Draft

The following is a draft response by the Board of Ethics to the Town Board’s proposed changes to the Code of Ethics. It is posted for public review prior to the Board of Ethics meeting on October 19, 2011. The Town Board proposal may be accessed through the minutes to the Town Board’s special meeting of August 2, 2011 or at the following website:


REPORT TO GREENBURGH TOWN BOARD
RE AMENDMENTS TO CODE OF ETHICS
REFERRED TO BOARD OF ETHICS
ON SEPTEMBER 14, 2011

The Code of Ethics provides in Section 570-11G that: “The Board of Ethics may make recommendations to the Town Board with respect to the amendment of this Code of Ethics. No amendment initiated by the Town Board shall be adopted by the Town Board without affording the Board of Ethics at least 30 days to consider the Town Board’s amendment.”

The Town’s Code of Ethics underwent a massive statutory change in July 2007. The Board of Ethics, in September 2009 after a year of study, proposed to the Town Board technical amendments to the Code of Ethics. Some members of the Town Board indicated that they wished to make substantive changes to the Code of Ethics, and between November 2009 and October 2010, a Subcommittee of the Board of Ethics and a Subcommittee of the Town Board met and worked on proposed amendments, both technical and substantive, to the Code of Ethics. Since October 2010, the Town Board worked alone on changes.

On September 14, 2011, the Town Board referred to the Board of Ethics proposed amendments to the Code of Ethics. (A copy of the proposed amendments can be found on the Town website, under Town Board resolutions associated with the August 2 special meeting.) The Board of Ethics requested and received a 60 day extension of time to consider and report to the Town Board. The Board of Ethics prepared and published a draft of this Report prior to its October 19, 2011 meeting and received public comments at the meeting.

From time to time the Board of Ethics Subcommittee gave reports to the whole Board of Ethics as to the framework of the discussions with the Town Board Subcommittee, and drafts were presented and made public on the Board of Ethics page on the Town website. Most of the proposed changes are within the framework of discussions between the Board of Ethics Subcommittee and the Town Board Subcommittee.

Recommendations

I.
The Board of Ethics concurs with the proposed amendments to the Code of Ethics in the September 14 referral, except as stated in this Report:

A. Section 570-3 Applicant

The term Applicant in Section 3 is a key concept in the Code of Ethics, as political contributions by applicants are restricted. The term has been redefined by the Town Board in the proposed amendments to exclude anyone seeking “ministerial licenses and permits, including those listed in Appendix B.”

The Board of Ethics supports a listing of excluded licenses and permits which would not normally be a grounds for anyone to make a political contribution (and thus the applying party is not an “Applicant” for Code of Ethics purposes), but believes that the list should be complete, self-contained and objective.

Town officials and applicants should be able to look at the list and make a determination. The Board of Ethics does not believe that the exclusion should be structured to be “including, but not limited to, the following;” (emphasis added). The listing should be complete and self-contained.

Also, the exclusion should not be based on the concept of what is “ministerial.” A definition of ministerial in the New York Codes, Rules and Regulations is: “Ministerial acts means an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license.” (emphasis added).

To achieve the goal of a clear below-the-radar exclusion, the Board of Ethics recommends that clause (i) of the new exclusion in the definition of Applicant read: “With respect to certificates, licenses and permits listed in Appendix B.” and that the title of Appendix B read “Certificates, Licenses and Permits Excluded from the Determination of an Applicant”.

Among the excluded licenses and permits listed in Proposed Appendix B are: “Blasting Permit” and “Steep Slope Permit”. The Board of Ethics does not believe that blasting permits and steep slope permits are in all cases devoid of the exercise of “any judgment or discretion as to the propriety of the act,” and they should not be excluded items. Further, in Greenburgh steep slope permits are subject to approval by the Planning Board and their inclusion on the list would be inconsistent with the intent to exclude from the list building approvals which have to go to one of the Town’s land use boards.

In the future, the Town Board may add or subtract from the list as circumstances warrant. For example, if a new type of certificate, license or permit is added to the Greenburgh Town Code, the Town Board would include in the authorizing resolution whether or not it should be on the list. We recommend that a proviso clause with the following or equivalent wording be added at the end of the second sentence of Section 11G: “. . ., provided, however, that deletions to Appendix B need not be referred to the Board of Ethics and additions to Appendix B need not be referred to the Board of Ethics if, when a new certificate, license or permit is established by the Town Board, the resolution states that it would be listed as an excluded certificate, license or permit on Appendix B of the Code of Ethics.”

B. Section 570-4 Gifts to the Town

Proposed 4A (2) provides that gifts to the Town shall be permitted if approved by the Town Board within 30 days of receipt. The Board of Ethics agrees that gifts to the Town must be accepted by the Town Board, but believes that: (i) the public must be given appropriate notice (including whether the proposed donor is an applicant or in litigation with the Town), (ii) the public must be given a reasonable
opportunity to address the Town Board with regard to accepting the proposed gift, and (iii) whether or not to accept the gift should be addressed by the Town Board prior to accepting the gift, unless the Town Board finds that particular circumstances make that unfeasible.

C. Section 570-2 Applicability of other laws

The proposed Section 2 contains a new role and duty for the Board of Ethics which, we believe, is unprecedented and impractical. Moreover, the Board of Ethics is not supported with staff or funded to carry out this proposed additional role and duty.

Section 806 of Article 18 of the General Municipal Law authorizes municipalities to establish local codes of ethics. Such codes may regulate or prescribe conduct of municipal officers and employees which is not expressly prohibited by Article 18 but may not authorize conduct otherwise prohibited. Since 1991, the Town’s ethics code has provided that Town officials are also subject, in addition to the town’s municipal ethics law, any higher standards provided by other law, regulation or judicial decision.

Proposed Section 2 would add a requirement that the Board of Ethics issue advisory notices of all other such laws, rules, regulations and judicial decisions relating to conflicts of interest, ethical conduct, and interest of Town officials which are more severe or restrictive in their application than the Town’s Code of Ethics.

Based on research conducted by the Board of Ethics, it would be unprecedented for a board of ethics to issue preemptory “advisory notices” as to all potentially applicable ethical standards. In addition, for the most part, ethics are contextual. It is impractical for a board of ethics to be able to predict, in the abstract out of a specific factual context, what actions a Town official may take as to which they should be notified to be careful about running afoul of ethical matters.

There is a well-established and workable procedure (both in general and in the Town’s Code of Ethics in particular) to provide advance advice to governmental officials -- namely, the advisory opinion procedure. The Code of Ethics (Section 11D) provides that the Town Board, or any official, may seek an advisory opinion as to a future act. Since 2007, the Board of Ethics has received requests for, and issued, over 20 advisory opinions. These were issued normally within a month of receipt, and, in some instances, the Board of Ethics has given informal advice when circumstances necessitated prior to the next meeting at which official actions could be taken. The advisory opinion procedure is founded in Section 808 of Article 18 of General Municipal Law which provides, in part, that a local board of ethics shall render advisory opinions to officers and employees of municipalities with respect to Article 18 and any code of ethics adopted pursuant hereto. Such advisory opinions shall be rendered pursuant to the written request (emphasis added) of any such officer or employee under such rules and regulations as the board may prescribe and shall have the advice of counsel employed by the board, or if none, the [municipality’s] attorney.

We recommend that the proposed words “be made known to Public Officers, Employees and Agency Members through advisory notices issued by the Board of Ethics and, thereafter, through training conducted by the Town Attorney’s office and...Referral” be deleted.

D. Section 570-10 F Promulgation of Code of Ethics

Since 2007, Section 10F of the present Code of Ethics has provided that it is the responsibility of the Office of the Town Attorney to develop ethics training materials and conduct ethics training programs. Proposed Section 10F shifts the responsibility for developing training materials to the Board of Ethics. While it is not unprecedented for a municipal board of ethics to be responsible for ethics training, such responsibility occurs either in cases in which the municipality is small and the code of ethics
is relatively simple or in cases in which the board of ethics is provided with the resources to carry out such a responsibility. In Greenburgh, the Board of Ethics is not supported with staff or funded to carry out this proposed additional role and duty. The Board of Ethics has no staff to support its work. The Town Board, though requested to do so, has never authorized a budget for the Board of Ethics. As a consequence, the citizen volunteers on the Board of Ethics have no staff support or budget to develop training materials.

Ethics training is important, and ethics training materials should be developed and ethics training should be conducted. The New York State Comptroller’s 2010 Audit of Greenburgh identified the lack of required ethics training. If the Town Board wishes the Board of Ethics to develop ethics training materials, it would be necessary for the Town Board to either (a) furnish a staff to the Board of Ethics with the appropriate time and skills to accomplish the task or (b) authorize a budget for the Board of Ethics appropriate to fund the task. If the Town Board does not furnish an appropriate staff or budget to the Board of Ethics to develop ethics training materials, the Town Board should ensure that paid members of the staff employed by the Town perform their assigned task of developing ethics training materials. The Board of Ethics is prepared to advise and assist the Town in developing training materials.

We recommend that Section 10 F. be revised to read:

“The Town Attorney’s Office, with the advice and assistance of the Board of Ethics, shall develop Code of Ethics training materials, and the Town Attorney’s Office shall develop training programs based on those materials with respect to the Code of Ethics. Each person who is required to file financial disclosure statements under § 570-8 (other than Local Political Party Officials and Candidates) shall be required to attend a Code of Ethics training program conducted by the Town Attorney’s Office at least once every three years."

E. Section 570-9 Penalties

The Town Board’s proposed amendments do not address the changes in Section 9 which were proposed by the Board of Ethics dealing with, among other things, (i) maximum fine, (ii) the authority to impose penalties, and (iii) the procedures for appeal. We recommend that Section 9 be retitled “Penalties and remedies for code violations and right of appeal” and that the wording set forth in Exhibit A be adopted.

The maximum fine contained in the current Code of Ethics is $250. The maximum fine which has been in place since 1991 was not increased in 2007 when the current Code of Ethics was adopted. We believe that this fine is insufficient in view of the overall intent of the Town’s Code of Ethics, the cost and effort of conducting investigations under the citizen complaint procedure and in comparison to other municipalities which have robust Codes of Ethics. For example the maximum fine in the Village of Mamaroneck is $1,500 and the maximum fine in the City of Yonkers is $10,000.

The maximum fine does not reflect the effect of inflation on economic value and relative to other government services and taxes. An examination of the percentage increase in property taxes to the average homeowner since 1991 would be indicative of how out-of-date the 1991 figure is.

In municipalities with a robust Codes of Ethics, the Board of Ethics should have the authority to require the return of improperly solicited or accepted political contributions and to impose provisional fines. To address the concern that the Board of Ethics may act unfairly, the proposed language builds in certain safeguards including authorizing the Town Board to overturn or reduce any fine assessed, and including the Town Court as part of the appeal process.

F. Section 570-12 Cooperation with Board
The Town Board’s proposed amendments eliminate the section on threats against the Board of Ethics and its members previously proposed by the Board of Ethics. We believe that it is in the public interest of maintaining an ethical climate that town citizens who are members of the Board of Ethics not be subject to threats when carrying out their responsibilities.

We recommend that the following wording be added to the Code of Ethics Section 570-12: “No Public Officer, Employee or Agency Member shall take or initiate, threaten or attempt to take or initiate, or induce or attempt to induce any other person to take, initiate or threaten or attempt to take or initiate a detrimental action against any member of the Board of Ethics by virtue of any Board of Ethics investigation or action that the member has taken or may take, except for any legal filing permitted by law or a written request for recusal filed with the Board of Ethics”.

II.

Below are what appear to be technical drafting issues in the referred amendments:

- Section 570-7 E. In the second sentence, place a period after the wording “... this Code of Ethics”. Prior to the wording “be updated by the first...” in the current second sentence (which will become the third sentence) add the wording “The Town Board shall cause such list to ....”

- Section 570-10 C. Add “d” at the end of the word “reference”.

GREENBURGH BOARD OF ETHICS
Adopted at October 19, 2011 Meeting
Voting for: Mr.
Mr.
Mr.
Mr.
Mr.

Exhibit A  § 570-9 Penalties and remedies for code violations and right of appeal

A. The Board of Ethics is empowered, if it finds in an opinion or report, that this Code of Ethics or Article 18 of the General Municipal Law has been violated:

(1) to require the return of improperly solicited or received political contributions or gifts, or the value thereof, and may include interest thereon;

(2) to provisionally assess civil fines of not more than $1,000 per violation, which provisional assessment shall become a final assessment of a civil fine payable to the Town unless overturned or reduced by a resolution of the Town Board within 45 days after the Town Board is notified in writing of the provisional assessment;

(3) to exercise all powers permitted under state law; to impose any other procedural, referral or remedial action which the Board of Ethics deems appropriate under the circumstances; and

(4) to recommend to the Town Board forfeiture of pay, suspension, demotion or removal from office or employment pursuant to the procedures set forth in Article 75 of the Civil Service Law and Article 3 of the Public Officers Law or such other disciplinary action as the Board of Ethics deems appropriate.
B. Any person aggrieved by a decision of the Board of Ethics or Town Board relating to a decision under the Code of Ethics may appeal the decision to the three justices of the Town Court and/or may seek judicial review and relief pursuant to Article 78 of the New York State Civil Practice Law and Rules. The Board of Ethics shall be a party to any appeal of a decision of the Board of Ethics to at least two justices of the Town Court or any Article 78 proceeding. The Town Board shall be a party to any appeal of a decision of the Town Board to at least two justices of the Town Court or any Article 78 proceeding.

C. [Renumber existing Section 570-9 B to become Section 570-9 C]

D. [existing Section 570-9 D remains as Section 570-9 D]