

RENDERED: JANUARY 8, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002219-MR

FLOYDS FORK ENVIRONMENTAL
ASSOCIATION; PAT THURMAN;
AND TEENA HALBIG

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 08-CI-005122

KENTCKY WATERWAYS ALLIANCE, A
KENTUCKY NON-PROFIT CORPORATION;
JUDITH PETERSON, KWA EXECUTIVE BOARD,
MEMBER, INDIVIDUALLY; BRUCE SCOTT,
EXECUTIVE BOARD MEMBER, INDIVIDUALLY;
GORDON GARNER, KWA EXECUTIVE BOARD
MEMBER, INDIVIDUALLY; HUGH ARCHER; KWA
EXECUTIVE BOARD MEMBER, INDIVIDUALLY;
BEV JUETT, KWA EXECUTIVE BOARD MEMBER,
INDIVIDUALLY; TOM VIERHELLER, KWA EXECUTIVE
BOARD MEMBER, INDIVIDUALLY; KENTUCKY
ENVIRONMETAL PROTECTION CABINET, A STATE AGENCY,
DIRECTOR SANDY GRUZESKY, AND KDOW
EMPLOYEES PETER T. GOODMAN, JOHN
EISININGER, ANGELA KESSANS, AND BROOKE
SHIREMAN; STANTEC CONSULTING SERVICES, INC.,
A CORPORATE DIVISION OF FULLER MOSSBARGER
SCOTT & MAY ENGINEERS, INC. AND ITS
EMPLOYEES KAREN SCHAFFER AND
STEVE HALL; PAMELA WOOD D/B/A
PAMELA WOOD CONSULTING; THE

FLOYDS FORK WATERSHED BASED
MANAGEMENT STEERING COMMITTEE
AND ITS MEMBERS; LOUISVILLE
METRO GOVERNMENT; MAYOR
JERRY ABRAMSON; METRO PLANNING
AND ZONING; CHARLES CASH; METRO
PARKS; MIKE HEITZ; LISA HITE;
METRO HEALTH DEPT.; DR. ADEWALE
TROUTMAN; LOUISVILLE AND JEFFERSON
COUNTY MSD, EXECUTIVE DIRECTOR
HERBERT SCHARDEIN; RANDY
STAMBAUGH; DEREK GUTHRIE;
OLDHAM COUNTY SEWER DISTRICT;
VINCE BOWLING; OLDHAM COUNTY,
JUDGE EXECUTIVE DUANE MURNER;
PAULA GISH; BETH STUBE; HENRY
COUNTY, JUDGE EXECUTIVE JOHN
BRENT; MAYOR JUDY DIEDRICH, SHELBY
COUNTY; SHELBY COUNTY JUDGE
EXECUTIVE ROB ROTHENBURGER,
MAGISTRATE MICHAEL RIGGS;
BULLIT COUNTY JUDGE EXECUTIVE
MELANIE ROBERTS, EVELYN FACKLER;
CITY OF JEFFERSONTOWN, MAYOR
CLAY FOREMAN, CITY OF HILLVIEW,
MAYOR JIM EDENS; JIM HARNED; CITY OF
MIDDLETOWN, MAYOR J. BYRON
CHAPMAN; CITY OF MT. WASHINGTON,
MAYOR JOETTA CALHOUN; KEN STOVALL;
RONNIE FICK; HOMEBUILDERS
ASSOCIATION OF LOUISVILLE; CHUCK
KAVENAUGH; JOHN COSBY; 21ST CENTURY
PARKS; DAN JONES; DAN CHURCH;
KENTUCKY LEAGUE OF CITIES, SYLVIA
LOVELY; BERT MAY; NATURAL RESOURCE
CONSERVATION SERVICE; KURT MASON;
KENTUCKY INSTITUTE FOR THE ENVIRONMENT
AND SUSTAINABLE DEVELOPMENT;
RUSS BARNETT; KENTUCKY
ASSOCIATION OF COUNTIES; AND
ROGER RECKTENWALD

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; HENRY, SENIOR JUDGE.¹

COMBS, CHIEF JUDGE: Floyds Fork Environmental Association (FFEA) and its members, Teena Halbig and Pat Thurman, appeal from a summary judgment of the Jefferson Circuit Court entered on August 13, 2008, in a lawsuit seeking a declaratory judgment as to an opinion of the Attorney General. The trial court declined to review the opinion of the Attorney General that was adverse to the position of FFEA, Halbig, and Thurman. We conclude that the court did not err by declining to review the opinion. Therefore, we affirm the judgment.

The Appellee Kentucky Waterways Alliance, Inc., (KWA) is a non-profit corporation interested in restoring and protecting Kentucky's waterways. Funded in part by federal grants, KWA coordinates with governmental and private entities to develop watershed-based frameworks for managing water quality.

The Appellee Environmental and Public Protection Cabinet, Department for Environmental Protection, Kentucky Division of Water (DOW) implements relevant provisions of the federal Clean Water Act through the Kentucky Nonpoint Source Management Program. In order to achieve its goals, this program incorporates watershed-based, nonpoint source pollution control plans

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

implemented primarily through cooperating agencies, institutions, and organizations.

In July 2006, the Cabinet entered into a Memorandum of Agreement with KWA to continue their work together to develop a plan for the restoration and preservation of Floyds Fork Watershed, a basin draining parts of Jefferson, Oldham, Shelby, and Henry Counties and emptying into the Salt River in Bullitt County. The agreement mandated public involvement in every aspect of the project and required regular community meetings to solicit information and to keep the public informed. The provisions of the Memorandum of Agreement were set to expire by their own terms on June 30, 2008.

The Appellee Floyds Fork Watershed Based Management Plan Steering Committee (the Steering Committee) is enabled to perform its particular functions by the terms of the Memorandum of Agreement. Those functions include: to provide overall direction to the project, to identify funding opportunities, and to document the final watershed-based management plan. It is comprised of a number of community leaders and entities potentially affected by the development and implementation of the plan. Pursuant to the terms of the Memorandum of Agreement, the Kentucky Division of Water (DOW) was also invited to participate in the committee. The committee is co-chaired by the Appellant FFEA and the Appellee KWA.

On March 10, 2008, the Steering Committee held a meeting in Louisville, Kentucky. Thurman and Halbig attended the meeting as did members

of the general public and the television news media. Thurman claims that when she requested permission to tape record the meeting, Peter Goodman, Manager of the Watershed Management and Groundwater Branches of DOW, told her that she could not. Thurman contends that a Steering Committee member had granted her express permission to record the meeting, and she admits that she placed her audio-recorder on a table at the front of the meeting room.

On March 14, 2008, Thurman wrote to Goodman to complain about his refusal to grant her permission to tape record the Steering Committee meeting.

Thurman's letter included the following passage:

IT IS MY BELIEF THIS WAS A PUBLIC MEETING
AND UNDER THE LAW TAPING IS PERMITTED.

AS A REMEDY, I SUGGEST TAPING BE ALLOWED
AT ALL FUTURE STEERING COMMITTEE
MEETINGS IN COMPLIANCE WITH THE OPEN
MEETINGS LAW.

On March 25, 2008, Goodman responded to Thurman. Goodman advised Thurman that he was not authorized to approve or to deny a request to record a Steering Committee meeting and that he did not recall her making such a request. Instead, he remembered her announcing her intention to tape record the meeting as it was subject to public meeting laws. Goodman noted that "you did appear to tape the meeting, and I heard no objections from the Steering Committee members who were aware of your actions." Finally, Goodman advised Thurman as follows:

That said, I believe your interpretation regarding the applicability of federal or Kentucky public meeting law is incorrect. EPA has determined that such meetings are not subject to federal public meeting requirements. Furthermore, the Division of Water has determined that these meetings are also not subject to Kentucky public meeting law. Therefore, as to whether these meetings should be public noticed, who is provided access to attend the meeting, and whether the meetings are recorded by audiotape or videotape are decisions to be made by the Floyds Fork Watershed Plan Steering Committee. That said, the steering committee has seemingly encouraged openness and public participation. I think the issue is important and I think it merits discussion with the steering committee.

On March 31, 2008 and April 6, 2008, Thurman wrote to the Office of the Attorney General. Thurman advised that she was appealing the Floyds Fork Steering Committee's denial of her open meetings complaint. She asked the Attorney General to determine whether the Steering Committee qualified as "a public agency for public meetings purposes." Correspondence dated March 31, 2008.

On April 15, 2008, the Attorney General's office issued an Open Meeting Decision. The decision was limited to a consideration of whether the Floyds Fork Watershed Management Plan Steering Committee had violated the Open Meetings Act by denying Thurman's request to tape record the meeting held on March 10, 2008. As a threshold matter, the Attorney General's office determined that the Steering Committee did not fall within the definition of a "public agency" as defined by Kentucky's Open Meetings Act. Kentucky Revised Statutes (KRS) 61.805(2). Consequently, it concluded that the Steering Committee

was not required to comply with provisions of the Open Meetings Act. KRS 61.805 – 61.850.

On May 8, 2008, FFEA, Thurman, and Halbig filed their complaint in Jefferson Circuit Court. The action was styled as an appeal from the Attorney General's Opinion and a declaratory judgment action. Nearly seventy (70) respondents (including Magistrate Michael Riggs of Shelbyville, who had given Thurman express permission to tape record the March 10 meeting) were named in the action. FFEA, Thurman, and Harbig sought declaratory and injunctive relief. They sought a declaration that the Steering Committee and KWA are public agencies; an order requiring that all future meetings of the Steering Committee comply with the Open Meeting Act; and an order voiding any and all resolutions and formal actions taken by the Steering Committee at its meetings of February 11 and March 10. An amended complaint naming still more respondents followed.

Numerous special appearances were made, and various motions to dismiss were filed. In support of the motions to dismiss, KWA and others contended that the expiration and non-renewal of the Memorandum of Agreement on June 30, 2008, rendered moot the issue raised by the appeal. The parties argued that without the existence of the Steering Committee, no actual controversy existed as a prerequisite for the circuit court to address and adjudicate the matter at issue. Since the Steering Committee would not conduct further meetings and since none of its prior actions had any effect, a determination with respect to whether it had been a public agency was meaningless.

FFEA, Thurman, and Halbig responded by tendering a second amended complaint seeking to join independent causes of action to the appeal – including claims for interference with prospective contractual relationships and intentional misrepresentation. The circuit court ordered that the motion to amend the complaint would be held in abeyance pending resolution of the motions to dismiss.

In an opinion rendered on August 13, 2008, the circuit court determined that the expiration of the Memorandum of Agreement and resulting dissolution of the Steering Committee made review of the issue addressed by the Attorney General’s opinion unnecessary. Since these circumstances stripped meaningful effect from any judgment that might be rendered, the court concluded that it lacked authority to consider the matter and granted the motions to dismiss. This appeal followed.

It is well established that an appeal should be dismissed as moot when an event occurs making a determination of the question unnecessary or rendering the potential judgment ineffectual. *Louisville Trans. Co. v. Dep’t. of Motor Transp.*, 286 S.W.2d 536 (Ky. App. 1956). A moot case is one which seeks a judgment upon a matter, which, if and when rendered, cannot have any practical effect upon a *then existing* controversy. *Id.* Furthermore, the Declaratory Judgment Act requires the existence of an actual controversy over a justiciable question. Kentucky Revised Statute(s) (KRS) 418.040. Under this statute, the court will not decide speculative rights or duties that may or may not arise in the

future but only those about which there is a present, actual controversy. KRS 418.065; *Mammoth Medical, Inc., v. Bunnell*, 265 S.W.3d 205 (Ky. 2008).

It is clear that a determination by the circuit court on its *de novo* review of the Attorney General's opinion could not have afforded the appellants any practical relief. The only question properly presented by the appeal of the opinion did not involve any existing facts or rights; it did not present the court with an opportunity to fashion an effective remedy. Consequently, we conclude that the circuit court did not err by ordering a dismissal.

The appellants also argue that the binding effect of the Attorney General's opinion pursuant to the provisions of KRS 61.846(4)(b) compels a different result. KRS 61.846(4)(b) provides as follows:

If an appeal [to the circuit court] is not filed within the thirty (30) day time limit, *the Attorney General's decision, as to whether the agency violated the provisions of KRS 61.805 to 61.850*, shall have the force and effect of law and shall be enforceable in the Circuit Court of the county where the public agency has its principal place of business or where the alleged violation occurred. (Emphasis added).

The provision is plainly inapplicable in this proceeding since the Attorney General's decision did not address itself to whether "the agency violated the provisions" of the Open Meetings Act. The opinion was narrowly tailored and was confined solely to the threshold matter of whether the Steering Committee qualified as a **public agency**. It reached no conclusion regarding an alleged

violation of the Open Meetings Act. Thus, no issue of enforceability of any action is at issue so as to bring this matter within the scope of KRS 61.846(4)(b).

The appellants also suggest that the issue was properly reviewable by the circuit court under the public interest exception to the mootness doctrine. We disagree. This exception applies only where the issue is capable of repetition – yet evades review. *Lexington Herald Leader Inc., v. Meigs*, 660 S.W.2d 658 (Ky. 1983). In making such a determination, a two-part analysis must be undertaken: first, it must be determined that the challenged action is too short in duration to be fully litigated prior to its cessation or expiration; next, it must be shown that there is a reasonable probability that the same complaining party would be subject to the same action again. *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992).

We need not address the first part of the analysis as it is moot. But as to part two, we do conclude that the exception does not apply under these circumstances because the appellants cannot show that there is a reasonable probability that they will again be subject to the same alleged violation of the Open Meetings Act. While the appellants note that KWA will continue to be involved in critical watershed planning issues in Kentucky (where they, too, plan to remain active), there is no indication that the Floyds Fork Watershed Based Management Plan Steering Committee will ever again be revived in order to be involved. Furthermore, there is no indication that the appellants would be subject to the same alleged violation of the Open Meetings Act – particularly where there is no reason

to believe that the Steering Committee ever denied anyone the opportunity either to attend or to tape record its meetings.

Finally, the appellants contend that the circuit court erred by failing to permit the addition of the independent causes of action included in their second amended complaint. Kentucky Rule(s) of Civil Procedure (CR) 15.01 provides that a party may amend his pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party. *Id.* Leave is to be freely given where justice so requires within the sound discretion of the trial court. *Id.*

The appellants do not explain how they were prejudiced as a result of the trial court's decision not to permit a second amendment of the pleadings. As bases for their request, they recite: questions concerning the use of federal funds for unintended purposes; the potentially illicit nature of the relationship between DOW and KWA; and the right of citizen volunteers to an accounting for money spent on projects never completed. Nonetheless, we cannot agree that the circuit court abused its discretion by not permitting the proposed amendment to their appeal of the Attorney General's opinion. Justice did not compel leave to amend. If these issues were to arise in a different context at a future time, the appellants would have the opportunity to litigate a justiciable controversy unaffected by the mootness that compelled dismissal of this case.

Accordingly, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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BRIEF FOR APPELLEES
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BRIEF OF APPELLEES STANTEC
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