State of Rhode Island and Providence Plantations

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Advisory Opinion
May 8, 2001

Michael D. Cassidy, Chairman
The Rhode Island Rivers Council
Department of Administration
One Capitol Hill
Providence, RI 02903

RE: Rhode Island Rivers Council Request for Advisory Opinion

In your letter of August 16, 2000, you requested an advisory opinion "clarifying the authority of designated local watershed councils and the capacity-building role of the RI Rivers Council." The General Assembly authorized, created and established within the state of Rhode Island department of administration, division of planning, the Rhode Island Rivers Council (hereinafter "Rivers Council"). Your letter, however, primarily asks about the powers and duties of the various local watershed councils (hereinafter "councils"). Therefore, although this opinion is directed to the Rivers Council, a subdivision of the department of administration, which is a department of state government, it mostly discusses the relevant statutory language as it pertains to the councils, which are separate and distinct entities.

The first part of your request seeks the interpretation of the standing provision in R.I.G.L.§46-28-8, and specifically asks:

> "... what specific authority is granted to 'officially designated' local watershed councils by the statement that they shall 'have standing' to give testimony in state and local administrative proceedings which impact rivers and quality? Who decides whether or not a proceeding impacts on rivers and water quality? Does the provision for standing require state and local authorities to notify the 'officially designated' local watershed councils of relevant administrative proceedings in a timely fashion? What are the most relevant kinds of administrative proceedings that this would apply to? Are quasi-state agencies considered 'state' agencies? Does the Rivers Council have any authority to enforce any 'notification' that may be required by this statute"?

Standing and Notice:

R.I.G.L. §46-28- 8 authorizes each 'officially designated' local watershed council (hereinafter "councils") **"to give testimony** in all state and local administrative proceedings which impact on rivers and water quality." (emphasis added) Id. The qualifier **"to give testimony"** is limiting in that it does not create in the local watershed councils a statutory right to seek judicial review or relief.

The legislature was clear in its intent that the councils should be able to give testimony in proceedings that "impact on rivers and water quality." The key question, however, is whether it is the state and local administrative bodies or the councils who are responsible for making the threshold determination of whether a proceeding "impacts on rivers and water quality"? Whether an administrative proceeding "impacts on rivers and water quality," so that a council has "standing to testify" in the context of R.I.G.L. §46-28-8, is an objective standard to be applied by the administrative body conducting the respective proceeding, notwithstanding, of course, the specific authority of the councils set forth in 46-28-8 (1) -(4), and (14) and (15). The intent that the "impacts on rivers and water quality" standard should be viewed as an objective standard is exemplified by the fact that the legislature did not include subjective language. For example, the legislature did not say: "**when the councils have reason to believe** that a proceeding 'impacts on rivers and water quality,' they have standing to give testimony." (emphasis added). See Accent Store Design v. Marathon House, Inc., et al., 674 A.2d 1223, 1226 (R.I.1996) (Supreme Court would not judicially create cause of action against public authorities, inasmuch as legislature could have easily created such cause of action by adding to statute requiring bond be posted and did not do so, which evidenced legislature's intent not to create cause of action).

Therefore, in the context of an administrative proceeding, the onus is on the councils to assert their statutory right of standing to give testimony, and the onus is on the administrative body to determine whether the proceeding "impacts on rivers and water quality." Nonetheless, in view of R.I.G.L. §46-28-8 as a whole, it is arguable that the legislature intended that the administrative bodies give deference to the councils when they assert standing to give testimony.

That being said, nothing in the language of §46-28-8 limits the right of councils to seek judicial review. The councils can seek judicial review so long as they establish standing in accordance with the requirements set forth in the relevant case law.[1]

[1] Standing to seek judicial review has been defined by the R.I. Supreme Court to mean "an access barrier that calls for the assessment of one's credentials to bring suit and involves an inquiry as to whether the party has alleged such a personal stake in the outcome of the controversy as to ensure concrete adverseness that sharpens the presentation of the issues upon which the court depends for an illumination of the questions presented." Blackstone Valley Chamber of Commerce, et al. v. Public Utilities Commission, 452 A.2d 931, 932 (R.I. 1982). In Pontbriand v. Sundlun, 699 A.2d 856, 861 (R.I. 1997) the R.I. Supreme Court further held that "when deciding an issue of standing, a Court must

I now turn to your question regarding "notice." Despite the "standing" provision in R.I.G.L. §46-28-8, the legislature did not make any provision requiring that actual notice of proceedings "impacting on rivers and water quality" be given to the councils. If the legislature had intended to provide councils with actual notice concerning relevant administrative proceedings, and if it had intended to place the burden of "giving notice" on the administrative bodies conducting the proceedings, it is reasonable to assume that the legislature would have done so expressly within the context of the Rhode Island Rivers Council Act. [2]

Therefore, the councils are not entitled to receive actual and specific notice of all proceedings "impacting on rivers and water quality" by virtue of R.I.G.L. §46-28-8. The councils are, however, entitled to such notice as is required by either the Open Meetings Act [3] or any other relevant state law.[4] To the extent that the councils are entitled to notice by the Open Meeting Act or other law, the councils also have the right to seek enforcement of such notice requirement in the same manner and to the same extent as any other aggrieved person.

The final question raised in the first half of your request seeks a broad interpretation of the term "quasi-state" agencies and is addressed in the second part of this opinion.

The second half of your request seeks the interpretation of provisions of §§46-28-7 and 46-28-8 with respect to "general powers," and specifically asks:

> "In the same section of law, what does the phrase 'Each local watershed council shall be a body corporate and politic, having a distinct legal existence from the state and any municipality within the watershed area....' mean in practical terms? Does the Rivers Council designation of local watershed councils provide for that watershed council to be recognized as an entity able to apply for state funding under any and all of the state's grant programs? Regarding Section 46-28-7, we would appreciate your interpretation of the broad powers of the RI Rivers Council itself."

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determine 'whether the person whose standing is challenged has alleged an injury in fact resulting from the challenged [act]'."

[2] See cases: Little v. Conflict of Interest Commission, 121 R.I. 232, 239, 397 A.2d 884, 888 (R.I. 1979); State v. Powers, 644 A.2d 828, 830 (R.I. 1994) ([I]n the absence of an ambiguity, this [C]ourt must give the words of the statute 'their literal and plain meaning.'"

[3] The Open Meetings Act. R.I.G.L. §42-46-1 et seq. governs the requirements for notice pertaining to "open meetings" as defined by the Act. This opinion does not address whether proceedings, which "impact on rivers and water quality" are in fact "open meetings." Such a determination must be made on a case-by case basis.

[4] For example, the Freshwater Wetlands Act, R.I.G.L. §2-1-22 requires that: "within fourteen (14) days after receipt of a completed application ..." (to alter freshwater wetlands), "the director shall notify all landowners whose properties are within two hundred feet (200') of the proposed project, ... and any other individuals and agencies in any city or town within whose borders the project lies who may have reason in the opinion of the director to be concerned with the proposal. The director may also establish a mailing list of all interested persons and agencies who may wish to be notified of all applications."

Body corporate and politic

Generally speaking, both the language chosen and the actual powers delegated by the legislature will classify a legislatively created entity in one of four categories: first, departments of the state, which are also state agencies; second, state agencies, which are not departments of the state; third, municipal or quasi-municipal corporations, which have distinct legal existences from the state, but which are also authorized to exercise some part of the sovereign powers of the state; or fourth, public corporations, also having distinct legal existence from the state, but not authorized to exercise any part of the sovereign powers of the state. It is the respectful opinion of the Attorney General that the councils fall into the fourth category, i.e., public corporations having a distinct legal existence from the state and unable to exercise any part of the sovereign powers of the state.

The term "body politic" is of ancient origin and generally connotes the collective body of citizens exercising political functions of the state. Kennelly v. Kent County Water Authority, 79 R.I. 376, 380, 89 A.2d 188, 190 (R.I. 1952). In Kennelly, the Rhode Island Supreme Court was asked to determine whether the language describing the Kent County Water Authority as a "body politic" and constituting it a "public benefit corporation" gave the Authority the distinguishing characteristics of a municipal or quasi-municipal corporation. The Court held that, notwithstanding the legislature's description of the Authority as a "body politic," "such language by itself is not effective to clothe the Authority with the distinguishing characteristics of a municipal or quasi-municipal corporation.... It is [the Court's] opinion, therefore, that the Authority is not a true body politic." Id. See also R.I.G.L. §39-16-2 (enacted thereafter and clarifying that "notwithstanding a finding by any court to the contrary, the Kent County Water District shall be a political subdivision of the state").

R.I.G.L. §46-28-8 describes the councils as a "body corporate and politic," but as outlined above, such language by itself does not render the councils true bodies politic in the nature of a municipal or quasi-municipal corporation. The test established by the Rhode Island Supreme Court in Kennelly for identifying a true "body corporate and politic" is to ask whether the legislature, in describing the councils as "bodies politic," conferred any part of any of the state's sovereign powers to the councils.[5] The legislature did not confer any such powers to the councils in the language of R.I.G.L.§46-28-8.

Your next question as to whether "'quasi-state' agencies are considered to be 'state' agencies" - the term "state agency" like the terminology "body corporate and politic" is dependent on the intent of the legislature and the specific language chosen by the legislators when creating a given entity.

[5] State ex rel. Costello et al. v. Powers, 80 R.I. 390, 395, 97 A.2d 584, 586 (1953)(Member of board of fire wards or an assessor and collector of taxes of a fire district are officers of a public or quasi-municipal corporation which exercised police powers in the general public interest but they did not individually discharge any substantial part of the sovereign power of the state or municipality so as to come within the meaning of civil officer in article IX, section 1, of the constitution of this state.)

Whether a particular body can be considered to fall into the category described by the terms "quasi-state" and "state" agency depends on the functions and powers conferred upon that body by the legislature and upon the intent of the legislature when creating the respective body. See In re Advisory Opinion to the Governor (RI Airport Corporation), 627 A.2d 1246 (R.I. 1993) (Because agencies are products of enabling legislation that creates them, agency action is only valid when agency acts within parameters of statutes that define its powers). For example, the Economic Development Corporation, although not a department of state government, is an agency of the state and a municipal corporation according to case law and statute. Thus, respectively falling into the second and third categories mentioned above.

To further discuss this example, R.I.G.L. §42-64-4 provides that the Economic Development Corporation is established as "a public corporation of the state having a distinct legal existence from the state and not constituting a department of state government, but which is a governmental agency and public instrumentality of the state...." Id. Moreover, the Economic Development Corporation is a municipal or quasi-municipal corporation in that the legislature conferred upon it, part of the sovereign powers of the state, i.e., eminent domain. See R.I.G.L. §42-64-6 (3) and (8). See also In re Advisory Opinion to the Governor supra (As subsidiary of Rhode Island Port Authority and Economic Development Corporation (RIPA), Rhode Island Airport Corporation (RIAC) was "governmental agency," authorized to accept transfer of property making up state's airport system from Department of Transportation (DOT)). Likewise, the Narragansett Bay Commission is a municipal corporation in that the legislature has designated it "a public benefit corporation, not constituting a department of state government," and conferred upon it part of the sovereign powers of the state, i.e., eminent domain. See R.I.G.L. §46-25-5. Please note, however, that although the Narragansett Bay Commission is not described by statute as an agency of the state, the Rhode Island Supreme Court has recognized it as such. See Town of Lincoln, et al. v. City of Pawtucket, 745 A.2d 139 (R.I. 2000). Therefore, the Narragansett Bay Commission can be classified as both a municipal corporation and a state agency, which places it in the second and third categories as mentioned above.

To take another example of a corporation that fits into both the second and third categories, the Rhode Island Resource Recovery Corporation was established as a "public corporation of the state.... The corporation is hereby constituted a public instrumentality and agency exercising public and essential governmental functions, and the exercise by the corporation of the powers conferred by this chapter shall be deemed and held to be the performance of an essential governmental function of the state." See R.I.G.L. §23-19-6 (a).

The legislature did not, by either its words or powers conferred, designate the councils as "municipal corporations" or "state" agencies. Presumably, if the legislature had intended such designations, it would have done so expressly, as it has previously. Thus, the councils fall into the fourth category.

The powers set forth in the language of R.I.G.L.§46-28-8 appear to be no greater than the ordinary powers of any corporation, with the noted exception that the councils

perform services for the benefit of the public good. The language in R.I.G.L.§46-28-8 which reads, "having distinct legal existence from the state and any municipality" implies that while the legislature did not confer authority upon the councils to exercise any part of the state's sovereign powers, i.e., taxation, eminent domain, it did intend that the councils, once officially designated, would become autonomous bodies subject only to the limits of powers imposed by law. See Little v. Conflict of Interest Commission, Supra (R.I. 1979) (quoting Housing Authority v. Fetzik, 110 R.I. 26, 289 A.2d 658 (1972).

With respect to your concern regarding the ability of the councils to apply for state funding, the statute addresses that concern clearly and unequivocally. R.I.G.L.§46-28-8 (16) states that the councils "shall have power: to apply for, contract for, and extend any federal or state advances or grants or assistance which may be made available for purposes of this chapter." Id.

Finally, you ask for this office's interpretation of the "broad powers of the Rivers Council itself." At the outset, as you know, the Rivers Council is not to be confused with the local watershed councils. Indeed, the Rivers Council is an example of an entity, that falls into the second category by virtue of the fact that the Rivers Council was created and established within a state agency and is therefore a subdivision of that agency.

R.I.G.L. §46-28-7 (1) - (9) clearly delineates the powers of the Rivers Council. This office gives the language set forth in §46-28-7 its plain and literal meaning. That being said, the statutory language appears to create in the Rivers Councils three basic roles, i.e., advisor, educator and capacity builder.

The majority of the Rivers Council's powers belong to the roles of advisor and educator. For example, the Rivers Council has the broad power to "make findings and recommendations to state agencies and political subdivisions by participating in administrative proceedings and by reporting to the governor regarding disputes and conflicts on river issues." The Rivers Council also has the power to report their findings, in addition to making recommendations, to the general assembly. The power to "make findings" is more extensive than a citizen's mere right to comment at a public hearing, it implies that the Rivers Council was deemed, or at least expected by the legislature to have some level of expertise with respect to rivers and rivers planning. Moreover, the power to "make findings and recommendations" implies at a minimum, an obligation on the part of the state agencies and political subdivisions to consider those findings and recommendations when making final decisions about rivers or rivers planning. Furthermore, the language of R.I.G.L. §46-28-7 (1) - (9) implies the intent on the part of the legislature that the Rivers Council take an active advisory role with respect to rivers and rivers planning.

With respect to its capacity building role, the Rivers Council can designate local watershed councils and provide grants to the councils to foster their abilities to protect, plan for and preserve rivers and watersheds at a local level. [6]

In conclusion, the Attorney General finds that the councils have standing to give testimony in administrative proceedings "impacting on rivers and water quality." The determination as to whether a proceeding does in fact "impact on rivers and water quality" ultimately belongs to the body conducting the proceeding. However, in accordance with the full intent of the legislature, the councils should usually be allowed to testify when they assert that a proceeding "impacts on rivers and water quality."[7]

Finally, and as a matter of practicality, without specific language from the legislature conferring sovereign powers to the councils and/or establishing the councils as state agencies, - the term "body corporate and politic" simply establishes the ability of councils to become public corporations and not municipal corporations or an agencies of the state.

I hope that this advisory opinion is of assistance to the Rhode Island Rivers Council as it carries out its duties.

Very truly yours,

Sheldon Whitehouse
Attorney General

SW/TKJ:cc

[6] This opinion does not fully interpret the broad powers of the Rivers Council, as such there are a number of powers that the Rivers council has, which are not discussed above. Therefore, this opinion should not be construed so as to limit the powers of the Rivers Council, which are prescribed by statute.

[7] This opinion does not address whether any particular state or local administrative proceeding does, in fact "impact on rivers and water quality. Such a determination must be made on a case-by-case basis by an appropriate body with jurisdiction.