



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
CRIMINAL DIVISION (302) 577-8500
DIVISION CIVIL RIGHTS & PUBLIC TRUST (302) 577-5400
FAMILY DIVISION (302) 577-8400
FRAUD DIVISION (302) 577-8600
FAX (302) 577-2610

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB49

November 18, 2024

VIA EMAIL

Michael Strange
njmresearch@yahoo.com

RE: FOIA Petition Regarding the City of Rehoboth Beach

Dear Mr. Strange:

We write in response to your correspondence alleging that the City of Rehoboth Beach Board of Adjustment violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("FOIA"). We treat this correspondence submitted as a combined petition ("Petition") for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. As discussed more fully herein, we determine that the Board has not violated FOIA as alleged regarding the September 30, 2024 meeting agenda.

BACKGROUND

The City's Board of Adjustment met on September 30, 2024, listing the following item for discussion:

Case No. 0824-08. REQUEST FOR VARIANCES / CLARIFICATION pertaining to Rehoboth Beach Planning Commission Site Plan Review Decision re: Application No. 1221-05, dated August 5, 2024. More specifically, this is a request for variances/clarification pursuant to Municipal Code §270-20 - Height regulations; §270-21 - Natural area, floor area ratio and lot

coverage; §270-35 - Minimum Parking Spaces required; exceptions and §270-36 - Loading and unloading berths. The property is located in the C-1 Central Commercial District on Lot Nos. 2, 4 & 6, Block - Rehoboth Avenue, Lot Nos. 3, 5, 7 & the easterly portion of Lot 9, Block - Wilmington Avenue and Lot Nos. 17 & 18, Block - Surf Avenue and Sussex County Tax Map Parcel Nos. 334-14.18- 20.00, 334-14.18-21.00 & 334-14.18-35.00. The address of the property is 2 Rehoboth Avenue. The Variances are being requested by Richard A. Forsten Esq. of the law firm Saul Ewing, on behalf of John N. Papajohn of Belhaven Hotel Investments Inc., owner of the property.¹

The October 16, 2024 Board’s Special Meeting listed the following item related to this same matter:

Continuation of Case No. 0824-08. REQUEST FOR VARIANCE pertaining to Rehoboth Beach Planning Commission Site Plan Review Decision re: Application No. 1221-05, dated August 5, 2024. More specifically, this is a request for a variance pursuant to Municipal Code §270-35 - Minimum Parking Spaces required. The property is located in the C-1 Central Commercial District on Lot Nos. 2, 4 & 6, Block - Rehoboth Avenue, Lot Nos. 3, 5, 7 & the easterly portion of Lot No. 9, Block - Wilmington Avenue, Lot Nos. 17 & 18, Block - Surf Avenue and Sussex County Tax Map Parcel Nos. 334-14.18-20.00, 334-14.18-21.00 & 334-14.18-35.00. and Lot Nos. 10 & 12 Baltimore Avenue and Sussex County Tax Map Parcel No. 334-14.14-55.00. The addresses of the properties are 2 Rehoboth Avenue and 10 Baltimore Avenue. The Variance is being requested by Richard A. Forsten Esq. of the law firm Saul Ewing, on behalf of John N. Papajohn of Belhaven Hotel Investments Inc., owner of the property.²

In the Petition, you allege that the September 30, 2024 agenda noticed the above three items related to the project, but a fourth item, related to a variance for a parking lot at Baltimore Avenue, was also discussed, without notice. You assert that this Baltimore Avenue parking lot was of interest to you, but you did not attend this meeting, as you relied on this agenda and thus, were unaware that this item would be discussed. In the subsequent meeting on October 16, 2024, you point out that the Baltimore Avenue property was specified. You contend that the discussion of an unlisted item resulted in “an unconscious positive bias in the ultimate voting by the [Board]

¹ Petition.

² *Id.*

panel members on the applicant’s other 3 variance requests.”³ In addition, you raise another claim regarding this same Belhaven project, alleging that the Board, with respect to the October 16, 2024 meeting, failed to properly notify by mail and to “post a sign ON the property in question indicating that a meeting was to be held for a variance related to the Belhaven Hotel to be constructed on Wilmington Avenue and required a parking lot to be constructed on Baltimore [Avenue] in order to meet the needed room count desired for the Hotel proper.”⁴

On October 28, 2024, counsel for the Board replied (“Response”) and attached an affidavit of the City Secretary, certifying the facts in the Response as accurate. The Board argues that the Petition’s claims are without merit, as the request for a variance is related to the on-site parking space requirements for the subject property at Rehoboth and Wilmington Avenue. The Baltimore Avenue property was considered only for relief from the on-site parking requirements on the subject property that was noticed, and the Baltimore Avenue was not proposed to be used in a manner contrary to its current zoning classification; this parcel was currently used as a parking lot and would continue to be used as a parking lot. This is why, the Board contends, the Baltimore Avenue property was not specifically listed on the initial notice or agenda. Further, the Board points out that nothing of substance occurred with respect to the on-site parking requirement variance at the September 30, 2024 meeting, as the discussion was deferred to the October 16, 2024 meeting; you reviewed the September 30, 2024 meeting video; and the applicant made its presentation regarding parking to the Board at the October 16, 2024 meeting. The Board asserts that you appeared and gave comments at the October meeting.

DISCUSSION

The public body has the burden of proof to justify any failure to comply with FOIA.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ This Petition asserts that an agenda item’s description is insufficient. An agenda for a public meeting must include a “general statement of the major issues” which a public body expects to discuss⁷ and must

³ *Id.*

⁴ *Id.*

⁵ 29 *Del. C.* § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁷ 29 *Del. C.* § 10002(a).

be worded in “plain and comprehensible language.”⁸ Delaware courts have opined on the means to determine the sufficiency of an agenda:

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.⁹

“[T]he point of the agenda is to put the public on notice, not to answer every question about the agenda item.”¹⁰ “[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.”¹¹

Considering the provided agenda and the sworn statements, we determine that the September 30, 2024 meeting agenda included the name of the applicant, the fact the applicant is seeking variances, the property for which the variances were sought, and the code provisions for the variances, one of which related to parking lot restrictions. As the variance was sought from the on-site parking requirements applicable to the noticed property, we do not believe that a separate, specific reference to the Baltimore Avenue property, which was considered as part of the remedy for this variance, was required to satisfy FOIA in these circumstances. We find that this agenda item meets FOIA’s minimum requirements and provides sufficient notice to the members of the public with an intense interest that the variance related to parking restrictions, including any remedial proposals, may be discussed.¹² Accordingly, we find no violation of FOIA in this regard.

⁸ *Chem. Indus. Council of Del. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *8 (Del. Ch. May 19, 1994).

⁹ *Lechliter v. Del. Dep’t of Natural Res. & Env’t Control*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017) (quoting *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *4 (Del. Ch. Aug. 29, 1986)).

¹⁰ *Del. Op. Att’y Gen.* 10-IB12, 2010 WL 4154564, at *1 (Sept. 28, 2010).

¹¹ *Lechliter v. Becker*, 2017 WL 117596, at *2 (Del. Ch. Jan. 12, 2017).

¹² *See Del. Op. Att’y Gen.* 10-IB12, 2010 WL 4154564, at *2 (finding no violation of FOIA when the Sussex County Board of Adjustment’s agenda identified one proposed variance’s location by “West of Road 78” and a second proposed variance’s location by “Route 26” and

Finally, the Petition also raises the issue of mailed notices and sign postings related to the Belhaven project. As these mailings and signage are not part of FOIA’s requirements, such claims are outside the scope of this Office’s authority to consider. Only claims alleging the FOIA statute has been violated may be considered by this Office.¹³

CONCLUSION

For the reasons set forth above, we conclude that the City’s Board of Adjustment did not violate FOIA as alleged at its September 30, 2024 meeting.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Fred A. Townsend, III, Counsel to the City of Rehoboth Beach Board of Adjustment

noting that “anyone concerned with Road 78 or Route 26 could have availed themselves of several means of getting more information”).

¹³ 29 *Del. C.* § 10005(e); *see also Del. Op. Att’y Gen.* 18-IB50, 2018 WL 6015767, at *2 (Oct. 12, 2018) (finding that this Office has “no authority under FOIA to direct [the public body] with regard to this Office’s interpretation of any other Delaware statute”); *Del. Op. Atty. Gen.* 96-IB28, 1996 WL 517455, at *2 (Aug. 8, 1996) (“To the extent you allege that Sussex County has not complied with the requirements of 9 *Del. C.* Section 6921, that matter is beyond the jurisdiction of this office and is not addressed here.”).