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May 15, 2009

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

Re: Review of Corporation Council Opinion Dated April 13, 2009

Dear Members of the Court of Common Council:

This letter responds to your request that I “review and comment” on the Corporation Council Opinion dated April 13, 2009 and entitled “The Authority per the Charter to Make Transfers of Appropriations and Additional Appropriations Relative to the General Fund Budget” (“the Opinion”). Based on my review of the Opinion, the relevant provisions of the Charter, and other legal authority discussed below, I have concluded as follows:

1. The Opinion’s conclusion that “if the General Fund, and all its constituencies, including the Fund Balance and the Sundries account, contains sufficient surplus to meet city obligations, the mayor is specifically authorized by Charter to make such additional appropriation without Council approval” is unjustified and unjustifiable. Except in the event of a public emergency, and within the limits established in the Charter for such an emergency, it is illegal for any city official to spend or otherwise obligate funds that have not been appropriated by the City Council.

2. Conversely, it is legal to spend funds that have been appropriated by the Council. If the city’s revenues, as projected in the budget, fall short of expectations but its expenditures are as budgeted, the city will run a deficit. That deficit will result in a reduction of the city’s accumulated fund balance. Such a reduction in the fund balance is not an “appropriation” and does not require Council approval.

I explain these conclusions below. Before doing so, however, since this is the first time I have provided an opinion to you, I thought it would be useful to explain briefly how I approach my task and what you should expect from a legal opinion.

WHAT YOU SHOULD EXPECT TO SEE

Questions about what the law requires or allows, or how the law will be applied to a specific set of circumstances, often have no certain answer. When that is the case, the lawyer's task is to evaluate the likelihood and consequences of the various possible outcomes and to place the full array of choices and consequences before the client. Especially in the context of advice given to a legislative body such as the Council, the lawyer must take great care to assure that his or her view of the best course for the client to take or of the most likely outcome is presented with full recognition of the relevant uncertainties and available alternatives, not as the only option. The lawyer's job is to present the available choices, not to make them.

Not all legal questions have more than one possible answer. When the law is clear, your lawyer should tell you that it is clear. That is what I will do in this Opinion, because I believe that there is no legitimate argument that the Mayor has the authority to make appropriations on his own, other than in the context of the Charter's provisions for public emergency.

Whether you are being told that there are many possible courses, one or more of which are recommended, or that there is only one answer, you are entitled to a full explanation of that conclusion. It should always be possible for you to follow the chain of reasoning that leads to your lawyer's conclusion. If that reasoning is unclear to you, you should ask for it to be clarified. If all your lawyer can tell you is that it is "the rule," you should expect to find that rule clearly stated in either a state or federal statute or an opinion of the Connecticut Supreme or Appellate Court or of the United States Supreme Court or the federal Court of Appeals with jurisdiction over Connecticut federal district courts. Even when there is such authority, you should expect your lawyer to provide not merely a statement of a rule but its rationale and an explanation why that rule applies to the circumstances with which you are concerned.

If you believe that the opinion that follows does not meet these tests, please ask for clarification or elaboration.

ANALYSIS OF THE OPINION

I. Whether The Mayor Can Make A Supplemental Appropriation Without Action By The Council

The Opinion purports to base its conclusion on a textual analysis of subsections 7(a) and 7(b) of the Charter. Both of those subsections deal with post-adoption modifications of the city budget. Subsection 7(a), captioned "Transfer of Appropriations," allows the Mayor to make intradepartmental transfers of unencumbered appropriation balances on his own accord. It also

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specifies that the Council, by resolution, can make transfers between departments at the request of the Mayor. Subsection 7(b) is captioned “Additional Appropriations,” and reads as follows:

“(b) Additional Appropriations. Appropriations in addition to those contained in the budget, except for the purpose of meeting a public emergency as provided in Chapter IV, § 2(n), shall be made **only on the recommendation of the Mayor and** only if the Director of Finance certifies that there is available general fund surplus sufficient to meet such appropriation.”

The emphasized words are unaccountably omitted from the Opinion’s quotation of Subsection 7(b).¹

The apparent rationale of the Opinion is that since Subsection 7(b) does not mention the Council, it must authorize the Mayor acting alone to make additional appropriations so long as funds are certified to be available. This reasoning is both a non sequitur and inconsistent with the plain language of Subsection 7(c), other provisions of the Charter, and the fundamental and long-established understanding in Connecticut that appropriating funds is a legislative function.

The Opinion’s conclusion does not follow from its observation that the Council is not mentioned in Subsection 7(c) because the absence of any mention of the Council does not constitute an affirmative grant of authority to the Mayor. Even as misquoted by the Opinion, Subsection 7(c) does not confer authority to make an appropriation on the Mayor; indeed, as misquoted, Subsection 7(c) does not mention the Mayor.

Of course, what counts is the language of the Charter, not that language as set forth in the Opinion. The Charter specifies that supplemental appropriations “shall be made only on the recommendation of the Mayor” That language cannot be squared with the Opinion’s conclusion because it does not authorize the Mayor to do anything more than make a recommendation. If the Mayor in his own right were authorized to make a supplemental appropriation, to whom would the Mayor’s required “recommendation” be directed? Surely the authors of the Charter did not intend to require the Mayor to talk or write to himself. Rather, they intended that the Mayor make a recommendation, and the Finance Director present a certification, to the body with the authority to make an appropriation.

That body is the Council, as Chapter IV, § 7(a) of the Charter makes clear. That section states, in pertinent part, as follows (emphasis added):

“In addition to such acts of the Council as are required by the general statutes or by other provisions of this Charter to be by ordinance, every act . . . making an appropriation . . . shall be by Ordinance.”

¹ The quotation of Section 7(b) appears on page 2 of the Opinion.

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Nothing in Chapter X, § 7(b) even suggests that the Mayor acting alone can make an appropriation; all the Mayor can do is recommend “making an appropriation” to the Council, which, if it agrees, acts by passing an ordinance.

The Charter’s specification that appropriations can be made only by the legislative act of passing an ordinance follows the established tradition of entrusting the power of the purse to the legislative branch of government. That power has long been considered a fundamental attribute of the legislative body, and its location in the legislative body is considered the principal check on the executive branch of government. As James Madison explained in *The Federalist No. 58*,

This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

Connecticut law follows this general principle. As the Connecticut Supreme Court said in 1972:

The power to legislate, which our constitution has committed solely to the General Assembly, necessarily includes the power to appropriate funds to finance the operation of the state and its programs.

Bridgeport v. Agostinelli, 163 Conn. 537, 544 (1972) (emphasis added). The Connecticut Supreme Court has repeatedly restated this conclusion. See University of Connecticut Chapter, AAUP v. Governor, 200 Conn. 386, 395 (1986); Eielson v. Parker, 179 Conn. 552, 560 (1980); id. at 561 (“It has been generally recognized for two hundred years that legislative power necessarily encompasses fiscal power.”); id. at 562 (“Madison’s view of the polity looks to countervailing power to limit possible legislative excesses and in so doing reinforces our conclusion of the primacy of legislative power over state spending.”).

By conferring on the Court of Common Council “the legislative power and authority of the City,” Charter ch. IV, § 1, the Charter invokes this historic and traditional understanding of “the power to legislate.” That power “necessarily includes the power to appropriate funds,” Bridgeport v. Agostinelli, 163 Conn. at 537, for the jurisdiction – the City of Hartford – whose legislative “power and authority” is vested in the Council. Nothing in the Opinion justifies the conclusion that the Mayor, in whom the Charter vests only “[t]he executive and administrative powers of the City,” Charter ch. V, § 1, can perform the legislative act of making an appropriation.² Except in the limited case of a public emergency, a supplemental appropriation requires the passage of an ordinance by the City Council.³

² The Opinion contains a number of references to statements in the legal treatise known as McQuillin, The Law of Municipal Corporations. For the most part, those statements simply describe typical budget procedures and do not

II. Whether the Reduction of the Fund Balance as a Result of a Fiscal Year Deficit Constitutes an Appropriation Requiring Council Action

The Opinion contains some discussion of the General Fund accumulated surplus, known as the Fund Balance. I also understand from inquiries I have made that the issue addressed in the Opinion was raised at least in part in response to the 2008 Financial Report, dated Jan. 20, 2009, which showed a reduction in the Fund Balance as of June 30, 2008 of \$6.567 million when compared with the Fund Balance as of the end of Fiscal Year 2007. In order to clarify the reach of the opinion I have stated above and to avoid misunderstanding, I address here the question whether such a reduction is an “appropriation” within the meaning of the Charter.

The short answer to this question is “no.” An appropriation is “a[n Ordinance] passed by the [Council] to authorize expenditures. . . .” University of Connecticut Chapter, AAUP v. Governor, 200 Conn. at 392. In the budgeting process, those expenditures are balanced against anticipated revenues. If at the end of the fiscal year revenues turn out to have been higher than expected, or expenditures lower, the City will end the year with a cash surplus that will be added to the previously accumulated Fund Balance. If, on the other hand, revenues are less than expected and expenditures are not reduced by the shortfall in revenues, then the city will end the year with a cash deficit. Adding that negative sum to the accumulated surplus necessarily reduces that surplus. So long as expenditures are no more than have been provided in the appropriation ordinance or ordinances passed by the Council,⁴ that mathematical result does not in any way offend the exclusive power of the Council to appropriate the City’s money.⁵

even arguably address the question considered in the Opinion. The only statement that at first glance appears relevant to that question is found on page 5, where the Opinion quotes Section 39:49 of McQuillin for the proposition that municipal “[s]urpluses may be carried over and used in the succeeding year for any purpose authorized by law whether budgeted or not.” That statement, however, does not address what authority is needed to use a surplus for a purpose that has not been budgeted. Moreover, a look at the McQuillin treatise discloses that the quoted statement is supported by reference to four court opinions, one each from Arizona, Michigan, South Carolina, and West Virginia. None of the cited opinions is from Connecticut, and none remotely suggests that surplus funds can be spent without authorization by the appropriating body.

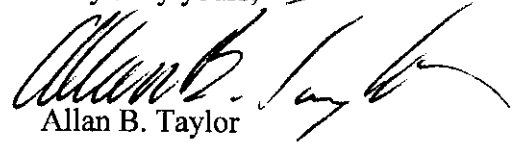
³ This conclusion should not surprise the City Administration, since that is exactly the process that the City followed when it twice increased appropriations contained in the 2007-2008 budget adopted by the City Council. I have attached copies of the agenda versions of the two supplemental appropriation ordinances adopted during fiscal year ’08.

⁴ As the Opinion notes, appropriations are made by department and by purpose. The Mayor has the authority on his own to transfer appropriations within a department, and with the approval of the Council by Resolution, to transfer appropriations among departments. The Charter and the Municipal Code require that spending be kept within the limits of the appropriations, as so adjusted, both on an overall City basis and on the basis of specific departments and purposes. See Charter ch. X § 8; Municipal Code art. VII, § 2-515.

⁵ If the Council wishes, it can replenish the Fund Balance by deliberately building a surplus into the budget, although doing so would obviously require identifying revenues in excess of expenditures. See Caulfield v. Noble, 178 Conn. 81(1979) (municipality not prohibited by general statutes from building and carrying over a fund

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Very truly yours,



Allan B. Taylor

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surplus). If the Council wishes to require that expenditures during any fiscal year not exceed actual (as opposed to predicted) revenues, it can revise Mun. Code art. VII, § 2-511. As it currently (and since 1977) reads, that provision requires the Mayor to reduce budget work programs and allotments to prevent incurring a deficit whenever he “ascertain[s] that the revenue cash receipts for the year, plus general fund cash surplus from the preceding year, will be less than the total appropriations. . . .” If the reference in that provision to the carryover general fund cash surplus were removed, the Mayor would be required to reduce current expenditures to match current revenues during the course of a fiscal year. Obviously, such a change would have significant policy implications; I have raised it only to inform the Council of its option, not to suggest that doing so would be either a good or a bad idea.

Introduced by:

Eddie A Perez, Mayor

HEADING
AND
PURPOSE

ORDINANCE CONCERNING A SUPPLEMENTAL APPROPRIATION IN THE
GENERAL FUND FOR FISCAL YEAR 2007-2008

COURT OF COMMON COUNCIL
CITY OF HARTFORD.

August 13, 20 07

Be It Ordained by the Court of Common Council of the City of Hartford:

That a supplemental appropriation is hereby authorized in the General Fund in the following amounts:

<u>Function</u>	<u>Department</u>	<u>Appropriation</u>
Hartford Public School System	Hartford Public School System	\$ 10,631,688
Hartford Public Library	Hartford Public Library	\$ 500,000
		\$ 11,131,688

I hereby certify the availability of General Fund Cash Surplus to meet this appropriation.

Director of Finance

Introduced by:

Eddie A Perez, Mayor

HEADING
AND
PURPOSE

ORDINANCE CONCERNING A SUPPLEMENTAL APPROPRIATION IN THE
GENERAL FUND FOR FISCAL YEAR 2007-2008

COURT OF COMMON COUNCIL,
CITY OF HARTFORD,

February 25, 20 08

Be It Ordained by the Court of Common Council of the City of Hartford:

That a supplemental appropriation is hereby authorized in the General Fund for the following amounts:

Function	Department	Appropriation
Municipality	Various Departments	\$ 2,726,985

Municipal Departments

Department	FY 07-08 Adopted	FY 07-08 Quarter 2	\$ Change	% Change
113 Treasurer's Office	486,730	481,945	-4,785	-1.0%
114 Registrars of Voters	763,000	1,074,003	311,003	40.8%
116 Corporation Counsel	1,702,292	2,199,642	497,350	29.2%
117 Town & City Clerk	907,216	896,462	-10,755	-1.2%
118 Internal Audit	421,115	389,167	-31,948	-7.5%
123 Finance	3,867,081	3,663,520	-203,561	-5.3%
126 Office Of Human Relations	907,110	909,763	2,653	0.3%
128 Management & Budget	1,498,669	1,358,012	-140,657	-9.4%
129 Office for Youth Services	2,825,530	3,080,579	255,049	9.0%
211 Fire	29,991,008	31,607,037	1,616,029	5.4%
212 Police	37,235,766	37,317,515	81,749	0.2%
213 Emergency Services & Telecommunications	3,631,102	3,670,787	39,685	1.1%
311 Public Works	13,973,635	14,205,771	232,136	1.7%
420 Development Services	4,804,721	4,612,465	-192,256	-4.0%
520 Health and Human Services	8,173,750	7,994,853	-178,897	-2.2%
811 Transfers To Other Funds	12,677,068	15,658,225	2,981,157	23.5%
812 Civic & Cultural Activities	1,947,495	2,049,909	102,414	5.3%
813 Debt Service	29,863,583	29,778,895	115,312	0.4%
814 Payments To Other Governmental Agencies	9,421,748	9,579,948	158,200	1.7%
815 Employee Benefits	40,990,176	39,760,176	-1,230,000	-3.0%
817 Settlements	4,880,000	3,580,000	-1,300,000	-26.6%
818 Other Sundry Items	17,802,008	17,429,115	-372,893	-2.1%
Grand Total	228,570,803	231,297,789	2,726,985	1.19%

I hereby certify the availability of General Fund Cash Surplus to meet this appropriation.

Director of Finance