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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB46

October 5, 2018

VIA U.S. MAIL AND EMAIL

Paul Reiger
18171 Deer Forest Rd.
Georgetown, DE 19947
Paulboatconnection@gmail.com

RE: FOIA Correspondence Regarding the Sussex County Board of Adjustment

Dear Mr. Reiger:

We write in response to your correspondence alleging that the Sussex County Board of Adjustment (the "Board") violated the open meeting provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). Specifically, you allege that the Board failed to provide sufficient notice in its September 10, 2018 meeting agenda of its intent to discuss and vote on a special use exception to operate an assisted living facility. For the reasons set forth below, it is our determination that the Board did not violate FOIA as alleged.

RELEVANT BACKGROUND

On or before September 10, 2018, you reviewed the Board's September 10, 2018 meeting agenda. The agenda contained the following item under the heading "Public Hearings": "Case No. 12194 – Country Rest Home, Inc. requests a special use exception to operate a convalescent home, nursing home, and/or home for the aged (Sections 115-23 & 115-210 of the Sussex County Zoning Code). The property is located on the east side of Hickman Rd., approximately 776 ft. south of University Rd. and at the northeast corner of University Rd. & Hickman Dr. 911 Address: N/A Zoning District: AR-1. Tax Parcels: 530-9.00-4.00 & 530-4.00-23.00."

POSITIONS OF THE PARTIES

In your Petition, you allege that the Board's wording of this particular agenda item was insufficient and that the "public had no notice that the Board of Adjustment was going to vote to approve an ASSISTED LIVING FACILITY and the 35 houses." As such, you argue that the

meeting agenda failed to comply with FOIA because “an item cannot be [brought] up and voted on that has not been posted.”

In its Response Letter, the Board maintains that that the language at issue fully complied with FOIA. The Board specifically argues that it “provided the public with adequately detailed notice of the public hearing for Case No. 12194 and the purpose thereof.” The Board states that the “Country Rest Home filed its application for a special use exception under Sussex County Code §115-23C.(4) and 210A.(3)(d) which allow for special use exceptions for ‘convalescent homes, nursing homes, and homes for the aged’” and that “assisted living facilities” is a type of special use included in “Sussex County Code §115-23C.(4) and 210A.(3)(d) which allow for special use exceptions for ‘convalescent homes, nursing homes, and homes for the aged.’” The Board also notes that “prior to the hearing’s commencement on September 10, 2018, a member of the public sent an email to the Board that was read into the record. This email raised an issue regarding the proposed facility, including specific references to an ‘assisted living facility’, the number of units which were referred to as ‘single family homes’ and addressed the specifics of the application. The fact that the identical issue was raised prior to the hearing is conclusive evidence that the public received adequate notice of this application.”

In your Reply, you argue that while the Board “advertised the hearing as a discussion about [a convalescent home, nursing home, and/or home for the aged],” the discussion concerned an assisted living facility. You state that the “distinction is substantially different.” You maintain that “the Board has caused confusion for itself and the public by advertising the case as being about one type of facility (a nursing home, convalescent home, homes for the aged) but then discussing a different type of facility (assisted living).” You state that, in your opinion, the Board “needs the advertisement and agenda to be consistent with the terminology used in the hearing”

RELEVANT STATUTES

FOIA requires public bodies to “give public notice of their regular meetings . . . at least 7 days in advance thereof.”¹ The notice “shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings”² “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.”³

DISCUSSION

As noted above, FOIA requires that the agenda include “general statement of the major issues expected to be discussed.”⁴ To this end, the Court of Chancery has suggested that an agenda

¹ 29 Del. C. § 10004(e)(2).

² *Id.*

³ 29 Del. C. § 10002(a).

⁴ *Id.*

should be worded in “plain and comprehensible language.”⁵ Accordingly, we assess the notice provided in an agenda by this objective standard.

Here, we do not believe that the agenda item was objectively incomprehensible or overly complicated. As such, we are satisfied that the Board’s citation to Sections 115-23 of the Sussex County Zoning Code for a special use exception to operate a convalescent home, nursing home, and/or home for the aged satisfied FOIA’s minimum notice requirements.

We recognize that the Board could have described Case No. 12194 by using the words “assisted living facility” or other descriptive language. However, the availability of other, perhaps better, methods of describing an agenda item does not equate to a violation of FOIA *per se*.⁶ As such, while we do not believe that the Board’s failure to use more specific terminology such as the phrase “assisted living facility” violated FOIA in this instance, we nevertheless encourage the Board, in the interest of transparency, to continue to provide robust notice of similar agenda items in the future.

CONCLUSION

For the reasons discussed above, it is our determination that the Board did not violate FOIA as alleged.

Very truly yours,



Lisa M. Morris
Deputy Attorney General

APPROVED BY:

/s/ Allison E. Reardon

Allison E. Reardon, State Solicitor

cc: J. Everett Moore Jr., Esq. (via email)

⁵ See *Chem. Indus. Council of Del. v. State Coastal Zone Indus. Bd.*, 1994 WL 274295, at *8 (Del. Ch. May 19, 1994) (“An agenda should be worded in plain and comprehensible language and must directly state the purpose of the meeting.”).

⁶ See, e.g., *Del. Op. Att’y Gen.* 17-IB31, 2017 WL 3426271, at *2 (July 24, 2017) (“Although the Board of Trustees could undoubtedly have identified the matter with specificity in its agenda, we cannot conclude that its failure to do so amounted to a FOIA violation.”).