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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB47

September 4, 2019

VIA EMAIL

Daniel J. Kramer
8041 Scotts Store Rd
Greenwood, DE 19950
djmjkramer@gmail.com

RE: August 16, 2019 FOIA Petition Regarding Sussex County Council

Dear Mr. Kramer:

We write in response to your August 16, 2019 correspondence alleging that Sussex County Council (the "Council") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") during its June 4, 2019 and June 11, 2019 meetings. We treat your correspondence as a petition for determination pursuant to 29 *Del. C.* § 10005(e) regarding whether the Council violated FOIA ("Petition"). We invited the Council to submit a written response to the Petition. We received the Council's response ("Response Letter") on August 21, 2018 and your Reply on August 23, 2019. For the reasons set forth below, we conclude that the Council did not violate FOIA as alleged.

BACKGROUND

On June 4, 2019 and June 11, 2019, the Council held open public meetings.¹ For each meeting, the Council's posted Agenda contained the item, "Executive Session – Land Acquisition pursuant to 29 *Del. C.* § 10004(b)."² On June 4, 2019, the Council entered into an Executive Session. Austin Short, Deputy Secretary of the Delaware Department of Agriculture presented the Council with a "general overview and history of the Agricultural Lands

¹ Petition.

² *Id.*

Preservation Program, including the State's funding for the program;"³ and the Council discussed participation in the program as well as specific properties in Sussex County that could be purchased for participation.⁴ On June 11, 2019, the Council revisited its discussion of the Agricultural Lands Preservation Program ("ALPP"); received a report of the properties selected for funding by the State, and discussed those properties, additional properties, and county funding of any purchased properties.⁵

POSITIONS OF THE PARTIES

In your Petition, you allege that the Council violated FOIA by discussing the ALPP in executive session because it is not a "land acquisition" and the ALPP is not a discussion topic exempt from FOIA.⁶ The Council responds that it did not violate FOIA because the ALPP requires the Council to purchase rights to some parcels of privately-held land for the purpose of creating permanent agricultural easements which are interests in land and, therefore, are an allowable purpose for calling an executive session under 29 *Del. C.* § 10004(2). The Council explained that deliberations in executive session were necessary to protect the Council's negotiating position on those parcels that will be approached for purchase, and to safeguard confidential pricing information before a final decision was made.

DISCUSSION

Delaware's FOIA provides that "[e]very meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (h) of [section 10004]."⁷ Pursuant to 29 *Del. C.* § 10004(b), a public body may call for an executive session closed to the public for one of nine specific purposes including for "[p]reliminary discussions on site acquisitions for any publicly funded capital improvements, or sales or leases of real property."⁸

³ Non-members of public bodies may attend executive sessions to relate information on the subject matter for which the executive session is authorized. *See Del. Op. Att'y Gen.* 18-IB38 (Aug. 17, 2018).

⁴ Council Executive Session Minutes dated June 4, 2019, attached to Petition.

⁵ Council Executive Session Minutes dated June 11, 2019, attached to Petition.

⁶ Petition.

⁷ 29 *Del. C.* § 10004(a).

⁸ 29 *Del. C.* § 10004(b)(2).

The Delaware Agricultural Lands Preservation Act was enacted to preserve agricultural lands in Delaware.⁹ To fulfill its purpose, the Act establishes the Delaware Agricultural Lands Preservation Foundation (the “Foundation”).¹⁰ The Foundation purchases future development rights to agricultural land from landowners creating “preservation easements,” permanently restricting agricultural landowners from developing their properties.¹¹ Every year, the State identifies agricultural parcels of land that have submitted applications to the Foundation to be considered for purchase.¹² If Sussex County determines that it would like to participate in the ALPP, the Council is told of the properties identified by the State, and the private landowners discounted price at which they are willing to sell.¹³ The Council then must determine which parcels would be most beneficial to the County as a whole to purchase for participation in the ALPP.¹⁴

“‘Property’ is more than just the physical thing- the land, the bricks, the mortar- it is also the sum of all the rights and powers incident to ownership of the physical thing.”¹⁵ An essential property right is the landowner’s right to use their property the way the owner sees fit.¹⁶ A landowner can sell this right. The Foundation, with funding from the Council, seeks to purchase essential property rights for certain parcels in Sussex County in order to create preservation easements.¹⁷ When a parcel-candidate under the ALPP is being considered by the Council for preservation, the Council is in effect considering the purchase of property rights on that parcel.¹⁸ It is well-settled that the State legislature designed 29 *Del. C.* §10004(b) to “protect the government when it enters the marketplace to purchase real property as an ordinary commercial buyer or seller.”¹⁹ Here, the Council is contemplating entering the market as a buyer. There is no difference between the purchase of an entire parcel of land and the purchase of an essential

⁹ 3 *Del. C.* § 901.

¹⁰ 3 *Del. C.* § 903.

¹¹ 3 *Del. C.* Ch. 9.

¹² Response, at 2.

¹³ Response.

¹⁴ *Id.*

¹⁵ *Dickman v. C.I.R.*, 465 U.S. 330, 336 (1984).

¹⁶ *See Cove on Herring Creek Homeowners’ Ass’n, Inc. v. Riggs*, 2003 WL 1903472, at *3 (Del. Ch. Apr. 9, 2003).

¹⁷ Response, at 3.

¹⁸ Affidavit of Todd F. Lawson, attached to Response.

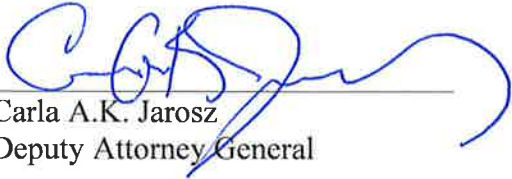
¹⁹ *Att’y Gen. Op.* 08-IB02 (Jan. 30, 2008) (*citing Att’y Gen. Op.* 02-IB27 (Nov. 4, 2002)).

property right incident to the land. The Council was not required to discuss the specific properties under consideration for purchase in open session.


CONCLUSION

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

Very truly yours,



Carla A.K. Jarosz
Deputy Attorney General

APPROVED BY 

Aaron Goldstein, State Solicitor

cc: J. Everett Moore, Esquire (via email)