

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2023-34

Approved: September 12, 2023

Re: Anthony DeSisto, Esq.

QUESTION PRESENTED:

The Petitioner, the Town Solicitor for the Town of Little Compton, a municipal appointed position, who is also legal counsel to the Rhode Island Coastal Resources Management Council, an independent contractor position, requests an advisory opinion regarding whether the Code of Ethics prohibits him from simultaneously serving in both capacities.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the Town Solicitor for the Town of Little Compton, a municipal appointed position, who is also legal counsel to the Rhode Island Coastal Resources Management Council, an independent contractor position, is not prohibited by the Code of Ethics from simultaneously serving in both capacities.

The Petitioner is a practicing attorney and the principal of Anthony DeSisto Law Associates, LLC (“law firm”). He represents that, in April of this year, the law firm was appointed by the Little Compton Town Council (“Town Council”) to provide legal services as Town Solicitor for the Town of Little Compton (“Town” or “Little Compton”). The Petitioner states that, according to the Town Charter, the duties of Town Solicitor include providing legal advice to the Town and all of its boards, commissions, departments, and officers thereof. The Petitioner adds that the Town Charter also provides that the Town Solicitor need not devote full-time to the office.

The Petitioner states that, since 2016, the law firm has been retained as an independent contractor to provide services as legal counsel to the Rhode Island Coastal Resources Management Council (“CRMC”). The CRMC is a state agency created by the General Assembly in 1971, whose “primary responsibility is for the preservation, protection, development and where possible the restoration of the coastal areas of the state via the implementation of its integrated and comprehensive coastal management plans and the issuance of permits for work with the coastal zone of the state.”¹ The CRMC is comprised of a Council consisting of members of the public and state and local government appointed by the Governor, and a staff of professional engineers, biologists, environmental scientists, and marine resources specialists.² The Petitioner represents that the legal counsel’s duties are to represent the CRMC in litigation matters and provide legal

¹ See <http://www.crmc.ri.gov/aboutcrmc.html> (last visited on August 7, 2023).

² Id.

advice to CRMC Council members and staff. The CRMC's regulatory authority generally extends from the territorial sea limit (which is 3 miles offshore) to 200 feet inland from any coastal feature.³

The Petitioner states that, pursuant to CRMC regulation 650-RICR-20-05-8.1, the CRMC may implement special area management plans ("SAMPs") for renewable energy and other offshore development as authorized by the federal Coastal Zone Management Act of 1972. The Petitioner further states that the CRMC has implemented SAMPs and enacted rules for offshore waters beyond the three nautical mile state water boundary, and within a geographic location description, in order to provide a regulatory framework for offshore development of renewable energy sources. The Petitioner explains that the CRMC has reviewed an offshore wind farm development proposed by Revolution Wind and has determined that the project is consistent with the enforceable policies of the coastal resource management plan. The Petitioner states that the proposed wind farm development would be located in a SAMP area approximately 15 nautical miles south of the Little Compton shoreline, 13 nautical miles east of Block Island, and 16 nautical miles southeast of Point Judith.

The Petitioner explains that at its meeting on April 6, 2023, the Town Council approved a resolution entitled "A Resolution in Opposition to Offshore Wind Turbines Sited Off Little Compton" ("Resolution"). The Petitioner further explains that the Resolution, which does not mention the CRMC, was forwarded to the clerks of all cities and towns in Rhode Island and to Little Compton's elected members of the Rhode Island General Assembly, the Speaker of the House of Representatives, the President of the Senate, and the Governor of the State of Rhode Island. The Petitioner emphasizes that, although the Town and the CRMC may have concurrent jurisdiction over certain coastal areas, their respective types of jurisdiction differ. Specifically, he explains that the Town has zoning jurisdiction and reviews proposed projects in those areas for compliance with zoning standards, whereas the CRMC reviews proposed projects in the same areas for their ecological impact. Given this set of facts, the Petitioner seeks guidance regarding whether the Code of Ethics prohibits him from simultaneously providing legal services as Town Solicitor and as legal counsel to CRMC.

The Code of Ethics provides that no public official or employee shall have an interest or engage in any business, employment, transaction, or professional activity which is in substantial conflict with the proper discharge of his duties or employment in the public interest. R.I. Gen. Laws § 36-14-5(a). A substantial conflict of interest exists if a public official or employee has reason to believe or expect that he, any person within his family, his business associate or his employer will derive a direct monetary gain or suffer a direct monetary loss by reason of his official activity. Section 36-14-7(a). The Code of Ethics also prohibits a public official or employee from engaging in any employment that would impair his independence of judgment as to his public duties. Section 36-14-5(b). Further, a public official or employee is prohibited from disclosing, for pecuniary gain, confidential information acquired by him in the course of his official duties. Section 36-14-5(c). Finally, a public official or employee is prohibited from using his public position or confidential information received through his position to obtain financial gain for himself, his family member, his business associate, or any business by which he is employed or which he represents. Section 36-14-5(d).

³ See <http://www.crmc.ri.gov/aboutermc.html> (last visited on August 7, 2023).

As an initial matter, the Ethics Commission notes that as legal counsel to the CRMC the Petitioner is an independent contractor and, as such, is not subject to the Code of Ethics and, therefore, not constrained by its conflict of interest provisions in that capacity. See Gemma v. Rhode Island Ethics Commission, No. PC94-3404 (R.I. Super. Ct., Sept. 17, 1994) (holding that an attorney contractually retained by the State was not an employee, but an independent contractor and, accordingly, was not subject to the revolving door provisions set forth in section 36-14-5(o)); A.O. 2008-32 (opining that private attorneys performing legal work for public agencies as independent contractors are neither subject to the Code of Ethics nor constrained by its conflict of interest provisions); A.O. 2007-43 (opining that a petitioner who served as legal counsel to the North Providence School Committee was an independent contractor and, thus, not subject to the Code of Ethics); A.O. 2004-19 (opining that a petitioner who served as legal counsel to the Planning Board and Zoning Board of Review for the Town of West Warwick was not subject to the Code of Ethics in that capacity, as independent contractors of a state or municipal government are neither employees nor appointed officials subject to the provisions of the Code of Ethics).

However, in his capacity as Town Solicitor, a municipal appointed position under the Town Charter, the Petitioner is subject to the Code of Ethics and its provisions, including the ones cited above. The Ethics Commission has consistently opined that public officials and employees are not inherently prohibited from holding other employment in addition to their public employment or positions subject, however, to certain restrictions and provided that their private employment would neither impair their independence of judgment nor create an interest that is in substantial conflict with their public duties. See also A.O. 2006-58 (opining that the Deputy Chief Legal Counsel employed by the Rhode Island Department of Health could accept employment by the Federation of State Medical Boards and serve as the Northeast Region attorney for a physician license verification project, provided that he completed the work on his own time, without the use of public resources, and that he not appear before his own agency).

Here, the Petitioner is an attorney who has been retained to provide legal services to two separate clients, the Town and the CRMC. The Petitioner represents that in his capacity as Town Solicitor, he does not need to devote full-time to that position. Importantly, although the Town and the CRMC have concurrent jurisdiction over certain coastal areas, the subject matter of their respective jurisdictions differ. Accordingly, based on all the representations above, it is the opinion of the Ethics Commission that there is no evidence that the Petitioner's service as legal counsel to the CRMC would either impair his independence of judgment or create an interest that is in substantial conflict with his public duties as Town Solicitor. Accordingly, the Code of Ethics does not prohibit the Petitioner from providing legal services to the CRMC while simultaneously providing legal services to the Town as Town Solicitor, provided that all of his work on behalf of the CRMC is performed on his own time and without the use of public resources or confidential information obtained as part of his duties as Town Solicitor. The Petitioner is cautioned to remain vigilant about his obligations under the Code of Ethics and to seek further guidance from the Ethics Commission in the event that a particular matter arises that may impair his independence of judgment or create an interest that is in substantial conflict with his public duties as Town Solicitor.

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)

§ 36-14-5(b)

§ 36-14-5(c)

§ 36-14-5(d)

§ 36-14-7(a)

Related Advisory Opinions:

A.O. 2008-32

A.O. 2007-43

A.O. 2006-58

A.O. 2004-19

Other Related Authority:

Gemma v. Rhode Island Ethics Commission, No. PC94-3404 (R.I. Super. Ct., Sept. 17, 1994)

Keywords:

Conflict of Interest

Other Employment