

STATE OF MICHIGAN
COURT OF APPEALS

LARRY TREUL, CAROL OSBORNE, and
ROBERT BROWN

UNPUBLISHED
September 17, 2002

Plaintiffs-Appellants,

v

OTSEGO COUNTY ZONING BOARD OF
APPEALS,

No. 231686
Otsego Circuit Court
LC No. 00-008755-CZ

Defendant-Appellee.

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiffs appeal by right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8).¹ Plaintiffs had claimed that defendant violated the Open Meetings Act (OMA), MCL 15.261 *et seq.*, by precluding public comment at two of its meetings. We reverse and remand for further proceedings.

Plaintiff Treul appealed the Otsego County Planning Commission's decision to issue a special use permit. Plaintiffs' complaint alleged that they² were denied the opportunity to address defendant during two hearings on plaintiff Treul's appeal. MCL 15.263(5) provides in pertinent part as follows: "A person shall be permitted to address a meeting of a public body under rules established and recorded by the public body." Thus, plaintiffs claimed that defendant violated MCL 15.263(5). Plaintiffs' lawsuit sought (i) a declaratory judgment that defendant violated the OMA; (ii) an invalidation of defendant's decision denying Treul's appeal; (iii) a ruling enjoining defendant from further violating the OMA; (iv) damages; and (v) attorney fees and costs.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), contending that the hearings at issue were not "meetings," MCL 15.263(5), because it was not deciding public policy, but performing the quasi-judicial task of reviewing the planning commission's

¹ The trial court also denied plaintiffs' "counter-request for summary disposition."

² Although plaintiff Treul was allowed to comment at one of the hearings, he was not allowed to comment at the second hearing.

decision. However, in granting defendant's motion for summary disposition, the trial court relied on defendant's other argument: that Otsego County Zoning Ordinance § 20.14.2 (the ordinance), which precluded new evidence from being presented to defendant, was a recorded rule of procedure. Indeed, MCL 15.263(5) also provides that a public body may establish and record rules regarding public commentary. Having granted defendant's motion for summary disposition, the trial court also denied plaintiffs' "counter-request" for summary disposition.

Generally, we review de novo a trial court's ruling on a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The *Beaudrie* Court explained:

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. [*Id.* at 129-130.]

"All well-pleaded facts are accepted as true and are construed in the light most favorable to the nonmoving party." *Madejski v Kotmar Ltd*, 246 Mich App 441, 444; 633 NW2d 429 (2001). Similarly, we review de novo issues of statutory construction. *Hinkle v Wayne Co Clerk*, 245 Mich App 405, 413; 631 NW2d 27 (2001).

Initially, it should be noted that "[t]he purpose of the OMA is to promote governmental accountability by facilitating public access to official decision making, and to provide a means through which the general public may better understand issues and decisions of public concern." *Manning v East Tawas*, 234 Mich App 244, 250; 593 NW2d 649 (1999). Thus, "the OMA should be construed broadly in favor of openness; exceptions should be construed narrowly, with the public body bearing the burden of proving the applicability of an exemption." *Id.*

In light of this general guidance, we disagree with the trial court's ruling that the ordinance was sufficient to allow defendant to prevent plaintiffs from commenting. Here, the ordinance did not at all address the permissible scope of "public comment." For example, the ordinance could have imposed reasonable limits on the amount of public commentary or restricted public commentary to certain times within meetings.³ Instead, the ordinance precluded the introduction of "new evidence." Moreover, there is no indication that plaintiffs wanted to introduce "new evidence." It is possible that they only wanted to comment on the evidence presented below. Accordingly, we believe that the trial court erred in ruling that the ordinance was a "rule of procedure" allowing defendant to avoid the OMA. Consequently, we conclude that defendant violated the OMA by prohibiting plaintiffs from commenting at the hearings.⁴

³ As the trial court noted below, it would be unreasonable to expect any public body to hear public commentary from thousands of persons. However, it is not reasonable for the public body to completely exclude public commentary out of concern that too many individuals might want to address it. Here, only five persons wanted to address defendant.

⁴ We also reject defendant's contention that the hearings were not "meetings" under the OMA. (continued...)

Having concluded that defendant violated the OMA, we must then determine the appropriate remedy. Plaintiffs are certainly entitled to a declaratory judgment that defendant violated the OMA.

Plaintiffs also sought an invalidation of defendant's decision. In *Nicholas v Meridian Charter Twp Board*, 239 Mich App 525, 532-533; 609 NW2d 574 (2000), we explained that invalidation is only proper where the violation impaired the rights of the public, and that the "mere recital of the language that the rights of the public were impaired is insufficient to support a request for invalidation." Here, plaintiffs have not alleged what they would have commented had defendant not violated the OMA. As such, there is no basis for a conclusion that defendant's OMA violation impaired the rights of the public. As a result, we cannot conclude that invalidation of defendant's decision is a proper remedy.

Similarly, an injunction is "an extraordinary remedy" requiring a "real and imminent danger of irreparable injury." *Nicholas, supra* at 533-534. Although there has been some suggestion that defendant would continue to violate the OMA, we are not persuaded that defendant would knowingly disregard our ruling. Indeed, defendant notes that it has been relying in good faith on advice from counsel. Accordingly, we do not believe that an injunction is necessary.

Further, plaintiffs are not entitled to damages because they have not alleged an intentional violation of the OMA by a public official, MCL 15.273(1). However, because we have agreed with their contention that defendant violated the OMA, we conclude that they are entitled to attorney fees and court costs, MCL 15.271(4).

In summary, we conclude that the trial court erred in ruling that defendant did not violate the OMA by prohibiting plaintiffs from publicly commenting at its hearings. Accordingly, we remand for the trial court to enter a declaratory judgment stating that defendant violated the OMA. Although plaintiffs are not entitled to invalidation, injunction, or damages, plaintiffs may recover court costs and attorney fees. Consequently, we remand for the trial court to determine the appropriate court costs and attorney fees.

(...continued)

MCL 15.262(b) defines a meeting as "the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy" Here, there is no dispute that defendant is a public body and that quorum was present at the relevant hearings. Instead, defendant contends that it was not deciding public policy, but merely acting as a quasi-judicial body. However, the only difference between defendant and the planning commission is the latter's role in receiving evidence. Both public bodies make various public policy determinations regarding the interplay of ordinances and facts.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald E. Holbrook, Jr.

/s/ Brian K. Zahra

/s/ Donald S. Owens