

TO: Mr. Robert B. Bernstein

CC: Greenburgh Town Board  
Greenburgh Town Clerk

## **OPINION 2007-4**

### *Background*

On September 5, 2007, Robert B. Bernstein, a resident of the Town of Greenburgh, submitted a Verified Complaint ("Complaint") to the Board of Ethics pursuant to the new "citizen complaint" procedure authorized by Section 11D(3) of the Code of Ethics adopted July 27, 2007. The Complaint was verified as required by the statute.

The crux of the Complaint is that Supervisor Feiner used the Town website system to make "personal and political attacks" against two private citizens: "Feiner's use of the Town website, to promote and publicize these statements, put the Town's imprimatur on these charges." (Complaint at Paragraph 4) This is said to violate Section 6 of the Town's Code of Ethics and to also constitute "official misconduct" in violation of NYS Penal Code Section 195.00.

Section 6 of the Town's Code of Ethics provides that no Town official shall use Town-owned property "for personal convenience, interest, use or benefit . . . , except when such services are available to the public generally or are specifically provided by the Town Board for the use of such [official] in the conduct of official business."

With respect to citizen complaints, under Section 11I of the Code of Ethics, the Board of Ethics shall conduct "an initial investigation as it deems appropriate." With respect to this Complaint involving the use of the Town's website, the Board posed several sets of questions to the Town Webmaster regarding the use and administration of the Town website and received prompt and complete answers from him, as well as supplementary explanatory information regarding the operation of the software that drives the Town website. Under Section 11J, after completing its initial investigation, the Board of Ethics then determines whether "good cause exists to proceed" with a full investigation.

### *Opinion*

The posting in question ("Website Posting") was placed on the Town website on July 13, 2007. A copy of the Website Posting, dated September 5, is attached as Exhibit A to the Complaint, on the top of which is the following: "Town of Greenburgh - News & Information"; "Welcome to Town of Greenburgh, NY"; the Town's official logo; "Currently: September 05, 2007 12:58PM." The Website Posting consists of introductory comments of two paragraphs; quotation of five paragraphs of a 66-paragraph affidavit filed in a Zoning Board of Appeals case; concluding comments of nine paragraphs; and signature of one Town elected official. The Complaint identifies six statements in the commentary portion of the Website Posting as being personal and political attacks.

The Board of Ethics has been informed by the Town's Webmaster that he places items on the Homepage's News & Information section which have been sent out on the Town's global email list by authorized "posters", which at present are the six Town elected officials (excluding the Town judges), the Town Council Legislative Aide and the Webmaster. The Website Posting was sent out by Supervisor Feiner, one of the authorized posters, to the Town's global email list on July 13 and then in accordance with that standard practice posted on the Town's Homepage under News & Information later on that date. The Board of Ethics has also been informed by the Town's Webmaster that items originally sent out by the Supervisor are also automatically posted on the Supervisors Office Page. Items posted on either the Homepage or Supervisor's Page are "archived" generally ten days after the original posting. This means that the archived items are taken off the front page of the Homepage and Supervisors Office Page and then may be located by clicking on a several website prompts that takes one to the archived area of the website. The Town's Webmaster informed the Board that this Website Posting was originally posted on July 13 and was archived on July 23. The Webmaster also informed the Board that, under the design of the software acquired by the Town in 2002, a particular archived posting cannot be selectively made non-accessible to the public. Under the software design, all archived items are accessible to the public though a series of website prompts or none are, although a particular item may be deleted from the website. The software used by the Town does not keep track of how many times a particular archived item is accessed. The Town does not at present have any content standards for materials posted on the Town website, any standards for what constitutes "conduct of official business", any standards as to the dividing line between personal uses and official

business, nor any standards for identifying political uses and determining whether they falls within permitted official business or proscribed personal use.

At its August 29, 2007 meeting, the Board of Ethics came to the determination that "a citizens complaint under and permitted by the new Code of Ethics (but not permitted by the old Code of Ethics) is not a procedurally proper vehicle to initiate a Board of Ethics investigation and opinion insofar as it pertains totally to conduct prior to the adoption of the new Code of Ethics [on July 27, 2007]." That decision was communicated via an August 29 email to all of the above addresses in connection with a complaint filed by Mr Bernstein on August 20 with respect to conduct stated in the August 20 complaint to be prior to the July 27 amendments to the Code of Ethics. The conduct in this September 5 Complaint was initiated on July 13 (before the adoption of the new Code of Ethics), but still posted in the archives area on the Town website after the adoption of the new Code of Ethics on July 27.

Based on the information given to it by the Town Webmaster, the Board's investigation leads it to conclude that (1) prior to the adoption of the new Code of Ethics (July 27), the Website Posting was archived, (2) under the design of the software that operates the Town website, the Website Posting could not be selectively made non-accessible to the public after July 27 and (3) after the adoption of the new Code of Ethics, the Website Posting could be deleted from the Town website.

As noted above, at present the Town does not have content standards for website postings, definition of official business, standards for distinguishing personal uses from official business, nor standards for identifying political uses and categorizing political uses as coming within official business or personal uses. Moreover, the software used by the Town does not permit the Board of Ethics to know the extent to which any particular archived item is viewed.

Under these circumstances, the Board of Ethics concludes that "good cause" does not exist to proceed further with a full investigation in the absence of Town policy on a number of issues relevant to applying Section 6. Once standards exist for use of the Town website and if the July Website Posting which is the subject of this Complaint does not meet those standards, it (and others which do not meet those standards) should then be deleted from the Town Website. The Town Supervisor or the Town Board could obviate the issue with respect to the July Website Posting in question by deleting it now.

Section 6 is an important component of the Town's ethics law. It prohibits the personal use of Town property. That is plain. What is not plain is what that means. For example, does content which may have implications in the realm of politics constitute a personal use in all instances. Also, what is not plain is how the personal use prohibition is to be applied in light of the fact that Section 6 has an exception for "the conduct of official business," as the Town does not have any definition of official business and the dividing line between personal use and official business, and how political uses fit in the mix, is not obvious in all instances.

Section 6 covers property acquired by public funds and owned by the Town for the benefit of the public to be used in official business. The interpretation and fair and consistent application of Section 6 is made difficult by the absence of applicable standards, particularly in the field of electronic communications. The Board of Ethics is seriously concerned about the issue of the permitted/proscribed uses of Town-owned property, such as the Town website, covered by Section 6 of the Code of Ethics. The circumstances underlying this Opinion has brought to the attention of the Board of Ethics the need for such standards. Other governmental entities have developed standards for the use of government property (e.g., the Federal franking privilege). Therefore, the Board of Ethics intends to develop standards relevant to applying Section 6 to the Town's electronic systems and publish them on the Board of Ethics section on the Town website. Of course, nothing in these standards would impinge *in any way* on the right, which is totally unaffected by the Code of Ethics, of any elected official to express her/his opinions in personal emails, campaign emails, printed campaign materials, public debates, communications with the press, and other means not involving the use of property owned by Town.

The Board of Ethics wishes to make clear what it is not addressing in this Opinion:

(1) Nothing herein addresses the merits of the charges brought in the Complaint by Mr Bernstein or the charges by Supervisor Feiner against the two private citizens.

(2) The Board of Ethics expresses no opinion herein as to the use of the Town website system with regard to one elected official attacking another on the Town website. The Website Posting attacks four Town elected officials. The prohibition in Section 6 of the Code of Ethics against personal use of the Town website has an exception

for "when such services are available to the public generally." We note that no member of the public has access to the Town website system, although Town elected officials (other than the Town judges) do.

BY THE BOARD OF ETHICS

*Adopted at October 2 and November 12, 2007 Meetings*

Voting for: Mr. Jennings

Mr. McLaughlin

Mr. Robinson

Mr. Sigal

Not present: Mr. Bunting