

Nuts and Bolts for the Municipal Attorney
February 5, 2010

Notes:

1. **Exercise of Municipal Power: Knowing your own local laws**
 - a. Powers of municipality are specified either in charter or home rule ordinance See General Statutes §7-188;
 - b. Charter must conform to the requirements of General Statutes §7-193:
 - i. municipality shall have a legislative body;
 - ii. and a chief executive officer;
 - iii. and all municipal officers, departments, boards, commissions and agencies which are required by the general statutes or by the charter.
 - c. As a creation of the state, a municipality has no inherent powers of its own and it can exercise only such powers as are expressly granted it or such powers as are necessary to enable it to discharge its duties and carry into effect the objects and purposes of its creation. *New Haven Water Company v. City of New Haven*, 152 Conn. 563, 210 A. 2d 449 (1965) (City had no authority to require private water company to fluoridate the water furnished to City in that the regulation of water supply was regulated by the state).
 - d. Where the municipal charter prescribes a particular procedure by which a specific act is to be done or a power is to be performed, that procedure must be followed for the act to be lawful. *Cadrello v. Planning Board of City of New London*, 193 Conn. 387, 476 A.2d 1063 (1984) (Subdivision regulation that required *approval* of subdivision plan by planning commission before submission to city council was invalid because charter only stated that subdivision plan would be submitted to planning commission for *recommendations* prior to its submission for city council for vote on approval)
2. **How to find ordinances, policies and regulations?**
 - a. Consult with legal staff or other person with knowledge who has historical knowledge of municipal charter;

- i. Meriden Charter and Code of Ordinances are on CD and on-line;
- ii. Municipal staff assigned to work with the specific board or commission will have the regulations for that board or commission; i.e., employees of Planning Department will have subdivision regulations and inland wetlands regulations;
- iii. Some issues may be covered by charter and special act; i.e. Some Meriden police and fire pensioners are covered by pension established by special act of legislature and some are covered by pension plan established in collective bargaining agreements; demonstrates importance of consulting employees with historical knowledge.

3. **General Municipal Powers**

- a. What and where they are:
 - i. Title 7: Chapters 90 - 119 of the General Statutes. Municipalities
 - ii. Title 8: Chapters 124-138K - Zoning/Planning/Economic Development
 - iii. Title 10: Education
 - iv. Title 12: Tax Assessment/Collection
- b. What Kind of Municipality Are You?
 - i. Town Meeting/Selectmen/Council-Manager or somewhere in between?
 - ii. Home Rule or “Special Act”?
 - (1) Article Tenth, §1 of the Connecticut Constitution
 - (2) Charter adoption/revision pursuant to Ch. 99 of the General Statutes.
 - (a) *City of Shelton v. Commissioner of Dept. of Environmental Protection*, 193 Conn. 506, 521, 479 A.2d 208 (1984). “Matters of purely local concern, such as the organization of local government or local budgetary policy.”

Board of Educ. of Town and Borough of Naugatuck v. Town of Borough of Naugatuck, 268 Conn. 295, 309-310, 843 A.2d 603 (2004): “...the particular procedure pursuant to which a municipality adopts its budget, including the procedure that it employs in adopting the education component of the budget, is not itself a matter of statewide concern.”

- c. General Statutes §7-148. General Scope of Municipal Powers:
 - i. Corporate powers.
 - ii. Finances and appropriations.
 - iii. Ownership of Property/Administration of Gifts.
 - iv. Public services.
 - v. Personnel powers.
 - vi. Public works, sewers, highways.
 - vii. Regulatory and police powers.
 - viii. The environment.
 - ix. Human rights.
 - x. Miscellaneous.
 - (1) “Make all lawful regulations and ordinances in furtherance of any general powers as enumerated in this section, and prescribe penalties for the violation of the same”
 - (2) Adopt a code of ethical conduct;
 - (3) Establish and maintain free legal aid bureaus;
 - (4) Perform data processing and related administrative computer services for a fee for another municipality;
 - (5) Adopt the model ordinance concerning a municipal freedom of information advisory board
- d. Contrast of Authority: Home Rule Authority v. Regulatory Power

- i. *Hennessey v. City of Bridgeport*, 213 Conn. 656, 661 569 A.2d 1122 (1990): “A city can do no act unless it is authorized to do so by its charter.”

Simons v. Canty, 195 Conn. 524, 530-31,488 A.2d 1267 (1985): “[W]e do not search for a statutory prohibition against such an enactment; rather, we must search for statutory authority for the enactment.”

- ii. *Hennessey v. City of Bridgeport*, 213 Conn. 656, 661 569 A.2d 1122 (1990): “The city’s powers are thus limited to those that the charter expressly grants and to those that, by implication, are necessary to the exercise of the powers expressly granted.”

Morris v. Congdon, 85 Conn.App. 555, 561-62, 858 A.2d 279 (2004). *NOTE: Reversed on Other Grounds*, 277 Conn. 565, 893 A.2d 413 (2006). “When a general power is given to a municipal officer, whatever is necessary for effective exercise of that power is, in the absence of express authority, conferred by implication....”

- iii. Preemption:

- (1) Preemption of the Field/Irreconcilable Conflict.

Bauer v. Waste Management of Connecticut, Inc., 234 Conn. 221, 232, 662 A.2d 1179 (1995): “[A] local ordinance is preempted by a state statute whenever the legislature has demonstrated an intent to occupy the entire field of regulation on the matter ... or ... whenever the local ordinance irreconcilably conflicts with the statute.... Whether an ordinance conflicts with a statute or statutes can only be determined by reviewing the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state’s objectives.... (Citations omitted.)”

- (2) Concurrent Jurisdiction.

Modern Cigarette, Inc. v. Town of Orange, 256 Conn. 105, 119, 774 A.2d 969 (2001): “[t]hat a matter is of concurrent state and local concern is no impediment to the exercise of authority by a municipality through the enactment of an ordinance, so long as there is no conflict with the state legislation.... Where the state legislature has delegated to local government the right

to deal with a particular field of regulation, the fact that a statute also regulates the same subject in less than full fashion does not, ipso facto, deprive the local government of the power to act in a more comprehensive, but not inconsistent, manner.’ *Aaron v. Conservation Commission*, 183 Conn. 532, 543, 441 A.2d 30 (1981).”

e. Agreements with other municipalities

i. General authority

(1) Conn. Gen. Stat. § 7-148cc, “Joint performance of municipal functions”

(2) Conn. Gen. Stat. §§ 7-339a et seq., “Interlocal agreements”

ii. Specific authority

There are other statutes that address specific situations, so be sure to review the statutes. See, for example, Conn. Gen. Stat. § 7-277a, “Police assistance agreements.”

4. **Ordinance or Resolution?**

a. **Ordinance** - passage of an ordinance is a municipal legislative act. *Coughlin v. Peters*, 153 Conn. 99, 101, 214 A.2d 127; ordinance is a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform and permanent rules of conduct, relating to the corporate affairs of the municipality. 5 McQuillin, Mun. Corp. §15:1 (3rd ed.); see also General Statutes §7-148(b) for statutory definition of ordinance.

However, an ordinance must conform to, be subordinate to, not conflict with, and not exceed the charter; an ordinance must not only conform with the express terms of the charter, but must not conflict in any degree with its object or with the purpose for which the local corporation is organized; therefore, an ordinance violative of or not in compliance with the city charter is void. *Palermo v. Ulatowski*, 97 Conn. App. 521, 525, 904 A. 2d 1278 (2006) (Ordinance passed by referendum establishing a 2 percent cap over the preceding year’s budget was void because town charter provision excepted the budgetmaking process from the referendum procedure)

b. **Resolution** - simply an expression of opinion or mind concerning some particular item of business coming within the legislative

body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality. *Morris v. Town of Newington*, 36 Conn. Supp. 74, 80, 411 A. 2d 939, 943 (1979).

- c. By ordinance or by resolution: Whether municipality should do a particular thing by resolution or ordinance depends on the forms to be observed in doing the thing and on the proper construction of the charter. 5 McQuillin Mun. Corp. §15:2 (3rd ed.); broadly stated, all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters on which the municipal corporation desires to legislate must be put in the form of ordinances. Id.

When the charter requires the passage of an ordinance to achieve a result of a legislative nature, any action taken without adopting an ordinance is ineffectual. *Sullivan v. Mortensen*, 132 Conn. 289, 43 A. 2d 731 (1945)(action of Board of Police Commissioners in appointing lieutenant to position of assistant police chief was invalid in that charter required that position be created by adoption of ordinance, which never occurred).

- d. Drafting new ordinances and resolutions:
 - i. Why reinvent the wheel? Look for prior forms used. Eg. CAMA, CCM, IMLA.
 - ii. Usual procedure is to draft ordinance and then draft a resolution to place adoption of ordinance on the council agenda; proposed ordinance gets attached to resolution so that each council member has copy of proposed ordinance in advance of meeting.
 - iii. Charter may require review/approval of ordinances by Town Attorney.

5. Managing an Office

- a. Unionized employees: Secretarial and paralegal staff will be members of a union and staff attorneys may be members of a union. Therefore, if you want to reassign responsibilities and duties, you will have to consider whether these are “mandatory subjects of bargaining” or if they are within “managerial prerogative.” If the proposed changes effect “mandatory subjects of bargaining”, then you cannot unilaterally make the changes but must negotiate the changes.

- b. Case list: Need to get familiar with all lawsuits pending against the city or town and whether there is insurance defense and coverage.
- c. Budget Process: Familiarize yourself with the budget process. You will have to submit a budget for your department by the applicable deadline. You will have to estimate the impact of any pending tax appeals upon future budget years. You will have to anticipate legal expenses for the ensuing fiscal year for various items: outside counsel for specialized matters; expert consultation and witness fees; i.e appraisers for tax appeals.
- d. Client contact: Especially important if most of legal work is performed by outside counsel. Can you allow employees, departments, commissions, etc. to call outside counsel directly, thereby incurring legal expenses without going through bureaucratic channels? Or, Do you want to establish a “Gatekeeper” policy, essentially requiring that all requests for legal advice go to the Mayor, First Selectman or City Manager for approval prior to incurring expense of outside counsel.
- e. Accountability and tracking of work. Depending on the need for such, you may consider maintaining or may be required to maintain:
 - i. *Legal Review Log*. Excel document with the following information: Description of request for review or legal opinion; from whom; attorney assigned to; date in; date out;
 - ii. *Litigation Log*. Excel document with the following information: Case name; pleading, brief, motion, or other court document; author; date filed.
- f. Procedure for receiving and responding to questions and requests for review. In Enfield, the Charter provides that “The town attorney shall upon written request furnish...a written opinion.” This precludes “misunderstandings” or misuse of opinion, etc. How requests are received may be determined by policy or practice if not Charter-driven.
- g. Policy re: counsel’s attendance at board/commission meetings. Other than Council meetings, this is not recommended, but may be driven by the culture of your Town. Reasons for not attending: discourages off-the-cuff legal opinions or attorney used as fact-finder.
- h. Hiring outside counsel. Determine who has the authority to do this. Town counsel (under charter) or the board or commission

involved. (To be covered more by later topic~Who is Client Anyway?)

6. **Public Finance**

- a. General Permissible Investments: General Statutes §7-400.
 - i. the obligations of the United States of America
 - ii. the obligations of any state or of any political subdivision, authority or agency thereof
 - iii. the obligations of the state of Connecticut, or any regional school district, town, city, borough or metropolitan district in the state of Connecticut.
- b. Special Rule for Loss/Retiree Reserve Funds: General Statutes §7-403a.
 - i. Not more than forty per cent, or with respect to a reserve fund for retiree benefits for which the budget-making authority has adopted an asset allocation and investment policy, fifty per cent, of the total amount of the reserve fund shall be invested in equity securities, and
 - ii. Remainder may be invested in:
 - (1) Bonds or obligations of, or guaranteed by, the state or the United States, or agencies or instrumentalities of the United States,
 - (2) Certificates of deposit, commercial paper, savings accounts and bank acceptances,
 - (3) Obligations of any state of the United States or any political subdivision thereof or the obligations of any instrumentality, authority or agency of any state or political subdivision thereof,
 - (4) Obligations of any regional school district in this state, of any municipality in this state or any metropolitan district in this state,
 - (5) in any fund in which a trustee may invest pursuant to section 36a-353,
 - (6) Investment agreements with financial institutions whose long-term obligations are rated within the top

two rating categories or whose short-term obligations are rated within the top rating category

- (7) Investment agreements fully secured by obligations of, or guaranteed by, the United States or agencies or instrumentalities of the United States.

c. Budget Process:

- i. July 1-June 30 Municipal fiscal years: General Statutes Chapter 110
- ii. Go back and review your budget process. If it has not started already, it will very soon.
- iii. Typical budget process varies with form of government, but may include:
 - (1) Departmental Estimates
 - (2) Submission of Preliminary Budget by Administration
 - (3) Review by Legislative Body
 - (4) Budget Hearings
 - (5) Adoption of Budget/Town Meeting
 - (6) Referendum (mandatory or by petition)
 - (7) Multiple Referenda

d. Budget (and other) Referenda: Whether you have referenda may be spelled out in your Charter, but General Statutes Ch. 152 also applies to how referenda are to be conducted.

- i. Advisory Referenda: Are they allowed?
 - (1) *Murray v. Egan*, 28 Conn.Supp. 204, 208-09, 256 A.2d 844 (1969): “When a question such as this, whether or not the contract for bussing should be entered into, presents itself, and no provision exists for its submission to referendum, the expense of submitting it to the voters, even on a ‘straw vote’ basis, as here, would constitute a misapplication and waste of public funds.”
 - (2) General Statutes §7-344: “Too high/ Too low” Budget Question

- ii. When are referenda to be held?
 - (1) “Standalone” Referenda versus Referenda combined with Elections
- iii. Form of the Question: Is it spelled out in your Charter? If not, General Statutes §§9-369 and 9-369a apply.
- iv. Timeframes
 - (1) Does your Charter specify day/hours during which referenda may be held? General Statutes §7-9b.
 - (2) If combined with election, Town Clerk notice to Secretary of the State 45 days prior.
 - (3) Special Rule where less notice is specifically permitted by General Statutes.
 - (4) ...But Absentee voting sets must be available 31 days prior.
- e. Use of Municipal funds in Referenda: General Statutes §9-369b.
 - i. Generally prohibited except for:
 - (1) Preparation and printing of concise explanatory texts.
 - (a) Authorized by vote of approving authority
 - (b) Prepared by the municipal clerk, subject to the approval of the municipal attorney
 - (c) Shall not advocate either the approval or disapproval of the proposal or question.
 - (d) Printed in sufficient supply for public distribution
 - (e) Printed on posters of a size to be determined by said clerk. At least three such posters shall be posted at each polling place at which electors will be voting on such proposals or questions.
 - (f) Must also be furnished to each absentee ballot applicant
 - (2) Preparation and printing of materials concerning any such proposal or question in addition to the explanatory

text if such materials do not advocate the approval or disapproval of the proposal or question

- (a) Must be approved by vote of legislative body and subject to the approval of its municipal attorney.
- (3) Written, printed or typed summary of an official's views on a proposal or question
 - (a) so long as prepared for any news medium or
 - (b) not distributed with public funds to a member of the public except upon request.
- (4) Summaries of arguments for, against local questions
 - (a) By ordinance.
 - (b) Shall provide for the establishment or designation of a committee to prepare such summaries
- ii. Civil penalty.
 - (1) Up to twice the amount of the improper expenditure or one thousand dollars, whichever is greater.
 - (2) No state or municipal officer or employee shall be indemnified or reimbursed by the state or a municipality.

7. **Authority to Bind Municipality Contractually**

- a. If an issue arises either in litigation or prior thereto as to the validity of an alleged contract with your town or city, keep these principles in mind.

Fennell v. City of Hartford, 238 Conn. 809, 681 A. 2d 934 (1996) held that a pension manual created and distributed by pension commission of city could not confer any additional benefits not provided for by city's charter. Essentially, the *Fennell* Court refused to apply in the public sector the legal principle that an employment manual may give rise to an express or implied contract between employer and employee. The case of *Finley v. Aetna Life & Casualty Co.*, 202 Conn. 190, 520 A.2d 208 (1987) had clearly established this principle as to private sector employees.

The Court reviewed important concepts regarding the authority to bind a municipality to a contract.

“[T]he officer, body or board duly authorized must act [on] behalf of the municipality, otherwise a valid contract cannot be created. Generally the power to make contracts on behalf of the municipality rests in the council or governing body.... Generally, no officer or board, other than the common council, has power to bind the municipal corporation by contract, unless duly empowered by statute, the charter, or authority conferred by the common council, where the latter may so delegate its powers....” “It follows that agents of a city, including its commissions, have no source of authority beyond the charter. [T]heir powers are measured and limited by the express language in which authority is given or by the implication necessary to enable them to perform some duty cast upon them by express language.” “[A]ll who contract with a municipal corporation are charged with notice of the extent of ... the powers of municipal officers and agents with whom they contract, and hence it follows that if the ... agent had in fact no power to bind the municipality, there is no liability on the express contract....” Thus, “every person who deals with [a municipal corporation] is bound to know the extent of its authority and the limitations of its powers.” *Fennell v. City of Hartford*, 238 Conn. 809, 813-814, 681 A.2d 934, 937-938, *supra*.

- b. If issue of enforceability of a contract arises, you should review the following:
 - i. check the charter or home rule ordinance to determine the entity within the municipality with authority to address the issue that is the subject of the contract;
 - ii. if the charter or home rule ordinance does not expressly authorize the named entity to address the issue, then check the regulations of the entity for a specific reference of authority;

Example: If there is an issue of contractual liability for receiving and then losing a certified check for a performance bond on a Planning Commission project, check the charter provision for the general authority of the Planning Commission. If charter does not address the receipt of bonds, then check the zoning ordinances, wherein the Planning Commission is given a variety of duties and responsibilities. If the duty of receiving bond is delegated to the Planning

Commission, then only the Planning Commission and its staff are able to bind the City to a contract as to the bond.

- c. Non-appropriations Clause: Authority to encumber funds limited to fiscal year?

8. **Municipal Procurement/Bidding**

a. State Funded Projects

The municipality is required to follow the state's process as set forth in the grant/loan agreement or in the statutes. See, for example, Conn. Gen. Stat. § 10-287 re: public school building projects receiving any state funding, which requires, among other things, competitive bidding, newspaper advertisement, and award to the "lowest responsible qualified bidder."

b. Projects not Receiving State Funding

Projects not receiving any state funding do not have to follow the process required for state funded projects.

However, municipalities generally have their own procurement requirements, so it is imperative to check your municipality's charter, ordinances, and policies.

Municipalities have substantial discretion in connection with the bidding and selection processes if they adopt and follow good practices.

Things to consider in connection with your public procurement process:

i. Requests for Proposals

- (1) When required
- (2) Maintaining a level playing field
- (3) Limit communications
- (4) Advantages of including the form of contract in the RFP
- (5) How specific and limiting can the specifications be?

- (6) Hold bids firm (i.e., they cannot be withdrawn) for a sufficient number of days after bid opening to investigate, negotiate and obtain approval
 - (7) Reserve the rights to cancel the bid process
 - (8) Reserve the right to accept any, all, or any part of bids; to reject any, all, or any part of bids; to waive any non-material deficiencies in bid responses; and to award the bid that in its judgment will be in the municipality's best interests
 - (9) Reserve the right to terminate the contract – for example, if funds are not appropriated to allow continuance of the contract, or if the municipality no longer has a need for the subject matter of the RFP
 - (10) Except for state funded projects or if charter, ordinance or policy requires otherwise, should state that municipality is not obligated to accept the lowest bid but can take into account such factors as experience, honesty and integrity, performance history, and responsiveness to RFP
 - (11) Insurance – involve the municipality's insurance broker before the RFP is issued
 - (12) Bid security
 - (13) Defense and indemnification
- ii. Selecting the Winner
- (1) Deficiencies in bids: material v. non-material
 - (2) Cost v. the “smell” test and other factors
 - (3) Reference checking
 - (4) Post-selection negotiations
 - (5) The “best interests” of the municipality
- iii. Selected Contract Provisions
- (1) Start with a good form that is understandable
 - (2) Identify the contract documents

- (3) Include quality standards
- (4) Right to terminate
- (5) Performance bond
- (6) Change orders/scope
- (7) Arbitration/mediation/lawsuit/venue
- (8) Penalties for late or poor performance
- (9) Right to assign
- (10) Opportunity to extend
- (11) Liability issues

9. **Start Planning NOW for When you Become the Center of Political Controversy.**

- a. Allegiance to the client.... Who is that anyway?
- b. Preserve Your Credibility.
- c. Being nonpartisan doesn't mean you can get away without being a politician. Try to be sensitive to the political issues you did not anticipate.

10. **Municipal Miscellany:**

- a. Personal liability protection. General Statutes §7-101a. Protection of municipal officers and employees from damage suits in the scope of their duties.
- b. Mandatory notice of claims to Town Clerk:
 - i. Defective highway/roads/bridges claim [liability] within 90 days. General Statutes §13a-149;
 - ii. Personal injury/property damage claim [employee negligence liability] within 6 months. General Statutes §7-465.
- c. Public Office. General Statutes §7-101a discusses protection of "public officers" and "public employees." What constitutes "public office"? Per Silverberg v. Great Southwest Fire Insurance, Co., 214 Conn. 632, 637 (1990), the essential characteristics of "public office" are:

- i. authority conferred by law;
 - ii. a fixed tenure of office; and
 - iii. the power to exercise some portion of the sovereign functions of government.
- d. Settlement Authority. Check Charter; e.g., “The Town Attorney shall have power... subject to the approval of the council, to compromise or settle any claims by or against the town.” Your municipality may have a threshold amount that allows you some latitude without Council approval.
- e. Helpful Sources.
- i. Organizations: CCM/CAMA, CBA sections, IMLA,
 - ii. Listserves: above organizations and others;
 - iii. McQuillin