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To: Jeff Stella, Chairperson, Safety and Health Committee,
Board of Representatives

From: Burt Rosenberg, Asst. Corporation Counsel

The Public Safety and Health Committee has asked for a legal opinion on the following issues with respect to Code Section 201-12, concerning enforcement of violations of Chapter 201 of the Code of Ordinances, entitled "Regulation of Municipal Separate Storm Sewer System ("MS4"):

1. Can the requirement to issue a warning before a citation be removed?
2. Can we bifurcate the fee structure so that businesses are fined a higher amount than individuals?

BACKGROUND

**The State DEEP Permit Required the City to Enact Legislation
for the Management of the City's Stormwater System**

By way of background, Stamford is the sole City in Connecticut which maintains separate storm water and sewage systems. On June 4, 2013, the State Department of Energy and Environmental Protection {"DEEP"} issued Permit No. CT0030279 which sets forth requirements for the operation of the City's stormwater system. Section 6.A.2.a of the Permit requires that:

The Permittee shall, within eighteen months from the start of the Permittee's first fiscal year that begins after the effective date of this permit, ensure legal authority to:

- (i) control the contribution of pollutants to the Stamford MS4 by permittees of the General Permit for the Discharge of Stormwater Associated with Industrial Activity and the General Permit for the Discharge of Stormwater Associated with Commercial Activity ("general permits"), issued pursuant

to sections 22a-430b of the Connecticut General Statutes, by ensuring the City's stormwater rules and regulations contain requirements consistent with those of the general permits;

- (ii) control the contribution of pollutants to the Stamford MS4 by commercial, industrial, municipal, institutional or other facilities, not otherwise authorized by permit issued pursuant to Sections 22a-430 or 22a-430b of the Connecticut General Statutes;
- (iii) regulate the discharge of pollutants from any site that may affect water quality to the Stamford MS4.

Additional provisions of the Permit mandate that the City “establish an ordinance, bylaw, regulations or other authority” to enforce the requirements set forth in the Permit with respect to (a) land disturbance and development; (b) illicit discharge detection and elimination; and (c) soil erosion and sedimentation control. *Significantly, Section 8.A.3(f)(iii) of the Permit requires the City to annually provide the Department of Energy and Environmental Protection with “documentation supporting the Permittee’s legal authority to administer this program and all elements of the Stormwater Management Plan.”* This includes all changes in City Ordinances relevant to Stormwater Management, which are subject to the review of DEEP pursuant to the express terms of the Permit.

DUE PROCESS REQUIREMENTS RE: NOTICE OF VIOLATIONS; FINES

The City’s authority to fine is subject to the State’s Home Rule Act, which requires a written warning be issued prior to a citation being issued and a fine imposed.

Connecticut General Statutes, Section 7-148, the state’s Home Rule Act, sets forth the scope of powers which a municipality may exercise. CGS Section 7-148(c)(10)(a) authorizes a municipality to:

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 not to exceed two hundred fifty dollars, unless otherwise specifically provided by the general statutes. Such regulations and ordinances may be enforced by citations issued by designated municipal officers or employees, **provided** the regulations and ordinances have been designated specifically by the municipality for enforcement by citation in the same manner in which they were adopted and **the designated municipal officers or employees issue a written warning providing notice of the specific violation before issuing the citation.**

Therefore, Connecticut state law requires that a municipal officer issue a written warning providing notice of a violation prior to issuing a citation for the violation. This requirement is based upon the Due Process Clause of the Fourteenth Amendment to the U.S.

Constitution. Due process is a protection from arbitrary action; the general test of due process is whether legislation is unreasonable, arbitrary or capricious and that the means chosen shall have a real and substantial relationship to a legitimate governmental purpose. *McQuillan, Municipal Corporations*, Section 19.11.

Connecticut courts have refused to sustain fines where no advance notice of a violation of an ordinance had been provided to a resident. In *Town of South Windsor v. Lanata*, 2019 WL 1399954, a Connecticut court overturned fines imposed for violation of a zoning ordinance where no notice to the defendant had been provided, finding:

But without a mechanism making clear how the blight fine is imposed and with no provision for adequate notice of it being imposed, allowing it to be imposed here under these circumstances can't be squared with a prudent exercise of the court's discretion and the basic notion that Norton is owed some due process before the government fines her.

In compliance with CGS Section 7-148(c)(10)(a), the City's Ordinance requires notice of a violation in Section 201-12. If abatement of a violation or remediation of the stormwater contamination/pollution is required, the notice must set forth a deadline within which appropriate measures to correct the violation may be taken by the resident. This procedure is consistent with the due process requirements of state law.

Based upon the statutory framework and the case law interpreting due process requirements, Section 201-12 *must* provide for a warning prior to a fine being imposed. Moreover, an amendment which did not include a warning prior to the imposition of a fine would not withstand the scrutiny of the Connecticut Department of Energy and Environmental Protection because it contravenes the legal requirements underpinning a municipality's authority to impose a fine set forth in CGS Section 7-148(c)(10)(a). Therefore, we must conclude that the Ordinance cannot be amended in a manner which would eliminate a warning prior to a fine being imposed.

2. There cannot be disparate fines for individuals and businesses because fair and equitable treatment of the regulated community is required.

It has been proposed that, for violations of the ordinance, there should be one fine for individuals who violate the ordinance and a different, higher fine for businesses.

Where a legislature has indicated an intention to impose a civil penalty, it must be determined whether the statutory scheme is so punitive either in purpose or effect as to negate the intention of the legislation. *McQuillan, Municipal Corporations*, Sec. 17:6. In analyzing whether a fine is excessive, courts have considered (a) whether the operation of a fine will promote the traditional aim of deterrence, and (b) whether the fine appears excessive. *Ibid.*

The purpose of the Chapter 201 of the Code is to deter the pollution of stormwater, not to punish violators. As discussed above, the warning provisions of Section 201-12 give the resident the opportunity to correct a violation prior to being fined. A fine must serve a legitimate, remedial purpose and must be rationally related to that purpose. *State v. Burnell*, 290 Conn. 634 (2009). The primary purpose of civil penalties is

deterrence. *Ibid.*

In *Keeney v. L and S Construction*, 226 Conn. 205 (1993), the State Supreme Court reviewed the imposition of a fine imposed by the Connecticut Department of Environmental Protection [the predecessor of DEEP] against a contractor for dumping of construction debris without a permit which created a danger to the environment, water supplies and wetlands. The court observed that in assessing the appropriateness of a fine, it must conduct an inquiry into the deterrence of future violations and the fair and equitable treatment of the regulated community. In interpreting the term “fair and equitable treatment of the regulated community”, the court in *McCarthy v. Cadlerock Properties Joint Venture, LP*, 210 WL 2926025, Superior Court, Judicial District of Hartford (May 6, 2010) considered the argument of the Commissioner of Environmental Protection that “fair and equitable treatment of the regulated community demands the violator be punished and that no penalty be borne by those who comply with the spirit and letter of environmental legislation.” The Court agreed with the Commissioner that “the focus of fairness takes into account the violator's degree of willfulness, good faith, ability to pay, degree of cooperation with the regulators and other factors”

Imposing one fine on an individual and another, higher fine on a business is not reasonable, does not promote deterrence, and does not constitute fair and equitable treatment of the regulated community. Connecticut courts have long held that municipal fines must be reasonable. *Herrera v. City of Bridgeport*, Superior Court of Connecticut, Judicial District of Fairfield, WL 1926113 (July 30, 2004). The amount of a fine which a legislature may properly impose depends largely upon the object designed to be accomplished by the imposition of the fine. *State v. Griffith*, 83 Conn. 1 (1910).

Moreover, the remedial measures taken by a party after receiving a notice of the violation from the City will demonstrate the party's degree of willingness, good faith, and degree of cooperation with the City -- those factors cited by the Court in *McCarthy, supra*, in determining whether a party has received fair and equitable treatment.

In this case, the object of the imposition of the fine is to deter residents from contaminating stormwater. This object is the same regardless of whether the party being fined is an individual or a business. Fining a business a greater amount than an individual for an identical violation of the ordinance does *not* constitute fair and equitable treatment of the regulated community as required by the courts. Moreover, it cannot be assumed that a business has a greater ability to pay a fine than an individual. There is no rational basis for imposing disparate fines on the basis of the violator's status as a person or as a business entity.

Based upon the foregoing considerations and case law, we must conclude that the Board of Representative cannot legislate different fines for individuals and businesses for the same violation of the ordinance.

C: Kathryn Emmett, Director of Legal Affairs
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