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21-OMD-086

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In re: Patrick Lance/Campbell County Board of Education

Summary: The Campbell County Board of Education ("Board") did not violate the Open Meetings Act ("the Act") when it held closed sessions to discuss the potential purchase of real estate and proposed or pending litigation. Furthermore, the Board did not violate the Act when it held certain meetings by video teleconference. The Act does not require a public agency to post its minutes, or video recordings of its meetings, to its website.

Open Meetings Decision

On February 23, 2021, Patrick Lance ("Appellant") submitted a written complaint to the Board in which he alleged that the Board had violated the Act at nine separate meetings it conducted. Those meetings concerned the Board's attempted purchase of a parcel of property and related litigation. In his complaint, the Appellant alleged that the Board had held a "secret meeting" and that it had improperly held closed session discussions during eight other meetings. The Appellant also alleged that the Board had improperly conducted an emergency meeting on February 15, 2021. Finally, the Appellant alleged that the Board had violated the Act by failing to provide live video of certain meetings held by teleconference; by not posting meeting minutes or video recordings of various meetings on its website; and by not allowing public participation at various meetings.

In a timely response, the Board stated that the alleged "secret meeting," its meeting on September 16, 2020, was open to the public and that at no point did the Board enter closed session. The Board did enter closed session at the other eight meetings, and each time the Board entered closed session under KRS 61.810(1)(b) to discuss the acquisition of property, or KRS 61.810(1)(c) to

discuss pending or proposed litigation pertaining to eminent domain of the property, or both. As to the meeting on February 15, 2021, the Board stated that it was not an emergency meeting. The Board explained that this meeting was supposed to be a regular meeting in-person, but that it was conducted via video teleconferencing because of inclement weather. The Board also explained that it had complied with the notice requirements for such a meeting and that all of its video teleconference meetings were properly noticed and available to the public as required by law. Finally, the Board stated that the Act does not require meeting minutes or video recordings to be posted on a public agency's website, nor does it require that an agency allow public participation at its meetings.

On April 19, 2021, the Appellant submitted a second complaint alleging that the Board had improperly held closed sessions at its meetings on March 15 and 29, 2021, to discuss the property. In a timely response, the Board stated that its actions were proper under KRS 61.810(1)(b) and KRS 61.810(1)(c) because the discussions concerned litigation strategy, which included the advisability of purchasing alternative property. Dissatisfied with the Board's responses to both of his complaints, the Appellant appeals to this Office.

Before addressing each of the alleged violations, this Office will first address the Appellant's claim that the September 16, 2020 was a "secret" meeting. The Appellant's claim that this meeting was "secret" is directly refuted by the very notice and agenda of the September 16 meeting, which the Appellant provides on appeal. The Board denies having entered closed session at any time during this meeting, and neither the agenda nor the minutes suggest that the Board entered closed session at any point during this meeting. There is thus no merit to the Appellant's complaint that this meeting took place in secret.[1]

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[1] The Appellant questions how the Board could have learned about the property before visiting the site unless the superintendent and the Board had discussed the matter before the September 16 meeting. The Appellant claims this alleged meeting violates the Act. He provides no evidence that such a meeting occurred. Moreover, the provisions of the Act only apply to "meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency." KRS 61.810(1). "Public business" under KRS 61.810(1) is "the discussion of the various alternatives to a given issue about which the board has the option to take action." *Yeoman v. Commonwealth, Health Policy Bd.,* 983 S.W.2d 459, 474 (Ky. 1998). This Office has consistently recognized that discussions about scheduling a meeting or setting the agenda are not discussions of "public business." *See, e.g.*, 00-OMD-171; 13-OMD-086; 20-OMD-072.

Most of the Appellant's complaints center on the Board entering closed session at various meetings by invoking KRS 61.810(1)(b) and (c). Under KRS 61.810(1)(b), a public agency may enter closed session to deliberate "on the future acquisition or sale of real property . . . but only when publicity would be likely to affect the value of a specific piece of property to be acquired for public use or sold by a public agency." In *Board of Commissioners of City of Danville v. Advocate Communications, Inc.*, 527 S.W.3d 803, 806-07 (Ky. 2017), the Kentucky Supreme Court analyzed this exemption in connection with the acquisition of property at an absolute auction. At issue were two closed sessions conducted by the City regarding the auction. At the first closed session, the City discussed its intent to bid on the property and the maximum bid it would authorize its agent to make for the property. The Court held that the City's discussion about its intent to bid should not have been discussed in closed session because that information would not affect the ultimate price of the property at an auction. *Id*. at 807. But the City's discussion about the maximum bid it would make, and its bidding strategy, was properly conducted in closed session under KRS 61.810(1)(b) because such would affect its bidding strategy at the auction and disclose to the public the highest price that the City would be willing to pay. *Id*. When the City conducted its second closed session to discuss formal approval of the execution of the closing contract, it could not rely on KRS 61.810(1)(b) because the price of the property had been fixed and no further discussion would alter the purchase price. *Id*.

A public agency may also enter closed session to discuss "proposed or pending litigation against or on behalf of the public agency" under KRS 61.810(1)(c). This "exception would apply to matters commonly inherent to litigation, such as preparation, strategy or tactics" as well as discussions about the attorney-client relationship. *Floyd Cty. Bd. of Educ. v. Ratliff*, 955 S.W.2d 921, 924 (Ky. 1997). The exception may not be invoked if "the possibility of litigation is still remote." *Id*.

With these principles in mind, we turn to each of the meetings for whuch the Appellant has challenged the Board's actions.

On September 21, 2020, the Board met in closed session under KRS 61.810(1)(b) to discuss whether to make a purchase offer on the property, the purchase price that it would offer, and whether to enter into a confidentiality agreement with the property owner concerning that offer. The property was not being sold at auction, where all bidders could compete at the same time and location. Instead, it was listed as an ordinary real estate transaction—meaning that the seller could accept the first reasonable price it was offered.

As of September 21, 2020, the public had no knowledge that the Board intended to purchase this property. In fact, the Board had not yet decided whether to purchase the property, and if its interest were made known, another purchaser could have made an offer before the Board and locked it out of negotiations. *See, e.g.*, 19-OMD-038 (finding that a city council lawfully discussed in closed session "what price range would be a fair offer" on a piece of property); 02-OMD-166 (finding that a city council lawfully discussed in closed session whether to accept, reject, or modify the terms of an offer of sale "already on the table" at a specific price). Therefore, the Board did not violate the Act on September 21, 2020, when it deliberated on the purchase of the property.

On October 26, 2020, the Board entered closed session under KRS 61.810(1)(b) and 61.810(1)(c). At that time, the Board had become aware that the property owner was requesting "highest and best" offers from multiple interested parties. Therefore, the Board discussed in closed session its "highest and best" offer. The Board also discussed "how the increasingly likely prospect of eminent domain affected the calculus of any revised offer." The Appellant objects to the Board's reliance on KRS 61.810(1)(b) for the same reasons as discussed above, and for the same reasons, the Board properly relied on KRS 61.810(1)(b) to discuss the acquisition of the property in closed session. The Board was discussing its maximum purchase price offer, which if discussed publicly, would affect the price of the property.

The Appellant also argues that the Board could not rely on KRS 61.810(1)(c) because the Board described the litigation as "potential" rather than "proposed," and therefore the contemplated eminent domain proceeding was neither "pending" nor "proposed" under KRS 61.810(1)(c). It is clear from this record, however, that the Board was contemplating a concrete proposal to file a condemnation action, and that it ultimately filed such an action in December 2020. Therefore, the Board properly discussed the matter in closed session under KRS 61.810(1)(c). *See Ratliff*, 955 S.W.2d at 924 (matters that include "preparation" for litigation are exempt under KRS 61.810(1)(c)).

On November 16, 2020, the Board entered closed session under KRS 61.810(1)(b). The Appellant alleged in his first complaint that the Board also discussed proposed litigation without invoking KRS 61.810(1)(c), which the Board has denied. The Appellant asserted that the Board must have discussed condemnation because the property owner had accepted a private developer's purchase offer three days earlier, which made condemnation the Board's "only remaining option." However, the Board has explained that the seller did not inform the Board that its offer had been rejected until November 30, 2020, a

fact also recited by the Appellant in his complaint. Therefore, there is no evidence that the Board's "only remaining option" on November 16 was to start condemnation proceedings. And there is no other evidence that the Board discussed proposed litigation on November 16, 2020.

On November 30, 2020, the Board again entered closed session under KRS 61.810(1)(b). Although the Appellant claims that the Board improperly discussed proposed litigation, the Board explains that it discussed how the property owner's rejection of its offer "impacted its consideration of alternate properties." Because there is no evidence that the Board discussed proposed litigation (and thus invoked the wrong exemption), the Board did not violate the Act at its November 30, 2020 meeting.

On December 14, 2020, the Board met again. At that meeting, the Board entered closed session under both KRS 61.810(1)(b) and 61.810(1)(c). The Appellant alleges that the closed session was improper because the presiding officer "noted that an action item may be occurring upon conclusion of the executive session," which suggested that the "outcome" of the closed session was already known. The Appellant seems to claim that the Board had conducted another "secret meeting" before this meeting. In its response, the Board explained that the presiding officer was merely referencing the fact that "an action item remained on the agenda" that had not yet been addressed. The Board stated that it discussed in closed session whether to exercise eminent domain or to consider other properties, and that the outcome of this discussion had not been discussed previously on some secret occasion. Despite the Appellant's claims, there is no evidence that the Board violated the Act.

On December 20, 2020, the Board met again. At this meeting, it entered closed session under KRS 61.810(1)(b) and 61.810(1)(c). The Appellant alleges that discussions under KRS 61.810(1)(b) were improper at this meeting because one week earlier the Board had decided to pursue condemnation. So, he suggests, any discussions about the property would not have affected its value. However, the Board states that it discussed the possible acquisition of alternative properties, including a specific property brought to its attention by the City of Cold Springs. And just as the Board's discussion of its interest in pursuing the first property could have affected the price of that property, the Board's discussion of its interest in these other properties could have affected their prices. Accordingly, the Board's closed session discussions under KRS 61.810(1)(b) at its December 20, 2020 meeting did not violate the Act.

On January 11, 2021, the Board again entered closed session under KRS 61.810(1)(b) and KRS 61.810(1)(c). The Appellant alleged in his first complaint that the closed session was improper "[f]or the reasons stated previously." The Board responded that by this time its eminent domain action was pending litigation, and that the closed session was proper. Furthermore, the Board was still considering the same alternative properties, which is why the Board conducted a closed session discussion under KRS 61.810(1)(b). In his second complaint, the Appellant alleged that the Board improperly held closed sessions on March 15 and 29, 2021 for the same reasons. But as discussed, the Board lawfully held these closed sessions to discuss the pending eminent domain litigation and the related question of the potential purchase of an alternative property. Therefore, the Board did not violate the Act at its meetings on January 11, 2021, March 15, 2021, and March 29, 2021.

The Appellant's remaining complaints involve the Board's practice in conducting meetings by video teleconference. Although the Act previously provided a mechanism to conduct meetings by video teleconference, in response to the novel coronavirus emergency, the 2020 General Assembly enacted Senate Bill 150 ("SB 150"), which became effective on March 30, 2020. Section 1(8)(b) of SB 150 provides that during the state of emergency, "notwithstanding KRS 61.826, a public agency may conduct any meeting, including its regular meeting, by live audio or live video teleconference during the period of the state of emergency." SB 150 does not require that an agency specify a particular reason for conducting its regular meeting by video teleconference.

SB 150 requires that an agency conducting a regular meeting by teleconference comply with the notice requirements for a special meeting under KRS 61.823. Under SB 150, a public agency must provide written notice of its meeting, issued at least 24 hours in advance of the meeting to Board members and those requesting such notices. KRS 61.823(4). SB 150 further requires that the notice "[p]rovide specific information on how any member of the public or media organization can access the meeting." SB 150 § 1(8)(b)3.

On February 14, 2021, the Board issued a public notice that its regular meeting scheduled for the next day would be held by video teleconference because of inclement weather. The Appellant claims, however, that inclement weather is not a valid basis to conduct a regular meeting by video teleconference and that the Board's meeting should have complied with the "emergency meeting" provisions of KRS 61.823(5). In that case, the Board's discussion should have been limited to the emergency for which the meeting was called. However, the Board was authorized to hold its meeting by video

teleconference for any reason, so long as it complied with the notice requirements of SB 150. Here, the Board complied with those requirements and no evidence supports his claim that such meeting was an "emergency" meeting subject to the requirements of KRS 61.823(5).[2] Therefore, the Board did not violate the Act at its February 15, 2021 meeting.

The Appellant also alleged that the Board "appears to be picking and choosing what meetings to broadcast and what meetings not to broadcast" by video teleconference. In response, the Board explains that it has held three "virtual" meetings since the beginning of the Covid-19 emergency, all of which "permitted public attendance by virtual means." Under SB 150 § 1(8)(b), an agency holding a meeting by teleconference must provide public notice that the meeting will be held by live audio or video teleconference and "[p]rovide specific information on how any member of the public or media organization can access the meeting." The Board referred the Appellant to its meeting notices, which stated whether the meetings would be by video teleconference and provided links for public access. There is no evidence that the Board held any meetings by video teleconference without giving sufficient public notice of the video teleconference and providing a means of public access. To the extent that the Appellant claims that the Board should post video recordings of its meetings to its website after its meetings have concluded, the Act so includes no such requirement.[3]

The Appellant also claims that the Board, by holding meetings via video teleconference, deprived the public of an alleged right to "public participation" under KRS 61.826(3). Although the Act guarantees that members of a public agency may be seen and heard by the public during meetings, it does not grant the public any right to participate in those meetings. *See, e.g.*, 95-OMD-99; 00-OMD-169. KRS 61.826(3) merely provides that when a meeting takes place by video teleconference, "[t]he same procedures with regard to participation, distribution of materials, and other matters shall apply in all video teleconference locations." Thus, if members of the public are present at

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[2] The Appellant also claims that the Board had to limit its discussions to the topics listed in the agenda, and that the Board failed to provide such an agenda. But the Appellant provides a copy of the February 15, 2021 agenda on appeal. In addition, the February 15, 2021 meeting was a regular meeting conducted under SB 150. A public agency is only required to limit its discussion to topics on its agenda when it conducts a special meeting. *See* KRS 61.823(3).

[3] Similarly, the Appellant complained that the Board did not post its meeting minutes on its website. But the Act includes no such requirement. Instead, minutes must "be open to public inspection at reasonable times no later than immediately following the next meeting of the body." KRS 61.835.

multiple meeting locations, persons attending at one location may not be subject to different meeting procedures. Thus, the Board did not violate the Act as the Appellant alleges.

The Appellant also alleged in his first complaint that the Board had used an illegal process to determine the value of the property and unconstitutionally limited public participation at its meetings. These are not issues arising under the Act and therefore this Office cannot address them in an open meetings appeal. Moreover, the Appellant raised new issues on appeal that were not included in his original complaints to the Board. Under KRS 61.846, this Office may only consider a public agency's denial of a complaint. Because the Appellants new arguments were not presented to the Board for its consideration, this Office lacks jurisdiction to consider the Appellant's new arguments.

In sum, this Office finds that the Board did not violate the Act as alleged in the Appellant's complaints.

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 shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings.

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/s/ James M. Herrick

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Distributed to:

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