

August 20, 2020 (4:30 AM EST)

VIA EMAIL TO [opengovernment@delaware.gov](mailto:opengovernment@delaware.gov)  
Delaware Department of Justice  
Attn: DOJ FOIA Coordinator  
820 French Street  
Wilmington, DE 19801

Re: Request for Immediate Action Regarding Proposed August 21, 2020 Public Meeting of Mayor & Commissioners of Rehoboth Beach

Dear FOIA Coordinator:

This is a Petition by Petitioners below, and a supplement to the email sent to you on the afternoon of August 19, 2020 by Petitioner Marie Hatkevich. We hereby ask for both immediate interim relief and, thereafter, final action, by the Delaware Department of Justice (“DOJ”) in regard to a proposed August 21, 2020 public meeting of the Mayor & Commissioners of the City of Rehoboth Beach (“M&C”) at which a discussion and vote will be taken on Agenda Item 9.E further described below (“Agenda Item 9.E”) (*attached as Exhibit A*) regarding a vote on the nomination and approval of a new member of the Board of Adjustment (“BoA”) for the City. The public notice of Agenda Item 9.E, particularly in the meeting agenda issued on Friday, August 14, does not comply with [FOIA], and so any discussion or vote on Agenda Item 9.E would be illegal.

**NEED FOR IMMEDIATE, INTERIM ACTION BY THE DOJ.** Because the M&C meeting on August 21, 2020 has yet to occur – it is less than 36 hours away – there is adequate time for the DOJ to request the M&C to postpone any discussion or action on Agenda Item 9.E until after the DOJ has issued its ruling on this Petition. Alternatively we ask that the DOJ advise the M&C that *if* it discusses and/or votes on Agenda Item 9.E before the DOJ has issued its final ruling on this Petition, and if the DOJ determines that the M&C violated FOIA, then any such action – particularly any vote – will have to be remediated by calling a new, properly-notice meeting at which a new discussion and new vote must be taken. Further, immediate action by the DOJ is necessary because on Monday, August 24, 2020, pursuant to a published agenda (*attached as Exhibit B*), the City’s BoA will meet to hear and vote upon an important pending case. If the M&C illegally votes to approve a new nominee to the BoA who then, on the very next business day, participates in a BoA meeting and votes in a pending case, the BoA vote would not be legal (given the participation of an illegally confirmed new BoA member). Therefore, immediate, interim action by the DOJ will eliminate what will otherwise be a legal morass for everyone involved not only in the M&C meeting, but everyone involved in the BoA meeting.

Our request for interim relief is practical, reasonable and seeks to avoid complicating an already problematic situation in which the meeting notice for Agenda Item 9.E is improper; the DOJ has an opportunity to stop the situation from becoming worse by informing the M&C that they will be proceeding at their own risk if they take up Agenda Item 9.E for discussion and a vote, and if a newly confirmed BoA member participates in the August 24, 2020 BoA meeting. Because this problem only recently came to the attention of Petitioners, we have acted responsibly and with all deliberate speed to address it before the August 21, 2020 meeting occurs. Indeed, we are still attempting to ascertain some additional facts, but there are more than sufficient facts in this Petition for the DOJ to act as we request above – before further violations occur. We understand that the DOJ is sometimes reluctant to order remedial action in situations where a petition is filed after a government body takes a vote on a matter which was improperly noticed or otherwise was already voted upon in violation of FOIA. But in this case there is time for DOJ to act before any such discussion and vote, and thereby preserve the status quo, by granting interim immediate relief or warning the M&C.

Further, if the M&C withdraw the Agenda Item from their August 21, 2020 public meeting and if they provide a new timely public notice and agenda that complies with FOIA, Petitioners will voluntarily withdraw this Petition.

**VIOLATION OF FOIA RE INADEQUACY OF PUBLIC NOTICE / AGENDA.** On Friday, August 14, 2020, the M&C published an agenda for a regular meeting to be held at 2PM on Friday, August 21. Agenda Item 9.E under New Business states: “Nomination of individual to fill remaining two year term on Rehoboth Beach Board of Adjustment vacated by Linda Kauffman and corresponding vote.”

The above description of Agenda Item 9.E might leave the impression with some persons that there may not yet have been a decision made on August 14, 2020 about who this “individual” will be. Specifically, because the agenda was so specific in so many other respects, it might appear to some readers that the identity of this “individual” would likewise have been specifically revealed if the Mayor intended to nominate and have the M&C vote upon a specific person.<sup>1</sup> In fact, earlier this week one of Petitioners inquired to City Hall about the identity of the nominee, but was told the identity of the “individual” was not known.

As it turned out, however, upon further inquiry we have learned that certainly by last Friday, August 14, 2020 – and apparently before then – the Mayor had identified and settled upon the specific person whom he intended to nominate and get confirmed by a vote at the August 21, 2020 meeting. At that time the Mayor also told one or more persons, who are not even members of the City Commission, the identity of that “individual”. Yet this morning, less than 36 hours before the August 21, 2020 M&C meeting, no public disclosure has been made of the identity of that “individual”.

In the above circumstances, Agenda Item 9.E violates FOIA because it is inadequate in describing only the “Nomination of individual to fill remaining two year term on Rehoboth Beach Board of Adjustment vacated by Linda Kauffman and corresponding vote.” At a minimum, the name of the “individual” to be nominated was required to appear in Agenda Item 9.E. The intentional withholding of the “individual’s” name meets “neither the spirit nor the letter of [FOIA] ... to draw the public attention” to the specific “individual” whom the Mayor intends to nominate. *Ianni v Department of Elections of New Castle County*, 1986 WL 9610 (Del. Ch. Aug. 29, 1986). Although the facts in *Ianni* were different, the principle in that case applies here: the failure of the agenda to specifically identify the “individual” to be nominated and voted on is inconsistent with the spirit and letter of FOIA. The *Ianni* principle has particular applicability in this case for multiple reasons: (1) prior to the August 14, 2020 agenda, the Mayor knew who he would nominate; (2) prior to the August 14, 2020 agenda, and thereafter, the Mayor privately told various persons of the identity of the “individual” to be nominated, including giving that information to persons not on the City Commission; (3) the meeting agenda provided excruciating details about almost every other substantive item on the agenda – ironically, to the point of stating that the unidentified “individual” was going to replace Linda Kauffman, the former BoA member whose seat became vacant; and (4) the unidentified “individual” will be nominated to complete a 2-year term on the BoA, an important City board whose decisions have immediate effect on the property rights of applicants and their neighbors as set forth in Delaware statutory provisions. In these circumstances, what valid rationale can there be for the agenda to have identified Linda Kauffman, whose BoA seat was vacated in May 2020, while the agenda omitted the name of her potential replacement? There is no legitimate rationale, and we can find no DOJ Opinion that has ever approved of this type of omission in similar circumstances; indeed, analogous DOJ Opinions indicate such omission is improper.<sup>2</sup>

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<sup>1</sup> For example, other agenda items included “Discussion and possible vote to award contract bid to GrassBuster Landscaping Inc., Newark DE, in the amount of \$1,223,294.00 for Lake Avenue Phase 2 Streetscape Project”; “Discuss Environmental Committee’s Proposal of Recommendations to the Wireless Communications Facilities” with multiple agenda attachments (e.g., Environment Committee’s Proposal of Recommendations for Wireless Communications Facilities Ordinance - 03 Aug 2020, Environment Committee’s Recommendations for Wireless Communications Facilities Ordinance - 07 Aug 2020, Proposed Wireless Communications Facilities Application, and Sample State Legislation Establishing Commission re 5G Wireless Technology); and “Discussion and possible vote on proposed right-of-way easement between DelDOT and the City of Rehoboth Beach for access of the construction of an entrance to the new Beebe Health Care Campus adjacent to Well 8 on Warrington Road”. Where the meeting agenda contains such details about other agenda items, it is incomprehensible how Agenda Item 9.E can be said to comply with FOIA when it simply refers to “an individual” who will be nominated by the Mayor.

<sup>2</sup> Other analogous Opinions include *Attorney General Op. 98-IB08, Complaint of Clifford Hearn*, where the agenda included an item entitled “Nominations for Vacant Town Council Seat”; the town council not only nominated a candidate for that vacancy, but at the same meeting it voted to elect that nominee. The Attorney General found the agenda was inadequate because it did not specify that a vote might be taken on any nomination. In fact, unlike here, in *Op.98-IB08*, apparently the nominee’s name was either on the agenda or otherwise known (i.e., the FOIA complaint stated it “was not advertised that Mr. Murray’s appointment was going to be voted on at the meeting”); but even though the nominee’s identity was known, the agenda’s failure to mention that a vote might be taken was a violation of FOIA. In our situation, although Agenda Item 9.E mentioned both a nomination and corresponding vote, the failure to identify the nominee on whom a vote would be taken is at least as serious as the failure of the agenda in *Op. 98-IB08* to state that subsequent to a nomination of a known individual a vote would occur. See also *Haworth Board of Education v Havens*, 637 P.2d 902 (Okla. App., 1981) (agenda item that stated “interview a new administrator” and “hire principals” had the “effect of actually deceiving or misleading the public regard the scope of matters to be taken up at the meeting by not identifying that the “new administrator” to be discussed was actually the school superintendent and that there would be a vote on whether to hire him).

In other states with similar FOIA laws which have considered the issue of identifying in city council agendas the names of nominees and appointees to independent boards and commissions, the failure to provide the names of such persons has been found to violate FOIA. For example, the Massachusetts Attorney General has long advised local governments that under the state's Open Meeting Law, the names of appointees and nominees to be voted on by city councils must appear in their agendas to be issued days in advance. But when a question arose how city councils could handle agendas where numerous (dozens) of appointees and nominees would be considered at the same meeting, the Massachusetts Attorney General's FAQs further clarified the application of state law. <https://www.mass.gov/info-details/frequently-asked-questions-about-the-open-meeting-law>. One of the specific questions in her FAQs is precisely applicable to our situation: "How detailed should meeting notices be where the public body intends to act on a large group of similar items (for example, annual license renewals or board appointments)?" In her answer, the Attorney General stated: "The notice must include details about each item, including the identity of the licensee or applicant or appointee, or the address that is the subject of an application to be considered by the public body. This level of detail is intended to provide members of the public with sufficient information to understand what business is being transacted by the public body and the opportunity to attend and observe deliberations in which they are interested." (emphases added). The Massachusetts Attorney General also referenced a recent court ruling in support of her FAQ answer, stating as follows: "See *Town of Swansea v. Maura Healey*, Civil Action No. 2017-3269-E (Suffolk Sup. Ct. October 29, 2018). Accordingly, the specific information [with the name of appointees] must be included on or with the notice itself; it is not acceptable for a meeting notice to refer members of the public to another location to find the required information. We encourage municipalities with limited posting space to consider adopting a website as the official notice posting method." More recent Massachusetts Attorney General Opinions have continually affirmed that the open meeting law requires the names of appointees to be listed on the agenda of a city council. See *2019 Mass. Op. Atty. Gen. No. 22* (Mass.A.G.), 2019 WL 1552378 (April 2, 2019); *2019 Mass. Op. Atty. Gen. No. 24* (Mass.A.G.), 2019 WL 1552380 (April 2, 2019). See also *Advisory Opinion 14-008 re Independent School District 833 (July 11, 2014)* (issued by the Minnesota State Commissioner of Administrator, the state official charged with duty to interpret the state's open meeting law) <https://mn.gov/admin/data-practices/opinions/library/?id=36-267005> (school board violated state FOIA when, prior to school board's vote to appoint an individual to fill a vacancy on the school board, it refused to release the names of individuals being considered for that appointment; such information about potential appointees could not be considered "personnel data" of "employees" because potential appointees are not "employees").

The M&C's agenda for its August 21, 2020 meeting violates FOIA because of the failure in Item 9.E to identify the "individual" who will be nominated and voted on for a BoA seat. Even at this early stage of our Petition, when the City's response may be abbreviated – but the Friday M&C meeting is imminent – there is enough information for the DOJ grant immediate, interim relief: either ask the M&C to remove Agenda Item 9.E from the agenda or advise the M&C that they will have to re-notice and take up this item anew at a future meeting – and advise the M&C that any vote on August 21, 2020 to approve the BoA nominee will have to be "undone" – if the DOJ ultimately determines that Agenda Item 9.E and action thereon was illegal under FOIA.

**INAPPLICABILITY OF ANY FOIA EXEMPTION.** Given the lack of any valid rationale for the agenda's omission of the name of the "individual" to be nominated and voted on, the question arises whether any FOIA exemption applies. We have been unable to find any FOIA exemption that can reasonably be applied. As numerous DOJ Opinions and court cases affirm, the Legislature intended the disclosure requirements in FOIA to be broadly interpreted, and its exemptions are to be narrowly interpreted.

The FOIA exemption which some have tried, unsuccessfully, to argue in other states is the exemption for "personnel" information. But as some of the above-mentioned rulings have determined, e.g., in Minnesota, that exemption does not apply here.

Over the years the "personnel" exemption, in the context of nominees and appointees, has arisen under California's open meeting law, the Brown Act, i.e., whether city councils must identify in their meeting agendas the names of potential appointees to various city boards and commissions. The explanation given by the City of Stockton, <http://qcode.us/codes/stockton-cpm/revisions/Res-2016-01-26-1203.pdf>, best describes part of the reason why the names of potential appointees must be included on a city council meeting agenda (even without regard to other laws):

1) In 1975 the State Legislature amended Government Code Section 54957 of the Brown Act, removing “public officer” from those appointees that the Council could consider in executive session. This action resulted in the requirement that all discussions and deliberations by the City Council regarding appointments or confirmation of appointments are to take place in public at regular or special meetings of the City Council as opposed to closed executive sessions. This amendment was placed into effect January 1, 1976.

2) To comply with this new requirement, the City Council on January 19, 1976 adopted Resolution No.32,937 establishing procedures for interviewing and confirming appointments in open Council session. The resolution additionally incorporated the existing informal procedures of the City Council regarding such appointments.

Not unlike California law, Delaware law exempts from disclosure “Personnel matters in which the names, competency and abilities of individual employees or students are discussed...” Del. Code Tit. 29, §10004(b)(9) (emphasis added). But as in California and other states, under Delaware law nominees or prospective appointees to independent boards and commissions, like the Board of Adjustment, Del. Code Title 22, §§322(b) and 322(d)(1), or the Planning Commission, Del. Code Title 22, §701, are not “employees” and their names cannot be withheld from a public agenda that states the Mayor will nominate, and the City Commission will discuss and vote on, a nominee or appointee – especially when the Mayor has already decided upon which specific “individual” he will nominate to an important independent board and has disclosed that name of that “individual” to persons who are not even City Commissioners.

Accordingly, there is no exemption that allows the M&C to withhold the name of the nominee from Agenda Item 9.E.

**IMPORTANCE OF DOJ ACTION.** As noted earlier, the nomination at issue here is for a seat an important independent board in the City; this is not the City’s Animal Issues Committee, or the Environment Committee, or the Parking Advisory Committee or some other committee which has no independent authority, which reports to the M&C, and which can only make recommendations. As the DOJ knows, the BoA in every city, town and county has significant decision-making authority that affects property rights of applicants and neighbors. And BoA decisions are self-effectuating and can be implemented immediately, unless stayed by a court. For these reasons, the public’s right to contact the M&C with feedback on any proposed BoA member is meaningless unless the public knows – in the meeting agenda published 7 days in advance – SPECIFICALLY WHO is being nominated and voted on. Now, less only 36 hours before the M&C meeting, it is impossible for the public to weigh in on whatever secret nominee the Mayor will propose. If the DOJ allows the M&C to get away with the Agenda Item 9.E, it is inviting every other local and county government in Delaware to hide the names of nominees and appointees of independent boards until the very last minute.

How the M&C have handled Item 9.E in the agenda for their August 21, 2020 meeting – an agenda published on August 14, 2020 – is the antithesis of how FOIA is supposed to work. We urge immediate action – at least immediate interim relief – from the DOJ. Especially with a BoA meeting scheduled for Monday, August 24, 2020, the nomination and approval of a new BoA member pursuant to an illegal agenda will only cause more havoc later.

Respectfully submitted,

Marie Hatkevich (original Petitioner)  
[mhatkevich54@gmail.com](mailto:mhatkevich54@gmail.com)

Harvey Shulman (additional Petitioner)  
[HarveyJShulman@gmail.com](mailto:HarveyJShulman@gmail.com)  
(phone: 202-362-3384)

# EXHIBIT A – MAYOR & COMMISSIONERS AGENDA FOR AUGUST 21 , 2020

<https://cityofrehoboth.civicweb.net/document/53044?printPdf=true>

PUBLISHED ONLINE ON AUGUST 14, 2020

Board of Commissioners  
229 Rehoboth Avenue  
P.O. Box 1163  
Rehoboth Beach, Delaware 19971



City of Rehoboth Beach  
Telephone 302-227-6161  
[www.cityofrehoboth.com](http://www.cityofrehoboth.com)

## THE COMMISSIONERS OF REHOBOTH BEACH

Virtual Regular Meeting\*\*\*

Friday, August 21, 2020; 2:00 p.m.

### AGENDA

**PLEASE NOTE - AS PERMITTED BY GUBERNATORIAL AUTHORITY, IN ORDER TO LIMIT THE RISK OF POTENTIAL COVID-19 EXPOSURE, THE PUBLIC SHALL BE DENIED ENTRY TO THE BOARD OF COMMISSIONERS REGULAR MEETING.(1) THE PUBLIC IS ENCOURAGED TO PARTICIPATE IN THE BOARD OF COMMISSIONERS REGULAR MEETING ELECTRONICALLY. FURTHER INSTRUCTIONS ARE LISTED AT THE BOTTOM OF THIS AGENDA.**

1. Call to Order
2. Roll Call
3. Correspondence (relating to agenda items only)
4. Consider a vote of the Commissioners to accept the consent agenda.
5. Approval of Minutes\*
  - Regular Meeting held on July 17, 2020
  - Special Meetings held on May 12, 2020, May 19, 2020, May 26, 2020, June 16, 2020, July 14, 2020, July 21, 2020, July 28, 2020 and August 4, 2020
  - Workshop Meetings held on August 6, 2018 and August 10, 2020
6. City Manager's Report
  - A. Street Aid Expenditure
7. City Solicitor's Report
8. Old Business
9. New Business
  - A. Discussion and possible vote to award contract bid to GrassBuster Landscaping Inc., Newark DE, in the amount of \$1,223,294.00 for Lake Avenue Phase 2 Streetscape Project.
  - B. Discuss Environment Committee's Proposal of Recommendations to the Wireless Communications Facilities.  
[Rehoboth Beach Environment Committee Proposal of Recommendations for Wireless Communications Facilities Ordinance - 03 Aug 2020](#)  
[Environment Committee Recommendations for Wireless Communications Facilities Ordinance - 07 Aug 2020](#)  
[Proposed Wireless Communications Facilities Application](#)  
[Sample State Legislation Establishing Commission re 5G Wireless Technology](#)
  - C. Discussion and possible vote on proposed right-of-way easement between DelDOT and the City of Rehoboth Beach for access of the construction of an entrance to the new Beebe Health Care Campus adjacent to Well 8 on Warrington Road.
  - D. Discussion for consideration and adoption of a Resolution recognizing the significance of the 19th Amendment to the Constitution of the United States granting women the right to vote.  
[Proposed Resolution Supporting 19th Amendment - 21 Aug 2020](#)
  - E. Nomination of individual to fill remaining two year term on Rehoboth Beach Board of Adjustment vacated by Linda Kauffman and corresponding vote.
10. Commissioner Comments
11. Determine future meeting dates.
12. Citizen Comment
13. Adjournment

AGENDA ITEMS MAY BE CONSIDERED OUT OF SEQUENCE

*(Time may not allow for consideration of all agenda items.)*

# EXHIBIT B - BOARD OF ADJUSTMENT AGENDA FOR AUGUST 24, 2020

<https://cityofreboth.civicweb.net/document/53086?printPdf=true>

[Application - Lot 1A East Lake Drive & Prospect Street](#)  
[Application Supplement - Lot 1A East Lake Drive & Prospect Street](#)  
[Exhibit A - Aerial View \(Lot 1A\)](#)  
[Exhibit B - Boundary Survey Plan \(Lot 1A\)](#)  
[Exhibit C - Current Setbacks \(Lot 1A\)](#)  
[Exhibit D - Requested Setbacks \(Lot 1A\)](#)  
[Exhibit E - Overlay of Current Request Setbacks \(Lot 1A\)](#)  
[Exhibit F - Photograph \(Lot 1A\)](#)

8. Other Business
9. Adjournment

\*For additional information or special accommodations, please call (302) 227-6181 (TDD Accessible) 24-hours prior to the meeting.

amw: 08/17/20; posted 08/17/20

## - MEETING INSTRUCTIONS -

\*\*The Board of Adjustment is holding this meeting under the authority issued by Governor John C. Carney through Proclamation No. 17-3292.(0) The meeting will be conducted using video-conference technology.

Members of the public wishing to speak will be required to pre-register with Ann Womack, City Secretary, at [awomack@cityofreboth.com](mailto:awomack@cityofreboth.com) at least two (2) full business days prior to the meeting.

Citizen comment will be administered by a moderator to ensure everyone has an opportunity to comment. You will not be able to speak until called upon by the moderator.

Registered members of the public joining the meeting on the phone or by computer will be provided an opportunity to make comments regarding New Business during each agenda topic after discussion by the Board of Adjustment. Speakers shall state their name and address. Comments are limited to three (3) minutes or at the discretion of the Chair.

The City will stream this meeting using the same technology it uses for its chamber broadcast that can be viewed on the City portal at <http://cityofreboth.civicweb.net/Portal/> or YouTube. This stream will broadcast the meeting, the public will not be able to comment or speak using this broadcast. This stream will experience a 30-second delay.

The Board of Adjustment meeting materials, including the "packet", are electronically accessible on the City's portal at <http://cityofreboth.civicweb.net/Portal/>.

If any member of the public would like to submit comments electronically, please feel free to send them to Ann Womack, City Secretary, at [awomack@cityofreboth.com](mailto:awomack@cityofreboth.com). All comments shall be submitted at least two (2) full business days prior to the meeting date.

City of Rehoboth Beach  
Telephone 302-227-6181  
[www.cityofreboth.com](http://www.cityofreboth.com)



Board of Adjustment  
229 Rehoboth Avenue  
P.O. Box 1163  
Rehoboth Beach, Delaware 19971

## BOARD OF ADJUSTMENT

Virtual Regular Meeting\*\*  
Monday, August 24, 2020, 1:00 p.m.

## AGENDA

**PLEASE NOTE - AS PERMITTED BY GUBERNATORIAL AUTHORITY, IN ORDER TO LIMIT THE RISK OF POTENTIAL COVID-19 EXPOSURE, THE PUBLIC SHALL BE DENIED ENTRY TO THE BOARD OF ADJUSTMENT REGULAR MEETING.(0) THE PUBLIC IS ENCOURAGED TO PARTICIPATE IN THE BOARD OF ADJUSTMENT REGULAR MEETING ELECTRONICALLY. FURTHER INSTRUCTIONS ARE LISTED AT THE BOTTOM OF THIS AGENDA.**

1. Call to Order
2. Roll Call
3. Verification of Meeting & Public Notice - A. Womack
4. Correspondence
  - [Email received November 19, 2019 from Morgan Burns re Lot 1A East Lake Drive & Prospect Street](#)
  - [Email received November 20, 2019 from Jay & Enid Lagree, 7 Prospect Street re Lot 1A East Lake Drive & Prospect Street](#)
  - [Email received November 25, 2019 from John Bisch, 96 East Lake Drive re Lot 1A \(East Lake Drive & Prospect Street\)](#)
  - [Email received August 14, 2020 from Enid Lagree, 7 Prospect Street re in opposition to granting variances](#)
5. Approval of Minutes
  - Regular Meeting held on July 27, 2020
6. Old Business
7. New Business
  - A. Case No. 1019-09, A REQUEST FOR VARIANCES pursuant to Sections 270-24 and 270-25 of the Municipal Code to allow both the front and rear setbacks to measure 10 feet on the lot. The property is located in the R-1 Residential District on Lot No. 1A (East Lake Drive and Prospect Street), Block No. 31. The address of the property is 100 East Lake Drive. The Variances are being requested by Bradley J. & Kathryn P. Rozansky, owners of the property.  
[Building Inspector Report - Lot 1A East Lake Drive & Prospect Street](#)