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By Electronic Mail Only
Mayor & City Council of Lewes
Lewes City Hall
114 E. Third Street
Lewes, Delaware 19958

PRIVILEGED & CONFIDENTIAL

Re: Video Takedown Investigation Report

Dear Mayor and Council:

This office was retained to conduct an independent investigation into the removal and subsequent reposting of a video—some contents of which were critical of the City, the Building Inspector, and Councilman Elder. The video was initially posted to the City’s website and YouTube. On May 8, 2026, a few hours after it was posted, it was removed from both sites. On May 9, 2026, the day of the City’s election, it was reposted to both sites. The scope of our investigation includes establishing the chain of events and analyzing the actions relative to the removal of the video. Please accept this letter as setting forth the findings of our investigation.

This letter, and all of the findings herein, are protected by the attorney-client privilege and may only be used, viewed by, and known to the Mayor and City Council of the City of Lewes—our client in this matter. Disclosure of this letter, or the contents of this letter and the attorney-client privileged information contained in this letter by any individual member of council or the Mayor would constitute a violation of the State’s public integrity laws and the City of Lewes’ ethics code. Lewes City Code § 9-3H.¹ As such, the contents of this letter must be kept strictly

¹ “No official or employee shall, beyond the scope of such public position, disclose confidential information gained by reason of such public position nor shall an official or employee otherwise use such information for personal gain or benefit.”

confidential by the Mayor and each member of Council. It should not be shared or transmitted to anyone who is not the Mayor or a current member of City Council.

That said, the attorney-client privilege is a privilege of the client, not of the lawyer. If the Mayor and Council of the City of Lewes desires to make the contents of this report publicly available, it may *collectively* do so. But that can only be done in a public vote of the members of Council at a City Council meeting. Naturally, any public vote to waive privilege for this investigation report would need to be placed on an agenda for consideration by Council at least seven (7) days in advance of the vote under Delaware's Freedom of Information Act ("FOIA"). Please note, if Mayor and City Council choose to waive privilege for this memo, unless you specifically state otherwise, privilege will also be waived for all attachments and communication included within this memo.

I make the findings herein based upon my interviews² of Ashley Akgoren (City Clerk), Alex Burns (City Solicitor), Joseph Elder (Councilperson), Amy Marasco (Mayor), Ellen Lorraine McCabe (City Manager), Rick Melendez (Public Works Director), Timothy Ritzert (Councilperson), Shelby Shockley (HR Manager) and Jon Ward (City Building Inspector) – along with documents provided by these individuals. I note that I also requested an interview with the Deputy City Manager Janet Reeves who did not participate in the interview process. Her e-mail outlining her decision not to participate is attached hereto as Exhibit A. I do not believe that Ms. Reeves' non-participation impacted my investigation, although her participation in this process may have assisted in corroborating some of the findings set forth below.

Naturally, when performing an investigation, the results of the investigation are only as strong as the information provided. For purposes of this report, our examination of documents has been limited to the examination of copies of documents proved to our satisfaction, and of documents provided to us by the witnesses interviewed or requested by us as a result of the interviews. We have not reviewed any documents other than the documents provided. In particular, we have not reviewed any documents that are referred to in or incorporated by reference into any document reviewed by us. We have assumed that there exists no provision in any document that we have not reviewed that is inconsistent with the conclusions stated herein. We have relied exclusively upon the foregoing documents provided, and the interviews, all of which we have assumed to be true, complete and accurate

² I selected all persons interviewed.

in all material respects. If there are other documents or facts upon that impact our findings herein that have not been provided to us, we reserve the right to alter the conclusions herein upon receipt of such new information. Indeed, if additional factual information comes to light contrary to the facts presently assumed and understood, a change in facts or circumstances may alter the conclusions stated herein.

A. Background

1. The March 17, 2026 Ward Memo

There are some background facts that are helpful context to the events of May 8 and 9, 2026 regarding the taking down and reposting of the video at issue.

As I am sure all of Council is aware, there is a history of friction and tension between Councilman Elder (the Council's former HPARC representative) and Building Inspector Ward on the one hand, and former HPARC chair Kevin Mallinson on the other hand, dating back to the fall of 2025. Indeed, Building Inspector Ward filed a bullying and harassment complaint against Mallinson in October of 2025. Although an investigation found no actionable bullying or harassment had occurred, the mere fact that a complaint was filed establishes ongoing tension between these individuals. That friction continued on a number of different projects involving properties and applications under HPARC's purview, which led to Building Inspector Ward sending a pair of memos on Saint Patrick's Day (March 17, 2026),³ seeking clarity on the roles of HPARC and the separate roles of the Building Official. Copies of the memos are attached hereto as Exhibit B.

At least to me, it is unclear whether the memos constituted a formal HR or Council complaint (e.g. because Mr. Ward used the words "complainant"), or whether Mr. Ward was seeking a legal opinion on the scope of the authority of the HPARC Chair (Mallinson) with regard to ongoing projects. The subject line states "Review of Jurisdictional Authority Concerns, Administrative Interference, and Workplace Conduct." I asked Building Inspector Ward his intent about sending the memos, and he confirmed that he was primarily seeking a legal determination on the roles and responsibilities of the respective camps—but he also confirmed that what

³ The memorandum is addressed to the City Manager and HR Manager Shockley. The transmittal letter is addressed to the City Manager and the City Solicitor.

he was seeking was outlined in items 1-4 on pages 5 and 6 of his memo. Most of these items are asking for legal clarity—but one of the things he also asked for was disciplinary action and possible removal of Mallinson (even though Mallinson is not mentioned by name in items 1-4). Whether or not the Building Inspector submitted the memos simply for informal legal guidance or to trigger a formal complaint process (including an investigation and formal response), I conclude that a third party reading the memos as submitted could reasonably conclude that they could be evaluated by the City as a complaint triggering an associated investigation.

Council tasked Solicitor Burns to prepare a memorandum on the issues raised by Building Inspector Ward. That memorandum, dated April 21 (Exhibit C), was sent to Council and was discussed at an executive session held on April 22, 2026. All witnesses having familiarity that I interviewed confirmed that Building Inspector Ward has not received a copy of the Solicitor's memorandum. By the date of the Solicitor's memorandum, Mallinson had resigned. In the memorandum, the Solicitor stated "[t]he resignation renders a formal workplace conduct review under the Personnel Policy or a potential referral to the Board of Ethics largely moot as a practical matter." Memo p. 7.

It is further clear that Solicitor Burns believed that the Mayor would communicate the findings of that memo to the Building Inspector because Solicitor Burns asked Building Inspector Ward if the Mayor had communicated with him yet on at least two occasions. Also, on April 23, 2026, Solicitor Burns sent an e-mail to the City Manager and the Mayor stating:

I am looking to close the loop on the HPARC investigation. Jon [Ward] and Kevin [Mallinson] both indicated during their interviews that they would appreciate follow-up correspondence after City Council had an opportunity to receive the information.

Below is a draft message that could be sent to each of them. It could come from either the Mayor or me. Let me know what you think - happy to collaborate and feel free to propose edits. I lean having it come from the Mayor because if it comes from the Mayor it carries more institutional weight and could be seen as a more meaningful closure . . . [draft correspondence follows].

Solicitor Burns calls it an "HPARC investigation" – making it appear that the March 17 memos from Building Inspector Ward were being treated as a complaint

filed as an investigation. However, according to the April 21, 2026 Solicitor's memorandum, City Council had directed a legal review of the Building Inspector's March 17 "Submission" on April 6, 2026. Again, it is unclear whether the March 17 "Submission" by the Building Inspector was a complaint or not – but it would be reasonable to conclude that it could be considered a complaint.

Solicitor Burns thereafter sent a follow up e-mail on May 13, 2026 to the City Manager and the Mayor forwarding the April 23, 2026 e-mail above, and indicating that the draft response was an item that "need[s] attention." Specifically, he states "I'm happy to reach out to them [Ward and Mallinson] if you'd like but wanted to give you the opportunity to do so first."

Based on the foregoing, it would be reasonable for one to conclude that there was an investigation of the March 17, 2026 memos conducted by the Solicitor, and as of May 7, 8, and 9 (the dates in question), the conclusions of that investigation had not been communicated to Building Inspector Ward. It would be reasonable for Ward to conclude the matter remained open – even though the advice had already been communicated to Council via Solicitor Burns' legal memorandum.

While it may have been reasonable for Mr. Ward to believe that inquiry into the matters raised in his March 17, 2026 memos was still under investigation as of May 7-9, 2026, the same cannot reasonably be true for the City Manager, who was, in part due to her attendance at the April 22, 2026 executive session on this topic, aware that Solicitor Burns completed his review and discussed his memo with Mayor and City Council on April 22, 2026. City Manager McCabe was also aware that the Solicitor had prepared a draft response regarding the City's review of the Building Inspector's memos to be sent to both Building Inspector Ward and Mallinson to notify them that the City has completed its review and views the matter concluded. The City Manager was also aware that Solicitor Burns was not doing any additional work on the matter. The only open item was the final communication to Building Inspector Ward (and Mallinson). If the results of the purported investigation are in hand, it is difficult, in my view, to claim that an investigation remains ongoing if the only step left is to communicate to the Complainant.

2. The Mallinson Resignation

Mallinson's term as HPARC chair expired on May 1, 2026. He sought to retain the position. The City Council met in executive session on April 6, 2026 to discuss Mallinson's reappointment. It appears that a consensus was reached in

executive session to not reappoint Mallinson.⁴ It is also clear that Councilperson Elder did not want Mallinson reappointed – and Mallinson did not have the votes to be reappointed.

It was ultimately Mayor Marasco who met with Mallinson to tell him that he did not have the votes to be reappointed as HPARC chair – and gave him the option to resign instead of being voted out as chair. Mallinson ultimately chose to resign instead of being voted to not be reappointed and he submitted his resignation on April 20, 2026 (according to the Solicitor’s April 21, 2026 memorandum to Council). With Mallinson out of office, the Building Inspector’s March 17, 2026 “complaint” (if it was a “complaint”) which related to actions of the HPARC Chair were largely “moot” in the words of Solicitor Burns. The source of the friction that led to the issues identified in Building Inspector Ward’s March 17 memos were the actions of Mallinson and not the other members of HPARC. Mallinson, therefore, was not a City official as of the next HPARC meeting held on May 7, 2026.

B. Mallinson’s Public Comments and Subsequent Events

No longer the Chair, Mallinson attended the May 7, 2026, HPARC meeting as a citizen. During public comment, he spoke. Initially, he thanked his former HPARC colleagues, and thereafter, made the following statements regarding Building Inspector Ward (who was present), Councilperson Elder (who was also present), and the City:

I have to say my experience with the Mayor and City Council and the City Administration, however, has left me disappointed and disillusioned despite the importance of historic preservation in this first town and first state. I have witnessed repeated attempts by city representatives to undermine HPARC functioning or to influence our

⁴ If my conclusion that a consensus was reached by Council in executive session is correct, such an act would violate Delaware’s Freedom of Information Act. *Att’y Gen. Op.* 06-IB12 (June 19, 2006) (internal citations omitted) (“Our Office has previously determined that ‘FOIA does not permit ‘straw polling’ nor does FOIA ‘allow public bodies to reach ‘consensus votes’ during executive session.’”); *Att’y Gen. Op.* 96-IB32 (Oct. 10, 1996) (“consensus votes in executive session are prohibited”).

decision making and there should never be political pressure on HPARC decisions, particularly if those decisions are being made in favor of those who have power or influence or money. Even worse, the Mayor and City Council engaged in discussions and votes of matters of great importance to HPARC while in executive sessions out of the public eye, out of the public view and not inviting an HPARC chair or designee to attend those meetings. Yet when I scheduled an executive session for this commission to privately address the erratic and ineffective actions of the ex officio to the city council, Joe Elder, the meeting was cancelled by the city council. His inappropriate comments, his backroom negotiations with applicants, and wild confabulations have really been disruptive. He's often unprepared or unwilling to effectively fulfill his role as ex officio to the commission and to the council. It would have been best if we could have handled those personal issues in private. But we were not allowed to.

Rather than finding cooperation and collaboration with the city, I found obstruction. Serious inquiries that I sent to the city manager's office or the building department often went unanswered. Rather, I noticed a pattern of delay, deflect and deceive. Sadly, I did lose confidence in the building officials ability to provide the truth, the whole truth and nothing but the truth in matters of great importance to HPARC.

The lack of professional communication, collaboration or support for HPARC from the city leaders is appalling. There is a serious lack of understanding about some of the basic principles of historic preservation and our city leadership, the building official and the ex officio of this commission, Joe Elder. It is a willful ignorance though. There have been ample and there are ample opportunities for learning and engaging in a meaningful way to learn more about why this commission is here and how it functions. I can only hope going forward there's a more serious attempt to communicate more effectively, more openly and transparently and work collaboratively and allow HPARC to meet its mission according to the city code. Thank you. It's been a pleasure working with you all.⁵

⁵ Transcribed by Connolly Gallagher staff – not a transcription service.

Following the meeting, the Building Inspector said to Solicitor Burns that this is a continuation of what was going on before. Based upon these comments, after the HPARC meeting, Solicitor Burns sent the following e-mail to HR Manager Shockley, and copied the City Manager:

I wanted to share a situation that occurred during the final public comment period at tonight's (Thursday's) HPARC meeting. Kevin Mallinson made negative comments about the City and specific staff members. Jon Ward and Dr. Elder appeared upset . . . Please let me know if you would like to discuss this on Friday or sometime next week, depending on your schedule, or if there is anything else I can do. You may also want to review the last five minutes of the HPARC YouTube video to see what occurred.

Although the following conversations were not specifically recalled at the time of his interview with me, it is evident that Councilperson Elder was very upset by Mallinson's comments. He spoke with Councilperson Ritzert right after the meeting in the parking lot and expressed his displeasure at Mallinson's comments. The next morning, May 8, Councilperson Elder was at City Hall right after 8:00 a.m. (opening) and was very agitated. He flagged down Maintenance Supervisor Melendez, who was getting in his truck, complaining that Mallinson should not have a right to do what he did, that Mallinson had no right to say stuff about him [Elder], and that Mallinson's comments make him look bad. Melendez stated that Elder was "PO'd" and very agitated.

Later that same day, Councilperson Elder had a conversation with Solicitor Burns around 3:00 p.m. During that conversation, Councilperson Elder was very heated and was glad the video was down. He indicated that he encouraged folks at the morning meeting to file complaints against Mr. Mallinson and encouraged the City to take the video down. While he expressed wanting a cease and desist letter and contemplated a defamation action,⁶ Solicitor Burns did not recall Councilperson

⁶ Public figures have a higher standard to make out a defamation claim. There are, ultimately, two categories of public figures. *See Mac Isaac v. Cable News Network, Inc.*, 2024 WL 4371035, at *3 (Del. Super. Sept. 30, 2024). The all-purpose public figure is an individual who "achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). A limited-purpose public figure is one who "thrust[s] [himself] to the forefront of particular public controversies in order to

Elder mentioning during that conversation that his requests were to protect the Building Inspector. Also, while Councilperson Elder was very agitated and upset, he also did not mention anything about his reelection during that call. In fact, no person interviewed directly linked any statement by Councilperson Elder to regarding the taking down of the video to Councilperson Elder's reelection campaign.

For the last several years, since at least 2021, the City posts the videos of all City meetings of boards and commissions to the City's website and also to YouTube. If the meeting is held at City Hall in council chambers, the video is posted to the City's website and YouTube the same day right after the meeting. If the meeting is held at the Rollins Center, the video is posted the next morning. Because the May 7, 2026 HPARC meeting was held in the Rollins Center, the video of the meeting was not posted until the morning of May 8, 2026 by City staff in the normal course of business.

Soon after City Hall opened on May 8, 2026, a meeting with Building Inspector Ward, City Manager McCabe, Councilperson Elder, and HR Manager Shockley took place. While it is not entirely clear from the interviews the exact statements from this meeting, Mallinson's comments were discussed, and certainly Ward, McCabe, and Elder felt that the comments were unfair, untrue, and defamatory.⁷ They felt that Mallinson would continue to do these things unless

influence the resolution of the issues involved." *Mac Isaac*, 2024 WL 4371035, at *5 (internal quotations omitted). Whether an individual is a limited purpose public figure involves a context-specific analysis, which depends on the nature and extent of the individual's participation in the controversy giving rise to the defamation. *Agar v. Judy*, 151 A.3d 456, 477-79 (Del. Ch. 2017). But, an elected town council member has been held to be a public figure. *See Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005).

⁷ To establish a defamation claim, all plaintiffs—both private individuals and public figures—must establish that “(1) the defendant made a defamatory statement; (2) concerning the plaintiff; (3) the statement was published; (4) a third party would understand the character of the communication as defamatory.” *Agar*, 151 A.3d at 470. Public figures are required to establish two additional elements. *New York Times v. Sullivan*, 376 U.S. 254, 298 (1964). “First, they bear the burden of pleading (and later proving) that the statements are false, as opposed to the common law rule

something was done. Councilperson Elder stated that he asked the City Manager what she would do about the matter and what actions would be taken to protect Building Inspector Ward. The Building Inspector stated in his interview that he wanted the video down pending review because it was a continuation of Mallinson's ongoing behavior. During the meeting, the City Manager decided that the HPARC video (containing Mallinson's statement) should be taken down and removed from public view. While I cannot be 100% sure, based upon my interviews, I believe it was Building Inspector Ward who made the initial request to remove the video from public view. The City Manager indicated to me that she was motivated by employee protection in removing the video. I received conflicting statements from the participants interviewed whether an ongoing investigation was discussed at this meeting. Nonetheless, following the meeting, the City Manager asked City Clerk Akgoren to remove the video from public view.

Either right before or right after this meeting, the City Manager sought legal guidance from the Solicitor, but Solicitor Burns was not immediately available. At 9:25 a.m. on May 8, 2025, the City Manager asked the Solicitor "[c]an Kevin's inaccurate remarks be edited."

After that meeting, I received a call from HR Manager Shockley.⁸ She called me because Solicitor Burns was unavailable, and I had been working on preparing

under which truth operates as an affirmative defense. Second, they must plead (and later prove) that the defamatory statements were made with 'actual malice,' a term of art meaning that the maker knew the statement was false or acted with reckless disregard for the truth." *Agar*, 151 A.3d at 477 (internal quotations and citations omitted). The actual malice element is subjective and focuses on the speaker's state of mind at the time of publication, rather than what a reasonable person would have known. *Page v. Oath Inc.*, 270 A.3d 833, 865 (Del. 2022) (Valihura, J. dissenting). "[B]efore a Court reaches the question of actual malice, it must determine two questions of law: *first*, whether alleged defamatory statements are expressions of fact or protected expressions of opinion; and *two*, whether the challenged statements are capable of a defamatory meaning. If a court determines that the statements are protected expressions of opinion or that they are not capable of a defamatory meaning, it will not reach the actual malice issue or need to inquire into the defendant's state of mind." *Riley v. Moyed*, 529 A.2d 248, 251 (Del. 1987).

⁸ I did not recall this conversation until I was reminded about it in Shockley's interview with me.

training for the City.⁹ Without providing any names or any specifics, she asked me a hypothetical about what could be done if there were unfair, untrue, or other negative comments about City staff made in public comment at a public meeting. I then discussed with Shockley the case from Charlottesville, Virginia (*Draego* – discussed below) wherein the City was held to have violated a person's First Amendment rights by cutting off his public comments that were highly critical of Muslim people. I went on to say that if an employee felt that the comments were unfair or untrue, the employee has a private right to take action against them for defamation/slander, but there is not much that could be done from the City's perspective due to the First Amendment. During my interview with her, Shockley stated that she relayed my comments to the City Manager, but the City Manager wanted to wait for Alex's view. Shockley advised that she later passed on my comments to Building Inspector Ward. Shockley's conversation with the City Manager about my advice occurred after the City Manager's initial instruction to remove the video—but as discussed below, it certainly occurred prior to the video being removed from the online platforms.

The City Manager initially verbally instructed City Clerk Akgoren to take the HPARC video recording off the online platforms soon after the morning meeting discussed above. City Clerk Akgoren, however, did not immediately do so because she had concerns about the appropriateness of removing a meeting recording and wanted time to consider the matter and discuss those concerns with the City Manager. Later that morning, Akgoren received a second inquiry from Shockley, directed by the City Manager, that the video remained up on YouTube and it should be taken down. City Clerk Akgoren said "no" at that time and advised Shockley that she wanted to have a more in-depth conversation with the City Manager before doing it because she felt removing the video was not appropriate. She waited to speak with the City Manager personally before taking action.

Sometime between 12:00 p.m. and 1:00 p.m. on May 8, 2026, City Clerk Akgoren and the City Manager had a direct conversation. At that time, City Clerk Akgoren stated that such an action could be viewed similarly to removing unfavorable comments posted on a social media platform. The City Manager stated that the video contained false and defamatory information about a member of city staff and the City Manager again directed City Clerk Akgoren to take the video down

⁹ Shockley advises that she mentioned during the meeting with the City Manager, Ward, and Elder that she would call me and get my view about untrue and defamatory statements.

from both online platforms. Being uncomfortable with the direction from her superior, City Clerk Akgoren did not want to have anyone on her staff take the videos down. But, she had a practical problem—she did not know how to perform the task. So, she was instructed by a staff member on how to make the videos private on the platform, and City Clerk Akgoren was the person who performed the task. The videos were made private and removed from public access in the early afternoon at approximately 1:00 p.m. on May 8, 2026.¹⁰

That same morning, at 11:13 a.m., Building Inspector Ward wrote to HR Manager Shockley stating, in part, that “I feel the actions taken by Mr. Mallinson at the meeting were an escalation of bullying/harassment documentation filed previously with the City of Lewes.” Ward also indicated that the “action” may now include legal ramifications and requested “independent legal counsel review of last night’s actions and all previous documentation filed with the City of Lewes.” At 4:15 p.m., HR Manager Shockley responded that the video of the May 7 HPARC meeting was temporarily removed “pending legal guidance from the City Solicitor.”

On the same day, Councilperson Elder wrote the City Manager and Shockley, and stated:

Ellen Lorraine, Shelby:

I write to request that you evaluate our options with independent legal counsel regarding the ongoing incivility occurring both within City Hall and from members of the community. Recent incidents – including negative events at HPARC meetings, public altercations involving council members during meetings, and repeated community complaints – point to a growing concern that should be addressed immediately.

Restoring professional courtesy by insuring colleagues, staff, and residents are treated with dignity, respect, and kindness will improve

¹⁰ At his interview, Councilperson Ritzert recalled the video not being accessible early in the morning of May 8. I believe it is very possible that Councilperson Ritzert attempted to access the video prior to it being uploaded in the normal course by City staff. City Clerk Akgoren removed the public access to the video and she did not do so until approximately 1:00 p.m.

overall well-being, employee job satisfaction, and productivity within the City.

At the May 7 HPARC meeting, several individuals, including Jon Ward and myself, were publicly and inappropriately singled out. In addition, Kevin Mallinson was recently given a vote of no confidence by council and subsequently stepped down as HPARC Chair. My concern extends particularly to Mr. Ward and the broader question of why the Mayor and City Council continue to allow Mr. Mallinson to direct retaliatory behavior toward City staff and officials during public meetings.

If there is anything further I can do to assist in restoring civility and professionalism, please do not hesitate to contact me.

For your awareness, I sent a similar request to Alex Burns last week following a public display of incivility involving Khalil Saliba at a public meeting, but I did not receive a written response.

At 4:13 p.m., HR Manager Shockley replied to the Councilman Elder's e-mail and responded that the video of the May 7 HPARC meeting was temporarily removed "pending legal guidance from the City Solicitor."

Legal advice from the Solicitor was ultimately received at 5:35 p.m. on Friday, May 8, approximately 4.5 hours after the video was removed from public view. The Solicitor, however, did not narrowly focus on the question posed by the City Manager at 9:25 a.m., specifically, "[c]an Kevin's inaccurate remarks be edited."¹¹ The Solicitor's e-mail response was primarily based upon Shockley's 2:20 p.m. email and questions therein and lengthy conversation with Councilperson Elder at approximately 3:00 p.m. that day, who provided Solicitor Burns background on events occurring after the HPARC meeting. The Solicitor's lengthy e-mail opined, in part, the video could be removed. The Solicitor went on to opine that removing the video is not a FOIA violation—and that FOIA conclusion was affirmed by the Attorney General's office opinion dated June 8, 2026.

¹¹ In response to the City Manager's inquiry, the Solicitor stated "So, you may remove the video in its entirety. I would caution against editing the video to remove the speech in question because it could make it appear that the City is targeting the content of speech, which could give rise to viewpoint discrimination or [present an] equal protection problem. Acting on the while video sidesteps that concern."

On that Friday evening, the Mayor received text messages from an employee who was very concerned that the video had been taken down. The Mayor had a conversation that evening with the Solicitor,¹² and based upon those concerns, a call was arranged with the Mayor, the Solicitor, and Luke Mette of the same firm that began at approximately 9:45 a.m. on election day, May 9. Following that discussion, as Council is aware (because all of Council is on the e-mail string), the Mayor directed the City Manager to make the video public again. That direction was based on advice she received from the Solicitor's firm that morning. At 10:49 a.m. on election day, the Mayor e-mailed the City Manager and copied others and stated:

As mayor, I am directing the city manager and/or her staff to immediately upload the video recording in its entirety of the May 7 HPARC public meeting. The action to remove this public record was not authorized by MCC. . . . Public records must stay available and it is inappropriate during an election to have taken such action.

At 11:32 a.m., the City Manager responded by providing the Solicitor's advice from the evening before, which stated that it was appropriate to remove the entire video. At 11:59 a.m. on election day, the Solicitor replied:

Hi Ellen Lorraine – My apologies for any confusion – I should have been clearer. My email sent after the video was taken down refers to videos generally [that] don't need to be posted. There could [be] no posting of any videos, but where one video is taken down due to disfavored speech, that is different. I agree with the Mayors last e-mail.¹³

At 12:43 p.m., the Mayor sent another e-mail directing the City Manager to upload the HPARC video "to protect the integrity of our ongoing election." At 1:09 p.m., the City Manager responded to Solicitor Burns' e-mail with a chronology of items that occurred the day before regarding requests for legal guidance, and, perhaps slightly frustrated remarks "[a]s done in all matters but specifically this one, I follow legal guidance received and expect it to provide clear, sound direction." At

¹² The Mayor also had conversations with others that evening about the video, but the primary contact/motivator was the text messages with the employee.

¹³ The next morning, the Solicitor sent an e-mail to the City Manager apologizing for putting her in a tough spot regarding the change of position on the video.

1:18 p.m., the Mayor again requested that the video be reposted and requested that the City Manager let her and all of council know when “that has been done.” At 1:23 p.m., the City Manager sent an e-mail to City Clerk Akgoren (with a cc to Deputy City Manager Reeves and HR Manager Shockley) asking her to “as soon as possible” post the video of the HPARC meeting—noting the Solicitor’s most recent advice. The City Manager also noted in her e-mail to Akgoren that “I know you are extremely busy with the election but am asking this video to be published as soon as you have time to do so.”

Indeed, in the middle of an election that City Clerk Akgoren was working, it was difficult for her to leave her election responsibilities to put the video back up—and she in fact did not see the request for some time. Ultimately, later in the day around 3:00 p.m., City Clerk Akgoren received a follow-up verbal request from the City Manager to make the HPARC meeting video public. According to City Clerk Akgoren, the video was reposted at or just after 3:30 p.m. on election day, May 9. The City Manager informed Council that the video was back online via e-mail at 4:39 p.m.

C. Findings

1. The Video Should Not Have Been Removed In The First Instance

In my view, the online video should not have been removed from public view. It was removed because of the content of the speech – which is likely improper. The City had not removed *any* video since at least 2021 when the practice of posting videos likely began. Whether or not the posting of videos online was a formal written policy or not, it was certainly the custom and practice of the City to post videos to be viewed online. The video was specifically removed due to the content of the speech. That should not be permitted for statements made in a limited public forum, like the HPARC meeting public comment period.

Indeed, federal courts have held that restricting a citizen from criticizing a public body or public official at a public hearing, when the restriction was not based on the need to maintain order and minimize unreasonable disruption, violates the Free Speech Clause of the First Amendment. *See, e.g., Draego v. City of Charlottesville, VA*, 2016 WL 6834025, at *21-22 (W.D. Va. Nov. 18, 2016) (denying City’s request for dismissal and granting preliminary injunction of City Council’s rule banning “defamatory attacks on groups” because it was vague and overbroad, and Council had no compelling interest to uphold the rule); *Searce v. Pittsylvania*

Cty. Bd. of Supervisors, 2023 WL 6121129, at *5-7 (W.D. Va. Sept. 19, 2023) (denying defendant's motion to dismiss First Amendment claim, holding that removing citizen from County Board of Supervisors hearing for criticizing the Board for showing favor to fire and rescue agencies violated his right to free speech; comment was expression on public issues, hearing was a limited public forum, and exclusion from forum not justified); *Markey v. Thompson*, 790 F.Supp.3d 407, 417-18 (E.D. Pa. 2025) (borough's deletion of public comment criticizing councilman's support for tax increase violated First Amendment because enforcement was viewpoint-based); *Marshall v. Amuso*, 571 F.Supp.3d 412, 426 (E.D. Pa. 2021) (stating that the "School Board could sensibly prohibit personal attacks not related to the School Board's business" but the prohibition on personal attacks related to their competence as board members was unconstitutionally overbroad); *Tighe v. Purchase*, 2014 WL 3058434, at *10 (W.D. Pa. July 7, 2014) (denying in part Board's motion for summary judgment, finding dispute of fact whether board president's motive for terminating plaintiff's presentation at one of the meetings was because plaintiff was off topic or to suppress his viewpoint, where plaintiff criticized the District's "lack of openness, transparency and accountability" and where meeting presentations were not limited to agenda items; granting in part Board's motion as to two other meetings where presentations limited to agenda items); *Zapach v. Dismuke*, 134 F.Supp.2d 682, 687 (E.D. Pa. 2001) (holding defendant violated First Amendment by suppressing citizen's speech by criticizing two individuals and identifying them by name because it offended defendant's sense of propriety).

The City might be able to fashion a defense to a First Amendment claim for removal of the HPARC video from the website because, as a technical matter, the City did not prevent Mallinson's comments from being made.¹⁴ However, here, the City's actions were taken directly because of the viewpoint of the speech—and that is what the First Amendment generally protects. I, therefore, concur with the Solicitor's determination on May 9 at 11:59 a.m. indicating that the video should not be "taken down due to disfavored speech."

¹⁴ See generally *King v. McKenna*, 2015 WL 4040437, at *5 (Del. Super. June 29, 2015).

2. The City Manager Took The Video of the HPARC Meeting Down Without Obtaining Legal Advice from the Solicitor.

It is undisputed that the City Manager made the ultimate decision to take down the video on May 8. At 9:25 a.m. the City Manager asked the Solicitor “[c]an Kevin’s inaccurate remarks be edited.” I have not been provided any evidence that a direct request was made by the City Manager to the Solicitor about making the video recording private. Also, no inquiry to the Solicitor was made about the appropriateness of taking the video down based upon an ongoing employee investigation. The only legal advice provided was the advice I provided in response to a hypothetical posed to me mid-morning that day by HR Manager Shockley, who later told me during this investigation that she shared my position with the City Manager. Solicitor Burns does not recall speaking with the City Manager on May 8. It was not until Shockley’s e-mail at 2:20 p.m. (following up on the City Manager’s 9:25 a.m. e-mail) that anyone communicated to the Solicitor that the video was removed from public view when HR Manager Shockley advised “the videos have been temporarily removed pending your guidance.”

The Solicitor’s 5:35 p.m. e-mail on May 8 answered much more than the initial question posed by the City Manager (“[c]an Kevin’s inaccurate remarks be edited.”). Instead, Solicitor Burns opined on whether the video could be removed – a fact he learned by Shockley’s 2:20 p.m. e-mail – and he addressed questions posed in that email and more. I find that Councilperson Elder gave Solicitor Burns additional background for Solicitor Burns’ 5:35 p.m. e-mail¹⁵—not the City Manager. Again, it does not appear that the Solicitor was asked to opine on whether any ongoing investigation impacted the City’s ability or need to remove the video from the website and restrict public viewing.

As discussed above, the Solicitor’s advice initially vindicated the actions taken earlier in the day to remove the video—but that advice was revised the next day (election day) when he clarified that, as a general matter, “videos generally don’t need to be posted . . . but where one video is taken down due to disfavored speech, that is different.” It is unclear to me exactly what advice Solicitor Burns was asked to provide during the afternoon of May 8 beyond responding to the City Manager’s question and Shockley’s 2:20 e-mail. Councilperson Elder does not remember the conversation with the Solicitor. It is clear that the Solicitor, in addition to responding

¹⁵ Commissioner Elder did not recall this conversation at the time of his interview with me.

to the City Manager's direct question, also opined on the removal of the video under FOIA, defamation, and other matters. Solicitor Burns was provided the wider version of what was happening after the HPARC meeting from Councilperson Elder.¹⁶

No matter what, it is clear that the City Manager initially requested that the video be removed from public view without the benefit of legal advice from the City Solicitor. At the time the video was taken down from public view, the only advice that had been given to the City on any related issue from a lawyer was from me – and that was based upon a hypothetical and not the specific facts regarding video removal. Based upon HR Manager Shockley's hypothetical, and my response, the video should not have been removed (*see, e.g., the Draego case cited above*). At the very least, the video should not have been removed without the Solicitor's guidance.

3. No Evidence Has Been Identified Supporting A Conclusion That The Video Was Taken Down To Influence The Election

There is no question that Councilperson Elder and Building Inspector Ward were upset about the public comments made by Mallinson at the May 7th HPARC meeting. There was a history of conflict amongst the three of them, likely contributing to their anger. From the City Manager's perspective, Mallinson denigrated the City when he alleged illegal conduct, claiming that the City Council took votes out of public view and in violation of FOIA, and also when he stated that serious inquiries that he sent to the city manager's office or the building department often went unanswered and alleged a pattern of delay, deflection and deception by the City. Mallinson also claimed that the City Council blocked an HPARC executive session to address "erratic and ineffective actions of the ex officio to the city council, Joe Elder." Mallinson further alleged there were backroom negotiations.

This anger towards and disagreement with Mallinson's remarks was likely the motivating factor for the decision to remove the video. As discussed above, and consistent with his brief conversation with the Solicitor immediately after the HPARC meeting, Building Inspector Ward, along with Councilperson Elder, appeared to be the voices during the early morning meeting on May 8th urging the

¹⁶ Again, Councilperson Elder did not recall this conversation during my interview with him. I specifically asked him if he spoke with the Solicitor that day and he did not remember. The Solicitor, however, confirmed that Councilperson Elder was the only person from the City he spoke with before sending his 5:35 p.m. e-mail.

City Manager to do something about Mallinson's comments. Both Building Inspector Ward and Councilperson Elder believed Mallinson's comments were malicious, false, and defamatory and both wanted action to be taken. As Councilperson Elder stated to the Maintenance Supervisor, the comments made him look bad. While I am not certain exactly who raised the possibility of taking the video down, I believe it was Building Inspector Ward. Regardless of who initiated the conversation, however, it is clear that Building Inspector Ward, Councilperson Elder, and City Manager McCabe viewed removal of the video as a favorable result. HR Manager Shockley, who was also present during the May 8th meeting, took no position on the video's removal.¹⁷ It is also clear to me that Building Inspector Ward reasonably believed that his March 17 "submission" regarding Mallinson remained pending, even though Mallinson had resigned his position as HPARC Chair.

With all of that said, no one indicated that the election was a driving force in the removal of the video. The driving force was likely Ward, and Elder was motivated by what he felt were untrue and defamatory statements made by Mallinson. While the election may have been the next day, and Councilperson Elder may have been *subjectively* motivated to want a video out of public view that made him "look bad" right before the election (and, indeed, the timing optics are not good), there are no *objective* verbalized facts provided to me indicating that the video was removed to assist Councilperson Elder's reelection chances. Moreover, Solicitor Burns did not recall any discussion of Councilperson Elder's reelection campaign when he had a long discussion with him in the afternoon of May 8, 2026.

4. The Rationale That the Video Was Taken Down Due To An Ongoing Investigation Is Not Supported By The Facts

Although it was stated to me that the reason the video had to come down was an ongoing investigation, I find that contention to be troubling. I have conflicting statements about whether the "ongoing investigation" issue was raised at the May 8th meeting with the City Manager, Councilperson Elder, the Building Inspector,

¹⁷ Taking down the video was important to Councilperson Elder. An employee overheard a conversation between Reeves and Elder early afternoon where Elder asked if the video was taken down yet – and Reeves said it was. I pulled the call logs from the City and confirmed that Elder did place a call to the City at 1:03 p.m. on May 8, 2026. Although Councilperson Elder did not recall this conversation at the time of his interview with me, I have no reason to doubt the veracity of the employee's statement.

and HR Manager Shockley. Putting that aside, the bullying/harassment claim of Building Inspector Ward was completed and closed long before May of 2026. And, as Council is aware, Mayor and City Council voted to have Solicitor Burns review and look into the issues raised in Building Inspector Ward's March 17, 2026 memorandum. That investigation was complete and findings were presented to Mayor and City Council in executive session on April 22, 2026. The last remaining step was a closing communication to Mallinson and Building Inspector Ward—a draft of which was sent to the City Manager and the Mayor on April 23, 2026. But neither the Mayor, the City Manager, nor the Solicitor ever actually sent the closure e-mail.¹⁸

That “investigation,” however, was fully complete but for the last step on May 8, 2026—and, in the eyes of the Solicitor, was largely rendered moot by Mallinson's resignation. The only other “investigation” that could have been active were to address the issues raised by Building Inspector Ward at the meeting on May 8th and his e-mail on the same date at 11:13 a.m. I have confirmed with HR Manager Shockley that no such investigation was started with respect to Building Inspector Ward's 11:13 a.m. election day email—so, in my view, there is (and was not as of May 8th) any viable ongoing investigation.

D. Recommendations

1. The City should adopt a policy, or pass an ordinance, stating that all meeting videos shall be posted within 24 hours of the meeting. Such videos shall not be edited absent vulgarity or content that is not appropriate for public viewing (e.g. pornography, etc.).¹⁹ The initial decision on whether vulgarity exists shall initially be by City staff - subject to review by the Mayor and Council at the next

¹⁸ Just after the April 23, 2026 draft e-mail was sent, Solicitor Burns recalls having a conversation at City Hall with the Mayor about edits she wanted to make to the response. But no response was sent to Building Inspector Ward prior to May 8. During her interview with me, the Mayor indicated that she believed the March 17, 2026 memos were a “concern” and that a response to a concern should be handled by human resources.

¹⁹ There needs to be some ability to remove or edit videos in extreme cases. Indeed, I attended a Kent County RPC meeting where the video was overtaken and porn was graphically displayed. I think we can all agree that City staff should have the ability to edit out such content from publicly posted meeting videos.

City Council meeting. Only the portions of the video that contain vulgarity should be edited or removed. Conversely, the City could decide to not publish any videos – that is fine as well.

2. Changes in settled practice by City staff, such as taking down a video (or a portion thereof) or a similar action should be discussed with the Solicitor (and advice received) *before* action is taken. This is especially true in matters where constitutional rights may be implicated (e.g. First Amendment rights).

3. Changes in settled practices for the handling of public information should not be altered just before an election. It looks bad. The goal should be transparency for the public. Significant changes in such practices should be directed by Council.

4. While I understand the actions here, as a general matter, the Mayor should not, as a regular practice, give direct orders to City staff. As stated at my training, everyone should stay in their respective lanes because a misstep could have consequences. Again, while I understand the circumstances here, in issues such as this, pertaining to legality of an action, should usually be addressed by the Solicitor in the first instance.²⁰

During the course of the investigation, persons I interviewed posed several questions (legal and factual) for which I felt were beyond the scope of what Mayor and Council charged me to do. As such, I did not answer or address those questions and requests in this report. If Council as a whole would like me to address issues other than what I present above, I am happy to do so upon request of Council. Moreover, the interview process provided a great deal of “facts” that did not end up being used in this report. I have considered those additional facts presented to me and have included only such facts herein that I feel are pertinent to resolving the questions posed to me by City Council.

²⁰ I recognize that Section 1-20H. of the Lewes City Code, outlining the powers of the City Manager, provides the City Council the authority to “at any time to resume its immediate exercise of all authority granted to it under the Charter.” My view is that this authority should be invoked sparingly.

Mayor & City Council of Lewes
July 10, 2026
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I am available at the call of the Mayor and Council.

Sincerely,

/s/ Max B. Walton

Max B. Walton

Attachments