

**Annual CBOA/CFMA Educational
Conference for Code Officials**

Sponsored by: The Office of Education and Data Management, DCS, DAS

**Liability of Municipalities & Building and Fire Officials:
Discretionary vs. Ministerial Acts**



November 18, 2014, Central Connecticut State University

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**Liability of Municipalities & Building and Fire
Officials: Discretionary vs. Ministerial Acts**

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for Code Officials**

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You Can't Sue Me!!!

Wait... Can you?

- Default rule: municipalities and other political subdivisions of the state are immune from lawsuits.
- Unless, the town or the state has given permission for a lawsuit.

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General Statutes 52-557n



- The General Assembly has waived the right to immunity in certain scenarios.
- The courts interpret the statute & decide whether particular facts fall within the exceptions.

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Sec. 52-557n. Liability of political subdivision and its employees, officers and agents. Liability of members of local boards and commissions.



- (a) (1) **Except** as otherwise provided by law, a political subdivision of the state **shall be liable** for damages to person or property caused by:
 - (A) The **negligent acts or omissions** of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties;
 - (B) **negligence** in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and
 - (C) acts of the political subdivision which constitute **the creation or participation in the creation of a nuisance**; provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149.

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But wait, there's more...



- (2) **Except** as otherwise provided by law, a political subdivision of the state **shall not be liable** for damages to person or property caused by:
 - (A) Acts or omissions of any employee, officer or agent which constitute **criminal conduct, fraud, actual malice or wilful misconduct**; or
 - (B) **negligent acts or omissions** which require **the exercise of judgment or discretion** as an official function of the authority expressly or impliedly granted by law.

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And more....



- (b) Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall **not** be liable for damages to person or property resulting from:
 - (1) The condition of natural land or unimproved property;
 - (2) the condition of a reservoir, dam, canal, conduit, drain or similar structure when used by a person in a manner which is not reasonably foreseeable;
 - (3) the temporary condition of a road or bridge which results from weather, if the political subdivision has not received notice and has not had a reasonable opportunity to make the condition safe;

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And more...



- (4) the condition of an unpaved road, trail or footpath, the purpose of which is to provide access to a recreational or scenic area, if the political subdivision has not received notice and has not had a reasonable opportunity to make the condition safe;
- (5) the initiation of a judicial or administrative proceeding, provided that such action is not determined to have been commenced or prosecuted without probable cause or with a malicious intent to vex or trouble, as provided in section 52-568;
- (6) the act or omission of someone other than an employee, officer or agent of the political subdivision;
- (7) the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend or revoke **any permit, license, certificate, approval, order or similar authorization**, when such authority is a discretionary function by law, **unless** such issuance, denial, suspension or revocation or such failure or refusal constitutes a reckless disregard for health or safety;

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And more...



- (8) **failure to make an inspection or making an inadequate or negligent inspection of any property**, other than property owned or leased by or leased to such political subdivision, to determine whether the property complies with or violates any law or contains a hazard to health or safety, **UNLESS the political subdivision had notice of such a violation of law or such a hazard or unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances**;
- (9) failure to detect or prevent pollution of the environment, including groundwater, watercourses and wells, by individuals or entities other than the political subdivision; or
- (10) conditions on land sold or transferred to the political subdivision by the state when such conditions existed at the time the land was sold or transferred to the political subdivision.

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The really bad stuff...



- Always potential liability if acting:
 - Criminally, willfully, maliciously, or intentionally.
 - Outside the scope of official duties.
- In such instances, liability will almost certainly be personal. (Sec. 7-101a & 7-465)

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Discretionary vs. Ministerial



- Some acts or omissions (the decision of what to do or whether to do anything at all) require professional judgment.
- Others involve no such judgment.
- Obvious example: “may” vs. “shall.”
 - Other situations, not so clear.

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When is an act “ministerial?”




- When a law, policy or directive clearly establishes that an act **must** be performed, the relevant officials are not free to exercise their own judgment in determining whether to conduct the inspection.

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Inspections




- The most common debate concerning ministerial vs. discretionary acts centers on inspections.
- Some are discretionary, while others are mandatory.

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Building Officials - Inspections




- Sec. 29-393: Building inspectors; duties, right of entry. On receipt of information from the local fire marshal or from any other authentic source that any building ... is in such condition as to be a hazard to any person or persons, the building inspector shall immediately make an inspection by himself or by his assistant, and may make orders for additional exit facilities or the repair or alteration of the building if the same is susceptible to repair or both or for the removal of such building or any portion thereof if any such order is necessary in the interests of public safety.

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Building Officials - Penalties



- Sec. 29-394: Any person who, by himself or his agent, fails to comply with the written order of a building inspector for the provision of additional exit facilities in a building, the repair or alteration of a building or the removal of a building or any portion thereof, shall be fined not less than two hundred nor more than one thousand dollars or imprisoned not more than six months, or both.

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Fire Marshals - Inspections



- Statutory authority to perform inspections:

- C.G.S. 29-305(a): Each local fire marshal and the State Fire Marshal, for the purpose of satisfying themselves that all pertinent statutes and regulations are complied with, **may inspect** in the interests of public safety all buildings, facilities, processes, equipment, systems and other areas regulated by the Fire Safety Code and the State Fire Prevention Code within their respective jurisdictions.

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Fire Marshals - Inspections



- When are you **required** to perform inspections?

- Local fire marshals are required to conduct an inspection **once per year**, or as often as prescribed by the State Fire Marshal in subsection (e), in the interests of public safety, all buildings and facilities of public services and all occupancies regulated by the Fire Safety Code within a local fire marshal's jurisdiction. (C.G.S. Sec. 29-305(b))
 - **Exception:** residential buildings designed to be occupied as a one or two family dwellings are to be inspected upon complaint of owner or occupant and then for smoke detection and warning equipment only. (C.G.S. Sec. 29-305(b))

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Fire Marshals - Inspections



- When are you **required** to perform inspections (cont.)?

- Upon receipt of information by the State Fire Marshal or a local fire marshal from "an authentic source" that any building or facility within their jurisdiction is "hazardous to life safety from fire," the State Fire Marshal or a local fire marshal **shall** inspect such building or facility." (C.G.S. Sec. 29-305(c)(d)).
- During what time of day can you inspect the property?
 - During "reasonable hours."
 - **Except** that "occupied dwellings and habitations, exclusive of common use passageways and rooms in tenement houses, hotels and rooming houses, may only be entered for inspections between the hours of 9:00 a.m. and 5:00 p.m."
 - **Except** in the event of any emergency requiring immediate attention for life safety, or in the interests of public safety.

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Fire Marshals - Inspections



- **What types of notes should I take during my inspection?**

- "Each local fire marshal shall make a monthly report to the authority which appointed the local fire marshal and shall be paid for his or her services in making such inspections of buildings, facilities, processes, equipment, systems and other areas the compensation agreed upon with such appointing authority." (C.G.S. Sec. 29-305(d)).

- **Amendments to these requirements.**

- The State Fire Marshal can adopt amendments to the State Fire and Prevention Codes regarding frequency of inspection requirements on all but three or more family occupancies if the interest of public safety can be met by less frequent inspections. (C.G.S. Sec. 29-305(e)).

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Abatement of Fire Hazards



- The local fire marshal is required to order the remedy of the following fire hazards found in any building or premises:

- (1) combustible or explosive matter, dangerous accumulation of rubbish or any flammable material especially liable to fire, that is so situated as to endanger life or property.
- (2) obstructions or conditions that present a fire hazard to the occupants or interfere with their egress in case of fire, or pursuant thereto.
- (3) a condition in violation of the statutes relating to fire prevention or safety, or any regulation made pursuant thereto. (C.G.S. Sec. 29-306).

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Abatement of Fire Hazards



- Penalty for failing to violate an order to abate a fire hazard:

- \$100 fine, 3 months incarceration, or both.
- Also a \$50 a day civil penalty may be recovered by the State.

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Abatement of Fire Hazards



- What happens if owner/occupant fails to abate the fire hazard after receiving the order?
 - The local fire marshal **shall**:
 - 1) Promptly notify in writing the prosecuting attorney having jurisdiction in the municipality in which such hazard exists of all the facts pertaining thereto, and such official shall promptly take such action as the facts may require; AND
 - 2) Promptly send a copy of such notification to the State Fire Marshal.

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Abatement of Fire Hazards



- What happens if owner/occupant fails to abate the fire hazard after receiving the order?
 - The local fire marshal **may**:
 - File an injunction action in court against such owner or occupant. The State Fire Marshal, on his own initiative, may apply to such court for such injunction.

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Order To Vacate A Building



- A local fire marshal or police officer **is permitted to** order any building vacated, where one or more of the following **enumerated violations** exist, **and** the local fire marshal or police officer determines that there exists in the building a **risk of death or injury**. These five instances are:
 - 1) blocked, insufficient or impeded egress;
 - 2) failure to maintain or the shutting off of any fire protection or fire warning system required by the Fire Safety Code or State Fire Prevention Code;
 - 3) the storage of any flammable or explosive material without a permit or in quantities in excess of any allowable limits pursuant to a permit;
 - 4) the use of any fireworks or pyrotechnic device without a permit; or
 - 5) exceeding the occupancy limit established by the State Fire Marshal or a local fire marshal, such fire marshal or police officer may issue a verbal or written order to immediately vacate the building.

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Order To Vacate A Building



- The local fire marshal or police officer issuing the order to vacate “**shall**” notify or submit a copy of such order to the State Fire Marshal if such marshal or officer anticipates that any of the [five] conditions . . . cannot be abated in **four hours or less** from the time of such order.” (C.G.S. Sec. 29-305(c))
- Upon receipt of any such notification or copy, the State Fire Marshal **shall** review such order to vacate, and after consultation with the local fire marshal or local police officer, determine whether to uphold, modify or reverse such order, with any further conditions the State Fire Marshal deems appropriate to protect any person from injury.
- **Penalties:** A violation of such order shall be subject to a fine between \$200-\$1,000, or imprisonment of not more than 6 months, or both.

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Fire Marshal - Other Inspections



- **Cargo tank motor vehicles:** A municipality, **may**, by ordinance, require the local fire marshal to inspect **once each year**, and more often if necessary, all cargo tank motor vehicles . . . used for the storage or transportation of flammable or combustible liquids, liquefied petroleum gas, liquefied natural gas or hazardous chemicals. (C.G.S. Sec. 29-322).
- **Dry cleaning businesses:** A local fire marshal “**shall**” inspect, at least once each year and at such other times as it appears necessary, all places where dry cleaning or dry dyeing is done. Each local fire marshal **shall** make written orders concerning any failure to comply with such regulations and for the abatement of any fire hazard or casualty hazard related thereto found upon inspection.” (C.G.S. Sec. 29-326).

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If it's discretionary, there's nothing to worry about, right?



- **Unless:**
 - The alleged conduct involves malice, wantonness, or the intent to injure.
 - A statute provides a cause of action for the failure to enforce certain laws.
 - The failure to act would be likely to subject an “identifiable victim to imminent harm.”

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Real world examples

(you just can't make this stuff up)

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Lewis v. Cox (1997)




- Foundation footings defective when home constructed in 1978.
- Building official inspected the construction and issued a certificate of occupancy.
- Plaintiff argued: “inspection prior to issuance of certificate is mandatory, therefore ministerial.” Is she right?

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Walmsley v. Scotland (1998).



- Foundation footings on newly-constructed home were defective and in violation of the building code.
- Building official inspected and issued a certificate of occupancy.
- Immunity?

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Walmsey continued...



- First claim: Building official and town were negligent in inspecting and issuing the certificate of occupancy.
 - Ministerial or discretionary?
- Second claim: Building official and town showed a “reckless disregard for health and safety.”

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West Haven Academy of Karate v. Guilford (2000)



- Building official and fire inspector approved plans to renovate building, subject to certain special conditions.
- Owner failed to comply with the conditions, building code, and fire code.
- After Town failed to act on complaints for months, tenant forced to re-locate business.

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Murphy v. Seaberg (2010)



- Newly-constructed cottage in Guilford.
- Building officials conduct preliminary inspections before boiler, electricity or water connected.
- Carbon monoxide poisoning when new owner sleeping in bedroom two months later.
- Court: Sec. 29-393 requires inspection “on receipt of information from the local fire marshal or any other authentic source that any building ... is in such condition as to be a hazard to any person or persons....”

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Phoenix Ins. Co. v. Vernon (2004).



- Sprinkler system froze and caused flooding to complex.
- Prior, multiple letters to and from Town officials concerning hazards associated with sprinklers.
- Sec. 29-305 requires fire marshal "shall inspect..."
- Sec. 29-393 requires building official "shall immediately make an inspection..."
- Immunity?

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Rinh Thach v. City of Bridgeport (2012)



- Plaintiff lost family members in an apartment fire in Bridgeport.
- Fire marshal allegedly failed to conduct an annual inspection of this building, as required by C.G.S. Sec. 29-305 – and allegedly failed to conduct an inspection after being put on notice of certain dangerous conditions.
- Court found that such inspections were "ministerial" in nature, and found the fire marshal's failure to perform the property inspection after being notified of violations could be considered "reckless misconduct," and thus, could trigger the loss of any protection of governmental immunity.

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Williams v. Housing Authority of Bridgeport (2013)



- Several minor children died as a result of a fire in an apartment building.
- While the court found that the local fire marshal failed to perform an annual inspection of the building, the court found that the local fire marshal had no knowledge/notice of any dangerous conditions at the building.
- Was the fire marshal afforded immunity under C.G.S. Sec. 52-577n(b)(8)?

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Williams v. Housing Authority of Bridgeport (2013)



- YES!
- Court made the following statement: "In the context of inspections, courts seem to agree that knowledge of a dangerous condition is necessary to show the type of reckless conduct necessary to defeat immunity pursuant to C.G.S. Sec. 52-557n(b)(8)."

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The "Knowledge" Requirement



- Smart v. Corbitt, 126 Conn. App. 788 (2011): The fact that defendant fire marshal was without notice of problem with smoke detection devices supported finding that fire marshal was not reckless and was therefore entitled to immunity from liability pursuant to C.G.S. Sec. 52-557n(b)(8) for failure to inspect.
- Shepard v. Keyes, Superior Court, judicial district of New Haven, Docket No. CV 12 6031150 (January 15, 2013, Wilson, J.): "[T]he failure to inspect the exterior of the property ... could be found to constitute reckless disregard for the health and safety of the plaintiff [pursuant to C.G.S. Sec. 52-557n(b)(8)], because the city already knew that there were numerous housing code violations at the premises based on its previous inspections."
- But See Pinos v. Mystic Fire District, Superior Court, judicial district of New London, Docket No. CV 09 5012096 (March 30, 2011, Cosgrove, J.): "The evidence before the court reveals that a genuine issue of material fact exists as to whether the fire marshal ... ever made a complete, statutorily required yearly inspection of the subject premises in his seven years as fire marshal prior to a fire that killed two people."

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Failure to inspect



- Sec. 52-557n(b)(8): "... notice of such a violation of law or such a hazard or unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances."

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Lawyers are no fun at all.



- Even terrible, can't-possibly-win lawsuits often subject a town and its building officials to months or even years of time, expense, and uncertainty.
- The trend in the law means that it is best to avoid any litigation concerning duties to inspect.

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Questions?



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