STATE OF MICHIGAN

COURT OF APPEALS

RICHARD A. KOBASIC,

Plaintiff-Appellant,

v

ESCANABA CITY COUNCIL, CHARLES L. VADER, JAMES F. CHRISTENSEN, THOMAS NAULT, LEO M. RAHOI and JEANNE M. ROSE,

Defendant-Appellees.

UNPUBLISHED
October 31, 1997

No. 199725
Delta Circuit Court
LC No. 94-012399-AW

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Summary disposition was granted for defendant on plaintiff's claims for issuance of a writ of mandamus and for violation of the Open Meetings Act (OMA), 15.261 *et seq.*; MSA 4.1800(11) *et seq*. Plaintiff appeals as of right. We affirm.

Plaintiff first argues that the trial court erred by failing to grant a writ of mandamus. Plaintiff filed suit for issuance of a writ to force the Escanaba City Council to place a proposed ordinance on the ballot for decision by the electorate. The proposed ordinance was intended to preserve historic buildings within the City of Escanaba. It provided that the penalty for its violation was the cost of repair and/or restoration of any demolished historical building[1]. When confronted with the petition, the council had three options via the city charter: adopt the ordinance; amend the proposed ordinance with changes not to affect the main purpose of it; or offer the ordinance as proposed, without any amendments, to the city's electorate for a vote. Instead of following any of these options, defendants, members of the city council, rejected the petition as not being a proper subject matter for an initiative referendum. The trial court granted summary disposition to the defendants and refused to issue the writ to force the council to place the petition on the ballot.

The proposed ordinance clearly violates MCL 117.4i(k); MSA 5.2082(k), which states:

Each city may in its charter provide:

> . . . For the punishment of those who violate its laws or ordinances, but no punishment shall exceed a fine of $500.00 or imprisonment for 90 days, or both, in the discretion of the court; said imprisonment may be in the county jail or city prison, or in any workhouse in the state authorized by law to receive prisoners from such city.

The ordinance set fines and punishment well in excess of that permissible under the statute. The ordinance is therefore unlawful.

Although the city council failed to adopt any of the three options specified in the charter, we agree with the trial court that a writ of mandamus should not issue to require the city council to place an unlawful ordinance on the ballot. A grant of mandamus is an extraordinary remedy and should be used only where there is "a clear legal duty incumbent on the defendant and a clear legal right in the plaintiff to discharge that duty." *Settles v Detroit City Clerk*, 169 Mich App 797, 802-803; 427 NW2d 188 (1988). We find no authority to support plaintiff's proposition that a patently unlawful ordinance is subject to public vote or that the city council had a clear legal duty to allow the electorate to vote on an ordinance that violates state law, such that mandamus should issue.

The cases cited by plaintiff in support of his position do not do so. In *Herp v Lansing City Clerk*, 164 Mich App 150, 161; 416 NW2d 367 (1987), this Court found that the petitions at issue were insufficient because they did not include statutorily mandated disclosure information. Here, the petition included language in direct contravention of an applicable statute. *Herp* supports our holding that there was no legal duty to submit the petition on the ballot where it was substantively deficient. In *Charter Twp of Meridian v City of East Lansing*, 101 Mich App 805, 810; 300 NW2d 703 (1980), this Court noted that "all doubts as to technical deficiencies or failure to comply with the exact letter of procedural requirements are resolved in favor of permitting the people to vote." See also *Newsome v Bd of State Canvassers*, 69 Mich App 725, 729; 245 NW2d 374 (1976). The unlawful provision in the proposed ordinance, however, is not a technical deficiency. It is a substantive one. Plaintiff had the burden of proving that mandamus was appropriate. *Settles, supra* at 803. Because he failed to demonstrate that the city council had a clear legal duty to place a patently unlawful ordinance on the ballot, we find no abuse of discretion in the trial court's failure to issue the requested writ.

We also refuse to order defendants to amend the proposed ordinance so the penalty conforms to MCL 117.4i(k); MSA 5.2082(k) and then adopt it. Issuance of a writ of mandamus is improper unless the act ordered is ministerial, involving no exercise of discretion. *Bingo Coalition for Charity v Bd of State Canvassers*, 215 Mich App 405, 413; 546 NW2d 637 (1996). An order to amend would involve the use of discretion, specifically with regard to the penalty that should be imposed for violations of the ordinance. In addition, such an order would amount to a judicial mandate that the ordinance must be adopted by the city council. We have no authority to order defendants in this case to amend and then adopt the ordinance.

Plaintiff also argues that the trial court erred in concluding that defendants did not violate the OMA in connection with a vacancy on the city planning commission. In 1994, John Winneroski filed an application for appointment to a vacant seat on the Escanaba City Planning Commission. Defendant Vader, the mayor of Escanaba, telephoned each council member individually to determine if they would

favor Winneroski's appointment. Vader ultimately failed to appoint Winneroski. Plaintiff filed suit claiming that Vader's actions in conducting the telephone poll amounted to a violation of the OMA. The trial court disagreed, finding that the mayor's appointment process was not subject to the OMA. We agree with the trial court.

An important point in the consideration of this issue is that it was within the exclusive province of the mayor to appoint or refuse to appoint Winneroski. If he had appointed Winneroski, the appointment would then have been submitted to the city council for approval. Action taken by the city council would be subject to the OMA. The open meetings act pertains to meetings of public bodies. MCL 15.263; MSA 4.1800(13). "Public body" is defined as:

> [A]ny state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function, or a lessee thereof performing an essential public purpose and function pursuant to the lease agreement.

Mayor Vader is not a public body. As the trial court noted:

> Nothing in the Escanaba City Charter mandates that applications be brought to the Council. Indeed, the mayor is free to use any procedure in deciding whom to appoint, including the method used by Mayor Vader. The decision of the Mayor whether or not to appoint someone is not the decision of a "public body" within the definition as set out in the Open Meetings Act . . .

Because the conduct at issue was not subject to the OMA, summary disposition on the issue of whether the conduct violated the OMA was appropriate.

We do not find plaintiff's argument that Vader's conduct was designed to avoid the strictures of the OMA to be persuasive. Plaintiff argues that the telephone calls amounted to deliberations of the city council with regard to approval of Winneroski's appointment. We disagree. There was no evidence that Vader's conduct was designed to avoid the OMA. Moreover, there was no appointment and thus, the city council was not deliberating about whether to approve an appointment. In *St Aubin v Ishpeming City Counsel*, 197 Mich App 100; 494 NW2d 803 (1992), the mayor held individual discussions with council members regarding whether the city manager should be retained. We ruled:

> In this case no decision was made by the body, instead Bosio [the mayor] was polling the individual members to determine their opinions. We find this conduct, an informal canvas by one member of a public body to find out where the votes would be on a particular issue, is not violative of the OMA. [*Id.* at 102-103.]

Here, similar to *St Aubin*, no decision was made by the city council with regard to Winneroski[2]. Vader was simply taking an informal survey to determine counsel members' opinions of the potential appointee. He wanted to know where the votes would lie if he were to make the appointment.

This case is unlike *Booth Newspapers v University of Michigan Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993) to which plaintiff cites. In *Booth*, the board of regents, the public body that was charged with selecting a new president, conducted all of its tasks, with the exception of the actual vote on the final candidate, behind closed doors. *Id* at 225-227, 229. The actions of the board constituted closed session decisions. *Id.* at 229. The board was deliberating in sub-quorum meetings in order to avoid the OMA.

Affirmed. No taxable costs pursuant to MCR 7.219, a question of public policy involved.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Richard A. Bandstra

[1] At the time the petition for the ordinance was presented to the city counsel, a debate regarding the fate of the Sawyer-Stoll building in the City of Escanaba was taking place. The proposed ordinance was apparently inspired by the controversy over the Sawyer-Stoll building. That building has subsequently been torn down. However, the proposed ordinance was a general ordinance for all potentially historical buildings.

[2] At oral argument, counsel for appellant indicated that *St Aubin, supra,* was distinguishable and was wrongly decided. We disagree on both points.