

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001545-MR

LARRY HALL

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 18-CI-01107

HARDIN COUNTY, KENTUCKY AND
BAPTIST HEALTH SYSTEMS, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

COMBS, JUDGE: Appellant, Dr. Larry Hall (Hall), appeals from a judgment of the Hardin Circuit Court entered on October 4, 2018. At issue was a pending sale of Hardin Memorial Hospital (Hardin Memorial) to Baptist Healthcare Systems, Inc., (Baptist Health). Hall filed suit and argued that the sale was negotiated by the county in violation of statutory provisions governing the process by which public

property may be sold. Concluding that he lacked the necessary standing, the court denied Hall's request for an order to enjoin the closing of the transaction. The court also determined that the county had not violated any provision of the Commonwealth's Open Meetings Act. Hall has appealed, arguing that the trial court erred in declining to declare that the sale violated statutory provisions pertinent to the transactions and thus in refraining from granting injunctive relief. After our review, we affirm.

As noted by the trial court in its thorough and well reasoned Findings of Fact, Conclusions of Law, and Declaration of Rights, Hardin County voters approved bonds more than sixty-seven years ago to finance construction of Hardin Memorial Hospital. Opening in 1954, the hospital was managed by a Board of Trustees composed of the elected magistrates of the county's fiscal court, and the county's judge/executive served as chairman of the board. As Hardin Memorial emerged as a regional healthcare provider, the Board of Trustees began partnering with Baptist Health in an effort to manage the hospital more effectively. Baptist Health is a non-profit healthcare organization that owns and operates 300 points of care across the Commonwealth and in several other states. The day-to-day operations of Hardin Memorial have been managed by Baptist Health since September 1, 1997.

As the management agreement between Hardin Memorial and Baptist Health neared its expiration in August 2016, Hardin Memorial's Board of Trustees convened to consider options for the hospital's future. The Board of Trustees met with many industry experts and consultants.

In November 2016, in an open session of their regular meeting, the Hardin County Fiscal Court, acting as Hardin Memorial's Board of Trustees, resolved to initiate an in-depth "RFP [Request for Proposals] process" whereby specific requests for proposals would be sent to potential strategic partners nationwide. This was a competitive process; a field of thirty-seven potential partners was eventually winnowed down to eleven. Information of a confidential and proprietary nature regarding Hardin Memorial's finances and operations was shared with the potential partners. During the first half of 2017, proposals submitted by four potential partners were reviewed by Hardin Memorial. The public was kept aware of the hospital's progress.

Ultimately, a single potential partner was identified. In August 2017, in an open session of their regular meeting, the Hardin County Fiscal Court authorized Hardin Memorial to enter into a non-binding letter of intent with Baptist Health to negotiate a definitive agreement between the parties. Hardin Memorial issued a press release and published information regarding the letter of intent. Between November 2017 and April 2018, the parties negotiated the terms of an

asset-purchase agreement. On May 1, 2018, multiple news outlets were notified of the terms of the parties' agreement. On May 22, 2018, at an open meeting, the Board of Trustees authorized the execution of the parties' asset-purchase agreement.

The terms of the \$361.4 million agreement were widely publicized. Baptist Health was to acquire all the assets of Hardin Memorial in exchange for Baptist Health's commitment to make operating and capital investments in the hospital totalling \$235 million over a ten-year period. In the first five years, Baptist Health agreed to direct \$150 million toward new facilities, additional physicians, and upgrades in the hospital's information technology systems and equipment. An additional \$126.4 million, less an amount necessary to fully fund the liability associated with the hospital's pension plans, was to be paid to Hardin County. Baptist Health was to assume Hardin Memorial's debt of approximately \$37 million and to provide up to \$150,000 per year for twenty-five years for the healthcare costs of the county's inmates. The transaction was expected to close on December 1, 2018.

On July 2, 2018, Hall, a retired physician and former chief medical officer at Hardin Memorial (and a resident and taxpayer of Hardin County), filed a civil action against Hardin County and Baptist Health seeking a declaration that Hardin County had failed to abide by the law governing the processes by which

publicly owned property can be sold. He sought an order enjoining the pending sale. Hall also alleged that the terms of the transaction had been “negotiated in secret.” Complaint at 1.

Hardin County and Baptist Health responded with a motion to dismiss. Hardin County contended that Hall lacked standing to pursue the action. After a hearing conducted in August 2018, the Hardin Circuit Court granted the motion of Baptist Health to dismiss for failure to state a claim for which relief could be granted; however, it denied the motion of Hardin County, reserving for later the question of Hall’s standing.

On October 4, 2018, the court rendered a judgment that denied Hall’s request for a declaration that Hardin County had violated the relevant statutory provisions. The court declined to enjoin the pending sale of Hardin Memorial to Baptist Health. The court determined that Hardin County had not violated statutory provisions governing the sale of public property and that Hall did not have standing to enjoin the county’s decision. The court also concluded that the Hardin County Fiscal Court had complied fully with the requirements of the Open Meetings Act. This appeal followed.

On appeal, Hall contends that the circuit court erred by permitting the sale of Hardin Memorial’s assets in a manner not authorized by the provisions of

KRS¹ 67.0802(3), KRS 67.080, and KRS 45A.365. He also argues that Hardin County negotiated the sale in violation of Kentucky's Open Meetings Act.²

Hardin County argues that Hall lacks standing to contest the official acts of the county government. In the alternative, Hardin County contends that the circuit court properly concluded that it had not violated any statutory provision in negotiating the sale of Hardin Memorial to Baptist Health. Hardin County also denies that it violated any provision of our Open Meetings Act. We conclude that Hall lacked standing to enjoin the pending sale of the property and that he failed to comply with the procedural requirements underlying an action to enforce provisions of our Open Meetings Act.

By virtue of being a taxpayer, a county resident has standing to challenge the constitutionality of a tax imposed by his local government and to challenge the legality of its expenditures. *Hardwick v. Boyd Co. Fiscal Court*, 219 S.W.3d 198 (Ky. App. 2007); *Rosenbalm v. Commercial Bank of Middlesboro*, 838 S.W.2d 423 (Ky. App. 1992). Standing is founded upon a taxpayer's interest in the use of municipal revenues -- an interest that is both direct and readily apparent.

However, in order to establish standing sufficient to enjoin an official act of a county government, a party must have suffered some injury distinct and

¹ Kentucky Revised Statutes.

² KRS Chapter 61.800, *et seq.*

particularized from that of the general public. *See Carrico v. City of Owensboro*, 511 S.W.2d 677 (Ky. 1974). In the absence of a statutory right, a citizen or taxpayer does not have standing to seek injunctive relief against his local government unless he can demonstrate a direct interest in the outcome of the controversy. Hall has not identified any such statutory right or any special interest in the processes by which Hardin County agreed to sell Hardin Memorial to Baptist Health. Instead, he contends that our decision in *Rosenbalm, supra*, and the decision of our highest court in *Cooper v. Kentuckian Citizen*, 258 S.W.2d 695 (Ky. 1953), support his claim of adequate standing. We disagree.

In *Rosenbalm*, 838 S.W.2d at 429, we considered whether taxpayers of Bell County could seek to “legally redress a situation directly impacting their pecuniary interest[.]” After relating the lengthy factual and procedural history of the proceedings, we analyzed whether the taxpayers could intervene in an action where the county had been ordered to satisfy a default judgment through a tax levy. We held that the taxpayers could pursue their claims where they contended that a tax levied to fund a certain debt was **unconstitutional**. Constitutionality of a levied tax is not at issue. Our analysis and holding in *Rosenbalm* simply do not support Hall’s contention that he has standing to seek an injunction of the pending sale.

In *Cooper, supra*, our highest court considered whether Robert F. Cooper, a taxpayer who purported to represent all the members of the class of Bourbon County taxpayers, could establish his standing to pursue *an appeal* against certain governmental units of Bourbon County and the City of Paris. In the circuit court proceedings, Cooper contended that certain annual financial statements required to be filed (under the provisions of a state statute) by local government agencies were legally insufficient. On appeal, the court concluded that Cooper's interest as a representative of the county's taxpayers was sufficient to permit him to prosecute the appeal. The judgment of the circuit court directing that detailed financial reports be published at the expense of the respective governmental units would affect the revenue of the county. If erroneous, illegal expenditure of public funds would result. Thus, we held that Cooper had standing. However, this analysis does not support Hall's position because the procedural posture of this case is materially different.

Hall has not identified -- nor have we discovered -- **any statute** that gives him a legally enforceable right to have a court compel Hardin County to sell the hospital in a manner that he sees fit. Because Hall cannot identify a statutory right to injunctive relief, and because he has not demonstrated any direct interest in the proceedings unique or different from that of the public at large, we hold that

the trial court did not err by concluding that he lacks standing to seek the relief he requested.

We now consider Hall's contention that "everything was done behind closed doors" in violation of our Open Meetings Act. The General Assembly has mandated that "formation of public policy is public business and shall not be conducted in secret[.]" KRS 61.800. To that end, KRS 61.810(1) provides that "[a]ll 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, shall be public meetings, open to the public at all times[.]" Upon application of any person, the circuit court of the county where the public agency has its principal place of business or where the alleged violation occurred has jurisdiction to enforce the provisions of our Open Meetings Act either by injunction or by another appropriate order. KRS 61.848. Although exceptions to the open meeting requirements are provided by the provisions of KRS 61.810, the Act provides that the exceptions are to be "strictly construed."

The Hardin County Fiscal Court is undoubtedly a public agency required to open its meetings to the public. KRS 61.805(2)(c). It contends that it did not violate any provision of our Open Meetings Act and that it was keenly aware and ever mindful of the obligations imposed by the Act's provisions. It also claims that Hall has offered **absolutely no evidence** that it violated any of them. It

notes the statutory exception related to discussions concerning a specific business proposal, arguing that that exception applies to the confidential negotiations undertaken for the sale of Hardin Memorial. This exception permits “[d]iscussions between a public agency and a representative of a business entity and discussions concerning a specific proposal, if open discussions would jeopardize the siting, retention, expansion, or upgrading of the business[.]” KRS 61.810.(1)(g). Hardin County also contends that Hall failed to follow the process required for enforcement of the Act’s provisions as outlined by KRS 61.846.

The provisions of KRS 61.846 require one seeking to enforce the Act’s provisions to submit a written complaint to the presiding officer of the public agency suspected of violating the requirements of KRS 61.805 to 61.850. The complaint must describe the circumstances which constitute an alleged violation of the Act and must state what the public agency should do to remedy the alleged violation. KRS 61.846. The public agency is given three days after its receipt of the complaint to decide whether it will remedy the alleged violation pursuant to the complaint and is required to notify the individual making the complaint of its decision. *Id.*

An agency's response denying, in whole or in part, the complaint's requirements for remedying the alleged violation must include a statement of the specific statute or statutes supporting the public agency's denial and a brief

explanation of how the statute or statutes apply. *Id.* The response issued by the presiding officer constitutes final agency action. *Id.* Thereafter, a complaining party may request that the Attorney General review the public agency's denial. *Id.*

A party has thirty days from the day that the Attorney General renders his decision to appeal that decision to the circuit court. *Id.* An appeal initiated within the thirty-day time limit is treated as if it were an action brought under the provisions of KRS 61.848. This process was not followed. And, while exhaustion of administrative remedies is not required prior to the filing of a civil action in the circuit court, the provisions of KRS 61.848(2) establish the procedure and timeline which must be followed in filing the action. Hall did not comply with any of these requirements. Under the circumstances, we decline to review his allegations that the trial court erred with respect to our Open Meetings Act.

We AFFIRM the judgment of the Hardin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE HARDIN
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