Dickover, Donnelly, Donovan & Biagi, LLP
Attorneys and Counselors at Law

James B. Biagi
David A. Donovan
Michael H. Donnelly
Robert J. Dickover

Successor Law Firm To:
Alexander Appelbaum, P.C., Florida, N.Y. (1915-1988)
Ludmerer & Vumo, Esqs., Warwick, N.Y.

28 Bruen Place
P.O. Box 610
Goshen, NY 10924
Phone (845) 294-9447
mail@dddblaw.com
Fax (845) 294-6553
(Not for Service of Process)

September 19, 2007

Houston Stebbins, Mayor
Village of Tuxedo Park
80 Lorillard Road
P.O. Box 31
Tuxedo Park, NY 10987

RE: Local Law 3 of 2006 Follow-Up

Dear Mayor Stebbins:

You have forwarded to me a letter authored by Trustee Chris Hansen in regard to Local Law 3 of 2006 as well as a copy of the September, 2007 issue of the Tuxedo Park Sunshine Report. You have asked me to respond to the legal points raised within these two documents. I do so at this time.

BZA Counsel Opinion

Both Mr. Hansen and the Sunshine Report suggest that Richard B. Golden (as counsel to the BAR) and I (as counsel to the BZA) had a conflict of interest that prohibited either of us from rendering an opinion on the scope and contour of the local law. When you asked me to give you my opinion concerning the law, it was my understanding that you asked me to do so because you wished to have as many opinions as possible regarding application of the law in order that the village board could make an intelligent decision regarding future reappointments of planning board, BAR and BZA members. The fact that I represented one of the boards whose members are subject to the law does not, in my view, create a conflict of interest. Application of the law to members of the board I represent was not an immediate issue because no sitting member of the BZA with possibly disqualifying years of service was being considered for reappointment. I did not

consult with any member of the BZA before writing my letter and understood my client to be—in regard to this specific matter—the village board.

I represent a number of municipalities and it is commonplace for me to be called upon, in my capacity as (for instance) a planning board attorney, to give an opinion to a village or town board on issues both related to and unrelated to land-use matters. This happens both when the village or town attorney is disqualified from giving an opinion for some legal reason and when the municipality's legislative body wishes to have multiple opinions on a single issue. Thus, I was not at all surprised to be asked by you to give you my legal opinion.

Intent of the Law

I had not had occasion, before you asked me for my opinion, to review the terms of Local Law 3 of 2006. When I first read the law I was surprised at the approach it took to sitting members of the planning board, BAR and BZA for, from all reports I had earlier received, I fully expected the law to disqualify from reappointment any board member who had served more than the allowable term limit of two five-year terms as of the date of the local law's adoption. Instead, the law provided, in Section 4, that the limitation provisions of the law "shall apply, to the current members of the Planning Board, the Board of Zoning Appeals and the Board of Architectural Review upon the expiration of their respective terms in office." For the reasons that I outlined in my letter of August 8, 2007, this clause made this law expressly prospective in its application and, therefore, the law applies to a sitting member of any of the three covered boards only when such member reaches the end of his or her present appointed term; and, when the law then applies to him or her, it applies to him for the first time, *i.e.*, as if such member had never before served on a board.

Both the Hansen letter and the Sunshine Report claim that the "true spirit" of the law was to include all prior years of service when a member of a covered board came up for reappointment. Under this here-is-what-I-meant-when-I-voted-for-the-law explanation, the language of Section 4 (quoted above) is read as merely allowing any sitting member of a covered board to complete his term in office (even if that term would bring his total years of service beyond the *term limit* period) and nothing more. While this would, indeed, be a legitimate way to approach the issue, this reading of the language of Section 4 is more than just a stretch—such a reading of the section is completely inconsistent with its rather precise language ("[the limitations provisions of the law] shall apply to the current members of [a covered board] upon the expiration of their respective terms in office."). Moreover, had the law intended the result urged by Hansen and the Sunshine Report, it could have compelled that result quite simply by using, instead of the language that appears in Section 4, language in its place something[1] like the following:

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[1] The language below is given for illustrative purposes only. If I were asked to draft (or now redraft)
[footnote continued on following page]

> Notwithstanding the foregoing, the provisions of Section 15-13... shall not disqualify any sitting member of the Planning Board, the Board of Zoning Appeals or the Board of Architectural Review from completing any term in office underway upon enactment of this law even if completion of that term would result in such member serving more than two consecutive five-year terms. However, upon completion of his or her present term in office, all past service on any covered board (including years of service performed before enactment of this local law) shall be included in determining whether a member is eligible to be reappointed to serve under Section 15-13. Thus, no individual shall be eligible for reappointment to any covered board if the term for which he or she is considered would bring his or her total years of consecutive service beyond the two consecutive five-year terms in office limitation of this law.

It matters not that Chris Hansen now says in his letter that ***this*** is what he thought the law meant when he voted in favor of its adoption. Even when an interpretation of a law is required—and as I told you in my letter of August 8, 2007, I do not believe that an *interpretation* is required here for a *construction* of the law gives us its meaning—a determination of intent is made, not upon what the present members of the legislative body that enacted the law now say that board *meant* when it enacted the law or what earlier members now say they meant back then, but rather by expressions of intent made at the time of enactment of the law in question or, failing specific expressions of intent at that time, by legal rules designed to assist in this task. Nowhere in the law does the meaning desired by Hansen or the Sunshine Report appear; nor (if it mattered, and it does not) did anyone say in any pre-adoption meeting minutes that I have seen that this was what the law intended.

Length of My Earlier Letter

Both Chris Hansen and the Sunshine Report complain about the length of my earlier letter, suggesting that its length was required to turn and twist[2] the law to an unintended meaning. My letter was lengthy—I would prefer to call it thorough—only because I wanted to explain the nuances of the law in the most likely contexts in which its application would arise. If that approach was not helpful, I apologize. I could probably

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this law, I might make a number of other changes that would enable a provision such as that set forth here better dovetail with the organization of the law.

[2] I bristle at the sinister suggestion that I was the tool of crafty manipulation by you. When you asked me to give you an opinion concerning the intent of the law you did not tell me what opinion I should reach and, had you given me such a direction, I would have replied that I was available only to tell you what the law intended, not what you desired it to intend.

have given the board my *conclusion* in two sentences.

Attorney-Client Privilege

My letter of August 8, 2007 was, as you appreciate, a privileged communication. Similarly, this letter is a privileged communication. However, given the controversy surrounding my letter, as well as the importance of this issue to the public, it is my recommendation that the trustees consider affirmatively waiving the privilege and releasing both my original letter and this follow-up letter to the public so that the entire community can fully understand the issue.

Very truly yours,

MICHAEL H. DONNELLY

MHD/lrm

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