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TO: Ralph Blessing, Land Use Bureau Chief  
Valerie Rosenson, Legislative Officer, Board of Representatives

FROM: Michael Toma, Assistant Corporation Counsel *MST*

DATE: September 17, 2020

RE: Proposed Affordable Housing Trust Fund Ordinance – Follow Up Questions

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You asked the following additional questions about the proposed Affordable Housing Trust Fund ordinance. Our answers appear below the questions.

Question: I understand that Fee-In-Lieu money can only be used for “brick and mortar” projects. Do the same limitations apply to commercial linkage fees pursuant to Sec. 146-65 et. seq. of the Stamford Code?

Answer: There are limitations on how Fee-In-Lieu money can be used because the state law that authorizes the implementation of the Fee-In-Lieu program (C.G.S. 8-2i) expressly requires that Fee-In-Lieu money be used for constructing, rehabilitating or repairing below market rate units. In contrast, the statutory authorization for the commercial linkage fee ordinance, C.G.S. 7-148(c)(4)(I), allows a broader use of commercial linkage fee funds.<sup>1</sup> This statute provides that an ordinance may “provide for the financing, construction, rehabilitation, repair, improvement or subsidization of housing for low and moderate income persons and families.” Consistent with this statutory authorization, the existing commercial linkage fee ordinance, at Section 146-67(B), appropriately authorizes the following uses of linkage fees: creation of affordable housing units; multi-family rehabilitation program; cooperative or condominium conversion; and home ownership assistance.

The proposed ordinance seeks to expand the uses of trust fund money. First, it provides that funds can be used to pay for studies to determine affordable housing needs and to prepare an affordable housing plan. Studies and an affordable housing plan are important planning tools. While the authorizing statute, C.G.S. 7-148(c)(4)(I), does not expressly state that a municipality is empowered to pay for studies and plans in furtherance of providing for the financing, construction, etc., of affordable housing, it is our opinion that the power to pay for such studies

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<sup>1</sup> The Commercial Linkage Fee Ordinance was adopted by the Board of Representatives as Ordinance 1039 on March 7, 2005. One of the Whereas clauses in Ordinance 1039 cites C.G.S. 7-148(c)(4)(I) as the authority relied upon to adopt the ordinance.

and plans is an implied power. Connecticut courts have recognized such implied powers. “[T]he principle has deep roots in our jurisprudence of municipal law that, in addition to those powers specifically conferred by statute, public officials have those implied powers that are necessary to the proper execution of their duties.” United Illuminating Co. v. City of New Haven, 240 Conn. 422, 439 (1997). See also, Fahy v. Town of Trumbull, 22 Conn. Supp. 105 (Super. Ct. 1960) (The powers of a municipal corporation include (1) powers expressly conferred by the constitution, statutes or charter; (2) powers necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) powers essential to the declared objects and purposes of the municipality.) As the trustees consider which projects to fund, they will need information to help them assess the merits of competing alternatives. Indeed, as will be touched upon below, the trustees have a fiduciary duty to seek out and consider such information. Therefore, studies and plans are essential to effectively and efficiently carry out the primary objective of the ordinance, which is to augment affordable housing in the City. As such, we believe that there is implied power to utilize commercial linkage funds for studies and plans.

The proposed ordinance also provides that funds from the trust can be used to provide financial assistance to renters or to landlords who rent to low income persons. Such assistance is permissible under the statute, as it can be considered the subsidizing of housing, which is authorized by the statute (provided the renters are of low or moderate income, which is not specified in the proposed ordinance). Therefore, commercial linkage funds can be used for this purpose.

Finally, the proposed ordinance provides that funds from the trust can be used to provide foreclosure and eviction prevention assistance, including legal services, financial counseling and financial assistance to persons threatened by foreclosure, eviction or other events that may lead to homelessness. One problem with this provision is that assistance is not limited to low and moderate income persons, and only such persons would be eligible for assistance under the statute. While providing financial assistance to low and moderate income persons who are in danger of foreclosure or eviction is consistent with the power to finance or subsidize affordable housing, providing legal services and financial counseling strikes us as qualitatively distinct and outside the scope of statutory authorization. Therefore, it is our opinion that commercial linkage funds can be used to provide foreclosure and eviction prevention assistance, with the exception of legal services and financial counseling.

Question: I understand that if the Trust Fund were to purchase any goods or services, such as paying a consultant for a study, the Trust Fund would have to follow the regulations of the Purchasing Ordinance. Would this also apply in instances where the Fund wouldn't purchase anything but give money for rental assistance or an affordable housing project with no good or service directly benefiting the City in return? What accountability measures would need to be used instead if this is not covered by the Purchasing Ordinance?

Answer: Since the Purchasing Ordinance only applies to purchases of goods or services,<sup>2</sup> it would not apply to the scenarios in your question; the furnishing of rental assistance or the furnishing of funds to an affordable housing project (if performed directly by the City without the assistance of a hired professional) would not involve the purchase of any service, and so the Purchasing Ordinance would not be triggered.

The Trustees of the Trust Fund have a fiduciary responsibility, so their decisions will be held to a fiduciary standard of care. This standard includes a duty of loyalty to the best interests of the purpose of the trust, and a related duty to act without personal economic conflict. It includes a duty of diligence, which requires that trustees inform themselves prior to making a decision of all material information reasonably available to them, and make prudent decisions that do not

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<sup>2</sup> The opening section of the Purchasing Ordinance, Sec. 23-14, provides that pursuant to Section C5-50-2(j) of the Charter, regulations governing the purchasing of goods and services are hereby established.

lead to waste of trust resources. A trustee must administer a trust with a degree of care, skill, and caution that a prudent trustee would exercise. Amgen Inc. v. Harris, 136 S.Ct. 758 (2016).

Trustees are also bound by the City's Code of Ethics, which prohibits, among other things, using the position of trustee to further their private interest.