

# RHODE ISLAND ETHICS COMMISSION

---

---

## Advisory Opinion No. 2022-27

Approved: September 20, 2022

**Re: Gail Berlinghof**

### **QUESTION PRESENTED:**

The Petitioner, a member of the North Smithfield Zoning Board of Review, a municipal appointed position, requests an advisory opinion regarding whether, following her recusal from official participation in all discussions and/or decision-making concerning a matter currently before the Zoning Board involving several acres of wetlands, she is prohibited by the Code of Ethics from publicly expressing her own opinion on said matter before the Zoning Board during a period of public comment.

### **RESPONSE:**

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a member of the North Smithfield Zoning Board of Review, a municipal appointed position, is not, following her recusal from official participation in all discussions and/or decision-making concerning a matter currently before the Zoning Board involving several acres of wetlands, prohibited by the Code of Ethics from publicly expressing her own opinion on said matter before the Zoning Board during a period of public comment, given that the Petitioner's proposed activity involves a matter of general public interest consistent with the provisions outlined in Commission Regulation 1.2.3 Public Forum Exceptions (36-14-7003).

The Petitioner is a member of the North Smithfield Zoning Board of Review ("Zoning Board"). Initially appointed by the North Smithfield Town Council ("Town Council") in 2018 as an alternate member, she was appointed to full membership earlier this year. The Petitioner represents that there is currently pending before the Zoning Board a matter involving several acres of wetlands ("subject property") on which the owner of a nearby private metals recycling business ("business owner") wishes to construct a warehouse to be used to operate a second metals recycling business. The Petitioner informs that the subject property is located above an aquifer, which she describes as an area that contains permeable rock well below the ground's surface in which groundwater is located. She further informs that the aquifer is situated in a community well head, which she describes as an area protected from development and pollution, adding that the groundwater located within the aquifer serves as a source of drinking water for many North Smithfield ("Town") residents.

The Petitioner states that, in order for the business owner to construct the warehouse, he will require several variances from the Zoning Board, including a loading dock variance, the

application for which has been scheduled for hearing before the Zoning Board on September 27, 2022. The Petitioner explains that the business owner was last before the Zoning Board on August 23, 2022, at which time he sought two other variances relative to the subject property. The Petitioner further explains that, although she was unable to attend that particular meeting due to illness, had she been present, she would have recused from participating in any discussion and/or decision-making relative to the business owner's variance applications, given that the Petitioner works closely with an abutter to the subject property.<sup>1</sup>

The Petitioner states that, following her recusal from participation as a member of the Zoning Board when the matter involving the subject property is next before the Zoning Board, she would like to publicly express her personal opinion about it during the period of public comment. She informs that she is among the roughly sixty percent of the approximately 13,000 Town residents who live above the aquifer on which the subject property is located. She further informs that some thirty homeowners, who live within a 200-foot radius of the subject property and who received notice of the Zoning Board meeting at which the business owner's requests for variances will be considered, could be directly affected should the requested variances be granted. The Petitioner represents that, because she lives some seven miles away from the subject property, there is no way to know whether or to what extent she would be directly affected if the business owner's requests for variances are granted.<sup>2</sup>

The Petitioner represents that there are a number of Town residents living above the aquifer whose wells are polluted and who are currently getting their water from a river in the City of Woonsocket. She explains that the City of Woonsocket treats its river water with chemicals to purify it, and adds that she does not wish to drink water that has been chemically treated, especially when the aquifer located below the subject property is intended to be protected from development and pollution. The Petitioner expresses her concern that, if the business owner is granted his requests for variances that would allow him to operate a second metals recycling warehouse over a natural aquifer that serves as a source of clean local drinking water for Town residents, not only will that water source be put at risk, but that other business owners might seek similar variances that could lead to water pollution. 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 publicly expressing her own opinion on the subject property before the Zoning Board during its period of public comment.

---

<sup>1</sup> The Petitioner states that the abutter owns a private company for which the Petitioner serves in a strictly volunteer capacity as a co-producer and researcher for a documentary being directed and co-produced by the abutter that is in no way related to the subject property or the business owner. The Petitioner has not requested a determination by the Ethics Commission of whether her affiliation with the abutter constitutes a business associate relationship under the Code of Ethics, representing that, even if the abutter were deemed not to be her business associate under the Code of Ethics, she would still recuse from participation in this matter in order to avoid even an appearance of impropriety. The Ethics Commission appreciates the Petitioner's decision to recuse under such circumstances and, given her recusal from participating in the Zoning Board's decision, there is no need for us to examine the nature of her affiliation with the abutter.

<sup>2</sup> The Petitioner states that there are hundreds of other homeowners living above this particular aquifer in close proximity to the subject property who, while not considered abutters, have wells which are either already polluted or have yet to be tested for pollution. She further states that the pollution of those wells is from an unconfirmed source, but that the business owner who is seeking the variances owns and operates a metals recycling business a short distance from where he seeks to construct the warehouse and to operate his second metals recycling business.

The Code of Ethics prohibits a public official from using her public position, or confidential information received through her public position, to obtain financial gain, other than that provided by law, for herself, her family member, her business associate, or her employer. R.I. Gen. Laws § 36-14-5(d). The Code of Ethics also specifically prohibits a public official from representing herself or authorizing another person to appear on her behalf before a state or municipal agency of which she is a member, by which she is employed, or for which she is the appointing authority. Section 36-14-5(e)(1); Commission Regulation 520-RICR-00-00-1.1.4(A)(1) Representing Oneself or Others, Defined (36-14-5016). However, the Code of Ethics contains a “Public Forum Exception” which provides that it shall not be a violation of the Code of Ethics for any person to publicly express her own viewpoints in a public forum on any matter of general public interest or on any matter which directly affects said individual or her spouse or dependent child. Commission Regulation 520-RICR-00-00-1.2.3 Public Forum Exceptions (36-14-7003) (“Regulation 1.2.3”).

Prior to this year, the Ethics Commission had advised public officials about their rights under the “Public Forum Exception” primarily in situations where a petitioner was an abutter to a property under consideration, resulting in a rebuttable presumption of financial impact upon the petitioner. See, e.g., A.O. 2020-33 (opining that a member of the West Warwick Town Council could address the Planning Board, the Zoning Board, and/or the Town Council, upon recusal, during public hearings regarding a proposed development of property located across the street from his personal residence, provided that he did not receive access or priority not available to any other member of the public); A.O. 2019-41 (opining that a member of the Middletown Town Council could attend and speak at public hearings before the Planning Board and/or, potentially, the Zoning Board regarding a proposed development of property located across the street from her personal residence, provided that the petitioner did not receive access or priority not available to any other member of the public); and A.O. 2003-15 (opining that a member of the Scituate Town Council could, upon recusal, attend and provide public comment at meetings of the Zoning Board regarding a special use permit application for property to which he was an abutter, provided that he did not receive special access or priority not available to any other member of the public).

Earlier this year, in Advisory Opinion 2022-22, the Ethics Commission opined that a member of the East Greenwich Town Council was not prohibited by the Code of Ethics from appearing as a member of the public during public hearings of the East Greenwich Planning Board (“Planning Board”), over which the East Greenwich Town Council has appointing authority, to provide public comment on a proposed major development of property located within a mile of the petitioner’s home. The petitioner was not an abutter to the proposed development; thus, there was no rebuttable presumption of financial impact upon her or her family relative to the proposed development. Nor was that petitioner certain at the time that she sought the advisory opinion whether or to what extent the proposed development would or could financially impact her property. The Ethics Commission determined that the development, described by the petitioner as “the largest proposed development in East Greenwich to date,” qualified as a matter of general public concern justifying the application of the Public Forum Exception, and allowed the petitioner to address the Planning Board as a member of the public during its period of public comment, provided that she did not receive access or priority not available to any other member of the public. The petitioner was further advised that she could not use her public position in any way to influence members of the Planning Board regarding that, or any other, subject matter.

Like the petitioner in Advisory Opinion 2022-22, the instant Petitioner is not seeking a hardship exception that would allow her to represent herself before a municipal agency of which she is a member (or, in the case of the petitioner in Advisory Opinion 2022-22, before a municipal agency for which she was the appointing authority). The Petitioner lives above the aquifer that is located below the subject property. While it remains to be determined whether the business owner's variance applications directly affect the Petitioner, given that her home is located seven miles away from the subject property and her representation that there is no way to know whether or to what extent she would be directly affected if the business owner's requests for variances are granted, the potential pollution of a natural drinking water source for hundreds of Town residents that could result from the construction of a metals recycling warehouse constitutes a matter of general public interest justifying the application of the Public Forum Exception. Accordingly, based on the representations by the Petitioner, the applicable provisions of the Code of Ethics, and prior advisory opinions issued, it is the opinion of the Ethics Commission that the Petitioner, may, following her recusal from official participation in all discussions and/or decision-making concerning the matter currently before the Zoning Board involving the subject property, appear and address the Zoning Board to express her own opinion during the period of public comment regarding the subject property, provided that she does not receive access or priority not available to any other member of the public. The Petitioner is further advised that she may not use her public position in any way to influence members of the Zoning Board regarding this, or any other, matter.

**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(d)

§ 36-14-5(e)

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

520-RICR-00-00-1.2.3 Public Forum Exceptions (36-14-7003)

Related Advisory Opinions:

A.O. 2022-22

A.O. 2020-33

A.O. 2019-41

A.O. 2003-15

Keywords:

Public Forum Exception