

At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at 285 Main Street,
Goshen, New York 10924 on the 16th day of January 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

In the Matter of Application of
CLAUDIO GUAZZONI DE ZANETT,

Petitioner,

DECISION & ORDER

-AGAINST-

Index No. EF004211-2023
Motion date: 10/25/23
Motion Seq. # 1 and 5

THE VILLAGE OF TUXEDO PARK,
DAVID C. MCFADDEN, Mayor, and the Village
Board of the VILLAGE OF TUXEDO PARK,
Joshua S. Scherer, Trustee, Tinka Shaw,
Deputy Mayor/Trustee, Christopher Kasker,
Trustee, and Paul A. Brooke, Trustee,

Respondents.

VAZQUEZ-DOLES, J.S.C.

The following papers were read on Petitioner’s application Seq. #1 for an order declaring that the June 26, 2023 meeting of the trustees of the Village of Tuxedo Park (“the Meeting”) was held in violation of law, declaring all resolutions from the Meeting to be null and void, and barring David McFadden from voting on or controlling any litigation related to the 2023 mayoral election, and Seq #5 for an order granting leave to amend the Petition, for a preliminary injunction, declaring that Respondents violated the Open Meetings Law, declaring the allocation of funds for any contract for legal services to be null and void, and for an award of legal fees:

Order to Show Cause Seq.#1/Petition/Ex. A-H.....1-10

Answer/Opposition Affirmation/Ex. A-B/Affidavit/Transcript/Ex. 1-6.....11-22
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Notice of Motion #5/Affirmation/Ex. A-B/“Supporting Papers”/Ex. A-H....1-13
 Opposition Affirmation.....14
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I. Summary of the Decision

In this special proceeding, Petitioner seeks declarations related to the conduct of officials serving in the government for the Village of Tuxedo Park (hereafter “the Village”). Respondents established that its June 26, 2023 meeting complied with every aspect of the Public Officer Law with one possible exception related to the virtual appearance of one Trustee. Moreover, a subsequent meeting, which Petitioner attended, involved votes in favor of the same resolutions that Petitioner challenges. Thus, the relief requested in Motion #1, i.e. declaring that the June 26, 2023 meeting and resolutions passed thereat violated the NY Public Officer Law, is DENIED. Respondent McFadden is no longer Mayor of the Village and therefore the request to exclude his participation in any aspect of the Village government as mayor is DENIED as MOOT.

The denial of Motion #1 addresses all causes of action pled in the Petition. As a result of the denial of Motion #1, all claims in the Petition are DISMISSED. Petitioner is not a prevailing party and therefore has no right to recover legal fees. The Court declines to award legal fees as a matter of discretion to any party.

Motion Seq. #5 to amend the Petition is DENIED because the amendments will not substantively alter the claims as pled in the original Petition. Since the Court is dismissing in this Decision and Order all claims in the Petition, a proposed amendment that does not amend the claims or forms of relief cannot alter that outcome, is futile, and is DENIED. The request for a “preliminary injunction” in the notice of motion is not supported by any assertion of what

Petitioner seeks to enjoin or his basis for that drastic relief. Indeed, Petitioner never mentions a provisional remedy in any supporting papers. That aspect of the motion is therefore DENIED.

II. Facts Underlying the Claims and Defenses

The Village Trustees held a public meeting on June 26, 2023 (“the First Meeting”). The First Meeting had originally been scheduled for June 21, 2023. The First Meeting was postponed as a result of Petitioner filing a different lawsuit against the Village related to the mayoral election. The mayor at the time, David McFadden, was seeking re-election against candidate Marc Citrin. Petitioner herein had filed a separate lawsuit on June 20, 2023 (Index No. EF004013-2023) (“the Election Lawsuit”) in which he named the Village, the Clerk, McFadden, Citrin and others as respondents in a challenge to the canvassing of certain absentee ballots.

The Clerk advised the Times Herald Record on June 21, 2023 of the First Meeting adjournment. A post on the Village website on June 23, 2023 advises of a meeting to be held “this Monday”, which would have been June 26, 2023. The Clerk posted an agenda for the First Meeting on the Village website on June 23, 2023 as well as on the Village physical bulletin board. The Clerk’s affidavit in Opposition to Motion #1 annexes an agenda at Exhibit 1 that she attests to posting.¹

The First Meeting began at 7:04 p.m. A motion to proceed to executive session was passed at 7:05 p.m. Executive session ended at 7:57 p.m. The Trustees then passed various resolutions, only some of which are germane to the instant motions. Resolution 0626-02 provided for the discharge of the attorney representing the Village and the Clerk in the Election

¹ The agenda differs from an agenda (Ex. E to the Petition) that Petitioner asserts he secured after the First Meeting with regard to the identity and location of a trustee appearing remotely. In all other relevant respects, the two agendas are the same.

Lawsuit. Resolution 0626-03 provided for allocation of \$25,000 to hire a new attorney for representation in the Election Lawsuit (“the Contract”). Resolution 0626-04 provide for the Office of Mayor to serve as primary contact for the new attorney. Then-Mayor McFadden participated in each of these three votes.

The First Meeting agenda did not mention these three resolutions as meeting topics. The agendas stated that an executive session would occur at which the Trustees would discuss “legal matters”. The content of the executive session discussion is not reflected in the record.

Petitioner is a resident of the Village. Petitioner claims he was “effectively barred” from attending the June 26, 2023 meeting, an apparent admission that he did not attend the meeting. Petition at Par. 9. Petitioner filed the instant Petition and a proposed order to show cause on June 28, 2023, after the First Meeting.

After becoming aware of the instant lawsuit, the Village held a subsequent meeting on July 6, 2023 (“the Second Meeting”). The Clerk posted notice of the Second Meeting on June 30, 2023 on the Village website and the physical bulletin board. The Clerk notified the Times-Herald Record that same day of the Second Meeting. The Clerk posted an agenda on the Village website on July 5, 2023. The agenda refers to resolutions that would be discussed as to retention of independent counsel to represent the Village and Clerk in the Election Lawsuit.

The Second Meeting proceeded on July 6, 2023. The official minutes note that Petitioner attended. Then-Mayor McFadden recused himself from all votes and other business. The Board passed Resolutions 0706-02, -03 and -04, which explicitly state that each resolution is intended to avoid the necessity of contesting the allegations in the instant lawsuit as to whether the First Meeting complied with the Public Officer Law. Resolution 0706-02 discharged prior counsel in the Elections Lawsuit. Resolution 0706-03 retained new counsel for the Election Lawsuit,

effectively ratifying the Contract approved at the First Meeting. Resolution 0706-04 designated the Clerk (not the mayor) as primary contact for counsel in the Elections Lawsuit.

III. Procedural History

Petitioner is a Village resident who has refers to himself in the Petition as “public advocate”. The Village has not created any elected or appointed position of “public advocate”. Petitioner also “claims status as a journalist” and asserts that he is entitled to receive direct notice of every Village meeting, on the basis that he publishes an internet blog. Petitioner provides no evidence of the dates of publication, scope of circulation/site visits, or other details.

After Petitioner filed the Petition and proposed order to show cause on June 28, 2023, the Court signed an Order on June 29, 2023. The Order to Show Cause was assigned Motion Seq. #1 by the Clerk of Court. Respondents filed an Answer and a Motion to Dismiss (Seq. #2) on July 13, 2023. Respondents’ Motion to Dismiss was denied without prejudice on July 14, 2023 on the record. Petitioner filed a Reply to the Answer on August 15, 2023.

Petitioner and certain respondents thereafter communicated to the Court that they were in discussions to resolve this lawsuit and asked that the Court await the results of those discussions before ruling on Motion Seq. #1. Therefore the Court set this case for a settlement conference on October 30, 2023. The parties did not reach a resolution of any claims and defenses. At the conference, Petitioner stated his intention to move to amend the Petition.

Thereafter, Petitioner filed two motions (Seq. #3 and #4), neither of which moved to amend the Petition. Both motions were denied because the relief was the very same as the relief already demanded in the Petition and in Motion Seq.#1.² Petitioner than filed Motion #5 with a

² Motion Seq. #3 was served on less than the minimum eight day notice required by CPLR 2214.

proposed Amended Petition.

The proposed amendments to the Petition do not change the claims in any substantive manner. The proposed amendments modify or add certain alleged facts, add a further form of relief that the Village recover monies paid for certain legal work, and add a verification from Petitioner himself. The eight separately identified causes of action remain the same as to the legal basis, if any, pled in the original Petition.

The causes of action pled concern the First Meeting, alleging: 1) the Trustees conducted business in an executive session that was required to occur in open session; 2) the passing of an appropriations resolution during executive session renders the vote null and void; 3) the retention of counsel to defend the Village and Clerk in the Election Lawsuit (that Petitioner himself filed) is void because the contract constitutes a loan or gift to then-Mayor McFadden; 4) the lack of reference to the retention of new counsel as an agenda item renders the vote null and void; 5) the notice of the meeting was inadequate because it did not refer to the location of Trustee Scherer, who appeared remotely, was not sent to the news media generally, and was not sent specifically to Petitioner, all of which renders the contract approval null and void; 6) the lack of notice of the meeting renders the contract approval null and void; 7) the lack of notice of the location of Trustee Scherer renders the contract approval null and void; 8) an “ethical violation” by former Mayor McFadden renders the Contract null and void.

The Petition pleads various forms of relief, none of which Petitioner relates directly to any particular cause of action: a) a declaration that Respondents violated the “Open Meetings Law”; b) a declaration that any contract for legal service “designed to confer a benefit upon” then-Mayor McFadden is null and void; c) a declaration that any resolution relating to a contract for legal services in relation to the Election Lawsuit is null and void; [*sic*] c) an order requiring

Respondents to adhere to the “Open Meetings Law” in all future meetings; d) awarding undefined damages to Petitioner; e) awarding attorney fees and costs to Petitioner; f) awarding punitive damages to Petitioner. The Amended Petition proposes one further form of relief: g) an order requiring the Village to recover all funds disbursed to pay for services pursuant to an improperly approved contract.

IV. Motion #1 – Public Officer Law Violations

CPLR 103(b) provides that special proceedings may involve procedures that vary from actions. Unlike an action, a special proceeding results in a summary determination by the Court if no issues of fact are raised that require a trial. CPLR 409(b). The show cause Order that Petitioner submitted and the Court signed for Motion #1 is the procedure pursuant to CPLR 403(d) that places before this Court the claims raised in this special proceeding. *See 1300 Franklin Avenue Members, LLC v Board of Trustees*, 62 AD3d 1004 (2d Dept 2009) (summary judgment motion is not necessary for the court to dispose of claims and defenses in special proceeding, where no issues of fact require a trial).

Petitioner’s claims in the first instance require a determination if Respondents violated the Public Officer Law. If so, then the Court reviews whether Respondents subsequently took action that “cured” the deviations that occurred in a past meeting. If Respondents did not successfully undertake curative action, then the Court must determine if the challenged actions of the Respondents should be voided.

Public Officer Law Relief

The NY Public Officer Law provides certain requirements that are incumbent upon public bodies, including a village board of trustees. Any “aggrieved person” has standing to enforce those laws. Petitioner’s “title” of public advocate provides him with no greater or lesser

rights than any other resident of the Village. Nor does Petitioner have the right to proceed on behalf of any person other than himself, as he suggests in each count of the Petition. He has not pled or moved for class certification or utilized any other procedure by which he could be representative of any person other than himself.

In the event that a person establishes that a public body violated the Public Officer Law, upon good cause shown the Court may, in its discretion, void any of the acts at issue. Public Officer Law 107. Notably, “not every breach of the Open Meetings Law automatically triggers its enforcement sanctions”. *Chestnut Ridge Associates, LLC v 30 Sephar Lane, Inc.*, 169 AD3d 995, 998 (2d Dept 2009) (reversing the annulment of a town board’s action because its decision was made in a public meeting on notice, despite its noncompliance with certain procedural prerequisites). Similarly, voiding a resolution due to the failure of a school board to post adequate notice of its meeting was an abuse of discretion where no bad faith existed and no prejudice occurred to the public. *Wilson v Board of Ed. of Harborfields*, 65 AD3d 1158 (2d Dept 2009).

Public Officer Law Meeting Requirements and Compliance

Among the Public Officer Law requirements is that the time and place of each meeting of a public body -- *that is scheduled at least one week in advance* -- is communicated at least 72 hours beforehand to the “news media” and conspicuously posted in a designated public location. NY Public Officer Law 104(a). Here, the First Meeting was scheduled no earlier than June 20, 2023, adjourning the June 21, 2023 meeting as a result of Petitioner filing the Election Lawsuit. Thus, the First Meeting was not scheduled at least one week in advance, rendering the requirements of Section 104(a) inapplicable.

The time and place of meetings scheduled less than one week in advance shall be posted

a “reasonable” time in advance and communicated to news media “to the extent practicable”.

Public Officer Law 104(2). Here, the Clerk complied with governing law by advising the Times Herald Record and posting a notice of the First Meeting several days in advance.

Public Officer Law 103(e) requires a public body – to the extent practicable – to make available to the public at least 24 hours before a meeting, inter alia, public records and resolutions that the public body plans to discuss during an open meeting. There is no evidence to establish that the Trustees intended to discuss the Contract at the First Meeting.³ As of June 23, 2023 (three days before the First Meeting), the subsequently discharged counsel was still filing court papers in the Election Lawsuit on behalf of the Village and Clerk. New counsel retained by the Contract did not file an appearance in the Election Lawsuit until after the First Meeting, on June 28, 2023.

The Petition is based upon speculation that some of the Respondents conspired before the First Meeting to replace counsel in the Election Lawsuit and intentionally withheld that topic from advance public disclosure. Petitioner does not refer to any document, testimony or other evidence to support his speculation. Nor has Petitioner engaged in any discovery in the past six months to locate such evidence. Therefore, Petitioner has not established that Respondents were required to post records or any resolutions related to the Contract for public access before the First Meeting.

Public Officer Law 105 provides for the conduct of an executive session upon a majority vote of a public body that identifies the subjects to be considered. One such permissible subject is pending litigation. Public Officer Law 105(1)(d). The First Meeting minutes reflect a

³ Petitioner has never moved to serve disclosure pursuant to CPLR 408 since this special proceeding was filed more than six months ago.

majority vote to adjourn to executive session to discuss legal matters. This process complied with governing law.

The meeting minutes reflect that upon returning to open session, the Trustees voted upon the appropriation of funds for the Contract. That vote was *not* conducted in executive session, as Petitioner asserts in the Second Count of the Petition. Petitioner admits he was not present for the First Meeting. No evidence in the record supports his assertion.

Thus, the First Meeting complied in every respect with the Public Officer Law save one possible exception. The location of Trustee Scherer may not have been disclosed on the agenda as required. The submission of two agendas in the record, one by Petitioner and one by Respondents, raises a question in this regard.

However, this one possible aspect of noncompliance does not rise to the level of “good cause” sufficient to cause the Court to void the actions of the Trustees at the First Meeting. Petitioner suffered no prejudice by their actions, which occurred in a public meeting, on notice as required by law. Petitioner could have, but apparently declined, to check the Times-Herald Record for a meeting notice. The possible omission of the location of Trustee Scherer did not disadvantage Petitioner because his Petition asserts he was “effectively barred” from the meeting entirely. For those who did attend, the Clerk attests to Trustee Scherer being visible throughout the meeting by video link. The Court declines to exercise its discretion to void any aspect of the First Meeting.

Curative Action at the Second Meeting

Apart from Respondents’ compliance with the Public Officer Law, the passage in the Second Meeting of all the contested resolutions from the First Meeting provides an independent and alternative basis to deny the relief in the Petition. The Second Meeting was not affected by

any of the challenges that Petitioner raises. The notice was sufficiently posted and sent to the media in advance; the agenda listed the Contract; all Trustees were physically present; then-Mayor McFadden recused himself; and the appropriation vote occurred in a public session. Petitioner attended the Second Meeting. In his Reply in support of the Petition, he does not dispute any of the facts regarding the Second Meeting that Respondents addressed in their Answer. Indeed, Petitioner again in his proposed Amended Petition fails to even refer to the Second Meeting.

Petitioner does not allege that the Second Meeting did not comply in any respect with the Public Officer Law. The ratification of the Contract and recusal of then-Mayor McFadden cured any possible deviations from required Public Officer Law procedures at the First Meeting. *Town of Moriah v Cole-Layer Trumble Co.*, 200 AD2d 879 (3d Dept 1994). Moreover, the Trustees voted to make the Clerk, not the Mayor, the person directing the Election Litigation, mooting Petitioner's challenges to then-Mayor McFadden's participation in any litigation decisions. Petitioner was not prejudiced because he attended the Second Meeting and never spoke against any resolution.

For all of these reasons, Motion Seq. #1 is DENIED.

V. Motion Seq. #5 -Amend the Complaint and Preliminary Injunction

The application to amend the Petition includes a draft Amended Petition. That proposed draft does not change any of the eight causes of action. Nor do the proposed changes allege any new facts or modify prior factual allegations that would affect the Court's denial of Motion Seq. #1. The verification of the Petition by Petitioner does not change his allegations of facts generally or his cause of action. The additional form of relief of seeking a return of funds already paid for the Contract presupposes a voiding of the Contract, which the Court has

rejected.

In sum, nothing that Petitioner alleges in his proposed Amended Petition would change the Court's holding that the First Meeting complied in all respects (save possibly one as noted) with the Public Officer Law. Nothing alleged would change the Court's holding that the Second Meeting cured any possible defects in the First Meeting. The proposed Amended Petition would therefore be futile as it would result in an immediate dismissal of that pleading for all the same reasons that supported dismissing the original Petition. That aspect of the motion is DENIED.

The request for a "preliminary injunction" in the notice of motion is not supported by any assertion of what Petitioner seeks to enjoin or his basis for that drastic relief. Indeed, Petitioner never mentions a provisional remedy in any supporting papers. That aspect of the motion is therefore DENIED.

For these reasons, Motion Seq. #5 is DENIED.

VI. Attorney Fees

The Court has discretion to award attorney fees to the prevailing party. Public Officer Law 107. The Court takes into account that the Petitioner established a possibility of one minor violation of law, namely whether the agenda for the First Meeting reflected that one trustee was appearing remotely. The issue of whether the Contract should have appeared on the agenda for the First Meeting was never established by Petitioner and he failed to conduct any discovery after initiating this special proceeding to support his speculative claims.

Nonetheless, the Court is also mindful of the possible chilling effect on challenges to public officials and their actions that can result from an award of legal fees to a municipality in this type of proceeding. Petitioner may not have been aware of the significance of the Second Meeting as to mooted his legal challenges to the First Meeting. For these reasons, the Court

declines to exercise its discretion to award legal fees to Respondents.

Upon the foregoing, it is hereby

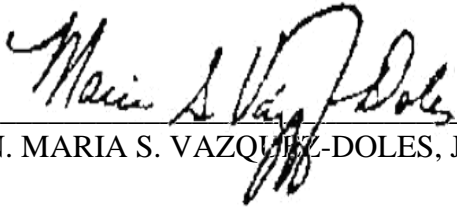
ORDERED that Motion Seq. #1 and Motion Seq. #5 is **DENIED**, and it is further

ORDERED that the Petition is **DISMISSED**.

This Decision constitutes the Order of this Court.

Dated: January 16th, 2024
Goshen, New York

ENTER:



HON. MARIA S. VAZQUEZ-DOLES, J.S.C.