

# RHODE ISLAND ETHICS COMMISSION

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## Advisory Opinion No. 2024-3

Approved: January 23, 2024

**Re: David A. Ursillo, Esq.**

### **QUESTION PRESENTED:**

The Petitioner, an Assistant Solicitor for the Town of Smithfield, a municipal appointed position, requests an advisory opinion regarding whether he may attend and speak at public hearings before the Smithfield Planning Board and, potentially, the Smithfield Zoning Board and the Smithfield Town Council, regarding the proposed development of property located in close proximity to his personal residence.

### **RESPONSE:**

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, an Assistant Solicitor for the Town of Smithfield, a municipal appointed position, may attend and speak at public hearings before the Smithfield Planning Board and, potentially, the Smithfield Zoning Board and the Smithfield Town Council, regarding the proposed development of property located in close proximity to his personal residence, based upon a finding that the unique facts as represented justify the application of the hardship exception as provided in R.I. Gen. Laws § 36-14-5(e)(1) and the public forum exception as provided in Commission Regulation 520-RICR-00-00-1.2.3 Public Forum Exceptions (36-14-7003) and consistent with the provisions herein.

The Petitioner is employed as an attorney with the Law Offices of Gregory J. Schadone, Ltd. (“Schadone Law Offices”). He states that Schadone Law Offices has served as the Assistant Solicitor for the Town of Smithfield (“Town” or “Smithfield”) since 2019, having been appointed to that position by the Smithfield Town Council (“Town Council”).<sup>1</sup> The Petitioner states that in his capacity as an Assistant Solicitor he provides legal advice to the Smithfield Planning Board (“Planning Board”) and Smithfield Zoning Board (“Zoning Board”). He further states that he occasionally advises the Town Council on matters in the event of the Town Solicitor’s unavailability.<sup>2</sup>

The Petitioner informs that a Master Plan Application (“Application”) has been submitted to the Planning Board relative to the proposed development of a Battery Energy Storage System

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<sup>1</sup> The Petitioner states that Schadone Law Offices also served as Smithfield’s Assistant Solicitor from 2015-2016.

<sup>2</sup> The Petitioner identifies Anthony M. Gallone, Esq. as Smithfield’s Town Solicitor. He explains that Mr. Gallone is of counsel to Schadone Law Offices, but operates as Town Solicitor independently from the firm.

(“BESS”) in Smithfield (“Development”).<sup>3</sup> He further informs that the Application is expected to go before the Planning Board for hearing in February or March of this year. The Petitioner explains that, if the Application is approved, the Development would be located in a residential zone behind his personal residence. He further explains that, due to the close proximity of his home to the proposed Development, he expects to receive notice as an abutter in advance of the Application hearing. The Petitioner identifies the proposed Development as a credible threat to the health, safety, and welfare of his family and others in Smithfield. He states by way of example that, in the event of a fire at the BESS, the burning of the lithium and other minerals in the batteries could not be completely extinguished and would produce harmful toxins.

The Petitioner represents that he has resided in his current home for almost 18 years and that the Development at the proposed location would directly financially impact the value of his property. He further represents that he intends to recuse from official participation in his role as Assistant Solicitor from all matters before the Planning Board and, potentially, the Zoning Board and the Town Council (collectively, “other agencies”) concerning the Application and the proposed Development (collectively, “proceedings”). The Petitioner states that he would like to attend and speak at public hearings before the Planning Board and the other agencies in his private capacity as a Smithfield citizen and abutter to the site of the proposed Development to convey his opposition to it. He adds that, if not prohibited by the Code of Ethics from doing so, he and another Smithfield resident intend to retain the services of an expert in the field of planning and real estate valuation to assist them in the presentation of evidence in opposition to the Development.

Cognizant of the Code of Ethics, the Petitioner acknowledges that his status as an abutter will require his continued recusal from participation in his official capacity as Assistant Solicitor to the Planning Board and the other agencies relative to the proposed Development, adding that he is prepared to continue to so recuse. The Petitioner seeks permission, however, to attend and speak at public hearings before the Planning Board and the other agencies regarding the proposed Development in the residential area to which he is an abutter.

Under the Code of Ethics, a public official may not participate in any matter in which he has an interest, financial or otherwise, that is in substantial conflict with the proper discharge of his duties or employment in the public interest. Section 36-14-5(a). A public official will have an interest that is in substantial conflict with his official duties if he has reason to believe or expect that a “direct monetary gain” or a “direct monetary loss” will accrue, by virtue of his activity, to the official himself, his family member, his business associate, his employer, or any business by which he is employed or which he represents. Section 36-14-7(a). Additionally, section 36-14-5(d) prohibits a public official from using his position or confidential information received through his position to obtain financial gain, other than that provided by law, for himself, his family member, his business associate or his employer.

In matters involving real property, the Ethics Commission has consistently applied a rebuttable presumption that a property owner will be financially impacted by official action concerning abutting property. See, e.g., 2012-4; A.O. 2007-18; A.O. 2006-37. Additionally, the Petitioner affirmatively represents that the Development at the proposed location would directly financially

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<sup>3</sup> The Petitioner states that a Pre-Application meeting took place before the Planning Board in October 2023, at which time the Petitioner, who was present in his role as Assistant Solicitor, recused from participation.

impact the value of his property. Therefore, the Petitioner must recuse from official participation as an Assistant Solicitor in all matters relating to the Development.

Hardship Exception – R.I. Gen. Laws § 36-14-5(e)(1)

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 “[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).

Here, the Petitioner affirmatively represents that the Development at the proposed location would directly financially impact the value of his property. Therefore, the Petitioner’s proposed conduct falls squarely within the Code of Ethics’ prohibition against representing himself, or authorizing another person to appear on his behalf, before the Planning Board and the Zoning Board, both municipal agencies by which he is employed. The Petitioner is likewise prohibited from appearing before the Town Council, given his representation that he occasionally advises the Town Council on matters in the event of the Town Solicitor’s unavailability. However, the Ethics Commission will consider whether the unique circumstances represented by the Petitioner herein justify a finding of hardship to permit him to appear and represent himself before the Planning Board and the other agencies, with certain restrictions.

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 Advisory Opinion 2000-45, the Ethics Commission granted a hardship exception to a former Jamestown solicitor who had sought to appear before the town and its boards and commissions prior to the expiration of one year following the completion of his law firm’s contract. The Ethics Commission applied the hardship exception to permit that petitioner to appear before the Jamestown Zoning Board, personally or through legal counsel, regarding a zoning application for property abutting his residence. The Ethics Commission took into consideration that the petitioner had not brought the application before that agency, had not advised it on the matter, and that the

application impacted the petitioner's residential property which he had owned for some 19 years. Also, in Advisory Opinion 2013-40, the Ethics Commission granted a hardship exception allowing an alternate member of the Pawtucket Zoning Board of Review to appear before that agency to oppose a use variance application for which he had received notice as an abutter, provided that he recused from that agency's discussion and vote regarding the variance.

In the present matter, the Petitioner's ownership interest in his personal residence predates his most recent appointment to the position of Assistant Solicitor by almost 13 years. The Application to the Planning Board, which could conceivably eventually be taken up by the other agencies, originated through no action by the Petitioner but, rather, by a third party or parties. The Petitioner's additional representations evidence that the proceedings may have a significant economic impact upon him. For these reasons, 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 appear and represent himself, either personally or through another, before the Planning Board and the other agencies based upon his standing as an abutter, in order to address his concerns relative to the proceedings. However, the Petitioner is required to recuse from participating in his role as Assistant Solicitor on all matters before all of those agencies relative to the proceedings. Notice of recusal must be filed consistent with the provisions of section 36-14-6.

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

The public forum exception provides that there shall be no violation of the Code of Ethics "by virtue of any person publicly expressing his [] own viewpoints in a public forum on any matter of general public interest or on any matter which directly affects said individual or his [] spouse or dependent child." Commission Regulation 520-RICR-00-00-1.2.3 Public Forum Exceptions (36-14-7003) ("Regulation 1.2.3"). Here, the Petitioner seeks guidance regarding whether he may, upon recusal, also address the Planning Board and the other agencies during periods of public comment relating to the Application and the proposed Development which could financially impact him as the owner of a nearby property.

In past advisory opinions, the Ethics Commission has advised public officials about their rights under the Public Forum Exception. See A.O. 2019-41 (opining that a member of the Middletown Town Council could attend and speak at public hearings before the Middletown Planning Board and/or, potentially, the Middletown Zoning Board regarding the proposed development of property located across the street from her personal residence, provided the petitioner did not receive access or priority not available to any other member of the public); 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 Scituate Zoning Board regarding a special use permit application where he was an abutter, provided that he did not receive special access or priority not available to any other member of the public).

The Ethics Commission has previously applied both the hardship and public forum exceptions in a number of advisory opinions. See, e.g., A.O. 2020-19 (permitting a member of the North Smithfield Zoning Board of Review to appear before that agency to object to an appeal filed by the owner of property that abutted the petitioner's personal residential property, based upon a

finding that the unique facts as represented justified the application of the hardship and public forum exceptions); A.O. 2018-58 (permitting a member of the Exeter Town Council, who was also a former member of the Exeter Planning Board, to appear before the Exeter Planning Board, the Exeter Zoning Board, and potentially the Exeter Town Council to oppose the development of property directly abutting his personal residential property, based on both the hardship and public forum exceptions).

Consistent with these prior opinions, and pursuant to the public forum exception found at Regulation 1.2.3, it is the opinion of the Ethics Commission that the Petitioner may also address the Planning Board and the other agencies during periods of public comment relating to the Application and Development, provided that the Petitioner does not receive access or priority not available to any other member of the public. The Petitioner is further cautioned that he may not use his position in any way to influence members of the Planning Board or the other agencies regarding the proceedings. See section 36-14-5(d). Finally, as he properly anticipated, the Petitioner must recuse from participating in any and all matters regarding the proceedings in his official capacity as an Assistant Solicitor. Notice of recusal must be filed 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(a)

§ 36-14-5(d)

§ 36-14-5(e)

§ 36-14-6

§ 36-14-7(a)

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. 2020-19

A.O. 2019-41

A.O. 2018-58

A.O. 2013-40

A.O. 2012-4

A.O. 2007-18

A.O. 2006-37

A.O. 2003-15

A.O. 2000-45

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