

August 16, 2012

Honorable Kent Walker
Deputy Attorney General
State of Delaware
820 N. French Street
Wilmington, Delaware 19801

Subject: Supplemental Information for my July 24, 2012 FOIA Complaint

Dear Mr. Walker:

Thank you for your letter of August 2, 2012 acknowledging receipt of my FOIA complaint dated July 24, 2012 requesting that your office investigate Open Meeting violations involving actions by the Dewey Beach Town Council in 2010 and 2011.

My purpose with this letter is to provide you with key supplemental information not included in my July 24, 2012 letter about Open Meeting violations at three Town Council meetings: December 11, 2010, February 19, 2011, and February 26, 2011.

These three meetings of the 2010-2011 Dewey Beach Town Council involve extensive and blatant FOIA violations with huge implications for the citizens of Dewey Beach that are far more egregious than other violations you have been asked to address. Behind closed doors, crucial agreements were reached that resulted in Town Council approval of an enormous development project that also violates a number of Dewey Beach and Delaware code requirements and that was vigorously opposed by many property owners.

The rationale for the closed Executive Sessions at each of these meetings was that they involved litigation. But the real issues considered were how to frame and whether to accept the developer's detailed proposal (Mutual Agreement and Release—MAR) that involved Town approval of this development in exchange for dismissal of four lawsuits the developer brought against the Town and one against commissioners personally.

The developer claimed in a recent news article in the Cape Gazette (Lewes Delaware) that because the Town Council held a long public hearing and several workshops this was an open process. But in fact all the critical issues were resolved secretly and then, with little or no notice or discussion of any details, voted in public session. It is worthy of note that the citizens were sufficiently dismayed with the actions of the 2010-2011 Dewey Beach Council that they subsequently voted two members supporting the development project out of office in the next election (September 2011) and reelected only Mayor Diane Hanson who voted against it.

There are at least five key FOIA issues related to these three 2010-2011 meetings, some of which I raised in my July 24, 2012 letter. Others are elaborated below. The violations involve:

- Abuse of Executive Sessions
- Failure to conform to open meetings requirements, including inadequate agendas and withholding relevant information from the citizens
- Use of Special Called Meetings to deny citizens the opportunity to comment on FOIA protected zoning issues
- Denial of FOIA document requests by Town Manager Diana Smith to hide public information
- Failure of Town Manager Diana Smith to prepare minutes of meetings, or retain sign-in sheets, submissions for the meeting record, emails or letters submitted for the record to Town Hall

December 11, 2010 Town Council Meeting

In addition to the issues raised in my July 24 letter, following the Executive Session, the 2010-2011 Dewey Beach Town Council stripped the Zoning Commission of its statutory authority to conduct a full public review of the MAR with public hearings and to make recommendations to the Town Council. The MAR specified procedures that limited the Planning Commission to making recommendations to the Council concerning only minor amenities such as a gazebo instead of a full review of the entire project as the Dewey Beach Zoning Code requires.

Thus, as a result of the closed Executive Session, the public never had the opportunity to comment before this first ever limitation of Zoning Commission authority was implemented, and never had the opportunity to testify and make recommendations to the Zoning Commission on the whole project.

To cover up this violation of Dewey Beach law, the Town Manager falsely noticed that its work sessions on the MAR in January and February 2011 were also meetings of the Zoning Commission. The Town Manager Diana Smith required a quorum of Zoning Commission members to attend the meetings and sit in the front row. But this was a sham. There is no public record of any testimony being taken by the Zoning Commission, there is no Planning Commission agenda, there are no public minutes and the Commission never actually convened a meeting. In fact, when one citizen asked to speak to the Commission about the MAR, the Town Solicitor denied her the opportunity. When asked about the absence of minutes on August 14, 2012, Planning Commission Chair Harry Wilson told Town Hall that there are not any minutes because there were not any meetings of the Planning Commission at that time. The Commission members just sat in the audience.

Subsequently, the Chair of the Zoning Commission, Harry Wilson, noticed two public meetings on the MAR under Del. Code, Title 22, Chapter 7, Section 703 and Dewey Beach Code 181-8 for February 19 and 25, 2011. When the developer then threatened to sue the Town (yet again), Chair Harry Wilson canceled the planned hearings.

February 19, 2011 Town Council Meeting

The Town Council apparently agreed in Executive Session on 11 amendments to the draft MAR proposed on December 11, 2010. Presumably these amendments had been proposed or agreed to by the developer before the Executive Session since the MAR is a "mutual" agreement. When it came out of Executive Session, the Council did not explain the 11 amendments in any detail, who had proposed them, any pros or cons, or allow real public discussion or questions about them. The Town Council just voted to approve what had been discussed in Executive Session.

The February 19, 2011 agenda for the Special Called Meeting was similarly ambiguous. It states only, "Possible action to be taken regarding Executive Session discussion regarding litigation with relation to modification of the proposed Mutual Agreement between the Town of Dewey Beach and Dewey Beach Enterprises as a result of public comments and information received during the public workshops and public hearing on this matter."

Thus, the public was kept in the dark about changes developed in secret to a highly controversial public document that had sparked serious public concern and broad public attendance at three special workshops. There was no real opportunity for public input on the 11 amendments before the Council voted to adopt them. There was no reason given about why other proposed amendments desired by the public (and recommended during the workshops) were not discussed in public session or considered by the Council. Amazingly, there are no minutes for the February 19, 2011 Town Council meeting, and no sign in sheet. Further, for reasons that are not clear, there is no public recording of the meeting (in recent years most Town Council meetings have been recorded and are available to the public in real time on the web).

The public first got any significant information about the 11 amendments when they were posted on the Town web site on February 21, 2011, after the Town Council voted to adopt them, but they were presented as "track changes" and extremely difficult to read and understand. On February 22, 2011, the developer sent a building permit application to the Town Solicitor for the "project set forth in the February 19 Amended Agreement," making it even more important that the February 19, 2011 decisions be fully transparent.

February 26, 2011 Town Council Meeting

This meeting blatantly violated FOIA Open Meetings requirements by not noticing the Executive Session, as I mention in my July 24, 2012 letter. It also violated the

Open Meetings requirements because in Executive Session the Commissioners secretly discussed a threat from its insurance carrier to not fund any attorney fees for the MAR litigation if the town voted to reject the MAR.

The Cape Gazette newspaper in an August 10, 2012 article stated that on February 25, 2011, former Commissioner Rick Solloway asked Nicole Baummer (a representative of the Town's insurer) in an email what would happen if the town council voted to deny the MAR. Baummer answered: "You are correct that upon any rejection of the proposed mutual agreement which is acceptable to DBE [the developer]—and which Darwin recommends—the town and its commissioners would immediately face additional and significant uninsured exposure...Please impress on everyone who will be participating in tomorrow's vote the magnitude of this."

This critical information was never disclosed to the public even though commissioners subsequently acknowledged it affected their votes on adoption of the MAR. These facts were only discovered in the days and weeks after a vote on February 26, 2011 to adopt the MAR. The Town's insurer, Solicitor and Council members never informed the public of this threat. My July 24, 2012 letter further explains that citizens filed a FOIA request for this information on March 4, 2011, which was denied by the Town Manager Diana Smith on March 16, 2011.

Furthermore, the **February 26, 2011 agenda** for the Special Called Meeting never referenced a critical Town Council vote to adopt a detailed nine page Resolution that was the operative vote to implement the MAR (the MAR itself is 11 pages). The agenda lists "Discussion and possible approval of the MAR" and also lists "Discussion and possible referral of items to the Planning Commission relative to the MAR", but it never references any discussion or vote on the Resolution. In fact, Town Solicitor Mandalas spoke at the very end of the meeting about a Resolution, to the surprise of many attendees. He read it out loud into the record and asked the Council to approve it, which it did. Earlier in the day the Town's lawyer paid by the insurance company gave a brief report on the resolution but its import was not sufficiently explained or understood.

It turns out that this Resolution document contains many misstatements of fact, it apparently was not generally available for review by the public before the vote, there was never any public opportunity to discuss it or comment on it, and it was designed as a substitute for the normal implementing instrument—an ordinance—in order to bypass the citizens' right in the Dewey Beach Charter to petition for a public referendum. As one of the public attendees at the entire meeting, I with others was shocked to learn about the Resolution, its misstatements of fact, and its purpose. None of this was ever discussed in the public meeting, or noticed in advance.

The Town Council on November 12, 2011 refused to ratify the draft minutes for the February 26, 2011 meeting of the Town Council where the MAR and Resolution

were approved because various commissioner were concerned the draft contained errors, lacked material facts, indicates far fewer opponent letters than Town Hall received, and does not reference petitions and other supplementary materials supplied by witnesses at the meeting. The Town Solicitor, Glenn Mandalas, was asked to reconsider the minutes. Although it was not on the agenda for the December 10, 2011, Council Meeting, Solicitor Mandalas told the Council these minutes should be approved at that meeting. The Council reluctantly approved the February 26, 2011 minutes but noted reservations about the absence of pertinent information.

As Vice Chancellor Noble of the Chancery Court noted in his July 31, 2012 opinion at page 17 on the citizens' lawsuit to overturn the MAR, "The convoluted manner in which the Town Council approved the Challenged Documents is not recommended and, quite possibly, may not have survived a timely challenge." Chancery Court Case: 6785-VCN

I hope these additional details about the three crucial 2010-2011 Dewey Beach Town Council meetings in December 2010 and February 2011 will lead you to a finding that these meetings were unlawful and voidable in litigation. It is critical that such important decisions running roughshod over the public's right to know and participate in decisions by the 2010-2011 Town Council not be allowed to occur.

Thank you for your consideration.

Sincerely,

Joan Claybrook
Property Owner
McKinley Street
Dewey Beach, Delaware

cc: Ian McConnel, Delaware State Solicitor

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