

TO: Town Supervisor
CC: Greenburgh Town Council
Greenburgh Town Clerk

OPINION 2011-7

Background

This Advisory Opinion addresses two separate inquiries regarding Section 4L(4) of the Code of Ethics, at the request of the Town Supervisor by emails dated July 4 and 21, 2011.

Section 4L(4) of the Code of Ethics provides: "No member of the Town Board shall participate as an advocate before the Planning Board or Zoning Board of Appeals for or against any application, except with respect to any property in which she/he has an Interest".

Section 4L(4) was adopted as part of the July 2007 amendments to the Code of Ethics. The Section pertains only to matters before the Planning Board or Zoning Board of Appeals, and the scope of the prohibition is narrow. The Section has been the subject of two Board of Ethics advisory opinions, Opinion 2008-3 and 2011-1. As discussed in those opinions, the Section prohibits appearing before the Planning Board or ZBA as an advocate or advocacy communications with members of those boards, but does not prohibit all activities by Town Board members regarding applications before the Planning Board and ZBA such as writing letters to newspapers and meeting with and advising citizens.

Opinion

I.

In his request of July 4, the Town Supervisor raises the question of whether this provision of the Code of Ethics violates the First Amendment of the U.S. Constitution because "elected officials should be advocates or opponents of projects when the public interest is at stake." The Town Supervisor also states that he would like to propose to the Town Board that it repeal this provision, but asked for the Board of Ethics' opinion first.

Section 4L(4) was proposed in 2007 by the Town Board itself. The Board of Ethics' only comment at that time was to add an exception clause for property in which the Town Board member has an interest. As noted in Opinion 2008-3, the Section is conducive to "keep[ing] the Planning Board and Zoning Board of Appeals free from political influence."

In Opinion 2008-3, we noted the general rule that reasonable, content-neutral regulation of speech is permitted by the First Amendment if the regulation is to permit the effective operation of and non-interference with a governmental entity, and if the regulation is narrowly drawn to achieve that end. The Supreme Court's decision in *Nevada Comm. On Ethics v. Carrigan*, 564 U.S. ___, 131 S. Ct. 857 (June 13, 2011) would appear to support the analysis as to the constitutionality of Section 4L(4): "This Court has rejected the notion that the

First Amendment confers a right [for a legislator] to use governmental mechanics to convey a message.” If the requesting party wishes to have a formal legal opinion on the constitutionality of Section 4L(4), he may, upon compliance with any relevant process requirements, seek it from the Town Attorney or an appropriate state official.

II.

In his request of July 21, the Town Supervisor states that, with respect to a matter before the Planning Board, he has asked former and current Town officials as to their recollection of factual information and he also wants to himself present to the Planning Board his first-hand recollection of factual information (i.e., promises made to the affected community in connection with a land use decision approved by the Planning Board).

Though the Supervisor does not specifically ask for a waiver of Section 4L(4), the “re” line of his email contains the word “waiver”. Section 16 of the Code of Ethics provides that, upon a super-majority vote of four members, the Board of Ethics may grant an advance waiver if: (i) there is a “compelling need”, and (ii) compliance would create “undue hardship”, and (iii) waiver would not be “inconsistent” with the intent of the ethics law. After-the-fact waivers are not permitted. All three standards must be met for an advance waiver. The Board of Ethics does not see why, with regard to facts the Supervisor wishes to present, there is either a compelling need or undue hardship, since pursuant to this Opinion any relevant facts may be presented to the board handling the land use matter via an affidavit. Moreover, allowing an expression of opinion would be diametrically opposed to Section 4L(4) and thus would not satisfy the standard of not being inconsistent with the intent of the ethics law. Thus, it does not appear that any, much less all, of the Section 16 standards for an advance waiver have been met.

However, the Board of Ethics is not clear that a waiver is necessary in any event. Section 4L(4) restricts “participat[ing] as an advocate”. Nothing in the Section restricts presentation of first-hand factual information. The Section is directed to advocacy. The Section is not designed to prevent factual information, devoid of advocacy, from being presented to a public body.

Thus, if a Town Board member has relevant first-hand information, that can be presented to the Planning Board or ZBA. It could be submitted in an affidavit submitted by a party in interest, such as the applicant or neighbors, or in an affidavit submitted by the Town Board member on his own volition, or in an affidavit submitted upon the request of the relevant board. In appropriate circumstances, the Town Board member might be called as a witness under the rules of the relevant board.

Concluding Matters

The Board of Ethics understands that, with respect to the particular matter generating the July 21 request, the comment period is about to expire. If the neighbors or Town Supervisor wish to file a factual affidavit and are not able to make the filing by the end of the present comment period due to the need to have first obtained an opinion from the Board of Ethics, the Board of Ethics of course expresses no opinion as to whether the circumstance of obtaining an opinion from the

Board of Ethics would be a grounds for a short extension of the time to file the affidavit. That would be solely up to the relevant land use board.

Advocacy is prohibited by the Section, and a particular presentation may be found to be in violation of the Section because of the way it is presented. Thus, the Board of Ethics cannot pass on whether any particular affidavit or other presentation to be made in the future to the Planning Board or ZBA would violate Section 4L(4) by going beyond a straightforward statement of first-hand knowledge of facts.

ETHICS

2011 Meeting

Constantine

Mr. Eisen

Mr. McLaughlin

Mr. Scott

Mr. Sigal

BY THE BOARD OF

Adopted at July 27,

Voting for: Mr.