

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2022-13

Approved: 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 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(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