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Attorney General Opinion No. 16-IB24

November 17, 2016

VIA EMAIL AND U.S. MAIL

Michael Heyman
90 Mason Drive
Newark, DE 19711
mike_heyman@hotmail.com

RE: October 3, 2016 Correspondence Regarding Newark Planning Commission¹

Dear Mr. Heyman:

On October 3, 2016,² 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 Newark Planning Commission (the “Commission”) violated FOIA’s open meetings provisions in connection with its August 2, 2016 meeting. By letter dated October 5, 2016, and pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Commission to submit a written response to the Petition. We received the Commission’s response (“Response Letter”) on October 12, 2016. We have reviewed the Petition and the Response Letter. Because we are satisfied that the Commission complied with 29 *Del. C.* § 10004(e)(4), we conclude that the Commission did not violate FOIA as alleged in the Petition.

BACKGROUND

On July 19, 2016, the agenda for the Commission’s August 2, 2016 meeting was published in the classified section of the News Journal. The agenda contained the date, time, and location of the meeting, which was to be held on August 2, 2016 at 7:00 PM in the Newark Municipal Building at 220 South Main Street, Newark, Delaware, which is also the Commission’s principal office.

¹ Although your Petition alleges specifically that the Newark City Council violated FOIA, we note that the Commission is a separate public body.

² We received your initial correspondence on September 30, 2016, and your supporting documentation on October 3, 2016. As such, we consider October 3, 2016 to be the date of receipt.

Among other things, the agenda included the following: “Review and consideration of an annexation, rezoning and major subdivision with site plan approval for 0 Valley Road and 308, 309, 310, 312 Mason Drive, to be known as Briar Creek North, to construct 37 townhouse style units at the site.”

On July 22, 2016, the Commission sent notice to Delaware property owners within 300 feet of the property. The notice indicated that the Planning and Development Department had received an application for the annexation, rezoning and major subdivision with site plan approval for the property. The notice provided the date, time, and location of the meeting and invited the property owners to attend the meeting. The notice also invited the property owners to review the plans in person at the Municipal Building during regular business hours, or online beginning one week prior to the meeting.

On July 26, 2016, City of Newark Secretary Renee Bensley posted the agenda on the bulletin board in the lobby of the City of Newark Municipal Building. That same day, the agenda was also posted to the City of Newark’s website with links to the proposed plan.

At some point prior to the meeting, the agenda was also posted at or near the subject property; specifically, on a sign at the intersection of Briar Creek and Valley Road.

The meeting was held as scheduled on August 2, 2016. Numerous individuals spoke both in support of and in opposition to the proposal.

SUMMARY OF ARGUMENTS

You allege that the Commission’s public notice on a sign on Valley Road “was ineffective and did not meet the standards of FOIA.” Specifically, you allege that the placement of the sign at Briar Creek and Valley road “placed an unreasonable burden on citizens to read it” and left numerous residents unaware of the August 2, 2016 meeting.

In its Response Letter, the Commission maintains that it satisfied FOIA’s notice requirements by: 1) posting the agenda in the City of Newark Municipal Building on July 26, 2016 2) advertising the meeting in the July 19, 2016 edition of the News Journal, 3) mailing notice to property owners within 300 feet on July 22, 2016, and 4) posting the agenda to the City of Newark website on July 26, 2016. The Response Letter included a sworn affidavit of City of Newark Secretary Renee Bensley regarding the events of July 26, 2016, a copy of the July 19, 2016 News Journal ad, and a copy of the July 22, 2016 letter to residents.

APPLICABLE LAW

Public bodies must give notice of their regular meetings at least 7 days in advance thereof.³ Such notice “shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists, at the place where the meetings of the public body are regularly held, and making a reasonable number of such notices

³ 29 Del. C. § 10004(e)(2).

available.”⁴ For noncounty and nonmunicipal public bodies, as well as public bodies in the executive branch of government, public notice must also be posted to a designated website.⁵ The notice shall include the agenda and the date, time, and location of the meeting.⁶

DISCUSSION

Here, the Response Letter makes clear that the Committee satisfied FOIA’s requirement of “conspicuous posting” by posting timely notice of its meeting at the City of Newark Municipal Building, which is the principal office of the Commission.⁷ FOIA does not, as the Commission correctly notes, require the posting of public notice on property which is the subject of a land use application.⁸ Indeed, “[t]he purpose of requiring conspicuous posting of notice at the public body’s principal office ‘is to ensure that no member of the public will have to search out to discover public meetings.’”⁹ Moreover, while FOIA only requires that notice be posted at the place of the meeting where no principal office exists,¹⁰ we also note that the City of Newark Municipal Building is both the principal office of the Commission and the place where the meeting was held. We also find that the Commission made a reasonable number of notices available to the public by: 1) advertising the meeting in the July 19, 2016 edition of the News Journal, 2) sending timely notice to all property owners within 300 feet of the subject property, and 3) posting the agenda to the City of Newark’s website. We believe these actions satisfy the notice provisions of FOIA.¹¹

⁴ 29 Del. C. § 10004(e)(4); *Ianni v. Dep’t of Elections of New Castle Cty.*, 1986 WL 9610, at *5 (Del. Ch. Aug. 29, 1986) (“Subsection 10004(e)(4) required that in addition to a public posting, the public body shall make a ‘reasonable number of such notices available.’”).

⁵ *Id.*

⁶ 29 Del. C. § 10004(e)(2).

⁷ See 29 Del. C. § 10004(e)(4); see also *Del. Op. Att’y Gen.* 13-IB10 (Dec. 6, 2013) (notice posted on door of suite within commercial office building where board’s office/meeting space located).

⁸ As this determination is limited to a determination of whether the Commission has violated FOIA, it does not address whether or to what extent some other statute or regulation might require such notice.

⁹ *Del. Op. Att’y Gen.* 07-IB24 (Dec. 27, 2007) (quoting *Del. Op. Att’y Gen.* 06-IB09 (Apr. 25, 2006)).

¹⁰ 29 Del. C. § 10004(e)(4) (requiring conspicuous posting “at the principal office of the public body holding the meeting, or *if no such office exists*, at the place where the meetings of the public body are regularly held”) (emphasis added); see also *Del. Op. Att’y Gen.* 06-IB09 (posting notice at place of meeting not required so long as notice is posted at the public body’s principal office).

¹¹ See *Del. Op. Att’y Gen.* 13-IB01 (Mar. 26, 2013) (“FOIA § 10004(e)(4) establishes two minimum notice requirements: (1) that the public body post a meeting notice at the public body’s

CONCLUSION

Based on the foregoing, because the Commission fully complied with 29 Del. C. § 10004(e)(4) in connection with its August 2, 2016 meeting, it is our determination that the Commission did not violate FOIA as alleged in your Petition.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, State Solicitor

cc: Bruce Herron, Newark City Solicitor (via email)
Danielle Gibbs, Chief Deputy Attorney General (via email)
Jennifer R. Noel, Deputy Attorney General (via email)

principal office, *or*, if no such office exists, at the regular meeting place; *and* (2) that the public body make a reasonable number of such notices available.” (citing *Ianni*, 1986 WL 9610, at *5)).