

Subject: Advisory Opinion 2008-3 -- Section 4L(4) of Code of Ethics

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

## OPINION 2008-3

### Background

This Advisory Opinion address several questions you posed regarding advocacy communications with respect to applications before the Town's Planning Board. By emails dated July 28, July 30, and September 3, 2008, you have inquired whether the Code of Ethics permits you to, or prohibits you from: (1) appearing at Planning Board meetings regarding applications, (2) writing letters to Planning Board members regarding applications, (3) calling and/or having other direct person-to-person contacts with Planning Board members regarding applications, (4) writing letters to newspapers regarding applications, (5) meeting with and advising residents regarding applications and (6) contacting an applicant.

For the reasons discussed below:

Advocacy communications in the form of (1) - (3) are prohibited, unless you qualify for the exemption with respect to property in which you have an interest as defined in the Code of Ethics; and

Advocacy communications in the form of (4) - (6) are permitted.

### Opinion

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 scope of the prohibition is narrow. For example, the prohibition does not relate to Town officials other than Town Board members; the prohibition does not relate to any board or municipal body other than the Town's Planning Board and Zoning Board of Appeals ("ZBA"); and the prohibition does not relate to all activities by Town Board members regarding applications before the

Planning Board and ZBA. Moreover, even with respect to otherwise prohibited activities, there is an express exemption permitting advocacy communications with respect to property in which a Town Board member has an interest.

Inquiries (1) - (3)

The Town Board unanimously passed the restriction in Section 4L(4) in order to keep the Planning Board and ZBA free from political interference. Reasonable, content-neutral regulation of a governmental-body forum 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.

Although the scope of the prohibition is narrow, we believe it is pervasive within the narrow scope in which it operates. Appearing before the Planning Board or ZBA advocating for/against an application, a letter to the Planning Board or ZBA from a Town Board member advocating for/against an application, or a letter, telephone call, personal contact or other direct communication to a Planning Board or ZBA member by a Town Board member advocating for/against an application, are all forms of "participat[ing] as an advocate before" the Planning Board or ZBA and would be prohibited by the present Section 4L(4), unless there is an exemption.

Section 4L(4) contains an express exemption permitting advocacy communications in instances relating to property in which a Town Board member has an interest. Thus, if a particular application before the Planning Board or ZBA would affect property in which you have an interest in some direct way, you would be exempt from the prohibition. With regard to the applicable standards for coming within the Section 4L(4) exemption "with respect to any property in which she/he has an interest", for purposes of the Code of Ethics interest is defined in Section 3. The definition of interest is based on a "pecuniary, financial, or other material benefit" of an individual or her/his affiliates, which is also a term defined in Section 3. One's elected status is irrelevant to the exemption in Section 4L(4).

Inquiries (4) - (6)

As noted above, all activities relating to an application are not prohibited. There is no prohibition in Section 4L(4) against Town Board members (i) writing letters to newspapers or (ii) meeting with, and advising, citizens of the Town. Indeed, unlike in the context of a governmental-body forum, the First Amendment permits virtually unlimited free speech, absent issues of public safety, in an open public forum (such as letters to newspapers and citizen gatherings).

There is no restriction under the Code of Ethics against a Town Board member contacting an applicant before the Planning Board or ZBA.

#### General

This Advisory Opinion is based on facts as presented to the Board of Ethics by you. Moreover, no view is expressed on the applications underlying your inquiries, as they are not matters which are addressed by the Board of Ethics.

We note that Section 4E of the Code of Ethics prohibits any Town official from "receiv[ing] compensation in connection with . . . any matter before the Town." Section 4J similarly prohibits any Town official from "receiv[ing] compensation, directly or indirectly, for representing any private interests before any Town agency . . . ." Section 4G prohibits any Town official from engaging in "private employment" which "may reasonably create a conflict with . . . her/his official duties." The Board of Ethics interprets this to preclude, among other things, a Town official from acting as a lobbyist before any Town agency. Under the NYS Lobbying Act, a lobbyist is one who is "retained, employed or designated by a client to engage in lobbying." Thus, in order for one to be a lobbyist, she/he must be acting on behalf of a client.

There may be non-ethical restrictions or policies applicable to a member of the Town Board contacting an applicant and the content of such contacts. Moreover, since land use decisions by the Planning Board and ZBA may be subject to potential litigation against the Town, you may wish to consult with the Town Attorney's Office with respect to any contact with an applicant. The Board of Ethics members are not expressing a view on any such non-ethical matters.

In sum:

- The Code of Ethics generally prohibits members of the Town Board from advocacy communications in any form with the Planning Board or ZBA, but if property in which you have an interest (as defined in the Code of Ethics) is affected in some direct way you would be exempt from the prohibition and could appear as an advocate in any format permitted by, and subject to the procedural rules of, the Planning Board or ZBA.

- The Code of Ethics does not prohibit you from writing letters to newspapers regarding applications, meeting with and advising residents regarding applications, or contacting applicants.

- All activities of Town officers are subject to the solicitation, acceptance of contributions, lobbying and receiving compensation restrictions of the Code of Ethics.

BY THE BOARD OF ETHICS

Adopted at September 16, 2008 Meeting

Voting for:        Mr. Jennings

Mr. McLaughlin

Mr. Robinson

Mr. Sigal

Not present:        Mr. Bunting