

MEMORANDUM

TO: The Honorable Mayor Frank Picozzi; Aaron Mackisey, Chief of Staff

FROM: Michael A. Ursillo, City Solicitor; Peter F. Skwirz, Assistant Solicitor

DATE: April 1, 2024

SUBJECT: Constitutionality of proposed legislation re RIAC

On March 29, 2024, this office received correspondence written by the Governor’s legal counsel to the General Assembly. The correspondence opined that proposed legislation to reinstate the position of an appointee by the Mayor of Warwick to the board of the Rhode Island Airport Corporation (RIAC) would violate Article IX, Section 5 of the Rhode Island constitution. This office was asked to analyze the opinion of the Governor’s legal counsel. For the reasons set forth herein, it is our opinion that the Governor’s legal counsel is incorrect, and it would not be unconstitutional to reinstate the Mayoral appointment on the RIAC board.

Article IX, Section 5, the relevant provision cited by the Governor’s legal counsel, reads as follows:

“The governor shall, by and with the advice and consent of the senate, appoint all officers **of the state** whose appointment is not herein otherwise provided for and all members of any board, commission or other state or quasi-public entity **which exercises executive power** under the laws of this state; but the general assembly may by law vest the appointment of such inferior officers, as they deem proper, in the governor, or within their respective departments in the other general officers, the judiciary or in the heads of departments.” (Emphases added).

This provision was approved by Rhode Island voters in 2004 in the same package of constitutional amendments that created separation of powers provision of the state constitution. The intent of these separation of powers amendments is to prevent the General Assembly from interfering with the executive branch of state government, including eliminating the practice of the General Assembly directly appointing members of the executive branch. This underlying purpose is important to keep in mind when analyzing this issue, as it demonstrates that the underlying concern of Article XI, Section 5 is usurpation of gubernatorial power by the General Assembly. Appointments made by local elected officials to entities with an outsized impact on the locality was not the underlying concern of Art. IX, Sec. 5,

Further, Article IX, Section 5, only applies to the appointment of “officers of the state” or a “board, commission or other state or quasi-public entity which exercises executive power under the laws of this state.” RIAC board members are not officers of the state and RIAC does not exercise executive power of the state government, so Article IX, Section 5 does not apply to RIAC whatsoever. RIAC is a subsidiary corporation of the Rhode Island Commerce Corporation and RIGL 42-64-4 expressly provides that Commerce Corp. entities are entities having “a distinct legal existence from the state and not constituting a department of state government.” Therefore, RIAC has a distinct legal existence apart from the state and is not a department of state government. Further, the Rhode Island Supreme Court has defined the exercise of executive power as follows:

“The executive power is the power to execute the laws, that is, to carry them into effect, as distinguished from the power to make the laws and the power to judge them. . . . The executive power is also commonly characterized as being the power relating to the ‘enforcement of the law’ and the power to ‘administer the law.’” In re Request for Advisory Opinion from House of Representatives (Coastal Res. Mgmt. Council), 961 A.2d 930, 940 (R.I. 2008).

RIAC doesn’t exercise executive power, as it isn’t created to execute laws or serve as a law enforcement authority or a regulatory/administrative agency overseeing private regulated parties.

Instead, RIAC was created to operate the state's airports – not to exercise the coercive power of the state.

The argument of the Governor's legal counsel falls apart when looking at three examples. The first is the Quonset Development Corporation (QDC), another Commerce Corp subsidiary. The QDC serves an analogous function to RIAC. Whereas RIAC operates the state airports, the QDC operates state land that it acquired from the federal government in the area of the Quonset naval base. The board of directors for the QDC is set forth in RIGL 42-64.10-7, which was passed in 2004, the same year the constitutional amendment referenced in the Governor's letter was approved. Subsection (a)(1) of that statute provides that the QDC board is comprised of "six (6) members appointed by the governor, with the advice and consent of the senate, two (2) members appointed by the town council of the town of North Kingstown, one member appointed by the town council of the town of Jamestown, and one member appointed by the town council of the town of East Greenwich." The QDC board is still comprised in this manner today. It is a highly dubious argument that the General Assembly would pass a statute creating a QDC board that violates the current language in Art. IX, sec. 5, in the very same legislative session it was proposing that constitutional language to the voters. Thus, the QDC board example clearly demonstrates that having local appointments to the board of an RI Commerce Corp. subsidiary does not violate Article IX, Sec. 5.

A second example involves the East Providence Waterfront District (EPWD). Pursuant to RIGL 42-64-7.1(e), the EPWD is "a subsidiary of the Rhode Island commerce corporation for the purposes of exercising such powers of the corporation as the board of directors shall determine." The latest version of the EPWD enabling legislation was updated in 2010, which is enacted as P.L. 2010, ch. 277 & 289 (attached). This legislation provides that the EPWD Commission shall consist

of “five (5) members shall be appointed by the City Council, . . . five (5) members appointed by the Governor, . . . [and] the Mayor, with the approval of the City Council, and the Governor shall jointly appoint a member who shall be the chairperson.” Thus, just like the QDC, the EPWD Commission exercises the authority of a Commerce Corporation subsidiary – which is not the executive power of the state – and is comprised of both local and gubernatorial appointees.

The third example is the composition of the RIAC board itself. Attached are the articles of incorporation for RIAC. It provides that the Mayor of Warwick appoints one member to the RIAC board. This remained the case until 2011, when the General Assembly enacted P.L. 2011, ch. 326 to provide that the Governor shall make all appointments. Thus, for five years after the enactment of Article IX, Sec. 5 of the state constitution, the Mayor of Warwick continued to appoint a member to the RIAC board with no issues, and no one ever argued during that five-year period that it was a violation of Art. IX, Sec. 5, to do so. That is because it plainly was not an issue. Art. IX, Sec. 5, was intended to prevent the General Assembly from exercising executive power. It was not created to prevent a local elected official from appointing a member to a Commerce Corp subsidiary that doesn’t exercise executive power. The composition of the QDC board, the EPWD Commission, and the former composition of the RIAC board clearly illustrates this point.