

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2023-29

Approved: July 25, 2023

Re: Timothy E. Sweeney

QUESTION PRESENTED:

The Petitioner, a member of the Bristol Town Council, a municipal elected position, requests an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the Bristol Historic District Commission, over which the Bristol Town Council has appointing authority, in order to seek review and approval of proposed renovations to his primary residence.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a member of the Bristol Town Council, a municipal elected position, qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the Bristol Historic District Commission, over which the Bristol Town Council has appointing authority, in order to seek review and approval of proposed renovations to his primary residence.

The Petitioner is a member of the Bristol Town Council ("Town Council") and has served in that position continuously since his initial election in 2012. He represents that he would like to complete maintenance and enhancements to the exterior of his home including, but not limited to, the construction of an outdoor kitchen with a pergola; maintenance and replacement of stairs at both entrances to his home, including the replacement of the bottom stair of each staircase with a solid bluestone step; installation of a privacy fence and privacy panels to screen the garbage cans and the existing air conditioning unit; and replacement and extension of the existing patio in his backyard. The Petitioner states that, because his home is located within the Bristol Historic District, some changes to the exterior¹ of his home will require approval by the Bristol Historic District Commission ("HDC"), over the members of which the Town Council has appointing authority. He explains that other changes are either exempt from HDC approval or are eligible for administrative approval by the HDC's staff assistant.² The Petitioner states that he purchased his home in 2010 and has resided there ever since. Given this set of facts, the Petitioner seeks guidance from the Ethics Commission regarding whether he may appear before the HDC in order to seek a review and approval of his renovation plans.

¹ The Petitioner represents that the changes to the exterior of his home that will require approval by the HDC are the proposed construction of the pergola, the installation of screening panels for the garbage cans and the air conditioning unit, and the replacement of the bottom stair of each of the two staircases.

² The Petitioner represents that the HDC's staff assistant is hired by the Town Administrator, who is a municipal elected official.

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) (“section 5(e)”); Commission Regulation 520-RICR-00-00-1.1.4(A)(1) Representing Oneself or Others, Defined (36-14-5016) (“Regulation 1.1.4”). Pursuant to Regulation 1.1.4(A)(1)(a), a person will represent himself 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 [] favor.” 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 receiving a hardship exception, the public official must also “follow 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).

The Petitioner’s proposed conduct squarely falls within the Code of Ethics’ prohibition on representing himself before an agency for which he is the appointing authority. Having determined that section 5(e)’s prohibitions apply to the Petitioner, the Ethics Commission will next consider whether the unique circumstances represented by him herein justify a finding of hardship to permit him to appear before the HDC.

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; and whether the matter involved a significant economic impact. When deciding whether to apply the hardship exception, the Ethics Commission considers the totality of the circumstances and no single factor is determinative.

In 2020, the Ethics Commission granted a hardship exception to the instant Petitioner through the issuance of Advisory Opinion 2020-34. There, the Petitioner was permitted to appear before the HDC to seek approval for modifications to the exterior of his home associated with the addition of a second bathroom in the home. The Ethics Commission has also previously granted hardship exceptions to a number of other public officials who sought to appear before boards for which they were the appointing authority regarding their personal residences. See, e.g., A.O. 2019-64 (granting a hardship exception to the President of the North Smithfield Town Council and permitting him to appear before the North Smithfield Zoning Board of Review to seek a dimensional variance for his personal residence, provided that he recused from the Town Council’s appointment or reappointment of any person to the Zoning Board until after the election cycle for his Town Council seat following the complete resolution of his application before the Zoning Board, including appeals, and that, prior to the Zoning Board’s consideration of his variance application, he informed the Zoning Board members of his receipt of an advisory opinion and that, consistent therewith, he would recuse from their reappointments); A.O. 2017-33 (granting a hardship exception to a member of the Bristol Town Council and permitting him to appear before the Bristol Zoning Board of Review to seek a dimensional variance for his personal property, provided that he recused from the Town Council’s appointment or reappointment of any person to

the Zoning Board until after the election cycle for his Town Council seat and following the complete resolution of his application before the Zoning Board).

Here, the Petitioner would like to construct an outdoor kitchen and conduct maintenance and enhancement to the exterior of his home. The Petitioner has owned his home since 2010, which predates his election to the Town Council in 2012. Based on the Petitioner's representations, and consistent with our past advisory opinions addressing this issue, it is the opinion of the Ethics Commission that the totality of these particular circumstances justifies making an exception to section 5(e)'s prohibitions. Accordingly, the Petitioner may represent himself, either personally or through a representative, before the HDC to seek approval of the proposed exterior modifications that require the approval of the HDC. This hardship exception extends to include the Petitioner's representation before the HDC's staff assistant.³

In order to avoid an appearance of impropriety, the Petitioner must recuse from the Town Council's appointment or reappointment of any persons to the HDC until after the election cycle for his Town Council seat following the complete resolution of the HDC's review and approval of his renovation plans, including any appeals. Notice of recusal must be filed consistent with the provisions of section 36-14-6. Finally, the Petitioner shall, prior to his appearance before the HDC relative to his application, inform the HDC members of his receipt of the instant advisory opinion and that, consistent herewith, he will recuse from their reappointments as set forth above.

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. 2020-34

A.O. 2019-64

A.O. 2017-33

Keywords:

Hardship Exception

³ The Ethics Commission makes no determination at this time regarding whether a hardship exception is required for the Petitioner to seek approval by the HDC's staff assistant of changes to the exterior of his home. The Ethics Commission shall, instead, make such a determination if and when presented with that question and following a detailed analysis of any additional facts necessary for making that determination.