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Board of Trustees
Village of Tuxedo Park
Tuxedo Park, NY 10987

Dear Village Trustees:

I was disappointed to read that the Village Trustees have purportedly authorized the expenditure of taxpayer funds for so-called “conflict counsel” for Mayor Citrin under circumstances that simply do not warrant the retention of such counsel. It seems the Trustees (all non-lawyers) were ambushed by Mayor Citrin (a lawyer) in executive session and confronted with an obscure legal doctrine that under very limited circumstances (not present here) would justify Mayor Citrin’s retention of counsel to advise him, at taxpayer expense, without any oversight from the Board of Trustees to whom the Legislature has entrusted such responsibility. I can only assume the Trustees did not fully understand what they were undertaking nor did they appreciate the intricacies of the conflict counsel doctrine, which I’m certain none of them were familiar with.

Moreover, it appears from the inexplicably rushed nature of this purported approval that the Village did not comply with the explicit requirements of the Village Code to approve conflict counsel for Mayor Citrin. Accordingly, I submit that any supposed approval of conflict counsel is void. Later, I address why retention of conflict counsel is unwarranted even if the Village attempts to undertake the proper procedure for approval.

The Supposed Conflict Counsel Approval Did Not Comply With Village Law

In 2011, the Village adopted substantial amendments to the Village Code regarding the defense and indemnification of Village employees¹ “providing for a more

¹ For purposes of this Article of the Code, Village “employee” is defined broadly to include “any employee, trustee, mayor, officer, member of a Village board or commission, director, volunteer expressly authorized to participate in a publicly sponsored volunteer program or any other person holding a position by election, appointment or

complete defense and indemnification of Village employees and officers.”² I urge the Trustees to read the entirety of Article II (Defense and Indemnification) of Chapter 15 (Officers and Employees), but I excerpt below portions thereof relevant to the legality of any purported retention of conflict counsel.

After declaring an employee’s right “to be represented by the Village Attorney, or counsel designated by the Board of Trustees, at no cost to the employee,”³ the Code delineates the circumstances under which conflict counsel may properly be employed at taxpayer expense (numbers in brackets are not original and correspond to my discussion of these specific provisions below):

“The employee shall be entitled to representation of private counsel of his or her choice [1] in such action or proceeding...at the expense of the Village whenever the Village Attorney determines, [2] based upon an investigation and review of the facts and circumstances of the case and the prevailing law, that a conflict of interest exists between the employee and the Village If the employee or group of employees is entitled to representation by private conflict counsel under the provisions of this Section at the expense of the Village, [3] the Village Attorney shall so certify this to the Board of Trustees.”⁴

1. As I informed the Village in my previous letter addressing conflict counsel, *Cahn* has always required “the good faith prosecution or defense of an action undertaken in the public interest,”⁵ and the Village Code now codifies this requirement that conflict counsel is proper only in an “action or proceeding”. The Sarcone letter threatens litigation, but until there is an actual “action or proceeding” there is no statutory right to conflict counsel, nor does *Cahn* and its progeny support any such right.
2. Before conflict counsel may legally be authorized by the Board of Trustees, the Board must be informed of the results of the Village Attorney’s required “investigation and review of the facts and circumstances of the case and the prevailing law”. Sarcone submitted his letter the same day as the Village Board of Trustees meeting, and Mayor Citrin has publicly stated that the Board authorized his employ of conflict counsel in executive session later that night. It is inconceivable that the Village Attorney could have completed and documented any such statutorily required investigation in such a compressed

employment in the service of the Village of Tuxedo Park, whether or not compensated, but shall not include an independent contractor.” Village Code §15-8.

² Local Law No. 2 of 2011, Section 1: Purpose.

³ Village Code §15-9(B).

⁴ *Id.*

⁵ *Cahn v. Town of Huntington*, 29 N.Y. 2d 451, 454-55 (1972)(emphasis added).

time period. Moreover, the plain meaning of “investigation and review of the facts and circumstances of the case and the prevailing law” suggests that any such investigation must be documented for the Board and provided sufficiently far in advance that the Board has an opportunity to read and reflect on such investigation and conduct any further due diligence with the Village Attorney as appropriate. Clearly, this statutory mandate was not complied with in this case.

3. Not only is the Village Attorney required to conduct an investigation and issue a report to the Village Board of Trustees before conflict counsel may be employed, but he must then “so certify this to the Board of Trustees”. Again, the plain meaning of certification requires a writing. Merriam-Webster defines certify as “to attest authoritatively: such as...to present in formal communication.” Dictionary.com defines certify as “to testify to or vouch for in writing.” With no such formal certification, retention of conflict counsel is not proper or legal.

As the *Cahn* Court explained, such strictures are designed “to ensure responsible municipal government” and “safeguard against the extravagance or corruption of municipal officials.”⁶ In addition, the substantive and procedural safeguards imposed by the Village Code and *Cahn* reflect a sensitivity to the “well settled proposition” under New York’s Constitution that “a municipality may expend its funds only to meet its lawful obligations incurred as a result of the performance of its governmental functions.”⁷

Because Mayor Citrin’s invocation of conflict counsel has satisfied neither the Village Code nor the requirements of *Cahn* and its progeny, he is not entitled to conflict counsel at this time.

The Sarcone Letter Is Not Credible

As explained below, I am mystified as to why Mayor Citrin believes the Sarcone letter merits any substantive response, let alone further taxpayer expenditures on legal fees. Nevertheless, even if the Board determines some legal advice regarding the Sarcone letter is appropriate, in the first instance, such advice should be solicited by, and provided to, the Board as a whole and not just to Mayor Citrin. This would represent a much more reasonable and cost-effective alternative to the

⁶ *Id.* (citations omitted).

⁷ *Corning v. Laurel Hollow*, 48 N.Y.2d 348, 353 (1979)(citing NY Const, art VIII, §1).

Mayor's retention of conflict counsel that would serve all parties and do so consistent with the Trustees' fiduciary obligations to taxpayers.

Now that the Mr. Sarcone's letter is public, it can be seen for what it is: an incoherent rant filled with baseless and wholly unsupported statements of fact and law. Mayor Citrin, as a lawyer himself, must recognize that the Sarcone letter is not worth the paper on which it is printed. Mayor Citrin claims he requires conflict counsel to respond to Sarcone's letter, but he never tells us why. Why does every half-baked threat to sue the Mayor or the Village require the expenditure of taxpayer resources on a lawyer to tell us what the four corners of Sarcone's letter broadcasts to any sensible reader: that it is not credible and not worthy of any response whatsoever.

Sarcone's letter cites not a single statute or case to support his bald assertions:

“Please be advised that pursuant to New York State Village Law, only you as Mayor have the legal right to hire and fire not only, *inter alia*, the Village Attorney, but also anyone who is hired to represent the interests of the Village of Tuxedo Park. You should be aware that the highest court in the State of New York has opined on this matter and the law is clear. Additionally, a ‘Consent to Change Attorney’ does not carry over from one mayor to another.

If you wish to proceed with allowing what amounts to be a high jacking of your legal and fiduciary responsibilities by allowing anyone other than you to appoint an attorney to represent the interests of the Village, you can be held not only liable personally but also accountable for any actions taken on behalf of the government and for any expenditures made to anyone in furtherance to the illegal representation.”

If the law is so clear, and has been made so by the state's highest court, why hasn't Sarcone cited a single statute or case to support this proposition (as I have done in great detail)? The answer is because his assertion is patently false. There is no such law nor any such case to support Sarcone's ludicrous contention that only a mayor may retain counsel on behalf of a Village. Indeed, the very *Pomona* case Mayor Citrin cites to support his supposed right to conflict counsel makes clear that the opposite is true: New York law vests the Village Board of Trustees with the authority to retain counsel on behalf of a village, and it was the Village of Pomona Board of Trustees that retained counsel for the Village.

In fact, the whole point of the conflict counsel doctrine is that it is a narrow, judicially created exception to the general statutory requirement that only the “governing body” (i.e., the elected board of a town or village) may authorize retention of counsel at taxpayer expense. *Cahn*, which established the conflict counsel doctrine, says as much; after quoting New York's Town Law (“No such

officer...shall employ legal counsel except as directed by the town board”), *Cahn* explains:

“It is well-settled law that an attorney may not be compensated for services rendered a municipal board or officer unless he has been retained in accordance with statutory authority. In other words, the power to employ counsel by a municipal board or officer is not deemed to be incidental to such board or officer. Rather, express authority, either by statute or *by appropriate resolution of the governing body* [the Board of Trustees], must be shown to justify the retention of an attorney by a municipal board or officer.”⁸

Of course, Mr. Sarcone knows all this, which is why he does not cite a single case or statute to support his outlandish claims. Just months ago, he represented dissident Westchester County legislators in an unsuccessful attempt to recover legal fees they incurred in opposing an action of the Westchester County Board of Legislature. The decision rejecting the contentions of Sarcone on behalf of his clients featured an extensive discussion of *Cahn*, observing that it “articulated a *narrow exception* to the general rule that express statutory authorization for the public payment of a municipal employee’s attorney’s fees is required.”⁹

This *Guzman* case Sarcone prosecuted also featured a discussion of the general requirement that government officers and employees are entitled to indemnification and government-provided defense in actions brought against them by virtue of conduct in the course of their public employ or representation. Guazzoni also is well aware of the fact that elected officials enjoy broad rights to indemnification under the Village Code. In my now-settled FOIL litigation, I urged the Village to terminate Guazzoni’s indemnification and defense based on his demonstrated misconduct, including perjury. Nevertheless, that action cost Village taxpayers over \$100,000, and it cost Guazzoni nothing. A baseless threat that Mayor Citrin will somehow be personally liable for action (or inaction) in his role as mayor is just that, a baseless threat, and should be treated as such by simply ignoring it.

In light of these facts and law, it should be obvious that Sarcone’s letter and the threats leveled therein are wholly baseless and the only appropriate reference is not for counsel to Mayor Citrin, to be obtained at taxpayer expense, but rather to the state bar’s disciplinary committee.

⁸ *Cahn v. Town of Huntington*, 29 N.Y. 2d 451, 454-55 (1972)(emphasis added).

⁹ *Guzman v. Westchester Cty Bd. of Legislature*, 2023 N.Y. Slip Op. 23172 (Supr. Ct. Putnam Cty June 5, 2023); *see also Id.* (“In the absence of extraordinary circumstances, a municipality may not be compelled to compensate for services rendered by an attorney unless his retainer is authorized by statute or appropriate resolution of the governing body.”)(quoting *Corning v. Village of Laurel Hollow*, 48 N.Y.2d 348, 351 (1979)).

What's the Hurry Mr. Mayor?

Mayor Citrin's puzzling sense of urgency to retain conflict counsel in light of Sarcone's nothingburger letter only makes sense when you consider his personal incentives. Recall that Citrin's and Guazzoni's personal legal and financial interests are aligned—and in direct opposition to the interests of the Village and its taxpayers—when it comes to disqualifying attorney Elisa Gilbert's representation of the Village to recover taxpayers' \$300,000 of legal fees squandered in their frivolous election lawsuit. Attorney Gilbert's motion to recover such taxpayer funds is pending in Orange County Supreme Court, and I urge all residents to read it (it can be found here:

<https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=RA6N54CbE6ZWrnf/BxbXXA==>)

Sarcone and Guazzoni both know that the appropriate forum to disqualify attorney Gilbert is that very court in that very action. But the problem for them is that this contention, like their lawsuit, is frivolous; and any attempt to attack her perfectly legal retention for the limited purpose of this recovery-of-fee motion is doomed to fail and would further prejudice them with the court that will decide whether they have to reimburse we taxpayers our \$300,000 that they squandered. These circumstances explain the motivation behind the Sarcone/Guazzoni letter attempting a Hail Mary to get Mayor Citrin to (improperly) insert himself into the unconflicted Trustees' decision to retain attorney Gilbert at no cost to taxpayers unless the motion succeeds.

These circumstances render Mayor's Citrin's urgent invocation of conflict counsel and his attempt to jam the Trustees all the more suspect. He has the same legal and financial incentives as Guazzoni to see attorney Gilbert's representation challenged. Without the pesky Trustees providing oversight, perhaps Mayor Citrin could hire a Sarcone-like hack as conflict counsel, at taxpayer expense, who might be inclined to agree with the Sarcone/Guazzoni Hail Mary? Frankly, the circumstances of this situation stink, and under such circumstances, Trustees have a heightened duty to protect Village taxpayers' interests.

Even if we accept the dubious proposition that the Sarcone letter demands some legal input, it does not follow that such legal input must come from conflict counsel answerable solely to Mayor Citrin. The Village Board (which obviously includes Mayor Citrin) can retain special counsel for the limited purpose of providing advice to the Board with respect to (a) whether there is any prima facie validity to the wild assertions of the Sarcone letter; and (b) in the unlikely event

there is, whether the Board's approval of conflict counsel for Mayor Citrin is appropriate. In this way, the Trustees can discharge their statutory and fiduciary obligations to taxpayers while Mayor Citrin can have some assurance that his supposed concerns based on the Sarcone letter will be reviewed by counsel. Importantly, this more limited construct serves taxpayers' interests if, as I firmly believe, the Sarcone letter merits no response whatsoever (other than with respect to any valid FOIL requests made therein).

If threats are required to get Mayor Citrin's attention, then consider this a threat to pursue him and the Village should he persist in his unlawful attempt to retain conflict counsel under the current circumstances. Taxpayers deserve more consideration than Citrin and the Trustees have provided to date in this matter.

Thank you for your consideration,

Sean P. Madden