

Town of Greenburgh Board of Ethics

TO: Supervisor Paul J. Feiner

Cc: Greenburgh Town Board
Greenburgh Town Clerk

ADVISORY OPINION 2007-3

Supervisor Feiner, this is an Advisory Opinion pursuant to your request. The Board of Ethics regrets that prior circumstances delayed the submission of this Advisory Opinion until this date.

On October 8, 2004, you requested from the Board of Ethics "an Advisory Opinion as to how section 570-7 of the Town Code should be interpreted" with respect to your "receiving campaign contributions from an individual Michael D'Alessio," who "attended a fundraiser that William LoSapio of Gregory's Restaurant in White Plains hosted for my campaign account on March 29th."

The Greenburgh Code of Ethics was originally adopted in 1991. On July 27, 2007, the Town Board adopted a new Code of Ethics. The 1991 Code of Ethics, which was still in effect in 2004, is the law which governs the conduct that is the subject of this Advisory Opinion, and all references to the Code of Ethics (except where otherwise indicated) are to the 1991 Code of Ethics.

Opinion Summary. The record clearly indicates that some parties having pending business before the Town made campaign contributions to you, Supervisor Feiner, in connection with the fundraising event in question (hereafter referred to as "the fundraiser" unless the context clearly indicates otherwise). Under the current Code of Ethics, the manner in which invitations to this fundraiser were determined and the receipt of these contributions would be improper. Finding a violation in the context of the Code of Ethics in effect in 2004, however, is not as straightforward. Nonetheless:

- The Board of Ethics advises you that *the contributions in question could be seen to result from "solicitation" on your part of a kind that the 1991 Code of Ethics prohibited.*
- The Board of Ethics also advises you that *insofar as any matters pending at the time of the March 29, 2004 fundraiser are still active at this time, you should not participate in any way in Town management, or as a decision-maker on the Town Board, with respect to those still active 2004 matters involving Mr. D'Alessio or any of the other parties specified below who were applicants before the Town and who gave in conjunction with the fundraiser.*
- The Board of Ethics further advises you that, *as a demonstration of good faith and as a repudiation of any intent to take part in unethical conduct, you should consider*

*returning those contributions that can readily and reasonably be identified as coming from parties who could not be solicited by town officials under the law.*¹

The investigation conducted by the Board of Ethics has produced a list of such donors and contributions and that list is included below. It contains 16 contributions totaling \$5,900.

I. Background

As previously noted, on October 8, 2004, you requested an Advisory Opinion pertaining to the March 29, 2004 fundraiser. In November 3, 2004, the Board of Ethics notified you that the Board voted to defer consideration of your letter pending requests by two civic associations in Greenburgh to the Westchester County District Attorney that she open a formal criminal investigation in connection with the fundraiser. On November 17, 2004, the Office of the District Attorney of Westchester County informed the Board of Ethics that that it had no objection to the Board of Ethics proceeding with its parallel ethics investigation. On June 30, 2006, the Office of the District Attorney of Westchester County finally concluded that criminal charges were not appropriate in this case and informed the two civic associations the "assessment of this office [is] that the issues you raised are ethical, rather than criminal, in nature."

The Town Board reconstituted the Board on Ethics in January through March 2007, appointing new members and setting to work on a revised ethics law. No action was taken on your request for this Advisory Opinion until the reconstituted Board of Ethics first met on March 30, 2007. At the March 30, 2007 meeting, the Board of Ethics determined to begin a factual and legal analysis of the ethical issues implicated in the October 2004 letter, and on April 4, 2007 sent a request to you that you and your campaign committees maintain all data, records and information relating to the contribution by Mr. D'Alessio and/or the fundraiser.

At the Board of Ethics April 13, 2007 meeting, the Board determined: (1) under Section 11C of the Code of Ethics, to proceed with your October 8, 2004 request for an Advisory Opinion with respect to the contribution of Mr. D'Alessio and (2) also, under the authority granted the Board of Ethics under Section 11D of the Code of Ethics, to proceed to issue a report with respect to the fundraiser as a whole. We did so because, at that point, there was no way to determine if other contributions might not raise questions under the Code of Ethics.

II. Inquiry Conducted by the Board of Ethics

At its April 13, 2007 meeting, the Board of Ethics decided to make an official document request to you under Section 12 of the Code of Ethics, which provides that all Town officers "shall furnish to the Board of Ethics such data information and statements as may in the opinion of the Board be necessary for the proper exercise of its functions, powers and duties." The document request was emailed to you on April 19, and you responded on June 1. The June 1 response indicated that you believed Mark P. Weingarten, Esq., who was one of the organizers of the fundraiser, was in possession of certain documents that had been requested by the Board. After analysis and discussion at its June 6 meeting, on June 15 the Board of Ethics made a follow-up document request and also posed certain questions to you. You responded by June 28.

On July 12, the Board of Ethics obtained two documents relevant to the fundraiser from Mr. Weingarten, who is a partner in the law firm of DeBello Donnellan Weingarten Wise & Wiederkehr LLP. On August 2, the Board of Ethics made several follow-up inquiries to you, to which you responded on August 20. All responses by you were made within the times requested by the Board of Ethics, and we appreciate your cooperation.

The Board of Ethics April 4 communication to you stated that you and your counsel may attend open meetings of the Board of Ethics. The Board of Ethics April 19 communication to you also stated that you have "full opportunity to make both oral and written presentations as this process continues." You have submitted written statements and responses to the Board of Ethics during the course of its inquiry, but you have not appeared in person before the Board. As the inquiry proceeded in August and September 2007, the Board of Ethics determined that a formal hearing was not necessary in this case, inasmuch as this inquiry involves a request for an Advisory Opinion rather than formal charges brought by the Town Board.

The Board of Ethics reviewed the files turned over by the former Chair of the Board of Ethics.² The Board of Ethics has reviewed all of the documents and responses to questions provided by you and two additional documents obtained from Mr. Weingarten.

The Board of Ethics requested David Fried, First Deputy Town Attorney, to ask of all Town Department Heads for a list of all individuals and entities who had, in the January-April 2004 time period, an application before the Town or who were otherwise seeking a material benefit from the Town. Mr. Fried then developed a list showing which of the those individuals or entities, and their professionals, made contributions to you in the March-April 2004 timeframe. Further research on this matter was conducted by members of the Board of Ethics in October 2007. The results of the Board of Ethics analysis of the information in these lists is set forth below.

III. Findings of Fact Used in the Advisory Opinion

In your June 25 response to the Board of Ethics questions, you stated that: "I did not know the names of the persons or entities invited to the event by Mr. Weingarten or Mr. Losapio. I was under the impression that they would be inviting Westchester County business leaders and people who were involved in county politics as I believe they typically do for other public officials and candidates. I was not provided with a list of invitees." You further stated that: "I attended the entire fundraiser" In your August 20 response, you stated that "to the best of my knowledge and belief, I have submitted to the Board all documents I could locate responsive to the Board's request" and that "I have never based any fundraising effort on targeting those . . . who are 'doing business with the town'."

One of the organizers of the fundraiser, Mr. Losapio, filed a zoning variance before the Town on March 15, 2004 (Zoning Board of Appeals Case No. 04-12)—11 days after the fundraiser invitation was sent out and 14 days prior to the fundraiser itself. The law firm of the other organizer of the fundraiser, Mr. Weingarten, represented at least four applicants before the Town (Greenburgh Heath Center and Mt. Vernon Neighborhood Health Center for a site plan approval in Planning Board Case No. 03-05 and zoning variances in Zoning Board of Appeals Cases No. 04-14 and 04-15; Winding Farm for a subdivision approval in Planning Board Case No. 00-02; LDC Properties for a site plan approval in Planning Board Case No. 03-11) in the relevant time frame.

The invitation to the March 04 fundraiser was sent out on March 4, 2004 by Mr. Weingarten on his law firm's letterhead. It requested "Please make check payable to: Friends of Paul Feiner." The text of the invitation was:

"On Monday, March 29, 2004 at 5:00 p.m. at Gregory's Restaurant, 324 Central Avenue, White Plains, New York, Bill Losapio and I will be hosting a fundraiser for Greenburgh Town Supervisor, Paul Feiner. Supervisor Feiner was recently re-elected to his seventh term and continues to be a national leader in balancing community needs with strong support for economic development within the Town of Greenburgh. I have enclosed a stamped, self-addressed envelope for your convenience in responding.

"I know that you have been helpful to Supervisor Feiner in the past, but he needs your additional assistance to effectively communicate with the public in this very expensive world we live in. Please join us at the above-mentioned reception. A minimum contribution of \$250.00 is recommended. Paul has earned our support in the past and we ask you to join with us to show our confidence in his ability to continue the job.

"We look forward to seeing you at the reception and Supervisor Feiner is anxious to hear your thoughts with regard to the future of the Town of Greenburgh."

In the emails turned-over by you to the Board of Ethics, there was a February 22-23, 2004 email exchange, on your campaign committee email account ("FEINER98@aol.com"), which ran as follows:

In a February 22 email from you to Chris Gadomski, you state: "The owner of Gregory's is planning a fundraiser for me on March 29th. He can only have about 50-60 people at the restaurant so I'm going to send invites to my bigger givers and will make this a \$ 250 a person fundraiser." (emphasis added)

In that same February 22, 2004 email from you to Chris Gadomski, you discuss the precise wording to be used in the invitation for the fundraiser: "Any thoughts about the following for an invite-YOU ARE INVITED TO JOIN GREENBURGH TOWN SUPERVISOR AT A RECEPTION AT GREGORY'S RESTAURANT.* * * Help Paul raise the funds to continue the good fight !" (emphasis added)

In a February 23, 2004 email to you from Chris Gadomski, he makes a number of suggestions on the wording of the invitation, one of which is: "Remember, you want to convey to your supporters that you are more interested in their thoughts and ideas than in their money. People will gladly contribute if they feel they have some access to policy making." (emphasis added).

Finally, in the documents furnished to the Board of Ethics by Mr. Weingarten, there was a March 29, 2004 email from you to Mr. Weingarten's secretary, in which you state: "Please thank Mark (and also, thanks to you) for your help with the fundraiser. It was a big success and I'm very appreciative. We collected over \$ 26,000 (took in over \$ 13,000 at the door)."

In its inquiry, the Board of Ethics was not provided a list or lists of those individuals or organizations who were invited to, contributed to or attended the March 29, 2004

fundraiser. You told us that you did not have such a list or lists. Mr. Weingarten, whose office sent out the invitations, does have a list of those who were invited but did not agree to provide that list to the Board of Ethics. Mr. Weingarten considered the list to be confidential business information since it was a partial list of his clients. Under the 1991 Code of Ethics, Mr. Weingarten is not required to provide such information to the Board of Ethics.

The Board of Ethics also obtained two lists of contributors to your campaign during the 6 month period between January 16, 2004 and July 15, 2004. The first list is the New York State Elections Commission filing by you which contains the names of 92 individuals, partnerships, corporations or other entities that contributed \$100 or more during the referenced period for a total of \$32,600. The second is a list you provided to the Board of Ethics of 7 individuals who made individual contributions of less than \$100 during the same period for a total of \$299. These lists contain the names of the contributors and the date and amount of each contribution. Analysis of this data shows that the 97% of the 99 separate contributions and 99% of the total of \$32,899 contributed during the six month period were made between March 1, 2004 through April 15, 2004. The written invitation to the fundraiser was sent on March 4. In the seven week period preceding March 4, only one contribution was received. It was for \$50. Since 2004 was not an election year this was not unusual. The dates of the contributions were heavily concentrated in the two weeks preceding the fundraiser, at the fundraiser itself, and in the week following the fundraiser. In the three month period from April 16 through July 15, only two contributions were received. They were in the amounts of \$100 and \$25.

In your e-mail concerning the event, you stated that over \$26,000 were collected and that over \$13,000 were taken in at the door. According to the filing with the New York State Elections Commission, contributions dated on March 29 totaled \$2,650 and contributions for the January 16 through March 29 period totaled \$15,125. Also according to this filing, contributions dated March 30 totaled \$11,750, for a total of \$14,400 for the two days (March 29 and March 30) combined and \$26,875 for the period January 16 through March 30. While we do not know why they were dated March 30, it is apparent that the contributions dated March 30 were included in the totals mentioned in your e-mail. This being the case, at least \$26,000 (approximately 97% of the \$26,875 in total contributions through March 30) was related to the fundraiser.

As mentioned above, Mr. Fried has compared records of donations received at the fundraiser or around the time of the fundraiser with records to pending applications before the Town during the same time period. Further research on this matter was conducted by members of the Board of Ethics in October 2007. The research indicates that of the parties who made contributions to Supervisor Feiner during the March-April 2004 timeframe, 16 had applications before the Town or were seeking a material benefit from the Town. The list of those applicants is as follows: ³

<u>Contributor</u>	<u>Date</u>	<u>Amount</u>
Peter Gaito & Associates	03/10/04	\$250
Mt. Vernon Neighborhood Health Center, Inc.	03/17/04	\$250
Martin Berger	03/19/04	\$250
Robert Weinberg	03/19/04	\$250
Bennett, Kielson, Storch DeSantis, LLP	03/19/04	\$500
Saccardi & Schiff, Inc.	03/19/04	\$250
Greenburgh Health Center, Inc. ⁴	03/26/04	\$250

John Meyer Consulting	03/29/04	\$400
D'Alessio Enterprises, LLP	03/29/04	\$1,000
The Losco Group	03/30/04	\$250
William Null	03/30/04	\$250
Ruth Roth	03/30/04	\$250
Zarin & Steinmetz	03/30/04	\$250
Toll Bros PAC	03/30/04	\$250
McCullogh, Goldberger, Staudt, LLP	04/02/04	\$750
DelBello, Donnellan, Weingarten, Tartaglia, Wise & Wiederkehr, LLP	04/06/04	\$500
Total		\$5,900 ⁵

All of the above contributions were made in the 28 day period between March 10 and April 6. The above 16 contributions and \$5,900 represent respectively 16% of the total number of 99 contributions and 18% of the total amount of \$32,899 received by your campaign during the January 16 through July 15, 2004 period.

IV. Legal and Ethical Analysis and Conclusions

In this section the Board of Ethics offers a legal and ethical analysis of the two principal points in this Advisory Opinion: (1) our advice concerning whether or not you may be held to be in violation of the 1991 Code of Ethics due to your involvement in the planning and invitations sent for the March 29, 2004 Fundraiser; and (2) that even absent an express finding of misconduct at this time under the 1991 Code of Ethics, you should seriously consider returning the contributions from parties whom you were prohibited from soliciting under the 1991 Code of Ethics.

A violation of the Code of Ethics would have occurred had you directly solicited contributions from parties with applications pending before the Town (as well as from other parties, such as Town employees, prohibited by the statute). In addition, a violation may have occurred if you had indirectly solicited contributions from such parties, or those representing them or closely associated with them.

The 1991 Code of Ethics does not give a completely straightforward answer given the facts in this case. There are two questions before us.

First, did your involvement in the planning of the fundraiser fulfill the meaning of the type of activity, "solicitation," prohibited by the statute, or did it fall short of that standard and remain within the realm of campaign conduct and fundraising not meant to be prohibited by the statute? The sections of the 1991 Code of Ethics that pertain to the prohibition of solicitation of anything of value from certain classes of persons are Section 4 and Section 7.

Section 4A(1) of the Code of Ethics provides that no Town officer "shall, directly or indirectly, solicit any gift . . . or contribution or donation from another officer, employee or agency member ;"

The Board of Ethics offers an Advisory Opinion that you, Supervisor Feiner, *did not violate Section 4A(1) by soliciting any of the Section 4A(1) proscribed classes of persons in connection with the March 29, 2004 fundraiser.*

The first sentence of Section 4A(2) provides that no Town officer "shall, directly or indirectly, solicit or accept or receive any gift . . . under circumstances in which it could reasonably be inferred that the gift . . . was intended to influence him . . . or was intended as a reward" Section 4A(2) then goes on to say that: "Nothing herein contained shall prohibit the receipt by candidates for public office of otherwise lawful political contributions so long as such contributions are not solicited in violation of Subsection A(1) of this section."

The second sentence of Section 4A(2) thus seems to obviate most of the effect of the "reasonable inference of influence/reward" prohibitions of the first sentence of Section 4A(2) with respect to political contributions made to a Town elected official.⁶

Accordingly, the Board of Ethics offers the Advisory Opinion that *you did not violate Section 4A(2) in connection with the March 29, 2004 fundraiser.*

Section 7A(1) of the Ethics Code prohibits "solicitation"⁷ of political contributions "from any party who has an application pending for a permit, variance, change of zoning, favorable construction of law or regulations or other material benefit not available as a matter of absolute right from the Town. . . ." Unlike Section 4A(1), this section does not differentiate between direct and indirect solicitation.

Two plausible interpretations of this portion of the 1991 Ethics Code are possible. The first is a strict interpretation of Section 7A(1) and the second is a more permissive interpretation of it, especially against the background of the special exemption for campaign fundraising contained in Section 4A(2).

The strict interpretation of Section 7A(1) holds that in prohibiting "solicitation" the Code of Ethics essentially prohibits any form of request for campaign contributions from any parties with applications pending before the Town. The March 29, 2004 fundraiser invitation was clearly such a request, and your involvement with it constitutes solicitation of a kind prohibited by the Code of Ethics.

The more permissive interpretation of Section 7A(1) holds that if you did not violate Section 4, which expressly prohibits both direct and indirect solicitation, then it would not be logically consistent to find you in violation of Section 7 either, because that section only prohibits "solicitation" when it comes to campaign contributions.

It is unclear whether "solicitation" means direct solicitation only or both direct and indirect solicitation. Since the framers of the 1991 Code made that distinction clear in Section 4, their failure to do so in Section 7 may have been intentional. What message were they trying to convey? Perhaps this ambiguity in Section 7A(1) and the language of Section 4A(2) previously discussed suggest that Section 7 sets a lower, more permissive standard of scrutiny than does Section 4. If one determines that you did not violate the stronger prohibition of Section 4, it is then difficult to conclude that your conduct is improper under the weaker prohibition of Section 7.

Nonetheless, despite this quandary of interpreting the 1991 ethics code, for the purposes of this Advisory Opinion the Board of Ethics chooses to follow the strict interpretation.

The Board of Ethics therefore advises you, Supervisor Feiner, that *the contributions in question could be seen to result from "solicitation" on your part of a kind that the 1991 Code of Ethics prohibits.*

Certain factual information on record and reasonable inferences from that information reinforce this conclusion. The Board of Ethics believes that the facts on record indicate that you, Supervisor Feiner, must have known that Mr. Weingarten's law firm was counsel to developers in the Town, and that parties whom you yourself were not permitted to solicit were likely to be reached by the invitation to the fundraiser. A late February email from you states that you are going to invite some of your larger contributors, thus showing that you did play some role in determining the invitation list for the event. The full extent of your participation in the planning and invitations for the fundraiser, and how direct your personal involvement was, are open to interpretation and cannot be definitively determined on the basis of the information reviewed by the Board of Ethics. However, it seems that you did have some involvement in the planning of the fundraiser.

The Board of Ethics considers it unfortunate, but not necessarily a violation of the 1991 Code of Ethics, that you did not make an effort to advise the organizers to place a legend on the invitation to the effect that applicants would be welcome to come to the fundraiser, but contributions could not be accepted from them. (Indeed, you mentioned the idea of such a legend or notice in your October 8, 2004 letter to the Board of Ethics). The best approach under the 1991 Code of Ethics would have been to take reasonable steps to prevent improper solicitations to a fundraiser on your behalf and to return contributions from invitee-applicants if a few slipped through the cracks.

Going forward, under the provisions of the 2007 Code of Ethics, such steps and precautions will be mandatory, and must become the standard operating procedure in managing fundraising events and campaign contributions in Greenburgh.

In your October 8, 2004 letter to the Board of Ethics, you state: "I have always been under the impression that campaign committees did not have any obligation to screen out potential contributors from mass mailings and such mailings would not be considered a solicitation by a town official under the [Ethics] code." That may be the correct view, but the standards of diligence for a mass mailing may be different for an invitation-only fundraising event; and standards for invitational fundraisers may be different again from the standards governing fundraising activities such as direct personal or telephone contacts either by candidates or by third parties on behalf of candidates.

Finally, our deliberations in preparing this Advisory Opinion also included the suggestion that your conduct in relation to the 2004 fundraiser may have violated Section 6 of the 1991 Code of Ethics, which provides that an elected official shall not use Town-owned property "for personal convenience, interest, use or benefit".

It is the Advisory Opinion of the Board of Ethics that you *did not violate Section 6 inasmuch as we did not find evidence that you used any Town-owned property in connection with the fundraiser.*

The Board of Ethics also considered whether the Code of Ethics has a general "appearance of impropriety" component with respect to gifts, even if they are not solicited in violation of Section 7A. Section 1 of the Code, in its Declaration of Policy, refers to avoiding "the appearance of impropriety", but then goes on to state that "in recognition of these goals, there is hereby established a Code of Ethics for officers" Thus, the Board

of Ethics concludes that it is the policy of the Code of Ethics that there be no free-standing, non-textual appearance of impropriety prohibition, but rather the Town Board codified in the text of the Code of Ethics what it felt was or could be improper appearances. The only basis for "appearance of impropriety" in the text of the Code of Ethics is the "reasonable inference of influence/reward" prohibition in Section 4A(2), but, as noted above, the force of much of this prohibition is obviated in the old Code of Ethics with respect to political contributions to candidates for public office. Thus the Board of Ethics does not believe that the issue of "appearance of impropriety" of Town officials receiving political contributions from applicants is raised by Section 4A of the Code of Ethics as in effect in 2004.

Nonetheless, being concerned about the effects of one's conduct on the public trust in government and about the appearance of impropriety is something that a prudent, conscientious public official does not take lightly. Your October 8, 2004 letter to the Board of Ethics requested that, in addition to the above-quoted opinion regarding the anti-solicitation rule of Section 7A, the Board of Ethics provide "guidance . . . going forward as to the appropriateness of my participating and reviewing Mr. D'Alessio's upcoming tree removal application"

In response to this request, we offer the following recommendations:

The Board of Ethics recommends that *insofar as any matters pending at the time of the March 29, 2004 fundraiser are still active at this time, you should not participate in any way in Town management, or as a decision-maker on the Town Board, with respect to those still active 2004 matters involving Mr. D'Alessio or any of the other parties specified above who were applicants before the Town and who gave in conjunction with the fundraiser.*

Moreover, it is the Advisory Opinion of the Board of Ethics that, *as a demonstration of good faith and as a repudiation of any intent to take part in unethical conduct, you should consider returning those contributions that can readily and reasonably be identified as coming from parties who could not be solicited by town officials under the law.* As noted above, the Board of Ethics investigation indicates 16 such contributions totaling \$5,900.

The October 8, 2004 letter also requested advice from the Board of Ethics on a legend that you had proposed to place on any future solicitations you would make after the fundraiser. Since the adoption of the new Code of Ethics on July 27, the Board of Ethics has developed a recommended legend for solicitations and posted it on the Board of Ethics page on the Town website.

The Board of Ethics offers one final recommendation for your consideration. Shortly after the passage of the amended Ethics Code, you personally called upon the Town Board to provide an official listing of those parties from whom soliciting and receiving gifts and contributions were prohibited, including those parties having official business pending before the town. Obviously such a listing must be kept up to date and is an ongoing task. *The Board of Ethics recommends that you take steps with the other Town Board members to have the Town develop and maintain such a list. It should be available both to town officials covered by the provisions of the Ethics Code and to the general public.* Without such a listing, the current Ethics Code will be difficult to comply with and to enforce.

V. Concluding Matters

Supervisor Feiner, the Board of Ethics hopes that this Advisory Opinion, together with the analysis and reasoning behind it, will be helpful to you in the future.

Please be advised that when a Town Official requests an Advisory Opinion from the Board of Ethics, that does not preclude a subsequent inquiry or investigation by the Board of Ethics, should a formal complaint on the matter be lodged in accordance with prior or current law. Nor does the issuing of an Advisory Opinion preclude a change in the Board of Ethics findings or opinions in light of new information that may arise during that subsequent investigation. Subsequent Board findings and recommendations to the Town Board will be informed by its prior Advisory Opinions, and the recipient may rely on them in good faith, but those subsequent findings will not be bound by such Advisory Opinions if new information arises.

Pursuant to Section 11 of the Ethics Code, a copy of this Advisory Opinion is being filed with the Town Clerk.

A copy is also being submitted to the Town Board for its information. The Board of Ethics does not recommend any further action by the Town Board on this matter at this time.

BY THE BOARD OF ETHICS

Adopted at the November 12, 2007 Meeting

Voting For:

Bruce Jennings
Jack McLaughlin
James Robinson
Mike Sigal

Voting Against:

None

Not Present:

Kenneth Bunting

Notes

¹ *Interpretative Ruling 427* (Sept. 25, 1987) of the U.S. Senate Select Committee on Ethics states that "offering campaign contributors access to [legislative] discussions in direct return for campaign contributions creates the appearance that contributors receive special access to the Members, and thereby exercise undue influence on the legislative process. ...Therefore, Senators should not make solicitations which may create the appearance that, because of a campaign contribution, a contributor will receive or is entitled to ether special treatment or special access to the Senator." Similarly, in the U.S. House of Representatives, Committee on Standards of Official Conduct, *Statement Regarding Disposition of the Complaint Filed Against Representative DeLay* (Oct. 6, 2004), states that "a Member should not participate in a fundraising event that gives even the appearance that special treatment or special access to the Member in his or her official capacity is being provided to donors." The Board of Ethics thinks the reasoning of the U.S. Senate and U.S. House of Representatives ethics committees is sound.

² These files included letters from Messrs. Robert Bernstein, Edward Krauss and Hal Samis. The Board of Ethics also reviewed: U. S. Senate Select Committee on Ethics, *Interpretative Ruling 427* (Sept. 25, 1987); U. S. House of Representatives, *Ethics Manual, "Campaign Contributions and Contributors"*, 102d Cong., 2 Sess. (1992); and U.S. House of Representatives, Committee on Standards of Official Conduct, *Statement of the Committee regarding Disposition of the Complaint Filed Against Representative Tom DeLay*, 108th Cong, 2d Sess. (Oct. 6, 2004).

³ On August 20, 2007, a Town resident, Robert B. Bernstein filed a "citizens complaint", a procedure allowed by the new Code of Ethics adopted on July 27, with respect to conduct occurring from 1998-July 13, 2007 pertaining to Supervisor Feiner. At the Board of Ethics August 29 meeting, the Board determined that the new citizens complaint process was not a procedurally proper vehicle to initiate a Board of Ethics investigation with respect to conduct occurring totally prior to the new Code of Ethics. Nevertheless, the Board of Ethics informed both Mr. Bernstein and Supervisor Feiner that the Board would consider the information contained in the complaint regarding the Board's pre-existing investigation of the fundraiser. From the Board of Ethics review of the August 20 Bernstein complaint, it appears that complaint alleges impropriety with respect to six contributions made in connection with the fundraiser. Four of these parties were already included in the Board of Ethics own analysis above. The Board re-checked the lists of applications furnished to it by municipal department heads and did not find that the other two parties had an application pending in the relevant timeframe.

⁴ As noted, political contributions were made by the Greenburgh Health Center (\$250) and the Mt. Vernon Neighborhood Health Center (\$250). Presumably these are not-for-profit corporations which are tax exempt organizations under Section 501(c)(3) of the United States Internal Revenue Code. Under Section 501(c)(3) of the Internal Revenue Code, an organization qualifying thereunder cannot "participate in . . . any political campaign on behalf of . . . any candidate for public office." If these Health Centers are tax-exempt organizations, it may not be permitted for those organizations to make political contributions to a particular candidate.

⁵ The Board of Ethics notes that this list may be incomplete. The Board of Ethics points out that it did not have the assistance of independent counsel to assist it in the factual investigation for this opinion. Further research may reveal additional information which could affect the conclusions reached by the Board of Ethics in this Advisory Opinion. For example, the Board notes that an executive of LCOR, Peter Gilpatric, made a contribution of \$1,000 but we cannot determine whether LCOR had an application pending before the Town at the time.

⁶ A "fundraiser" is a prototypical instance of a request for contributions or donations. In the ordinary everyday sense of the term, a fundraiser is a solicitation, but not necessarily in the special statutory meaning of the term. Fundraisers are a historical part of the American political tradition, where political campaigns for public office are financed by the individual candidate and/or from raising funds in the private sector. Also, in a democracy, as stated in the U.S. Senate Select Committee on Ethics *Interpretative Ruling 427*: "[Public officials] must, as a matter of course, discuss policy and legislative issues with constituents, political supporters and individuals and organizations with specific concerns and interests in legislation. Frequently such meetings will include campaign contributors." The need to raise

funds for political campaigns, and dialogue between elected officials and the electorate, including campaign contributors, are two realities of a representative democracy. Reconciling these realities are within the realm of ethics codes, and the legislatures of different political jurisdictions can reasonably reconcile these two realities in different ways. Within the Town of Greenburgh, the Town Board evidently decided, when it adopted Section 7A of the Ethics Code in 1991, to circumscribe the tradition of political fundraising within the Town of Greenburgh political arena by prohibiting solicitation from applicants before the Town and from those seeking material benefits from the Town. We also note that unlike the Code amended in 2007, the 1991 Code did not go so far as to prohibit the receipt of contributions from applicants before the Town and from those seeking material benefits from the Town.

⁷ In addition to the matters of interpreting the 1991 Ethics Code discussed in the text, the Board of Ethics also engaged in a careful discussion of the meaning of the concept of solicitation and the nature of the harm or wrong done to the public and the public interest by this kind of conduct on the part of public officials. One way of construing "solicitation" is the straightforward and common sense definition of asking or requesting. Another point of view holds that "solicitation" in the prohibited sense does not merely mean asking or requesting, but rather refers to a request that carries with it an element of coercion, pressure, or threat to the party being asked, express or tacit, in virtue of implied consequences (negative or positive) to that party. All fundraising may be said to involve a mild element of pressure, but the prohibition against solicitation of campaign contributions from those having business before the Town does not necessarily rule out such requests or invitations to events which do not put undue pressure on the recipient and which the recipient is clearly free to refuse (such as an impersonal mass mailing). According to this second viewpoint, whether or not a request rises to the level of a prohibited solicitation must be determined on a case-by-case basis and in light of the surrounding circumstances.

While the members of the Board of Ethics hold somewhat different views on this question, they agree that in most cases both definitions of the concept of "solicitation" will yield the same practical conclusions. They also agree that the 2007 amendments to the 1991 Code of Ethics, which add a prohibition against the receipt of gifts or campaign contributions to public officials from parties having business before the town, will render this discussion about two different meanings of solicitation moot for nearly all practical purposes and future complaints.