

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2024-18

Approved: June 4, 2024

Re: Edward A. Mello

QUESTION PRESENTED:

The Petitioner, the town administrator for the Town of Jamestown, a municipal appointed position, requests an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the town planner and the zoning/building official over whom he has appointing and supervisory authority, given that the Petitioner would like to add a garage to the home that he intends to eventually become his personal residence, and that certain aspects of that project fall within the purview of the town planner and the zoning/building official.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the town administrator for the Town of Jamestown, a municipal appointed position, qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the town planner and the zoning/building official over whom he has appointing and supervisory authority, given that the Petitioner would like to add a garage to the home that he intends to eventually become his personal residence, and that certain aspects of that project fall within the purview of the town planner and the zoning/building official.

The Petitioner is the town administrator for the Town of Jamestown, having served in that position since July 2023, upon his appointment by the town council. He represents that he and his spouse own a single-family home in Jamestown which they purchased in 2020 and which they currently offer as a rental unit year-round.¹ The Petitioner explains that, sometime during the next four years, they plan to move into this home and make it their primary residence. Thus, they would like to construct a single-car garage for the home in preparation for their anticipated move. The Petitioner represents that in order to construct the garage, he will need to obtain a building permit, which will require him to submit an application to the town planner and the zoning/building official. The Petitioner describes the process as administrative, as he will not have to request any variances or exceptions, or even appear before either the planning board or the zoning board. He explains that he would submit the building plans to the town planner who, in turn, would advise the zoning/building official regarding whether any variances would be required. The zoning/building official would then review the proposed plans, determine whether they comply with all the zoning requirements, and issue a building permit, as appropriate.²

¹ The Petitioner represents that he and his spouse currently live in a second home that they own in Jamestown.

The Petitioner represents that, as town administrator, he has supervisory authority over the town planner and the zoning/building official. The Petitioner further represents that pursuant to the town's charter, the hiring process for the town planner and the zoning/building official consists of nomination by the town administrator, with the approval of the town council. The Petitioner states that both the town planner and the zoning/building official are considered town employees and do not have a set term of employment. The Petitioner further states that he did not participate in the hiring process for either the current town planner or the zoning/building official as they were hired prior to the Petitioner's appointment. Given this set of facts, the Petitioner seeks guidance from the Ethics Commission regarding whether he qualifies for a hardship exception in order to represent himself before the town planner and the zoning/building official relative to his desire to construct the garage.

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 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 5(e)(1)(iii). 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 and 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).

The Petitioner's proposed conduct falls squarely within the Code of Ethics' prohibition against representing oneself before an agency for which he is the appointing authority. Therefore, the Ethics Commission will consider whether the unique circumstances represented by the Petitioner herein justify a finding of hardship to permit him to appear before the town planner and the zoning/building official, either personally or through an authorized representative.

² The Petitioner explains that although the duties of the zoning official and the building official are performed by the same person in Jamestown, the duties of these two positions are normally performed by two separate people. He further explains that appeals of decisions made by the town planner and the zoning official are normally reviewed by the zoning board and that appeals of decisions made by the building official are reviewed by the state building commission. The Petitioner states that he has no appointing authority over the zoning board or the state building commission.

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 the past, the Ethics Commission has applied the hardship exception in various circumstances allowing public officials to represent themselves before an agency over which they had appointing authority. For example, in Advisory Opinion 2022-10, the Ethics Commission opined that a member of the Scituate Town Council qualified for a hardship exception allowing him to appear before the town's building and zoning official over whom the town council had appointing authority, in connection with the construction of a new home in which the petitioner intended to reside with his family. In that advisory opinion, the Ethics Commission noted that, although the subject property was not acquired prior to the start of the petitioner's public service, the relief sought involved the petitioner's anticipated future personal residence and not a new commercial venture. See also A.O. 2024-8 (granting a hardship exception to a member of the Newport City Council allowing him to appear before the Newport Historic District Commission and the Newport Zoning Board of Review, both municipal agencies over which the city council had appointing authority, in order to request approval of repairs and renovations he had planned for a home that he was waiting to close on and in which he and his family intended to reside); A.O. 2023-29 (granting a hardship exception to a member of the Bristol Town Council and permitting him to represent himself, either personally or through a representative, before the Bristol Historic District Commission over which the town council had appointing authority, in order to seek review and approval of proposed renovations to his primary residence).

In contrast, the Ethics Commission has previously declined to grant a hardship exception for matters involving new commercial ventures. For example, in Advisory Opinion 2003-49, the assistant solicitor for the Town of Lincoln 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. A hardship exception was not granted because the petitioner's ownership of the lots did not predate his appointment as assistant solicitor and it was uncertain as to whether either lot would be used as the petitioner's primary residence or simply resold in commercial transactions after development. The Ethics Commission also declined to grant a hardship in Advisory Opinion 2000-41, where a member of the Exeter Zoning Board sought to generate additional income by entering into a contract to locate a cellular communications tower on his residential property. Although the subject property involved the petitioner's principal residence, the proposed commercial venture served only to generate additional income for the petitioner.

In the instant matter, the Petitioner would like to construct a single-car garage for a home that, although currently used as a rental property, he and his spouse intend to reside in sometime in the next four years. He describes the process for obtaining a building permit for the construction of the garage as administrative and not requiring a variance or a special use permit. Further, the

subject property was acquired prior to the start of the Petitioner's public service, and the relief sought involves the Petitioner's anticipated future personal residence and not a new commercial venture. In consideration of the Petitioner's representations, the applicable provisions of the Code of Ethics, and prior advisory opinions issued, 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 town planner and the zoning/building official relative to the proposed construction of a garage on the rental property that he anticipates becoming his personal residence within the next four years. However, in order to avoid even the appearance of impropriety, the Petitioner must recuse from discussions and decision-making relative to the town planner's and the zoning/building official's job performance, retention, or reappointment until after the completion of the construction of the proposed garage and all inspections and/or awarding of certificates related thereto, including any appeals. Notices of recusal must be filed consistent with the provisions of R.I. Gen. Laws § 36-14-6. Additionally, the Petitioner shall, prior to his appearance before or application to the aforementioned officials relative to the construction of the garage, inform them of his receipt of the instant advisory opinion and that, consistent herewith, he will recuse from any discussions and decision-making regarding their job performance, retention, or reappointment 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. 2024-8

A.O. 2023-29

A.O. 2022-10

A.O. 2019-64

A.O. 2003-49

A.O. 2000-41

Keywords:

Hardship Exception