

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION – CIVIL

BRIAN FREY and JON FOLEY SHERMAN, :
Plaintiffs, :
 :
v. : No. CI-22-02699
 :
RAY D’AGOSTINO, JOSHUA G. :
PARSONS, and JOHN TRESKOT in their :
official capacities; THE LANCASTER :
COUNTY BOARD OF ELECTIONS; and :
LANCASTER COUNTY, :
Defendants. :
_____ :

OPINION

This case is about Pennsylvania’s Sunshine Act and whether the Lancaster County Board of Elections (“the Board”) followed it when notifying the public of the Board’s April 13, 2022 meeting. This case is not about election integrity or voter suppression. For the reasons stated below, plaintiffs’ request for a preliminary injunction will be granted in part and denied in part.

In 1644, the Reverend Samuel Rutherford published the provocative book, *Lex, Rex*. The book was provocative because of the order of the words, with *Lex*—the law—being placed before *Rex*—the king. Throughout his book, Rutherford argued that the king is not above the law. The principles espoused by Rutherford became one of the underpinnings for the rule of law in the United States. No person or group is above the law, and justice cannot be administered based on any factor other than what the law says.

Pennsylvania’s 1998 Sunshine Act, 65 Pa. C.S.A. § 701 et seq., is the progeny of the ideas expressed by Rutherford in 1644. One does not have to guess at the intent of the legislature in passing the Sunshine Act because Section 702 clearly expresses their intent. The citizens of Pennsylvania have the right “to be present at all meetings of agencies and to witness the deliberation, policy formation and decisionmaking of agencies.” § 702. The legislature explained

that “secrecy in public affairs undermines the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society.” Id. (emphasis added).

I. BACKGROUND

On September 23, 2020, the Lancaster County Board of Elections met to discuss and invite comment on whether to install a ballot drop box at the Lancaster County Government Center. Prior to the meeting, the Board posted a public agenda listing “Drop Box” and “Extended Lobby Hours” as agenda items up for discussion. The Board ultimately reached a consensus: three Board members ordered a secure drop box be placed in the Government Center and made available to the public for extended hours leading up to the November 2020 election.¹

The Board used the drop box, along with extended drop-off hours, for the November 2020, May 2021, and November 2021 elections.

The Board provided notice of the agenda and a meeting scheduled for April 13, 2022. There was no information included under Old Business and only two matters listed under New Business. Listed under New Business were “Resolution No 3 of 2022 – Proposed Polling Place Changes” and “Update on the 2022 Primary Election.” The meeting occurred on April 13, 2022 and lasted approximately one hour and forty minutes. Much of this time was taken up in comments by the Board members and citizens addressing removal of the drop box placed in the Lancaster County Government Center in 2020.²

On May 10, 2022, plaintiffs filed a complaint seeking declaratory and injunctive relief alleging, among other things, that the failure of the Board to notify the public that it would consider the drop box at its April 13, 2022 meeting violated the Sunshine Act.

¹ The minutes of this meeting reflect agreement between the Board members and officers of both political parties who spoke at the meeting that a drop box be placed in the Lancaster County Government Center.

² The court watched the entire meeting and compliments the Board and all participants on their demeanor and professionalism in discussing an emotionally charged issue.

II. LEGAL STANDARD

A petitioner must establish six elements to obtain a preliminary objection: (1) a clear right to relief; (2) immediate and irreparable harm in the absence of an injunction; (3) restoration of the status quo; (4) no adequate remedy at law exists and the injunction is appropriate to abate the alleged harm; (5) greater injury will result by not granting than by granting the injunction; and (6) the preliminary injunction will not adversely affect the public interest. See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003).

III. DISCUSSION

A. *Clear Right to Relief*

The basic question here is whether the agenda for the meeting on April 13, 2022 should have included the ballot drop box³ so that the public was on notice that the Board intended to address the issue. The Board asserts that notice was unnecessary as the removal of the drop box was an administrative action and not an official action. There is no dispute that at this meeting the Board of Elections made a decision to remove the drop box. According to the evidence presented at the hearing, this decision was not made by formal vote but by what the Board members referred to as “consensus,”⁴ even though one Board member was opposed to the removal.

The Board asserts that action by consensus underscores the fact that the Board is merely taking an administrative action. The Sunshine Act defines an administrative action as:

³ While plaintiffs ask that the court enjoin defendants from changing the extended hours to access the lobby during election day, this issue was not addressed during the April 13, 2022 meeting, any of the comments, or in the action taken by the Board.

⁴ It is unclear to the court the parameters of “rule by consensus” in a three-person board as most government agencies comply with Robert’s Rules of Order where formal motions and votes are taken to give a clear record of the agency’s action. Robert’s Rules do recognize actions by unanimous consent (sometimes referred to as common consent), but there was not unanimous consent at the April 13, 2022 meeting. See Robert’s Rules of Order Newly Revised, 11th edition, pp. 54-56.

The *execution of policies* relating to persons or things as *previously authorized or required by official action of the agency adopted at an open meeting of the agency*. The term does not, however, include the deliberation of agency business.

65 Pa. C.S.A. § 703. (emphasis added). In essence, an administrative act is one that executes a prior official action by the Board.

An official action is:

- (1) Recommendations made by an agency pursuant to statute, ordinance or executive order.
- (2) The establishment of policy by an agency.
- (3) The decisions on agency business made by an agency.
- (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

Id. (emphasis added). The Board contends that the official action it is undertaking is the broadly stated action of administering elections. Following the Board's logic, the official action it is undertaking is administering elections pursuant to hundreds of pages of statutes and rules. But the definition of official action does not support the Board's position. Official action, as it relates to statutes, involves recommendations made by the Board pursuant to the statute, not the simple (or complex) adherence to the Election Code. Official action cannot mean merely following a statute and thereby regulating all other actions to administrative in nature. Any time an agency like the Board establishes a policy or makes a decision on agency business, it is official action as defined by the Sunshine Act.

No party disputes that on September 23, 2020, the Board listed on its agenda "Drop Box" along with "Extended Lobby Hours" and approval of absentee and mail-in ballot instructions. The minutes of the meeting reflect a true "consensus" as all three Board members agreed to the placement of a drop box. The Board made this decision on agency business and as such, the

decision constitutes an official action. The drop box has been available for every election since the election of November 2020.

At a Board meeting on April 13, 2022, without a vote or the agreement of all Board members, the drop box for the upcoming election was removed. Board Member Parsons stated that the drop box matter was “a matter of public interest.” Board Member D’Agostino commented that the removal of the drop box was an administrative action. Board Member Trescot disagreed with removal of the drop box. Regardless, Board Member D’Agostino declared a consensus existed to remove the drop box. Like its decision in 2020 to act on agency business, the Board’s decision to remove the drop box was an official, not an administrative, action because it clearly meets the definition of official action and does not meet the definition of administrative action.⁵

Section 712.1 provides exceptions to the public notice requirement. If an exception is not met, “an agency may not take official action on a matter of agency business at a meeting if the matter was not included in the notification required under section 709(c.1).” The Board argues that Section 712.1(d) is the safe harbor for its failure to comply with the notice requirement.

Section 712.1(d) provides:

(d) Business arising during meeting.--If, during the conduct of a meeting, a resident or taxpayer brings a matter of agency business that is not listed on the meeting agenda to the attention of the agency, the agency may take official action to refer the matter to staff, if applicable, for the purpose of researching the matter for inclusion on the agenda of a future meeting, or, if the matter is de minimis in nature and does not involve the expenditure of funds or entering into a contract or agreement, the agency may take official action on the matter.

⁵ The Board may contend that the Pennsylvania Supreme Court stated boards of election “may” establish the use of drop boxes, which is correct. However, by taking official action to establish the use of a drop box it cannot remove that same drop box by calling it an administrative action, thereby avoiding the necessity of complying with Section 709(c.1) of the Sunshine Act.

The Board can do one of two things with business that arises during a meeting: (1) take official action to refer the matter for inclusion on the agenda of a future meeting; or (2) take official action if the matter is *de minimis*. By relying on this exception, the Board is admitting it took official action as that is the only outcome possible under the exception. “Official action” includes making recommendations based on statute or ordinance, establishing agency policy, and making decisions regarding agency business. 65 Pa. C.S.A. § 703. Generally, an agency cannot take official action to frame, prepare, make, or enact laws, policies or regulations unless it notifies the public in advance. § 712.1(a), § 703 (defining “agency business”). However, agencies can take official action on matters that arise during the meeting which are “*de minimis* in nature.” § 712.1(d).

De minimis means “lacking significance or importance: so minor as to merit disregard.” Merriam-Webster, <https://www.merriam-webster.com/dictionary/de%20minimis> (accessed May 12, 2022). Because Section 712.1 of the Sunshine Act is a new amendment added in 2021, there is no case law exploring “*de minimis*” matters in this context. But in the land use context, a *de minimis* variance is one where the requested change is so minor that “rigid compliance is not necessary to protect the public policy concerns of the ordinance.” Lench v. Zoning Bd. Of Adjustment of City of Pitt., 13 A.3d 576, 581 (Pa. Commw. 2011); see also Hawk v. City of Pitt. Zoning Bd. Of Adjustment, 38 A.3d 1061, 1066 (Pa. Commw. 2012) (cleaned up) (no standard for *de minimis* variances, which are granted or denied based on the facts of each case). The number of public comments related to the drop box and the amount of time the Board itself spent discussing the issue establishes to the satisfaction of the court that the removal of a ballot drop box is not “so minor as to merit disregard” and accordingly is not *de minimis*. Notably, Board Member D’Agostino suggested at the April 13, 2022 meeting that the matter of the drop box be

addressed at a Board meeting the following week, which would have likely satisfied the requirements of Section 712.1(d); however, Board Member Parsons suggested that a consensus existed, and the matter was finalized without a vote.

Finally, the Board offered testimony that people in the community were aware that the drop box would be discussed because of the number of public comments on the topic. There is no exception to Section 709's notice provision excusing notice when general knowledge may exist within the community that a topic may be addressed at a public meeting. Furthermore, plaintiff Jon Foley Sherman credibly testified that he was not aware that the Board would take action on the drop box and, if he had been aware of it, he would have attended the meeting.

The court does not find the Board's arguments persuasive. The placement of a drop box approved by the Board on September 23, 2020 was not an administrative action but was a decision "on agency business made by an agency" neatly meeting the definition of an official action. The reversal of an agency decision is not administrative and such a topic must be included in the public notice provided pursuant to Section 709 of the Sunshine Act.

B. Irreparable Harm

Irreparable harm is irreversible harm that cannot be adequately compensated by money damages because it "can be estimated only by conjecture and not by an accurate pecuniary standard." Sovereign Bank v. Harper, 674 A.2d 1085, 1091, 1093 (Pa. Super. 1996). The Sunshine Act gives citizens the right to "have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon" 65 Pa. C.S.A. § 702.

Plaintiff Jon Foley Sherman testified about finding it important to engage civically in a democratic society. A habitual meeting attendee, Mr. Sherman relies on the posted agenda, email alerts, and friends to know when interesting items are on agency agendas and if he should attend

a meeting. He said he did not attend the April 13, 2022 meeting because the status of the drop box was not on the agenda and he received no alert that the issue could arise. According to Mr. Sherman, the Board's decision "robbed me of my voice in front of my elected officials."

Although the Board asserted Mr. Sherman suffered no irreparable harm because he left a disapproving message for the Board after learning of its decision, the Sunshine Act conveys a broader right than simply having one's voice heard by elected representatives. Pennsylvanians have a right to attend agency meetings and to "witness the deliberation, policy formation and decisionmaking of agencies." § 702. This right encourages faith in the government decisions by ensuring citizens can fully participate in the democratic process. See id. The damage to one's ability to participate in the democratic process is not quantifiable and cannot be compensated.

C. *Restoring the Status Quo*

The goal of a preliminary injunction is to maintain the status quo until the court can finally determine the parties' rights. New Castle Orthopedic Assocs. v. Burns, 392 A.2d 1383, 1385 (Pa. 1978). "The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful non-contested status which preceded the pending controversy." Valley Forge Hist. Soc. v. Wash. Mem'l Chapel, 426 A.2d 1123, 1129 (Pa. 1981). It may be maintained in two ways: by enjoining an action that changes the status quo (prohibitory injunction) or by ordering a party to take action to preserve the status quo (mandatory injunction). See Mazzie v. Commonwealth, 432 A.2d 985, 988 (Pa. 1981). Mandatory injunctions should be issued less frequently and only when a plaintiff establishes a clear right to relief. See id. .

Here, the status quo is the presence of a ballot drop box in the Lancaster County Government Center leading up to and during election day. This has been the standard practice since the Board unanimously decided to install the ballot drop box in 2020. A preliminary

injunction would preserve the status quo by enjoining the removal of the ballot drop box until the matter could be heard with the required notice to the public.

D. No Adequate Remedy

“Irreparable injury” is the antithesis of “an adequate remedy at law.” Stuart v. Gimbel Bros., 131 A. 728, 730 (Pa. 1926). An “adequate remedy” is one that is “full, perfect, and complete.” Pa. State Chamber of Commerce v. Torquato, 125 A.2d 755, 766 (Pa. 1956) (internal quotations omitted). Damages cannot compensate the plaintiffs, who lost the ability to attend, participate, and witness local policy formation and agency decisionmaking on an important issue.

E. The Greater Harm

“[T]he party seeking to enjoin certain conduct must demonstrate that greater injury would result by refusing the injunction than by granting it.” Pa. Orthopaedic Soc. v. Indep. Blue Cross, 885 A.2d 542, 547 (Pa. Super. 2005). Plaintiffs demonstrated the greater harm in this case. Denying an injunction would permit a government agency to make important election decisions without providing prior notice to the public, thus depriving county residents of the right to participate in the democratic process. Granting an injunction, as both parties concede, simply means the Board must schedule a new hearing and list the “Drop Box” as an agenda item before making an ultimate decision on its removal.

F. In the Public Interest

“[T]he party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.” Summit Towne Ctr., Inc., 828 A.2d at 1001. As the language of the Sunshine Act explains, a strong public interest exists in the right of Pennsylvanians to attend and engage in agencies’ deliberative processes. The court disagrees with the Board that granting an injunction would create a dangerous chilling effect on public

agencies and prevent elected officials from engaging with the public or discussing matters with the public at meetings. To the contrary, requiring advance notice from the Board before it makes important policy decisions will only increase democratic debate and hold the government agencies accountable to the rule of law. Board Member D'Agostino implicitly recognized this when he suggested that the matter of the drop box be discussed at the Election Board meeting the following week.

IV. CONCLUSION

Whether or not the Board determines to have a drop box is solely the Board's decision. However, the Board must include notice of the discussion of the ballot drop box in a notification required under 65 Pa. C.S.A. § 709(c.1). Because the Board did not provide notice of potential agency action on the ballot drop box yet took official action at the meeting to remove the drop box instead of listing the matter on the agenda of a future meeting, plaintiffs have established a reasonable likelihood of success on the merits and met the other requirements to receive a preliminary injunction. An appropriate order follows.

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LANCASTER COUNTY, :
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ORDER

AND NOW, this 13th day of May 2022, after a hearing on plaintiffs’ motion for preliminary injunction and argument, it is ORDERED that plaintiffs’ request for a preliminary injunction is GRANTED IN PART. Defendants are ENJOINED from removing the ballot drop box unless and until such time as defendants include notice of the discussion of the drop box in a notification required by 65 Pa. C.S.A. §709(c.1). Plaintiffs’ request for an injunction regarding a change in extended hours to access the lobby is DENIED. Plaintiffs shall post a bond of one thousand five hundred dollars (\$1,500) for this injunction to take effect.

BY THE COURT:

LEONARD G. BROWN, III, JUDGE

ATTEST:

Copies: J. Dwight Yoder, Esq.
Jacquelyn E. Pfursich, Esq.