

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2024-21

Approved: June 25, 2024

Re: Philip L. Hervey, AICP

QUESTION PRESENTED:

The Petitioner, the Barrington Town Manager, a municipal appointed position, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from participating in the oversight, discussions, and decision-making relative to a redevelopment project in town under circumstances where the only developer to bid on the project initially intended to engage a real estate firm for the marketing and sale of certain real estate units that will be developed under the project and the Petitioner's spouse is employed by that real estate firm as its office manager.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the Barrington Town Manager, a municipal appointed position, is not prohibited by the Code of Ethics from participating in the oversight, discussions, and decision-making relative to a redevelopment project in town under circumstances where the only developer to bid on the project initially intended to engage a real estate firm for the marketing and sale of certain real estate units that will be developed under the project and notwithstanding that the Petitioner's spouse is employed by that real estate firm as its office manager.

The Petitioner is the Barrington Town Manager, having served in that position since January 1, 2022. The Petitioner represents that in 2021 the town purchased land located at 25 Watson Avenue in Barrington (property) which is the site of the former Carmelite Monastery and since has been planning the redevelopment of the property. He states that the town council ultimately approved a redevelopment plan for the property that includes the development of six single-family home sites, a public park, and a pocket neighborhood of 12 cottage-style single-family homes (collectively, "the project"). The Petitioner adds that in January 2024, the town council issued a Request for Proposals for the development of the pocket neighborhood aspect of the project. The Petitioner represents that a single developer, FJS Associates, Ltd. (FJS), submitted a proposal, which the Petitioner reviewed upon receipt. The Petitioner notes that the proposal indicated that FJS would engage the real estate firm of REMAX River's Edge (REMAX) for the marketing and sale of the real estate units to be located in the pocket neighborhood. He states that because his spouse is employed by REMAX as an office manager, and upon consultation with the town solicitor, he has since recused from further participation in the project and delegated his authority relative to the project to the town's Director of Planning, Building, and Resilience. The Petitioner notes that, as required, the project was subsequently approved by the voters at a Financial Town Meeting in May of 2024.

The Petitioner states that the project will require significant resources and supervision from town officials, including himself. He further states that, in March of 2024, FJS removed REMAX from its proposal. Furthermore, the Petitioner represents that, as an office manager with REMAX, his spouse receives a fixed salary, and neither her salary nor any bonus that she might receive from her employment is based on specific sales. He further represents that his spouse would not have received any additional compensation based on the project or even worked on the project, and she would not have appeared before the town or the Petitioner to represent FJS relative to the project. Lastly, the Petitioner states that the town will have no role in selecting or approving the real estate agent or firm that FJS eventually selects to market and sell the real estate units in the pocket neighborhood. Given this set of facts, the Petitioner seeks guidance from the Ethics Commission regarding whether he may now resume his public duties relative to the performance respectively of the town and FJS under the terms of the development agreement between them.

Under the Code of Ethics, a public official may not participate in any matter in which he has an interest, financial or otherwise, which is in substantial conflict with the proper discharge of his duties in the public interest. R.I. Gen. Laws § 36-14-5(a). A substantial conflict of interest occurs if a public official has reason to believe or expect that he, any member of his family, his business associate, or any business by which he is employed or which he represents, will derive a direct monetary gain or suffer a direct monetary loss by reason of his official activity. R.I. Gen. Laws § 36-14-7(a). A “person within his [] family” includes the official’s spouse. R.I. Gen. Laws § 36-14-2(1); Commission Regulation 520-RICR-00-00-1.3.1(A)(2) Prohibited Activities – Nepotism (36-14-5004) (Regulation 1.3.1). A “business associate” is defined as a person joined together with another person to “achieve a common financial objective.” § 36-14-2(3). A “person” is defined as an individual or a business entity. § 36-14-2(7).

A public official is further prohibited from using his public office or confidential information received through his position to obtain financial gain, other than that provided for by law, for himself, his business associate, or any person within his family. § 36-14-5(d). Additionally, Commission Regulation 520-RICR-00-00-1.2.1(A)(1) Additional Circumstances Warranting Recusal (36-14-5002) requires a public official to recuse himself from participation when any person within his family appears or presents evidence or arguments before his state or municipal agency. Furthermore, Regulation 1.3.1(B)(1) prohibits a public official from participating in any matter as part of his public duties if he has reason to believe or expect that any person within his family is a party to or participant in the same matter, or will derive a direct monetary gain or suffer a direct monetary loss, or obtain an employment advantage.

In the instant matter, REMAX has been removed from FJS’s proposal. Further, any official action taken by the Petitioner relative to the project at this stage of the project would have a direct financial impact on FJS rather than on REMAX. Additionally, the Ethics Commission has previously opined that a public official is not required to recuse from matters that may cause a financial impact on his family member’s employer or business associate, as long as there is no corresponding financial impact upon the family member. In Advisory Opinion 2018-53, for example, the Ethics Commission opined that a member of the Jamestown Zoning Board of Review could participate in discussions and voting on zoning board matters in which an applicant or objector was represented by an attorney from the law firm at which the petitioner’s spouse was

employed as a legal assistant, because none of the compensation received by the petitioner's spouse in the course of her employment was dependent upon a particular outcome in any case, and the petitioner's spouse did not work on zoning matters. See also A.O. 2015-45 (opining that the deputy chief of legal services for the Public Utilities Commission was not prohibited by the Code of Ethics from working on a matter involving a utility company that was represented by her spouse's law firm, based on the petitioner's representations that her spouse would not perform any work on the matter nor appear before the Public Utilities Commission); A.O. 2008-69 (opining that a member of the Woonsocket Zoning Board of Review was permitted to participate in discussion and voting on a petition for a variance brought by CVS, notwithstanding that the petitioner's sister was employed as an accounting analyst with CVS, since his sister would not be financially impacted by the zoning board's decision regarding the petition).

Here, the Petitioner's spouse is a salaried employee, and neither her salary nor a bonus she might receive is dependent upon whether REMAX is part of the project or the marketing and sale of the real estate units within the proposed pocket neighborhood. As an office manager, the Petitioner's spouse would not have performed any work on the project, nor would she have represented FJS before the town or the Petitioner relative to the project. Thus, even if REMAX had remained part of the project, or is later again selected by FJS to be part of it, the Petitioner would not be prohibited by the Code of Ethics from performing his public duties relative to the project. This would include any discussions and decision-making relative to the project and the supervision of the performance of the town and/or JFS under their development agreement. Accordingly, based on 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 Code of Ethics does not prohibit the Petitioner from participating in the project. However, if circumstances should change such that it becomes reasonably foreseeable that his participation in such matters could result in financial impact upon his spouse, the Petitioner is encouraged to seek further guidance from this Commission and/or recuse from participation in accordance with R.I. Gen. Laws § 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(1)

§ 36-14-2(3)

§ 36-14-2(7)

§ 36-14-5(a)

§ 36-14-5(d)

§ 36-14-6

§ 36-14-7(a)

520-RICR-00-00-1.3.1 Prohibited Activities – Nepotism (36-14-5004)

520-RICR-00-00-1.2.1 Additional Circumstances Warranting Recusal (36-14-5002)

Related Advisory Opinions:

A.O. 2018-53

A.O. 2015-45

A.O. 2008-69

Keywords:

Family

Financial Interest

Nepotism