

In the matter of

THE SUFFOLK COUNTY LEGISLATURE'S
SPECIAL LEGISLATIVE COMMITTEE INVESTIGATION
OF THE SUFFOLK COUNTY ETHICS COMMISSION.

MEMORANDUM OF LAW

This memorandum of law is respectfully submitted on behalf of County Executive Steve Levy to address issues which are the subject of the hearing being conducted by the Suffolk County Legislature's Special Legislative Committee that was established to investigate the operations and procedures of the Suffolk County Ethics Commission.

PRELIMINARY STATEMENT

According to Procedural Resolution No. 21-2010, the county legislature ostensibly established the Special Legislative Committee ("Committee") to review the operations and procedures of the Suffolk County Ethics Commission ("Commission") and to recommend any necessary corrective action. The legislative action was purportedly prompted by a letter issued by the Director of the Commission which confirmed that County Executive Steve Levy would properly comply with the county's financial disclosure law by completing and filing the financial disclosure form he is required to file pursuant to New York Public Officers Law §73-a. As discussed below, the position expressed by the Commission's Director was not only correct; it was mandated by State law.

The current legislative action followed a series of misleading, inaccurate and biased articles appearing in Newsday which were written in a manner to create the false impression that the County Executive had searched for a way to avoid filing the county's financial disclosure

form and that he had inappropriately exerted pressure on the Commission to “give him a pass” and “allow” him to file the State form in lieu of the county’s form. The articles were based on pure speculation with no basis in truth or law. Indeed, in its reporting, Newsday virtually ignored the fact that as a member of the Pine Barrens Commission, the County Executive was *required by law* to file the State’s financial disclosure form and that State law specifically provides that a person who files the State form satisfies a county’s local filing requirement by filing a copy of the State form with the appropriate local body. *See* GML §§811, 812.

The false impression created by Newsday’s misleading reporting was reinforced by its virtual dismissal of opinions offered by leading legal authorities in the field of ethics that, under the circumstances presented, only the State form was required to be filed. Mark Davies, Executive Director and Counsel for the New York City Conflicts of Interest Board and former Executive Director of the Temporary State Commission on Local Government Ethics, perhaps the leading authority on the State’s ethics law, has confirmed that the General Municipal Law “MANDATES” that a local government accept the State financial disclosure form in lieu of its own form when the person filing is also required to file the State form pursuant to the Public Officers Law. The local government “*has no discretion*” in this matter. *See* Exhibit A.

In short, the county legislature created the Committee to investigate the operation and procedures of the Commission without a scintilla of evidence that the County Executive exerted improper influence or pressure on the Commission or its members, or that the Commission or its Director acted improperly.¹ There is nothing which transpired which could even remotely justify

¹ The resolution authorizing the Committee also referred to the fact that two ethics matters which arose from complaints filed by the County Executive’s office have been pending before the Commission for two years or more. It is counter-intuitive and simply bizarre to suggest that the delay by the Commission in addressing these complaints somehow reflects that the County Executive exerts influence over the decisions made by the Commission. Ironically, the delay

the investigation initiated by the county legislature. Certainly, mere disagreement by certain members of the legislature with the decision rendered is not a legitimate basis for questioning the integrity of the Commission or its members who volunteer their services and whose reputations were beyond reproach until the legislature formed this Committee questioning their independence and impartiality.

In light of the fact that there was no evidence of wrongdoing by any member of the Ethics Commission or its Director - - all of whom have stated in writing that no pressure was exerted on them by the County Executive, his staff or the county attorney - - it is hard to explain the legislature's expenditure of public funds to conduct this investigation.² Why did the legislature establish the Committee? The only conclusion that can justifiably be reached is that certain members of the legislature are intent on advancing a political agenda by creating a false impression that the County Executive has something to hide in an attempt to discredit him.³ Interestingly, since the 2006 filing, when the County Executive first started filing only the State financial disclosure form until now, no one expressed any concern regarding the form he filed. It was only after March 2010, when he announced that he was switching his party affiliation from Democrat to Republican, and that he would seek the Republican Party's nomination for governor, that the filing suddenly became an issue both for Newsday and certain members of the county legislature. By placing politics above all else, and by publically questioning the integrity

further confirms no such influence; since the County Executive certainly would have received a favorable opinion within a matter of just a few months if he had the type of control over the Commission that was suggested by the legislative resolution.

² Attached as Exhibit B are letters and statements by the Commission members confirming that the County Executive did not exert any pressure on the Commission to render a determination in his favor.

³ Although not required by law to do so, the County Executive has now *voluntarily* filed both the State financial disclosure form and the county's financial disclosure form.

of the Director and the members of the Ethics Commission without any basis in fact for doing so, the legislature has permanently damaged the Commission's reputation, undermined its authority, and rendered suspect any future opinions it may issue.

A PERSON WHO IS REQUIRED TO FILE A STATE FINANCIAL DISCLOSURE FORM PURSUANT TO PUBLIC OFFICERS LAW §73-a COMPLIES WITH THE COUNTY'S FINANCIAL DISCLOSURE REQUIREMENT BY FILING THE STATE FORM WITH THE COUNTY.

The State's financial disclosure law which became effective January 1, 1989, specifically requires state officers or employees, including members of certain commissions such as The Central Pine Barrens Joint Planning and Policy Commission ("Pine Barrens Commission"), to file an annual statement of financial disclosure containing information set forth in the statute.⁴ Pub. Off. Law §73-a (2)(a). Mr. Levy is a member of Pine Barrens Commission by virtue of his position as Suffolk County Executive. As such, he is required to, and has in fact, filed the State financial disclosure form each year that he has served on the Commission.

At the same time that the State Legislature was considering the State Financial Disclosure Law, the Legislature also enacted legislation which authorized the governing body of each political subdivision to adopt a local law, ordinance, or resolution promulgating a form of annual statement of financial disclosure by officers and employees of the political subdivision, including counties. See GML §§811(1)(a), 812(1)(a). Suffolk County adopted such a requirement.

The State Legislature, in enacting the various financial disclosure statutes obviously recognized that there would be instances in which individuals might be required to file a State disclosure form as well as a disclosure form promulgated by a local government. The State

⁴ The term "state officer or employee" includes members of commissions, like the Pine Barrens Commission, in which at least one of its members is appointed by the Governor. Pub. Off. Law §73-a (1)(c)(iii).

Legislature chose to specifically address that possibility. Both GML §811 and GML §812 contain the same provision which eliminates the need for such individuals to complete and file two separate financial disclosure forms. The provision provides in relevant part as follows:

“[A] person who is subject to the filing requirements of both subdivision Two of Section Seventy-Three-a of the Public Officer’s Law and of this subdivision may satisfy the requirements of this subdivision by filing a copy of the statement filed pursuant to section filed pursuant to Section Seventy-Three-a of the Public Officer’s Law with the appropriate body, as defined in Section Eight Hundred Ten of this article, on or before the filing deadline provided in such Section Seventy-Three-a, notwithstanding the filing deadline otherwise imposed by this subdivision.”

See GML §811(1)(b) and GML §812(1)(f)

In other words, if an individual is required to file the State’s financial disclosure form pursuant to Pub. Off. Law §73-a, he satisfies the county’s disclosure requirement by filing the State form with the appropriate local body and he may do so on or before the State’s filing deadline regardless of the county’s deadline.

The provision is clear and unambiguous. The rationale for the statutory provision is also quite obvious - - a person who is required to make full financial disclosure to a degree satisfactory to the State should not need to duplicate such information on a second financial disclosure report since to do so will discourage people from engaging in public service.

An argument asserted by some - - that the county disclosure form is more extensive than the State form and, therefore, both forms must be filed - - is not an accurate statement and, in any event, is not a legitimate reason to ignore the statutory provision. While it is true that the two disclosure forms are not mirror images of each other, they both essentially request similar information albeit in a different format. Indeed, in some instances, the State form requires

information that is not requested in the county's disclosure form.⁵

Even if there was a meaningful difference in the two forms, the State Legislature, in its wisdom, has determined that the information required pursuant to Pub. Off. Law §73-a is sufficient for both purposes. If one disagrees with that determination, that disagreement should be addressed with the State Legislature and not with the Ethics Commission.

Despite the clear statutory provision to contrary, some people still assert that a person who files the State financial disclosure form is, nevertheless, required to file the county's form. In doing so, they cite to the decision by the Appellate Division, Second Department in Suffolk County Ethics Commission v. Neppell, 307 A.D.2d 961, 762 N.Y.S.2d 915 (2nd Dept. 2003), as authority for their position. Their reliance on Neppell is misguided and misplaced because the defendant in that case, Thomas M. Neppell, was not required to file the State financial disclosure form and was, in fact, trying to avoid *any and all* financial disclosure. Whether Neppell would have been required to file the county's form if he had filed the State financial disclosure form was *not* a question before the court or a matter which was considered by it.

The issue presented in Neppell was whether Neppell, the Chairman of the Brookhaven Town Republican Committee, was a "political party officer" as defined by the Suffolk County Administrative Code and was, therefore, required to file the county's financial disclosure form. In support of his position that he was not required to file the form, Neppell argued that GML

⁵ For example, item 7 on the State form requires the reporting individual to list any positions held as an officer of any political party or political organization, as a member of any political party committee, or as a political party district leader. Item 10 requires the filer to identify and describe the source of any reimbursements for expenditures including travel-related expenses provided by nongovernmental sources and for activities related to the person's official duties such as speaking engagements, conferences, or fact-finding events. Item 12 requires the reporting individual to describe the terms of, and the parties to, any contract, promise or other agreement between him and any person, firm or corporation with respect to the employment of such individual after leaving office or the position. These disclosures are not required by the county's form.

§800 *et seq.* preempted the field of financial disclosure by local governments and that according to the definition set forth in the General Municipal Law, he was not a “local political party official.” The Court held that Neppell was required to file the county form because the county’s filing requirement was not inconsistent with the State law. The same is not true with respect to the issue of whether a person who files the State financial disclosure form is also required to file the county form.

Interpreting the county’s law to require a local government official who files the State financial disclosure form to also separately file the county form would be in direct conflict with the provisions of the General Municipal Law since both GML §811 and §812 specifically authorize the completion and filing of *only* the State financial disclosure form with the appropriate local authority. A local government may not impose restrictions on rights granted under State law or prohibit what would otherwise be permissible under State law. *See, New York State Club Assoc. v. City of New York*, 69 N.Y.2d 211, 217, 513 N.Y.S.2d 349, 351 (1987) (local government may not exercise its police power by adopting a local law inconsistent with constitutional or general law and may not exercise its police power when the [State] Legislature has restricted such an exercise by preempting the area of regulation); *Bracker v. Cohen*, 204 A.D.2d 115, 116, 612 N.Y.S.2d 113, 115 (1st Dept. 1994) (a local law may neither prohibit what would be permissible under State law nor impose pre-requisites or additional restrictions on rights granted under State law so as to inhibit the operation of the State’s general law); *DiFrancesco v. County of Rockland*, 41 A.D.3d 530, 531-532, 839 N.Y.S.2d 105, 107 (2nd Dept. 2007) (local law would be inconsistent with State law if it prohibits what would be permissible under State law or imposes prerequisites or additional restrictions on rights granted under State law so as to inhibit the operation of the State’s general laws).

With respect to the matter at issue, the State law clearly preempts the local law to the

extent that the local law would require a person to complete and file both the State and county forms. Indeed, such legislative preemption need not even be as explicit as it is in this situation to be an effective limitation on the county's authority. See New York State Club Assoc., *supra*, 69 N.Y.2d at 217 ("The legislative intent to pre-empt need not be express. It is enough that the [State] Legislature has impliedly evinced its desire to do so and that desire may be inferred from a declaration of State policy by the Legislature or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area). Here the State Legislature has enacted a "comprehensive and detailed regulatory scheme" with respect to the filing of financial disclosure statements by public officials and has *explicitly* stated as part of its regulatory scheme that individuals who are required to file a State financial disclosure form can utilize that same form to satisfy any local government's financial disclosure requirements. The Neppell Court noted that a county cannot make impermissible that which is permissible under state law. Neppell, 762 N.Y.S.2d at 916. An interpretation of the county's financial disclosure law which would impose a requirement that such a person must also file the county's form would be inconsistent with State law since it would effectively prohibit what is permissible under State law and would impose a restriction on a right granted under State law by the State Legislature. In short, the county can not ignore the State law.

CONCLUSION

The county legislature's decision to establish a Special Legislative Committee to investigate the operations and procedures of the Suffolk County Ethics Commission was an improvident exercise of its authority. Not only was it based on unsubstantiated rumors spread by Newsday's misleading reporting, it permanently damaged the Commission's reputation, undermined its authority and rendered suspect any future opinions the Commission may issue. The only explanation for the legislative action and its unwarranted expenditure of public funds,

is that it is politically motivated in an effort to discredit the County Executive. The action of the county legislature is particularly disturbing since the purported justification for the investigation is a letter from the Ethics Commission Director which was an accurate reflection of the law. If the true goal of the legislature is for the Committee to review the operations and procedures of the Commission in order to analyze the process and determine if it is flawed, that analysis should not focus only on the County Executive, as the legislature appears to be doing, but should encompass a review by the Committee of all financial disclosure filings, including those filed by members of the legislature.

Finally, it is appropriate to recall the Special Counsel's remarks before the county legislature in August 2010, wherein he state that a certain "threshold" must be met in order to justify further investigation. It is respectfully submitted that the threshold has not been met. Given the unambiguous State law, the Commission Director's proper interpretation of the law, and the fact that no evidence of coercion exists, the Special Counsel should declare that there is no need or predicate to justify the time or further expenditure of public funds in an effort that will serve only to unfairly denigrate the fine reputations of the members of the Ethics Commission or to further a partisan political agenda on the part of certain legislators.

Dated: Garden City, New York
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Respectfully submitted,
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