

LEGAL ASPECTS OF CODE ENFORCEMENT AND ADMINISTRATION



JUDITH ROTHSCHILD DICINE, J.D.

STATE OF CONNECTICUT, DIVISION OF CRIMINAL JUSTICE



New England Building Officials Educational Association
UMASS, Amherst, October 7, 2019

LEGAL DISCLAIMER



This presentation includes important general principles of law regarding building and safety code administration and enforcement. It is not intended to be legal advice to any person.

Questions on the proper administration and enforcement of code in your jurisdiction should be directed to the appropriate legal counsel for your jurisdiction.

PERFORMANCE OBJECTIVES

1. Understand that the duly empowered code official in the United States is a critical health and safety “**governmental official**”, bound to administer and enforce code in accordance with the U.S. Constitution and the applicable state constitution, including on matters of **right of entry**.
2. Know and understand the law generally concerning the **authority and obligations** of a code official to obtain code compliance through administration and enforcement.
3. Recognize the **orders** available for building officials under the International Building Code and review when and how each are used in enforcement.
4. Explain general procedure for referring a case to **civil and criminal court** and what occurs during criminal prosecution.

HOW ARE WE GOING TO MEET THE OBJECTIVES?



BY WHAT WE ARE GOING TO COVER:

- GOALS
- RESEARCH ON CODE ENFORCEMENT
- AUTHORITY
- RIGHT OF ENTRY/DENIAL OF ENTRY
- INSPECTION
- ABATEMENT PROCEDURE
- CIVIL AND CRIMINAL COURT



GOALS OF ENFORCEMENT

1. COMPLIANCE

Create safer and healthier communities by enforcement of required code standards. Using the abatement process improves community well being.

2. CORRECT HUMAN BEHAVIOR

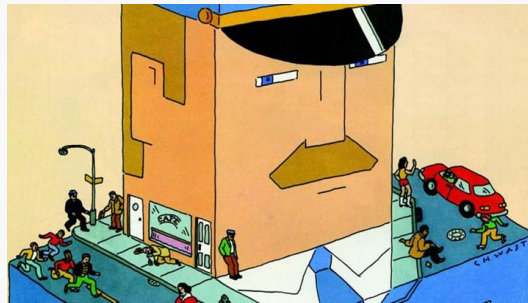
Bring the importance of building and fire safety to landlords, tenants and the surrounding community.

Fixing *“Broken Windows”*



“Broken Windows” Theory (1982)

- Political Scientist James Q. Wilson and Rutgers Criminologist Georg Kelling
- <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>



The *“Broken Windows”* Theory

- Criminals perceive broken windows and other forms of disorder as signs of weak social control.
- In turn, they assume crimes committed there are unlikely to be checked.

Criticisms of “Broken Windows”

- Motivation for “zero tolerance” policing, wherein officers arrest for petty crimes and courts punish for convictions of them.
- In practice resulted in stopping, frisking and arresting more people, particularly in high crime areas which were populated with minorities and low income persons.
- Resulted in a spike in reports of police unfairly targeting minorities, especially black men.

Consider the Theory

(The famous evocation of how disorder begins)

At piece of property is abandoned, weeds grow up, a window is smashed. Adults stop scolding rowdy children; the children, emboldened, become more rowdy. Families move out, unattached adults move in. Teenagers gather in front of the corner store. The merchant asks them to move; they refuse. Fights occur. Litter accumulates. People start drinking in front of the grocery; in time, an inebriate slumps to the sidewalk and is allowed to sleep it off. Pedestrians are approached by panhandlers.

Look again at the first steps...

- *A piece of property is abandoned,*
- *weeds grow up,*
- *a window is smashed.*



What if...

- What is the authors of "*Broken Windows*" and policy makers who heeded them had taken another track?
- What if vacant property had received the attention that, for thirty years, was instead placed on petty criminals?

What's the Problem With Abandoned Structures?

- Good place to run and hide from police
- Easy place to store fire arms
- Notoriously useful for drug dealing
- Dangerous attractive nuisance for children
- Susceptible to arson
- Promotes fear of the area



Abandoned Housing/Crime Studies

- 1993- Criminologist William Spelman in Austin, TX : Crime rates on blocks with open abandoned buildings were twice as high as rates on matched blocks without open buildings.
- 2005 – Sociologist Lance Hannon in NYC: in high poverty areas, the number of abandoned houses in a given census tract correlated with homicide levels.

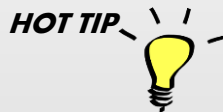
Remediating Abandoned, Inner City Buildings Reduces Crime and Violence in Surrounding Areas

http://www.safeguardproperties.com/News/Industry_Updates/2015/07/Remediating_Abandoned_Inner_City_Buildings_Reduces_Crime_and_Violence_in_Surrounding_Areas.aspx



CT STATE BUILDING CODE SEC. 116: UNSAFE STRUCTURES AND EQUIPMENT

- Unsafe structures **shall** be taken down and removed or made safe, as the Building Official deems necessary and as provided in SBC 116.
- A **vacant** structure that is not secured against entry **shall** be deemed unsafe.



Enforcement of this provision by the building official can be a tremendous help to community safety. See also SBC Sec. 118 on Vacant Structures.

New Study Shows Restoring Blighted, Vacant Land Significantly Reduces Gun Violence, Crime and Fear

<https://www.pnas.org/content/115/12/2946>



LACK OF HOUSING STANDARDS – *THE EFFECT*



Driving Public Health 3.0 in the Motor City

07/12/2016 10:53 AM EDT

If you start at City Hall and drive 15 minutes east to Gross Pointe, a wealthy suburb of Detroit, you'll cross a difference of nearly 12 years in life expectancy and 10 percent in teen pregnancy rates. Detroit's children continue to suffer infant mortality, asthma, and lead exposure at higher rates than their counterparts elsewhere.

Source: Office of the United States Assistant Secretary of Health with support from Healthy People 2020

ON TO YOU: THE CODE OFFICIAL



KNOW YOUR AUTHORITY

- Your authority to enforce code comes from several sources, which apply as dictated.
 - U.S. Constitution
 - U.S. Supreme Court and District Court Opinions
 - Federal laws and regulations
 - State Constitution
 - State Court Opinions
 - State laws and regulations
 - Directives from state agencies
 - Local jurisdiction laws and regulations

MINISTERIAL VS. DISCRETIONARY ACTS



- **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 act.
- **DISCRETIONARY:** Some acts or omissions (the decision of what to do or whether to do anything at all) require professional judgment. Obvious example: “may” vs. “shall.”



CHECK YOUR JURISDICTION ON WHAT HAS BEEN DEEMED A MINISTERIAL VS. A DISCRETIONARY ACT TO AVOID LIABILITY FOR FAILURE TO ACT!!!



PRACTICE PROFESSIONALISM

- Treat people in your community, your office, and in other departments with respect
- Do your best to keep commitments
- Know your code well
- Be honest in all matters
- Don't take things personally
- Be diligent and effective in gaining compliance, remembering *honey* usually works best

COMMUNICATION = THE KEY TO SUCCESSFUL ENFORCEMENT

“The single biggest problem in communication is the illusion that it has taken place.”



George Bernard Shaw



Avoid misunderstandings and delays in correction of violations by requiring that the responsible person provide a reasonable written plan of compliance with dates to start and finish each item along with any other specific considerations such as submission of plans, applications for permits, etc.

INSPECTIONS



Many inspection provisions are **ministerial** in nature, as indicated with words like the official *shall* or *must* inspect. These commands must be followed to avoid potential liability.

However, the code official must always use lawful means to gain entry into private property to inspect, including by consent or a court order.

In an emergency the code official may access as necessary to protect the public safety.

INSPECTIONS

- Entry and inspection must be completed in accordance with law by a duly authorized code official.
- Your notes should indicate date, time and who was present when the inspection was completed.
- Your notes should be specific regarding the type of violations, where the violation occurs and include any special conditions that are present.

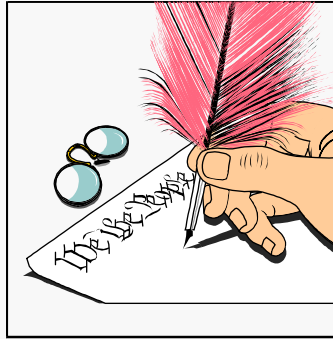


PHOTOS



- Photos, videos and sketches are generally allowed if you are legally there to inspect.
- Remember to take notes for the photos: who took the photos, what they depict and the address that you are taking the photos of along with the date/time of the picture.

THE UNITED STATES CONSTITUTION



THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It's Not Just For This...

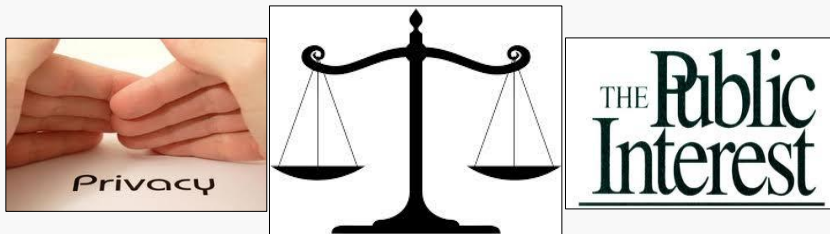


For Federal Constitutional Purposes...



There is No Difference!!!

WHAT IS AN “UNREASONABLE SEARCH”?



Warrantless Searches Are Presumed



Unreasonable
(Unless An Exception Applies)

WHY DO YOU CARE?



Illegal entry onto private property *may* result in:

- Exclusion in court of any evidence obtained from an illegal search – *the Exclusionary Rule*
- Municipal and department civil liability
- Personal civil liability
- Personal criminal liability (for intentional acts)
- Administrative sanctions

So How Do We Do It Right?



Know The Warrant Requirement And Its Important Exceptions For The Code Official:

- Consent ✓
- Plain View ✓
- Exigency/Emergency ✓
- Special Need Searches:
Regulatory Scheme - Permits ✓

CONSENT



CONSENT



- Consent must be given freely and voluntarily
- Consent must be by an authorized person of suitable age and discretion
- Consent may not be by duress or coercion
- Burden of proof is on the official, so your actions *must* be proper to prevail on claim of good consent.

CONSENT



- An inference that refusal is futile, or that a search warrant will be issued automatically, has been held to be coercive.

Consent Considerations

- Consent can be withdrawn at any time



- Consent can be limited



Factors Showing Consent

- Knowledge of constitutional rights in general
- Knowledge of the right to refuse consent
- Sufficient age and maturity to make an independent decision
- Intelligence to understand the significance of consent



More Factors Showing Consent

- Education in or experience with the workings of the criminal justice system
- Cooperation with inspectors
- Length of detention and nature of questioning regarding consent
- Coercive governmental behavior surrounding the incident

Third Party Consent...a.k.a. “The Roommate Scenario”

- A person may consent to a search of areas over which he has common authority with another person.
- One person cannot consent to a search of the exclusive possessions or private space of another person.

Third Party Consent

Exception:

- The consent of one occupant is **insufficient** when another occupant
 - is present, and
 - objects to the search

Third Party Consent: “Apparent Authority”

- Conduct a **reasonable inquiry** of the person giving consent.



Third Party Consent: “Apparent Authority”

- A search without a warrant is valid when it is based on consent given by someone who the government official *reasonably believes* has common authority over the premises, but who actually does not.
- Based on objectively reasonable belief.
- Each case judged on its own facts.

Third Party Consent

- Not valid from Landlord (even with a right of entry clause in the lease) except in cases of a true **emergency**.



Third Party Consent

Not valid from a hotel clerk



Written Consent Is Good!



State of Connecticut
DIVISION OF CRIMINAL JUSTICE

Consent To Search And Examine Evidence

Case No: _____ Date: _____ Time: _____ City/Town: _____

Name: _____ DOB: _____

Address: _____

I, _____ (print name) after having been informed of my Constitutional right not to have a search performed without a search warrant and of my Constitutional right to refuse to consent to such a search,

DO CONSENT (initials) to have _____ and _____ who are members of the Division of Criminal Justice, and _____ and _____ who are members of the _____ (insert agency name)

conduct a complete search of my: Residence Place of business Vehicle Other property

(describe vehicle or property to be searched)

which property is located at: _____ (specify location/ address/ street/ apartment number/ suite/ city or town/ state)

I authorize members of the Division of Criminal Justice and the _____ Police Department to take from the location or locations specified above, such materials and other property as they may desire and to perform examinations and tests, including forensic examinations and tests, on any item seized.

Permission for this search and examination of evidence is granted by me, knowingly, willingly and voluntarily, to the above named police officer or police officers and no inducements, threats or promises have been made to me in order to gain my consent.

Signature: _____ Witness: *

Witness: _____ Witness: *

(If used for the entry of the subject's signature and initials, this form shall be completed by a police inspector/officer. * 2 Police inspectors/officers should be witnessed)

Plain View

Plain View



- It is not a search within the Fourth Amendment to observe what is in plain view from a location where you have the right to be.



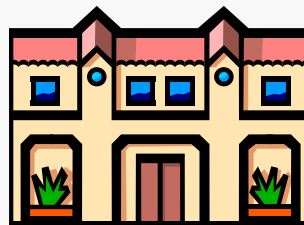
Plain View



- Requires a “lawful initial entry” =
 - Entry onto private property was lawful, *or* condition is visible either from a public area or a place you are authorized to be.
 - Must be detectable with one of the five senses, although commonly used enhancement devices may be okay.

To Bar Your Inspection, The Individual Must Have A Reasonable Expectation of Privacy In The Area To Be Searched

- There is no reasonable expectation of privacy in common hallways of an apartment building
 - Mutual use and control by tenants and owner
 - Used by visitors, delivery people, trades people
 - Can be used by you, too



Reasonable Expectation of Privacy

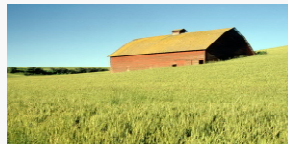


- No reasonable expectation of privacy of tenant or non-tenant on multi-unit common porch.



Fourth Amendment Doesn't Protect

- **Open Fields**



- **Abandoned Property**

Buildings which are not occupied and for which a building owner cannot be identified or located by reasonable efforts



Curtilage or Open Field?



- **“Curtilage,”** the area immediately surrounding the house, is considered to be part of the house for Fourth Amendment privacy and warrant requirement purposes
- Generally applies to the exterior of one and two family dwellings, not to three family dwellings or larger (apartment occupancies)

Curtilage or Open Field?

- Factors that help decide:
 - Distance from the house?
 - Fenced in area around the house?
 - Use to which the area is put?
 - Steps taken to protect the area from observation by passers by?
 - 6 foot fence with “keep out”
 - Fence shut: no view from street



Trespass

- An implicit license exists for visitors to:
 - Approach by the front path
 - Knock promptly
 - Wait to be received
 - Absent invitation to remain longer, leave
- Government official may do what any other private citizen may do without trespassing
 - Salesman, trick or treater, Girl Scout

No Trespass

OK:

- Walk up the driveway
- Walk up porch steps to front door
- Knock on door
- Observe anything in plain view on your way to and from the door
- Observe anything in plain view from the front porch if resident opens the door
- Ask permission to enter and inspect

Trespass

NOT OK:

- Open a gate marked “No trespassing”
- Explore path or yard with specialized devices (metal detector, thermal imager)
- Go into back yard (absent invitation to do so)
- Go around house looking into windows (curtilage)

Exigent Circumstances & Emergency

Exigency/Emergency Circumstances

- Imminent and substantial threat to life safety or property
- No time to get a warrant
- No other reasonable options
- Mere inconvenience of seeking a warrant is not sufficient



Special Needs Searches: Regulatory Scheme



SPECIAL NEEDS: Permit Inspection

Palmieri v. Lynch, 392 F.3rd 73 (U.S. 2nd Circuit, 2004)

- Warrantless inspection of private dwelling by municipal administrative officer without consent of owner is generally unreasonable absent specifically delineated circumstances; however, searches pursuant to **regulatory scheme** need not adhere to usual requirements of warrant and probable cause, where special governmental needs are present.

SPECIAL NEEDS: Permit Inspection, cont.

- **Palmieri v. Lynch**, 392 F.3rd 73 (U.S. 2nd Circuit, 2004), cont.
Factors in applying special needs doctrine, to determine whether special governmental needs outweigh particular privacy interest and thus justify warrantless administrative inspection, are:
 - **(1)** nature of privacy interest allegedly compromised by challenged governmental conduct;
 - **(2)** character of intrusion imposed by challenged conduct; and
 - **(3)** nature and immediacy of state's concerns and efficacy of governmental conduct in meeting them.

SPECIAL NEEDS: Permit Inspection, cont.

- ***Palmieri v. Lynch***, 392 F.3rd 73 (U.S. 2nd Circuit, 2004), cont.
- In response to wetland **permit** application, owner had a diminished expectation of privacy
- Owner chose to apply to construct on state-regulated land, in an area freely visible from navigable water, from public-access beach and from neighbor's property, and owner was on notice that application process would involve some form of site inspection.

Administrative Search Warrants

WHAT DOES THE U.S. SUPREME COURT ABOUT IT?



- **Camara v. Municipal Court**
U.S. Supreme Court (1967), 387 U.S. 52387 S.Ct. 1727, 18 L.Ed.2d 930
"Probable cause to issue a warrant to inspect for safety code violation exists if reasonable legislative or administrative standards for conducting an area inspection are satisfied."
- **See v. Seattle**
U.S. Supreme Court (1967), 387 U.S. 54187 S.Ct. 1737, 18 L.Ed.2d 943

INSPECTION WHERE ENTRY REFUSED

*When cooperation ceases
and access to the property is denied, an
ADMINISTRATIVE SEARCH WARRANT
is required before entry and
inspection can be accomplished.*



DENIAL OF ENTRY? CAN'T TAKE "NO" FOR AN ANSWER?

- In most cases you should make a reasonable attempt to gain entry by voluntary consent from the correct person before you seek a warrant.
- Many state and local laws allow a code official entry onto private property. Despite that, some persons refuse that entry. The code official's right of entry does not mean that the official should get into a physical confrontation at the door. In the event the code official is denied access, an **administrative search warrant** may be applied for seeking a judge ordered entry.
- Although approved by the U.S. Supreme Court, administrative search warrants must also be permitted by state law. Generally, they also must be approved by a prosecutor before submission to a judge.



ABOUT YOUR FILES:

- General rule: If you write it, be prepared to have it publicized. State laws must be consulted for applicable disclosure laws.
- Freedom of Information laws generally require disclosure of your files, however some items may be closed as confidential.
- Prior to disclosure, seek the opinion of your legal counsel for criminal and civil matters, particularly on an open investigation or pending case.

ABATEMENT:



- **ISSUING ORDERS:**

- Always identify the owner or other responsible person or entity *before* issuing legal notice.
- Get a certified copy of the deed for you file as proof ownership. Owners should be listed with full names on the order. Mirroring the deed is good form.
- Please be aware that if the owner is a business, estate, corporation or partnership, additional information may be required. Check with your local attorney on this.

The following slides demonstrate the process of abatement under the 2018 ICC International Building Code©.



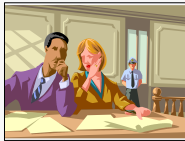
IBC 114 VIOLATIONS

- **IBC 114.1** states it shall be unlawful for any person firm or corporation to erect, construct, alter, extend, repair, move, remove, demolish or occupy any building, structure or equipment regulated by this code, or cause same to be done, in conflict with any provisions of this code.



IBC 114.2 NOTICE OF VIOLATION

- Authorizes the *building official* to serve a notice of violation or order on the person responsible for violation of the code, or of a permit or certificate issued under the code.
- Such order **shall** direct the discontinuance of the illegal action or condition and the abatement of the violation.



IBC 114.3 PROSECUTION OF VIOLATION

- If the notice is not complied with promptly, the BO is authorized to request legal counsel of the jurisdiction institute the appropriate proceeding at law as well as in equity to restrain, correct or abate such violation or to require the removal or termination of the unlawful occupancy or of the order or direction made pursuant thereto.



IBC 114.4 VIOLATION PENALTIES

- Any person who violates this code, fails to comply with requirements thereof or of approved construction documents or of the directive of a building official or of a permit or certificate issued shall be subject to penalties as described by law.



IBC 115 STOP WORK ORDER

- IBC 115.1 The BO is authorized to issue a **stop work order** whenever the BO finds any work regulated this code being performed in a manner either contrary to the provisions of this code or dangerous or unsafe.



IBC 115.2 ISSUANCE OF STOP WORK ORDER

- The order **shall be in writing and shall be given** to the owner, owner's agent or the person performing the work.
- The order shall state the reason for the order and the conditions under which the cited work will be permitted to resume.



IBC 115.3 UNLAWFUL CONTINUANCE

- Any person who shall continue any work after having been served with a stop work order, except as directed to remove or make safe a condition, shall be subject to penalties as prescribed by law.



IBC 116: UNSAFE STRUCTURES AND EQUIPMENT

- IBC 116.1: **The BO shall** deem structures or equipment an unsafe condition which are or become:
 - Unsafe
 - Insanitary
 - Deficient because of inadequate means of egress, inadequate light and ventilation



IBC 116: UNSAFE STRUCTURES AND EQUIPMENT

- constitute a fire hazard
- Or are otherwise dangerous to human life or public welfare
- Or that involve illegal or improper occupancy or inadequate maintenance.

The BO **shall** cause a report to be filed on an unsafe condition. SBC 116.2



IBC 116: UNSAFE STRUCTURES AND EQUIPMENT

- Unsafe structures **shall** be taken down and removed or made safe, as the BO deems necessary and as provided in IBC 116.
- A **vacant** structure that is not secured against entry **shall** be deemed unsafe.



HOT TIP

Enforcement of this provision can be a tremendous help to community safety.



IBC 116.3 NOTICE OF UNSAFE STRUCTURE

- If an unsafe condition is found, the **BO shall serve** on the owner, agent or person in control of the structure a written notice that describes the condition and specifies the abatement required, or demolition within a stipulated time.
- Requires the person notified declare immediately to the BO acceptance or rejection of the terms of the order.



IBC 116.4 METHOD OF SERVICE

- The unsafe structure or equipment order is deemed properly served if delivered to the owner personally, sent certified or registered mail to the last known address return receipt requested, or any other manner prescribed by law.
- If returned undelivered, a copy shall be posted in a conspicuous place in or about the structure.
- Service on the owner's agent or person responsible for the structure shall constitute service on the owner.



DELIVERY

- Although proof of delivery is not specifically required by the IBC, prosecution of a violation generally requires proof that the person actually received the notice.
- Proof of delivery is required to prove knowing violation of the order.



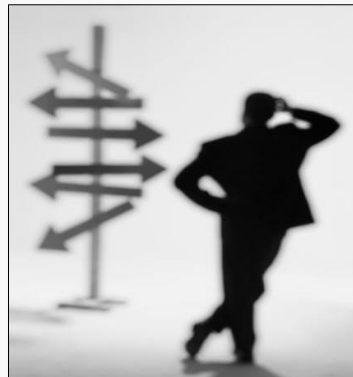
OTHER CONCERNS:

- Always be mindful of where you are.
- Various conditions/violations that you find may not be a result of purposeful disregard of the law. Determine the cause of non-compliance if possible before you choose your next enforcement step.
- There are mental health conditions that are a factor in some of the conditions you will find. For example, a deteriorated and collapsing house with excessive combustibles which may be a result of hoarding disorder, a mental health .

REFERRALS:

Everyone is busy, become familiar with and utilize the other agencies in your town to accomplish the goal.

- Fire
- Police
- Health
- Housing
- Planning and Zoning
- Animal control
- Legal



UNLESS AUTHORIZED BY LAW,

NEVER, NEVER, NEVER...



- Order any person to act without authority.
- Tell anyone you will have them arrested.
- Tell anyone you will get a search warrant.
- Tell anyone that you must be allowed on the property without legal grounds.
- Tell anyone what the prosecutor may or may not do with the case.
- Excuse anyone from a court date.
- Tell anyone that you will get their case dropped.

THANK YOU FOR ALL YOU DO
FOR OUR SAFETY AND WELL-BEING





CONTACT INFORMATION:

Judith Rothschild Dicine, J.D.
Supervisory Asst. State's Attorney, Housing
State of Connecticut
Division of Criminal Justice
Office of the Chief State's Attorney
121 Elm Street, New Haven, CT 06510
Phone 203 773-6755 FAX 203 789-6459
Email: judith.dicine@ct.gov