

To: Mr. Nicolas DeCicco
Mr. Robert Bernstein

cc: Greenburgh Town Board
Greenburgh Town Clerk

OPINION 2011-5

On February 11, 2011, Robert Bernstein, a resident of the Town of Greenburgh, submitted a Verified Complaint to the Board of Ethics pursuant to the "citizen complaint" procedure authorized by Section 11D(3) of the Code of Ethics adopted July 27, 2007. The complaint states that a member of the Zoning Board of Appeals, Nicholas DeCicco, violated several provisions of the Code of Ethics, namely several provisions of Section 4 dealing with disclosure and recusal, the provision of Section 4 dealing with gifts intended to influence or reward, and the provision of Section 7 dealing with soliciting and accepting political contributions from an applicant or from an applicant's representative.

For the reasons discussed below, the Board of Ethics concludes that Mr. DeCicco did not violate any provision of Section 4 of the Code of Ethics, but he did violate the prohibition in Section 7A(1) against accepting contributions from a professional of an applicant.

Background

The circumstances of this complaint involves the application of Deli Delicious, a business in the Town, for several zoning variances from the Zoning Board of Appeals ("ZBA"); Mr. DeCicco who is a member of the ZBA; and Mr. Pateman who is a professional consultant of the applicant Deli Delicious and who appeared before the ZBA as a professional of Deli Delicious. Only Mr. DeCicco, who is a member of a Town agency and who at some point earlier this year became the candidate of the Republican Party in a special election held to fill a vacant seat on the Westchester County Board of Legislators, is the party against whom the ethics complaint has been brought.

At the January 6 and January 20, 2011 meetings of the ZBA, Mr. DeCicco supported the application of Deli Delicious and at the latter meeting voted in a "straw vote" to grant the application. The January 20 straw vote was not in favor of granting the application, and the ZBA counsel was to prepare a draft opinion denying the application and the formal vote was to take place at the February 17 ZBA meeting. [1]

After the January 20 ZBA meeting, Mr. Pateman contacted Mr. DeCicco about hosting, and on February 5 did host, a reception for Mr. DeCicco. Mr. Pateman provided various things of value such as food, alcoholic and non-alcoholic beverages, and live music entertainment. The reception was co-hosted by Mr. Constantine, who is a member of the Board of Ethics.

As noted above, the complaint was filed on February 11. The complaint seeks to have Mr. DeCicco be recused from further participation on the Deli Delicious application and to have determined that his acceptance of Mr. Pateman hosting the reception was a violation of the Code of Ethics.

The complaint also requests that Mr. Constantine recuse himself from the Board of Ethics consideration of this matter, which he did at the first meeting (February 15) the complaint was considered by the Board of Ethics.

At its February 15, 2011 meeting, the Board of Ethics determined that the complaint was in proper form and that there was good cause to proceed to a Phase 1 investigation. On February 18, the Board of Ethics sent inquiries under Section 12 of the Code of Ethics to Mr. DeCicco, which he timely answered. Both Mr. DeCicco and Mr. Bernstein appeared at the March 8 meeting of the Board of Ethics. Mr. DeCicco submitted a "complaint reply" and made a statement and answered questions from the Board of Ethics. Mr. DeCicco stated that his recusal will continue "forever". In response to a question from a Board of Ethics member, Mr. DeCicco stated that he had not checked the Code of Ethics before accepting Mr. Pateman's offer to sponsor a fund raiser. Mr. Bernstein also made a statement. Mr. DeCicco stated that he was not prepared at that time to waive a Phase 2 investigation, and Mr. Bernstein stated that he would not withdraw his complaint. The Board of Ethics determined to commence a Phase 2 investigation.

On March 25, 2011, the Board of Ethics notified Mr. DeCicco that his oral testimony, under oath, would be taken at the April 13, 2011 meeting. Mr. DeCicco requested an adjournment until the June meeting, which was granted.

On May 6, 2011, Mr. DeCicco submitted an affidavit and request, sworn to on May 3, 2011. Attached thereto are four checks, dated May 3, to Mr. and Mrs. Pateman in the total amount of \$ 3,800, and a check, dated May 3, to Mr. Constantine in the amount of \$ 150. The affidavit/request seeks that the complainant, Mr. Bernstein, withdraw the complaint and that, if he does not, the Board of Ethics promptly decide the complaint on papers and dismiss the complaint. In the affidavit/request, Mr. DeCicco characterizes his actions as an "honest oversight" and states "I am not contesting the complaint as it relates to this section [Section 7A(1)], and have reimbursed Mr. Pateman for the costs of the February reception, and also returned the contribution of Mr. Constantine"

At the Board of Ethics May 18, 2011 meeting, Mr. DeCicco did not appear. Mr. Bernstein appeared. After informing the Board that he declined to withdraw his complaint, Mr. Bernstein addressed the complaint and the affidavit/request.

Opinion

Section 4D

Section 4D of the Code of Ethics requires that an agency member Town official shall disclose any "direct or indirect Interest" in any matter in which her/his agency is involved in the decisionmaking process. Mr. DeCicco is an agency member, and is required to disclose any interest, as defined by the Code of Ethics, in any official action pending before the ZBA. For the purposes of the Code of Ethics, "Interest" is defined in Section 3 as "a pecuniary, financial or other material benefit to the [agency member] . . . or any of her/his Affiliates. Mr. DeCicco has submitted a sworn affidavit that at no time did he have any interest, as defined by the Code of Ethics, in the Deli Delicious application. Thus, the Board of Ethics concludes that Mr. DeCicco did not violate Section 4D.

Section 4L(1)-(2)

If a ZBA or Planning Board member has an interest in an application or has done any "business other than ordinary retail purchases of goods and services" with the applicant or the applicant's affiliates, the board member must promptly recuse her/himself. It is asserted that Mr. DeCicco has non-ordinary course business relationship with Mr. Pateman, a professional for Deli Delicious. Mr. DeCicco has submitted a sworn affidavit that Mr. Pateman approached him on January 24, 2011 about hosting a reception and that he recused himself on the next day afterwards, January 25, 2011. The Board of Ethics has a copy of an email from the Chair of the ZBA stating that Mr. DeCicco recused himself on January 25 or 26, 2011. Mr. DeCicco stated to the Board of Ethics that his recusal was "forever", and Mr. DeCicco has submitted a sworn affidavit that he did not participate subsequent to his recusal. Given that the Code of Ethics does not proscribe non-ordinary course of business relationships, but only provides for

recusal in such situation, and given his prompt recusal, the Board of Ethics concludes that Mr. DeCicco did not violate Section 4L(1)-(2).

Section 4A(2)

This section, modeled after state law (General Municipal Law, Article 18, Section 805-a1), proscribes gifts “under circumstances in which it could reasonably be inferred” were intended to influence or reward a public officer, employee or agency member. The hosting of the reception occurred after Mr. DeCicco’s recusal, so it could not have been intended to influence any decision by him as a member of the ZBA. In fact, the mere offering of hosting the reception was counter-productive to having Mr. DeCicco continue to advocate for the approval of the Deli Delicious application, as Mr. DeCicco recused himself on the very next day, or within two days, and before any meeting of the ZBA. It is theoretically possible that the hosting of the reception was a reward for Mr. DeCicco having tried, albeit unsuccessfully, to obtain approval of the Deli Delicious application. Mr. Pateman was a regular supporter of Republican Party candidates, and had hosted receptions at this home before. The Board of Ethics does not find a reasonable inference, under the circumstances, leading to the conclusion that the hosting of the reception was a reward for Mr. DeCicco having, prior to his recusal, supported the Deli Delicious application.

Section 7A(1)

As part of the revisions to the Code of Ethics in 2007, Section 7A(1) was expanded to prohibit solicitation and acceptance of “any contribution or money, services, or thing of value for . . .any Candidate from any Applicant or from an Applicant’s Affiliates or from an Applicant’s legal representatives or professional consultants or their respective Affiliates.”

In his affidavit/request, Mr. DeCicco admits to violating this Section, and acknowledges that recusal is not satisfactory to avoid the restrictions of this Section.

Remedial Actions

In his affidavit/request, Mr. DeCicco states that his voluntary reimbursing Mr. Pateman for the cost of the reception should constitute “full reconciliation”. [2] The Board of Ethics agrees with the concept that the full out-of-pocket costs of the reception should be reimbursed, and has before it Mr. DeCicco’s affidavit that the amount is \$ 3,800 and attached to the affidavit are check to Mr. and Mrs. Pateman in aggregating that amount. The Board of Ethics makes no recommendation for further reimbursement to Mr. Pateman.

Mr. DeCicco has additionally volunteered to provide a legend or footnote on any future campaign letters advising potential donors about Section 7A and other relevant sections of the Code of Ethics. As has been noted before by the Board of Ethics, actions of this type are considered important in the long-run of establishing a basis for political activities within the Town that comport with the Town’s Code of Ethics.

With respect to campaign contributions received by Mr. DeCicco, in his affidavit Mr. DeCicco states there are two categories: (i) \$ 3,200 received from family, friends and long-time acquaintances, which he categorizes as “not event related” and (ii) \$ 2,700 received from those with which he did not have any prior relationship, which he categorizes as “event related”. The Board of Ethics believes that Mr. DeCicco’s categorization misses the mark. The relevant issue under the Code of Ethics is whether the donor is a defined applicant or affiliate, or legal representative or professional consultant, per Section 7A(1) and Section 3. Thus, the Board of Ethics will direct Mr. DeCicco to supplement his affidavit within 60 days and state under oath (i) which, if any, donors were applicants or other parties from whom contributions could not be accepted under the Code of Ethics, and (ii) if there are any, provide evidence of the return of such contributions. In addition, the supplemental affidavit under oath must (iii) provide evidence that the checks to Mr. and Mrs. Pateman were cashed and (iv) a representation by Mr. DeCicco

that he has not received, and will not accept in the future, from Mr. Pateman, the Republican Party or any other person or entity, reimbursement of the \$ 3,800 or any other monies required to be returned pursuant to this Opinion. The supplemental affidavit should be filed with the Town Clerk and an copy emailed to the complainant and to each of the Board of Ethics members and counsel listed above.

The Board of Ethics has the power to recommend fines, not in excess of \$ 250. In Opinion 2009-3 and in Opinion 2010-3, the Board of Ethics declined to recommend fines based on particular factors present there. Under the totality of the circumstances present here, and assuming compliance with the directive to file a supplemental affidavit and to return any contributions from parties proscribed by Section 7A(1), the Board of Ethics declines to recommend a fine in this situation. The Board of Ethics would review any future violations of the Code of Ethics by Mr. DeCicco, if hypothetically there should be any, in light of the fact that it declined to recommend a fine this time.

BY THE BOARD OF ETHICS

Adopted at May 18, 2011 Meeting

Voting For: Mr. Eisen
Mr. McLaughlin
Mr. Scott
Mr. Sigal

ENDNOTES:

1. At its March 17, 2011 meeting, the ZBA denied the application of Deli Delicious for zoning variances. At its April 2 meeting, the ZBA denied the application of Deli Delicious for reconsideration.

2. Mr. DeCicco's affidavit also states that he reimbursed the contribution of co-host Mr. Constantine who is a member of the Board of Ethics. Mr. Constantine, as noted above, recused himself from deliberations on this complaint.