

12-OMD-179

September 28, 2012

In re: *The Advocate-Messenger*/Danville City Commission

Summary: Open meetings decision distinguishing *Cunningham v. Whalen*, -- S.W. 3d -- (Ky. 2012), and holding that Danville City Commission violated KRS 61.815(1)(c) by taking final action on the purchase of real property in closed session and KRS 61.846(1) by failing to respond to open meetings complaint alleging this violation.

Open Meetings Decision

The question presented in this appeal is whether the Danville City Commission violated KRS 61.815(1)(c) at its July 23, 2012, meeting by taking final action in closed session and KRS 61.846(1) by failing to respond to *The Advocate-Messenger's* August 30, 2012, complaint alleging this violation. The answer to both questions is "yes."

In a written complaint addressed to Mayor Bernie Hunstad, *Advocate-Messenger* reporter Stephanie Mojica alleged that the Commission violated KRS 61.815(1)(c) by agreeing to the purchase of the Boyle County Industrial Storage Company (BISCO) Building in a closed session conducted under authority of KRS 61.810(1)(b). As a means of remedying the alleged violation, Ms. Mojica proposed that the Commission discuss the purchase in open session at a future meeting and nullify the action improperly taken in closed session. Having received no response to the complaint, *The Advocate-Messenger* initiated this appeal on September 10, 2012.

On appeal, *The Advocate-Messenger* explained that "no action was taken when the Commission returned to open session, and no disclosure of specifics discussed," but that the newspaper subsequently "learned that action was taken behind closed doors." In support, the newspaper noted that the City purchased the building at an auction conducted

on August 10 and that the successful bid was made by a local realtor retained by the Commission for this purpose. “Neither the authorization to make the purchase nor the contract with the bidder,” the newspaper continued, “was approved by vote in a public meeting” On August 13, the Commission “approved the transaction after the fact following another lengthy closed session.” The Commission later expressed regret for the lack of transparency in the purchase of building but defended its conduct as an attempt to avoid jeopardizing its bidding position. *The Advocate-Messenger* rejected this defense, noting that the Commission’s interest in purchasing the building was widely known and clearly evidenced in its status as a tenant in the building as well as previous offers of purchase.

In correspondence directed to the Attorney General after *The Advocate-Messenger* filed this appeal, the Commission denied that it took any votes or final action in the properly called closed session. The Commission summarized the content of the closed session discussion, indicating that “the Commissioners collectively stated to the City Manager that they could potentially approve of a purchase of the BISCO Building if the sale price was less than the appraised value” and that there was “support from all” for the City Manager to “hire a professional bidder as its agent . . . so as not to showcase that it was the City bidding.” The Commission maintained it did not take final action on the purchase until the purchase was unanimously approved at its August 13 meeting. The July 23 discussion focused on “what dollar amount would be an acceptable purchase price and the manner in which it should be bid by an agent of the City.”

The Commission analogized its actions to those of the Florence City Council in a recent Kentucky Supreme Court opinion recognizing that the council did not violate the Open Meetings Act “when it agreed in private discussions to settle a pending lawsuit in a zoning matter, when the settlement itself was voted on in an open meeting.” *Cunningham v. Whalen*, -- S.W.3d – (Ky. 2012), 2012 WL 3631408. The Court observed:

What the General Assembly gives it can also take away. Though requiring public agencies to conduct public business at public meetings, the General Assembly also created exceptions. KRS 61.810(1)(c) specifically exempts from the requirements of public meetings “discussions of proposed or pending litigation against or on behalf of the public agency.” [Footnote omitted but discussed below.] Settlement conferences in litigation are just that – discussions and proposed agreements. As long as the vote on the municipal order accepting the agreement is made at a public meeting, and the necessary ordinance changing the zone is made at public meetings, the Open Meetings Act has been complied with.

The Court thus approved “a private meeting [of a quorum of council members] to discuss a possible settlement of ongoing litigation,” adding in a footnote that KRS 61.815(2) excludes such discussions “from the requirements of announcement of a closed session and a public vote on holding a closed session, as well as the requirement that no final action be taken.” *Id.* Because the appeal before us does not involve a settlement conference in litigation, *Cunningham v. Whalen* is inapposite.

Cunningham v. Whalen stands for the limited proposition that a public agency may, under authority of KRS 61.810(1)(c), and KRS 61.815(1) notwithstanding, privately conduct a “settlement conference in litigation” as long as the agency conducts a public vote to accept or reject the resulting settlement agreement. *Cunningham* does not repudiate thirty-eight years of open meetings law recognizing that “[t]he Act prohibits a quorum from discussing public business in private” *Yeoman v. Commonwealth Health Policy Board*, 983 S.W.2d 459, 474 (Ky. 1998). In *Yeoman*, the Court opined:

For a meeting to take place within the meaning of the Act, public business must be discussed or action must be taken by the agency. Public business is not simply any discussion between two officials of the agency. Public business is the discussion of the various alternatives to a given issue about which the [agency] has the option to take action. Taking action is defined by the Act as “a collective decision, a commitment or promise to make a positive or negative decision, or an actual vote by a majority of the members of the governmental body. KRS 61.805(3).

Id. Analyzing the question of compliance with the requirements for conducting a closed session, in an earlier opinion the Court held that “[t]he express purpose of the Open Meetings Act is to maximize notice of public meetings and actions [and that t]he failure to comply with the strict letter of the law in conducting meetings of a public agency violates the public good.” *Floyd County Board of Education v. Ratliff*, 955 S.W.2d 921, 923 (Ky. 1997). The Court did not address these opinions in *Cunningham*. Obviously, then, the Court did not reverse these opinions in *Cunningham*. Therefore, *Cunningham* cannot be read to “violate a settled doctrine of the law, adopted from motives of great wisdom and sound policy, and matured by time and experience.” *Thompson v. Patton*, 5 Litt. 74, 15 Ky. 74 (Ky. 1824). As noted, because *Cunningham* deals exclusively with settlement conferences in litigation, and not with the acquisition of property, it is not relevant to the appeal before us.

The narrow issue presented in this appeal is whether the Commission violated KRS 61.815(1)(c) by taking final action in closed session. *The Advocate-Messenger* does not dispute the propriety of the closed session discussion of the “various alternatives” relating

to the purchase of the BISCO Building or assert that the Commission failed to “state the specific exception contained in the statute which [it] relied upon in order to permit a secret session.” Instead, the newspaper alleges that the Commission carried the scope of permissible secrecy too far by “making a collective decision, . . . commitment or promise to make a . . . decision, or an actual vote by a majority of the members,” to purchase the building in closed session. Although ratification of the purchase did not occur until August 13, that purchase being contingent on a successful bid in an amount not to exceed the building’s appraised value, we agree with *The Advocate-Messenger* that the Commission’s collective commitment to a course of action aimed at the acquisition of the BISCO Building constituted final action and that it contravened KRS 61.815(1)(c) by taking final action in closed session at its July 13 meeting.

The record on appeal confirms that in a letter to the editor dated September 7, 2012, Mayor Hunstad stated that the commissioners discussed acquisition of the building during their July 23 closed session and that “[a]ll commissioners were *in agreement* to purchase the building.” Further, Mayor Hunstad stated that “[a]ll city commissioners *affirmed* the purchase . . . on Aug. 13 during the regular City Commission meeting.” In responding to this office’s notification of receipt of *The Advocate-Messenger’s* open meetings appeal, the Commission again acknowledged that the commissioners “collectively stated to the City Manager that they could potentially approve of a purchase of the BISCO Building if the sale price was less than the appraised value,” and that “[t]here was support from all of the Commissioners that the City Manager should hire a professional bidder as its agent.” These statements confirm that final action, in the form of a decision to purchase the building through an agent at a price below its appraised value, was taken in closed session on July 23 and that the purchase was merely affirmed, or ratified, on August 13.

The Commission’s attempts to characterize the purchase as inchoate prior to August 3 are unavailing. But for the July 23 closed session “agreement” to purchase the building, there would have been no bid submitted for its purchase and no purchase to approve/ratify at the August 13 meeting. The fact that the door remained ajar for dissenting votes at the August 13 meeting does not alter our analysis. The public was entitled to know each Commission members’ position on the purchase of the BISCO Building at the time the agreement was reached to extend a bid and not after the purchase was consummated. Although its intent in failing to conduct a public vote on the purchase may have been prompted by a desire to acquire the building at the least cost and in the most fiscally responsible way, the City Commission did not enjoy the privilege of cloaking its final action in secrecy, and its decision to do so constituted a violation of KRS 61.815(1)(c).

The Danville City Commission offers no justification for its failure to respond to *The Advocate-Messenger’s* September 14, 2012, open meetings complaint. Accordingly,

its inaction also constituted a violation of KRS 61.846(1).

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.846(4)(a). The Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

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Distributed to:

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The Advocate-Messenger acknowledges receipt of a September 7 letter to the editor from Mayor Hunstad. That letter, a copy of which was attached to the newspaper's appeal, does not include a statement of the specific statute or statutes supporting the denial of the newspaper's allegations, as required by KRS 61.846(1), but is a direct response to two earlier editorials appearing in the newspaper.

Significantly, *Ratliff* involved a challenge to a closed session conducted under authority of KRS 61.810(1)(f), the "personnel" exception. Rejecting the agency's claim that "the so-called veiled threats of potential litigation . . . justified the secret meeting," the Court observed:

KRS 61.815 provides that prior to going into an executive session, the public body must state the specific exception contained in the statute which is relied upon in order to permit a secret session. There must be specific and complete notification in the open meeting of any and all topics which are to be discussed during the closed meeting. In this case, the minutes of the [agency] do not reflect any mention of the "proposed or pending litigation" exception to the Open Meetings Act. The specific reason given for the closed session must be the only topic of discussion while the [agency] convenes in such a secret session. [Citations omitted.]

Id. at 924. The Court did not exclude general "discussions of proposed or pending litigation" from the KRS 61.815(1) requirement of "specific and complete notification in the open meeting of any and all topics which are to be discussed." This lends further support to the view that the Court's holding in *Cunningham* is restricted to "settlement conferences in litigation."

Nor is *Deters v. Kenton County Public Library*, 168 S.W.3d 62 (Ky. App. 2005), a case cited by the Commission for the proposition that the law does not require a public hearing before an agency executes a contract for the purchase of real estate. That case focused on KRS 173.520 and the powers of a library district, referencing the Open Meetings Act only once in a footnote. Moreover, *Deters* involved the requirement of a public *hearing* as opposed to the requirement of a public *meeting*.

12-OMD-179

Page PAGE 2