August 2, 2007

Office of the Attorney General
Attn: Kathryn Sheingold, Esq.
State of New York
The Capitol
Albany, N.Y. 12224

Dear Ms. Sheingold:

This letter is being sent to the Office of the Attorney General pursuant to a resolution of the Town Board of the Town of Greenburgh.


The Code of Ethics, originally and as amended, was adopted pursuant to the New York State Constitution and two general State laws:

The NYS Constitution Article IX, Section 2(c)(ii), and Municipal Home Rule Law, Section 10(1)(l), give a town the right to adopt and amend local laws that relate to "its property, affairs or government".

The NYS Constitution, in Article IX, Section 3(c), further provides that the "[r]ights, powers, privileges and immunities granted to local governments by this article [of the Constitution] shall be liberally construed."

General Municipal Law Section 806 mandates that "the governing body of each . . . town . . . shall . . . adopt a code of ethics . . ." and further provides that, subject to the limitation that municipal ethics codes may be stricter but not more lax than the state ethics standards in General Municipal Law Article 18, "such codes may provide for the prohibition of conduct . . ."
Under the Town of Greenburgh Code of Ethics, certain conduct with respect to Town elected officials accepting gifts and contributions is restricted in the Town's governmental interest, as stated in Section 1 of the Code of Ethics, in "the public hav[ing] confidence in its government and the Public Officers, Employees and Agency Members thereof, and that those Public Officers, Employees and Agency Members avoid even the appearance of impropriety."

Under Section 4A(1) of the 1991 law, elected officials were prohibited from soliciting gifts or contributions from any appointed official or employee. Elected officials were also prohibited from soliciting gifts or contributions from any person on Town property or during regular Town business hours. Under Section 7A(1), elected officials were prohibited from soliciting contributions from a party having an application in front of the Town or a Town agency.

Under the Greenburgh Code of Ethics (both original and as amended), any proposed amendments initiated by the Town Board must be referred to the Board of Ethics for comment. In March 2007, the Town Board proposed a series of amendments to the Code of Ethics, including amendments to Sections 4A and 7A. Among other things, these amendments to Sections 4A and 7A retained the prohibition of soliciting gifts and contributions and added a prohibition against "accepting" gifts and contributions. As noted above, the amendments to Sections 4A and 7A, and other amendments, to the Greenburgh Code of Ethics were adopted by the Town Board on July 27, 2007. Elected officials are now prohibited from both soliciting or accepting gifts or contributions from (i) any appointed official or employee and (ii) from those doing business with the Town (parties with applications or contracts and their professional advisors) during a limited period of time. As stated in Section 1, the purpose is "to avoid any appearance of impropriety [by restricting] acceptance of any gift or contribution from a limited class of persons...for a limited duration." (emphasis added)

In the course of the public comments during the Board of Ethics review of the proposed amendments, it was pointed out that Informal Opinions 95-46 and 98-3 raised the issue that the AG Office might consider these provisions restricting gifts and contributions preempted by the NYS Election Law. Informal Opinions 95-46 and 98-3 are both based on the doctrine of "implied preemption." As stated Informal Opinion 98-3: "A legislative intent to preempt local legislation is evident either from a declaration of State policy by the Legislature or from a comprehensive and detailed regulatory scheme covering a particular subject. In our view, the [municipality's] proposal is preempted by State law. Article 14 of the Election Law requires reporting and disclosure of campaign receipts and expenditures and establishes individual contribution limits."

Neither the Greenburgh Board of Ethics nor the Greenburgh Town Board believes that the Election Law preempts the Town of Greenburgh's governmental interest, in the integrity of its government and the public perception of its citizens in the Town's governmental integrity, exercised under the NYS Constitution, the Municipal Home Rule Law and the General Municipal Law, in providing in its revised Code of Ethics limited "prohibition of conduct" of Town officials in the form of restrictions on elected officers accepting gifts and contributions from limited persons.

The Greenburgh Town Board would respectfully request that the AG Office consider the amendments to Sections 4A and 7A of the Greenburgh Code of Ethics; that the AG Office issue an informal opinion to the Greenburgh Town Attorney as to whether in its opinion those amendments are preempted by the Election Law; and that, in such opinion, the AG Office specifically address the following:
Implied Preemption

The Town's Legal Department has informed us that it did not find any case in New York holding that the Election Law preempts a municipality's ethics law.

The basis of both previous Informal Opinions (95-46 and 98-3) is that preemption by the Election Law is implied from its comprehensive regulatory scheme.

Neither Informal Opinion, however, cites or analyzes Section 1-102 of the Election Law. Section 1-102, which is the second provision of the Election Law, is entitled "Applicability of chapter" Section 1-102 provides:

"Where a specific provision of law exists in any other law which is inconsistent with the provisions of this chapter [Election Law], such provision shall apply unless a provision of this chapter [Election Law] specifies that such provision of this chapter [Election Law] shall apply notwithstanding any other provision of law."

It is puzzling, to say the least, as to the applicability of and the legal validity of utilizing the doctrine of implied preemption when the NYS Legislature itself specifically addressed, in the statute in question, the important topic of when, if at all, the Election Law would override other law. It is equally puzzling as to how a conclusion regarding the NYS Legislature's intent regarding the preemptive effect, if any, of the Election Law could be formed without analyzing the precise section of the law where the Legislature stated its intent.

While there are cases utilizing the doctrine of implied preemption where the Legislature is silent on the topic of preemption [e.g., Village of Nyack v. Daytop Village (no implied preemption); Hertz Corp. v. City of New York (no implied preemption); Albany Area Builders Ass'n v. Town of Guilderland (implied preemption)], the rule of the New York Court of Appeals is clear that the doctrine of implied preemption is inapplicable when the Legislature speaks on the topic -- in those cases, the analytical process to be followed by New York courts is one of statutory construction, using the statutory provision's plain meaning.

In Frew Run Gravel Products v. Town of Carroll, the Court of Appeals considered the preemptive effect of the NYS Mined Land Reclamation Law, which "establishes a detailed legislative scheme." The Court ruled that:

"The Legislature has simplified our determination of whether the Mined Land Reclamation Law preempts the provisions of the town zoning ordinance in question. Unlike preemption cases which require the court to search for indications of an implied legislative intent to preempt in the Legislature's declaration of a State policy or in the comprehensive and detailed nature of the regulatory scheme established by the statute, we deal here with an express... clause [dealing with preemption - which expressly permitted stricter local standards]."

Thus, "the appeal turns on the proper construction of this statutory provision." After directing that the statutory provision should be construed in accordance "with what appears to be its plain meaning," the Court found no preemption.

As described a few years later by the Court of Appeals in Gennatt Asphalt Products v. Town of Sardinia, "the preemption question was one of statutory construction, not a search for implied preemption, because the Legislature included within [the statute] an express [preemption] clause" which preempted "all other state and local laws relating to the extractive mining industry... except local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein."
The Greenburgh Board of Ethics and Town Board believe that a New York court, as to the question of preemption, under the controlling precedents of the Court of Appeals: (i) would not utilize the doctrine of implied preemption, even where a comprehensive regulatory scheme existed under a state statute, where the NYS Legislature itself addressed in the statute its intent as to which law controls if there should be actual inconsistency and (ii) would not conclude that the NYS Legislature intended preemption to occur with respect to the Election Law except in accordance with the plain meaning of the detailed requirements set forth by the Legislature itself in Section 1-102.

The Town Board would request that, if the AG Office believes that the doctrine of implied preemption is applicable in face of an express provision in the Election Law addressing the applicability of the Election Law vis-à-vis other laws, the AG Office please explain its legal authority and rationale for such conclusion.

Construction of Section 1-102

Section 1-102 seems to clearly state, under normal usage of words, that the Election Law would preempt another law only where (i) such other law is "inconsistent with the provisions of this chapter [Election Law]" and (ii) where "a provision of this chapter [Election Law] specifies that such provision of this chapter [Election Law] shall apply notwithstanding any other provision of law."

Thus, the Greenburgh Board of Ethics and Town Board understands that the NYS Legislature determined that:

(1) preemption of the Election Law would be on a provision-by-provision basis, and

(2) there would be a dual requirement for preemption by any particular provision of the Election Law: (i) actual inconsistency of that provision with another law and (ii) specification in the Election Law provision that it is to govern notwithstanding any other provision of law.

The Town Board would request that, if the AG Office believes that this is not the proper construction of Election Law 1-102, the AG Office please explain its legal authority and rational for such conclusion.

Application of the Election Law

Neither of the previous Informal Opinions cites any precise language in the provision of the Election Law providing for individual monetary contribution limits which even purports to satisfy the requirement set by the NYS Legislature that such provision "specifies that [it] shall apply notwithstanding any other provision of law."

Section 14-114 of the Election Law (Contributions and receipt limitations) establishes specified monetary "limitations [applicable] to all contributions for candidates for election to any public office or for nomination for any such office . . . ." In reviewing this section of the Election Law, the Greenburgh Board of Ethics and Town Board did not observe any language that would appear to attempt to specify that Section 14-114 shall apply notwithstanding any more restrictive limitation imposed by another law.

The Town Board would request that, if the AG Office believes that the individual monetary contribution limits provision of the Election Law has language that satisfies the Legislature's requirement that it "specifies that [it] shall apply notwithstanding any other provision of law", the AG Office please so identify that precise language and its location in the statute.
Harmonization

In ruling on preemption, courts consider whether the two statutes in question can be read as not being inconsistent. As stated by the Court of Appeals in Hertz v. City of New York: "Here, there is no express conflict between the State and local law." On the other hand, the Court of Appeals has found inconsistency (as in Walker v. Town of Hempstead) where a state statute "in unmistakable terms provides that no other or further notice * * * shall be required."

The text of the Election Law would seem to reinforce the need to make this analysis, for Section 1-102 specifically relates the topic of applicability of the Election Law solely to where "other law which is inconsistent with the provisions of this chapter. " The Greenburgh Board of Ethics and Town Board did not find any "and no other or further limitation" language, or similar language, in the individual monetary contribution limits provision of the Election Law.

As noted in Informal Opinion 98-3, where there is no preemption, "a local law is not inconsistent with a State law because it prohibits that which the State statute allows." No one seriously would suggest that one can make a political contribution, which was within the individual monetary contribution limits set by the Election Law, if the contribution violated an anti-bribery statute. Similarly, it is not clear to the Greenburgh Board of Ethics and Town Board why a law designed to address actual and potential corruption and the citizenry's confidence in the integrity of government is any more inconsistent with the Election Law than an anti-bribery statute.

The Town Board would request that, if the AG Office believes there is preemption (which the Board of Ethics and Town Board does not believe there is), the AG Office please provide its analysis of why there is an inconsistency between the Election Law and the Greenburgh Code of Ethics and its analysis of why an anti-bribery statute would not also be inconsistent.

On behalf of the Greenburgh Town Board, thank you for your consideration of this request.

Very truly yours,

Timothy W. Lewis
Town Attorney

TWL:app


cc: Paul J. Feiner, Town Supervisor
    Eddie Mae Barnes, Town Councilwoman
    Steve Bass, Town Councilman
    Diana Juettner, Town Councilwoman
    Francis Sheehan, Town Councilman
    Kenneth Bunting, Board of Ethics
    Bruce Jennings, Board of Ethics
    John McLaughlin, Board of Ethics
    James Robinson, Board of Ethics
    Mike Sigal, Board of Ethics