

SUPREME COURT OF THE STATE OF NEW YORK  
WESTCHESTER COUNTY

-----X  
SAMUEL DAVIS and DAWN POWELL,

Petitioners,

For a judgment pursuant to CPLR Article 78 against

THE TOWN OF PUTNAM VALLEY TOWN BOARD  
and BOARD OF ETHICS,

Respondents.

-----X

**MEMORANDUM OF LAW IN  
SUPPORT OF  
RESPONDENTS' MOTION TO  
DISMISS**

Index No. 06-23102

**PRELIMINARY STATEMENT**

This memorandum of law is submitted in support of the motion of respondents THE TOWN OF PUTNAM VALLEY TOWN BOARD and BOARD OF ETHICS to dismiss the verified petition based on objections in point of law pursuant to CPLR §404(a).

**STATEMENT OF FACTS**

The facts are more fully set forth in the accompanying affidavit of Bishop Anthony Bondi dated January 16, 2007, and the affirmation of Steven G. Leventhal, dated January 17, 2007.

Petitioner Samuel Davis is the Supervisor of the Town of Putnam Valley. He and petitioner Dawn Powell reside together. They are financially interdependent. In early 2006, Supervisor Davis hired Ms. Powell to serve as his confidential aide.

In March 2006, a member of the respondent Town of Putnam Valley Town Board (the "Town Board") requested an advisory opinion from the respondent Board of Ethics as to (a) whether a prohibited conflict of interest existed by virtue of the Supervisor's full time employment as a teacher in the New York City school system during the first month

of his term of office; (b) whether a prohibited conflict of interest existed by virtue of the Supervisor's approval of an agreement of employment between the Town and Ms. Powell, whom the inquiring Town Board member described as the Supervisor's domestic partner; and (c) whether a prohibited conflict of interest existed by virtue of the participation by the Supervisor and another member of the Town Board in the discussion of a proposal to extend health insurance benefits to the domestic partners of Town officers and employees.

The Board of Ethics provided Supervisor Davis and Ms. Powell with copies of the inquiry, and requested that they respond to the allegations that it contained. Supervisor Davis and Ms. Powell each submitted a written response to the inquiry and were interviewed by the members of the Board of Ethics. Neither Supervisor Davis nor Ms. Powell denied that they were domestic partners. Rather, they admitted that they were financially interdependent.

The Board of Ethics analyzed the facts as presented and the applicable provisions of Article 18 of the New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees), the then current Code of Ethics of the Town of Putnam Valley, and applicable case law and commentary.

On July 24, 2006, the Board of Ethics rendered an advisory opinion (the "Advisory Opinion") in which it opined that (a) the question of whether the Supervisor was required to devote his full time and attention to his official duties during the first month of his term of office was a question of law beyond the competence of the Board of Ethics, and should be referred to the Town Attorney; (b) a prohibited appearance of impropriety existed by virtue of the Supervisor's approval of the agreement of

employment between the Town and Ms. Powell; (c) a prohibited appearance of impropriety did not exist by virtue of the rate of compensation paid to Ms. Powell for her work as the Supervisor's confidential aide; and (d) a prohibited conflict of interest did not exist by virtue of the participation by the Supervisor and another member of the Town Board in the discussion of a proposal to extend health insurance benefits to the domestic partners of Town officers and employees.

On August 16, 2006, the Town Board adopted the Advisory Opinion by resolution, and on November 15, 2006 it "censured" the appearance of impropriety arising from the Supervisor's hiring decision.

On October 18, 2006, the Town Board enacted Local Law No. 5 of 2006 (the "Revised Code of Ethics"), in which it made comprehensive revisions to the Town's Code of Ethics.

Petitioners seek a judgment pursuant to Article 78 of the CPLR: (a) reversing and annulling the "Advisory Opinion" of the Board of Ethics; (b) reversing and annulling the resolution of the Town Board in which it accepted the Advisory Opinion; (c) reversing and annulling the resolution of the Town Board in which it "censured" the appearance of impropriety arising from the Supervisor's hiring decision; and (d) annulling the Revised Code of Ethics enacted by the Town Board. Petitioners also seek a declaratory judgment declaring that the Supervisor's hiring decision did not create a prohibited appearance of impropriety, and declaring that the Revised Code of Ethics is invalid.

**OBJECTIONS IN POINT OF LAW**

**A. Advisory Opinion of the Board of Ethics**

**I.**

**THE ADVISORY OPINION IS NOT REVIEWABLE BECAUSE IT WAS NOT A FINAL DETERMINATION.**

An advisory opinion is not a “final determination” within the meaning of CPLR §7801 and therefore is not reviewable. *See, Scarpati-Reilly v. Town of Huntington Bd. of Ethics*, 300 A.D. 2d 404 (2d Dep’t 2002); *Neale v. Cohen*, 281 A.D.2d 421 (2<sup>nd</sup> Dept 2001); *Hammer v. Veteran*, 86 Misc. 2d 1056 (Westchester Co. 1975), *affd.*, 53 A.D.2d 629 (2d Dep’t 1976).

**II.**

**THE STATE COMPTROLLER’S INTERPRETATION OF STATE LAW IS IRRELEVANT BECAUSE THE ADVISORY OPINION WAS BASED ON THE TOWN CODE OF ETHICS.**

**(Petition ¶9)**

Petitioners cite Informal Opinion No. 91-18 of the NYS Comptroller for the proposition that “a town supervisor would not have a statutory conflict of interest if the supervisor appointed his or her spouse to the position of confidential secretary. However, the Comptroller’s opinion was based on his interpretation of NY General Municipal Law §800(3)(a)(providing that an employment agreement between a municipality and the spouse of an officer or employee is not a contract in which the officer or employee is deemed to have a prohibited interest), and NY Town Law §29(15) (providing that a town supervisor may designate a confidential secretary).

Here, in rendering the Advisory Opinion, the Board of Ethics considered the application of Article 18 of the New York General Municipal Law and, consistent with the Comptroller’s opinion cited by petitioners, determined that the Supervisor’s conduct

in hiring Ms. Powell did not constitute a violation of that statute. The Board reasoned that:

NY Gen. Mun. Law §801 prohibits a municipal officer or employee from having an interest in a contract with the municipality where the official, either individually or as a member of a board, has the power to approve the contract, or to approve payment under the contract. A contract that violates this section is void. The willful and knowing violation of this section is a misdemeanor. NY Gen. Mun. Law §800-3 provides that a municipal officer or employee is deemed to have an interest in the contracts of his spouse, minor children and dependents except a contract of employment with the municipality. Thus here, even if the Supervisor's domestic partner was his dependent at the time she was hired by the Town, her contract of employment would not present a prohibited conflict of interest under NY Gen. Mun. Law §801.

However, the Comptroller noted in Opinion 91-18 that the analysis should not end with a review of Article 18 of the New York General Municipal Law. The Comptroller stated that:

While we conclude that there would be no statutory conflict in this situation [under Article 18 of the NY Gen. Mun. Law], we note that General Municipal law §806 requires a town to adopt a code of ethics setting forth standards of conduct for the guidance of its officers and employees. A code of ethics may regulate or prescribe conduct that is not expressly prohibited by Article 18 and may prohibit conduct...[citation omitted]. We believe that the employment of relatives or dependents of town officers is one of the subjects that should be addressed by a code of ethics. Therefore, we suggest that the town's code of ethics be consulted to determine whether it contains any pertinent provisions. **Further, even if the town has determined through its code of ethics not to preclude the supervisor from appointing his or her spouse as confidential secretary or bookkeeper, it is our opinion that the supervisor should abstain from any discussions and votes of the town board on matters relating to the confidential secretary and bookkeeper so as to avoid the appearance of impropriety to the extent possible under these circumstances.** (emphasis added).

The same conclusion was reached by the State Attorney General in 1996 N.Y. Op. (Inf) Att'y Gen. 1019 (a member of a town board should refrain from participating in any official action that would affect the terms and conditions of employment of his or her spouse), and learned commentators. *See*, Hogan, Nepotism, NYSBA/MLRC *Municipal*

*Lawyer*, Fall 2005, Vol. 19, No. 4 (“Often, a commitment to public service runs in families...merely allowing family members to work for the same municipality presents little harm. Rather, the harm lies in the abuse of office that arises when a public official hires, retains or promotes family members or supervises them or is supervised by them”); *see also*, *The Handbook for Village Officials*, New York Conference of Mayors and Municipal Officials, 2006 ed., Ch. 12 “Municipal Ethics”, p.103 (“Issues concerning spouses and family members are particularly troublesome for municipal officials and tend to raise the specter of impropriety even under the most innocent circumstances.”).

Consistent with the opinions of the State Comptroller, the Attorney General, and the commentators, the Board of Ethics did not end its analysis with its review of New York General Municipal Law Article 18. The Board of Ethics went on to analyze the provisions of the then current Town Code of Ethics. The Board noted that the Town Code of Ethics was more restrictive than the state law. Unlike the state law which permits nepotism in employment contracts, the Town Code of Ethics did not exclude contracts of employment from those contracts of a spouse, minor child or dependent in which an officer or employee was deemed to have an interest. Therefore, the Board of Ethics concluded that the Supervisor’s participation in the decision to employ his domestic partner violated the spirit and intent of the then current Town Code of Ethics. The Board stated that:

The Supervisor should have recused himself from participating in the hiring of his domestic partner, the setting of her salary, the supervision of her work, and from taking any other actions concerning the terms and conditions of her employment. The Supervisor’s failure to recuse himself from participating in these matters involving the terms and conditions of the employment of his domestic partner created a prohibited appearance of impropriety.

This Board's conclusion is entitled to great weight. *See, Byer v. Town of Poestenkill*, 232 A.D.2d 851 (3<sup>rd</sup> Dept. 1996).

**III.**  
**PURPORTED PRACTICES ELSEWHERE IN THE STATE HAVE NO RELEVANCE BECAUSE THE ADVISORY OPINION WAS BASED ON THE SPIRIT AND INTENT OF THE CODE OF ETHICS FOR THE TOWN OF PUTNAM VALLEY.**  
**(Petition ¶10)**

Although petitioners allege on information and belief that it is a “widespread practice around the state” for the Supervisors of small towns to hire their spouses to serve as their confidential secretaries, here the Board of Ethics did not based its Advisory Opinion on Article 18 of the General Municipal Law, applicable statewide. Rather, it was based on the spirit and intent of the more restrictive Code of Ethics for the Town of Putnam Valley in effect at the time. Accordingly, the purported practices elsewhere in the state have no relevance.

**IV.**  
**THE SUBSTANTIVE PROVISIONS OF THE TOWN CODE OF ETHICS ARE NOT IN CONFLICT WITH ARTICLE 18 OF THE GENERAL MUNICIPAL LAW BECAUSE THE STATE LAW EXPRESSLY AUTHORIZES LOCAL MUNICIPALITIES TO ADOPT THEIR OWN MORE RESTRICTIVE CODES.**  
**(Petition ¶ 17)**

New York General Municipal Law §806 expressly authorizes local municipalities to adopt their own local codes of ethics, provided that a local code “may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited.” Thus the more restrictive provisions in the former Town of Putnam Valley Code of Ethics were not in “conflict” with Article 18 of the NY General Municipal Law.

**V.**  
**MS. POWELL LACKS STANDING TO CHALLENGE THE ADVISORY  
OPINION BECAUSE HER CONDUCT WAS NOT THE SUBJECT OF THE  
OPINION.**

No advisory opinion was requested with respect to any conduct of Dawn Powell, and no opinion was expressed by the Board of Ethics regarding her conduct. Rather, the Board was requested to opine as to whether the action of Supervisor Davis in hiring Ms. Powell violated the applicable provisions of state and local law. The inquiry stated in pertinent part that:

On numerous occasions over the past 2½ months many citizens of our town have made it known to me and other members of our Town Board that there are questions regarding Supervisor Davis' action as to his hiring of Dawn Powell as his personal secretary.... The questions, as best as I can distill them are as follows:....Mr. Davis hired his domestic partner, Dawn Powell, as his "personal secretary." He hired her at a salary of \$46,000 dollars. This salary was what the previous secretary was making after six years on the job with the town. The previous secretary started at \$32,000 dollars. A) Was the hiring of Ms. Powell, and her being paid \$46,000 dollars, a "business dealing" that would benefit Mr. Davis in that he was in a "position to influence" it to his financial advantage? B) Why did Ms. Powell start at such a high salary, higher than what many town workers are paid despite years of service? C) How much more money is Mr. Davis paying Ms. Powell over what she made in her previous job? [and] D) Did Ms. Powell have any secretarial experience/skills at all for her to merit this position?...I am, therefore, asking that the members of the committee launch a full investigation into these actions by Supervisor Davis. I request that the pertinent sections of the town code and other pertinent state laws be examined to determine if any laws were not strictly complied with; and I also request a determination as to whether or not there is an appearance of impropriety regarding each of these issues once the above questions have been answered.

Similarly, the Advisory Opinion referred only to the Supervisor's conduct and not to any conduct of Ms. Powell. The Board of Ethics framed the issue as "whether a prohibited conflict of interest existed by virtue of the Supervisor's approval of an agreement of employment between the Town and his domestic partner". For the reasons stated in the Advisory Opinion, it concluded that "a prohibited appearance of impropriety

existed by virtue of the Supervisor's approval of an agreement of employment between the Town and his domestic partner."

For the same reasons, Ms. Powell lacks standing to challenge the resolutions adopted by the Town Board accepting the Advisory Opinion and "censuring" the appearance of impropriety.

**VI.**  
**BECAUSE THE SUPERVISOR, AS A MEMBER OF THE TOWN BOARD, HAS THE POWER TO NEGOTIATE HIS OWN CLAIMS, THEY ARE BARRED BY NY GEN. MUN. LAW §801.**

Article 18, §801 of the NY General Municipal Law prohibits a municipal officer or employee from having an "interest" in a "contract" over which the officer or employee has control.

The term "contract" is defined by §800-2 as "any *claim*, account or demand against or agreement with a municipality, express or implied..." (emphasis added). An interest is defined by §800-3 as "a direct or indirect pecuniary or material benefit accruing to the municipal officer or employee as a result of a contract with the municipality which such officer or employee serves." Under §801, a municipal officer or employee has control over a contract (or here, a "claim") "when such officer or employee, individually or as a member of a board, has the power or duty to...negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder..."

Under §804, a contract willfully entered into by or with a municipality in violation of §801 is null, void and wholly unenforceable. Thus, because Davis as Supervisor is a member of the Town Board, and since the Town Board has the power and

duty to negotiate, authorize or approve his claim, the claim represents a prohibited contract with the municipality and is wholly unenforceable.

For the same reasons, Supervisor Davis is barred from challenging the resolutions adopted by the Town Board accepting the Advisory Opinion and “censuring” the appearance of impropriety.

**VII.**  
**THE SUBSTANTIAL EVIDENCE RULE DID NOT APPLY TO THE BOARD OF**  
**ETHICS IN RENDERING ITS ADVISORY OPINION**  
**(Petition ¶32)**

The substantial evidence rule applies where a hearing is required and evidence is taken pursuant to direction by law. See, 6 NY Jur Art. 78, §59. Because an advisory opinion is not a final determination, there was no requirement that the Board of Ethics conduct an evidentiary hearing in rendering the Advisory Opinion.

Nevertheless, even under the substantial evidence rule, the advice rendered by the Ethics Board was reasonable based on the record before it. In his request for an advisory opinion, Councilmember Tandy alleged that the petitioners were domestic partners. The petitioners were afforded notice, provided with a copy of the inquiry, and asked to respond to the allegations. Supervisor Davis and Ms. Powell each submitted written responses. Neither Supervisor Davis nor Ms. Powell denied that they were domestic partners. In separate interviews, they each confirmed that they were financially interdependent upon each other. The Board of Ethics reasonably relied upon the record before it.

In the discussion leading to adoption by the Town Board of its resolution accepting the Advisory Opinion, Supervisor Davis acknowledged that he and Ms. Powell reside together. The minutes of the August 16, 2006 meeting state that:

...Supervisor Davis felt that Dawn could to a good job. At first she turned the job down also and than [sic] agreed. When she agreed, Supervisor Davis called legal counsel at the Association of Towns who assured him that the appointment was both legal and ethical. He added that they had no problem with hiring someone who shares his home with him....

It should be noted that the opinion of unnamed legal counsel, if based upon Article 18 of the New York General Municipal Law, was irrelevant for the same reasons that the New York Comptroller interpretation of the state law was irrelevant (see Point II above). The Advisory Opinion here was based upon the spirit and intent of the more restrictive Town Ethics Code, and not on the provisions of Article 18 of the New York General Municipal Law.

Moreover, not having denied the allegation that they were domestic partners in the proceedings before the Board of Ethics, the Supervisor and Ms. Powell should be estopped from arguing now that the Board's conclusion that they were domestic partners was not supported by substantial evidence. *See, Village of Tarrytown v. Planning Board of Village of Sleepy Hollow*, 292 A.D.2d 617 (2<sup>nd</sup> Dept. 2002). The natural and reasonable inference of their silence in the face of Councilman Tendy's allegation that they were domestic partners is that Supervisor Davis and Ms. Tendy tacitly admitted that they were domestic partners. *See*, 58 NY Jur Evidence and Witnesses §294.

**B. Resolutions of the Town Board**

**VIII.  
THE TOWN BOARD PROPERLY EXERCISED ITS GENERAL POWERS IN  
ACCEPTING THE ADVISORY OPINION AND IN “CENSURING” THE  
APPEARANCE OF IMPROPRIETY.  
(Petition ¶19)**

New York Town Law §64(23) provides that a town board “shall have and exercise all the powers conferred upon the town and such additional powers as shall be necessarily implied therefrom.”

New York General Municipal Law Article 18 expressly authorizes the governing bodies of local municipalities to adopt their own local codes of ethics and establish their own boards of ethics. The Town Board is authorized by state law to adopt a local ethics code (*see*, NY Gen. Mun. Law §806-(a)), establish a board of ethics (*see*, NY Gen. Mun. Law §808), appoint and remove its members (*see*, NY Gen. Mun. Law §808-3), and appropriate money for its operations (*Id.*).

Accordingly, the Town Code of Ethics then in effect provided at §17-12 that:

The Town Board of the Town of Putnam Valley does hereby establish a town Board of Ethics, composed of five members, and shall appropriate moneys for maintenance and personal services in connection therewith. The members of such Board shall be appointed by the Town Board...and shall serve at the pleasure of the Town Board.

The Town Board has the additional powers necessarily implied from its power to adopt a local code of ethics, appoint and remove members to a board of ethics, and administer the town’s ethics program through appropriations. (*see*, NY Town Law §64(23)).

Here, the resolutions of the Town Board accepting the Advisory Opinion and censuring the appearance of impropriety amounted to no more than an expression by the Board of its own opinion. On November 15, 2006, the Town Board resolved that:

[T]he Town Board hereby censures the appearance of impropriety in the Supervisor's hiring of a confidential assistant and requests that the Supervisor replace Ms. Powell as his personal assistant with a candidate in whom the community will have trust and confidence.

A censure is an official reprimand or condemnation. Black's Law Dictionary (8<sup>th</sup> ed. 2004). In censuring the appearance of impropriety here, the Town Board imposed no sanction or other penalty upon the Supervisor or Ms. Powell. Rather, it expressed the sense of the town's governing body, memorialized its disapproval of the appearance of impropriety found by the Board of Ethics, and *requested* that the Supervisor replace Ms. Powell.

**C. New Ethics Code**

**IX.  
BY ITS OWN TERMS, THE NEW CODE OF ETHICS DOES NOT APPLY  
RETROACTIVELY.  
(Petition ¶¶ 20, 29)**

The Revised Code of Ethics enacted by the Town Board on October 18, 2006 as Local Law No. 5 of 2006, provides at Section 6 (Effective Date and Applicability) that: “[t]his Local Law shall take effect immediately upon filing by the Town with the Secretary of State of the State of New York, and shall govern conduct on or subsequent to the date thereof.”

Moreover, the Advisory Opinion of the Board of Ethics rendered on July 24, 2006 concluded that the Supervisor's hiring decision created a prohibited appearance of impropriety because it violated the spirit and intent of the *former* Code of Ethics. Thus,

the Revision of Code of Ethics enacted on October 18, 2006, in so far as it prohibited the same type of hiring decision, did not change the standard of conduct applicable in the Town of Putnam Valley.

**X.  
THE CONSTITUTIONAL CHALLENGE IS NOT RIPE BECAUSE NO ACTION  
HAS BEEN TAKEN UNDER THE NEW CODE**

To the extent the petitioners' challenge the constitutionality of the new ethics code is based on its application to them, their challenge is unripe for adjudication. The Advisory Opinion of the Board of Ethics and the resolutions of Town Board accepting the Advisory Opinion and censuring the appearance of impropriety were promulgated under the *former* Code of Ethics. No action was taken and no determination was made against the petitioners under the new Code of Ethics.

**XI.  
THE REVISED CODE OF ETHICS SUBSTANTIALLY COMPLIED WITH  
MUNCIPAL HOME RULE LAW §22(1).  
(Petition ¶¶ 22-23)**

NY General Municipal Law §806 expressly authorizes local municipalities to adopt their own local codes of ethics, provided that the local code "may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited." Accordingly, the Revised Code of Ethics expressly provided at §17-08 (Conflicts with General Municipal Law) that:

In the event that any provision of this chapter shall conflict with the provisions of Article 18 of the General Municipal Law of the State of New York, the provisions of this code shall prevail except that nothing in this code shall authorize conduct otherwise prohibited by the *General Municipal Law* [italics in original]. Pursuant to authority in the New York State Constitution and Municipal Home Rule Law this code supersedes all inconsistent provisions of Article 18 of the General Municipal Law of the State of New York, except that nothing in this chapter shall authorize conduct otherwise prohibited by Article 18 of the General Municipal Law.

Thus, the more restrictive standards of conduct set forth in the Revised Code of Ethics did not “supersede” the provisions of Article 18 of the NY General Municipal Law, and there was no need to identify the specific state law provisions that were superseded by their enactment.

The Revised Code of Ethics superseded state law in only one respect – it altered the composition of the Board of Ethics. The Revised Code of Ethics provides at §17-05 that “...[n]o member of the Ethics Board shall hold any other Town office or be an employee of the Town....” This provision is inconsistent with New York General Municipal Law §808-3, which provides that “...[the] ...[B]oard [of Ethics] shall include at least one member who is an elected or appointed municipal officer or employee.”

The Court of Appeals has repeatedly stated that a town’s authority to supersede state law may be exercised upon *substantial* compliance with the procedures set forth in Municipal Home Rule Law §22(1). *See, Kamhi v. Town of Yorktown*, 74 N.Y.2d 423 at 434 (1989); *Turnpike Woods v. Town of Stony Point*, 70 N.Y.2d 735 at 737-738 (1987); *Walker v. Town of Hempstead*, 190 A.D.2d 364 at 372 (2 Dept., 1993), *affd.*, 84 N.Y.2d 360 (1994). In *Turnpike Woods*, the Court stated that:

While section 22 (1) does not, by its terms, mandate technical adherence to any one of the specifically described procedures for amending or superseding a State law, we have required substantial adherence to the statutory methods to evidence a legislative intent to amend or supersede those provisions of a State law sought to be amended or superseded (*Bareham v City of Rochester*, 246 NY 140, 150 [interpreting predecessor provision City Home Rule Law § 12; repealed by *Municipal Home Rule Law § 58*, eff Jan. 1, 1964]; *see also, County of Rensselaer v City of Troy*, 102 AD2d 976, 977; *Matter of La Cagnina v City of Schenectady*, 70 AD2d 761, 762; *Municipal Home Rule Law § 22 [2]*). The purpose of section 22 is to compel definiteness and explicitness, to avoid the confusion that would result if one could not discern whether the local legislature intended to supersede an entire State statute, or only part of one -- and, if only a part, which part (*Bareham v City of Rochester*, 246 NY 140, 150, *supra*).

Here, the Revised Code of Ethics substantially complied with the requirements of Municipal Home Rule §22(1) by specifically identifying the provision of state law that it intended to supersede. The Revised Code of Ethics reiterated at §17-09 (Conflicts with Town Code) Section 4B that it did not authorize conduct otherwise prohibited by Article 18 of the New York General Municipal Law, and stated that :

In particular and without limitation, it is the intent of the Town Board to supersede, and the instant local law hereby supersedes, any inconsistent provision of subdivision 1[sic] of section 808 of the General Municipal Law relating to the composition of the Board of Ethics.

There can be no confusion that the Town Board intended to supersede section 808 of the General Municipal Law relating to the composition of the Town Board of Ethics.

However, in the event the Court finds that the Revised Ethics Code violated the Municipal Home Rule Law §22(1) by misidentifying the superseded section of the General Municipal Law as §808-1 (relating to county boards of ethics) rather than §808-3 (relating to town boards of ethics), only the provision that “[n]o member of the Ethics Board shall hold any other Town office or be an employee of the Town” should be invalidated. The balance of the Revised Code of Ethics should not be invalidated. The Revised Ethics Code provides at §17-09 (Conflicts with Town Code) Section 5 (Severability) that:

Should any section, sub-section, paragraph, sub-paragraph, sentence, clause, phrase, or other portion of this Local Law be declared invalid by a court of competent jurisdiction such action shall not be construed to invalidate the remaining portion of this Local Law.

**XII.**  
**THE NEW ETHICS CODE PROVIDES FOR DUE PROCESS IN THE  
INVESTIGATION OF COMPLAINTS, AND WAS NOT REQUIRED TO  
PROVIDE FOR DUE PROCESS IN THE RENDERING OF ADVISORY  
OPINIONS**  
**(Petition ¶¶24, 28, 30)**

Due process is required before a municipal agency makes a final determination that affects a person's property or liberty rights.

An advisory opinion of the Board of Ethics is not a final determination requiring due process (*See*, Point I above). Nor would the investigation of complaints by the Board of Ethics pursuant to §17-05D of the Revised Ethics Code result in final determinations because the investigation by Board of Ethics results in a recommendation to the Town Board. It is the Town Board, not the Ethics Board that is authorized to impose the penalties authorized by §17-07 of the Revised Ethics Code.

Nevertheless, the new Ethics Code provides that the Board of Ethics will provide notice and an opportunity to be heard in the performance of its investigatory function and provides that other procedures shall be adopted by the Ethics Board. *See*, Revised Code of Ethics §17-05D-2 and 3.

**XIII.**  
**THE PETITIONERS LACK STANDING TO CLAIM THAT THE NEW ETHICS  
CODE IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO DOMESTIC  
PARTNERS BECAUSE THEY DENIED IN THE PETITION THAT THEY ARE  
DOMESTIC PARTNERS**  
**(Petitioner ¶¶24, 26)**

Supervisor Davis and Ms. Powell have no standing to challenge the application of the Revised Ethics Code to domestic partners because they denied in their petition (at ¶8 that they are domestic partners. *See* 20 NY Jur Con Law §§51-53; Plaza Health Clubs, Inc. v. City of NY, 76 AD2d 509 (1<sup>st</sup> Dept. 1980), *app. disp.* 51 N.Y.2d 1008 (1980).

**XIV.**  
**NEITHER THE TERM “DOMESTIC PARTNERSHIP” NOR THE TERM**  
**“COHABITATION” IS UNCONSTITUTIONALLY VAGUE.**  
**(Petitioner ¶¶24, 26)**

Due process does not require that a statute meet impossible standards of specificity; all that is required is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practice. 20 NY Jur Constitutional Law §402.

The term “domestic partnership” is defined by Black’s Law Dictionary (8<sup>th</sup> ed. 2004), in pertinent part, as: “[a] nonmarital relationship between two persons of the same or opposite sex who live together as a couple for a significant period of time.” The term “cohabitation” is defined by Black’s Law Dictionary (8<sup>th</sup> ed. 2004) as: “[t]he fact or state of living together, esp[ecially] as partners in life, usu[ally] with the suggestion of sexual relations.”

It should be noted that the Revised Code of Ethics provides a means by which any town officer or employee may clarify the meaning and application of any terms contained in the statute. The Revised Code of Ethics provides at 17-05 (Town Board of Ethics) that “[u]pon written request, the Board [of Ethics] shall render advisory opinions to officers and employees with respect to this [Revised] Code [of Ethics]”.

**XV.**  
**SUPERVISOR DAVIS AVAILED HIMSELF OF THE BENEFITS OF THE**  
**REVISED ETHICS CODE BY REQUESTING AN ADVISORY OPINION; HE**  
**SHOULD BE ESTOPPED FROM CHALLENGING THE**  
**CONSTITUTIONALITY OF THE REVISED ETHICS CODE.**

One who has availed himself of the benefits of a statute, or exercised a right that it accords, has manifested his or her assent to the statute and may not challenge its constitutionality. 20 NY Jur Constitutional Law §58.

Here, Supervisor Davis wrote to the Board of Ethics on November 29, 2006 stating that:

As I work toward the reorganization meeting in January there are a number of issues that arise regarding the new ethics law. I would appreciate your confidential review of these personnel matters

By requesting an advisory opinion regarding the Revised Ethics Code, the Supervisor exercised a right that the statute accords. The Supervisor has manifested his assent to the Revised Code of Ethics and should be estopped from challenging its constitutionality.

**XVI.**  
**IN PROHIBITING CONDUCT WHICH CREATES AN APPEARANCE OF IMPROPRIETY, THE NEW ETHICS CODE CODIFIED A WELL SETTLED LINE OF COMMON LAW CASES.**  
**(Petition ¶25)**

New York courts have held that the laws governing municipal ethics prohibit conduct which materially violates the spirit and intent of those laws, even where no express provision of the law has been violated. *See, e.g., Tuxedo Conservation & Taxpayers Assn. v. Town Bd.*, 69 AD2d 320 (2d Dept. 1979); *Zagoreos v. Conklin*, 109 AD2d 281 (2d Dept. 1985).

The codification of legal principles announced by the courts of this State was an appropriate exercise of legislative discretion.

**XVII.**  
**THE REVISED ETHICS CODE DEFINES THE TERMS “OFFICER AND EMPLOYEE” IN SUBSTANTIALLY THE SAME WAY AS GEN. MUN. LAW §800-5**  
**(Petition ¶27)**

The standards of conduct established by Article 18 of the New York General Municipal Law apply to “municipal officers and employees”. *See e.g., NY Gen. Mun. Law §§801, 803, 805 and 805-a.* NY Gen. Mun. Law §800-5 provides that:

Municipal officer or employee means an officer or employee of a municipality, whether paid or unpaid, including members of any administrative board, commission or other agency thereof....No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer fireman or civil defense volunteer, except a fire chief or assistant fire chief.

Similarly, the standards of conduct established by the Revised Code of Ethics apply to Town “officers and employees. *See e.g.*, Revised Code of Ethics §§17-03A, B, C, D, F-1, F-3, F-4, F-5, F-6, G, H, I, J, K-1 and K-2. Revised Ethics Code §17-02 defines the phrase “officer or employee”: as:

An officer or employee of the Town of Putnam Valley, whether paid or unpaid, including members of any administrative board, commission, contract employees, or other agency thereof. No person shall be deemed to be an officer or employee solely by reason of being a volunteer firefighter, volunteer ambulance corps member or emergency management volunteer.

By nearly mirroring Article 18 of the New York General Municipal Law in its application to unpaid members of boards and commissions, the Revised Ethics Law was manifestly reasonable. By expanding the definition of “officers and employees” to include contract employees, the Revised Code of Ethics complied with the mandate of New York General Municipal Law §806 which authorizes local municipalities to adopt their own local codes of ethics, provided that a local code “may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited.”.

**XVIII.**  
**THE ACTIONS OF THE RESPONDENTS WERE NOT ARBITRARY,**  
**CAPRICIOUS, UNREASONABLE, OR AN ABUSE OF DISCRETION.**  
**(Petition par. 31, 32)**

The Board of Ethics diligently gathered the facts and rendered its Advisory Opinion based on the facts presented. Supervisor Davis and Ms. Powell were provided with a copy of Councilmember Tendy’s inquiry and were given an opportunity to

respond in writing – an opportunity they availed themselves of. They were personally interviewed by members of the Board of Ethics. They did not dispute Councilman Tendency's allegation that they were domestic partners. They confirmed that they were financially interdependent.

The Board of Ethics was balanced in its conclusions, declining to determine whether the Supervisor was obligated to devote his full time and attention to his official duties and referring the inquiry to the Town Attorney as a question of law; and finding no prohibited conflict of interest in the rate of salary paid to Ms. Powell, or in the Supervisor's participation in the discussion of a legislative proposal to extend health insurance benefits to the domestic partners of Town officers and employees.

The Board carefully concluded that the Supervisor's hiring of Ms. Powell did not violate New York General Municipal Law §801. It carefully compared the language of the state law with the Town's own ethics code to discern the spirit and intent of the then current Town Code of Ethics. Finally it reached the same conclusion as the State Comptroller, the State Attorney General, and the learned commentators (*see*, Point II above) – that a municipal officer or employee should refrain from participating in hiring a member of his household, setting her salary, supervising her work, and from taking any other actions concerning the terms and conditions of her employment.

### **CONCLUSION**

For the forgoing reasons, it is respectfully requested that the Court grant an order dismissing the verified petition, and that respondents The Town of Putnam Valley Town Board and Board of Ethics have such other and further relief as the Court deems just and proper.

Dated: Roslyn, New York  
January 17, 2006

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