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Sent: Monday, August 03, 2009 5:27 PM
To: Paul Feiner; Town Board
Cc: Townclerk; Jackmc1@optonline.net; wr@espinosa-law.com; Scott, Eric; David Fried; glnnpeisen@gmail.com; Jebelkin@aol.com
Subject: Report of the Board of Ethics on Gifts to the Town

TO: Greenburgh Town Board
CC: Greenburgh Town Clerk

Board of Ethics Report Regarding Accepting Gifts to or for the benefit of the Town of Greenburgh

I. Background

In July 2009, the Board of Ethics received several email inquiries from the Town Supervisor regarding acceptance by the Town Board of gifts to the Town. The situation described in the Supervisor’s emails had three salient features: (1) there was no solicitation (“we have not reached out to [the potential donor] for donations”), (2) the potential donor does not appear to be a present applicant seeking an approval or permit from the Town (“the company is planning to relocate to the town”); and (3) the acceptance would be by the Town Board, a public body which (except in rare instances) acts in open meetings after an opportunity for residents to comment (“Town Board should be able to accept”). Additionally, the Supervisor forwarded to the Board of Ethics an email inquiry from President of the Library Board of Trustees regarding gifts to the Library.

The Board of Ethics is appreciative of the Supervisor’s inquiries and, because of the importance of the issue of gifts to or for the benefit of the Town, is issuing this Report pursuant to Section 11H of the Code of Ethics which provides that “the Board of Ethics shall have the power and authority, in its discretion, to render reports and recommendations to the Town Board for appropriate action respecting unethical practices in violation of this chapter or any statute, rule or regulation relating to conflicts of interest, ethical conduct and interests of public officers and employees in contacts.”

Based on and subject to the discussion below, the Board of Ethics concludes:

(1) Any official action of the Town Board which culminates in the acceptance of a gift to or for the benefit of the Town at a meeting conducted pursuant to and in accordance with the requirements of the NYS Open Meeting Law does not violate either NYS or Town ethical laws, if the public has a reasonable opportunity to comment on the proposed gift. No statutory action is needed.

(2) If and to the extent the Library Board of Trustees is authorized by statute to accept gifts, any official action of the Library Board which culminates in the acceptance of a gift to the Library at a meeting conducted pursuant to and in accordance with the requirements of the NYS Open Meeting Law does not violate either NYS or Town ethical laws, if the public has a reasonable opportunity to comment on the proposed gift. No statutory action is needed if the Library Board is already authorized to accept gifts.

These conclusions must be read in conjunction with the discussion below, including Part IV “Comments on Limitations of the Scope of this Report”.

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II. Framework of State and Town Statutes and Rules

The Board of Ethics, pursuant to Section 11D and H of the Code of Ethics, issues findings, opinions and reports with respect to both New York State and Town ethical laws. Both are discussed in this Report. Also discussed are relevant opinions and guidelines of (i) the New York State Attorney General and (ii) the New York State Commission on Public Integrity and its predecessor, the New York State Ethics Commission.

**New York State Laws**

NYS law (Section 806(1)(a) of Article 18 of the NYS General Municipal Law) states that local municipal codes of ethics “may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited.” Thus, a town in the State of New York may have a stricter, but cannot have laxer, ethical standards than provided under NYS law.

NYS law (Section 64(8) of the NYS Town Law) permits a town board, subject to law, to accept gifts on behalf of a town: "Subject to law and the provisions of this chapter, the town board of every town . . . 8. [m]ay take by gift . . . [r]eal and personal property . . . for any public use, upon such terms or conditions as may be prescribed by the grantor or donor and accepted by said town . . . "

NYS law (Section 805-a(1) of Article 18 of the NYS General Municipal Law) provides that no municipal officer can directly or indirectly either solicit a gift; or accept a gift of $75 or more, under circumstances where there could be a reasonable inference of influence or reward. A similar prohibition applies to state officers pursuant to Public Officers Law Section 75(5).

There is authority for the proposition that “the term ‘gifts’ [in NYS ethical statutes] was intended to be read broadly.” NY Attorney General Informal Opinion 2005-10 (April 12, 2005).

**Town of Greenburgh Laws**

Greenburgh’s Code of Ethics Section 4A(2) prohibits any public officer from directly or indirectly soliciting or accepting any gift under circumstances where there could be a reasonable inference of influence or reward.

Section 4A(1) of the Code of Ethics sets forth a number of per se "prohibited acts". Subsection (a) prohibits gifts to be solicited or accepted on Town property, but exempts from this per se prohibition gifts for and on behalf of the Town. This exemption would permit, for example, the Town Board to accept a gift on Town property pursuant to its authority under Town Law Section 64(8).

**NYS Ethical Rulings**

In New York, authorizations for governmental entities to accept gifts are not absolute. They must be read “in light of [ethical laws] to determine whether a violation of those ethical provisions could occur from such acceptance.” New York State Ethics Commission, Opinion 92-1 (Feb. 6, 1992) (gift to "Farm Products Publicity Fund" of the Dept. of Agriculture and Markets supporting its Seal of Quality program); see also, New York State Ethics Commission, Opinion 95-36 (Dec. 19, 1995) (same) (gift to Dept. of Environmental Conservation). These opinions of the New York State Ethics Commission were reaffirmed by the New York State Commission on Public Integrity in its “Guidelines Concerning the Propriety of a State Agency Accepting Gifts” (Feb. 3, 2009).

The NYS Ethics Commission also considered gifts to the Consumer Protection Board, whose duties are to conduct studies and analysis of matters affecting consumers, participate in administrative and regulatory proceedings affecting consumers, and advise and make recommendations to the Governor on matters affecting consumers. The CPB does not itself issue approvals or permits. The State’s Ethics Commission held that the CPB could not accept gifts from any entity in litigation with it or subject to proceedings conducted by it.

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Acceptance of gifts from other entities "must be examined on a case-by-case basis, and the source, timing and amount should be carefully considered." New York State Ethics Commission, Opinion 97-6 (Mar. 17, 1997). This opinion was also reaffirmed by the New York State Commission on Public Integrity.

III. Analysis and Conclusions

A. **Town Board**

NYS law authorizes a town board, subject to law, to accept gifts of real and personal property for any public use upon such terms and conditions accepted by the town board. This authorization is expressly made "subject to law", and thus is subject to ethical standards.

Unlike actions to accept gifts in the ethical opinions cited above, acceptance of gifts by the Town Board would occur only as an official action of the Town Board voted on at a Town Board meeting. Meetings of the Town Board are held under the Open Meetings Law (Art. 7 of the NYS Public Officers Law), which has a number of safeguards to protect the public. These safeguards include: notice of the meeting, publication of a written agenda, attendance by the public, and a requirement that (with a few exceptions not relevant here) final formal action be taken in public.

The public is the principal beneficiary of the state and local ethics laws, and if the public has a reasonable opportunity to comment on the proposed gift, that provides an additional safeguard. If the public has a reasonable opportunity to comment on the proposed gift, then the Town Board, as an official public body elected by the public and authorized by State law to act on behalf of the public, can then make an informed decision as to whether to accept the gift.

The Board of Ethics thus concludes that any official action of the Town Board which culminates in the acceptance of a gift to or for the benefit of the Town at a meeting conducted pursuant to and in accordance with the requirements of the NYS Open Meeting Law does not violate either NYS or Town ethical laws, if the public has a reasonable opportunity to comment on the proposed gift. In response to the inquiry from the Town Supervisor, the Board of Ethics does not believe that any statutory change is needed, but does believe that the procedures of the Town Board must assure that the public has a reasonable opportunity to make comments on proposed gifts.

The Board of Ethics recognizes that the amount of information regarding a proposed gift and the amount of public discussion that would be appropriate could vary from gift to gift, and thus there can be no one-size-fits-all answer. It would assist informed public comment if the meeting agenda stated relevant facts, such as the proposed donor, the amount of the proposed gift (or equivalent information if the gift is not purely monetary), and (if applicable) whether the proposed donor was in litigation with the Town, or was a lobbyist, or was seeking an approval or permit from the Town. The Board of Ethics believes that with respect to proposed gifts where the proposed donor was in litigation with the Town, was a lobbyist or was seeking an approval or permit from the Town that the public should be able to address the issue of acceptance of the gift as a separate matter (and not be required to bundle comments on the gift with other agenda items). Additionally, the Town Board may, if it wishes, refer any sensitive proposed gift to the Board of Ethics for an advisory opinion which the Town Board could also consider in making its decision.

B. **Library Board**

Public libraries are included within the definition of those municipal entities covered by the NYS ethics laws applicable to municipalities. See General Municipal Law Section 800(4). Similarly, the Library Board is included within the definition of "agency" in the Town's Code of Ethics. See Section 3.

If the Education Law applies to the Library Board, Section 260-5 provides that meetings of library boards of trustees "shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law [the Open Meetings Law]." If the Library Board is a municipal agency not covered by the Education Law, it would still be required to operate under the Open Meetings Law, as do all public bodies of a
New York State municipality.

By analogy to official actions by the Town Board and also because the Library Board is not an agency involved in issuing approvals and permits (other than library cards), the Board of Ethics concludes that, if and to the extent the Library Board is authorized by statute to accept gifts, any official action of the Library Board which culminates in the acceptance of a gift to the Library at a meeting conducted pursuant to and in accordance with the requirements of the NYS Open Meeting Law does not violate either NYS or Town ethical laws, if the public has a reasonable opportunity to comment on the proposed gift. In response to the inquiry from the President of the Library Board of Trustees forwarded by the Town Supervisor, the Board of Ethics does not believe that any statutory change is needed if the Library Board is already authorized to accept gifts.

Many libraries have "Friends of the Library" organizations to support its work and some also utilize a "Foundation" to solicit contributions. Neither friends of libraries organizations or library foundations re specifically listed within the State’s definition of entities covered by the State's ethical laws or Town's Code of Ethics' definition of agencies, and the Board of Ethics expresses no opinion in this Report as to whether such adjunct organizations and foundations are covered by the State or Town ethics laws in their respective activities. But, regardless of whether the activities of adjunct organizations and foundations are covered by the State's ethics laws and the Town’s Code of Ethics, the ultimate transaction whereby a gift was transferred from one of those organizations/foundations to the Library would be a matter covered by the Code of Ethics and the above conclusion of the Board of Ethics would apply to how that gift was accepted by the Library Board. As is the case with the Town Board, if a particularly sensitive issue arose, the Library Board could request an advisory opinion from the Board of Ethics.

The Board of Ethics is addressing in this Report solely the issue of ethical standards applicable to acceptance of gifts by the Library Board of Trustees. No opinion is expressed in this Report as to (i) any other issue regarding activities of the Library or (ii) whether the Town Board is also required to accept gifts to the Library, but if so the above standards in Part III A would be applicable to actions of the Town Board.

IV. Comments on Limitations of the Scope of this Report

The Board of Ethics believes that application of ethical standards is, in many instances, contextual, causing ethical advice as to future actions difficult to give in the abstract. Thus, the principles in this Report are only applicable to a municipal body (i) which is authorized by law to accept gifts, (ii) which operates under and in accordance with the Open Meeting Law, and (iii) which gives the public a reasonable opportunity to comment on proposed gifts.

Moreover, this Report assumes that there is no extrinsic facts relevant to a gift to the town, such as for example a non-disclosed payment to or for the benefit of a member of the Town Board. If so, the above analysis of ethical issues may be complete and could lead to a different conclusion in the context of a particular gift.

Also, this Report does not address acceptance of gifts to or for the benefit of the Town by (i) a municipal body which is not authorized by law to accept gifts, which does not operate under and in accordance with the Open Meeting Law, and which does not give the public a reasonable opportunity to comment on proposed gifts, or (ii) a public officer purporting to act for the Town or a Town body. The Board of Ethics notes the rules of the NYS Commission on Public Integrity on a state agency accepting gifts, supra, since local ethical standards cannot be laxer than state rules: (A) "First, it is necessary to determine whether the agency has the statutory authority to accept gifts." (B) "Second, if the agency has the requisite statutory authority to accept gifts, . . . gifts from regulated persons and entities must be tempered by consideration of Public Officers Law Section 73 (5) [whose provisions are substantially equivalent to General Municipal Law Section 805-a(1) and Greenburgh Code of Ethics Section 4A(2)] which precludes accepting gifts under certain circumstances. [I]t may be reasonable to infer that a gift from [certain] potential donors, such as lobbyists or applicants for permits or licenses, is intended to influence an action or decision of the State agency . . . ." 

Further, this Report does not address personal gifts to or for the benefit of a public officer.
V. Additional Comments for Consideration by the Town Board Regarding Town Agency Acceptance of Gifts

The Board of Ethics has not researched, and does not express any opinion in this Report as to, which agencies of the Town (if any) are authorized to accept gifts by themselves.

The Board of Ethics has the following general observations regarding ethical standards if the Town Board has the authority to authorize municipal agencies to accept gifts and wishes to do so. As a general matter, the Board of Ethics sees a distinction between governmental agencies which are regularly involved in issuing approvals or permits and those agencies which are not. There would appear to be less ethical issues that would arise with respect to the latter category of agencies accepting gifts. However, the Board of Ethics recognizes, as pointed out in the rules of the NYS Commission on Public Integrity, that gifts from a donor to a governmental agency which may normally raise no ethical issues may raise ethical issues under particular factual circumstances, and thus no agency would in all circumstances be free of potential ethical issues. If the Town Board has the authority to authorize municipal agencies to accept gifts and wishes to do so with respect to particular municipal agencies, the Board of Ethics believes that at a minimum the guidelines of the NYS Commission on Public Integrity would apply since municipal ethical standards cannot be laxer than state ethical standards.

BY THE BOARD OF ETHICS
Adopted at July 29, 2009 Meeting
Voting For: Mr. McLaughlin
Mr. Rivera
Mr. Scott
Mr. Sigal

8/4/2009