



COMMONWEALTH OF KENTUCKY
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18-OMD-118

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In re: Steven Schletker/City of Villa Hills

Summary: Where the Villa Hills City Council did not anticipate a large crowd and made reasonable efforts under the circumstances to maximize public participation, this office is unable to conclude that the city violated KRS 61.820 or 61.840.

Open Meetings Decision

The question presented in this appeal is whether the City of Villa Hills violated the Open Meetings Act by failing to provide adequate facilities for public observation of the May 16, 2018, meeting of the Villa Hills City Council insofar as feasible. For the reasons stated below, we do not find a violation.

Villa Hills, in Kenton County, is a city of approximately 7,489 residents.¹ During 2018, a contentious local issue has been a proposed zoning amendment to allow a development project by the Ashley Commercial Group on property surrounding the St. Walburg Monastery. Due to the heightened public interest, the city council scheduled a special meeting in February 2018 to discuss the issue in the River Ridge Elementary School gymnasium, as the council chambers had a fire code capacity of only 40 persons. In March 2018, the city council scheduled two additional special meetings in the River Ridge Elementary School cafeteria to discuss the amendment, one of which included a presentation by the appellant,

¹ 2010 census figure cited by City of Villa Hills.

Steven Schletker, on behalf of a group called "Defend VH" that opposed the amendment.

The city council's April 2018 meeting, which did not relate to the zoning amendment, was a special meeting held in the auditorium of Villa Madonna Academy so that students could participate in the annual "Government Shadowing Night" meeting, during which elementary students had the opportunity to "shadow" city officials. There is nothing in the record to suggest that an abnormally large crowd was present for the April meeting, other than the families of the students involved.

The meeting on May 16, 2018, was the first regular meeting of the Villa Hills City Council since January 2018, and took place in the regular meeting location, the council chambers. An agenda for the May 16 meeting indicated no planned discussion or action on the zoning amendment. A review of the video record of the meeting further reveals that no discussion or action on the amendment took place.

On May 22, 2018, Mr. Schletker submitted a written complaint to Mayor Butch Callery. He attached affidavits from three individuals who stated that they arrived to attend the May 16 council meeting and were denied entrance to the council chambers because the room was already filled to fire code capacity; that the hallway outside the council chambers was crowded with people who could not get in; and that they observed people approaching the building and leaving after seeing that the hallway was already crowded. Mr. Schletker alleged that the city violated the Open Meetings Act by failing to make "accommodations ... to address a potential crowd of more than 40 persons" by scheduling the meeting for a larger venue, relocating the meeting to the Villa Hills Public Works maintenance garage, or providing an audiovisual broadcast in a suitable location for overflow attendees on the premises. As a remedy for the alleged violation, he proposed that the council void all action taken at the May 16 meeting and "revisit all matters" at a special meeting in a larger venue.

In a response on behalf of the city, attorney Mary Ann Stewart asserted that the council chambers had historically served to provide adequate space for public attendance both at routine meetings and for extraordinary matters. Additionally, she stated that the Telecommunications Board of Northern

Kentucky ("TBNK") provides a live broadcast of all council meetings held in the council chambers, which is not possible at other venues because no broadcast equipment is installed at those locations. Ms. Stewart indicated that the council could not have used River Ridge Elementary School and Villa Madonna Academy sites without securing advance permission. Furthermore, she stated that the meeting could not have relocated to the Public Works garage because the garage "was not in a condition where it could readily be used."

Ms. Stewart provided an affidavit from Police Chief Bryan Allen, who asserted that although people in excess of the chambers' capacity had to stand in the adjoining hallway, no one was "turned away" from the meeting except one person who "continued to shout and interrupt the meeting." After an early item of business, several people left the meeting; Chief Allen stated that he then "directed persons in the hallway and persons standing in the Council chambers to the now-empty seats." He indicated that "[a]pproximately 25 people remained in the hallway." He further stated that Ms. Stewart (who was present at the meeting) repeatedly invited those in the hallway to come into the chambers.

In addition, Ms. Stewart points out that the city council did not anticipate an abnormally large crowd because it was not going to discuss the zoning amendment at that meeting. She states that holding another special meeting away from the council chambers would result in "arguably less accessibility" due to the lack of broadcast equipment elsewhere. Nor, she contended, did the council have "blanket permission" to use school facilities. Nevertheless, while denying any violation of the Open Meetings Act, "in an effort to promote positive discourse," the city agreed to conduct additional readings of all ordinances, orders, and resolutions considered at the May 16 meeting, and to provide a live broadcast of future council meetings in the Public Works garage "along with seating, in order to accommodate an overflow crowd."

Mr. Schletker initiated this appeal on May 29, 2018, arguing that the city should have been aware that a large crowd would be present because "Defend VH" had erected three elevated signs on the day of the meeting, urging people to

attend that night.² He further stated that the reason people in the hallway disregarded the invitation to enter the council chambers was their reluctance to exceed the fire code capacity of the room. Mr. Schletker pointed out that he, during the meeting, made his allegation of an Open Meetings Act violation and "suggested the meeting be suspended and reconvened in a larger venue," but his suggestion was not followed. He provided approximately 16 seconds of footage of the hallway outside the meeting, during which time the crowd was not making much noise.³ Mr. Schletker argued that the noise made in the hallway was "principally" people saying they could not hear.⁴

In a response dated June 4, 2018, the City of Villa Hills stated that adjournment of the meeting to the Public Works garage was not feasible without advance notice "so that the Public Works Director can remove vehicles, gas tanks, tools, machinery and other equipment, set up tables, and generally make it safe for the public."⁵ The city argued that after the March 2018 meetings "business related to the [zoning issue was] seemingly concluded" and "[t]he City Council had no reason to expect that its usual Council chambers would prove to be inadequate for a routine meeting - particularly since the business on the agenda consisted of routine budget matters." In connection with this argument, the city asserted that most of the opponents of the zoning amendment who "unexpectedly" showed up in May "had not attended the previous meeting held at Villa Madonna Academy."

KRS 61.820(1) and 61.840, as amended in 2013, govern conditions at public meetings. KRS 61.820(1) provides as follows:

² There is no evidence in the record that city officials either had read these signs or were aware that a larger-than-usual crowd would in fact be present that night.

³ While Mr. Schletker asserted that the proceedings could not be heard from the hallway, the video footage is inconclusive on this point.

⁴ This assertion contradicted Chief Allen's affidavit, which stated that the people in the hallway "kept shouting that they were being turned away."

⁵ The video record, in fact, reflects that some discussion of this suggestion occurred at the meeting after Mr. Schletker's objection, but the council found it impracticable because, as the city points out, "the Public Works Director stated ... that it would take approximately eight hours of work to prepare the garage if [the] Council were to move the meeting there."

All meetings of all public agencies of this state ... shall be held at specified times and places which are convenient to the public. In considering locations for public meetings, the agency shall evaluate space requirements, seating capacity, and acoustics.

KRS 61.840 provides, in pertinent part:

All agencies shall provide meeting room conditions, including adequate space, seating, and acoustics, which insofar as is feasible allow effective public observation of the public meetings.

As the Supreme Court of Kentucky has noted, "Kentucky's Open Meetings Act does not impose upon government agencies the requirement to conduct business only in the *most* convenient locations at the *most* convenient times." *Knox County v. Hammons*, 129 S.W.3d 839, 845 (Ky. 2004) (emphasis in original). "[T]he open meetings statutes are designed to prevent government bodies from conducting [their] business at such inconvenient times or locations as to effectively render public knowledge or participation impossible, not to require such agencies to seek out the most convenient time or location." *Id.*

The mere fact that "numerous citizens were not able to enter" the meeting room due to overcrowding "and observed the proceedings from the hallway" does not *per se* establish "that persons wishing to attend or participate in the proceeding were effectively prevented from doing so." *Id.* at 844-45. In 97-ORD-28, however, this office held that a public agency confronted with a crowd that is larger than anticipated is "under a duty to make some attempt to correct the matter." We elaborated as follows:

Neither the Open Meetings Act nor decisions of this office specify the particular action an agency must take; rather the agency's actions are dependent on the particular factual situation.

Thus, we found in 97-ORD-28 that an agency which made no attempts at correction whatsoever failed to make "reasonable efforts" in good faith to control the noise or "to provide a place where the public [could] effectively observe." Citing 94-ORD-87 and *Gutierrez v. City of Albuquerque*, 96 N.M. 398, 631 P.2d 304 (1981), we expressed approval of such measures as an overflow room with a

television monitor and "efforts ... to allow the excess crowd to listen to the proceedings by means of a radio broadcast and loudspeakers."⁶

13-OMD-107 presented a case in which a board of education had excluded numerous members of the public from its meeting room when all chairs were filled, then closed the doors on "hundreds of interested people." We found a violation of the Open Meetings Act due to the board's failure to make any efforts to accommodate the crowd to "ensure the broadest possible participation." We noted that the agency offered no "detailed information regarding why it was impractical or difficult, as opposed to merely inconvenient, to relocate the meeting to a nearby gymnasium that would have accommodated the crowd."

In 06-OMD-079, by contrast, we addressed a similar factual situation to the present appeal, in which a city council was faced with larger attendance than expected and "was apprised, at least once, that some attendees were unable to gain entrance to the room because of the overcrowding and that some attendees were unable to hear."⁷ As in this case, the record indicated that "when the crowd became too loud, order was called for," and that persons waiting in the hallway were invited to come into the room, although it was unclear "whether people remained outside of their choice ... or whether the room simply could hold [no] more." We concluded that while it was "a close question," the record did not show the necessary proof that the public was effectively prevented from attending the proceeding and the council made a good-faith effort to maximize public participation.

Similarly, in 07-OMD-127, a city council was unprepared with adequate seating capacity for a meeting that had not been expected to draw much attendance. As the city attorney described events, "just before the meeting, a resident placed signs all over the neighborhood advertising this meeting as some kind of national emergency." As a result, citizens who tried to attend "left soon

⁶ In this case, the TBNK live television broadcast of the council meeting provided some mitigation of the problem, even in the absence of an onsite facility to view the broadcast. The television broadcasts are also repeated and the video can be viewed on demand at TBNK's website.

⁷ Unlike this case, the city council in 06-OMD-079 was equipped with neither broadcast capability nor "an internal sound amplification system."

after arriving because of a lack of seating.” Nevertheless, we found no evidence that the public was effectively prevented from attending.

Since 07-OMD-127, of course, the 2013 amendments to KRS 61.820 and 61.840 have been enacted, expressly requiring public agencies to “evaluate space requirements, seating capacity, and acoustics” in setting meeting locations and to provide for these factors adequately for effective public observation “insofar as is feasible.” The analysis, however, remains “fact-specific.” 18-OMD-060. In this case, there is insufficient evidence that the Villa Hills City Council failed to consider the factors in KRS 61.820 and 61.840 when it elected to hold its May 2018 meeting at the regular location. Rather, the record indicates that historically the council chambers had been adequate for all meetings that were not addressing the St. Walburg zoning amendment; the council considered that matter “concluded”; and the council neither planned to address, nor did address, the zoning issue at the May 16 meeting. As in 07-OMD-127, the council was apparently taken by surprise with signs posted on the day of the meeting, resulting in what the city describes as “flash mobbing.”

Furthermore, when the problem was brought to the council’s attention by Mr. Schletker, the record indicates that city officials, in good faith, took what limited action was feasible to ensure public participation, by inviting the people in the hallway to come into the council chambers.⁸ There was also consideration of whether the meeting could be moved to the Public Works garage, but the record clearly shows that this would have been impracticable. The city’s response to the appeal has also described the difficulties involved in securing another facility within Villa Hills for the council’s use and the impossibility of doing so without advance arrangements. Thus, the city has offered “detailed information regarding why it was impractical or difficult, as opposed to merely inconvenient, to relocate the meeting” to a larger venue. 13-OMD-107.

We find, based on the record, that there is insufficient evidence of a violation of KRS 61.820 or 61.840. Consequently, we are unable to conclude that the City of Villa Hills violated the Open Meetings Act.

⁸ The city’s good faith is further attested by its pledge to revisit at its next meeting the business conducted at the May 16 meeting and to have the garage set up as an overflow space with seating and monitors at its future meetings.

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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Distributed to:

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Hon. Irvin T. "Butch" Callery