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IN THE SUPERIOR COURT OF BIBB COUNTY
STATE OF GEORGIA

BIBB COUNTY GEORGIA

LEE A. JOHNSON, LOUIS M.
RYAN, and LINDSAY HOLLIDAY,

Plaintiffs

v.

BOARD OF COMMISSIONERS,
BIBB COUNTY, GEORGIA, AND
FORMER CHAIRMAN CHARLES
BISHOP, AND CURRENT
COMMISSIONERS SAM HART,
JOE ALLEN, ELMO RICHARDSON,
BERT BIVINS, AND LONZY EDWARDS,

Defendants

Vicki Aubrey
CIVIL ACTION NO. 09CV50451

ORDER

This matter is before the Court for consideration of Defendants' Motion to Dismiss Plaintiffs' Complaint.

On August 5, 2008, the Bibb County Board of Commissioners voted in a closed session to acquire future real estate for the purposes of locating a new courthouse. Subsequently, on November 18, 2008, the Board of Commissioners again voted in a closed session to acquire additional property for the proposed new courthouse. In a duly advertised open meeting on February 17, 2009, the Board of Commissioners ratified their votes for both the August 5 meeting and the November 18 meeting.

Prior to the open meeting on February 17, Plaintiffs filed suit on February 12, 2009, seeking a declaratory judgment and injunctive relief. In their Complaint, Plaintiffs asked this Court to declare that the Georgia Open Meetings Act (O.C.G.A.

§ 50-14-1 et seq.) prohibits the Board of Commissioners from voting on property acquisitions in closed sessions, and to enjoin them from continuing to do so in the future. Additionally, Plaintiffs sought reasonable attorney's fees and litigation costs pursuant to O.C.G.A. § 50-14-5(b).

In response to Plaintiffs' Complaint, Defendants filed a Motion to Dismiss the Complaint on the grounds that: (1) there is no violation of the Georgia Open Meetings Act because the Act permits taking a vote in a closed session regarding the future acquisition of real estate; and (2) assuming arguendo that such actions are not permitted, the ratification of the votes at the duly advertised open meeting on February 17, 2009, renders the Plaintiffs' Complaint moot. A hearing on Defendants' Motion to Dismiss Plaintiffs' Complaint was held on April 17, 2009.

The Georgia Open Meetings Act requires that "[e]xcept as otherwise provided by law, all meetings as defined in subsection (a) of this Code section shall be open to the public." O.C.G.A. § 50-14-1(b). However, the Act also provides that this general rule shall not apply to:

Meetings when any agency is discussing the future acquisition of real estate, except that such meetings shall be subject to the requirements of this chapter for the giving of the notice of such a meeting to the public and preparing the minutes of such a meeting; provided, however, the disclosure of such portions of the minutes as would identify real estate to be acquired may be delayed until such time as the acquisition of the real estate has been completed, terminated, or abandoned or court proceedings with respect thereto initiated;... O.C.G.A. § 50-14-3(4).

This exception authorizes a vote in a closed meeting regarding the future acquisition of real estate. O.C.G.A. § 50-14-1(e)(2) sets forth the requirements for minutes under the Georgia Open Records Act. Specifically, this section provides that "said minutes shall, at a minimum, include the names of the members present

at the meeting, a description of each motion or other proposal made, and a record of all votes." Therefore, by requiring minutes of the closed session, the Act logically authorizes a vote regarding a future acquisition of real estate.

This same reasoning is seen in cases where courts have held that the attorney-client privilege also provides an exception to the general rule that meetings be open. In *Schoen v. Cherokee County, et al.*, a county resident sued the county board of commissioners for violation of the Open Meetings Act. 242 Ga. App. 501 (2000). The Superior Court entered summary judgment for the defendants, and the resident appealed. The Court of Appeals held that the closed meeting between the county board of commissioners and county attorney about a zoning lawsuit fell within the attorney-client exception to the Open Meetings Act. *Id.* at 502. The Court stated "a governing body discussing pending litigation with counsel must necessarily be permitted to decide whether to accept or reject a proposed settlement agreement even if it incidentally involves the taking of a vote." *Id.* Because the attorney-client privilege protected the underlying discussion, the privilege protected the voting that accompanied it as well.

However, even assuming arguendo that Defendants violated the Georgia Open Meetings Act, Plaintiffs' lawsuit was rendered moot by the Board's subsequent consideration and ratification of the votes at a public meeting. *Id.* An issue is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. *Carlock v. Kmart Corp.*, 227 Ga.App. 356, 361 (1997). The issue of whether the Board violated the Act by either discussing the acquisition of property at a closed meeting, or failing to

disclose the minutes, was rendered moot when the Board later ratified the votes at a public meeting. *Id.*

The Georgia Open Meetings Act reflects the General Assembly's desire to promote government accountability by requiring disclosure (or eventual disclosure) of the minutes from closed meetings. However this is not the only interest at stake. By allowing the Board of Commissioners to discuss and vote in closed meetings about the future acquisition of real estate, the Georgia Open Records Act seeks to protect county taxpayers by preventing undue land speculation and inflation of prices. For instance, if word leaked about the identity of the real estate chosen for the location of the new Bibb County Courthouse, then the price might be artificially inflated, resulting in Bibb County paying more than they would have had the information been kept secret. Ultimately, the taxpayers would be harmed on account of the inflated prices. Therefore, the statute attempts to strike a balance between promoting government accountability and protecting taxpayers from undue land speculation.

In furtherance of this balance, all minutes of a closed session regarding the future acquisition of real estate are not exempt from public disclosure. As noted herein, O.C.G.A. § 50-14-3(4) provides that only such portions of the minutes as would identify real estate to be acquired may be delayed until such time as the acquisition has been completed, terminated, abandoned or Court proceedings related thereto have been initiated. Therefore, although the Georgia Open Meetings Act permits the discussion and vote in closed session regarding the future acquisition of real estate, the minutes of such closed session must be released as

provided by law except such portions as would identify the property to be acquired. While this Court will not attempt to "bright line" what the identifying markers are, the fact that a vote was taken to acquire real estate would be subject to disclosure in the minutes within the time prescribed by law for publication of minutes.

With respect to Plaintiffs' claims for attorney's fees and litigation costs, Plaintiffs have not shown that Defendants acted without substantial justification and as already stated herein, it is this Court's opinion that Defendants' actions were permitted under the Georgia Open Meetings Act. To prove Defendants have acted "without substantial justification," Plaintiffs must show that the Defendants' actions were "substantially frivolous, substantially groundless, or substantially vexatious." *Evans County Board of Commissioners v. Claxton Enterprise*, 255 Ga. App. 656, 657 (2002). No such showing is present, and accordingly Plaintiffs are not entitled to attorney's fees or other litigation costs.

For the foregoing reasons, Defendants' Motion to Dismiss is hereby granted.

SO ORDERED, this 25 day of June, 2009



GEORGE F. NUNN, Judge
Houston Judicial Circuit

ORDER PREPARED BY:
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