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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB29

July 20, 2017

VIA U.S. MAIL AND EMAIL

Ms. Patricia McCune
PO Box 1098
1182 Levels Road
Middletown, DE 19709
mccpatti@gmail.com

Re: May 2, 2017 Correspondence Regarding the Delaware Agricultural Land Preservation Foundation

Dear Ms. McCune:

On May 2, 2017, the Delaware Department of Justice (“DOJ”) received your petition (“Petition”) requesting our determination, pursuant to the Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”), of whether the Delaware Agricultural Land Preservation Foundation (“DALPF”) violated FOIA in connection with its April 19, 2017 meeting. By letter dated May 3, 2017, we invited DALPF to submit a written response to the Petition. We received DALPF’s response on May 19, 2017.¹ We have reviewed the Petition and the Response Letter. For the reasons set forth below, it is our determination that the DALPF did not violate FOIA as alleged.

FACTS

On or about February 28, 2017, Delaware Municipal Electric Corporation, Delmarva Power & Light Company, and the Town of Middletown requested that the DALPF approve a proposed right of way agreement (“Agreement”). The property owner of the impacted land agreed to the terms and conditions of the Agreement. However, because the proposed right of way was located on lands subject to an Agricultural Lands Preservation Easement, the Agreement required written approval of the DALPF.

¹ We had requested the DALPF’s response by May 10, 2017.

The DALPF met on April 19, 2017. The DALPF originally posted notice of its April 19, 2017 meeting on April 11, 2017. On April 12, 2017, the DALPF amended its agenda to include an item not relevant to this determination. Both the original agenda and the amended agenda as contained the following information:

I. Preservation Districts

...

C. District Eligibility and Final Approval

...

D. Expansion Eligibility & Final Approval

...

III. Opportunity for Public Comments

...

VII. Other Business

A. Delmarva Power & Light Co. Permanent Easement Request -
Sedgeville Expansion of the Baker Farms District (N-99-01-187C).

.....

The agenda also appended a three-page attachment entitled "Public Notice" ("Attachment"). The Attachment was written in paragraph form, largely mirrored the agenda, and included the following statement: "The Foundation will examine an application from Delmarva Power & Light Co. for a permanent 'Right of Way' easement to effectuate a high voltage transmission line between the Town of Middletown and Middletown along Levels Rd (SR15) on the Sedgefield Expansion of the Baker Farms District (N-99-01-187C) Parcel #1401000006." The Attachment also stated: "The public is invited to provide comments prior to the April 19, 2017 meeting."

You, along with several of your family members, attended the April 19 meeting. You provided written comments to the DALPF regarding the Agreement and, during the meeting, spoke out publicly against the Agreement. After extensive discussion and public comments from you and two other individuals, the DALPF approved the Agreement with one member voting against it.

SUMMARY OF ARGUMENTS

In your Petition, you allege that the DALPF violated FOIA in connection with its April 19, 2017 vote to approve a right of way agreement (the “Agreement”). Specifically, you allege that DALPF violated FOIA by: 1) providing an inadequate description of the Agreement on its agenda, 2) failing to indicate an intent to vote on the Agreement, and 3) failing to address public comments in its agenda. You highlight what appears to be a typographical error in the Public Notice, which stated that the easement would effectuate a high voltage transmission line between the Town of *Middletown* (rather than Townsend) and Middletown in support of your argument that the agenda was inadequate. Similarly, you point to the DALPF’s use of the word “examine” in the Public Notice in support of your argument that the agenda failed to indicate that a vote would be taken on the matter. Finally, you allege that the agenda failed to address public comments. For the reasons set forth below, it is our determination that the DALPF did not violate FOIA as alleged.

In its Response Letter, the DALPF stated that the Agreement required DALPF approval because the proposed right of way was located on lands subject to an Agricultural Lands Preservation Easement. The DALPF provided no real substantive argument regarding the merits of your claims. However, the DALPF provided several documents, including a copy of the April 19 meeting minutes, and noted that you attended the meeting and made comments. The DALPF also stated that, on or about March 21, 2017, you met with a DALPF representative to discuss the your concerns regarding the proposed right of way. The DALPF also noted that, prior to the meeting, the DALPF provided you with documentation regarding the proposed right of way, including a copy of the Agricultural Lands Preservation Easement that provides for DALPF approval of any proposed right of way located on lands subject thereto.

RELEVANT STATUTES

FOIA requires all public bodies to “give public notice of their regular meetings and their intent to hold an executive session closed to the public, at least 7 days in advance thereof.”² Public notice of meetings “shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings . . .”³ An agenda is defined as including a “general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific grounds therefore.”⁴

² 29 *Del. C.* § 10004(e)(2).

³ *Id.*

⁴ 29 *Del. C.* § 10002(a).

DISCUSSION

As an initial matter, we note that the Court of Chancery has recently stated:

In order that the purpose of the agenda requirement be served, it should, at least, “alert members of the public with an intense interest in” the matter that the subject will be taken up by the [public body]. In other words, members of the public interested in an issue should be able to review a notice and determine that an issue important to them will be under consideration. . . . FOIA provides an informational right to allow public involvement in government. If that interest is complied with, FOIA is satisfied; it is not a tool for use by those who disagree with the actions of their government to have those actions set aside, after the fact, on hyper-technical grounds. Such a result would be as inimical to the open exercise of democracy as failure of the informational right itself.⁵

It is against this backdrop that the DALPF’s notice must be judged.⁶

First, we conclude that the DALPF sufficiently identified the Agreement in its agenda as a major issue that the DALPF expected to discuss. Indeed, the two-page agenda contained the following description: “Delmarva Power & Light Co. Permanent Easement Request - Sedgeville Expansion of the Baker Farms District (N-99-01-187C).” Notably, you take issue not with the agenda itself, but with an apparent typographical error contained in the Attachment included therewith. However, we see no evidence that the agenda – or the Attachment, inclusive of the apparent typographical error – failed to put the public on notice of its intent to discuss the Agreement. To the contrary, we believe that the record demonstrates that you attended the meeting expecting as much.

Similarly, we conclude that the agenda was sufficient to put the public on notice that the DALPF might vote upon the Agreement. Importantly, “[n]othing in FOIA, and importantly nothing in a common-sense reading of the statute in light of its purpose, requires public notice to provide every alternative that may take place with respect to a specific subject under

⁵ *Lechliter v. Del. Dep’t of Natural Res. & Env’t Control*, 2017 WL 2687690, at *2 (Del. Ch. June 22, 2017) (internal citation omitted).

⁶ *See id.* (“It is in that light that I must examine whether the notice given of the . . . Meeting offends FOIA”); *see also Lechliter v. Becker*, 2017 WL 117596, at *2 (Del. Ch. Jan. 12, 2017) (“[T]he purpose of FOIA is to ensure that public business is done in the open, so that citizens can hold public officials accountable. The purpose of FOIA is *not* to provide a series of hyper-technical requirements that serve as snares for public officials, and frustrate their ability to do the public's business, without adding meaningfully to citizens' rights to monitor that public business. It is in that light that I review the actions of Lewes and its officials here.”).

consideration.⁷ Rather, as noted above, “[a]ll that the statute requires is that adequate notice of the matters to be considered is given to the public, so that interested members will have an opportunity to appear and monitor or participate in the proceedings.”⁸ Here, as with your first allegation, you point to the language of the Attachment to the agenda, which stated that the DALPF would “examine” the application, to support your argument that the DALPF failed to notice its intent to vote on the matter. Notably, however, your reliance on the language of the Attachment undercuts your argument. Under the circumstances, we believe that the DALPF’s reference to the *request* in its two-page agenda was sufficient to alert the public that the DALPF might vote on the request. Nevertheless, even if we were to conclude that the agenda description “Delmarva Power & Light Co. Permanent Easement Request - Sedgeville Expansion of the Baker Farms District (N-99-01-187C)” was insufficient to alert the public of the possibility of a vote, the language contained in the three-page Attachment more strongly suggests the possibility of a vote. Indeed, it is clear that the purpose of the DALPF’s “examination” of the Agreement was to inform the DALPF’s vote on the matter.⁹ The public, including those individuals with a personal interest in the Agreement, had ample notice that the Agreement was being considered by the DALPF. Here, we see nothing in the agenda that would mislead the public regarding the possibility that the DALPF might vote on the matter.

Finally, we conclude that the DALPF did not violate FOIA by failing, as you allege, to address public comments in its agenda. Although FOIA does not require a public body to allow for public comment,¹⁰ the agenda stated that the DALPF would provide an opportunity for public comment and, as evidenced by your comments during the DALPF’s discussion of the Agreement, did so. To the extent you argue that the DALPF violated FOIA by allowing for public comment out of sequence with the agenda, we have previously concluded that “FOIA does not require that the items addressed by a public body in a meeting be discussed in the order in which they are listed in the agenda.”¹¹ Moreover, the record demonstrates that the DALPF allowed for public comment

⁷ *Lechliter v. Becker*, 2017 WL 117596, at *2 (quoting *Ianni v. Dep’t of Elections of New Castle Cty.*, 1986 WL 9610, at *4 (Del. Ch. Aug. 29, 1986)).

⁸ *Id.*

⁹ *See id.* (“The purpose of [the Lewes City Council’s] consideration [of an amendment to a sublease], obviously, was to inform a vote by the City Council either approving or denying such an amendment. The public, including those with an interest in the dog park, had all the notice they required that this subject—of particular interest to them—was under review by the City Council.”).

¹⁰ *See Reeder v. Del. Dep’t of Ins.*, 2006 WL 510067, at *12 (Del. Ch. Feb. 24, 2006) (“Although FOIA entitles citizens to notice of public meetings and to attend meetings of public bodies, FOIA does not mandate that public bodies allow for public comments at any or all meetings. There is nothing in the text of the declaration of policy or the open meeting provision requiring public comment or guaranteeing the public the right to participate by questioning or commenting during meetings. What is provided by FOIA generally, and by the open meetings provision in particular, is public access to attend meetings.”) (citations omitted).

¹¹ *Del. Op. Att’y Gen.* 03-IB20, 2003 WL 22669565, at *1 (Sept. 3, 2003).

during its discussion of the very matter in which you demonstrated a clear interest. This appears to have been to your benefit inasmuch as it offered real-time context during the DALPF's consideration of the matter.

CONCLUSION

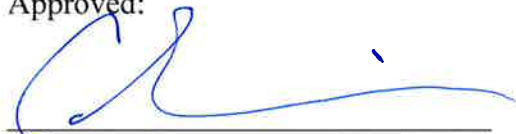
Based upon the foregoing, it is our determination that the DALPF did not violate FOIA as alleged in the Petition.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

cc: William A. Denman, Esquire (via email)