



STATE OF RHODE ISLAND

RHODE ISLAND ETHICS COMMISSION

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NOTICE OF OPEN MEETING

AGENDA

5th Meeting

DATE: Tuesday, April 26, 2022

TIME: 9:00 a.m.

PLACE: Rhode Island Ethics Commission
Hearing Room - 8th Floor
40 Fountain Street
Providence, RI 02903

1. Call to Order.
2. Motion to approve minutes of Open Session held on March 22, 2022.
3. Director's Report: Status report and updates regarding:
 - a.) Discussion of impact of COVID-19 crisis on Ethics Commission operations and staffing;
 - b.) Complaints and investigations pending;
 - c.) Advisory opinions pending;
 - d.) Access to Public Records Act requests since last meeting;
 - e.) Ethics Administration/Office and Education Updates.
 - f.) Legislative Update: 2022 House Bill No. 7818.
4. Advisory Opinions.
 - a.) Jessica McCarthy, a member of the Jamestown Harbor Commission, requests an advisory opinion regarding whether the Code of Ethics prohibits her from participating in Harbor Commission discussions and decision-making concerning the number of moorings to be included at each of the eighteen mooring fields

located within the Town of Jamestown, given that the Petitioner is currently on a waitlist to receive a mooring at one of those fields. [Staff Attorney Radiches]

- b.) The Honorable Anastasia Williams, a legislator serving as a member of the Rhode Island House of Representatives, requests an advisory opinion regarding whether the Code of Ethics prohibits her from participating in General Assembly discussions and decision-making that will financially impact the Black and Latino Caucus Community Partnerships, a private organization incorporated by the Petitioner and for which the Petitioner was, until recently, the registered agent. [Staff Attorney Radiches]
 - c.) Bradford G. Marthens, a member of the New Shoreham Sewer Commission, requests an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before his own agency, in order to appeal sewer assessments against his properties. [Staff Attorney Papa]
5. Motion to go into Executive Session, to wit:
 - a.) Motion to approve minutes of Executive Session held on March 22, 2022, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).
 - b.) In re: Richard Nassaney, Complaint No. 2022-2, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).
 - c.) Motion to return to Open Session.
 6. Motion to seal minutes of Executive Session held on April 26, 2022.
 7. Report on actions taken in Executive Session.
 8. New Business proposed for future Commission agendas and general comments from the Commission.
 9. Motion to adjourn.

ANYONE WISHING TO ATTEND THIS MEETING WHO MAY HAVE SPECIAL NEEDS FOR ACCESS OR SERVICES SUCH AS A SIGN LANGUAGE INTERPRETER, PLEASE CONTACT THE COMMISSION BY TELEPHONE AT 222-3790, 48 HOURS IN ADVANCE OF THE SCHEDULED MEETING. THE COMMISSION ALSO MAY BE CONTACTED THROUGH RHODE ISLAND RELAY, A TELECOMMUNICATIONS RELAY SERVICE, AT 1-800-RI5-5555.

Posted on April 21, 2022

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: April 26, 2022

Re: Jessica McCarthy

QUESTION PRESENTED:

The Petitioner, a member of the Jamestown Harbor Commission, a municipal appointed position, requests an advisory opinion regarding whether the Code of Ethics prohibits her from participating in Harbor Commission discussions and decision-making concerning the number of moorings to be included at each of the eighteen mooring fields located within the Town of Jamestown, given that the Petitioner is currently on a waitlist to receive a mooring at one of those fields.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a member of the Jamestown Harbor Commission, a municipal appointed position, is prohibited by the Code of Ethics from participating in Harbor Commission discussions and decision-making concerning the number of moorings to be included at each of the eighteen mooring fields located within the Town of Jamestown, given that the Petitioner is currently on a waitlist to receive a mooring at one of those fields.

The Petitioner is a member of the Jamestown Harbor Commission (“Harbor Commission”), having been appointed to that position by the Jamestown Town Council in or about October of 2021. She is expected to serve a three-year term. The Petitioner represents that the Harbor Commission is preparing to determine whether there are currently an appropriate number of moorings at each of the 18 mooring fields (“mooring fields” or “fields”) located in the Town of Jamestown (“Town” or “Jamestown”). She explains that each of the 18 fields has a different number of moorings because the fields differ dramatically in size. The Petitioner states that the Harbor Commission intends to establish the criteria for determining how many moorings should be located at each field based, in part, upon the availability of necessary facilities at each field, including parking and restrooms. She adds that a number of moorings at each field must also be reserved for non-residents of Jamestown. The Petitioner represents that the criteria for determining the number of moorings at each field will be influenced by the Harbor Commission’s investigation and review of best practices implemented by other Rhode Island municipalities in which mooring fields are located, and that the subject of mooring waitlists could be the topic of conversation among the members of the Harbor Commission when they meet to discuss this issue.

The Petitioner states that, of the 18 mooring fields located in Jamestown, six currently have a waitlist for moorings. The Petitioner further states that the amount of time that someone remains

on a waitlist for a mooring in Jamestown varies drastically based on the desirability of the mooring locations, adding that the fields with larger waitlists are located in the more desirable areas of Jamestown and that the others are little neighborhood areas. The names of each field for which there is a waitlist are identified in the chart below, which also contains information about the current number of moorings, the number of waitlist applications, and the approximate wait time for a mooring.

Name of Mooring Field	Current Number of Moorings	Number of Waitlist Applications	Approximate Wait Time for a Mooring
East Ferry	206	178	19 years
West Ferry	144	103	14 years
Park Dock	8	2	2 years
Cranston Cove	9	2	2 years
Head's Beach	14	9	5 years
Lot 108	4	2	5 years

The Petitioner states that, approximately six months ago, she requested that her name be added to the waitlist for a mooring at Head's Beach. She informs that she became number six on the waitlist and has not moved from that position since. The Petitioner further states that the person who is first on the waitlist for Head's Beach has been waiting for a mooring there for ten years. She explains that the individuals who are second, third and fourth, and fifth on the Head's Beach waitlist applied for moorings in 2019, 2020, and 2021, respectively. The Petitioner represents that the person who is number two on the waitlist for a mooring at Head's Beach is also on the waitlists for the East Ferry and West Ferry mooring fields. She explains that the persons who are numbers one, three, four, and five on the waitlist for a mooring at Head's Beach are only on that waitlist, and informs that she, too, is only on the Head's Beach waitlist.

Cognizant of the Code of Ethics, and desirous of acting in conformance therewith, the Petitioner seeks guidance from the Ethics Commission regarding whether the Code of Ethics prohibits her from participating in Harbor Commission discussions and decision-making concerning both the establishment of criteria for determining the number of moorings to be included in each of the eighteen mooring fields located in Jamestown, and the subsequent application of such criteria to each field.

A person subject to the Code of Ethics may not participate in any matter in which she has an interest, financial or otherwise, which is in substantial conflict with the proper discharge of her duties in the public interest. R.I. Gen. Laws § 36-14-5(a). A substantial conflict of interest occurs if a public official has reason to believe or expect that she, any person within her family, her business associate, or any business by which she is employed or which she represents, will derive a direct monetary gain or suffer a direct monetary loss by reason of her official activity. Section 36-14-7(a). The Code of Ethics also prohibits a public official from using her public office, or confidential information received through her public office, to obtain financial gain for herself, her family member, her business associate, or any business by which she is employed or which she represents. Section 36-14-5(d).

However, section 36-14-7(b) of the Code of Ethics, often referred to as the “class exception,” states that a public official will not have an interest which is in substantial conflict with the proper discharge of her official duties if any benefit or detriment accrues to her, any person within her family, her business associate, or any business by which she is employed or which she represents “as a member of a business, profession, occupation or group, or of any significant and definable class of persons within the business, profession, occupation or group, to no greater extent than any other similarly situated member of the business, profession, occupation or group, or of the significant and definable class of persons within the business, profession, occupation or group.” When determining whether a particular situation supports and justifies the application of the class exception, the Ethics Commission considers the totality of the circumstances. Among the important factors considered are: 1) the description of the class; 2) the size of the class; 3) the function or official action being contemplated by the public official; and 4) the nature and degree of foreseeable impact upon the class and its individual members as a result of the official action.

The Ethics Commission has previously applied the class exception in a variety of circumstances involving public officials. See, e.g., A.O. 2005-22 (applying the class exception and opining that an Exeter Town Council member could participate in a proposed tax freeze ordinance for all property owners aged 65 and over, notwithstanding that his spouse was over age 65 and could benefit from the tax freeze, because 250 to 300 other property owners would be similarly impacted by the ordinance).

However, in prior advisory opinions issued by the Ethics Commission involving situations where it was unclear from the outset whether and how a petitioner or his or her family member might be impacted by certain matters in which the petitioner sought to participate, the class exception was not applied. For example, the Ethics Commission issued Advisory Opinion 2018-19 to a member of the New Shoreham Town Council who inquired whether he was prohibited from participating in Town Council discussions and voting relative to amending the Old Harbor Dock Policy and Harbor Management Plan (“Plan”). In his private capacity, the petitioner was self-employed as the owner of a fishing charter business; worked as an independent contractor for a local business engaged in mooring sales and service; had a private mooring in New Harbor; and was on waiting lists for a charter slip and a commercial fishing slip at the Old Harbor Dock. What was not known at the time was the wording and intent of any proposed amendments to the Plan, and the impact of any such amendments on the petitioner and others with moorings or on waitlists. The absence of clarity surrounding whether and to what extent the petitioner and/or his business associate might be impacted by certain matters in which the petitioner sought to participate ultimately precluded the application of the class exception.

Additionally, in Advisory Opinion 2021-29, the Ethics Commission opined that the Chairperson of the Narragansett Recreation Advisory Board was prohibited from participating in Recreation Advisory Board discussions and recommendations to the Narragansett Town Council concerning the existing rental policy for cabanas located directly on the Narragansett Town Beach, given that the petitioner’s spouse then currently rented one of the cabanas. There, although the petitioner was not a member of the Town Council, he chaired the Recreation Advisory Board as an appointee of the Town Council and, as such, was tasked with advising the Town Council regarding the rental policy for the Town Beach cabanas. Because it was unclear whether and how the Recreation Advisory Board’s discussions and ultimate recommendations to the Town Council might

financially impact the petitioner's spouse as a cabana renter, the Ethics Commission determined that the class exception was inapplicable, and that the petitioner was required to recuse from participating in the matter. See also A.O. 2021-14 (opining that the class exception was inapplicable and that the Solicitor for the Town of Middletown was prohibited from participating in Town Council discussions or advising the Town Council regarding the proposed revision of an ordinance relating to short-term residential leases, given that the petitioner and his spouse owned property regulated by said ordinance, where it was unclear at the outset whether and how the actions of the Town Council, in response to the advice of the petitioner in his capacity as Middletown Solicitor, might financially impact the petitioner and his spouse); A.O. 2018-23 (opining that the class exception was inapplicable and that a member of the Portsmouth Town Council could not participate in the Town Council's discussions and voting relative to mitigating the negative effects caused by the operation of a town-supported wind turbine on neighboring homes, given that the petitioner was one of the affected residents and it was unclear at the outset of the Town Council's discussions how any resolution to the noise and shadow flicker problem would impact the petitioner).

Here, the members of the Harbor Commission intend to establish the criteria by which to determine the number of moorings to be included at each of the eighteen mooring fields located in Jamestown. After that, the Harbor Commission intends to apply such criteria to determine the number of moorings to be included at each field. The Petitioner states that the criteria by which to determine the number of moorings to be included at each field will be influenced by the Harbor Commission's review of best practices implemented by other Rhode Island municipalities in which mooring fields are located. Information about such best practices is unknown at this time. Further, the subject of mooring waitlists could be the topic of conversation among the members of the Harbor Commission when they meet to establish the criteria. There is no way to know at the outset of this matter whether and to what extent the Petitioner's official action as a member of the Harbor Commission, be it during the establishment of criteria based on information as yet to be determined, or during the application of that criteria once it has been decided, would directly financially impact her, given her status as the sixth person on the waitlist for a mooring at Head's Beach. Accordingly, it is the opinion of the Ethics Commission that the class exception is inapplicable here and that the Petitioner must recuse from participating in all Harbor Commission discussions and decision-making relative to this matter. Recusal shall be consistent with section 36-14-6.

However, in the event that the Petitioner would like to participate in determining the number of moorings to be included at each field once the criteria for making such determination has been established by the Harbor Commission without her participation, she should seek further guidance from the Ethics Commission regarding whether she may so participate without violating the Code of Ethics.

This Draft 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(a)
§ 36-15-5(d)
§ 36-14-6
§ 36-14-7(a)
§ 36-14-7(b)

Related Advisory Opinions:

A.O. 2021-29
A.O. 2021-14
A.O. 2018-23
A.O. 2018-19
A.O. 2005-22

Keywords:

Conflict of Interest

DRAFT

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: April 26, 2022

Re: Bradford G. Marthens

QUESTION PRESENTED:

The Petitioner, a member of the New Shoreham Sewer Commission, a municipal appointed position, requests an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before his own agency, in order to appeal sewer assessments against his properties.

RESPONSE:

It is the opinion of the Ethics Commission that the Petitioner, a member of the New Shoreham Sewer Commission, a municipal appointed position, qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before his own agency, in order to appeal sewer assessments against his properties.

The Petitioner is a Co-Chairperson of the New Shoreham Sewer Commission ("Sewer Commission"), to which he was appointed by the New Shoreham Town Council in 2010.¹ The Petitioner states that he resides in the Town of New Shoreham in a home that he built in 2007/2008 and which is his primary residence. The Petitioner adds that he also owns a rental property that is located on a lot adjacent to the one on which his primary residence is located.

The Petitioner represents that, in the spring of 2021, he and his wife had a landscaping project completed and, as a result, they had to hydroseed a large area that stretched over the lots of his personal residence and the rental property. He states that the hydroseeded area required a large amount of water to cause the seeds to germinate and grow during the months of April and May. The Petitioner represents that the sewer bills for his personal residence and his rental property during the irrigation period were calculated based on the total water usage during that time, including the water that was used for the irrigation, notwithstanding that the latter never entered the sewer system. Therefore, the Petitioner states that, based on the sewer charges historically assessed against the two properties for the same time period, rather than paying the full amount, he paid an amount that corresponded to the sewer charges that would have been assessed against the properties but for the irrigation. The Petitioner would like to appeal the excess sewer charges.

¹ The Petitioner states that he was simultaneously appointed to the New Shoreham Water Commission for which he currently serves as Chairperson. The Petitioner explains that the two commissions conduct joint meetings to discuss matters of general concern to both commissions such as rates and contracts; however, each of the commissions also conducts its own separate meetings and reviews agenda items specific to the respective commissions.

He states that such appeals are routinely granted whereby the Sewer Commission allows the Superintendent to then reduce the fees by the suggested amount. Cognizant of the Code of Ethics' prohibition against representing himself before the Sewer Commission, given his membership on it, the Petitioner seeks a hardship exception to allow him to appeal the excess sewer charges associated with the irrigation of the hydroseeded area last spring. He states that he will recuse from the Sewer Commission's consideration of this matter.

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); Commission Regulation 520-RICR-00-00-1.1.4(A)(1) Representing Oneself or Others, Defined (36-14-5016) ("Commission Regulation 1.1.4"). Pursuant to Commission Regulation 1.1.4(A)(1)(a), a person will "represent him or herself before a state or municipal agency" if he or she "participates in the presentation of evidence or arguments before that agency for the purpose of influencing the judgment of that agency in his or her own favor." While many conflicts can be avoided under the Code of Ethics by recusing from participating and voting in certain matters, such recusal is insufficient to avoid section 36-14-5(e)'s prohibitions. 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 36-14-5(e)(1) & (4). Upon receipt of a hardship exception, the public official must also advise the state or municipal agency in writing of the existence and the nature of his interest in the matter at issue; recuse himself from voting on or otherwise participating in the agency's consideration and disposition of the matter at issue; and follow any other recommendations that the Ethics Commission may make in order to avoid any appearance of impropriety in the matter. Section 36-14-5(e)(1).

The Petitioner's proposed conduct falls squarely within the Code of Ethics' prohibition against representing himself before an agency of which he is a member. Having determined that section 36-14-5(e)'s prohibitions apply to the Petitioner, the Ethics Commission will consider whether the unique circumstances represented by him herein justify a finding of hardship to permit him to appear before the Sewer Commission and appeal said sewer charges. The Ethics Commission reviews questions of hardship on a case-by-case basis and has, in the past, considered 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; whether the matter involved a significant economic impact; and whether the official's interests were brought before an agency by a third party. The Ethics Commission may consider other factors and no single factor is determinative.

We do not believe that public officials should be prevented from challenging municipal assessments against their personal residences or their businesses, provided that they request and receive advisory opinions prior to representing themselves before agencies of which they are members, by which they are employed, or over which they have appointing authority. The Ethics Commission has previously granted hardship exceptions to public officials who sought to appear before agencies of which they were members or for which they were the appointing authority in connection with municipal assessments against either their personal residences or their businesses.

Most recently, the Ethics Commission issued Advisory Opinion 2021-50 to another member of the New Shoreham Sewer Commission under somewhat similar circumstances. There, the Ethics Commission granted a hardship exception allowing the petitioner to appear before the Sewer Commission in order to appeal sewer charges assessed against his personal residence. The sewer charges were higher than those for the same period the year before due to a leak in one of the water pipes in the basement of the petitioner's home. Like the instant matter, the sewer bill had been generated automatically based on the total water usage and not on the amount of water that actually entered the sewer system. That petitioner also wished to appeal the excess sewer charges. See also A.O. 2020-18 (granting a hardship exception to a member of the Jamestown Town Council so that he could appear before the Jamestown Tax Assessment Board of Review, over which the Town Council had appointing authority, in order to appeal the tax assessment of his personal residence); A.O. 2015-8 (granting a hardship exception to a Woonsocket City Council member so that he could represent himself before the Woonsocket Board of Tax Review, over which the City Council had appointing authority, in order to appeal the tangible property tax assessed against a business that he owned).

Here, the Petitioner seeks to appear before the Sewer Commission, of which he is a member, in order to appeal the excess sewer charges assessed against his personal residence and his rental property as a result of irrigation of hydroseeds following the completion of a landscaping project. The Petitioner has lived in his home and has owned the rental property since he built them in 2007/2008, which predates his appointment to the Sewer Commission in 2010. In consideration of the facts as represented above, and consistent with the applicable provisions of the Code of Ethics and past advisory opinions issued, it is the opinion of the Ethics Commission that the totality of the circumstances justifies making an exception to section 36-14-5(e)'s prohibitions. Accordingly, the Petitioner may appear before the Sewer Commission to appeal the sewer charges assessed against his personal residence and his rental property. However, the Petitioner must recuse himself from participating in the Water Commission's consideration of this matter. Pursuant to section 36-14-5(e)(1), and concurrent with his recusal, the Petitioner must inform the other Sewer Commission members of his receipt of the instant advisory opinion and of his recusal in accordance therewith. Notice of recusal shall be filed with the Ethics Commission consistent with section 36-14-6.

This Draft 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. 2021-50

A.O. 2020-18
A.O. 2015-8

Keywords:
Hardship Exception

DRAFT