

TO: Commissioner Thomas Madden

Mr. Hal Samis

CC: Greenburgh Town Board

Greenburgh Town Clerk

OPINION 2011- 4

Complaint and Background to this Opinion

This matter arises out of an ethics complaint brought by Hal Samis through emails commencing on March 26, 2008 and verified on November 18, 2008. Mr. Samis' complaint centered on the alleged solicitation and/ or acceptance of refreshments provided by Westchester BMW for the Town's Comprehensive Plan Committee kick off and neighborhood meetings.

On May 8, 2009 Mr. Samis amended his complaint limiting the scope of the complaint to Town Board member Francis Sheehan and Town Planning Commissioner Thomas Madden.

On September 7, 2010 Mr. Samis orally amended the complaint limiting its scope to Commissioner Madden at the Board of Ethics meeting and confirmed the amendment by email.

The Board of Ethics conducted a Phase 1 investigation, involving review of documents (emails to and from Mr. Sheehan and Mr. Madden, and minutes of the Comprehensive Plan Committee and the Town Board), answers to interrogatories to Mr. Sheehan, Mr. Madden and a third party, building department files pertaining to the corporate donor, and grievance complaints filed with the Town's board of assessment review and tax certiorari petitions filed in NYS Supreme Court seeking tax reductions for the corporate donor. Unable to conclude that Mr. Madden had not violated the Code of Ethics, the Board of Ethics commenced without prejudice a Phase 2 investigation. The Town Board then adopted the resolution discussed below.

Conclusion

For the reasons set forth below, and without reaching the ultimate issue of whether or not there has been a violation of the Code of Ethics, the Board of Ethics concludes that absent an indication by the Town Board that the resolution was not intended to absolve any solicitation by Mr. Madden, and their specific ratification of the acceptance of the donations, the Town Board resolution, or pardon, is an intervening cause rendering moot the issue in controversy and preventing any further action by the BOE.

Relevant sections of the Code of Ethics and New York State Law

§570-4A (2) states: “No Public Officer, Employee or Agency Member shall, directly or indirectly, solicit, accept, receive any gift or item of personal property ... or in any other form, under circumstances in which it could reasonably be inferred that the gift or item ... was intended to influence her/him in the performance of her/his official duties; could reasonably be expected to influence her/him in the performance of her/his official duties; or was intended as a reward for any official action on her/his part.” NYS General Municipal Law 805-a1 is similar.

There is nothing in these sections which limits their scope to gifts received by a Town official. In addition to receipt, these sections specifically proscribe solicitation and acceptance. For example, a member of the Town Board could not claim non-violation of this section for a gift solicited to his/her church or temple or to a favorite charity. The fact that the gifts in question were not received by Mr. Madden for his personal use does not preclude application of these ethical standards.

Board of Ethics Investigation

At the BOE meeting of May 19th, 2009 a Phase 1 investigation commenced and Section 12 document requests were authorized.

On July 7, 2009 responses to the document requests were received from Mr. Madden and Mr. Sheehan.

On September 17, 2009 the BOE received Building Commissioner Lucido’s response to inquiries made of him as to files in the possession of the building dept.

On October 20, 2009, responses were received from Mr. Madden and Mr. Sheehan as to inquiries made of them.

On October 21 and 26, 2009, responses were received from David Fried, First Deputy Town Attorney, regarding grievances before the Town’s board of assessment review and tax certiorari petitions.

On September 2, 2010 the BOE received Mr. Madden’s and Mr. Sheehan’s follow up responses to further inquiries made of them.

On October 15, 2010 the BOE received a response from a third party not employed or affiliated with the Town.

Also, as part of its investigation the BOE reviewed the minutes of the Greenburgh Town Board and the Comprehensive Plan Steering Committee, exchanges of emails to and from Mr. Sheehan and Mr. Madden, records of the Building Department, records of the Board of Assessment

Review and certiorari petitions filed with the NYS Supreme Court, as well as the responses referred to above and the documents submitted with those responses.

TAX REDUCTION LITIGATION

Westchester BMW filed tax grievance petitions with the Town's Board of Assessment Review for the years 2006, 2007, 2008 and 2009. The first two of these had been filed by the time of the donation of refreshments. Additionally Westchester BMW had filed tax certiorari petitions with the NYS Supreme Court for each of these years seeking tax reductions from the Town. The first two of these were in litigation at the time of the donation of refreshments.

CPSC MINUTES

On January 7, 2008 the Comprehensive Plan Steering Committee (CPSC) held its first meeting. Mr. Sheehan was present but Mr. Madden was not. The minutes indicate Refreshments for the neighborhood meetings were discussed. *"Town will fund/coordinate (light refreshments)"*

On January 22, 2008 the CPSC met. Mr. Sheehan and Mr. Madden were both present. The minutes include the following statement: *"Ask the Town Board who will fund refreshments at neighborhood meetings;"*

On February 26, 2008 the CPSC met. Mr. Sheehan and Mr. Madden were present. The minutes contained no mention of refreshments but did note that "Flyer for the March 8, 2008 kickoff meeting to be revised and mailed..." A copy of the revised flyer is stated to be attached, but was not accessible on the Committee's website

Copies of the flyers were produced in response to the BOE document request. The flyer for each meeting includes a notation that *"Refreshments will be served"*.

GREENBURGH TOWN BOARD

In the January 22 and 29, 2008 work sessions summaries reference is made to the March 8 kick off meeting. No mention was made of refreshments.

In the February 13 and February 27, 2008 Town Board minutes the March 8 kick off and the East Irvington neighborhood meetings were discussed but no mention of refreshments was noted.

In the March 12, 2008 Town Board minutes, the Hartsdale neighborhood meeting was noted but no mention of refreshments was noted.

At the March 26, 2008 Town Board meeting, the Edgemont neighborhood meeting was noted and the fact that refreshments were to be served. At this point, the kickoff meeting and the neighborhood meetings in East Irvington and Hartsdale had been held.

At the April 9, 2008 Town Board meeting the CPSC neighborhood meetings were noted with the comment that refreshments were to be served at three of the meetings.

EMAILS

On January 31, 2008 Danny Gold sent an email to Mr. Sheehan, among others, stating that the East Irvington Civic Association will be happy to sponsor the East Irvington meeting.

On February 19, 2008 Mr. Madden sent an email to Mr. Sheehan, among others, advising that *“Ray Catena has offered to supply the refreshments for the Comp Plan kick off meeting on March 8th.”*

On March 6, 2008 Mr. Madden sent an email to Jeff Rubin of Westchester BMW, thanking Rubin for offering to sponsor the refreshments for the neighborhood meetings. The email provided a list of the meetings. There was also the following: *“As we discussed, the Town is expecting approximately 100 people to each meeting. Please get back to me on which meetings you would like to sponsor”*

On March 6th Mr. Rubin replied to Mr. Madden with the list of meetings BMW wished to sponsor and Mr. Madden responded: *“We would be happy to mark you down for those dates. I will send you further information on the location of the meetings so we can coordinate the deliver[sic] and set up at each venue.”*

On March 22, 2008 the Town sent a global email regarding the March 25, 2008 meeting and advised that *“Refreshments will be served”*

THOMAS MADDEN RESPONSES

Mr. Madden states he had informed approximately 50 businesses that the town was undertaking the comprehensive plan and that the Town would like to hear from the business sector. The businesses were selected from the Tax assessor’s database of property owners. Mr. Madden states that the businesses were informed *“through kick off flyers”*. As noted above, these flyers appear to have gone out by mail after the February 26, 2008 CPSC meeting, and as also noted above there is email evidence that a week before, on February 19, 2008, the corporate donor had already offered to supply refreshments.

Mr. Madden states he received a call from Mr. Rubin asking if he (Rubin/BMW) could provide refreshments for the meeting. Mr. Madden does not recall the details of the discussion. Mr. Madden emailed him a list of dates. Mr. Rubin chose dates to provide refreshments and Mr. Madden emailed him back thanking him.

Mr. Madden denies *“accepting the offers”* of refreshments.

Mr. Madden denies asking or soliciting any person or entity to sponsor or provide refreshments.

Mr. Madden does not know how the refreshments were delivered to the meetings or how much they cost. He states he only provided the dates times and places of the meetings.

Mr. Maddens states that he discussed the CPSC meetings and the issue of refreshments with the Town Board at the February 27, 2008 Town Board meeting. This is not reflected in the Town Board minutes of that meeting.

Mr. Madden states that he discussed the issue of refreshments at the CPSC meeting on February 26, 2008. The minutes of that meeting contain a discussion of numerous issues under “Public Outreach” and the “March 8, 2008 Comprehensive Plan Kickoff Meeting”, but no specific mention is made regarding refreshments.

THIRD PARTY RESPONSE

The third party who responded to our questionnaire had no recollection of any of the details surrounding the sponsorship of any of the CPSC meetings.

Greenburgh Town Board Resolution

On December 15, 2010 the Town Board passed a resolution which *“ratifies and approves the donation of refreshments at Town Comprehensive Plan Steering Committee meetings March 8th thru June 24th, 2008, acknowledging that the refreshments were provided to the public with the implied consent of the Town Board for a town purpose by Ray Catena Lexus, Westchester BMW NA, East Irvington Civic Association, Councilman Francis Sheehan and Commissioner Thomas Madden for the town purpose of having food available for the public at publicly held Comprehensive Plan visioning meetings sponsored by the Town of Greenburgh during this period.”*

Upon learning of the resolution the BOE determined that, although the resolution addressed the issue of the acceptance of the donations in question, it was silent regarding the possible solicitation of those donations which independently of acceptance could be a violation of Section 4A(2). The BOE requested clarification from the Town Board by emails on February 1, and February 9, 2011. Although a response was received from Town Supervisor Paul Feiner on February 1, his personal response did not address all of the questions posed and did not speak for the Town Board. A third email request was sent to the Town Board on March 14, 2011 specifically addressing the solicitation issue. The email stated that if a response was not received from the Town Board by April 5, 2011 the BOE would assumed that the Town Board resolution was intended to absolve any solicitation that may have occurred, including any solicitation of any business with litigation with or applications pending before the Town. No response was received by the BOE.

Opinion

Mr. Samis' complaint is comprised of a series of emails to the Greenburgh Town Board and the Board of Ethics. The "Complaint" sets forth allegations of solicitation and acceptance of donations of food from BMW. On March 26, 2008 Mr. Samis states: *"Is is not only alarming that such generosity would be accepted; it would be far more compromising to realize that such largesse may have been 'SOLICITED'."* (Emphasis added) On April 17, 2008 Mr. Samis speaks of the *"appearance of impropriety"*. On April 26, 2008 Mr. Samis states: *"There is no reason to assume that the gift to the Comprehensive Plan Steering Committee was a gift for the personal benefit of any one individual."* On April 28, 2008 Mr. Samis states: *"I have been given to believe that the refreshments were solicited by the Planning Commissioner Thomas Madden, either directly or by his directive."* (Emphasis added) Mr. Samis has not submitted evidence either documentary or through fact witnesses to support his allegations, or even stated the basis for his "may" or "given to believe" assertions.

The Board of Ethics undertook a multi-faceted Phase 1 investigation. It appears that at the time of the donations the corporate donor had made applications to the Town for tax reductions and was in litigation with the Town seeking tax reductions. The documentary evidence and the answers to the Board of Ethics' inquiries raised factual questions as to how the corporate donor learned of the desire to have refreshments and the timing of that and the nature and extent of Mr. Madden's role and activities with respect to the refreshments being provided by the corporate donor. The Internal Rules of the Board of Ethics provide for an investigation to proceed to Phase 2 without prejudice when at the end of Phase 1 the BOE cannot conclude that a violation has not occurred. In this case, the Phase 1 investigation raised questions which the BOE felt required that the matter go into Phase 2 without prejudice because, as stated in the Board of Ethics October minutes, "numerous factual issues were not clear and required further inquiry". As discussed in this Opinion, the Phase 2 investigation was superseded by Town Board action and no conclusions as to Code of Ethics violations have been reached by the Board of Ethics.

Approximately two months after the commencement of the Phase 2 investigation, the Town Board passed a resolution wherein the Town acknowledged the receipt of the food donations, ratified the acceptance of the donations as being on behalf and with the consent of the Town Board, and absolved any potential or existing solicitation of members of the public or local businesses that may have had applications, litigation or other business with the Town. There is no provision in the Code of Ethics or the Town Code that prohibits such a retroactive resolution by the Town Board.

The Town Board is the ultimate arbiter of the consequences of acts found to be violations of the Town's Code of Ethics by the BOE's (see Section 570-9). The Town Board, through its resolution, has effectively granted Mr. Madden relief or amnesty from any potential violations of the Code of Ethics arising out of the donation of refreshments for the CPSC kick-off and neighborhood meetings. Absent an indication by the Town Board that the resolution was not

intended to absolve any solicitation by Mr. Madden, and their specific ratification of the acceptance of the donations, the Town Board resolution, or pardon, is an intervening cause rendering moot the issue in controversy and preventing any further action by the BOE.¹

This decision by the BOE should not be construed by the public or the Greenburgh Town Board as a consent to or ratification of the Town Board's actions which culminated in the passing of the resolution.

BY THE BOARD OF ETHICS

Adopted at May 18, 2011 Meeting

Voting For: Mr. Eisen

Mr. Constantine

Mr. Scott

Mr. Sigal

¹ The Board of Ethics wishes to emphasize the fact that it has not reached any conclusion as to whether or not Mr. Madden violated the Code of Ethics. The use of the terms "Amnesty" and "Pardon" are used to describe the Town Board's action of forgiving any potential violation that may have occurred. Amnesty is a term quite often used when individual charges are not brought, such as when a general Tax or Gun amnesty is declared. Pardons, under long-established usage, may be granted to individuals before, during or after the conclusion of legal proceedings.