CITY OF HARTFORD

INTERDEPARTMENTAL MEMORANDUM

OPINION NO. 09-6

TO: Court of Common Council, City of Hartford

FROM: John Rose, Jr., Corporation Counsel JR Jr. 8/6/09

DATE: August 6, 2009

SUBJECT: Request for Legal Opinion Regarding Issues Concerning THE AUTHORITY OF THE CITY COUNCIL TO ISSUE SUBPOENAS

QUESTION PRESENTED

Whether, under State law, the Council has the authority to issue subpoenas to compel the attendance of persons at proceedings or to compel the production of documents.

I. BACKGROUND

A. The New Charter

The Charter of the City, in place since after the election of November 5, 2002, makes provision in two places in Chapter IV, Sec. 3 for the concept of subpoena power.

First, at Ch. IV, Sec. 3(a), the Charter provides concerning removal of elective and other officers and employees, that…

> Such officer or employee shall have the right to be represented by counsel at the hearing, to present testimony personally and through witnesses, to cross-examine witnesses presented in favor of removal, and **to compel the attendance of witnesses by subpoena issued in the name of the council…**

Then at Ch. IV, Sec. 3(d) captioned "Power of investigation" the City's "constitution" provides in material part:

> The council or any committee thereof, when so authorized by the council, shall have the power to investigate the official conduct of any department or agency of the city government or of any officer or employee thereof. For the purpose of conducting any such investigation and hearings… the council or authorized committees thereof may compel the attendance of witnesses and require the production of books and papers. Any person who refuses to obey the subpoena of the council or an authorized committee thereof shall be fined not more than $100 or imprisoned not more then thirty (30) days

or both. The council may appropriate from available funds amounts necessary to cover expenses incurred pursuant to this section.

The only origin indicated in the New Charter for the referenced subpoena powers is "(Election of 11-5-02)."

B. The Old Charter.

The Charter for the City effective November 7, 1967 made the following provisions regarding City Council authority concerning subpoenas:

First, Chapter III, Sec. 16 captioned "Removal of elective officers" reads, in material part:

> The council, by a vote of at least six (6) members may remove any elective officer, including a member of the council **or a member of the board of education**, after notice and hearing... Witnesses whose testimony shall be pertinent to the charge shall be subpoenaed by the council at the request of the defending officer...

Then, at Sec. 17 of Ch. III, the 1967 Charter reads, in material part:

> The council, or any committee thereof when so authorized by the council, shall have the power to investigate the official conduct of any department or agency of the city government or of any officer or employee thereof. For the purpose of conducting any such investigation and hearings relating to the removal of appointive or elective officers **any member of the council or authorized committees** thereof may compel the attendance of witnesses and require the production of books and papers. Any person who refuses to obey the subpoena of the council shall be fined not more then one hundred dollars ($100) or imprisoned not more than thirty (30) days or both.

According to the 1967 Charter, both Sec. 16 ("Removal of elective officers") and Sec. 17 ("Power of Investigation") derive from the 1947 Special Laws.

As an aside, the above-referenced Charter provisions are at least problematic in that: (a) there is no statutory authority in Connecticut which would allow a City Council to remove an elected official; (b) the Sec. 16 (Old Charter) provision authorizing the removal of a member of the board of education was unconstitutional and unenforceable since the board is a state agency. (c) the provision in both the Old Charter and in the New Charter allowing for the imposition of a fine and imprisonment would likely not pass constitutional muster; and a provision allowing for imprisonment without a right to a jury trial is almost certainly flawed.

II. THE LAW

A. Origins of the Home Rule Act and Relevant Statutes

Clearly, the origins of the subpoena powers set forth in the New Charter (2002) and the Old Charter (1967) are the 1947 Special Acts, reduced to Ordinance on November 7, 1967. See the Old Charter, Chap III, Sec. 16 and Sec. 17.

Times have changed and the law has changed.

Connecticut, by State law, is a Home Rule state. The Municipal Powers Act was originally enacted in 1949. It is subsumed at Chapter 98 of the State statutes. Specifically the legislation provides that "Any municipality shall have the power to do any of the following in addition to all powers granted to municipalities under the Constitution and general statutes." C.G.S. Sec. 7-148 (c).

That broad, general authorization comes with very real constraints.

In Ganim v. Smith & Wesson Corp., 258 Conn. 313 (2001), an expansive opinion by Justice Borden, our Supreme unanimously agreed that:

a. The purposes of the Home Rule Act are well established. "The purpose... of Connecticut's Home Rule Act is clearly twofold: to relieve the General Assembly of the burdensome task of handling and enacting special legislation of local municipal concern and to enable a municipality to draft and adopt a home rule charter or ordinance which shall constitute the organic law of the city, superseding its existing charter and any inconsistent special acts [citations omitted]. The rationale of the act, simply stated, is that issues of local concern are most logically answered locally, pursuant to a home rule charter, exclusive of the provisions of the General Statutes... Moreover, home rule legislation was enacted to enable municipalities to conduct their own business and control their own affairs to the fullest extent in their own way... upon the principle that the municipality itself knew better what it wanted and needed than did the state at large, and to give the municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs.

But, the check and balance is...

it is equally settled that a municipality, as a creation of the state, has no inherent powers of its own, and has only those powers expressly granted to it by the state or that are necessary for it to discharge its duties and carry out its purposes.

Where the State by legislation has seen fit to exercise its own power of regulation by the enactment of law affecting all towns and cities, it has "limited the powers of all towns to regulate the subject matter." Ordinances in conflict with the general law are "in excess of the powers granted to the town and... void." Gionfriddo v. Windsor, 137 Conn. 701, 706 (1951); Yaworski v. Canterbury, 21 Conn. Sup. 347, 351-352 (1959).

> It is well settled that towns, like other municipalities, can exercise no powers except such as have been expressly granted to them or by fair implication conferred upon them by the state. Crofut v. Danbury, 65 Conn. 294, 30D; Johnson v. Norwich, 14 Conn. Sup. 202.

The City's Charter, like the City's ordinances, are subject to and may not contradict or conflict with State law. The Charter is "theoretically a delegation of a portion of the state's powers for local self-government."

> Owing its existence to the law, the [municipal] corporation is precisely what the law makes it. It has no powers except those expressly given, and to enable it to accomplish the purposes of its creation.
> McQuillen, Municipal Corporations, Sec. 9:1

The "New Charter" (2002), at Chapter II. **Powers of the City**, specifically recognizes the limits of the City's powers, proscribed by those "expressly forbidden by the constitution and the General Statutes of the State of Connecticut."

> Home rule powers and home rule charters... must be consistent with the constitution and general laws of the state.
> McQuillen, Sec. 10:15.

Connecticut's home rule legislation, as set forth at Chapter 98 of the General Statutes concerning Municipal Powers, evidences the General Assembly's legislative grant of powers to municipalities to affect or implement subpoena power – being the power to compel the attendance of witnesses and/or the production of documents.

Specifically, the legislature, under the Municipal Powers Act, prescribes three (3) areas where municipalities are authorized to utilize subpoena powers, being:

1. C.G.S. Sec. 7-148b, related to the creation of a fair rent commission, which may "make studies and investigations, conduct hearings and receive complaints... and, for such purposes, may "...compel the attendance of persons at hearings, issue subpoenas and administer oaths...

2. C.G.S. Sec 7-148h, related to ethics commissions, their establishment and powers in municipalities. Ethics Commissions may be established by charter or ordinance; may receive allegations of unethical conduct, corrupting influence or illegal activities and incident thereto may conduct investigations and have the power to "compel the attendance of persons at hearings and the production of books, documents, records and papers."

3. C.G.S. Sec. 7-148, related to discriminatory practices and the creation and powers of boards, commissions, councils, committees or other agencies to investigate allegations of discriminatory practice in violation of state law. The powers of such boards, per Sec. 7-148j of the General Statutes includes "(1) The power to issue subpoenas or subpoenas duces tecum, enforcible upon application to the Superior Court, to compel the attendance of persons at hearings and the production of books, documents, records and papers. The language of Sec. 7-148j specifically recognizes and limits the powers of boards constituted under Sec. 7-148; to investigate discriminatory practices.

Nowhere else in the Municipal Powers Act is authority granted to compel the attendance of persons or the production of documents before municipally created agencies or boards, councils or committees or commissions.

The State has seen fit to exercise its own power of regulation by the enactment of legislation affecting all towns and cities concerning the powers of subpoena and has "limited the powers of all towns to regulate the subject matter." A resolution, an ordinance – even a Charter Provision – in conflict with or expanding upon that legislative grant is an enactment in excess of the powers granted to the town and is void.

B. Subpoena Law

Chapter 899 of the General Statutes governs the issuance of subpoenas. It provides at Sec. 52-143:

> a. Subpoenas for witnesses shall be signed by the clerk of the court or a commissioner of the Superior Court and shall be served by an officer, indifferent person... The subpoena shall be served not less than eighteen hours prior to the time designated for the person summoned to appear, unless the court orders otherwise.

And at C.G.S. Sec. 52-144 even the form of a subpoena is prescribed by law:

> To A.B. and C.D. of ...
>
> By authority of the state of Connecticut, you are hereby commanded to appear before the... court, to be held at... on the... day of... or to such day thereafter and within sixty days hereof on which the action is legally to be tried, to testify what you know in a certain civil action pending in the court, between E.F. of H., plaintiff, and G.A. of M., defendant.
>
> Hereof fail not, under penalty of law.
>
> To any proper officer or indifferent person to serve and return.
>
> Dated at H., etc.
>
> J.K. (title of officer authorized to sign subpoena)

Subpoenas are subject to motions to quash and may be enforced by orders of the court authorizing fines for failure to appear and even by a capias ordering the person summoned to be taken into custody. See, C.G.S. Sec. 52-143(d) and (e).

III. CONCLUSION

There are no subpoena powers conferred to municipalities under the State Constitution. The provisions in the Old (1967) Charter and the New (2002) Charter derive from a 1947 Special Act, made an ordinance in the same year (1947), which **pre-dates** the Municipal Powers Act. That is its origin.

The language in Sec. 16 and Sec. 17 of Chapter III of the Old Charter is mirrored in large part in the New Charter at Chapter IV, Sec. 3(a) and (b). No subsequent legislative (state) authority has been granted municipalities concerning the subpoena issue, beyond the several statutes referenced above.

The Municipal Powers Act authorizes a municipality to "adopt and amend a charter" ...which charter or amended charter may include the provisions of any special act concerning the municipality **but which shall not otherwise be inconsistent with the constitution or general statutes.**" C.G.S. Sec. 7-188.

To the extent that the Charter provisions, derived from the 1947 Special Act, concerning subpoena powers are inconsistent with the scope and breadth of the statutorily authorized subpoena powers, C.G.S. Sec. 7-188 makes it clear such is not authorized or permitted.

This office has previously written concerning the authority – or lack of statutory authority – in the Council to effect the removal of elected officials.

Earlier in this opinion, the issue of the constitutional and other statutory infirmities of the provisions of the Old Charter and of the New Charter were mentioned. Specifically, the provision in the New Charter authorizing imprisonment for failure to obey a subpoena – without a provision for court review or intervention; and without provision for a hearing or trial by a jury, is an infirmity. And the provision in the Old Charter authorizing not only the removal of "any elective officer" (there being no statutory authority therefore) but also the removal of "a member of the board of education," an entity created by State statute and defined as a state entity situate in a municipality... whose members in 1967 were elected in partisan elections – further reflects the legal and constitutional infirmities of the Charter's origins and current provisions.

The Council has no authority to compel the attendance of persons or the production of documents based on the existing provisions of the Charter, whom measured against the law.

Alternatively, the Council may obtain documents by using the Freedom of Information Act if there is resistance to providing public documents – which there should not be. As for persons whose testimony the Council may wish to solicit, in-person or written requests or invitations from an entity with the Council's stature would hopefully move people to comply.