

# RHODE ISLAND ETHICS COMMISSION

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## Advisory Opinion No. 2023-5

Approved: February 14, 2023

**Re: Thomas E. Brun**

### **QUESTION PRESENTED:**

The Petitioner, a member of the East Providence Economic Development Commission, a municipal appointed position, who in his private capacity owns and operates the Indoor Tennis Court, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from pursuing federal grant funding through the Storefront Improvement Program administered through the East Providence Department of Planning and Economic Development and, if so, whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the municipal agency of which he is a member for purposes of pursuing the grant funding.

### **RESPONSE:**

It is the opinion of the Ethics Commission that the Petitioner, a member of the East Providence Economic Development Commission, a municipal appointed position, who in his private capacity owns and operates the Indoor Tennis Court, is prohibited by the Code of Ethics from pursuing federal grant funding through the Storefront Improvement Program administered through the East Providence Department of Planning and Economic Development; however, the Petitioner qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the municipal agency of which he is a member for purposes of pursuing the grant funding, subject to the conditions outlined below.

The Petitioner is a member of the East Providence Economic Development Commission ("EDC"), having been appointed to that position by the East Providence City Council ("City Council") in March of 2020. He states that the role of the EDC is to promote a healthy and vigorous local economy in the City of East Providence ("City" or "East Providence"). Its powers and duties include, but are not limited to, the following: "to confer with and advise the City Council and the Mayor on all matters concerning economic development in the City; to advertise the economic advantages and opportunities of the City within the means provided by any appropriations made therefor by the City Council; . . . to cooperate with all community groups that are dedicated to the orderly economic expansion of the City and to furnish them such aid and advice as is deemed appropriate; [and] to cooperate with all industries and businesses in the City in the solution of any community problems which they might have and to encourage the management of such concerns to have a healthy and constructive interest in the City's welfare . . . ."<sup>1</sup>

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<sup>1</sup> <https://www.eastprovidencebusiness.com/economic-development-commission> (last visited December 28, 2022).

In his private capacity, the Petitioner owns and operates the Indoor Tennis Court, a business located in East Providence that is available for rental on an hourly basis by those who wish to play indoor tennis there. The Petitioner states that the Indoor Tennis Court also hosts visitors seeking to tour the facility, which was built in 1914 and is one of the oldest tennis courts of its kind in the country. The Petitioner further states that he purchased the Indoor Tennis Court 32 years ago and is its sole proprietor and only employee. He adds that the Indoor Tennis Court has been his only employment for the past 15-20 years. The Petitioner represents that he has no plans to sell his business or the building that houses it and that he hopes to continue to operate the Indoor Tennis Court for at least another decade.

The Petitioner states that the City is currently offering qualified local businesses the opportunity to apply for federal grant funding through the Storefront Improvement Program (“Program”), which utilizes federal funds awarded to the City under the American Rescue Plan Act (“ARPA”) in response to the COVID-19 pandemic. He explains that the Program was developed as a means of providing long-term benefits and improvements to small businesses in the City, particularly in demographic areas that are disproportionately affected by higher levels of demographic distress. The Petitioner represents that the Program is directly administered by a staff member (“Storefront Improvement Manager”) of the City’s Department of Planning and Economic Development (“Department”) who receives the applications and reviews them for compliance with all eligibility requirements under the Program.

According to the Storefront Improvement Program information sheet issued by the City<sup>2</sup>, eligible commercial property owners and tenants can receive a grant of up to \$40,000 for eligible storefront improvements. For grant requests over \$10,000, applicants are required to provide a 25% match of the amount over \$10,000 (which may not be met by using funds from other ARPA-funded programs). Grant amounts up to \$10,000 do not require a match. The Program covers items such as window repair or replacement, doors, awnings, painting, siding, exterior lighting, window boxes, landscaping, and signage. Eligible businesses include those related to the arts, entertainment, recreation, accommodation, food services, and personal care services. Successful applicants will receive payment in two installments: the first installment upon submission of an invoice from qualified contractors and a second payment upon completion of all proposed improvements.

The Petitioner represents that he was appointed to the EDC prior to the availability of ARPA funds to the City and the decision to use them for the Program, and further represents that the EDC had no role in establishing the criteria, application or design guidelines for the Program. He further represents that the role of the EDC in the Program process is to review the applications for purposes of then making a recommendation to the Mayor as to whether they should be granted, adding that after the applications are reviewed by the EDC, they are returned to the Department for an advisory sign-off for approval by the Department Director. The Department then submits the applications and advisory sign-off to the Mayor for final approval. The Petitioner explains that the Storefront Improvement Manager presents every application that she receives to the EDC for review and consideration, and that the application for ARPA funds cannot be reviewed and approved or denied without participation by the EDC. He states that applications will be accepted until December 31,

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<sup>2</sup> See <https://eastprovidenceri.gov/storefront-improvement-program> (last visited December 22, 2022).

2024, that grants are issued on a rolling basis, and that grant funds, which the Petitioner estimates to total approximately one million dollars, could be depleted prior to the end of the application period.

The Petitioner states that he recently applied for grant funding through the Program, adding that consideration of his application is on hold pending the issuance of an advisory opinion from the Ethics Commission that either the Code of Ethics does not prohibit him from applying or that the circumstances justify application of the hardship exception. He further states that he is applying for grant funds to remove old wooden shingles from the entire front of the Indoor Tennis Court building and to install new wooden shingles there, adding that the new shingles would be of similar style and material as the original wooden siding. The Petitioner represents that, because the lowest bid he received for the project is \$54,000, he is requesting \$40,000, which is the maximum amount available under the grant. He further represents that he will have in his budget the necessary funds above the requested grant award to complete the project. The Petitioner states that, if allowed to pursue the grant funding, he would recuse not only from participation in the discussion and voting relative to his own application, but from the discussion and voting relative to all other applications submitted to the EDC for consideration on or before December 31, 2024.<sup>3</sup> It is in the context of these representations that the Petitioner seeks guidance from the Ethics Commission regarding whether he is prohibited by the Code of Ethics from pursuing federal grant funding through the Storefront Improvement Program and, if so, whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the EDC for purposes of pursuing the grant funding.

The Code of Ethics prohibits a public official from representing himself or any other person before any state or municipal agency of which he is a member. R.I. Gen. Laws § 36-14-5(e) ("section 5(e)") (1) & (2). This prohibition extends for a period of one year after the public official has officially severed his position with the agency. Section 5(e)(4). The "revolving door" language of section 5(e) is designed to both prevent any undue influence that a current public official may have over his agency and colleagues by reason of his membership thereon, and to minimize any undue influence that a former public official may have over his former agency and colleagues by reason of his past membership thereon. Under the Code of Ethics, a person represents himself or another person before a state or municipal agency if he participates in the presentation of evidence or arguments before that agency for the purpose of influencing the judgment of the agency in his own favor or in favor of another person. Section 36-14-2(12) and (13); Commission Regulation 520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016). Section 5(e)'s prohibitions are stricter than virtually any other provisions in the Code of Ethics. In most instances under the Code of Ethics, public officials and employees may address potential conflicts of interest by declining to participate in related discussions and votes. Such is not the case with section 5(e). Absent an express finding by the Ethics Commission that a hardship exists, the prohibitions in section 5(e) are absolute.

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<sup>3</sup> The Petitioner states that there have already been seven applications for grant funding from the Program for which he participated in discussions and voting that resulted in the approval of those applications, but that his participation occurred prior to him submitting his own application.

### The Submission of Grant Applications is Representation Before One's Own Agency

Historically, the Ethics Commission has consistently recognized the submission of grant applications by a public official as the representation of that public official before his or her own state agency. See A.O. 2020-32 (opining that a former Senior Projects Review Coordinator for the Rhode Island Historical Preservation & Heritage Commission (“RIHPHC”) was prohibited from, among other things, submitting a grant application to the RIHPHC from the petitioner’s new private employer on which the petitioner’s name appeared); A.O. 2016-23 (opining that Pawtucket’s Assistant City Solicitor, who was also President of the Board of Directors of Cape Verdean American Community Development (“CACD”), was prohibited from representing the CACD before the City of Pawtucket on any matter, including Block Grant applications, and from signing and submitting such applications); A.O. 2002-59 (opining that a former Rhode Island State Council on the Arts (“RISCA”) member could not apply for a grant from the RISCA, given that she would have to appear before her former board prior to the expiration of one year following her resignation).<sup>4</sup>

Given the advisory opinions issued herein which recognize a public official’s application for grant funding as an appearance before one’s own agency, the Petitioner’s proposed conduct falls within the Code of Ethics’ prohibition against representing oneself before a municipal agency of which he is a member. Having determined that section 5(e)’s prohibitions apply to the Petitioner, the Ethics Commission will consider whether the unique circumstances represented by the Petitioner herein justify a finding of hardship to permit him to apply for a Storefront Improvement Program Grant.

### The Hardship Exception

Section 5(e)(1) specifically authorizes the Ethics Commission to grant an exception, in certain circumstances, to allow a public official to represent himself before his own agency, based upon a finding that a denial of such self-representation would result in a hardship. Upon receiving a hardship exception, the public official is required to recuse from participating in his agency’s consideration and disposition of the matter at issue. Section 36-14-5(e)(1)(ii). The public official must also “[f]ollow any other recommendations that the Ethics Commission may make to avoid any appearance of impropriety in the matter.” Section 36-14-5(e)(1)(iii). See, e.g., A.O. 2014-4 (granting a hardship exception to a member of the Portsmouth Town Council and permitting him to represent himself before the Portsmouth Zoning Board in order to seek a variance for his personal residence, provided that, in order to avoid any appearance of impropriety, he recused from the Town Council’s appointment or reappointment of any person to the Zoning Board until after the election cycle following the resolution of his applications for zoning relief).

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 public official’s principal residence or principal place of business; whether

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<sup>4</sup> In the cases of Advisory Opinions 2020-32, 2016-23, and 2002-59, while each of the petitioners had either been, or could potentially have been, tasked with reviewing grant applications as part of the performance of their duties for each of their respective agencies, none of the subject grants sought by the petitioners related to their own real property.

the public 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.

In past advisory opinions, the Ethics Commission has applied the hardship exception where the matter involved a modification to a public official's place of business. For example, in Advisory Opinion 2017-54, the Ethics Commission granted a hardship exception to a member of the Bristol Town Council to appear before the Bristol Zoning Board of Review for permission to install a 9-foot fence around a commercial boat storage facility that he had owned and managed for several years prior to his election to the Town Council. Similarly, in Advisory Opinion 2001-29, the Ethics Commission granted a hardship exception to a member of the Narragansett Town Council permitting him to appear before the Narragansett Zoning Board, over which he had appointing authority, to apply for an alteration to the site plan to enclose the outdoor seating areas of his restaurant that were used during the summer season. The Ethics Commission based its decision primarily on the fact that the petitioner had owned and operated the restaurant for eight years prior to his election to the Town Council. See also A.O. 2011-33 (granting a hardship exception to a former Westerly Planning Board member and permitting him to seek a permit from his former board to install an additional sign at his ice cream shop because the business was his primary source of income and his ownership interest predated his service on the Planning Board); A.O. 2010-19 (granting a hardship exception to an alternate member of the Newport Zoning Board to appear before his own board and appeal the denial of a building permit to refurbish unused space for commercial rental use within a residential rental property, where his ownership predated his public service, the desired use was consistent with prior use, and had the least financial impact on the petitioner); A.O. 2005-32 (granting a hardship exception to a Westerly Planning Board member to appear before the Planning Board to request a zone change which would allow the petitioner to relocate his business, an ice cream shop, notwithstanding that his property rights did not pre-exist his appointment to the Planning Board). Compare A.O. 2003-49 (opining that the Assistant Solicitor for the Town of Lincoln who wished to represent himself before the Lincoln Town Council, Zoning Board, and Planning Board regarding the development of two parcels of real estate he owned in the town did not qualify for a hardship exception because the petitioner's ownership of the lots did not predate his appointment as Assistant Solicitor, and it was uncertain whether either lot would be resold in commercial transactions after development).

Here, the Petitioner seeks to avail himself of the opportunity to seek federal funds in the form of a grant in order to restore and renovate the front of a commercial property from which he has operated the business which has been his only employment for approximately two decades prior to his appointment to the EDC. The Petitioner affirmatively represents that he does not intend to sell the property or the business anytime in the next ten years. Considering these representations, and consistent with our past opinions in this area, it is the opinion of the Ethics Commission that the totality of the circumstances justifies making an exception to section 5(e)'s prohibitions to allow the Petitioner to pursue federal grant funding through the Storefront Improvement Program.

However, section 5(e) authorizes the Ethics Commission to condition such exception upon the Petitioner's agreement to follow certain steps aimed at reducing any appearance of impropriety. Section 36-14-5(e)(1)(iii). Pursuant thereto, the Petitioner must recuse from participating in the

discussion and voting not only from the EDC's consideration of his own grant application, but from the discussion and voting by the EDC relative to all grant applications through the Storefront Improvement Program, given that any decisions made by the Petitioner concerning other applications prior to a determination by the other members of the EDC concerning his own application would likely affect the availability of ARPA funds. Additionally, participation by the Petitioner in the consideration of grant applications submitted by other business owners following a determination by the other members of the EDC concerning his own grant application could carry with it an appearance of impropriety of the nature that section 5(e) aims to reduce. Finally, the Petitioner shall not use his public position to attempt to influence his or any other application for grant funding. All notices of recusal shall be made consistent with the provisions of 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:

§ 36-14-2(12)

§ 36-14-2(13)

§ 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. 2020-32

A.O. 2017-54

A.O. 2016-23

A.O. 2014-04

A.O. 2011-33

A.O. 2010-19

A.O. 2005-32

A.O. 2003-49

A.O. 2002-59

A.O. 2001-29

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