General Commission Advisory No. 2010-1:
Historic Architects Who Are Members of Historic District Commissions

I. General Purpose

The purpose of this General Commission Advisory (GCA) is to explain a specific hardship exception to what would otherwise constitute prohibited conduct, in the case of historic architects serving on municipal Historic District Commissions. This GCA is intended to serve as a general guide for persons subject to the Code of Ethics and members of the public, but it is not intended to address the innumerable factual possibilities which may arise in this area. Persons who are uncertain as to whether specific conduct may be prohibited are strongly encouraged to seek an individual advisory opinion from the Ethics Commission or contact the Commission's offices at (401) 222-3790.

II. Representations before One's Own Agency in General

A. General Prohibitions

Pursuant to R.I. Gen. Laws § 36-14-5(e), persons subject to the Code of Ethics are prohibited from representing themselves, any other person or acting as an expert witness before any state or municipal agency of which the person is a member or by which he or she is employed. *See* R.I. Gen. Laws § 36-14-5(e)(1), (2), and (3). This prohibition extends for a period of one-year from the date the person subject to the Code severs his or her position with the state or municipal agency. *See* R.I. Gen. Laws § 36-14-5(e)(1). Under this prohibition, a person subject to the Code is also prohibited from authorizing or directing another person, such as an attorney or a spouse, to participate in the presentation of evidence or arguments before the official's agency for the purpose of influencing the judgment of the agency in his or her favor. *See* Regulation 36-14-5016(a)(2). This prohibition also extends to matters pending before an agency for which one is the appointing authority. *See* Regulation 36-14-5016(a)(3) and (b)(3). Representing others before a state or municipal agency also includes acting as an expert witness before that agency. *See* Regulation 36-14-5016(b)(2).

EXAMPLE:

> *Jackson is on the Planning Commission in Metropolis. Jackson is also an attorney in private practice. One of Jackson's private clients is coming before the Planning Commission seeking approval of a proposed master plan to develop a large tract of land in Metropolis and wants Jackson to represent her before the Planning Commission. Jackson is prohibited from representing her client before the Planning Commission pursuant to R.I. Gen. Laws §36-14-5(e).*

B. Hardship Exception

Pursuant to R.I. Gen. Laws § 36-14-5(e), the Rhode Island Ethics Commission may grant a hardship exception through the issuance of a formal advisory opinion. Officials must not presume that their circumstances constitute a hardship, as safe harbor is only provided through a formal advisory opinion.

III. Historic Architects Who are Members of Historic District Commissions

Based on information available to the Ethics Commission, it is the understanding of the Commission 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[1] and preservation. Given the small pool of individuals qualified in this area within the State of Rhode Island, it is the understanding of the Commission that recruiting such qualified persons to serve on historic district commissions, if they are thereafter prohibited from representing private clients before the commission on which they serve, would be difficult to do and would reduce the ability of historic district commissions to effectively function. Accordingly, it is the opinion of the Ethics Commission that justification exists to allow members of historic district commissions who are architects specializing in historic architecture or historic preservation to represent private clients before their own commissions under a finding of hardship pursuant to R.I. Gen. Laws § 36-14-5(e)(1).[2]

EXAMPLE:

> *Fredrickson is a member of the Metropolis Historic District Commission and is also an architect in private practice specializing in historic architecture and preservation. Currently, Fredrickson has a client in Metropolis who wants to have work done on her home that is located within the historic overlay district; such work requires that the client appear before the Metropolis Historic District Commission. The client needs Fredrickson to appear as the architect doing the work to explain the work and how it conforms to current requirements. Fredrickson may*

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[1] For the purposes of this GCA, we reference the standards promulgated by the National Park Service, as codified in the Code of Federal Regulations at 36 CFR Part 61, regarding the qualifications for an individual to be considered an historic architect. The National Park Service web site located at http://www.nps.gov/history/local-law/arch_stnds_9.htm articulates those minimum professional qualifications as: "a professional degree in architecture or a State license to practice architecture, plus one of the following: [a]t least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field; or [a]t 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." *Id.*

[2] This General Commission Advisory continues to apply the same analysis previously adopted by the Ethics Commission in General Commission Advisory No. 8: *Architect Members of State and Local Historic Preservation Commissions Appearing before Their Respective Agencies*, which was authorized by the Commission on November 30th, 1989.

represent the client before the Metropolis Historic District Commission pursuant to a finding of hardship under R.I. Gen. Laws §36-14-5(e)(1), but he must recuse from all participation in matters coming before the Historic District Commission involving this client, pursuant to R.I. Gen. Laws §36-14-5(a), (d) and (f).

IV. Topical Advisory Opinion Abstracts:

While the Ethics Commission has not yet issued any individual advisory opinions pursuant to this General Commission Advisory Opinion, the following citations are to previously issued advisory opinions that applied the predecessor to this advisory, General Commission Advisory No. 8, which addressed the same topic. However, be advised that, pursuant to Commission Regulation 1024, persons subject to the Code may not rely on advisory opinions issued to others. Additionally, individuals may not request advisory opinions regarding other peoples' conduct; accordingly, persons subject to the Code may only request an advisory relative to the provisions of the Code which may affect that individual and may not ask for one on behalf of anyone else.

Hardship Exception:

A.O. 2010-7:
Opining that a member of the Town of New Shoreham Historic District Commission ("NSHDC"), who is also an historic architect in private practice, may represent a private client before the NSHDC based on GCA No. 8, provided that he recuse from participation in all matters coming before the NSHDC concerning his client.

A.O. 99-113:
Opining that a member of the New Shoreham Historic District Commission, who was also an apprentice architect specializing in historic preservation, may represent clients before the Historic District Commission if she recuses on those matters, based on GCA No. 8.

Outside of Exception:

A.O. 99-120:
Opining that a member of the New Shoreham Historic District Commission did not fall within the exception carved out by GCA No. 8 based on the fact that he worked as a landscape architect, a profession not recognized as an exception to the prohibitions set out by state law.