

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

RHODE ISLAND ETHICS COMMISSION

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April 1, 2020

Amy H. Goins, Esq.
Ursillo, Teitz & Ritch, Ltd.
2 Williams Street
Providence, RI 02903

Re: Advisory Opinion request for Joseph T. Murphy

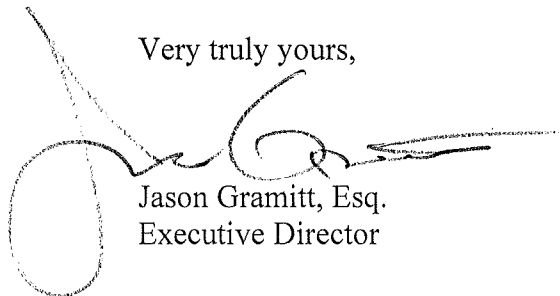
Dear Ms. Goins:

In response to your request for an Advisory Opinion, enclosed is a Draft Opinion that has been prepared by Commission staff. This Draft Opinion will be considered by the Commission on April 7, 2020, at 9:30 a.m., in Open Session. If approved, the Commission will issue a formal Advisory Opinion, a copy of which will be mailed to you.

The meeting will be held remotely via zoom webinar. You may attend and participate by using the zoom app or website at <https://zoom.us/>. Instructions and an ID number for the meeting will be provided to you separately by the Commission staff attorney who has been working on your advisory opinion.

If you have any questions, please contact this office.

Very truly yours,



Jason Gramitt, Esq.
Executive Director

JG:srg

Enclosure

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: April 7, 2020

Re: Joseph T. Murphy

QUESTION PRESENTED:

The Petitioner, a member of the South Kingstown Planning Board, a municipal appointed position, requests an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition on appearing before his own board to seek approval to subdivide his property.

RESPONSE:

It is the opinion of the Ethics Commission that the Petitioner, a member of the South Kingstown Planning Board, a municipal appointed position, may represent himself before his own board in order to seek approval to subdivide his property, based upon a finding of hardship in accordance with R.I. Gen. Laws § 36-14-5(e).

The Petitioner is a member of the South Kingstown Planning Board ("Planning Board"), having served since 2015. The Petitioner states that, in March of 2007, he purchased a property ("Property") consisting of a single-family residential structure that his daughter has occupied since 2015. The Petitioner notes that he resides at a different address. He represents that he is seeking to subdivide the Property into two lots and construct a second residential structure on the newly created lot. He envisions that, after the subdivision, his daughter will continue to occupy the current residential structure and one of his other children will occupy the new structure on the newly created lot. The Petitioner represents that the subdivision approval that he is seeking is personal in nature and is in no way related to any commercial venture. Cognizant of the Code of Ethics' prohibition against representing himself before his own board, the Petitioner requests an advisory opinion regarding whether the facts as presented justify the application of the hardship exception.

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); Commission Regulation 520-RICR-00-00-1.1.4(A)(1) Representing Oneself or Others, Defined (36-14-5016) ("Regulation 1.1.4"). 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). Moreover, while many conflicts can be avoided under the Code of Ethics by recusing from participation, such recusal is insufficient to avoid section 36-14-5(e)'s ("section 5(e)") prohibitions

against representation absent an express finding by the Ethics Commission that a hardship exists. 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).

The Petitioner's proposed conduct falls squarely 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 the Petitioner herein justify a finding of hardship to permit him to appear before the Planning Board.

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.

The Ethics Commission has granted hardship exceptions to public officials who sought to appear regarding their residential properties before their own boards or boards over which they had appointing authority. For example, in Advisory Opinion 2007-51, the Ethics Commission granted a hardship exception, permitting a member of the Portsmouth Town Council to appear before the Portsmouth Zoning Board of Review to seek a variance for property jointly owned by the petitioner and her spouse. In that case, the property under review included the petitioner and her spouse's personal residence and an adjacent lot on which they had built a garage, but sought to build a new personal residence as well, intending to give their existing home to their then 24-year old son. The Ethics Commission opined that because the petitioner had owned the land for over twenty years, predating her election to the Town Council, and sought to develop the lot directly adjacent to her residence, the particular facts justified the application of the hardship exception.

Also, in Advisory Opinion 2011-28, the Ethics Commission has granted hardship exception to a member of the Narragansett Town Council to appear before the Narragansett Planning and Zoning Boards to seek approval to subdivide one of his two residential properties which was purchased a year prior to the petitioner's election to the Town Council, was located four doors down from his primary residence, and where the petitioner and his wife planned to live after retirement. The petitioner was unable to maintain two homes and wanted to subdivide said property so that he could create two lots, one to sell and one on which he planned to build a home for himself. See also A.O. 2017-6 (opining that a member of the Hopkinton Planning Board could represent himself, either personally, through a family member, legal counsel or other representative, before his own agency relative to establishing a residential compound on his personal property given that his ownership of the subject property predated his election to the Planning Board, that he sought to establish a family residential compound in order to provide land to his children to build their own homes, and that he had no intention or plans to expand his small business or put any lots up for sale).

In the instant matter, the Petitioner is seeking to subdivide a residential property that he has owned since 2007, approximately 7 years prior to his appointment to the Planning Board, and which his daughter has occupied since 2015. Furthermore, the Petitioner represents that the subdivision he seeks is personal in nature and is in no way related to a commercial use or venture as he plans to transfer the subdivided lots to his children. Based on the Petitioner's representations, and consistent with the provisions of the Code of Ethics and our past advisory opinions in this area, it is the opinion of the Ethics Commission that the totality of the circumstances justifies making an exception to section 5(e)'s prohibitions to allow the Petitioner to represent himself, either personally or through a representative, before the Planning Board relative to seeking approval to subdivide the subject property. The Petitioner must, however, recuse himself from participating in the Planning Board's consideration of and voting on the matter. 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. 2007-51

A.O. 2011-28

A.O. 2017-6

Keywords:

Hardship Exception