General Municipal Law §§ 806, 806(1)(a), Article 18; New York State Constitution Article IX, §§ 2(c), 2(c)(1); Municipal Home Rule Law §§ 10(1), 10(1)(i), 10(1)(11)(a)(1); Election Law §§ 3-200(1), 3-200(2), 3-200(4), 3-204

A county is authorized to adopt an amendment to its code of ethics prohibiting its officers from simultaneously serving as county political party officers. Such amendment may be applied to county commissioners of election.

November 19, 2007

Joshua N. Koplovitz
County Attorney
Ulster County
240 Fair Street
P.O. Box 1800
Kingston, New York 12402

Informal Opinion
No. 2007-7

Dear Mr. Koplovitz:

You have requested an opinion regarding whether the County is authorized to amend its code of ethics to include a provision prohibiting elected county officers, county department heads, and commissioners or chairpersons of county committees, commissions, or boards to simultaneously serve as chairperson, vice-chairperson, secretary, treasurer, or any other executive office in any county political party or political committee. You have further asked whether, if we conclude that the County is authorized to so amend its code of ethics, such a provision would apply to a county election commissioner, or whether its application would be preempted by the Election Law. As explained more fully below, we conclude that the County may amend its code of ethics to prohibit its officers from simultaneously holding executive offices with county political parties or committees, and that such an amendment would apply to the County's election commissioners.

Analysis

1. Prohibition on Holding Political Office in a Code of Ethics

We believe that the County is amply authorized to amend its code of ethics to prohibit county officers from simultaneously serving as political party officers. First, General Municipal Law § 806, governing municipal codes of ethics, requires that the County adopt a code of ethics that provides standards for its

officers and employees with respect to certain specified topics[1] and "such other standards relating to the conduct of officers and employees as may be deemed advisable." General Municipal Law § 806(1)(a). The County is specifically authorized to adopt a code that regulates or proscribes conduct that is not expressly prohibited by article 18 of the General Municipal Law. Id.

In addition, the County, by virtue of its home rule authority, may adopt local laws, not inconsistent with the Constitution or with any general law, relating to its property, affairs, or government. N.Y. Const. Art. IX, § 2(c); Municipal Home Rule Law § 10(1)(i). It may also adopt local laws, not inconsistent with the Constitution or any general law, relating to the qualifications of its officers and employees, except to the extent that the Legislature restricts the adoption of such a local law relating to other than the property, affairs, or government of the County. N.Y. Const. Art. IX, § 2(c)(1); Municipal Home Rule § 10(1)(ii)(a)(1).

We are of the opinion that the County may adopt the proposed amendment to the code of ethics under either the authority granted by the General Municipal Law to adopt a code of ethics establishing standards for the conduct of its officers or the authority to adopt local laws relating to its government and to the qualifications of its officers. Indeed, a local law analogous to that you describe has been upheld as a valid exercise of a local government's home rule authority and authority to adopt a code of ethics. Belle v. Town Board of Onondaga, 61 A.D.2d 352 (4th Dep't 1978) (upholding a local law that prohibited town officers and employees from serving also as chairperson or vice-chairperson or on a committee of a political party). See also Op. Att'y Gen. (Inf.) No. 97-50 (local law amending a county code of ethics to prohibit any person appointed to a county office from holding an executive office in a political party organization is lawful).

Moreover, a provision such as the one you describe has withstood constitutional challenge. In Golden v. Clark, 76 N.Y.2d 618 (1990), the Court of Appeals upheld a provision in the New York City charter that prohibited high-level city officers from also serving in certain political offices, including

---

[1]These topics are (1) the disclosure of interest in legislation before the local governing body, (2) the holding of investments in conflict with official duties, (3) private employment in conflict with official duties, and (4) future employment. General Municipal Law § 806(1)(a).

chairperson or officer of the county committee of a political party. The charter provision was challenged on several constitutional grounds, including violating the right to vote, the right against disenfranchisement, equal protection, the right of association, and freedom of speech. Id. at 623. Rejecting arguments on each of these grounds, the Court upheld the charter provision as establishing a valid qualification for public office rationally related to the legitimate purposes of eliminating conflicts of interest, broadening opportunities for political and public participation, reducing opportunities for corruption, and increasing citizens' confidence in the integrity and effectiveness of their government. Id. at 626. See also Belle, 61 A.D.2d at 358-59 (rejecting argument that prohibition on political activities violated public officers' First and Fourteenth Amendment rights).

2. Application of Prohibition to County Election Commissioners

Your second question is whether application of the prohibition against holding political party office to the county election commissioners is inconsistent with or preempted by state law.

We begin with the question of inconsistency. As discussed above, a local government may not adopt a local law that is inconsistent with the Constitution or a general state law. See N.Y. Const. Art. IX, § 2(c); Municipal Home Rule Law § 10(1). It has been suggested that application of the proposed restriction on political activity by county officers would be inconsistent with Article II, § 8 of the State Constitution. This section provides that

> [a]ll laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes. All such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties respectively, as the legislature may direct. Existing laws on this subject shall continue until the legislature shall

> otherwise provide. This section shall not apply to town, or village elections.

The Legislature has provided for county boards of elections in the Election Law. Each board of elections consists of two election commissioners, except for certain counties that may choose to increase the number of commissioners to four. Election Law § 3-200(1), (2). Section 3-200 governs the qualifications of commissioners, providing that "[n]o person shall be appointed as election commissioner . . . who is not a registered voter in the county and not an enrolled member of the party recommending his appointment, or who holds any other public office, except that of commissioner of deeds, notary public, village officer, city or town justice, member of a community board within the city of New York or trustee or officer of a school district outside of a city." Election Law § 3-200(4). It also provides that each of the major political parties shall be eligible to recommend appointment of an equal number of commissioners, id. § 3-200(2), complying with the requirement in the Constitution that all laws regulating boards of election shall secure equal representation of the two political parties receiving the greatest number of votes at the last general election. The appointment of election commissioners is governed by Election Law § 3-204, and provides for the nomination of commissioners by party committee and appointment by the county legislature.

We see no inconsistency between the proposed amendment to the code of ethics and these provisions of law. The prohibition against county officers also serving as political party officers does not conflict with the constitutional requirement that all laws regulating election boards or officers must secure equal representation of the two political parties receiving the greatest number of votes at the last general election. If the proposed amendment to the code of ethics is adopted, the two political parties receiving the greatest number of votes in the last general election still must be equally represented by the election commissioners. The code of ethics will simply prevent the same person from representing his or her political party as both an officer of the party and as commissioner of elections at the same time.

The proposed amendment to the code of ethics does not conflict with the constitutional provision that the election commissioners are to be appointed in the manner that the Legislature directs; the manner of appointment provided by Election Law § 3-204 would still apply if the amendment is adopted.

Finally, the proposed amendment to the code of ethics does not conflict with the qualifications of commissioners provided by Election Law § 3-200(4). While the proposed amendment would impose an additional qualification upon individuals to be appointed election commissioner, this does not render the local law inconsistent with the Election Law. In the absence of preemption by state law, which we will discuss below, a local law that prohibits what state law implicitly permits through silence is not inconsistent. See People v. Cook, 34 N.Y.2d 100, 109 (1974). To conclude otherwise would render a local government's home rule authority meaningless. Id. By contrast, a local law would be inconsistent with a prohibitory general state law if it permitted what that state law forbids, but the County's proposed amendment does not have that effect - it does not allow someone to be appointed commissioner who is prohibited from holding that position by section 3-200(4).

Indeed, section 3-200(4) has been interpreted as providing only "minimum requirements" for an election commissioner. Matthews v. Gulotta, 198 A.D.2d 280 (2d Dep't 1993) ("The most rational interpretation [of section 3-200(4)] is that unless, at a minimum, a candidate for the office of commissioner meets these requirements, he or she may not be appointed. The appellants' contention that if a candidate meets these requirements the [county legislature] may not reject his or her appointment for any other reasons, is irrational.").

Having concluded that the proposed amendment to the code of ethics would not be inconsistent with any of the state law provisions suggested, we turn to the question of whether the proposed amendment is preempted by state law.

The doctrine of preemption constitutes a fundamental limitation on a local government's broad power to adopt local laws. Albany Area Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 377 (1989). Where the Legislature has expressed an intent to preempt a field of regulation, a municipality may not legislate in that field absent clear and specific authorization. Robin v. Incorporated Village of Hempstead, 30 N.Y.2d 347, 350-51 (1972). This limitation "embodies the untrammeled primacy of the Legislature to act . . . with respect to matters of State concern." Albany Area Builders, 74 N.Y.2d at 377, quoting Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490, 497 (1977). Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's interest, even if the terms of the local law do not directly conflict with a state statute. Id. at 377. Such laws, were they permitted to operate in a field preempted by state law, would

tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns. Jancyn Mfg. Corp. v. County of Suffolk, 71 N.Y.2d 91, 97 (1987). The mere fact, however, that the state law and the proposed local law would touch upon the same area is insufficient to demonstrate that the State has preempted the entire field of regulation in a given area. Id. at 99. Rather, the test is whether, in acting upon a subject, the Legislature has evidenced a desire that its regulation should preempt the possibility of varying local regulations. Village of Nyack v. Daytop Village, Inc., 78 N.Y.2d 500, 508 (1991).

The Legislature's intent to preempt a field of regulation need not be express, but may be implied from the nature of the subject matter being regulated and the purpose and scope of the state legislative scheme, including the need for statewide uniformity in a given area. Albany Area Builders, 74 N.Y.2d at 377. Typically, courts have relied upon an expression of policy or the presence of a comprehensive and detailed regulatory scheme to find that an area of law has been preempted. See Consolidated Edison Co. v. Town of Red Hook, 60 N.Y.2d 99, 105 (1983).

We find no evidence of an intent, express or implicit, to preempt the area of qualifications of elections commissioners. There is no express statement of preemption. Nor is there a declaration of state policy regarding qualifications for appointment to local boards of election. Finally, the legislative scheme for the qualifications of elections commissioners is not so detailed and comprehensive that we believe it evinces an intent to preempt the area. Instead, section 3-200(4) provides the "minimum" qualifications for an election commissioner. See Matthews, 198 A.D.2d at 281.

We therefore conclude that the County is authorized to adopt its proposed amendment to the code of ethics. We further conclude that such amendment neither conflicts with nor is preempted by the Election Law and thus it may be applied to county commissioners of election.

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

Very truly yours,

KATHRYN SHEINGOLD
Assistant Solicitor General
In Charge of Opinions