

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2022-14

Approved: 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 Sewer 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 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. 2021-50

A.O. 2020-18

A.O. 2015-8

Keywords:

Hardship Exception