

**MINUTES OF THE OPEN SESSION
OF THE RHODE ISLAND ETHICS COMMISSION**

May 19, 2009

The Rhode Island Ethics Commission held its 7th meeting of 2009 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, May 19, 2009, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

Barbara R. Binder, Chair Deborah M. Cerullo SSND

Ross Cheit, Vice Chair Mark B. Heffner

Frederick K. Butler John D. Lynch, Jr.

Also present were William J. Conley, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt, Dianne L. Leyden and Esme DeVault; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.

At 9:02 a.m., the Chair opened the meeting. The first order of business was approval of minutes of the Open Session held on April 21, 2009. Commissioner Lynch noted a typographical correction on

page 6. Upon motion made by Commissioner Cerullo and duly seconded by Chair Binder, it was unanimously

VOTED: To approve minutes of the Open Session held on April 21, 2009, as corrected.

ABSTENTION: Frederick K. Butler.

The next order of business was that of advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Jean Brown, a member of the Jamestown Planning Commission. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present. In response to Commissioner Cerullo, Staff Attorney DeVault advised that the Code does not define "hardship." In response to Commissioner Cerullo, the Petitioner indicated that it is common for an individual to want to subdivide a property.

Commissioner Cerullo inquired regarding standards the Planning Commission utilizes in exercising its discretion to grant a variance. The Petitioner replied that it becomes a balance between the Planning Commission, the abutters and the property owners. She stated that she has gone through the application process as any homeowner would and that she has not had any discussion with members of the

Planning Commission regarding her application. In further response to Commissioner Cerullo, the Petitioner indicated that the granting of a variance would depend upon the facts of the particular situation. Chair Binder asked if the Petitioner anticipated that there would be any controversy regarding her application, such as objecting abutters. The Petitioner replied in the negative and stated her belief that it will come down to an issue of water conditions, which may kick in another municipal ordinance.

In response to Chair Binder, the Petitioner informed that she has been serving on the Planning Commission for five years and is presently its Secretary. In response to Commissioner Lynch, she advised that her appointment expires in December. Commissioner Cheit inquired why the issue is coming up now, given that her daughter is fifteen years old. The Petitioner replied that the real answer to why she is seeking to subdivide is that the price of energy fuel is high and her home, being older, is not energy efficient. She stated that she could have a brand new residence for less money.

Commissioner Cerullo stated that the facts relating to the Petitioner's daughter do not seem to be the driving feature with respect to the proposed subdivision. The Petitioner represented that she would not turn around and build a home tomorrow, she is just planning on it. She suggested that she would not be able to afford to build the house after putting her daughter through college. Commissioner Cheit indicated that he did not see the hardship if the Petitioner could not

do it now. The Petitioner stated that she is trying to save money to pay for college. She informed that her current house is worth about a half million dollars. Chair Binder asked if the Petitioner really wants to subdivide the property and sell the house. The Petitioner stated that she might want to sell as she goes along. Commissioner Cheit commented that what the Petitioner would actually do is tentative and that he does not see a clear hardship.

In response to Chair Binder, Staff Attorney DeVault informed that the analysis would potentially change based upon these additional facts, given that the draft is not premised upon the selling of the primary residence at this time. She noted that there is a different fact pattern being presented which could be more like a commercial venture, as opposed to the past advisory opinions dealing with “family compounds.” Commissioner Cerullo stated that the issue seems to be one of intent. She voiced concern about giving safe harbor when something else might happen later on. Staff Attorney DeVault clarified that safe harbor would be given regarding the Petitioner’s present intent. The Petitioner inquired if that would relate to her building immediately. Staff Attorney DeVault replied that it contemplates building within a short period of time.

The Petitioner noted that her application to subdivide does not even contain plans for a house on the lot. Staff Attorney DeVault stated that the draft opinion is based upon the Petitioner’s representations made to her in their telephone conversations. Chair Binder advised

that the Commission does not grant hardship exceptions for amorphous situations. The Petitioner represented that her expenses are pushing the limits of her current house and she is trying to downsize and plan for her daughter's future. Commissioner Cerullo asked when the Petitioner would build a smaller home, if she received the exception. The Petitioner replied that she would take down the garage, build the road and then build the house as soon as she could afford to do so, but that she does not know when that would be.

Commissioner Lynch inquired about a new water table ordinance, previously referenced by the Petitioner, and whether it would prevent the proposed subdivision. The Petitioner replied that she did not think it would. Commissioner Lynch asked if this were a move to subdivide in anticipation of a new ordinance that would prevent the subdivision or make it more difficult. The Petitioner stated that she is not sure that a new ordinance would make it more difficult because it is a pretty normal lot. Commissioner Lynch sought clarification as to whether the decision to do it now is based upon any understanding that a new ordinance could be adopted. The Petitioner replied in the negative.

Chair Binder expressed that the "family compound" analysis seems to have evolved, creating a need to go back to the drawing board for a new analysis and reconsideration at the next meeting. Commissioner Cheit inquired if the Petitioner would provide more facts and reiterated that he does not see the existence of hardship.

Commissioner Cerullo stated that she is a little more persuaded by the Petitioner's need to have a smaller residence, but noted that the situation with her daughter is far removed. She indicated that the hardship analysis relates to intent. She voiced her concern that the Petitioner's intention today is to downsize, so that she can afford to live there, but questioned what her intent might be in three months.

Commissioner Cerullo questioned what would happen if the Commission were to issue an advisory opinion, based upon the Petitioner's need to build a smaller house for financial reasons, but in six months the Petitioner has a better opportunity to sell the property.

She expressed her concern that the circumstances are attenuated. Commissioner Cheit commented that, for that reason, he does not believe there is a hardship. Chair Binder noted that there does not seem to be an immediate plan. Commissioner Cheit stated that the Petitioner could do this next year and not serve on the Planning Board. The Petitioner represented that she did not understand the hardship exception. Staff Attorney DeVault informed that the request had originated as a duty call, in which she had urged the Petitioner to seek an advisory opinion after explaining section 5(e)'s prohibitions.

The Petitioner stated that she would be happy to come back to the Commission and consider the issue again. Commissioner Cheit echoed Commissioner Cerullo's concerns. He asked what would happen if the Petitioner affirmatively states that the subdivision is not for commercial use and then she later sells the property.

Commissioner Cerullo clarified that her concern is not that it is an intentional omission by the Petitioner, but that circumstances could change and she could have the opportunity to do something financially beneficial. Commissioner Heffner indicated that he would appreciate a re-analysis by the Staff and reconsideration of the issue, given that the Petitioner is here in good faith. Chair Binder suggested that the Petitioner would have to present the facts again, as different scenarios have evolved. Commissioner Cheit inquired as to whether the Petitioner would come back before the Commission versus a reconsideration. Chair Binder suggested that the Commission should not grant the hardship exception.

In response to Commissioner Cerullo, the Petitioner advised that the matter will be before the Planning Commission on June 2nd. Commissioner Cheit noted that there really is not a procedure for reconsideration. Commissioner Heffner inquired whether the Commission needs to deny this hardship exception. Chair Binder replied that she believes the Commission should deny it because the facts upon which the opinion is based are not the facts as now stated. Commissioner Heffner voiced that he is troubled with denial because the facts will always evolve slightly. Staff Attorney DeVault advised that the Commission could vote to withdraw safe harbor with respect to a finding of hardship, even if it were to continue the matter to the next meeting. Commissioner Butler stated that some of the facts presented could be elements of a hardship, but the opinion is not just in need of additional facts or clarification. He noted that the draft is

based upon a set of facts that are not really the basis of the request, specifically with respect to establishing a residence for the Petitioner's daughter. He indicated that if a request were to come before the Commission, it must be based on the hardship exemption sought.

Chair Binder advised the Petitioner that if she were to come before them stating that she cannot afford to live in her house and needs to downsize, the Commission would consider her situation, although it might not necessarily approve an exemption. The Petitioner apologized for not being educated as to what would constitute a hardship and for doing a sloppy job of trying to unveil what is going on. Commissioner Lynch stated that the Petitioner can submit a new request based upon the additional facts. Legal Counsel Conley advised that the clearest option is not to approve the opinion, based upon the facts presented within the four corners. He also informed that the Commission could withdraw safe harbor, so that the document is not a means for the Petitioner to proceed before the Planning Commission, and the Petitioner can come back with further facts. He stated that withdrawing safe harbor really means that the Commission is denying the hardship exemption at this point, since she would not be getting approval.

Commissioner Heffner stated that he is troubled with denying the opinion based upon the four corners of the document versus what has transpired before the Commission. Legal Counsel Conley

advised that, when he speaks of the four corners of the document, he refers more accurately to what is set forth in the document and the representations of the Petitioner before the Commission. Upon motion made by Commissioner Cheit and duly seconded, it was

VOTED: To approve the draft advisory opinion.

AYES: None.

NOES: Deborah M. Cerullo SSND, Frederick K. Butler, Mark B. Heffner, John D. Lynch, Jr., Ross Cheit and Barbara R. Binder.

At approximately 9:50 a.m., upon motion made by Commissioner Cerullo and duly seconded by Commissioner Heffner, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

**a.) Motion to approve minutes of Executive Session held on
April 21, 2009.**

**b.) In re: James Conway,
Complaint No. 2009-1**

c.) Status Update:

William V. Irons v. The Rhode Island Ethics Commission, No. 2008-335-M.P. and 2009-01-M.P.

d.) Status Update:

Jason E. Ferrell v. Frank Caprio, Jr., et al.,

U.S. District Court C.A. No.08-378S

e.) Motion to return to Open Session.

The Commission returned to Open Session at approximately 10:14 a.m. *Commissioner Cerullo left the meeting at 10:14 a.m.

The next order of business was a motion to seal minutes of the Executive Session held on May 19, 2009. Upon motion made by Commissioner Heffner and duly seconded by Commissioner Butler, it was unanimously

VOTED: To seal minutes of the Executive Session held on May 19, 2009.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on April 21, 2009; 2) initially determined that Complaint No. 2009-1, In re: James Conway, states sufficient facts to allege a knowing and willful violation of the Code of Ethics; and 3) received status

updates on William V. Irons v. The Rhode Island Ethics Commission and Jason E. Ferrell v. Frank Caprio, Jr.

***Commissioner Cerullo returned at 10: 16 a.m.**

The next order of business was a status update on the request for written comments and proposed June workshop regarding participation of public officials who are union members in actions involving a different bargaining unit of the same umbrella labor union.

Staff Attorney Gramitt advised that a request for comment was sent to the usual groups providing input, including Common Cause, Operation Clean Government, the RI League of Women Voters, as well as the RI Associations of School Committees and Superintendents, the NEA, just about every union, including Council 94 and the AFLCIO, and all town clerks. He stated that Staff Attorney DeVault updated the website to include information on the request for public comment and a special email address has been established to receive comments, although none have been received. He indicated that the issue would be the subject of a June workshop.

The next order of business was discussion and scheduling of proposed workshop on the Complainant's role in the complaint process. Staff Attorney Gramitt informed that the Commission previously indicated its intent to hold this matter until a decision is received in the Irons litigation.

The next order of business was the Director's Report. Executive Director Willever reported that there are three complaints and four advisory opinion requests pending, and there have been no formal APRA requests since the last meeting. He advised that the Education Program is redoubling its efforts after a build-up of requests for presentations. Staff Attorney Gramitt will be speaking at the RI Bar Association's Annual Meeting, as well as the Attorney General's Open Government Summit.

With respect to the budget, Director Willever advised that the Commission is watching every dollar. He stated that there will be one day without pay in June, as reported, but the Commission essentially has been level funded. He expressed his appreciation to the executive and legislative branches. He noted that the Commission was able to absorb personnel cuts due to vacancies. Director Willever stated that the Commission was able to fill these two critical vacancies, despite the hiring freeze. He indicated that the only real areas in which Commission funding has been impacted is with regard to outside legal counsel, which will not be problematic because Legal Counsel Conley never goes over budget, and out-of-state travel, which applies to all state agencies. Director Willever pointed out that the Commission incurred no outside legal counsel costs in the Irons litigation.

The next order of business was New Business. Chair Binder advised that a prior Petitioner from Block Island has requested

reconsideration of his advisory opinion and the issue has been placed on the June 2nd agenda. Staff Attorney Gramitt provided the Commission with the background regarding the issuance of the opinion at the last meeting. He informed that he had advised the Commission that the Petitioner was coming from Block Island and believed that he had information which would change the recommendation. He stated that the Petitioner did not come to the meeting and the Commission approved the draft opinion. Staff Attorney Gramitt indicated that the Petitioner has filed a written request for reconsideration and the Town Manager has submitted a letter on his behalf. He stated that he informed the Petitioner that it would be on the agenda for a type of motion. Staff Attorney Gramitt advised that the first issue would be whether the Commission wishes to reconsider the opinion. If so, the Staff will present it again.

Chair Binder inquired as to why the Petitioner did not come to the meeting. Staff Attorney Gramitt replied that the fairest way to characterize it would be a misunderstanding that the Petitioner would contact him if he could not be present. In response to Commissioner Cheit, Staff Attorney Gramitt stated that the Petitioner believes he has additional facts to present. In response to Commissioner Cerullo, Staff Attorney DeVault clarified that she had specifically asked him for those additional facts during the drafting process and he declined to provide them. Chair Binder stated that the Petitioner should be advised that the Commission wants him to provide the additional facts in writing. Commissioner Cheit expressed his concern that a

motion for reconsideration not be a motion for a do-over, as well as the fact that the Petitioner could come to the meeting and the Commission could decline to entertain his request.

Staff Attorney Gramitt stated that he will contact the Petitioner and inform him that any additional facts must be submitted in writing by the end of the week. In response to Commissioner Lynch, Staff Attorney DeVault informed that the Petitioner declined to provide the additional facts in their email communications. Commissioners Cheit and Cerullo both expressed that the Commission needs to know the reason why it should hear his request, whether it is based upon the content or the fact that the Petitioner was not at the meeting. Commissioner Heffner inquired about the difference between a motion for rehearing or reconsideration, noting that if the Petitioner does not bring forth additional facts it would be more like a rehearing. In response to Commissioner Cerullo, Staff Attorney Gramitt stated his understanding that the Petitioner did not expect his opinion to go forward in his absence.

Legal Counsel Conley cautioned the Commission against taking any action on this matter today, as it has not been so noticed on the agenda. Commissioner Lynch commented that since the Commission acted upon what the Petitioner submitted, he would almost prefer issuance of a new opinion with a new number. Commissioner Butler noted that a Petitioner's testimony colors the facts and adds depth. He stated that the Petitioner can clarify any

questions the Commission has. He suggested that if the Petitioner believes he has additional facts that are persuasive, he should get them to the Staff.

At approximately 10:36 a.m., upon motion made by Commissioner Cheit and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch
Secretary