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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB42

August 25, 2017

VIA EMAIL

Mike Kwiecien
info@explorerhomes.com

RE: August 17, 2017 Correspondence Regarding the Sussex County Planning & Zoning Commission and the Sussex County Council

Dear Mr. Kwiecien:

We write regarding your correspondence, received on August 17, 2017, alleging violations of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") by the Sussex County Planning & Zoning Commission (the "Commission") and the Sussex County Council (the "Council"). Specifically, you allege that the Commission and the Council approved a conditional use ordinance and a subsequent amendment thereto without providing "public notice."¹ We have reviewed the record, which includes the audio recording of the Commission's July 27, 2017 meeting, and have determined that the challenged actions took place at meetings that were held in 2002 and 2016, respectively.

As a general matter, this Office does not address the merits of petitions alleging violations of FOIA's open meetings provisions when the alleged violations occurred more than six months prior to our receipt of the petition.² We have noted that this is a general rule that we adhere to "for

¹ While it is not clear from the record, we assume for purposes of this correspondence that you allege violations of the notice provisions of Delaware's FOIA, 29 *Del. C.* § 10004. Indeed, to the extent you allege that the Commission and the Council failed to provide notice consistent with County Code, the Council's Rules of Procedures, or some other provision, such allegations would fall outside the scope of FOIA.

² See, e.g., *Del. Op. Att'y Gen.* 12-IB11, 2012 WL 5894039, at *5 (Nov. 7, 2012); *Del. Op. Att'y Gen.* 16-IB14, 2016 WL 3462345, at *2 (June 9, 2016); *Del. Op. Att'y Gen.* 05-IB26, 2005 WL 3991284, at *10 n.3 (Aug. 29, 2005); *Del. Op. Att'y Gen.* 04-IB08, 2004 WL 771854, at *2 (Mar. 9, 2004); *Del. Op. Att'y Gen.* 00-IB05, 2000 WL 1092970, at *1 (Feb. 18, 2000); *Del. Op. Att'y Gen.* 97-IB23, 1997 WL 800821, at *1 (Dec. 23, 1997); *Del. Op. Att'y Gen.* 94-IO16 (Apr.

fairness and practical reasons.”³ Among other reasons,⁴ this practice reflects this Office’s awareness of the strict time limitations that Delaware courts apply to FOIA claims. For example, the Court of Chancery has determined that FOIA requires a citizen wishing to challenge the validity of any action of a public body initiate suit within 60 days of learning of the action.⁵ The Court has also determined that the statute “bars a FOIA claim filed after six months, even if the citizen did not learn of the public body’s action until after that period,”⁶ and even if the citizen was previously unaware of his or her rights under FOIA.⁷ Indeed, the statute provides: “Any citizen may challenge the validity under this chapter of any action of a public body by filing suit *within 60 days of the citizen’s learning of such action but in no event later than 6 months after the date of the action.*”⁸ While we are not bound by the time limitations set forth in 29 *Del. C.* § 10005(a),⁹

7, 1994); *Del. Op. Att’y Gen.* 93-IO28 (Sept. 21, 1993); *Del. Op. Att’y Gen.* 93-IO06 (Mar. 5, 1993).

³ *Del. Op. Att’y Gen.* 02-IB10 (Apr. 24, 2002).

⁴ For example, we have previously noted the unfairness and uncertainty that would result if decisions made by public bodies, and upon which citizens and officials rely, could be challenged at any future time. *See, e.g., Del. Op. Att’y Gen.* 06-IB02, 2006 WL 1242011, at *6 (Jan. 9, 2006) (citing *Wilmington Federation of Teachers v. Howell*, 374 A.2d 832, 836 (Del. 1977)); *Del. Op. Att’y Gen.* 12-IB11, 2012 WL 5894039, at *6 n.7 (recognizing that our “long-standing policy, like the statutory limitations period in FOIA § 10005(a), reflects a balance of competing interests and goals” including fostering “finality and certainty” in governmental decisions). We also note that the public body bears the burden of proof pursuant to 29 *Del. C.* § 10005(c), which its ability to satisfy might be prejudiced by the mere passage of time.

⁵ *Reeder v. Del. Dep’t of Ins.*, 2006 WL 510067, at *9 (Del. Ch. Feb. 24, 2006); 29 *Del. C.* § 10005(a).

⁶ *See id.* at *9; *see also Lechlitter v. Del. Dep’t of Natural Res.*, 2015 WL 7720277, at *4 (Del. Ch. Nov. 30, 2015) (“[T]he statute of repose as provided by 29 *Del. C.* § 10005(a) is six months.”); *Lechlitter v. Del. Dep’t of Natural Res.*, 2015 WL 9591587, at *15 (Del. Ch. Dec. 31, 2015) (“I find that the Plaintiff’s failure to contest the alleged FOIA infractions within six months amounts to laches, by analogy to the statute of repose, and grant summary judgment in favor of the Defendants for the FOIA claims embedded in Count II.”).

⁷ *Reeder*, 2006 WL 510067, at *7 (stating that plaintiff’s claim that his suit was untimely because he was unaware of FOIA “would be inadequate [to excuse his failure to file in the timeframe required by statute] even if it were true”).

⁸ 29 *Del. C.* § 10005(a) (emphasis added).

⁹ *See Del. Op. Att’y Gen.* 06-IB01, 2006 WL 1242008, at *2 (Jan. 4, 2006) (“The sixty day/six month statute of limitations in Section 10005(a) applies only to suits a citizen may bring in Chancery Court. It does not apply to complaints under Section 10005(e) brought to the Attorney General’s office for administrative review.”); *see also Del. Op. Att’y Gen.* 97-IB23, 1997 WL 800821, at *1 (noting that this Office is not bound by the time limitations set forth in 29 *Del. C.* §

we have reviewed the record and do not believe that the circumstances warrant a departure from our longstanding policy and practice.¹⁰ As the challenged actions took place at meetings occurring more than six months prior to our receipt of your August 17, 2017 correspondence, it is our determination that your FOIA petition is untimely.¹¹

You may wish to consult with counsel regarding your legal options.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein
State Solicitor

cc: LaKresha S. Roberts, Chief Deputy Attorney General (via email)
J. Everett Moore, Jr., Esq. (via email)

10005(a) but exercising its discretion in concluding that petitioner's delay of almost six months warranted a determination that the petition was untimely).

¹⁰ Indeed, we note that you have indicated that you have retained private counsel and have fought the conditional use ordinance for years. We also note that you have specifically requested relief that only a court can grant.

¹¹ Your request for an ethics review is outside the scope of FOIA and, as such, is not addressed herein.