

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2022-10

Approved March 8, 2022

Re: Timothy J. McCormick

QUESTION PRESENTED:

The Petitioner, a member of the Scituate Town Council, a municipal elected position, requests an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the Scituate Building and Zoning Official, over which the Town Council has appointing authority, given that the Petitioner is currently building a new home in Scituate in which he intends to reside with his family, and that certain aspects of that project fall within the purview of the Building & Zoning Official.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a member of the Scituate Town Council, a municipal elected position, qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the Scituate Building and Zoning Official, over which the Town Council has the appointing authority, given that the Petitioner is currently building a new home in Scituate in which he intends to reside with his family, and that certain aspects of that project fall within the purview of the Building & Zoning Official.

The Petitioner is a member of the Scituate Town Council ("Town Council") and has served continuously in that capacity since November of 2018. He represents that he and his spouse are in the process of building a new home in Scituate on land that they purchased in 2021 and that it is their intent to reside in that new home once construction has been completed. The Petitioner adds that construction is expected to begin in March of this year and could be completed as soon as October.

The Petitioner states that the issuance of permits and performance of inspections relative to the construction of his new home are both within the purview of the Scituate Building and Zoning Official ("Building Official") and that the Building Official will be tasked with matters which include inspecting the foundation, plumbing, and structural work of the home and ultimately determining whether to issue a certificate of occupancy. The Petitioner states that the Building Official is a direct hire of the Town Council and that the current Building Official is under contract with the town until December of 2023. The Petitioner identifies among the duties of the Building Official responsibility for inspecting the work of new constructions in Scituate. The Petitioner seeks a hardship exception that would allow the builder with whom he has contracted for the

construction of his new home to apply for necessary permits, arrange for required inspections, and generally communicate with the Building Official regarding the construction.

The Petitioner states that, unrelated to the construction of the Petitioner's new home, the job performance of the Building Official was addressed by the Town Council during two recent executive sessions. The Petitioner further states that he recused from participation on both occasions, given that he and his spouse have a house under construction and because he wanted to avoid even the appearance of impropriety that might accompany his participation. He explains that the Town Council is expected to meet again to discuss the job performance of the Building Official. The Petitioner inquires of the Ethics Commission whether, if he is granted the hardship exception requested herein, he will be precluded from participating in future Town Council discussions and decision-making relative to the job performance of the Building Official.

The Code of Ethics prohibits a public official from representing himself, or authorizing another person to appear on his behalf, before a state or municipal agency of which he is a member, by which he is employed, or for which he is the appointing authority. R.I. Gen. Laws § 36-14-5(e)(1) ("section 5(e)"); Commission Regulation 520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016) ("Regulation 1.1.4"). Pursuant to Regulation 1.1.4(A)(1)(a) and (b), a person will represent himself before a state or municipal agency if he or, pursuant to his authorization and/or direction, another person "participates in the presentation of evidence or arguments before that agency for the purpose of influencing the judgment of the agency in his [] favor." Absent an express finding by the Ethics Commission in the form of an advisory opinion that a hardship exists, these prohibitions continue while the public official remains in office and for a period of one year thereafter. Section 5 (e)(1) & (4). Upon receipt of a hardship exception, the public official must also follow any other recommendations the Ethics Commission may make in order to avoid any appearance of impropriety in the matter. Section 5(e)(1)(i-iii).

The Petitioner's proposed conduct falls squarely within the Code of Ethics' prohibition against representing oneself before an agency for which he is the appointing authority. Therefore, the Ethics Commission will consider whether the unique circumstances represented by the Petitioner herein justify a finding of hardship to permit him to appear before the Building Official, whether personally or through an authorized representative.

The Ethics Commission reviews questions of hardship on a case-by-case basis and has, in the past, considered some of the following factors in cases involving real property: whether the subject property involved the official's principal residence or principal place of business; whether the official's interest in the property was pre-existing to his public office or was recently acquired; whether the relief sought involved a new commercial venture or an existing business; and whether the matter involved a significant economic impact. The Ethics Commission may consider other factors and no single factor is determinative.

The Ethics Commission has previously granted hardship exceptions to public officials who sought to appear before boards for which they were the appointing authority regarding their personal residences. For example, in Advisory Opinion 2020-34, a hardship exception was granted to a member of the Bristol Town Council allowing him to represent himself, either personally or through a representative, before the Bristol Historic District Commission ("HDC"), over which

the Town Council had appointing authority, in order to seek review and approval of proposed renovations to his primary residence which he had purchased two years prior to his election to the Town Council. However, in order to avoid even the appearance of impropriety, the petitioner was required to recuse from the Bristol Town Council's appointment or reappointment of any persons to the HDC until after the election cycle for the petitioner's Town Council seat following the complete resolution of the HDC's review and approval of his renovation plans, including any appeals. Additionally, the petitioner was required, prior to his appearance before the HDC relative to his application, to inform the HDC members of the receipt of the advisory opinion issued to him and that, consistent therewith, he would recuse from their reappointments in the manner set forth therein. See also A.O. 2019-64 (granting a hardship exception to the President of the North Smithfield Town Council and permitting him to appear before the North Smithfield Zoning Board of Review to seek a dimensional variance for his personal residence, provided that he recused from the Town Council's appointment or reappointment of any person to the Zoning Board until after the election cycle for his Town Council seat and following the complete resolution of his application before the Zoning Board, including appeals, and that prior to the Zoning Board's consideration of his variance application, he informed the Zoning Board members of his receipt of an advisory opinion and that, consistent therewith, he would recuse from their reappointments); A.O. 2017-33 (granting a hardship exception to a member of the Bristol Town Council and permitting him to appear before the Bristol Zoning Board of Review to seek a dimensional variance for the installation of a fence on his personal property, provided that he recused from the Town Council's appointment or reappointment of any person to the Zoning Board until after the election cycle for his Town Council seat and following the complete resolution of his application before the Zoning Board).

Here, the Petitioner is building a home in which he and his family intend to reside. The subject property was not acquired prior to the start of the Petitioner's public service; however, the relief sought involves the Petitioner's anticipated future personal residence and not a new commercial venture. Further, the construction of a new home does involve a significant economic impact. In consideration of the Petitioner's representations, the applicable provisions of the Code of Ethics, and prior advisory opinions issued, it is the opinion of the Ethics Commission that the totality of these particular circumstances justifies making an exception to section 5(e)'s prohibitions. Accordingly, the Petitioner may represent himself, either personally or through a representative, before the Building Official in matters relative to the construction of his new personal residence. However, in order to avoid even the appearance of impropriety, the Petitioner must recuse from the Town Council's discussions and decision-making as relates to the Building Official's job performance, retention, or reappointment until after the election cycle for the Petitioner's Town Council seat following the completion of the construction of the Petitioner's new residence and all inspections and/or awarding of certificates related thereto, including any appeals. Notice of recusal shall be filed consistent with the provisions of section 36-14-6. Additionally, the Petitioner shall, prior to his appearance before the Building Official relative to the construction of his new home, inform the Building Official of his receipt of the instant advisory opinion and that, consistent herewith, he will recuse from the Town Council's discussions and decision-making regarding the Building Official's job performance as set forth above.

This Advisory Opinion is strictly limited to the facts stated herein and relates only to the application of the Rhode Island Code of Ethics. Under the Code of Ethics, advisory opinions

are based on the representations made by, or on behalf of, a public official or employee and are not adversarial or investigative proceedings. Finally, this Commission offers no opinion on the effect that any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics may have on this situation.

Code Citations:

§ 36-14-5(e)

§ 36-14-6

520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016)

Related Advisory Opinions:

A.O. 2020-34

A.O. 2019-64

A.O. 2017-33

Keywords:

Hardship Exception