the exclusion of the standard that *does* apply to the defendant's premises. It seems that it is more likely that the drafters of the state building code determined that preexisting uses of annealed glass in entryways were *not* so dangerous as to necessitate remediation and, accordingly, approved those uses of annealed glass by exempting them from regulation.[2] The fact that the state building code prohibits the use of annealed glass in entryway sidelites in new construction does not reflect any definitive judgment as to what is, and what is not, reasonably safe. Evidence of the state building code therefore does not make it more or less probable that the defendant was required to replace the glass to render its premises reasonably safe, and is thus irrelevant.[3]

Moreover, even if the building code's prohibition on the use of annealed glass in an entryway were relevant, any probative value it may have is outweighed by the danger of unfair prejudice or confusion, or of misleading the jury. See Conn. Code Evid. § 4-3 ("[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury"). The admission of evidence of an inapplicable statutory standard of care creates a virtual certainty of jury confusion in light of the nebulous distinction between supposedly permissible use of the statute as evidence of the standard of care and supposedly impermissible use of the statute as evidence of negligence. As Judge Prettyman opined in his dissent in *Curtis* v. *District of Columbia*, supra, 363 F.2d 973, "[o]nce the regulation is in evidence, a jury would almost inevitably give it effect. Indeed I am not quite sure myself what the line is between giving effect to the regulation and considering it as evidence of negligence." Id., 978 (Prettyman, J., dissenting); see also *Ellis* v. *Caprice*, 96 N.J. Super. 539, 553, 233 A.2d 654 (App. Div.) (any probative value of evidence of statute purportedly establishing standard of conduct was outweighed by possibility of prejudice), cert. denied, 50 N.J. 409, 235 A.2d 901 (1967); *Trimarco* v. *Klein*, 56 N.Y.2d 98, 108, 436 N.E.2d 502, 451 N.Y.S.2d 52 (1982) ("it cannot be said that [nonretroactive] statutes, once injected into the adversarial conflict, did not

prejudice the defendants''). This likelihood of confusion underlies Professor Wigmore's opposition to the use of statutory standards in any context other than those involving the rule of negligence per se. 2 J. Wigmore, Evidence (Chadbourn Rev. Ed. 1979) § 461, pp. 606–607. For this additional reason, the trial court's consideration of evidence of the state building code was improper.

Finally, policy considerations militate against the admission of this evidence. The drafters of the state building code expressly exempted certain premises, including the premises at issue in the present case, from regulation. The law, however, requires a person not to do that which is negligent—including, apparently, failing to replace exempted uses of annealed glass in entryway sidelites. See *Curtis* v. *District of Columbia*, supra, 363 F.2d 978 (Prettyman, J., dissenting). Thus, in permitting the state building code to inform a property owner's standard of care, the majority effectively expands the regulatory force of the code far beyond what its drafters intended.[4] The majority makes much of its distinction between using the building code as a substantive standard and using it as evidence of the standard of care. This distinction, however, is cold comfort to the owner of an exempted premises who nonetheless will be required either "to reconstruct and remodel his building to meet changing safety standards" on an ongoing basis or to take his chances with a jury.[5] *Coleman* v. *Hall*, 161 N.W.2d 329, 331 (Iowa 1968); see also *Curtis* v. *District of Columbia*, supra, 977–78 (Prettyman, J., dissenting). The majority's usurpation of the function of the drafters of the state building code to promulgate rules for the construction and use of buildings is another reason to preclude evidence of an inapplicable building code from informing an exempted property owner's standard of care.

My position is supported by this court's decision in *Dinnan* v. *Jozwiakowski*, 156 Conn. 432, 242 A.2d 747 (1968). The majority states that, in that case, this court "did not reject the trial court's instruction that [an inapplicable] building code could be considered in evaluating expert testimony regarding the standard of care" and that "*Dinnan* precludes a jury instruction that a technically inapplicable building code must be considered as *the* standard of care, or, stated another way, a violation of this building code would not have constituted negligence per se." (Emphasis in original.) These statements, although accurate, are nonetheless misleading because the issues of whether an inapplicable building code may be considered in impeaching expert testimony and whether an inapplicable building code can support a negligence per se instruction were not contested in *Dinnan* and are not contested in the present case. I interpret *Dinnan* to stand for the more pertinent proposition that, although evidence of an inapplicable building code may be used to impeach a

witness, it may not be used for the substantive standards that the code establishes. This *was* the issue that this court decided in *Dinnan*.

In *Dinnan*, a tenant was injured when she fell down the staircase of a building owned by the defendant, Stanislawa Jozwiakowski. Id., 433. The staircase appeared to be in compliance with the local building code. See *Dinnan* v. *Jozwiakowski*, Conn. Supreme Court Records & Briefs, April Term, 1968, Pt. A-479, Record pp. 15, 17. The staircase nevertheless was exempt from the code because it had been constructed prior to the code's enactment. See *Dinnan* v. *Jozwiakowski*, supra, 156 Conn. 436. At trial, Henry J. Falsey, a former local building inspector, testified for the tenant that the staircase was not reasonably safe. *Dinnan* v. *Jozwiakowski*, Conn. Supreme Court Records & Briefs, supra, Appendix to Plaintiff's Brief p. 6a. On cross-examination, the building owner introduced testimony regarding the local building code—which Falsey himself had been "primarily responsible for preparing"—in an apparent attempt to impeach Falsey's testimony that the staircase was not reasonably safe. Id., Appendix to Defendant's Brief p. 4a. The trial court instructed the jury that the testimony regarding the local building code was admitted "for the purpose of testing the soundness of the opinions given by [Falsey]." Id., Record p. 29. The trial court made it clear, however, that no party was claiming "that there [was] any violation of the building code in [the] case because it seem[ed] to be undisputed that the code was enacted sometime after [the] building was erected." Id.

On appeal, the building owner argued that the jury should have been instructed to consider the inapplicable local building code not only for impeachment purposes but also for the standards it established, presumably because the building owner believed that her compliance with the code, at least with respect to the staircase at issue, would support her case. Id., Defendant's Brief pp. 6–7 ("[T]he [c]ode must be considered with respect to the standards of safety it sets up. . . . [T]he jury should have been charged on its consideration of the standards established in the [c]ode."). This court rejected the building owner's argument, however, reasoning that "[t]here was no claim of any violation of the building code since it was enacted after the building was erected. Under the circumstances, the [building owner] certainly ha[d] no ground to complain of the court's charge that the evidence as introduced in this connection was for the purpose of testing the soundness of the opinions given by the experts." (Internal quotation marks omitted.) *Dinnan* v. *Jozwiakowski*, supra, 156 Conn. 436. The rule established in *Dinnan* is both clear and directly pertinent to the present case: Although an inapplicable building code may be used to impeach a witness, it may not be used for the substantive standards it establishes, even when the

proponent seeks to establish that his or her premises are in compliance with the inapplicable code.

II

Even if an inapplicable building code is admissible as evidence of the defendant's standard of care, the plaintiff still failed to meet his burden of demonstrating the defendant's negligence insofar as he failed to offer any evidence that the defendant had notice of any defect in the premises.[6]

A plaintiff bears the burden of proving the allegations in his or her complaint. E.g., *Rivera* v. *Meriden*, 72 Conn. App. 766, 769, 806 A.2d 585 (2002). In the present case, the plaintiff's burden includes making out a prima facie case of the defendant's negligence. A prima facie case of negligence consists of four elements: duty; breach; causation; and injury. E.g., *Jagger* v. *Mohawk Mountain Ski Area, Inc.*, 269 Conn. 672, 687 n.13, 849 A.2d 813 (2004). There can be no breach, however, unless the defendant "had actual knowledge of the defect [in the premises] or . . . [was] chargeable with constructive notice of it, because, had [the defendant] exercised a reasonable inspection of the premises, [it] would have discovered [the defect]." *Pollack* v. *Gampel*, 163 Conn. 462, 468, 313 A.2d 73 (1972).

The majority opinion rests on the premise that the mere presence of annealed glass in the entryway sidelite was an unsafe defect requiring replacement or warning. The plaintiff, however, has failed to demonstrate the defendant's constructive notice that the sidelite was composed of annealed glass insofar as he has failed to offer evidence "from which the jury reasonably could have concluded that a reasonable inspection would have disclosed the [fact that the sidelite was composed of annealed glass]." Id., 470.

Shanok testified—and the majority apparently agrees—that the hazard posed by the use of annealed glass in the sidelite could have been discovered if the defendant had engaged in the process of risk management, "which is simply the inspection of premises to locate hazards and deal with them so that you lessen the possibility of liability or accidents . . . ." The logic of this position under the circumstances of the present case is untenable. Annealed glass is indistinguishable from safety glass in appearance, and the plaintiff offered no evidence that the pane through which he fell was etched or otherwise marked as annealed glass.[7] See, e.g., *Becker* v. *IRM Corp.*, 38 Cal. 3d 454, 469, 698 P.2d 116, 213 Cal. Rptr. 213 (1985) ("the undisputed affidavits are to the effect that there was 'no visible difference between the tempered and untempered glass in terms of visible appearance' "); *Trimarco* v. *Klein*, supra, 56 N.Y.2d 102 ("the [glass] door [of a bathtub that shattered], which turned out to have been made of ordinary glass variously estimated as one sixteenth to one quar-

ter of an inch in thickness, *concededly would have presented no different appearance to the plaintiff . . . than did tempered safety glass*" [emphasis added]). Indeed, the plaintiff himself testified that "[i]t didn't appear that there was anything wrong with the glass" of the sidelite before he fell into it. Moreover, Joseph A. Geary, the defendant's deputy director of public works, testified that the documents and records available to him did not indicate what type of glass was used in the entryway sidelite.[8] In the absence of any indication of the type of glass used in the pane, an inspector would have had to shatter the pane in order to determine whether it was composed of annealed glass. This simply is not a reasonable inspection to require a property owner to perform. See *Fitzgerald* v. *Cestari*, 569 So. 2d 1258, 1260 (Fla. 1990) ("the dangerous condition, in this case a lack of safety glass [in a sliding door], was not discoverable through a reasonable inspection by the owners"). But cf. *Becker* v. *IRM Corp.*, supra, 469 (reversing judgment in favor of defendant because jury could have found that reasonable visual inspection by defendant would have disclosed that injury causing glass was marked "untempered"). Because the plaintiff has offered no evidence to demonstrate how a reasonable inspection would have put the defendant on notice of the presence of annealed glass on its premises, I must conclude that the plaintiff has failed to meet his burden of proving the allegations contained in his complaint.

I respectfully dissent and would reverse the judgment of the trial court.

[1] The former standard requires owners of regulated premises to refrain from using annealed glass in entryway sidelites whereas the latter standard does not require any particular improvement to exempted premises.

[2] The majority, after reciting the qualifications of the professionals responsible for adopting and administering the state building code, asserts that "the building code reflects the reasoned judgment of numerous professionals with extensive relevant experience that in the interests of safety the use of annealed glass in the entryway of buildings should be prohibited in future construction." Footnote 18 of the majority opinion.

I agree with the majority that those persons responsible for adopting and administering the state building code are experts. The majority, however, fails to appreciate that the building code also reflects the reasoned judgment of numerous professionals with extensive relevant experience that the use of annealed glass in preexisting building entryways is *not so unsafe* as to necessitate remediation.

[3] If anything, evidence of the inapplicable state building code is relevant to show that the defendant did not act unreasonably in failing to replace the entryway's annealed glass.

[4] This rationale is particularly persuasive when an inapplicable building code is the *only* evidence of the standard of care. Although the majority, in stating that "the trial court properly considered the building code and the federal regulations as some evidence of the standard of care," implies that additional evidence of the standard of care will be offered beyond the inapplicable building code, it is unclear whether the majority would *require* evidence of the standard of care in addition to the evidence of the inapplicable building code.

[5] The majority disagrees that its decision "signals that an owner of exempt property will be held negligent for failing to remodel his or her building to conform with otherwise inapplicable building code standards." Footnote 20 of the majority opinion. This, however, is precisely what has happened in the present case as a consequence of the majority's decision.

[6] The plaintiff does not claim that the defendant had actual notice that the sidelite was composed of annealed glass. He only claims that the defendant had constructive notice thereof.

[7] The majority states that "the record contains no evidence to support [my] assertion that a visual inspection cannot distinguish between annealed and toughened glass." Footnote 23 of the majority opinion. The majority, however, fails to appreciate that the record contains no evidence to support the assertion that a visual inspection—or, indeed, any reasonable inspection—*can distinguish* between annealed and toughened glass. In so doing, the majority misplaces the burden of proof. It was incumbent on the plaintiff to demonstrate that reasonable inspection of the defendant's premises would have put the defendant on notice of the presence of annealed glass in the entryway. The plaintiff has not met this burden.

Moreover, even though the standard of review requires us to view the evidence in the light most favorable to sustaining the verdict, drawing reasonable inferences therefrom, it can hardly be said that any reasonable inference can be drawn from Shanok's conclusory opinion testimony, which was not grounded in facts and did not contain any reasons in support of his opinion.

Finally, the majority's assertion that "the record would support an inference that visual inspection would reveal the distinction between [annealed and safety] glass" is disingenuous. Id. Although it is true that Joseph A. Geary, the defendant's deputy director of public works, testified that the glass appeared to be "regular" glass, he also testified that he "[did not] know, you know, the technical version of what type of glass was in that door . . . ." Moreover, Geary testified that the pieces of glass he observed upon arriving at the scene the night of the accident were "smaller pieces of glass" and that the broken glass "appeared to be in smaller pieces than when safety glass would break." Geary testified after Shanok had testified that annealed glass "has a [tendency] to break in large shards," while safety glass "would break into small cubes . . . ." The majority, in attempting to use Geary's testimony to support an inference regarding the type of glass in the entryway, once again cherry-picks isolated fragments of Geary's testimony without regard to the full extent of his testimony.

[8] Geary also testified that the glass had not been broken, repaired or replaced since the clubhouse's construction in 1962.