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September 8, 2009

Members of the Court of Common Council
c/o The Honorable Calixto Torres
Council President
550 Main Street
Hartford, CT 06103

Re: Review of Corporation Counsel Opinion No. 09-6 Dated August 6, 2009

Dear Members of the Court of Common Council:

This letter responds to your request for an opinion with regard to the authority of the Council to issue and enforce a subpoena pursuant to Chapter IV § 3 (b) of the City Charter. To fulfill this assignment, I have reviewed the Corporation Counsel opinion referenced above (the "Opinion"), the relevant Charter and statutory provisions, and Connecticut case law. Based on my review of these materials, I have concluded as follows:

1. The Charter's grant of subpoena power to the Court of Common Council is valid. The Opinion's conclusion to the contrary rests on a fundamental misunderstanding of the Home Rule Act.

2. The procedure that the Council would have to follow to enforce its subpoena is less clear, but I believe a subpoena would be enforceable in at least two ways. First , a Council subpoena would provide the basis for a civil enforcement action in the superior court. Second, that violation of a Council subpoena would be subject to prosecution initiated by the State's Attorney in the Superior Court. Finally, refusal to comply with a Council subpoena could be a basis for exercise of the Council's removal power for any person subject to that power.

I explain these conclusions below.

I. Chapter III § 4(b) validly vests in the City Council and its duly authorized committees the power to issue a subpoena.

As the Opinion notes, the Charter references subpoena power in connection with the Council in Sections 3(a) and (b) of Chapter IV. Section 3(a), which deals with the power of the Council to remove elected officers and other officers and employees of the City, grants the

person subject to a removal proceeding the right "to compel the attendance of witnesses by subpoena issued in the name of the Council."[1] Section 3(b) of Chapter IV grants the Council, "or any committee thereof when so authorized by the Council," the power to investigate the conduct of any department, agency, officer or employee of the City government. The section then authorizes the Council and any authorized Council committee to "compel the attendance of witnesses and require the production of books and papers" for the purpose of any such investigation and of hearings related to the removal of an appointed or elected officer or employee. Finally, it provides that "[a]ny person who refuses to obey the subpoena of the Council or an authorized committee thereof shall be fined not more than one hundred dollars ($100.00) or imprisoned not more thirty (30) days or both."[2]

I agree with the Opinion that Sections 3(a) and (b) of the current Charter have their origin in the charter passed by the legislature and approved by the Governor as a Special Act on May 1, 1947, 1947 Conn. Spec. Acts 36. A Special Act is a law enacted by the legislature that, as its name suggests, applies only to a specific person, entity, or situation. Before the adoption of the Home Rule Act in 1957, Pub. Act 57-465, 1957 Conn. Pub. Acts 465, which created an entirely

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[1] The Opinion questions the validity of the removal power provision of the Charter on pages 2 and 6. Although the reasoning set forth below for concluding that the subpoena power is valid certainly applies to the removal power as well, I have not been asked to review Corporation Counsel's opinions with regard to that power and therefore state no opinion as to those aspects of the August 6 Opinion. To the extent that the Opinion suggests that the alleged infirmities in the removal provision undermine the Council's subpoena authority, I disagree. Chapter XIII § 2 of the Charter, which derives directly from Chapter XX § 3 of the former Special Act Charter, specifically provides that a finding that "any portion of this Charter . . . [is] unconstitutional . . . shall not affect the remainder thereof, but as to such remainder this Charter shall remain in full force and effect until amended or repealed."

[2] Section 3(b) reads as follows:

> Power of Investigation. The Council, or any committee thereof when so authorized by the Council, shall have 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 or employees, pursuant to § 3(a) of this Chapter, above, any member of the Council shall have power to administer oaths and the Council or authorized committee 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 one hundred dollars ($100.00) or imprisoned not more than thirty (30) days or both. The Council may appropriate from available funds amounts necessary to cover expenses incurred pursuant to this section.

locally administered means of adopting a charter, special legislative enactments were a common means of creating a municipal charter.[3]

The Opinion correctly explains that municipalities, including the City of Hartford, can exercise only the governmental powers that have been delegated to them by the legislature. It also correctly asserts that neither the provisions of the Home Rule Act, codified in Chapter 99 of the General Statutes, nor the general provisions establishing municipal powers, codified primarily in Chapter 98 of the General Statutes, contain any grant of subpoena authority to a city council.[4] The Opinion's conclusion that these two legal principles invalidate the Hartford Charter's authorization of subpoena power to the Court of Common Council, however, is incorrect.

The Opinion's conclusion is wrong because the Home Rule Act specifically provides that the powers conferred upon a municipality by special act of the legislature may be retained in a Home Rule Act charter and, if they are retained, exist in addition to the powers conferred on all municipalities by the General Statutes. In particular, § 7-188 of the General Statutes states (emphasis added):

> (a) Any municipality, in addition to such powers as it has under the provisions of the General Statutes or any special act, shall have the power to (1) adopt and amend a charter which shall be its organic law and shall supersede any existing charter, including amendments thereto, and all special acts inconsistent with such charter or amendments, 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, provided nothing in this section shall be construed to provide that any special act relative to any municipality is repealed solely because such special act is not included in the charter or amended charter . . . .

This language plainly allows municipal charters to contain authority not generally granted to a municipality so long as the legislature has specifically granted that authority to the municipality in question and it has retained that authority in any locally adopted charter.[5]

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[3] The Connecticut Constitution adopted in 1965 generally prohibits the legislature from enacting "special legislation relative to the powers, organization, terms of elective offices or form of government of any single town, city or borough" after July 1, 1969. Conn. Const. Art. X, § 1 (1965).

[4] Indeed, the Connecticut Supreme Court has held that the General Statutes do not authorize a municipality to give its governing or legislative body the power to issue subpoenas. *City Council of West Haven v. Hall*, 180 Conn. 243 (1980). *See* p.6 *infra*.

[5] The Opinion quotes this language but completely ignores the significance of the word "otherwise", which can only be read as allowing a charter provision that includes the provisions of a special act to be inconsistent with the

The conclusion that a municipality can exercise authority granted to it in a special act even if no such authority has been granted to all municipalities in a general act does not contradict the principle that municipalities are creatures of the State and can exercise only authority granted to them by the State. A special act, after all, is an act of the legislature. An authority granted by a special act is, therefore, granted to the municipality by the State.

The Connecticut Supreme Court has explicitly held that the Home Rule Act authorizes a municipal charter to incorporate an authority conferred by special act even when no such authority has been conferred on all municipalities by a general act of the legislature. In three cases between 1962 and 1972, the Supreme Court considered the power of municipalities to amend their charters to create a civil service system for municipal employees. In the first case, *Sloane v. Waterbury*, 150 Conn. 24 (1962) ("*Sloane I*") the question was whether the mayor of the city could veto a council resolution putting onto the ballot a charter revision commission proposal to institute civil service. Although the charter of the City of Waterbury, which had been granted by a special act, set forth a charter revision procedure that explicitly allowed the mayor to veto the board of aldermen's approval of a proposed charter amendment, thereby keeping the proposal from the ballot, the Supreme Court held that that provision did not control. Rather, the court concluded that "the legislature intended the procedure outlined in the Home Rule Act to be a complete, self-contained method – not involving action by the General Assembly – of amending the charter of a city, irrespective of any existing charter provision." *Id.* at 29.

After the voters of Waterbury approved the charter amendment, the city's police and fire commissioners concluded that the amendment was not valid and made promotions without following procedures required by the charter amendment. In *State Ex. Rel. Sloane v. Reidy*, 152 Conn. 419 (1965) ("*Sloane II*"), the Connecticut Supreme Court considered whether the police and fire boards were correct. It held that the charter revision was valid and that the promotions, therefore, were not.

The *Sloane II* court noted that the defenders of the charter had originally argued to the trial court that the amendment was authorized by the Home Rule Act, and the court had entered judgment for the police and fire boards on the ground that the Act did not authorize the amendment. The trial court, however, had opened the judgment to consider the claim that the charter itself conferred the power to create a civil service commission, and on that argument it entered judgment in support of the charter amendment. *Id.* at 422. The issue before the Supreme Court was whether the provision of the charter allowing the city to amend the charter to provide

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General Statutes to the extent that the special act is inconsistent with those statutes. (The suggestion in the Home Rule Act that a charter can be inconsistent with either the state or federal constitution if it incorporates an unconstitutional provision from a special act is equally plainly incorrect as a matter of law, but that fact does not negate the grant of authority to include constitutionally sound provisions that originate in special acts.)

for a civil service board had been superseded by the Home Rule Act and the court's decision in *Sloane I* holding that the Home Rule Act provided the exclusive means for amending a charter.

The court began its analysis by reiterating that municipalities have only the power granted to them by the legislature: "Being a creature of the state, the City of Waterbury has only such powers as have been granted to it by the legislature, whether by general or special act." *Id.* at 423 (emphasis added). The court then explained that *Sloane I* had held that the Home Rule Act procedure for amending a charter superseded the procedure set out in the special act charter. It went on to explain, however, that that decision did not mean that the authority to create a civil service board for the City of Waterbury granted by its special act charter had also been superseded:

> The Home Rule Act, however, does not have any effect on the grant of power in the Charter of Waterbury to amend its charter by providing for a civil service system. Legislation is construed to effectuate the expressed intention of the legislature . . . . That intent is determined from the language used when there is no ambiguity . . . . Thus, in this case also, the clear language of the Home Rule Act exhibits a legislative intent to add a new power to those which municipalities already had without affecting existing powers. That language is found in General Statutes § 7-188, also part of the Home Rule Act, which states "any town, city or borough, in addition to such powers it has under the General Statutes or any Special Act, shall have the power to draft, adopt and amend a charter."

Id. at 424 (emphasis added). In 1972, to complete the trilogy, the court held in *State Ex. Rel. Barnard v. Ambrogio*, 162 Conn. 491 (1972) that Hamden's effort to create a classified service was invalid because the Home Rule Act does not contain any reference to a merit or civil service system, and Hamden had no special act authority dealing with that topic. The court explained that *Sloane II* did not control because in Waterbury, unlike in Hamden, a special act charter empowered the city to amend its charter by providing for a civil service system.

Thus, these three cases establish that the Home Rule Act does not extinguish special act grants of power to a municipality and that municipalities with such grants can exercise powers not available to municipalities that must rely only on the General Statutes for their powers.[6]

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[6] For a similar holding, *see O'Donnell v. Waterbury*, 111 Conn. App. 1 (2008) App. denied, 289 Conn. 959 (2008) In *O'Donnell*, the Connecticut Appellate Court held that a provision in Waterbury's special act charter allowing an appeal from a decision of the city's Retirement Board created jurisdiction in the Superior Court to hear a challenge to a decision denying a disability pension. Interestingly, the court was not troubled by the fact that the appeal was actually filed under an amended ordinance that replaced the language in the charter, rather than under the special act itself, because the ordinance "echoes the charter language granting a right of appeal from the board's pension and retirement decisions." *Id.* at 6. The court specifically held that "the ordinance does not create a right of appeal but merely amends an existing right, extending the number of days an aggrieved person has to appeal and streamlining

The two Connecticut state court decisions that have explicitly dealt with the issue of municipal subpoena power acknowledge the distinction between the question whether the General Statutes grant such authority and the question whether a particular municipality has subpoena power because of a special act. In *City Council of West Haven v. Hall*, 180 Conn. 243 (1980), the Connecticut Supreme court considered an appeal by a reporter from a trial court decision ordering the reporter to comply with a subpoena signed by the chairman of the city council and by the city's corporation counsel. The subpoena had been issued pursuant to a charter provision that authorized the council to investigate "any officer, department or board" of the city and that gave the council the power to compel the attendance of witnesses and production of data by subpoena signed by the chairman of the council.[7] The trial court ordered the reporter to comply with the subpoena. The Supreme Court reversed the trial court ruling on the ground that nothing in the General Statutes authorized West Haven to adopt a charter provision giving its legislative body the power to issue subpoenas. The Court noted, however, that West Haven did not assert that its council had been granted subpoena power by a special act:

> The city council has not claimed that a special act granted the subpoena power to West Haven. See Gen. Stat. §7-188; *Board of Selectmen of the Town of Fairfield v. Kellis*, 31 Conn. Sup. 668, 406 A.2d 9 (1979).

Id. at 246 n.4. In the *Board of Selectmen of the Town of Fairfield v. Kellis* case cited by the Supreme Court, by contrast, the appellate session of the Superior Court recognized that the town selectmen had been given subpoena power by the General Assembly in Fairfield's special act charter, enacted in 1947, and that that power had been retained in subsequent charters. *Board of Selectmen of the Town of Fairfield v. Kellis*, 35 Conn. Sup. 668, 669 (Conn. Super. App. Sess. 1979) ("*Town of Fairfield*").[8]

The General Assembly also gave the Hartford City Council subpoena power in its 1947 Special Act charter. As the Home Rule Act explicitly allows, the City has retained that provision in its charter. The grant of subpoena power by the General Assembly authorizes the Hartford City Council, and its duly authorized committees, to issue valid subpoenas.

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the language describing the appeal proceedings." For this reason, the court concluded that O'Donnell retained his statutory right of appeal under the city's charter. *Id.* at 6-7.

[7] The Council issued the subpoena to obtain information underlying the reporter's stories asserting improprieties in the City's school lunch program.

[8] The *Town of Fairfield* court went on to conclude that in light of the language of the Fairfield Charter and the procedural posture of the case, there was no procedure by which the Fairfield Board of Selectmen could obtain enforcement of their subpoena. I address that aspect of the holding in the section that follows.

II. The Council's subpoena would be enforceable.

Although it is clear that the Charter provision giving the Council subpoena authority is valid, the answer to the question how such a subpoena would be enforceable is less clear. While recognizing that there is room for argument, I believe that a Council subpoena issued by an attorney for the Council would be enforceable by application to the Superior Court for an order compelling compliance. I also believe that failure to comply would be a violation of a penal law of the State subject to prosecution by the State's Attorney. Finally, the refusal to comply of someone subject to the Council's removal power could be considered grounds for the invocation of that power.

The *Town of Fairfield* case discussed above both identifies the problem addressed here and suggests its solution. *Town of Fairfield* arose when the Fairfield Board of Selectmen subpoenaed Mr. Kellis to testify with regard to charges he had made against various officials and employees of the town. Kellis appeared, but refused to answer questions, and the selectmen went to court for an order to compel him to testify. The trial court denied the requested order, concluding that "'[t]here are no procedures by which the [selectmen] may apply to a court for an order to compel compliance with its subpoena power.'" On appeal to the Appellate Session of the Superior Court, the selectmen argued that the legislative grant of subpoena power necessarily carries with it the power to seek court enforcement of the subpoena. The appellate court disagreed:

> The special act and charter do not grant subpoena powers accompanied by a grant of power to punish summarily those who refuse to obey the subpoena or testify, nor do they grant subpoena powers coupled with the authority to apply to the court to compel compliance. If the General Assembly desired the [selectmen] to have those powers, it could have so provided by special act or by statute.

Id. at 670.[9]

Although the Hartford Charter provision granting subpoena power is, like the Fairfield provision, devoid of any grant of authority to enforce or seek court enforcement of a Council subpoena, the *Town of Fairfield* holding does not compel the conclusion that a Hartford Council subpoena is unenforceable for two reasons. First, the law provides that a subpoena authorized by the Council and issued on its behalf by an attorney can be enforced by the Superior Court, a procedure not considered by the Court in *Town of Fairfield*. Second, because the Hartford Charter, unlike the Fairfield Charter, provides for penalties for failure to comply with a Council

[9] I doubt that the holding in *Town of Fairfield* would withstand review in the Connecticut Court of Appeals or Supreme Court, because it is illogical and leads to the unacceptable conclusion that the legislature had enacted a meaningless statute. Provisions of the General Statutes providing subpoena powers in particular circumstances would also be rendered ineffective by *Town of Fairfield*'s logic. *See, e.g.*, Conn. Gen. Stat. § 31-245. For the purpose of this analysis, however, I have accepted it as a valid statement of the law.

subpoena, the Superior Court's criminal jurisdiction may also be invoked in support of a Hartford Council subpoena.

Section 51-85 of the General Statutes grants attorneys the authority to issue subpoenas (emphasis added):

> Each attorney-at-law admitted to practice within the State, while in good standing, shall be a commissioner of the Superior Court and, in such capacity, may, within the State, sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgements of deeds. Each attorney may also issue subpoenas to compel the attendance of witnesses and subpoenas duces tecum[10] in administrative proceedings. If, in any administrative proceeding, any person disobeys such subpoena or, having appeared in obedience thereto, refuses to answer any proper and pertinent question or refuses to produce any books, papers or documents pursuant thereto, application may be made to the Superior Court or any Judge thereof for an order compelling obedience."

Although the selectmen argued in their brief in *Town of Fairfield* that § 51-85 provided an alternative basis for its enforcement action since its subpoena had been signed by the town attorney, the appellate panel refused to consider that argument because it had not been made to the trial court. *Town of Fairfield*, 35 Conn. Sup. at 671-72.[11] That procedural issue does not call into question the availability of enforcement for a Hartford Council subpoena under § 51-85. Notably, in a recent decision, the Superior Court relied on § 51-85 to enforce a subpoena issued by a municipal body. *Brandon v. Boyden*, 2008 Conn. Super. LEXIS 3030 (No. LLICV084007696, Conn. Super., J.D. Litchfield, Nov. 24, 2008).

Although this procedure appears straightforward, it is important to note that there is no case law defining the meaning of the statutory term "administrative proceedings". The court in *Brandon v. Boyden* noted the absence of guidance as to the reach of that term, but concluded that it would enforce the subpoena. One could argue that a zoning board of appeals, the municipal body at issue in *Brandon v. Boyden*, is clearly an administrative agency, but that a Council committee, or the Council as a whole, when investigating the conduct of the City government, is

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[10] A subpoena duces tecum is a subpoena that requires the recipient to produce documents and other records.

[11] In *City Council of West Haven v. Hall*, 180 Conn. 243 (1980), the Connecticut Supreme Court also did not address the impact of Section 51-85. In that case, the trial court, which held that the West Haven Council did have subpoena power, also relied on Section 51-85 as a basis for enforcing the subpoena. The trial court held, however, that Section 51-85 confers subpoena power on an attorney in an administrative proceeding only when the administrative body itself has subpoena power. Since the Connecticut Supreme Court concluded that the charter provision granting subpoena power to the West Haven City Council was not valid, and since the Council had not cross-appealed from the trial court's holding that Section 51-85 applies only if the administrative body has its own subpoena power, the Supreme Court did not consider whether the West Haven Council subpoena could be enforced on the basis of Section 51-85 alone. *See id.* at 246, 247 n.5.

a legislative body and that § 51-85 therefore does not apply. On the other hand, one could argue that since all of the legislative authority exercised by the Council is delegated from the General Assembly, as is true of a zoning board or, for that matter, of the State agencies, and since it is certainly common for administrative agencies to conduct investigations, § 51-85 does apply. While I think that the argument that the statute applies is stronger than the contrary argument, I must advise you that the outcome of a challenge to the applicability of § 51-85 cannot be predicted.

In addition to, or as an alternative to, seeking enforcement under §51-85, the City Council could request the State's Attorney to prosecute any refusal to obey a Council subpoena. Since the Special Act granting the subpoena power made refusal to obey punishable by a fine, a jail sentence, or both, [12] failure to obey a subpoena constitutes an "offense" within the meaning of the State's Penal Code.[13] The State's Attorney's office is charged with taking "all steps necessary and proper to prosecute all crimes and offenses against the laws of the state and ordinances, regulations and bylaws of any town, city, borough, district or other municipal corporation or authority." Conn. Gen. Stat. § 51-277. This duty would clearly apply to a refusal to obey a Council subpoena.[14]

Finally, the Council itself could determine that violation of a Council subpoena to an official subject to its removal power constitutes a dereliction of official duty and is therefore a ground for removal from office.[15]

Very truly yours,

Allan B. Taylor

ABT/gb

[12] The subpoena power granted to the Town of Fairfield, by contrast, did not contain any provision imposing punishment for failure to obey.

[13] *See* Conn. Gen. Stat. § 53a-24(a).

[14] The General Statutes contain provisions establishing expedited procedures for the resolution of violations of municipal ordinances that impose a penalty of no more than $250. *See, e.g.*, Conn. Gen. Stat. §§ 7-152c, 51-164n. It might be advisable for the Council to enact an ordinance bringing violation of its subpoenas within the reach of these statutes.

[15] I do not express an opinion on the validity of that power, its reach, or the appropriateness of imposing such a consequence.