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JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

January 8, 1985

Representative John P. Daggett
House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Representative Daggett:

You have requested an opinion of this office concerning the legal authority of a Regional Planning Commission ("RPC"), authorized and organized pursuant to state statute, to form a wholly-owned profitmaking subsidiary corporation. This question was prompted by the formation of such a corporation by the Northern Maine Regional Planning Commission (the "Commission") for the purpose of selling personal services and property rights in a certain design for a solid waste incinerator. For the reasons which follow, it is the opinion of this office that a regional planning commission has no legal authority to form a subsidiary corporation to perform any act which it could not perform itself, and, since such a commission is limited by statute to purely advisory functions, it cannot form a corporation to engage in the sale of goods or services.

The relevant facts are as follows: The Northern Maine Regional Planning Commission was founded in 1969, pursuant to the Regional Planning Commission Act, 30 M.R.S.A. § 4501 et seq. In addition, the Commission was incorporated under the Maine Nonstock Corporation Act, 13 M.R.S.A. § 901 et seq. This latter statute was primarily intended for corporations devoted to a "benevolent or nonprofit-making purpose," including civic activities, but it also authorized corporations established "for the purpose of fostering, encouraging and assisting the physical location, settlement or resettlement of industrial, manufacturing, fishing, agricultural and other business enterprises and recreational projects in any locality within the state." The Articles of Incorporation of Northern Regional Planning Commission, Inc. recite these latter purposes as among its corporate purposes, in addition to purposes appropriate to a regional planning commission.

In 1981, the Commission formed the First Aroostook Corporation, Inc. pursuant to the Maine Nonprofit Corporation Act, 13-B M.R.S.A. § 101 et seq., a statute enacted in 1977. P.L. 1977, c. 525. All of the stock of the First Aroostook Corporation is owned by Northern Regional Planning Commission, Inc. Documents provided to this Office suggest that the First Aroostook Corporation has so far been inactive, but that it was created (1) to market certain property rights in the design of a municipal incinerator, and (2) to offer personal services on a contract basis, including the services of persons also employed by the Commission.^{1/} The rights to sell the incinerator design were assigned to First Aroostook Corporation by the Commission, which evidently never intended to exercise them.^{2/} In addition, the Commission apparently believes that it could not legally sell personal services to "private people,"^{3/} although it has sold personal services (engineering design, construction supervision) to public or quasi-public entities, including non-members.^{4/}

Any analysis of the legality of the formation of the First Aroostook Corporation, Inc. must begin with the Regional

^{1/} May 3, 1983 letter of Philip Peterson, Northern Maine Regional Planning Commission Chairman, to the Local and County Government Committee, and Excerpt of Minutes of Northern Maine Regional Planning Commission meeting of February 5, 1982.

^{2/} Id.

^{3/} Id.

^{4/} Letter of January 20, 1983 from Daniel Bridgham, Northern Maine Regional Planning Commission Project Inspector, to Richard Green of the Maine Department of Environmental Protection, concerning inspection contract with Aroostook-Prestile Treatment District; letter of April 28, 1983 from Richard Engles, Northern Maine Regional Planning Commission attorney to the Local and County Government Committee. The question of whether the provision of such design and construction supervision services is within the power of the Commission is beyond the scope of this Opinion. As indicated below, the statutory functions of an RPC is essentially the provision of "planning assistance and advisory services." 30 M.R.S.A. § 4511. If "planning" is considered to be distinct only from actual construction, then the design of a structure or facility, and its presentation in the form of engineering plans, could be considered not only "planning assistance," but also an "advisory service." Even by this reading, however, construction supervision or other services involved in the execution of a plan would appear to fall beyond the scope of "planning assistance and advisory services." Moreover, the RPC Act provides that these services may be given only "to municipalities," which apparently refers only to member municipalities. 30 M.R.S.A. § 4522(8). The Legislature may wish to clarify the statute in this respect.

Planning Commission Act, since it is axiomatic that a subsidiary of a legal entity cannot engage in activities which the entity itself cannot undertake. Associated Hospital Services of Maine v. Mahoney, 161 Me. 391, 404 (1965). At the time of the incorporation of Northern Regional Planning Commission (in 1969), the Act clearly specified the "powers and duties" of regional planning commissions. 30 M.R.S.A. § 4504 (1964). As stated in the first subsection of that statute:

1. Jurisdiction

- A. The jurisdiction of a regional planning commission includes the area of its members.
- B. The power of the commission is advisory, and pertains generally to the development of the whole region, or to the solution of a problem which involves more than one member.

The Act was then repealed and replaced in 1973. P.L. 1973, ch. 534, §§ 3, 4. The new Act provided that:

The purpose of a regional planning commission shall be to promote cooperative efforts toward regional development, prepare and maintain a comprehensive plan, coordinate with state and federal planning and development programs and to provide planning assistance and advisory services to municipalities. 30 M.R.S.A. § 4511.

In addition, the statute required that RPCs be incorporated pursuant to the Maine Nonstock Corporation Act, 13 M.R.S.A. § 901 et seq.^{5/} and that they

. . . shall possess all powers of a corporation organized without capital stock, except as limited by this subchapter.
30 M.R.S.A. § 4512 (emphasis added).

The clear intention and legal effect of this statutory scheme is evident: a regional planning commission is legally limited to the planning and advisory functions set forth in Section 4511 of the RPC Act. The fact that it is required to be incorporated as a nonstock corporation does not authorize it to engage in non-advisory activities appropriate to other nonstock corporations (such as benevolent, civic or business development activities) because the provision of the RPC Act

^{5/} As indicated above, the Northern Maine Regional Planning Commission had already been incorporated under this statute at the time of its creation in 1969.

requiring such incorporation expressly states that an RPC's ability to exercise the powers of a nonstock corporation are "limited by this subchapter." Thus, since an RPC can only engage in planning and advisory activities in the first place, an incorporated RPC can do no more.

The question which you pose thus resolves into one of whether the proposed activities of the First Aroostook Corporation could be engaged in by the Northern Maine Regional Planning Commission. As indicated above, these activities appear to be (1) the sale of property rights, and (2) the sale of engineering or other personal services.

In the opinion of this Office, neither of these types of activities are within the scope of the purely planning and advisory functions for which regional planning commissions are expressly intended, nor can they be considered powers implicitly held by the Commission, as necessary to carry out its express purposes. "The implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those which are expressly granted, but comprise all that are necessary, in the sense of being appropriate, convenient and suitable for such purposes, including the right of a reasonable choice of means to be employed." Flaherty v. Portland Longshoremen's Benevolent Society, 99 Me. 253, 255-6, 59 A. 58 (1904). The offering of property or personal services for sale are certainly not indispensable to the performance of a regional planning commission's planning and advisory responsibilities. The statute plainly contemplates that regional planning commissions will provide services only to their members, and that such services will be supported by contributions from the members, or by grants or gifts. 30 M.R.S.A. § 4515 (1978); formerly 30 M.R.S.A. § 4502(2) and § 4504(2)(C), (1965). Although the Commission, and indirectly its member municipalities, would no doubt be benefitted by the sale of property or personal services, through a reduction of the costs of its planning services, the same can be said of any income-producing activity. The bare benefit of subsidizing authorized activities through income-producing activities is insufficient to bring such activities within the implied powers of a corporation having limited statutory purposes. Gardiner Trust Co. v. Augusta Trust Co., 134 Me. 191, 182 A. 685, 689 (1936); Davis v. Old Colony R.R., 131 Mass. 258, 275-6 (1881); Teele v. Rockport Granite Co., 224 Mass. 20, 112 N.E. 497, 498 (1916); 19 C.J.S. Corporations § 945(b).

The sale of the incinerator design "on a multi-state basis" offers no direct or immediate assistance to the performance of its functions by the Commission. This office cannot perceive, nor does the Commission suggest, any benefit from marketing the design beyond first, recovering the investment for the member communities participating in the incinerator, and thereafter, a subsidy of the Commission's statutory functions. The first of

these is not for the benefit of the Commission at all. Although the second objective may be indirectly beneficial financially to the member municipalities, we consider the marketing of property rights to be "foreign in nature to those [powers] contemplated" in the authorizing legislation,^{6/} involving the Commission in "remote and un contemplated lines of activity,"^{7/} and thus beyond the power of a regional planning commission.^{8/}

Likewise, the sale of engineering design services, or any personal services other than "assisting any of its members in solving a local planning problem,"^{9/} is without benefit of statutory authorization, and appears to benefit the Commission, or its membership as a whole, only through the production of income. Since such services are of a different type entirely from "planning assistance," and are provided on a fundamentally different basis from "advisory services to municipalities," and their sale serves in no direct way "to promote cooperative efforts toward regional development," 30 M.R.S.A. § 4511 (1978), the sale of such services to members or non-members must be considered beyond the authority of a regional planning commission.^{10/}

* * * *

In summary, therefore, it is the view of this Office that activities discussed herein are beyond the express and reasonably implied powers of a regional planning commission, which is a creature of statute limited to the functions set forth in its authorizing legislation, or necessarily implied in order to enable the accomplishment of those functions. Such

^{6/} Oakland Electric Co. v. Union Gas and Electric Co., 107 Me. 279, 282, 78 A. 288 (1910).

^{7/} Good Will Home Association v. Erwin, 266 A.2d 218, 221 (Me. 1970).

^{8/} See also 13 M.R.S.A. § 932, which authorizes nonprofit corporations generally to "use and dispose [of property] only for the purposes for which the corporation was organized."

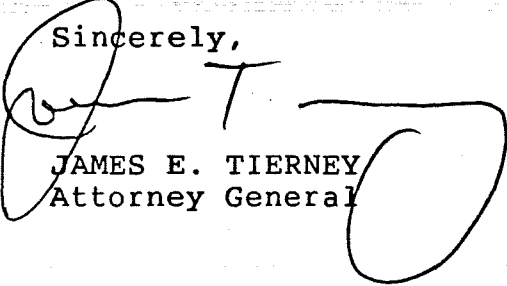
^{9/} See 30 M.R.S.A. § 4522(8)(C), (1978), formerly 30 M.R.S.A. § 4504(4)(C), (1965), providing a separate method of payment for such services. But see note 4, supra.

^{10/} Direct services to advance any legitimate municipal project could certainly be provided by an employee or contract agent of the municipality itself. In contrast to regional planning commissions, it is noteworthy that a Council of Governments is expressly authorized to "exercise such...powers as are...capable of exercise...by the member governments..." so long as that exercise is authorized by the member municipalities. 30 M.R.S.A. § 1983(2) (1978).

activities may not, therefore, be undertaken by a subsidiary of such a commission and the formation of a subsidiary for those purposes is unauthorized by law. This is not to say, of course, that the constituent municipalities of a regional planning commission may not accomplish these objectives through some other means, such as through an agreement entered into pursuant to the Interlocal Agreement Act, 30 M.R.S.A. § 1951 et seq. It is also not to say that such powers could not be given to a regional planning commission by a legislative enactment. It is only to say that such profit-making activities cannot be undertaken by a regional planning commission or its subsidiary corporation.^{11/}

I hope the foregoing answers your request. Please feel free to reinquire if further clarification is necessary.

Sincerely,



JAMES E. TIERNEY
Attorney General

JET/ec

cc: Richard E. Barringer

^{11/} It has been suggested by counsel for Northern Maine Regional Planning Commission that its designation as a Regional Planning and Development District under 30 M.R.S.A. § 4521 and 4522 expands the powers of the Commission beyond those in the authorizing legislation. While this statement is correct, the powers conferred by these statutes are likewise limited to reviewing plans, providing coordination between different governmental entities, and other such advisory services within the scope of planning assistance.