

STATE OF MICHIGAN
COURT OF APPEALS

LARRY LOCKREY and HOWARD WILLIS,

Plaintiffs-Appellants,

v

DEERFIELD TOWNSHIP, DEERFIELD
TOWNSHIP BOARD, DEBRA S. OLIVER, AND
BARB MORAN,

Defendants-Appellees.

UNPUBLISHED

June 5, 2003

No. 236752

Lapeer Circuit Court

LC No. 00-029298-CZ

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Plaintiffs Larry Lockrey and Howard Willis appeal as of right from the trial court's order denying their motion for summary disposition under MCR 2.116(C)(10) and granting defendants' motion for summary disposition under MCR 2.116(I)(2). We affirm in part and reverse and remand in part.

I

This case involves 1) claims by the plaintiffs-taxpayers that practices of defendants in imposing taxes have violated statutory requirements, and 2) an agreement reached that resulted in the voluntary dismissal of a previous lawsuit filed by plaintiffs. The disputes resulted, at least in part, from sloppy procedures on the part of defendants and, in part, from a misunderstanding of an applicable statute on the part of plaintiffs.

II

Plaintiffs first claim that defendants violated the police and fire protection act, MCL 41.801 *et seq.*, when they assessed a levy on plaintiffs' properties without notice or a hearing. We agree.

We review a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Where the motion was granted under MCR 2.116(C)(10), this Court "must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a

matter of law.’” *Unisys Corp v Comm’r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999). Where the opposing party, though, is entitled to summary disposition, the court may grant summary disposition under MCR 2.116(I)(2). *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000).

MCL 41.801(4)¹ provides detailed and explicit procedural requirements for the creation of a special police and fire protection assessment district and the levy of the assessment once created. Defendants failed, in material part, to comply with the statutory mandates.

This Court’s primary concern in construing statutes is to give effect to the intent of the Legislature. *Tryc v Michigan Veterans’ Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). The construction should be reasonable and should comport with the purpose of the act. *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997).

Plaintiffs admit that when the special assessment was initially levied in 1996, defendants properly afforded notice and a public hearing. However, according to the statute, defendants

¹ MCL 41.801(4) states in pertinent part:

If a special assessment district is proposed under subsection (3), the township board, or township boards acting jointly, shall estimate the cost and expenses of the police and fire motor vehicles, apparatus, equipment, and housing and police and fire protection, and fix a day for a hearing on the estimate and on the question of creating a special assessment district and defraying the expenses of the special assessment district by special assessment on the property to be especially benefited The hearing shall be a public meeting held in compliance with the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. Public notice of the time, date, and place of the meeting shall be given in the manner required by the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. In addition, the township board, or township boards acting jointly, shall publish in a newspaper of general circulation in the proposed district a notice stating the time, place, and purpose of the meeting. If there is not a newspaper of general circulation in the proposed district, notices shall be posted in not less than 3 of the most public places in the proposed district. This notice shall be published or posted not less than 5 days before the hearing. On the day appointed for the hearing, the township board, or township boards acting jointly, shall be in session to hear objections that may be offered against the estimate and the creation of the special assessment district. Before January 1, 1999, if the township board, or township boards acting jointly, determine to create a special assessment district, they shall determine the boundaries by resolution, determine the amount of the special assessment levy, and direct the supervisor or supervisors to spread the assessment levy on all of the lands and premises in the district that are to be especially benefited by the police and fire protection, according to benefits received The township board, or township boards acting jointly, shall hold a hearing on objections to the distribution of the special assessment levy. This hearing shall be held in the same manner and with the same notice as provided in this section. The township board, or township boards acting jointly, shall annually determine the amount to be assessed in the district for police and fire protection, shall direct the supervisor or supervisors to distribute the special assessment levy, and shall hold a hearing on the estimated costs and expenses of police and fire protection and on the distribution of the levy.

were required to comply with additional requirements subsequent to the initial assessment determination:

The township board, or township boards acting jointly, shall *annually* determine the amount to be assessed in the district for police and fire protection, shall direct the supervisor or supervisors to distribute the special assessment levy, *and shall hold a hearing on the estimated costs and expenses of police and fire protection and on the distribution of the levy*” [MCL 41.801(4).]

Defendants held a properly noticed annual budget hearing on March 14, 2000. However, the minutes do not reflect any discussion or a vote on the special assessment. Where the public has a right to a hearing, it is implied that “a particular question will be considered and those interested in that question will be given an opportunity to be heard.” See *Haven v Troy*, 39 Mich App 219, 224; 197 NW2d 496 (1972). A public board speaks through its minutes and resolutions only. *Palladium Publishing Co v River Valley School Dist*, 115 Mich App 490, 493; 321 NW2d 705 (1982), citing *Tavener v Elk Rapids Rural Agricultural School Dist*, 341 Mich 244, 251; 67 NW2d 136 (1954). Considering these two tenets, although a properly noticed hearing was held, the public was not given the opportunity to be heard on the issue of the fire assessment because the fire assessment was not discussed. Moreover, the Board violated MCL 41.801(4) by not presenting the estimated costs, expenses, and distribution of the levy for tax year 2000.

However, assuming *arguendo* that holding a hearing sufficed for purposes of the statute, defendants subsequently revoked the special assessment at a September 2000 meeting. Although defendants reassessed the levy in November 2000, it did not provide notice or a hearing at that time. Therefore, defendants violated the statute in question, and the trial court erred by not granting plaintiff’s motion for summary disposition.

III

Plaintiffs next argue there was a genuine issue of material fact that defendants violated a settlement agreement when they failed to place the issue of the special assessment on the November 2000 election ballot. We agree.

The existence of a settlement agreement is analyzed according to general contract principles, *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484-485; 637 NW2d 232 (2001), but it must also comply with MCR 2.507(H):

An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party’s attorney. [MCR 2.507(H).]

Here, plaintiffs offered to dismiss a previous lawsuit relating to the special assessment in exchange for the Board’s act of placing the assessment issue on the election ballot. The Board’s minutes indicate that after plaintiffs made the offer, a board member moved to put the

assessment on the ballot. The Board discussed the matter then voted 3-2 in favor of placing the assessment on the ballot, thereby creating a written record. In accord, plaintiffs dismissed their lawsuit.

A board speaks through its minutes. *Palladium, supra*. Because of the context in which the decision was made, plaintiffs presented a genuine issue of material fact regarding whether the Board's resolution was an enforceable settlement agreement.

IV

Plaintiffs next argue that the trial court erred by finding no genuine issue of material fact regarding the Board's failure to provide notice and a hearing before raising the millage rate in violation of the General Property Tax Act, MCL 211.1 *et seq.* However, notice and a hearing are not required when the increase in millage is below the maximum tax rate as defined in MCL 211.24e(3). See MCL 211.24e(1)(a). Defendants presented sworn affidavits that the millage increase did not exceed the maximum tax rate, and plaintiffs did not counter that evidence. Thus, pursuant to MCR 2.116(G)(4), the trial court did not err by dismissing plaintiffs' claim on this count.

V

Plaintiffs next argue there was a genuine issue of material fact that defendants violated their own General Appropriations Act, which set forth a millage rate of 1.442, when they increased the millage to 1.4755 without amending the Act. We agree.

The Uniform Budgeting and Accounting Act, MCL 141.421 *et seq.*, required the township to amend its General Appropriations Act "as soon as it bec[ame] apparent" that the millage rate was incorrect. MCL 141.437(1). Defendants, through the affidavit of their township assessor, revealed that they knew the maximum taxable amount in March 2000, and that they intended to levy the maximum amount. Not only did defendants never properly amend their General Appropriations Act, but the resolution to change the millage rate was not made until November 2000. Thus, the trial court erred by not granting plaintiffs' motion for summary disposition on this count.

VI

Plaintiffs also claim there was a genuine issue of material fact regarding whether defendants violated the Open Meetings Act, MCL 15.261 *et seq.* We agree.

Plaintiffs claim that defendants placed the special assessment on the tax books after revoking it in September 2000 and before reinstating it in November 2000. Plaintiffs presented evidence that on November 16, 2000, six days before the November 22, 2000, public meeting, the special assessment was on the tax books. Therefore, plaintiffs presented a genuine issue of material fact that defendants violated the Open Meetings Act by deciding to levy the assessment before holding a public meeting.

VII

Finally, plaintiffs argue that the trial court erred in refusing to reinstate the class action status of their claims. We disagree that the trial court abused its discretion because plaintiffs failed to show that their tardiness was due to excusable neglect. An abuse of discretion is found only “when the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but [the] defiance [of it] . . .” *Kurtz v Faygo Beverages, Inc*, 466 Mich 186, 193; 644 NW2d 710 (2002).

Counsel for plaintiffs claimed he did not move for certification because he was attempting to resolve a potential conflict of interest between plaintiff Willis and counsel for defendant although he failed to explain why the claimed conflict had to be resolved before proceeding with the class certification issue. However, as the trial court correctly pointed out, plaintiffs had ninety-one days to move for class certification, while there was no deadline for resolving the conflict of interest. Moreover, plaintiffs’ counsel did not address the conflict of interest issue until ten days before the motion deadline. This Court has refused to equate excusable neglect with a “lack of due diligence.” *Lark v The Detroit Edison Co*, 99 Mich App 280, 283-284; 297 NW2d 653 (1980). Thus, the trial court did not abuse its discretion by holding that plaintiffs’ failure was not excusable neglect.

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

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten F. Kelly