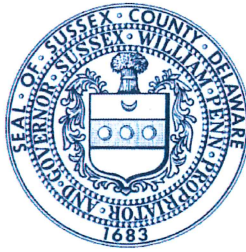


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September 14, 2018

Mr. John Flaherty, Board of Directors
Mr. Keith Steck, Member
Delaware Coalition for Open Government
1012 Kent Road
Wilmington, DE 19807

Dear Mr. Flaherty and Mr. Steck:

On behalf of the Sussex County Council, please allow this letter to respond to the email letter submitted by the Delaware Coalition for Open Government ("Coalition") on or about August 16, 2018, related to the Sussex County Board of Adjustment.

I appreciate the time and effort you took to draft the Coalition's letter and the points you raise. The County takes great effort to operate in a transparent and open manner, and to afford citizens access to their government, including the Board of Adjustment.

To develop this response, I worked directly with the County's legal staff to accurately and thoroughly address the points outlined in your letter. You will see in my response that I do not agree with every point the Coalition raises, and some of those points are simply not supported by the law. On the other hand, if and where possible, the County may consider your feedback and adjust its operations to make the necessary improvements.

The Coalition's letter raised several issues outlined in four major sections which I will address below in order.

Number One. Accessibility to the Board's key documents in a usable format.

The Coalition makes the following comments about Board records:

1. There are no "oral versions of agendas or minutes available online for the blind or sight impaired residents."

RESPONSE: Oral versions of agendas and minutes are unavailable. There is no requirement under FOIA that these records be made available in an oral version. The agendas and minutes are available online, as well as at the Planning & Zoning Office. Further, I am unaware of oral versions of such documents being made available for other public bodies either. I should note that under 29 Del. C. § 10003(d)(1), "all state agencies and public bodies are to provide reasonable assistance to the public in identifying and locating public records to which they are entitled access."



Indeed, if a vision-impaired person wanted to know the scope of an agenda, he or she could call the Board's office for that information. Audio recordings of the hearings are already available online, so an oral version of the minutes would seem to be duplicative.

2. The Board either does not transcribe its public hearings or make them available for the public.

RESPONSE: The Board does not, as a general practice, transcribe its hearings. The audio recordings of the hearings are available online, and transcriptions are only made in the event of an appeal. In appeals, the cost of the transcription is borne by the appealing party pursuant to 9 Del. C. § 6918(d). As such, the appealing party often retains a court reporter to transcribe the hearing. If the Board retains the court reporter, the transcription expense is passed along to the appealing party. Transcriptions in those appeals are available as part of the Superior Court docket. In addition, since the vast majority of items considered by the Board are neither opposed nor appealed, transcribing the entire meeting would be a very large and unnecessary expense.

3. Findings of Fact are not posted online.

RESPONSE: Findings of Fact are not posted online but are available upon request from the Planning & Zoning Office. In addition, the Land Use Application Docket is available online, and it has a wealth of information about applications pending before or decided by the Board of Adjustment. The Docket includes a synopsis of the application, the decision (e.g. approved, denied), a notice of the application, a link to the hearing audio archive, and a link to the site on the tax map. Given the Coalition's feedback, the County will explore the option to post the approved Findings of Fact on the Docket in the near future.

4. Findings of Fact are posted generically as agenda items.

RESPONSE: Findings of Fact are generally identified on an agenda as "Approval of the Findings of Fact for _____ (insert date of meeting)." This notifies the public that any decisions rendered by the Board at the noted meeting are being finalized by the approval of the Findings of Fact. For example, if the Board voted on an application on May 7, 2018, and a future agenda identified "Approval of Findings of Fact for May 7, 2018," the agenda is notifying the public that the Board intends to approve the written decisions for the cases voted upon on May 7th. This procedure is similar to how the Kent County Board of Adjustment handles approvals of its decisions. Their agenda reads, "Approvals of the Notices of Decisions from the _____ (insert date of meeting) Board meeting." The posting of these items in this fashion comports with FOIA, and I am unaware of any other Code provision which would require greater detail.

5. Findings of Fact are not read aloud prior to the vote.

RESPONSE: This statement is true. The reading of the Findings of Fact would likely be time-consuming and wasteful prior to the vote.

6. The Findings of Fact are also not available to the public prior to the vote.

RESPONSE: As a matter of practice and in his role as the Board's attorney, Assistant County Attorney Jamie Sharp shares draft Findings of Fact with the Board prior to the vote on those findings, and they are free to adopt, amend, or reject those proposed findings. These draft findings are typically shared with the Board a week or so prior to the hearing; though sometimes draft findings are sent out closer to the hearing date. The draft findings are not published prior to the vote.

Number Two. Lack of public input to the Board's operation during a meeting.

The Coalition makes the following comments about public comments at Board meetings.

1. "Contrary to the Board's Rules of Procedures, if someone wants to comment on pertinent points about the Board's operation, there is no way to raise such points to the Board as part of its regular meeting."

RESPONSE: The Board's Rules are specific to public comments during public hearings. Board Rule 2.3 provides that "[d]uring public hearings, the presiding officer may set reasonable time limits on public comments." The Board's Rules provide for participation during each public hearing by the applicant and the audience. This provides an orderly and organized method of conducting the Board's hearings and the meeting in general. By design, the Rules of Procedure provide no place for general public comments on Board procedures because that is not the appropriate forum to provide such comments.

The purpose of the public comments is to allow persons with an interest in specific cases to speak on that specific case. The concept of general public comments to the Board could be dangerous since speakers may be tempted to speak about pending cases, or cases which have the potential to come before the Board, or matters that are not within the purview of the body, or matters completely off-topic to the issues before the Board.

I note that Rule 2.1, which outlines the Order of Business, does not include a place for public comments (though it does have a section for Public Hearings).

2. "This is not consistent with the Board's rules, which state 'The privilege of the floor may be granted to the public at any time by the presiding officer.'"

RESPONSE: Again, as noted above, the public comment portion of the hearings comes into play only "during public hearings," and the order of comments made during public hearings is governed by Board Rule 15 – which outlines that the Applicant speaks first, supporters speak next, opposition follows, etc.

Rule 15.11 specifically provides that, "The presiding officer shall have authority to terminate or limit any testimony or questioning which is irrelevant or unduly repetitive or provocative." Public comment regarding general Board procedures and which is not relative to a specific case will be deemed irrelevant by the Chairman and the testimony will be terminated.

3. "Although interested parties can comment about specific cases during the meetings, the public cannot make public comments or suggestions about how the Board operates, is organized, or other aspects of the Board at these meetings."

RESPONSE: This statement is correct. Further explanation provided below.

4. "There does not seem to be a public mechanism for raising concerns."

RESPONSE: Per 9 Del. C. § 6915, "The county government shall provide and specify in its zoning or other regulations, general rules to govern the organization, procedure and jurisdiction of the Board of Adjustment, which rules shall not be inconsistent with this subchapter, and the Board of Adjustment may adopt supplemental rules of procedure not inconsistent with this subchapter or such general rules." Per § 115-207(c), "The Board shall ... prescribe rules for the conduct of its affairs." § 115-207 and § 115-208 provide guidance as to Board membership and procedure. Otherwise, the Board has the right to establish its own Rules of Procedure. The Board's right to do so, however, is derived from powers delegated to it by the County. County Council has a right to pass legislation to effectuate such changes in Board procedure, and the proper forum to raise such comments, concerns, or suggestions is with County Council and County staff, not the Board.

5. The Code and the Board's procedures are silent on the mechanism for raising public comment on general Board matters.

RESPONSE: As with any legislative change, a member of the public may contact County Council and the County Administrator to raise concerns. For example, there is nothing in the Code regarding how to raise public comment for suggested changes to certain zoning regulations. The method of which the public can raise comment on general Board procedures is no different than the process to bring forth suggestions on other Code matters.

GENERAL RESPONSE: In this section of its letter, the Coalition appears to seek the ability to directly comment to the Board of Adjustment during its meetings regarding the Board's operation in the hope the Board would amend its operations. The Coalition's pursuit is misguided. The Board of Adjustment is a quasi-judicial Board appointed by the County Council. As stated above, the Board's authority is derived from the powers delegated to it by the Council. As such, if the Coalition seeks to amend the Board's operations, it should pursue the recommendations with the body that has the authority to effectuate those changes, the County Council.

Number Three. There is no administrative mechanism for opponents of cases brought to the Board to challenge Board decisions.

The Coalition makes the following comments about rehearing of Board decisions.

1. "According to the Planning and Zoning Director...an applicant can request a rehearing by the Board if he/she is unhappy with the outcome, but there is no such option available to opponents or even disinterested third parties who believe an administrative error was made."

RESPONSE: This statement is untrue and was not corroborated by the Planning and Zoning Director. Requests for rehearing are available pursuant to Board Rule 18, and the relief is not limited to applicants. Board Rule 18.2 provides that a motion for rehearing "shall be provided by mail to the opposing party of record, if any." This would allow the opposition the opportunity to file the motion and send it to the applicant (or vice versa).

It is worth noting, the procedures of the Board of Adjustment, and appeals from that body, are also strictly governed by Title 9 § 6918 of the Delaware Code and many Delaware court decisions that have interpreted that statute. The County, just like anyone aggrieved by a decision of the Board, must follow these procedures.

2. "This two-tiered way of handling challenges to Board decisions is neither fair nor equitable to opponents."

RESPONSE: Opponents have the same remedies as applicants who wish to challenge Board decisions. Also, please see prior explanation in Number 1 above.

3. "More substantially, this one-sided rehearing mechanism does not appear to be consistent with the County's zoning regulation pertaining to the Board of Adjustment."

RESPONSE: As noted above, the mechanism is not one-sided. This relief is afforded to all parties. The procedure for filing a motion for rehearing is similar to the motion for reargument before Delaware courts. See Superior Court Rules 59 and 60. The motion for reargument provides a party with relief short of a full-blown appeal when certain conditions are met (mistake, inadvertent surprise or excusable neglect; newly discovered evidence which by due diligence could not have been discovered at the time of the original hearing; or fraud, misrepresentation, or other misconduct of an adverse party). The right to a motion for reargument is separate and distinct from a right to appeal as set forth in 9 Del. C. § 6918.

Number Four. The Board is not properly administering oaths and affirmations in obtaining testimony in cases.

The Coalition makes the following comments about the Board's administration of oaths.

1. "There is a conflict between the Board's Rules of Procedures--specifically Rule 2 that says the attorney administers the oath--and the County's zoning regulation covering the Board that says the Board's chairman or the acting chairman does. State law says in conflicts such as this, the County's regulations overrides the Board's rules. Therefore, the Board rules need to be revised so they are consistent with state law and the county's regulations and say that the chairman administers the oath!"

RESPONSE: There is no conflict between the County Code and the Board Rules. Sussex County Code § 115-207(c) and § 115-208(e) provide that the Chairman may administer oaths. There is no requirement that oaths be solely administered by the Chairman. There is also no evidence that the Chairman's authority to administer oaths is exclusive. Rather, §115-207(c) and §115-208(e) provide the Chairman with a right to administer oaths which is not otherwise available under Delaware law.

2. "Further, the consequence may be that the Board has not been in compliance with County code and cases where the attorney administered oaths and affirmations may not be valid."

RESPONSE: This is not true. First, § 115-207 also provides that the Board may prescribe its own rules of procedure, and the Board's Rules of Procedure (Rule 2.5) specifically provide that "[t]estimony at public hearings shall be taken under oath which shall be administered by the Board's attorney or any other individual as may be directed by the presiding officer." Second, 10 Del. C. § 5301 provides that, "Any judge of any court in this State, any justice of the peace, or notary public, may, in any case in which an oath or affirmation is necessary or proper, administer such oath or affirmation." As an attorney with a non-expiring commission, the Assistant County Attorney is authorized to administer such oaths, and the administration of oaths by an attorney does not invalidate those oaths.

3. "At the state level, Delaware state law covering rules governing the Board of Adjustment specifically addresses this kind of conflict in favor of County regulations. In Title 9 Chapter 69, Subchapter 1. General Provisions, section 6915 explains that county government 'shall provide and specify in its zoning or other regulations' general rules about how the Board of Adjustment is organized and what its rules and jurisdiction are. The section also states that Board rules and supplemental rules of procedures can't be 'inconsistent with this subchapter' or the County's general rules."

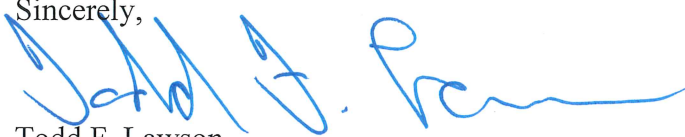
RESPONSE: The Board rules are not in conflict with the State Code or the County Code. There is nothing in either Code that restricts a licensed notary public from administering oaths at Board meetings.

In conclusion, let me reiterate that I appreciate the Coalition's feedback and attention to these important matters. The County remains committed to conducting the public's business in an accessible, transparent, and efficient manner so citizens such as yourselves can be informed,

Letter to Mr. John Flaherty and Mr. Keith Steck
September 14, 2018
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active participants in local government. I appreciate your interest in Sussex County and look forward to your continued involvement in the issues facing our community now and in the future.

Sincerely,



Todd F. Lawson
County Administrator

pc: J. Everett Moore Jr., Esquire
James P. Sharp, Esquire
Vincent G. Robertson, Esquire
Mr. Dale A. Callaway
Ms. Ellen M. Magee
Mr. J. Bruce Mears
Mr. John M. Mills
Mr. E. Brent Workman
Ms. Janelle M. Cornwell