

**BLISH & CAVANAGH**<sup>LLP</sup>  
C O U N S E L L O R S   A T   L A W

September 28, 2010

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**Via Regular Mail and E-Mail**  
Ms. Luly E. Massaro, Clerk  
R.I. Division of Public Utilities  
and Carriers  
89 Jefferson Boulevard  
Warwick, RI 02888

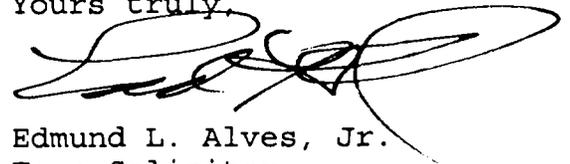
**RE: Rhode Island Public Towing Association Inc.'s  
Petition for Declaratory Judgment  
Docket No. D-10-26**

Dear Ms. Massaro:

Enclosed please find original and three copies of the  
Legal Memorandum of the Town of Smithfield and the  
Smithfield Police Department with regard to the above-  
referenced matter.

Thank you.

Yours truly,



Edmund L. Alves, Jr.  
Town Solicitor

ELA:vm  
encl.

cc: Terrence Mercer, Associate Administrator/Via E-Mail  
John Spirito, Jr., Chief Legal Counsel/Via E-Mail  
All Counsel of Record/Via E-Mail

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE:           RHODE ISLAND PUBLIC TOWING           :  
                  ASSOCIATION, INC.'S PETITION           : Docket No. D-10-26  
                  FOR DECLARATORY JUDGMENT           :

**LEGAL MEMORANDUM OF THE TOWN OF SMITHFIELD AND THE  
SMITHFIELD POLICE DEPARTMENT**

*Introduction / Background*

On May 26, 2010, petitioner, the Rhode Island Public Towing Association (the "Towing Association"), petitioned the Rhode Island Division of Public Utilities and Carriers (the "Division") for a Declaratory Judgment or Declaratory Ruling pursuant to R.I. GEN. LAWS § 42-35-8 and Rule 13 (c) of the Division's Rules of Practice and Procedure. In its petition, the Towing Association seeks a ruling from the Division on the following issue:

Whether the storage fees imposed by a certificated tower on a police department instigated motor vehicle storage impoundment at a private storage lot may be assessed against the owner of said motor vehicle, or is it the liability and financial responsibility of the police department instigating the tow?

The Towing Association was apparently inspired to file its petition after the City of Warwick took the position that towing companies may not charge storage fees to an owner of a motor vehicle on which its police department has placed a "hold" until such time as that "hold" is released.

Inasmuch as the Town of Smithfield and the Smithfield Police Department (alternatively or collectively, "Smithfield") have an acute interest in the outcome of this petition, they submit this Memorandum to convey their position. Their position is that in all instances in which motor vehicles are towed to private storage lots or facilities at

the direction of the police, the owners of the vehicles should be liable and financially responsible for towing and storage fees, in accordance with the policies and procedures Smithfield has employed to date.

### *Facts*

For many years, Smithfield has conducted towing operations in a logical and equitable manner. Upon information and belief, its practices, procedures and policies relating to police-instigated towing of motor vehicles have been consistent with those employed by many if not most of the municipal police departments within the State of Rhode Island, as well as by the Rhode Island State Police. They are as follows:

1. When a motor vehicle is towed for the purpose of "impoundment," a police "hold" is placed on the vehicles until the reason(s) for impoundment cease to exist. Impoundment is undertaken when there is a specific need to retain the vehicle for official police purposes, such as the search or investigation of the vehicle. At the end of the impoundment period, the hold is released, and the motor vehicle owner is immediately notified. He or she is required to provide proof of ownership and a valid driver's license to the Smithfield Police prior to retrieving the vehicle. Motor vehicles which are impounded are generally towed to the Smithfield Police headquarters parking lot. However, after the impoundment period, they may be towed to a private storage facility.

2. When motor vehicles are towed for reasons or purposes other than impoundment, or after the impoundment hold is released, they are towed to private towing facilities. The owner of the vehicle is immediately notified, and is required to provide proof of ownership and a valid driver's license to the Smithfield Police in order to retrieve the vehicle. If the individual seeking to retrieve the vehicle is unable to provide proof of ownership (or proof of permission from the owner), and that individual fails to produce a valid driver's license, the vehicle will not be released for retrieval. The owner of such a motor vehicle is financially responsible to the private towing facility for all towing and storage charges accrued until retrieval.

In the course of pre-conference proceedings, questions and issues have been raised about police "release" procedures for towed vehicles, and as to what constitutes a

“hold” and “impoundment.” It is important to understand that there are two entirely different types of “releases” implicated here. The first type of “release” is simply the release of a motor vehicle to an owner after he or she procures proper proof of ownership and a valid driver’s license. The second is a “release” of a “hold” for an “impoundment.” It is essential that each release be treated differently. Otherwise, a legal interpretation which treats them the same would compromise Smithfield’s police instigated tow system.

Smithfield’s policy and practice to refuse to release motor vehicles, until proper proof of ownership and a valid driver’s license are produced, is employed for good reason. If this policy were not in place and adhered to, it would lead to instances in which individuals would be permitted to retrieve vehicles they do not own. It would also lead to instances in which owners with suspended licenses and other impairments would be permitted to drive motor vehicles. For obvious reasons, this would be unacceptable. Thus, it is apparent that Smithfield’s policy regarding the release of motor vehicles in this regard is sound and should not be disturbed.

Similarly, Smithfield’s release procedure for holds for impoundment purposes makes eminent sense. For law enforcement purposes, it is critical to be able to impound vehicles for investigatory purposes, and to only release those holds after the investigations are complete. Given that these vehicles are towed directly to police headquarters, Smithfield does not charge fees for storage during these impoundment periods.

#### *Argument*

Notably, the Division in its pending Petition has made clear that the issues raised therein may be narrowed as follows:

- a) storage charges for the first 24-hour period are exclusively the responsibility of the vehicle owner, irrespective of the circumstances under which the vehicle is towed;
- b) storage charges resulting from delays directly attributable to the vehicle owner shall always be the responsibility of the vehicle owner;  
and

c) the “storage impoundment” matter in issue relates exclusively to “holds” placed on vehicles by the police departments instituting the tows until police departments “release” the vehicles to their owners. Where there is no “hold” placed on a vehicle, the owner remains exclusively responsible for all valid storage charges. (See “Procedural Schedule, Docket No. D-10-26” of Chief Legal Counsel to the Division.)

Consistent with paragraph (c) above, the Division issued a legal opinion letter of December 21, 2009 (see Petition, at Exhibit D), which concluded that it would be improper to charge owners for “storage days directly linked to a police department-ordered impound,” because “it is unauthorized under any approved tariff, and there is no specific authorization for these charges under statutory law or Division rules.” Smithfield, based on its population, and the size of its police headquarters parking lot, is presently in a position to ensure that most motor vehicles upon which it has placed a “hold” for impoundment purposes are towed directly to police headquarters, thereby eliminating the storage fees which would otherwise accrue at a private storage lot.

Thus, if the Division were to interpret “impounds” in the same manner as Smithfield, this would not present an issue to Smithfield. Similarly, if it were to interpret “delays directly attributable to the vehicle owner” as including delays in releases caused by failures to produce proof of ownership or drivers’ licenses, it appears that Smithfield would be in accord with the Division’s interpretation.

However, based on a legal opinion letter issued by counsel for the Division in January 2010, such does not appear to be the case. Thus, two issues are raised by the within Petition which are of significant concern to Smithfield. Each is discussed below.

A. Motor Vehicles Owners Should Be Responsible for Private Towing and Storage Fees, Irrespective of Whether the Reasons for the Police-Instigated Towing Are Listed in R.I. GEN. LAWS § 39-12.1-1

A critical issue to Smithfield raised not by the Petition itself, but by the legal opinion letter issued by the Division of January 20, 2010, concerns the ability to charge motor vehicle owners towing and storage fees when vehicles are towed for reasons not expressly listed in the Rhode Island Towing Storage Act. That opinion letter concludes that R.I. GEN. LAWS § 39-12.1-1 affords limited authority to police departments to

arrange for the towing and storage of motor vehicles, for only those reasons which are listed in one "whereas" clause in the statute. Therefore, it concludes, if tows are ordered for any reasons other than those listed in R.I. GEN. LAWS § 39-12.1-1, police departments and not owners should be required to pay storage charges consequently incurred. (*See* Petition, at Exhibit E.)

This interpretation would compromise the entire police instigated towing system in Smithfield. Moreover, it is not a correct interpretation of Rhode Island law. Nothing in Rhode Island statutory law prohibits the policy and practice Smithfield has historically employed.

The Division relies on a portion of the Rhode Island Towing Storage Act, R.I. GEN. LAWS § 39-12.1-1, out of context. This statutory section in its entirety declares the "purpose and policy" of the Towing Storage Act. The portion of that statute upon which the Division relies notes:

WHEREAS, The police powers delegated by the legislature of the state include the power of the police, even without the owners' consent, to have public ways cleared of conditions which in the opinion of the officer, creates a hazardous condition to the motoring public; to have removed abandoned, abandoned and of no value, and unattended vehicles; to have removed and or relocated vehicles in violation of parking ordinances; and to have removed any vehicle under control of any person arrested for any criminal offense.

Erroneously, the Division makes a leap by concluding that this provision "provides an unambiguous description of the limited authority conferred to the police officer at the scene," and therefore motor vehicle owners must pay only those towing and storage fees which are "narrowly limited to this removal function." (*See* Division's letter of January 20, 2010.)

In fact, nowhere does this statutory provision state or even suggest that it includes an all-inclusive list of all instances in which police powers may be invoked to direct the non-consensual towing of motor vehicles. In fact, to the contrary, it is clear that this statutory provision does not contain an exhaustive list. In order to carry out their important duties of law enforcement and investigation, police must exercise authority to impound vehicles for other purposes, such as, for example, search warrants. Other valid and necessary reasons for police-instigated non-impounded tows, include,

for example, the need to tow unregistered vehicles, or motor vehicles whose owners are stopped with suspended licenses. It is therefore inconceivable that simply because the Rhode Island Towing Storage Act contains a simple “whereas” clause in its preamble, the General Assembly thereby intended that towing and storage fees incurred for the array of legitimate police-instigated tows, for various reasons not specified in this preamble, should be borne by local police departments.

Such an interpretation fails to comport with legitimate law enforcement procedures. If Smithfield were to become responsible to pay storage fees for all police instigated tows other than those listed in this statutory provision, this would be unreasonable and problematic, inasmuch as the Smithfield Police must arrange for the towing of numerous motor vehicles for many reasons throughout the year, and not those exclusively listed in this section. The Division’s interpretation, if accepted, would have a chilling effect on police-instigated tows, with potential dire effects. Instead of arranging for necessary tows, police would be left to question whether they should either leave the vehicle where it is in lieu of bearing the cost. Based on the costs involved, some departments may be forced to institute their own towing operations, thereby increasing their expenses, and removing business from towing businesses in Rhode Island.

Critically, while the Division relies heavily on the foregoing provision in the preamble of the Rhode Island Towing Storage Act, it neglects to note that this same statutory section expressly acknowledges the “legal duty” of law enforcement to order towing, without the concomitant duty of paying the cost. It provides as follows:

WHEREAS, the process of selection of the operator of a towing-storage business for police work is unique in that law enforcement, through having the legal duty to order the work, *has no legal duty to pay costs and charges connected therewith, the same being the duty of the vehicle owner.* (Emphasis supplied.)

Thus, the statute makes clear that police should have no duty to pay towing and storage fees for privately owned motor vehicles.

Moreover, the Division also disregards R.I. GEN. LAWS § 39-12.1-3, which authorizes police departments or owners of private property to order the removal of

abandoned or unattended vehicles on their property, and to charge owners for the towing and storage fees incurred. Also, R.I. GEN. LAWS § 39-12.1-4(3)(b)(4) specifically requires “That recovery, towing and storage charges are accruing as a legal liability of the registered and/or legal owner.” Nowhere does it suggest police departments should be responsible. Subsection 3(b)(6) of that same statute permits police to demand proof of ownership prior to retrieving vehicles. It provides “That the registered and/or legal owner may retake possession at any time during business hours by appearing, proving ownership and paying all charges due the certificated tower pursuant to its published tariff.”

Thus, the entire statutory scheme requires owners of vehicles, and not police departments, to pay for towing and storage fees for police-instigated tows.

Notably, members of the public are amply protected by provisions in the Towing and Storage Act which calls for the tight control of rates and charges. R.I. GEN. LAWS § 39-12-11 requires:

Every common carrier by motor vehicle shall print, file with the administrator, and keep open for public inspection, tariffs showing all the rates and charges for transportation, and all services in connection therewith, of property, in intrastate commerce . . . . The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information as the administrator, by regulation, shall prescribe.

R.I. GEN. LAWS § 39-12-12 further provides:

It shall be the duty of every common carrier of property by motor vehicle to establish, observe, and enforce just, reasonable, and reasonably compensatory rates, charges, and classification, and reasonable regulations and practices relating thereto . . . . No change shall be made in any rate, charge, classification, or any rule, regulation or practice affecting the rate, charge, or classification, or the value of the service thereunder specified in any tariff of a common carrier by motor vehicle, except after thirty (30) days notice of the proposed change filed and posted in accordance with 39-12-11.

Thereby, the public is duly protected from being charged unfair rates for towed vehicles.

B. Storage Fees Incurred During Delays in the Release of Motor Vehicles to their Owners, Which are Caused by the Owners' Failure to Produce Proper Proof of Ownership or a Valid Driver's License, Should be Paid by Vehicle Owners.

The second question presented here is what constitutes a "delay directly attributable to vehicle owners"? Or, more specifically, when a vehicle owner fails to provide proper proof of ownership and a valid driver's license to retrieve a towed vehicle from a private storage facility, and Smithfield therefore refuses to "release" that vehicle, does this create a "delay directly attributable to the vehicle owner"?

In its January 20, 2010 opinion letter, the Division suggested that storage fees may only be charged to vehicle owners who *voluntarily* elect to delay retrieving their vehicles from storage lots. Thereby, it has suggested that storage fees which accumulate as a result of the owners' inability to properly retrieve the vehicle (with proof of ownership and a valid driver's license) should be the responsibility of the police department, irrespective of the reasons for the tow.

Smithfield urges the Division that the failure to provide proper proof of ownership or a valid driver's license should be interpreted to constitute a delay directly attributable to a vehicle owner. The police require proof of ownership before releasing the vehicle for a litany of essential reasons. Of course, the primary reason is that proof of ownership ensures that someone other than the owner is not improperly retrieving the vehicle. Also, failure to provide a valid driver's license would lead to releasing vehicles to drivers who are not permitted to operate motor vehicles. Police would therefore be remiss in not employing some type of concise release procedure in this regard. Otherwise, they would be open to liability for the improper release of personal property, to potentially dangerous drivers. If Rhode Island law were interpreted in accordance with the legal opinion of the Division's counsel, Smithfield would be placed in the untenable position of either having to release vehicles to non-owners or unlicensed drivers, or having to pay storage charges until those items are produced. This would place police in an impossible and nonsensical position.

***Conclusion***

For the reasons set forth above, the Division should declare that owners of motor vehicles are responsible to pay towing and storage facility fees when their vehicles are towed to private storage facilities, irrespective of the reasons for the tow, and until such time as they produce proper proof of ownership and valid drivers' licenses to retrieve their vehicles.



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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on this 28th day of September, 2010, a true copy of the foregoing Memorandum was forwarded via electronic mail to the following counsel of record:

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