STATE OF MICHIGAN

COURT OF APPEALS

DAVID A. CYNAR,

Plaintiff-Appellant,

v

VILLAGE OF DEXTER COUNCIL, PHILIP ARBOUR, JIM ADAMS, PAUL COUSINS, JIM GILLETT, JOHN RUSH, RAY TELL, DIANE WALTERS, and DONNA L. FISHER,

Defendants-Appellees.

UNPUBLISHED
November 21, 1997

No. 198088
Washtenaw Circuit Court
LC No. 96-006690-CZ

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting defendants summary disposition. We reverse in part and affirm in part.

Plaintiff brought this suit against defendants, alleging violations of the Open Meetings Act (OMA), MCL 15.261 *et seq.;* MSA 4.1800(11) *et seq.*, and the Freedom of Information Act (FOIA), MCL 15.231 *et seq.;* MSA 4.1081(1) *et seq.* Plaintiff's allegations arise out of the sale of four lots in the Dexter Business and Research Park, owned by Dexter Village. At two separate meetings, defendants entered into closed session to consider offers to purchase lots in the park, returning each time to open session to vote on the proposals before adjourning. When plaintiff learned of the first closed session, he requested that defendants provide him with the records pertaining to the land sale that they discussed. Defendants unsealed the minutes of the first closed session and sent plaintiff a copy along with their letter promising to hold discussions about real estate transactions in open session except when "highly sensitive circumstances" warrant a closed session.

Defendants moved for summary disposition both on the merits of plaintiff's claims and on mootness grounds. The lower court did not state its reasons for deciding to grant defendants summary disposition; however, the lower court's failure to address the issues that were raised and argued by the parties below does not preclude this Court's consideration of the issue on appeal. *Peterman v Dep't of Natural Resources,* 446 Mich 177, 183; 521 NW2d 499 (1994). The facts necessary for resolving

the questions of law raised in this issue are present. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992). Because both parties submitted documentary evidence to the lower court, summary disposition was appropriately granted under MCR 2.116(C)(4) and MCR 2.116(C)(10). MCR 2.116(G)(5); *Shirilla v Detroit*, 208 Mich App 434, 436-437; 528 NW2d 763 (1995). Therefore, this Court examines all relevant affidavits, depositions, admissions, and other documentary evidence and construes the evidence in favor of the nonmoving party. *Id.* at 437. This Court then determines whether a genuine issue of material fact exists on which reasonable minds could differ or whether the movant is entitled to judgment as a matter of law. *Id.; Steele v Dep't of Corrections*, 215 Mich App 710, 712; 546 NW2d 725 (1996).

I

Plaintiff first argues that the lower court should not have dismissed his OMA claims. The OMA mandates that all "decisions" of such a public body must be made in a public meeting, MCL 15.263(2); MSA 4.1800(13)(2), yet it allows certain "deliberations" during closed sessions, MCL 15.263(3); MSA 4.1800(13)(3). *Moore v Fennville Public Schools Bd of Ed*, 223 Mich App 196, 200; 566 NW2d 31 (1997). The threshold question here is whether defendants' actions in either disclosing the minutes of the two closed sessions or promising to hold open sessions in the future rendered plaintiff's OMA claims moot.

> A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision, in advance, about a right before it has been actually asserted and tested, or judgment upon some matter which, when rendered, for any reason cannot have practical legal effect upon the then existing controversy. *Parsons Investment Co v Chase Manhattan Bank*, 466 F2d 869 (CA 6, 1972). [*Menominee Co Taxpayers Alliance, Inc v Menominee Co Clerk*, 139 Mich App 814, 819-820; 362 NW2d 871 (1984).]

In this case, defendants' disclosure of the minutes of the closed sessions rendered moot plaintiff's prayer for relief for court-ordered disclosure. MCL 15.267(2); MSA 4.1800(17)(2). However, it is clear from the pleadings that plaintiff sought not only the disclosure of records but also an injunction against future violations and the invalidation of the sales at issue. Both of these remedies are provided for in the OMA. MCL 15.271; MSA 4.1800(21), MCL 15.270(2); MSA 4.1800(20)(2). In light of plaintiff's request for an injunction, defendants' letter is not likely to render plaintiff's OMA claim moot because defendants' promise about holding future open sessions was conditioned upon whether there are "highly sensitive circumstances" present. It is true that the OMA permits a public body to conduct a closed session to consider material exempt from disclosure by state statute, MCL 15.268(h); MSA 4.1800(18)(h), such as the FOIA's exemption for "information of a personal nature" that constitutes "a clearly unwarranted invasion of an individual's privacy," MCL 15.243(1)(a); MSA 4.1801(13)(1)(a). See, e.g., *Ridenour v Dearborn School Dist Bd of Ed*, 111 Mich App 798, 802-803; 314 NW2d 760 (1981). However, defendants' letter to plaintiff is unclear about whether the village council would define "highly sensitive circumstances" the same as an invasion of privacy or whether it would again consider the details of a real estate transaction sufficiently sensitive to warrant a closed session. Therefore, injunctive relief would still be available to plaintiff, assuming his OMA claim has merit.

Similarly, in light of plaintiff's request for an invalidation of defendants' closed session decisions, neither defendants' letter nor disclosure of the minutes is likely to render plaintiff's OMA claim moot because neither action returned the parties to their previous positions as an order for invalidation would do. If defendants' decisions violated the OMA, then the court could fashion a remedy for this aspect of the controversy. In short, because the OMA provides a successful complainant with these two remedies and either remedy could have been fashioned for the alleged OMA violations in controversy here, the lower court erred when it declared this case moot.

Nonetheless, the lower court's grant of summary disposition may have been properly ordered if defendants were entitled to judgment as a matter of law on plaintiff's OMA claims. The merit of plaintiff's OMA claims turns on whether defendants' actions during the closed sessions constituted a "decision" as defined by the OMA that should have been made during open session, or whether defendants' actions were excepted from the act as closed session deliberations "to consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained." MCL 15.268(d); MSA 4.1800(18)(d). Under the act, "decision" means "a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." MCL 15.262(d); MSA 4.1800(12)(d).

It is clear to us that, like the board's actions in *Booth Newspapers, Inc v Bd of Regents of the University of Michigan,* 444 Mich 211, 229; 507 NW2d 422 (1993), defendants' actions in closed session here were not mere deliberations. Although defendants returned to open session to vote, they were by that point merely announcing publicly the decision at which they arrived during closed session. Any alleged distinction between consensus building and a determination or action, as advanced in the OMA's definition of "decision," is a distinction without a difference. *Id.* at 227. To hold otherwise would "undermine the legislative intent to promote responsible and open government." *Id.* Consequently, the decisions about the real estate in this case should have been made during open session. MCL 15.263(2); MSA 4.1800(13)(2). Because we hold that defendants' actions constituted decisions, not deliberations, we decline to enter the parties' discussion about the legislative intent of MCL 15.268(d); MSA 4.1800(18)(d), an exception for certain types of deliberations. *Moore, supra* at pp 7-9.

The next question is whether invalidation of those decisions is required. A court may consider invalidation when the plaintiff's complaint is filed "within thirty days after the approved minutes are made available to the public pursuant to that decision." MCL 15.270(3)(b); MSA 4.1800(20)(3)(b), *Cape v Howell Bd of Ed,* 145 Mich App 459, 465-466; 378 NW2d 506 (1985). Plaintiff's February 26, 1996, complaint is timely because defendants published the minutes of the January meetings on February 1 and 12, 1996. Invalidation of decisions made in contravention of the OMA is discretionary with the court. *Crowley v Governor of Michigan,* 167 Mich App 539, 546; 423 NW2d 258 (1988). Plaintiff must allege not only that the public body failed to comply with the act, but also that this failure impaired the rights of the public. MCL 15.270(2); MSA 4.1800(20)(2). Here, the public merely had the opportunity to observe the council's formal vote. Access to the closed session minutes after defendants made their decisions is not equivalent to participation. Indeed, this Court has previously found that the denial of a public hearing "in itself" impairs the rights of the public because the public

cannot present their views. *Menominee*, *supra* at 820. Moreover, plaintiff presented factual allegations to support his conclusion that the public's rights were impaired because the purchase prices were too low. Therefore, the lower court erred in finding that defendants were entitled to judgment as a matter of law.

Finally, plaintiff brought an OMA claim against Fisher, the village clerk, because of the disclosure of the minutes of the closed sessions, an alleged violation of MCL 15.267(2); MSA 4.1800(17)(2). However, because this section only applies to the disclosure of the minutes of closed sessions and we hold that the council's decisions should have been made during open sessions, the statute is inapplicable.

In summary, plaintiff's OMA claims are not moot and, with the exception of plaintiff's claim against Fisher, it is necessary to reverse the lower court's grant of summary disposition for defendants. On remand, the lower court should consider invalidating defendants' decisions where defendants failed to comply with MCL 15.263(2); MSA 4.1800(13)(2) and where the failure impaired the rights of the public by denying them a public hearing at which to express their views. Moreover, assuming plaintiff is also successful in his action for injunctive relief, then he is entitled to recover attorney fees and costs. MCL 15.271(4); MSA 4.1800(21)(4).

II

Plaintiff argues that the trial court also erred in granting defendants summary disposition on his FOIA claim. We disagree. At the time the events in this case occurred, the FOIA required a public body that receives a request for a public record, to respond "not more than 5 business days after the day the request is received." MCL 15.235(2); MSA 4.1801(5)(2). Here, plaintiff gave defendants a letter dated Monday, February 12, 1996, requesting that defendants provide him with all notes, tapes, records, minutes and other items pertaining to the discussion of land sales at the council's first meeting. Defendants responded to plaintiff's request by enclosing with their letter dated Monday, February 19, 1996, the previously sealed minutes of the closed session during their first meeting. Despite plaintiff's argument about the date on which he received defendants' response, the response complied with the statute as it was written at that time. Plaintiff also argues that defendants did not respond to the remainder of his FOIA request, but he does not specify to which documents or records he refers. We are unable to determine what, if any, documents were unavailable to plaintiff because defendants published the minutes of the open sessions from both meetings and unsealed the minutes of the closed sessions. Once the requested records are produced, the substance of a FOIA controversy disappears and becomes moot because the disclosure that the suit seeks has already been made. *Densmore v Dep't of Corrections*, 203 Mich App 363, 366; 512 NW2d 72 (1994). Consequently, the lower court properly dismissed this claim either because it was moot or without merit. Accordingly, plaintiff is not entitled to costs and attorney fees under MCL 15.240(4); MSA 4.1801(10)(4).

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ David H. Sawyer
/s/ Janet T. Neff