



STATE OF RHODE ISLAND

RHODE ISLAND ETHICS COMMISSION

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NOTICE OF OPEN MEETING

AGENDA

11th Meeting

DATE: Tuesday, June 29, 2021

TIME: 9:00 a.m.

TO ATTEND: **ANTICIPATED REMOTE MEETING:** It is anticipated that this meeting will be conducted remotely in Zoom webinar format. Authority to conduct remote meetings is pursuant to Governor Daniel J. McKee's Executive Order No. 21-59, which extended Executive Order No. 20-46 (EO20-46) until June 25, 2021. This remote meeting on June 29, 2021 will only occur if Governor McKee further extends EO20-46, which is expected but has not yet occurred as of the publishing of this agenda.

POTENTIAL FOR IN-PERSON MEETING: If EO20-46 is not extended, and if no other legal authorization occurs prior to the meeting date, the Ethics Commission will conduct an in-person meeting with no remote component on June 29, 2021, at 9:00 a.m., at the Rhode Island Ethics Commission, Hearing Room – 8th Floor, 40 Fountain Street, Providence, RI. Please contact the Ethics Commission at (401) 222-3790 or at ethics.email@ethics.ri.gov for updated information as to meeting format and location.

REMOTE MEETING ACCESS: Any member of the public who wishes to attend and view this video meeting may do so by:

- Clicking this link to join the webinar:
<https://us02web.zoom.us/j/856733127212>
and using Webinar ID: 856 7331 2721
- Or using iPhone one-tap US:
 - +13017158592,, 85673312721# or
 - +13126266799,,85673312721#

- Or by Telephone, Dial (for higher quality, dial a number based on your current location) US:
 - +1 301 715 8592 or
 - +1 312 626 6799 or
 - +1 646 558 8656 or
 - +1 253 215 8782 or
 - +1 346 248 7799 or
 - +1 669 900 9128 or
 - 833 548 0276 (Toll Free) or
 - 833 548 0282 (Toll Free) or
 - 877 853 5247 (Toll Free) or
 - 888 788 0099 (Toll Free)
- International numbers available:
<https://us02web.zoom.us/j/kdBC7dscZO>
Webinar ID: 856 7331 2721

1. Call to Order.
2. Discussion of Remote Meeting Format; Identifying and Troubleshooting any Remote Meeting Issues.
3. Motion to approve minutes of Open Session held on June 8, 2021.
4. Director's Report: Status report and updates regarding:
 - a.) Discussion of impact of COVID-19 crisis on Ethics Commission operations and staffing;
 - b.) Complaints and investigations pending;
 - c.) Advisory opinions pending;
 - d.) Access to Public Records Act requests since last meeting;
 - e.) Financial Disclosure: Update on 2020 filing period.
5. Advisory Opinions (petitioners may participate remotely):
 - a.) James B. King Jr., a member of the Jamestown Zoning Board of Review, requests an advisory opinion regarding whether he qualifies for a hardship exception the Code of Ethics' prohibition on appearing before the municipal agency of which he is a member to seek a setback variance in order to construct a garage on his personal residence.
 - b.) Matthew McGeorge, AIA, LEED AP, the chairperson of the East Greenwich Historic District Commission, who in his private capacity is an architect, requests an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition on representing another person before the municipal agency of which the Petitioner is a member.

- c.) David J. DeCost, Jr., a principal civil engineer for the Rhode Island Department of Environmental Management's Division of Planning and Development, who in his private capacity owns and operates an apple cider orchard, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from applying for a Local Agriculture and Seafood Act Grant advertised by the Rhode Island Department of Environmental Management's Division of Agriculture and, if so, whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the state agency by which he is currently employed for purposes of seeking the grant.
- 6. New Business proposed for future Commission agendas and general comments from the Commission.
- 7. Motion to go into Executive Session, to wit:
 - a.) Motion to approve minutes of Executive Session held on June 8, 2021, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).
 - b.) In re: Suzanna Alba, Complaint No. 2020-5, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).
 - c.) In re: Brett Smiley, Complaint No. 2021-1, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).
 - d.) Motion to return to Open Session.

NOTE ON REPORTING OUT OF ACTIONS TAKEN IN EXECUTIVE

SESSION: *After the Commission votes to go into Executive Session, the Open Session Zoom meeting will temporarily close and viewers will not be able to join the Executive Session which is being held in a separate Zoom meeting. At the conclusion of the Executive Session, which has no set duration, the Commission will reconvene in the Open Session meeting solely for the purpose of reporting out any actions taken in Executive Session and sealing the executive session minutes. You may rejoin the Open Session by following the same instructions on Page 1 of this agenda that you followed to join the original Open Session meeting. If you attempt to rejoin the Open Session Zoom meeting while the Executive Session portion is occurring, you will see a message that the meeting host is in another meeting. Eventually, once the Executive Session meeting concludes, the host will reconvene the Open Session meeting and you will be able to view the Commission Chair report out any actions taken in Executive Session. Alternatively, it may be more convenient for you to view a written report of any actions taken in Executive Session by visiting our website (<https://ethics.ri.gov/>) later in the day.*

- 8. Motion to seal minutes of Executive Session held on June 29, 2021.

9. Report on actions taken in Executive Session.
10. Motion to adjourn.

ANYONE WISHING TO ATTEND THIS MEETING WHO MAY HAVE SPECIAL NEEDS FOR ACCESS OR SERVICES SUCH AS A SIGN LANGUAGE INTERPRETER, PLEASE CONTACT THE COMMISSION BY TELEPHONE AT 222-3790, 48 HOURS IN ADVANCE OF THE SCHEDULED MEETING. THE COMMISSION ALSO MAY BE CONTACTED THROUGH RHODE ISLAND RELAY, A TELECOMMUNICATIONS RELAY SERVICE, AT 1-800-RI5-5555.

Posted on June 24, 2021

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: June 29, 2021

Re: James B. King Jr.

QUESTION PRESENTED:

The Petitioner, a member of the Jamestown Zoning Board of Review, a municipal appointed position, requests an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition on representing oneself before the municipal agency of which he is a member, in order to seek a setback variance that is required to construct a garage on his personal residence.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a member of the Jamestown Zoning Board of Review, a municipal appointed position, qualifies for a hardship exception to the Code of Ethics' prohibition on representing oneself before the municipal agency of which he is a member, in order to seek a setback variance that is required to construct a garage on his personal residence.

The Petitioner is a member of the Jamestown Zoning Board of Review ("Zoning Board"), having served in that capacity since his appointment by the Jamestown Town Council in 2018. The Petitioner states that he resides in a home that he purchased in 2017. He further states that his home does not currently have a garage and that he would like to construct one. The Petitioner represents that in order to construct the garage, he will need to receive a setback variance from the Zoning Board. The Petitioner states that he has retained an attorney to represent him before the Zoning Board relative to his request for a setback variance and that the Petitioner will recuse from participation in Zoning Board discussions or decision-making on the matter. Given this set of facts, the Petitioner requests a hardship exception to allow him to represent himself before the Zoning Board, either personally or through legal counsel, in order to seek the variance needed 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"). While many conflicts can be avoided under the Code of Ethics by recusing from participating and voting in certain matters, such recusal is insufficient to avoid section 5(e)'s prohibitions. 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 receipt of a hardship exception, the public official must also advise the state or municipal agency in writing of the existence and the nature of his interest in the matter at issue; recuse himself from voting on or otherwise participating in the agency's consideration and disposition of the matter at issue; and follow any other recommendations the Ethics Commission may make to avoid any appearance of impropriety in the matter. Section 36-14-5(e)(1). See, e.g., A.O. 2014-26 (granting a hardship exception to a member of the Barrington Zoning Board of Review ("BZB") and permitting him to appear before the BZB to request a dimensional variance for his personal residence, but requiring that he recuse himself from participating and voting in the BZB's consideration of his request for relief).

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

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. The Ethics Commission may also consider other factors and no single factor is determinative. See, e.g., A.O. 2020-15 (granting a hardship exception to an Exeter Zoning Board of Review member, allowing him to represent himself before his own board in order to seek a dimensional variance to construct a shed at his personal residence that he acquired prior to his appointment to the Zoning Board, but requiring him to recuse from participation and voting during the Zoning Board's consideration of his request for relief); A.O. 2011-34 (granting a hardship exception to an East Greenwich Zoning Board member, allowing her to represent herself before her own board in order to seek a dimensional variance from the side-yard setback requirement to build a storage shed at her personal residence that she acquired prior to her appointment to the Board, but requiring her to recuse from participation and voting during the Zoning Board's consideration of her request for relief).

In the present matter, the Petitioner seeks to obtain a setback variance in order to construct a garage at his personal residence. The Petitioner's purchase of his home predates his appointment to the Zoning Board and the relief sought involves a personal, as opposed to commercial, venture. Considering the Petitioner's above representations, the relevant provisions of the Code of Ethics, and prior advisory opinions issued, it is the opinion of the Ethics Commission that the totality of the circumstances justifies making an exception to section 5(e)'s prohibitions in order to allow the Petitioner or his authorized representative to appear before the Zoning Board in order to seek a setback variance which would allow the Petitioner to construct a garage at his personal residence.

However, section 5(e)(1)(i-iii) authorizes the Ethics Commission to condition such exception upon the Petitioner's agreement to follow certain steps aimed at reducing any appearance of impropriety. Pursuant thereto, the Petitioner must inform the other Zoning Board members of his

receipt of the instant advisory opinion and that, consistent therewith, he will recuse from participation and voting during the Zoning Board's consideration of his request for relief. Notice of recusal shall be filed with the Ethics Commission consistent with section 36-14-6.

This Draft 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(A)(1) Representing Oneself or Others, Defined (36-14-5016)

Related Advisory Opinions:

A.O. 2014-26

A.O. 2020-15

A.O. 2011-34

Keywords:

Hardship Exception

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: June 29, 2021

Re: Matthew McGeorge, AIA, LEED AP

QUESTION PRESENTED:

The Petitioner, the chairperson of the East Greenwich Historic District Commission, a municipal appointed position, who in his private capacity is an architect, requests an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition on representing another person before the municipal agency of which the Petitioner is a member.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the chairperson of the East Greenwich Historic District Commission, a municipal appointed position, who in his private capacity is an architect, qualifies for a hardship exception to the Code of Ethics' prohibition on representing another person before the municipal agency of which the Petitioner is a member.

The Petitioner is the chairperson of the East Greenwich Historic District Commission ("HDC"), having served continuously since his appointment in 2011 by the East Greenwich Town Council. He represents that this is an unpaid, volunteer position. The Petitioner states that in his private capacity he has been a registered architect in Rhode Island since 2007 and is presently also registered in Massachusetts, Connecticut, Pennsylvania, Maine, and New Hampshire. He represents that he earned a Bachelor of Environmental Design Degree from the University of Tasmania, Tasmania, Australia, and a Master of Architecture from the Illinois Institute of Technology. The Petitioner states that he specializes in historic preservation, adaptive reuse, and the design of new structures with historic character allusions and, in the past five years, his firm and he have completed more than fifteen historic adaptive reuse projects, including a 25-million-dollar adaptive reuse of the Elizabeth Mill in Warwick, and several historic renovation projects, including the Edward Bannister House for Brown University, the Caleb Greene House in Warwick for AAA New England, and the Saw Tooth Mill in Warwick. He further states that over thirty percent (30%) of his work involves historic structures.

The Petitioner represents that he has been advising a client regarding a renovation to the attic and a portion of the second floor of the client's 19th century home located in the Historic District of the Town of East Greenwich. The Petitioner explains that the renovation of the attic would include replacement of the existing windows and a possible installation of skylights. He states that, because the home is located within the Historic District, it is subject to the jurisdiction of the HDC. Thus, the client must receive a Certificate of Appropriateness from the HDC prior to any alterations to the exterior of the home which will include the replacement of the attic windows and the possible

installation of the skylights. The Petitioner represents that, thus far, he has consulted the client on the local design and permitting procedures, including the HDC conceptual and final approval process, and expects to later prepare the design plans and present the project before the HDC at the hearing for the Certificate of Appropriateness. The Petitioner adds that he has informed the client of his service as the chairperson of the HDC and the requirement that he receive permission from the Ethics Commission to represent the client before the HDC. The Petitioner hopes to have a conceptual design ready to submit to the HDC in July for an August hearing. He states that he will recuse from HDC discussions and voting relative to these renovations. At this time, the Petitioner requests a hardship exception to represent his client before the HDC, pursuant to General Commission Advisory ("GCA") 2010-1.

R.I. Gen. Laws § 36-14-5(e)(1)-(3) ("Section 5(e)") of the Code of Ethics prohibits public officials and employees from representing themselves, representing another person, or acting as an expert witness before a state or municipal agency of which they are a member or by which they are employed. See also Commission Regulation 520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016) ("Regulation 1.1.4"). Section 5(e)'s prohibitions continue while an official remains in office and for a period of one (1) year thereafter. Section 5(e)(4). In contrast to most other Code of Ethics provisions, declining to participate in related discussions and votes is insufficient to avoid section 5(e) conflicts, absent an express finding by the Ethics Commission in the form of an advisory opinion that a hardship exists. Upon receipt of a hardship exception, a public official must also advise the state or municipal agency in writing of the existence and the nature of his interest in the matter at issue; recuse himself from voting on or otherwise participating in the agency's consideration and disposition of the matter; and follow any other recommendations the Ethics Commission may make to avoid any appearance of impropriety in the matter. Section 5(e)(1). See, e.g., A.O. 2014-26 (granting a hardship exception to a member of the Barrington Zoning Board of Review ("BZB") and permitting him to appear before the BZB to request a dimensional variance for his personal residence, but requiring him to recuse himself from participating and voting in the BZB's consideration of his request for relief).

The Petitioner's proposed conduct falls within section 5(e)'s prohibition on representing his client before a board of which the Petitioner is a member. However, the Ethics Commission has carved out a specific hardship exception outlined in GCA 2010-1 for "Historic Architects Who Are Members of Historic District Commissions."¹ This exception is based upon the Ethics Commission's finding that "municipal historic district commissions within the state of Rhode Island are best served if they are able to have a sitting member who specializes in historic architecture and preservation." GCA 2010-1. The Ethics Commission has concluded that, given the limited number of historic architects in the state, recruiting qualified persons to serve on historic district commissions would be difficult and would reduce the ability of historic district commissions to effectively function if those architects were thereafter prohibited from representing private clients before the commissions on which they serve.

¹ On November 30, 1989, the Ethics Commission issued GCA No. 8, "Architect Members of State and Local Historic Preservation Commissions Appearing Before Their Respective Agencies," allowing architects who specialize in historic preservation and who serve on historic district commissions to represent clients before their respective commissions without violating the Code of Ethics. In 2010, after considering public comment, and in response to overwhelming support for continuing the use of the exception, the Ethics Commission replaced GCA No. 8 with GCA 2010-1 entitled "Historic Architects Who Are Members of Historic District Commissions."

However, pursuant to GCA 2010-1, members of historic district commissions may not presume that the exception is applicable to their specific set of circumstances, and are required to seek an advisory opinion each time they consider accepting a client whose project would require them to appear before their own board. Additionally, GCA 2010-1's narrow exception only applies to historic architects and does not apply to other architectural specialties. See A.O. 99-120 (declining to grant a hardship exception to a member of the New Shoreham Historic District Commission, who was a landscape architect and the owner of a landscape architecture business on the island, because his qualifications did not fall within the guidelines of a historic architect).

For GCA 2010-1 to apply to his particular situation, the Petitioner must make representations to establish that he is a qualified historic architect. For example, the Ethics Commission granted six GCA 2010-1 hardship exceptions to an architect on Block Island, one for each client, after concluding that it was satisfied that his representations regarding his extensive education and work experience in historic preservation established that he was a qualified historic architect. See A.O. 2017-38; A.O. 2015-44; A.O. 2014-15; A.O. 2013-42; A.O. 2013-29; and A.O. 2010-7.

In the present matter, the Petitioner is an architect who specializes in historic preservation, and represents that his work experience and education exceed the United States Secretary of the Interior's minimum professional qualifications for a historic architect.² It is significant to note that the Ethics Commission has previously issued four similar advisory opinions to this Petitioner in which hardship exceptions were granted based upon the Petitioner's status as a historic architect. See A.O. 2021-39; A.O. 2021-35; A.O. 2019-43; A.O. 2017-27.

Accordingly, it is the opinion of the Ethics Commission that the Petitioner qualifies for a hardship exception to the Code of Ethics' prohibition on representing his client before the municipal agency of which the Petitioner is a member, in accordance with GCA 2010-1, provided that he recuses from participating in all HDC matters involving his client. Pursuant to section 5(e)(1), and concurrent with his recusal, the Petitioner must inform the HDC and its members of his receipt of the instant advisory opinion and of his recusal in accord therewith. Notice of recusal shall be filed with the Ethics Commission consistent with section 36-14-6.

² In order to ascertain whether someone is a historic architect, GCA 2010-1 incorporated the minimum professional qualifications for historic architecture set forth by the U.S. Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. The minimum professional qualifications are:

A professional degree in architecture or a State license to practice architecture, plus one of the following:

1. At least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field; or
2. At least one year of full-time professional experience on historic preservation projects.

Such graduate study or experience shall include detailed investigations of historic structures, preparation of historic structures research reports, and preparation of plans and specifications for preservation projects.

This Draft 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:

G.C.A. 2010-1

A.O. 2021-39

A.O. 2021-35

A.O. 2019-43

A.O. 2017-38

A.O. 2017-27

A.O. 2015-44

A.O. 2014-26

A.O. 2014-15

A.O. 2013-42

A.O. 2013-29

A.O. 2010-7

A.O. 99-120

Keywords:

Hardship Exception

Historic Architect

MEMORANDUM

To: Rhode Island Ethics Commission
From: Staff Attorney Lynne Radiches
Date: June 23, 2021
Re: Advisory Opinion for David J. DeCost, Jr.

I have prepared two Draft Advisory Opinions for Petitioner David J. DeCost, Jr., for your consideration. This is a very close case involving the application of the hardship exception. In order to facilitate your review of both drafts, please note that, with the exception of the Response, Versions 1 and 2 are identical from the Question Presented through and including the first two paragraphs under the heading on page 5 which reads "The Hardship Exception." Both Versions 1 and 2 contain identical facts, Code of Ethics' provisions, and cites to the same Advisory Opinions. Only the analyses and conclusions differ. Thank you.

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: June 29, 2021

Re: David J. DeCost, Jr. (Version 1 of 2)

QUESTION PRESENTED:

The Petitioner, a principal civil engineer for the Rhode Island Department of Environmental Management's Division of Planning and Development, a state employee position, who in his private capacity owns and operates an apple cider orchard, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from applying for a Local Agriculture and Seafood Act Grant advertised by the Rhode Island Department of Environmental Management's Division of Agriculture and, if so, whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the state agency by which he is currently employed for purposes of seeking the grant.

RESPONSE:

It is the opinion of the Ethics Commission that the Petitioner, a principal civil engineer for the Rhode Island Department of Environmental Management's Division of Planning and Development, a state employee position, who in his private capacity owns and operates an apple cider orchard, is prohibited by the Code of Ethics from applying for a Local Agriculture and Seafood Act Grant advertised by the Rhode Island Department of Environmental Management's Division of Agriculture and does not qualify for a hardship exception to the Code of Ethics' prohibition against representing himself before the state agency by which he is currently employed for purposes of seeking the grant.

The Petitioner is currently employed as a principal civil engineer in the Division of Planning and Development ("Division of P&D") at the Rhode Island Department of Environmental Management ("DEM") and has been so employed for the last five years. He cites among the accomplishments of the Division of P&D the design and construction of award winning State Park & Management Area Facilities including boat ramps, beach pavilions, bike paths, and more. The Petitioner explains that, in his capacity as a principal civil engineer, he assists with the completion of capital improvement projects which may include infrastructure upgrades, renovations to older buildings, new construction, and site improvements and that his duties also include the permitting and design processes and management of construction efforts.

The Petitioner states that, in his private capacity, he has owned and operated an apple cider orchard located in Glocester, Rhode Island, not far from his home, for the past eighteen months. He further states that he would like to apply for a Local Agriculture and Seafood Act Grant ("LASA Grant")

to fund the purchase of some apple processing equipment. He explains that, although the LASA Grant is advertised and administered by the DEM's Division of Agriculture, he actually learned about the LASA Grant from another local farmer. The Petitioner informs that the Division of P&D and the Division of Agriculture are two separate offices within the DEM and that neither he nor the Division of P&D had any involvement in the creation of the LASA Grant application or its advertisement and, likewise, will have no involvement in the scoring of the applications or awarding of any LASA Grants. The Petitioner referred Ethics Commission Staff to the DEM website on which the LASA Grant is advertised ("the website")¹ and to DEM employee Ananda Fraser ("Ms. Fraser"), Chief of Program Development within the Division of Agriculture, to obtain more information about the LASA Grants Program.

According to the website, the LASA Grants Program was established by the Local Agriculture and Seafood Act (LASA) of 2012, and its goal is "to support the growth, development, and marketing of local food and seafood in Rhode Island." Ms. Fraser states that the DEM's Division of Agriculture will award between \$160,000 and \$240,000 in the current grant round and that the maximum grant award available to any farmer, individual, business, or non-profit organization is \$20,000. Ms. Fraser further states that all applicants must be based in Rhode Island and that, while the application does not inquire of an applicant's employment status, that information could be disclosed by an applicant in an answer to a particular question or within an answer to an essay question contained in the application. This year's application deadline was extended from May 30th to June 13th, and the awards are expected to be announced in June of 2021.²

Ms. Fraser represents that the LASA Grant applications will be evaluated by the LASA Grants Program Advisory Committee ("Advisory Committee"), after which the Advisory Committee will forward its recommendations for grant recipients to the DEM Director ("Director") for approval. She explains that the Advisory Committee is composed of nine members and is chaired by the Chief of the DEM's Division of Agriculture ("Chair"), who is the only non-voting member of the Advisory Committee. Ms. Fraser states that the other eight members, all of whom were appointed by the Director, and none of whom are employed by the DEM, represent agencies, organizations, and individuals that have a role or interest in the planning, development, and support of viable agriculture and seafood sectors and a locally-based sustainable food system. Because the Chair is a non-voting member of the Advisory Committee, he will not participate in the selection of applicants to recommend as LASA Grant recipients. Ms. Fraser represents that requiring the Chair to refrain from participation in the recommending of grant recipients is intended to keep the DEM impartial, given the Chair's familiarity with certain applicants and/or their projects because of the

¹ <http://www.dem.ri.gov/programs/agriculture/grants-lasa.php> (last accessed June 18, 2021).

² The Petitioner's request for this advisory opinion was received by the Ethics Commission on May 26, 2021. Because it was not feasible to provide the Petitioner with an advisory opinion prior to June 13, 2021, the Petitioner was advised by Ethics Commission Staff that he would not be prohibited from applying for the LASA Grant on the condition that, if the Ethics Commission ultimately issues an advisory opinion deeming him ineligible to apply for and receive a LASA Grant, he will either withdraw his application or, if he has been awarded a LASA Grant before the Ethics Commission considers his request, will condition his acceptance of the LASA Grant on the issuance of a formal advisory opinion from the Ethics Commission that applying for and accepting the LASA Grant does not violate the Code of Ethics. The Petitioner agreed to these conditions.

Division of Agriculture's regulatory role with aspects of agriculture by which certain applicants and grant recipients are bound. She further represents that the appointment of eight voting members of the Advisory Committee who are not DEM employees is also intentional, the goal being to seat the Advisory Committee with a wide swath of agricultural stakeholders.

Prior to this year, the DEM had contracted with the Rhode Island Food Policy Council, a local non-profit organization, to organize and administer the LASA Grants Program on behalf of the DEM. This year, the DEM has assumed responsibility for the administration of the LASA Grants Program. Ms. Fraser explains that the change will allow the DEM to increase the pool of grant funds to be made available to applicants by approximately \$20,000 (the fee previously paid to the Food Policy Council) and allow the DEM to monitor the use of the funds awarded to grant recipients more closely. Ms. Fraser states that the percentage of grant applicants who are awarded grants fluctuates annually depending upon the number and quality of applications received.³ Ms. Fraser reports that, while the Director makes the final decision on who will receive a LASA Grant, the Director has always gone with the recommendations of the Advisory Committee. She explains that the Director might ask questions of the Advisory Committee or seek additional information about a particular applicant, but that the Director trusts the process and adopts the recommendations of the Advisory Committee.

Ms. Fraser states that, beginning this year, LASA Grant recipients will be paid 50% of their total award amount upon receipt by the DEM of the executed grant agreement and related documents and receive the second 50% of their total award amount after completion of their project when a final report, claim, and invoice have been submitted and approved by the DEM's Division of Agriculture. Each grant recipient must authorize the DEM to monitor his or her project, which may be up to 24 months in length. Discretion will be exercised by the DEM employee monitoring the work of each grant recipient when determining whether the grant is being used in conformance with the methods stated in the grant application, be it through on-site visits or the review of interim and final reports submitted by the grantees. Ms. Fraser represents that, while there are other grant opportunities available to area farmers, none match the amounts awarded and flexibility of use offered by the LASA Grants. It is in the context of these representations that the Petitioner seeks guidance from the Ethics Commission regarding whether he is prohibited by the Code of Ethics from applying for a LASA Grant and, if so, whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the DEM for purposes of seeking the grant.

The Code of Ethics prohibits a public employee from representing himself or any other person before any state agency by which he is employed. R.I. Gen. Laws § 36-14-5(e)(1) & (2) ("section 5(e)"). This prohibition extends for a period of one year after the public employee has officially severed his position with the agency. Section 5(e)(4). The "revolving door" language of section 5(e) is designed to both prevent any undue influence that a current employee may have over his agency and colleagues by reason of his employment there, and to minimize any undue influence that a former employee may have over his former agency and colleagues by reason of his past

³Ms. Fraser states that the DEM currently has no policy in place making DEM employees ineligible to apply for LASA Grants. She adds that, in the past, DEM employees have applied for and received LASA Grants when the Rhode Island Food Policy Council had been hired by the DEM to run the LASA Grants Program.

employment there. Under the Code of Ethics, a person represents himself or another person before a state 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 own favor or in favor of another person. Section 36-14-2(12) and (13); Commission Regulation 520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016). Section 5(e)'s prohibitions are stricter than virtually any other provisions in the Code of Ethics. In most instances under the Code of Ethics, public officials and employees may address potential conflicts of interest by declining to participate in related discussions and votes. Such is not the case with section 5(e). Absent an express finding by the Ethics Commission that a hardship exists, the prohibitions in section 5(e) are absolute.

Section 5(e) Applies to Entire Agency

In Advisory Opinion 2020-7, the Ethics Commission opined that the Chief Civil Engineer of the Transportation Planning Division of the Rhode Island Department of Transportation ("DOT") was prohibited by the Code of Ethics from preparing plans to be submitted by a private client to the DOT, including any separate divisions thereof or entities therein, while he was employed by the DOT and for a period of one year thereafter. Such was not always the case. More than twenty years earlier, the Ethics Commission opined that section 5(e)'s prohibitions could apply to either the entire agency by which an individual was employed or, more narrowly, to only the specific department by which he or she was employed or with which he or she had contact, based upon factors that included the agency's size, the nature of working relationships of separate departments within the agency, and a particular individual's responsibilities within the agency. See, e.g., A.O. 97-46 (opining that a DEM engineer working in the Office of Waste Management could submit material for approval to the DEM's Office of Water Resources and Office of Compliance and Inspection as a private engineer).

However, in Advisory Opinion 2003-51, the Ethics Commission affirmed that, notwithstanding the issuance of prior advisory opinions interpreting section 5(e) more narrowly, no person subject to the Code of Ethics shall represent himself or herself or any other person before any state or municipal agency of which he or she is a member or by which he or she is employed and that this prohibition is absolute and applies to the entire agency, including all of its offices, sections, programs or divisions. Therefore, the Petitioner's statement that the Division of P&D to which he is assigned and the Division of Agriculture which administers the LASA Grants are two separate offices within the DEM will not factor into the Ethics Commission's determination as to the applicability of section 5(e).

The Submission of Grant Applications is Representation Before One's Own Agency

Historically, the Ethics Commission has consistently recognized the submission of grant applications by a public official as the representation of that public official before his or her own state agency. See A.O. 2020-32 (opining that a former Senior Projects Review Coordinator for the Rhode Island Historical Preservation & Heritage Commission ("RIHPHC") was prohibited from, among other things, submitting a grant application to the RIHPHC from the petitioner's new private employer on which the petitioner's name appeared); A.O. 2016-23 (opining that Pawtucket's Assistant City Solicitor, who was also President of the Board of Directors of Cape

Verdean American Community Development (“CACD”), was prohibited from representing the CACD before the City of Pawtucket on any matter, including Block Grant applications, and from signing and submitting such applications); A.O. 2002-59 (opining that a former Rhode Island State Council on the Arts (“RISCA”) member could not apply for a grant from the RISCA, given that she would have to appear before her former board prior to the expiration of one year following her resignation).⁴

Given the advisory opinions issued herein which recognize a public official’s application for grant funding as an appearance before one’s own agency, the Petitioner’s proposed conduct falls within the Code of Ethics’ prohibition against representing oneself before a state agency by which he is currently employed. Having determined that section 5(e)’s prohibitions apply to the Petitioner, the Ethics Commission will consider whether the unique circumstances represented by the Petitioner herein justify a finding of hardship to permit him to apply for a LASA Grant.

The Hardship Exception

Section 5(e)(1) specifically authorizes the Ethics Commission to grant exceptions, in certain circumstances, to allow a public official to represent himself before his own agency, based upon a finding that a denial of such self-representation would result in a hardship. Upon receiving a hardship exception, the public official is required to recuse from participating in his agency’s consideration and disposition of the matter at issue. Section 36-14-5(e)(1)(ii). 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). See, e.g., A.O. 2014-4 (granting a hardship exception to a member of the Portsmouth Town Council and permitting him to represent himself before the Portsmouth Zoning Board in order to seek a variance for his personal residence, provided that, in order to avoid any appearance of impropriety, he recused from the Town Council’s appointment or reappointment of any person to the Zoning Board until after the election cycle following the resolution of his applications for zoning relief).

The Ethics Commission reviews questions of hardship on a case-by-case basis and has, in the past, considered some of 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. The Ethics Commission may consider other factors and no single factor is determinative.

Here, the Petitioner’s ownership of the apple orchard does not involve his principal residence, his principal place of business, or predate the start of his employment at the DEM, and the relief sought more closely resembles a new commercial venture than a personal undertaking. However, the LASA Grant award, which could be up to \$20,000 for the Petitioner, is significant and, reportedly, while there are other grant opportunities available to area farmers, none match the amounts

⁴ In the cases of Advisory Opinions 2020-32, 2016-23, and 2002-59, each of the petitioners had either been, or could potentially have been, tasked with reviewing grant applications as part of the performance of their duties for each of their respective agencies.

awarded and flexibility of use offered by the LASA Grants. Additional factors worthy of consideration include the Petitioner having learned about the LASA Grant from another small farmer rather than through his employment at the DEM and the Petitioner's representation that he had no role in the development of the LASA Grant and that he will have no role in the evaluation of the applications and the selection of grantees. The fact that the Advisory Committee is purposely composed of voting members who are not employees of the DEM further distances the Petitioner from section 5(e)'s design to prevent any undue influence that a current employee may have over his agency and colleagues by reason of his employment there, although the DEM did delegate its responsibilities to the Advisory Committee and retains the discretion to act independently of the Advisory Committee's recommendations concerning grant awards. Further, the DEM will be actively involved in the monitoring of grantees' projects and adherence to the representations made in their applications.

The analysis of the factors routinely considered when weighing the award of a hardship exception does not tip the scale in the Petitioner's favor concerning his proposed submission of a LASA Grant application to the DEM. While the extenuating circumstances presented by the Petitioner are not without merit, such as the absence of both his involvement and that of the Division of Planning and Development with the LASA Grants Program, and that the voting members of the Advisory Committee are not DEM employees, they also do not warrant the granting of a hardship exception because the DEM Director retains discretion with respect to the ultimate selection of grantees and a fellow DEM employee will actively monitor the compliance of grantees through the completion of their projects.

It is worth noting that there have been several instances where the Ethics Commission allowed a petitioner to appear before his or her own agency, or former agency, without invoking the hardship exception. See A.O. 2002-42 (opining that a Central Falls Housing Authority employee could participate in the City's Section 8 subsidized housing program as a landlord property owner but was required to recuse from participation in any Housing Authority matters involving his own property). In Advisory Opinion 2016-38, the Deputy Chief of Legal Services for the Rhode Island Department of Business Regulation ("DBR"), who also served as legal counsel to the Rhode Island Board of Real Estate Appraisers ("Board"), was allowed to complete her real estate appraiser pre-licensing education and obtain a real estate appraiser license from the DBR. There, the petitioner stated that in her capacity as legal counsel to the DBR and to the Board she did not participate in any way in the decision-making relative to approval or disapproval of a real estate appraiser application and that the standards and required qualifications for trainee and licensed real estate appraisers were federally mandated. Moreover, the examination required to upgrade from a trainee to a licensed appraiser was administered and graded by an independent online testing company and the results forwarded to the DBR, negating the risk of favoritism to the petitioner by DBR or the Board.

In the instant matter, while the DEM delegated to the Advisory Committee the duties of scoring the LASA Grant applications and selecting the grant recipients, because the DEM Director retains the discretion to select the ultimate grant recipients, the Advisory Committee is not truly independent of the DEM. Also, while the Ethics Commission opined in Advisory Opinion 2016-38 that the petitioner's submission of a real estate appraiser application did not amount to the type of self-representation before her own agency which is prohibited by section 5(e), the Ethics

Commission has consistently opined, as evidenced in the advisory opinions cited herein, that the submission of a grant application to one's own agency does amount to self-representation.

There have also been instances where the Ethics Commission has allowed public officials to seek loan funds from the state agencies by which they were employed, deeming the applications as ministerial in nature. See, e.g., A.O. 98-22 (opining that a Providence Plan Housing Corporation employee could submit an application for HOME funds to the PPHC, given that it was a ministerial act and she did not possess discretionary authority regarding the HOME funding program in her employment with the PPHC, nor was she in any way involved with the application or approval process for the HOME program).

Still, dating back even further, the Ethics Commission allowed public employees to petition their public employers for licenses, loans, and programs in instances where those employees were not involved in the decision-making process and provided they did not use their positions to influence the status of their applications. See A.O. 95-76 (opining that an employee of the Rhode Island Department of Substance Abuse ("DSA"), who was responsible for monitoring a federal grant funded by the Center for Substance Abuse Prevention, was not prohibited by the Code of Ethics from petitioning the DSA for a license to open an out-patient substance abuse facility because the employee did not participate in the decision-making process concerning whether to issue the license and used neither his position with the DSA nor confidential information received through his position to benefit his business venture); A.O. 95-105 (opining that employees of the Historical Preservation & Heritage Commission could apply for loans made available through that agency, provided that said employees did not use their official positions or confidential information obtained through those positions to influence their selection for the loans and, further provided that they notified the HPHC, in writing, of the nature of their interest in the matter and refrained from participation in said matter⁵); A.O. 90-55 (opining that an employee of the Department of Transportation was allowed to apply to a program operated and administered by his employer provided that the petitioner did not use his official position to influence the status of his application).

Conclusion

The instant advisory opinion references several advisory opinions that were issued twenty years ago or more which demonstrate a more liberal approach to the application of section 5(e)'s prohibitions. However, consistent with the more recent advisory opinions cited herein, the Ethics Commission deems the submission of a LASA Grant application by the Petitioner to be self-representation before the DEM, which is prohibited by section 5(e). Further, the analysis of the factors routinely considered when weighing the award of a hardship exception does not tip the scale in the Petitioner's favor. While the extenuating circumstances presented by the Petitioner

⁵ The Ethics Commission did conclude, however, that the Code of Ethics barred the HPHC Commissioners from applying to the loan program, based on the fact that Commissioners of that agency played a vital discretionary role in the loan application process; served on the Loan Committee, made recommendations concerning applications; and voted to provide the final approval of each loan application.

are not without merit, such as the absence of both his involvement and that of the Division of Planning and Development with the LASA Grants Program, and that the voting members of the Advisory Committee are not DEM employees, they also do not warrant the granting of a hardship exception. The DEM Director retains discretion with respect to the ultimate selection of grantees and a DEM employee will actively monitor the compliance of grantees through the completion of their projects.

Additionally, while sympathetic to the Petitioner, the Ethics Commission wishes to avoid potentially opening a floodgate by granting an uncharacteristic hardship exception which could mislead and encourage other public officials and employees to seek similarly uncharacteristic hardship exceptions. Accordingly, it is the opinion of the Ethics Commission that the Petitioner is prohibited by the Code of Ethics from applying for a LASA Grant advertised by the DEM Division of Agriculture and does not qualify for a hardship exception to the Code of Ethics' prohibition against representing himself before the state agency by which he is currently employed for purposes of seeking a LASA Grant.

This Draft 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(12)

§ 36-14-2(13)

§ 36-14-5(e)

520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016)

Related Advisory Opinions:

A.O. 2020-32

A.O. 2020-7

A.O. 2016-38

A.O. 2016-23

A.O. 2014-4

A.O. 2003-51

A.O. 2002-59

A.O. 2002-42

A.O. 98-22

A.O. 97-46

A.O. 95-105

A.O. 95-76

A.O. 90-55

Keywords:

Grants

Hardship Exception
Revolving Door

DRAFT

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: June 29, 2021

Re: David J. DeCost, Jr. (Version 2 of 2)

QUESTION PRESENTED:

The Petitioner, a principal civil engineer for the Rhode Island Department of Environmental Management's Division of Planning and Development, a state employee position, who in his private capacity owns and operates an apple cider orchard, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from applying for a Local Agriculture and Seafood Act Grant advertised by the Rhode Island Department of Environmental Management's Division of Agriculture and, if so, whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the state agency by which he is currently employed for purposes of seeking the grant.

RESPONSE:

It is the opinion of the Ethics Commission that the Petitioner, a principal civil engineer for the Rhode Island Department of Environmental Management's Division of Planning and Development, a state employee position, who in his private capacity owns and operates an apple cider orchard, qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the state agency by which he is currently employed for purposes of seeking a Local Agriculture and Seafood Act Grant administered by his agency's Division of Agriculture.

The Petitioner is currently employed as a principal civil engineer in the Division of Planning and Development ("Division of P&D") at the Rhode Island Department of Environmental Management ("DEM") and has been so employed for the last five years. He cites among the accomplishments of the Division of P&D the design and construction of award winning State Park & Management Area Facilities including boat ramps, beach pavilions, bike paths, and more. The Petitioner explains that, in his capacity as a principal civil engineer, he assists with the completion of capital improvement projects which may include infrastructure upgrades, renovations to older buildings, new construction, and site improvements and that his duties also include the permitting and design processes and management of construction efforts.

The Petitioner states that, in his private capacity, he has owned and operated an apple cider orchard located in Glocester, Rhode Island, not far from his home, for the past eighteen months. He further states that he would like to apply for a Local Agriculture and Seafood Act Grant ("LASA Grant") to fund the purchase of some apple processing equipment. He explains that, although the LASA

Grant is advertised and administered by the DEM's Division of Agriculture, he actually learned about the LASA Grant from another local farmer. The Petitioner informs that the Division of P&D and the Division of Agriculture are two separate offices within the DEM and that neither he nor the Division of P&D had any involvement in the creation of the LASA Grant application or its advertisement and, likewise, will have no involvement in the scoring of the applications or awarding of any LASA Grants. The Petitioner referred Ethics Commission Staff to the DEM website on which the LASA Grant is advertised ("the website")¹ and to DEM employee Ananda Fraser ("Ms. Fraser"), Chief of Program Development within the Division of Agriculture, to obtain more information about the LASA Grants Program.

According to the website, the LASA Grants Program was established by the Local Agriculture and Seafood Act (LASA) of 2012, and its goal is "to support the growth, development, and marketing of local food and seafood in Rhode Island." Ms. Fraser states that the DEM's Division of Agriculture will award between \$160,000 and \$240,000 in the current grant round and that the maximum grant award available to any farmer, individual, business, or non-profit organization is \$20,000. Ms. Fraser further states that all applicants must be based in Rhode Island and that, while the application does not inquire of an applicant's employment status, that information could be disclosed by an applicant in an answer to a particular question or within an answer to an essay question contained in the application. This year's application deadline was extended from May 30th to June 13th, and the awards are expected to be announced in June of 2021.²

Ms. Fraser represents that the LASA Grant applications will be evaluated by the LASA Grants Program Advisory Committee ("Advisory Committee"), after which the Advisory Committee will forward its recommendations for grant recipients to the DEM Director ("Director") for approval. She explains that the Advisory Committee is composed of nine members and is chaired by the Chief of the DEM's Division of Agriculture ("Chair"), who is the only non-voting member of the Advisory Committee. Ms. Fraser states that the other eight members, all of whom were appointed by the Director, and none of whom are employed by the DEM, represent agencies, organizations, and individuals that have a role or interest in the planning, development, and support of viable agriculture and seafood sectors and a locally-based sustainable food system. Because the Chair is a non-voting member of the Advisory Committee, he will not participate in the selection of applicants to recommend as LASA Grant recipients. Ms. Fraser represents that requiring the Chair to refrain from participation in the recommending of grant recipients is intended to keep the DEM impartial, given the Chair's familiarity with certain applicants and/or their projects because of the Division of Agriculture's regulatory role with aspects of agriculture by which certain applicants

¹ <http://www.dem.ri.gov/programs/agriculture/grants-lasa.php> (last accessed June 18, 2021).

² The Petitioner's request for this advisory opinion was received by the Ethics Commission on May 26, 2021. Because it was not feasible to provide the Petitioner with an advisory opinion prior to June 13, 2021, the Petitioner was advised by Ethics Commission Staff that he would not be prohibited from applying for the LASA Grant on the condition that, if the Ethics Commission ultimately issues an advisory opinion deeming him ineligible to apply for and receive a LASA Grant, he will either withdraw his application or, if he has been awarded a LASA Grant before the Ethics Commission considers his request, will condition his acceptance of the LASA Grant on the issuance of a formal advisory opinion from the Ethics Commission that applying for and accepting the LASA Grant does not violate the Code of Ethics. The Petitioner agreed to these conditions.

and grant recipients are bound. She further represents that the appointment of eight voting members of the Advisory Committee who are not DEM employees is also intentional, the goal being to seat the Advisory Committee with a wide swath of agricultural stakeholders.

Prior to this year, the DEM had contracted with the Rhode Island Food Policy Council, a local non-profit organization, to organize and administer the LASA Grants Program on behalf of the DEM. This year, the DEM has assumed responsibility for the administration of the LASA Grants Program. Ms. Fraser explains that the change will allow the DEM to increase the pool of grant funds to be made available to applicants by approximately \$20,000 (the fee previously paid to the Food Policy Council) and allow the DEM to monitor the use of the funds awarded to grant recipients more closely. Ms. Fraser states that the percentage of grant applicants who are awarded grants fluctuates annually depending upon the number and quality of applications received.³ Ms. Fraser reports that, while the Director makes the final decision on who will receive a LASA Grant, the Director has always gone with the recommendations of the Advisory Committee. She explains that the Director might ask questions of the Advisory Committee or seek additional information about a particular applicant, but that the Director trusts the process and adopts the recommendations of the Advisory Committee.

Ms. Fraser states that, beginning this year, LASA Grant recipients will be paid 50% of their total award amount upon receipt by the DEM of the executed grant agreement and related documents and receive the second 50% of their total award amount after completion of their project when a final report, claim, and invoice have been submitted and approved by the DEM's Division of Agriculture. Each grant recipient must authorize the DEM to monitor his or her project, which may be up to 24 months in length. Discretion will be exercised by the DEM employee monitoring the work of each grant recipient when determining whether the grant is being used in conformance with the methods stated in the grant application, be it through on-site visits or the review of interim and final reports submitted by the grantees. Ms. Fraser represents that, while there are other grant opportunities available to area farmers, none match the amounts awarded and flexibility of use offered by the LASA Grants. It is in the context of these representations that the Petitioner seeks guidance from the Ethics Commission regarding whether he is prohibited by the Code of Ethics from applying for a LASA Grant and, if so, whether he qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the DEM for purposes of seeking the grant.

The Code of Ethics prohibits a public employee from representing himself or any other person before any state agency by which he is employed. R.I. Gen. Laws § 36-14-5(e)(1) & (2) ("section 5(e)"). This prohibition extends for a period of one year after the public employee has officially severed his position with the agency. Section 5(e)(4). The "revolving door" language of section 5(e) is designed to both prevent any undue influence that a current employee may have over his agency and colleagues by reason of his employment there, and to minimize any undue influence that a former employee may have over his former agency and colleagues by reason of his past employment there. Under the Code of Ethics, a person represents himself or another person before

³Ms. Fraser states that the DEM currently has no policy in place making DEM employees ineligible to apply for LASA Grants. She adds that, in the past, DEM employees have applied for and received LASA Grants when the Rhode Island Food Policy Council had been hired by the DEM to run the LASA Grants Program.

a state 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 own favor or in favor of another person. Section 36-14-2(12) and (13); Commission Regulation 520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016). Section 5(e)'s prohibitions are stricter than virtually any other provisions in the Code of Ethics. In most instances under the Code of Ethics, public officials and employees may address potential conflicts of interest by declining to participate in related discussions and votes. Such is not the case with section 5(e). Absent an express finding by the Ethics Commission that a hardship exists, the prohibitions in section 5(e) are absolute.

Section 5(e) Applies to Entire Agency

In Advisory Opinion 2020-7, the Ethics Commission opined that the Chief Civil Engineer of the Transportation Planning Division of the Rhode Island Department of Transportation ("DOT") was prohibited by the Code of Ethics from preparing plans to be submitted by a private client to the DOT, including any separate divisions thereof or entities therein, while he was employed by the DOT and for a period of one year thereafter. Such was not always the case. More than twenty years earlier, the Ethics Commission opined that section 5(e)'s prohibitions could apply to either the entire agency by which an individual was employed or, more narrowly, to only the specific department by which he or she was employed or with which he or she had contact, based upon factors that included the agency's size, the nature of working relationships of separate departments within the agency, and a particular individual's responsibilities within the agency. See, e.g., A.O. 97-46 (opining that a DEM engineer working in the Office of Waste Management could submit material for approval to the DEM's Office of Water Resources and Office of Compliance and Inspection as a private engineer).

However, in Advisory Opinion 2003-51, the Ethics Commission affirmed that, notwithstanding the issuance of prior advisory opinions interpreting section 5(e) more narrowly, no person subject to the Code of Ethics shall represent himself or herself or any other person before any state or municipal agency of which he or she is a member or by which he or she is employed and that this prohibition is absolute and applies to the entire agency, including all of its offices, sections, programs or divisions. Therefore, the Petitioner's statement that the Division of P&D to which he is assigned and the Division of Agriculture which administers the LASA Grants are two separate offices within the DEM will not factor into the Ethics Commission's determination as to the applicability of section 5(e).

The Submission of Grant Applications is Representation Before One's Own Agency

Historically, the Ethics Commission has consistently recognized the submission of grant applications by a public official as the representation of that public official before his or her own state agency. See A.O. 2020-32 (opining that a former Senior Projects Review Coordinator for the Rhode Island Historical Preservation & Heritage Commission ("RIHPHC") was prohibited from, among other things, submitting a grant application to the RIHPHC from the petitioner's new private employer on which the petitioner's name appeared); A.O. 2016-23 (opining that Pawtucket's Assistant City Solicitor, who was also President of the Board of Directors of Cape Verdean American Community Development ("CACD"), was prohibited from representing the

CACD before the City of Pawtucket on any matter, including Block Grant applications, and from signing and submitting such applications); A.O. 2002-59 (opining that a former Rhode Island State Council on the Arts ("RISCA") member could not apply for a grant from the RISCA, given that she would have to appear before her former board prior to the expiration of one year following her resignation).⁴

Given the advisory opinions issued herein which recognize a public official's application for grant funding as an appearance before one's own agency, the Petitioner's proposed conduct falls within the Code of Ethics' prohibition against representing oneself before a state agency by which he is currently employed. Having determined that section 5(e)'s prohibitions apply to the Petitioner, the Ethics Commission will consider whether the unique circumstances represented by the Petitioner herein justify a finding of hardship to permit him to apply for a LASA Grant.

The Hardship Exception

Section 5(e)(1) specifically authorizes the Ethics Commission to grant exceptions, in certain circumstances, to allow a public official to represent himself before his own agency, based upon a finding that a denial of such self-representation would result in a hardship. Upon receiving a hardship exception, the public official is required to recuse from participating in his agency's consideration and disposition of the matter at issue. Section 36-14-5(e)(1)(ii). 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). See, e.g., A.O. 2014-4 (granting a hardship exception to a member of the Portsmouth Town Council and permitting him to represent himself before the Portsmouth Zoning Board in order to seek a variance for his personal residence, provided that, in order to avoid any appearance of impropriety, he recused from the Town Council's appointment or reappointment of any person to the Zoning Board until after the election cycle following the resolution of his applications for zoning relief).

The Ethics Commission reviews questions of hardship on a case-by-case basis and has, in the past, considered some of 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. The Ethics Commission may consider other factors and no single factor is determinative.

Before reviewing the question of hardship in the Petitioner's case, it is worth noting that there have been several instances where the Ethics Commission allowed a petitioner to appear before his or her own agency, or former agency, without invoking the hardship exception. See A.O. 2002-42 (opining that a Central Falls Housing Authority employee could participate in the City's Section 8 subsidized housing program as a landlord property owner but was required to recuse from participation in any Housing Authority matters involving his own property). In Advisory Opinion

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2016-38, the Deputy Chief of Legal Services for the Rhode Island Department of Business Regulation ("DBR"), who also served as legal counsel to the Rhode Island Board of Real Estate Appraisers ("Board"), was allowed to complete her real estate appraiser pre-licensing education and obtain a real estate appraiser license from the DBR. There, the petitioner stated that in her capacity as legal counsel to the DBR and to the Board she did not participate in any way in the decision-making relative to approval or disapproval of a real estate appraiser application and that the standards and required qualifications for trainee and licensed real estate appraisers were federally mandated. Moreover, the examination required to upgrade from a trainee to a licensed appraiser was administered and graded by an independent online testing company and the results forwarded to the DBR, negating the risk of favoritism to the petitioner by DBR or the Board.

There have also been instances where the Ethics Commission has allowed public officials to seek loan funds from the state agencies by which they were employed, deeming the applications as ministerial in nature. See, e.g., A.O. 98-22 (opining that a Providence Plan Housing Corporation employee could submit an application for HOME funds to the PPHC, given that it was a ministerial act and she did not possess discretionary authority regarding the HOME funding program in her employment with the PPHC, nor was she in any way involved with the application or approval process for the HOME program).

Still, dating back even further, the Ethics Commission allowed public employees to petition their public employers for licenses, loans, and programs in instances where those employees were not involved in the decision-making process and provided that they did not use their positions to influence the status of their applications. See A.O. 95-76 (opining that an employee of the Rhode Island Department of Substance Abuse ("DSA"), who was responsible for monitoring a federal grant funded by the Center for Substance Abuse Prevention, was not prohibited by the Code of Ethics from petitioning the DSA for a license to open an out-patient substance abuse facility because the employee did not participate in the decision-making process concerning whether to issue the license and used neither his position with the DSA nor confidential information received through his position to benefit his business venture); A.O. 95-105 (opining that employees of the Historical Preservation & Heritage Commission could apply for loans made available through that agency, provided that said employees did not use their official positions or confidential information obtained through those positions to influence their selection for the loans and, further provided that they notified the HPHC, in writing, of the nature of their interest in the matter and refrained from participation in said matter⁵); A.O. 90-55 (opining that an employee of the Department of Transportation was allowed to apply to a program operated and administered by his employer provided that the petitioner did not use his official position to influence the status of his application).

⁵ The Ethics Commission did conclude, however, that the Code of Ethics barred the HPHC Commissioners from applying to the loan program, based on the fact that Commissioners of that agency played a vital discretionary role in the loan application process; served on the Loan Committee, made recommendations concerning applications; and voted to provide the final approval of each loan application.

Here, the Petitioner's ownership of the apple orchard does not involve his principal residence, his principal place of business, or predate the start of his employment at the DEM, and the relief sought more closely resembles a new commercial venture than a personal undertaking. However, the Ethics Commission is not limited to contemplation of only those factors routinely considered when weighing the award of a hardship exception, but may consider other factors, as well. In this case, additional factors worthy of consideration include the Petitioner's representation that he had no role in the development of the LASA Grant, has no role in the evaluation of the applications and the selection of grantees, and that the grant program is administered by an entirely different division outside of his chain of command or responsibilities. The fact that the Advisory Committee is purposely composed of voting members who are not employees of the DEM further distances the Petitioner from section 5(e)'s design to prevent any undue influence that a current employee may have over his agency and colleagues by reason of his employment there. This year, the DEM has elected to monitor the use of grant funds awarded to grant recipients more closely than in years past before distributing the second 50% of a grant award to a recipient. Under such circumstances, in the event that the Petitioner is among those selected by the Advisory Committee to receive a grant, it is highly unlikely that he would be situated to use his position to influence the determination by a DEM employee of whether the Petitioner's grant award is being used in conformance with the methods stated in his application, a determination which is, arguably, ministerial. Further, the LASA Grant award, which could be up to \$20,000 for the Petitioner, is significant and, reportedly, while there are other grant opportunities available to area farmers, none match the amounts awarded and flexibility of use offered by the LASA Grants.

Conclusion

Consistent with the advisory opinions cited herein, the Ethics Commission deems the submission of a LASA Grant application by the Petitioner to be self-representation before the DEM, which is prohibited by section 5(e). However, the extenuating circumstances presented by the Petitioner under which he seeks a hardship exception have merit. Such circumstances include the absence of both the Petitioner's involvement and that of the Division of Planning and Development with the LASA Grants Program, and that the voting members of the Advisory Committee are not DEM employees. That the DEM has elected to monitor the award of the second 50% of grant funds to recipients more closely this year does not lend itself to an ability on the part of the Petitioner to exercise any undue influence over the DEM by reason of his employment there. Accordingly, based upon the very specific facts as represented herein, it is the opinion of the Ethics Commission that the Petitioner qualifies for a hardship exception to the Code of Ethics' prohibition against representing himself before the state agency by which he is currently employed for purposes of seeking a LASA Grant.

This Draft 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(12)

§ 36-14-2(13)

§ 36-14-5(e)

520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016)

Related Advisory Opinions:

A.O. 2020-32

A.O. 2020-7

A.O. 2016-38

A.O. 2016-23

A.O. 2014-4

A.O. 2003-51

A.O. 2002-59

A.O. 2002-42

A.O. 98-22

A.O. 97-46

A.O. 95-105

A.O. 95-76

A.O. 90-55

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