

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CENTURA DEVELOPMENT CO., INC.,	:	
Plaintiff	:	DOCKET NO. 13-02707
	:	
vs.	:	
	:	
BOARD OF SUPERVISORS of OLD LYCOMING	:	
TOWNSHIP and JOHN W. ECK and LINDA	:	
MAZZULLO, in their official capacities,	:	ACTION FOR
Defendants	:	DECLARATORY JUDGMENT

OPINION AND ORDER

This matter comes before the Court on Plaintiff’s Motion for a Judgment on the Pleadings. Among other relief, Plaintiff specifically requested the Court to invalidate the Board’s decision regarding the Centura Application announced by the Board during the September 25, 2013 meeting for violations of the Sunshine Act, 65 Pa.C.S. § 701, et. seq. (Sunshine Act).¹ Argument was held on March 17, 2014 at which time the parties agreed that there were technical violations with respect to the Sunshine Act but disputed what legal remedies were available. For the reasons that follow, Plaintiff’s motion for a Judgment on the Pleadings to provide the relief requested is DENIED.

Findings of Fact

1. The Board of Supervisors for Old Lycoming Township (Board) held a hearing on Plaintiff’s conditional use application for their water withdrawal on August 14, 2013.
2. The Board held public meetings on August 13, 2013, September 17 and 25, 2013.
3. The Board announced and subsequently held a special supervisor meeting on September 25, 2013 on Plaintiff’s water withdrawal.

¹Plaintiff seeks the following relief: 1) a declaratory judgment that Defendants violated the Sunshine Act, 2) an Order invalidating all official actions taken during or as a result of discussions at any meeting that violated the Sunshine Act, 3) a permanent injunction directing Defendants to comply with the Sunshine Act, 4) a permanent injunction directing defendants to publish a detailed statement of matters discussed and deliberated at every meeting found to be in violation of the sunshine Act, and 5) an award of attorney fees and costs.

4. Public participation was permitted as to the September 25, 2013 meeting.
5. On September 25, 2013 the Township denied the conditional use application at a public special board meeting. Open public comment was available at the regularly scheduled public meetings on August 16, September 17, October 8, and at the special meeting on October 25 at which the denial occurred.
6. The Board held executive sessions (not open to the public) on August 16, 2013, September 20, 24, and 25, 2013.
7. The Board announced that the executive sessions had been held on September 20, 24, and 25, 2013 at their next regularly scheduled board meeting on October 8, 2013 but not at the September 25, 2013 special supervisor meeting.
8. Defendants averred that the executive sessions were held for obtaining legal advice from their solicitor and for quasi-judicial discussions, See Defendants' Answer and New Matter at ¶¶ 35-37, and exhibits.
9. The reasons for the executive sessions were announced at the October 8, 2013 as having been held "for a Legal Matter" and for a "Personnel Matter." See Defendants' Answer and New Matter, Exhibit "C."

Conclusions of Law

1. Pursuant to Pa. R.C.P. 1034, "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." A motion for judgment on the pleadings may be entered by this Court "when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law," similar to a demurrer. *Mellon Bank, N.A., v. Nat'l Union Inc.*, 768 A.2d 865, 868 (Pa. Super. Ct. 2001) (citations omitted).

2. Old Lycoming Township is an agency subject to the requirements of the Sunshine Act.
3. “Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under section 707 (relating to exceptions to open meetings), 708 (relating to executive sessions) or 712 (relating to General Assembly meetings covered).” 65 Pa.C.S. § 704
4. Under the Sunshine Act, an agency may hold an executive session “[t]o consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed. 65 Pa.C.S. § 708(4).
5. An agency may also hold an executive session for quasi-judicial deliberations. Kennedy v. Upper Milford Twp. Zoning Hearing Bd., 575 Pa. 105, 108 (Pa. 2003).
6. In this case, at a minimum, the pleadings raise an issue of disputed fact that the executive sessions at issue in this case were held for permissible reasons, specifically for legal consultation and advice from their solicitor and for quasi-judicial discussions, which are permitted under the Sunshine Act. See, Defendants’ Answer and New Matter at ¶¶ 35-37; 65 Pa.C.S. § 708(4); Kennedy v. Upper Milford Twp. Zoning Hearing Bd., 575 Pa. 105, 108 (Pa. 2003).
7. An issue of fact exists and the pleadings do not establish whether the Board discussed or deliberated about the water use application at the executive session on September 25, 2013. See, Plaintiff’s Complaint and Defendants’ Answer and New Matter at ¶¶ 16-19.
8. The Sunshine Act requires that “[t]he reason for holding the executive session must be announced at the open meeting occurring immediately prior or subsequent to the executive session.” 65 Pa.C.S. § 708(b)(emphasis added)

9. Therefore, the pleadings alone do not establish that any of the executive sessions were held for impermissible reasons which would render the meetings themselves a violation of the open meetings requirement of the Sunshine Act., 65 Pa.C.S. § 704.
10. The Board did not comply with the time requirements of 65 Pa.C.S. § 708(b) for announcing executive sessions because it announced the executive sessions (that had been held on September 20, 24, and 25, 2013) at the next regularly scheduled board meeting on October 8, 2013 but not at the open meeting on September 25, 2013 nor prior to the sessions.
11. The Board also did not comply with the specificity requirements for announcing executive sessions pursuant to 65 Pa.C.S. § 708(b).
12. An agency must provide the reason for an executive session with enough specificity that the public may discern the legitimacy of the session. See, e.g., Reading Eagle Company v. Council of the City of Reading, 627 A.2d 305 (1993) (“to discuss matters of litigation” was insufficient, upholding the trial court’s order that for legal matters, the reasons for the executive session require that the names of the parties, docket number, and court in which the matter is filed are announced. When that level of identification is inappropriate, such as where no action has been filed, the reasons should be stated in a manner akin to “to discuss a threatened personal injury suit.”) See, also, Butler v. Indian Lake Borough, 14 A.3d 185, 189 (Pa. Cmwlth. 2011).
13. On October 8, 2013, the board announced that executive sessions had been held “for a Legal Matter,” but that reason did not meet the specificity requirements outlined in Reading Eagle Co., supra.
14. The September 25, 2013 special supervisor’s meeting itself complied with the Sunshine Act where it was properly announced, open to the public and public comments were permitted.

15. 65 Pa.C.S. § 713 does not permit the Court to invalidate action taken at a public meeting simply because that meeting occurred after a private meeting was held in violation of the Sunshine Act. See, e.g., Ackerman v. Upper Mt. Bethel Township, 130 Pa. Commw. 254, 262-263 (Pa. Commw. Ct. 1989)(upheld trial court’s refusal to invalidate an action at a public meeting which occurred after a private meeting among the supervisors occurred involving the topic of the public action in violation of the Sunshine Act.) See also, Kennedy v. Upper Milford Twp. Zoning Hearing Bd., 575 Pa. 105 (Pa. 2003), *citing Ackerman, supra*, with approval.
16. The Sunshine Act provides that “[s]hould the court determine that **the meeting did not meet the requirements** of this chapter, it may in its discretion find that any or all official **action taken at the meeting shall be invalid.**” 65 Pa.C.S. § 713 (emphasis added).
17. The pleadings alone do not establish that a decision on plaintiff’s conditional use application was reached at an unlawful private meeting.²
18. This Court need not, as the Ackerman Court did not, consider “whether the later open meeting may have some curative effect upon the earlier violation [of a decision reached at an unlawful private meeting] because the pleadings did not establish that a decision on the conditional use application was reached at an unlawful private meeting. Ackerman v. Upper Mt. Bethel Township, 130 Pa. Commw. 254, 263 (Pa. Commw. Ct. 1989). The Pennsylvania Supreme Court has noted that “[S]ubsequent public action can serve to “cure” the effect of prior formal action taken unlawfully in private.” Kennedy v. Upper Milford Twp. Zoning Hearing Bd., 575 Pa. 105, 139 (Pa. 2003)(citations omitted).

² Though it was alluded to at oral argument that the official action taken on the conditional use application at the September 25, 2013 public meeting simply rubber stamped a decision made at an executive session earlier in that day, the pleadings do not establish this fact; thus an issue of fact exists as to that allegation. *See, Plaintiff’s Complaint and Defendants’ Answer and New Matter* at ¶¶ 16-19.

19. In this case, the executive sessions were announced at the next regularly scheduled open meeting held on October 8, 2013.
20. Public participation was permitted as to the September 25, 2013 meeting pursuant to Section 710.1(a) of the Sunshine Act. 65 Pa.C.S. § 710.
21. An agency's willful or wanton disregard for the Sunshine Act warrants an award to the prevailing party of "reasonable attorney fees and costs of litigation or an appropriate portion of the fees and costs." 65 Pa.C.S. § 714.1
22. The pleadings do not establish any willful or wanton disregard for the Sunshine Act by Board.
23. "To prevail in a claim for a permanent injunction, the plaintiff must prove a "clear right to relief." Wellspan Health v. Bayliss, 869 A.2d 990, 995 (Pa.Super. 2005), citing, Buffalo Township v. Jones, 571 Pa. 637, 644, 813 A.2d 659, 663 (2002), cert. denied, 540 U.S. 821, 157 L. Ed. 2d 41, 124 S. Ct. 134 (2003). "The injury claimed must be one that cannot be compensated by an award of damages." Wellspan Health v. Bayliss, 869 A.2d 990, 995 (Pa.Super. 2005), citing, Peugeot Motors of America, Inc. v. Stout, 310 Pa. Super. 412, 456 A.2d 1002, 1008-09 (Pa. Super. 1983).
24. For a permanent injunction, a plaintiff "must show that an actual and substantial injury has occurred and/or is threatened in the future." Wellspan Health v. Bayliss, 869 A.2d 990, 995 (Pa.Super. 2005), citing, Peugeot Motors, supra at 1008.
25. 65 Pa.C.S. § 714 provides a criminal penalty of a summary offense and costs and fines for any member of an agency "who participates in a meeting with the intent and purpose by that member of violating this chapter[.]"

26. The penalty provisions provide an adequate remedy at law for intentional disregard for the Sunshine Act.

27. The pleadings alone do not establish that plaintiff has a clear right to the relief requested.

Discussion

At argument, the Defendants conceded there were technical violations with respect to the Sunshine Act but disputed the availability of the relief sought. In the instant case, the Board failed to comply with the time and specificity requirements for announcing its executive sessions that occurred on September 20, 24, and 25, 2013. The Board failed to announce those sessions at the special supervisor meeting on September 25, 2013 but it did announce the sessions at the next regularly scheduled open meeting on October 8, 2013. When announcing the executive sessions, the Board failed to provide general details of the legal matters to be discussed with enough specificity to meet the requirements outlined in Reading Eagle Co., *supra*.

This Court cannot invalidate all official actions at the September 25, 2013 open meeting based upon technical violations concerning the time and specificity of the announcement of closed executive sessions occurring prior to that meeting (September 20, 24, and 25, 2013). While §713 authorizes the court to invalidate action should it determine that a meeting did not meet the requirements of the Sunshine Act, it does not specify that an executive session for a permissible reason under the Sunshine Act would fall within this provisions simply because it was announced with inadequate specificity and/or was announced at a meeting following the meeting when it should have been announced. This is particularly true because the Sunshine Act does not require that the public be specifically informed of the sessions prior to them occurring. The Sunshine Act explicitly permits the announcement of executive sessions to take place after the executive sessions occurred.

The Commonwealth Court has stated that the Sunshine Act “does not expressly permit courts to invalidate "official action" taken at a public meeting occurring after a private meeting held in violation of section 4 [requiring that official actions take place at open meetings].” Ackerman v. Upper Mt. Bethel Township, 130 Pa. Commw. 254, 262 (Pa. Commw. Ct. 1989). Our Pennsylvania Supreme Court has cited Ackerman with approval in Kennedy v. Upper Milford Twp. Zoning Hearing Bd., 575 Pa. 105 (Pa. 2003). In Ackerman, *supra*, the trial court refused to invalidate the action in circumstances that are more compelling than those presented here. In Ackerman, a newly appointed board supervisor arranged and attended a meeting to learn about a proposed amendment that was scheduled and was voted on at a public meeting later that day. The meeting included another supervisor and a person from the company seeking the amendment to the zoning ordinance which was the subject of the vote. One of the supervisors declined to attend the gathering because he believed it would violate the Sunshine Act. The Court concluded that the closed meeting violated section 4 of the Sunshine Act. Nonetheless, the Court refused to invalidate the action taken at the public meeting which followed the closed meeting.

In the instant case, the closed meetings were permissible for executive sessions under § 708. Significantly, the Board denied that the conditional use application was even discussed at the executive session on September 25, 2013, which occurred prior to the public meeting on that same date. The pleadings do not establish that the topic of the conditional use application was discussed at an executive session outside of the context of legal advice or quasi juridical deliberations. The pleadings do not establish that any official action took place at a closed meeting. Open public comment was available at the regularly scheduled public meetings on

August 16, September 17, and at the special meeting on September 25. The official action on the application was taken at an authorized public meeting on September 25, 2013.

While this Court finds that there were technical violations with respect to the Sunshine Act, the pleadings alone do not establish Plaintiff's entitlement to an Order invalidating official actions taken at a public meeting. Actions were taken at public meetings and ample opportunity for public comment existed. Criminal penalties exist should a willful or wanton disregard for the Sunshine Act as to the timeliness and specificity of announcements occur in the future. At this point, the violations appear to be de minimis. Accordingly, the Court enters the following Order denying Plaintiffs' Motion for Judgment on the Pleadings.

ORDER

AND NOW, this ____ day of April, 2014, after oral argument on Plaintiffs' Motion for Judgment on the Pleadings and for the reasons stated above, it is hereby ORDERED and DIRECTED that Plaintiffs' motion is DENIED.

BY THE COURT,

Date

Richard A. Gray, J.

cc: J. David Smith, Esq.
Fred A. Holland, Esq.
Kurt E. Williams, Esq. & Scott T. Wyland, Esq.
SALZMANN HUGHES, PC, 354 Alexander Spring Rd., Ste 1, Carlisle, PA 17015