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January 18, 2012

Village of Tuxedo Park
Board of Zoning Appeals
80 Lorillard Road
P.O. Box 31
Tuxedo Park, New York 10987

RE: Availability of Documents Prior to Meetings

Members of the Board:

An amendment to the "Open Meetings" portion of the Public Officer's Law that directly affects your day-to-day functioning was recently enacted and becomes effective on February 2, 2012. The new law reads as follows:

CHAPTER 603
A. 72-B
STATE AGENCIES--OPEN MEETINGS--PUBLICATION
Approved January 3, 2012
Effective February 2, 2012

AN ACT to amend the public officers law, in relation to requiring certain records which are the subject of a discussion conducted at an open meeting be made available to the public. The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. Section 103 of the public officers law is amended by adding a new subdivision (e) to read as follows:

(e) Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be

discussed. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision.

§ 2. This act shall take effect on the thirtieth day after it shall have become a law.

While the law is relatively straightforward, let me add some comments. Planning boards, boards of architectural review and boards of zoning appeals are “public bodies” governed by the law, as are village boards. The requirements of the law apply to any “open meeting” of such boards (i.e., any non-executive session or non-attorney-client privilege session) and not just to public hearings. Under the amendment, each board needs to make available, before the meeting begins, any documents that would be subject to production¹ under the Freedom of Information law, but only to the extent that such documents are “scheduled to be the subject of discussion” at that open meeting and only to the extent that it is practicable to do so. Specifically included are proposed resolutions, local laws, proposed regulations or any amendment proposed to any such items as may already exist. The documents covered by the law are to be made available *prior* to the meeting [note: no fixed duration before the meeting is established].

The covered documents need to be made available in two ways. First, hard copies must be made available, upon request, but a reasonable charge (the same charge that is imposed for copying under FOIL) may be imposed for making the copies. In addition, “if the agency in which [the] public body functions (i.e., here, the larger village within which the BZA functions) maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall also be posted on that website (again, to the extent practicable as determined by the agency or the department) prior to the meeting.” This requirement, if applicable, is imposed without regard to request for the posting of such documents. As noted, no production is required (of either the hard copy or the internet variety) except “to the extent practicable as determined by the agency (i.e., the village) or the department (i.e., the BZA).”

How should the village and the BZA implement this law? I do not know whether the village is willing to “expend additional moneys to implement the provisions of this subdivision” or even whether its web site is a regularly and routinely updated website utilizing a high speed internet connection. If it is not so willing (or if the village’s website does not meet that specification), then the village may well determine that it is not practicable to post every application, plan set, local law and consultant’s memo and draft resolution in advance of each BZA meeting.

¹ Note that the same exemptions from production that apply under FOIL apply here. Thus consultant memoranda could, in the first instance, be redacted to the extent that they contain opinions and recommendations beyond statistical or factual tabulations or data. Such redacted posting may well, however, constitute more work than simple posting. Moreover, if you routinely discuss those opinions and recommendations, a court may determine that such redaction is not authorized by this amendment.

Moreover, even if the *village board* makes a determination that such posting is practicable, if the BZA determines, for budgetary or staffing reasons, that it is not practicable for it to post, then its determination to that effect will avoid the requirement of posting. Of course, either of these determinations of non-practicabilty can be challenged in the courts.

However, it will be a little harder for the village or the BZA to issue a non-practicabilty determination as to hard copies because the village is permitted to charge for these. If—again, due to staffing inadequacies in the BZA “department”—it is determined, however, that it is not practicable to make and have copies available before each meeting then production and copying of requested documents can be excused through issuance of such a non-practicabilty determination.

Thus, by copy of this letter to the village board, I am requesting—on your behalf—that the village let you know whether it deems the use of its web site practicable for posting of BZA documents. Should it find such posting practicable, and should you also find it practicable, you will need to require applicants to provide you with *pdf* (or some other electronically formatted) copies of all submissions in sizes that can be posted, stored and accessed by the general public.

Very truly yours,



MICHAEL H. DONNELLY

MHD/lrm

Cc: Village of Tuxedo Park Village Board
Richard B. Golden, Esq.